# MICHIGAN REPORTS

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CASES DECIDED

IN THE

# SUPREME COURT

OF

# MICHIGAN

FROM

APRIL 7 to JUNE 1, 1931

RICHARD W. COOPER
STATE REPORTER

VOL. 254
FIRST EDITION

CHICAGO
CALLAGHAN AND COMPANY
1932

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MAY 9 1932

# SUPREME COURT.

CHIEF JUSTICE.

| | TERM EXPIRES |
|---|---|
| HENRY M. BUTZEL, DETROIT, . . . . . | Dec. 31, 1931 |

ASSOCIATE JUSTICES.

| | |
|---|---|
| HOWARD WIEST, LANSING, . . . . . | Dec. 31, 1931 |
| GEORGE M. CLARK, BAD AXE, . . . . . | Dec. 31, 1933 |
| 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 |

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

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>ALFRED J. MURPHY,<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, | 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. | CLAYTON C. JOHNSON,[1]<br>THEODORE T. JACOBS,[2] | COLDWATER.<br>STURGIS. |
| 16. | NEIL E. REID,<br>JAMES E. SPIER, | MT. CLEMENS. |

[1] Resigned June 1, 1931.

[2] Appointed June 1, 1931.

| | | |
|---|---|---|
| 17. | WILLIS B. PERKINS,<br>MAJOR L. DUNHAM,<br>WILLIAM B. BROWN, | GRAND RAPIDS. |
| 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. |
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| 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 W. KILPATRICK.

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

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# IN MEMORIAM.

## JOSEPH B. MOORE.

Upon the convening of Court during the October term, 1930, on Tuesday, October 28th, JOHN H. PATTERSON, of Pontiac, presented the following resolutions, prepared by a committee of the Oakland County Bar Association, and moved the Court to place it on the records of the Court:

JOSEPH B. MOORE was born at Commerce, Mich., November 3, 1845, the son of Jacob and Hepsibeth Moore.

His boyhood days were spent in the villages of Commerce and Walled Lake in each of which places his father operated a sawmill. He attended the country schools, afterward taking a three-year course at Hillsdale college and one year in the university of Michigan. At the conclusion of these studies, in 1868, he moved to the city of Lapeer and began the practice of law; taking an active part in politics. He held various local offices, served two terms as prosecuting attorney, and in 1878 was elected a member of the State senate where he served one year.

His industry and talents were such that he soon became a prominent member of the Lapeer bar and in 1888 was elected circuit judge for the judicial circuit composed at that time of the counties of Oakland and Lapeer. He held this position until 1896 when he was elected a Justice of the Supreme Court

of the State of Michigan; re-elected in 1905, 1913, and 1921, the latter time for a period of eight years which he did not serve as he resigned his office in December of 1925, after having served as a Justice of the Supreme Court of this State for a period of 30 years.

Since his retirement he has continued to live at Lansing, taking, until his last sickness, an active interest in public affairs.

Some weeks ago he was taken to Grace hospital, Detroit, to undergo a serious operation from which he never recovered, and where he died March 23, 1930, in the eighty-fourth year of his age.

Justice MOORE was an unusual man. As a lawyer he was thorough in his preparation, clear in his statement, and courteous in his manner. His greatest claim to the respect of not only the legal fraternity, but the people of the State, is to be found in the record of his thirty-eight years of service on the circuit and Supreme Court benches.

He was keen in his analysis, lucid in his expression, and tenacious in his adherence to what he regarded as fundamental. A tireless worker, although he never possessed a great physical endowment.

He was a seeker after the correct principles which should govern the case under consideration. He was democratic in his instincts and manifested this in all his relations with men. At the same time he possessed an air of dignified aloofness which, coupled with a charming, courtly manner, rendered him a most delightful friend and companion.

He possessed in a high degree the confidence and loyalty of his associates upon the bench. He merited and received equally the respect of the lawyers at the bar.

In politics he was an earnest, consistent supporter of the Republican party.

To Justice MOORE was given the great boon of growing old gracefully; with an intellect unimpaired to the last; a constantly growing appreciation of the value of friendship; the consciousness, without ostentation, of having played an important part in the affairs of the State for over half a century; with patience and unconscious dignity and friendliness, he felt the shadows of the great Hereafter drawing closer and closer about him until finally he passed to his eternal reward.

Therefore, be it resolved:

1. That the State of Michigan in the death of Honorable JOSEPH B. MOORE has lost a son who has given over one-half a century of honest, untiring effort in the constructive, sane and upward progress of his native country.

2. That the bench of this State has lost one who gave it luster and prestige and commended it to all people.

3. That on the death of Justice MOORE the legal fraternity has lost a man who, as a lawyer, was the embodiment of those characteristics which are calculated to be an honor to our profession in the highest sense of the term.

4. That his immediate circle of friends, which was large, has lost forever a personality rare in that it combined democracy with dignity, unflinching honesty with courtly consideration; that in his personal relations the friends of the years that are gone were very dear to him, while scenes of his boyhood and early manhood days called to him with a voice which he neither tried to nor could forget; that as the years rolled by more and more the charm of his personality grew, the mellowness of his character

was more apparent, and the deep-seated affection for his friends became more and more manifest.

Be it further resolved:

That a copy of these resolutions be spread at large upon the records of our Court, and a properly engrossed copy of the same forwarded to Mrs. Ella MOORE, the widow of Justice MOORE.

JAMES H. LYNCH,
FRANK L. COVERT,
FRANK L. DOTY,
Committee.

Mr. THEODORE D. HALPIN, of Lapeer, read the following resolutions prepared by a committee of the Lapeer County Bar Association:

In proper appreciation of the splendid life of Justice JOSEPH B. MOORE, the bar of Lapeer county has adopted the following resolutions:

1. That while his death came in an orderly manner after a long life of usefulness, nevertheless his passing brought the deepest sorrow to those of us who have always considered him one of our number.

2. That Justice MOORE's professional career has seldom been surpassed, if ever, by a lawyer practicing before the courts of this State. Commencing in 1869 with his admission to the bar and continuing until his death, it may well be pointed to as a splendid example of what a member of the legal profession owes to his community, his State and his Country. As mayor of his city, prosecuting attorney, State senator, circuit judge, and Justice of the Supreme Court he served his fellow men. His association with the reported decisions of the Supreme Court began as early as the thirtieth Michigan, where, on page 410, he appears as counsel; his first decision as a member of the court is reported in the

108 Mich. 228, and the career thus began closes with Volume 233 of our Supreme Court Reports. In this long professional career Justice MOORE exhibited great legal talent, sound and extensive learning, and it was with his able assistance that our political institutions and jurisprudence attained the growth and development we so proudly exhibit today.

3. As a man, a colleague, a friend and a neighbor, those who knew Justice MOORE loved him. Kindly, courteous, and affectionate, he endeared himself to all with his pleasing and gracious manner and his social disposition. His intellectual tastes were refined and cultivated. To Lapeer he has always been and will always be, a man from our midst that we could point to with pride.

4. That these resolutions be spread upon the journal of the circuit court for the county of Lapeer, and that they be presented to the Supreme Court of the State of Michigan.

GEORGE W. DESJARDINS,
JOHN LOUGHNANE,
GLENN L. HOLLENBECK,
Committee.

Mr. HALPIN then spoke as follows:

It seems presumptuous for me to stand before this bench that Justice MOORE was a member of for 30 years, to say anything that could add to the good name which he always has borne in this State and particularly as a member of this Court.

Thirty years is a long space of time for a man to be devoted to one position. During that time Justice MOORE had his part in framing and announcing the law of this State. The volumes of the Michigan Reports where his decisions appear and the decisions in which he had a part in framing will continue

to be the law so long as law exists. It is something for any man to have a hand in making a decision which not only decides the rights of the parties involved but which is preserved in permanent form for all time to come when law is applied. We called Justice MOORE one of our bar. He came to Lapeer in 1869, and on the 20th of October that year he was admitted to the bar by the circuit court for the county of Lapeer. He entered upon the practice of law at Lapeer and continued to practice law there until the first of January, 1888, when he became circuit judge of the Sixth judicial circuit, which at that time comprised Oakland and Lapeer counties. During the time he was a member of the bar and even before he was elected judge he had endeared himself to the people of that community. They knew him as an able and honorable member of the profession, a man who had the ethics of his profession at heart and in mind. He devoted his entire energy to the interest of his clients. He came to court with his cases well prepared both on the law and the facts. He had strong opposition during those years and some of the greatest lawsuits tried in this State were tried in Lapeer county with Justice MOORE as one of the attorneys. He was mayor of our city. He was State senator and prosecuting attorney. He took a hand in the affairs of our community and was loyal to his party, and in those days when our schoolhouses and town halls rang with the eloquence of political speeches, Justice MOORE had his part in them, not only in our county and our district, but throughout the State of Michigan.

He was an inspiration to the young men of that community as well he might be because if one could emulate the example and fill the place that he held in

that community while he was practicing in the legal profession he had accomplished much. He was judge of our circuit court from January, 1888, to 1896, when he became a member of this Court. There were no half way measures with Justice MOORE when he was our circuit judge. I have heard him make the remark "I may be wrong, but if I am I will put that proposition in such shape so the Supreme Court will know exactly how I held." You could always put a finger on Justice MOORE and know exactly where he was. He adorned our bench for eight years and then became a member of this great Court, as he loved to call it. It was a great Court before he came here, and for 30 long years he helped to keep it great. You know, and others know, as well as I, how well he filled that position as Justice of this Court. We knew we had a friend in Court. He was gracious always and many times I have come into this Court and shortly after would come down a note from Justice MOORE to meet him in chambers at the recess. He never forgot those little courtesies which mean so much, and I simply say in closing that I never knew a more kindly, courteous man than our beloved Justice JOSEPH B. MOORE.

Mr. THOMAS GUNSON spoke as follows:

*Your Honors:*

I deem it a privilege to be permitted, as a friend among the multitude of friends whose lives have been made brighter and sweeter because they have known the late JOSEPH B. MOORE, to add my brief tribute to his memory.

Justice MOORE loved to walk and talk with people and they considered themselves honored to have him talk to them. Some one has said that it is a com-

paratively easy thing for men in high positions in life to receive the plaudits and hurrahs of the crowd, but few win the love; Justice MOORE won the love. He has perpetuated his name to posterity because of the genuine affection he bore his fellow man which was constantly being reflected in kindly words and thoughtful and tender ministrations.

It is beyond any power to attempt to deliver a panegyric on the life and work of Justice MOORE, as a lawyer and member of this Court; but as he looks down upon us from his place amid the galaxy of men whose names and faces adorn the walls of this chamber, we who knew him so well and loved him so tenderly, are thrilled with pride as we note his outstanding distinction among this group of distinguished men.

We can testify that he was not ambitious for place and power; he did not desire money; for 40 years he occupied public office, and always with pure heart and hand discharged each public trust. In adversity and disappointment he was brave and uncomplaining; in success modest and unassuming. In some ways he was like a child, sincere and frank, and as full of hope as spring. At the last he was weary of life's burdens and so, willingly and still trustingly, he laid them down.

If the following definition of success is a true one, then Justice MOORE's life was eminently successful:

"He has achieved success who has lived well, laughed often, and loved much. Who has gained the respect of intelligent men and the love of little children. Who has filled his niche and accomplished his task. Who has left the world better than he found it, whether an improved flower, a perfect poem, or a rescued soul. Who has always looked for the best in others and has given the best he had. Whose life

was an inspiration and whose memory a benediction."

Chief Justice WIEST spoke as follows:

Fourscore and five years ago, in the eighth year of the statehood of Michigan, JOSEPH B. MOORE was born at Commerce, Oakland county. He lived all his life in Michigan and died March 23, 1930.

There is pause this day while his former associates upon the bench and at the bar speak of his merits and attainments, express appreciation of his long public service, and recall his fellowship.

JOSEPH B. MOORE was educated in the old-time preparatory private school of parental precept and example, then in the public school, Hillsdale college, the university of Michigan, and a post-graduate course of threescore years as an advocate and an executive, legislative, and judicial officer. Sixty-one years ago this month he was admitted to the bar. He was prosecuting attorney for the county of Lapeer, mayor of the city of Lapeer, State senator, circuit judge, and Justice of this Court. He lived under the three State Constitutions and participated in the expansion and application of the law, commensurate with public and private needs. He was judge of the sixth circuit, comprised of the counties of Oakland and Lapeer, from January 1, 1888, to December 31, 1895, and a Justice of this Court from January 1, 1896, until he voluntarily retired, December 31, 1925, a period of exactly 30 years.

In his old age he was, by reason of legislation, enabled to lay aside judicial cares and depart the judgment seat with something more compensatory than a commendatory platitude or proverb.

His opinions, while a Justice of this Court, are in volumes 108 to 233, inclusive. A count of the opin-

ions written by him, in the 126 volumes mentioned, will disclose that he wrote more opinions than any other Justice ever upon this bench, and this record has probably not been exceeded by any other judge of a court of last resort.

He was an interested listener to pointed elucidation, but was righteously impatient of mere time consumption or flights of fancy or attempted eloquence upon a subject foreign to judicial consideration. He was an agreeable and helpful associate, capable of grasping quickly controlling points and recalling applicable case precedents and statutory provisions. He was open to meritorious reasoning, but when, upon mature reflection, he reached a conclusion, he was as immovable as the rock of Gibraltar. This does not mean that he was always right in his conclusions; few Justices are, but disclosed the courage of his convictions. He sometimes dissented; this happens, and his power of expression and reasoning on such occasions also disclosed his ability.

He was a member of this Court when there were five Justices, and continued with the increase to eight. Thirteen of his former associates upon this bench preceded him to the great beyond.

I stood with him one day, looking out of a window in this building, at the trees putting on their annual beauty of leaf and blossom, and he said, "This is a beautiful world." He wanted to live, not because he feared to die, but to witness the wonders he prophesied in the near future.

He was not of rugged physique, but had great mental power. The youth, rejected for military service in the Civil War for physical reasons, became a leader in the field of mental endeavor and

attainments, and helped greatly to bring about the Michigan of which we are so justly proud.

He was well grounded in the law, was blessed with a good memory, intensely interested in the advancement of the legal profession, an active participant in world peace movements, an able jurist, and a valued judicial associate.

He has entered "The quiet haven of us all."

# APRIL TERM, 1931.*

GENERAL EXCHANGE INSURANCE CORPORATION *v.* SERVICE PARKING GROUNDS, INC.

1. BAILMENTS—BAILMENT NOT LIMITED BY HOURS STATED ON TICKET WHERE HABITUALLY IGNORED.
   Where automobile owner habitually left his car in parking lot after day parking hours as stated in parking ticket were over, and no extra charge was made therefor, said time limit for day parking became inoperative through conduct of parties, and therefore did not limit the bailment.

2. SAME—NEGLIGENCE—BURDEN OF PROOF ON BAILEE.
   Where automobile, parked in enclosed lot for which fee was charged and ticket given, was not returned to owner, burden was on parking company to show, in action for value of car, not only that it was stolen, but that company was not negligent.

3. SAME—DUTY OF BAILEE.
   It was parking company's duty to see that car was not removed except upon surrender of ticket.

4. SAME—MOTOR VEHICLES—STATUTES—"DAMAGE" CONSTRUED.
   Word "damage," as used in 1 Comp. Laws 1929, § 4796 *et seq.*, relating to liability of owner of place where cars are accepted for hire for any damage to them while in his possession, is construed to cover total loss of car.

5. SAME—PRIMA FACIE CASE—ONUS OF EXONERATION ON BAILEE.
   *Onus* of exoneration for failure to return automobile parked in enclosed lot for hire is on parking company under 1 Comp. Laws 1929, § 4796 *et seq.*, and is not met by evidence tending to show that car was stolen, where it failed to show that it was not negligent.

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* Continued from Vol. 253.

As to whether placing automobile in parking place is a bailment, see annotation in 34 A. L. R. 925.

Generally as to duty and liability of garage keeper to owner of car, see annotation in 15 A. L. R. 681; 42 A. L. R. 135; 49 A. L. R. 319; 65 A. L. R. 431.

6. SAME—STOLEN CAR—BURDEN OF PROOF.

In action against parking company for value of automobile left with it for hire and not returned to owner, showing that car was stolen does not excuse defendant, where undisputed evidence shows that, under the circumstances, defendant was negligent in its care of car.

McDONALD and POTTER, JJ., dissenting.

Error to Wayne; Smith (Guy E.), J., presiding. Submitted October 8, 1930. (Docket No. 30, Calendar No. 35,122.) Decided April 7, 1931.

Case by General Exchange Insurance Corporation, a New York corporation, as assignee, against Service Parking Grounds, Inc., a Michigan corporation, for loss of a car parked on defendant's parking lot. Judgment for defendant in common pleas court. Plaintiff appealed to circuit court. Judgment for defendant. Plaintiff brings error. Reversed, and judgment ordered entered for plaintiff.

*Dykema, Jones & Wheat,* for plaintiff.

*Gerald K. O'Brien* (*Patrick H. O'Brien,* of counsel), for defendant.

BUTZEL, C. J. Plaintiff issued a policy of insurance to David S. Block, on October 5, 1928, against loss by fire or theft of an automobile. Defendant maintained and operated a parking lot at the intersection of First street and Bagley avenue in the city of Detroit. There were two entrances and exits to the lot, the balance being enclosed by barriers. There was a shack in the rear for accommodation of the attendants. It was the custom at night to move all unlocked cars to that portion of the lot near the shack. The only persons in charge after 5:45 p. m. were a middle-aged woman and a 13-year old girl, both of whom remained in the shack. It

contained windows which looked out on the lot, but at nighttime the lot was dark, there being no illumination. Block had been parking his car at the defendant's lot for over two months. There was never any objection or extra charge made to his leaving the car after 5 p. m. He usually called for it late in the evening. It was the custom of defendant to frequently move the cars with the exception of those brought in early in the morning before the lot was opened for business and locked by their owners.

On September 28, 1929, at about 8:30 a. m., in accordance with his usual custom, Block parked his automobile on this lot, paid the sum of 25 cents therefor, and received a parking ticket as follows:

"8 9 10 11 12 1 2 3 4 5
"Sep. 28, 1929
"This ticket MUST be surrendered when car is taken from lot.

---

"SERVICE PARKING GROUNDS
"(Incorporated)
"Offices: 1301 Industrial Bank Building

---

"WE COMPLY WITH CITY ORDINANCE

---

"WE ARE NOT INSURERS

---

"Do not leave any valuables in the car.
"No attendant after parking hours.

---

"Day Parking Hours 8 a. m. to 5 p. m.

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"License No.
"CHECKER CABS
"Empire 7000
"285–579
"63196"

Block accepted the ticket without reading it and paid no further attention to it. When he called for his car later in the evening, at first he found no one in charge of the lot. After walking around the lot to see if he could locate his car, he sounded the horn of another car, and a few minutes later the woman in charge and the young girl came out of the shack. The car was missing, and evidently had been stolen. It was so reported by Block to defendant and the Detroit police department. It was worth $375. Plaintiff paid Block this amount, and received from him a bill of sale of the car and an agreement subrogating plaintiff to Block's rights. Plaintiff then sued defendant in the common pleas court in the city of Detroit to recover the damages sustained by it, and a judgment of no cause of action was rendered. Plaintiff appealed to the circuit court, and before trial the stolen car was recovered and at the time of its recovery was worth $150. Plaintiff's damages amounted to $225. The case was tried in the circuit court without a jury.

There was absolutely no conflict in the testimony. The trial judge found in favor of defendant solely on the ground that it was excused from liability because it was shown that the car was stolen; that defendant was not an insurer, and he held that defendant took all precautions proper and necessary for the care of the car. He stated his doubts as to the correctness of his decision, and expressed the hope that the case might be reviewed by this court.

In *Knights* v. *Piella,* 111 Mich. 9 (66 Am. St. Rep. 375), it is said:

"There is no presumption of negligence from the mere fact of the loss or theft, and while there is much reason for the rule, adhered to in many States, that the defendant has the burden of prov-

ing the fact of loss, it does not necessarily follow that a presumption of negligence arises; and, if the facts shown in connection therewith do not fail to excuse, the *onus* is on the plaintiffs to shake defendant's exculpation. This does not deny the proposition that when the bailment is proved, and a refusal to deliver is established, the plaintiff has made out a *prima facie* case, and the inference of wrong by the defendant follows, or that it is then for the defendant to explain the loss and exonerate himself, which he may do by showing circumstances which *prima facie* excuse the failure to deliver. To this extent, and in this sense, a burden rests upon the defendant; but, if this question of fact becomes a disputed one, the evidence of the plaintiff must preponderate; and if the language of the charge, viewed abstractly, extends further, it cannot be said to have prejudiced the plaintiffs, under the established facts, the disputed question in this connection being whether or not the care exercised was equal to that to be expected from ordinarily prudent persons under similar conditions and circumstances. See Schouler, Bailments, § 23, for a discussion of this subject."

The testimony shows that the parking lot was maintained for both day and evening service, and that competent persons were supposed to be in attendance until 11:45 p. m. After that hour, any cars uncalled for were moved for safety to a more central parking lot. Almost daily, for a period of two months, plaintiff did not call for his car until after the day parking hours were over, and no extra charge was made for overtime. It is quite evident that inasmuch as the time stated in the ticket was not considered by either party as a limit of the bailment, or of the obligations of the bailee, it became inoperative through the conduct of the parties.

In *Galowitz* v. *Magner,* 208 App. Div. 6 (203 N. Y. Supp. 421), it was said:

"Appellant contends that there was no bailment, or if there was, no negligence was shown.

"I have not been able to find any authority covering such a contract as that presented in this case. I think, however, it was a bailment for hire. It was, in my opinion, of the same nature as checking parcels, and the disclaimer of liability could only become effective, if brought to plaintiff's knowledge (*Healy* v. *Railroad Co.,* 153 App. Div. 516, 138 N. Y. Supp. 287). Or storing an automobile in a garage (*Smith* v. *Economical Garage,* 107 Misc. Rep. 430 [176 N. Y. Supp. 479]). * * *

"The proof in this case is very meager, but is in my opinion sufficient to present a question of fact for the jury. Where a space is inclosed by an eight-foot board fence, for parking cars, with an entrance and an exit, a checking system, and three attendants to look after and take care of the cars as they came in and went out, the jury might infer that the theft of plaintiff's car could not have occurred had defendant and his employees properly performed their duty. Indeed, it seems to me that such inference is well-nigh irresistible, because some one must have taken out plaintiff's car without presenting a check or ticket therefor, and to permit this was clearly negligent."

The burden was on defendant not only to show that the car was stolen but also that the theft took place without any negligence on its part. As a rule automobiles brought in after 8 a. m. were left unlocked. Attendants were supposed to be at the parking lot so that cars could not be taken away without a surrender of the ticket given to the owner. It was defendant's duty to see that cars were not removed except upon the surrender of the ticket. Plaintiff might have had a better opportunity of protecting his car from theft had he kept it locked at the curb of a street in the vicinity. At least there would

have been more difficulty in stealing a car that was locked and not properly guarded.

Act No. 391, Pub. Acts 1919 (1 Comp. Laws 1929, § 4796 *et seq.*), provides as follows:

"SECTION 1. Whenever any damage shall be done to any motor vehicle while in the possession or under the care, custody or control of the owner, his agent or servant, or the keeper of any public garage or other establishment where such vehicle shall have been accepted for hire or gain, proof of such damage shall be *prima facie* evidence that such damage was the result of the negligent act of such owner or keeper of the place where such vehicle was stored."

The word "damage" in the statute must be construed to also cover a total loss of the automobile. Under this statute, the *onus* of exoneration for failure to return the car was upon defendant and it was its duty to show that it was not negligent in the care of the car. *Tatro* v. *Baker-Fisk-Hugill Co.*, 215 Mich. 623. This it failed to show. Not only was the car taken without the surrender of the ticket, but it was further shown that there were no lights on the lot at nighttime; that the lot was enclosed by barriers but it had two exits and entrances which were not guarded; that the lot was situated in a neighborhood frequented by persons of questionable character, and there were not sufficient capable attendants in charge so as to guard the property. The showing that the car was stolen does not excuse defendant, for the undisputed testimony shows that defendant was negligent in its care of the car.

The judgment is reversed, with costs to plaintiff, and the case remanded to the lower court, where, on the undisputed testimony, a judgment is ordered entered for plaintiff in the sum of $225, the damages proven, together with costs.

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

POTTER, J. (*dissenting*). Plaintiff issued a policy of insurance to David S. Block, insuring him against loss by fire or theft of an automobile, effective October 5, 1928, to October 5, 1929. Defendant maintained and operated a parking lot at the intersection of First and Bagley streets in the city of Detroit. September 28, 1929, at about 8:30 a. m., Block parked his automobile on this lot and paid the sum of 25 cents therefor, receiving a parking ticket as follows:

"8 9 10 11 12 1 2 3 4 5
"Sep. 28, 1929
"This ticket MUST be surrendered
when car is taken from lot.

---

"SERVICE PARKING GROUNDS
"(Incorporated)
"Offices: 1301 Industrial Bank Building

---

"WE COMPLY WITH CITY ORDINANCE

---

"WE ARE NOT INSURERS

---

"Do not leave any valuables in the car.
"No attendant after parking hours.

---

"Day Parking Hours 8 a. m. to 5 p. m.

---

"License No.
"CHECKER CABS
"Empire 7000
"285–579
"63196"

Block returned for his automobile at about 9 o'clock p. m. on the same day. He asked for his car, but neither he nor the attendants in charge of the parking lot were able to find it. There were two entrances and exits to the lot, the balance being enclosed by barriers. There was a shack on the lot for the accommodation of the attendants. It was the custom of the attendants to move all unlocked cars to that portion near the shack. Neither the day attendants nor the night attendants recalled seeing this particular car. The only persons in charge after 5:45 p. m. were a middle-aged woman and a 13-year old girl. The car was reported stolen by Block to plaintiff and the Detroit police department. It was then worth $375. Plaintiff paid Block this amount and received from him a bill of sale of the car and an agreement subrogating plaintiff to Block's rights. Plaintiff then sued defendant in the common pleas court in the city of Detroit, to recover the damages sustained by it, where a judgment of no cause of action was rendered. Plaintiff appealed to the circuit court and before trial the stolen car was recovered and at the time of its recovery was worth $150. The case was tried in the circuit court without a jury. Requests for findings of fact and law were proffered by both parties. Plaintiff proposed amendments to the court's findings, which were denied. A judgment was entered for defendant. Plaintiff filed exceptions to the findings of fact and conclusions of law and brings error.

"Unless a bailee has assumed the obligations of an insurer, or as in a few special cases has had the same imposed on him by operation of law, in the interest of public policy, he may relieve himself of responsibility for a failure to redeliver by showing that the property bailed was lost through no fault

of his, or was stolen, destroyed, or otherwise put beyond his power to return, while he was in the exercise of the care required by law." 3 R. C. L. p. 116.

"It is a sufficient excuse for nondelivery or misdelivery that the property has been lost or destroyed without fault of the bailee, so a loss by theft without negligence on the bailee's part is sufficient excuse for nondelivery." 6 C. J. pp. 1140, 1141.

In *Knights* v. *Piella,* 111 Mich. 9 (66 Am. St. Rep. 375), it is said:

"There is no presumption of negligence from the mere fact of the loss or theft, and while there is much reason for the rule, adhered to in many States, that the defendant has the burden of proving the fact of loss, it does not necessarily follow that a presumption of negligence arises; and, if the facts shown in connection therewith do not fail to excuse, the *onus* is on the plaintiffs to shake defendant's exculpation. This does not deny the proposition that when the bailment is proved, and a refusal to deliver is established, the plaintiff has made out a *prima facie* case, and the inference of wrong by the defendant follows, or that it is then for the defendant to explain the loss and exonerate himself, which he may do by showing circumstances which *prima facie* excuse the failure to deliver. To this extent, and in this sense, a burden rests upon the defendant; but, if this question of fact becomes a disputed one, the evidence of the plaintiff must preponderate; and if the language of the charge, viewed abstractly, extends further, it cannot be said to have prejudiced the plaintiffs, under the established facts, the disputed question in this connection being whether or not the care exercised was equal to that to be expected from ordinarily prudent persons under similar conditions and circumstances. See Schouler, Bailments, § 23, for a discussion of this subject."

The rule of *Knights* v. *Piella, supra,* is supported by *Mills* v. *Gilbreth,* 47 Me. 320 (74 Am. Dec. 487); *Kelton* v. *Taylor,* 79 Tenn. 264 (47 Am. Rep. 284); *Schmidt* v. *Blood,* 9 Wend. (N. Y.) 268 (24 Am. Dec. 143); *Staley* v. *Old Colony Union Gin Co.* (Tex. Civ. App.), 163 S. W. 381.

"The burden is upon the owner of the motor vehicle of proving negligence on the part of the operator of the parking place, and no cause of action is shown by a complaint which merely sets up the duty of defendant to keep the motor vehicle safely and its loss by theft, but does not contain any allegations of negligence." 42 C. J. p. 1304.

Plaintiff relies upon Act No. 391, Pub. Acts 1919 (1 Comp. Laws 1929, § 4796 *et seq.*), entitled:

"An act to protect the owners of motor vehicles, entrusting the same for any purpose, to the care, custody or control of the owner or keeper of a public garage or other establishment where such motor vehicles are so accepted for hire or gain."

Section 1 of this act provides:

"Whenever any damage shall be done to any motor vehicle while in the possession or under the care, custody or control of the owner, his agent or servant, or the keeper of any public garage or other establishment where such vehicle shall have been accepted for hire or gain, proof of such damage shall be *prima facie* evidence that such damage was the result of the negligent act of such owner or keeper of the place where such vehicle was stored."

This statute is declaratory of the common law. When plaintiff proved the car was delivered to defendant and defendant failed to deliver the same on demand, it established a *prima facie* case, and when defendant showed the car was stolen it showed a

*prima facie* excuse for its failure to deliver the car. The burden was on the plaintiff to show the car was stolen through the negligence of the defendant. This it did not do. *Knights* v. *Piella, supra; Pennsylvania R. Co.* v. *Dennis' Estate,* 231 Mich. 367; *Southern R. Co.* v. *Prescott,* 240 U. S. 632 (36 Sup. Ct. 469); *Gillette Safety Razor Co.* v. *Davis* (C. C. A.), 278 Fed. 864; *Douglas Shoe Co.* v. *Railway Co.,* 241 Mich. 297.

We find no reversible error. Judgment should be affirmed, with costs.

McDONALD, J., concurred with POTTER, J.

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KRENERICK *v.* HORTON.

1. BILLS AND NOTES—PRESENTMENT—INDORSER—WAIVER.
Presentment for payment is necessary to hold indorser, unless waived (2 Comp. Laws 1929, §§ 9319, 9331).

2. SAME—NOTICE OF PRESENTMENT AND DISHONOR—WAIVER.
Where, at time payees signed indorsement on back of promissory note, there was no previous indorsement, and printed waiver of protest, demand, and notice of nonpayment printed on back was not stricken out by them, but they merely added thereto instructions as to payment above their indorsement, they waived notice of presentment and dishonor.

Error to Jackson; Williams (Benjamin), J. Submitted March 17, 1931. (Docket No. 169, Calendar No. 35,320.) Decided April 7, 1931.

As to necessity of presentment, demand and notice to hold indorser of note liable, see annotation in 46 L. R. A. 804.

Assumpsit by William Krenerick against Edgar C. Horton and others on a promissory note. Judgment for plaintiff against all defendants. Defendants Addison bring error. Affirmed.

*Harry E. Barnard,* for plaintiff.

*Burney E. Brower,* for defendants Addison.

POTTER, J. Assumpsit on a promissory note dated February 6, 1926, due October 1, 1927, made by defendant Horton to William Addison & Son or order, for $1,000 with interest at 6 per cent. per annum. On the back of this note was printed:

"For value received, I hereby guarantee the payment of the within note, and waive protest, demand and notice of nonpayment thereof."

Beneath this printed matter was written:

"Pay to Fred Main of Albion, Mich.
"William Addison & Son,
"Dr. F. W. Main."

From a judgment for plaintiff against all defendants, William Addison & Son bring error. The question is whether appellants are liable under the facts. *Mooers* v. *Stalker,* 194 Iowa, 1354 (191 N. W. 175), holds the negotiable instruments law was obviously intended to change the previous rule that a waiver written or printed on the back of a note at the time of its execution had the same force and effect as though embodied in the instrument. Presentment for payment is necessary to hold an indorser, 2 Comp. Laws 1929, § 9319; unless waived, 2 Comp. Laws 1929, § 9331. No notice of dishonor was given to appellants. The question is whether

appellants waived presentment and notice of dishonor.

In *Mooers* v. *Stalker, supra,* it is said:

"An indorser who waives notice waives for himself alone, and a subsequent indorser does not, by the mere fact of indorsement, accept or become bound by a waiver of a previous indorser. Under the statute, he is not now required to cancel or reject such waiver or to add to his indorsement words repudiating the waiver of a prior indorser."

In this case there were no indorsers prior to appellants. The printed waiver quoted above was on the back of the note. It was not erased. The writing was added thereto and signed.

"Where language constituting a waiver is printed on the back of a note or placed thereon by an indorser, it has been held that those who merely append their naked signature beneath such waiver must be assumed to have adopted the same and will be bound thereby, although such waiver is not apparently connected with his indorsement." 8 C. J. p. 702.

In *Farmers Bank of Kentucky* v. *Ewing,* 78 Ky. 264 (39 Am. Rep. 231), it is said:

"It must be presumed that the parties knew of the memorandum when the contract of indorsement was executed; and when on the paper at the time of the indorsement it cannot be disregarded because of the ignorance of the appellee as to its legal effect."

At the time appellants signed the indorsement on the back of the note in question, there was no previous indorsement. They did not strike out the printed waiver on the back of the note, but added thereto the written language above indicated before signing.

Under the circumstances, this language must be construed together with the printed waiver, and, so construed, indicates appellants waived notice of presentment and dishonor. Judgment affirmed, with costs.

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

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POLESKI *v.* POLISH AMERICAN PUBLISHING CO.

1. LIBEL AND SLANDER—EVIDENCE—DAMAGES—VOLUME OF BUSINESS BEFORE AND AFTER LIBEL.

   In action for libel, where plaintiff claimed damages to his business as real estate dealer by reason thereof, he was properly allowed to testify as to volume of his business for six months preceding publication of libel and for same period succeeding publication.

2. SAME—ADMISSIBILITY OF INCOME TAX REPORT.

   While plaintiff's income tax report for year he claims to have suffered loss because of libel was admissible in evidence on question of damages, in action therefor, it did not render incompetent his own testimony as to loss of profits.

3. SAME—DAMAGES—TESTIMONY AS TO PARTICULAR INSTANCE.

   In action for libel, testimony by plaintiff as to conversation with prospective customer who stated he would not have anything to do with plaintiff because of charges appearing in libelous article was admissible in evidence as tending to establish plaintiff's general claim of damage by showing particular instance.

4. SAME—HEARSAY—PROPER TO SHOW EXTENT AND EFFECT OF LIBELOUS ARTICLE.

In action for libel, witnesses were properly permitted to testify as to what other persons had said to them relative to alleged libelous article, because, while such testimony may be said to be of hearsay character, it is nevertheless competent, in actions of this kind, to show extent and effect of publication of libelous article, and it is also competent as tending to sustain plaintiff's allegation of general damage to his reputation, character, and business.

5. SAME—EVIDENCE—CONCLUSION—WITNESS WITH SPECIAL KNOWLEDGE MAY TESTIFY AS TO EFFECT OF LIBEL.

In action for publication of libelous article in Polish newspaper charging plaintiff, who was candidate for public office, with conspiring with members of Ku Klux Klan against Polish people, it was competent for witness, who was shown to have special knowledge on subject, to testify that feeling among rank and file of Polish citizens was very bitter against Ku Klux Klan, giving reasons therefor.

6. SAME—TESTIMONY AS TO CONDITIONS UNDER WHICH LIBEL WAS PUBLISHED ADMISSIBLE.

It is competent and material for plaintiff in action for libel to show conditions under which libelous article was published, especially where such conditions have bearing on extent of injury sustained by him in consequence thereof.

7. SAME—FAILURE TO DEFINE EXEMPLARY DAMAGES—APPEAL AND ERROR—REQUESTS TO CHARGE.

Where, in action for libel, trial court explained to jury that exemplary or punitive damages had to do with "injury to feelings," and defendant made no request for further definition or explanation thereof, its claim of error for court's failure to define said terms is without merit.

8. SAME—INSTRUCTIONS—TRIAL—MALICE—GOOD FAITH NO DEFENSE AGAINST ACTUAL DAMAGES.

In action against publishing company for publishing libelous article, where plaintiff claimed both exemplary and actual damages, defendant was not entitled to instruction that if it acted in good faith it could not be found guilty of malice and verdict should be in its favor, because even if it acted in good faith and without malice it would still be liable for actual damages sustained by plaintiff.

9. SAME—TRIAL—INSTRUCTIONS—PRIVILEGE.

In action against publishing company for publishing article libeling plaintiff, who was candidate for public office, trial court's instruction to jury in respect to privilege and defendant's good faith in publishing it in belief it was for public good, *held,* to fully protect defendant's rights.

10. SAME—DAMAGES—EXCESSIVE VERDICT.

In action for libel, where there is decided conflict in testimony and wide latitude in issue submitted to jury, court should not substitute its judgment as to measure of damages for that of jury.

11. SAME—EXCESSIVE VERDICT.

In action against publishing company for libel, where plaintiff claimed that unjustified and vicious attack was made upon him prompted by malicious motive of giving defendant's president advantage over plaintiff in political contest, verdict of $5,000 for property damage, which was well within range of testimony, and $10,000 for injury to feelings may not be said to be so excessive as to require reversal.

Error to Wayne; Gillespie (Glenn C.), J., presiding. Submitted January 6, 1931. (Docket No. 12, Calendar No. 35,281.) Decided April 7, 1931. Rehearing denied June 1, 1931.

Case by John J. Poleski against Polish American Publishing Company, a Michigan corporation, for libel. Judgment for plaintiff. Defendant brings error. Affirmed.

*Arthur A. Koscinski* and *Robert J. Wojcinski,* for plaintiff.

*Colby, Berns & Costello,* for defendant.

NORTH, J. In his suit for libel plaintiff had verdict and judgment. Defendant reviews by writ of error. In the fall of 1925, plaintiff, a man of Polish ancestry, was a candidate for election to the common council of Detroit. He was a lawyer by profession,

but devoted his energies largely to the real estate business. Many of his friends and constituents were of Polish nationality. Louis F. Wojcik, a banker and president of the defendant publishing company, was also a candidate for election to the common council. The defendant company publishes a newspaper in the Polish language, the Polish Daily News. This Polish paper supported Wojcik, but a rival Polish newspaper—the Daily Record—supported plaintiff. While the political campaign was pending, and on October 26, 1925, defendant published in its newspaper an article antagonistic to plaintiff and by him alleged to have been libelous. Among other charges contained in the article were the following:

"He (Joseph J. Poleski) conspired with the Klan, against his own conscience, against the interests of the Polish public in Detroit. * * * He went merely to get votes, merely to cheat the Polish public. * * * Mr. Poleski betrayed, belied and deceived the citizens of Polish descent in Detroit, * * * (and) conspired against the interests of the Polish public in Detroit. * * * The eyes of the Poles in Detroit now will open, * * * when they see that this alleged Polish progressive * * * sold himself, cheated the Polish public, bargained for himself with the votes of Polish citizens. * * * Mr. Poleski does not belong to any parish, * * * he ridicules the priests and the faith, * * * he laughs at those ideals that are sacred to the parishioners. * * * But since Mr. Poleski lies that he belongs to St. Thomas parish, or to the St. Stanislaus parish—although he does not belong to any of them—but only to gain for himself the parish votes, it is our duty to unmask such a person. * * * However, the Polish people will open its eyes today and convince itself that it has to do with an ordinary political swindler, with an ordinary liar, who pulls

the wool over the eyes of the people, that he belongs to a parish, that he wars with the Klansmen, yet (in the) meantime he goes hand in hand with the Klansmen, and does not belong to any parish. How does such a candidate present himself? Let the Polish public know now with whom it has to do!"

Plaintiff alleges he was thus maliciously libeled by defendant, and that in consequence thereof he has "been and is greatly injured in his good fame and credit and brought into public scandal, infamy and disgrace;" and has been "deprived of great gains and profits in his said profession and occupation as a real estate broker, * * * and also thereby suffered great mental pain, anguish and mortification." Plaintiff contends this alleged libelous publication was prompted by malice and bad faith, that defendant sought by thus maligning plaintiff to advance the rival candidacy of the president of the defendant company. On the other hand, defendant asserts it acted in good faith in discharging its public duty in attempting to give publicity to the qualifications or fitness of plaintiff as a candidate for public office, that such publication was qualifiedly privileged, and, since defendant acted without malice in the reasonable belief that its publication was true, it is not liable.

The verdict was for $5,000 property damages and $10,000 for injury to feelings. Appellant asserts that the court erred in permitting plaintiff to testify concerning his loss of profits from the sale of real estate which he owned individually. Plaintiff was connected with a copartnership and a corporation engaged in real estate business; but in the trial of this case the court excluded all testimony tending to establish loss or damage except such as was incident to plaintiff's individual property or business

affairs. As indicative of such loss, plaintiff was allowed to testify over defendant's objection as to the volume of his business for six months next preceding this publication and the volume of his business for a like period next following the publication. His testimony indicates that individually he dealt extensively in real estate transactions, and he testified that by reason of diminution of business the six months following the publication he lost $15,000. On cross-examination he testified that all of this property was sold within the following year. Defendant asserts this practically nullifies his claim of loss; but plaintiff testified in that connection "I could have sold them and then some, had I been able to." Defendant also stresses the fact that plaintiff's income tax report for 1925 contradicts his present claim concerning the amount of profits he derived from his real estate activities. These and other matters of like character were proper items of proof on direct and cross-examination, but they do not render incompetent plaintiff's own testimony as to his loss of profits.

Appellant also asserts error on the part of the court in allowing plaintiff to testify to a conversation with one Lipinsky whom plaintiff approached relative to the sale of property, and thereupon Lipinsky stated that he did not like the position plaintiff took politically, saying "You were associated with the Ku Klux Klan. I won't have anything to do with you." Appellant contends that this testimony tended to establish special damages and that such special damages were not alleged. We do not so understand. This testimony tended to establish plaintiff's general claim of damage by showing a particular instance. Had plaintiff sought to show

the loss of a particular sale to Lipinsky and a specific profit, appellant's objection would be well taken.

Appellant also urges that the court erred in permitting witness Joseph Karasiewicz and other witnesses to answer over defendant's objection questions concerning what other people had said to them relative to the alleged libelous article. While such testimony may be said to be of a hearsay character, nonetheless in actions of this kind it is competent to show the extent and effect of the publication of the alleged libelous article. Such testimony was competent as tending to sustain plaintiff's allegation of general damage to his reputation, character, and business. *Cyrowski* v. *Polish-American Publishing Co.*, 196 Mich. 648.

Joseph Karasiewicz had previously been the editor-in-chief of defendant's paper and likewise of another Detroit Polish daily. He was living in or near Detroit at the time the article here in suit was published. As a witness for plaintiff he testified that through his activity he had come to know "thousands of Polish people," and, concerning their attitude towards the Ku Klux Klan, he testified:

"The feeling among the rank and file of the Polish citizens, especially, was very bitter against the Ku Klux Klan, because they were under the impression that the Ku Klux Klan wants to drive them away from this country, deny them the right of having parochial schools, and trying to force them to support 100 per cent. Americanism, which is used by the Ku Klux Klan as the cloak of their intolerance."

Appellant claims this testimony was highly incompetent "because it calls for a conclusion on the part of the witness, as to what the feeling of the rank and file of the Polish citizenry was." Appellant asserts

this witness was no more qualified or capable of giving testimony of this character than the jurors. Appellant's position in this regard is not well founded. There was ample testimony of special knowledge possessed by this witness. It was both competent and material for plaintiff to show the conditions under which the libelous article was published; especially if, as is here claimed, such conditions had a bearing upon the extent of the injury sustained by plaintiff in consequence thereof. *Line* v. *Spies,* 139 Mich. 484; *Bolton* v. *Walker,* 197 Mich. 699 (Ann. Cas. 1918 E, 1007).

Appellant complains of the trial court's failure to define in his charge to the jury the terms exemplary and punitive damages, and also of the court's failure to charge that if the defendant in publishing this article acted in good faith it could not be found guilty of malice, and in that event the verdict should be one of no cause of action. In the course of his charge the trial court did intimate to the jury that exemplary or punitive damages had to do with "injury to feelings." Defendant made no request for a further definition or explanation of these terms, and its claim of error in that particular is without merit. *Halloran's National Detective Agency* v. *Weiden,* 238 Mich. 242. Defendant's request to charge that in case defendant acted in good faith it could not be found guilty of malice and the verdict would therefore be in favor of the defendant, is not sound as a proposition of law. Lack of malice would foreclose plaintiff's right to recover punitive or exemplary damages, but he would still be entitled to damages actually sustained, if any, incident to his business. *Clair* v. *Battle Creek Journal Co.,* 168 Mich. 467. The case was fairly and plainly submitted to the jury on defendant's claim that in pub-

lishing this article it was protected by a qualified privilege. The court charged the jury:

"If it appears that criticism is just and proper and was made in good faith, without malice and for the public good, for the purpose, as supposed by the person at the time, to prevent an incompetent and unfit person from receiving a majority of the votes of the electors, the article is *prima facie* privileged, and the law requires the party who complains to show that it was published with bad motives and not for good ends and purposes. * * *

"Where, as in this case, the publication is qualifiedly privileged, it is not actionable unless made in bad faith or with actual malice or without reasonable cause to believe it to be true. * * * If you should find for the plaintiff, damages for libel upon a candidate for public office are reduced to a minimum if the libel resulted from an honest mistake made or an honest effort to enlighten the public as to his character; and if you find from the facts in this case that the defendant published the alleged libel through an honest mistake made, or an honest effort to enlighten the public as to the character of the plaintiff when he was a candidate for councilman for the city of Detroit, then your damages which the plaintiff is entitled to recover are reduced to a minimum."

We think this and other similar statements in the charge of the court fully protected defendant's rights. Complaint is made that the damages awarded are excessive. In cases where there is decided conflict in testimony and wide latitude in the issues submitted to the jury, courts should not substitute their judgment as to the measure of damages for that of the jury. If plaintiff's contention in this case is true, a most unjustified and vicious attack was made upon him and prompted by the malicious

motive of giving defendant's president an advantage over plaintiff in a political contest. Plaintiff immediately demanded retraction, and this demand reached defendant October 28th. Notwithstanding defendant was publishing a daily paper it made no retraction until its afternoon edition on the day before the election, which was held November 3d. The retraction was tardily made, but the court charged the jury that it should be considered in mitigation of damages. Defendant was permitted to show all the circumstances under which the article was published. Its attempt at justification was not at all convincing. The amount awarded as damages to property or business was well within the range of plaintiff's testimony. Under the facts disclosed by this record we would not be justified in setting aside the jury's verdict as to either actual or exemplary damages. In a libel case, we have said:

"The court, on appeal, will not set aside a verdict on the ground that it was excessive unless satisfied that the result was reached as a consequence of gross error, passion, bias, or corruption." *Clair* v. *Battle Creek Journal Co., supra* (syllabus).

We have given consideration to the other assignments of error and find them without merit. They are not prejudicial or such as to justify reversal. The case was carefully tried and submitted to the jury under a full and impartial charge. The judgment rendered is affirmed, with costs to appellee.

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

*In re* VOLK.

1. JUDGMENT—CONSTITUTIONAL LAW—FULL FAITH AND CREDIT—FOREIGN COURTS.

Decree granted in divorce suit by court of competent jurisdiction in another State at time when both parties were residents thereof must be given full faith and credit in this State under Federal Constitution (article 4, § 1).

2. DOMICILE—INFANTS—DIVORCE.

Although domicile of infant, until emancipation, is that of father, yet when divorce has been granted to mother and unrestricted custody of infant awarded to her, infant's domicile thereafter becomes that of mother.

3. SAME—INFANTS WARDS OF STATE.

Where mother, awarded unrestricted custody of infant son by decree of court in Ohio, moved to this State, infant became domiciled here, became ward of this State, and was no longer subject to courts of Ohio.

4. JUDGMENT—CONSTITUTIONAL LAW—INFANTS—DOMICILE.

Orders made by court in Ohio relative to custody of infant after latter became domiciled in this State do not constitute judgments which must be given full faith and credit under Federal Constitution (article 4, § 1).

Certified question from Wayne; Gilbert (Parm C.), J., presiding. Submitted March 24, 1931. (Calendar No. 35,578.) Decided April 7, 1931.

Habeas corpus proceedings by Frederick Volk against Hazel Volk to obtain custody of their minor son, Gilbert Clyde Volk. Question as to binding effect on courts of this State of order of Ohio court awarding custody of son to father after mother and son had acquired domicile in this State was certified

Extraterritorial effect of provision in decree of divorce as to custody of child, see annotation in 39 L. R. A. (N. S.) 988; 20 A. L. R. 815.

Divorce of parent as affecting citizenship, domicile, residence or inhabitancy of child, see annotation in 49 L. R. A. (N. S.) 864; 53 A. L. R. 1161.

to this court under Rule No. 78, Michigan Court Rules. Order of Ohio court denied extraterritorial effect.

*Maxwell W. Benjamin,* for plaintiff.

*Lawrence J. De Ferie,* for defendant.

SHARPE, J. Section 1 of Rule No. 78 of the Michigan Court Rules, adopted by this court to take effect January 1, 1931, reads as follows:

"Whenever the judge of any court, or the officers of any tribunal, from which an appeal lies to the Supreme Court, shall be in doubt as to any controlling question or questions of law involved in a pending case or controversy, such judge or officers may certify such question or questions to the Supreme Court with a statement of the facts relevant thereto sufficient to make clear the application of such question or questions, and further proceedings relative to such case or controversy shall thereupon be stayed to such extent as the judge or officers shall by order direct pending the receipt of an answer from the Supreme Court."

Pursuant thereto, the trial court has certified to this court the following statement of facts, and requests an answer to the question appended thereto:

"1. This is an action by writ of habeas corpus brought by the above-named plaintiff, Frederick Volk, a citizen of the State of Ohio, against the above-named defendant, Hazel Volk, now domiciled in the State of Michigan, for the purpose of obtaining custody and control of Gilbert Clyde Volk, aged two years, the minor child of the parties hereto.

"2. Both plaintiff and defendant resided in the city of Toledo, Ohio, sometime prior to September 10, 1930. Plaintiff herein commenced divorce pro-

ceedings against defendant in the court of common pleas for Lucas county, Ohio, praying for a divorce. Defendant herein entered an appearance in that cause and a final decree was duly entered therein on April 7, 1930, granting plaintiff herein an absolute divorce from defendant and giving custody of said minor child to the mother, Hazel Volk, defendant herein, and ordering plaintiff herein to pay certain alimony for the support of the child.

"3. The State of Ohio has a statutory court known as the juvenile court, which in Lucas county is presided over by one of the judges of the common pleas court. Under the statute organizing the juvenile court, it has exclusive jurisdiction over minors in the following cases:

"a. In divorce cases, where the decree of divorce refers the custody and care of the minor children to the juvenile court (there was no reference to the juvenile court in the decree of divorce granted the parents).

"b. Children under eighteen years of age, when they were:

"1. Delinquent.

"2. Dependent.

"3. Neglected.

"Upon determination of the juvenile court that the child was delinquent, dependent, or neglected, the jurisdiction of the court was as follows:

"'Section 1643. When Jurisdiction Terminates. —When a child under the age of eighteen years comes into the custody of the court, under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she shall attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age.'

"Other pertinent sections of the juvenile court act of Lucas county are as follows:

"'Section 1645 * * * For the purpose of this chapter, the words "dependent child" shall mean any child under eighteen years of age, who is dependent upon the public for support; or who is destitute, homeless or abandoned; or who has not proper parental care and guardianship * * * or whose condition or environment is such as to warrant the State, in the interest of the child, in assuming its guardianship.'

"'Section 1648 * * * Upon filing of the complaint, a citation shall issue, requiring such minor to appear and the parents or guardian or other person, if any, having custody or control of the child or with whom it may be, to appear with the minor, at a time and place to be stated in the citation. * * * A parent, step parent, guardian, or other person not cited may be subpœnaed to appear and testify at the hearing.'

"'Section 1653 * * * When a minor * * * is found to be dependent or neglected, the judge may make an order committing such child to the care of * * * some reputable citizen of good standing.'

"'Section 1663 * * * When a complaint is made or filed against a minor, the probation officer shall inquire into and make investigation into the facts and circumstances surrounding the alleged delinquency, neglect, or dependency. * * * He shall be present in court to represent the child when the case is heard. * * *,

"'Section 1683. Chapter to be liberally construed —This chapter shall be liberally construed to the end that proper guardianship may be provided for the child, in order that it may be educated and cared for, as far as practicable in such manner as best subserves its moral and physical welfare, and that, as far as practicable in proper cases, the parents, parent or guardian of such child may be compelled to perform their moral and legal duty in the interest of the child.'

"4. On the 28th day of February, 1930, Hazel Volk, defendant herein, the mother of the minor child, Gilbert Clyde Volk, filed a petition in the juvenile court of Lucas county, Ohio, stating that 'Gilbert Clyde Volk has not proper parental care, in that his parents are separated and fail to properly care for him.' This application was filed in the juvenile court on the 28th day of February, 1930, citation was issued, served on the father, who is plaintiff herein, and on the mother, defendant herein. The records of the juvenile court of Lucas county show the following proceedings and orders made after the filing of the application.

"March 3, 1930, citation issued and duly served and on March 5, 1930, the record shows the following entry:

" 'Defendant in court, hearing had. Defendant dismissed and given right of visitation during daytime every other day starting March 10, 1930.'

"On May 9, 1930, another citation was issued and duly served and on May 14, 1930, said record shows the following entry:

" 'Defendant in court, hearing had. Father allowed to have child as ordered next Sunday and every other Sunday.'

"On July 2, 1930, a third citation was issued and duly served and on July 16, 1930, said record shows the following entry:

" 'Allowance by United States to be paid through the Toledo Humane Society, Trustee. Visitation only to be had 3 to 6 p. m. Sunday.'

"On September 5, 1930, a fourth citation was issued and duly served and on September 10, 1930, the record shows the following entry:

" 'Defendant in court, hearing had. Father to have child every week Thursday, 1 p. m. to Friday, 6 p. m. Mother to give child to father. Father to return child to mother. Starting September 11, 1930.'

"On the night of September 10, 1930, defendant herein with her said minor child moved to Detroit, Michigan, where she and said child have since resided continuously with her parents. Since her arrival in Michigan she has not been without its confines.

"The record of the Lucas county, Ohio, juvenile court also shows that on September 15, 1930, another citation was issued for hearing September 17, 1930, served on plaintiff herein but not on defendant herein, and under date of September 17, 1930, the following entry appears:

" 'Defendant in court, hearing had. Gilbert Clyde Volk probated to temporary care and custody of father, Frederick Volk, to be kept with paternal grandparents.'

"On October 10, 1930, another citation was issued by said juvenile court, served on the plaintiff herein but not on defendant herein for hearing on October 15, 1930, and under date of October 15, 1930, appears the following entry:

" 'Defendant in court, hearing had. Judge ordered sole and legal custody awarded to father. See J. E. 12/8205/403.'

"The defendant, Hazel Volk, admits that in all proceedings had in said juvenile court up to and including September 10, 1930, she appeared in person in the juvenile court after service of due process, and it is conceded that no citations were served on defendant, Hazel Volk, for either of the hearings held on September 17th or October 15, 1930; and that she was not present in court at either of said last two hearings.

"Neither the decree of divorce nor any of the orders made in the juvenile court of Ohio, expressly prohibited the mother from removing the child out of the jurisdiction of the Ohio courts, but on the 10th day of September, 1930, without the permission or knowledge of the juvenile court, or the knowledge

or consent of the father, Frederick Volk, defendant, Hazel Volk, moved to the State of Michigan, taking the infant child with her.

"CERTIFIED QUESTION.

"Are the orders of the juvenile court for Lucas county, Ohio, modifying its previous orders for the temporary care and custody of the minor child, Gilbert Clyde Volk, made without service of process on defendant, Hazel Volk, and made after she had left the State of Ohio, with the child, and she had acquired a domicile in the State of Michigan, valid and binding, so that such orders cannot be collaterally attacked in the proceedings instituted in the circuit court for the county of Wayne, State of Michigan?"

The decree of divorce in this case was granted by the court of common pleas for Lucas county, in the State of Ohio, at a time when both parties were residents of that county. Its jurisdiction in such cases is similar to that of our circuit courts, and "full faith and credit" must be given to the decree under article 4, § 1, of the Constitution of the United States. The custody of the minor child was given to his mother. It does not appear that this decree has been in any way modified or changed by the court granting it.

It does appear, however, that the mother filed a petition in the juvenile court of Lucas county, stating that the minor child "has not proper parental care, in that his parents are separated and fail to properly care for him." The jurisdiction of that court as it appears from the statute above quoted was dependent upon a finding that the child was either dependent or neglected.

At the time the petition for the writ of habeas corpus was filed, the mother had acquired a domi-

cile in the State of Michigan. The domicile of an infant until emancipation is that of his father. But, under the decree of divorce, the mother was given his unrestricted custody. His domicile thereafter became that of his mother, and, when she removed to this State and became domiciled here, the domicile of the child was in Michigan.

"When a divorce has been granted to the wife, however, and unrestricted custody of the minor child of the marriage given her in the decree, her own domicile, and not the father's, establishes that of the child." 9 R. C. L. p. 549.

See, also, *Fox* v. *Hicks,* 81 Minn. 197 (83 N. W. 538, 50 L. R. A. 663), note 49 L. R. A. (N. S.) 864 *et seq.*

When the minor became domiciled here, he became a ward of this State (*Kane* v. *Kane,* 241 Mich. 96), and no longer subject to, or under the control of, the courts in Ohio. The orders thereafter made by the juvenile court of that State in no way affected his status, and do not severally constitute judgments which must be given full faith and credit under the provision in the Federal Constitution.

The reason for the application of this rule is well stated in 15 R. C. L. p. 940:

"Nor is a decree of a court of one State awarding the custody of a child binding upon the courts of another State under the full faith and credit clause of the Federal Constitution after the child had become domiciled in the latter State. Such a decree as to a child has no extraterritorial effect beyond the boundaries of the State where it is rendered, and the courts of the second State will not remand the child to the jurisdiction of another State, especially where it is against the true interests of the child. The reason for this rule is found in the

fact that children are the wards of the court and the right of the State rises superior to that of the parents. Therefore, when a child changes his domicile and becomes a citizen of a second State, he is no longer subject to the control of the courts of the first State."

See, also, *In re Hugh Alderman,* 157 N. C. 507 (73 S. E. 126, 39 L. R. A. [N. S.] 988), and the note appended to the latter.

It follows that the question submitted must be answered in the negative.

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

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HERP *v.* HERP.

1. DIVORCE—JURISDICTION STATUTORY.
   Jurisdiction of chancery courts in divorce cases in this State is purely statutory, and not within original cognizance of such courts.

2. SAME—PARTIES.
   There are three parties to every divorce proceeding—husband, wife, and State.

3. SAME—CONSENT DECREE MAY NOT BE GRANTED.
   Consent decrees may not be granted in divorce proceedings.

4. SAME—BURDEN OF PROOF.
   In wife's suit for divorce on ground that husband had grossly or wantonly and cruelly refused or neglected to provide her with suitable maintenance (3 Comp. Laws 1929, § 12729), burden was on her to establish said fact.

5. SAME—SUFFICIENCY OF PROOF.

Where wife's income was not less than $100 per month for period covered by bill of complaint, during which time she made no demand upon husband for money except to send him bill for coal, which he is paying, her proof was insufficient to entitle her to decree of divorce on ground that husband had grossly or wantonly and cruelly refused or neglected to provide her with suitable maintenance (3 Comp. Laws 1929, § 12729).

Appeal from Kent; Perkins (Willis B.), J. Submitted January 14, 1931. (Docket No. 122, Calendar No. 35,436.) Decided April 7, 1931.

Bill for divorce by Mildred C. Herp against Edwin J. Herp. Decree for plaintiff. Defendant appeals. Reversed, and bill dismissed.

*Linsey, Shivel & Phelps,* for plaintiff.

*Fred P. Geib* (*Henry C. Hart,* of counsel), for defendant.

SHARPE, J. Defendant has appealed from a decree granting a divorce to the plaintiff, awarding her all of his interest in the property owned by them and ordering him to pay to her $10 per week for the support of their daughter, now 11 years old, until she shall attain the age of 16 years, or until the further order of the court. A $50 attorney fee was also allowed.

The record discloses that on April 2, 1929, plaintiff filed a bill for separate maintenance, which she voluntarily discontinued. Later that spring, she filed another bill, seeking the same relief. In this suit, the defendant filed a cross-bill, asking for divorce. Trial was had in August, and both bill and cross-bill were dismissed.

On January 15, 1930, she filed the bill of complaint herein, seeking a divorce. The defendant answered, and, after a hearing in which the proofs were taken in open court, a decree was entered on July 8th, as above stated.

Under section 12729, 3 Comp. Laws 1929, a divorce—

"may be decreed on the complaint of the wife, when the husband, being of sufficient ability to provide a suitable maintenance for her, shall grossly or wantonly and cruelly refuse or neglect so to do."

On this record, the evidence of the refusal or neglect of the defendant must be confined to the time between August, 1929, when the former bill was dismissed, and January 15, 1930, when this bill was filed. They had not lived together during that time.

It appears that the plaintiff and the defendant and their minor child are each owners of an undivided one-third interest in a lot in Grand Rapids, referred to as the Prospect street property, on which stands a residence which has been converted into a four-family apartment house. Of this, plaintiff has had possession and the income thereof since the dismissal of the former suit. She admits that the defendant had paid the balance due on the furnishings of these apartments. Considerable other property is in the joint names of herself and her mother.

Plaintiff testified that she received in rents for the apartments, in August, 1929, $60; in September, $80; in October, $105; in November, $110, and in December, $110. One apartment, consisting of six rooms, was occupied by her mother, her daughter, and herself. The mother furnished the provisions for the family as her share of the rental thereof. Plaintiff also testified that she worked at Friedman-

Springs as an overseer during September and October, for which service she received about $120 per month.

The defendant is a railroad engineer. While his testimony as to his earnings was not confined to the period stated, it may be inferred therefrom that they then amounted to from $40 to $50 per week. He testified that during the time stated plaintiff made no demand upon him for money, except that she mailed to him a bill for coal, amounting to $178, and that he is paying it. It is admitted that he purchased some clothing and schoolbooks for the child.

In our opinion, plaintiff has failed to sustain the burden of proof imposed on her by the statute to entitle her to a decree. Her counsel urge that as defendant, as a witness, stated that there was no possibility of reconciliation, and as his counsel intimated to the court at the opening of the trial that plaintiff's right to a divorce would not be contested, the decree should not be disturbed for want of sufficient proof. But the jurisdiction of chancery courts in divorce cases in this State is purely statutory, and not within the original cognizance of such courts. *Haines* v. *Haines,* 35 Mich. 138. The tendency to consider the equities of the case, and the probability of reconciliation, cannot be encouraged. This court has many times held that, "There are three parties to every divorce proceeding—the husband, the wife, and the State." *Wieser* v. *Wayne Circuit Judge,* 247 Mich. 52, 54. Consent decrees may not be granted. The burden was upon the plaintiff to establish the fact that defendant had "grossly or wantonly and cruelly" refused or neglected to provide her with a suitable maintenance. Her income during the period from August, 1929, to January, 1930, when the bill was filed, was certainly not less

than $100 per month. In view of the fact that her mother provided the food for herself and her daughter for the privilege of occupying the apartment with them, it cannot be said that this sum was not reasonably sufficient to supply their other needs.

A decree may be here entered dismissing the bill of complaint, but without costs to either party.

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

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AMICK *v.* HICKEY.

1. REFORMATION OF INSTRUMENTS—CONTRACTS—MUTUAL MISTAKE.
   Where certain factors, omitted by mistake from contract for compensation to be paid to income tax experts for making defendant's income tax report in such way as to legally effect saving in tax paid on profit made on certain transaction, were essential to making computation of said compensation due under the contract in manner parties had in mind, contract was properly reformed by court below to include said necessary factors.

2. CONTRACTS—CONSTRUCTION.
   If there is occasion for construing contract, its terms must be interpreted most strongly against those by whom it was drafted.

3. SAME—EQUITY MAY NOT MAKE CONTRACT FOR PARTIES.
   Equity may not create contracts for litigants any more than may courts of law.

4. SAME—CONSTRUCTION—MUST BE CONSTRUED AS CONTEMPLATED. Where contract for payment of compensation to income tax experts provided that they were to have certain per cent. of saving legally effected by manner of reporting profit on certain transaction, and agreement contemplated that tax payments thereon would be made over series of years, computation should be had as if payments had been made as contemplated, although they might not actually have been so made.

Appeal from Wayne; Hart (Ray), J., presiding. Submitted January 9, 1931. (Docket No. 71, Calendar No. 35,107.) Decided April 7, 1931. Rehearing denied June 25, 1931.

Bill by James H. Amick and Joseph H. Spicer, copartners doing business as Amick & Spicer, against Edward J. Hickey for reformation of a contract for services and an accounting. Decree for plaintiffs. Defendant appeals. Reversed, and remanded.

*Wm. Henry Gallagher,* for plaintiffs.

*Stevenson, Butzel, Eamon & Long* (*Thomas G. Long,* of counsel), for defendant.

NORTH, J. Plaintiffs seek to recover from defendant $21,553.38 and accrued interest as compensation claimed to be due them for services rendered as income tax experts and accountants under a written contract with defendant providing for such services and compensation therefor. Plaintiffs claim that by reason of mutual mistake the contract as executed does not conform to the agreement of the parties and on this account they also seek its reformation. In the circuit court plaintiffs were decreed the relief sought. Defendant has appealed.

On the 31st of May, 1921, defendant entered into a contract with the S. S. Kresge Company for the

sale of real estate located on the southwest corner of Woodward and Grand River avenues in the city of Detroit. The contract price was $1,660,000. The vendee assumed a mortgage of $675,000, made a down payment of $100,000 and agreed to pay the balance of the purchase price in substantial annual installments extending from 1921 to 1934. Mr. Hickey's profit on this sale was $522,682.03. Incident to making his 1921 income tax return, Mr. Hickey consulted his attorney and auditor; and was advised that such profit should be reported as on a 1921 sale made on an installment basis and that the tax would then be payable in annual installments as the payments on the land contract were made from 1921 to 1934. At a meeting between plaintiffs and defendant the matter was broached as to whether plaintiffs could make a report of defendant's income, including the profit on this real estate transaction, so that his income tax would be legally computed upon a different basis which would result in a saving to defendant. After some consideration the plaintiffs and defendant, on April 13, 1922, entered into a written contract for plaintiffs' service in making defendant's income tax return "for such years as may be affected by the profit derived from the afore-mentioned real estate transaction." In substance this contract, which was prepared by plaintiffs, provided that they should have as compensation for such services 10 per cent. of any saving effected.

The meaning of "saving" as used in this contract and the method of determining the amount of such saving is set forth in the contract as follows:

"The word 'saving' as herein used shall be considered as meaning the amount by which

"(a) The income taxes actually and finally paid or payable by said taxpayer on taxpayer's taxable net income from all sources for the year or years affected by the profit derived from the above-mentioned sale of real estate, is less than

"(b) The income taxes which such taxpayer would have paid on taxpayer's taxable net income from all sources for the year or years affected by the profit derived from said real estate transaction, had the tax on said real estate transaction been computed on the 'installment sales' basis as provided in article 45, regulations 62, issued by the treasury department through the commissioner of internal revenue."

Appellant first contends that plaintiffs are not entitled to reformation. The contract as drawn (paragraph b) does not specify in what year the Kresge sale or the profit incident thereto was to be reported or assumed to have been reported by Mr. Hickey, nor does it specify or identify the provision or provisions of the revenue act under which the theoretical computation of Mr. Hickey's income tax for the various years would be computed. Thus neither the time nor the rate was fixed for making the computation by which plaintiffs' compensation would be measured. Each of these factors was essential to making the computation in the manner which the proofs clearly show these parties had in mind when they entered into this contract. Such a computation was necessary to determine what, if any, "saving" plaintiffs accomplished for defendant. This determined the amount of plaintiffs' compensation. The circuit court justly decreed reformation; and, as reformed, paragraph (b) above-quoted reads:

"(b) The income taxes which such taxpayer would have paid on taxpayer's taxable net income

from all sources for the year or years affected by the profit derived from said real estate transaction, had the profit on said real estate transaction been reported as a 1921 sale on the installment basis as provided in article 45, regulation 62, issued by the treasury department through the commissioner of internal revenue, and the tax thereon computed by applying the rates specified in sections 210 and 211 of the revenue act of 1921 (42 U. S. Stat. at Large, pp. 233–237)."

It is further urged by appellant that the method of computing the amount of plaintiff's compensation was erroneous and resulted in a substantial overpayment being decreed. From the quoted portion of the contract it is clear that plaintiffs were to have as compensation 10 per cent. of the difference between the income tax Mr. Hickey, acting under their advice, was actually to pay incident to his profit on the Kresge sale and the amount of such tax he would have paid if the sale had been reported as first contemplated by Mr. Hickey, *i.e.,* as a 1921 "installment sale." Acting under their contract, plaintiffs adopted a different plan of making Mr. Hickey's income tax return and thereby they materially reduced the amount of his tax. By altering the Kresge transaction so that it became a fully consummated sale in 1922, by giving a deed and taking back a mortgage; and by having all of Mr. Hickey's profit thereon taxed on the basis of "capital gain" (section 206, revenue act of 1921 [42 U. S. Stat. at Large, p. 232]), plaintiffs were able to have the tax on this item computed at 12½ per cent. It was paid at that rate as a part of Mr. Hickey's 1922 tax. Including this item, his income tax for 1921 and 1922 totaled $76,060.43. It is plaintiffs' claim that since the Kresge transaction was thus fully consummated in 1922 in so far as it

affected defendant's income tax, they are entitled under their contract to compute the amount that Mr. Hickey's tax under sections 210 and 211 of the revenue act of 1921 (42 U. S. Stat. at Large, pp. 233–237) would have been if all of the Kresge transaction profit had been returned by Mr. Hickey in 1921 and 1922. Computed in this manner, defendant's total tax for the two years would have been $291,594.19. This exceeds the amount he actually paid ($76,060.43) by $215,533.76. Plaintiffs were decreed 10 per cent. of this amount as compensation due them under their contract.

Appellant asserts that this method is not in accordance with the contract, but instead, that paragraph (b) above quoted provides that the computation should be on the basis of the amount of income tax Mr. Hickey would pay on his profit if the Kresge sale was reported as an "installment sale" and the payments received during the various years from 1921 to 1934 as provided in the Kresge contract. It is clear that had such a plan been followed by Mr. Hickey and he had included in his income tax return each year from 1921 to 1934 such a proportion of his profit on the Kresge sale as he received payment on the purchase price, he would have been taxed at a much lesser rate than that assumed in plaintiffs' computation wherein all this profit is included in a hypothetical 1921 and 1922 tax return. The difficulty of ascertaining the amount of plaintiffs' compensation under such a construction of the contract is obvious; but notwithstanding that unfortunate circumstance, we are satisfied that such was the method the parties agreed upon as a basis of fixing plaintiffs' compensation. As noted, the contract was prepared by plaintiffs and they must abide by it. If there is occasion for construing such a contract, its terms must be interpreted most strongly against

those by whom it was drafted. *Greenough* v. *Willcox,* 238 Mich. 52; *Weber* v. *Wilson,* 240 Mich. 462. Equity cannot create contracts for litigants any more than courts of law. *Wood* v. *Truax,* 39 Mich. 628. It is urged by plaintiffs that payments on the Kresge contract might not have been made in accordance therewith, and that defendant's income tax would be affected by the payments as made rather than by the contract provisions for payments. Regardless of that fact, we think the contract between plaintiffs and defendant was consummated in contemplation of the subsequent performance of the Kresge contract in accordance with the terms thereof, and that paragraph (b) of plaintiffs' contract must be construed in the light of that circumstance. Plaintiffs' compensation should be computed on the assumption that the payments on the Kresge contract have been made or will be made as provided therein; because such were the terms and conditions plaintiffs and defendant obviously had in mind when paragraph (b) was made a part of their contract.

The record does not contain testimony from which a computation of plaintiffs' compensation on the proper basis can be made. This necessitates remanding the case for further proof. The decree entered in the trial court will be set aside, and the case remanded for further testimony and final decree in accordance herewith. Appellant will have costs of this court.

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

O'TOOLE & NEDEAU CO. *v.* BOELKINS.

1. APPEAL AND ERROR—JUDGMENT NON OBSTANTE.
   In reviewing judgment *non obstante veredicto* for defendants, Supreme Court must accept plaintiff's version of facts, in view of jury's verdict in its favor.

2. TENDER—SUFFICIENCY.
   Where defendants prevented plaintiff from making tender by failing to be at home as agreed, tender should be considered same as it would have been made to defendants in person and without objection by them that it was not legal tender.

3. SAME—CERTIFICATES OF DEPOSIT AS LEGAL TENDER.
   Certificate of deposit indorsed in blank is legal tender, in absence of objection thereto.

4. SAME—FAILURE TO BE PRESENT—ESTOPPEL.
   Defendants' failure to be present as agreed, when plaintiff would have tendered certificates of deposit as payment, estops defendants from claiming that, if present, they would have objected to such tender as being legally insufficient.

5. CONTRACTS—OPTIONS—PERFORMANCE.
   Courts should not look with favor on claims of those who seek to evade their obligations in the form of options by avoiding optionees until time of performance has expired.

6. TENDER—SUFFICIENCY—ESTOPPEL.
   Optionee may not be deprived of his rights under option by optionor's avoiding him until time for performance expired and then claiming that tender, if made as intended, would have been objected to as legally insufficient; especially where tender as intended to be made would have been sufficient in absence of objection thereto.

Error to Muskegon; Vanderwerp (John), J. Submitted January 22, 1931. (Docket No. 81, Calendar No. 35,408.) Decided April 7, 1931.

Assumpsit by O'Toole & Nedeau Company, a Michigan corporation, against A. Bert Boelkins and another for breach of a real estate option. Judgment for defendants *non obstante veredicto*. Plaintiff brings error. Reversed, and judgment ordered entered for plaintiff.

*Alexis J. Rogoski,* for plaintiff.

*Cross, Foote & Sessions,* for defendants.

North, J. Plaintiff company, a corporation, brought this suit to recover damages incident to defendants' alleged failure or refusal to perform a real estate option. Plaintiff had a verdict for $1,100; but judgment *non obstante veredicto* was entered for defendants. Plaintiff has appealed. The judgment *non obstante* was entered on the ground that plaintiff's tender was insufficient. This presents the sole question for review.

Plaintiff's 30-day option to purchase defendants' land for $12,000, $6,000 cash and balance in deferred payments, expired June 7, 1929. According to plaintiff's version of the facts, which we must accept in view of the jury's verdict, the defendants in the afternoon of the last day of the option were informed by plaintiff's officers that they wished to close the transaction. Defendants were then attending a social gathering, and they promised they would be at their home at seven o'clock that evening and complete the deal. Messrs. O'Toole and Nedeau with two other gentlemen went to defendants' home at the time specified, remained there over two hours and then left. They assert they were then ready, willing, and able to complete the transaction on the terms of the option. Defendants were not at their home as they had agreed. The record does not dis-

close a subsequent refusal by defendants to perform, excepting by their pleadings in this suit which was instituted shortly thereafter. Defendants' refusal to convey seems to have been prompted by dissatisfaction with plaintiff arising out of another transaction.

At the trial it developed that when Mr. O'Toole and Mr. Nedeau went to close the option instead of having in their possession the full amount of the cash payment ($6,000) in legal tender, they had $1,500 in currency and the balance in certificates of deposit of a local bank indorsed in blank. No claim is made that these indorsed certificates of deposit were not the equivalent of cash and acceptable as such, but the technical defense is urged that when plaintiff's officers went to close the transaction they were not ready and able to make a legal tender. As against this contention plaintiff urges that since the defendants were first in default in repudiating their option by failing to appear at the agreed time and place to conclude the transaction, they cannot stand on a technical objection which plaintiff might have overcome had defendants met with plaintiff's officers as agreed and actually insisted upon a legal tender.

It is too plain for argument that the circumstance which primarily defeated a technically legal tender was defendants' failure to keep their agreement to meet Messrs. O'Toole and Nedeau. Whether or not such failure was a deliberate plan by which defendants sought to avoid the option, they now seek to be released from it because by staying away they prevented plaintiff's officers from making a tender which would have been good in the absence of a specific objection by defendants that the proffered payment was not in legal tender. We think the tender plaintiff was prepared to make should be considered

the same as it would have been if made to defendants in person and without objection by them on the ground that it was not a legal tender. In the absence of such objection the tender would have been good. *Murphy* v. *Frank P. Miller Corp.*, 229 Mich. 162; *Browning* v. *Crouse,* 40 Mich. 339; 36 Cyc. p. 702, and cases cited. At the trial defendants did not claim they would have refused the tender because of the form in which plaintiff's officers were prepared to make it. Defendants' failure to be present as agreed estops them from now claiming if present they would have objected to the tender as being legally insufficient. To hold otherwise would allow defendants to take advantage of their own wrong. Courts should not and have not looked with favor upon the claims of those who seek to evade their obligations in the form of such options by avoiding the optionees until the time of performance has expired. The party holding the option is not thereby deprived of his rights. *Cheney* v. *Libby,* 134 U. S. 68 (10 Sup. Ct. 498); *Schaeffer* v. *Coldren,* 237 Pa. 77 (85 Atl. 98, Ann. Cas. 1914 B, 175); *Borden* v. *Borden,* 5 Mass. 67 (4 Am. Dec. 32); *Foternick* v. *Watson,* 184 Mass. 187 (68 N. E. 215); *Noyes* v. *Clark,* 7 Paige, Ch. (N. Y.) 179 (32 Am. Dec. 620).

"Acts insufficient in themselves to make a complete tender may operate as proofs of readiness to perform, so as to protect the rights of a party under a contract, where a proper tender is made impossible by reason of circumstances not due to the fault of the debtor. * * * And if the tender is prevented through the contrivance of the persons to whom it should be made, it will be excused or be considered equivalent to a tender." 26 R. C. L. pp. 623, 624, citing cases.

In the *Schaeffer Case, supra,* the syllabus in part reads as follows:

"Acts insufficient in themselves to make a complete tender may operate as proof of readiness to perform so as to protect the rights of a party under the contract, where a proper tender is made impossible by reason of circumstances not due to the fault of the tenderer.

"A certificate of deposit or certified check is a sufficient tender, if no objection be made on the ground that it is not lawful money."

The trial judge entered judgment for defendants *non obstante veredicto* because he was of the opinion that the certificates of deposit with which plaintiff's officers proposed to pay defendants did not constitute legal tender. Technically his holding was correct; but under the circumstances disclosed in the instant case, defendants not having declined to perform for that reason, they will not now be permitted to urge it as a justification for their nonperformance. The case is remanded to the circuit court with direction to set aside the judgment *non obstante,* and that judgment for plaintiff in the sum of $1,100 with taxable costs be entered as of April 26, 1930. Appellant will have costs in both courts.

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

## RICE *v.* GOODSPEED REAL ESTATE CO.

1. APPEAL AND ERROR—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
   In reviewing denial of defendant's motion for judgment *non obstante veredicto*, in action for personal injuries, on ground that plaintiff was guilty of contributory negligence, it is assumed that there was proof of defendant's negligence, and plaintiff's version of contested facts is accepted as settled by verdict of jury.

2. LANDLORD AND TENANT—LIGHTING HALLWAY—NEGLIGENCE.
   Landlord is not required to light hallway after regular hours although tenants are permitted to use building and elevator if they so desire, in absence of provision therefor in lease; there being no common-law or statutory duty in regard thereto.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DEGREE OF CARE.
   Tenant who was permitted to use elevator after regular hours of closing, and who had been in habit of doing so, was bound to exercise greater degree of care for his own safety when he found vestibule in darkness instead of lighted as was customary.

4. SAME—DUTY TO USE FACULTIES.
   One is required to make reasonable use of his faculties of sight, hearing, and intelligence to discover dangerous conditions to which he is or may become exposed.

5. SAME—CONTRIBUTORY NEGLIGENCE.
   One who knows or in exercise of ordinary care should have known of existence of danger from which injury might reasonably be anticipated and who by voluntary acts or omissions exposes himself to such danger is guilty of negligence, if under the circumstances an ordinarily prudent person would not have incurred the risk of injury which such conduct involved.

6. SAME—MOMENTARY FORGETFULNESS.
   Momentary forgetfulness of or inattention to a known danger may, and usually does, amount to negligence.

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Right of action for violation of statutory duty of landlord to light halls and stairways, see annotation in L. R. A. 1915E, 545.

Contributory negligence of one stepping into elevator shaft, see annotation in 2 L. R. A. (N. S.) 757; 24 L. R. A. (N. S.) 246; L. R. A. 1915E, 731.

7. LANDLORD AND TENANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE —DARK VESTIBULE.

Tenant familiar with surroundings, who entered unlighted vestibule for purpose of taking elevator to his office after hours, as was his custom, and who, while attempting to locate elevator cage, fell down elevator shaft, door to which had been left open, was guilty of contributory negligence as matter of law.

Error to Kent; Brown (William B.), J. Submitted January 22, 1931. (Docket No. 60, Calendar No. 35,242.) Decided April 7, 1931.

Case by Clarence F. Rice against Goodspeed Real Estate Company, a Michigan corporation, for personal injuries received from falling down an elevator shaft. Judgment for plaintiff. Defendant brings error. Reversed.

*Linsey, Shivel & Phelps,* for plaintiff.

*Payne & Payne* (*Ward & Strawhecker* and *Dunham, Cholette & Allaben,* of counsel), for defendant.

NORTH, J. In February, 1929, plaintiff rented for use as an office and salesroom certain space on the fifth floor of a business block owned by defendant in Grand Rapids. Plaintiff's business was such that he had occasion at times to go to his office during evening hours. The regular elevator service provided by defendant was from eight a. m. to six p. m. only. Certain of the tenants in the building were provided with keys to the elevator and were permitted to use it after six o'clock. At such times the elevator was operated by the tenants or by their employees. From the early spring of 1929 until the date of this accident, August 2, 1929, plaintiff from time to time had so operated the elevator for his own convenience. About nine o'clock in the evening

of the accident plaintiff entered the building and approached the elevator opening on the first floor intending to use the elevator to go to his office. The entryway and vestibule were unlighted and plaintiff fell through the door to the elevator shaft into the elevator pit 14 feet below. He was seriously injured. He brought this suit against the landlord to recover damages for his injuries, alleging that the defendant was negligent in failing to light the vestibule at the entrance to the elevator and also in permitting the door to the elevator shaft to be left open when the elevator cage was not at that level. Decision of defendant's motion for a directed verdict was reserved. After verdict for plaintiff defendant's motion for judgment *non obstante* and its motion for a new trial were denied. On review by writ of error defendant presents numerous assignments, one of which is that defendant should have had judgment on the ground that plaintiff was guilty of contributory negligence as a matter of law.

In reviewing this phase of the case it will be assumed that there was proof of defendant's negligence, and plaintiff's version of the contested facts will be accepted as settled by the verdict of the jury. In addition to the facts above stated we must accept plaintiff's contention that, like some other tenants in the building, he was permitted by defendant to use this elevator after the regular hours and was furnished a key for that purpose; that on other occasions when he had gone to the building during the evening hours he had always found the vestibule lighted, but on this occasion there was no light in the hallway, which was about 12 feet long and led to the vestibule, nor in the vestibule itself; that plaintiff did not know where or how the electric light was turned on; and that he had never before found the

door to the elevator shaft open or unlocked when the elevator cage was not at that floor. Also that on this occasion, in accordance with his usual custom, as plaintiff approached the elevator opening he was leaning over and looking through a transom and up the elevator shaft, which was about three feet to his left as he entered the vestibule, for the purpose of discovering where the elevator cage was located, and that this could ordinarily be done by reason of the electric light in the cage. While attempting to make this observation, and not knowing that the door to the elevator shaft was open, plaintiff stepped beyond the threshold of the elevator entrance and fell to the bottom of the shaft. Plaintiff's lease provided:

"Party of the first part (the defendant) agrees to furnish heat and elevator service in the ordinary manner as furnished in the regular process of operating the building in common with other tenants. It is also agreed by parties of the second part (plaintiff) that any damages or loss to them caused by fire, water, broken pipes and loss or damages of any other name or nature will be assumed by themselves, and party of the first part will not be held responsible."

As bearing upon the question of his own negligence, plaintiff's testimony contains the following:

"*Q.* Did you try the elevator door?

"*A.* No sir, I stooped over to look up the transom.

"*Q.* You didn't try to look for the elevator door?

"*A.* No, sir, I didn't look for the elevator door; I looked for the elevator. * * *

"*Q.* You knew there was a door there?

"*A.* Yes, sir.

"*Q.* You had operated that elevator before?
"*A.* Yes, sir. * * *
"*Q.* So you knew when you were stopped (stooped) over there to look up the elevator shaft, there was no light there so you could see the door and entrance to the elevator?
"*A.* Yes, sir.
"*Q.* Did you try for the door?
"*A.* No, sir.
"*Q.* Didn't put your hand out to try to see if the door was there in the darkness?
"*A.* No, sir.
"*Q.* Didn't you realize there must be something wrong when it was dark?
"*A.* No, sir.
"*Q.* You never gave that a thought?
"*A.* No, sir.
"*Q.* You just walked into this dark hallway and walked over to the elevator, never tried to see if the door was there, and then attempted to look up the shaft and fell down into the elevator shaft?
"*A.* Yes, sir.
"*Q.* Is that true, witness?
"*A.* That is true that I stooped over to look up for the elevator and fell down the shaft, yes, sir.
* * *
"*Q.* You walked over toward the elevator door?
"*A.* Yes, sir.
"*Q.* You did that because you knew the position and location of the elevator door, didn't you?
"*A.* Yes, sir.
"*Q.* And without trying to find out if the elevator door was in place, you walked in deliberately, looked up and fell down the shaft?
"*A.* Yes, and you can look up without going through over to the door.
"*Q.* And you didn't try to find the door by feeling with your hand, did you?
"*A.* No, sir."

Plaintiff knew the location of this elevator shaft. He knew if one walked into it injury would probably follow. If he had walked into the open shaft while the entryway or vestibule was lighted, there could have been no doubt of his negligence in so doing. Instead, as he approached the shaft he found for the first time the premises were in darkness; and obviously it then became his duty to exercise a greater degree of care. His own testimony discloses that he wholly failed to do so, and his misfortune resulted. There is no complaint made that this elevator was not properly installed, in proper repair, or that the doors to the shaft were not properly equipped with locks. Because of his having so used the elevator plaintiff knew that after six p. m. this equipment was operated by others than defendant or its employees. He was bound to know that those using it after the regular operating hours were charged with exercising such care as was necessary for their own safety. In the darkness and knowing the location of the elevator (as stated in his declaration) "plaintiff stepped off and into the elevator shaft." Whether plaintiff was negligent in so doing must be tested in the light of the surrounding circumstances. The lease did not require defendant to light its hallway. There was no common-law duty to do so (*Lindsley* v. *Stern,* 203 App. Div. [N. Y.] 615 [197 N. Y. Supp. 106]); nor are we advised of any such statutory requirement. See *Gleich* v. *Detroit Free Press,* 169 Mich. 247. In his approach to the vestibule and the elevator shaft at a time when plaintiff expected to operate the elevator for his own use, he was obligated to exercise a reasonable degree of care to save himself from injury. We think it conclusively appears from this record that his failure to do so was the proximate cause of his injury.

This is not a case wherein at the time of the accident the elevator either actually or supposedly was in the charge of the defendant or its agents. Nor is it a case where the open door to the elevator in a dimly lighted approach constituted an invitation to enter, as in *Dawson* v. *Sloan,* 49 N. Y. Super. Ct. (17 Jones & S.) 304, aff'd in 100 N. Y. 620. See, also, *Tousey* v. *Roberts,* 114 N. Y. 312 (21 N. E. 399, 11 Am. St. Rep. 655). Plaintiff did not look for a door to this elevator shaft nor use any other means in his possession to locate it or to determine whether it was open or closed. He knew the shaft was there and in the darkness walked into it.

There is almost unlimited authority in adjudicated cases covering the following propositions: (1) One is required to make reasonable use of his faculties of sight, hearing, and of intelligence to discover dangerous conditions to which he is or he may become exposed. (2) One who knows or in the exercise of ordinary care should have known the existence of danger from which injury might reasonably be anticipated and who by his voluntary acts or omissions exposes himself to such danger is guilty of negligence, if under the circumstances an ordinarily prudent person would not have incurred the risk of injury which such conduct involved. (3) Momentary forgetfulness of or inattention to a known danger may, and usually does, amount to negligence. See cases cited in notes of 45 C. J. pp. 947–950, and 957.

"Where the entrance is dark, it would seem that ordinary care would condemn the act of a person who steps into an elevator shaft without satisfying himself that the elevator is there." 9 R. C. L. p. 1258, citing *Bedell* v. *Berkey,* 76 Mich. 435 (15 Am. St. Rep. 370).

We cite below cases somewhat similar to the circumstances here involved in which recovery was denied on the ground of contributory negligence. *Kauffman* v. *Machin Shirt Co.,* 167 Cal. 506 (140 Pac. 15); *Globe Indemnity Co.* v. *Hook,* 46 Cal. App. 700 (189 Pac. 797); *Taylor* v. *DuPont Bldg. Corp.,* 29 Del. 277 (99 Atl. 284); *Parker* v. *Portland Publishing Co.,* 69 Me. 173 (31 Am. Rep. 262); *Ballou* v. *Collamore,* 160 Mass. 246 (35 N. E. 463); *McCarvell* v. *Sawyer,* 173 Mass. 540 (54 N. E. 259, 73 Am. St. Rep. 318); *Daley* v. *Kinsman,* 182 Mass. 306 (65 N. E. 385); *State, ex rel. Cox,* v. *Trimble,* 312 Mo. 322 (279 S. W. 60); *Brudie* v. *Renault-Freres Selling Branch, Inc.,* 138 App. Div. (N. Y.) 112 (122 N. Y. Supp. 963); *Lindsley* v. *Stern, supra; Brenstein* v. *Mattson,* 10 Daly (N. Y.), 336; *Massey* v. *Seller,* 45 Ore. 267 (77 Pac. 397); *Despointes* v. *Almond,* 18 B. C. 578.

In *Murray* v. *Earl,* 282 Pa. 517 (128 Atl. 436), concerning a plaintiff who for six months had been familiar with the building in which he was injured by falling into an elevator shaft, it is said:

"If it was so dark that he could not see, he had other means of ascertaining whether the elevator was there, as, for example, by stepping cautiously and feeling with his foot, as one naturally does when approaching a step in the dark, or by calling to his companions. In such a case the rule applies that 'where the entrance is dark, it would seem that ordinary care would condemn the act of a person who steps into an elevator shaft (knowing its location) without satisfying himself that the elevator is there.'"

In disposing of an elevator case wherein it was held plaintiff's contributory negligence prevented recovery, Chief Justice CAMPBELL, speaking for this court, in substance said:

"A person who pays little heed to his surroundings, and goes hither and thither in an absent-minded manner, or thinking only of some particular object and shutting his eyes to everything else, is guilty of an inattention sometimes dangerous to himself and quite as often to his neighbors, and of a want of that ordinary care which the safety of society requires all sane persons of mature age to exercise, and for which they are civilly responsible." (Syllabus) *Hutchins* v. *Priestly E. W. & S. Co.*, 61 Mich. 252.

See, also, *Bedell* v. *Berkey, supra; Steger* v. *Immen*, 157 Mich. 494 (24 L. R. A. [N. S.] 246). In the case last cited plaintiff opened an unlocked door, stepped into a darkened opening and fell down an elevator shaft, much like plaintiff herein who opened the door from the dimly-lighted outside corridor, stepped into the darkened vestibule, and fell through the opening into the elevator shaft. In the *Steger Case* plaintiff's contributory negligence is pointed out by saying that he "groped his way in the dark, found a closet door, which he opened without taking the trouble of striking a match or making any investigation, and stepped into darkness, which resulted in his injury." In the instant case plaintiff's conduct may be summarized in much the same way. We think the record is such that as a matter of law he must be held to have been guilty of contributory negligence. The judgment of the lower court will be set aside and one entered there in favor of defendant. Defendant will have costs of both courts.

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

## VILLAGE OF GROSSE POINTE SHORES *v.* AYRES.

1. ACTION—DECLARATORY JUDGMENTS—PLEADINGS MUST PRESENT ISSUE.

   Requisite to proceeding under declaratory judgment law (3 Comp. Laws 1929, § 13903) is actual controversy over specific issue to be set up in pleadings so that binding declaration of rights may be made thereon.

2. SAME—SPECIAL PROCEEDING.

   Said proceeding is special, is not substitute for regular actions, and is not exercise of general equity jurisdiction in which court may grant consequential relief under general prayer or on general equitable considerations.

3. DEDICATION—EFFECT OF CONDITION SUBSEQUENT—DECLARATORY JUDGMENTS.

   In proceeding by village under declaratory judgment law (3 Comp. Laws 1929, § 13903) for declaration of rights under deeds dedicating lands for highway purposes, under pleadings and admissions issue presented is validity of conditions subsequent in effective dedication to plaintiff.

4. SAME—FRAUD NOT WITHIN SCOPE OF ACTION UNDER PLEADINGS.

   Question of fraud of village in accepting dedication of lands for highway purposes with conditions subsequent after advice of counsel that said conditions were void and would not affect grant, although defendants had insisted upon rejection of deeds in case conditions were not satisfactory, *held*, not within scope of proceeding under defendants' pleadings.

5. ACTION—DECLARATORY JUDGMENTS—FUTURE RIGHTS NOT DECIDED.

   In proceeding under declaratory judgment law (3 Comp. Laws 1929, § 13903), court will not decide as to future rights, especially where, by reason of extraneous circumstances creating estoppel or otherwise, the situation may become so changed that declaration now might be obsolete when need for it arises.

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As to declaration of rights or declaratory judgments, see annotation in 12 A. L. R. 52; 19 A. L. R. 1124; 50 A. L. R. 42; 68 A. L. R. 110.

6. DEDICATION—EFFECT OF CONDITION SUBSEQUENT.

In present proceeding, under pleadings and proofs, only controversy between parties is in respect to installation of gas, water, lighting, and telephone systems in east parkway of highway, and said controversy presents specific and only issue.

7. HIGHWAYS AND STREETS—PARKWAY SUBJECT TO LAW APPLICABLE TO STREETS.

Land dedicated for parkway purposes in street is ordinarily part of street and governed by laws applicable thereto rather than those applicable to parks.

8. SAME—GRANT FOR STREET PURPOSES ESTABLISHES CHARACTER AS STREET.

Grant of land to village for purpose of highway established its character as such, and provisions in grant restricting its use to parkway are ineffectual restrictions upon use and control of street by village.

9. SAME—MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW.

Control of streets conferred on village by Constitution and statutes is to be used by authorities for public good as need arises, and may not be bartered away.

10. DEDICATION—HIGHWAYS AND STREETS—USES OF STREET.

Dedication of land for purpose of highway carries right to public travel and also use for all present and future agencies commonly adopted by public authority for benefit of people, such as sewer, water, gas, lighting, and telephone systems.

11. SAME—RESTRICTIONS VOID AS AGAINST PUBLIC POLICY—INCONSISTENT WITH GRANT.

Condition in deed dedicating land for street prohibiting its use for such purposes as sewer, water, gas, etc., is void as against public policy or as inconsistent with grant.

12. SAME—DEDICATION EFFECTIVE ALTHOUGH CONDITION INOPERATIVE.

Where condition in dedication for street is void as against public policy or as inconsistent with grant, dedication is effective but condition is inoperative.

Appeal from Wayne; Smith (Henry H.), J., presiding. Submitted January 22, 1931. (Docket

No. 132, Calendar No. 35,457.) Decided April 7, 1931.

Bill by Village of Grosse Pointe Shores, a municipal corporation, against Clarence L. Ayres and others for a declaration of rights under a deed dedicating land to plaintiff for street purposes. From decree entered, defendants appeal. Affirmed in part, reversed in part.

*Elroy O. Jones* (*Raymond K. Dykema* and *Renville Wheat,* of counsel), for plaintiff.

*Lightner, Oxtoby, Hanley, Crawford & Dodd* (*A. George Abbott,* of counsel), for defendants.

FEAD, J. Under contract and agreed plan of construction and maintenance, plaintiff and the county road commission of Wayne county undertook the widening to 120 feet of a 66-foot street in the village of Grosse Pointe Shores; plaintiff to secure the right of way. The plan contemplated a street of boulevard style, with 22-foot parkways on the outside, two 27-foot driveways, and a 22-foot parkway in the center. Some of the abutting owners conveyed lands to plaintiff for the street on forms drafted by the village attorney. Defendants conveyed and dedicated lands "for the purposes of a highway known as Lake Shore Road" by a different form of deed prepared by their own lawyers. The dedications were formally and unconditionally accepted by resolution of the village council.

Both forms described the street planned, and provided that the east and west parkways shall always remain unpaved. The action arises over the following special conditions in defendants' deeds:

"(6) No sidewalk, storm-water sewer, water-main, or underground public utility conduits or any other future installed public utility shall occupy the easterly 22 feet of the road, all of which, if and when installed shall be placed, as far as practicable, in or under the unpaved parkway between the two paved roadbeds, otherwise may be placed under the pavement or in or under the westerly 22 feet of the road. The three parkways of approximately 22 feet shall for all time be continued as such parkways and shall never be used for widening the paved portions of said roadbeds.

"(7) Should said highway ever be widened by condemnation proceedings or by other than voluntary dedication, or any of the terms of this conveyance and dedication be violated, or any portion of said parkways ever be used for widening the paved portions of said roadbeds, then the property herein conveyed and dedicated with all improvements thereon, shall automatically revert to said first parties, their heirs, executors, administrators or assigns. The express conditions hereof shall be strictly complied with and shall be construed in favor of the first parties, and is the moving and principal consideration hereof.

"(8) For the purpose of clarity, it is understood that this dedication is made by the first parties with the distinct understanding that the consideration for it is a road with two distinct paved roadbeds and an unpaved boulevard parkway between as shown by the blueprints hereto attached; that the first parties would not make a free dedication and give to said village said land for any other kind of roadway other than that shown in the blueprints hereto attached, and that if and/or when said village or its municipal successor or successors impose any other plan of roadway or otherwise violate any of the provisions of this deed of dedication, then and in that event the property herein dedicated shall

automatically revert to the first parties their heirs, executors, administrators or assigns."

This is a proceeding under the declaratory judgment law, 3 Comp. Laws 1929, § 13903, to determine and declare the effect of these conditions, which plaintiff contends are void and defendants urge are valid. The circuit court held with plaintiff. The first consideration is to define the issue.

A requisite to the proceeding is an actual controversy over a specific issue to be set up in the pleadings, in order that a binding declaration of rights may be made thereon. The proceeding is special, is not a substitute for the regular actions, and is not an exercise of general equity jurisdiction in which the court may grant consequential relief under a general prayer or upon general equitable considerations. *Washington-Detroit Theatre Co.* v. *Moore,* 249 Mich. 673 (68 A. L. R. 105); 50 A. L. R. 42; 19 A. L. R. 1124; 12 A. L. R. 52, notes.

In the pleadings, plaintiff alleged and defendants admitted that the deeds and acceptance "constitute a good and valid dedication of the land described therein for highway purposes." Hence the issue is upon the validity of conditions subsequent in an effective dedication to plaintiff.

Defendants' claim, upon the oral testimony, that the acceptance of the dedication was tainted with fraud and the grant should be annulled is not within the scope of the action. The claim is that, before accepting the dedication, plaintiff had advice of counsel that the above conditions were void and did not affect the grant, and then accepted it although defendants, in delivering the deeds, had insisted upon their rejection in case the conditions were not satisfactory to plaintiff. To raise such issue would require pleadings which would convert the proceeding into a regular action by proper allegations of

fact and a prayer for affirmative relief. Defendants did not so plead.

The court will not decide as to future rights, especially where, by reason of extraneous circumstances creating estoppel or otherwise, the situation may become so changed that a declaration now might be obsolete when the need for it arises. *Washington-Detroit Theatre Co.* v. *Moore, supra.* A change in the present plan of the street by which parkways will be paved or the street widened is not now contemplated by any of the parties, and its possibility is too remote to afford a basis for a declaration of rights at this time. The pleadings and proofs disclose no actual controversy between the parties regarding the conditions of the dedication except in respect of the installation of gas, water, lighting, and telephone systems in the east parkway, which was immediately intended under the plan of construction. Such controversy presents the specific and only issue.

The gist of defendants' contention is that the dedication should be divided into two separate parts, one covering the three parkways to be governed by the law applicable to the parks, and one including the two driveways to be controlled by the law of highways, the force of conditions in the dedication of parks and of highways being different in many respects. If the land had been dedicated for park purposes, the parkway could be treated as a park. *In re City of Detroit,* 227 Mich. 132. But ordinarily a parkway is not a park but a street or part of a street. *Kleopfert* v. *City of Minneapolis,* 90 Minn. 158 (95 N. W. 908); *Municipal Securities Corp.* v. *Kansas City,* 265 Mo. 252 (177 S. W. 856); *Kupelian* v. *Andrews,* 233 N. Y. 278 (135 N. E. 502). And a dedication expressly for parkway purposes to widen a street renders the land dedicated part of the street

and subjects it to later conversion into a driveway within the power of the constituted authorities. *State, ex rel. Townsend,* v. *Board of Park Com'rs,* 100 Minn. 150 (110 N. W. 1121, 9 L. R. A. [N. S.] 1045). The grant here was for the purpose of a highway. This established the character of the dedication and the provisions regarding parkways were merely attempted restrictions upon the use and control of the street by the village.

The control of streets is conferred on a village by Constitution and statute. It is to be used by the authorities for the public good as the need arises and cannot be bartered away. *In the Matter of Opening First Street,* 66 Mich. 42; *Whitcomb* v. *City of Boston,* 192 Mass. 211 (78 N. E. 407); *Vandalia R. Co.* v. *State, ex rel. City of South Bend,* 166 Ind. 219 (76 N. E. 980, 117 Am. St. Rep. 370); *Penley* v. *City of Auburn,* 85 Me. 278 (27 Atl. 158, 21 L. R. A. 657).

The dedication of property for the purpose of a highway carries the right to public travel and also the use for all present and future agencies commonly adopted by public authority for the benefit of the people, such as sewer, water, gas, lighting, and telephone systems. *Warren* v. *City of Grand Haven,* 30 Mich. 24; *Magee* v. *Overshiner,* 150 Ind. 127 (49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358); *Wood* v. *National Water Works Co.,* 33 Kan. 590 (7 Pac. 233); *Julia Building Ass'n* v. *Bell Telephone Co.,* 13 Mo. App. 477. In this connection attention may be called to the fact that the dedication of the east parkway is not a new gift but is in fact a rededication, because all of it was within the limits of the old road. The point suggests itself that the village had no power to contract away its right to lay pipes and erect poles in territory which had been and continued to be part of the street. But

as the point was not briefed by counsel and is not necessary to decision it will be passed.

A condition in a deed of dedication prohibiting the uses above stated or circumscribing the future freedom of action of the authorities to devote the street to the wants and convenience of the public is void, as against public policy or as inconsistent with the grant. And where the condition in the dedication for a street is void as against public policy or as inconsistent with the grant, the dedication is effective but the condition is inoperative. *Leggett* v. *City of Detroit,* 137 Mich. 247; *Dickerson* v. *City of Detroit,* 99 Mich. 498; *Richards* v. *City of Cincinnati,* 31 Ohio St. 506; *Wood* v. *National Water Works Co., supra;* 4 McQuillin, Municipal Corporations (2d Ed.), § 1670; 18 C. J. p. 71; *Moser* v. *Greenland Hills Realty Co.* (Tex. Civ. App.), 300 S. W. 177; *Haight* v. *City of Keokuk,* 4 Iowa, 199; *Bradley* v. *Railroad Co.,* 79 Wash. 455 (140 Pac. 688); *Neagle* v. *City of Tacoma,* 127 Wash. 528 (221 Pac. 588); *State, ex rel. Townsend,* v. *Board of Park Com'rs, supra; Vandalia R. Co.* v. *State, ex rel. City of South Bend, supra; Riddle* v. *Town of Charlestown,* 43 W. Va. 796 (28 S. E. 831); *Julia Building Ass'n* v. *Bell Telephone Co., supra.* The exceptions to this rule, which apply to reservations for public utilities, need not be considered.

We must, therefore, hold that the above condition of the deed at bar is void and inoperative, but the dedication remains in force.

Upon the issue here decided, the decree is affirmed, but the declaration of other rights will be reversed as not now presenting an actual controversy; without costs.

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

DETROIT & SECURITY TRUST CO. *v.* GITRE.

SAME *v.* SAME.

1. DEEDS—DESTRUCTION DID NOT RESTORE TITLE TO GRANTOR.
   Destruction of unrecorded deed did not restore title to grantor, but it remained in grantee.
2. FRAUDULENT CONVEYANCES—DEEDS—DESTRUCTION OF DEED.
   Where, at time judgment debtor deeded property to his nephew he had previously deeded it to his brother, which deed was destroyed without recording, debtor had no interest to convey, and therefore second deed was not in fraud of his creditors.
3. FRAUDS, STATUTE OF—HUSBAND AND WIFE—ORAL AGREEMENT.
   Oral agreement of husband to put all of his property in joint names of himself and wife, in connection with their reconciliation after wife had filed suit for divorce, did not give her title or create debt from husband to her.
4. FRAUDULENT CONVEYANCES—PRIMA FACIE CASE—BURDEN OF PROOF.
   Where, in judgment creditors' suit to reach property claimed to have been conveyed by judgment debtor in fraud of creditors, plaintiffs made *prima facie* case, burden rested on defendants to show that conveyance was *bona fide* (3 Comp. Laws 1929, § 14617).
5. SAME—PRESUMPTIONS.
   Although presumption created by statute vanishes and is not to be weighed against evidence when defendants make showing of *bona fide* conveyance by credible evidence, yet this does not relieve them of burden of producing evidence of existence of every essential of good faith.
6. SAME—CONVEYANCE FROM FATHER TO SON—ADEQUACY OF CONSIDERATION.
   Where no rights of creditors intervene, transfer from father to son in payment of services is lawful and adequacy of consideration unimportant, but where creditors are interested, transaction is subject to close scrutiny and fairness of considera-

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As to right of married woman to recover for services rendered by her outside the home, see annotation in L. R. A. 1917E, 282.

Validity of contract by husband to pay wife for services rendered in carrying on his business, see annotation in 23 A. L. R. 18.

Burden of proof as to consideration for transfer from husband to wife, see annotation in 56 L. R. A. 828.

tion is material, and where it assumes to be in payment of antecedent debt, consideration must not be disproportionately small as compared with value of property or obligation obtained (3 Comp. Laws 1929, § 13394).

7. SAME—JUDICIAL NOTICE—EVIDENCE OF VALUE NECESSARY.
Where property conveyed by father to son in consideration of latter's services was far outside ordinary run of human experience, court may not take judicial notice of adequacy, but affirmative evidence is required to justify holding that it was fair, in suit to set conveyance aside as in fraud of creditors.

8. SAME—BURDEN OF PROOF—BONA FIDES OF TRANSACTION.
Burden of showing that conveyance of property by father to son was *bona fide* and not in fraud of creditors (3 Comp. Laws 1929, § 14617) was not met by testimony that it was in consideration of son's services, where property was worth much more than such services ordinarily would be worth, and there was no proof of value of said services.

9. HUSBAND AND WIFE—RIGHT OF MARRIED WOMAN TO EARNINGS—STATUTES.
Right of married woman to earnings acquired by her as result of her personal efforts (3 Comp. Laws 1929, § 13061) covers services performed by her for others than the family as well as apart from her household duties.

10. SAME—HUSBAND NOT OBLIGATED TO PAY WIFE FOR SERVICES—STATUTES.
The statute (3 Comp. Laws 1929, § 13061) does not convert marital relationship into business partnership nor raise money debt from husband to wife for her services to him, even though they take her outside the strict ambit of domestic circle, and consist of aid to him in business.

11. FRAUDULENT CONVEYANCES—CONSIDERATION.
Agreement by son to support his mother did not furnish consideration for conveyance to him of father's property as against rights of latter's creditors.

12. SAME—ASIDE FROM EXEMPTIONS DEBTOR'S PROPERTY SUBJECT TO CREDITORS' CLAIMS.
Aside from exemptions allowed by law, all property of debtor is subject to claims of creditors, and those claims may not be defeated by conveyance which secures to debtor future fruits of property.

13. SAME—EXECUTION—DISSOLUTION—CERTIORARI.

On certiorari to review order of court below dissolving attachment levied on property claimed to have been conveyed in fraud of creditors, on petition of grantee under 3 Comp. Laws 1929, § 14810, order is set aside on finding that said conveyance was void.

Appeal from Wayne; McMahon (Maurice H.), J. Submitted January 20, 1931. (Docket No. 136, Calendar No. 35,460.) Decided April 7, 1931. Rehearing denied June 25, 1931.

Bill in aid of execution by Detroit & Security Trust Company, a Michigan corporation, and others, executors, against Lester W. Gitre and others. Decree for defendants. Plaintiffs appeal. Affirmed in part, reversed in part.

Certiorari to Wayne; McMahon (Maurice H.), J. Submitted January 20, 1931. (Docket No. 162, Calendar No. 35,455.) Decided April 7, 1931.

Attachment proceedings by Detroit & Security Trust Company, a Michigan corporation, and others, executors, against Lester W. Gitre. On petition of Stanley A. Gitre the writ was dissolved. From an order denying motion to set aside dissolution of the writ, plaintiffs bring certiorari. Reversed, and dissolution set aside.

*Wurzer & Wurzer* (*John T. Higgins* and *Alfred N. Slaggert,* of counsel), for plaintiffs.

*Louis Starfield Cohane* and *Regene Freund Cohane* (*Abbott & Coulter,* of counsel), for Stanley A. Gitre.

*Henry Fischer* and *Ray V. Richards* (*Sempliner, Dewey, Stanton & Bushnell,* of counsel), for defendants George C. and Delos Gitre.

FEAD, J. This is a bill, filed February 25, 1930, in aid of execution. The court accepted defendants' testimony, which was substantially undisputed, and dismissed the bill.

On July 9, 1929, plaintiffs brought suit against Lester Gitre for rent due on a lease expiring in 1932. About October 11th the attorneys, Lester Gitre, and his son Stanley had a conference, in which Lester proposed surrender of the lease and his own discharge from further liability on it. The offer was refused, plaintiffs' attorney insisting on the obligations of the lease, pointing out that Lester was financially responsible through ownership of a large number of lots in Gitre Park subdivision in Detroit, and that plaintiffs would look to the lots for satisfaction of the rent due and to become due.

On November 5th, Lester conveyed, partly to Stanley and partly to his nephew Delos, the Gitre Park lots and other property in Michigan, California, and Canada. There was some indefinite testimony of his retaining a piece of land near Niles, Michigan, which he later sold, but the property was not identified as to character, value, or time of sale sufficiently to warrant its consideration here in mitigation of the effect of the conveyances at bar.

Plaintiffs levied on the Gitre Park lots which, in his pleadings, Stanley stated are worth $100,000. The separate value of the lots deeded to Stanley and Delos respectively was not shown. Plaintiffs claimed the transfers were in fraud of creditors. Defendants claimed they were *bona fide* and for valuable and adequate consideration. Lester Gitre did not testify. As the conveyances present different considerations, they will be treated separately.

*Delos Gitre Deeds*

Delos claims to hold as trustee for his father, George Gitre. In 1926, George transferred these Gitre Park lots to Lester in at least partial fraud of creditors. On the same day, Lester deeded them back to George. George said he held the deeds unrecorded to prevent his wife and her children from taking an interest in them. When Lester became financially involved in 1929 and something had to be done about the record title, instead of recording the deeds a new conveyance was made from Lester to Delos in verbal trust for George, in order to escape the wife's claim. The unrecorded deeds were destroyed by the attorney who conducted the conveyances. The trust has become written by the pleadings in this case.

The testimony did not show that Lester was given credit by plaintiffs upon the strength of the record title of these lots, and the question of the rights of the parties, had such credit been given, is not before us. Nor are we here concerned with the rights of George's wife. We agree with counsel for George and Delos Gitre that, through the unrecorded deeds, George had title, it was not restored to Lester by the destruction of the deeds, and George is still the owner of the lots. *Tabor* v. *Tabor,* 136 Mich. 255. As Lester did not own the lots, they are not subject to execution against him.

As to this property the decree will be affirmed, but without costs.

*Stanley Gitre Deeds*

Defendants claimed they paid fair consideration for these conveyances, running both from Stanley and his mother to Lester. The deeds covered sev-

eral lots in Ontario as well as those in Gitre Park. The claimed considerations were:

*First:* Debt owing by Lester to Stanley for work. Stanley was born in 1907. From the time he was 14 years old he worked in his father's drug stores after school, Saturdays, and during vacations, receiving board and room and wages of $18, increasing to $35 per week, until about 1925. He attended school and a military academy until he was about 18, when he was sick for approximately six months, and then worked on his father's poultry farm until it was sold, some seven months after Stanley became of age. He said his father promised him for his labor a $12,000 drug store and the $70,000 chicken farm. On receiving the deeds in 1929, he released his father from the oral agreement and all claims for labor and otherwise. The value of his services was not shown.

*Second:* Debt owing by Lester to his wife for labor. When Lester and Mrs. Gitre were married, they were poor and Mrs. Gitre worked for their mutual benefit, aiding her husband in accumulating his property. She took boarders and roomers to finance an education for him and later worked in the drug stores. She claimed the value of her services as part consideration for the transfer to Stanley, but offered no evidence of their worth.

Lester and his wife were not happy together. Mrs. Gitre had filed suit for divorce in 1926, and later discontinued it. She testified that, in connection with the reconciliation in 1926, Lester promised to put all of his property in their joint names. However, no conveyances were actually made to her, as in the cases relied on by defendants, and the oral agreement neither gave her title nor created a debt from her husband to her.

*Third:* Property settlement on wife. In connection with the conveyances on November 5, 1929, Lester and Stanley executed an agreement, not referred to in the deeds, reciting that Lester was about to remove from the city, wanted to permanently provide for the support of his wife, Stanley was willing to assume the burden in consideration of the transfer of the property, that the transfer was accordingly made, Stanley agreed to support his mother for the balance of her life, the obligation to be charged against the real estate conveyed, and Stanley should always hold at least $10,000 in fair value of the real estate for the protection of Lester and the mother in the faithful performance of the agreement of support. Mrs. Gitre executed a consent to the instrument, in full of all her claims for dower, alimony, support, and share in the real estate and property accumulated by Lester and herself through their joint efforts.

*Fourth:* Defendants claimed Stanley gave his father $390 and Mrs. Gitre gave him $1,500 to invest in some lots with the understanding that title would be taken in their joint names, but Lester did not do this, and the property was later disposed of by him.

Plaintiffs made a *prima facie* case under 3 Comp. Laws 1929, § 14617, and the burden then rested on defendants to show that the conveyances were *bona fide*. This means that defendants had the burden of producing credible evidence of a *bona fide* conveyance. It is true that when such showing is made the presumption vanishes and is not to be weighed against the evidence (*Schick* v. *Levine,* 247 Mich. 595; *Corbett* v. *Williams,* 248 Mich. 541), but this does not relieve defendants of the burden of pro-

ducing evidence of the existence of every essential of good faith.

From the sequence of events, it is plain that both Lester and Stanley intended to put the property beyond plaintiffs' reach. Their evident purpose was to make a property settlement with Mrs. Gitre, provide for Stanley, and leave plaintiffs' claim unpaid.

Where no rights of creditors intervene, a transfer from father to son in payment of services is lawful and the adequacy of the consideration unimportant. Even a gift is legal. But where creditors are interested, the transaction is subject to close scrutiny and the fairness of the consideration material. Where it assumes to be in payment of an antecedent debt, the consideration must be not "disproportionately small as compared with the value of the property or obligation obtained." 3 Comp. Laws 1929, § 13394.

There was no evidence of the value of the services performed by Stanley nor of the worth of the property received by him from which the fairness of the consideration may be found. The proposition that the services of a schoolboy have been of sufficient value to his father to constitute an adequate consideration for the properties Stanley claimed his father agreed to convey to him is so far outside the ordinary run of human experience that the court cannot take judicial notice of the adequacy, but affirmative evidence would be required to justify a holding that it was fair. *First National Bank* v. *Engel*, 245 Mich. 185. Defendants did not sustain the burden on this item of consideration.

Aside from the fact that there was no evidence of their value, the services performed by Mrs. Gitre for her husband afforded no consideration for the

transfer. The right of a married woman to the "earnings acquired by any such married woman as the result of her personal efforts," 3 Comp. Laws 1929, § 13061, covers services performed by her for others than the family as well as apart from her household duties. *Gregory* v. *Oakland Motor Car Co.*, 181 Mich. 101; *Sorensen* v. *Sorensen*, 211 Mich. 429; *In re Moon's Estate*, 219 Mich. 104. The statute does not convert the marital relationship into a business partnership nor raise a money debt from husband to wife for her services to him, even though they take her outside the strict ambit of the domestic circle, and consist of aid to him in his business.

Nor did the agreement of the son to support the mother furnish a consideration for the transfer. The contract purported to release Lester Gitre from performance of a future duty to his wife, so he would retain the continuing benefit of his property, a benefit which belongs to his creditors. Aside from the exemptions allowed by law, all property of a debtor is subject to the claims of creditors, and those claims cannot be defeated by a conveyance which secures to the grantor the future fruits of the property. *Walker* v. *Cady*, 106 Mich. 21; *Rynearson* v. *Turner*, 52 Mich. 7; 27 C. J. p. 559; *Annis* v. *Bonar*, 86 Ill. 128; *Bank of Versailles* v. *Guthrey*, 127 Mo. 189 (29 S. W. 1004, 48 Am. St. Rep. 621).

In view of the court's acceptance of defendants' testimony and the failure of plaintiffs to present circumstances which tend to contradict the cash items of $390 and $1,500, respectively, they must be held proved. However, it was not shown that the Ontario real estate is not ample to compensate for these advances and they cannot be allowed as against the Gitre Park lots.

As to the conveyances to Stanley Gitre, the decree will be reversed and one may be entered subjecting the property to plaintiffs' levy, with costs against both Lester and Stanley.

*Attachment Proceedings*

On March 3, 1930, plaintiffs commenced another action against Lester Gitre for rent due and to become due under the lease, and levied an attachment on the Gitre Park lots. Stanley Gitre filed petition for dissolution of attachment under 3 Comp. Laws 1929, § 14810, which changed the former law, 3 Comp. Laws 1915, § 13075, to permit such petition to be filed by "any other person not a party to the suit" whose property is attached. After partial hearing, counsel stipulated that the testimony given in the chancery suit be used as a basis for determination of the petition. On finding Stanley's title good, the court dissolved the attachment and plaintiffs review by certiorari, submitted herewith.

Counsel raised many points as to practice, which need not be considered because, as we have found that Lester Gitre's deed to Stanley is void as to creditors, it follows that the order dissolving the attachment will be set aside, with costs.

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

SHONIKER *v.* ENGLISH.

1. HIGHWAYS AND STREETS—REGULATIONS AS TO PARTLY CLOSED HIGHWAY.

When State highway department closes road only partly, but it is open to use of public, as matter of right, for purposes of vehicular travel, it remains highway (1 Comp. Laws 1929, § 4693 [n]), and department may make regulations as to its use which are binding on public if they are posted on road (sections 4629, 4630).

2. SAME—DETOUR PART OF MAIN HIGHWAY.

Detour established by State highway department under authority of 1 Comp. Laws 1929, § 4629, becomes part of main road, and part temporarily cut off remains highway if open to travel, subject to such use and regulations as may be adopted and posted, but it loses special character attached to road from which it was taken.

3. MOTOR VEHICLES—HIGHWAYS AND STREETS—RIGHT OF WAY.

Generally, automobile which is required to stop at crossing yields right of way to other car approaching on intersecting street.

4. HIGHWAYS AND STREETS—STOP SIGN.

Regardless of testimony of highway officials as to superiority of roads, stop sign established by authority is imperative.

5. MOTOR VEHICLES—HIGHWAYS AND STREETS—STOP SIGN—DUTY TO STOP.

Where automobile drivers approaching intersection were both required to stop, one because of requirement of statute, and other because of stop sign established by authority, it was duty of both to stop, regardless of which technically had right of way.

6. SAME—DUTY TO HAVE CAR UNDER CONTROL.

Stop sign on highway is warning of possible danger, and imposes duty not only to stop vehicle, but also to make reasonable observation of intersecting highway at place where view is clear and to keep car under such control as will enable driver to stop at once if observation discloses approaching vehicles.

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On the general rule as to right of way of vehicles entering at intersection of street or highway, see annotation in 21 A. L. R. 974; 37 A. L. R. 493; 47 A. L. R. 595.

7. SAME—CONTRIBUTORY NEGLIGENCE.

Drivers of automobiles in collision at highway intersection where both were required to stop and have cars under control were both guilty of contributory negligence as matter of law, barring their right to recover for damages so inflicted.

Error to Kent; Brown (William B.), J. Submitted January 7, 1931. (Docket No. 28, Calendar No. 35,248.) Decided April 7, 1931.

Case by Clairmont Shoniker against Warren W. English and another for injuries sustained in an automobile collision. Cross-actions by defendants against plaintiff for injuries sustained in the same collision. Directed verdict and judgment for defendants in plaintiff's action. Verdict and judgment for defendants in their cross-actions. Plaintiff brings error. Reversed.

*Grant Sims* and *Rodgers & Dunn,* for plaintiff.

*Linsey, Shivel & Phelps,* for defendant.

FEAD, J. In action and cross-action for injuries sustained in a collision between automobiles, verdict was directed against plaintiff for contributory negligence, and defendants had verdict of a jury and judgment for damages.

Just outside the city limits of Grand Rapids, US–131, a superhighway, runs north and south on Division street and crosses M–114, a State trunk line highway, properly so marked, at Beals street. Both streets are paved 40 feet wide at the intersection. The State highway department undertook the paving of US–131 for a distance south of the crossing and detoured the superhighway west on Beals street. It erected a barricade across Division street 20 feet south of the pavement and put up the usual

sign that the road was under repair and travel was at driver's risk. At the time of the collision, September 15, 1929, the east half of the pavement had been completed and was open to local traffic. The barricade then extended over only the west half of the road. M–114 had been a stop street as to US–131, and was properly equipped with stop signs. When US–131 was detoured the department continued the stop sign on Beals street 80 feet west of the crossing.

In outlining the circumstances of the collision, we accept the testimony favorable to the parties respectively.

Defendant Harold English drove east on Beals street and halted at the stop sign. On his right was a gasoline station which obstructed his view to the south. He could see 150 feet south of the intersection on Division street, his view was obstructed for the next 100 feet; and from that point he could see to a rise 400 feet distant from the crossing. When at the station, he looked to the south, saw no car approaching, waited for one to come out of the blind spot, none came, he started in low gear, shifted to second speed, ran at a rate of 12 miles per hour, did not look to the south again until he was at the west line of the intersection, saw plaintiff's car some 10 feet south of the barricade, applied his brakes instantly, could not stop, and his car was struck at about the middle by plaintiff's some four feet west of the east line of the crossing. At a speed of 12 miles per hour he could have stopped his car in five feet.

Plaintiff was driving north at a speed of 30 miles per hour, coasting after he passed the rise. When about 80 feet from the crossing he looked to the west and saw no car. The gasoline station pre-

vented his seeing defendants. He did not look again until about at the barricade, saw defendants' car 20 feet west of the intersection, coming at 30 to 35 miles per hour, applied his brakes, reduced speed to 20 miles per hour, but was not able to stop. Plaintiff knew US–131 had been detoured, that the barricade and sign were at the crossing, that M–114 was a trunk line highway, that the road on which he was traveling was under repair and the east portion had been open only to local travel.

Each party claims he had the right of way, and, therefore, was not guilty of negligence and the other was negligent. Plaintiff said he relied upon there being a stop sign on Beals street, that there was no such sign on Division street, and, as he was on the right, he had the right of way. Defendants contend that Beals street was the superior road because M–114 was a trunk line highway and the detour of US–131 had left the portion of Division street under repair with a status no greater than a private road.

When the State highway department closes a road only partly, but it is open "to the use of the public, as a matter of right, for purposes of vehicular travel," it remains a highway. 1 Comp. Laws 1929, § 4693(n). The department may make regulations as to its use, which are binding on the public if they are posted on the road. 1 Comp. Laws 1929, §§ 4629, 4630. Except as modified by such posted regulations, the road has the dignity and incidents of a highway.

The department also has authority to establish detours. 1 Comp. Laws 1929, § 4629. The detour becomes a part of the main road. The part temporarily cut off remains a highway if open to travel, subject to such use and regulations as may be adopted and posted by authority, but it loses the

special character attached to the road from which it was taken.

In this instance the right of way presents unusual features. Plaintiff had the advantage of being on the right of defendants. 1 Comp. Laws 1929, § 4712. However, Beals street, M–114, was a State trunk line highway, properly so marked, and plaintiff was required to approach it at a maximum rate of speed of 10 miles per hour and to come to a full stop because defendants' car was approaching. 1 Comp. Laws 1929, § 4713(e). On the other hand, Beals street had a stop sign at the intersection. As a general rule, a car which is required to stop at a crossing yields the right of way to the other.

Out of the somewhat complicated situation, the clearest rule is that both cars were required to stop. Plaintiff's duty to do so was established by statute. Regardless of the testimony of highway officials as to the superiority of roads, a stop sign established by authority is imperative. It is the means by which the law requires the highway officials to register their determination for the guidance of the public. So, defendants' duty to stop was also plain.

Because both cars were required to stop at the intersection, plaintiff, being on the right, had the technical right of way. But, under the circumstances, the technical right of way is unimportant because it did not enter into the accident. The collision was caused by negligence occurring prior to the time when the right of way became a factor.

We cannot agree that defendant performed his whole duty because he stopped his car at the sign, where his view was obstructed, and estimated the time it would take a car to appear out of the blind spot. A stop sign on the highway is a warning of possible danger. It imposes the duty not only to

stop the vehicle but also to make reasonable observation of the intersecting highway at a place where the view is clear and to keep the car under such control as will enable the driver to stop at once, if observation discloses approaching vehicles.

Neither driver made reasonable observation because, although the view was clear a much farther distance, he did not see the other car until each was about 20 feet from the intersection. Neither had his car under proper control, as he was unable to stop after he saw the other, and this in spite of his being warned, defendant by the stop sign and plaintiff by nearing a trunk line highway, that the intersection was to be approached cautiously. In addition, plaintiff was negligent in not approaching at the lawful rate of speed and in not stopping. If defendant's claim that he was driving at 12 miles per hour, and could have stopped in five feet, is accepted, then he probably had his car under proper control but was still negligent in not looking seasonably when the view was clear and in not stopping after he saw plaintiff, as he could have done.

In our opinion, both drivers were guilty of contributory negligence as a matter of law.

Judgment will be reversed, and the case remanded with directions to enter judgment of no cause of action on both the principal and cross-suits, without costs.

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

J. R. WATKINS CO. *v.* RICH.

1. APPEAL AND ERROR—FAILURE TO FILE EXCEPTIONS TO FINDINGS.
   Where, in trial had without jury, no exceptions to court's findings were seasonably filed, judgment stands if sustained by findings.

2. CONTRACTS—OPTION FOR TERMINATION MUST BE EXERCISED IN GOOD FAITH.
   Provision in contract for termination at option of party is valid, but where relationship is commercial and does not involve fancy, taste, sensibility, judgment, or other personal features, option may be exercised only in good faith.

3. SAME—BREACH OF CONTRACT.
   Finding of trial court that plaintiff did not act in good faith in exercising option to terminate contract, *held*, warranted by testimony.

4. PRINCIPAL AND SURETY—BREACH OF CONTRACT DISCHARGED SURETIES.
   Where dealer in merchandise arbitrarily and illegally terminated and breached contract to sell goods to salesman on credit, sureties thereon were discharged from liability.

Error to Ionia; Hawley (Royal A.), J. Submitted January 23, 1931. (Docket No. 166, Calendar No. 35,151.) Decided April 7, 1931.

Assumpsit by the J. R. Watkins Company, a Delaware corporation, against Walter E. Rich, principal, and Irving H. Brown and others, sureties, on a contract for the sale of merchandise. Judgment for plaintiff against defendant Rich only. Plaintiff brings error. Affirmed.

*Eldred & Gemuend,* for plaintiff.

*Watt & Colwell,* for defendants.

FEAD, J. The action is against Rich as principal and the other defendants as his sureties. Judgment ran against Rich, but in favor of the sureties, and plaintiff reviews. Trial was had before the court without a jury. No exceptions to the findings were seasonably filed, and the judgment stands if sustained by the findings. *Gervickes* v. *Royal Exchange Assurance Co.,* 222 Mich. 103.

Plaintiff sells merchandise through salesmen who buy it on credit and solicit business and deliver goods in allotted territory. Rich had contracts with plaintiff continuously since 1924, and had become indebted to it in the sum of $715.30. The contract at bar was dated December 31, 1927, and gave Rich the right to purchase and sell until March 1, 1929. The suretyship agreement obligated the sureties to pay the old debt and future charges at the time, place, and manner provided in the contract. The contract provided that payment of the old debt should be from time to time during its term in amounts satisfactory to plaintiff, and that future charges should be paid on expiration or termination of the agreement. The practice was to make periodical or occasional payments.

The contract was sent to Rich on December 31st for execution. He returned it signed by some of the sureties. It was sent back to him two or three times for more sureties, and was not finally executed and delivered to plaintiff until on or about May 8, 1928. Goods were purchased at intervals during the next month and some payments made, but not sufficient to equal the charges. The summer was the best business season.

On June 8, 1928, plaintiff, without prior demand for payments on the old or new debt or intimation of dissatisfaction in any respect, notified all the defendants that the contract was terminated and the whole debt due and payable. It claimed the right to prematurely end the contract under the provision:

"And it is further mutually agreed that either of the parties hereto may terminate this agreement at any time by giving the other party notice thereof in writing by mail, and any indebtedness then owing by either party to the other shall thereupon be and become immediately due and payable."

The court found that the purpose of the sureties in their undertaking was to aid Rich to obtain the business for a new full term in which to pay his debts; that they would not have executed it if they had known such opportunity would be arbitrarily refused him; that during the winter Rich had been in poor health, unable to attend to business, the roads were in bad condition so it was impracticable to travel until May; and that he undertook his campaign for business as soon as the contract had been accepted. The court further found:

"The plaintiff company has never assigned any reason for the termination of the contract, and, so far as the record discloses, none existed. The canceling of the contract by the plaintiff was obviously and as a matter of fact an arbitrary exercise of the will of the plaintiff and was not a reasonable and good-faith exercise of the power conferred by the contract to terminate the same by notice."

A provision in a contract for termination at the option of a party is valid. But where the relationship is commercial and does not involve fancy, taste, sensibility, judgment, or other personal features, the

option may be exercised only in good faith. *Cummer* v. *Butts,* 40 Mich. 322 (29 Am. Rep. 530); *Brucker* v. *Railroad Co.,* 166 Mich. 330; *Holton* v. *Monarch Motor Car Co.,* 202 Mich. 271; *Brown* v. *Board of Education,* 117 Kan. 256 (231 Pac. 72); *Bishop* v. *Bloomington Canning Co.,* 307 Ill. 179 (138 N. E. 597); 13 C. J. p. 607.

Counsel argued, and this is the only reason suggested by the testimony, that plaintiff canceled the contract because payments were not made on the old debt nor in full on the new charges. It had refused to tell Rich the cause on demand. Even at the trial plaintiff did not assign a reason. Plaintiff's conduct justifies a serious doubt that it ever intended to extend to Rich the benefit of the contract for its term. The testimony strongly indicated that plaintiff was concerned with securing the execution of a contract to pay the old debt by sufficient sureties, and, having obtained their guaranty, desired to make immediate collection. It amply warrants the finding of the court that plaintiff did not act in good faith.

Plaintiff, having arbitrarily and illegally terminated and breached the contract, the sureties were discharged from liability thereon. *Warner* v. *Fallon Coal Mines Co.,* 246 Mich. 493.

Judgment affirmed, with costs.

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

LEDUC *v.* DETROIT EDISON CO.

1. NEGLIGENCE—ATTRACTIVE NUISANCE—TRESPASS.

Although doctrine of "attractive nuisance" has been recognized and applied in this State, it has not been permitted to seriously impair the rule that property owner owes no duty to protect trespassers, adult or infant, from injury other than wanton or wilful.

2. SAME—RECOVERY NOT BARRED BY TECHNICAL TRESPASS—INFANTS.

Where child is where he has right to be, as in street or as licensee on private premises, and his trespass is technical rather than wilful, *i. e.*, consists of playing with or taking the property of another as the spontaneous and natural act of an irresponsible child immediately attracted to the object, recovery for his injury is not barred by the trespass.

3. SAME—INTERVENING ACT—PROXIMATE CAUSE.

Where immediate cause of injury resulting in death of plaintiff's decedent was act of other boys taking defendant's gasoline and their negligence in spilling it over decedent, their acts control plaintiff's right of recovery, because, even if defendant was negligent in leaving gasoline in work cart in the neighborhood, the intervening acts of the boys broke the legal connection between defendant's conduct and the injury unless they were irresponsible agents or mere conduits to carry effect of defendant's negligence to decedent.

4. SAME—ATTRACTIVE NUISANCE—TRESPASS.

Where defendant left work cart containing gasoline on parkway between sidewalk and street, and boys playing in neighborhood secured key, opened faucet, and obtained gasoline which was accidentally spilled on one of them, resulting in fire which caused his death, defendant is not liable therefor, even if negligent, because the cart did not constitute attractive nuisance, and trespass of boys in opening faucet and taking gasoline was actual and not technical.

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For authorities discussing the question of doctrine of attractive nuisance, see annotation in 36 A. L. R. 34; 39 A. L. R. 486; 45 A. L. R. 982; 53 A. L. R. 1344; 60 A. L. R. 1444.

As to whether the intervening act of a child may break the casual connection between the defendant's negligence and the injury, see annotation in 23 L. R. A. (N. S.) 249.

Error to Wayne; Lamb (Fred S.), J., presiding. Submitted January 20, 1931. (Docket No. 15, Calendar No. 35,288.) Decided April 7, 1931.

Case by Emil LeDuc, administrator of the estate of James LeDuc, a deceased minor, against Detroit Edison Company, a New York corporation, for the death of plaintiff's decedent resulting from the maintenance of an alleged attractive nuisance. Judgment upon directed verdict for defendant. Plaintiff brings error. Affirmed.

*Monaghan, Crowley, Reilley & Kellogg* (*Edward F. Kelley,* of counsel), for plaintiff.

*Oxtoby, Robison & Hull,* for defendant.

Fead, J. The action is for negligence in causing the death of James LeDuc, six years old. Defendant had directed verdict.

A vacant lot in Detroit had been used as a playground by the neighborhood children for some years. In the fall, the boys would cut and burn the grass and weeds, the city would flood the lot with water, and nature would make a skating rink. For a few days prior to Sunday, November 28, 1926, defendant had been engaged in repair work in the street corner immediately adjoining the lot. In the course of its operations it used a work cart holding a supply of gasoline. The faucet was operated by a removable key and could be opened by such a key as is used in the home on water taps. On Saturday, the cart was left for the week-end on the parkway between the sidewalk and street, on the same side as the vacant lot but across an alley.

Sunday afternoon, 15 to 20 boys, ranging from 14 years of age down, were engaged in pulling and

burning grass and weeds on the lot. An 8-year old boy had a mouse in a bottle and was using a water key as a stopper. Some one of the boys suggested they get gasoline to aid the burning. One of the older boys, unidentified, took the water key from the boy with the mouse and several gathered cans nearby, went to defendant's cart, the older boy opened the faucet, and many carried gasoline to the fire. James LeDuc came up and watched the burning but had no part in it. As a 10-year old boy was bringing a can of gasoline to the lot, a 14-year old boy tried to take it from him, in the struggle he struck the can, the contents splashed over James, caught fire, and he was burned so severely he died from the injuries.

We are unable to find in the record any testimony supporting the claim that there had been a fire on the lot while defendant's employees were working in the vicinity, nor that they had seen any children burning weeds or grass thereon at any time.

The case takes us into the field of "attractive nuisances" and related law, upon which the conflict of judicial opinion ranges from ostensible repudiation of the doctrine to its acceptance to an extreme degree. All sorts of instrumentalities and conditions have been held attractive nuisances, from the most common objects to a charming girl. *Johnson* v. *Atlas Supply Co.* (Tex. Civ. App.), 183 S. W. 31. The liberal decisions took impetus from the so-called "turntable cases" (*Railroad Co.* v. *Stout,* 17 Wall. [U. S.] 657), from which later, however, the court found it proper to partially recede (*United Zinc & Chemical Co.* v. *Britt,* 258 U. S. 268 [42 Sup. Ct. 299, 36 A. L. R. 28]). And several of the courts have expressed the opinion that the doctrine has gone too far and should be restricted rather than extended.

The subject is exhaustively annotated in notes in 36 A. L. R. 34; 39 A. L. R. 486; 45 A. L. R. 982; 53 A. L. R. 1344; 60 A. L. R. 1444.

This court has recognized and applied, but conservatively, the law of attractive nuisances. The doctrine has not been permitted to seriously impair the rule that a property owner owes no duty to protect trespassers, adult or infant, from injury other than wanton or wilful, as has been done in some States.

The attractive nuisance doctrine was announced in *Powers* v. *Harlow,* 53 Mich. 507 (51 Am. Rep. 154), but seems to have hibernated for a season. The turntable cases were expressly disapproved in *Ryan* v. *Towar,* 128 Mich. 463 (55 L. R. A. 310, 92 Am. St. Rep. 481), and the trespass rule was applied to children both in going upon real property (*Peninsular Trust Co.* v. *City of Grand Rapids,* 131 Mich. 571), and in playing upon a flat car in the street (*Kaumeier* v. *Railway Co.,* 116 Mich. 306 [40 L. R. A. 385, 72 Am. St. Rep. 525]). See, also, *Stark* v. *Muskegon Traction & Lighting Co.,* 141 Mich. 575 (1 L. R. A. [N. S.] 822); *Preston* v. *Austin,* 206 Mich. 194.

Both doctrines were considered in *O'Leary* v. *Michigan State Telephone Co.,* 146 Mich. 243 (two justices dissenting). Defendant was working in the street with block and tackle. The operators knew children were playing about the snatch block, but left it unguarded. A child took hold of the rope near the block while it was at rest, the team was started without warning to the children, and plaintiff's hand was drawn into the pulley. The court differentiated the two lines of cases in these words:

"The case of *Powers* v. *Harlow* is an authority in this State, and is supported by the great weight

of authority in this country and in England. The present case differs from *Kaumeier* v. *Railway Co.* and other cases cited in appellant's brief in that here the owner of the property was present, operating the property, and the plaintiff was where he had a right to be. The plaintiff was in the public highway, where he had as much right to be as defendant's employees, and while his laying his hand upon the cable was technically a trespass, it was no more so than taking the exploder cap from the box in the case of *Powers* v. *Harlow.* Plaintiff's mere technical trespass did not set in motion, as in the cases cited, the agencies which caused his injury; those agencies were brought into operation and controlled by defendant's employees. There is reasonable ground for distinction between a case where something is left in the highway which can only injure a child by his meddling with it and putting it into operation in the absence of the owner or person having it in charge and a case like the present when the owner is present operating the apparatus and has actual notice that the children are attracted by the tackle and will play with it unless prevented."

Thereafter the doctrines had a vigorous battle. The court divided evenly in *Iamurri* v. *Saginaw City Gas Co.,* 148 Mich. 27, where children climbed on a gas wagon in the street and caused an explosion by dropping a match into an open vent. The trespass rule was applied in *Reid* v. *Harmon,* 161 Mich. 51 (turntable), but the attractive nuisance theory prevailed over it in *Anderson* v. *Newport Mining Co.,* 202 Mich. 204 (three justices dissenting), (dynamite cap); *Jaworski* v. *Detroit Edison Co.,* 210 Mich. 317 (poles negligently piled in the street to form a teeter); and *Butrick* v. *Snyder,* 236 Mich. 300 (dynamite cap). However, the cases affirming liability recognized the trespass rule and the point of dis-

tinction is this: Where the child is where he has a right to be, as in the street or as a licensee on private premises, and his trespass is technical rather than wilful, *i. e.,* consists of playing with or taking the property of another as the spontaneous and natural act of an irresponsible child immediately attracted to the object, recovery is not barred by the trespass.

This court has been conservative also in declaring objects, especially common things, attractive to children as a basis for imposing upon the owner a duty to guard them against injury. The attraction has been denied in *Kaumeier* v. *Railway Co., supra* (flat car in street); *Czarniski* v. *Security Storage & Transfer Co.,* 204 Mich. 276 (moving van); *Jackson* v. *Mills Baking Co.,* 221 Mich. 64 (26 A. L. R. 906), (electric truck); *Belisle* v. *Jones,* 224 Mich. 191 (automobile).

The accident at bar was most distressing, but defendant cannot be held responsible for it except for negligence in failing to perform a legal duty. *Butrick* v. *Snyder, supra.* The immediate cause of the injury was the act of the other boys in taking defendant's gasoline and their negligence in spilling it over plaintiff's decedent. Their acts control plaintiff's right of recovery, because, even if defendant had been negligent, the intervening acts of the boys broke the legal connection between defendant's conduct and the injury, unless the boys were irresponsible agents or mere conduits to carry the effect of defendant's negligence to James LeDuc.

The case may be disposed of under our decisions on the ground that the cart did not constitute an attractive nuisance, and the trespass of the boys in opening the faucet and taking the gasoline was actual and not technical. They were not attracted

to the cart in play, nor did the train of events which led to the injury start from a spontaneous and irresponsible taking of an enticing object. The cart was a thing apart from their activities, and they went to it merely as a source of supply for the predetermined purpose of obtaining gasoline. Nor were the agencies which caused the injury "brought into operation and controlled by defendant's employees," as in *O'Leary* v. *Michigan State Telephone Co., supra.*

However, even under the liberal doctrine of attractive nuisances, the case lacks so many of the conditions of liability stressed by the courts as to clearly preclude recovery. Thus —

It was not shown, as in *Peirce* v. *Lyden,* 85 C. C. A. 312 (157 Fed. 552), and *Shaffer Oil & Refining Co.* v. *Thomas,* 120 Okla. 253 (252 Pac. 41), relied on by plaintiff, that prior to the accident children had been playing around the cart and taking gasoline, from which defendant knew or was chargeable with notice of the practice and incurred the duty to anticipate a continuance of the custom and to take special precautions against injuries to children therefrom.

It was not shown that the manner of guarding, which need not be "child proof," 45 C. J. p. 782, was not considered in the business a careful practice, nor that it had been insufficient in other cases.

Plaintiff left upon the cart or accessible no tool to open the faucet, and it was not shown, nor can the court take notice, that the instrument used was an ordinary part of the contents of a boy's pocket, varied as they usually are, or was commonly possessed by children.

The faucet was not opened in the course of the investigation and experimentation of an irresponsible child but by an instrument, the intentional

selection and use of which demonstrated a considerable degree of mechanical skill and intelligence.

The gasoline was not taken in the ordinary course of childish play about the machine but as the deliberate, understanding and conscious appropriation of the goods of another for a definite use elsewhere.

The boy who opened the faucet and induced the taking of the gasoline was not identified and shown to have been of tender years.

The injury to plaintiff's decedent did not result from any effect of the gasoline unknown to the boys who took it, nor different from the purpose for which it was taken, nor from any inherent danger ignorantly released.

Between defendant's acts and the injury was the intervening conduct of the boys, who knew the effect of the contact of the gasoline and fire, in opening the faucet, taking the gasoline to another place where it became dangerous, and their negligence in handling it. *Jackson* v. *Mills Baking Co., supra; Beetz* v. *City of Brooklyn,* 10 App. Div. (N. Y.) 382 (41 N. Y. Supp. 1009); 23 L. R. A. (N. S.) 249, note.

Individually, some of these elements are not vital but others are, and, in combination, they are fatal to recovery. Imposition of liability on defendant in this case would carry the doctrine of attractive nuisance beyond that of any reported case and would result substantially in creating a duty upon owners of vehicles in the highway to insure children against the opportunity to hurt themselves.

Judgment is affirmed, with costs.

Butzel, C. J., and Wiest, Clark, McDonald, Potter, Sharpe, and North, JJ., concurred.

BECKER-BOTER OIL & GAS CO. *v.* MASSACHUSETTS BONDING & INSURANCE CO.

1. PRINCIPAL AND SURETY—DEVIATION FROM CONTRACT—RELEASE OF SURETY.

   Where bond for performance of construction contract is executed by paid surety, latter is not released from liability by departure in execution of contract unless variation is material and operates to injury of surety.

2. SAME—CONTRACTS—BREACH OF CONTRACT.

   If contractor's delay in drilling oil well was caused by breakdown of machinery and reasons other than owner's failure to pay installment due, and latter had reason to fear well would not be completed although substantial sum had been paid on contract, it was justified in demanding assurance that work would be prosecuted diligently if money was paid, and such insistence was for benefit and not injury of contractor's surety.

3. SAME—WEIGHT OF EVIDENCE.

   In action by owner against surety on oil well contractor's bond, finding of trial court that contractor had breached contract, entitling plaintiff to recover, *held*, not against great weight of evidence.

Error to Ottawa; Miles (Fred T.), J. Submitted January 23, 1931. (Docket No. 126, Calendar No. 35,413.) Decided April 7, 1931.

Assumpsit by the Becker-Boter Oil & Gas Company, a Michigan corporation, against Massachusetts Bonding & Insurance Company, a Massachusetts corporation, on a surety bond. Judgment for plaintiff. Defendant brings error. Affirmed.

*Robinson & Parsons,* for plaintiff.

*Cross, Foote & Sessions,* for defendant.

FEAD, J. November 14, 1928; F. M. Gray, Jr., Inc., contracted to drill an oil well for plaintiff, 1,700 or more feet deep, for $7,500 to $8,500, operations to begin within 10 days, and to be prosecuted diligently. Defendant executed a bond to plaintiff, conditioned on the Gray company performing the contract. The well was not completed, and plaintiff had judgment on the bond in the amount it had advanced the Gray company. The trial was before the court without a jury. Defendant contends the findings were against the great weight of evidence and did not support the judgment, that plaintiff had breached the contract and thus released defendant from the bond.

In the course of the transaction, the Gray company was represented by Gray, Weinstein, Watkins and Milaeger, and the plaintiff by Klomparens and others.

From the beginning, performance of the contract varied from its precise terms. The down payment of $2,000 was seven days late. Two thousand dollars more was paid in December. Ordinarily the well could have been completed in about 30 days, but drilling was not commenced until January 2, 1929. The Gray company excused the delay in drilling by weather conditions and the difficulty of obtaining suitable machinery. Plaintiff claimed it was largely due to lack of supervision, and it became fearful the work would not be completed.

On January 7th, $1,750 became due. Gray said he wrote Klomparens, but the latter denied knowledge that the sum was due until a few days later, when Watkins called on him. Drilling stopped January 11th. Defendant claimed it was because of nonpayment of the $1,750. Plaintiff's witnesses said it was because of a break-down of machinery.

Later, Watkins called on plaintiff two or three times. What happened was in sharp dispute. Watkins said he merely demanded the money due. Plaintiff claimed Watkins urged abandonment of the well and offered to return some of the advances if the work were discontinued. On January 18th, Watkins put the matter in the hands of an attorney and again saw plaintiff's officers. They said he insisted upon abandonment of the work, and that they offered to pay the sum due upon assurance that the well would be completed. Gray was consulted by telephone. Plaintiff paid Watkins $1,000. Gray testified the payment was received upon the agreement that the well should be abandoned. Watkins said it was agreed that the well should be abandoned but if the other $750 was paid on the following Monday, January 21st, he would recommence drilling. Plaintiff's witnesses testified that the $1,000 was paid on the contract with the definite agreement that the drilling would be continued.

Later, whether on January 21st or 25th is in dispute but the court found the earlier date, plaintiff gave Gray's attorney a certified check for $750, payable to the order of the Gray company. The attorney testified he telephoned the Gray office and Milaeger told him the work would continue, and the check was given him by plaintiff upon that assurance. Milaeger said the attorney talked with him on January 25th and he instructed him that he, the attorney, had no authority to accept the check or represent the Gray company.

The well, at a depth of 540 feet, was wholly abandoned and the outfit removed by the Gray company January 21st. Some time later, plaintiff told the attorney the work had been discontinued, and he returned the check to it. On January 24th, Gray

company telegraphed to plaintiff that the well had been shut down for nonpayment of the $1,750, that on January 18th the agreement had been to abandon the well and new arrangements would have to be made if plaintiff desired to proceed. Shortly thereafter a receiver was appointed for the Gray company. Later plaintiff tried to induce the receiver to resume drilling.

Few, if any, construction contracts are executed in precise conformity with their terms, and it is the rule that where the bond for performance is executed by a paid surety, the latter is not released from liability by departure in execution of the contract unless the variation is material and operates to the injury of the surety. *People* v. *Bowen,* 187 Mich. 257; *People* v. *Fidelity & Deposit Co.,* 238 Mich. 326; *Realty Construction Co.* v. *Kennedy,* 234 Mich. 490.

Defendant contends plaintiff breached the contract in failing to pay the sum of $1,750 when due, that if prompt payment had been made the well would have been drilled and defendant saved from liability, and the lack of prompt payment caused the discontinuance of the work.

The assumption is untenable that prompt payment of the $1,750 would have resulted in completion of the contract, in view of the fact that prompt payment would have followed, and did follow, verbal assurances by the Gray company that the contract would be performed. If plaintiff's testimony be accepted that the contractor's delay in commencing drilling was unjustified and caused it to fear the well would not be completed although it had already paid Gray company $4,000, that the drilling ceased on January 11th because of a break-down of machinery, and that the Gray company at once there-

after sought to discontinue the work and terminate the contract, the demand for verbal assurances that it would be performed was not unreasonable. In making such demand plaintiff asked no more than the contract called for, and its insistence upon the further and diligent prosecution of the work was for the benefit, not the injury, of defendant.

If, upon nonpayment, the Gray company had declared the contract at an end, the situation would be different. But the time of payment was waived by subsequent negotiations and agreement and the well was not abandoned for failure of prompt payment. Defendant claimed it was discontinued by agreement, and plaintiff said it was because the Gray company had breached the contract. Both claims were supported by testimony.

Plaintiff finally paid the whole amount due. The authority of the attorney to receive the final payment was a question of fact. If it was paid on assurances that the work would continue, as claimed by plaintiff, it performed the contract and the Gray company breached it. The act of the attorney in later returning the check to plaintiff was for the benefit of the defendant, as it decreased its liability.

There was ample testimony to sustain the findings of the court or the converse on all the controlling issues of the case. The question was one of credibility of witnesses. The court held that plaintiff had substantially performed the contract and the Gray company had breached it. It cannot be said that the findings were against the great weight of evidence.

Judgment affirmed, with costs.

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

## ANGELOFF *v.* SMITH.

1. DIVORCE—TENANTS IN COMMON—STATUTES.
   Where divorce decree did not dispose of lot owned by the parties by entireties, they held title thereafter as tenants in common (3 Comp. Laws 1929, § 12767).

2. EQUITY—LACHES.
   Doctrine of laches is founded on long inaction to assert right, attended by such intermediate change of conditions as renders it inequitable to enforec the right.

3. SAME—APPLICABILITY OF LACHES TO VESTED TITLE.
   Where right is not executory one but is vested legal title, doctrine of laches has little, if any, application, and this is particularly true where title is of record for world to see.

4. SAME—INFANTS—LACHES.
   Right to relief is not lost through nonaction during minority, as laches does not run against infant.

5. SAME—RECOGNITION OF RIGHT OBVIATES NECESSITY OF ASSERTING IT.
   Where grantee recognized that plaintiff had right in lot, necessity of asserting it by action was obviated.

6. SAME—INFANTS—LACHES—CONSTRUCTIVE NOTICE—TENANTS IN COMMON.
   Divorced wife is not barred by laches from asserting her right to lot owned by her and husband as tenants in common, and conveyed by husband alone, where part of time she was minor, defendant's grantor recognized her right, and she commenced suit soon after learning of conveyance to defendant, who bought with constructive notice of her title.

Appeal from Wayne; Robertson (William), J., presiding. Submitted January 6, 1931. (Docket No. 16, Calendar No. 34,525.) Decided April 7, 1931.

Bill by Helen Angeloff against William E. Smith and others for partition of real estate. Decree for defendants. Plaintiff appeals. Reversed.

*Sol. Blumrosen,* for plaintiff.

*Henry P. Rosin,* for defendants.

FEAD, J. This is a bill for partition of a lot in Detroit. Defendants, by cross-bill, claimed plaintiff was barred by laches from asserting title, and they had decree. The charge of laches is that plaintiff stood by for many years and saw her former husband, Vasile Huja, and grantees through him dealing with the property and made no claim of title.

The oral testimony is quite uncertain and fragmentary and the record evidence, therefore, is of particular weight. May 22, 1917, plaintiff, then 17 years of age, and Huja, then her husband, took title to the lot by the entireties. The deed was duly recorded May 24, 1917. The same summer Huja filed a bill for divorce and had decree February 21, 1918. The decree did not dispose of the lot, and, under 3 Comp. Laws 1929, § 12767, the parties held title thereafter as tenants in common. Nevertheless, on August 3, 1918, Huja, as a single man, deeded the whole lot to Vasile Faje. Huja testified that plaintiff had signed a land contract on sale to Faje, but it was not produced, and the circuit court evidently gave no weight to the claim. On June 27, 1919, Faje conveyed to Aaron and Rosa Fiaeska and they to defendant Smith in 1925. Fiaeska built a house on the lot, but it does not appear when. The evidence disclosed no other improvements made upon the property at any time. Plaintiff became of age May 10, 1921. In 1923, Fiaeska visited her in Ohio and offered to purchase her interest in the lot, but she refused to sell until she should return to Detroit.

Plaintiff knew of Huja's sale of the lot to Faje, perhaps about the time it occurred. She was then a minor, and, it is apparent, did not know much about the title. It does not appear that she knew of the sale to Smith until shortly before suit brought, when she had the title examined. It is uncertain whether she knew in 1923 that Fiaeska had actually bought or discovered it later.

Faje is dead. Fiaeska was available to defendants but was not produced. Smith testified he did not know anything about plaintiff's interest in the property when he bought, but he did not disclose whether he had examined an abstract nor that he had paid valuable consideration nor that he thought he was obtaining a clear title to the whole premises when he purchased.

The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right. *Epstean* v. *Mintz,* 226 Mich. 660.

Where the right is not an executory one but is a vested legal title, the doctrine of laches has little, if any, application. 21 C. J. p. 215. This is particularly true where the title is of record for the world to see.

Plaintiff lost no right to relief through nonaction during her minority, as laches does not run against an infant. *Putnam* v. *Tinkler,* 83 Mich. 628; *Dragoo* v. *Dragoo,* 50 Mich. 573.

Fiaeska's recognition of her title obviated the necessity of her asserting it against him by action. 21 C. J. p. 243.

No equities run against her in favor of Smith, as he bought with constructive notice of her title and she brought suit shortly after learning of the con-

veyance to him. The case is not accompanied by elements of estoppel and plaintiff cannot, under the circumstances, be held guilty of laches.

Decree is reversed, and one may be entered for partition upon prayer in the bill, with costs.

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

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FRY *v.* WAYNE CIRCUIT JUDGE.

SAME *v.* SAME.

1. EXCEPTIONS, BILL OF—EXTENSION OF TIME FOR SETTLEMENT.
   Where appealing party has filed certificate of stenographer showing that transcript of testimony has been ordered he is entitled, on *ex parte* application made within 20 days after entry of judgment, to 60-day extension of time for settlement of bill of exceptions (Former Circuit Court Rule No. 66, subd. 2; 3 Comp. Laws 1915, § 12634).

2. SAME—MANDAMUS—ANSWER OF JUDGE MUST BE ACCEPTED.
   On mandamus to compel circuit judge to extend time, beyond 20 days after entry of judgment, for settlement of bill of exceptions and to move for new trial, Supreme Court must accept answer of judge.

3. SAME—NECESSARY THAT STENOGRAPHER'S CERTIFICATE BE FILED.
   Mandamus will not issue to compel circuit judge to extend time, beyond 20 days after entry of judgment, for settlement of bill of exceptions and to move for new trial, where stenographer's certificate showing that transcript of testimony had been ordered was not filed within 20 days after entry of judgment, although counsel had said certificate in his possession and motion for extension was made within 20 days.

Mandamus by Vernon C. Fry against Maurice H. McMahon, Wayne circuit judge, to grant an extension of time in two cases consolidated and heard as one for settlement of a bill of exceptions and to move for a new trial. Submitted February 3, 1931. (Calendar Nos. 35,306, 35,307.) Writs denied April 7, 1931.

*S. Pointer Bradley,* for plaintiff.

*Charles R. Robertson* (*Benedict H. Lee,* of counsel), for defendant.

WIEST, J. Plaintiff herein seeks our writ of mandamus directing the circuit judge to extend the time, beyond 20 days after entry of judgment, for settlement of a bill of exceptions and to move for a new trial.

The case of Elizabeth Taylor against plaintiff herein was tried in the circuit court without a jury. At the close of the proofs, on May 21, 1930, the trial judge stated that plaintiff was entitled to have judgment, but he would take time for preparing his reasons. Defendant requested findings. The court granted 20 days after entry of judgment in which to move for a new trial or settle a bill of exceptions. June 18, 1930, the findings were filed and, June 19th, judgment entered against defendant.

Counsel for plaintiff claims that he was entitled to notice of entry of judgment and received none. It is apparent, however, that he did learn of the judgment at least as early as July 3d, for on that day the court stenographer certified that a transcript of the testimony had been ordered. July 5th, counsel for defendant therein mailed to counsel for plaintiff a copy of a motion, to be heard on July 8th, for an extension of 60 days within which to settle

a bill of exceptions and for stay of proceedings and approval of a stay bond. Hearing of this motion was opposed because the notice thereof was less than four days. The trial judge was on vacation, and, after some postponements, the matter was submitted to defendant herein, who, on July 28th, approved the bond for stay of proceedings, entered an order extending the time for filing exceptions to the findings, and, on August 1, 1930, denied the motion for an extension of time to move for a new trial, settle a bill of exceptions, and for a stay of proceedings.

Counsel for plaintiff herein contends that he was "entitled to an *ex parte* order, without notice, for the first extension beyond 20 days, upon production of the surety company bond and official stenographer's certificate, which he held up in his hand before the bench, and stated that he had these that morning." This was on July 8th, and within 20 days after judgment. Relative to this the defendant herein makes the following answer:

"That on July 8, 1930, both counsel appeared before Judge Moll to argue petitioner's motions; that petitioner's counsel then had in his possession a surety bond in the sum of $3,000, and also the official stenographer's certificate, but that neither the bond nor certificate was handed to nor seen by Judge Moll; that when said motion was called plaintiff's counsel objected to the hearing of same on the ground that he had not been given the four days' notice which he claimed he was entitled to under the rules of this court; that petitioner's counsel insisted that plaintiff's counsel was not entitled under the rules to four days' notice on the first motion for extension of time beyond 20 days; that Judge Moll held that plaintiff's counsel was entitled to four days' notice and therefore adjourned the hearing of all the motions until July 14, 1930."

Judge Moll was in error. Former Circuit Court Rule No. 66, subdivision 2; 3 Comp. Laws 1915, § 12634 (3 Comp. Laws 1929, § 14313); *Miley* v. *Grand Traverse Circuit Judge,* 217 Mich. 415, 418; *Walker* v. *Wayne Circuit Judge,* 226 Mich. 393.

We must accept the answer of the circuit judge. The record does not show that the stenographer's certificate has ever been filed. Had the certificate been filed within 20 days after the judgment plaintiff herein could be granted relief. It was necessary to file the certificate within the 20 days. *Davis* v. *Macomb Circuit Judge,* 239 Mich. 447.

The writ is denied, with costs.

This holding applies as well to the case of *Charles R. Robertson et ux.* v. *Vernon C. Fry,* submitted herewith.

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

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SHIREK *v.* ROESINK.

1. FRAUDS, STATUTE OF—SALES—PART PERFORMANCE OF PAROL CONTRACT.

Parol contract for sale of goods of value of $100 or upwards, to be delivered at some future time, may be validated by acceptance of part of the goods (2 Comp. Laws 1929, § 9443), but in such case the contract is the parol agreement and not the order made out by seller's agent and not signed by buyer.

2. SAME—GOODS MANUFACTURED ESPECIALLY FOR BUYER.
If goods are to be manufactured by seller especially for buyer, and are not suitable for sale to others in ordinary course of seller's business, then verbal contract is valid (2 Comp. Laws 1929, § 9443, subd. 2).

3. CONTRACTS—PAROL CONTRACT—FINDINGS OF COURT.
In action on parol contract for sale of goods, finding of trial judge that, under contract, buyer had right of rejection, *held*, supported by evidence and course of dealings between parties.

Error to Wayne; Webster (Clyde I.), J. Submitted January 20, 1931. (Docket No. 36, Calendar No. 34,917.) Decided April 7, 1931. Rehearing denied June 1, 1931.

Assumpsit by Milton L. Shirek and Arthur Z. Hirsch, copartners, doing business as Shirek & Hirsch, against John A. Roesink, doing business as Roesink Pants Store, for the purchase price of a quantity of clothing sold defendant under a parol contract. Judgment for defendant. Plaintiffs bring error. Affirmed.

*Finkelston, Lovejoy & Kaplan* (*Henry Glicman*, of counsel), for plaintiffs.

WIEST, J. Defendant gave an agent of plaintiffs a verbal order for novelty clothing. The agent filled out order sheets identifying by numbers the kind of clothing so ordered and purporting to state the terms of sale. The order sheets were not signed by defendant but copies thereof were given to him. Goods were shipped from time to time to defendant, some of which were accepted and paid for, and some in part rejected, returned to plaintiffs, and credit given defendant therefor. The last shipment, claimed to have been of special manufacture, was refused by defendant. Plaintiffs claim there was a

valid contract for all the goods by reason of part performance, and brought this suit to recover $1,964.20, for the last and wholly rejected shipment. Defendant, under his plea, gave notice of the statute of frauds and also an agreed right of rejection duly exercised. The issues were tried without a jury, the facts found by the court, and judgment entered for defendant. Plaintiffs filed exceptions to the findings and prosecute review by writ of error.

Plaintiffs contend that the unsigned orders constitute the contract between the parties to the exclusion of parol evidence. A parol contract for the sale of goods of the value of $100 or upwards, to be delivered at some future time, may be validated by acceptance of part of the goods (2 Comp. Laws 1929, § 9443), but in such case the contract is the parol agreement and not the order made out by plaintiffs' agent and not signed by defendant. "If the goods are to be manufactured by the seller especially for the buyer, and are not suitable for sale to others in the ordinary course of the seller's business," then a verbal contract is valid. 2 Comp. Laws 1929, § 9443, subd. 2; *Ericsson Manfg. Co.* v. *Caille Bros. Co.*, 195 Mich. 545. In either event the parol contract governs.

The circuit judge found that the contract was as claimed by defendant, and, under its terms, defendant had a right to refuse the consignment of goods in suit. The evidence and course of dealings between the parties support the finding.

The judgment is affirmed. Defendant not having filed a brief will not recover costs.

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

VAN WIE *v.* FIDELITY TRUST CO.

1. PRINCIPAL AND AGENT—DISCLOSED PRINCIPAL—FRAUD—LIABILITY OF AGENT.
   In absence of fraud, agent acting for disclosed principal is not liable to third party.
2. FRAUD—MISTAKE NOT FRAUD.
   Mere mistake is not fraud.
3. APPEAL AND ERROR—AMENDMENT OF DECLARATION.
   Request for amendment of declaration in Supreme Court is denied, where amendment would be no help to plaintiff.
4. REFORMATION OF INSTRUMENTS—OPTIONS—EQUITY.
   Option required to be in writing may be reformed by decree in equity, on proper showing, but law court has no such power.
5. ACTION—ACTION FOR CASH MAY NOT BE MAINTAINED ON OPTION FOR STOCK.
   Where defendant corporation planned merger with another company and offered either cash or stock for shares surrendered, and plaintiff stockholder, on surrendering her shares, by mistake signed option to receive stock, she may not maintain action for cash so long as said option stands.

Error to Wayne; Spier (James E.), J., presiding. Submitted January 23, 1931. (Docket No. 138, Calendar No. 35,392.) Decided April 7, 1931.

Action by Marie Van Wie against Fidelity Trust Company and Stinson Aircraft Corporation, a Michigan corporation, on an option for the redemption of stock. Judgment for defendant Fidelity Trust Company and against Stinson Aircraft Corporation. Plaintiff and defendant Stinson Aircraft Corporation bring error. Affirmed as to defendant Fidelity Trust Company. Reversed as to defendant Stinson Aircraft Corporation.

*Beaumont, Smith & Harris,* for plaintiff.

*Yerkes, Goddard, McClintock & Shreve,* for defendant Fidelity Trust Company.

*Emmons, Oren & Sleeper,* for defendant Stinson Aircraft Corporation.

WIEST, J. Review in this case is on findings of fact and conclusions of law without a bill of exceptions.

Plaintiff claims that, on the facts as found, she is entitled to have judgment against both defendants, under a declaration in an action of assumpsit, but asks, if the declaration should sound in tort, that an amendment be allowed in this court.

Defendant Stinson Aircraft Corporation claims that the findings do not support the judgment. Defendant Fidelity Trust Company is content with the judgment in its favor and contends that it should not be disturbed.

Briefly stated the facts are as follows: Plaintiff owned 50 shares of stock of the Stinson Aircraft Corporation. That company planned a merger with the Cord Corporation, and employed the Fidelity Trust Company to act as depositary with whom its stockholders could deposit their shares of stock, accept the terms of the depositary agreement, and elect to have one share of stock of the Cord Corporation for two shares of stock of the Stinson Aircraft Corporation, or have cash at the rate of $17.50 for each share. Plaintiff learned of the offer, and, desiring to deposit her shares and take the cash offer, visited the depositary, turned in her stock, and stated that she elected to take cash, but, by mistake, arising from her inability to read without her eyeglasses, and the possible misunderstanding of the clerk of the trust company, she signed an option to take stock. Not receiving cash, she brought this suit in assumpsit against the aircraft company and

the trust company to recover, as though she had elected to have cash, and had judgment against the aircraft company, but not the trust company.

The judgment in favor of the trust company was right. The aircraft company was the disclosed principal of its agent, the trust company, and, in the absence of actionable fraud, was not liable to plaintiff. There was no fraud perpetrated by the trust company. A mere mistake is not fraud. Under the facts, as found by the circuit judge, it would not help plaintiff to permit the declaration to be amended, and the request to amend is denied.

The judgment against the aircraft company cannot be sustained. The option, signed by plaintiff, called for stock and not money. The judgment calls for money and not stock. The suit is upon an obligation to pay money. The proof shows an obligation to deliver shares of stock. The option signed by plaintiff controls as long as it stands, and it stands unless and until reformed by decree in equity. Plaintiff could not sue upon the option, and, notwithstanding the option, have judgment to the contrary.

The law court cannot reform instruments or ignore written agreements. The option had to be in writing. If the option signed by plaintiff is ignored, then no valid option was executed. If there was no valid option executed, then plaintiff has received no promise of money for her shares of stock.

The judgment in favor of the Fidelity Trust Company is affirmed, and the judgment against the Stinson Aircraft Corporation reversed, without a new trial, and with costs against plaintiff.

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

LITTLEJOHN *v.* COREY.

HIGHWAYS AND STREETS—ABANDONMENT—TRESPASS—INJUNCTION.

In suit by adjoining landowners against highway commissioner to restrain trespass on land alleged to have been abandoned as highway, decree in favor of defendant is affirmed, on appeal.

Appeal from Mecosta; Pugsley (Earl C.), J. Submitted January 22, 1931. (Docket No. 101, Calendar No. 35,421.) Decided April 7, 1931.

Bill by James B. Littlejohn and another against J. F. Corey, highway commissioner of Grant township, Mecosta county, to restrain trespasses on land alleged to have been abandoned as a highway. From decree rendered, plaintiff appeals. Affirmed.

*Arthur J. Butler,* for plaintiffs.

*Fred R. Everett,* for defendant.

WIEST, J. The appeal herein presents the question of whether a public highway exists on the line between sections 32 and 33, Grant township, Mecosta county, from the quarter post north to where an angling road leads to the southwest. The strip in suit was established as a highway many years ago, and, at the quarter post, there was a highway to the west. In 1894 a cut-off, or angling road, leaving the section line about 47 rods north of the quarter post and to the southwest was established, and the road from the quarter post west was abandoned. Plaintiffs own the land on both sides of the old sec-

tion line road from the quarter post north to the angling road, and claim that, from the angling road to the quarter post, the section line road was abandoned. Defendant denies this. The issue in the circuit court also involved the existence of a highway along the section line from the quarter post south to Pickerel lake. The circuit judge held that, from the quarter post south there was not a "public road either duly laid out or by user," and enjoined travel thereover, but also held that, from the quarter post north to the angling road there "was and is a public highway and that the same has never been legally discontinued or abandoned." Plaintiffs appealed from the last-mentioned holding.

Defendant not having appealed, the issue here relates only to the old roadway north of the quarter post.

The evidence has been examined with care, and we are unable to find, by a preponderance thereof, that the road from the quarter post north to the angling road ceased to exist, either by abandonment or nonuser. After establishment of the cut-off and abandonment of the road west from the quarter post there was little occasion to use the section line road down to the quarter post, but it was in fact used by the public and some repairs, though slight, were made. Pickerel lake, at the south end of the section line, appears to have been a favorite place for fishermen and picnic gatherings, and to reach that point travelers used the old road from the angling road to the quarter post and from there proceeded over plaintiffs' land to the lake.

Under the decree in the circuit court, the section line road ends at the quarter post, and, unless a highway is opened from the quarter post to Pickerel lake, there will be little, if any, occasion to use the

old highway from the angling road to the quarter post. This, however, is not decisive.

Plaintiffs now make no claim of rights acquired by adverse possession, and it may be stated that, under the evidence, no such title has been acquired.

The decree in the circuit is affirmed, with costs to defendant.

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

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## DEVLIN *v.* MORSE.

1. CONSTITUTIONAL LAW—ACCRUED COMMON-LAW RIGHT OF ACTION MAY NOT BE DESTROYED BY LEGISLATION.

   Existing right of action which has accrued to a person under rules of common law or in accordance with its principles is vested property right which may not be destroyed or impaired by legislation.

2. MOTOR VEHICLES—NEGLIGENCE—GUEST PASSENGER'S RIGHT OF ACTION NOT DESTROYED BY STATUTE.

   Guest passenger's common-law right of action based on ordinary negligence of automobile owner, which accrued before enactment of Act No. 19, Pub. Acts 1929, relieving automobile owners from liability to gratuitous guests except for injuries occasioned by "gross negligence or wilful and wanton misconduct," was not destroyed or affected by said statute.

3. SAME—DRIVER FALLING ASLEEP AT WHEEL.

   Automobile owner who had taxed his powers of endurance with intoxicating drink and loss of sleep so that he fell asleep at steering wheel while driving guest passenger to her home, resulting in her injury, was guilty of actionable negligence.

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Liability of owner of automobile for injury to guest due to negligent operation, 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.

Error to Wayne; McMahon (Maurice H.), J. Submitted January 20, 1931. (Docket No. 106, Calendar No. 35,293.) Decided April 7, 1931.

Case by Helen Devlin against Harlow Morse for personal injuries received while a guest passenger in defendant's automobile. Judgment for plaintiff. Defendant brings error. Affirmed.

*Barbour & Martin* (*Henry C. L. Forler,* of counsel), for plaintiff.

*Edward A. Smith,* for defendant.

WIEST, J. This is an action to recover damages for personal injuries received by plaintiff while riding as a gratuitous guest in defendant's automobile.

Plaintiff and defendant, together with others, the night of January 26, 1929, visited places where they danced and partook of refreshments. Plaintiff admits drinking a glass of beer and defendant admits that he had drinks. At an early hour in the morning defendant, while taking plaintiff to her home, and driving at a speed of about 30 miles per hour, fell asleep at the steering wheel, the automobile ran into a safety platform post, and plaintiff received a broken leg and bruises. Trial was had before the court without a jury. Defendant was found guilty of "gross and wanton negligence" and cast in damages.

After the accident, and before this suit was brought, Act No. 19, Pub. Acts 1929 (1 Comp. Laws 1929, § 4648), relieved owners of motor vehicles from liability to gratuitous guests except for injuries occasioned by "gross negligence or wilful and wanton misconduct." At the time of injury there

accrued to plaintiff a common-law right of action, based on ordinary negligence of defendant.

Three questions are presented:

"(a) There was no negligence on the part of defendant.

"(b) That if the defendant was negligent the plaintiff herein was guilty of contributory negligence which would bar her recovery.

"(c) The provisions of Act No. 19, Pub. Acts 1929 (1 Comp. Laws 1929, § 4648), prevent the plaintiff recovering except in case of gross negligence or wanton and wilful misconduct and there is no proof of gross negligence in this case."

As well stated in 12 C. J. p. 972:

"An existing right of action which has accrued to a person under the rules of the common law, or in accordance with its principles, is a vested property right which may not be destroyed or impaired by legislation."

This in nowise conflicts with what we said in *Bejger* v. *Zawadski,* 252 Mich. 14. In that case a statute relieved the plaintiff from making proof required at common law, and, before trial, the statute was repealed and plaintiff was put to proof as at common law. What the statute gave the statute could take away, there being no contract relation.

In the case at bar the statute takes away the common-law right of action for injuries after its enactment but not before. The plaintiff's right of action was given by common law and not by statute, accrued before the enactment of the statute, and could not be destroyed or impaired by subsequent legislation. In *Siller* v. *Siller* (Conn.), 151 Atl. 524, a similar "guest act" was held not to affect an accrued previous common-law right of action.

In *Dunlap* v. *Railway Co.*, 50 Mich. 470, it was held (syllabus):

"A common-law right of action is property, and as such is within the rules of constitutional protection."

It was not necessary for the court below to find defendant guilty of gross and wanton negligence. Was defendant guilty of negligence? Defendant had been up all night, had taxed his powers of endurance with drink and by loss of sleep, and it was actionable negligence, under the circumstances, for him to continue driving until overcome by "tired nature's sweet restorer." See *People* v. *Robinson*, 253 Mich. 507. The approach of sleep is indicated by premonitory symptoms.

The question was considered at length in *Bushnell* v. *Bushnell*, 103 Conn. 583 (131 Atl. 432, 44 A. L. R. 785). We quote:

"In such a case, the question must be, Was the defendant negligent in permitting himself to fall asleep? *Helton* v. *Railroad Co.*, 97 Ala. 275, 284 (12 South. 276). The defendant argues that, granted that premise, then he cannot be charged with negligence because no man can tell when sleep will fall upon him. It is probably true that one cannot ordinarily fix with certainty upon the precise moment when he lapses into unconsciousness, but it is not true that ordinarily sleep comes unheralded. * * * In any ordinary case, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, without having been negligent; it lies within his own control to keep awake or cease from driving; and so the mere fact of his going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a *prima facie* case, and sufficient for a recovery, if no circumstances tending to excuse or justify his conduct are proven."

There was no want of care on the part of plaintiff.

Judgment affirmed, with costs against defendant.

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

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BUTTERWORTH HOSPITAL *v.* SUPERINTENDENTS OF POOR OF KENT COUNTY.

PAUPERS—REMOVAL OF PAUPERS—LIABILITY FOR HOSPITAL TREATMENT—MUNICIPAL CORPORATIONS.

County to which indigent persons were removed for hospital treatment after they became indigent is not liable to the hospital for such treatment (2 Comp. Laws 1929, § 8274).

Error to Kent; Perkins (Willis B.), J. Submitted January 14, 1931. (Docket No. 128, Calendar No. 35,405.) Decided April 7, 1931.

Assumpsit by Butterworth Hospital, a corporation, against Superintendents of Poor of Kent County, a corporation, for the hospital care of three indigent patients. Judgment for defendant as to two patients. Plaintiff brings error. Affirmed.

*Butterfield, Keeney & Amberg,* for plaintiff.

*Bartel J. Jonkman,* Prosecuting Attorney, and *Arthur R. Sherk,* Assistant Prosecuting Attorney, for defendant.

BUTZEL, C. J. Plaintiff Butterworth Hospital, located at Grand Rapids, Kent county, Michigan, brought suit against the superintendents of the poor of Kent county, a corporation, defendant herein, to recover for the care of three indigent patients. The

trial judge who heard the case without a jury found defendant liable for the care of one of the patients, a resident of Kent county, but not for the other two, John Gargeich and Goerto Satrornino. He held that inasmuch as their indigency and need of immediate assistance had arisen prior to their removal to Kent county, of which they were nonresidents, no liability could be imposed upon defendant. Plaintiff has appealed.

It is claimed that Gargeich's home is in Chicago. He was working on a farm near Wayland, in Allegan county, Michigan, when he met with a very severe automobile accident. He suffered severe bodily injuries, including a fractured femur. He was taken by friends to plaintiff hospital in Kent county, and not to Allegan, the county seat of Allegan county. Wayland is but a few miles further from Grand Rapids than it is from Allegan.

Satrornino was suffering from encephalorrhagia, which resembles and is frequently confused with "sleeping sickness." He was indigent when he became afflicted with this disease at Thompsonville, in Benzie county, a long distance from Kent county. In the belief that a difficult surgical operation was necessary, he was transported to plaintiff hospital. There is no claim that he had a legal settlement in Benzie county. His residence is not disclosed by the record. It only shows that he was working with a crew of men on the Pere Marquette railroad at Thompsonville, Michigan, where they were living in box cars.

Both of these patients were indigents and in an extremely serious physical condition both before and after they were brought to plaintiff hospital. It would have been inhuman for plaintiff to refuse them first aid if not also subsequent treatment. It

took months for Gargeich to recover. Satrornino died 11 days after his arrival at the hospital.

It was shown that plaintiff is supported by public or private subsidies and its chief purpose is to take care of the people of Kent county. There is no doubt but that it would be a very great hardship upon any hospital to be compelled to accept free patients from all over the State. It would be unfair to a county to be compelled to pay for the care of paupers brought to it from other counties where they had no legal settlement but where their indigency arose and must have been known. It is apparent that both of these patients were transported to plaintiff hospital on account of its superior facilities and not with the intention of relieving the responsibility of the counties where their indigency arose. Shortly after the patients arrived, plaintiff hospital served notice upon defendant that it was caring for them. Bills were sent to defendant, which it refused to honor but it failed to return them. It at no time acknowledged itself as either responsible or willing to pay for the care of these patients. On the contrary, it asserts that it is not liable. Plaintiff claims liability on the part of defendant under the following subsections of section 8274, 2 Comp. Laws 1929:

"SECTION 1. When any person applies for or requires relief and support as a poor person, in any county, township or city, the superintendents of the poor of the county, or the supervisor or director, as the case may be, shall ascertain the township, city, county or State in which such poor person is settled, and relief and support of such person shall be granted, as follows:

"First, If such settlement cannot be ascertained or is in another State or country, the relief and

support of such poor person shall be at the expense of the county in which he may be; * * *

"Third, If it is ascertained that the settlement of any such poor person is in another county or any other township or city of any other county, relief and support of such poor person shall be granted by the superintendents of the poor of the county where such poor person may be, at the expense of the county where such poor person has a settlement, or the county in any township or city of which county such poor person has a settlement."

Our attention is called to the case of *Superintendents of Poor of Kalkaska County* v. *Superintendents of Poor of Grand Traverse County,* 120 Mich. 247, in which plaintiffs failed to recover from the defendants for the care of an indigent who had his home in defendant county.

Plaintiff relies on the case of *Superintendents of Poor of Livingston County* v. *Superintendents of Poor of Oakland County,* 141 Mich. 667, where the defendants were held not liable for the support of an indigent person because when the latter moved to plaintiff county the removal was not brought about by the defendants with the intent of making her a charge upon the poor authorities of plaintiff county. The facts are different from those in the present case.

Plaintiff relies on the case of *City Hospital of Quincy* v. *Milton,* 232 Mass. 273 (122 N. E. 274), where the circumstances are somewhat similar to the present case. Plaintiff calls our attention to the case of *Eckman* v. *Township of Brady,* 81 Mich. 70 (1890), where the township in which the indigent had a legal settlement was held liable for her care by a private individual who furnished her with support which the township had neglected to give. This

case was decided at a time when conditions were different from those of the present day and when indigency and delinquency were infrequent and could be readily localized and the responsibility for support could be properly charged. There were not the present day methods of quick and cheap transportation, nor was there the migration from city to farm and back again, nor the constant shifting of part of the population from one place to another. In *Eckman* v. *Township of Brady, supra,* the indigent also had a legal settlement, and we do not believe the principle set forth in that case can be extended so as to apply to the case at bar. In the present case the indigency arose in other counties where the indigents were at the time they required support. Plaintiff knew this fact when it received the patients. They had no legal settlement in Kent county. Subdivision 1 of section 8274, 2 Comp. Laws 1929, does not contemplate that the relief and support of such poor person without a legal settlement and whose home cannot be ascertained shall not only be at the expense of the county where he may be but also of the county to which he may be transported after the indigency has arisen. Such a construction would lead to the imposition of an unjust burden upon the county to which the poor person might have been transported. If there is any liability at all, it is against the counties in which the indigents were when they became public charges. See *McCaffrey* v. *Town of Shields,* 54 Wis. 645 (12 N. W. 54). This we do not determine as the question is not before us.

The judgment of the lower court is affirmed, but without costs.

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

VALISANO *v.* CONTINENTAL INSURANCE CO.

1. INSURANCE—INSANE PERSON EXCUSED FROM SUBMITTING PROOF OF LOSS.

   Insured person who is insane is excused from submitting proof of loss, since such action on his part would be nullity.

2. SAME—PROOF OF LOSS—WAIVER.

   Whether insurance companies waived proof of loss by offering to pay certain sum and no more, *held*, question of fact for jury.

3. SAME—HUSBAND AND WIFE—WIFE'S DUTY TO TAKE OUT INSURANCE ON INSANE HUSBAND'S PROPERTY.

   Where husband was insane, and no guardian appointed, wife had right and duty to conserve his property by taking out insurance thereon, and, after its destruction by fire, to attempt to adjust loss.

4. SAME—ESTOPPEL.

   Where insurance companies recognized wife's right and authority to take out insurance on insane husband's property and to adjust loss, they may not later object thereto.

Error to Gogebic; Driscoll (George O.), J. Submitted January 20, 1931. (Docket No. 23, Calendar No. 35,311.) Decided April 7, 1931.

Assumpsit by Anton Valisano, by Mary Valisano, his next friend, against Continental Insurance Company of New York and others on fire insurance policies. Judgment for plaintiff. Defendants bring error. Affirmed.

*Jones & Patek* (*Ernest A. O'Brien,* of counsel), for plaintiff.

*Charles M. Humphrey,* for defendants.

BUTZEL, C. J. A dwelling house in the city of Wakefield, Michigan, owned by plaintiff Anton Valisano, was insured in each of the four defendant insurance companies. The amount of the policies

As to effect of insanity or sickness of insured as excuse for failure to give notice or furnish proofs of loss as required by policy of fire insurance, see annotation in L. R. A. 1917A, 305.

aggregated the sum of $3,800. Valisano had been insane since 1913 and his property was being looked after by his wife, Mary, who has brought suit as his next friend. She obtained the insurance from defendants' agent, who knew of Valisano's insanity both at the time the policies were issued and for many years previous thereto.

On May 8, 1928, a fire occurred, resulting, it is claimed, in a total loss. Mrs. Valisano notified the insurance companies. The adjusters met and made her an offer of settlement. The testimony is in dispute as to just what occurred. Plaintiff's wife claims that they first offered her $2,700, and then only $1,700. She testified that they told her they would pay $1,700 and no more. That she thereupon stated she would get an attorney and fight for her rights, whereupon they said: "Do as you please. It is up to you."

On June 20, 1928, she began four suits, which have been consolidated in this action. All of the policies follow the Michigan standard fire insurance form. The defendants claim that they did not know of plaintiff's insanity, that no proofs of loss were furnished them, that the suits were prematurely brought, and that there was no appraisement as demanded by them, that the verdict is excessive and against the great weight of the evidence. Plaintiff claims that owing to Anton's insanity, no proofs of loss were required, that no notice of demand for appraisement was given until after the suits were begun, that proofs of loss, appraisement, etc., were waived by defendants' adjusters when they stated that the companies would pay a certain amount and no more; that this constituted a discharge of the obligation to furnish proof of loss, etc. This latter question was one of those submitted to the jury who found in favor of plaintiff for the full amount of the

insurance. All of the questions raised are before us for review.

An insured person who is insane is excused from submitting a proof of loss. Such an action on his part would be a nullity. *Insurance Companies* v. *Boykin,* 12 Wall. (U. S.) 433; *Hartford Fire Ins. Co.* v. *Doll,* 23 Fed. (2d) 443 (56 A. L. R. 1059); *Houseman* v. *Home Insurance Co.,* 78 W. Va. 203 (88 S. E. 1048, L. R. A. 1917A, 299); *Woodmen Accident Ass'n* v. *Pratt,* 62 Neb. 673 (87 N. W. 546, 89 Am. St. Rep. 777); *Concordia Fire Ins. Co.* v. *Waterford,* 145 Ark. 420 (224 S. W. 953, 13 A. L. R. 1387).

The question of failure to send notice by the assured on account of his mental incompetence arose in *Reed* v. *Loyal Protective Ass'n,* 154 Mich. 161, where the court stated:

"But we are committed to the doctrine in insurance cases that a provision requiring a notice on pain of forfeiture will not be construed to require strict performance, when by a plain act of God it is made impossible of performance."

The disputed question as to whether defendants' agent stated to Mrs. Valisano that they would pay a certain sum and no more was submitted to the jury. There were corroborating witnesses who testified that this statement was made, although defendants' witnesses vigorously denied they made it. It became a question of fact for the jury who decided in plaintiff's favor. The case falls squarely within the doctrine set forth in *Rott* v. *Westchester Fire Ins. Co.,* 218 Mich. 576, and *Maki* v. *Commonwealth Ins. Co.,* 232 Mich. 295.

It is further claimed that Mrs. Valisano had neither right or authority to act for her husband. Defendants, through their agent, both in issuing the

policies and in attempting to adjust the loss made no objections whatsoever to her so acting. As an agent *ex necessitate* she had a right to act. Although as such agent she would not have the right to engage in new enterprises, nevertheless it was both her right and duty to conserve plaintiff's property, and in that connection to take out the insurance and attempt to adjust the loss.

In *Barron* v. *McChesney,* 198 Iowa, 657 (200 N. W. 197), the wife took a mortgage from the debtor of her insane husband, and the question was raised whether she had authority. The court, in holding that she had, said:

"In this case, the plaintiff was taken in mental derangement to the hospital, from which he returned a few weeks later. The wife remained at the home on the farm and looked after all the property and transacted the current daily business. To that extent, at least, she was fairly within the scope of authority which the law would presume in her favor. The general scope of such authority was to conserve the property rights of her husband. It did not extend to the initiation of new enterprises. It was in an attempt to conserve her husband's property that she accepted delivery of the mortgage. The mortgagor had become insolvent. He was owing a debt to her husband. It was unsecured. The mortgagor tendered the security. This was plainly beneficial to her husband and conserving in character. The burden this benefit carried was of a minor character, as compared with the benefit conferred."

Unless and until a guardian is appointed, it was incumbent on the wife to protect her insane husband's property. Defendants recognized this right and authority and may not now object.

The question is raised as to the amount of the verdict, which is sufficiently supported by the evi-

dence. Other minor questions raised we do not believe of such importance as to require discussion.

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

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

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JOHNSON *v.* NATIONAL FIRE INSURANCE CO.

1. APPEAL AND ERROR—EVIDENCE—SAVING QUESTION FOR REVIEW.
   Where, in action on fire insurance policy, testimony by plaintiff as to his arrest by fire marshal when he went to meet adjuster in response to telephone call was objected to, but no ruling asked for, no motion to strike made, and no request to charge made in reference thereto, question of its admissibility was not saved for review.

2. PARTIES—ASSIGNMENTS—REAL PARTY IN INTEREST—INSURANCE.
   Absolute assignment to vendees by vendors of their interest in claim under fire insurance policy, made after loss occurred, vested entire claim in vendees, so that they became sole parties in interest.

3. SAME—STATUTES.
   3 Comp. Laws 1929, § 14010, authorizes person to sue as real party in interest if he can legally discharge debtor and satisfaction of judgment rendered will operate as such discharge, notwithstanding amount recovered may be for benefit of another.

4. INSURANCE—PROOFS OF LOSS—WAIVER.
   Whether proof of loss was waived by insurer, *held*, properly submitted to jury under conflicting testimony.

Error to Allegan; Miles (Fred T.), J. Submitted January 8, 1931. (Docket No. 64, Calendar No. 35,163.) Decided April 7, 1931.

Assumpsit by Elwood Johnson and another against National Fire Insurance Company of Hart-

ford, Connecticut, on a fire insurance policy. Judgment for plaintiffs. Defendant brings error. Affirmed.

*Leo W. Hoffman* and *Clare E. Hoffman,* for plaintiffs.

*Smith & Searl,* for defendant.

BUTZEL, C. J. Elwood Johnson and Alma Johnson, plaintiffs, acquired the vendee's interest in a land contract on which the sum of $4,700 was still due. It provided for the purchase of a farm, together with the nine-room house, barn, and some small buildings situated thereon, all of the value of $8,000 according to plaintiffs' claim. The vendor assigned his interest to Eber W. Sherwood and Cynthia Sherwood and thereafter, upon the surrender of the contract, a new one was entered into between the Sherwoods as vendors, and plaintiffs as vendees. It called for the payment by the latter of the sum of $4,700, the balance still due on the former contract. The new contract contained a clause obligating vendees to insure the buildings on the property in a manner, amount, and by insurers approved of by the vendors, loss first payable to them and the balance, if any, to the vendees, in accordance with their respective interests. Plaintiffs secured from the Kalamazoo agency of defendant company a policy insuring the farmhouse for $4,000 and its contents for $1,000. It contained an appropriate clause conforming with the contract in regard to the payment of the insurance in the event of loss.

On November 3, 1928, two months and seven days after the issuance of the policy, both house and contents were destroyed by fire. Plaintiffs did not furnish proofs of loss. They claim that they were waived by defendant and became unnecessary after

its adjuster denied liability and charged that the fire was an incendiary one started by plaintiff Elwood Johnson.

On April 4, 1929, a day prior to the beginning of this suit, the Sherwoods executed an assignment in following form to plaintiff:

"For a valuable consideration and for the purpose of bringing suit and so that they may apply the amount recovered upon the contract of purchase, which we hold, we assign to Elwood and Alma Johnson all our right under the insurance policy covering the loss on the buildings burned."

The declaration stated that the Sherwoods had assigned their interest to plaintiffs for the purpose of bringing suit. Defendant in its plea gave notice that no proofs of loss had been furnished and that all of the parties in interest had not been joined as plaintiffs. Plaintiff recovered judgment for the full amount of the policy.

A further statement of facts appears in the discussion of the assignments of error relied upon by defendant in its appeal.

1. Defendant claims that the jury was prejudiced by the admission of testimony showing that plaintiff, through the connivance of defendant, had been arrested on a charge of arson and after four days and nights of imprisonment had been released through *habeas corpus* proceedings and the charge no further pressed. This testimony developed without objection and in the natural course of the narrative of events that occurred shortly after the fire and at a time when negotiations were being carried on for the purpose of adjusting the loss. Without any objection whatsoever, plaintiff Elwood Johnson testified that a person who represented himself over the telephone to be an adjuster of the defendant requested him to come to South Haven to confer in

reference to the loss; that when he arrived there, he was not met by the adjuster, but was arrested by the fire marshal. After plaintiff had testified how he had been called to South Haven, he was asked: "And what did they do with you?" The following colloquy then took place:

"*Mr. Smith:* Objected to. Do you mean there was any connection between the State fire marshal and the insurance company?
"*Mr. Hoffman:* Yes."

This was the only objection made to the testimony in regard to his arrest. No ruling was asked of the court and the witness continued to testify. Inasmuch as no ruling was asked for, no motion to strike the testimony from the record made, and there was no request to charge the jury that there was no connection between the fire marshal and the adjuster of the defendant, as claimed by plaintiff, the question was not saved for review.

2. Plaintiffs claim that they were the only real parties in interest and that the insurance was entirely for their benefit though it also was for the purpose of further securing the Sherwoods in the event of loss. We need not discuss this claim, as the assignment of the claim was complete. It was made after the loss occurred and vested the entire claim in plaintiffs so that they became the sole parties in interest. The Sherwoods had no interest in the household furniture which was covered by the same policy that insured the house. The assignment was an absolute one, and while it did not release plaintiffs from their liability to the Sherwoods to the extent of the amount due them, it nevertheless vested the entire title and interest to the insurance in plaintiffs. It released defendant from all further liability to the Sherwoods.

The rule stated in *Barak* v. *Detroit Apartments Corp.*, 232 Mich. 59, 61, is that the statute (3 Comp. Laws 1929, § 14010) authorizes a person to sue as the real party in interest if he can legally discharge the debtor and the satisfaction of judgment rendered will operate as such discharge, notwithstanding that the amount recovered may be for the benefit of another.

3. The testimony as to the waiver of the proofs of loss was conflicting. Johnson testified that defendant's adjuster stated that defendant was not going to pay the loss and that Johnson had set fire to the building. An attorney whom Johnson had retained at the time of his arrest also gave corroborative testimony to the effect that defendant's adjuster told him that defendant was not liable on account of the fact that it was a "crooked fire." If these statements are true, it became unnecessary for plaintiffs to file proofs of loss. *Young* v. *Ohio Farmers' Ins. Co.*, 92 Mich. 68; *Morgan* v. *Illinois Ins. Co.*, 130 Mich. 427. The question of waiver of proof of loss on account of the statements of defendant's adjuster was one of fact. It was fairly presented to the jury by the trial judge in his charge. He stated that the burden of proof was on plaintiffs. The jury decided in plaintiffs' favor.

Other questions are raised, but we deem it unnecessary to pass on them. Even if they constituted error, they were nonprejudicial. The judgment is affirmed, with costs.

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

HARTFORD ACCIDENT & INDEMNITY CO. *v.* JIRASEK.

1. FRAUDULENT CONVEYANCES—DEBTOR MAY PREFER CREDITOR.
   Debtor has right to give preference to certain of his creditors if he so desires.
2. SAME—WHEN CONVEYANCE FRAUDULENT.
   Under uniform fraudulent conveyance act (3 Comp. Laws 1929, § 13392 *et seq.*), conveyance which rendered grantor insolvent was fraudulent as to creditors if made without fair consideration.
3. SAME—PURPOSE OF UNIFORM FRAUDULENT CONVEYANCE ACT.
   Purpose of uniform fraudulent conveyance act is to make available to a "creditor," as defined in the act, an adequate remedy which theretofore was not available until the creditor had first reduced his claim to judgment.
4. SAME—REMEDIAL STATUTE SHOULD BE LIBERALLY CONSTRUED.
   Uniform fraudulent conveyance act is remedial, and should be given liberal construction.
5. SAME—EQUITY—JURISDICTION.
   Where conveyance claimed to have been given to secure certain creditors rendered grantor insolvent, court of equity has jurisdiction of whole subject-matter in litigation in suit by other creditors attacking said conveyance as fraudulent as to them, and it is immaterial whether their right to recover from grantor is based on fraud and deceit or on assumpsit upon waiver of tort (3 Comp. Laws 1929, § 13392 *et seq.*).
6. ELECTION OF REMEDIES—EQUITY—ACTION AT LAW.
   Mere starting of action at law or suit in equity does not constitute election of remedy.
7. SAME—FRAUDULENT CONVEYANCES.
   Suit to set aside deed as in fraud of creditors is not barred by previous action at law by plaintiffs against grantor.
8. FRAUDULENT CONVEYANCES—EQUITY—JURISDICTION—ACCOUNTING.
   Where, in suit to set aside deed as in fraud of creditors, it appears that said deed constitutes valid mortgage lien prior to plaintiffs' claim, and that grantor by said conveyance was rendered insolvent, determination of amount of secured indebtedness should be made, and grantor's equity, if any, subjected to plaintiffs' claim (3 Comp. Laws 1929, § 13392 *et seq.*).

CLARK and MCDONALD, JJ., dissenting.

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Remedy of general creditor or judgment creditor as affected by uniform fraudulent conveyance act, see annotation in 65 A. L. R. 251.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted April 18, 1930. (Docket No. 97, Calendar No. 34,940.) Decided April 7, 1931. Rehearing denied June 1, 1931.

Bill by Hartford Accident & Indemnity Company, a Connecticut corporation, and another, as assignees, against Charles Jirasek and others to set aside a conveyance of real estate. Decree for plaintiffs. Defendants appeal. Modified and affirmed.

*Byron A. Carse,* for plaintiffs.

*Lyle G. Younglove* and *Harry H. Wait,* for defendants.

MCDONALD, J. (*dissenting*). This is an appeal by the defendants from a decree awarding damages to the plaintiffs against defendant Charles Jirasek for $60,623.09 and setting aside as fraudulent a quit-claim deed from him to Joseph Jirasek and Julia, his wife.

The controversy grew out of an alleged conspiracy between Charles Jirasek, Gustav Peeters, and two bank tellers of the Detroit Savings Bank which resulted in a loss to the bank of $59,777.67. The plaintiffs had furnished the bank with indemnity bonds. They paid the loss and took an assignment of the bank's claims against Peeters and Jirasek and the two tellers. Jirasek is the only one of the parties concerned in this suit. The plaintiffs began attachment proceedings against him in the Wayne circuit court and attached certain land in Oakland county known as the Sylvan Shores property. They subsequently learned that Sylvan Shores had been deeded by Charles Jirasek to his brother Joseph Jirasek and wife. Alleging that this transfer was fraudulent as to creditors, this bill was filed to have the deed set aside and for a money decree against Charles Jirasek. The attachment suit in

the Wayne circuit court has been brought to an issue and is now pending awaiting trial by jury.

The vital proposition in the case is whether this deed is fraudulent as to creditors, and, in discussing that question, it will be necessary to make a further statement of the facts.

The defendant Charles Jirasek was engaged in the real estate business, associated with John C. Hoskins of Pontiac, Michigan. They organized and operated real estate corporations, bought and sold property, and were generally successful. Jirasek had relatives in the city of Detroit who became interested in the business to the extent that they advanced money in various sums which Charles was to invest for them. It was taken and used by him for the firm in the purchase of real estate with the understanding that when a sale was made of any property, to the purchase of which they had contributed, the amount of their contributions together with their share of the profits should be paid to them. In some transactions there were large profits, but Mr. Hoskins wanted to retain all of the money in the business. He recognized their interest but deferred payment. Finally Jirasek secured a power of attorney from each of the relatives and began suit against Hoskins for an accounting. A settlement agreement was reached by which the Sylvan Shores property, valued at $200,000 but subject to liens amounting to $42,000, was deeded to Jirasek in full for his interest and that of his relatives. They received no money. Charles Jirasek testified that while negotiations for settlement were pending,

"I discussed with my relatives the proposed settlement as agreed upon and it was agreed between us that Sylvan Shores property was to be security for the amount owing to them.

"*Q.* And in that discussion between you and your relatives, state what was agreed upon between you with reference to the giving of the quitclaim deed * * * by you to Joseph Jirasek and his wife. * * *

"*A.* We have discussed that and I was to give them the deed as security and then handle the property and sell it until they will be paid, to pay their claims and whatever will be over that, why, will be mine."

Joseph Jirasek is attorney for the Studebaker Corporation in Detroit. He also had invested in the business. He testified as to how it came that he received the deed.

"Ever since the time when Charlie received a settlement in the case against Hoskins, the settlement consisted of the Sylvan Shores subdivision, there was talk between me and my relatives, who had an interest in this Sylvan Shores subdivision, as to the necessity for some sort of security to be given by Charlie, inasmuch as this money was in his hands for a long period of time. * * *

"*Q.* State if that was the talk. * * *

"*A.* The talk was some security should be given by Charlie for us all to protect ourselves in case something should happen to him * * *. In talking with Charles I spoke that it would be the thing to give a quitclaim deed solely as security for the obligation he owed my relatives and myself.

"*Q.* State whether or not you were looking after the matter for your relatives.

"*A.* Yes, sir.

"*Q.* State whether or not they left that matter in your hands.

"*A.* They did.

"*Q.* Now, * * * state the amount you claim is owed to you and your relatives for the payment of which that deed was given. * * *

"*A.* $120,000, * * * consisting of the invest-

ments, original investments, plus the profits ever since the moneys have been handled by Charles."

The settlement with Hoskins was made in December, 1928. The deed was made to Joseph January 22, 1929, and delivered to him at his office in Detroit on the same day. On January 30, 1929, the plaintiffs attached an automobile belonging to Charles and served process on him. On the following morning, he told Joseph he was going to Pontiac and offered to take the deed and have it recorded. It was recorded at 8:40 a. m., and at 2:30 p. m. the plaintiffs attached the land conveyed. On these facts, the trial court found that the conveyance to Joseph was not made in good faith to secure an indebtedness to the relatives, that it was fraudulent as to creditors and should be set aside. We are unable to agree with his finding.

The indebtedness to the relatives of Charles Jirasek was not something framed up for a defense in this case. It had existed for several years. At the insistence of Hoskins, it had been carried along by the firm until the suit for an accounting. At the time of the settlement, Charles Jirasek receipted for the relatives and they surrendered to Hoskins certain shares of stock which they held in one of the firm's corporations. They received no money, but all understood that they were to be paid out of the Sylvan Shores property which was deeded to Charles by Hoskins. It is true that the deed to Joseph was not given until about the time when plaintiffs levied their attachment, but, under the circumstances, that fact is not inconsistent with good faith in giving the conveyance. It is quite probable that Joseph, who represented himself and the other relatives, was willing to leave matters as they were so long as Charles was successful in his real estate business. But, when financial difficulties arose, he

concluded that, with the title in Charles, their interests in the Sylvan Shores property might be in danger. He discussed the matter with the relatives and it was decided to ask for a quitclaim deed as security. There is no doubt that at this time Charles Jirasek owed Joseph and the other relatives a large sum of money, a considerable portion of which had gone into the purchase of the Sylvan Shores property. It was not only proper that he should ask for security but it was good business. If Joseph Jirasek's testimony is true, there can be no question as to the good faith of the transaction. We see no reason to doubt it. He and the other relatives were *bona fide* creditors. Their claim was pre-existing. Charles Jirasek had a right to secure them by this conveyance though his act in doing so was to prefer them to other creditors. *Shelton* v. *Mann,* 85 Mich. 265; *Fassbender* v. *Donohue,* 184 Mich. 52; *Jordan* v. *White,* 38 Mich. 253; *Iosco County Savings Bank* v. *Barnes,* 100 Mich. 1; *McMorran* v. *Moore,* 113 Mich. 101.

While the deed in question is absolute on its face, the testimony shows that it was given as security for a debt and is therefore held to be a mortgage. On this ground it is sustained. It was not fraudulent as to creditors.

In view of this disposition of the case, it will not be necessary to discuss any of the other questions presented by the record. No relief can be granted.

In the opinion filed by my Brother NORTH he has reached a wrong conclusion in holding that this quitclaim deed given to secure a debt is fraudulent as to other creditors. That there was no fraud even in his view of the facts is apparent from the following statement which I quote from his opinion:

"We think it conclusively appears that the quitclaim deed (mortgage) was given in good faith to

secure payment of an antecedent debt due from Charles to his relatives, and it cannot be said from this record that the amount of the debt was disproportionately small as compared with the value of the property mortgaged. Charles had the right to give preference to certain of his creditors if he so desired."

If this is a correct statement of the facts, and there is no doubt of it, how can it be said that the deed is fraudulent? My brother's conclusion is inconsistent with his findings on the facts. Though he says that the quitclaim deed was given in good faith to secure a debt; that it was for a fair consideration; and that Charles had a right to thus secure this debt in preference to the debts of other creditors, he holds that it was fraudulent as to these other creditors. How he reaches this conclusion appears in the following statement quoted from his opinion:

"There was absolutely no consideration for Charles' conveyance of his equity over and above the amount he owed to his relatives."

The obvious answer to this statement is, that the instrument is a mortgage and there was no conveyance of an equity. Charles still owns an interest in the property and that interest is covered by the attachment filed before the commencement of this suit. All he did by executing the quitclaim deed was to give his relatives a lien to secure their debt. It is difficult to follow my brother in his attempt to find fraud in an instrument which he says is a legally perfect mortgage.

In my judgment, the quitclaim deed is not fraudulent as to creditors and therefore the plaintiffs cannot ask to have their claims determined on the equity side of the court. All the relief which under my brother's theory they could obtain in equity can be obtained in the pending attachment suit. Their re-

lief is for a money judgment. In the absence of fraud, equity cannot retain jurisdiction to grant that relief. *Koontz* v. *Bay Circuit Judge,* 224 Mich. 463; *Wisper* v. *Dix-Ferndale Land Co.,* 241 Mich. 91.

A decree should be entered dismissing the bill, with costs to defendants.

CLARK, J., concurred with MCDONALD, J.

NORTH, J. (*for modification*). I am unable to agree with the conclusion of Mr. Justice MCDONALD that plaintiffs' bill of complaint should be dismissed. In an opinion filed by him the circuit judge made the following determinations:

(1) That the defendant Charles Jirasek was a party to the fraudulent conspiracy which rendered plaintiffs herein liable to the Detroit Savings Bank for the resultant loss.

(2) That the quitclaim deed of property known as Sylvan Shores in Oakland county from Charles Jirasek to his brother Joseph is in fact and in law a mortgage, that it was not made in good faith as security for prior indebtedness of Charles Jirasek to his relatives and is void as against plaintiffs' claim.

(3) That "it is true relatives (of Charles Jirasek who now claim prior rights under this quitclaim deed as a mortgage) had advanced considerable sums of money to Jirasek during a period of over ten years." (The undisputed proof shows these advancements are still unpaid.)

(4) That notwithstanding a prior attachment suit to recover the same amount here claimed by plaintiffs had been started by them in the circuit court of Wayne county, the circuit court of Oakland county, in chancery, has jurisdiction under the so-called uniform fraudulent conveyance act, Act No. 310, Pub. Acts 1919 (3 Comp. Laws 1929, § 13392 *et seq.*), to hear and determine the issues presented by the bill of complaint; and plaintiffs are entitled to the relief sought.

A careful examination of the record convinces us that the determination of the circuit judge should be sustained except that portion of paragraph 2 above wherein it is held the quitclaim deed (mortgage) was not made in good faith as security for a prior indebtedness and that it is void as against plaintiffs' claim.

We think it conclusively appears that this quitclaim deed (mortgage) was given in good faith to secure payment of an antecedent debt due from Charles to his relatives, and it cannot be said from this record that the amount of the debt was disproportionately small as compared with the value of the property mortgaged. Charles had the right to give preference to certain of his creditors if he so desired. (See cases cited in the opinion of Justice MCDONALD.) But this quitclaim deed from Charles to Joseph purported to divest Charles of all his interest in the Sylvan Shores property, thus defeating plaintiffs' right to obtain satisfaction of any judgment or decree secured against Charles who possessed no other property of value. I fully agree with Mr. Justice MCDONALD that "the vital proposition in the case is whether this deed is fraudulent as to creditors," particularly as to plaintiffs. If the conveyance is fraudulent, plaintiffs' bill should not be dismissed on the ground of lack of equity jurisdiction. Whether or not it is fraudulent should be determined in the light of the provisions of the uniform fraudulent conveyance act (3 Comp. Laws 1929, § 13392 *et seq.*) which provides:

"'Creditor' is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent. 'Debt' includes any legal liability, whether matured or unmatured, liquidated, absolute, fixed or contingent. (3 Comp. Laws 1929, § 13392.)

"A person is insolvent when the present fair

salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured. * * * (3 Comp. Laws 1929, § 13393.)

"Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is *fraudulent* as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without fair consideration." (3 Comp. Laws 1929, § 13395.)

There can be no question but that by giving this deed to his brother, Charles Jirasek became insolvent within the meaning of the act quoted. In this particular the circuit judge made the following finding:

"At the time of giving the deed practically all of the property possessed by the defendant Charles Jirasek of any value, including his automobile, was in the name of his brother, Joseph."

Because the conveyance rendered Charles Jirasek insolvent, it was fraudulent as to creditors if made "without fair consideration." The undisputed proof is that there was absolutely no consideration for Charles' conveyance of his equity over and above the amount he owed to his relatives. Within the meaning of the act plaintiffs are creditors of Charles Jirasek and he is their debtor.

"One who has a cause of action based on a tort is a 'creditor' within the meaning of the uniform fraudulent conveyance act." (Syllabus) *Dutcher* v. *Van Duine,* 242 Mich. 477.

The obvious purpose of this legislation was to make available to a "creditor," as defined in the act, an adequate remedy which theretofore was not available until the creditor had first reduced his claim to judgment. This statute provides:

"SEC. 9. (1) Where a conveyance or obligation

is fraudulent as to a creditor, such creditor, when his claim is matured, may * * *

"(a) Have the conveyance set aside or the obligation annulled to the extent necessary to satisfy his claim. * * * (3 Comp. Laws 1929, § 13400.)

"SEC. 10. Where a conveyance made or an obligation incurred is fraudulent as to a creditor whose claim has not matured, he may proceed in a court of competent jurisdiction * * * and the court may,

"(a) Restrain the defendant from disposing of his property,

"(b) Appoint a receiver to take charge of the property,

"(c) Set aside the conveyance or annul the obligation, or

"(d) Make any order which the circumstances of the case may require." (3 Comp. Laws 1929, § 13401.)

The act is remedial. It should be given a liberal construction. It has been so construed in courts of other States wherein this uniform act has been adopted. In *American Surety Co.* v. *Conner,* 251 N. Y. 1 (166 N. E. 783, 65 A. L. R. 244), Chief Justice Cardozo writing for the court said:

"We think the effect of these provisions is to abrogate the ancient rule whereby a judgment and a lien were essential preliminaries to equitable relief against a fraudulent conveyance. The uniform act has been so read in other States (*Gross* v. *Pennsylvania Mtg. & Loan Co.,* 101 N. J. Eq. 51 [137 Atl. 89]; *United Stores Realty Corp.* v. *Asea,* 102 N. J. Eq. 600 [142 Atl. 38]; *Morse* v. *Roach,* 229 Mich. 538; *Lipskey* v. *Voloshen,* 155 Md. 139 [141 Atl. 402]). * * * The reading seems to be inevitable, aside from any precedent. The act is explicit that a creditor may now maintain a suit in equity to annul a fraudulent conveyance, though his debt has not matured. * * * He (the creditor) may seek the

aid of equity, and without attachment or execution, may establish his debt, whether matured or unmatured, and challenge the conveyance in the compass of a single suit."

See, also, *Conway* v. *Raphel,* 102 N. J. Eq. 531 (141 Atl. 804); *Adams* v. *Wallace,* 94 Okla. 73 (220 Pac. 872).

While technically it may be *dicta,* this court, speaking through Justice WIEST, in the case above cited by Chief Justice Cardozo, said:

"With the adoption of the uniform fraudulent conveyance act * * * the troublesome question of whether a levy should be made and a bill in aid of execution filed, or a creditor's bill filed upon return of an execution, or a bill with double aspect filed, has departed. Now, in case a conveyance is fraudulent as to a creditor he may" have relief under this act. *Morse* v. *Roach, supra.*

It is of no consequence in this equitable proceeding whether plaintiffs' recovery from Charles Jirasek is based on fraud and deceit or that it is considered as in assumpsit upon waiver of a tort. Charles Jirasek's fraudulent conveyance of his property rendered him insolvent, and under the uniform fraudulent conveyance act the equity court acquired jurisdiction of the whole subject-matter in litigation. This case is unlike our recent decision in *Farrell* v. *Hannan Real Estate Exchange,* 251 Mich. 669, wherein the court found the plaintiff was not entitled to equitable relief of any character whatever but only to damages recoverable, if at all, in an action at law. Under such circumstances the proceeding in equity was properly dismissed. But in the instant case, as against all the defendants, plaintiffs have established a clear right to injunctive and other equitable relief provided they maintain their conspiracy charge against Charles Ji-

rasek. Under the circumstances of this record, to hold that these plaintiffs do not have a right to equitable relief in this case is to say that the uniform fraudulent conveyance act affords a defrauded victim no remedy which he did not have prior to the enactment of this statute. For all practical purposes it would nullify the act. To make available the remedy provided by this legislation we should hold and do hold that the court of equity has and retains jurisdiction to adjudicate the whole controversy between these litigants.

Defendants' contention that since plaintiffs first instituted attachment in Wayne county they have elected their remedy and cannot proceed in equity in Oakland county is not well founded. At the time the decree was taken in the circuit, the suit at law in Wayne county had not proceeded to trial. In fact, the alleged fraudulent conveyance which gave the court in equity in Oakland county jurisdiction had not been recorded at the time the suit at law was started in Wayne county, and plaintiffs then had no knowledge thereof. The mere starting of an action at law or suit in equity does not constitute an election. 15 Cyc. p. 264. This court has said:

"But a lawsuit pending and not determined is not a bar to a suit in equity upon the same subject. At a proper stage of the cause, the court in equity may and will, on a motion for that purpose, determine whether the interests of justice require a complainant to be put to his election of remedies. He will always be allowed to elect his equitable remedy if he chooses. Story's Equity Jurisprudence (6th Ed.), § 889; 2 Daniell's Chancery Practice, 961, and *seq.* and notes." *McGunn* v. *Hanlin,* 29 Mich. 476, 480.

See, also, *Morse* v. *Roach, supra.*

The pending suit at law in Wayne county did not constitute a conclusive election which barred plain-

tiffs from instituting the equity case in Oakland county under the circumstances here presented. Nor do we find anything in the record which constitutes an estoppel against or a waiver of plaintiffs' right to pursue their equitable remedy. Defendants' claim that partial restitution by one of the other joint tort-feasors or the giving of security incident to an agreement to make restitution constitutes an estoppel barring plaintiffs from resorting to the remedy in equity is not well founded.

Since we hold the quitclaim deed constitutes a valid mortgage lien prior to plaintiffs' claim, adjudication of the latter's rights necessitates both the determination of the amount of Charles Jirasek's liability to plaintiffs and also the amount of his indebtedness to his relatives, payment of which is secured by the quitclaim deed (mortgage). On the face of the present record it seems to appear that Charles Jirasek has a very substantial equity in this property over and above his indebtedness to his relatives. This equity should be held liable for the payment of the amount found due from Charles to plaintiffs. Because of his holding that the quitclaim deed (mortgage) was wholly void as against plaintiffs' claim, the trial judge made no determination of the exact amount of Charles' indebtedness which it secured. We are unable to determine from the record before us whether or not the amount claimed was in excess of the actual *bona fide* indebtedness of Charles to his relatives. This should be determined upon a further hearing before the trial judge. The case will be remanded for such further hearing and final determination, and decree in accordance herewith. Costs of this court to the appellants.

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

## SMITH v. McCLUSKEY.

1. PRINCIPAL AND SURETY—DEFAULT BY TRUSTEE—WEIGHT OF EVIDENCE.

   In action against trustee and sureties on his bonds, finding of trial judge that securities as listed by trustee in his report were owned by him at time second bond was approved by probate court, *held*, not against great weight of evidence.

2. SAME—TRUSTS—UNSECURED PROMISSORY NOTE—LIABILITY OF SURETY FOR PROCEEDS.

   While it is generally accepted rule that it is not prudent to invest trust funds in unsecured promissory notes, yet if such note was paid to trustee after his bond was given, the surety thereon would be liable to account for its proceeds on default of trustee.

3. SAME—PRESUMPTION OF PAYMENT OF NOTE.

   In action against trustee and sureties on his bonds, where surety disclaimed liability for amount of unsecured promissory note accepted by trustee, trial court properly held that there was presumption that note had been paid to trustee in absence of showing to contrary by production of note itself or other evidence repelling said presumption.

4. BILLS AND NOTES—WHEN PAYMENT OF NOTE NOT PRESUMED.

   In action brought to enforce payment of unsecured promissory note in hands of payee or assignee, rule that law presumes payment is not applicable, but in such case payment is made matter of affirmative defense (Mich. Court Rule No. 23, § 3), and burden of proof is on defendant.

5. APPEAL AND ERROR—PRINCIPAL AND SURETY—CONCURRENT LIABILITY.

   In action against trustee and sureties on two bonds given by trustee, where judgment was against surety on second bond only, from which plaintiff did not appeal, question of concurrent liability is not before Supreme Court.

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Personal liability of trustee for loss of trust estate from investments, see annotation in 44 L. R. A. (N. S.) 873.

Error to Sanilac; Boomhower (Xenophon A.), J. Submitted January 8, 1931. (Docket No. 56, Calendar No. 35,272.) Decided April 7, 1931. Rehearing denied June 1, 1931.

Assumpsit by Grant H. Smith, Sanilac probate judge, for the use and benefit of Arthur A. Hartshorn, against C. E. McCluskey and others on two surety bonds. Judgment for plaintiff against defendant Fidelity & Deposit Company, and it brings error. Affirmed.

*Alfred H. Sauer,* for plaintiff.

*Robert J. West,* for defendant Harry H. Hartshorn.

*Mark L. Rowley* (*Robert W. McKenzie,* of counsel), for defendant Fidelity & Deposit Company.

SHARPE, J. This case was tried before the court without a jury. He filed findings of fact which may be summarized as follows: In the last will and testament of Arthur H. Hartshorn, he provided for the payment by his executors to the defendant McCluskey, as trustee, of certain moneys for the use and benefit of his son, Arthur A. Hartshorn. It seems undisputed that the sums so received by him and interest thereon, less advances made to Arthur, pursuant to the terms of the trust, amounted at the time of the trial to the sum of $6,440.37. McCluskey qualified as such trustee by giving a bond with Harry H. Hartshorn and D. R. Brown as sureties in the sum of $10,000, which was approved by the judge of probate on May 3, 1926. Harry H. Hartshorn sought to be relieved from his obligation under said bond, and McCluskey, at the request of the probate judge, filed an account in the probate court, and on July 12, 1927, filed a new bond, with the

defendant Fidelity & Deposit Company of Maryland as surety, in the sum of $6,000, which was duly approved.

Arthur A. Hartshorn became 25 years of age on January 8, 1929, and was then entitled to receive the corpus of the trust fund. On May 27th following, McCluskey, as such trustee, was cited to appear before said court to show why he had not settled and closed the matters of his said trust, and, not appearing, the probate court authorized the bringing of this action for the recovery of the moneys due Arthur A. Hartshorn from said trustee. The sureties on both bonds were made parties defendant.

The last finding of fact reads as follows:

"The default of the trustee, C. E. McCluskey, occurred after July 12, 1927, the date of the approval of the second bond hereinbefore mentioned by the said probate court. Such default consisted in the conversion of the remainder of the said trust funds belonging to the said Arthur A. Hartshorn."

Based on these findings, the trial court concluded as matter of law that—

"The second bond was a substitute bond; the sureties on the former bond were released except for liability on account of defaults of the trustee committed prior to the approval of the second bond by the probate court; and the surety on the second bond is liable for all defaults of the trustee occurring after the approval of such bond by said court."

McCluskey had not been served with process. A judgment in favor of the plaintiff against the Fidelity & Deposit Company for $6,000 was entered, of which it seeks review by writ of error.

It proposed certain amendments to the findings of fact. It requested the court to substitute for the last of such findings the following:

"The default of the trustee, C. E. McCluskey, occurred prior to July 12, 1927, the date of the approval of the second bond by the probate court, except as to the sum of $500, which was received by the said trustee on November 5, 1927, and as to this sum the default of the said trustee in the amount of said $500 occurred subsequent to July 12, 1927."

In the report filed by McCluskey above referred to, he listed certain securities as held by him as trustee for "Arthur A. Hartshorn & Gladys Scholer." It appears that he was also a trustee for Mrs. Scholer, a sister of Arthur. In it he acknowledged that he had received for the estate of Arthur A. Hartshorn moneys to the amount of $6,075.02, and stated that he had paid to him $975.06. The list of securities as undisposed of and moneys on hand amounted in all to $8,007.86, but it was in no way indicated to which estate they belonged. It seems to be conceded, however, that the amount thereof included all sums at that time in his hands as trustee for Arthur A. Hartshorn. Harry H. Hartshorn, a brother of Arthur and a surety on the first bond, testified that he saw the report in which these securities were listed and asked McCluskey about them on July 16th or 17th, after the second bond was given, and that they were then shown to him by McCluskey and he made a list of them in a memorandum book, and he produced the book.

The Fidelity Company insists that the great weight of the evidence supports its claim that these securities, except a promissory note hereafter referred to, were the property of the trustee's father, Heber V. McCluskey. His testimony was taken by deposition. He admitted that, while the securities thus listed (real estate mortgages) were payable to

him, he had assigned them to his son "and he had them for a while." As to two of them he said:

"That was all the mortgages I had left at that time and I assigned them at his request and he sent them back and asked me to advance the money on them and I took them back and sent the Laufer mortgage $500 and the Grice mortgage $400 and gave him $900."

On cross-examination he testified:

"*Q.* You knew he was going to list these mortgages in this particular account?
"*A.* I expected he would.
"*Q.* That is, Arthur Hartshorn?
"*A.* Yes.
"*Q.* And you knew that was what he was going to use it for?
"*A.* I didn't know what he was going to use it for. I didn't know anything more about his business than a stranger would know. I don't know what he did with any of it. I know I let him have it and that is all I know because the presumption was he was paying his debts, using it in a legitimate manner. That is what I supposed.
"*Q.* Particularly in the Arthur A. Hartshorn matter, wasn't it?
"*A.* I think so, yes; but I don't know."

The trial court was apparently satisfied from the evidence submitted that the trustee was the owner of these securities at the time the second bond was approved and filed. We cannot say that his finding in that respect is against the great weight of the evidence.

Among the items of securities listed by the trustee in his account was a promissory note, executed by Charles Merriman, in the sum of $1,952.94. Coun-

sel for the appellant proposed an amendment as to this item, reading as follows:

"As to this item the court finds that this was not and is not a proper or legal investment for trust funds, and therefore, the trustee had defaulted and devastavit of the trust funds had occurred as to this amount prior to July 12, 1927."

This court has declined to lay down "any definite rule as to the class of securities in which trustees may legally invest." *In re Buhl's Estate,* 211 Mich. 124, 131 (12 A. L. R. 569). In *Michigan Home Miss. Soc.* v. *Corning,* 164 Mich. 395, 402, the court said:

"It is a generally accepted rule that it is not prudent to invest trust funds in unsecured notes of an individual or of a partnership. We have found no decision which announces a contrary rule where the trust contemplated an investment of a permanent nature."

But, conceding the fact as stated in the proposed amendment that the unsecured promissory note was not such an investment as would relieve the sureties on the first bond, yet if it was paid to the trustee by the maker after the second bond had been given, the surety thereon would be liable to account for its proceeds. The record does not disclose what became of this note. It does not appear that proof concerning it was not available.

In the early case of *Bailey* v. *Gould,* Walk. Ch. 478, 483, wherein proceedings were taken to foreclose a mortgage securing a promissory note and the note was not offered in evidence, the court said:

"The promissory note is not in evidence, and, for aught that appears from the testimony, it may have been paid. The law does not raise a presumption of nonpayment, but of payment when due, unless the contrary is shown by the production of the note, or

other evidence repelling the presumption of law, when the note itself cannot be produced."

In *Martin* v. *McReynolds,* 6 Mich. 70, 74, the *Bailey Case* was cited as authority for the statement—

"For the law presumes every man has done his duty, and on that raises a presumption of payment, unless the contrary is shown."

It was also cited with approval in *George* v. *Ludlow,* 66 Mich. 176, and in *Ward* v. *Munson,* 105 Mich. 647.

This court has held that the law will presume that a member of a fraternal organization has paid the dues fixed by the by-laws. *Petherick* v. *Order of the Amaranth,* 114 Mich. 420; *Rousseau* v. *American Yeomen,* 186 Mich. 101. See, also, *Bergen* v. *Urbahn,* 83 N. Y. 49; 41 C. J. p. 794. The rule thus stated does not apply when an action is brought to enforce the payment of such a note in the hands of the payee or his assignee. In such a case, payment is made a matter of affirmative defense (Michigan Court Rule No. 23, § 3), and the burden of proving it is on the defendant.

We are unwilling to reverse the finding that the proceeds of this note came into the hands of the trustee after the second bond was given. As to the cash in his hands, there is no evidence that he did not have it at the time the second bond was filed.

The probate judge testified that he informed Harry H. Hartshorn, one of the sureties on the first bond, that "automatically we considered the discharge of the bond as soon as the new bond was filed." It is urged that he was in error in doing so; that the statutory requirement as to notice had not been complied with. 3 Comp. Laws 1929,

§ 15880; *Rice* v. *Wilson,* 129 Mich. 520. While the action was against McCluskey and the sureties on both bonds, the judgment was entered against the Fidelity & Deposit Company alone. The plaintiff not having assigned error, the question of concurrent liability is not before us for consideration.

The judgment is affirmed.

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

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NATIONAL LIBERTY INSURANCE CO. *v.* FOTH.

1. APPEAL AND ERROR—DIRECTED VERDICT.
   In reviewing judgment for defendant on directed verdict, the testimony and its legitimate inferences most favorable to plaintiff must be accepted.

2. SAME—INFERENCES FROM TESTIMONY NOT CONSIDERED.
   In action for damages resulting from automobile collision, inferences which might be drawn from testimony tending to relieve defendant of negligence and to show that driver of plaintiff's car was negligent may not be considered, on review, in view of fact that verdict for defendant was directed.

3. MOTOR VEHICLES—NEGLIGENCE—PRESUMPTIONS.
   Automobile driver approaching intersection on pavement must be assumed to have seen automobile approaching on cross road and about to enter pavement in front of him.

4. SAME—DIRECTED VERDICT.
   If automobile approaching pavement on cross road was running at such rate of speed that it indicated driver did not intend to stop, but planned on entering pavement in front of defendant's car, jury might have found that defendant was negligent in failing to reduce his speed at time when application of brakes would not have caused his car to skid in front of plaintiff's car, and therefore directed verdict in favor of defendant was error.

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Liability for damages for injury caused by skidding motor vehicle, see annotation in 58 A. L. R. 264.

5. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
Where automobile collision was caused by defendant's car skidding in front of plaintiff's car when defendant applied his brakes to avoid hitting car entering pavement from cross road, question of negligence of both plaintiff and defendant, under the circumstances, should have been submitted to jury, and therefore directed verdict in favor of defendant was error.

6. PARTIES—ASSIGNMENTS—REAL PARTY IN INTEREST.
Where insurance company paid owner for damages to his automobile by collision and took assignment of all of owner's claims therefor, insurance company was real party in interest and could maintain suit in its own name.

7. ACTION—ASSIGNMENT OF CLAIM—SPLITTING CAUSE OF ACTION.
Where automobile owner assigned all of its claim for damages by collision to insurance company which paid the loss, and owner makes no claim for damages other than that assigned, there was no splitting of cause of action.

Error to Kent; Perkins (Willis B.), J. Submitted January 20, 1931. (Docket No. 57, Calendar No. 35,015.) Decided April 7, 1931.

Case by National Liberty Insurance Company, assignee, against Charles Foth for damages to an automobile resulting from a collision. Directed verdict and judgment for defendant. Plaintiff brings error. Reversed, and new trial ordered.

*Mason, Alexander & McCaslin,* for plaintiff.

*Dunham, Cholette & Allaben,* for defendant.

SHARPE, J. On March 25, 1929, while George E. Kelley, manager of the wholesale grocery firm of Lee & Cady, a corporation, was driving an automobile, owned by it, north on the paved highway from Lansing towards St. Johns, the car collided with that of the defendant at a point about five miles north of Lansing, and was badly wrecked.

The plaintiff, with which the corporation had its car insured, after investigation, settled for the damage done to it and took from the corporation a "Subrogation Receipt," acknowledging payment of $865 and assigning its right to damages arising out of the collision. This action is brought for the recovery thereof. At the conclusion of plaintiff's proofs, the trial court directed a verdict for the defendant. Plaintiff seeks review of the judgment entered thereon by writ of error.

The verdict having been directed, "the testimony and its legitimate inferences most favorable to plaintiff must be accepted." *Olchefsky* v. *Brick Co.*, 240 Mich. 536, 539.

Earl C. Gignac, who was driving south about 200 feet behind defendant's car, was a witness to the accident. He testified that defendant's car was traveling about 40 miles an hour; that just before the collision a car from the east came on the paved highway at an intersection "directly in front of the man in front of me;" that the pavement was wet; that defendant apparently applied his brakes, and his car veered to the left and turned partly around on the east side of the pavement on which Mr. Kelley was driving, and that Kelley's car crashed into it and forced it off the west side of the traveled portion of the highway. Mr. Kelley testified:

"I was driving in a northerly direction. I saw two or three cars coming towards me, and when I saw those cars coming towards me one of them deviated from its regular course. The cars were all on the right-hand side of the road when I first saw them coming, or on the west side of the road. The second car turned out of its course and went directly east. When this car came over towards the east or on the east side of the road I just threw on my

brakes and shut my eyes. I was less than ten feet from this car when it turned over onto my side of the road. My car is almost a total wreck. Mr. Foth was driving this other car. After the accident I inquired as to whether he or his wife was hurt, and just talked about the accident in regard to I had no chance of missing him, and he agreed. He said something about a car ahead of him started to stop and he threw on his brakes to miss hitting that car and skidded across the road."

Carl J. Weale, the Lansing manager of Lee & Cady, testified that he came to the scene of the accident about an hour after it occurred; that the defendant was still there, and in answer to a question put to him by the witness,

"He said that his car skidded in front of the car going north which was Mr. Kelley's, and that Mr. Kelley had no opportunity to stop."

While it may be said that under the cross-examination of Gignac and Kelley inferences may be drawn which tend to relieve the defendant from the charge of negligence, and to show negligence on the part of Kelley, these may not be considered in view of the fact that a verdict was directed.

It must be assumed that the defendant saw the car on the side road as it approached the intersection. If it was running at a rate of speed and in a way which indicated that the driver did not intend to stop, but planned on entering the paved highway in front of defendant's car, then the jury might have found that the defendant's failure to reduce the speed of his car at a time when the application of the brakes would not have resulted in causing it to skid, as it did, directly in front of that driven by Kelley, was negligence on his part and the proximate cause of the collision. Whether Kelley was

negligent in not sooner checking the speed of the car he was driving, or turning so as to avoid the collision, was doubtless also a question for their consideration. But, on the record now before us, it must be said that there was error in the direction of a verdict for the reason that no negligence on the part of the defendant was established and that Kelley was guilty of contributory negligence.

The trial court was also of the opinion that under the terms of the "subrogation receipt" the entire claim of Lee & Cady was not assigned to plaintiff, and that, as a plaintiff may not split a cause of action, recovery could not be had thereon. This instrument, after reciting the payment of $865, in settlement of all claims and demands for loss and damage to the car insured, stated that Lee & Cady—

"hereby assigns and transfers to the said company each and all claims and demands against any other party, person, persons, property or corporation arising from or connected with such loss and damage (and the said company is hereby subrogated in the place of and to the claims and demands of the undersigned, against said party, person, persons, property or corporation in the premises) to the extent of the amount above named and the said company is hereby authorized and empowered to sue, compromise or settle in their name or otherwise to the extent of the sum of money paid as aforesaid."

While called a "subrogation receipt," this instrument by its terms was an assignment by Lee & Cady to the plaintiff of its claim for the damages sustained by it by the injury to its car to the amount stated. In *Heck* v. *Henne,* 238 Mich. 198, 201, wherein it appeared that a similar assignment had been made, this court said:

"By assignment before suit, the insurance company was the real party in interest seeking recovery for damage to the automobile."

In *McPeake* v. *Railway Co.*, 242 Mich. 676, where both the owner and the insurance company were joined as plaintiffs, it was said (678):

"The assignment to the insurance company stated that it was to the extent of the payment made by the company to McPeake. There was an improper joinder of parties plaintiff. The cause of action could not be split. The suit should have been dismissed as to plaintiff McPeake when it appeared that he had assigned his right of action (*Heck* v. *Henne*, 238 Mich. 198), and, as such fact was stated in the declaration, defendant was entitled to such an order at once, upon request. The request was made early in the trial and denied, and McPeake gave his direct testimony as a plaintiff, but, at the close thereof, he was dropped. His improper joinder was not fatal. 3 Comp. Laws 1915, § 12364 (3 Comp. Laws 1929, § 14021)."

This action was brought in the name of the insurance company under the assignment made to it, and its right to recover is sustained by these decisions. It may, however, be well said that there was no splitting of the cause of action as it conclusively appears from the evidence that Lee & Cady make no claim for any other damage than that assigned to the plaintiff.

Attention may properly be called to Act No. 271, Pub. Acts 1929 (3 Comp. Laws 1929, § 14010), amending section 12353, 3 Comp. Laws 1915, relating to "parties to actions," which provides:

"That where an assignment of a part of a cause of action in tort has been made by an insured to an insurer, both assignor and assignee may join in an

action on such claim, and a joint judgment shall be rendered for all the damages to which either or both may be entitled."

It follows that the trial court was in error in directing a verdict for the defendant. The judgment entered thereon is reversed, with costs to plaintiff, and a new trial ordered.

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

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KATES *v.* READING.

1. JUSTICES OF PEACE—STATUTES—COMMON PLEAS COURT.
   Act No. 260, Pub. Acts 1929, consolidating courts of justices of the peace in cities of prescribed population into one court named common pleas court, does not legislate justices of the peace out of office, but continues justices' courts under another name and form without creating a new court.

2. COURTS—COURT CONSISTS IN ITS JURISDICTION RATHER THAN NAME.
   A court consists in its jurisdiction and functions and not in its title or name.

3. SAME—JUSTICES OF PEACE—CITIES—CONSTITUTIONAL LAW.
   Under the Constitution (article 7, § 1), the legislature may provide for courts in cities by means of justices of the peace or otherwise, at its discretion; and in view of exception in section 16, jurisdiction of justices' courts is not exclusive.

4. SAME—NEW COURTS MAY BE CREATED.
   Constitution does not prohibit the legislature from establishing new courts in cities and vesting in them the jurisdiction of justices of the peace.

5. CONSTITUTIONAL LAW—STATUTES—LOCAL ACTS—REFERENDUM.
Although Act No. 260, Pub. Acts 1929, has an amendatory effect upon certain local acts, it is not an amendatory act in a constitutional sense requiring referendum vote (article 5, § 30), because it is independent and general in form, is not amendatory or supplementary in language, and operates alike on existing and future courts established under general or local law.

6. SAME—GENERAL ACT.
Nor is said act a local act because the standard of population adopted by it renders it applicable only to the city of Detroit; there being a reasonable relation between population and the object of the act.

7. SAME—HOME-RULE ACT—JUSTICES OF PEACE.
Act No. 260, Pub. Acts 1929, does not violate the home-rule act in that it deprives the city of Detroit of the right to regulate its minor courts, since such courts are not solely of municipal concern, but are instrumentalities for exercise of sovereign power, and are of such interest to the whole State that, in absence of constitutional limitation, the legislative power may not be subordinated to local considerations or authority.

8. SAME—STATUTES—VALIDITY.
Act No. 260, Pub. Acts 1929, consolidating courts of justices of the peace in cities of prescribed population into one court named common pleas court, is valid.

Appeal from Wayne; Miller (Guy A.), Webster (Arthur), and Ferguson (Homer), JJ. Submitted April 7, 1931. (Calendar No. 35,526.) Decided April 14, 1931.

Mandamus by James A. Kates to compel Richard W. Reading, Detroit city clerk, to place his name on primary ballot as a candidate for justice of the peace. Arthur E. Gordon, presiding judge of common pleas court, intervened as defendant. Writ denied. Plaintiff appeals. Affirmed.

*Morris Garvett,* for plaintiff.

*John C. Bills* (*Leo I. Franklin,* of counsel), for intervener.

FEAD, J. Plaintiff sought mandamus to compel the clerk of the city of Detroit to place his name on the primary ballot as a candidate for justice of the peace. The clerk refused his application on the ground that, by Act No. 260, Pub. Acts 1929 (3 Comp. Laws 1929, § 16369 *et seq.*), the office of justice of the peace for the city of Detroit had been abolished. Plaintiff contends that Act No. 260 is unconstitutional.

The justices' courts in Detroit operated under Act No. 475, Local Acts 1903, and the charter of the city, adopted in pursuance of general law. There were six justices, functioning independently of each other, each responsible for all matters in relation to suits commenced before him. The testimony shows that, because of growth of population of the city, increase in litigation, lack of co-ordination among the justices necessarily arising out of the independence of their functions, together with some want of co-operation among them, such delay, inconvenience, expense, and injustice resulted to litigants, counsel, and witnesses that a remedy became advisable, if not imperative. Undoubtedly, the condition could have been ameliorated by voluntary action of the justices, but it was not. Probably some of the evils were inherent in the system and could not have been cured even by personal co-operation. Act No. 260 was adopted in an attempt to better the situation. Its purpose and purport are shown by its title:

"An act to consolidate into one court the courts of justices of the peace in any city having or which

may hereafter have, over two hundred and fifty thousand inhabitants; to prescribe the title and define the jurisdiction of and practice in such consolidated court; to fix the number, the time and mode of election and compensation, and to define the powers and duties of the judges thereof; to provide for the designation of a presiding judge of such court and to prescribe his powers and duties; to authorize such court to make and enforce rules governing the practice and procedure therein; to provide for a clerk of such court and to prescribe his compensation, powers and duties; to provide for a review of judgments rendered by such court and the taking and filing of transcripts of such judgments; to provide for the service of process issued from such courts; and to repeal all acts or parts of acts inconsistent herewith."

At present, Detroit is the only city in the State having the prescribed population.

When it becomes operative in a city, Act No. 260 consolidates the existing independent justices' courts into one tribunal, names it the common pleas court, changes the names of the judicial officers to judges, co-ordinates the work under the direction of a presiding judge, and establishes the practice and procedure in certain respects. It does not legislate the justices of the peace out of office, but they continue as judges of the common pleas court to the end of their terms; and, except as otherwise specially provided in the act, the qualifications, terms of office, time and manner of election, compensation, jurisdiction, powers and duties of the judges, and the practice and procedure of the court, are made determinable by the laws, general and local, governing justices of the peace and their courts in such cities. Substantially, the departures from such laws are pertinent to the organization and operation of

a unified court. The keynote of the act, as expressed in the title and maintained in the body, is consolidation of existing courts. Under the authorities, it must be held that the act continues the justices' courts under another name and form and does not create a new court. See *Attorney General, ex rel. Hooper,* v. *Loomis,* 141 Mich. 547; *People, ex rel. Smith,* v. *City of Aurora,* 78 Ill. 218; *State, ex rel. Stanton,* v. *Powell,* 109 Ohio St. 383 (142 N. E. 401); *Worthington* v. *London Guarantee & Accident Co.,* 164 N. Y. 81 (58 N. E. 102); *Johnson* v. *State,* 59 N. J. Law, 535 (37 Atl. 949, 39 Atl. 646; 38 L. R. A. 373). In the latter case it was said:

"A court consists in its jurisdiction and functions, and not its title or name."

May the legislature abolish the office of justice of the peace *eo nomine* and create such a consolidated court as is here provided?

We are not concerned with the cases relied on by plaintiff, holding that a justice of the peace is a constitutional officer who cannot be legislated out of office, as Act No. 260 makes no such attempt.

By mandatory language, the Constitution requires the establishment of a Supreme Court, circuit courts, probate courts, and justices of the peace in organized townships. These commands emphasize the permissive character of Constitution, art. 7, § 15:

"The legislature may provide by law for justices in cities."

Under the Constitution of 1850, article 6, § 17, the provision read:

"The legislature may increase the number of justices in cities."

Because of this language, and the fact that the legislature could not establish other courts than those named in the Constitution, except municipal courts, it may have been necessary, under the Constitution of 1850, to establish justices' courts in cities in order to complete the exercise of the judicial power of the State. *Allor* v. *Wayne County Auditors,* 43 Mich. 76, 100. But the necessity no longer exists, as the present Constitution, article 7, § 1, authorizes the legislature to establish, by general law, "other courts of civil and criminal jurisdiction, inferior to the Supreme Court." This, with the change in wording in the provision for justices in cities, clearly permits the legislature to provide for courts in cities by means of justices of the peace or otherwise, at its discretion.

The Constitution, article 7, § 16, provides:

"SEC. 16. In civil cases, justices of the peace shall have exclusive jurisdiction to the amount of one hundred dollars, * * * with such exceptions and restrictions as may be provided by law."

In contending that this section prohibits the legislature from taking such exclusive jurisdiction from justices and vesting it in other courts, counsel does not give force to the exception. The legislature, from early days, has evidenced its understanding that the exception is effective by enacting laws circumscribing the jurisdiction of justices and conferring on other courts original jurisdiction in cases involving less than $100. The power has been sustained by this court. *Milroy* v. *Mining Co.,* 43 Mich. 231; *Detroit Lbr. Co.* v. *Auxiliary Yacht "Petrel,"* 153 Mich. 528.

The Constitution does not prohibit the legislature from establishing new courts in cities and vesting in them the jurisdiction of justices of the peace.

Much less does it restrain the legislature from continuing jurisdiction in the same court under another name and form.

It is contended that Act No. 260 is merely amendatory of local acts governing justices' courts in the city of Detroit; therefore, is itself local (*Attorney General, ex rel. Cotter,* v. *Lindsay,* 221 Mich. 533); and is invalid without a referendum (Constitution, article 5, § 30).

The *Lindsay Case* involved Act No. 364, Pub. Acts 1921, amending Act No. 369, Pub. Acts 1919, which was "An act to supplement existing laws providing for the establishment and maintenance of municipal courts of record," etc. The "existing laws" were local acts. Act No. 369 was tied to them in an amendatory character by the word "supplement." Moreover, it contained an express referendum clause. Construed as merely amendatory of local acts, it was held local.

The act at bar is independent and general in form, not amendatory or supplementary in language, and operates alike on existing and future courts established under general or local law. Of course, it has an amendatory effect upon local acts, and may upon general law, in the respect that, because of inconsistency, it may modify or repeal their provisions. But this does not stamp it as amendatory in a constitutional sense. *People, ex rel. Drake,* v. *Mahaney,* 13 Mich. 481; *People* v. *Stimer,* 248 Mich. 272 (67 A. L. R. 552). If it did, the legislature would be without power to give full effect to general law governing matters already covered by local laws without a favorable referendum in all districts having such local laws. The *Lindsay Case* cannot be given such effect; nor does the Constitution so restrain the legislature.

If Act No. 260 applied only to the city of Detroit, it would not be difficult to consider it as purely amendatory of a local act. However, as it is general in application, it is to be visualized as leaving local laws untouched until certain conditions occur, upon which it supersedes them in some respects. Taking the courts as established under local acts, it superimposes a new organization, by consolidation, through law applicable alike to all cities which come within its terms. If it is otherwise a general law, Act No. 260 cannot be considered local as amendatory in character of local acts.

Plaintiff also urges that Act No. 260 is a local act because the standard of population adopted by it renders it applicable only to the city of Detroit.

The act is unlike that under consideration in *Mulloy* v. *Wayne County Bd. of Supervisors,* 246 Mich. 632, in that it has an open end through which cities are automatically brought within its operation when they attain the required population.

It differs from the act treated in *Attorney General, ex rel. Dingeman,* v. *Lacy,* 180 Mich. 329, where there was no showing of necessity or advisability, and in which it was held that population had no such reasonable relation to the object of the law as to justify classification upon it, because the city of Detroit presented no problems of domestic relations, except frequency, different from other communities. Here, population is of the essence of the condition sought to be corrected. Growth of population causes increase of litigation and requires more judges to handle it. When the litigation becomes burdensome, its proper disposal requires co-operation among the judges. A few will agree together better than many. And, as was shown by the testimony, the mass of litigation may become so great that even voluntary

co-operation would not solve the problem. It is not for the court to say whether the conditions render a remedy imperative nor what the remedy should be. These are legislative questions. It appearing that there is a reasonable relation between population and the object of the law, the act, general in form, must be held general within the Constitution. *People* v. *Brazee,* 183 Mich. 259 (L. R. A. 1916 E, 1146); *Burton* v. *Koch,* 184 Mich. 250; *Hayes* v. *Auditor General,* 184 Mich. 39; *Grinnell Bros.* v. *Moy,* 230 Mich. 26; *Dunne* v. *Railway Co.,* 131 Mo. 1 (32 S. W. 641); *State* v. *Ames,* 91 Minn. 365 (98 N. W. 190); *In re Church,* 92 N. Y. 1; *Bingham* v. *Bd. of Supervisors of Milwaukee County,* 127 Wis. 344 (106 N. W. 1071); *Cooper* v. *Rollins,* 152 Ga. 588 (110 S. E. 726, 20 A. L. R. 1105); *Mortland* v. *State, ex rel. Christian,* 52 N. J. Law, 521 (20 Atl. 673); 12 C. J. p. 1134.

It is urged that Act No. 260 deprives the city of Detroit of the right to regulate its minor courts and violates the home-rule principle of the State. We are cited to no constitutional provision which suggests such principle as a restriction on the power of the legislature to establish or consolidate courts having jurisdiction over other than inhabitants of the city. Such courts are not solely of municipal concern but are instrumentalities for exercise of sovereign power and of such interest to the whole State that, in the absence of express constitutional limitation, the legislative power cannot be subordinated to local considerations or authority.

Act No. 260 is valid, and the judgment of the circuit court denying mandamus is affirmed.

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

PEOPLE v. CROFOOT.

1. CRIMINAL LAW—ASSAULT WITH INTENT TO RAPE—INSTRUCTION—ALIBI.

In prosecution for assault with intent to rape, requested instruction that, where testimony is directly conflicting and both versions as given cannot be true, and there is reasonable doubt as to which story is true, it is jury's duty to accept that version which is consistent with innocence of defendant, should have been given, or instruction equally informative, where evidence supporting defendant's *alibi* and improbabilities disclosed by testimony of prosecutrix made requested instruction peculiarly applicable.

2. SAME—ALIBI—REASONABLE DOUBT.

If testimony supporting *alibi* accomplishes no more than to create reasonable doubt, defendant is entitled to acquittal.

Error to Allegan; Cross (Orien S.), J. Submitted October 16, 1930. (Docket No. 151, Calendar No. 34,845.) Decided April 14, 1931.

Alton Crofoot was convicted under an information charging assault with intent to rape and assault and battery. Reversed, and new trial granted.

*Leo W. Hoffman* and *Clare E. Hoffman* (*Carl E. Hoffman,* of counsel), for appellant.

*Wilber M. Brucker,* Attorney General, and *Harry Pell,* Prosecuting Attorney, for the people.

WIEST, J. A new trial should be granted in this case.

Defendant requested the following instruction:

"Where the testimony is directly conflicting and both versions, as given to you, cannot be true, and

there is reasonable doubt as to which story is true, it is your duty to accept that version which is consistent with the innocence of the defendant."

The instruction was refused and nothing equally informative given. The instruction should have been given. If the testimony supporting an *alibi* accomplished no more than to create a reasonable doubt, defendant was entitled to acquittal. *People* v. *Marvill,* 236 Mich. 595; *People* v. *Miller,* 250 Mich. 72. The court gave the usual instruction, relative to presumption of innocence and the burden of establishing defendant's guilt beyond a reasonable doubt, but did not mention the claimed *alibi,* or the effect of testimony in support thereof if it created no more than a reasonable doubt. The requested instruction stated a familiar principle of law involving a substantial right of defendant and not met in this instance by the general instruction given. The evidence, supporting defendant's *alibi,* and the improbabilities disclosed by the testimony of the woman made the requested instruction peculiarly applicable.

The charge here involved is one easily made, if mere opportunity to commit the offense is afforded, and it is hard to disprove unless an *alibi,* supported by credible testimony, is accorded serious consideration or the testimony of the alleged victim discloses improbabilities. It is claimed that the assault was made during an intermission at a Saturday night dance. Several persons present at the dance testified that defendant did not leave the dance hall during the intermission. The woman was of mature years and we may assume possessed ordinary instincts and sensibilities. She claims that defendant, under pretense of wanting to talk with her privately, induced her to enter his automobile

and then drove away from the dance hall, and, alongside of the public road, threw her to the ground, and, while he was trying to force her and had struck her in the face, another automobile came along and she made no outcry because she feared that the occupants might be intoxicated. After the alleged assault she again entered his automobile, noted the time of night by her watch, and, upon renewal of his solicitation, she got out and then got in the automobile again and returned with him to the dance hall, where she showed a bruise on her face to a girl friend and later went home, and the next day, and for the first, told the hired man of the assault and asked him to go with her to look up evidence in an intended suit against defendant for damages. Later she went to one of the attorneys, now representing defendant, and he very properly sent her to the prosecuting attorney. At the trial this attorney was subjected to some unmerited criticism harmful to defendant.

The conviction should be reversed, and a new trial granted.

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

NORTH, J. (*concurring*). Under the particular facts involved in this case, and in view of the circumstances under which the complaint was made and the subsequent testimony given, I concur in reversal.

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

*In re* NEWBROUGH.

1. RECEIVERS—PUBLIC SALE.

"Public sale," under 3 Comp. Laws 1929, § 15355, is synonymous with "public auction" under section 15354.

2. SAME—NOTICE—SALE OF ASSETS—STATUTES.

Where sale by receiver of assets of insolvent corporation was at private sale, and was so treated by the court, 3 Comp. Laws 1929, § 15355, providing for 14 days' notice of public sale, was not applicable.

3. SAME—WAIVER.

Where no objection was made at hearing that notice of confirmation of sale was insufficient under 3 Comp. Laws 1929, § 15355, the point was waived.

4. SAME—CORPORATIONS—ADVERTISING SALE—CONFIRMING SALE—ABUSE OF DISCRETION.

Where confirmation of sale of corporation's assets by receiver was objected to by certain stockholders on ground that sale was not properly advertised, but no constructive criticism was offered, trial court did not abuse its discretion in holding advertising sufficient, especially where sale was private, in which case advertisement is not required by law.

5. SAME—ADEQUACY OF PRICE.

Where there appears to be no possibility of new sale of assets at sufficient price to pay all debts and leave balance for stockholders, objection by certain stockholders that sale price is inadequate is without much force.

6. SAME—CONFIRMING SALE—ABUSE OF DISCRETION.

Where stockholders objecting to confirmation of sale of corporation's assets by receiver on ground of inadequacy of price gave no assurance to court that other bids would be secured, court did not abuse its discretion in confirming sale, especially where value was not so inadequate as to shock conscience of court.

7. CORPORATIONS—DISSOLUTION—REVIVING CORPORATION—STATUTES.
   3 Comp. Laws 1929, § 15325, providing that court may vacate order of dissolution and revive corporation is inclusive in its terms, and is applicable to dissolution proceedings under section 15310.

8. SAME—PETITION FOR RETURN OF ASSETS—HEARING DISCRETIONARY.
   Under 3 Comp. Laws 1929, § 15325, hearing on petition for return of assets to corporation is not matter of right, but court, if such petition shall be deemed sufficient, may make an order for hearing thereon, so that hearing, as well as return of property, is discretionary.

9. SAME—ABUSE OF DISCRETION.
   Refusal of court to grant hearing on petition for return of assets to corporation (3 Comp. Laws 1929, § 15325), was not abuse of discretion, where petition was filed day before time set for confirmation of sale of its assets and upon which hearing was not moved until after sale had been confirmed and closed.

10. SAME—DISSOLUTION—REVIVING CORPORATION.
    When corporation is dissolved by order of court, creditors may rely upon estate being liquidated in orderly manner and their participating in residue, and it would be abuse of discretion to permit stockholders to further hazard its property without consent of creditors or their immediate insurance against loss.

11. SAME—PETITION FOR REVIVAL—HEARING ON PETITION—ABUSE OF DISCRETION.
    Where petition by certain stockholders for return of assets to corporation (3 Comp. Laws 1929, § 15325), filed after receiver's sale, failed to allege such assurance of successful reorganization with security to creditors as would have justified the court in granting it, there was no abuse of discretion in denying hearing thereon.

    WIEST and MCDONALD, JJ., concurring in part.

Appeal from Ingham; Carr (Leland W.), J. Submitted April 14, 1931. (Docket No. 88, Calendar No. 35,599.) Decided April 22, 1931.

In receivership proceedings of the New Way Motor Company, a corporation, William E. McNamara and others filed objections to confirmation of receiver's sale of certain assets and petitioned for return of assets to corporation. Objectors and petitioners appeal from orders denying relief sought. Affirmed.

*Pierce & Planck,* for appellants.

*Shields, Silsbee, Ballard & Jennings,* for receiver-appellee.

*Kelley, Sessions & Warner,* for purchaser-appellees.

FEAD, J. April 24, 1930, on petition of a majority of the board of directors, filed March 7th, under 3 Comp. Laws 1929, § 15310 *et seq.,* the New Way Motor Company, a corporation engaged in the manufacture of small gasoline engines at Lansing, was decreed dissolved and a permanent receiver appointed. Certificate of dissolution was filed with the secretary of State May 9th.

October 3d, on petition of the receiver, the court gave him leave to sell the assets at private or public sale, at his discretion, subject to confirmation by the court. November 25th he reported a bid of $75,000 cash and assumption of $32,740.09 real estate taxes, for all the assets except cash, bills and accounts receivable, made by three indorsers of the corporation notes to banks, acting for themselves and other indorsers. The court ordered hearing December 10th on acceptance or rejection of the bid, and directed the receiver to give ten days' mail notice of hearing to stockholders and creditors and to advertise for additional bids, and "that such addi-

tional bids may be considered by the court at the time of said hearing." Notices were mailed November 26th.

Claims were allowed December 9th. On the same day, a group of ten stockholders, holding over 55 per cent. of the stock, filed a petition, under 3 Comp. Laws 1929, § 15325, setting up a proposed plan of reorganization and asking that the assets be returned to the corporation. December 10th a creditors' committee, representing over $70,000 of the $88,000 trade claims, filed consent to the plan of reorganization, if it should be approved by the court and the property returned to the corporation. The committee was authorized by the creditors to consent to reorganization on condition that the corporation be continued as a going concern, with a reasonable amount of working capital to permit of increasing volume and earnings. December 10th the group of stockholders filed objections to confirmation of the sale of assets on the grounds of inadequacy of price, failure of the receiver to properly advertise the sale, and pendency of the petition for return. No objections to confirmation were presented by creditors.

Hearing was had December 10th, considerable testimony was taken of the value of the property, the advisability of accepting the bid, and the status of the reorganization plan. Continuances were had from day to day, until December 15th, to permit the objecting stockholders to file a bond assuring an equal or larger bid within 60 days. The bond not being filed, and counsel for objectors announcing they had decided not to submit a bond, the court made an order confirming the sale on December 16th. There was no claim that objectors were financially unable to give the bond.

December 26th present counsel for appellants came into the case and filed a motion to set aside the order confirming sale and for a hearing on the petition for return of assets to the corporation. January 2, 1931, the motion was denied. The group of stockholders and two members of the creditors' committee have appealed from the orders of December 16th and January 2d.

The value of the assets was problematical, especially in view of the business depression. There was testimony that the bid was fair under the conditions. The bidders had a reorganization plan in which they valued the property at $250,000. Appellants' estimates were between $500,000 and $600,000. Upon the testimony a specific finding of value would be largely a guess. Possibly the property would be worth appellants' estimates to an established and profitable concern, while as a basis of a corporation which requires capitalization from the public and development of a paying business the bidders' valuation might not appear ultraconservative. The debts were, in round numbers, personal taxes of $14,000, real estate taxes, $32,700, general trade claims, $88,000, bank loans indorsed by the bidders and their associates, $121,000, a total of $256,000.

Appellants contend the 13 days' notice of confirmation of sale was insufficient because 14 days' notice of public sale is required under 3 Comp. Laws 1929, § 15355. "Public sale" under that section is synonymous with "public auction" under section 15354. While sale on bids may sometimes be equivalent to a public sale or auction (*In re Nevada-Utah Mines & Smelters Corp.*, 198 Fed. 497; *Dulin* v. *National City Bank* [Ind. App.], 130 N. E. 426), the sale here was private and was so treated by the court in the proceedings. Moreover, the point was

waived by appellants because not made at the hearing.

Appellants contend the sale was not properly advertised, both in extent of territory and in failing to set up the attractive features of the property. The receiver testified he previously had pursued all opportunities to interest buyers. There was no claim of bad faith on his part. The sale was advertised several times in two Detroit, one Chicago, and two Lansing daily papers. Appellants did not suggest a paper or locality in which the receiver could have advertised with a greater probability of attracting prospective purchasers than through the mediums he used. Upon such matters, mere complaint is not sufficient. Criticism should be constructive and enable the court to determine whether other methods were likely to have produced better results. Both because of this and because the advertisement was not required by law for private sale but was done in obedience to the order of court, we cannot say the court abused its discretion in holding it sufficient.

Appellants further contend the sale price was inadequate. In circuit court, this objection was made only by the group of stockholders, who would lose nothing by sale at a low price and who apparently could not be benefited by a new sale because there appeared to be no possibility of a sale at sufficient price to pay all the debts and leave a balance for stockholders. This impaired the force of the objection.

Estimates of the value of manufacturing plant property, of an unsuccessful and dissolved corporation, in hard times, are more or less theoretical. Drastic losses on receiver's sale of such property are common, if not universal. There was pointed

out no possible outside market for the property. Purchasers reasonably could be looked for only among creditors or stockholders interested in avoiding loss, by purchasing at a figure which would enable them to recoup. Of such were the bidders at bar. Appellants' witnesses were able to name no possible or prospective other buyers. A chance for sale elsewhere was purely speculative. Mere estimates of value cannot prevail against the facts of the situation, especially the fact that the appellants did not care to themselves assume the risk of being required to purchase the property at the bid price. The hazard of a new sale, had the bid been refused and not renewed by the same parties, was too great to require the court to refuse confirmation without some assurance from appellants for the protection of creditors. It cannot be said the court abused its discretion, nor, under the situation, that the value was so inadequate as to shock the conscience of the court.

It is a fair inference from the record that the foregoing objections to the sale were urged by appellants, principally as a leverage to move the court to grant the petition to return the property to the corporation. This presents the real issue.

The court may vacate an order of dissolution and revive a corporation. 14A C. J. p. 1133. 3 Comp. Laws 1929, § 15325, is inclusive in its terms, and, we think, is applicable to dissolution proceedings. Under it, hearing on petition for return of assets is not a matter of right, but the court, "if such petition shall be deemed sufficient, may make an order for a hearing thereon." The hearing, as well as the return of property, is discretionary. It is hardly necessary to suggest that it is not an abuse of discretion to refuse to grant a hearing on such a peti-

tion filed the day before the time set for confirmation of sale of assets and upon which hearing is not moved until after the sale has been confirmed and closed.

Nor was the petition sufficient. It alleged that the stockholders desired to reorganize the corporation by selling for cash class A stock in the amount of $175,000; to give trade creditors class B stock in lieu of their claims; to distribute class C stock to present stockholders; and that trade creditors, to the amount of $75,000, had accepted the plan. The plan contemplated a working capital of over $100,000, and would carry into the reorganization $156,000 of the present debts, consisting of $13,000 current liabilities (evidently trade creditors who had not agreed to take stock for their claims), $21,000 taxes, and $121,000 bank loans. The petition did not allege that any part of the new stock had been subscribed, actually or tentatively, even by the petitioning stockholders, nor indicate how or to whom it could be sold. It alleged an expectation, but no promise, that the banks would defer their loans, but did not suggest how release of the present indorsers therefrom was to be obtained. Aside from the trade creditors' conditional consent to reorganization, the petition alleged nothing definitely done toward success of the plan. To a considerable extent the matter was gone into on the hearing on confirmation of sale and the testimony gave no aid to the petition.

There had been time and opportunity to make a concrete showing. The testimony was that, for a time, some of the petitioners had been working in conjunction with the indorsers on reorganization. That relation had ceased and petitioners knew, about August 18th, that the indorsers' plan contemplated

no participation by or benefit to the old stock. Thereafter they had opportunity to present their own plan to stockholders and others and make at least a showing of progress which would justify a grant of further time, if not of immediate return of assets.

The property may be returned to the corporation, under the statute, only in the exercise of sound judicial discretion. When a corporation is dissolved by order of the court, creditors may rely upon the estate being liquidated in an orderly manner and their participating in the residue. It would be an abuse of discretion to permit the stockholders to further hazard the property without consent of the creditors or their immediate insurance against loss, at least to the extent of what they would receive on regular liquidation.

The petition failed to allege such assurance of successful reorganization with security to creditors as would have justified the court in granting it. Consequently, there was no abuse of discretion in denying hearing thereon.

The orders are affirmed, with costs.

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

WIEST, J. (*concurring*). I concur in affirmance, reserving, however, opinion upon the mentioned statute (3 Comp. Laws 1929, § 15325) until it is before the court in a case requiring decision thereon. This I do not consider such a case.

McDONALD, J., concurred with WIEST, J.

## PRINGLE *v.* MORTON SALT CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPLICABILITY OF ACT.

Decision in *Thomas* v. *Morton Salt Co.*, 253 Mich. 613, holding that workmen's compensation act is applicable, and denying right to maintain action at law, is controlling of instant case.

Certiorari to Department of Labor and Industry. Submitted June 5, 1930. (Docket No. 44, Calendar No. 34,838.) Decided April 24, 1931.

Wilmot E. Pringle and another presented their claim against Morton Salt Company for accidental injuries resulting in the death of their son, Harold James Pringle, and later attempted a discontinuance of same, and commenced action at law. From the award made, plaintiffs bring certiorari. Affirmed.

*Stewart & Black,* for plaintiffs.

*Cady & Pepper,* for defendant.

CLARK, J. Plaintiffs as dependents of a deceased employee, their son Harold James Pringle, bring certiorari to review an award in their favor against defendant employer and its insurer.

*Thomas* v. *Morton Salt Co.*, 253 Mich. 613, negatives right to recover damages for injuries resulting in the death of Harold James Pringle in an action at law by representative of the deceased employee against defendant employer and sustains right to award of compensation. The award is affirmed.

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

DEFFENBAUGH *v.* INTER-STATE MOTOR FREIGHT CORPORATION.

1. NEW TRIAL—INADEQUATE VERDICT—DISCRETION.
   Court has discretion to grant new trial where, in view of evidence, verdict is inadequate.

2. SAME—INADEQUATE VERDICT PROPERLY SET ASIDE—DAMAGES.
   Where, in personal injury case, evidence showed that plaintiff received very serious injuries, verdict of $5,000 was properly set aside as inadequate.

3. EVIDENCE—INSURANCE—MOTOR VEHICLES.
   In action for personal injuries received in automobile accident, evidence that defendant carried insurance is inadmissible.

4. APPEAL AND ERROR—EVIDENCE—INSURANCE—MOTOR VEHICLES.
   Where, in action for personal injuries received in automobile accident, in cross-examining defendant's witness, plaintiff's counsel asked proper question, answer thereto indicating that defendant carried insurance was not reversible error.

5. SAME—SUPREME COURT ASSUMES THAT JURY FOLLOWED INSTRUCTIONS.
   Supreme Court assumes that jury followed instructions of trial court to entirely disregard fact that defendant carried automobile insurance, unintentionally brought into case on cross-examination.

6. SAME—NEW TRIAL—EXCESSIVE VERDICT—SAVING QUESTION FOR REVIEW.
   Whether trial court erred in denying motion for new trial on ground that verdict was excessive is not open to review, where no reasons were filed by court for overruling motion and none were requested.

ON REHEARING.

7. DAMAGES—EXCESSIVE VERDICT.
   Verdict of $35,000 for injuries to young man 21 years of age, which resulted in permanent mental and physical impair-

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On excessiveness of verdicts in actions for personal injuries other than death, see annotation in L. R. A. 1915F, 30.

Excessiveness of verdicts in actions for personal injuries causing paralysis, see annotation in 46 A. L. R. 1250, 1255, 1282.

ment, may not be said to be excessive, where it is well within the evidence.

WIEST and CLARK, JJ., dissenting.

Error to Wayne; Webster (Arthur), J. Submitted October 17, 1930. (Docket No. 110, Calendar No. 35,274.) Decided January 23, 1931. Resubmitted February 27, 1931. Decided April 23, 1931.

Case by George Deffenbaugh against Inter-State Motor Freight Corporation, a Michigan corporation, for personal injuries received in an automobile collision. Judgment for plaintiff. Defendant brings error. Affirmed.

*Joseph A. Bloom* (*Walter M. Nelson,* of counsel), for plaintiff.

*Stevens T. Mason* and *Mason, Alexander & McCaslin,* for defendant.

McDONALD, J. This suit was brought to recover damages for injuries received in an automobile collision which occurred on the highway, US–16, near Webberville, Michigan. The plaintiff was a minor at the time of the accident. He was a student at the College of the City of Detroit and a member of a debating team which was in charge of Preston H. Scott, professor of dramatics and public speaking. On March 14, 1928, Professor Scott took the team in his automobile to Lansing, where they were engaged to debate with a team of the Michigan State College. On the way back to Detroit, Professor Scott was driving. The plaintiff sat in the front seat beside him. The defendant's truck was coming toward them from the east. The plaintiff claims that, as the vehicles neared each other, the truck

suddenly swerved to the left directly in the path of the car in which he was riding. A collision followed, in which the plaintiff was seriously and permanently injured.

It is the defendant's claim that, as the automobile in which the plaintiff was riding approached, it was weaving back and forth over the center line of the road, and, just as it neared the truck, suddenly made a sharp turn to the left over to the north side and into the path of the truck.

These issues were submitted to the jury in a proper charge and the plaintiff received a verdict of $35,000. A motion for a new trial was refused. Judgment was entered on the verdict and the defendant has brought error.

The case has been tried twice. In the first trial, the plaintiff recovered a verdict of $5,000. On motion, the court set the verdict aside on the ground that it was grossly inadequate. This is the second trial.

The defendant claims error:

1. In setting aside the verdict of $5,000 in the first trial.
2. In admitting testimony showing that the defendant was insured.
3. In denying defendant's motion for a new trial on the ground that the verdict was excessive.

1. Did the court err in setting aside the verdict in the first trial?

On entering the order in the first trial, the defendant applied to the Supreme Court for a writ of mandamus to compel the circuit judge to set it aside. An order to show cause was denied. In reviewing the subsequent verdict and judgment, the defendant has assigned error on the order of the circuit judge in the previous trial. If in the circumstances it may

be assumed the question is properly in this case for review, we must hold it to be entirely without merit. The granting of a new trial rests in the judicial discretion of the trial court. If in view of the evidence it appears that the verdict is inadequate, he may set it aside on his own motion or on motion of a party.

"The trial court has discretionary power in a personal injury case to set aside the verdict rendered, and order a new trial, of its own motion, if it deems the award insufficient." *Fort Wayne & Belle Isle R. Co.* v. *Wayne Circuit Judge,* 110 Mich. 173 (syllabus).

In the instant case, considering the very serious injuries which the plaintiff sustained, the verdict of $5,000 was insufficient. The trial court rightly exercised his discretion in setting it aside and granting a new trial.

2. Was it error to admit testimony tending to show that defendant carried insurance?

This testimony was not admitted. It just came in without suggestion of counsel and without opportunity by the court to reject it. Ernest A. Sinclair was sworn and examined in behalf of the defendant. He had not been a witness on the previous trial, and, on cross-examination, plaintiff's counsel sought to find out why. The witness said they wanted him to come before, but he was working and could not come.

"*Q.* Who wanted you to come down before?

"*A.* I can't recall the lawyer's name.

"*Q.* Mr. Mason or Mr. Frost or Mr. Davison or Mr. Alexander?

"*A.* Some of the insurance lawyers. * * *

"*Mr. Mason:* If the court please, what has this developed about insurance lawyers?

"*Mr. Nelson:* He did it; I didn't know what it was."

The question asked by counsel was proper cross-examination. It did not suggest insurance, and counsel was not to blame that the witness answered in that way. Experience in the trial of these cases shows that the question of insurance very frequently gets before the jury in spite of court and counsel. While always it should be excluded, the present day decisions are against holding it to be reversible error unless it is deliberately injected into the case and improperly used by counsel. In *Morris* v. *Montgomery,* 229 Mich. 509, this court said:

"The time has come when probably a majority of persons on every jury own automobiles and the policy of carrying insurance is so common that it is not surprising if jurors sense the fact. The rule of exclusion, perhaps, ought to continue, even though every day affairs have moved beyond its original reason, but it ought not to be employed to set aside judgments except in cases of flagrant violation."

And in *Sutzer* v. *Allen,* 236 Mich. 1, it was said:

"It has now become common knowledge that people owning automobiles have them insured, and because that fact in a particular case reaches the ears of the jury during the trial, it is no longer reversible error unless an improper use is made of it by counsel for the evident purpose of inflaming the passions of the jury and thereby increasing the size of the verdict."

Nothing of that kind happened in the instant case. The matter of insurance was not again referred to during the trial except when the court charged the jury that they must disregard it entirely. This court will assume that they followed his instructions. Its presence in the case does not constitute reversible error.

3. Did the court err in refusing a motion for a new trial on the ground that the verdict was excessive?

This assignment is not here for review. No reasons were filed by the court for overruling the motion. None were requested. Time and again we have held that, to save this point for review, reasons must be filed. In *Groat* v. *Railway,* 153 Mich. 165, 169, we said:

"A motion for a new trial was made, which included as one of the reasons why the verdict should be set aside, that it was excessive. No request was made of the trial court to file reasons for overruling the motion, and none were given. This court has repeatedly held that it cannot in such case consider error assigned upon such refusal."

See *Moerman* v. *Clark-Rutka-Weaver Co.,* 145 Mich. 540; *Campbell* v. *Haughton Elevator & Machine Co.,* 233 Mich. 157.

No other questions merit discussion. The judgment is affirmed, with costs to the plaintiff.

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

WIEST, J. (*dissenting*). I think the damages excessive, and the motion for a new trial on that ground should have been granted.

The judgment should be reversed, and a new trial granted, with costs to defendant.

CLARK, J., concurred with WIEST, J.

ON REHEARING.

MCDONALD, J. Yielding to the insistence of counsel for defendant, we have considered on rehearing

their contention that a verdict for $35,000 in this case is excessive. At the time of the accident, the plaintiff was about 21 years of age and was preparing to enter the law profession. He was in excellent physical and mental condition. Immediately following the accident, he remained unconscious for approximately 30 days. The injuries brought about a complete change in his personality and mentality, caused partial paralysis of his right side, impaired his speech, sight, and hearing and rendered him incapable of any sustained physical or mental effort. Eminent specialists who were called to testify gave it as their opinion that his mental and physical impairment was permanent. The record justifies an award of very substantial damages. In *Fishleigh* v. *Railway Co.*, 205 Mich. 145, many cases are cited in which large verdicts have been affirmed. This verdict is large, but we think it is well within the evidence.

The judgment is affirmed.

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

WIEST, J. I adhere to my former opinion.

CLARK, J., concurred with WIEST, J.

## HARKER *v.* BUSHOUSE.

1. MOTOR VEHICLES—VOIR DIRE EXAMINATION—INSURANCE—JURIES.
   In action for injuries received in automobile accident, unless question of insurance is brought into case on *voir dire* for purpose of influencing jury, it is not reversible error.

2. SAME—GOOD FAITH.
   Error will result if question in regard to insurance is not asked in good faith.

3. CONSTITUTIONAL LAW—STATUTES—CONSTITUTIONAL JUDICIAL POWER MAY NOT BE INTERFERED WITH.
   The legislature may not interfere with the judicial power vested in courts by State Constitution.

4. SAME—INSURANCE—MOTOR VEHICLES.
   In so far as subdivision 6, § 33, chap. 2, pt. 3, Act No. 154, Pub. Acts 1929, prohibiting any reference to insurance in action at law for damages, attempts to control judicial power, it is void, since naming insurance company may become necessary on *voir dire*.

5. MOTOR VEHICLES—VOIR DIRE EXAMINATION—JURIES—INSURANCE.
   In action for injuries received in automobile accident, plaintiff has right to ascertain on *voir dire* whether any members of jury belong to mutual automobile insurance company in which defendant is insured, but proper method of interrogating jury should be followed.

6. SAME—APPEAL AND ERROR.
   Interrogating jury on *voir dire* as to whether they were members of mutual automobile insurance company was not error, where question was propounded in correct form, there was no studied effort to repeat it, and question of insurance was not again referred to during trial.

7. SAME—EVIDENCE—CONSEQUENTIAL DAMAGES—CONSORTIUM.
   In action for injuries received in automobile accident, admission of evidence tending to show that plaintiff lost his home and the society and companionship of his wife as result of his injuries was error, where no consequential damages were set forth in declaration.

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On right of husband to recover for loss of consortium through personal injury to wife, see annotation in 33 L. R. A. (N. S.) 1042; L. R. A. 1915D, 524.

8. HUSBAND AND WIFE—CONSORTIUM.
Since the passage of married woman's act, neither husband nor wife may recover for loss of consortium in this State.

9. EVIDENCE—PERSONAL INJURIES—NEGLIGENCE—APPEAL AND ERROR.
In personal injury case, evidence as to immaterial and collateral matters which tends to show plaintiff's poverty and enlist sympathy of jury should be excluded.

10. APPEAL AND ERROR—HARMLESS ERROR.
Where record shows that verdict was not enhanced by admission of improper testimony, judgment is affirmed, although it would have been reversed had it been for unduly large amount.

Error to Kalamazoo; Weimer (George V.), J. Submitted January 23, 1931. (Docket No. 118, Calendar No. 35,323.) Decided April 23, 1931.

Case by Paul Harker against John Bushouse and another for personal injuries received when struck by defendant's automobile. Judgment for plaintiff. Defendants bring error. Affirmed.

*Frank F. Ford,* for plaintiff.

*Jackson, Fitzgerald & Dalm* (*Pulver & Bush,* of counsel), for defendants.

BUTZEL, C. J. Plaintiff for over 20 years had been engaged in selling shirts, hosiery, and underwear, etc., to his customers at their respective homes and offices in the city of Kalamazoo. His earnings amounted to $1,300 a year.

Shortly after dark on the afternoon of February 6, 1929, upon alighting from a street car on his way home, at the corner of Westnedge avenue and Walnut street, plaintiff claims he looked in both directions before proceeding from the street car tracks to the sidewalk. As he was nearing the curb, he was struck by an automobile belonging to de-

fendant John Bushouse and driven by his 17-year old son, defendant Isa Paul Bushouse. According to the record, there seems to be but little doubt that plaintiff's injuries were sustained through the negligence of defendants. It was admitted that the car was old and the lights so dim that the driver could not see over 60 feet ahead. The brakes were applied, but failed to work properly. This was due to the speed at which the car was driven over the pavement, covered with ice. No contributory negligence was shown on the part of plaintiff. The jury rendered a verdict of $5,000 in his favor.

Questions of the admissibility of the evidence are solely presented in the assignments of error. It is claimed that the answers to improper questions, timely objected to, affected the verdict. Plaintiff at the time of the accident was 75 years of age. He was suffering from some infirmities, including a disability and stiffening of the hip joints, slowness of locomotion and then at times only with the aid of a cane. Nevertheless his general health was otherwise good and he was able each day to go about unassisted and walk a long distance in order to visit his customers. The record leaves little doubt as to the seriousness, painfulness, and permanency of his injuries. Several ribs were broken and his arm and wrist badly injured. He sustained compound comminuted fractures of both bones of the right leg just below the knee, and also other serious injuries resulting therefrom. He remained at the hospital for over five months, during a large part of which time he suffered very acute pain. In addition to the Roentgenologists, three physicians testified that plaintiff's condition was very serious. Two of them examined him shortly before the trial, almost a year after the date of the accident. They found that he was permanently disabled. At the time of the trial

he was only able with the aid of crutches to move about the floor of the house in which he lived. He needed the support of others to get about. He required help to dress and undress. His right hand has only about one-tenth of its former grip, due to the injury to the muscolo-spinal nerve. This may affect his use of crutches. The fracture of two ribs still caused him pain upon deep respiration or coughing. His right leg had almost ceased to function. It was very purple and swollen from the toes to the knee. The ankle joint could scarcely be moved and the leg seemed almost lifeless. The medical testimony indicates that amputation may become necessary. There is little doubt that plaintiff will continue to suffer severe discomforts, painful attacks, and possibly more serious consequences from his injuries. His earning capacity appears to be ended. The testimony shows that at the time of the trial his expectancy was 5.88 years. If the $1,300 he would have earned from the time of the accident up to that of trial, together with $759.42, the amount of the medical bills and hospital expenses, be added to the present worth of the expectancy, his financial loss would amount to $8,000 or thereabouts. This does not include any compensation for the extreme pain and suffering he endured and which may continue in an undetermined degree.

Defendants ask for reversal on two assignments of error, and that they be considered both separately and together so that if there is insufficiency in one, it may be supplemented by the other.

Upon the *voir dire,* the jury was asked whether they were members of the Citizens Mutual Insurance Company of Howell, Michigan. The question was at first improperly framed, but, after objection, propounded in correct form. There was no studied

effort to repeat it nor was the question of insurance again referred to during the trial. It is unfortunate that the question of insurance should arise so frequently in trials of negligence cases. Undoubtedly the question may be a very important one. It is well known that many automobile drivers carry liability insurance. Some companies in the conduct of their large businesses have many officers and employees, some of whom may be summoned for jury service. Shares of stock in some of the companies may be held by potential members of a jury. Mutual companies do a very large business and members thereof may be interested in the outcome of a case in which their company may be the real, though not the nominal, defendant. We have held in previous cases that if the question of insurance is not brought into the case on the *voir dire* examination for the purpose of influencing a jury, it is not reversible error. The entire question depends upon the good faith of counsel. *Church* v. *Stoldt,* 215 Mich. 469; *Reynolds* v. *Knowles,* 223 Mich. 70; *Morris* v. *Montgomery,* 229 Mich. 509; *Sutzer* v. *Allen,* 236 Mich. 1; *Oliver* v. *Ashworth,* 239 Mich. 53. It, however, will result in error if a question in regard to insurance is not asked in good faith but for the purpose of inflaming or prejudicing the minds of the jury. *Holman* v. *Cole,* 242 Mich. 402; *Palazzolo* v. *Sackett,* 245 Mich. 97.

Subdivision 6, § 33, chap. 2, pt. 3, Act No. 154, Pub. Acts 1929 (3 Comp. Laws 1929, § 12460), refers to provisions required in certain policies. Beginning with the twenty-second line of this section, it is provided as follows:

"In such original action, such insurance company, or other insurer, shall not be made, or joined as a party defendant, nor shall any reference whatever

be made to such an insurance company, or other insurer, or to the question of carrying of such insurance during the course of trial."

We need not discuss the constitutional objection raised that this quoted provision is in no way referred to in the title of the act, nor need we consider whether it applies to the present case. We have repeatedly held that the legislature may not interfere with the judicial power vested in the courts by the Constitution of this State. *People, ex rel. Atty. General,* v. *Holschuh,* 235 Mich. 272; *Bielecki* v. *United Trucking Service,* 247 Mich. 661; *People* v. *McMurchy,* 249 Mich. 147. The quoted provision as far as it attempts to control judicial power is void. The naming of an insurance company may become necessary on the *voir dire.* It would be better not to name it, and thus avoid the suspicion that it was done for the purpose of influencing or prejudicing the jury.

While we realize that in the present case the jury might have concluded from the question objected to that the Citizens Mutual Insurance Company of Howell, Michigan, was the real party defendant, we also are fully appreciative of the fact that plaintiff should have the right of inquiry to ascertain on the *voir dire* whether any members of the jury belonged to this organization. Had the question of insurance been further stressed, there would have been error which we could not overlook. While we are constrained to hold that there was no error in asking the question on the *voir dire,* we nevertheless again call attention of counsel to the case of *Holman* v. *Cole, supra,* where a proper method of interrogating the jury in regard to insurance on the *voir dire* is set forth. We also might suggest to the trial judges who so frequently examine the jury on the

*voir dire,* that they might make a brief statement calling attention to the fact that some automobile drivers do and others do not carry insurance; that under no circumstances should it make any difference whatever as to the outcome of the case whether such insurance is carried or not; that the judge asks the question about to be put in every negligence case, and that he does not know, nor does the asking of the question signify, whether defendant carried insurance; that the law does not permit any further reference to be made to the subject during the trial of the case, but that the plaintiff has a right to know whether any of the members of the jury are officers, employees, or stockholders in any insurance company or members of any mutual insurance company. If, after asking the question, the answer is in the affirmative, further questions may follow and challenges made, if desired. If it is in the negative, the question is disposed of with finality. Such an action on the part of the trial judges should result in the further exclusion of all reference to insurance under penalty of a reversal of the case should counsel persist in again purposely referring to it. We do not believe that there was any error in permitting the question as propounded in the present case, though it might have led to difficulty if further referred to. As a rule there is no necessity of naming an insurance company.

The second assignment of error relates to the admission of testimony, as follows:

"*Q.* Now, after this accident, did you give up your home on Walnut Street?

"*A.* Yes sir.

"*Mr. Fitzgerald:* I object to that as immaterial and irrelevant. I suppose he was in the hospital as far as that is concerned.

"*Mr. Ford:* Well, we shall claim damages that this plaintiff has given up his home. He hasn't lived with his wife. It was a necessary result of this accident. He has been deprived of earnings. He has been unable to provide a home.

"*The Court:* You may take it.

"*Mr. Ford:* The court said you may answer that question. Read it, Mr. Reporter.

"*Mr. Fitzgerald:* I suggest that the loss of earnings, if such is the case, is quite a different thing from somebody else losing a home, or not having the accommodations—

"*The Court:* As I understand, physical pain and suffering, any inconvenience or annoyance, Mr. Fitzgerald, entailed by it.

"*Mr. Fitzgerald:* Of course, on the other angle, he is asking compensation for hospital bills, services for being taken care of. He ought not to be allowed both of them.

"*The Court:* Well, I suppose Mr. Ford has reference to the period since he left the hospital. I take it that is the purpose of this inquiry.

"*Mr. Ford:* Well, I didn't limit it to that. To be perfectly frank, my question—immediately after this accident and as a result of it.

"*The Court:* He went to the hospital.

"*Mr. Ford:* He went to the hospital, and by reason of his having no earnings since, he has had no home. A man can't have a home without earnings.

"*The Court:* Well, proceed.

"*Mr. Ford:* Read the question, Mr. Stenographer.

"(Question and answer read.)

"*The Court:* It may stand.

"*Q.* What was done with your household goods, Mr. Harker?

"*A.* We sold some of them.

"*Mr. Fitzgerald:* I object to that. May the objection also apply to that?

"*The Court:* I think the objection to this should be sustained. I don't see how this enters into any element of damages.

"*Q.* Have you lived with your daughter ever since this accident?

"*The Court:* He has already answered that.

"*Q.* Where has your wife been since the accident?

"*Mr. Fitzgerald:* I want to object to that as immaterial, irrelevant, and incompetent.

"*The Court:* You may take it.

"*A.* Part of the time, while I was in the hospital, my wife was with my daughter, but since I came out, she has been with my son at Milford, Michigan, near Pontiac."

This testimony was highly improper. When the answers to the questions objected to are considered in connection with the remarks interpolated by counsel and the answer given before an objection could be made, the jury necessarily were impressed with plaintiff's claim that the loss of his home, and the society and companionship of his wife resulted from his injuries. No consequential damages were set forth in plaintiff's declaration. Since the passage of the married woman's act, neither husband or wife may recover for the loss of consortium in this State. *Blair* v. *Seitner Dry Goods Co.,* 184 Mich. 304 (L. R. A. 1915 D, 524, Ann. Cas. 1916 C, 882). The evidence further tends to show plaintiff's poverty and thus enlists the sympathy of the jury. In an action for personal injuries, testimony as to such immaterial and collateral matters should be excluded, and particularly so if their sole purpose is to enlist the sympathy of the jury and affect the legitimate measure of damages. *McKormick* v. *City of West Bay City,* 110 Mich. 265; *Mortensen* v. *Brad-*

*shaw,* 188 Mich. 436; *Haynes* v. *Clark,* 252 Mich. 295; *Pennsylvania Co.* v. *Roy,* 102 U. S. 451.

There was error in not excluding the testimony hereinbefore quoted. Defendants, however, made no requests to charge so as to undo any harm that might have resulted. The improper testimony did not affect the general result of the trial for the negligence was proven beyond any question. The sole question before us is whether the admission of this improper testimony enhanced the amount of the verdict. Were it for an unduly large amount, we would set it aside. *Holman* v. *Cole, supra.*

In denying the motion for a new trial, the trial judge stated, in answer to the two assignments of error:

"Respecting the amount of the verdict, plaintiff's injuries were so serious, his suffering so constant and so great and of such duration, his expenses so large, his fixed, definite earning capacity so entirely destroyed; in fact, the resulting damages were so pronounced and undisputed that we do not need to look further to account for the amount of the verdict. On the question of damages the case was lopsided, so overwhelming was the testimony and so wholly undisputed. There is no occasion for any alarm that the *voir dire* examination or that that portion of plaintiff's testimony of which complaint is here made may have enhanced the verdict."

A careful reading of the record convinces us that the amount of the verdict was not enhanced by the improper testimony. It is wholly supported by proper evidence. For this reason alone, we affirm the judgment, with costs.

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

## THRALL *v.* PERE MARQUETTE RAILWAY CO.

1. MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK.

   Under Federal employers' liability act (45 USCA, §§ 51–59), it was duty of section foreman to report to railroad company defects in rails of track and in wheels of motor car, which were of long standing, and call for repairs, and by his failure to do so he assumed the risk incident to use in defective condition.

2. SAME—CONTRIBUTORY NEGLIGENCE.

   Section foreman who had heavy drill placed on rear of motor car with defective wheels, and who then directed car to be run backward over defective track, was guilty of want of due care for his own safety.

3. SAME—NEGLIGENCE.

   Since section foreman's own negligence does not relieve him from risks he had assumed, and risks so assumed may not be made basis of actionable negligence, recovery for his accidental death may not be had unless railroad company was negligent in some respect outside of risks assumed by him.

4. SAME—CONTRIBUTORY NEGLIGENCE.

   Contributory negligence on part of section foreman could not arise out of his acts alone.

5. SAME—ASSUMPTION OF RISK.

   Negligence of fellow servant is not within rule of assumed risk barring recovery and is within rule of contributory negligence not barring recovery under Federal employers' liability act.

6. SAME—COMPARATIVE NEGLIGENCE.

   If section foreman's death was caused in part by negligence of fellow servant, recovery might be had under Federal employers' liability act notwithstanding foreman was himself negligent and had assumed certain risks which contributed to accident, but in such case recovery could be had only for proportional amount bearing true relation to negligence attributable to both.

Error to Allegan; Miles (Fred T.), J. Submitted January 8, 1931. (Docket No. 65, Calendar No. 35,209.) Decided April 23, 1931.

Case under Federal Employers' Liability Act (45 USCA, §§ 51–59), by Alice A. Thrall, administratrix of the estate of William P. Thrall, deceased, against Pere Marquette Railway Company, a corporation, for death of plaintiff's decedent. From a judgment for plaintiff, defendant brings error. Reversed, and new trial granted.

*Leo W. Hoffman* and *Clare E. Hoffman* (*Carl E. Hoffman,* of counsel), for plaintiff.

*W. K. Williams* and *John C. Shields* (*Wilkes & Stone,* of counsel), for defendant.

WIEST, J. This case has been here before. 249 Mich. 440. Plaintiff's decedent, William P. Thrall, was a railroad section foreman, had been such for 30 years, and for about 20 years was in charge of the section of defendant's railroad where he was injured. In his work he had a motor car for carrying himself, his helpers, and tools. Among the tools was a drill weighing about 100 pounds. November 15, 1927, at the close of work for the day, the drill was loaded on the rear end of the motor car, and, while the car was being run backward, it jumped the rails, either by reason of defective car wheels and track, or the jolting of the drill from the car in the path thereof and its consequent derailment, and Mr. Thrall was run over and received injuries causing his death. The railroad is engaged in interstate commerce and this suit is under the

Federal employers' liability act (45 USCA, §§ 51–59). In the course of this opinion we view the testimony most favorable to plaintiff.

The track rails were light weight, had been long in use, were worn and bent at joints, the flanges of the motor wheels were worn, and all this caused the car to jolt sideways. If the flanges of the motor car wheels were unsafe by reason of wear, it was a part of Mr. Thrall's duty to observe the fact and call for repairs, for the condition was of long existence. No repairs were asked for or made, and, under the Federal act, Mr. Thrall assumed the risk incident to its use. The same is true of the railroad track. The drill was loaded on the car in the usual place and adjusted, in part at least, by direct act of Mr. Thrall, and such location of the drill was not at all improper, nor did it involve any hazard, unless the car was run backward. If the accident was solely occasioned by defective track and motor car wheels, plaintiff cannot recover, for such defects were of long standing and either known to or unavoidably observable by Mr. Thrall in the very course of his work and duties, and were used by him without request for or promise of repair, and he, therefore, assumed the risk. At this point comes the placing of the drill on the motor car and the negligence of Mr. Thrall in ordering the defective car to be run backward over the defective track. Had the car been run forward, as was usual, the accident would not have happened. Mr. Thrall was guilty of a want of due care in directing the defective car to be run backward over the defective track. Mr. Thrall's own negligence in this respect did not relieve him from the risks he had assumed. Risks assumed by Mr. Thrall cannot be made the basis of actionable negligence. Negligence of Mr. Thrall

bars recovery unless defendant was negligent in some respect outside of risks assumed by Mr. Thrall. Contributory negligence on the part of Mr. Thrall could not arise out of acts of Mr. Thrall alone. It is claimed, however, that Mr. Thrall directed one of his helpers to keep watch of the drill while the car was being operated, and the helper neglected to do so, and it is contended that, if Mr. Thrall was guilty of negligence, the accident was caused as well by the negligence of his fellow servant in not watching the drill and keeping it from falling off the car. There is merit in this.

Defendant was entitled to an instruction that Mr. Thrall assumed the risk incident to use by him of the defective track and motor car, and was guilty of negligence barring recovery in directing the defective car to be run backward over the defective rails, unless he, in fact, stationed a helper and directed him to watch the drill and the helper neglected to do so, and by reason of such neglect the drill jolted off and caused the accident. In such case the negligence of the helper would be that of a fellow servant, not within the rule of assumed risk barring recovery and within the rule of contributory negligence not barring recovery, but under the Federal statute requiring the damages to be diminished in proportion to the amount of negligence attributable to Mr. Thrall in directing the defective car to be run backward and riding thereon over the defective track. Under this issue the full damages, occasioned by the negligence of defendant's servant, the section helper, and the negligence of Mr. Thrall, cannot be recovered, but only a proportional amount bearing a true relation to the negligence attributable to both defendant and Mr. Thrall. Unless Mr. Thrall in fact directed a helper to watch the drill

and the helper failed to do so, and had he done so, would have saved the drill from being jolted from the car, there can be no recovery. This is the sole issue of fact in the case. If the car was derailed by reason of its defects and those of the rails, and the derailing was not occasioned by the drill falling off, then plaintiff cannot recover.

The court was in error in the following instruction to the jury:

"If you find by a preponderance of the evidence, that the track was so defective that as the car proceeded toward Allegan, it left the rail, overturned and killed Mr. Thrall, and that the danger of the car leaving the track was not so obvious nor so imminent, nor so apparent that an ordinarily prudent person, under the circumstances, would not have ridden upon the motor car, then the plaintiff is entitled to recover."

Upon retrial, if the issue is limited as we have pointed out, many debatable questions presented by this record will not again arise, and, therefore, we have no occasion to discuss the same.

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

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

## McHUGH *v.* TRINITY BUILDING CO.

1. VENDOR AND PURCHASER—PAYMENT OF TAX—COMPLETION OF RECORD—APPEAL AND ERROR.

   In suit involving land contract, where it does not appear in record that tax has been paid, but plaintiffs' brief states that tax was paid and county treasurer's certificate was filed in law action on contract, decree is withheld until it is made part of record by stipulation of counsel or filing of such certificate in this court.

2. JUDGMENT—RES ADJUDICATA.

   Where bill for rescission of land contract and for other relief was filed before judgment was rendered in action at law on contract, and, although said action was allowed to proceed to judgment, summary action thereon was restrained, said judgment may not be held *res adjudicata* of equity suit, although not appealed from.

3. VENDOR AND PURCHASER—PLEADING—FAILURE TO ANSWER CROSS-BILL—ADMISSIONS.

   Where defendants filed answer in nature of cross-bill, alleging default and praying for foreclosure, an answer thereto was demanded, and it was not answered by merely denying that defendants were entitled to relief prayed for; but this is of little moment where plaintiffs admitted nonpayment, alleged excuse, and asked for relief.

4. CANCELLATION OF INSTRUMENTS—RESCISSION IN EQUITY.

   Bill in equity praying rescission proceeds on theory that there has been no rescission, not on theory that rescission has already been accomplished.

5. EQUITY—RESCISSION—JURISDICTION.

   Bill in equity praying rescission of land contract gave court jurisdiction.

6. APPEAL AND ERROR—FAILURE TO APPEAL.

   Where plaintiffs did not appeal from decree holding that their right to rescission of land contract was lost by laches and payments made after discovery of misrepresentations, Supreme Court may not hold otherwise.

7. Equity—Damages May be Awarded Instead of Rescission. Under bill for rescission of land contract and other relief, if equity demands affirmance and damages instead, it may be so decreed, and court is not required to remit plaintiffs to action at law.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted January 7, 1931. (Docket No. 30, Calendar No. 35,367.) Decided April 23, 1931. Rehearing denied June 25, 1931.

Bill by Ralph T. McHugh and another against Trinity Building Company and others to rescind a land contract and for other relief. Cross-bill by defendant Northwestern Investment Company for foreclosure of said land contract and for other relief. From decree entered, defendant Northwestern Investment Company appeals. Affirmed.

*James M. Cleary,* for plaintiffs.

*J. Gilbert Quail* and *Arthur Gloster,* for defendant Northwestern Investment Company.

Wiest, J. This is a bill by vendees to rescind a land contract, alleged to have been induced by false representations, and have a vendee's lien for payments made. Rescission was denied, but an award of damages decreed and credited upon the contract.

Defendant Northwestern Investment Company, assignee of the vendor, prosecutes this appeal. The land contract was executed January 16, 1928, with plaintiffs, vendees, and the Trinity Building Company, vendor, and the same day assigned by the vendor to defendant Northwestern Investment Company.

The house was built upon swamp ground, the building was improperly constructed, has settled, the interior walls have cracked, doors and windows

do not fit, the roof leaks and many other defects exist, all contrary to representations made by the builder, defendant Trinity Building Company. There was sharp controversy over the question of a swamp at the point where the house stands, but considering the mute evidence furnished by the house and the articulate evidence by frogs in the back yard, we are satisfied that the witnesses who said there was formerly a swamp at that point are correct. But it is said that no such claim was set up in the bill. The bill alleged representations made, and averred falsity thereof, and sufficiently connected many of the defects with the mentioned cause. The house was new, and when the frost left the ground in the spring the building soon disclosed defects. Plaintiffs complained, relied on promises to repair, and made payments of installments for many months.

The circuit judge held the right to rescind lost, but the right to have justice remained, and awarded a sum sufficient to remedy the wrong done.

At the hearing it was claimed, and in this court it is urged, that:

"This land contract should not have been admitted in evidence and when at the close of the hearing the tax had not been paid the court should have granted defendant's motion to dismiss the bill."

The record does not show payment of the tax, but in the brief of counsel for plaintiffs it is said that the tax was paid by the Northwestern Investment Company in September, 1929, when that company brought suit on the contract in the common pleas court, and set forth the certificate of the county treasurer. This, not being in the record, cannot be considered beyond leading us to say that, hearing the case *de novo,* we will withhold decree until it is

made a part of the record by stipulation of counsel or filing of such certificate in this court.

In its answer to the bill defendant stated:

"This defendant further shows that plaintiffs * * * were served with summons in case No. 6228 in the common pleas court as the return of the officer will show, in which case they appeared by attorney, and pleaded thereto. And that on October 28, 1929, a valid judgment in the sum of $460.60 was rendered in favor of the Northwestern Investment Company against the plaintiffs and a motion for new trial was made, argued and denied, reference to which is prayed, which judgment is in full force and effect and has never been appealed and which is *res adjudicata* to all the claims which the plaintiffs attempt to raise in this suit."

The bill herein was filed October 16, 1929, and before the judgment was rendered in the common pleas court. The original record returned to this court shows that upon filing the bill an order was made for defendants to show cause, if any, why an injunction should not issue restraining prosecution of the action in the common pleas court, together with a restraining order in the meantime. October 26, 1929, the restraint was modified and the Northwestern Investment Company permitted to proceed with its action in the common pleas court, but required any money collected to be deposited with the clerk of the circuit court to await further order of the court. January 22, 1930, the order modifying the restraint was vacated and the cause "referred back to Hon. Theodore J. Richter, circuit judge." February 14, 1930, the restraining order was dissolved for failure to file a bond. March 10, 1930, the order dissolving the restraining order was set aside and an injunction authorized and issued restraining defendants "from taking any summary action either

before the circuit court commissioner or in any other manner, for the purpose of collecting on said contracts during the pendency of this suit, and from proceeding any further with the action now instituted in the common pleas court for the city of Detroit." This case was heard in June, 1930.

Upon this record we cannot hold that the judgment in the court of the common pleas is *res adjudicata* of issues herein.

The answer of the Northwestern Investment Company, in the nature of a cross-bill, alleged default by plaintiffs and prayed foreclosure. The answer to plaintiffs' bill called for no counter pleading by plaintiffs, but the cross-bill demanded an answer, and it was no answer to merely deny that defendant was entitled to the relief prayed in the cross-bill. But this is of little moment, for plaintiffs admitted nonpayment, alleged excuse, and asked for relief. Plaintiffs asked for rescission or other relief agreeable to equity and good conscience.

We said in *Witte* v. *Hobolth,* 224 Mich. 286:

"A bill in equity praying rescission proceeds on the theory that there has been no rescission, not on the theory that rescission has already been accomplished."

The bill gave the court of equity jurisdiction. The court evidently thought that right to have rescission was lost by laches and payments. Plaintiffs not having appealed we may not hold otherwise. Upon the subject of laches see *Culver* v. *Avery,* 161 Mich. 322; *Witte* v. *Hobolth, supra; Plate* v. *Detroit Fidelity & Surety Co.,* 229 Mich. 482.

In *Jefferson Park Land Co.* v. *Wayne Circuit Judge,* 234 Mich. 341, we said:

"This seems to be a case in which equity and exact justice may or may not require rescission, and in-

capable of determination until the proofs are in. Even under a bill to rescind, if equity demands affirmance and damages instead, it may be so decreed."

In the case at bar the court, upon refusing rescission, was not required to remit plaintiffs to an action at law.

We think the decree just, and it is affirmed, with costs to plaintiffs.

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

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BASSETT *v.* TRINITY BUILDING CO.

1. JUDGMENT—RES ADJUDICATA.
   A judgment in an action at law from which no appeal is taken becomes *res adjudicata* as to subject-matter involved.

2. EQUITY—JUDGMENT—SETTING ASIDE.
   A judgment in a court of law will not be set aside by a court of equity unless it is so manifestly wrong that it is against good conscience.

3. SAME—GROUNDS FOR SETTING ASIDE JUDGMENT.
   In order to set aside a judgment of law in equity, there must be ignorance of the defense when the judgment was rendered, diligence on the part of complainant, and the fact that adequate relief cannot be had at law.

4. SAME—JUDGMENT WILL NOT BE SET ASIDE ON GROUNDS PRESENTED IN LAW CASE.

A court will not set aside a judgment because it was founded on a fraudulent instrument, perjured testimony, or for any matter if these questions were actually presented or considered in the case which resulted in the judgment assailed.

5. JUDGMENT—RES ADJUDICATA—SETTING ASIDE.

Where the very questions presented in suit to rescind a land contract and for other relief were litigated as far as one defendant is concerned in an action at law from which no appeal was taken, they became *res adjudicata*.

6. EQUITY—JURISDICTION—TRANSFER TO LAW SIDE OF COURT.

Where plaintiffs in suit for rescission of land contract have failed to make out a case for equitable relief, and the sole relief given them is a money judgment which cannot be satisfied out of the property in question, equity will not keep jurisdiction, but the case should be transferred to the law side of the court.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted January 7, 1931. (Docket No. 29, Calendar No. 35,366.) Decided April 23, 1931. Rehearing denied June 25, 1931.

Bill by Bert L. Bassett and another against Trinity Building Company, a Michigan corporation, and others to rescind a land contract and for other relief. Cross-bill by defendant J. Gilbert Quail for an accounting and for other relief. Decree for plaintiff against all defendants. Defendant Quail appeals. Reversed, and permission granted to transfer to law side as to defendant Trinity Building Company, and bill dismissed as to defendants Northwestern Investment Company and Quail.

*James M. Cleary,* for plaintiff.

*Arthur Gloster* and *J. Gilbert Quail,* for defendant Quail.

BUTZEL, C. J. Plaintiffs Bassett traded in an equity in property as first payment on the purchase of a house and lot in Detroit. A land contract dated June 26, 1928, was executed by defendant Trinity Building Company, as vendor, and plaintiffs as vendees. After giving plaintiffs credit for the equity traded in, the contract called for further payments aggregating $6,800, payable with interest at the rate of $60 a month. The contract was sold the day it was executed to or through defendant Northwestern Investment Company and the same day defendant Quail purchased it. The latter gave his check direct to the Trinity Building Company and it executed an assignment direct to him. It also gave him a deed which was duly recorded. Just what connection the Northwestern Investment Company had with the contract is not shown. It is uncertain whether it acted as broker or purchased and immediately sold the contract and caused the transfer to be made by the Trinity Building Company to Quail. The assignment of the contract contained a guaranty on the part of the Trinity Building Company that the building had been finished and accepted by the vendees; that there were no agreements between the vendor or the vendees and their assigns except as stated in the contract. It contained no exceptions. Plaintiffs moved into the house a few days after the execution of the contract. A driveway and garage were built for plaintiffs by Trinity Building Company at a cost of $350. They paid this amount direct to the builder. This transaction had nothing whatsoever to do with the contract or payments to become due thereunder.

Plaintiffs made payments amounting to $300 on the contract but refused to pay any further sums, claiming that the house had defects and that its con-

dition had been misrepresented to them by the defendant Trinity Building Company. Plaintiffs claim that the latter agreed to make repairs and alterations and that some were made; that their delay in asking for a rescission of the contract was due to promises made by the Trinity Building Company. They, however, admit that they continued to live in the premises for over six months from the time they last complained to the building company. It was almost two years from the date of the contract that plaintiff filed the present bill for rescission of the contract and for other relief.

On January 28, 1930, Quail began suit in the common pleas court for the city of Detroit against plaintiffs to recover $480 due on the land contract. A copy of the contract was attached to the declaration. Plaintiffs appeared as the defendants in this law case and pleaded the general issue with notice of the following special defenses: failure of consideration, no consideration, fraud and misrepresentation, and breach of warranty. The case resulted in a judgment in favor of Quail for the full amount of his claim against plaintiffs Bassett. The latter thereupon made a motion to set aside the judgment and filed an affidavit again charging fraud and misrepresentation, and the other questions raised in the case now before us. The motion was denied on March 29, 1930, and no appeal taken. The judgment thus became *res adjudicata*. After the time for taking an appeal had expired, plaintiffs filed this bill for rescission, a lien for moneys paid, and an injunction restraining defendant Quail from proceeding to collect on his judgment. After a hearing, the trial judge denied plaintiffs the right to rescind. He, however, decreed the equivalent of a money judgment, for he ordered that $1,200 should be

credited on the land contract and the balance still due reduced by that amount; that in addition, the judgment in favor of Quail, rendered by the court of common pleas, should also be set aside and considered as satisfied.

The decree setting aside this judgment is obviously wrong. A judgment in a court of law will not be set aside by a court of equity unless it is so manifestly wrong that it is against good conscience. *Cleveland Iron Mining Co.* v. *Husby,* 72 Mich. 61. In order to set aside a judgment of law in equity, there must be ignorance of the defense when the judgment was rendered, diligence on the part of complainant, and the fact that adequate relief cannot be had at law. *Taylor* v. *Sutton,* 15 Ga. 103 (60 Am. Dec. 682).

A court will not set aside a judgment because it was founded on a fraudulent instrument, perjured evidence, or for any matter if these questions were actually presented or considered in the case which resulted in the judgment assailed. *United States* v. *Throckmorton,* 98 U. S. 61. The very questions presented in the bill of complaint were litigated as far as defendant Quail is concerned in the law case in the court of common pleas and became *res adjudicata.* As Mr. Justice COOLEY said in *Miller* v. *Morse,* 23 Mich. 365:

"And we do not see why, if this bill should be sustained, the defeated party might not maintain a similar one in nearly every case which the courts at law disposed of."

Also, see *Lafayette Benevolent Society* v. *Richardson,* 188 Mich. 57; *Becker* v. *Welch,* 206 Mich. 613.

The testimony shows, as the trial judge found, that defendant Northwestern Investment Company

was not guilty of the fraud, fraudulent representations, and breach of warranty that the Trinity Building Company is charged with. These questions were *res adjudicata* as to defendant Quail. The trial court held that no conspiracy existed and that plaintiffs were not entitled to a rescission of the contract. He, however, gave them the equivalent of a money judgment and imposed a lien on property which the Trinity Building Company had parted with and which defendant Quail owned, notwithstanding the fact that it had been determined in the previous litigation that Quail was not liable for the damages for which the lien was given. Stripping the bill of complaint of the charges of conspiracy and the claim of rescission, the equity suit became one solely for the recovery of damages for fraud, fraudulent misrepresentations, and breach of warranty. The grounds for equitable jurisdiction were denied. As the bill was filed after the claim against defendant Quail had become *res adjudicata,* it really became one against the Trinity Building Company for a money judgment. Where plaintiffs in the suit for rescission have failed to make out a case for equitable relief, and the sole relief given them is a money judgment, which cannot be satisfied out of the property in question, equity will not keep jurisdiction but transfer the case to the law side of the court. *Koontz* v. *Bay Circuit Judge,* 224 Mich. 463; *Wisper* v. *Dix-Ferndale Land Co.,* 241 Mich. 91.

The decree of the lower court will be set aside and the bill dismissed as to defendants Northwestern Investment Company and Quail. The decree will also be set aside as to defendant Trinity Building Company, but the case remanded to the trial court with the right reserved to plaintiffs to move for the transfer of the suit against defendant

Trinity Building Company to the law side of the court in accordance with provisions of 3 Comp. Laws 1929, § 14008, or its dismissal as they may elect. Defendants will recover costs.

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

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PARISEAU *v.* TRINITY BUILDING CO.

1. VENDOR AND PURCHASER—RESCISSION—COMPROMISE AND SETTLEMENT—PERFORMANCE.

   In vendees' suit for rescission of land contract and other relief, where it appears that agreement in writing was entered into that plaintiffs would accept the property on condition that certain repairs and improvements were made by vendor, testimony *held*, sufficient to establish that agreement on part of vendor was fully performed.

2. SAME—FRAUD—WAIVER.

   Where vendees, after discovering misrepresentations as to property sold and defects in building, agreed in writing to accept the property on condition that certain repairs and improvements were made, and thereafter continued to make payments, they thereby waived, not only the right to rescind, but also the fraud.

3. SAME—FRAUD—WAIVER—FORECLOSURE.

   Where, in vendees' suit for rescission of land contract, it appears that fraud of vendor relied on was waived, vendor is entitled, on cross-bill, to decree of foreclosure of vendor's lien.

4. SAME—VENDOR'S LIEN—WAIVER.

   Vendor, by taking judgment for installments of purchase price past due, with interest, did not thereby waive its vendor's lien.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted January 7, 1931. (Docket No. 31, Calendar No. 35,368.) Decided April 23, 1931.

Bill by Urban Pariseau and another against Trinity Building Company, a Michigan corporation, and others to rescind a land contract and for other relief. Cross-bill by defendant Northwestern Investment Company for foreclosure and for other relief. From decree rendered, defendant Northwestern Investment Company appeals. Reversed, and foreclosure granted.

*James M. Cleary,* for plaintiffs.

*J. Gilbert Quail,* for defendant Northwestern Investment Company.

CLARK, J. On May 28, 1928, plaintiffs purchased on contract a new house and a lot from defendant Trinity Building Company, a corporation, which contract simultaneously was assigned by vendor to Northwestern Investment Company, a corporation. The Trinity Building Company continued, acted as the vendor, and collected and received payment from plaintiffs, the purchasers. Plaintiffs, although making some payments, complained of defects in construction of the house and of the condition of the lot. Finally, on February 28, 1929, after all claimed defects were known, it was agreed in writing that the property was accepted on condition that vendor do certain grading and sodding and repair sidewalk and roof. Testimony for plaintiffs respecting these repairs is contradictory, exaggerated, and unsatisfactory. Witnesses for defendants gave credible and convincing testimony that the repairs were made as agreed. We find that the agreement on the

part of the vendor was fully performed. Plaintiffs, after this agreement, made payments and gave note promising to pay more. Plaintiffs filed bill for rescission and other relief, and had decree for money damages to be credited on the contract. Defendant Northwestern Investment Company has appealed.

The trial judge was of the opinion that by settlement and agreement of February 28, 1929, and acts pursuant thereto, the right to rescind had been waived. We agree with him, but go further and hold that the fraud was waived. So there can be recovery neither on the theory of rescission nor on the theory of affirmance. There being now no fraud, there is no basis for rescission and no ground for recovery of damages. See *Craig* v. *Bradley,* 26 Mich. 353; *Jensen* v. *Evans,* 230 Mich. 199; *Van Scherpe* v. *Ulberg,* 232 Mich. 699; 27 C. J. p. 24.

With the answer there is cross-bill praying foreclosure of vendor's lien, and in the brief it is urged that the relief be decreed. Judgment was taken in October, 1929, against plaintiffs in common pleas court of Detroit for a total of several installments of the purchase price with interest. By taking such judgment, vendor's lien was not waived. *Zeigler* v. *Valley Coal Co.,* 150 Mich. 82 (13 Ann. Cas. 90); 39 Cyc. p. 1841.

Decree of foreclosure is granted to be settled in usual way.

Decree appealed from is reversed, with costs to appellant.

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

LEWIS *v.* BAXTER LAUNDRIES.

1. LANDLORD AND TENANT—WRITING GIVING PERMISSION BUT NOT POSSESSION IS LICENSE.

Writing which purports to "let and lease and give * * * exclusive permission" to defendant to erect and maintain signs on roof of plaintiff's building, and which gives defendant mere permission under owner to have and maintain signs on roof without conferring possession of premises on defendant, is a license and not a lease.

2. SAME—LICENSES—PLEADING.

Action under declaration as for rent may not be maintained against licensee.

Error to Kent; Perkins (Willis B.), J. Submitted January 23, 1931. (Docket No. 97, Calendar No. 35,382.) Decided April 23, 1931.

Assumpsit by Benjamin Lewis against Baxter Laundries, Incorporated, a foreign corporation, for breach of a contract for the use of a roof. Judgment for defendant. Plaintiff brings error. Affirmed.

*Smith & Searl*, for plaintiff.

*Clapperton & Owen*, for defendant.

CLARK, J. Plaintiff contends that defendant was a tenant under a lease for a term of years of the roof of his building for the purpose of having and maintaining advertising sign or signs and that defendant quit the premises and failed to pay rent. This suit is to recover certain monthly installments.

Defendant contends it was not a tenant but a licensee, and therefore cannot be held as for rent.

In a trial without a jury the judge found defendant a licensee, not a tenant, and that plaintiff could not recover on his declaration. Plaintiff brings error.

The writing between the parties is in the form of a lease and purports to "let and lease and give * * * exclusive permission" to erect and maintain signs.

Both parties had keys and had access to the roof. There was a pent house on the roof in which were stored articles belonging to defendant.

The writing here does not confer possession of premises upon defendant. It gives a mere permission under the owner to have and maintain sign or signs on the roof. It is a license, not a lease.

See 35 C. J. p. 954, and cases cited; *Morrill* v. *Mackman,* 24 Mich. 279 (9 Am. Rep. 124); 1 Thompson, Real Property, § 647; *Forbes* v. *Gorman,* 159 Mich. 291 (25 L. R. A. [N. S] 318, 134 Am. St. Rep. 718); 1 Tiffany, Real Property (2d Ed.), § 47.

Affirmed.

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

SINKIEWICZ *v.* LEE & CADY.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENTAL DEATH.

Death of an employee from peritonitis caused by ruptured bowel brought on probably by lifting 100-pound sacks of sugar, which he was employed to do, was not accidental within the meaning of the workmen's compensation act, in absence of evidence of any unusual, fortuitous, or unexpected happening which caused the injury.

Certiorari to Department of Labor and Industry. Submitted January 6, 1931. (Docket No. 6, Calendar No. 35,213.) Decided June 1, 1931.

Veronica Sinkiewicz presented a claim against Lee & Cady, a corporation, for compensation on behalf of herself and minor children for the death of her husband, Tony Sinkiewicz, while in defendant's employ. Defendant and Hartford Accident & Indemnity Company, insurer, bring certiorari to review award to plaintiff. Reversed.

*Harold S. Knight* (*Kerr, Lacey & Scroggie,* of counsel), for appellants.

McDONALD, J. In behalf of herself and minor children, the plaintiff presented a claim for compensation against Lee & Cady for injuries resulting in the death of her husband, Tony Sinkiewicz, while in its employ. To review an order awarding compensation, the defendants have brought certiorari.

As to what constitutes accidental injury within the meaning of workmen's compensation act, see annotation in L. R. A. 1916A, 32, 228; L. R. A. 1917D, 111; 25 A. L. R. 510.

Briefly stated, the facts show that on January 11, 1930, Tony Sinkiewicz was working for Lee & Cady as a laborer. His duties required him to pick up sacks and cases of sugar from the floor and place them on a truck. The sacks weighed 100 pounds and the cases 60. He was working alone when he received his injuries. His foreman found him lying on his hands and knees on a pile of sugar suffering great pain in the region of his abdomen. He said he had hurt himself lifting a bag of sugar. He was removed to the hospital and operated on. The doctor testified that he found a ruptured bowel about one-half inch long with considerable fecal matter through the peritoneal cavity. It was his opinion that the condition he found could be caused by trauma. There was no evidence of other causes.

The defendants admit that decedent was injured while in the employ of Lee & Cady and that his injuries resulted in his death, but they deny that the injury was accidental within the meaning of the workmen's compensation act (2 Comp. Laws 1929, § 8407 *et seq.*).

In its opinion upon which the award was based, the commission pointed out no direct evidence as to how the decedent received his injury. Its conclusion that it was due to an accident is by inference from circumstances shown in the following statement, which we quote from the opinion:

"We have presented a case of a young man who had worked steadily for his employer for a period of 16 years and never complained of any disability; and on this particular morning was found lying on a bag of sugar on the premises of the employer, and it was necessary to remove him to his home. He was operated on the next day for peritonitis and died a few days later. This peritonitis could be

brought on according to the undisputed testimony by trauma."

Do these circumstances justify the inference that his condition was due to an accident? We think not. But it is not necessary to indulge in inferences as to what caused the injury. There is direct evidence of it. He told his foreman that he had hurt himself lifting a bag of sugar. If he injured himself in that way, and there is no evidence direct or circumstantial to the contrary, he did not suffer an accidental injury within the meaning of the compensation law. He was injured while doing the work he was employed to do and doing it in the usual manner. To justify compensation for accidental injury, there must have been "some unusual, fortuitous or unexpected happening which caused the injury and which was in essence accidental in character." *Kutschmar* v. *Briggs Manfg. Co.*, 197 Mich. 146 (L. R. A. 1918 B, 1133); *Stombaugh* v. *Peerless Wire Fence Co.*, 198 Mich. 445.

In this case there is a total lack of evidence tending to show accident. The commission was not justified in awarding compensation. The award is vacated.

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

McCORMICK *v.* SEARS, ROEBUCK & CO.

1. Master and Servant—Workmen's Compensation Act—Independent Contractor.

   Where plaintiff contracted in writing to take roofing jobs in certain territory for certain period, for which defendant was to furnish material and pay plaintiff so much per square, and plaintiff was to employ at his own expense all help and discharge same at will, and have complete supervision and control over them, he was not an employee within the meaning of the workmen's compensation act, but was an independent contractor.

2. Same—Right to Interfere With Work Rather Than Actual Interference is Test of Relationship.

   Whether relationship of master and servant exists is to be measured by terms of contract when in writing, and where contract provided that contractor was to control the workmen and the work, said relationship is not established by actual acts of interference by owner with workmen and manner of doing work; right to interfere and to control being the test and not the fact of actual interference.

Appeal from Department of Labor and Industry. Submitted April 14, 1931. (Docket No. 83, Calendar No. 35,558.) Decided June 1, 1931.

Earl McCormick presented his claim against Sears, Roebuck & Company for compensation for accidental injuries received while in defendant's employ. Defendant appeals from an award of compensation. Reversed.

*D. G. F. Warner,* for plaintiff.

*Carton, Gault & Parker,* for defendant.

McDonald, J. The plaintiff presented a claim to the department of labor and industry to recover

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Circumstances under which the existence of relationship of employer and independent contractor is predicable, see annotation in 19 A. L. R. 1168.

Independent contractor as workman or employee within meaning of workmen's compensation act, see annotation in L. R. A. 1916A, 118, 247; L. R. A. 1917D, 148; L. R. A. 1918F, 206.

compensation for accidental injuries sustained while in defendant's employ. Defendant denied liability on the ground that at the time of the accident plaintiff was not an employee but an independent contractor. From an award in favor of the plaintiff the defendant has appealed.

The material facts are not in dispute. On February 20, 1930, the parties entered into a written contract wherein it was agreed that for a period of one year from date the plaintiff would accept any roofing job tendered to him by the defendant within 30 miles of the city hall in the city of Flint, Michigan, that he would perform all jobs in a workmanlike manner and in accordance with specifications contained in estimate sheets furnished by the defendant; that he would employ at his own expense all workmen engaged in and about the work, discharge them at will, and have complete supervision and control over them; that he would make good any defect in workmanship; that he would return to defendant all ladders, scaffolding, and equipment loaned to him for use in the work, and, in case of any damage thereto, allow the defendant to deduct the same from any money due to him; that on all jobs he would save the defendant harmless from demands for compensation, protect defendant against all liens, claims for damages, lawsuits, and claims of every nature arising out of the performance of the work; that defendant would furnish all material used on the job and pay to the plaintiff as compensation so much per square of the actual roofing.

On June 2, 1930, the plaintiff was accidentally injured while working on a roofing job taken by him in accordance with the terms of the contract.

The department of labor and industry was not pleased with this contract. It correctly character-

ized it as unfair to the plaintiff and as a studied attempt to avoid the provisions of the workmen's compensation act (2 Comp. Laws 1929, § 8407 *et seq.*). Nevertheless, the plaintiff had a right to make it and presumably he did so voluntarily. If it was in force and effect at the time of the accident, and the work he was doing was being done under its terms and provisions, he must be held to have been an independent contractor. It gave him the right to control the work and the workmen, to hire and to discharge them at will, and required him to pay them out of his compensation. It provided that he should do the work according to specifications furnished by the defendant, and to make good any defects in workmanship. In short, it was a contract to do a job of rooflaying with full control of the work and means of accomplishing it. In doing this work he was an independent contractor. *Perham* v. *American Roofing Co.*, 193 Mich. 221; *Carleton* v. *Foundry & Machine Products Co.*, 199 Mich. 148 (19 A. L. R. 1141).

The department of labor and industry reached a different conclusion, evidently on the theory that the defendant departed from the contract by assuming to hire and discharge workmen and to control the plaintiff in the manner of doing the work. If the contract rested in parol, the defendant's conduct would be strong evidence of the relationship of employer and employee; but it was in writing and the relationship of the parties must be measured by its terms and provisions. Moreover, actual interference or actual control is not the test of the relationship. In *Tuttle* v. *Embury-Martin Lumber Co.*, 192 Mich. 385 (Ann. Cas. 1918C, 664), it was said:

"It is not the fact of actual interference with the control, but the right to interfere, that makes the

difference between an independent contractor and a servant or agent."

By the provisions of the contract, the right to control was in the plaintiff, and the fact that there was actual interference by the defendant with his right did not change the relationship established by the contract.

As the relation of employer and employee did not exist between the parties, the plaintiff was not entitled to compensation. The award is reversed.

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

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ROSE *v.* STEVENS & WOOD.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—QUESTION NOT RAISED ON HEARING NOT CONSIDERED ON REVIEW.

   Whether injured employee's wife had authority to sign application for review of order by deputy commissioner stopping compensation payments, not having been questioned at hearing before department, may not be raised in Supreme Court.

2. SAME—EVIDENCE—SUFFICIENCY.

   Where there was evidence sustaining the findings of the department, its order continuing compensation payments to injured employee was justified.

Certiorari to Department of Labor and Industry. Submitted April 9, 1931. (Docket No. 55, Calendar No. 35,167.) Decided June 1, 1931.

Elisha Rose presented his claim against Stevens & Wood, Inc., employer, and General Accident, Fire & Life Assurance Corporation, Limited, insurer, for compensation. From an order refusing to stop compensation, defendants bring certiorari. Affirmed.

*Robert H. Brucker,* for plaintiff.

*Kerr, Lacey & Scroggie,* for defendants.

POTTER, J. Defendants review by certiorari an order of the department of labor and industry refusing to stop plaintiff's compensation.

March 14, 1929, plaintiff was injured while in the employ of Stevens & Wood, Inc. An agreement was entered into to pay plaintiff $18 a week during the period of disability. Compensation was paid plaintiff to January 16, 1930. January 23, 1930, a petition was filed to stop compensation, upon the hearing of which, before a deputy commissioner, compensation was ordered stopped, which order was reversed by the department.

Two questions are presented: It is claimed that inasmuch as the application to the department of labor and industry to review the order of the deputy commissioner was signed by plaintiff's wife and no application for review was filed, signed by plaintiff or his attorney, until after the lapse of the statutory period, the department of labor and industry was without jurisdiction to enter the order complained of. The authority of plaintiff's wife to sign the application for review was not questioned at the hearing. Had it been, her authority might have been established. The question cannot be here raised for the first time. It is claimed the evidence

does not sustain the findings of the department. There was evidence to sustain the findings. The department's order is affirmed, with costs.

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

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SHARP *v.* GRAND RAPIDS TRUST CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING OF DEPARTMENT CONCLUSIVE IF SUPPORTED BY TESTIMONY.
   Finding of the department of labor and industry that employee's death arose out of and in course of his employment, supported by competent testimony, is conclusive.

2. SAME—REASONABLE RULES OF DEPARTMENT BINDING.
   Rules of the department of labor and industry which are reasonable and within its power to make are binding, not only on the department and litigants, but also on the Supreme Court.

3. SAME—NOTICE OF DEFENSES—LIMITATION OF ACTIONS.
   Under rules of the department of labor and industry, the statute of limitations may not be urged as defense to claim for compensation unless reasonably definite notice thereof is given.

4. SAME—INDEFINITE ASSERTION INSUFFICIENT NOTICE OF DEFENSE.
   Indefinite assertion by defendant that proper claim for compensation was not made is not sufficient notice to plaintiff that defendant intended to rely on the defense that the claim for compensation was not filed within the statutory period.

Appeal from Department of Labor and Industry. Submitted April 8, 1931. (Docket No. 20, Calendar No. 35,520.) Decided June 1, 1931.

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Applicability of statute of limitations to actions and proceedings under workmen's compensation act, see annotation in 16 A. L. R. 462; 40 A. L. R. 495.

Monington Sharp presented her claim against Grand Rapids Trust Company, receiver for William Horner, employer, and Employers Mutual Liability Insurance Company, insurer, for compensation for the death of her husband while in defendant's employ. From an award granting compensation, defendants appeal. Affirmed.

*A. L. Sayles,* for plaintiff.

*Derham & Derham,* for defendants.

NORTH, J. This is an appeal from an award made to plaintiff under the workmen's compensation law (2 Comp. Laws 1929, § 8407 *et seq.*). An appeal has been perfected in behalf of defendants and it is asserted that the award should be vacated because: (1) There was no competent testimony that the death of plaintiff's husband resulted from an injury which arose out of and in the course of his employment; and (2) Plaintiff did not make a claim for compensation within six months after her husband's death as required by statute. 2 Comp. Laws 1929, § 8431.

Review of the record satisfies us that there was testimony supporting the finding of the commission that the accident suffered by plaintiff's husband arose out of and in the course of his employment and was the cause of his death. It is undisputed that plaintiff's deceased husband while in the employ of William Horner sustained a serious injury to his left leg on January 14, 1929. Compensation was paid for 19 weeks, whereupon a settlement receipt was signed and filed; but this receipt does not seem to have been approved by the department. Infection developed in the injured limb and plaintiff's husband died June 9, 1929. There is testimony

that previous to the injury he had been afflicted with high blood pressure and had suffered dizzy spells. The death certificate reads: "Cause of death, * * * chronic myocarditis * * * contributory * * * myocardity with hypertension." Plaintiff testified that prior to the accident Mr. Sharp enjoyed good health. She claims that the injury and resulting infection lowered the vitality of her decedent and was the cause of his death. In this particular Dr. Perry, who had known Mr. Sharp for a number of years, testified in part as follows:

"*A.* * * * He (Mr. Sharp) never regained his health after the accident.

"*Q.* Was he ever a well man after the accident?

"*A.* No.

"*Q.* What is your opinion as to the cause of Lloyd Sharp's death?

"*A.* I think the accident was the contributory cause.

"*Q.* This accident hastened his death?

"*A.* Yes."

This and other competent testimony presented an issue of fact, and the finding of the commission thereon is conclusive.

So far as appears in this record appellant did not urge either before the deputy commissioner or on review by the commission that plaintiff's claim for compensation was not timely presented. Appellants assert that this question was raised by the denial of liability on the ground that: "A proper claim for compensation was not made." This indefinite assertion was not sufficient notice to plaintiff that defendants expected to urge as a defense that her claim for compensation was not filed within the statutory period. The statute of limitations cannot be urged as a defense unless reasonably definite no-

tice thereof is given. This is not only a matter of common practice but it is covered by the following rule of the department:

"If the employer or insurer desires to deny liability an answer to the plaintiff's claim shall be filed with the department in writing * * * which answer shall set forth with reasonable detail and certainty all of the essential grounds of defense without unnecessary repetition, upon which the defendant relies as its defense to said claim, serving a copy of same upon the plaintiff and filing with the department proof of such service. The defendant will be limited to those grounds of defense so stated on the hearing of said matter, and also on review before the commission."

Referring to the power of the board to limit by rule the defense to such as was stated in the denial of liability, in *Reno* v. *Holmes,* 238 Mich. 572, we quoted with approval the following:

"The rule in question was within the power of the board to adopt. It is reasonable and valid; it not only binds the board, and litigants before it, but it binds this court. Being reasonable and within the power of the board, this court must follow it and recognize it in cases coming here for review."

See, also, *Roach* v. *Kelsey Wheel Co.,* 200 Mich. 299.

The award is affirmed, with costs to appellee.

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

FLINT *v.* VAN MAANEN.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PARTNERSHIP—INSURANCE.

Finding of department of labor and industry that decedent was employee of partnership, although contract for construction of building on which he was working at time of accident was in name of individual partner and no written assignment thereof to the partnership was ever made, *held*, justified under the evidence, warranting an order of the department for payment of compensation by partnership's insurer.

Certiorari to Department of Labor and Industry. Submitted April 9, 1931. (Docket No. 37, Calendar No. 35,381.) Decided June 1, 1931.

Mrs. Henry C. Flint and another presented their claim against Gerrit Van Maanen as employer and Builders & Manufacturers Mutual Casualty Company, his insurer, and Boylan & Van Maanen, a partnership, employer, and Standard Accident Insurance Company, its insurer, for the accidental death of Henry C. Flint, employee. From an award to plaintiffs against the partnership and its insurer, they bring certiorari. Affirmed.

*Wm. J. Howard,* for plaintiffs.

*Kelley, Sessions & Warner,* for defendants Van Maanen and Builders & Manufacturers Mutual Casualty Co.

*Lightner, Oxtoby, Hanley, Crawford & Dodd,* for defendants Boylan & Van Maanen and Standard Accident Insurance Co.

NORTH, J. Incident to an award of compensation by the department of labor and industry, this controversy has arisen between two insurance companies as to which should be held liable. The commission ordered payment by the Standard Accident Insurance Company, and it has appealed.

Gerrit Van Maanen had been engaged in the contracting and building business in the city of Kalamazoo for several years prior to December, 1929. In April, 1928, he and Walter E. Boylan became copartners in the contracting and building business. But Van Maanen, with the knowledge of his partner, continued to engage in the building business in his individual capacity after the formation of the partnership. In December, 1929, Van Maanen entered into a contract with one Jacob Vander Salm and wife for the erection of a dwelling house. This contract was in writing, signed by Van Maanen individually as contractor and did not in any way refer to the copartnership of Boylan and Van Maanen. At the time this contract was executed Boylan was absent from the city of Kalamazoo. No written assignment of this contract to the partnership was ever executed. Cornelius Flint, an employee on the Vander Salm job, was fatally injured in the course of his employment on the 5th of February, 1930. The award of compensation was made to his dependents. The controlling question in the case is whether at the time of his injury Cornelius Flint was in the employ of Gerrit Van Maanen or in the employ of the copartnership of Boylan & Van Maanen.

In their building operations, both Gerrit Van Maanen and the copartnership composed of Boylan & Van Maanen were under the workmen's compensation act (2 Comp. Laws 1929, § 8407 *et seq.*). The risk of the former was carried by the Builders & Manufacturers Mutual Casualty Company, an appellee herein; and the insurer of the latter was the appellant, the Standard Accident Insurance Company.

In behalf of Mr. Van Maanen and his insurer, it is claimed notwithstanding that the Vander Salm contract was taken in the individual name of Van Maanen, it was none the less an undertaking of the copartnership, and that at the time of his injury Mr. Flint was an employee of the copartnership. Upon the hearing before the commission this contention was sustained; and an investigation of the record discloses ample testimony to justify such a finding. For the purposes of the issue before us the form or provisions of the Vander Salm contract are not conclusive. Notwithstanding the written contract was executed by Van Maanen alone and in his name, it still may have been a partnership undertaking. Both the partners testified it was a partnership contract. Mr. Boylan filed with the department reports in connection with this injury and therein designated the deceased as an employee of the partnership. Mr. Vander Salm testified that he understood in making this contract that Boylan and Van Maanen "were in together," and that during the construction of the building he consulted the former about the work, and that he considered Boylan one of the contractors. As noted above, there was competent evidence to sustain the commission's finding that Flint was at the time of his injury an employee of the copartnership, and this fixed lia-

bility upon the appellant. It follows that the finding of the department must be affirmed, with costs to appellees.

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

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LACOMBE *v.* BIRDS EYE VENEER CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SETTLEMENT RECEIPT NONEFFECTIVE UNTIL APPROVED.

   Settlement receipt signed by injured employee has no binding effect until approved by the department of labor and industry.

2. SAME—SUIT TO SET ASIDE NONEFFECTIVE SETTLEMENT RECEIPT PROPERLY DISMISSED.

   Suit to set aside, on ground of fraud, settlement receipt signed by injured employee was properly dismissed, where said receipt was never approved by the department of labor and industry and therefore had no binding effect.

3. SAME—UNAUTHORIZED DISCONTINUANCE OF PAYMENTS—PETITION AND DENIAL NONEFFECTIVE.

   Agreement for compensation to be paid to injured employee by employer's insurer, approved by the department of labor and industry and not changed, continues in effect, so that employee's petition for further compensation on unauthorized discontinuance of payments, and its denial by deputy commissioner, are of no force and effect.

Appeal from Delta; Bell (Frank A.), J. Submitted April 9, 1931. (Docket No. 44, Calendar No. 35,539.) Decided June 1, 1931.

Bill by George Lacombe against Birds Eye Veneer Company, as employer, and Lumbermen's Mutual Casualty Company, insurer, to set aside a settlement receipt for workmen's compensation on the ground of fraud. Bill dismissed. Plaintiff appeals. Affirmed.

*Derham & Derham,* for plaintiff.

*C. L. Peters,* for defendants.

BUTZEL, C. J. George Lacombe, plaintiff, on December 12, 1928, sustained severe injuries to his right hand and arm while in the employ of defendant Birds Eye Veneer Company. An agreement was entered into a short time later providing for workmen's compensation to plaintiff at the rate of $15 a week. This was approved by the department of labor and industry, and payments were made until October 12, 1929.

About the 1st of October, an adjuster of defendant Lumbermen's Mutual Casualty Company, the insurer of the risk, interviewed plaintiff and urged him to attempt light work at the plant of the Veneer company. Plaintiff attempted to work as a sweeper by using only his left hand, but at the end of a short period he was discharged.

About the 1st of November, 1929, while plaintiff was working at the plant, an agent of the defendant offered him a check for $55 and asked him to sign a document. Plaintiff is unable to read or write. He alleges that he signed, however, when it was represented to him that acceptance of the check and his signature would not constitute a release of defendant's liability for further payments. The document which plaintiff signed is a settlement

receipt on the form of the department of labor and industry. The receipt was filed with the department on December 9, 1929, but was never approved by it.

In July, 1930, not having received any further payments, plaintiff filed a petition with the department of labor and industry for further compensation. In it he alleged that it was only after the refusal of further payment that he became aware of the claim of defendants that the paper he had signed released them from further liability. Plaintiff withdrew his petition before a hearing, but nevertheless the deputy commissioner entered an order denying compensation. He stated therein that the petition had been withdrawn.

In the belief that the settlement receipt might be binding on him unless set aside, plaintiff filed his bill in the instant case asking that the receipt be annulled on the ground that it had been obtained from him by fraud. Relying on the case of *Richards* v. *Rogers Boiler & Burner Co.*, 252 Mich. 52, the trial judge dismissed the bill on defendants' motion. The bill was properly dismissed.

Without the approval of the department of labor and industry, the settlement receipt has no binding effect. It does not excuse defendants from continuing to pay the agreed compensation. The original agreement, which was approved by the department, remains undisturbed until it is changed by a valid order of the department. One of the purposes of the law demanding that a settlement receipt in order to be effective must be approved by the department, is to provide for the very situation which it is claimed exists in the present case. Plaintiff's petition for further compensation and the order entered by the deputy commissioner are of no force and effect.

Inasmuch as the settlement receipt has never been approved by the department of labor and industry, the original award still stands and plaintiff has an adequate remedy at law without the aid of a court of equity. The decree of the lower court in dismissing the bill is affirmed, without costs to either party.

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

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INTERNATIONAL TRANSPORTATION ASS'N *v.* BYLENGA.

1. CONTRACTS—MEETING OF MINDS NECESSARY.
   Meeting of the minds of the parties upon all essential points is necessary to constitute valid contract.

2. SAME—FAILURE TO READ NO DEFENSE.
   One who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.

3. SAME—WHEN NEGLECT TO READ INDUCED BY FRAUD RULE NOT APPLICABLE.
   General rule that one who signs a contract will not be heard to say that he did not read it is not applicable where neglect to read is not due to carelessness alone, but was induced by some stratagem, trick, or artifice on the part of the one seeking to enforce the contract.

4. SAME—FRAUD.
   Where plaintiff sent to defendants a communication containing a clipping descriptive of defendants' business, asking permission to print same in its publication, and no reference to charge therefor was made in the letter proper, but the offer to print for charge was made in upper right-hand corner of

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Ignorance of the contents of a contract due to failure to read it affords no ground for relief therefrom, see annotation in 6 L. R. A. (N. S.) 463; L. R. A. 1917F, 637.

sheet to which clipping was attached, which defendants' manager failed to read, his signature thereto was obtained by fraud, and no valid contract resulted.

Case-made from Kent; Brown (William B.), J. Submitted January 23, 1931. (Docket No. 164, Calendar No. 35,477.) Decided June 1, 1931.

Assumpsit by Publication Division of the International Transportation Association, Inc., against Cornelius Bylenga, Sr., and others, copartners trading as Star Transfer Line, in justice's court on an advertising contract. Judgment for defendants. Plaintiff appealed to circuit court. Judgment for defendants. Plaintiff reviews by case-made. Affirmed.

*Boltwood & Boltwood* (*Francis L. Williams,* of counsel), for plaintiff.

*Irving H. Smith,* for defendants.

SHARPE, J. On August 28, 1926, defendants received a letter from plaintiff, reading as follows:

"We are now engaged in compiling the next issue of our Railroads and Steamships Manual. In future issues we propose to list the warehouses of the world.

"We are enclosing a clipping regarding your activity which we solicit authority to rewrite to conform with our style and method of presentation, publishing the same in future issues of the warehouse section of this reference work should you accept our offer for such special representation. In connection please make any necessary marginal corrections or additions desired and return to us promptly. Thanks in advance."

Enclosed therewith was a sheet of paper of ordinary letter size, made up as follows: In the upper left-hand corner is a picture or outline, about two inches in width and three inches in length, of the book plaintiff proposed to publish, entitled, "Directory of Railroads and Steamships also Warehouse Service." In the opposite corner, boxed in by a black line, is printed in small type, occupying the same space as the picture of the book, an offer to publish defendants' advertisement in the directory for the years 1927 and 1928 for $50 per year. Between these two designs, which slant towards the center of the sheet, there is printed in large letters at the top, "Directory of Railroads and Steamships also Warehouse Service," and in smaller type an additional reference to plaintiff's business. Below, and where a communication on a letterhead would usually begin, is printed:

"The undersigned accepts your offer to prepare and publish a revised description of our activity in the DIRECTORY OF RAILWAYS AND STEAMSHIPS, ALSO WAREHOUSE SERVICE, to be made up from the following data:
Classify under City of....."

A mucilaged slip was then pasted thereon, containing an advertisement of the defendants' business, consisting of six lines, in which its officers were named and information given as to consignments to be sent to it for shipment. At the bottom of the sheet was a dotted line for defendants' signature and the date of mailing. On it appears the name of the defendant company, by H. Bylenga, General Manager.

The plaintiff published defendants' advertisement in its 1927 and 1928 issues, and brings this action to recover the $100 claimed to be due it under

the contract. Defendants had judgment. Plaintiff seeks review by case-made.

Defendants' manager, while admitting his signature, testified that he did not read the printing in the oblique box in the upper right-hand corner; that he supposed he was merely signing a consent that plaintiff might publish the advertisement in its directory without charge to the defendants.

The trial court concluded as a matter of law:

"The minds of the parties hereto never met upon the terms of the alleged contract. That defendants never intended to contract with plaintiff that plaintiff should publish the data contained on the free listing clipping, in plaintiff's register, and to pay plaintiff therefor."

A meeting of the minds of the parties upon all essential points is necessary to constitute a valid contract. *Sterling & Son Co.* v. *Watson & Bennett Co.,* 193 Mich. 11; *Pangburn* v. *Sifford,* 216 Mich. 153.

This court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms. *Gardner* v. *Johnson,* 236 Mich. 258; *Draeger* v. *Kent County Savings Ass'n,* 242 Mich. 486; *Powers* v. *Indiana & M. Elec. Co.,* 252 Mich. 585. But the general rule announced in those cases is not applicable when the neglect to read is not due to carelessness alone, but was induced by some stratagem, trick, or artifice on the part of the one seeking to enforce the contract. This exception was noted in the *Gardner Case,* wherein it was said:

"There is no testimony of procuring her signatures by trick, or artifice, no testimony of any act of fraud."

A fraud is usually accomplished by making its victims neglect the precautions essential to prevent injury. In *Schupp* v. *Davey Tree Expert Co.*, 235 Mich. 268, 271, this court said:

"The fraud worked because plaintiff was careless, but this did not render it any less a fraud."

In 6 R. C. L. p. 633, it is said:

"But the fact that the means of knowledge were open to him, were indeed easily available, and that nothing but gross negligence would have failed to discover the falsehood, do not preclude an inquiry into the truth as to whether he in fact had the knowledge, and was in fact misled by the stratagem of his adversary."

This statement of the law is a quotation from the decision in *Western Manfg. Co.* v. *Cotton & Long*, 126 Ky. 749 (104 S. W. 758, 12 L. R. A. [N. S.] 427), wherein a somewhat similar question was discussed at length. It was therein further said:

"While there is always a sharp struggle in the courts between the desire to repress fraud upon the one hand, and to discourage negligence and the opportunity and invitation to commit perjury by laying down the bars upon the other, the question seems to be settling down to hearing all the facts, still scrutinizing closely, and even suspiciously, the claim of a party to such an instrument that he had not read it. The fact is that very thing frequently happens. The rule of law is one of policy. Is it better to encourage negligence in the foolish, or fraud in the deceitful? Either course has most obvious dangers. But judicial experience exemplifies that the former is the least objectionable, and least hampers the administration of pure justice."

The question presented is whether the communication sent to defendants was designedly prepared

by the plaintiff in such a manner as to cause an ordinary business man to affix his signature in the place indicated for it without reading the boxed-in printed matter in the upper corner thereof. In our opinion this question should be answered in the affirmative.

When the envelope was opened by Mr. Bylenga, his attention was first attracted to the letter it contained. On reading it, he could not be chargeable with notice that the proposal to list his company's business in the directory was other than gratuitous. On turning to the sheet accompanying it, he found, pasted thereon, a clipping containing an advertisement of the company's business, which he believed to have been taken from a magazine or directory in which it had been published without charge. He testified that he did not examine the upper part of the sheet or read what was printed thereon. He assumed that a checking of the correctness of the advertising matter and a consent to its publication were all that plaintiff required the defendants to do, and that was the only purpose he had in mind when he signed it. That there was no meeting of the minds of the parties as required to make a valid contract is apparent, and the stratagem resorted to by plaintiff to secure defendants' signature relieves the defendants of the liability usually attaching to one who signs an instrument without ascertaining its true character.

Plaintiff relies on *Publication Division, etc.,* v. *Blakeslee,* 225 App. Div. 229 (232 N. Y. Supp. 508). The facts clearly distinguish it. We quote from the opinion:

"The offer made by the plaintiff was mailed to the defendant from the plaintiff's place of business in the city of Baltimore, Md. In large letters inclosed within an arrow pointing to certain printed matter are the words 'Here is Our Offer.' "

No letter accompanied it as in the case before us. The change in the form there used, although for the same years, is suggestive that plaintiff discovered from the lack of the acceptances that it was calling attention to the offer too plainly, and substituted the form here used therefor.

Our attention is called to *Shannon* v. *International Transp. Ass'n* (Ga. App.), 155 S. E. 773. In that case, this plaintiff brought an action to recover upon the acceptance of a similar offer, and was permitted to recover. In deciding it, however, the court said:

"The defendant did not undertake to set up any fraud or device as suggesting his failure to read the agreement. Under this state of facts, a verdict in favor of the plaintiff was demanded, and the judge of the superior court did not err in overruling the defendant's motion for new trial, based upon the general grounds."

The judgment is affirmed.

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

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CURTISS *v.* WILMARTH.

1. CORPORATIONS—SUIT BY STOCKHOLDERS AGAINST DIRECTORS—EVIDENCE.

In a suit by stockholders against directors of a corporation on the ground of fraudulent representations in the sale of stock, and, by amended bill, for fraudulent and negligent misconduct in conducting the corporation's business, elimination of proof of said fraudulent representations, *held*, justified, in view of prayer for relief in amended bill and statement of plaintiff's counsel as to issues involved in court below.

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On the question as to necessity of applying to board of directors as a condition of right of stockholder to sue on behalf of the corporation, see annotation in 51 L. R. A. (N. S.) 99.

2. EVIDENCE—JUDICIAL NOTICE.
   Court takes judicial notice that drop in price of products in the fall of 1920 and thereafter was not confined to the business of the company involved in instant case.

3. CORPORATIONS—AMOUNT OF LOSS SUFFERED—NEGLIGENCE OF DIRECTORS.
   Finding of court below as to amount of loss sustained by corporation due to failure of certain director to account for corporate stock sold by him, *held*, supported by evidence.

4. SAME—MISCONDUCT OF DIRECTORS.
   Finding of court below that no intentional fraud or misconduct is chargeable to defendant directors, *held*, justified by evidence.

5. SAME—BANKRUPTCY—DUTY OF STOCKHOLDERS.
   Stockholders having knowledge of facts claimed to show fraudulent and negligent misconduct of directors in conducting corporation's business before discharge of corporation's trustee in bankruptcy, rendering said directors liable to account for money so lost, had duty to present said facts in bankruptcy court so that trustee could have recovered said money and used it for purpose of further satisfying creditors' claims.

6. SAME—DUTY TO PAY CREDITORS.
   Stockholders are equally interested with directors in the performance by the corporation of its duty to pay its creditors.

7. SAME—STOCKHOLDERS MAY NOT BENEFIT TO EXCLUSION OF CREDITORS.
   Stockholders having knowledge of facts rendering directors liable to corporation for negligence in handling its business may not sit quietly by and allow proceedings in bankruptcy to be concluded whereby creditors receive but a small part of their claims, and thereafter bring suit to recover the money due the corporation by reason of said negligence and themselves benefit thereby to the exclusion of the creditors.

8. SAME—STOCKHOLDERS NOT CREDITORS.
   Stockholders are not creditors of corporation as that word is generally understood.

9. SAME—STOCKHOLDERS DO NOT SUE IN OWN RIGHT.
   Stockholders do not sue in their own right, but in that of corporation, since cause of action is asset of corporation.

10. SAME—NEGLIGENCE OF DIRECTORS—STOCKHOLDERS' RIGHT TO SUE.

Stockholders may not bring suit on corporation's cause of action unless they have requested directors to bring it in name of corporation, except where brought to recover money lost to corporation through directors' negligence.

11. SAME—INSOLVENCY—ASSETS PASS TO TRUSTEE—RIGHT OF CORPORATION TO SUE.

Since all of the assets of insolvent corporation, including right to recover money lost to it through directors' negligence, passed to trustee in bankruptcy, corporation could not thereafter maintain suit thereon, in absence of claim that trustee was in any way chargeable with negligence complained of.

12. SAME—NECESSARY THAT DEMAND BE MADE ON TRUSTEE TO BRING SUIT BY STOCKHOLDERS.

Where contract was made primarily for benefit of corporation and only indirectly for benefit of stockholders, before latter may prosecute claim based on its breach, after corporation becomes insolvent, demand must first be made on receiver or trustee in bankruptcy to bring suit.

13. SAME—PLEADING—STOCKHOLDER MUST SHOW BENEFIT TO HIM.

Where corporation is insolvent, stockholder may not maintain suit to hold directors liable for fraud unless he alleges that the relief asked for will be of some benefit to him, *i. e.*, that there will be a surplus for stockholders after creditors are paid.

Appeal from Kent; Perkins (Willis B.), J. Submitted January 21, 1931. (Docket No. 116, Calendar No. 34,817.) Decided June 1, 1931. Rehearing denied September 10, 1931.

Bill by James A. Curtiss and others against Oscar B. Wilmarth and others to rescind contracts for the purchase of corporate stock on ground of fraud, and to account for losses of the Grand Rapids Knitting Mills alleged to be due to their fraudulent misconduct and negligent acts as directors of said corporation. Bill dismissed. Plaintiffs appeal. Affirmed.

*McAllister & McAllister,* for plaintiffs.

*Butterfield, Keeney & Amberg,* for defendants Wilmarth, Foote, and Murray.

*Travis, Merrick, Johnson & McCobb,* for defendant Palmer.

SHARPE, J. In June, 1923, the defendant Grand Rapids Knitting Mills filed a petition in voluntary bankruptcy. The assets of the company were disposed of, from the proceeds of which the unsecured creditors received payment of 22.14 per cent. of their claims. The trustee filed his final account, and was discharged on December 2, 1924.

On February 21, 1925, a large number of the stockholders filed the bill of complaint herein, alleging that they had been induced to purchase their stock by the fraudulent representations of the individual defendants, the then board of directors of the company, and praying for a rescission of their contracts of purchase and the payment to them by the individual defendants of the moneys paid by them thereon. The defendants, except Mather and Case, who were not served with process, appeared and answered, denying the material allegations in the bill.

On April 16, 1927, more than two years thereafter, by order of the court, but against the objection of the defendants, an amended bill of complaint was filed. It contained many of the allegations of the former bill, but particularly set forth that, by mismanagement and neglect of their duty as such directors, the individual defendants permitted the moneys which had been received by the sale of certain of its stock "to be squandered, misappropriated

and lost," and that the financial ruin of the company had been produced and it forced into bankruptcy thereby. They prayed for a decree adjudging the individual defendants liable for the losses so incurred, and for the appointment of a receiver to collect the same and disburse the sums so received.

The defendants, except Mather and Case, who are hereafter called the defendants, answered the amended bill, denying the material allegations therein. The proofs were submitted in open court, after which the trial court entered a decree dismissing the bill of complaint, from which the plaintiffs have taken an appeal.

The trial court filed a written opinion, in which he reviewed the proofs and the claims of counsel at considerable length. In it he said that the claim of plaintiffs' counsel, as stated in their final brief filed with him, was as follows:

"The parties to this suit are agreed that the question to be adjudicated is what damage did the corporation suffer from the acts of the directors, what is the damage to the corporation, and what are the facts of negligence of the directors."

He eliminated a very considerable part of the proofs submitted as immaterial to the question as above presented. This included that tending to support the claim of the fraudulent representations which induced plaintiffs to purchase their stock and the earnings and losses of the company prior to such purchase. It appeared that one of the directors, Carl N. Mather, had been intrusted with the sale of certain stock authorized to be issued by the securities commission, and the trial court limited the issue to—

"whether these defendants were guilty of negligence in permitting Mather to become indebted to the company in the sum of approximately $60,000."

While counsel in their brief filed in this court discuss at considerable length the effect of the proofs thus eliminated from consideration by the trial court, we are of the opinion that the prayer for relief in the amended bill and the statement of counsel above quoted fully justified such action on his part.

After a consideration of the pleadings and the material proofs submitted, the trial court said:

"The real issue in this cause in its last analysis relates to the responsibility, if any, of the four defendants, Foote, Wilmarth, Murray and Palmer for loss to the corporation due to Mather's failure to pay to the company all he owed as a result of the sale of the company's stock to him."

To understand how this sale came about, it seems necessary to detail at some length the history of the company. It apparently was in a fairly prosperous condition in the fall of 1920, but from that time on there was a steady drop in the prices of its products. We may take judicial notice that this period of deflation was not confined to the business of this company alone. It lost money on practically everything it handled for a period of months. In the spring of 1921 there were signs of improvement, and the board of directors caused an audit to be made in order to ascertain its exact financial condition. The report of the auditors and an independent appraisal of the value of the company's property revealed the fact that on June 30, 1921, its assets and liabilities were about the same. It then had a paid-in capital of $79,100, but no funds with which to do business.

At a meeting of the board of directors on May 28, 1921, at which Case, Mather, Murray, and Palmer were present, a tentative balance sheet, prepared by the auditors, was presented. A proposition of certain fiscal agents for increase and sale of capital stock was presented and discussed, and Case, Mather, and Palmer were appointed a committee to consult with the bank and fiscal agents and to make recommendation to a special meeting of the stockholders to be thereafter called. Such meeting was held on July 5, 1921, at which it was decided to change the name of the corporation from Mather-Palmer Company to Grand Rapids Knitting Mills; to increase the capital stock to $400,000 of preferred and 300,000 shares of no-par value. The directors were authorized to secure permission for such increase from the Michigan securities commission. Fifteen per cent. was fixed as the commission to be allowed on the sale of the stock. At this meeting, the holders of 4,200 shares of stock out of 4,910 outstanding were present or represented.

On July 14th, the securities commission validated both preferred and no-par stock and authorized the sale of $100,000 of common stock and $100,000 of preferred stock on condition that not to exceed 15 per cent. commission be paid on the sale thereof. The sale of the stock was considered at a meeting of the stockholders on July 18th, and a proposition of director Mather to underwrite it was submitted and recommended for approval to the board of directors. A by-law of the corporation was amended to authorize the treasurer to sign the certificates instead of the president. Later, on the same day, the board of directors met and the following action was taken:

"The minutes of the annual meeting of the stockholders of July 18th were read and upon discussion

it was unanimously moved, seconded and carried that Messrs. Case, Mather and Palmer be authorized to arrange for a sale of the no-par value stock of the company through C. N. Mather as broker as recommended in such stockholders' meeting with power on the part of Case, Mather and Palmer to take such action as shall be necessary to consummate such arrangement."

On July 23, 1921, a written agreement was entered into between the company and Mather, wherein the company agreed to sell to Mather all of the stock which had been validated by the commission "in such amounts as said second party shall from time to time order or demand from said first party" at the price of $10 per share for the preferred stock and a sum to be agreed upon, to be evidenced by a supplementary contract, for the no-par value stock. It was provided therein:

"It is further agreed that said second party shall acquire a broker's license and dispose of any stock so purchased by him in his discretion."

In an agreement supplemental to this, which was lost, but proof of which was submitted, the price of the no-par stock was fixed at $2 per share, from which Mather was entitled to deduct a 15 per cent. commission. He secured a license as a broker, and proceeded to sell this no-par stock; $8,500 worth was delivered to him and his note for that amount placed in the hands of the treasurer. He engaged the services of other brokers and salesmen in disposing of it and of other stock which came into his hands for sale, being that of stockholders, some of whom had been permitted to exchange their common stock for no-par stock, with the result that in June, 1923, when the company was adjudged a bankrupt, Mather also became such. The manner in which he

was permitted to dispose of the stock of the company, without paying in cash therefor, forms the basis on which the plaintiffs' claim of negligence on the part of the defendants rests.

Counsel differ widely as to the amount of the company's stock sold by Mather, or by others acting for him. While some of the records which would doubtless more clearly show the exact amount are now lost, we think it quite satisfactorily appears that the proceeds thereof to which the company was entitled, less the money paid by him into the treasury of the company, $44,876.48, amount approximately to the sum of $61,187.44. In the Mather bankruptcy proceeding, the referee allowed the claim of the trustee in bankruptcy of the company against Mather at the sum of $61,189.49, of which $305.95 was paid out of the bankruptcy assets, leaving a balance of $60,883.54.

Counsel for plaintiffs insist that the amount of Mather's indebtedness was largely in excess of the sum stated. Irrespective of the contention of defendants that the determination in the bankruptcy proceedings is *res adjudicata,* we are satisfied that the amount fixed fairly represented the amount of such indebtedness. It also appears to be the amount which one of plaintiffs' auditors found to be due from Mather to the company.

The trial court found:

"The ultimate failure of the corporation was not due to Mather's inability to pay his account. In spite of $44,000 or thereabouts, paid into the company on new stock sales, the losses in retail and wholesale selling of merchandise were so great, due to adverse business conditions, as to make further operations impossible. The payment of Mather's entire debt would have been barely sufficient to

satisfy existing creditors and ultimate failure must have occurred in any event."

The evidence supports this finding. It appears that the operating end of the company's business received attention from the directors. Its financial failure was due to causes which they were unable to control.

The trial court was of the opinion that, under the proofs submitted, the defendants could not "be held responsible for the unpaid debt of Mather. There is nothing in this case indicating such nonfeasance or misfeasance of these defendant directors as should make them personally responsible therefor." While defendants' counsel strenuously insist that the conclusion thus reached is supported by the evidence and the law applicable to the conduct of directors of a mercantile corporation, we are unwilling to rest decision thereon. We are, however, in accord with the finding that no intentional fraud or misconduct is chargeable to the defendants.

This suit cannot be considered as other than one by the plaintiffs, representing the corporation, to compel the defendants to pay into the treasury of the company certain moneys lost to it by their negligence in the conduct of its affairs. The material facts here presented were known to many of the plaintiffs before the discharge of the trustee in bankruptcy on December 2, 1924. They had held meetings and made arrangements with attorneys for the bringing of this suit as early as October, 1924. The bill of complaint was filed on February 21, 1925. It was their duty to have presented these facts in the bankruptcy court, in an effort to have the liability of the defendants there established, to the end that money would have come into the hands of the trustee

with which to further satisfy the claims of the creditors. Their counsel now say:

"In this case there was no trustee in bankruptcy at the time that the plaintiffs discovered this fraud and instituted this suit. The estate of the Grand Rapids Knitting Mills was entirely closed and the trustee was discharged of his trust, and his bond as trustee canceled December 2, 1924,"—

and insist that the plaintiffs who have instituted this suit "are the only ones entitled to the avails."

A duty rests upon every corporation to pay its creditors. In its performance, the stockholders, while they may not be personally liable for the debts of the corporation, are equally interested with the directors whom they have chosen to manage its affairs. It would be a strange doctrine for a court to announce a rule that certain stockholders, having knowledge of facts which render the directors liable to the corporation for negligence in the handling of its fiscal affairs, may sit quietly by and allow proceedings in bankruptcy to be carried on and the assets of the corporation disposed of, under which the creditors receive but a small percentage of their claims as allowed, and, after the discharge of the trustee, institute a suit to recover money due the corporation from the directors on account of such negligence and be themselves entitled to the sums so recovered to the exclusion of the claims of the creditors.

Stockholders are not creditors of the corporation as that word is generally understood. *Leland* v. *Ford,* 245 Mich. 599. In a stockholders' suit, they do not sue in their own right, but in that of the corporation. The cause of action is an asset of the corporation, and, as a general rule, a stockholder

may not bring suit unless he has requested the directors to bring it in the name of the corporation. There is an exception to this rule, as here, when the suit is brought to recover moneys lost to the corporation through the negligence of the directors. But, in this case, all of the assets of the corporation passed to the trustee in bankruptcy. The corporation could not thereafter maintain a suit. Its assets, including all rights of action, were in the hands of the trustee as an officer of the court. Had the plaintiffs furnished him with information justifying action against the defendants, on his refusal to prosecute the same, recourse might have been had to the court to compel such action on his part. But the law will not permit the plaintiffs to quietly sit by and permit the trustee to close the bankrupt estate, paying to the creditors but a small percentage of their claims, and, after his discharge, bring suit for their own benefit to recover from the directors moneys due the corporation.

No claim is made that the trustee was himself in any way chargeable with the negligence complained of, as was the case in *Flynn* v. *Third National Bank*, 122 Mich. 642, relied on by plaintiffs' counsel.

"A demand on the corporation need not be made where the corporate functions have been suspended by the appointment of a receiver since its power to sue no longer exists. In cases where the corporation is in the hands of a receiver or trustee in insolvency, the demand must be made on this official." 6 Thompson on Corporations (3d Ed.), p. 486.

A suit by a stockholder is in fact a suit by the corporation to redress a wrong to the corporation, and the relief granted belongs to the corporation and not to the stockholder individually. He is not

entitled to the money recovered. That goes to the corporation, and not to the individual complainants. 6 Thompson on Corporations (3d Ed.), p. 465.

In *Talbot* v. *Scripps,* 31 Mich. 268, in which an action was brought by a stockholder against individuals, who, it was alleged, had conspired with the directors to wreck the corporation, it was said:

"The wrong alleged will be seen to be a corporate wrong, in which all the stockholders are proportionally interested, and any legal redress should be at the instance of the corporation, if the board of directors will consent to demand it. There is no allegation that the board has been requested to bring suit and has refused. Under these circumstances, we know of no ground on which the suit can be maintained. As well might an individual stockholder bring suit to recover his share of corporate funds which had been lost by negligence or embezzlement, or his proportion of insurance money on the corporate property destroyed by fire. The injury counted on is not a separate injury to each of the stockholders, but a joint injury to all, and the corporation represents all for the purposes of legal remedy; at least until it is shown that the corporate authorities refuse after proper application to act."

The above holding was referred to with approval in *Horning* v. *Louis Peters & Co.,* 202 Mich. 140, 151, where it was said:

"The contract, then, having been made primarily for the benefit of the corporation and only secondarily or indirectly for the benefit of its stockholders, such stockholders including plaintiff cannot prosecute a claim based upon its breach without first making a demand upon the receiver (in this case the trustee in bankruptcy), to commence suit."

In 4 Cook on Corporations (8th Ed.), p. 3202, it is said:

"Another important principle of law in this connection is that where the corporation is insolvent a stockholder cannot maintain a suit to hold the directors liable for fraud unless he alleges that the relief asked for will be of some benefit to him; in other words, that there will be a surplus for the stockholders after the creditors are paid."

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

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

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HATCH *v.* MUSKEGON COUNTY SUPERVISORS.

1. HIGHWAYS AND STREETS—COUNTIES—COUNTY ROAD COMMISSION.
The board of county road commissioners is the agency through which the county's activities relative to highways are carried on (1 Comp. Laws 1929, § 3994).

2. SAME—TOWNSHIPS—LIGHTING TOWNSHIP ROADS.
1 Comp. Laws 1929, § 2415, authorizing township boards to provide for artificially lighting highways, has reference to township highways only, and not to county highways.

3. SAME—TAXATION—LIGHTING COUNTY ROADS.
Appropriate action by the county road commission and the board of supervisors to raise money by taxation for the purpose of artificially lighting county roads in certain congested and dangerous localities is within the scope of the statutory duty imposed upon them to keep county roads "in condition reasonably safe and fit for public travel" (Const., Art. 8, § 26; 1 Comp. Laws 1929, § 3995), and therefore the levy of taxes for said purpose is legal.

Certiorari to Muskegon; Vanderwerp (John), J. Submitted April 2, 1931. (Calendar No. 35,302.) Decided June 1, 1931.

Mandamus by the Board of Supervisors of Muskegon county to compel Burt P. Hatch, assessor of the City of Muskegon, and others to spread certain tax items for street lighting. Judgment for plaintiff. Defendants review by certiorari. Affirmed.

*Edward C. Farmer,* for appellant Hatch.

*William J. Balgooyen,* for appellant Seng.

*Irving J. Dodge,* for appellant Van Oort.

*John A. McLaughlin* (*Gordon F. Van Eenenaam,* of counsel), for appellee.

NORTH, J. The board of supervisors of Muskegon county at its October, 1929, meeting determined that in the $190,000 to be raised by taxation for county road purposes there should be included $10,000 to be used for lighting the county highways, and in the $386,106.86 to be raised for county purposes there should be included $705 for street lighting. These tax items were apportioned among the cities and townships of the county. Two of the appellants, as assessing officers, refused to spread their portion of the $10,000 item upon their rolls, and the remaining appellant refused to spread upon the assessment roll of his city the apportioned share of either of these items. Upon petition of the board of supervisors the circuit judge granted mandamus to compel the spreading of these respective tax items. From this adjudication the appellants have brought the matter to this court for review on certiorari.

Appellants' refusal to spread these items on their respective assessment rolls is based upon the claim that the county was not authorized to levy taxes of this character, *i. e.*, that such a tax was illegal. We think appellants' contention cannot be sustained. Section 26, art. 8, of the Michigan Constitution provides:

"The legislature may also by general law prescribe the powers and duties of boards of supervisors in relation to highways, bridges and culverts."

The board of county road commissioners is the agency through which the county's activities relative to highways are carried on. 1 Comp. Laws 1929, § 3994, provides that:

"Said board of county road commissioners shall have authority to grade, drain, construct, gravel, shale or macadamize any road under its control, or to place thereon any form of improvement which in its judgment may be best, * * * it shall have authority * * * to repair and maintain the said roads, * * * The commissioners shall have all the authority in respect to such roads, bridges and culverts which is vested in the highway officers in townships."

It is further provided in 1 Comp. Laws 1929, § 3995, that:

"It shall be the duty of the board of supervisors to raise a sufficient tax to keep any county roads or bridges already built in reasonable repair and in condition reasonably safe and fit for public travel. After the said board of supervisors shall have decided upon the amount of tax to be raised, the said board shall thereupon apportion such tax between the several townships and cities of said county according to their equalized valuation. The super-

visors or other assessing officers in such townships and cities shall levy and apportion the taxes so apportioned as provided in this section, to their respective townships and cities respectively, upon which the county taxes are assessed."

In behalf of appellants it is pointed out that 1 Comp. Laws 1929, § 2415, authorizes township boards to provide for artificially lighting highways; but we think that this act provides for lighting township highways only, not county highways. This is clearly indicated by the title which reads: "An act to authorize township boards to provide for the lighting of *township* highways," etc. It appears from this record that the tax items in question were included in the budget of the Muskegon county road commission as approved by the board of supervisors; and that these funds were to be used solely for lighting county roads in congested and dangerous localities. It was a precautionary or safety measure. Clearly such action on the part of the county road commission and the board of supervisors was within the scope of the statutory duty imposed upon them to keep the county roads "in condition reasonably safe and fit for public travel." The taxes appropriated for that purpose were in compliance with the statute, and appellants should have spread them upon the tax rolls of their respective districts. The order of the circuit judge granting mandamus is affirmed. This being a matter of public concern, no costs will be awarded.

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

## ROSE *v.* RAMM.

1. PRINCIPAL AND SURETY—CONTRACT CONSTRUED AGAINST PARTY DRAFTING IT.

   Construction of contract of guaranty, if uncertain, must be against party drafting it.

2. SAME—CONSTRUCTION—SPECIFIC ENUMERATION.

   Specific enumeration of conditions which would render contract of guaranty void impliedly excludes other agreements from having effect of discharging it.

3. SAME—SURETY FOR HIRE.

   One who conveyed his vendor's interest in a land contract, and, as part consideration, executed a contract guaranteeing payment of principal and interest, is not a gratuitous surety, and therefore not entitled to a strict construction of the contract.

4. SAME—NOTICE OF DEFAULT—PERSONAL SURETY FOR HIRE.

   Failure to give notice of default of principal does not discharge a paid surety unless loss is shown therefrom, and this applies to personal sureties who receive consideration as well as to corporations engaged in the business of suretyship for hire.

5. DAMAGES—COMPUTATION OF JUDGMENT.

   In an action on a contract guaranteeing payment of principal and interest due under a land contract, the amount of the mortgage tax, which plaintiff was obliged to pay to forfeit the land contract, as required by the contract of guaranty, and also the amount of general taxes and delinquent installments, were properly included in the judgment.

6. TRIAL—DIRECTED VERDICT—ISSUES OF FACT.

   Directed verdict in favor of plaintiff was proper where it was justified even if certain issues of fact presented in the case were resolved in favor of defendant.

Error to Wayne; Webster (Clyde I.), J. Submitted April 23, 1931. (Docket No. 133, Calendar No. 35,468.) Decided June 1, 1931.

Assumpsit by Albert A. Rose against Max A. Ramm on a contract of guaranty. Judgment for plaintiff. Defendant brings error. Affirmed.

*Frank C. Cook* and *John P. O'Hara,* for plaintiff.

*Corliss, Leete & Moody,* for defendant.

FEAD, J. February 21, 1927, in part payment on the purchase price of property, defendant conveyed to plaintiff the vendor's interest in a land contract running to Isadore Adler, as vendee. As part consideration for the deal, defendant executed to plaintiff an instrument, prepared by defendant, under which he guaranteed payment of principal and interest on the Adler contract, according to its terms; and by which it was agreed that plaintiff, in case of delinquency in payment, should—

"first exhaust every customary means of making land contract collections, such as notifying the said vendee personally, by telephone or by mail, following such preliminary notifications by issuing and sending notice of forfeiture to said vendee by registered mail, the guarantor hereunder to be advised in writing as soon as payments have become delinquent for a period of sixty days.

"It is further understood and agreed that this guarantee is to become null and void in the event that any changes are made in the terms thereof by said Albert A. Rose or in the event that said Albert A. Rose should dispose of his interest in the said contract."

The vendee's interest was assigned to Harry Adler on February 13, 1929, but, so far as the record indicates, without release of Isadore. The last payment was made June 11, 1929, for the installment due May 16th. Payments due June 16th and July 16th were not made. About July 16th plaintiff gave notice of forfeiture to Isadore and Harry Adler. He later brought summary proceedings and judgment of restitution was taken September 19th. Verbal notice of delinquency had been attempted in July, but defendant denied knowledge of it. Written notice was given him October 1st. Defendant did nothing about it.

Thereafter Harry Adler offered to make a new contract at a reduced price. Plaintiff sought defendant's consent to enter into the contract and claims to have received it subject to the claim that he had been wholly acquitted of the guarantee for failure of notice of delinquency. This was denied. The parties and their counsel had some conferences and correspondence, with the final result that defendant denied liability and refused to consent to a change of the contract. December 1st, plaintiff made a new contract with Harry Adler at a deduction of $759.32 from the amount due on the old contract. The court directed a verdict for plaintiff in that amount.

As defendant drafted the contract of guaranty, its construction, if uncertain, must be against him. The specific enumeration of conditions which would render the guaranty void impliedly excludes other agreements from having the effect of discharging it. Moreover, defendant was not a gratuitous surety entitled to a strict construction and observance of the contract. Failure to give notice of default of principal does not discharge a paid surety unless

loss is shown therefrom. While most of the cases in which this rule has been applied have involved corporations engaged in the business of suretyship for hire, it also applies to personal sureties who have received consideration for their engagement. *Overly Special School District* v. *Haber,* 193 Wis. 403 (214 N. W. 342). Defendant showed no injury from the delay of notice and the contract was not voided thereby.

Adler's former contract having been forfeited, the new contract was on a new sale to him. There was no evidence the property could have been sold for more money, and the case was tried on the theory that the measure of damages was the difference between such sale price and the balance owing on the contract. Defendant claims the judgment was excessive because the computation of the amount owing included mortgage tax, general taxes on the land, and delinquent installments. Plaintiff was obliged to pay the mortgage tax to forfeit as required by the contract of guaranty, and the charge was proper. The other sums were obligations of the vendee which defendant had guaranteed and the latter showed no loss from delay in paying taxes nor in failure to give him contract notice of delinquency.

The case presented some issues of fact, but even if they were resolved in favor of defendant, the directed verdict for plaintiff was justified.

Judgment is affirmed, with costs.

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

CITY OF DETROIT, *for use of* WATSON, *v.* BLUE RIBBON AUTO DRIVERS' ASS'N.

1. PRINCIPAL AND SURETY—INFERENCES—SURETY FOR HIRE.
   Inference may be drawn that corporation acting as surety on taxicab owner's bond was so acting for hire.

2. SAME—CONSTRUCTION OF BOND—SURETIES FOR HIRE.
   Bonds of sureties for hire are more strictly construed against them than are bonds against gratuitous sureties.

3. SAME—SURETY ADOPTING WORDING BOUND THEREBY.
   Surety for hire adopting its own wording in bond is bound thereby.

4. SAME—OBLIGATION OF SURETY FOR HIRE IN NATURE OF INSURANCE.
   Obligation of surety for hire is in nature of insurance, and in construction of such contracts courts usually invoke rules applicable to insurance.

5. SAME—CONSTRUCTION OF BOND—INTENT.
   Bond given by surety for hire to afford protection to general public, if its terms permit, should be so construed as to accomplish that purpose.

6. SAME—LIABILITY OF SURETY ON TAXICAB OPERATOR'S BOND—ORDINANCES.
   Where surety for hire on taxicab operator's bond did not limit its liability to license period, but liability was assumed for damages "to any person or property caused by the negligent operation of such taxicab," and the bond also provided that the surety would be liable in case taxicab was operated in violation of ordinance, the surety was liable for damages caused by negligent operation of taxicab after expiration of license in violation of city ordinance.

Error to Wayne; Houghton (Samuel G.), J., presiding. Submitted January 13, 1931. (Docket No. 89, Calendar No. 35,410.) Decided June 1, 1931.

Assumpsit by the People of the City of Detroit for the use and benefit of Amanda Watson against Blue Ribbon Auto Drivers' Association, Inc., a Michigan corporation, on a taxicab operator's bond. Judgment for plaintiff. Defendant brings error. Affirmed.

*Edward G. Kemp,* for plaintiff.

*Edward N. Barnard,* for defendant.

NORTH, J. James Dunbar procured a license for the calendar year 1924 and gave a bond under which he operated a taxicab in the city of Detroit. He continued to operate his cab during 1925, but did not secure a 1925 license until March 6th of that year. On January 6, 1925, Amanda Watson, plaintiff herein, was struck and seriously injured by Dunbar's cab. The accident was due to the carelessness and recklessness of the driver. Mrs. Watson sued Dunbar and recovered a judgment on which there is unpaid an amount in excess of the bond. In this suit against the surety on the bond, tried before the court without a jury, Mrs. Watson had judgment for the amount of the bond, $1,000. Defendant reviews by writ of error and states in its brief:

"There is but one question involved in this case, and that is whether any liability arises under the bond filed March 29, 1924, by reason of the operation of such taxicab on January 6, 1925, six days subsequent to the expiration of the license for which the bond was filed. * * * Was the bond in force and effect and did the surety's liability continue as to acts occurring subsequent to the expiration of the license December 31, 1924?"

The Detroit ordinance provides that no person, firm, or corporation shall operate a taxicab without

first obtaining a license therefor from the mayor. The applicant for the license is required to execute a bond to the city of Detroit in the sum of $1,000 for each taxicab, the bond to be executed by one or more "adequate sureties * * * satisfactory to the commissioner of police." The ordinance provides the condition of the bond shall be:

"That such taxicab or motor vehicle for hire will be operated in accordance with the provisions of the laws of the State of Michigan and the charter and ordinances of the city of Detroit, * * * and that any judgment rendered in any court against such applicant arising out of damage or injury to any person or property caused by the negligent operation of such taxicab will be paid. Any person, firm or corporation who is damnified by reason of such taxicab or motor vehicle for hire being operated in violation of the provisions of such bond may, in the name of the people of the city of Detroit, institute an action upon the same to recover damages sustained by him."

Defendant's bond is conditioned in accordance with the above-noted provision of the ordinance. Unquestionably Dunbar's license expired December 31, 1924; and, as above noted, it is defendant's contention that its liability as surety on Dunbar's bond expired simultaneously with the license. As bearing upon defendant's contention, it should be observed that the ordinance does not by express terms so limit the bond, nor will such a limitation be found in the bond itself. In fact, the express condition of the bond is directly to the contrary, for it provides that if the principal on the bond operates his cab in violation of the ordinance (which he was doing by operating without a license at the time of the accident) the surety will be liable in case of injury

resulting from such operation. Further, the bond expressly provides that it shall remain in full force and effect unless "any judgment rendered in any court against the owner of such taxicab arising out of damage or injury to any person or property caused by the negligent operation of such taxicab is paid." It is fair to infer from the record that this corporation acting as a surety on this bond was so acting for hire. Bonds of sureties for hire are more strictly construed against them than are bonds against gratuitous sureties. *Rose* v. *Ramm, ante,* 259; *Grinnell Realty Co.* v. *Surety Co.,* 253 Mich. 16. If such surety intended its liability should be confined to the license period rather than to be held responsible for the damage "to any person or property caused by the negligent operation of such taxicab" (as is expressly stated in the bond) it surely should have so provided in its obligation. This could easily have been done in clear and concise language. Defendant adopted its own wording in the bond and is bound thereby. *Grinnell Realty Co.* v. *Surety Co., supra.* The defendant's obligation as a surety for hire is in the nature of insurance; "and courts in the construction of its contracts usually invoke rules applicable to insurance." *Sandusky Grain Co.* v. *Borden's Condensed Milk Co.,* 214 Mich. 306.

Further, it may well be doubted whether the municipal authorities would have accepted a bond wherein the liability was expressly limited to the exact term of the license, especially in view of the fact appearing from this record that city officials countenanced the operation of these cabs for some reasonable time after the expiration of the license for a given calendar year before requiring the taxi owner to take out a license for the subsequent year.

Dunbar's 1924 license was not issued to him until January 11, 1924; and his 1925 license was not taken out until March 6, 1925. To hold that the surety's liability is limited to the license period is to hold that sureties on bonds given by taxi owners who are thus operating in express violation of the ordinance are exempt from liability; and that the public is without the protection contemplated by the ordinance.

"There is no question as to the general rule that the language of the bond should receive that construction most reasonable to effectuate the intention of the parties, in view of all the circumstances of the case and the purpose and object of the bond." *Stratford Arms Hotel Co.* v. *General Casualty, etc., Co.,* 249 Mich. 518.

This bond was obviously required for the protection of the public. If its purpose had been to protect rights of the municipality issuing the license, there would be force and logic in limiting the life of the bond to the license period. Of such a type is the case of *Adams* v. *State,* 105 Tex. 374 (150 S. W. 591), cited by defendant. But when, as here, the bond is given to afford protection to the general public, if its terms permit, it should be so construed as to accomplish that purpose. Protection against the unlawful operation of licensed taxicabs is no more needed by the public than protection against the unlawful operation of unlicensed cabs; and this bond as drawn is broad enough to cover such cases. If the limitation contended for by defendant is even to be inferred at all, it is only from the ordinance. But the bond refers to the ordinance only by a single casual reference in its recital portion. It does not even make the provisions of the ordinance a part of the bond by express reference thereto.

At the time of the accident and injury to plaintiff, Dunbar's taxi was being operated in violation of both the ordinance and the statute. Except for such violation plaintiff would not have been damaged. It hardly seems logical to hold that because the taxicab was so operated and also operated in violation of the express conditions of the bond, the surety is discharged from liability. We think this bond cannot be so construed. If the surety proposed to thus limit its liability it should have expressly so provided in the bond. Not only is there no such limitation, but the express provisions of the bond are inconsistent therewith. A similar case passed upon in a Federal circuit court is reported in *United States* v. *Truesdell*, 2 Bond's Rep. 78 (Fed. Case No. 16,543). The syllabus reads:

"The liability of the sureties on the bond of a manufacturer of tobacco, given in pursuance of section 12 of the act of Congress of March 3, 1863, does not cease upon the expiration of his license as such manufacturer."

The following is from the body of the opinion:

"The undertaking of the sureties is, not that they are bound for the acts of the manufacturer for any specified time, or until the expiration of his license, but generally, that they will be responsible for him while he manufactures and sells tobacco subject to tax or duty, at the place designated. * * * While it is expressly the duty of the manufacturer to renew his license, and failing to do so, if he continues his business, he subjects himself to a severe penalty, I know of no principle by which it can be held that his failure to comply with the law can inure to the benefit of his sureties."

The record in the instant case justifies the following from the trial judge's opinion:

"Neither was said defendant's bond conditioned that it would terminate with the defendant's city license to operate his taxicab. Its conditions were that defendant would operate his taxicab in a lawful manner and if he failed and damage resulted therefrom defendant company undertook to respond in damages in the amount of one thousand dollars.

"In short, the function of the bond was to secure the public against unlawful operation of said taxicab, without limiting itself to any particular law or ordinance nor time when it should cease to be effective. * * *

"On January 6, 1925, plaintiff did sustain damages considerably exceeding one thousand dollars, as a result of the breach of the conditions of said bond, and is entitled to recover thereon the sum of one thousand dollars with costs to be taxed."

The judgment of the lower court is affirmed, with costs to the appellee.

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

BARTH *v.* WOMEN'S CITY CLUB.

1. FRAUDS, STATUTE OF—LEASE FOR FIVE YEARS.
   Lease for five years with right to landlord after two and one-half years to cancel on six months' notice created tenancy for five years upon condition, and therefore statute of frauds (3 Comp. Laws 1929, § 13411) requiring it to be in writing is applicable.

2. SAME—SURRENDER OF LEASE MUST BE IN WRITING.
   Since lease for five years has to be in writing to be valid (3 Comp. Laws 1929, § 13411), surrender of it when the unexpired term is more than a year must also be in writing.

3. LANDLORD AND TENANT—SURRENDER OF LEASE—FRAUDS, STATUTE OF.
   Offer by lessee in letter to lessor to surrender lease in conformity with oral understanding, which was not accepted by lessor, did not constitute valid surrender of lease.

4. SAME—SURRENDER OF TENANT'S ESTATE MUST BE BY TENANT IN WRITING.
   Landlord may not by writing surrender to himself tenant's estate, but surrender, to be valid, must be by tenant in writing.

Error to Kent; Dunham (Major L.), J. Submitted January 14, 1931. (Docket No. 114, Calendar No. 34,489.) Decided June 1, 1931.

Assumpsit by Louis Barth against Women's City Club, a corporation, for rent due under a lease. Judgment for defendant. Plaintiff brings error. Reversed, and new trial granted.

*McAllister & McAllister* and *Steketee & Steketee*, for plaintiff.

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On the general rule as to right to surrender written lease by parol, see annotation in 4 A. L. R. 666.

*G. A. Wolf* and *Clare J. Hall,* for defendant.

CLARK, J. Plaintiff as lessor and defendant as lessee, on November 15, 1924, made and executed in writing a lease of lands in Grand Rapids for a term of five years from and after the date, $150 per month for first two and one-half years and $200 per month for remainder of the term.

On May 1, 1928, the tenant quit the premises and refused to pay rent. This suit is to recover the monthly installments of May, June, July, and August, 1928, $800 with interest.

The cause was tried to a jury who returned a verdict of no cause of action. Defendant had judgment. Plaintiff brings error.

The lease contained a condition that the landlord, at any time after two and one-half years of the term had elapsed, might cancel the lease and recover possession upon six months' notice in writing to the tenant. In the fall of 1927, the tenant desired to quit the property and to surrender the lease and to acquire other more commodious quarters. Defendant, by its officers and agents, discussed the matter with plaintiff. He was willing, if another tenant might be provided. Western Michigan Motor Club of the city offered to take the property under a lease. A lease was prepared, signed by the motor club, and presented to plaintiff, who declined to sign, for reasons not here material. During these negotiations with the motor club and when it appeared that it was to take lease, plaintiff discussed the matter with agents of defendant and the substance and effect of this discussion, as it appears the jury rightly found, was an oral understanding that defendant might surrender the lease as of May 1, 1928.

Plaintiff requested defendant to write a letter respecting the matter. This is the letter:

"November 7, 1927.

"DR. LOUIS BARTH,
"E. Fulton Street,
"Grand Rapids, Michigan.

"Dear Sir:

"In accordance with your request that we submit a written proposition to vacate your property on Guild avenue occupied by the Women's City Club under lease from you, we hereby offer to surrender up the lease and vacate the premises on or before May 1, 1928, whereupon on such surrender our lease shall terminate and be void.

"Please indicate your acceptance of this offer, and oblige,

"Very truly yours,
(Signed by defendant)."

Learning that plaintiff had not concluded lease with the motor club and that he intended to hold it on its lease, defendant, on December 6, 1927, wrote to plaintiff calling attention to the verbal agreement and protesting his change of attitude and insisting the agreement be carried out. On December 9, 1927, defendant replied in part:

"I have received your letters of November 7th and December 6th and am surprised at them. I have at no time agreed to release your club from the lease I hold with it unless I can get a tenant satisfactory in character and willing to pay the rents that your club is bound to pay under its lease."

The decisive question is that there was no surrender in writing as required by the statute of frauds, 3 Comp. Laws 1915, § 11975 (3 Comp. Laws, 1929, § 13411):

"No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or

power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing."

And therefore the trial judge ought to have directed a verdict for plaintiff.

Defendant contends that because of the condition of the lease permitting the lessor to cancel upon six months' notice, performance within a year was possible and therefore the statute does not apply, citing *Caplis* v. *Monroe,* 228 Mich. 586. The tenancy was for five years upon condition. *Shaw* v. *Hoffman,* 25 Mich. 162. Under 3 Comp. Laws 1915, § 11977 (3 Comp. Laws 1929, § 13413), leases for a longer period than one year are void unless in writing. *In re Reh's Estate,* 196 Mich. 210. As the lease here for five years had to be in writing to be valid, a surrender of it when the unexpired term is more than a year as here, must also be in writing, must be of equal dignity. *Pontiac Nursery Co.* v. *Miller,* 236 Mich. 511; *Range* v. *Davison,* 242 Mich. 73; note, 4 A. L. R. 666; 27 C. J. p. 214.

The surrender urged is of the tenant's estate. Where is the "deed or conveyance in writing" thereof? We find none. Defendant's letter of November 7th is a mere offer and the letter of December 6th not a surrender but a mere protest of plaintiff's change of attitude. No particular form of words is required to constitute a surrender, but clearly there must be more than a mere offer. See 2 Underhill on Landlord and Tenant, p. 1196. It is unnecessary to consider how an acceptance of the offer might have been made and a surrender

effectuated, as the record shows no acceptance, rather a repudiation. See *Wardell* v. *Williams,* 62 Mich. 50; 2 Tiffany, Landlord and Tenant, § 189; 25 R. C. L. p. 675.

It is argued that plaintiff's letter of December 9th, above quoted from, is an admission of the existence of the oral agreement and sufficient to take the case out of the statute.

Plaintiff was not to surrender his reversionary estate. He could not by his writing surrender to himself the tenant's estate. The tenant might surrender the estate for years. It is the tenant's estate, which surrender, to be valid, must be in writing as the statute requires. 2 Tiffany, Landlord and Tenant, § 187.

Estoppel, perhaps an important question, was pleaded, but not urged in the trial court, and therefore receives no attention here.

Verdict should have been directed for plaintiff. Reversed. New trial granted. Costs to abide the result.

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

GRAY v. ELLIOTT.

MOTOR VEHICLES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In action by pedestrian for personal injuries inflicted by defendant's automobile at street crossing, questions of driver's negligence and plaintiff's contributory negligence were properly submitted to jury, where testimony was conflicting.

Error to Wayne; Hunt (Ormond F.), J. Submitted April 9, 1931. (Docket No. 50, Calendar No. 35,355.) Decided June 1, 1931.

Case by Beatrice Gray against David Elliott for personal injuries received when struck by an automobile owned by defendant. Judgment for plaintiff. Defendant brings error. Affirmed.

*Martin & Williams,* for plaintiff.

*Stevens T. Mason* and *Edward A. Smith,* for defendant.

McDONALD, J. This action was brought to recover damages for personal injuries sustained by the plaintiff when struck by an automobile driven by Loraine Bertrand and owned by the defendant. The accident occurred at the intersection of Salem and Grand River avenues in the city of Detroit. On Grand River avenue there are two strips of concrete, each 40 feet wide, separated by a parkway on which are street car tracks. The north strip is for west-bound traffic and the south strip is for east-bound traffic. About 9:30 o'clock on a Sunday evening, the

plaintiff and her mother alighted from a street car at the intersection and proceeded across Grand River avenue toward the south curb. Before stepping off the curb into the street, she says they looked for approaching traffic and observed that the nearest automobile was about .450 feet away. They stepped into the street, and, when nearly two-thirds of the way over, saw the nearest car then 60 feet from them. It slowed down and they crossed about 20 feet ahead of it. They looked again and saw no traffic in that portion of the street which they still had to traverse before reaching the curb 10 feet away. At that time she says the car that injured them was in line behind the one which slowed up to allow them to pass; that it suddenly turned out to pass the car ahead of it and ran into them when they were about to step upon the curb. The plaintiff was very seriously injured and her mother was killed.

The negligence charged against the defendant is that the driver of his car, in violation of the statute, passed a car going in the same direction at a street intersection; that she passed on the right instead of on the left; and that she did not have the car under control. At the close of the proofs, the defendant moved for a directed verdict on the ground that plaintiff was guilty of contributory negligence as a matter of law. The motion was taken under advisement and the issue submitted to the jury. There was a verdict for the plaintiff in the sum of $14,500. Motions for a judgment *non obstante veredicto* and for a new trial were denied. The motion for a new trial was denied on condition that the plaintiff accept a reduction of $4,500 on the verdict. This was done, and judgment was entered thereon for $10,000. The defendant has brought error.

The only question involved is that of contributory negligence. The defendant thinks the trial court should have directed a verdict in his favor on the ground that the evidence showed plaintiff to have been guilty of contributory negligence as a matter of law. In his brief the question is stated as follows:

"The case at bar is very simple. It is just a question of whether plaintiff had a right to walk in front of a car going 30 miles an hour into the traffic which she could not see because her view was obstructed. If that is due care the judgment should be affirmed. If not, the judgment should be reversed."

The plaintiff and the driver of the defendant's car were not agreed as to how the accident happened. The driver, Miss Bertrand, testified that the plaintiff and her mother walked past the car that slowed down directly in the path of the one she was driving. The plaintiff testified that when they passed the car that slowed down, Miss Bertrand was in line behind that car; that there were no automobiles in that portion of the street between them and the curb; that there was no apparent danger and would have been no accident if Miss Bertrand had remained in line with the other automobiles instead of swinging out and attempting to pass on the wrong side. This conflicting testimony made the negligence of both parties a question for the jury. The trial court was right in submitting it.

The judgment is affirmed, with costs to the plaintiff.

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

MOORADIAN *v.* PETROFF.

1. LANDLORD AND TENANT—ASSIGNMENT OF LEASE—WRITTEN CONSENT.

   Where lease prohibited assignment without lessor's consent in writing, valid assignment required lessor's written consent.

2. VENDOR AND PURCHASER—CONTRACTS—RESCISSION—ASSIGNMENT OF LEASE.

   Purchaser of lease and restaurant business who undertook to secure lessor's written consent to assignment to him of lease had no legal ground for rescinding the contract because he failed to secure consent of assignment satisfactory to him, where no notice of such failure was given to seller or opportunity afforded him to secure it; and especially where purchaser was offered proper written consent and refused to accept it.

Appeal from Wayne; George (Fred W.), J., presiding. Submitted April 15, 1931. (Docket No. 108, Calendar No. 35,580.) Decided June 1, 1931.

Bill by Marderos Mooradian against Andrew Petroff to rescind a contract for the purchase of a lease and restaurant business. Decree for plaintiff. Defendant appeals. Reversed, and bill dismissed.

*Samuel H. Rubin* (*Walter Stark,* of counsel), for plaintiff.

*Peck & Armstrong,* for defendant.

MCDONALD, J. This bill was filed for rescission of a contract to purchase a lease and restaurant business. The lease contained a clause prohibiting assignment without the lessor's consent in writing. The bill was drawn on the theory of a failure of con-

sideration because the defendant did not secure such consent. A decree was entered in favor of plaintiff. The defendant has appealed.

The sale was consummated on May 5th, 1930. The consideration was $5,985, payable $1,000 in cash and a note for $1,500 on the execution of the contract, $1,000 in four months thereafter, and the balance in equal installments in six, nine, and twelve months.

This controversy has arisen out of the following provision of the contract:

"For the purpose of effectuating the sale hereinbefore mentioned, the said party of the first part shall and will execute and deliver to the said party of the second part an assignment of said lease and possession of the personal property described herein, provided, however, that actual delivery of the said lease and the assignment thereof to the party of the second part shall be withheld by the party of the first part and the title thereto and title to the aforesaid personal property and the right to possession thereof shall be and remain in said party of the first part until said sum of $5,985 and interest shall be paid in full."

At the making of this contract, both parties were represented by their attorneys. The papers necessary to its consummation, except the lessor's consent to the assignment of the lease, were executed and delivered to the plaintiff. The American State Bank was lessor. Mr. Wheeler, attorney for the plaintiff, suggested that he would look after the matter of securing the bank's consent. The unsigned paper prepared for that purpose was delivered to him. The plaintiff took immediate possession of the premises and business. Mr. Wheeler presented the written consent to Mr. DeYonkers, assistant cashier of the bank, who said the bank had

no objections to a transfer of the lease to the plaintiff, but wanted the writing to include a clause preserving the liability of the original lessee. For some reason not appearing in the record, Mr. Wheeler thought that such a consent would not fully protect the plaintiff and declined to insert the condition requested by the bank. However, he continued to negotiate for a more satisfactory consent until he went away on his summer vacation. From that time until commencement of suit no further attempt was made by any one to secure a written consent to a transfer of the lease. In the meantime, plaintiff was conducting the business. He paid rent to the bank for June and July and otherwise carried out his obligations under the contract. Early in September he was two months in arrears on the rent. He called on the bank and promised to pay if given time. But he did not pay. On September 16, 1930, without notice to the defendant or demand that he secure the lessor's written consent to a transfer of the lease, he filed this bill for rescission of the contract. The defendant claims that until summons in the suit was served on him he was unaware that the plaintiff's attorney had failed to secure the lessor's consent in writing to the transfer, and that when he learned of it he immediately went to the bank and secured its signature. The question is whether there were legal grounds for rescission.

At the time of the sale the lease had an unexpired term of four years and was valuable. No valid assignment could be made without the written consent of the lessor. It was a condition of the sale that such consent should be procured by the defendant. But he was relieved, at least temporarily, of this duty by Mr. Wheeler who voluntarily and with

plaintiff's consent took over the matter of securing the necessary writing from the lessor. Mr. De-Yonkers, acting for the bank, offered him a written consent containing a reservation of liability against the original lessee. He refused to accept it, but continued negotiations with him, endeavoring, as he says, to "work out" an assignment that would be satisfactory to the plaintiff. These negotiations failed, but he did not turn the matter back to the defendant. In replying to a question on cross-examination by defendant's counsel, he said:

"To my knowledge neither Mr. Petroff or you were ever asked subsequently to assume charge of obtaining that consent in my stead or instead of any body else, had there."

The defendant did not contract to secure any particular form of consent. That which the bank offered contained no unreasonable conditions, and was in form and substance a sufficient compliance with the contract. The facts are that the defendant never refused to procure from the bank a proper consent in writing and the bank never refused to give it. The plaintiff was offered a proper written consent and that he did not accept it was no fault of the defendant. No fraud is claimed. The plaintiff had bought and sold restaurants and was not inexperienced in business. Having taken over the matter of securing the lessor's written consent to a transfer of the lease, and having failed to secure one in satisfactory form, fairness required that he give the defendant an opportunity to secure it for him before beginning his suit for rescission. Further, it is a significant fact that he continued in possession with no apparent thought of rescission until he saw the business failing and became in

arrears for rent. The evidence shows no legal grounds for rescission. The circuit judge should have dismissed the bill.

A decree will be entered in this court in accordance with this opinion. Defendant will have costs.

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

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ELLIOTT *v.* CASUALTY ASS'N OF AMERICA.

1. INSURANCE—AUTOMOBILE INSURANCE—BREACH OF POLICY.
   Refusal of insurance company to defend actions against insured for damages caused by insured truck, which was its duty to do under the policy, under erroneous impression that the policy did not cover particular truck involved, was breach of policy.

2. SAME—REFUSAL TO RELEASE INSURER NO EXCUSE FOR ITS REFUSAL TO DEFEND ACTIONS.
   Where it was insurer's duty, under the policy, to defend actions against insured truck owner, breach of said duty was not excused because insured refused to sign agreement releasing insurer from liability in action against it under the policy.

3. SAME—RIGHT OF INSURED TO RECOVER AMOUNT PAID IN SETTLEMENT.
   Where insurer wrongfully refuses to defend actions against insured, and latter defends and in good faith makes settlement thereof, he may recover amount paid in such settlement, unless it is shown that there was in fact no liability, or that amount paid was excessive; such settlement, in absence of proof to contrary, being evidence of liability, and amount thereof.

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On effect of refusal of insurer to defend action and its effect under automobile liability insurance policy, see annotation in 41 A. L. R. 525.

4. SAME—CONSTRUCTION OF POLICY.

Language used in insurance policy should be so construed, if possible, as to make policy of some value to insured.

5. SAME—PAYMENT—JUDGMENT—SATISFACTION BY PROMISSORY NOTE SUFFICIENT.

Satisfaction of judgments against insured by promissory notes was sufficient compliance with requirements of policy to entitle insured to recover same against insurer.

Error to Wayne; Merriam (DeWitt H.), J. Submitted April 15, 1931. (Docket No. 94, Calendar No. 35,509.) Decided June 1, 1931. Rehearing denied October 5, 1931.

Assumpsit by Clarence E. Elliott, as assignee, and another against Casualty Association of America, a Michigan reciprocal insurance association, on an automobile insurance policy. Judgment for defendant. Plaintiff Elliott brings error. Reversed, and judgment ordered entered for plaintiff.

*Leithauser, Brown, Lenehan & O'Donnell,* for plaintiff Elliott.

*James B. Van Vechten, Jr.,* for defendant.

MCDONALD, J. This is a suit to recover for loss under an indemnity automobile policy issued by the defendant to Richard Frederick insuring property described as a 1926 Ford truck, motor No. 12264548. The applicable portions of the policy are as follows:

To indemnify the assured against loss for liability imposed by law upon him for damages on account of bodily injuries or death suffered by any person other than an employee; to defend any suit brought against him to enforce a claim, "whether groundless or not," for damages on account of bodily injuries or death to any person other than an em-

ployee; the association shall have the right to settle any claim or suit; the policy shall be void if the assured shall voluntarily assume any liability or interfere in any negotiations or legal proceedings conducted by the association or shall settle any claim or incur any other expense without the written consent of the association; if claim for damage is made to the assured he shall give notice to the association with full particulars; if any suit is brought against him he shall immediately forward to the association every summons or other process as soon as the same shall be served; no action shall be brought against the association under the policy except for loss and until final judgment has been rendered after a trial in a suit against the assured and within 90 days from the date of judgment.

On January 6, 1928, while the policy was in full force and effect, the Ford truck became involved in an accident in which two women, Nellie E. Silk and Harriet L. Silk, were seriously injured. On June 2, 1928, each began suit against the assured. Notice of the accident and suits was promptly given to the insurer. It denied liability and refused to defend on the alleged ground that the truck involved in the accident was not the truck covered by the policy. About three weeks thereafter, the assured retained an attorney and assumed the defense. After appearance was entered and plea filed, the insurer offered to defend the suits on certain conditions not acceptable to the assured. The suits were not defended by the insurer. Eventually they were settled by the assured. His pleas were withdrawn and a judgment by default entered in each case for $5,000, which was the liability limit of the policy. The assured borrowed $10,000 from Clarence E. Elliott

to satisfy the judgments and to him they were assigned. This suit was brought under the policy to recover the loss. At the close of the plaintiff's case and on motion of defendant, Richard Frederick was dismissed as a party. The case was tried before the court without a jury. Findings of fact and conclusions of law were filed, on which judgment was entered in favor of the defendant on the theory that the insured breached the policy and relieved the defendant of liability when it settled the suits without its permission.

The plaintiff has appealed.

The principal question involved is whether the defendant breached the policy by refusing to defend and thereby released the insured from his agreement not to settle without its consent the suits brought against him by Nellie Silk and Harriet Silk.

It was the duty of the insurer to defend these suits brought against its assured. It refused to do so under the erroneous impression that its policy did not cover the particular truck involved in the accident. It is now settled that it was the same truck. Its refusal to defend was a breach of the policy. It was not excused because the insured refused to sign an agreement to waive any objections to its defenses in an action under the policy. When these suits were commenced against the insured, one of two courses was open to the insurer. It could repudiate liability and refuse to defend, taking its chances on a showing that the truck involved in the accident was not the truck insured, or it could defend, with notice to the insured that it reserved the right to later question the identity of the truck. At first it repudiated liability and refused to defend.

Later, after the insured had assumed the defense, it offered to defend if he would sign an agreement, the applicable sections of which read as follows:

"1. In consideration of the mutual promises hereinafter contained, the said second party agrees to and does hereby release the said association from any and all liability which may have been or might have been incurred on account of or by reason of the terms of said policy of indemnity. * * *

"3. The said second party does hereby agree that no act of said association in defending said two suits above mentioned for and on behalf of said second party, and/or no act of said association in providing counsel to appear for and on behalf and to defend the said second party, shall be construed, looked upon, or considered as in any way, manner or form a waiver or prejudicial to the rights, claims and/or defenses of said association, it being expressly understood and agreed by and between the parties hereto that none of the acts above mentioned on the part of the association shall be prejudicial to or shall be considered or construed to waive any and/or all defenses which the association may have against the party of the second part hereto, or any other person whatsoever."

This contract if signed by the insured would have constituted an absolute release of all liability in an action against the defendant under the policy. The insured refused to sign it. The defendant's attorney testified he offered to eliminate section one. That he offered to do so is denied; but that makes no difference. The insured was not required to sign a contract in order to induce the insurer to defend the suits. The policy provided for that. The duty of the insurer in such circumstances is well stated by the court in *Mason-Henry Press* v. *Ætna Life*

*Insurance Co.*, 211 N. Y. 489 (105 N. E. 826), as follows:

"Under such circumstances, I think that the insurer as a matter of safety to itself and of fairness to the insured was bound to undertake the defense of the action for the benefit of both and of each. * * * Of course, there was no method by which it could compel the insured to make an explicit agreement of the kind above suggested covering this subject. All it could or was bound to do was to fairly and reasonably assert its rights under the policy in such a manner as would be notice to the insured that it did not intend to waive those rights by proceeding with the defense of the action."

In the instant case, the insurer should have defended. The policy unqualifiedly required it to do so. If it believed the truck involved in the accident was not the truck insured, it could easily have protected itself by a simple notification to the insured that, in defending, it did not waive its right to later deny liability on that ground. It wrongfully refused to defend, thereby breaching the policy and releasing the insured from its agreement not to settle the suits without its consent.

"Where the insurer has agreed to settle or defend an action brought to recover of the insured for an accident covered by the policy, and has wrongfully refused to so settle or defend the action, and the insured defends the same and in good faith makes a settlement thereof, he may recover the amount paid on such settlement, unless it is shown that there was in fact no liability, or that the amount paid was excessive. The settlement is presumptive evidence that there was a liability, and as to the amount thereof." *Butler Bros.* v. *American Fidelity Co.*, 120 Minn. 157 (139 N. W. 355, 44 L.

R. A. [N. S.] 609); 14 R. C. L. p. 1322; 36 C. J. p. 1116.

This decision is supported by the great weight of authority and is in harmony with reason and justice.

In this action, questions as to the reasonableness of the settlement, the good faith of the insured and his liability in the suits brought against him for damages were open to the defendant. They were not challenged by any evidence.

"Such settlement, in the absence of proof to the contrary, is presumptive evidence of a liability and the amount thereof." 36 C. J. p. 1116, § 108.

The loss defined in the policy is a loss actually sustained by the payment of money. It is claimed by the defendant that, as the insured did not pay any money to satisfy the judgment, but merely gave his note, he did not sustain a loss within the meaning of the policy.

"It is now well established by precedent that an insurer, having thus violated its contract to defend a suit against the insured, may not be allowed to defeat a recovery on the policy by objecting to the manner in which the judgment was paid." *Ford Hospital* v. *Fidelity & Casualty Co. of New York*, 106 Neb. 311 (183 N. W. 656); 36 C. J. pp. 1099, 1100.

If possible, the construction of the language used in the policy should be such as to make it of some value to the insured. There is no sense or justice in holding that unless his loss is in actual currency he cannot ask his insurer to reimburse him. We think the satisfaction of the judgments in this case by promissory note was a sufficient compliance with the requirements of the policy.

The defendant should pay this loss without further attempts at technical evasions of liability. The record discloses no reasonable excuse for refusal to discharge its obligations under the policy.

The judgment is reversed, and the case remanded to the circuit court for entry of judgment in favor of the plaintiff, with costs.

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

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PALAZZOLO v. SACKETT.

1. JUDGMENT—RES ADJUDICATA—LAW OF CASE—APPEAL AND ERROR.
When an appellate court speaks, such holding is the law of the case in all subsequent proceedings of the case in both the trial and appellate courts.

2. SAME—LAW OF CASE—WEIGHT OF EVIDENCE.
Decision of Supreme Court that verdict was not against the weight of the evidence is binding on trial court, on retrial, unless the record is materially different.

3. SAME—NEW TRIAL.
Where record on retrial was substantially the same as on the first trial, decision of Supreme Court that verdict for plaintiff was not against weight of evidence was law of case, and therefore trial court was in error in setting aside verdict for plaintiff and granting new trial on ground that it was against weight of evidence.

4. APPEAL AND ERROR—TRIAL—INSTRUCTION—MOTOR VEHICLES.
Where trial court instructed jury that vehicle driver had right to drive to left of center of street if he had to do so to avoid cars parked on right side, court's failure to repeat same, in instruction immediately following, on duty, under city ordinance, to keep to right of center, was not prejudicial.

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Excessiveness of damages in actions for personal injuries not resulting in death, see annotation in L. R. A. 1915F, 30; 46 A. L. R. 1230.

5. DAMAGES—EXCESSIVE VERDICT—PERMANENT INJURIES—PAIN AND SUFFERING.

Verdict of $4,500 for serious and permanent injuries to right knee of three-year old boy, causing him great pain and suffering, may not be said to be excessive, where well within the evidence, and there is no claim that jury were influenced by partiality or prejudice.

Appeal from Superior Court of Grand Rapids; Verdier (Leonard D.), J. Submitted April 28, 1931. (Calendar No. 35,546.) Decided June 1, 1931.

Case by Joseph Palazzolo, an infant, by next friend, against Ray C. Sackett and another for personal injuries received when struck by an automobile. Verdict and judgment for plaintiff. Plaintiff appeals from order granting new trial, and defendants filed cross-appeal. Reversed, and judgment ordered entered for plaintiff.

*Linsey, Shivel & Phelps* and *Wicks, Fuller & Starr,* for plaintiff.

*Dale Souter* (*Fred N. Searl,* of counsel), for defendants.

MCDONALD, J. This is an action to recover damages for injuries sustained by the plaintiff because of the negligence of the defendants in operating an automobile on Ionia avenue in the city of Grand Rapids. The case has been twice tried. On the first trial a judgment for the plaintiff was reversed by this court in 245 Mich. 97. The facts are therein sufficiently stated. In reversing that judgment, this court held that the verdict was not against the great weight of the evidence. On the second trial the verdict was again in favor of the plaintiff. On motion of the defendants the trial court set the verdict aside and granted a new trial on the sole ground

that it was against the great weight of the evidence. It is the plaintiff's contention that the former decision of this court on that question made the law of the case and that the trial court was bound to follow it on the second trial when the record was substantially the same.

"It is so well known as to be well-nigh a maxim of the law that, when an appellate court speaks, such holding is the law of the case in all subsequent proceedings of the case in both the trial and appellate courts." *St. Louis & S. F. R. Co.* v. *Barker,* 210 Fed. 902.

See, also, 4 C. J. §§ 3075, 3265; 2 R. C. L. § 191, p. 227; *Hall* v. *Murdock,* 119 Mich. 389; *Ruttle* v. *What Cheer Mining Co.,* 161 Mich. 150; *Wood* v. *Vroman,* 226 Mich. 625; *Terrill* v. *Traction Co.,* 214 Mich. 478; *State National Bank of Albuquerque* v. *Wernicke,* 202 Mich. 8.

Applying this rule to the case at bar, it must be held that our decision on the first review, that the verdict was not against the weight of the evidence, made the law of the case and was binding on the trial court in the second trial unless the record is materially different.

"When the evidence presented upon the second appeal is materially different from that previously passed upon, the decision on the prior appeal is not conclusive. There must, however, be a material change in the evidence; additional evidence which is merely cumulative will not take the case out of the rule and constitute a material change, where evidence of the same class and character on the former appeal was held insufficient to prove the fact in controversy." 2 R. C. L. p. 228.

The rule of law is firmly settled. The question is, Should it be applied in this case? A comparison of the records shows that with two exceptions the same

witnesses testified on both trials and that their testimony is substantially alike. Two additional witnesses, Edward C. Palmer and George Ford, were sworn for the defendants on the second trial. Neither of them saw the accident, which occurred on Ionia avenue about 100 feet south of its intersection with Graham street. The defendants came from the east on Graham street and turned south on Ionia. A witness for the plaintiff testified that they were then driving at a speed of 30 or 35 miles an hour. The only purpose of Mr. Palmer's testimony was to show that they could not make the turn at that rate of speed. But as they did not make it without hitting the curb according to plaintiff's witness, it is apparent that Mr. Palmer's testimony made no material change in the record on the question of speed.

Mr. Ford testified that if defendants' car was traveling 30 miles an hour at the time of the accident, as claimed by the plaintiff, it could not be stopped in a distance of 10 or 12 feet on a gravel street. It was defendants' claim that it was stopped in that distance after hitting the plaintiff. This was disputed. But the rate of speed at which defendants were driving was not necessary to a showing of negligence. Regardless of the speed, the defendants were negligent if the accident happened as claimed by the plaintiff. Speed was not a contributing cause. The plaintiff was three years of age at the time of the accident. He was playing on the grass between the sidewalk and curb. It is his claim that defendants were driving on the wrong side of the street and when they got within three or four feet of him he suddenly jumped from the curb in the path of their car. It was a sudden and unanticipated act arising from childish impulse. In these circumstances the defendants would have

been without fault had they not been driving on the wrong side of the street. With equal truth it may be said that, if the accident happened as the defendants claim, speed was not a contributing cause. They say they were driving on the right side of the street when the plaintiff suddenly darted out from between two parked automobiles directly in front of their car. So, whatever view may be taken of the testimony, speed had little or no effect in producing the results. The testimony of Mr. Ford had so slight, if any, bearing on the question of negligence that it cannot be said to have made any material change in the record. We have examined all of the evidence and think this record and that on the first appeal are substantially the same. It follows that the decision of this court on the weight of the evidence in the first record was made the law of the case and was binding on the trial court in the subsequent trial. His failure to follow it was error.

But the defendants contend they were entitled to a new trial for other reasons, and have filed a cross-appeal in which it is insisted that the verdict is excessive and that the court erred in his instructions to the jury.

The charge complained of is as follows:

"If you find by a preponderance of the evidence that defendant was driving to the east of the center of the street, that is a violation of the city ordinance that I have read to you, and is evidence of negligence—not negligence in and of itself; and if you find in addition that it was the proximate cause of this accident, then the defendants were negligent."

The ordinance referred to provides:

"Vehicles shall keep to the right side of the street, except when necessary to turn to the left in crossing or in overtaking another vehicle."

It will be noted that the exception stated in the ordinance was omitted by the court in that portion of the given charge. Defendants say this omission was prejudicial because the testimony showed that at the time of the accident they were passing cars parked on the right side of the street. This contention is without merit because immediately preceding the reference to the ordinance the court said:

"A driver does have a right to drive to the left of the center of the street, if he has to do so in order to avoid cars parked on the right side of the street."

Considering all that was said on the subject, the charge, though not strictly correct, was without prejudice to the defendants.

It is further claimed by the defendants that the verdict of $4,500 is excessive.

The injury was to the right knee. He was confined to his bed for five months, was unable to walk for ten months and then only with assistance. Following the injury, infection set in. It was necessary to open the infected tissues and put in drainage tubes about the knee to drain off the pus and infection. Dr. William H. Veenboer, who treated him at that time, testified:

"The condition of the infection was that the tissues above and in and around the joint and below the joint, in the back part of the leg below the joint, was very much swollen and inflamed and contained considerable pus. That condition continued for a long time. * * * The boy suffered greatly at the time. The putting in of these tubes would cause pain. Of course, he was under an anesthetic when they were put in, but afterwards the tubes had to be irrigated and dressed and every dressing was painful. * * *

"*Q.* What did you find the condition of the knee to be today?

"*A.* The knee is swollen, deformed to a certain extent, and larger than the left knee and the muscle and tissues above and below the joint are wasted away from the disease, as they have been every time I have seen him in the last several years. That is the condition today. The injury took place six years ago; that is the 16th of May, 1924. * * * In my opinion the condition as it is today is permanent. There will be very little improvement; there has been very little change in the last four years. I remember seeing him four years ago. He has grown, but the function and use of the leg has not changed much, and the condition of atrophy has not improved, or the swelling to the knee has not grown smaller. * * * There is deformity in the knee-cap. The knee-cap is flattened, and the bursa is more or less eliminated, and there are thickenings that can be felt in various places in the cartilage on the end of the bone."

Physicians who testified for the defendants disagreed with Dr. Veenboer as to the extent of the permanency of the injuries, but all agreed that there is a permanent deformity to the knee. The evidence leaves no doubt that the plaintiff was seriously and permanently injured. The jury, under proper instructions from the court, fixed his damages at $4,500. It is not claimed that they were influenced in the least by partiality or prejudice. Their verdict is within the evidence and ought not to be disturbed.

The record presents no reversible error except as to the order of the court in setting aside the verdict on the ground that it was against the great weight of the evidence. That order is set aside and the cause remanded for the entry of judgment on the verdict in favor of the plaintiff, with costs.

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

CHAJNACKI *v.* DOUGHERTY.

1. MASTER AND SERVANT—SCOPE OF EMPLOYMENT—LIABILITY OF MASTER FOR SERVANT'S NEGLIGENT ACTS.

Master is not liable for negligent acts of his servant unless at the time the servant is acting within scope of his employment or within his actual authority.

2. SAME.

Where truck driver had been instructed by his employer not to allow any one to ride on truck, driver's act in inviting boy to ride was not within scope of his employment, and therefore employer was not liable for driver's negligence in starting truck and injuring boy while he was trying to board it.

Error to Wayne; Moll (Lester S.), J. Submitted April 22, 1931. (Docket No. 5, Calendar No. 35,459.) Decided June 1, 1931.

Case by Anthony Chajnacki, an infant, by next friend, against J. H. Dougherty, doing business as Globe Cinder Supply Company, for personal injuries received while attempting to board defendant's truck. Judgment for defendant. Plaintiff brings error. Affirmed.

*Walter M. Nelson,* for plaintiff.

*Frederick J. Ward,* for defendant.

MCDONALD, J. This action was brought to recover damages for personal injuries received by the plaintiff while attempting to get on a truck driven by one James Lewis, and belonging to the defendant, his employer.

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Liability of master for injury to person riding with servant by latter's invitation or permission, see annotation in L. R. A. 1917F, 425.

Liability of master for injury to one whom servant in violation of instruction permits to ride on vehicle, see annotation in 14 A. L. R. 145.

The plaintiff's testimony shows that as the truck was being driven along Harper avenue in the city of Detroit, he signaled the driver for a ride. The truck was stopped and the plaintiff was invited to get on. As he was attempting to do so, it suddenly moved forward and threw him to the pavement. He was seriously injured. The driver had been instructed by the defendant not to allow any person to ride on the truck. For this reason the trial court held that the defendant was not liable for the plaintiff's injuries, and directed a verdict in his favor. The plaintiff has brought error.

It is well settled that a master is not liable for the negligent acts of his servant unless at the time the servant is acting within the scope of his employment or within his actual authority. In inviting the plaintiff to ride, the driver of the truck was not acting within the scope of his employment. His act was not only unauthorized but was contrary to the express instructions of his employer. In *Stornelli* v. *Railway Co.,* 193 Mich. 674, the plaintiff was injured while riding on one of the defendant's trains at the invitation of the engineer. The court said:

"If any such invitation was given, such invitation was outside the scope of the engineer's authority. *Keating* v. *Railroad Co.,* 97 Mich. 154 (37 Am. St. Rep. 328); *Schulwitz* v. *Lumber Co.,* 126 Mich. 559; *Mahler* v. *Stott,* 129 Mich. 614."

In *Schulwitz* v. *Lumber Co., supra,* quoting the syllabus, it was said:

"A master is not liable for the negligence of his servant in permitting a boy, contrary to the master's orders, to ride upon a wagon provided for the servant's use in hauling lumber, such act not being within the scope of the servant's employment."

See, also, *Rolfe, Admx.*, v. *Hewitt,* 227 N. Y. 486 (125 N. E. 804, 14 A. L. R. 125), and annotation page 145, 14 A. L. R.

In the instant case it is not claimed that the driver was guilty of wanton or wilful misconduct. It is true, as urged by the plaintiff, that, having invited him to ride, it was the driver's duty to exercise ordinary care for his safety; but, as the invitation was not within the scope of his employment, the defendant was not liable for his neglect of duty.

The court correctly directed the verdict. The judgment is affirmed, with costs to the defendant.

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

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## CLOUGH *v.* FIRST NATIONAL BANK OF PAW PAW.

1. GIFTS—DELIVERY—PASSING TITLE—INTENTION.
   Where bank claimed that donor left with it certain bonds to be delivered to his great grandchildren at his death, it is essential to validity of said gifts that donor voluntarily delivered the bonds to the bank for the donees with intention of relinquishing control and passing title to them.

2. SAME—DELIVERY AND ACCEPTANCE COMPLETES GIFT.
   Where donor, with intention to make gift of certain bonds to his great grandchildren at his death, made delivery to bank for that purpose, and bank accepted the trust, nothing further was necessary on part of donor to complete the gift.

3. SAME—FORM OF RECEIPT NOT CONTROLLING.
That bank, in accepting trust of holding certain bonds till donor's death and then delivering them to donees, used printed form of receipt containing language not directly applicable to transaction, is not fatal to its validity, where intention of donor to make gift to donees is clear and unmistakable.

4. SAME—DELIVERY.
Delivery to bank, *held,* sufficient to support gift.

5. SAME—WHERE TITLE PASSED TO DONEES, POSTPONEMENT OF POSSESSION NOT CONTROLLING.
Where delivery of bonds to bank to be delivered to donees at donor's death passed present title to donees, fact that possession was postponed until donor's death did not make transaction testamentary in character.

Error to Van Buren; Warner (Glenn E.), J. Submitted April 22, 1931. (Docket No. 36, Calendar No. 35,495.) Decided June 1, 1931.

Case by Frederic M. Clough, administrator of the estate of John B. Shered, deceased, against First National Bank of Paw Paw, Michigan, a Federal banking corporation, for the conversion of bonds left with it for safekeeping. Judgment for defendant. Plaintiff brings error. Affirmed.

*Marvin J. Schaberg,* for plaintiff.

*H. H. Adams* and *David Anderson,* for defendant.

MCDONALD, J. This action was brought for the conversion of two bonds of $1,000 each which the plaintiff claims belong to the estate of John B. Shered, deceased. The defendant claims that the bonds were delivered to it by Mr. Shered during his lifetime with directions that they be delivered to his great grandchildren, Marvel Shered and Marvin

Shered, at his death; that it delivered them according to instructions; and that they belong by gift to Marvin and Marvel. At the close of the proofs, both parties requested a directed verdict. The verdict was directed and judgment entered in favor of the defendant. The plaintiff has brought error.

The undisputed testimony shows that the defendant bank purchased for John B. Shered two $1,000 bonds of the Gemmer Manufacturing Company and at his request retained them for safekeeping. About six months prior to his death, Mr. Shered expressed a desire to give the bonds to his great grandchildren, Marvin and Marvel, sons of Paul Shered. For that purpose he went to the bank and talked to Mr. Parks, its cashier. To effectuate the gifts, Mr. Parks prepared the following paper:

"Paw Paw, Michigan, May 10, 1928.
"FIRST NATIONAL BANK.

"Received of John B. Shered ..... value $2,000.

"We hereby acknowledge receipt of the following documents or valuables, which we undertake to hold for your account and at your risk, to be delivered on the return of this receipt. We agree to give the said documents or valuables the same care we do our own property, but beyond this, we assume no responsibility.

"FIRST NATIONAL BANK,
(Signed) "E. F. PARKS, Cashier.

"ARTICLES.

"Two Gemmer Manfg. Company bonds, 5½ per cent, due 1-1-1933, Nos. 712 and 713, to be, at his death, delivered to Marvel and Marvin Shered.

"Not negotiable."

After this transaction the bank paid to Mr. Shered interest on the bonds and at his death delivered

them to Paul Shered, the guardian of Marvin and Marvel.

It is essential to the validity of these gifts that Mr. Shered should have voluntarily delivered the bonds to the bank for the donees with the intention of relinquishing control and passing title to them. *Shepard* v. *Shepard,* 164 Mich. 183, and cases cited on page 199.

It is undisputed that Mr. Shered went to the bank for the purpose of making these gifts. It is not claimed that he acted under compulsion or duress. His act was voluntary. He attached no conditions to the gifts except that possession of the bonds by the donees should be postponed until his death. It was his intention, clearly expressed in the writing prepared by the cashier at his dictation, that the bank should hold the bonds until his death and then deliver them to Marvin and Marvel:

"Two Gemmer Manfg. Company bonds, 5½ per cent, due 1-1-1933, Nos. 712 and 713, to be, at his death, delivered to Marvel and Marvin Shered."

These facts show an intention to make the gift, accompanied by a delivery to the bank for that purpose and an acceptance by the bank of the trust. Nothing further was necessary on the part of the donor to complete the gift. But the plaintiff contends that the receipt given by the bank in accepting the trust for the donees shows an intention on the part of the donor to retain control of the bonds, and invalidates the gift. We do not think so. The receipt was on a printed form used by the bank when securities or valuables were left with it for safekeeping. It contains language not directly applicable to a transaction of this kind, but nothing to indicate that Mr. Shered reserved any control over the bonds; and in fact no control was attempted.

It is not necessary to discuss other contentions of the parties. The intention of the donor to make these gifts to his great grandchildren is clear and unmistakable. The delivery was sufficient to support the gifts. The bonds were not registered and were transferable by delivery. Delivery to the bank passed a present title to the donees, and the fact that possession was postponed until the donor's death did not make the transaction testamentary in character. The circuit judge was correct in holding the gifts valid.

The judgment is affirmed, with costs to the defendant.

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

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MOWAT *v.* WALSH.

ATTORNEY AND CLIENT—DEATH OF ATTORNEY—NOTICE TO APPOINT ATTORNEY—CONTINUANCE—ABUSE OF DISCRETION.

Where defendant's attorney died after pleadings were filed and cause at issue, and after lapse of three years cause was proceeded with without notice to defendant to appoint another attorney, as required by 3 Comp. Laws 1929, § 13589, it was abuse of judicial discretion to deny defendant's motion, made before case was closed, for continuance in order that he might secure an attorney.

Error to Wayne; Toms (Robert M.), J. Submitted April 23, 1931. (Docket No. 51, Calendar No. 35,111.) Decided June 1, 1931.

Case by William L. Mowat against John H. Walsh and Elmore A. Starkweather for fraud in the exchange of real estate. Judgment for plaintiff against defendant Starkweather. Defendant Starkweather brings error. Reversed, and new trial ordered.

*George Katz* and *Myron Schiffman* (*Clarence E. Gittins,* of counsel), for appellant.

MCDONALD, J. On the 29th day of December, 1926, the plaintiff brought this action against the two defendants. Each retained counsel. Ralph A. Aldrich represented defendant Starkweather. After the pleadings were filed and the cause became at issue, Mr. Aldrich died. This was in April, 1929. No further proceedings were had in the case until November, 1929, when the plaintiff filed a motion to advance it for early trial. Notice of the motion was not served on the defendant. The motion to advance was granted and the trial began January 9, 1930, about three years after suit was started. Defendant Starkweather received no notice of the trial. After his attorney died he did not employ other counsel. At about the conclusion of the trial, the other defendant, Walsh, who was present with his attorney, telephoned to Mr. Starkweather that the case was being tried. Starkweather then appeared in court and requested time to procure an attorney. His request was denied, and judgment was entered against him for $5,400. As to the other defendant, who was represented by William Tarsney, the judgment was no cause of action. Mr. Starkweather made a motion for a new trial, which was denied. It is his claim that the denial of this motion was error, for which the judgment should be reversed.

The chief contention of defendant is that, after the death of his attorney, it was incumbent upon the plaintiff before any further proceedings were taken by him to notify the defendant to employ another lawyer. This contention is based on 3 Comp. Laws 1915, § 12068 (3 Comp. Laws 1929, § 13589), and reads as follows:

"When an attorney shall die, be removed or suspended, or cease to act as such, the person for whom he was acting shall be notified to appoint another attorney at least thirty days before any proceedings shall be had against such person, in the matter wherein such attorney was acting for him."

If this statute is mandatory, as it seems to be, the court was without authority to proceed with the trial until it had been complied with by the plaintiff. But regardless of the statute, it was in the discretion of the trial judge to continue the case in order that defendant might have time to secure an attorney. A very substantial judgment was rendered against him. He was not permitted to present his defense, which he says was meritorious. The case was not closed when he appeared in court, gave a reasonable excuse for his apparent neglect, and requested an opportunity to secure counsel. In the circumstances, the denial of his request was an abuse of judicial discretion for which the judgment is reversed, and a new trial granted, with costs to the defendant.

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

## McCLINTIC-MARSHALL CO. *v.* FORD MOTOR CO.

1. MECHANICS' LIENS—THEORY OF STATUTE.

   The mechanics' lien law is framed upon the theory that those who perform work or furnish material which enters into and enhances the value of improvements on real estate are entitled to a preferred claim against and a lien upon the specific property presumably bettered by the performance of such labor and the furnishing of such materials.

2. RAILROADS—LIENS—STATUTES.

   Laborers and materialmen doing work for or furnishing material to railroad companies are protected under 2 Comp. Laws 1929, §§ 11394–11396, and not under the mechanics' lien law.

3. STREET RAILWAYS—LIENS—STATUTES.

   Those who furnish labor and material to street railways are protected under 2 Comp. Laws 1929, § 11397, and not under the mechanics' lien law.

4. MUNICIPAL CORPORATIONS—LIENS—STATUTES.

   Enforcement of claims against municipal corporations, townships, cities, and villages is governed by 3 Comp. Laws 1929, § 14690.

5. MECHANICS' LIENS—WHEN INTEREST IS SUFFICIENT TO SUSTAIN LIEN.

   Any interest which the owner, part owner, or lessee may have is sufficient to sustain mechanics' lien, provided the interest is such that it can be assigned, transferred, mortgaged, or sold under execution.

6. EASEMENTS—UNDERPASS—LIMITATIONS OF GRANT.

   Right acquired in writing by manufacturing company to construct for use by its employees and others an underpass under land owned by railroad companies and the city amounted to more than a license and was in nature of an easement for the benefit of particular land, but it is limited to such land and to purposes of the grant.

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As to right to enforce mechanic's lien for building erected by licensee, see annotation in 45 A. L. R. 581.

On right of owner of dominant estate to grant rights in easement to one having no title to or interest in the tract to which it is appurtenant, see annotation in 41 L. R. A. (N. S.) 1107.

7. SAME—EASEMENT DEFINED.

An easement is a right which one proprietor has to some profit, benefit, or lawful use, out of, or over, the estate of another proprietor.

8. APPURTENANCES—WHEN APPURTENANT.

A thing is appurtenant to something else when it stands in the relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter.

9. EASEMENTS—INCORPOREAL RIGHT—UNDERPASS UNDER LANDS OF OTHERS—RIGHT TO CONVEY.

Easement in nature of right to construct and maintain underpass under land of others constitutes incorporeal right attached to and belonging with the grantee's real property to which it is annexed, and though it might pass as an incident to it, it is a species of servitude incapable of existence separate and apart from the particular land to which it is annexed, and therefore may not be conveyed separate from the land to which it is appurtenant, nor converted into an easement in gross.

10. MECHANICS' LIENS—EASEMENTS.

Where railroad companies and city granted to manufacturing company right to construct underpass under their lands to be used in connection with grantee's lands, neither grantors' land nor said easement is subject to mechanic's lien for labor or materials used in constructing said underpass.

11. SAME—CLAIM OF LIEN MUST FOLLOW CONTRACT.

Claims of lien claimants under mechanics' lien law must follow the contract.

12. EASEMENTS—HIGHWAYS AND STREETS—QUASI-PUBLIC USE OF EASEMENT—STREET RAILWAYS—RAILROADS—MUNICIPAL CORPORATIONS.

Where purpose of underpass constructed under city street and railroad companies' land by manufacturing company was to facilitate speed and safety of city street cars and of persons going to and from said company's plants, its uses are *quasi*-public in character.

13. MECHANICS' LIENS—LIENS ATTACH TO LAND AS WELL AS BUILDINGS.

Under mechanics' lien law (3 Comp. Laws 1929, § 13101 *et seq.*), liens attach not only to the buildings erected, but to the interest of the party erecting them, the owner, part owner, or lessee, in the real estate.

14. Same—When Lien Attaches to Building Only—Severability.
    If the person contracting for the erection of the building has no legal title to the land, the lien attaches to the structure erected, and the court may order sale of the building separately if severable from the land.

15. Licenses—Personalty—Right of Licensee to Remove Building.
    Generally, buildings erected on lands of another under leave or license so to do, in furtherance of the purposes of the permissive use and occupation, remain personal property and may be removed by the lessee or licensee at any time during his occupancy, or, if such occupancy or right of occupancy terminate on a contingency, within a reasonable time thereafter.

16. Mechanics' Liens—Lien If Any is Against Entire Structure Erected Under One Contract.
    Where underpass constructed by manufacturing company under lands of others was also partly on its own land, but construction was under one contract, it must be considered as one piece of work, and if liens exist they must be against entire structure.

17. Same—Not Enforceable Against Part.
    Mechanic's lien may not be enforced against part of an entire building.

18. Same—Enforceability Essential Characteristic.
    Since right to enforce lien by sale of the property to which it attaches is its essential characteristic, liens in abstract are nonexistent; lien that is unenforceable being a nullity.

19. Same—Easements—Underpass Incapable of Alienation Separate from Land Not Subject to Lien.
    Easement granted to manufacturing company to erect underpass under lands of grantors, to be used as appurtenance thereto and to grantee's land, is not subject to mechanic's lien, because not capable of mortgage, sale, or alienation separate and distinct from the land to which it is appurtenant, and if detached it ceases to exist.

Appeal from Wayne; Jayne (Ira W.), J. Submitted April 22, 1931. (Docket No. 132, Calendar No. 35,460.) Decided June 1, 1931. Rehearing denied September 10, 1931.

Bill by McClintic-Marshall Company, a Pennsylvania corporation, against Ford Motor Company, a Delaware corporation, and others to establish and enforce a mechanic's lien. James B. Clow & Sons, a foreign corporation, and others filed cross-bills to establish mechanics' liens. Bill by Labadie Brothers Company, a copartnership, against same defendants to establish a lien. Consolidated by stipulation before hearing. Decree for plaintiff and cross-plaintiffs. Defendant Ford Motor Company appeals. Reversed.

*Wilkinson, Lowther & O'Connell,* for plaintiff and defendant, cross-plaintiff Otis Construction Company.

*Charles F. Delbridge* and *W. Leo Cahalan* (*William P. Foster,* of counsel), for plaintiff Labadie Brothers Company.

*Longley & Middleton,* for defendant Ford Motor Company.

*Bryant, Lincoln, Miller & Bevan,* for defendant, cross-plaintiff Ray Sand & Gravel Company.

*Colby, Berns & Costello,* for defendant, cross-plaintiff P. F. Wynne Cartage Company.

*Griffin, Heal & Emery,* for defendant, cross-plaintiff Kalman Steel Company.

*Angell, Turner, Dyer & Meek,* for defendant, cross-plaintiff James B. Clow & Sons.

*Payne & Payne,* for defendant, cross-plaintiff H. H. Dickinson Company.

*Abraham J. Levin, in pro. per., amicus curiæ.*

Potter, J. The Ford Motor Company, a corporation, engaged in manufacturing in Fordson, in 1925 desired a grade separation at Eagle avenue—to construct an underpass 121 feet wide under the yard of the Pennsylvania, Ohio & Detroit Railroad, the tracks of the Pere Marquette Railroad, and the land of the city of Detroit, department of street railways—to enable its employees and others to reach its plant more easily, quickly, and safely. It entered into contracts in writing with the Pere Marquette Railroad Company, the Pennsylvania, Ohio & Detroit Railroad Company, the Pennsylvania Railroad Company operating the Pennsylvania, Ohio & Detroit Railroad, and with the city of Detroit, department of street railways, for the acquisition of the right to make this grade separation; and subsequently entered into a contract in writing with John M. Blair, doing business as the Blair Construction Company, to build this underpass and grade separation. Blair entered upon the work, making many contracts for material, but before the job was completed, disputes arose between Blair and the Ford Motor Company, and the Ford Motor Company rescinded the contract and took over the work. A large number of claims for liens were filed by subcontractors and materialmen, including plaintiff; about 60 suits were commenced against Blair in the circuit court for Wayne county, in which the Ford Motor Company was garnisheed; several cases were commenced in justice's court against Blair in which the Ford Motor Company was named as garnishee defendant, and other litigation ensued. A bill was filed by plaintiff to declare and enforce its lien; various other lien claimants named in the bill as defendants filed answers and cross-bills to establish, declare, and enforce claims of lien filed

by themselves. The Ford Motor Company filed motions to dismiss these bills and cross-bills upon the ground the property upon which a lien was claimed was not lienable and answered the bill of complaint and the several cross-bills filed. An arbitration agreement between Blair and the Ford Motor Company was entered into, a hearing had, and an award filed by the arbitrators awarding Blair $437,294.77. This case was brought on for hearing, referred to William C. Markley, a circuit court commissioner, who, September 23, 1930, filed findings herein to which exceptions were taken, and subsequently heard before the circuit court and a final decree entered sustaining the liens. The Ford Motor Company appeals.

The bill of complaint describes three parcels of land, parcel number one, being owned by the Ford Motor Company, a corporation; parcel number two, being owned by the Pennsylvania, Ohio & Detroit Railroad Company; and parcel number three owned by the city of Detroit, department of street railways (described in the bill of complaint as the Detroit United Railroad, a Michigan corporation). The lands, and the interests of the Ford Motor Company therein, occupied by the right of way and structures incident to the Eagle avenue grade separation, are described in different ways by claimants. Though there is no uniformity in description, they all attempt to describe, in different ways, the interest of the Ford Motor Company in the right of way and the grade separation incident thereto. The bill of complaint alleges, "the owners of said property being desirous of making a separation of grades of the railroad crossings through said property, did enter into a contract with John M. Blair, doing business as Blair Construction Company, for the separa-

tion of said grades and the erecting of viaducts and crossings thereunder." No contract, such as alleged in the bill of complaint, was entered into by the owners of the lands upon which this grade separation was made. The grade separation affects the lands of the Pere Marquette Railroad Company, the Pennsylvania, Ohio & Detroit Railroad Company, the city of Detroit, department of street railways, and the operating rights of the Pennsylvania Railroad Company. None of these parties entered into contract with Blair for the construction of this grade separation. They assumed no responsibility for damages resulting from its building, maintenance, and operation. On the other hand, the railroad companies above named, owners of the lands crossed by the grade separation, granted to the Ford Motor Company the right to construct the same at its own expense; the Ford Motor Company agreeing to keep, save, and bear harmless the owners of the lands from any loss or damage resulting from the building, maintenance, and operation of such grade separation.

The mechanics' lien law (3 Comp. Laws 1929, § 13101 *et seq.*) is framed upon the theory that those who perform work or furnish material which enters into and enhances the value of improvements on real estate are entitled to a preferred claim against and a lien upon the specific property presumably bettered by the performance of such labor and the furnishing of such materials; the security of attaching creditors and mortgagees being so enhanced in value thereby that they are not prejudiced.

The statute, 3 Comp. Laws 1929, § 13101, under which a lien is claimed, provides:

"Every person who shall, in pursuance of any contract, express or implied, written or unwritten,

existing between himself as contractor, and the owner, part owner or lessee of any interest in real estate, build, alter, improve, repair, erect, ornament or put in, or who shall furnish any labor or materials in or for building, altering, improving, repairing, erecting, ornamenting or putting in any house, building, machinery, wharf or structure, or who shall excavate, or build in whole, or in part, any foundation, cellar or basement for any such house, building, structure or wharf, or shall build or repair any sidewalks or wells or shall furnish any materials therefor, and every person who shall be subcontractor, laborer, or materialman, perform any labor or furnish materials to such original or principal contractor, or any subcontractor, in carrying forward or completing any such contract, shall have a lien therefor upon such house, building, machinery, wharf, walk or walks, wells, foundation, cellar or basement, and other structures, and its appurtenances, and also upon the entire interest of such owner, part owner or lessee in and to the lot or piece of land, not exceeding one-quarter section of land, or if in any incorporated city or village, not exceeding the lot or lots upon or around or in front of which such improvement is made, to the extent of the right, title and interest of such owner, part owner or lessee at the time work was commenced or materials were begun to be furnished by the contractor under the original contract, or by the subcontractor who furnishes or is furnished with any labor or material in the performance or execution of such subcontract and also the extent of any subsequent acquired interest of any such owner, part owner or lessee.''

This statute came before the court of appeals of the sixth circuit, Judges Taft, Lurton, and Severens, in *Pennsylvania Steel Co.* v. *J. E. Potts Salt & Lumber Co.*, 11 C. C. A. 11 (63 Fed. 11). The

court placed its decision upon the construction of the statute. It said:

"In most of the statutes of the several States, the subject of the lien is localized within restricted limits; in others, it is of an extended character; and in some; railroads are expressly mentioned. We are not disposed to question the proposition that such statutes, though they are in contravention of the common law, should be fairly and liberally construed; but we cannot extend them beyond the bounds of the purpose of the legislature, as gathered from the words employed. Upon general principles of construction, we do not think that the words 'other structure,' following, as they do, in the Michigan statute, such limited and localizing words as 'house, building, machinery, wharf,' can reasonably be held to include a railroad. This conclusion appears to us to be strongly fortified by the restriction of the lien in the latter part of the section to 'the lot or piece of land not exceeding one quarter section of land, or if in a village not exceeding the lot or lots' on which the improvement is made. Giving all these considerations their just weight, it seems clear to us that the complainant has no lien, and therefore that his suit must fail.

"It is suggested by counsel for complainant that the statute gives an independent lien upon the 'structure,' and a further one upon the land upon which it is built. We do not find it necessary to decide this point, or whether, if it is well taken, the statement of lien which was filed would support the claim of a lien upon the material composing the structure; for we are of the opinion that the structure for which the complainant furnished the material is not such a one as the statute contemplates, and it is only for material furnished for such a purpose that a lien is afforded."

In *Detroit Trust Co.* v. *Railway,* 159 Mich. 442, suit was brought to foreclose a mortgage. Defendants Praether Engineering Company, J. H. Kusell, trustee, and the Harrisburg Foundry & Machine Works, filed answers in the nature of cross-bills to enforce mechanics' liens. The question arose as to the construction of the statute. It is said:

"'The validity of the claimed mechanics' liens, apart from questions of procedure, depends upon the construction of our statute providing for such liens. See 3 Comp. Laws [1897], § 10710, as amended (Act No. 17, Pub. Acts 1903). This statute came under the consideration of the United States circuit court of appeals, sixth circuit, on appeal from the decree of the circuit court for the eastern district of Michigan, in the case of *Pennsylvania Steel Co.* v. *Lumber Co.,* 11 C. C. A. 11 (63 Fed. 11). The eminent judges who constituted the court, after much consideration and examination of authorities, reached the conclusion that the statute was not intended to give a lien for the materials used in the construction of a railroad. We are satisfied that the court correctly interpreted our statute, so far as concerns materials furnished to become an integral and permanent part of the railway system, and that the property upon which the mechanics' liens are claimed in the instant case is as much outside of the statute as the rails in the case referred to. *Phœnix Iron-Works Co.* v. *Trust Co.,* 28 C. C. A. 76 (83 Fed. 757), and cases cited; *Detroit United Ry.* v. *State Tax Com'rs,* 136 Mich. 96."

(a) Laboring and material men doing work for or furnishing material to railroad companies, such as those above named, are protected under Act No. 100, Pub. Acts 1871 (2 Comp. Laws 1929, §§ 11394 to 11396 inclusive), and not under the mechanics' lien law.

(b) Those who furnish labor and material to street railways are protected by Act No. 110, Pub. Acts 1899 (2 Comp. Laws 1929, § 11397), and not under the mechanics' lien law.

(c) The enforcement of claims against municipal corporations, townships, cities, and villages is governed by 3 Comp. Laws 1929, § 14690.

It is claimed, so far as the property of the Pere Marquette Railroad Company, the Pennsylvania, Ohio & Detroit Railroad Company, and the city of Detroit, department of street railways, are involved, the Ford Motor Company had no title. Its rights are said to amount only to a license.

"A license is a permission to do some act or series of acts on the land of the licensor without having any permanent interest in it. 3 Kent's Commentaries, p. 452; *Cook* v. *Stearns,* 11 Mass. 533, 538; *Woodbury* v. *Parshley,* 7 N. H. 237 (26 Am. Dec. 739); *Prince* v. *Case,* 10 Conn. 375 (27 Am. Dec. 675); *Wolfe* v. *Frost,* 4 Sandf. Ch. (N. Y.) 72, 91. It is founded on personal confidence, and therefore not assignable. 3 Kent's Commentaries, p. 452; Brown on Stat. of Frauds (3d Ed.), § 22. It may be given in writing or by parol; it may be with or without consideration; but in either case it is subject to revocation, though constituting a protection to the party acting under it until the revocation takes place. Where nothing beyond a mere license is contemplated, and no interest in the land is proposed to be created, the statute of frauds has no application, and the observance of no formality is important. But there may also be a license where the understanding of the parties has in view a privilege of a less precarious nature. Where something beyond a mere temporary use of the land is promised; where the promise apparently is not founded on personal confidence, but has reference to the ownership and occupancy of other lands, and is

made to facilitate the use of those lands in a particular manner and for an indefinite period, and where the right to revoke at any time would be inconsistent with the evident purpose of the permission; wherever, in short, the purpose has been to give an interest in the land, there may be a license but there will also be something more than a license, if the proper formalities for the conveyance of the proposed interest have been observed. What that interest shall be called in the law may depend upon the character of the possession, occupancy or use, the promisee is to have, the time it is to continue, and perhaps upon the mode in which the compensation, if any, is to be made therefor. It may be an easement or it may be a leasehold interest; or if the proper grant or demise has not been executed for the creation of either of these, the permission to make use of the land may still constitute a protection to the party relying upon it, until withdrawn." *Morrill* v. *Mackman,* 24 Mich. 279 (9 Am. Rep. 124).

If the Ford Motor Company is a bare licensee, the property of the railroad companies and the city of Detroit, department of street railways, would not for that reason be lienable. *Griffith* v. *Happersberger,* 86 Cal. 605 (25 Pac. 137, 487); *Boise Payette Lbr. Co.* v. *Bickel,* 42 Idaho, 245 (245 Pac. 92, 45 A. L. R. 575); *W. H. Atkinson Co.* v. *John Shields Construction Co.,* 76 N. J. Law, 751 (72 Atl. 81).

What interest in real estate must the Ford Motor Company have to sustain a lien by plaintiff and the other lien claimants herein? Such interest has been defined as,

"Any interest in land which could be sold under execution." *McGreary* v. *Osborne,* 9 Cal. 119.

"Any interest which the party could pass by mortgage." *Montandon & Co.* v. *Deas,* 14 Ala. 33 (48 Am. Dec. 84).

"Any interests in land which is legally subject to mortgage." *Tyler* v. *Birmingham Realty Co.*, 207 Ala. 210 (92 South. 264).

In short, any interest which the owner, part owner, or lessee may have, "provided such interest is such that it can be assigned, transferred, mortgaged or sold under execution." 40 C. J. p. 62.

The right of the Ford Motor Company to construct this grade separation amounted to more than a license. It was in the nature of an easement.

"An easement is a right which one proprietor has to some profit, benefit or lawful use, out of, or over, the estate of another proprietor. * * * It does not displace the general possession by the owner of the land, but the person entitled to the easement has a qualified possession only, so far as may be needful for its enjoyment." *Morrill* v. *Mackman, supra.*

"An easement is a liberty, privilege, or advantage without profit, which the owner of one parcel of land may have in the lands of another; or to state it from the opposite point of view, it is a service which one estate owes to another, or a right or privilege in one man's estate for the advantage or convenience of the owner of another estate." 19 C. J. p. 862.

Its right is to occupy and use as a private way the tunnel or underpass constituting the Eagle avenue grade separation as a means for travel and transportation by those coming to or going from its plant. Such right was granted by the railroad companies and the city of Detroit to the Ford Motor Company for the benefit of particular land and for a specific purpose. Its use is limited to such land; *Wood* v. *Woodley,* 160 N. C. 17 (75 S. E. 719, 41 L.

R. A. [N. S.] 1107), and to the purposes of the grant. Gale on Easements (10th Ed.), pp. 330, 347.

A thing is appurtenant to something else when it stands in the relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter. *Humphreys* v. *McKissock,* 140 U. S. 304, 313 (11 Sup. Ct. 779).

This grade separation or underpass constitutes an incident to and a part of the right of way granted to the Ford Motor Company under the tracks and across the lands of the railroad companies and the city of Detroit. Its construction and maintenance was one of the conditions of the grant of such right of way which would be valueless except in connection with its use by employees of the Ford Motor Company and others having occasion to go to and from its plants. This right of way or easement is appurtenant to the property of the Ford Motor Company, which was bound to construct, improve, and maintain it, but nevertheless it constitutes an incorporeal right attached to and belonging with the real property of the Ford Motor Company. It is annexed thereto, and though it might pass as an incident to it, it is a species of servitude incapable of existence separate and apart from the particular land to which it is annexed. 2 Bouvier's Institutes, note 1600; 3 Kent's Commentaries (14th Ed.), p. 419; *Lamb* v. *Railroad Co.,* 150 Mich. 340; *Cadwalader* v. *Bailey,* 17 R. I. 495 (23 Atl. 20, 14 L. R. A. 300); 19 C. J. p. 865. Such right of way and the incidents thereto may not be conveyed by the Ford Motor Company separate from the land to which it is appurtenant, but may only be conveyed by it in connection with such land. It cannot exist separate from it and cannot be converted into an easement in gross. *Wood* v. *Woodley, supra;* Jones on Ease-

ments, § 28. Being an appurtenant easement, it is incapable of existence separate and apart from the particular land to which it is annexed. *Cadwalader* v. *Bailey, supra; Reise* v. *Enos,* 76 Wis. 634 (45 N. W. 414, 8 L. R. A. 617); *Houston* v. *Zahm,* 44 Ore. 610 (76 Pac. 641, 65 L. R. A. 799); *Wooldridge* v. *Smith,* 243 Mo. 190 (147 S. W. 1019, 40 L. R. A. [N. S.] 752); *Jarvis* v. *Seele Milling Co.,* 173 Ill. 192 (50 N. E. 1044, 64 Am. St. Rep. 107); *Wood* v. *Woodley, supra; Mahler* v. *Brumder,* 92 Wis. 477 (66 N. W. 502, 31 L. R. A. 695); Jones on Easements, § 28; 3 Kent's Commentaries (14th Ed.), p. 419; 9 R. C. L. pp. 737, 802; 19 C. J. p. 865.

Neither the land of the railroad companies, the city of Detroit, nor the easement granted by them to the Ford Motor Company, is subject to a lien. There are no contractual relations between the railroad companies and the city of Detroit and the principal contractor, or between them and the lien claimants. The grade separation itself was constructed as an incident to and for the security and protection of an easement appurtenant to the property of the Ford Motor Company which cannot be sold, mortgaged, assigned, transferred, or conveyed separate and distinct from the dominant estate to which it is attached. Upon sale or conveyance it would cease to exist.

The claims of the lien claimants must follow the contract. The real estate upon which the lien is here claimed belongs to distinct owners. These several owners did not enter into any contract which may be made the basis of a lien. The only contract entered into is that of the Ford Motor Company. The Ford Motor Company is primarily a private corporation engaged in the manufacturing business. Its entire property is subject to levy and

sale under execution. It entered into no contract with plaintiff or with the other lien claimants. Their contracts were primarily entered into with Blair. Such lien claimants as materialmen seek advantage of the mechanics' lien law, claiming a lien upon the Eagle avenue grade separation. It is this property upon which the lien claimants seek to fasten liens and sell to satisfy their claims from the proceeds of sale.

The Eagle avenue grade separation, although constructed by the Ford Motor Company, is devoted to a *quasi*-public use. Its purpose is to facilitate the speed and safety of the city street cars of the city of Detroit and of persons going to and from the Ford Motor Company's plants. Its uses are *quasi*-public in character. To use this grade separation it must be kept intact. The safety of operation of the several railroads, intrastate and interstate carriers, must be safeguarded. To tear apart this grade separation and divide its constituent parts among the contesting lien claimants would destroy and defeat the purposes of its creation, render it unable to perform its intended functions, and increase the danger of travel of those who use it, and subject them to greater hazards of life and limb. Yet, if the lien claimants have liens to establish and enforce, they must be permitted to do so.

Under our statute, liens attach not only to the buildings erected but to the interest of the party erecting them, the owner, part-owner, or lessee, in the real estate. If the person contracting for the erection of the building has no legal title to the land, the lien attaches to the structure erected. The court may order the sale of the land and buildings together, or the buildings separately, if severable

from the land. *Carland* v. *United Engineering Co.,* 209 Mich. 244.

It is a general rule that buildings erected on the lands of another under leave or license so to do, in furtherance of the purposes of the permissive use and occupation, remain personal property and may be removed by the lessee or licensee at any time during his occupancy, or, if such occupancy or right of occupancy terminate on a contingency, within a reasonable time thereafter. *Kerr* v. *Kingsbury,* 39 Mich. 150 (33 Am. Rep. 362); *Osborn* v. *Potter,* 101 Mich. 300; *VanNess* v. *Pacard,* 2 Peters (U. S.), 137; *Martin* v. *Roe,* 7 El. & Bl. 237 (119 Eng. Rep. Repr. 1235); *Northern Central R. Co.* v. *Canton Co.,* 30 Md. 347; *Antoni* v. *Belknap,* 102 Mass. 193; 2 Taylor, Landlord and Tenant (9th Ed.), § 552. It is in recognition of this principle that, under our statute, buildings may be sold separately from the land in case a lien is established thereon.

A part of the Eagle avenue grade separation was built by the Ford Motor Company upon its own land. Is this land and this part of the grade separation subject to the lien claimed?

There was a single contract entered into with the Ford Motor Company for the construction of the grade separation, which must be considered as one piece of work, and if liens exist in favor of the lien claimants, they must be against the entire structure.

In *Detroit International Bridge Co.* v. *American Seed Co.,* 249 Mich. 289, it is said:

"The bridge and its approaches form one structure. As such, it constitutes a union of highways of Michigan and of Ontario and converts them into one uninterrupted public road."

The Eagle avenue grade separation must be regarded as one structure. It constitutes a union of Mulkey avenue and Miller road. It was constructed primarily for the use of the Ford Motor Company and its employees, but the use to which it is put is substantially the same as if it had been constructed by public authority.

In *Orear* v. *Dierks Lumber Co.*, 188 Mo. App. 729 (176 S. W. 467), an action in equity was brought to restrain defendant from removing the west 40 feet of a three-story brick business building 120 feet in length in Kansas City. The question was whether or not this building was severable. It is said:

"While the law is that where a building is erected on land not owned by the builder and a judgment is obtained and execution had enforcing a mechanic's lien against the building, it may be removed from the ground within a reasonable time. *Ambrose Manfg. Co.* v. *Gapen*, 22 Mo. App. 397; *Deatherage* v. *Sheidley*, 50 Mo. App. 490. But this, as intimated in those cases, cannot be done when it would destroy an entire structure of which it has been made a part. *O'Brien* v. *Pettis & Leithe*, 42 Iowa, 293, wherein it is said, 'The defendants' right depends upon the fact as to whether the building upon which these materials were furnished and work done is so far an independent structure as to be capable of being removed without materially injuring or destroying that which would remain, or whether it is so united with that which was before upon the lot, as to constitute substantially the one building or structure.'"

A mechanic's lien cannot be enforced against a part of an entire building. *Leidel* v. *Bloeser*, 77 Mo. App. 172; *Wright* v. *Cowie*, 5 Wash. 341 (31 Pac. 878); *O'Brien* v. *Pettis & Leithe*, 42 Iowa, 293.

Liens in the abstract are nonexisting. A lien that is unenforceable is a nullity. The right to enforce a lien by sale of the property to which it attaches is its essential characteristic. "The lien abstractly is nothing, its consequences and results are everything." *Vulcanite Paving Co.* v. *Philadelphia Rapid Transit Co.*, 220 Pa. 603 (69 Atl. 1117, 17 L. R. A. [N. S.] 884).

See, also, *Vulcanite Portland Cement Co.* v. *Allison,* 220 Pa. 382 (69 Atl. 855).

There are limitations on the right to a lien.

(a) The mechanics' lien law does not by its terms extend to claims against the property of railroad companies, street railway companies, or municipalities.

(b) A lien may attach only to interests in real estate capable of alienation as separate and distinct entities.

(c) The right of way granted to the Ford Motor Company by the several railroad companies and by the city of Detroit was a grant upon conditions of an easement.

(d) These conditions of the grant were complied with, the grade separation constructed, and the easement is now appurtenant to the land of the Ford Motor Company.

(e) This easement is not lienable because not capable of mortgage, sale, or alienation separate and distinct from the land to which it is appurtenant. Attached, it is a valuable appurtenance; detached, it ceases to exist.

(f) The grade separation is one structure, incapable of division without destroying it and thwarting the purposes of its creation and existence.

(g) As such structural unit this grade separation may not be disintegrated, and its constituent ele-

ments separately sold, because not severable from the easement.

It follows that none of the property herein involved is lienable. Decree reversed, and the bill and cross-bills dismissed, with costs.

CLARK, MCDONALD, SHARPE, NORTH, and FEAD, JJ., concurred with POTTER, J. WIEST, J., concurred in the result. BUTZEL, C. J., did not sit.

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## AVERY *v.* MIDWEST COMMERCIAL CREDIT CO.

1. MORTGAGES—CHATTEL MORTGAGES—TENDER OF AMOUNT DUE DISCHARGES LIEN.

   If tender was made of amount due under chattel mortgage before property was sold, and refused by holder of mortgage, mortgage lien would thereby be discharged.

2. SAME—RIGHT OF MORTGAGOR TO REDEEM BEFORE SALE.

   Under chattel mortgage to be foreclosed by sale of property at either public or private sale, mortgagor is entitled to redeem therefrom upon paying, at any time before sale, the amount due.

3. FRAUD—ONE MAY NOT BENEFIT BY OWN FRAUD.

   Party may not gain benefit by its own fraud.

4. MORTGAGES—CHATTEL MORTGAGES—FRAUD—REDEMPTION—CONVERSION.

   Where mortgagor was ready, able, and willing to make tender of amount due under chattel mortgage about to be foreclosed, and went to holder's office to make tender, when he was falsely told by its agent that property had been sold, court must treat case as if tender had been made and lien discharged, and therefore subsequent sale of property was conversion, for which holder is liable.

Error to Jackson; Williams (Benjamin), J. Submitted April 10, 1931. (Docket No. 67, Calendar No. 35,397.) Decided June 1, 1931.

Case by C. L. Avery against Midwest Commercial Credit Company and another for the conversion of motor trucks. Judgment for plaintiff against defendant Midwest Commercial Credit Company in municipal court of Jackson. Defendant appealed to circuit court. Directed verdict and judgment for both defendants. Plaintiff brings error. Reversed, and new trial ordered.

*Rosenburg & Lawrence* (*Frank C. Painter,* of counsel), for plaintiff.

*Burney E. Brower,* for defendant Midwest Commercial Credit Company.

POTTER, J. Plaintiff sued defendant Midwest Commercial Credit Company in municipal court of Jackson in trespass on the case for the conversion of two automobile trucks. Subsequently defendant Gilbert Loomis Motors Company was joined as a defendant. Both defendants pleaded the general issue. Plaintiff recovered a judgment in the municipal court against the Midwest Commercial Credit Company, which appealed to the circuit court, where the trial judge directed a verdict for the Midwest Commercial Credit Company against plaintiff, who brings error. Plaintiff gave a chattel mortgage to the Gilbert Loomis Motors Company for $695 on the truck here in question, which chattel mortgage was assigned by it to the Midwest Commercial Credit Company. This chattel mortgage was collateral to a promissory note of like amount, payable $69.50 June 10, 1910, and in like amount each month there-

after. The note contained the usual acceleration clause and was likewise assigned. June 12, 1930, plaintiff offered to pay the first payment.

Defendant Midwest Commercial Credit Company, upon default made in payment on time, declared the whole amount due upon the chattel mortgage and repossessed itself of the property, and, plaintiff says, gave him a few days in which to get the money. Defendant's agent says he told plaintiff he would give him ten days to do so. If plaintiff had made a tender of the amount due upon the mortgage before the property was sold on the chattel mortgage, it would have discharged the lien of the Midwest Commercial Credit Company. The question is whether, under the circumstances, the making of a tender by plaintiff was excused. Plaintiff testifies, and it is not disputed, that he procured the money, so he was later ready, able, and willing to make a tender, and went to the office of the Midwest Commercial Credit Company to do so. At that time there had in fact been no foreclosure of the chattel mortgage; no sale either public or private of the property mortgaged. The property was under the control of the defendant Midwest Commercial Credit Company. Its agent falsely stated to plaintiff the property had been sold and it was too late for him to redeem. If the property had been sold in pursuance of the chattel mortgage, the right of redemption would have been extinguished, and plaintiff could not recover; but, under the chattel mortgage to be foreclosed by the sale of the property either at public or private sale, the plaintiff was entitled to redeem therefrom upon paying at any time before sale the amount due.

Can defendant, who had not in fact sold the property when its agent told plaintiff it had sold it,

now insist a tender should have been made by plaintiff? Defendant cannot take advantage of the false representations by its agent to plaintiff. It cannot gain a benefit from its own wrong. It cannot profit by its own fraud. It cannot insist upon a lien which would have been discharged by tender but for the false representations of its agent. We must treat the chattel mortgage at the time plaintiff sought to make a tender as unforeclosed; hold a tender made would have discharged defendant's lien; the subsequent sale by defendant of the property amounted to a conversion thereof, and defendant is liable to the plaintiff for its conversion. Defendant cannot, after its agent made the false representations, under circumstances leading the plaintiff to rely thereon, be heard to say plaintiff ought not to have been misled.

The truck was not sold until June 25, 1930, when it was sold for $800. The testimony shows the truck was worth from $1,200 to $1,500. The mortgage provides that, upon taking possession of the truck, the mortgagee may sell the same either at private or public sale. Plaintiff claims under the circumstances appellee is liable for a conversion of the truck. Defendant claims it was not guilty of a conversion by refusing to turn the truck over; that trover will not lie against one in actual possession of property which he has a right to retain for the satisfaction of his lien. *Card* v. *Fowler,* 120 Mich. 646.

We must treat the parties as if a tender had been made before sale. Defendant is liable to plaintiff in damages. Judgment reversed, with costs, and new trial ordered.

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

WOODLIFF *v.* FRECHETTE.

1. RECEIVERS—POWERS DERIVED FROM STATUTES, RULES, AND ORDERS OF COURT.

   Receiver of insolvent corporation appointed by circuit court is arm of the court, and derives his authority from the statutes and rules of court, the order appointing him, and specific orders which may from time to time be made by court of his appointment.

2. SAME—POWER OF CORPORATION'S RECEIVER TO SUE DIRECTORS WITHOUT SPECIAL AUTHORIZATION.

   Receiver of insolvent corporation as such has right to sue directors for discovery, to recover money claimed to have been lost through their fraud and negligence, and it is not necessary that he be specially authorized by the court to bring such suit (former Circuit Court Rule No. 61; Michigan Court Rule No. 53).

Appeal from Presque Isle; Smith (Fred P.), J. Submitted April 23, 1931. (Docket No. 61, Calendar No. 35,483.) Decided June 1, 1931.

Bill by Richard S. Woodliff, receiver of Quality Home Builders Company, against Elmer E. Frechette and others for discovery, to recover assets alleged to have been lost through defendants' fraud and negligence. From order denying motion to dismiss, defendants appeal. Affirmed.

*D. W. Closser* and *George B. Hartrick,* for plaintiff.

*Orville H. Foster, Jr.* (*Edmund E. Shepherd,* of counsel), for defendants.

POTTER, J. Plaintiff, receiver of Quality Home Builders Company, a corporation, sued defendants for discovery, to recover money claimed to have been lost through the fraud and negligence of the directors of the corporation and for other relief. Defendants Willings and Spathelf moved to dismiss the bill of complaint. From an order denying defendants' motion to dismiss they appeal. Plaintiff was appointed by the circuit court of Oakland county. As such receiver he is the arm of the court. He derives his authority as such receiver from the statutes and rules of court, the order appointing him, and specific orders which may from time to time be made by the court of his appointment. Defendants object that it does not appear plaintiff was authorized to bring suit and he has no right to bring it unless authorized so to do. High on Receivers (4th Ed.), p. 245. Plaintiff filed this bill in 1930. At that time Circuit Court Rule No. 61 was in force. It provides:

"Every receiver of the property and effects of the debtor, appointed in a suit upon a creditor's bill, shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character."

The rule gives him many other powers and provides it shall be his duty without unreasonable delay to convert all the personal estate and effects into money. Former Circuit Court Rule No. 61 is identical with Michigan Court Rule No. 53.

"His right to sue is limited to the right of the person or corporation over whose property he is appointed, if no receiver had been appointed except

in those instances where, as a representative of the creditors, he may avoid illegal and fraudulent acts of the party whom he succeeds which the party might be estopped from doing. * * * His suit is legal and equitable, according to the subject matter, and his rights when in court are precisely those of any other person." 2 Tardy's Smith on Receivers, pp. 1999, 2002.

No other reason assigned for dismissing the bill of complaint merits discussion, and the order of the trial court is affirmed, with costs.

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

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CROSS *v.* HICKEY.

1. SET-OFF AND RECOUPMENT—DAMAGES FROM SLANDER MAY NOT BE SET OFF IN ACTION OF ASSUMPSIT—JUDGMENT—SUMMARY JUDGMENT—AFFIDAVIT OF MERITS.

   Damages resulting from slander may not be set off in defense of action of assumpsit, and therefore affidavit of merits containing allegations of plaintiff's slander of defendant with resulting damage is insufficient to prevent entry of summary judgment in action for rent due under lease.

2. JUDGMENT—SUMMARY JUDGMENT—AFFIDAVIT OF MERITS—GARNISHMENT.

   In action for rent due under lease, affidavit of merits showing that defendant had been garnisheed for rent due plaintiff is insufficient to prevent entry of summary judgment.

3. SET-OFF AND RECOUPMENT—DEMAND ARISING FROM JUDGMENTS—EXECUTION.

While demand arising from judgments for costs may be set off by defendant in action of assumpsit, it is not necessary to establish defendant's right of set-off, since defendant could issue execution on these judgments (3 Comp. Laws 1929, § 14132).

4. EXECUTION—SET-OFF AND RECOUPMENT.

Executions between same parties may be set off against each other by the sheriff (3 Comp. Laws 1929, § 14550).

Error to Wayne; Campbell (Allan), J. Submitted April 9, 1931. (Docket No. 34, Calendar No. 35,466.) Decided June 1, 1931. Rehearing denied September 10, 1931.

Assumpsit by Merrill F. Cross against H. Starkey Hickey for rent due under a lease. Summary judgment for plaintiff. Defendant brings error. Affirmed.

*Wm. Henry Gallagher,* for plaintiff.

*Ralph E. Routier,* for defendant.

POTTER, J. Plaintiff sued defendant in assumpsit to recover unpaid rent due under a lease of premises in Detroit. Defendant appeared, pleaded the general issue, and gave notice of the special defenses of novation, set-off and recoupment. Plaintiff had summary judgment. On defendant's motion this judgment was set aside, whereupon plaintiff again had summary judgment. Defendant brings error, claiming his affidavit of merits was sufficient to entitle him to a trial; that no evidence was introduced entitling plaintiff to summary judgment; that the court should have allowed defendant's claims of set-off and recoupment. Defendant's affidavit of

merits sets forth the facts tending to show a novation, but this seems to have been adjudicated in a prior suit between the same parties from the judgment in which suit no appeal was taken. Defendant's affidavit of merits contains allegations of plaintiff's slander of defendant, damages resulting from which are sought to be set off, but damages resulting from slander cannot be set off in defense of an action of assumpsit. 3 Comp. Laws 1929, § 14132. Defendant claimed he had been garnisheed for the rent due plaintiff. This defense, it has been held, cannot be raised. *Jackson Reinforced Concrete Pipe Co.* v. *Central Contracting & Engineering Co.*, 253 Mich. 157. Defendant had judgments for costs against plaintiff which he sought to set off. While this was permissible (3 Comp. Laws 1929, § 14132), it was not necessary to establish defendant's right of set-off. Defendant could issue execution on these judgments. Executions between the same parties may be set off against each other by the sheriff. 3 Comp. Laws 1929, § 14550. No other questions need discussion. Judgment affirmed, with costs.

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

## NATIONAL BANK OF COMMERCE OF DETROIT *v.* B. W. MARR & CO.

1. CORPORATIONS—ACT ONLY BY OFFICERS AND AGENTS.
   Corporations act only by their officers and agents.

2. SAME—PRESIDENT HAS NO IMPLIED POWER TO BIND.
   The president of a corporation has no implied power to bind the corporation by his signature.

3. SAME—NO PRESUMPTION THAT PRESIDENT MAY USE CORPORATION NOTE TO PAY PERSONAL DEBTS.
   There is no presumption that the president of a corporation has a right to use a note belonging to the corporation, or the proceeds thereof, to pay his individual debt.

4. SAME—AUTHORITY OF PRESIDENT TO INDORSE CORPORATION'S NOTE.
   President's indorsement on a note belonging to the corporation was not binding on it in absence of authority of president to so indorse it or ratification by the corporation.

5. BILLS AND NOTES—FRAUD—HOLDER IN DUE COURSE.
   That note was fraudulently obtained does not necessarily render it void in hands of holder.

6. SAME—INDORSEMENT BY AGENT—NOTICE.
   An indorsee of commercial paper has no right to disregard any circumstances known to him calculated to lead a prudent man to suspect that the indorser might be acting in fraud of his principal.

7. SAME—FRAUDULENT INDORSEMENT OF VALID NOTE DOES NOT RELIEVE MAKER.
   If promissory note was valid as against the maker, his liability would remain though it was fraudulently indorsed and transferred, since it would make no difference to him who held the note.

8. SAME — FRAUDULENT INDORSEMENT — NOTICE — HOLDER IN DUE COURSE.
   Where promissory note payable to corporation was fraudulently obtained from maker, and transferred to bank by indorsement of corporation's president, who used the proceeds to pay per-

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Authority of president of corporation to indorse and transfer commercial paper, see annotation in 12 A. L. R. 130.

sonal obligations, the bank, which had notice from the face of the note that it belonged to corporation, was not an innocent holder for value.

Error to Wayne; Sprague (Victor D.), J., presiding. Submitted April 14, 1931. (Docket No. 84, Calendar No. 35,260.) Decided June 1, 1931. Rehearing granted October 5, 1931.

Assumpsit by National Bank of Commerce of Detroit, a Federal banking corporation, against B. W. Marr & Company, a corporation, Asa L. Hill, and P. E. Vandermade on a promissory note. Judgment for plaintiff. Defendant Hill brings error. Reversed, and new trial ordered.

*David I. Hubar* (*Milton M. Maddin,* of counsel), for plaintiff.

*Bratton & Bratton,* for defendant Hill.

POTTER, J. Plaintiff sued defendants in assumpsit on a promissory note as follows:

"Detroit, Mich., Dec. 11, 1926.

"$2500

"Ninety days after date, I promise to pay to the order of B. W. Marr & Co. two thousand five hundred and no/100 dollars payable at National Bank of Commerce. Value received with six per cent. interest per annum.

"No..... Due Mar. 11, 1927.

(Signed) "A. L. HILL

"2028 Longfellow Av."

On face of note:

"Protested for non-payment

"GEORGE P. MIERAMO, Notary Public."

On back of note:

"B. W. MARR & Co. (Sgd.) by B. W. MARR, Pres.
"P. E. VANDERMADE (Sgd.)"

Defendant Hill pleaded the general issue; gave notice the note was procured by fraud; that plaintiff was not an innocent holder for value; that B. W. Marr, who indorsed the note at the time it was acquired by the bank, was not authorized to indorse the note, and the bank had knowledge the note was being used for Marr's personal benefit. From a judgment for plaintiff, defendant Hill brings error. The principal error relied upon is that the court erred in holding the plaintiff was an innocent purchaser for value without notice. There is no question but appellant's note was fraudulently procured from him by Marr without consideration. Marr negotiated the note to defendant Vandermade, indorsing it in the company's name and using the proceeds from its sale for the payment of his personal obligations. When plaintiff acquired the note no inquiry was made as to Marr's authority to indorse it. The authorized signature of the company held by the bank with which it transacted business required the names of both Marr, the president, and of Novy, the treasurer, of the corporation, to transfer its funds. Corporations act only by their officers and agents. The president of a corporation has no implied power to bind the corporation by his signature.

There is no presumption that Marr, though he was president of the corporation, had a right to use the note or the proceeds thereof to pay his individual debt. The indorsement was not binding upon the corporation without actual authority or ratification. *Gould* v. *W. J. Gould & Co.*, 134 Mich. 515 (104 Am. St. Rep. 624, 2 Ann. Cas. 519). The

original note being fraudulent, does not make it so in the hands of plaintiff.

"To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." 2 Comp. Laws 1929, § 9305.

Bad faith may of course be shown by evidence of actual knowledge of the purposes for which the paper was given. An indorsee of commercial paper has no right to disregard any circumstances known to him calculated to lead a prudent man to suspect the indorser might be acting in fraud of his principal. Plaintiff, from the face of the note, had notice it originally belonged to the corporation.

In *Wagner Trading Co.* v. *Battery Park Nat'l Bank,* 228 N. Y. 37 (126 N. E. 347, 9 A. L. R. 340), plaintiff, a New York corporation, acquired the assets and business before that time conducted by Christopher J. Wagner, who became a stockholder in and president of the corporation. Wagner had a personal account with defendant and deposited therein checks signed "Wagner Trading Company, C. J. Wagner, Pres." These notes were countersigned. They were indorsed by C. J. Wagner, and collected through the clearing house in the usual course of business, the proceeds being credited to his personal account. The court said:

"The plaintiff had no relations with and owed no special duty to the defendant. It was not a depositor of the defendant. When the defendant accepted the deposit of Wagner and became his banking agent, the defendant was in complete control of its relations with Wagner. It could, to safely

protect itself in its dealings with Wagner, inquire as to his relations with the plaintiff, the authority he possessed, and could insist upon an examination of the plaintiff's by-laws and minutes if it thought that necessary to protect itself. When it accepted the checks payable to the plaintiff and indorsed by Wagner as president of the plaintiff for deposit to the account of Wagner himself, it did so at its peril to ascertain whether Wagner had authority to indorse them and by his indorsement transfer the money to be paid thereon to his personal account. *Cheever* v. *Railroad Co.*, 150 N. Y. 59 (44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646); *Ward* v. *City Trust Co.*, 192 N. Y. 61, 71 (84 N. E. 585). If Wagner had no such authority, title to the money in question never passed to the defendant and if it received it, it did so without authority and must account and make payment to the owner. *Schmidt* v. *Garfield Nat'l Bank*, 64 Hun, 298 (19 N. Y. Supp. 252), affirmed in 138 N. Y. 631 (33 N. E. 1084); *Sims* v. *United States Trust Co.*, 103 N. Y. 472 (9 N. E. 605); *Fidelity & Deposit Co.* v. *Queens County Trust Co.*, 226 N. Y. 225, 233 (123 N. E. 370)."

It is contended the appellant cannot raise the question of the validity of the original note, and cases are cited to sustain that position. They are not applicable. If appellant's note was a valid note against him, then, though it was fraudulently indorsed and transferred by Marr or the company, his liability would remain the same. It would make no difference to him who held the obligation. Under such circumstances the maker of a note cannot raise the question of its fraudulent or otherwise invalid transfer, but such is not this case. Here, appellant's liability depends upon the validity of the indorsement of the note by Marr in the company's name, and there is nothing to take the case out of

the rule of *Wagner Trading Co.* v. *Battery Park Nat'l Bank,* above cited. Judgment reversed, with costs, and new trial ordered.

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

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## THEISEN *v.* CITY OF DETROIT.

1. HIGHWAYS AND STREETS—BOULEVARDS—DEFINITION.
   While the word "boulevard" has not been exactly defined, to the popular mind and understanding it suggests, at least, a broad and attractive highway, designed and used for the transportation of persons and things.

2. SAME—DEDICATION—DESIGNATING STREETS AS BOULEVARDS IN PLAT.
   In dedication of plat, where the streets were laid out as such, there was nothing significant in designating them as "boulevards."

3. SAME—PRIVATE PARTIES MAY NOT TAKE BACK PART OF DEDICATED STREET.
   Private individuals may not, as against the public, after the dedication of land as a street and acceptance by the proper authorities, take back the land so dedicated or any rights therein.

4. SAME—PRIVATE PARTIES MAY NOT CHANGE STREET TO BOULEVARD.
   Persons interested in plat may not, on their own initiative, after streets have been dedicated to the public, change them to boulevards by making park places in the middle of them, and by planting grass, shrubs, and flowers.

5. MUNICIPAL CORPORATIONS—HIGHWAYS AND STREETS—CONTROL OVER STREETS—TAXATION—IMPROVEMENTS.

City has reasonable control over its public streets, and has right to grade, pave, and otherwise improve them, and to assess the abutting property owners for cost and expense of same.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted April 15, 1931. (Docket No. 95, Calendar No. 35,450.) Decided June 1, 1931.

Bill by Robert L. Theisen, individually and as agent of others, against City of Detroit, a municipal corporation, to restrain imposition of a special paving tax assessment. Decree for defendant. Plaintiffs appeal. Affirmed.

*Frank C. Golden* and *Benedict H. Lee,* for plaintiffs.

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

POTTER, J. Plaintiffs filed a bill of complaint against defendant for an injunction to restrain it from imposing a special tax assessment upon their lands and premises to defray the cost and expense of paving Liddesdale avenue, and from enforcing such assessment already placed thereon, and from selling any of said lands for the nonpayment of such special assessment. The lands and premises in question at the time they were platted were a part of Ecorse township, Wayne county. On the 15th day of November, 1915, a part of the lands in dispute were platted and the streets and alleys as shown on said plat were dedicated to the use of the public. On March 22, 1916, a part of said lands and premises were platted and the streets and alleys as

shown on said plat were dedicated to the use of the public. These plats were severally approved by the township board of the township of Ecorse, Wayne county. The land in controversy, whether a street or a boulevard, was laid out on the plats as a street, although it was named on each of the plats as a boulevard. There was nothing indicating any part of the lands dedicated to the public was not to be used as streets. The parties plaintiff bought their lands according to the recorded plat thereof.

The word "boulevard" has not been exactly defined.

"To the popular mind and understanding it suggests, at least, a broad and attractive highway, designed and used for the transportation of persons and things. Such transportation may be by any of the means now commonly employed on the streets of a city or on the roads of the country." *Clendaniel* v. *Conrad,* 26 Del. 549 (83 Atl. 1036, Ann. Cas. 1915 B, 968).

The word "boulevard" is thus defined in the Century dictionary:

"Originally, a bulwark or rampart of a fortification or fortified town; hence, a public walk or street occupying the site of demolished fortifications. The name is now sometimes extended to any street or walk encircling a town, and also to a street which is of especial width, is given a parklike appearance by reserving spaces at the sides or center for shade trees, flowers, seats, and the like, and is not used for heavy teaming." *West Chicago Park Comrs.* v. *Farber,* 171 Ill. 146 (49 N. E. 427).

This court, in defining a boulevard, quoted with approval the language of *Albers* v. *City of St. Louis,* 268 Mo. 349 (188 S. W. 83); *Miller* v. *City of Detroit,* 244 Mich. 38.

In view of the dedication of the street upon the plat to the public, there is nothing in the name "boulevard" that would indicate it was other than a public street. It is undisputed parties interested in the sale of the lots bordering on or affected by this street on their own initiative changed the street by putting islands or park places in the center thereof which were covered with grass, shrubs, and flowers. The seller sold the lands herein involved, and represented, in some cases at least, the street was a boulevard. There was nothing on the plat to indicate that either the lot owners or anyone else had any interest in the street. It was dedicated to the public. The title was held for the use of the public. Private individuals could not, as against the public, after the dedication of the property as a street and acceptance by the township, take back the land so dedicated or any rights in it. They were powerless to change the dedication. All of the street remained as dedicated for street purposes. After the annexation of the land here involved to the city of Detroit and upon the petition of the abutting property owners, the street was paved by the city, and in so paving the city removed the park-way in the middle of the street and paved the entire width thereof. The city has reasonable control over its public streets. It has a right to grade, pave, and otherwise improve them, and under the facts in this case it had a right to assess the abutting property owners for the cost and expense of this improvement. The trial court so held, and with his holding we agree. The decree of the trial court is affirmed, with costs.

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

PEOPLE *v.* RUCKER.

1. CRIMINAL LAW—CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL.
Right of trial by jury is constitutional.

2. SAME—CHANGE OF PLEA AFTER SENTENCE NOT FAVORED.
To permit change of plea after sentence involves setting aside the judgment of the court and is not favored.

3. SAME—WHEN COURT'S DUTY TO SET ASIDE PLEA OF GUILTY.
Where there was doubt of truth of defendant's plea of guilty to charge of robbery armed, it was duty of trial judge, on application of defendant's attorney before sentence, to vacate plea of guilty, direct entry of plea of not guilty, and order trial.

4. SAME—WHEN PLEA OF GUILTY MAY BE CHANGED.
At any time before sentence, plea of guilty may be changed by court to one of not guilty.

Error to Recorder's Court of Detroit; Murphy (Frank), J. Submitted April 16, 1931. (Docket No. 152, Calendar No. 35,380.) Decided June 1, 1931.

Owen Rucker was convicted of robbery armed. Reversed, and new trial ordered.

*Edward J. Roberts* (*Ellis C. Duncan,* of counsel), for appellant.

*Paul W. Voorhies,* Attorney General, *Harry S. Toy,* Prosecuting Attorney, and *Duncan C. McCrea,* Assistant Prosecuting Attorney, for the people.

POTTER, J. Defendant, a young negro boy 18 years of age, a native of Georgia, resident in De-

troit, with no previous criminal record and of good family, was arrested and informed against charged with robbery armed, under Act No. 374, Pub. Acts 1927 (3 Comp. Laws 1929, §§ 16722, 16723). On arraignment he pleaded guilty to the information filed against him. Subsequently, on the trial of other defendants with him at the time of the alleged robbery, they were acquitted, and it appeared defendant was probably not guilty. When brought before the trial judge for sentence, he appeared by counsel and sought to withdraw his plea of guilty and enter a plea of not guilty. The court refused his application to change his plea, and sentenced him to the State reformatory at Ionia for not less than two and one-half nor more than 15 years. Defendant brings error.

The law favors trial on the merits. *People* v. *Merhige,* 212 Mich. 601. The right of trial by jury is constitutional. To permit a change of plea after sentence involves setting aside the judgment of the court and is not favored (*People* v. *Goldman,* 245 Mich. 578), but it was the duty of the trial judge, if there was doubt of the truth of defendant's plea of guilty, to vacate the same, direct the entry of the plea of not guilty, and order a trial of the issue thus formed. 3 Comp. Laws 1929, § 17328. We have such doubt. "We have no question that at any time before sentence the plea of guilty may be changed by the court to one of not guilty." *People* v. *Utter,* 209 Mich. 214. Judgment reversed, and new trial ordered.

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

SOLEAU *v.* SOLEAU.

EXECUTORS AND ADMINISTRATORS—SALE BY ADMINISTRATRIX TO HERSELF—ADEQUACY OF PRICE—FRAUD.

Where administratrix sold estate's real estate for sum substantially in excess of appraised value, and used proceeds to pay estate's debts, the sale was properly held valid by the trial court, although the property was deeded to her the same day by her daughter, who was the purchaser, where there was no showing of inadequacy of consideration, and no claim made of fraud or breach of trust.

Error to Monroe; Root (Jesse H.), J. Submitted April 17, 1931. (Docket No. 129, Calendar No. 35,364.) Decided June 1, 1931.

Ejectment by Comillious Soleau and another, an infant, by next friend, against Josephine Soleau and others to recover an undivided interest in lands. Judgment for defendants. Plaintiffs bring error. Affirmed.

*Golden, Kelly & Blake,* for plaintiffs.

*Golden, Nadeau & Fallon,* for defendants.

POTTER, J. Plaintiffs brought ejectment in the circuit court for Monroe county to recover an undivided interest in the lands and premises in Monroe county described in the declaration. From a judgment for defendants, plaintiffs bring error. Frank X. Soleau died in Monroe county, March 6, 1911, leaving the lands in dispute as his sole property, according to the inventory of the estate in the

probate court; several children and two infant grandchildren, plaintiffs herein. His widow, Josephine Soleau, was regularly appointed administratrix of his estate by the probate court of Monroe county, gave a bond as such, and entered into the discharge of her trust. Appraisers appointed by the probate court appraised the real estate in question, May 2, 1911, at $2,500, subject to a mortgage of $600. Various claims were presented against the estate and allowed by commissioners on claims appointed by the probate court in the sum of $2,307.14. By order of the probate court, September 9, 1911, the administratrix was ordered to pay the debts of the estate within 60 days. During the probate proceedings Josephine Soleau, the widow, filed a petition for a widow's allowance, and was awarded $200 in personal property, to be selected by her, and $5 a week for the support of herself and children for a period of one year. Later the administratrix filed a petition in the probate court for leave to sell the real estate belonging to the estate to pay the debts of deceased. Notice of hearing on such petition was duly published, a bond on the sale of real estate filed, and December 8, 1911, she was granted a license by the probate court to sell the real estate. She sold the real estate in question for $3,500, paid the claims allowed against the estate, the mortgage and interest thereon, charged the estate for her support, attorney's fees and fees as administratrix, in all, $3,500. Her final account was allowed by the probate court and she discharged, and her bond canceled September 27, 1912. Plaintiffs claim, and it is admitted, the real estate in question was sold by the administratrix at private sale to Rose Soleau, her daughter, who, on the same

day, conveyed it to the defendant Josephine Soleau. It is claimed by plaintiffs the sale by her of the real estate is void. The trial court held the sale valid. No inadequacy of consideration was shown. Defendant Josephine Soleau, as administratrix, realized from the sale of the real estate in question a sum substantially in excess of the appraised value thereof, and used the proceeds of sale to pay and discharge indebtedness of the estate. No fraud or breach of trust is claimed. The case is ruled by *Taylor* v. *Brown,* 55 Mich. 482, and *Ketchum* v. *Ketchum,* 177 Mich. 100. Judgment affirmed, with costs.

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

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COLTON *v.* DUVALL.

1. CONTRACTS—CONSTRUCTION—SALE OF GOOD WILL.
   Contract for sale of truck, business, and good will is construed most strongly against seller, who prepared and delivered it to purchaser.

2. SAME—GOOD WILL DEFINED.
   Good will is based upon prospective profits to result from voluntarily continued patronage of public, and indicates that value which inheres in the fixed and favorable consideration of customers arising from an established and well-conducted business.

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Sale of business and *good will* as a limitation upon the right of vendor to engage in competing business, see annotation in 19 L. R. A. (N. S.) 762.

3. SAME—GOOD WILL—CONSIDERATION.
   Consideration paid for truck and business is sufficient to support sale and transfer of good will.

4. SAME—RESTRAINT OF TRADE—PUBLIC POLICY.
   Public policy requires that, when a man has created a business which he wants to sell, he should have the right to sell it in the most advantageous way, and to preclude himself from re-engaging in business directly competitive with that sold.

5. SAME—EQUITY—CONTRACT NOT TO RE-ENGAGE IN BUSINESS ENFORCEABLE.
   Contract in connection with sale of business and good will not to re-engage in business directly competitive with that sold is valid and enforceable in equity, where the restraint is only partial and is limited to particular place.

6. SAME—SELLER MAY NOT DESTROY THING SOLD.
   One who sells business and good will may not derogate from his own assignment, nor is he at liberty to destroy what he transferred, or depreciate what he sold.

7. SAME—IMPLIED COVENANT NOT TO SOLICIT BUSINESS SOLD.
   There is an implied covenant on the sale of the good will of the business that the seller will not solicit the custom which is paid for and parted with.

8. SAME—INJUNCTION—RESTRAINT OF TRADE.
   Purchaser of good will of business is entitled to injunction restraining seller from re-engaging in same business in same locality.

Appeal from Monroe; Root (Jesse H.), J. Submitted April 8, 1931. (Docket No. 18, Calendar No. 35,493.) Decided June 1, 1931.

Bill by Kenneth Colton against Ernest J. Duvall to restrain violation of a contract not to re-engage in local freight hauling in same locality. Bill dismissed. Plaintiff appeals. Reversed.

*Clayton C. Golden* and *James J. Kelley,* for plaintiff.

*Golden, Nadeau & Fallon,* for defendant.

POTTER, J. Plaintiff filed a bill of complaint against defendant for an injunction to restrain him from engaging or continuing in the business of local freight handling in the city of Monroe, and for other relief. From a decree for defendant, plaintiff appeals. Defendant was the owner of a motor truck engaged in the local freight-handling business in Monroe. He sold plaintiff his truck, business, and good will, and made and delivered to him a list of his local customers, below the list of which he wrote over his own signature, "I have sold my business to Kenneth Colton and my good will." Plaintiff testifies, and it is not disputed, the defendant told him he would not re-engage in the local freight-handling business. This was one of the inducements which led him to purchase.

In pursuance of the sale of the truck and business, defendant told various customers he had gone out of business, and plaintiff notified the rest. Defendant engaged for a short time in long-distance freight handling by motor truck, then returned to Monroe and engaged in local freight-handling business in competition with plaintiff, soliciting customers whose names were on the list delivered by him to plaintiff when he sold the truck, business, and good will.

The written statement delivered by defendant to plaintiff indicates a sale of the business and good will. It was prepared by defendant and delivered by him to plaintiff and will be most strongly construed against defendant. *Waites* v. *Miller,* 244 Mich. 267; *Saxon* v. *Howey,* 247 Mich. 508; *Patterson* v. *Miller,* 249 Mich. 89.

Defendant sold the good will of the business—those intangible advantages or incidents which are impersonal and attached to the thing conveyed

(*Williams* v. *Farrand,* 88 Mich. 473 [14 L. R. A. 161]); the favor which the management of the business had won from the public and the probability the old customers would continue their patronage in the future (*Chittenden* v. *Witbeck,* 50 Mich. 401). Good will is based upon the prospective profits to result from voluntarily continued patronage of the public. It indicates that value which inheres in the fixed and favorable consideration of customers arising from an established and well-conducted business. *Mills* v. *Rich,* 249 Mich. 489.

The consideration paid for the truck, the business, and good will was sufficient. No further consideration was necessary to support the sale and transfer of good will. *Weickgenant* v. *Eccles,* 173 Mich. 695; *Weiss* v. *Stein,* 187 Mich. 369. Though it is sometimes said contracts in restraint of trade are void as against public policy (*Hubbard* v. *Miller,* 27 Mich. 15 [15 Am. Rep. 153]), public policy requires when a man has created a business which he wants to sell he should have the right to sell it in the most advantageous way and to preclude himself from reengaging in business directly competitive with that sold. *Hubbard* v. *Miller, supra; Leather Cloth Co.* v. *Lorsont,* L. R. 9 Eq. 345, 353; *Up River Ice Co.* v. *Denler,* 114 Mich. 296 (68 Am. St. Rep. 480). The contract pleaded and proven was valid and enforceable. *Doty* v. *Martin,* 32 Mich. 462; *Beal* v. *Chase,* 31 Mich. 490. The rule is that contracts of this nature will be enforced in equity where the restraint is only partial and is limited to a particular place (*Hubbard* v. *Miller, supra; Up River Ice Co.* v. *Denler, supra;* 2 High on Injunctions [4th Ed.], § 1167); and the defendant enjoined from a violation of the contract (*Timmerman* v. *Dever,* 52 Mich.

34 [50 Am. Rep. 240]; *Reber* v. *Pearson,* 155 Mich. 593; *C. H. Barrett Co.* v. *Ainsworth,* 156 Mich. 351).

Defendant will not be permitted to derogate from his own assignment. He is not at liberty to destroy what he transferred or depreciate what he sold. There was an implied covenant on the sale of the good will of the business by defendant that he would not solicit the custom which was paid for and parted with. It was a fraud to sell that which he did not mean the purchaser to have; to pocket the paid price and attempt to recapture the thing sold; or to solicit or attempt to decoy it away from plaintiff, or call it back to himself before plaintiff had time to attract it to himself and make it his own. Defendant cannot impair the value of what he sold or sell the business and its good will, take the price paid, and keep or retake the thing sold. These principles are elementary and have been repeatedly stated by the English and American courts. *Labouchere* v. *Dawson,* L. R. 13 Eq. 322; *Trego* v. *Hunt,* L. R. 21 App. Cas. 7; *Suburban Ice Manfg. & Cold Storage Co.* v. *Mulvihill,* 21 Ohio App. 438 (153 N. E. 204); *Grow* v. *Seligman,* 47 Mich. 607 (41 Am. Rep. 737).

Defendant's conduct violates the contract, deprives plaintiff of the good will which he bought and paid for, and should be enjoined. *Thompson* v. *Andrus,* 73 Mich. 551. The decree of the trial court is reversed, with costs, and decree will be entered for plaintiff.

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

## MOREHEAD *v.* REEM.

1. INSURANCE—AGENTS AND BROKERS—RIGHT TO COMMISSIONS AFTER TERMINATION OF CONTRACT.

   Where insurance agent's contract with branch manager of life insurance company was terminated, and he thereafter ceased to represent said company, he would not be entitled to compensation by way of commissions on a policy subsequently written by it even though it appeared he was the efficient means of consummating the bargain.

2. SAME—PROCURING CAUSE.

   Where, at time insurance agent's contract was terminated, prospect on which he had been working had made no application for insurance, but later made application and policy was written, said agent was not agent of company at time policy was written, did not produce the business, and therefore he was not entitled to commissions thereon, as against the company.

3. SAME—AGREEMENT BETWEEN AGENTS.

   Agreement between life insurance agents as to division between them of commissions to be paid on prospective business, not consented to by the branch manager under whom they worked, would have no binding effect on him.

4. SAME—FRAUDS, STATUTE OF.

   Such contract, to be effective, must, under the statutes, be in writing and signed by the party to be charged, and be based on a valuable consideration.

5. SAME—RELEASE—AGENT BARRED BY RELEASE FROM RECOVERING COMMISSIONS.

   Where insurance agent, after termination of his contract, in writing released his right to all future commissions, including certain prospect on which he and another agent had been working, he is barred from recovering from said other agent or the branch manager a percentage of commissions paid on a policy thereafter issued to said prospect.

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Effect of termination of agency as affecting insurance agent's right to commissions on renewals, see annotation in 35 L. R. A. (N. S.) 153.

Error to Wayne; Warner (Glenn A.), J., presiding. Submitted April 21, 1931. (Docket No. 10, Calendar No. 35,492.) Decided June 1, 1931. Rehearing denied September 10, 1931.

Assumpsit by Orda H. Morehead against Guy A. Reem and another for commissions on certain life insurance policies. Judgment for plaintiff. Defendants bring error. Reversed.

*Harry J. Lippman,* for plaintiff.

*Max Kahn* (*Leonard V. Pylkas* and *Ned E. Mellen,* of counsel), for defendants.

POTTER, J. Plaintiff sued defendants to recover commissions claimed to be due him on life insurance policies written on the life of Charles S. Mott of Detroit, Michigan. Plaintiff entered into a contract with the Detroit branch manager of the Canada Life Assurance Company at Detroit, Michigan, July 30, 1924, to take effect August 1, 1924, whereby plaintiff was to act as a life insurance agent. Plaintiff's contract with the Detroit manager of the Canada Life Assurance Company provided that:

"During the continuance of this contract renewal commissions shall be allowed the agent on the renewal premiums. * * * Either party hereto may terminate this agreement by giving to the other ten days' notice in writing to that effect."

In the fall of 1925 defendant Galbraith made contact with Mr. Charles S. Mott and Mr. Mott became interested in the Canada Life Assurance Company, and, it is possible, what plaintiff did in connection with Mr. Mott's interest had something to do with what Mott eventually did in applying for insurance. Plaintiff and defendant Galbraith were working together. They thought they might procure a policy

from Mr. Mott, and October 15, 1925, defendant Galbraith wrote plaintiff:

"I wish to acknowledge your participation in the Mott case to the extent of 62½ per cent. of all commissions payable to me, either now or hereafter, on said case."

This arrangement related to the division of commissions between defendant Galbraith and plaintiff. On January 8, 1926, plaintiff and defendant Galbraith had concluded to sever their working arrangements and plaintiff to surrender his agency with the Canada Life Assurance Company. On that date, January 8, 1926, Galbraith wrote a letter to the manager of the Canada Life Assurance Company at Detroit furnishing a copy thereof to plaintiff, which letter stated:

"It is my understanding that any business written on the life of Mr. C. S. Mott, by yourself or Mr. Morehead or myself, shall be divided as follows: Guy A. Reem—50%; A. L. Galbraith—33⅓%; O. H. Morehead—16⅔%. Will you kindly verify and acknowledge the above."

It does not appear that defendant Reem, who was then manager of the Canada Life Assurance Company at Detroit, ever acknowledged the receipt of this letter or made any written agreement as to what the basis of division of commission might be. No commission was due at that time. Defendant Galbraith and plaintiff were only speculating on a division of what the future might bring forth.

March 4, 1926, plaintiff left the employ of the Canada Life Assurance Company.

March 27, 1926, defendant Reem wrote plaintiff:

"This letter will serve as acceptance for your resignation, tendered to become effective March 8,

1926, thereby canceling your contract with the Canada Life Assurance Company dated July 30, 1924."

March 31, 1926, plaintiff wrote to defendant Reem:

"In view of the fact that I have severed my connections with the Canada Life Assurance Company, I beg to advise you that the understanding and arrangement outlined in my letter to you of January 8, 1926, copy of which I sent to Mr. A. L. Galbraith, between Mr. Galbraith and myself, is hereby terminated and canceled.

"I release, in its entirety, any future interest I may have in all of the following cases" naming them, and including that of C. S. Mott.

Defendants claim, by reason of plaintiff having terminated his contractual relations with the Canada Life Assurance Company, he has no right to commissions on business applied for and written thereafter, and plaintiff's right to commissions on renewals ceased.

"The rights of the respective parties here are to be determined by reference to the contract which they adopted to fix and regulate them. This would be so in any case of a contract fixing and defining the rights of the parties thereto." *Scott* v. *Travellers' Ins. Co.*, 103 Md. 69 (63 Atl. 377, 7 Ann. Cas. 1166).

"The right to compensation is associated with a continuance of services, and the compensation is the agreed measure of their value. When the policy first issues, the per centum specified becomes due, and on each renewal the reduced per centum is allowed. Very manifestly the scope of the agreement conferring the authority is to provide the measure of remuneration for what the agent may do while he remains such, and no further. He was not to be paid for renewals afterwards made, unless participated in by him while in possession of authority to renew.

Although renewals are the consequence of the original contract of insurance, and in this particular beneficial to the company, yet the full compensation given and accepted for this service is the twenty-five per centum on the sum received, provided in the contract which creates the agency and regulates its terms." *North Carolina State Life Ins. Co.* v. *Williams,* 91 N. C. 69 (49 Am. Rep. 637).

"The agent having the right to receive commissions only so long as the contract continued in force and it having been annulled was without right to any commissions on renewal premiums, after the date of the termination of his contract of agency." *Security Life Ins. Co. of America* v. *McCray,* 124 Ark. 202 (186 S. W. 819).

"The authorities are overwhelming that such provisions, standing alone, deprive an agent of any right to commissions on renewal premiums paid after the termination of his agency." *Fidelity & Deposit Co.* v. *Washington Life Ins. Co.,* 193 Fed. 512.

"It is now well settled by the great weight of authority that stipulations in contracts of insurance agency similar to those in the contracts sued upon deprive the agent of any right to commission on renewal premiums paid after the termination of his agency. Such was the holding in *Fidelity & Deposit Co.* v. *Washington Life Ins. Co.,* 193 Fed. 512, cited in our original opinion, which gives quite a full citation of the authorities upon that question up to that time. The cases upon this subject are digested in a note under *Walker* v. *Insurance Co.,* 80 N. J. Law, 342 (79 Atl. 354, 35 L. R. A. [N. S.] 153, Ann. Cas. 1912 A, 526), and in the recent case of *Locher* v. *Insurance Co.,* 200 Mo. App. 659 (208 S. W. 862). Also see the following texts: 16 A. & E. Enc. of Law (2d Ed.), p. 919; 22 Cyc. p. 1441; 14 R. C. L. p. 869." *American Nat'l Ins. Co.* v. *Teague* (Tex. Civ. App.), 239 S. W. 604.

It is apparent the contact between the Canada Life Assurance Company and Mr. Mott, when first made, was made through the defendant Galbraith, but neither plaintiff nor Galbraith were able to procure an application from Mr. Mott or deliver to him an acceptable policy. Plaintiff left the Canada Life Assurance Company March 4, 1926. He ceased to represent the company thereafter. He would not be entitled to compensation from the insurance company by way of commissions on a policy subsequently written by it, even though it appeared he was the efficient means of consummating the bargain. It did not so appear in this case. Ordinarily a principal pays an agent for results, not attempts; for business, not prospects. At no time during the plaintiff's employment by the insurance company was Mr. Mott ready and willing to take insurance. He did, after plaintiff left the employ of the company, make an application through defendant Reem in March, 1926, for a policy of insurance. The insurance company refused to issue a policy at the usual and ordinary rate, but insisted upon charging a higher or raised rate on the policy of $210,000. Mr. Mott refused to accept the policy or to pay the raised rate thereon. Subsequently, through defendant Reem and others, a new arrangement was made whereby the Canada Life Assurance Company wrote a policy of $50,000 on Mr. Mott at its standard or ordinary rates. Another $150,000 was placed in the New England Mutual Life Insurance Company and the Equitable Life Assurance Company of New York, and Mr. Reem received a commission thereon and divided it with defendant Galbraith and Mrs. Howland, who had assisted in some statistical work done in procuring the Mott application. We must hold that plaintiff, at the time the application was

procured and the policy written, was not the agent of the company. He did not produce the business. Mr. Mott, conceding his ability to take the policy at any time, was never ready or willing to do so upon any terms and conditions agreed upon between the plaintiff and Mr. Mott or between the Canada Life Assurance Company and Mr. Mott. The Canada Life Assurance Company never accepted Mr. Mott's application as made, nor did it issue a policy thereon acceptable by him as applied for. There was no liability to plaintiff by the Canada Life Assurance Company, not only because of the termination of the contract of agency, but because he did not consummate or close a deal with Mr. Mott. The question, then, is whether there is any liability to plaintiff from defendants. If so, such liability must rest on contract, which must, under the statutes in force, be in writing and signed by the party to be charged, and it must likewise be based upon a valuable consideration. Whatever defendant Galbraith's arrangements with plaintiff may have been, it does not appear that Mr. Reem ever signed anything whereby he acknowledged any indebtedness to plaintiff. It is true Galbraith and plaintiff, as between themselves, sought, long before Mr. Mott made application for insurance, to divide the prospective profits on profitable business, the acquiring of which depended upon contingencies which might or might not ultimately happen.

It does not appear that Reem participated in this division by plaintiff and Galbraith of elusive profits, or agreed to pay percentages of commissions on the basis thereof or upon any other basis than plaintiff's agency contract with the Canada Life Assurance Company with which he had severed connection before the application was made. Plaintiff was

leaving the company, dissolving any business relations he had with it. He was likewise dissolving any relationship which may have existed between himself and Galbraith. No right to recover for commissions on the Mott business had accrued to him during the time he was agent of the company and none could accrue to him under his contract thereafter. After plaintiff left the company, before the commission on the Mott business accrued, plaintiff in writing released his right to all future commissions and thus barred himself from a right to recover in this case. Judgment reversed, and no new trial ordered.

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

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*In re* SACHS' ESTATE.

SACHS *v.* SACHS.

1. EVIDENCE—ADMISSIBILITY OF HOSPITAL RECORDS.
   Hospital records of a patient were properly rejected, in absence of proof as to their correctness.

2. WILLS—EXPERT WITNESSES—EVIDENCE—OPINION NOT BASED ON FACTS NOT EVIDENCE.
   Testimony by a medical expert, who had never seen or heard of testator in his lifetime, that testator was incompetent to make a will, given in response to a hypothetical question based on no facts tending to show testator's mental incompetency, was not evidence.

3. SAME—MENTAL COMPETENCY—DIRECTED VERDICT.

Where no one acquainted with testator testified to anything indicating either mental incompetency or undue influence, and the scrivener who drew the will, the subscribing witnesses who were old friends of testator, and the doctors who treated him all testified that he was mentally competent, a verdict for proponents was properly directed.

Error to Wayne; Webster (Arthur), J. Submitted April 22, 1931. (Docket No. 26, Calendar No. 35,529.) Decided June 1, 1931.

William Sachs and others presented for probate the last will and testament of Henry Sachs, deceased. Arthur Sachs filed objections on the ground of nonexecution, mental incompetency, and undue influence. Upon certification to the circuit court, verdict was directed and judgment given for plaintiffs. Defendant brings error. Affirmed.

*Charles F. Delbridge* and *W. Leo Cahalan,* for plaintiffs William Sachs and Clara Sachs Asmus.

*Frank G. Mixter,* for plaintiffs Ralph Sachs and Myrtle Sachs, guardian.

*Frank C. Sibley,* for defendant.

POTTER, J. Henry Sachs of Wyandotte made his last will and testament, January 24, 1929, and died February 22, 1929. His will, on being offered for probate, was objected to by appellant on the grounds of nonexecution, mental incompetency, and undue influence; and, on appellant's application, certified to the circuit court, where, upon trial, a verdict was directed for proponents. Contestant brings error. The testimony of the scrivener who drew the will, an attorney of 34 years' practice, of the subscribing

witnesses who were old friends of the testator, and of doctors Albert P. Walker, Presley L. Pound, and William H. Honor, all of whom had treated him, is that testator was mentally competent. No one acquainted with him testified to anything indicating either mental incompetency or undue influence. Testator signed the will with proper formalities. The testator was in a hospital in 1928. The hospital records were offered in evidence and properly rejected. *Metropolitan Life Ins. Co.* v. *Dabudka,* 232 Mich. 36; 22 C. J. p. 902. Their authenticity was not questioned, but their correctness was not proven. One William C. Lawrence, a medical expert, in response to a hypothetical question based upon no facts tending to show testator's mental incompetency, and who, so far as the record shows, had never known, seen or heard of testator in his lifetime, testified testator was mentally incompetent to make a will. This was not evidence. The direction of a verdict for proponents was correct. Judgment affirmed, with costs.

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

ENGEL *v.* GILDNER.

EASEMENTS—JOINT DRIVEWAY—PRESCRIPTION.

In suit to restrain defendants' use of joint driveway, decree in their favor setting forth limits of easement in driveway acquired by prescription, *held,* supported by evidence.

Appeal from Kent; Perkins (Willis B.), J. Submitted April 16, 1931. (Docket No. 128, Calendar No. 35,598.) Decided June 1, 1931.

Bill by George Engel and another to restrain Eva Gildner and others from using a joint driveway. From a decree for defendants, setting forth limits of easement in driveway, plaintiffs appeal. Affirmed.

*Emil B. Gansser,* for plaintiffs.

*Linsey, Shivel & Phelps* and *John H. Vander Wal,* for defendants.

POTTER, J. This case was once before this court and it was held defendants were entitled to a prescriptive easement in the driveway in question to a point to be determined by the circuit judge. *Engel* v. *Gildner,* 248 Mich. 95. The circuit judge, after the case was remanded, and after hearing the testimony adduced by the respective parties, made a final decree which we think is supported by the evidence, and which is affirmed, with costs.

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

CROWLEY *v.* McCULLOUGH.

1. CONTRACTS—FRAUD—DEFRAUDED PERSON MAY REFUSE TO PERFORM.
   Where defendant was induced to become a member of a syndicate organized to purchase land under false representations that the price to be paid was the same price paid to the owners, he was justified in refusing further to perform on discovery of the fraud.

2. EQUITY—ENFORCEMENT OF RIGHTS.
   Rights of a member of a syndicate organized to purchase land could be enforced only by bill in equity.

3. CONTRACTS—RESCISSION—FRAUD—TENDER.
   Refusal by a member of a syndicate to make further payments to its trustee after discovery of fraud, and notice attached to his plea, in an action against him for payments due, that he would seek recovery of the amounts paid by him, amounted to repudiation of his rights under the syndicate agreement, entitling him to recovery without tendering back what he had received, since he had nothing of value relating to the transaction which he could tender back.

4. SAME—RESCISSION—FRAUD—LACHES.
   That defendant relied on the integrity of the trustee, who induced him to join a syndicate by fraudulent representations, rather than on talk he heard about the club to which they both belonged, may not be relied on to sustain the claim that defendant was guilty of laches; especially where trustee reassured defendant after he had heard said talk.

5. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.
   Motion for new trial based on affidavits of persons that if called as witnesses they would dispute defendant's testimony was properly denied, where said testimony if given would not warrant a change in the decision arrived at.

Error to Wayne; Webster (Arthur), J. Submitted April 9, 1931. (Docket No. 56, Calendar No. 35,438.) Decided June 1, 1931.

Assumpsit by Dennis J. Crowley, as trustee and agent of Clark Farm Syndicate, and others against William D. McCullough on the syndicate agreement. Judgment for defendant on plea of recoupment. Affirmed.

*Douglas, Barbour & Wing,* for plaintiffs.

*James O. Murfin,* for defendant.

SHARPE, J. On April 7, 1925, Dennis J. Crowley, one of the plaintiffs, secured an option from the owners to purchase a tract of land in the township of Northville, in Wayne county, consisting of 88 acres, at the price of $800 per acre. At his request, the plaintiffs Earl R. Frost and Karl L. Ernst and the defendant, McCullough, joined with him in the organization of a syndicate, to be called the Clark Farm Syndicate, for the purpose of purchasing said land and selling the same. A written agreement so providing was prepared and signed by the parties on August 31, 1925. Crowley was designated the manager thereof, and the others agreed to pay to him such portion of the sums set opposite their respective signatures as he should call for from time to time. Opposite the name of Crowley appears the sum of $16,971.43; of Frost, $28,285.71; of Ernst, $5,657.15, and of McCullough, $28,285.71, in all the sum of $79,200.

On August 31, 1925, contracts of purchase and sale were entered into between the owners of the land and Crowley individually, the purchase price being stated therein to be $70,400, or $800 per acre. These contracts were duly executed and acknowledged.

The defendant paid all sums requested by Crowley until February 28, 1929, when a payment of $1,974.33

was said to be due. Another payment of $1,827.14 was demanded on August 31, 1929. The defendant declined to make these payments, and this action was brought for their recovery. The members of the syndicate, except the defendant, are made the plaintiffs, although the declaration alleges that Ernst had sold his interest therein to John H. Friedman, who is also a plaintiff.

The defense rested upon the claim of the defendant that Crowley fraudulently represented to the defendant that the price to be paid for the land was $900 an acre, whereas in fact it was purchased by him for $800 per acre.

Trial was had before the court without a jury. The trial judge filed an opinion, in which he discussed at length the evidence, and found that the defendant had sustained the burden of proof upon his claim above stated, and entered a judgment of no cause of action on plaintiffs' claim and a judgment in favor of the defendant for the amount paid by him to Crowley pursuant to the syndicate agreement.

Plaintiffs' counsel in their brief say that the "issues involved" are:

"1. Was any fraud proven which would release the defendant from his liability under the syndicate agreement?

"2. Had the defendant rescinded the syndicate agreement so as to be entitled to a judgment for the money which he had put into the syndicate?

"3. Was the defendant's right to rescind, if it ever existed, barred by his delay in asserting it?

"4. Did the court err in denying plaintiffs' motion for a new trial?"

1. It will serve no useful purpose to set forth at length the evidence which supports the finding in

this respect. The following facts, admitted or established by a preponderance of the evidence, may be noted:

(1) Crowley was here purchasing under land contract property of the value of $70,400, and, while the contracts were properly acknowledged, he did not place them upon record.

(2) Defendant sent his check to Crowley for $5,000 on July 13, 1925, to apply on the down payment on these contracts, and in the letter accompanying it he stated: "The purchase price being seventy-nine thousand two hundred ($79,200) dollars exactly." This letter was written more than a month before the syndicate agreement was formally executed.

(3) Crowley testified that he personally mailed a letter to the defendant acknowledging receipt of this check and stating therein that he had purchased this land at $800 per acre and was turning it in to the syndicate at $900 per acre. He further testified that this letter had been prepared for him by an attorney, and that he had sent a similar one to the other members of the syndicate, but, although the defendant denied receiving it, neither the attorney nor any of the other members of the syndicate, all of whom are plaintiffs herein, was called to corroborate his testimony in this respect.

(4) Crowley prepared and sent to defendant several statements, each of which was headed: "Statement of Clark Farm Syndicate," followed by the words, "Clark Farm, 88 acres at $900 per acre * * * $79,200," and in which the payments made by the members of the syndicate were listed and the balance due was stated, followed by the amount required to be paid by defendant as his share of the payment then due.

(5) The second paragraph of the syndicate agreement provided:

"The object of the syndicate is to negotiate for and purchase the following described premises:"—

At the time it was entered into, Crowley had an option to purchase this land at $800 per acre. No negotiation was needed to secure it. If it was then understood that he had such option, and that he was to turn the land into the syndicate at $900 per acre, it could have been easily so stated, but, as it was written, the defendant had the right to assume that the syndicate was to pay the purchase price at which Crowley, after negotiation with the owners, was able to secure it.

There are other circumstances which tend to support the claim of the defendant that Crowley deceived him in representing that the price to be paid to the owners was $900 per acre, and justify the finding of the court that on the discovery of such fraud the defendant was not required to further perform the obligation he had assumed in the syndicate agreement.

2. Under this heading counsel urge that, before the defendant could recover the moneys he had paid to Crowley, he must have made a "tender back of that which has been received." They rely upon the holding in *Victor* v. *D. E. Meyer Co.*, 243 Mich. 673, in which it was said:

"Obviously, the plaintiffs cannot recover on the theory of rescission and surrender of the property purchased, because they have not restored to the vendor the thing purchased, nor have they kept good a tender of restoration. This is essential to rescission and recovery in an action at law."

The contract of purchase was entered into by Crowley as an individual, and not as a trustee for the members of the syndicate. The only rights acquired by the defendant were under the syndicate agreement, and these could have been enforced only by a bill in equity. His refusal to make further payment, and his claim under the notice attached to his plea that he would seek recovery of the amounts paid by him clearly amounted to a repudiation of these rights. He had no copy of the syndicate agreement to surrender, nor anything in his possession to which the plaintiffs were entitled, nor anything of value relating to the transaction to deliver to them. The rule stated in *Duncombe* v. *Tromble,* 219 Mich. 8, 11, is more clearly applicable:

"Whether plaintiffs so notified defendant (of a rescission), or not, under the circumstances here disclosed, does not defeat the action. The bringing of the suit within a few days after the payment of the money operated as notice to defendant of the refusal of the plaintiffs to go ahead with the deal under the new terms imposed and as a demand for the return of the money paid. The bringing of suit by plaintiffs to recover the consideration money paid was sufficient evidence of rescission on the part of plaintiffs."

3. Crowley and the defendant had long been friends. While the defendant admits that he had heard talk about the club to which they both belonged that Crowley had made the purchase from the owners at $800 per acre, he was loath to believe it and made payments thereafter. He finally consulted an attorney, and became satisfied that he had been defrauded only after his attorney had made investigation which seemed to establish the fact. That he relied upon the integrity of Crowley rather than the

talk he heard about the club cannot be said to sustain the claim of laches.

4. The defendant testified that, after he had heard the talk in the club above referred to, he met Crowley in a restaurant, and that he then assured him that he was paying $900 an acre for the land. The motion for a new trial was based on affidavits of persons who claimed to be then present and who would, if called as witnesses, dispute the testimony of the defendant in that respect. In arriving at the conclusion we have reached, we have not considered this testimony, and we agree with the trial court that if these witnesses so testified on a new trial it would not warrant a change in the decision arrived at.

In view of the affirmance of the judgment, we do not find it necessary to pass upon the defendant's motion to compel the trial court to set aside an order made by him extending the time to settle the bill of exceptions, decision on which had been reserved to this time.

The judgment is affirmed.

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

DETROIT & SECURITY TRUST CO. *v.* ECHTERNKAMP.

SAME *v.* DEROSIER.

1. FRAUD—MISREPRESENTATIONS—EVIDENCE—SUFFICIENCY.
   In actions on promissory notes given by certain members of syndicate as their *pro rata* share of payment on contract for purchase of land, defense of fraud in misrepresenting purchase price of said land, *held*, not supported by evidence.

2. SAME—EXPRESSION OF CONFIDENCE IN FUTURE PROFITS NOT FRAUD.
   Expressions of confidence that venture would prove a wonderful success are insufficient to sustain claim of fraud in defense to actions on promissory notes.

3. SAME—MISAPPROPRIATION OF FUNDS.
   Claim, in defense to actions on promissory notes, that defendants as members of syndicate were induced to invest in enterprise by payee, who then appropriated to his own use funds belonging to syndicate, *held*, not supported by evidence.

Error to Wayne; Merriam (DeWitt H.), J. Submitted April 21, 1931. (Docket Nos. 77, 78, Calendar Nos. 35,531, 35,532.) Decided June 1, 1931. Rehearing denied September 10, 1931.

Separate actions of assumpsit by Detroit & Security Trust Company, administrator of the estate of Joseph A. Martin, deceased, against William Echternkamp and another and Eugene R. DeRosier, on promissory notes. The cases were heard together and consolidated for review by stipulation. Judgments for plaintiff. Defendants bring error. Affirmed.

*Monaghan, Crowley, Reilley & Kellogg* (*Edward T. Kelley*, of counsel), for plaintiff.

*James Gibbons* (*Andrew G. Stevenson,* of counsel), for defendants.

SHARPE, J. The cases were tried together by the court without a jury, and, by stipulation, but one bill of exceptions was settled to be used as the basis for review in this court of the judgments entered in favor of the plaintiff in the circuit court. The action in the first case is on a promissory note, a renewal of one theretofore given by the defendants in that case to Joseph A. Martin, deceased. We quote from the findings of fact filed by the trial court:

"The two defendants were members of a syndicate which was purchasing certain land on land contract. The vendee upon the contract was the Guardian Trust Company of Detroit, which held the vendee's interest for the benefit of the members of the syndicate. Each of the defendants had undertaken in writing to subscribe and pay a certain sum of money to the trustee. Subsequently an assessment to meet payments on the land contract was levied against the members, and the defendants herein were obligated under the terms of the syndicate or trust agreement, to which they were parties, to pay their prorated share of the assessment. The prior note for $400, of which the note in suit was a renewal, represented the unpaid portion of defendants' share of this assessment."

He further found that Martin had paid the assessment for which the first note was given; that he, or his agent, was not guilty of any fraud or misrepresentation in procuring its execution, or in inducing the defendants to become members of the syndicate.

The fraud of which defendants complain is thus stated:

"(a) By deceiving the members of the syndicate in the purchase price of the land, that is, buying it

at $800 per acre and turning it over to the syndicate at $1,400 per acre."

The answer to this claim is that no representation was made by Martin to either of the defendants as to the purchase price of the land or the price at which he was turning it over to the syndicate. In this respect it differs from *Crowley* v. *McCullough*, *ante*, 362.

"(c) By stating that great profits would inure to defendants by the investment made by them through him, and due to his professed expert knowledge of the real estate business, upon which they relied."

Defendants were doubtless induced to invest by the expectation of large profits. What was said to them amounted to no more than expressions of confidence that the venture would prove a wonderful success, and does not support this defense of fraud. *Kulesza* v. *Wyhowski*, 213 Mich. 189; *J. B. Colt Co.* v. *Cousino*, 226 Mich. 518.

"(d) By inducing them to invest in said enterprise and then appropriating to his own use and benefit, funds belonging to the syndicate."

The evidence does not support this claim. It clearly appears that the proceeds of the note first given were paid by Martin to the trustee for the syndicate.

The other questions presented have received consideration, but do not merit discussion. We do not consider the question of the sale made to defendants being in violation of 2 Comp. Laws 1929, § 9769 *et seq.* (the blue sky law), as it does not appear that the syndicate had not complied therewith.

The judgments are affirmed.

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

BRAENDLE *v.* DRUM.

SAME *v.* SAME.

SAME *v.* SAME.

SAME *v.* SAME.

1. APPEAL AND ERROR—DIRECTED VERDICT.

In reviewing judgment on directed verdict in favor of defendant, testimony must be considered in light most favorable to plaintiffs.

2. MOTOR VEHICLES—NEGLIGENCE—PROXIMATE CAUSE—QUESTIONS FOR JURY.

Where bus driver, on dark, rainy night, turned out to left-hand side of pavement to pass car in front of him, causing a car coming from the opposite direction to swerve in front of plaintiffs' car, which resulted in collision and injuries to plaintiffs, questions as to whether bus driver was guilty of negligence under the circumstances, and, if so, whether such negligence was the proximate cause of the accident, should have been submitted to the jury.

Error to Wayne; Smith (Henry H.), J., presiding. Submitted April 7, 1931. (Docket No. 1, Calendar No. 35,452.) Decided June 1, 1931.

Separate actions of case by Minnie Braendle, Donna Braendle, Samuel E. Braendle, and Gordon George Braendle against A. L. Drum, receiver of Peoples Motor Coach Company and Detroit United Railway, and another for personal injuries sustained by the several plaintiffs in an automobile collision. The cases were heard together. Plaintiffs bring error from directed verdict and judgment for defendant Drum. Reversed, and new trials granted.

*Walter M. Nelson* (*Willard McIntyre,* of counsel), for plaintiffs.

*Bishop & Weaver,* for defendant Drum.

SHARPE, J. These cases were tried together and have been so submitted in this court. At the conclusion of plaintiffs' proofs, the defendant receiver moved for a directed verdict, and, on the trial court announcing that he felt compelled to grant such motion, the plaintiffs asked, and were permitted, to withdraw a juror, and the cases were continued as to the defendant Yeip. Plaintiffs review the judgments entered on the directed verdicts by appeal.

There is little dispute about the facts, but they must be considered in the light most favorable to plaintiffs. About 9 o'clock at night on September 4, 1926, the plaintiffs were riding in an automobile towards the east on Grand River avenue a few miles west of Farmington. The night was dark and rainy, and there were no lights on the highway except those on the cars passing thereon. William Voght and his wife were riding in a car about 25 feet in the rear of plaintiffs' car, and a "Blue Goose" bus of the Peoples Motor Coach Company or Detroit United Railway had been following the Voght car for a considerable distance. These cars were traveling at a speed of about 25 miles per hour. The paving was about 18 or 20 feet in width, and the shoulders quite narrow. The bus turned to the left and drove up alongside of the Voght car. At this time a car approached from the east, driven by the defendant Yeip, and traveling at about 27 miles per hour. Yeip testified:

"When I was just about three car lengths in front of the Braendle car all at once the Blue Goose bus

sort of came down the left-hand side and I slammed on the brakes and my car made a complete circle. My car swung around to the right, completely around. That threw me right over on the left-hand side of the road in the path of Dr. Braendle's car. I was approximately three car lengths distance from Dr. Braendle's car when my car began to swerve. There wasn't any room there for Dr. Braendle's car to avoid my car as it swung around. He didn't have a chance.

"My car got hit on the right-hand side at the door by the left-hand front corner of Dr. Braendle's car. There was a fellow riding with me.

"When the two cars came together I saw Dr. Braendle come half through the windshield and Mrs. Braendle went out head first on the pavement right in between the two cars, that is my car and their car. Both cars stopped. I saw the Voght car turn out to the right and go to the ditch.

"When everything had come to a stop I noticed the passenger bus had come practically to a stop right abreast of the Braendle's. The front of the bus was parallel or even with the front of the Braendle car but it wasn't completely stopped there, though."

As a result of the collision, the plaintiffs were injured, and these actions were brought to recover the damages incident thereto.

The question presented on the motion to direct a verdict was whether, under the circumstances, it was negligence on the part of the driver of the bus to turn to the left and attempt to pass the Voght car, and, if so, whether such negligence was the proximate cause of the collision and the injuries to the plaintiffs resulting therefrom.

Had the driver of the bus been watchful, as it was his duty to be, in view of the darkness and the condition of the pavement at the time, due to the rain

which was falling, he would necessarily have seen the approach of the car driven by Yeip when he turned out to pass the Voght car. By doing so he occupied that part of the pavement which Yeip would necessarily travel on in passing the three cars. He could not have planned on taking a position behind the Braendle car as the distance between it and the Voght car was only about 25 feet. These facts being considered, the jury might well have found that the driver was guilty of negligence in turning his bus to the left at the time he did.

In our opinion they might also have found that his negligence in this respect was the proximate cause of the collision. *Tozer* v. *Railroad Co.,* 195 Mich. 662, 666; *Jaworski* v. *Detroit Edison Co.,* 210 Mich. 317, 320; *Butrick* v. *Snyder,* 236 Mich. 300, 308.

When Yeip saw the bus approaching on the same side of the road on which he was traveling, and when he was but a short distance from the Braendle car, he testified that he applied his brakes, and, due to the slippery condition of the pavement, his car skidded and turned around and in the path of the Braendle car. The driver of the bus could but have expected that Yeip would make an effort to stop his car to avoid a collision with the bus, and the jury might have found that by the exercise of reasonable foresight he should have known that, if Yeip did so, his car was likely to skid and collide with the Braendle car.

The action of the trial court was doubtless based on the testimony of Gordon George Braendle, who stated that Yeip, when about two car lengths from the car he was driving, suddenly swerved to the left and came in collision with his car. But, as before

stated, the testimony must be viewed in the light most favorable to plaintiffs, and, when so considered, presented issues of fact as to the negligence of the driver of the bus and as to such negligence being the proximate cause of the injuries plaintiffs received.

The judgments are reversed, with costs to plaintiffs, and new trials granted.

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

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MEGINNITY *v.* PIKE.

1. BROKERS—COMMISSIONS—WHEN COMMISSION EARNED.
   When offer to purchase property was accepted by owners' agent, as he was authorized in writing to do, the commission which owners had agreed to pay to person securing purchaser was earned.

2. SAME—PRIVITY OF CONTRACT.
   Where acknowledgment was made in writing by owners' agent that plaintiffs had taken advantage of the offer made by owners to pay a commission to the person securing a purchaser for their property, and that plaintiffs were entitled to such commission, a privity of contract was created between plaintiffs and owners enforceable in action at law.

3. SAME.
   Where three owners agreed in writing to pay commission to person procuring purchaser for their property, each agreeing to pay one-third thereof, plaintiffs securing purchaser, who were paid two-thirds of said commission by two owners, were entitled to recover the other one-third from other owner.

Error to Wayne; Moll (Lester S.), J. Submitted January 6, 1931. (Docket No. 9, Calendar No. 35,283.) Decided June 1, 1931.

Assumpsit by Norman Meginnity and another against Clara L. Henderson Pike for commission for the sale of real estate. Judgment for plaintiffs. Defendant brings error. Affirmed.

*John E. Martz,* for plaintiffs.

*Rowland M. Connor,* for defendant.

SHARPE, J. The defendant and her brother and sister, as heirs of their mother, were the owners of certain property in Detroit which they desired to dispose of. The brother was trying to find a buyer, as was also the defendant and her attorney, Charles F. Delbridge. The price was agreed upon. In order to stimulate activity in procuring a purchaser, and to avoid dispute as to the person who should do so, a written agreement was entered into between them. It provided that upon the deposit with Mr. Delbridge of an offer in writing from a responsible party to purchase the property at the price agreed upon, accompanied by a certified check for $3,000, payable to the order of the defendant as executrix, the parties would enter into a written contract to sell the same on the terms therein stated.

It was further provided that on receipt of the first offer made, accompanied by such deposit, Mr. Delbridge should acknowledge its receipt and enter into an agreement on behalf of the parties for the execution of such contract by them and notify each of the parties thereto of such action. The paragraph following then appears therein:

"That the usual real estate commission of 5 per cent. of the sale price of said property shall be paid by the parties hereto, each a one-third part thereof, to such person or persons as shall procure such purchaser, whether such person or persons procuring such purchaser shall be one of the parties, to be paid out of the first $50,000 paid on said contract."

It became known to many real estate salesmen that the property was for sale. Mr. Delbridge testified:

"Personally, if I could have found a buyer I would have been tickled to death to get the commission myself, and my recollection is not clear whether it was Mr. Meginnity or Mr. Helbig, or both of them, one of them came and said they had this man, Ben Jacobs, that would buy this property.

"*Q.* So then they were the first to produce Mr. Jacobs?

"*A.* There is no question about that."

Mr. Jacobs' offer was made in writing on June 16, 1922. It was brought to Mr. Delbridge by the plaintiffs. It fully complied with the requirements of the agreement, and was accompanied by a certified check for $3,000, payable to the defendant as executrix. Mr. Delbridge acknowledged its receipt in writing. He stated therein that it was the first offer made and that it constituted an agreement on the part of the defendant and her brother and sister to enter into a contract for the sale and purchase of the property.

He at once by letter informed the parties to the agreement of the receipt of the offer, and stated that he understood that Mr. Jacobs was financially responsible. In these letters he stated:

"I have explained to Norman Meginnity and August Helbig, the real estate men, who brought in this offer that the transaction carries the usual real estate commission of 5 per cent. on the purchase price thereof which, according to the terms of the agreement, is to be deducted out of the first $50,000 paid."

At the same time he wrote the plaintiffs, informing them of the agreement among the heirs relative to the commission (quoting the paragraph), and stating as his understanding that they were entitled to it.

When the Jacobs offer was accepted by Delbridge, the plaintiffs had earned the commission which the heirs had promised to pay to any person who should produce a purchaser who complied with the requirements of their offer. It appears that, by mutual consent of the heirs, Jacobs' offer and its acceptance were canceled and a similar offer from Howard Coffin was accepted and the sale to him thereafter consummated. The plaintiffs were instrumental in securing Mr. Coffin as a purchaser. Mr. Delbridge testified that he did not consider that they waived their right to a commission on the sale to Jacobs by doing so.

Under the terms of the agreement among the heirs, they constituted Mr. Delbridge as their agent to bind them by a preliminary agreement for the sale of their property. As such agent he acknowledged in writing that the plaintiffs had taken advantage of the offer made by them to pay a commission to the person securing a purchaser of the property and were entitled to such commission. A privity of contract was thereby created between the plaintiffs and the heirs, enforceable by the plaintiffs

in this action. Two-thirds of the commission have been paid by the other heirs, and the plaintiffs were entitled to a judgment against the defendant for her one-third thereof.

The judgment is affirmed.

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

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DRAPER *v.* NELSON.

1. SALES—WHEN TITLE PASSES.

Generally, when one has agreed to sell and the other to buy a specific and designated article, the title passes to the purchaser at once unless the contract indicates the intention to have been otherwise.

2. CONTRACTS—SALE OF PERSONALTY AND REALTY—SEVERABILITY—INTENT.

Contract to sell personalty along with real estate on certain conditions as to payment is not severable unless made so by the contract.

3. SAME—VENDOR AND PURCHASER—PASSING TITLE TO PERSONALTY SOLD WITH REALTY—CONVERSION.

Where contract for sale of land and personal property provided that personal property should be maintained during life of contract at not less than present amount, title thereto did not pass, although purchaser was given possession, and, therefore, when he defaulted, vacated the premises, and took the personalty with him, he became liable for its value.

Appeal from Van Buren; Warner (Glenn E.), J. Submitted April 16, 1931. (Docket No. 119, Calendar No. 35,607.) Decided June 1, 1931.

Case by Ella M. Draper and another against Gordon E. Nelson for the conversion of certain personal property. Judgment for plaintiffs. Defendant appeals. Affirmed.

*Earl L. Burhans* and *Lewis R. Williams,* for plaintiffs.

*David Anderson,* for defendant.

SHARPE, J. On July 23, 1927, the plaintiff Ella M. Draper entered into a written agreement with the defendant in which she agreed to sell to him 40 acres of land described therein and the following personal property:

"1 team horses and harness, 3 cows, 1 brood sow and 7 shoats, chickens now on the farm, all farm tools also all crops on the farm at time of sale harvested or unharvested,"—

for the sum of $6,500, to be paid for as follows: $200 on execution of the agreement, $1,300 on or before August 15th and $200 or more annually until $3,000 and interest at 6 per cent. had been paid, when a warranty deed would be given and mortgage taken for the balance.

On August 29, 1927, when the $1,500 had been paid, a land contract in the usual form was entered into by the parties, with conditions as to payments of the balance similar to those above stated. The personal property was referred to therein in the following language:

"This contract to include personal property on the farm, which personal shall be maintained during the life of this contract at not less than the present amount."

Defendant defaulted in his payments. A notice of forfeiture was given, and he vacated the premises on October 15, 1930, taking the personal property with him. Plaintiffs bring this action to recover the value thereof. The trial court held that under the provisions of the contracts the title to the personal property was still in the plaintiffs and that the defendant was liable for the conversion thereof. He submitted the question of its value to the jury, and entered a judgment for the plaintiffs for the amount thereof as found by them.

In the conceded facts in the case made, by which review in this court is sought, it is said:

"Defendant makes no claim of error as to the proofs submitted or the verdict rendered as to the amount of damages, defendant hereby admitting that if there was a cause of action at all in favor of plaintiffs the judgment is correct in amount."

The contract first entered into was simply an agreement on the part of the plaintiff to sell certain real estate and personal property to the defendant at a stated price. No title passed to the defendant thereunder. When the $1,500 had been paid, the land contract was entered into and possession of both the real and personal property delivered to the defendant. It contained the usual provision that in case of default in payment the plaintiffs (vendors) should have the right to declare the contract void and to retain all payments as stipulated damages for nonperformance.

Counsel for the defendant insists that the title to this personal property passed to him when delivery was made thereof. Ordinarily, this is so.

"It is a general rule that, when one has agreed to sell and the other to buy a specific and designated article, the title passes to the purchaser at once, unless the terms of the contract indicate the intention to have been otherwise." *People* v. *Sheehan,* 118 Mich. 539, 541.

The seller may, however, reserve title in himself, and that, in effect, is what we think was here done. Plaintiff agreed to sell the personalty along with the real estate on certain conditions as to payment. It was not a severable contract (*Gates* v. *Gamble,* 53 Mich. 181) unless made so by the contract thereafter executed. Title surely did not pass thereunder, although possession was at that time given. The purpose of the land contract was to more formally express the rights and obligations of the parties relative to such sale. The reference to the personalty therein, while peculiarly worded, negatives any intent that the title to it had passed to the defendant. A considerable payment had then been made, and, had it been intended that title would then pass, no allusion to it would have been made.

"Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument." 6 R. C. L. p. 838, quoted in *McIntosh* v. *Groomes,* 227 Mich. 215, 218.

"It is elementary that a contract must be construed so as to effectuate the intent of the parties when it was made; and, to ascertain the intent of the parties, a contract should be construed in the light

of the circumstances existing at the time it was made." *Kunzie* v. *Nibbelink,* 199 Mich. 308, 314.

"It is also true that what is plainly implied from the language used in a written instrument is as much a part thereof as if it was expressed therein." *Maclean* v. *Fitzsimons,* 80 Mich. 336, 343.

No claim is made that the personal property for which judgment was recovered is not the same as that listed in the agreement first entered into. In our opinion, the trial court correctly disposed of the matter.

The judgment is affirmed.

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

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HERMESMEYER *v.* NORTHWESTERN INVESTMENT CO.

APPEAL AND ERROR—APPEAL DISMISSED WHERE LEAVE TO APPEAL NOT OBTAINED.

Appeal from an order denying defendant's motion for summary judgment on its claim by way of counterclaim and recoupment is dismissed, where leave to appeal was neither applied for nor granted (Mich. Court Rules, No. 60, § 3).

Appeal from Wayne; Webster (Clyde I.), J. Submitted April 17, 1931. (Docket No. 130, Calendar No. 35,647.) Decided June 1, 1931.

Bill by Matthew H. Hermesmeyer and another against Northwestern Investment Company, a Michigan corporation, and others to rescind a land contract. Upon transfer to the law side of the court, defendants filed counterclaim for payments due. From order denying defendants' motion for summary judgment on counterclaim, they appeal. Appeal dismissed.

*James M. Cleary,* for plaintiffs.

*J. Gilbert Quail* and *Arthur Gloster,* for defendants.

SHARPE, J. The defendant Northwestern Investment Company here seeks review by appeal from an order of the trial court denying its motion for summary judgment on its claim made by way of counterclaim and recoupment in a notice attached to the plea of the general issue. No application for leave to appeal was made to this court, and no such leave has been granted. The appeal must therefore be dismissed. As this question is not raised by counsel for appellees, no costs will be allowed.

We may say, however, after an examination of the record, that, were decision to rest on the merits of the appeal, the same result would be reached.

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

FREEZE *v.* SMITH.

1. CORPORATIONS—SYNDICATES—"SECURITIES"—BLUE SKY LAW.
   Units issued by syndicate organized to purchase real estate and which represent an equitable interest in property are "securities" within the meaning of the blue sky law (2 Comp. Laws 1929, § 9769 *et seq.*), requiring approval by the securities commission.

2. SAME—AGENT CHARGEABLE WITH NOTICE.
   One agreeing in writing to act as trustee for syndicate organized to purchase real estate, units of which are to be sold to the public, is chargeable with knowledge as to whether provisions of blue sky law have been complied with relative to sale of such securities.

3. SAME—AGENT PARTICIPATING IN UNAUTHORIZED SALE LIABLE.
   Trustee of syndicate organized to purchase real estate, who told prospective purchaser of unit therein that he had authorized salesmen making sale to accept money therefor, was acting as agent of the syndicate, and thus participated in making the sale, rendering him liable for violation of the statute (2 Comp. Laws 1929, § 9788) whether he profited thereby or not.

4. SAME—STATUTES—APPLICABILITY.
   Language "pre-organization certificate or pre-organization subscription," as used in 2 Comp. Laws 1929, § 9770, subd. (c), has no application to units offered for sale by syndicate organized to purchase real estate.

5. SAME—TENDER—SUFFICIENCY.
   In action to recover purchase price of unit sold by syndicate organized to purchase real estate in violation of blue sky law, tender back of what plaintiffs had received, made in court after action was brought, was sufficient under the statute (2 Comp. Laws 1929, § 9788).

Error to Wayne; Dingeman (Harry J.), J. Submitted April 15, 1931. (Docket No. 96, Calendar No. 35,315.) Decided June 1, 1931. Rehearing denied September 10, 1931.

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Validity and interpretation of "blue sky laws," see annotation in 15 A. L. R. 262; 24 A. L. R. 523; 27 A. L. R. 1169; 30 A. L. R. 1331; 40 A. L. R. 1014; 54 A. L. R. 498; 57 A. L. R. 1004.

Assumpsit by Earl P. Freeze and another against T. Allan Smith and others to recover the price paid for a unit in a syndicate formed to deal in real estate sold in violation of the blue sky law. Judgment for defendants in justice's court. Plaintiffs appealed to circuit court. Judgment for defendants. Plaintiffs bring error. Reversed, and judgment ordered entered for plaintiffs.

*Leithauser, Brown, Lenehan & O'Donnell,* for plaintiffs.

*David I. Hubar* and *Cyril Bevan* (*Milton M. Maddin,* of counsel), for defendant Smith.

SHARPE, J. In the fall of 1926 the Sunrise Park Syndicate was formed for the purpose of purchasing certain real estate in Oakland county and subdividing and selling the same. Forty-two interests, called units, were represented in the purchase, the holder of each unit paying therefor the sum of $500.

At the solicitation of the defendant John J. Andrews and A. R. Fraser, the plaintiffs purchased one of these units. Before doing so, they called the defendant Smith, whom they well knew, on the telephone, and were informed by him that he was to act as trustee for the syndicate, and that Andrews and Fraser were authorized to accept the money on their purchase. They turned over to them certain stocks, concededly of the value of $500, and received a receipt, signed by Smith, acknowledging the payment of $500—

"for one unit of interest in the SUNRISE PARK SYNDICATE a syndicate formed for the purpose of purchasing and selling a certain parcel of land situated in Royal Oak township, Oakland county, in accordance

with the terms of agreement as set forth in a certain agreement to form aforesaid syndicate and other correlated matters."

At the same time they signed a copy of the agreement referred to in the receipt, which reads, in part, as follows:

"We, the undersigned, being the unit holders of the syndicate known as the SUNRISE PARK SYNDICATE which syndicate was formed for the purpose of acquiring the following described property: (here follows a description of the property.)

"WHEREAS the said syndicate is divided into forty-two units, each unit representing an investment of $500.

"Now THEREFORE, it is agreed that each unit shall represent a one forty-second interest in the above described property and shall share equally in all profits derived in the said property.

"We, and each of us, in consideration of others having subscribed to this syndicate do hereby agree and do hereby appoint and constitute T. ALLAN SMITH of Detroit, Michigan, as trustee for the said syndicate for the purpose as hereinafter set forth."

It then provided that the trustee should receive all moneys paid in by the members of the syndicate; that it was understood that the purchase price of the property was to be $90,000, of which $21,000 ($500 paid by each of the 42 unit holders) should be paid in cash, and the balance in annual payments specifically stated therein.

It was further provided that if the entire amount of $21,000 was not paid to the trustee on or before November 21, 1927, each unit holder should be entitled to a return of the money paid by him, and that the trustee should be guided in the handling of the property by a majority vote of the units cast at

meetings provided for therein, and it was made the duty of the trustee to enter into such contracts as directed at any such meeting. Following the signatures to the agreement was an acceptance of the trust, signed by Mr. Smith.

At the same time the plaintiffs executed a power of attorney, which, after reciting that they were the owners—

"of a 1/42 undivided interest in the property known as the Sunrise Park Syndicate, which syndicate is purchasing land contract in the following described property,"—

describing it, and that Smith had been "designated trustee for the benefit of all unit owners in the said syndicate," appointed him their attorney-in-fact to purchase the property; to "execute a sales agreement for the sale of the foregoing property with C. J. Lingman Company;" to sell and convey their interest therein, and to disburse the moneys received by him therefor.

It is conceded that the units issued under the trust agreement had not been "accepted for filing" by the Michigan securities commission, and the question here presented is whether they were "securities" within the meaning of that term as used in Act No. 220, Pub. Acts 1923, as amended by Act No. 136, Pub. Acts 1929 (2 Comp. Laws 1929, § 9769 *et seq.*), known as the blue sky law. The title to the act reads, in part, as follows:

"An act to prevent fraud, deception and imposition in the issuance, sale or disposition of stocks, bonds and other securities sold or offered for sale within the State of Michigan, and for such purpose to create a commission to regulate and supervise the issuance, sale and disposition of such securities."

Subsection (c) of section 9770, as amended in 1929, reads as follows:

"The term 'security' or 'securities' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, pre-organization certificate or pre-organization subscription, transferable certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas, or mining lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in or title to property or profits, or any other instrument commonly known as security."

The words "pre-organization certificate or pre-organization subscription" were inserted therein by the amendment.

The purpose of the act is clearly expressed in its title. It is also provided in section 3 thereof:

"The provisions of this act shall be liberally construed to the end that the purposes thereof may be accomplished by preventing fraud, deception and imposition on purchasers of securities."

The purpose of forming such a syndicate to acquire property would seem to be to avoid the necessity of incorporation. In a corporation the interests of those who invest in it are represented by certificates of stock. In this syndicate, such interests are represented by the instruments above referred to, from which it appears that the plaintiffs have an equitable interest in property. The act provides that a certificate of stock, transferable certificate of interest or participation, certificate of interest in a profit-sharing agreement, or any transferable share, investment contract, or beneficial interest in or title to property or profits shall be deemed a security and subject to its provisions.

We are impressed that if it be given the liberal construction intended by the legislature, and in fact provided for therein, as above quoted, it should be held that the sale of these units is within its terms. That which the plaintiffs have received, and now hold, is a duplicate of the trust agreement in which their rights are set forth as above stated. It is transferable by assignment. The purpose was not to convey to the plaintiffs an undivided interest in land. It may well be called a transferable share in an "investment contract" or, with greater certainty, a "beneficial interest in or title to property or profits."

The question here presented is a new one in this State. An association organized under the common law, having a declaration of trust in favor of the association for the benefit of purchasers of its stock, was held to be an investment company within the meaning of the act. *People* v. *Clum,* 213 Mich. 651 (15 A. L. R. 253).

In *State* v. *Gopher Tire & Rubber Co.,* 146 Minn. 52, 56 (177 N. W. 937, 938), it was said:

"The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an investment as that word is commonly used and understood."

In *State* v. *Ogden,* 154 Minn. 425, 427 (191 N. W. 916, 917), it was said:

"The arrangement was legitimate, so far as appears, and convenient enough. The paternalistic purpose of the statute is to prevent offering to the public, not land contracts, but investment contracts, evidencing a right to participate in the proceeds of a venture, without the commission first ascertaining whether there is behind the venture something so

tangible that a sound policy of regulation permits exposing the investing public to them."

Many authorities, while not directly in point, which shed light upon the construction which should be given to this section of the act, are collected and commented on in 15 A. L. R. 262; 24 A. L. R. 523; 27 A. L. R. 1169; 40 A. L. R. 1014, and 54 A. L. R. 498.

Section 20 of the original act reads as follows:

"Every sale or contract for sale of any security, not accepted for filing under this act or made contrary to any order of the commission, shall be voidable at the election of the purchaser, and the person making such sale or contract for sale, and every agent of or for such seller who shall have participated or aided in any way in making such sale, knowing such sale to be in violation of this act, shall be jointly and severally liable to such purchaser, upon tender to the seller or in court of the securities sold or of the contract made, for the full amount paid by such purchaser, together with all taxable court costs, in any action brought under this section."

The requirement as to knowledge was eliminated from this section by the 1929 amendment (2 Comp. Laws 1929, § 9788). The plaintiffs purchased this unit from the syndicate. The sale to them was made by the defendant John J. Andrews and A. R. Fraser. The latter is not a party hereto. William J. Andrews was made a party defendant. It does not appear that he had anything to do with the matter. Neither of these defendants was served with process. It is insisted that no liability on account of the sale attached to the defendant Smith; that he was not an agent of the seller, participating or aiding in any

way in making the sale, and had no knowledge that such sale was made in violation of the act.

The plaintiff Earl P. Freeze testified, as before stated, that he called the defendant Smith on the telephone, and, when asked to relate the conversation, said:

"Well, I just told Mr. Smith that these men were here and they told me that he was acting as trustee, and of course if he knew the men. He went ahead and said he authorized them to accept the money and told me he did and he knew the men. I turned the stock over to them and since that time I have never received any report or any information in connection with this syndicate. We called the trustee in person and over the 'phone and he said there was nothing to report."

At the time of this sale, if not before, Mr. Smith had agreed in writing to act as the trustee for the syndicate. Before doing so, it was his duty to ascertain whether the promoters had complied with the provisions of the act relative to the sale of such securities. He must be charged with knowledge of the fact that they had not. When he told Mr. Freeze that he had authorized Andrews and Fraser to accept the money from them on such sale, and when he afterwards accepted this money, he was acting as an agent of the syndicate. It is apparent that what he said to Freeze influenced him and his wife in making the purchase. He had joined with the promoters in the carrying out of an enterprise contrary to the terms of the statute, and in what he then said to Freeze he aided and participated in making the sale. It makes no difference whether he profited thereby or not. *Thompson* v. *Cain,* 226 Mich. 609; *Lewis* v. *Bricker,* 235 Mich. 656.

Defendants' counsel insist that the legislature, by inserting the words "pre-organization certificate or pre-organization subscription" in subsection (c) in 1929, evidenced its understanding that such securities were not theretofore included therein, and that the purchase made by plaintiffs falls within these terms. In our opinion this language is not applicable to the proceedings here taken resulting in the sale made to the plaintiffs.

It is urged that no tender of that which the plaintiffs received was made before suit brought. Section 20 of the act, above quoted, expressly provides that such tender may be made "in court," and this was done.

The judgment entered will be reversed and set aside, with costs, and the cause remanded with directions to the trial court to enter a judgment for plaintiffs for the sum of $500. As the action was first brought in the justice's court, no interest will be allowed.

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

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BRUCE *v.* HENRY FORD HOSPITAL.

1. APPEAL AND ERROR—BRIEFS—COMPLIANCE WITH COURT RULES NECESSARY.

   Supreme Court's action in not striking from files appellant's brief for failure to comply with Michigan Court Rule No. 69 must not be taken as precedent, but said rule must be complied with.

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As to what is a charitable institution within the rule exempting from liability for negligence, see annotation in 2 L. R. A. (N. S.) 556,

2. CHARITIES—HAS WELL-UNDERSTOOD MEANING.
That word "charity" has well-understood meaning may be implied from use of word "charitable," without defining it, in connection with word "hospitals" in article 8, § 11, State Constitution, and in many statutes, and, when so used, has much broader significance than when used in common parlance applying to almsgiving alone.

3. SAME—TEST APPLIED TO GIFTS.
The test as applied to a gift is whether it is charitable in its nature.

4. SAME—HOSPITALS—TEST APPLIED TO HOSPITALS.
The test which determines whether a hospital is charitable is its purpose, that is, whether it is maintained for gain, profit, or advantage; and the purpose is to be determined, in case the hospital is incorporated, not only from its powers as defined in its charter, but also from the manner in which it is conducted.

5. SAME—CHARITABLE HOSPITAL NOT LIABLE FOR NEGLIGENCE OF EMPLOYEES.
Corporation organized under 2 Comp. Laws 1915, § 9054 *et seq.*, not for pecuniary profit, but to construct and maintain a hospital on land donated for that purpose with money also donated "for the care and relief of indigent and other sick, infirm, or injured persons," and which accepts persons for treatment regardless of their ability to pay (there usually being a large operating deficit), is a charitable hospital, and therefore not liable for the negligence of its employees.

6. DEEDS—GIFTS—CONDITION SUBSEQUENT—REVERSIONARY CLAUSE—DETERMINABLE FEE.
Language in the habendum clause of a deed conveying land as a gift to be used for hospital purposes providing that in case of failure to so use it for certain period it shall revert to grantors, their heirs, etc., does not render the gift void, but under said language a determinable fee was created.

Error to Wayne; Brennan (Vincent M.), J. Submitted April 22, 1931. (Docket No. 6, Calendar No. 34,472.) Decided June 1, 1931.

Case by Elizabeth Bruce against Henry Ford Hospital and others for malpractice. Directed verdict

and judgment for defendant hospital. Plaintiff brings error. Affirmed.

*Davidow & Davidow,* for plaintiff.

*Longley & Middleton,* for defendant hospital.

SHARPE, J. This action was brought by the plaintiff to recover damages alleged to have been caused by acts "of gross negligence and mistreatment and malpractice" of the defendants and their agents while she was in their care and under treatment in the defendant hospital. The trial resulted in a disagreement of the jury. The defendant hospital thereafter moved for judgment upon the evidence and proofs submitted, and judgment was thereupon entered in its favor, pursuant to the provisions of Act No. 73, Pub. Acts 1927 (3 Comp. Laws 1929, § 14535). Plaintiff seeks review by writ of error.

Counsel for appellant have failed to comply with the requirements of Michigan Court Rule No. 69. We do not strike their brief from the files for this reason, but our action in this respect must not be treated as a precedent. The rule must be complied with.

The question presented is whether the hospital is liable to a patient for malpractice of its surgeons. In opening the argument in their brief, plaintiff's counsel say:

"It is the contention of plaintiff in this cause that the defendant Henry Ford Hospital is not an eleemosynary institution. That is not a charitable organization. That while it is a corporation organized not for pecuniary profit, it does not come within the law of charitable organizations, and, therefore, it is liable for negligent acts of its employees and agents within the scope of their employment."

If it is a charitable organization, decision is controlled by the holding of nonliability in *Downes* v. *Harper Hospital,* 101 Mich. 555 (25 L. R. A. 602, 45 Am. St. Rep. 427), and *Pepke* v. *Grace Hospital,* 130 Mich. 493. To determine this question, we must look to the manner in which it was organized and the way it has always been conducted. This hospital was incorporated on August 18, 1915, under Act No. 171, Pub. Acts 1903 (2 Comp. Laws 1915, § 9054 *et seq.*), entitled "An act for the incorporation of associations not for pecuniary profit." Its purposes, as set forth in its articles of incorporation, are:

"To construct, complete, equip, maintain and conduct a hospital for the care and relief of indigent and other sick, infirm or injured persons, and the treatment of maternity cases; the study and teaching of the cause, nature, prevention and cure of various diseases, and the dissemination of knowledge relating thereto, and the erection, equipment and maintenance of all buildings and laboratories necessary or incidental thereto, upon land situated in the city of Detroit, in the county of Wayne, Michigan, and this day conveyed by Henry Ford to said corporation, in trust for said purposes."

The incorporators were Henry Ford, Edsel B. Ford, Clara J. Ford, Ernest G. Liebold, and Frank J. Sladen, the first four of whom were named as trustees or directors. By-laws were adopted providing for annual and special meetings; for the election of a board of four trustees, who should manage and control the business and property of the corporation; for filling vacancies in such board; for the duration of their term of office, and for the election of officers and prescribing their duties.

The money with which the hospital was built was contributed by Mr. and Mrs. Ford and their son, Edsel B. Ford. Their contributions up to and in-

cluding the year 1927 (trial was had in 1928) amounted to over $12,000,000, of which about one-third was represented by operating deficit. The deficit for the year 1927 was $718,508.48. No other contributions have been received.

The word "charity" was defined by Mr. Justice COOLEY in *Allen* v. *Duffie,* 43 Mich. 1, 7 (38 Am. Rep. 159), as follows:

"Charity is active goodness. It is doing good to our fellow men. It is fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general or to any class or portion of mankind."

In both volumes of Words and Phrases, under the heading "Charity," many definitions of this word will be found. That it has a well-understood meaning may be implied from the use of the word "charitable," without defining it, in connection with the word "hospitals" in article 8, § 11, of our State Constitution, and in many of our statutes. It has a much broader significance when so used than in common parlance, when we are likely to apply it to almsgiving alone, and it "embraces the improvement and promotion of the happiness of man." *New England Sanitarium* v. *Inhabitants of Stoneham,* 205 Mass. 335, 342 (91 N. E. 385). The test as applied to a gift is whether it is charitable in its nature.

In *Downes* v. *Harper Hospital, supra,* it appeared that the organization had its origin in two deeds conveying property to certain persons in trust. The purpose was stated therein to be—

"The institution, erection, and maintenance of a hospital in the city of Detroit, or in the immediate vicinity thereof, for the succor, care, and relief of such aged, sick, poor persons who shall apply for

the benefit of the same, and who shall seem to my trustees hereof to be proper subjects for such aid as their means will enable them to afford."

The property was conveyed by the trustees to a corporation organized under Act No. 242, Pub. Acts 1863 (3 Comp. Laws 1915, § 10840 *et seq.*), enacted after the deeds were given. The court referred at some length to the manner in which it was conducted, which did not materially differ from the defendant hospital in that respect, and then said:

"It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition."

It was further said:

"Several hospitals of this character exist in this State, founded by private munificence. Obviously, they would not have been founded if their donors had known, or ever supposed, that their charitable purposes might be thwarted by the verdicts of juries for the negligent acts of those who must necessarily be employed in the execution of the charity."

The similarity between the purpose as expressed in the deed in the *Downes Case* and that in the articles of association of the Ford Hospital will be noticed. While the same language is not used, it is apparent that the same object was sought to be attained. In 30 C. J. p. 462, it is said:

"The test which determines whether a hospital is charitable or otherwise is its purpose, that is, whether it is maintained for gain, profit, or advantage, or not. And the question of whether a hospital is maintained for the purpose of charity

or for that of profit is to be determined, in case the hospital is incorporated, not only from its powers as defined in its charter but also from the manner in which it is conducted."

That persons without means to pay for their care and treatment were not refused admission clearly appears from the testimony of Israel R. Peters, the "executive head" of the hospital. If the patient "made some comment about not being able to pay to the original admitting clerk," he was referred to Mr. Peters, in which case he tried to secure an adjustment under which the patient would pay a portion of the bill and the difference would be assumed by the hospital. He further said:

"Of course, in a great many instances they did not pay anything, and either expired or when they were discharged were not able to resume employment, or the family was a large one and they just didn't have enough money to make ends meet. The result was that that was charged off."

In *Michigan Sanitarium & Benevolent Ass'n* v. *Battle Creek,* 138 Mich. 676, 683, wherein the question of the exemption of the property of the plaintiff from taxation was involved, Mr. Justice CARPENTER, speaking for the court, said:

"Such a corporation is sufficiently charitable to entitle it to the privileges of the act when the charges collected for services are not more than are needed for its successful maintenance."

It seems clear that the Ford hospital was a charitable organization at the time plaintiff was a patient therein.

Counsel call attention to the fact that this corporation was not organized under the law providing for the incorporation of hospitals. While the provi-

sions of Act No. 242, Pub. Acts 1863 (3 Comp. Laws 1915, § 10840 *et seq.*), under which the Harper hospital was organized, appear in compilations since that time, and were not in terms expressly repealed until the enactment of the general corporation act (Act No. 84, Pub. Acts 1921, 2 Comp. Laws 1929, § 9943 *et seq.*), yet section 7 of Act No. 171, Pub. Acts 1903, as amended in 1905 (Act No. 163), and in 1909 (Act No. 148), in force at the time the Ford hospital was incorporated in 1915, contained this provision:

"Hereafter all new corporations not organized for profit and having no capital stock, except religious organizations * * * shall be organized under this act."

Counsel for the plaintiff direct our attention to the habendum clause in the deed of conveyance from Mr. and Mrs. Ford to the corporation. After stating that the premises were conveyed for the purpose of maintaining and conducting a hospital thereon, it contained the following:

"Said land, appurtenances and all improvements thereon shall revert to first parties, their heirs, representatives and assigns, upon the failure of second party, its successors and assigns, to conduct and maintain said hospital thereon for a period of ninety days."

They rely upon the following from 28 C. J. p. 646:

"A condition attached to a gift, that upon the happening of a certain event the property shall revert to the donor, renders the gift void."

The effect of this reversionary provision is not involved in this case. It seems clear, however, that the rule as stated is not applicable. If so, then the

corporation has no property out of which any judgment recovered by plaintiff could be satisfied. Under the language used, a determinable fee was created. *Epworth Assembly* v. *Railway,* 236 Mich. 565.

The judgment is affirmed.

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

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## UNION TRUST CO. *v.* MARSH.

1. RECEIVERS—ACCOUNTING—SCOPE OF ACCOUNTING UNDER DECREE.
   Under decree requiring receiver to report to court true and complete accounting of deceased's business and of net profits earned since his death under management of his wife, her claim for advances to business prior to husband's death was properly disallowed.

2. SAME—JUDGMENT—RES JUDICATA—ESTATES OF DECEDENTS.
   Wife's claim, in accounting for profits of husband's business under her management since his death, that she had established the business and that her husband had made no contributions thereto, was properly rejected as having been litigated in prior suit.

3. SAME—OWNERSHIP OF BUSINESS INCLUDES BANK ACCOUNT.
   Decree determining that business claimed by wife belonged to husband's estate included account in bank in name of business, although it was not specifically referred to in decree.

4. SAME—ACCOUNTING—ESTATES OF DECEDENTS.

In accounting by wife for profits of husband's business since his death, advances by her to husband's children and grandchildren were properly disallowed.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted April 15, 1931. (Docket No. 111, Calendar No. 35,340.) Decided June 1, 1931.

Bill by Union Trust Company, a Michigan corporation, administrator of the estate of Enoch W. Marsh, deceased, and receiver of the Michigan Brief and Record Company and United States Law Printery against Ella B. Marsh for an accounting. From order made approving accounting submitted made after remand to court below, defendant appeals. Affirmed.

*Black & Black,* for plaintiff.

*J. H. M. Alexander* and *Walter M. Trevor* (*Ralph E. Routier* and *Dean W. Kelley,* of counsel), for defendant.

SHARPE, J. Defendant here seeks review of an order made by the trial court on the accounting had, pursuant to the order of this court entered on June 2, 1930 (250 Mich. 561).

By reason of the claim here made by the defendant, it seems necessary to review the proceedings in this case at some length. In doing so, we have had resort to the records and briefs filed on the former hearings.

The bill of complaint was filed on July 29, 1926, by the plaintiff as administrator of the estate of Enoch W. Marsh, deceased. It was alleged therein that the deceased, in November, 1915, had estab-

lished a printing business on Field avenue, in Detroit, and that he carried it on as owner thereof until his death on October 15, 1922, under the name of the Michigan Brief and Record Company; that on his death the defendant, his widow, took possession thereof under a claim of ownership; that she had converted the net income thereof to her own use, and should account to the plaintiff therefor. The relief sought was an accounting and an order that defendant turn over said business to the plaintiff.

Annexed thereto were copies of five chattel mortgages, given by the deceased to the Mergenthaler Linotype Company, with dates and amounts as follows: November 26, 1915, $2,180; August 12, 1916, $2,741; May 26, 1920, $3,000; July 12, 1921, $2,500, and April 17, 1922, $2,200, on linotype machines, presumably to secure the purchase price thereof. In the last three of these, the mortgagor was said to be "Enoch W. Marsh, doing business as the Michigan Brief & Record Company."

The defendant answered, denying the material allegations in the bill. She admitted that the chattel mortgages were executed by her husband, but averred that they were so signed "at the direction and under the authority of this defendant." In a cross-bill she alleged that the business was established by her, and that she was the owner thereof, and prayed for a decree so determining.

After a hearing on proofs taken in open court, a decree was entered on December 24, 1927, containing the following provision:

"That the printing business known as the Michigan Brief and Record Company, and United States Law Printery, located at 4429 Field avenue (old No. 1009), Detroit, Michigan, and all furnishings, machinery and equipment thereof, and all records

thereof, of every kind whatsoever, including books of account, bank books, bank check books, canceled checks, invoices, receipts, and other instruments, or papers or writings in anywise pertaining to said business, and all merchandise, supplies and stock thereof, and all good will existing, developed and connected with said printing business, together with all notes and accounts receivable, is the property of the estate of Enoch W. Marsh, deceased."

In it the plaintiff was appointed a receiver of the company and the defendant ordered to deliver to it all of its property and effects. It also provided for an accounting of the business conducted by the defendant after the death of her husband, and that defendant do pay to the receiver such sum as should be found due from her conduct of such business.

The defendant made an ineffectual effort to appeal from this decree. *Marsh* v. *Wayne Circuit Judge,* 243 Mich. 530. When the report of the receiver was presented and allowed by the trial court, she sought, on appeal therefrom, to incorporate into the record the testimony and exhibits taken on the trial, but such right was denied to her. *Marsh* v. *Wayne Circuit Judge,* 246 Mich. 511.

In the taking of the accounting now before us, the defendant testified:

"From the date of the starting of the business, that is from the period of November 5, 1915, to and including the 15th day of October, 1922, I have made advances to the business."

On objection thereto, the court said:

"That of course was in the original record and that was determined. At the present time it is not the question involved, as has already been determined by the court."

Under the statute so permitting, she submitted proof that during the period above stated she had contributed to the business the sum of $7,609.03. In ruling upon it, the trial court said:

"If Mrs. Marsh made any advances prior to October 15, 1922, they are charges against the estate of Enoch W. Marsh, and should be pursued as a claim against the estate."

Under the ruling of the court, the plaintiff was not required to rebut the claim thus made on her part, and counsel's statement that there was no controversy over the fact that she made such advances is without force or effect.

Counsel seem unable to appreciate the duty imposed on the court by the decree in taking the accounting. The receiver appointed in the decree was ordered to report to the court a true and complete accounting of said printing business, its property and effects, and of the net profits earned since the date of the death of Enoch W. Marsh, October 15, 1922. The argument of counsel is founded upon their claim that—

"Appellant established the business of the Michigan Brief and Record Company and Enoch W. Marsh made no contribution whatsoever."

This claim was litigated on the hearing first had, and the decree then made forecloses her from raising it in this proceeding. On this record we cannot but hold that the trial court was right in declining to consider her claim for advances made to the business prior to the death of her husband.

Stress is laid upon the fact that the "bank account" was not specifically referred to in the decree determining that the business belonged to the estate

of the deceased. We do not again quote this provision, but it seems clear that under it any moneys in the bank to the credit of the Michigan Brief and Record Company would pass to the receiver. We do not find that the amount of the bank account is stated in the report, nor do counsel refer to it in their brief. The claim relative to it is thus stated:

"We contend that appellant was the owner in her own right of the bank account and all sums deposited therein, that the same were her sole and separate property and estate and not that of any other; that the record warrants no other finding, than that this was the sole and separate estate of Ella B. Marsh and she is not required to account to plaintiff, the decedent's estate, his children or the receiver."

If considered by the court, we think it was properly disallowed.

The trial court found that the business "was profitably run and managed" by the defendant; that her personal withdrawals from the business amounted to $62,035.31; that she should be charged with interest on overdrafts by her exceeding the sums allowed her for salary and rent, amounting to $5,468.45—in all, $67,503.76. These charges do not seem to be attacked.

He credited her with salary for 62½ months at $500 per month, $31,250; with rental of her building in which the business was conducted at $125 per month for the same time, $7,812.50, and for personal advancements made by her to the business during that time, $1,037.01—in all the sum of $40,099.51. The only criticism of these allowances is as to the rent, which it is urged should have been fixed at $200 per month. The evidence sustains the allowance as made. The difference between these amounts, $27,404.25, he found to be due from her to

the estate, and ordered it to be paid by her to the plaintiff.

It appeared that the defendant had paid out of the business certain sums to persons claiming to be the children of the deceased, amounting to $4,502. The court declined to give her credit for these payments, saying they were a matter of adjustment in the probate court. In this we think he was right, as also in disallowing an item of $541, made up of gifts to the grandchildren of the deceased.

The claim of the injustice to the defendant in requiring her to pay to the estate of her deceased husband moneys which in fact and in right belong to her has impelled us to give this case very thoughtful consideration. We can only say that, upon the record before us, the order made by the trial court was fully justified, and it is affirmed, with costs to appellee.

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

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BOWEN *v.* MOHRHARDT.

1. PARTNERSHIP—ACCOUNTING.

In suit for accounting of partnership business, finding of court below that partnership existed, *held*, justified by evidence.

2. SAME—PERCENTAGE OF EARNINGS.

Finding of court below that defendant agreed to give plaintiff certain per cent. of earnings of business for year as recompense for delaying date when partnership was to become effective, is affirmed, on appeal.

3. SAME—INCREASE IN SALARY.

Finding of court below that defendant agreed that increase in plaintiff's salary should be allowed as from time he began work is affirmed, on appeal.

4. BILLS AND NOTES—LOST INSTRUMENTS—INDEMNIFYING BONDS—NEGOTIABLE INSTRUMENTS.

Before indemnifying bond may be required under 3 Comp. Laws 1929, §§ 14209, 14210, in suit involving lost promissory note, it must affirmatively appear that said note was negotiable.

Appeal from Kent; Dunham (Major L.), J. Submitted April 9, 1931. (Docket No. 35, Calendar No. 35,346.) Decided June 1, 1931.

Bill by Matthew J. Bowen against Jacob A. Mohrhardt for an accounting of partnership moneys. Cross-bill by defendant for set off of amount alleged to be due him. Decree for plaintiff. Defendant appeals. Affirmed.

*Martin H. Carmody* (*Henry C. Hart,* of counsel), for plaintiff.

*Linsey, Shivel & Phelps* and *John H. Vander Wal,* for defendant.

SHARPE, J. The defendant has been engaged in the meat and canned goods business in Grand Rapids for many years. In December, 1927, he employed the plaintiff as a bookkeeper, on part time, at a salary of $30 per week. The service rendered was such that on April 1, 1928, this wage was increased to $50 per week. On May 28, 1928, plaintiff loaned defendant $900, and on October 5th of that year he loaned him $2,500, for which he received defendant's notes bearing 7 per cent. interest.

It is plaintiff's claim that as early as April, 1928, there was talk of a partnership in the business. The

trial court found that such an agreement was in fact entered into on February 11, 1929, to become effective January 1st of that year, whereby the plaintiff became the owner of a one-quarter interest in the business, for which he was to pay $5,000. He was discharged by the defendant in October, 1929, and filed the bill of complaint herein soon thereafter for an accounting of the moneys due him on account of the service rendered; of the loans made, and his share of the profits of the business during the time he was a copartner with defendant therein.

The defendant answered, denying that a partnership agreement was entered into, and by cross-bill set up facts supporting a claim that plaintiff was indebted to him in sundry amounts which should be set off against the notes held by plaintiff.

The proofs were submitted in open court, after which the trial court filed an opinion reviewing the proofs submitted at length. A further accounting was ordered as to certain items, and, after consideration thereof, a decree for plaintiff was entered sustaining the claim of partnership and awarding him the sum of $4,111.59, from which the defendant has taken an appeal.

1. *Partnership.* We are satisfied from the record that defendant much appreciated the service that plaintiff was rendering. His books had not theretofore been kept in a manner to reveal the true condition of his business. The plaintiff testified that when he presented the quarterly statement to defendant in April, 1928, the defendant said "that I was the man he wanted there, and that he would give me a partnership in the business." It is undisputed that his salary was then increased to $50 per week. The business needed money. On May 28th plaintiff offered to raise $900 on his wife's life insurance

policy and loan it to defendant, and this offer was accepted. While the business was conducted at a profit, additional money was needed for operation, and on October 5th plaintiff raised $2,500 by a mortgage on real estate owned by his wife and deposited it to defendant's credit in the bank. That he did this in anticipation of the partnership is apparent. He testified that defendant then said to him, "Well, if you can borrow the money at the bank now, it will be a good time, and we can finish up this partnership proposition." After the deposit was made, he testified that defendant said to him, "Now, Bowen, it is so late in the year, why not let's waive the partnership proposition until after the first of the year," and that he gave his assent thereto.

Defendant gave his notes for these loans, and was charged interest thereon to January 1, 1929. On that date, defendant's investment in his business amounted to about $22,000. He drew out $2,000 during January, and on February 11th, when the terms of the partnership agreement were finally agreed upon, he was credited with this amount and with plaintiff's investment of $5,000 for a one-quarter interest in the business. On that day, plaintiff made appropriate entries in the books, which had theretofore been kept by him, charging himself with the $5,000 and crediting that amount to the defendant. These entries were used as a basis for quarterly statements thereafter made by him and presented to defendant. On these statements it clearly appeared that the defendant had an investment in the business of $15,000 and plaintiff $5,000. While defendant testified that he did not see the entries in the books, he admitted that he received these statements, but says he did not examine them; that

his only interest in them was in the amount of profit they disclosed.

Louis Harmon, an apparently reputable business man of Grand Rapids, testified:

"At the time I went to Detroit with Mr. Mohrhardt, I had some talk with him about the partnership and Mr. Mohrhardt said that after he took Mr. Bowen in as a partner, he was greatly relieved of his financial worries."

Defendant, on being asked if he did not so state, replied: "Not that I know of." The defendant owned the building in which the business was conducted. Up to January 1, 1929, he had been charging the business a monthly rental of $125 per month, and on that date increased it to $200. His explanation is that it made no difference as it all belonged to him.

After plaintiff's discharge, defendant had an examination made of the books relating to the business by Charles Payne. He prepared a statement of plaintiff's account with defendant, the first entry in which was "Investment a/c $5,000." It showed an indebtedness of plaintiff to defendant of $1,834.58. Payne testified that after he had prepared it he showed it to defendant, and he said, "Now, go down and show that to Mr. Bowen," and he did so. He also testified:

"There is nothing about the books that is hidden or anything covered up as to that investment. If I was not told by anybody about it, I would immediately conclude that it was a partnership."

The books as kept disclose that both plaintiff and defendant were allowed weekly salaries after January 1, 1929. There are other facts and circumstances which tend to support plaintiff's claim in

this respect, and, in our opinion, the finding of partnership was justified by the evidence submitted.

2. *Profits of 1928.* It is plaintiff's claim that when he raised the $2,500 he expected that the partnership would then be entered into; that when it was suggested that it should begin on January 1st defendant said to him:

"Now, in lieu of your waiving that partnership proposition, I will give you a flat 10 per cent. of the profits of 1928 which would approximately have been about the same as one-quarter of the business would be in 1928 for the last quarter. That is the best quarter in the year."

Defendant denies making this statement. The trial court heard them both testify. His finding that many of the answers of the defendant to questions put to him were "evasive" finds support in the record. When the agreement for a partnership was deferred at the time the last loan was made, it is not unreasonable to conclude that he thought plaintiff should be recompensed for the delay. The interest which the notes bore was but the same as plaintiff was paying. We are unwilling to reverse the finding of the court that the agreement for a share of the profit in 1928 was in fact made.

3. *Increase in Salary.* Plaintiff claims that when his salary was increased to $50 per week defendant agreed that he should be allowed this amount from the time he began work. The testimony is quite convincing that plaintiff, under the first agreement of hire for part time, found himself unable to do the work expected of him without devoting most of his time to defendant's business. No proper books of account had been theretofore kept. That defendant was pleased with his efforts to start a proper accounting system is apparent. Defendant denies that

he so agreed. What has been heretofore said as to the weight of the evidence applies equally to this item. We are unwilling to reverse the finding allowing it.

4. *Bond for Notes.* Defendant insists that the payment of the sum awarded plaintiff should be conditioned on his filing a bond to indemnify him against any claim by any other person on account thereof. He relies upon the statute (3 Comp. Laws 1929, §§ 14209, 14210) which provides that such a bond must be given when action is brought upon a lost negotiable promissory note, or when such a note is relied upon as a set-off. The $900 note was offered in evidence and marked as an exhibit. Plaintiff testified that he had looked for, but was unable to find, the $2,500 note. The defendant also testified, "I looked for it and haven't found it." While the due date of this note was not fixed, it is apparent that it was made payable on January 1, 1929. Interest on it to that date was charged to defendant. It is uncertain whether this note was not delivered to defendant when the partnership agreement was entered into. It does not affirmatively appear that these notes were negotiable instruments. Proof of that fact must be submitted before an indemnifying bond can be required under the statute. *Reese* v. *Dyer,* 199 Mich. 204.

The decree is affirmed, with costs to appellee.

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

GEE v. GEE.

1. DIVORCE—EQUITY.
   Wife suing for divorce asks for equitable relief and appeals to conscience of court, and, if her conduct is inequitable, court could refuse to grant her relief.

2. SAME—FRAUD.
   Where wife induced husband to convey to her property standing in their joint names, and concealed from him her intention of abandoning him as soon as this was done, her action in suing for divorce after obtaining the property was a fraud on him.

3. SAME—DIVISION OF PROPERTY.
   Where wife fraudulently concealed from husband her intention of abandoning him until after she had obtained title to property standing in their joint names, when she brought suit for divorce, decree granting divorce to her, from which he does not appeal, properly ordered property sold and proceeds divided between them.

Appeal from Wayne; Merriam (DeWitt H.), J. Submitted April 23, 1931. (Docket No. 166, Calendar No. 35,677.) Decided June 1, 1931. Rehearing denied September 10, 1931.

Bill by Annie Gee against Charles Gee for divorce. Cross-bill by defendant for declaration of interest in certain property. From decree granting divorce to plaintiff and division of property as prayed by defendant, plaintiff appeals. Affirmed.

*Peter P. Boyle,* for plaintiff.

*Hulburt & Randall,* for defendant.

POTTER, J. The parties hereto were married July 1, 1912. They have one child, a daughter nine years old. Plaintiff began suit for divorce June 1, 1929, on the grounds of extreme and repeated cruelty and nonsupport, asking for temporary and

Marital misconduct of one spouse as avoiding gift by other spouse, see annotation in 35 L. R. A. (N. S.) 124.

permanent alimony, custody of the minor child, an injunction restraining defendant from molesting her, and for other relief. Defendant answered, denying all the material allegations of the bill of complaint, and by way of cross-bill asked to be decreed an interest in the real estate which plaintiff held in her name; that a bank account from which she had drawn the money be decreed joint property, for an injunction restraining her from disposing of or incumbering the real estate and household furniture, and from ejecting him from the home.

The trial court granted plaintiff a decree for divorce, directed defendant to pay the friend of the court $8 a week for the care and support of the minor child, gave defendant the right to have the custody of the minor child for two weeks in July of each year, and directed the real estate, part of which stood in the name of the wife, be sold and the proceeds divided.

Plaintiff appeals, claiming the court erred in directing the real estate in her name to be sold and the proceeds divided between the parties. Defendant does not appeal. Plaintiff asked for equitable relief; she appealed to the conscience of the court. If her conduct was inequitable or unconscionable, he could refuse to grant her relief. There is no sufficient evidence to warrant a decree upon the ground of nonsupport. There is proof of her cruelty to her husband, her neglect of the minor child, and her associations with other men, but on the whole case the trial court granted her a decree of divorce. The Detroit real estate stood in the joint names of the parties. It was the result of their joint efforts. Plaintiff wanted it. There was evidence she told her neighbor she was going to get defendant's property and as soon as she got the property she was

going to show him he could get out. Plaintiff testifies she started divorce proceedings against defendant but "dropped them right away when he signed over to me." Defendant testified plaintiff kept after him during the time he was out of work and insisted he should give her the property or she would get a divorce; that he was discouraged and finally agreed to sign it and did sign the deed turning the property over to her; that plaintiff agreed he should live just the same as if the property was joint, and "the minute she got it was just I could bake in hell." There was other testimony, but it did not materially vary the statements of the parties. The authorities here and elsewhere sustain the rule that it was a fraud for plaintiff to conceal her intention of abandoning defendant as soon as she got his property. 2 Pomeroy, Equity Jurisprudence (4th Ed.), §§ 951, 956; 1 Story's Equity Jurisprudence (13th Ed.), § 218; *Basye* v. *Basye,* 152 Ind. 172 (52 N. E. 797); *Witbeck* v. *Witbeck,* 25 Mich. 439; *Turner* v. *Turner,* 44 Mo. 535; *Evans* v. *Evans,* 118 Ga. 890 (45 S. E. 612, 98 Am. St. Rep. 180); *Meldrum* v. *Meldrum,* 15 Colo. 478 (24 Pac. 1083, 11 L. R. A. 65); *Brixel* v. *Brixel,* 230 Ill. 441 (82 N. E. 651); *Thomas* v. *Thomas,* 27 Okla. 784 (109 Pac. 825, 113 Pac. 1058, 35 L. R. A. [N. S.] 124, Ann. Cas. 1912 C, 713); *Holt* v. *Holt,* 23 Okla. 639 (102 Pac. 187). In *Basye* v. *Basye, supra,* it is said:

"It was a fraud on appellant for appellee to conceal her intention of abandoning him as soon as she got his property."

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

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

COMMERCIAL STATE SAVINGS BANK *v.* BIRD.

1. FRAUDULENT CONVEYANCES—GOOD FAITH OF PARTIES—AGREEMENT FOR RECONVEYANCE—ESCROWS.

   Where corporation was financially unable to repurchase certain of its stock as it had agreed to do, and the principal stockholder, wishing to preserve the credit of the company, took the stock and in consideration therefor conveyed certain real estate under agreement that it was to be delivered in escrow and reconveyed to him within certain period on payment of purchase price, and the parties apparently acted in good faith, grantee having no notice of insolvency of either corporation or grantor, said conveyance cannot be said to have been in fraud of creditors.

2. SAME—CONSIDERATION—HINDERING CREDITORS.

   The right secured to grantor by said agreement to have the property reconveyed on payment of specified amount did not have the effect of hindering and delaying grantor's creditors, where there was sufficient consideration and title passed immediately to grantee.

3. DEEDS—DELIVERY TO GRANTEE—ESCROWS.

   A deed may not be delivered in escrow to the grantee; when there is valid delivery by grantor to grantee it is impossible to annex a condition thereto, and delivery vests title in grantee although it may be contrary to the intention of the parties.

4. FRAUDULENT CONVEYANCES—CONSIDERATION—AGREEMENT TO RECONVEY.

   Where property conveyed by debtor has no value in excess of that paid for it by grantee, there is no interest which grantor's creditors are entitled to reach under agreement between grantor and grantee that latter would reconvey within certain period on payment of purchase price.

Appeal from Wayne; Dehnke (Herman), J., presiding. Submitted April 22, 1931. (Docket No. 31, Calendar No. 35,304.) Decided June 1, 1931.

Bill by Commercial State Savings Bank, a Michigan corporation, against Israel S. Bird and another to set aside transfers of real estate alleged to have been made in fraud of creditors. Bill dismissed. Plaintiff appeals. Affirmed.

*Bryant, Lincoln, Miller & Bevan,* for plaintiff.

*Joslyn, Joslyn & Joslyn,* for defendants.

SHARPE, J. A corporation known as "Clare E. Mosher, Inc.," had been engaged in the wholesale jewelry business in Detroit for several years prior to 1924. The greater part of the stock was owned by Clarence E. Mosher. In December of that year, Mosher succeeded in interesting the defendant Israel S. Bird in the business, and the negotiations resulted in an agreement executed on December 11, 1924, under the terms of which Bird entered into the employ of the corporation at a salary stated therein, and agreed to, and did, purchase 30 shares of its capital stock, for which he paid the sum of $3,000. It further provided that the corporation would, within a specified time, if requested, repurchase the stock at the price he had paid therefor, "or replace him by securing another party to take investment."

Early in the spring of 1925, Mosher informed Bird that the corporation was not doing sufficient business to justify its retaining him in its employ at the salary agreed upon, and Bird consented to retire. After some delay, an agreement was entered into on May 12th, under which Mosher and his wife conveyed to Bird and his wife two parcels of real estate in Grand Rapids, by separate deeds, for a consideration of $4,100, represented by $1,000 then paid by Bird to Mosher and the value of the stock ($3,100) then assigned to Mosher by Bird. The

defendants agreed to hold these deeds in escrow until June 25th, at which time, unless they were paid the said sum of $4,100, they should become absolute, and in the event of such payment they would reconvey the property to Mosher. The deeds were immediately recorded. No tender of the $4,100 was at any time thereafter made. The defendants afterwards, and before the commencement of this suit, sold said property, receiving approximately $3,700 therefor.

On June 23, 1925, the corporation executed a trust mortgage to a trustee of all of its property. Its assets were then listed at about $13,000, and its liabilities at about $28,000.

On June 25, 1925, Mosher filed a voluntary petition in bankruptcy, and on September 9, 1925, Mrs. Mosher did likewise, and both were adjudicated bankrupts. No estate from either of them passed into the hands of the trustees. The claim of the plaintiff, arising upon a promissory note executed by Mr. and Mrs. Mosher, amounting to about $3,000, was filed in each bankruptcy proceeding.

In July, 1925, the Moshers removed to Washington, D. C., where they have since resided. It seems to be conceded that they own no property in this State or elsewhere.

On May 3, 1927, this suit was begun. Its purpose is stated by counsel for the plaintiff as follows:

"The bill herein was filed to void said transfers to Bird as fraudulent and void as against plaintiff bank, a creditor of the Moshers, and to impress a trust upon the property in Bird's hands."

The proofs were submitted in open court. The trial court filed an opinion, in which he denied a motion made by defendants to dismiss for want of jurisdiction, but held that the deeds were valid, and

entered a decree dismissing the bill of complaint, from which plaintiff has appealed.

Plaintiff attacks the conveyances because they were "partially voluntary and were fraudulent," and insists that they were "void as matter of law by reason of the secret reservation" contained in the agreement executed at the time they were given.

At the time Bird purchased the stock, the corporation undertook, if requested to do so within a specified time, to repurchase it or "replace him by securing another party to take investment." When such request was duly made, the corporation had not the funds on hand to retire this stock. Mosher was then making an effort to sell a larger amount of stock, and had confidence that he would succeed in doing so. He testified: "I am positive that if I could have gotten this money everything would have been all right at the time." He was the large stockholder in the company. His income therefrom was his only means of subsistence. He did not want the credit of the company affected by proceedings on the part of Bird to enforce the contract, and so he and his wife concluded to purchase the stock from Bird. They were personally under no legal obligation to do so, but they felt that their interest in the corporation warranted their doing so. It satisfactorily appears that when the deeds and agreement were executed, Bird indorsed his certificate of stock and delivered it to Mosher. It does not appear that at that time Bird knew that the Moshers were indebted to plaintiff or that the corporation was insolvent.

We cannot but conclude, as did the trial court, that Bird acted in good faith in his acceptance of the deed; that a sufficient consideration passed to the Moshers therefor, and that there was no intent

on the part of either Bird or the Moshers to delay, hinder, or defraud the creditors of the latter.

No stress is laid upon the fact that the defendants recorded the deeds soon after delivery. That it was expected they would do so is apparent from the requirement that upon payment they would reconvey to the Moshers.

It is insisted that the right secured to the Moshers in the contract to have the property reconveyed to them on the payment of the $4,100 at any time until June 25, 1925, had the effect of hindering and delaying the creditors of the Moshers, and that the deeds executed pursuant thereto were for that reason fraudulent and void.

Counsel rely on our decision in *Anderson* v. *Chapman,* 215 Mich. 80, in which the effect of a secret agreement between the parties to a conveyance was involved. The deed in that case reserved to the grantor the use and possession of the property for 15 months. In a separate writing, he was given the right to repurchase within that time at the same consideration for which the premises were sold. It was urged that this secret reservation voided the conveyance. The court said:

"Under our view the question will not be very important in this case, but the question is here and should be answered,"—

and, after a consideration of the authorities, further said:

"These papers, construed together, show, beyond question, a secret reservation to the grantor and one which the law says is illegal and one which obviously hindered and delayed the collection of these notes in question."

This was at once followed by the further statement:

"This conclusion, however, is not as important to us as it has been to counsel, by reason of the view we take of the facts. The burden of proof was on plaintiff to show his *bona fides.*"

After a consideration of the evidence, it was said that he had not done so and the conveyance was held to be subject to the defendant's rights under an execution which had been levied by him upon the property.

The quotation from 12 R. C. L. which appears in the opinion, and which we need not here repeat, was applicable to the facts there presented. In the preceding paragraph it was said:

"No effort of a debtor to hinder or delay his creditors is more severely condemned by law than an attempt to place his property where he can enjoy it, but require his creditors to await his pleasure for the payment of their claims out of it. A man cannot be the beneficial owner of property and still have it exempt from his debts. * * * It is also held in some instances that the effect is the same though the transferee be innocent of any wrong intent, and acted from the best of motives. But other cases hold that the presumption of an evil intent in a grantee who accepts a conveyance of property in which a benefit is reserved cannot be indulged in the absence of some further fact than the reservation itself. Under these decisions to impute or show bad faith in the grantee, whether by construction merely or as a fact, it must appear, in addition to the trust created or benefit reserved on the face of the instrument, that the grantee was charged with inquiry into the purposes of the grant by a knowledge of the grantor's insolvency, or, at least, of the fact that he was indebted. Nothing short of this will suffice

to impute to the grantee even that kind of bad intent which rests on legal presumptions." 12 R. C. L. pp. 544, 545.

And following the quotation in the *Anderson Case* above referred to, it is said:

"So a man cannot tie up his property under trust in such manner that he may be enabled to enjoy the income thereof and set his creditors at defiance." 12 R. C. L. p. 546.

The conveyances in question were delivered to Bird when executed by Mr. and Mrs. Mosher. At the same time Bird assigned his stock certificate to Mr. Mosher and paid him the sum of $1,000. By such delivery the title passed to the defendants. The use of the word "escrow" in the agreement in no way affected defendants' rights under the deeds. The effect of delivery of a deed to a grantee to be held by him in escrow was considered at length in *Dyer* v. *Skadan,* 128 Mich. 348 (92 Am. St. Rep. 461), and in *Wipfler* v. *Wipfler,* 153 Mich. 18 (16 L. R. A. [N. S.] 941). In the *Dyer Case,* the following was quoted with approval from *Darling* v. *Butler,* 45 Fed. 332 (10 L. R. A. 469):

"The rule is ancient and familiar that a deed cannot be delivered in escrow to the grantee. When there is a valid delivery of a deed by the grantor to the grantee, it is impossible to annex a condition to such delivery; and the delivery vests the title in the grantee, although it may be contrary to the intention of the parties."

See, also, *Hawthorne* v. *Dunn,* 210 Mich. 176, 187.

In the agreement made at the time of delivery the Birds agreed to reconvey within a stated time on receiving payment of the amount paid by them for the property. If this undertaking be treated as a

land contract, rights under it could be had only by a tender of the amount to be paid and demand for a reconveyance. If the deed and agreement be treated as an equitable security given Bird for the payment of the $4,100 due him, it does not help the plaintiff's case upon this record. The trial court was inclined to so consider it, and to hold the defendants liable to pay for any excess in the value of the property conveyed over and above the $4,100. In the opinion filed he said:

"As matters stand, defendants, if liable at all, might be required to respond for whatever the property, or the Mosher interest in it, was actually worth, over and above their own claim, if the property was in fact worth more. If plaintiff, within ten days after filing of this opinion, requests the same in writing, I will hear further proofs as to the question of value; otherwise the finding will be that the Moshers' interest in the property conveyed was worth not more than $4,000."

No such request was made. While Mosher testified that the property was worth $7,000, it seems clear to us, as it did to the trial court, that defendants paid for it all that it was fairly worth, and more than they got for it on a sale made soon after they acquired title.

We do not think the rule applied in the *Anderson Case* applicable to the facts here presented. In that case possession of the farm was reserved to the grantor for a period of 15 months, and the value of the property was much greater than the sum paid the grantor for the conveyance. It clearly appears that there was no intent on the part of either Bird or Mr. and Mrs. Mosher to defraud the plaintiff. The property conveyed having no value in excess of

that paid by Bird for it, the plaintiff has shown no interest therein entitling it to a decree.

In view of the conclusion reached, we do not consider the question as to whether plaintiff should have obtained a judgment against Mr. and Mrs. Mosher before filing its bill of complaint herein.

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

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

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RICHARDS *v.* KLINE.

1. PARTNERSHIP—DISSOLUTION AGREEMENT—COMPETITIVE BUSINESS—TRADE SECRETS—PATENTS.

   Partner who sold his interest in business, including good will, but who did not agree not to re-engage in business and who remained in purchaser's employ, could use the knowledge he there acquired in order to build a machine which would compete with his employer's machine in the market, after leaving his employ, unless it infringed upon the latter's design, for which a patent had been applied and was afterward obtained; no other trade secrets being involved.

2. SPECIFIC PERFORMANCE—PARTNERSHIP DISSOLUTION AGREEMENT—COMPETITIVE BUSINESS—PATENTS.

   Suit for specific performance of partnership dissolution agreement was properly dismissed, where the only issue presented was whether machine manufactured and sold by defendant in competition with plaintiff's business was infringement on patent obtained by plaintiff, since such issue should be determined in suit brought therefor in proper court.

Appeal from Kalamazoo; Weimer (George V.), J. Submitted April 10, 1931. (Docket No. 68, Calendar No. 35,138.) Decided June 1, 1931.

Bill by J. A. Richards, doing business under the name and style of J. A. Richards Company, against James G. Kline for specific performance of a partnership dissolution agreement. Bill dismissed. Plaintiff appeals. Affirmed.

*Harry C. Howard,* for plaintiff.

*Glenn R. Faling,* for defendant.

SHARPE, J. Prior to March 10, 1922, the plaintiff was engaged in the business of manufacturing machinery for the printing and allied trades at the city of Kalamazoo under the firm name of J. A. Richards Company. On that day he sold a one-third interest in the business, including special tools, patterns, patents, and good will, to the defendant for the sum of $4,000. The business was continued under the same firm name. On July 27, 1927, the partnership was dissolved by written agreement. For a consideration of $4,500 the defendant sold his one-third interest therein, including "the good will of said business, and all other assets of said copartnership," to the plaintiff. He was employed by the plaintiff thereafter until about the middle of January, 1929.

Before the partnership agreement was entered into, the plaintiff had applied for a United States patent on certain improvements pertaining to a circular saw structure which he was then manufacturing, and which the partnership continued to manufacture. Soon after leaving plaintiff's employ, the defendant engaged in business at Comstock, in

Kalamazoo county. He began the manufacture of a machine which plaintiff claims to be an infringement of his patent. Alleging that the defendant had taken certain drawings and tracings appertaining to this machine, plaintiff filed a bill praying for an injunction to restrain their use, and obtained a decree therefor on May 11, 1929.

On July 24, 1929, he filed the bill of complaint herein. In it he set forth the dissolution agreement, and alleged that the defendant is advertising for sale a saw trimmer manufactured by him in violation of the terms of such agreement. In his prayer for relief he asked that defendant—

"be compelled to specific performance of the dissolution contract and also enjoined from advertising the saw trimmer referred to in the advertisement and also benders and cutters,"—

and from selling the same, and that he be awarded such damages as he had sustained by reason thereof.

The answer contained a denial of the material allegations in the bill. While the cause was pending, plaintiff's application for a patent, above referred to, was granted, and the bill was amended to so state.

After hearing the proofs submitted, the trial court in an opinion filed by him said:

"In my opinion the only question involved herein is that of infringement. No other question is presented to which infringement is merely incidental, or the determination of which brings this cause within the jurisdiction of this court,"—

and entered a decree dismissing the bill, from which plaintiff has appealed.

Plaintiff's claim is thus stated by his counsel:

"The theory of the bill in the instant case is that the plaintiff and the defendant together owned all of the assets of the partnership, and that the defendant in the dissolution agreement conveyed to the plaintiff the same assets which he had acquired and which included the good will and the patents; that he was bound by the dissolution agreement not to injure the plaintiff by selling plaintiff's customers machines within the terms of the patent which he had sold; that by the decree in the earlier case he had no lawful right to make use of plaintiff's drawings."

He relies on the holding in *Becher* v. *Contoure Laboratories,* 279 U. S. 388 (49 Sup. Ct. 356), to support his right to the relief prayed for. In that case it appeared that Becher, while in the employ of one Oppenheimer, who had invented a machine, learned all of the facts relative thereto, and, while still in such employ, without the knowledge of Oppenheimer, and in violation of his agreement—

"to keep secret and confidential the information thus obtained and not to use it for the benefit of himself or of any other than Oppenheimer,"—

applied for and obtained a patent on such machine. In an action brought in the State court to compel Becher to deliver to Oppenheimer an assignment of the letters patent and to enjoin him from manufacturing the machine, and from transferring any rights under the patent issued to him, Oppenheimer was granted the relief prayed for. At about the time the judgment was entered, Becher brought suit in the Federal court of the State, setting up his patent, alleging infringement and praying for an injunction. The jurisdiction of the State court which rendered the judgment was assailed, it being in-

sisted that the jurisdiction of the Federal courts is exclusive in suits arising under the patent laws. In affirming the judgment of the lower court denying plaintiff relief, it was said:

"It is plain that that suit had for its cause of action the breach of a contract or wrongful disregard of confidential relations, both matters independent of the patent law, and that the subject-matter of Oppenheimer's claim was an undisclosed invention which did not need a patent to protect it from disclosure by breach of trust. (Citing several cases.) Oppenheimer's right was independent of and prior to any arising out of the patent law, and it seems a strange suggestion that the assertion of that right can be removed from the cognizance of the tribunals established to protect it by its opponent going into the patent office for a later title."

The facts here presented differ widely from those there considered. In the written agreement dissolving the partnership, the defendant sold to plaintiff, as before stated, his one-third interest therein, including "the good will of said business, and all other assets of said copartnership." It contained no provision that defendant should not engage in a competitive business. He had no right to remove any of the drawings from plaintiff's place of business, and his use of them was enjoined by the decree first rendered. If he has violated its terms, he may be punished therefor. But neither the agreement nor the decree in any way prohibited the defendant from manufacturing a machine for use in the printing business which did not infringe upon the design for which plaintiff had then applied for a patent. After the dissolution, defendant was employed by plaintiff as a superintendent in his shop for about 18 months. That he might, after he left this employment, use the knowledge he there acquired in

order to build a machine which would compete with plaintiff's in the market seems clear, unless the machine so built by him infringed upon the design for which plaintiff was then seeking and afterwards obtained a patent. No trade secret was involved except as pertained to the design filed in the patent office. Plaintiff's invention was protected by his application, made before the partnership agreement was entered into. Any knowledge acquired by the defendant during the partnership, or while in plaintiff's employ after the dissolution, which pertained to the design sought to be patented, could not be used by him. But knowledge acquired relative to the manufacture of machines which did not so infringe might certainly be used by him without incurring any liability to the defendant either under the dissolution agreement or otherwise.

This court has held that—

"One who is given employment by a manufacturer whose processes of manufacture, methods, and machinery are kept secret from the public, upon the agreement, express or implied, that he will not use the information imparted to him in the course of his employment for his own benefit or communicate it to strangers, will be enjoined from breaking his agreement." *O. & W. Thum Co.* v. *Tloczynski,* 114 Mich. 149 (syllabus) (38 L. R. A. 200, 68 Am. St. Rep. 469).

See, also, *Glucol Manfg. Co.* v. *Schulist,* 239 Mich. 70.

But the only secret in the manufacture of plaintiff's machine at the time the partnership agreement was entered into, or during the after employment of the defendant, was in the design, of which plaintiff had theretofore applied for a patent.

The question then resolves itself, as stated by the trial court, into whether the machine now manufactured by the defendant is an infringement of the patent granted to plaintiff. The plaintiff pointed out the respects in which it does infringe, and the defendant was equally positive that it does not. A patent attorney produced by defendant was examined at length as to the points of similarity in the two machines. Apparently in answer to a question put by the court, he said:

"Now, what I desire to show, your honor, is, that although there are admittedly resemblances between the Kline machine and the Richards machine, the resemblances are only of a general nature, and that the specific mechanism of the two machines is quite different, and the difference between the specific mechanism of the Kline machine and the Richards machine is fully as great as the difference between the specified mechanism of the Richards machine and the prior art."

If defendant's machine does not infringe the patent granted plaintiff, he should not be enjoined from manufacturing it, and whether it does or does not must be determined in a suit brought therefor in the proper court to decide such cases.

The decree is affirmed, with costs to defendant.

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

REINERT v. ROBERTS.

1. FRAUD—CONSPIRACY—COURT NOT CONCERNED IN DOING EQUITY BETWEEN CONSPIRATORS.

Courts are not much concerned with working out equities or doing exact justice between coconspirators who have deliberately defrauded a third person and later have been compelled by the court's decree to reimburse their victim.

2. SAME—PARTIES PERPETRATING FRAUD PERSONALLY LIABLE.

Defendants who conspired together and perpetrated a fraud upon plaintiffs were properly held personally liable for plaintiffs' loss.

3. SAME—CONSPIRATOR'S WIFE NOT PARTICIPATING IN FRAUD NOT LIABLE PERSONALLY.

Wife of defendant guilty of defrauding another should not be held personally liable therefor, in absence of testimony that she knew of said fraud, was a party thereto, or that she in any way benefited thereby.

4. SAME—ACCOUNTING—TITLE TO REAL ESTATE.

Decree that defendants are personally liable in sum of $3,620.28 for fraud perpetrated on plaintiffs is modified, on appeal, and amount thereof reduced to $2,928.73; and title of real estate involved is vested in plaintiffs subject to contract rights of vendees.

Appeal from Ottawa; Vanderwerp (John), J., presiding. Submitted April 15, 1931. (Docket No. 98, Calendar No. 35,595.) Decided June 1, 1931.

Bill by Walter A. Reinert and another against Timothy A. Roberts and others for an accounting in the sale of lands held as tenants in common. From decree made on remand from this court for an accounting, plaintiffs and defendants Roberts

and Harry F. Stickney appeal. Modified and affirmed.

*Charles E. Misner,* for plaintiffs.

*Robinson & Parsons,* for defendants Roberts.

*Daniel Ten Cate,* for defendants Stickney.

NORTH, J. By the decree in *Reinert* v. *Roberts,* 250 Mich. 387, plaintiffs herein were entitled to an accounting against defendants, and the case remanded to the circuit court therefor. The accounting has been had and a decree entered thereon in the circuit court. Both plaintiffs and defendants claim error in the accounting and have appealed. Before passing upon the accuracy of the accounting, we will consider other questions presented by the record and briefs now before us.

The circuit judge decreed there was due to plaintiffs $11,460.28 together with interest thereon from the date to which computation was made, July 12, 1930; and he decreed the defendants Timothy A. Roberts and Harry F. Stickney personally liable to plaintiffs for the payment of $3,620.28. Mr. Stickney claims the testimony shows that more than half of the amount for which he and Roberts are personally liable has already been paid to plaintiffs by money which belonged to him personally, and he therefore urges personal liability for the balance decreed should not run against him but against Mr. Roberts only. This position is not tenable. In our former opinion we found that Roberts confederating with Stickney perpetrated a fraud upon plaintiffs. Courts are not much concerned with working out equities or doing exact justice between coconspirators who have deliberately defrauded a third per-

son and later have been compelled by the court's decree to reimburse their victim. In *Gilbert* v. *Hoffman,* 2 Watts (Pa.), 66, in commenting on this phase of the law, it is said:

"It is certainly not the duty of a court to protect the interest of a person who has been detected in an attempt at fraud."

"The law will not aid wrong-doers to adjust equities among themselves, nor alleviate their hardships growing out of their trespasses upon the rights of others." (Syllabus) *Upham* v. *Dickinson,* 38 Mich. 338.

"Public policy demands that two or more wrongdoers shall be left as to each other where their joint offense leaves them." *Township of Hart* v. *Noret,* 191 Mich. 427, 432 (L. R. A. 1916 F, 83).

The circuit judge justly held both Roberts and Stickney personally liable for plaintiffs' loss.

The circuit judge also held Mrs. Lillie M. Roberts personally liable to the extent of $1,812.64 of the amount found due plaintiffs. Mrs. Roberts has appealed from this portion of the decree, claiming that she should not thus be held personally liable. As disclosed in our former opinion (250 Mich. 387), this fraud was perpetrated by selling property formerly owned jointly by Reinert and Roberts to W. B. and Louis A. Jarvis for $20,000, but under Roberts' representation to Reinert that the consideration actually received for the property was only $7,500. The Jarvis sale was consummated by Roberts and Stickney and the contract payments, which were made at the Peoples State Bank in Holland, Michigan, were equally divided between these two men. Mr. and Mrs. Roberts had two joint accounts at this bank, one a commercial account, the other a savings account. Payments on the Jarvis contract

to the amount of $1,812.64 were credited by the bank to the Roberts' joint savings account. The funds in this account were not at any time sequestered incident to this litigation. At one time after these deposits were made Mrs. Roberts drew $700 out of the savings account and placed it in the joint commercial account. Other than this there is no satisfactory proof by whom the withdrawals were made or in what amounts. While Mrs. Roberts knew that the payments on the Jarvis contract were being deposited in the joint savings account, it is not shown that she knew of or was in any way a party to the fraud perpetrated on these plaintiffs. She had property of her own prior to her marriage to Roberts; and after her marriage to him she conducted a business to some extent on her own account. She testified: "I did not draw out of that account any more money than what I put in myself." The bank cashier, evidently a disinterested witness, also testified that both of the Roberts' bank accounts were joint, and further:

"As I recall it they started to do business that way when Timothy A. Roberts married Lillie M. Crisler. In fact Mrs. Roberts had some property and when she married Roberts they put this money in a joint account and this property in their joint names."

We think the testimony fails to establish that Mrs. Roberts now has in her possession or under her control or has ever benefited in any way by payments on the Jarvis contract. Under such circumstances, Mrs. Roberts should not have been decreed personally liable. If the joint bank account or some portion thereof had been reached by some process of the court and the Jarvis deposits thus sequestered

a different question would have been presented; but under this record personal liability should not be decreed against Mrs. Roberts.

Unless otherwise indicated, in the remaining portion of this opinion we shall refer to Mr. Roberts and Mr. Stickney as the defendants. In their behalf it is asserted that plaintiffs' side of the account should have been debited with one-half of the principal of a $5,500 mortgage given on this property by one Dickover, who was Stickney's father-in-law, and to whom defendants had the property conveyed in order that Dickover might in turn convey it to them and thus the fraud upon plaintiffs be consummated. The trial judge correctly found and decreed that the Dickover mortgage should be canceled and discharged of record, and not charged against plaintiffs. The seven installments of interest on this mortgage supposed to have been paid by Dickover, but in fact paid by Stickney, amounting to $577.50, were properly considered in the accounting. Plaintiffs have received one-half of that amount; they are chargeable therewith, and, as hereinafter noted, with legal interest thereon.

Examination of the details of the accounting in the circuit court discloses error in two particulars. Roberts and Stickney have received on the Jarvis contract payments totaling $15,520. In the accounting they were charged interest at the rate of six per cent. on these various installments from the date of payment to the date of computation—July 12, 1930. The computation of interest should have been at the rate of five per cent. per annum. So computed the amount is $2,559.85 which added to the $15,520 totals $18,079.85. Plaintiffs are entitled to one-half, or $9,039.93. In accordance with our former decree (see 250 Mich. 387), the unpaid portion of the Jarvis

contract has been sequestered and is to be applied on payment of the amount due plaintiffs. Defendants' one-half thereof with interest totaling $3,920 should therefore be first deducted from the $9,039.93, leaving $5,119.93.

But plaintiffs have also received the following payments which should be debited against them in this accounting:

(A) $1,000 (August 6, 1925) on the Dickover sale, with accrued interest at five per cent. per annum computed to July 12, 1930, $1,246.66.

(B) Seven items of interest on the Dickover mortgage totaling $577.50 and interest at five per cent. to July 12, 1930, $658.03.

(C) One-half of the $954 incumbrance (which Stickney paid—December 26, 1925) and interest to July 12, 1930, $585.38.

In the accounting of the circuit judge plaintiffs were not charged with interest on items A, B, and C, as computed above. We think they should have been. These three items total $2,490.07. Deducting this amount from the above items of $5,119.93, there is a net balance of $2,629.86 for which Roberts and Stickney should be held liable to plaintiffs.

By common consent the parties seem to have agreed that the $298.87 of taxable costs incident to the former hearing in this court shall be included in this accounting. Adding this amount to the above $2,629.86, the final total would be $2,928.73.

Defendants assert the right to certain other credits. These were properly disallowed for reasons noted in the following portion of the circuit judge's finding:

"The checks to DeKeyzer, the Stickney personal expense claims and the credit for advertising,

should in my opinion not be allowed as a credit against the plaintiffs' claim. All of these items were expended in the efforts to defraud the plaintiffs as determined by the Supreme Court, and plaintiffs have received no benefit therefrom, with the possible exception of a few dollars for drawing the duplicate contract to Jarvis, and this item is not separated from the other total DeKeyzer bill, so it should not be allowed."

Plaintiffs have also appealed, and they assert error in the allowance by the circuit judge of items A and B above noted as credits to the defendants. They also urge that Mrs. Stickney should have been decreed personally liable. We have considered these claims and find them to be without merit.

The decree will be modified by eliminating the provisions by which Mrs. Roberts was held personally liable in the amount of $1,812.64, and by reducing the amount for which Timothy A. Roberts and Harry F. Stickney are decreed personally liable to plaintiffs from $3,620.28 to $2,928.73, as of July 12, 1930. We think the decree should also vest the fee title to the real estate covered by the Jarvis contract in plaintiffs subject to the rights of the vendees; it being of importance that the fee title should be definitely vested either in the event of the vendees performing and requiring conveyance or in the event of their default and a possible foreclosure. No costs are awarded on this appeal.

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

NORDBERG *v.* TODD.

1. BOUNDARIES—DEFINITE MONUMENTS SHOULD CONTROL.
   Where parties agree upon definite monuments which fix the boundaries of a parcel of land conveyed by one or the other, such monuments should control.

2. SAME—TESTIMONY AS TO AREA NOT CONCLUSIVE WHERE DEFINITE MONUMENTS ESTABLISHED.
   Where the testimony established definite monuments, testimony of the parties relative to the area of the land contained within the boundaries is not conclusive, especially in view of the rule of law that quantity in any description must generally give way to fixed lines and monuments.

3. PLEADING—RELIEF GRANTED—CONSTRUCTION OF DEED—REFORMATION OF INSTRUMENTS.
   While plaintiffs' bill for construction of deed does not specifically ask for reformation, such relief might well be granted under their prayer for general relief, and especially where the issue of reformation is definitely raised by defendant's cross-bill wherein reformation of the deed is prayed.

4. COSTS—ATTORNEY'S FEES—COURT RULES.
   In fixing costs in equity case court below should have followed former Circuit Court Rule No. 64, and fixed attorney's fee at $30 instead of at $75.

Appeal from Kent; Dunham (Major L.), J. Submitted April 14, 1931. (Docket No. 70, Calendar No. 35,560.) Decided June 1, 1931.

Bill by Alfred Nordberg and another against Jennie Todd for construction of a deed. Cross-bill by defendant against plaintiffs to reform the deed. Decree for plaintiffs. Defendant appeals. Modified and affirmed.

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As to effect of compromise agreement locating division line at place known not to be the true boundary, see annotation in 10 L. R. A. (N. S.) 610.

*Knappen, Uhl, Bryant & Snow,* for plaintiffs.

*Linsey, Shivel & Phelps* and *John H. Vander Wal,* for defendant.

NORTH, J. This bill of complaint was filed for the purpose of securing construction of a deed establishing a line between the properties of these respective parties and obtaining injunctive relief. Defendant presented a cross-bill seeking affirmative relief including reformation of her deed to plaintiffs. On September 8, 1924, the defendant executed to plaintiffs a warranty deed of a triangular piece of property east of Grand Rapids and bordering Cascade road on the north, which deed contained the following description:

"Beginning on the east line of and 589.3 feet south of northeast corner of southwest quarter of section five (5), said township of Cascade, thence south along the east line of premises owned by first party 1,250.7 feet to Cascade road, so-called; thence northwesterly along said Cascade road 548.2 feet; thence northeasterly in a direct line 922.4 feet to place of beginning, being in all 5.4 acres, more or less, and all on section five (5), township of Cascade, Kent county, Michigan, subject, however, to all roadway rights of said Cascade road, so-called."

About three months prior to her deed to plaintiffs defendant had released a 50-foot right of way north of the center line of Cascade road. Prior to this the north half of this highway was only 33 feet in width; but this and a like addition on the south side made Cascade road 100 feet in width. At the time of her conveyance to plaintiffs defendant's deed for this highway widening was not recorded but all parties concerned had full knowledge thereof. In contemplation of preparing the deed plaintiffs

employed Williams and Works to survey and stake out the parcel about to be purchased. The following from the opinion filed by the trial judge is sustained by the record:

"These surveyors set an iron stake at each of the three corners of the property, the stake at the southwest corner being 548.2 feet northwesterly from the quarter line measuring along the edge of the old or 33-foot right of way. The surveyors at that time also set out a row of some six wooden stakes extending from the iron stake in the southwest corner, northeasterly to the place of beginning, on the north and south quarter line. The defendant owned the balance of the land to the west of the premises conveyed to the plaintiffs, and lived thereon.

"At the time the deed was prepared by the defendant's attorney the parties had before them the sketch prepared by Williams and Works which showed measurements as follows, the northerly point of the triangle not being in any dispute:

"Distance from the northerly point of beginning to the center line of Cascade road 1,250.7 ft.

"Distance from northerly point of beginning to edge of 33-foot roadway 1,202.7 ft.

"Distance from quarter line to southwest corner of property 548.2 ft. Measured along the edge of the 33-foot road.

"Distance from southwest corner of property starting on the edge of the 33-foot road, northeasterly to point of beginning 866.6 ft.

"This last line, extended south to the center of the road, is shown on the sketch as 922.4 feet. The sketch also showed the acreage included within the triangle, having as its base the 548.2 measurement on the edge of the 33-foot road, as 5.4 acres.

"The plaintiffs paid for the property $1,080, being 5.4 acres at $200 per acre.

"The plaintiff took possession and occupied the land up to the surveyors' row of stakes on the west, which stakes remained standing for several months. He plowed the land to within three or four feet of this westerly line, and planted fruit trees thereon. The evidence shows that Mrs. Todd knew that the plaintiff was claiming under the deed the land to the surveyors' stakes, and that she acquiesced and consented thereto until about three years after the deed was given.

"On or about July 1, 1929, the defendant caused to be erected the present fence on the westerly portion of plaintiffs' premises, which fence, at the southern end thereof, was 529.86 feet northwest of the north and south quarter line measuring along the edge of the 33-foot highway (18.34 feet southeasterly of iron stake)."

It thus appears that the southerly end of the fence erected by defendant is a little more than 18 feet southeasterly of the location of the iron stake which plaintiffs claim marked the southwest corner of their parcel. The controversy presented involves a wedge-shaped piece of land lying between the two disputed westerly boundary lines of plaintiffs' property, which lines converge to a common point at the north but diverge so at the southerly line of the property they are 18.34 feet apart. These conflicting claims arise from the fact plaintiffs assert that their southerly line coincides with the northerly line of the 33-foot highway, but defendant contends that it coincides with the center line of the highway. It will be noted that the description in the deed is from the point of beginning (about which there is no dispute), "thence south along the east line of the premises owned by first party 1,250.7 feet to Cascade road, so-called; thence northwesterly along said Cascade road 548.2 feet;" the first meas-

urement would extend the line to the middle of Cascade road. This circumstance surely tends to sustain defendant's claim that the southerly boundary line extended along the center line of the highway rather than the northerly line. It should also be noted that the next provision in the deed is "thence northeasterly (from the southwest corner of the parcel) in a direct line 922.4 feet to the place of beginning, being in all 5.4 acres, more or less." Without doubt the figures in the description were taken from the sketch prepared by Williams and Works; but from the testimony it seems equally clear that by mistake of the conveyancer the sides of the triangle were extended to the center of Cascade road, while the base was the distance between the sides along the northerly line of the road rather than along the center line. In contending that the southerly line of this parcel is the center of the highway the defendant relies upon and insists upon the application of the following rule of law, as well as upon the description in the deed:

"We hold the correct rule to be that a conveyance of land bounded on a highway, street, or alley carries with it the fee to the center thereof, subject to the easement of public way, provided the grantor at the time of conveyance owned to the center and there are no words in the deed showing a contrary intent, whether the dedication of the highway, street, or alley has been accepted or not, and whether it has been opened or not." *Loud* v. *Brooks*, 241 Mich. 452.

Notwithstanding the rather persuasive circumstances relied upon by appellant, we are convinced after a careful consideration of the testimony that the trial judge was correct in his finding that prior to the conveyance the "surveyors set an iron stake at each of the three corners of the property," and

beyond question the parcel thus marked was the parcel that the deed was intended to convey and it should be so construed if possible. Where parties agree upon definite monuments which fix the boundaries of a parcel of land conveyed by one or the other, such monuments should unquestionably control. *Diehl* v. *Zanger,* 39 Mich. 601; *Flynn* v. *Glenny,* 51 Mich. 580; *Miller* v. *Michel,* 227 Mich. 497.

Plaintiffs' contention is also supported by the conduct of these parties immediately following the conveyance in mutually acquiescing in the location of the westerly boundary line as indicated on the Williams and Works survey sketch. 2 Tiffany on Real Property (2d Ed.), § 444; *Monfort* v. *Stevens,* 68 Mich. 61. It is worthy of notice that in the instant case the iron stake placed at the southwesterly corner of the parcel together with the agreed point of beginning would definitely fix the location of the westerly line regardless of whether that line extended to the center of the highway as defendant contends or only to the northerly line as plaintiffs contend.

In addition to the foregoing, the defendant on cross-examination testified she was willing to be bound by the Williams and Works survey. To some extent she retracted this on her redirect-examination, but it seems that her statement on cross-examination, which we quote, was not inadvertent:

"*Q.* I am asking you now if you were satisfied that Mr. Nordberg was to have the land, by this deed that was made, that land between the three iron stakes marking off the triangle of the property?

"*A.* Certainly, where Mr. Williams' iron stakes was, yes."

Each of these litigants offered testimony relative to the area of the land contained within the bounda-

ries contended for by the respective parties. This testimony under the circumstances of this case is not at all conclusive either way; especially in view of the rule of law that quantity in any description must generally give way to fixed lines and monuments. *Keyser* v. *Sutherland*, 59 Mich. 455. The testimony taken as a whole, especially that establishing definite monuments, convinces us that the westerly line of plaintiffs' property should be located in accordance with their contention. In other words, this deed should be construed as extending plaintiffs' southerly boundary line along the northerly line of the 33-foot road northwesterly from the quarter line a distance of 548.2 feet.

The appellant asserts that the appellees are really seeking in this court reformation of the deed rather than a construction of it; and it is urged such relief should not be granted because it was not prayed for in the bill of complaint nor urged in the circuit court. In the instant case it is of little consequence whether the relief granted is by way of construction of the deed or by its reformation. While plaintiffs' bill does not specifically ask for reformation, such relief might well be granted under plaintiffs' prayer for general relief, especially since the issue of reformation was definitely raised by defendant's cross-bill wherein reformation of the deed was prayed.

Complaint is made by appellant that an attorney fee in the sum of $75 was allowed to plaintiffs as taxable costs in the circuit court. We think this provision in the decree cannot be sustained. Instead the court should have followed former Circuit Court Rule No. 64, which fixed the attorney's fee in the amount of $30. Subject to this modification, the decree of the lower court is affirmed, with costs.

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

## DAVIDOW *v.* BANK OF DETROIT.

1. BANKS AND BANKING—BILLS AND NOTES—NOTICE IN PASS BOOK—CONTRACTS.

   Notice printed in bank pass book stating that checks, drafts, notes, etc., when deposited are received for collection only, constitutes contract between depositor and bank which is not affected by fact that, for convenience, bank carried note so deposited in its discount ledger.

2. SAME—ALLOWING DEPOSITOR TO CHECK AGAINST NOTE DEPOSITED FOR COLLECTION.

   Mere fact that depositors were allowed to check against credit resulting from note deposited with bank for collection does not change import of transaction, but note remains property of depositors, and where it was dishonored their account was properly charged with amount thereof.

3. SAME—NOTICE—CONSTRUCTIVE NOTICE.

   Depositors who had been using bank pass book for upwards of four years are bound by notice printed therein, notwithstanding their testimony that their attention had not been called thereto previous to transaction involved; they being chargeable at least with constructive notice.

4. SAME—AGREEMENTS BETWEEN DEPOSITOR AND BANK.

   Bank deposit may be subject to any agreement which depositor and bank may make with respect thereto, so long as rights of third parties are not injuriously affected thereby.

5. SAME—DEPOSITOR BOUND TO USE ORDINARY CARE IN LEARNING OF PROVISIONS IN PASS BOOK.

   Depositor is bound to use ordinary care and diligence in becoming informed of contents of reasonable provisions plainly printed in pass book which constitute part of the contractual relation between himself and the bank.

Error to Wayne; Miller (Guy A.), J. Submitted April 15, 1931. (Docket No. 113, Calendar No. 35,425.) Decided June 1, 1931.

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Title to commercial paper deposited in bank for collection, see annotation in 11 A. L. R. 1046; 42 A. L. R. 492; 68 A. L. R. 727.

Assumpsit by Larry S. Davidow and others, doing business as Davidow & Davidow, against Bank of Detroit, a Michigan corporation, on a bank account. Judgment for plaintiff. Defendant brings error. Reversed, and judgment ordered entered for defendant.

*Davidow & Davidow,* for plaintiffs.

*Anderson, Wilcox, Lacy & Lawson* (*C. J. Huddleston,* of counsel), for defendant.

NORTH, J. The defendant reviews by writ of error a judgment entered against it for $959.44. The pertinent facts appear from the following portion of the circuit judge's findings:

"On January 30, 1926, J. and A. Schweizer executed to Davidow & Davidow their promissory note in the amount of $900 in payment of legal services. This note was indorsed by Davidow & Davidow and came into the possession of the Bank of Detroit. April 1, 1926, it was paid by the receipt of $50 in cash on principal and the accrued interest and by the giving of a new note for $858. June 2d, this renewal note was paid by the payment in cash of $50 on principal and of the accrued interest and the giving of a further renewal note in the sum of $800, signed by J. T. Schweizer and Anna Schweizer and indorsed by plaintiffs. This note was not paid at its maturity on August 2d.

"Davidow & Davidow is a partnership engaged in the practice of law in the city of Detroit. The partnership maintained a commercial account on the Bank of Detroit covered by pass book, Exhibit 7, from August 16, 1922, to August 28, 1926. * * *

"On the 2d of August notice of dishonor was executed and mailed to J. T. Schweizer and Anna Schweizer. * * * Notice that the note had been dishonored was not received by the plaintiffs in this case until the 9th day of August, 1926, at which time

they received notice that the amount of the note together with interest and charges, in all $809.69, had been charged back by the bank to their commercial or checking account.

"The Bank of Detroit carried upon its books two accounts with Davidow & Davidow. One account is the ledger account carried in connection with their commercial or checking account. * * * The bank also opened an account with Davidow & Davidow in connection with the note transactions above described. This account is in evidence as Exhibit 9. It is on a sheet under the heading of liability ledger, 'Indirect as indorser and guarantor.' It contains a statement of each transaction and named J. and A. Schweizer as makers of the note in question and Steve Davidow as accommodation indorser or guarantor.

"On the first page of the deposit book, Exhibit 7, there is a printed notice containing the following language in so far as it is material in this case:

" 'This bank in receiving checks, drafts and notes or other items *on deposit or for collection* acts as your agent only, and assumes no responsibility beyond the exercise of due care in selecting agents at other points and forwarding such items to them.

" 'Should any such check, draft or other item be dishonored or should there be any delinquency on the part of the collecting agent, the amount will be charged back to the depositor's account and the check, draft, note or other item delivered to the depositor.'

"There is no evidence in the case other than the fact that this deposit book had been in use for a period of upwards of four years that the plaintiffs or any of them knew of the existence of this rule."

We also quote the following portion of the trial judge's findings of law:

"The notice printed in the pass book, Exhibit 7, under the testimony in the case, constitutes a con-

tract between the depositors and the bank which contract is binding in connection with the commercial account in accordance with its terms.

"This contract does not cover the transaction in question for the following reasons:

"(1) The transaction between the plaintiffs and the defendant bank in connection with the note, Exhibit 1, was neither a receipt thereof for deposit or for collection.

"(2) Such transaction was a discount by plaintiffs with the bank of said note. The deposit as shown in the pass book, Exhibit 7, was a deposit of the proceeds of such discount and not a deposit of the face of said note. * * *

"The note was discounted and a separate account was started as the result of that discount. What was deposited in the checking account was the proceeds of that discount. If the plaintiffs in this case had chosen to take the cash instead of a credit resulting from the discount certainly the bank could not maintain that any relationship existed except the relationship of indorsers and indorsee. The bank could not then recover unless the provisions of the negotiable instruments law were carried out (2 Comp. Laws 1929, § 9338). It is not quite clear how the accidental fact that the proceeds instead of being received in cash were transferred in the shape of credit to their checking account can make any difference in the relationship created by the signing of their names on the back of the paper, Exhibit 1, and their transfer of that paper to the bank."

The issues hereinafter considered are raised by exceptions to the trial judge's findings of fact and law and assignments of error thereon. From the above-quoted portion of the record it is obvious that the trial judge in part based his determination of defendant's liability upon the fact that defendant carried a record of the Schweizer notes in its dis-

count ledger. In this connection the undisputed testimony shows that this was merely a matter of bookkeeping for the convenience of the bank.

"*Q.* Then a distinction is made by the bank between the checking accounts and the indirect indorser and guarantor?

"*A.* As far as bookkeeping is concerned, yes."

As between the parties concerned in the original transaction, we think a mere form of bookkeeping is not of sufficient consequence to alter a definite contractual relation between the parties, if such is found to exist. The trial judge correctly determined that the printed notice in the pass book constituted a contract between the plaintiffs and the bank which was binding in connection with the plaintiffs' commercial account. We are mindful that one of the three members of plaintiffs' firm testified:

"That this language (of the notice printed in the pass book) was not called to our attention at any time, and the first intimation we had of it was when it was raised by the pleadings in the case."

At least one of the other two members of this firm was in court at the trial of this case; but neither of them testified as to their knowledge or lack of knowledge of the pass book notice. But obviously determination of defendant's liability is not controlled by this phase of the case if, as plaintiffs claim, the note in question was discounted by the bank rather than being received as a conditional item of credit in plaintiffs' account. As noted above, the trial judge held as a matter of law that this note was discounted; but in this conclusion we are constrained to hold there was error. When the two preceding Schweizer notes fell due plaintiffs went

with the makers to the bank without notice or demand, so far as the record shows, and arranged with the bank upon payment of $50 on principal to again carry the item in plaintiffs' account another two months. In view of plaintiffs' method of handling the previous Schweizer notes at maturity the defendant bank was fully justified in assuming that the note in question was only a tentative or conditional credit item carried for plaintiffs' benefit in their commercial account, rather than a discount of the note. Perhaps in a strictly technical sense it cannot be said that the bank held this and the two preceding notes for collection; but the transaction as viewed by the parties concerned obviously contemplated ultimate collection for the benefit of plaintiffs. If such were not the case it would seem that in both the first and second renewal notes the bank would have been named as payee instead of plaintiffs. The trial court expressly found that "the renewal notes of April 1st and June 2d were taken by the defendant bank at the request of the payees." As noted, the amount of each of these renewals was credited to plaintiffs' account; and obviously at the same time their account must have been debited with the amount of the matured note which was then surrendered. The renewal notes, as well as the original note, were payable at plaintiffs' office, not at the bank. We think that each of these notes by reason of the obvious understanding between the plaintiffs and the bank remained the property of the former; and as stated in *People's State Bank* v. *Miller,* 185 Mich. 565, hereinafter quoted, the mere fact that plaintiffs were allowed to check against the credit resulting from these notes to their account does not change the import of the transaction.

"It seems to be a general rule that when checks or other commercial paper are deposited in a bank indorsed 'for collection,' *or where there is a definite understanding* that such is the purpose of the parties at the time of the deposit, the title to the paper remains in the depositor. See note to *Fayette National Bank* v. *Summers,* 105 Va. 689 (54 S. E. 862, 7 L. R. A. [N. S.] 694); 5 Cyc. p. 493. *And the mere fact that the depositor is allowed to check against the credit does not change the import of the transaction,* so as to preclude the bank from charging back the amount of credit if the check deposited is not paid. The bank may, as a matter of favor and convenience, permit checks to be drawn against it before payment; the depositor, in the event of nonpayment, being responsible for the sums drawn, not by reason of his indorsement, the check not having ceased to be his property, but for money paid. 3 R. C. L. (under title 'Banks') p. 522." *People's State Bank* v. *Miller, supra.*

"But, after all, the question is one of the agreement of the parties, *either express or implied,* from the general course of business between them. There can be no doubt that if a draft or other paper is delivered to a bank for collection, the mere fact that the indorsement of the owner is unrestricted, will not, as between him and the bank, make the latter the owner of the property.

"Neither is it conclusive upon the question of ownership of the paper that before collection the amount of it is credited to the customer's account, against which he has the privilege of drawing by check. It has been frequently held, with the approval of the best text writers, that if paper is delivered by a customer to a bank for collection, or 'for collection and credit,' a credit of the amount to the customer before and in anticipation of collection will be deemed merely provisional, and the privilege of drawing against it merely gratuitous, and that the bank may cancel the credit, or charge

back the paper to the customer's account, if it is not paid by the maker or drawee. *Giles* v. *Perkins*, 9 East's T. R. 12 (103 Eng. Rep. Repr. 477); *Levi* v. *National Bank of Missouri*, 5 Dill. 104 (Fed. Cas. No. 8,289); *Balbach* v. *Frelinghuysen* (C. C.), 15 Fed. 675. The right of banks to do this in case of the deposit of checks on other banks, without any special contract, is generally exercised and recognized." *In re State Bank*, 56 Minn. 119 (57 N. W. 336, 45 Am. St. Rep. 454).

While the context above quoted refers primarily to checks and drafts which presumably are due forthwith, we think with equal reason and justice the same rule should be applied to short-time paper when such is clearly shown to be the understanding between the parties themselves. And in the instant case "notes" were expressly included in the printed notice in plaintiffs' pass book wherein the bank reserved the right to charge them back in case of nonpayment. Notwithstanding the testimony in the record that such notice was not called to plaintiffs' attention at or prior to the time of this transaction, we think they are still bound thereby under the circumstances of this case. This provision in the pass book covers both "items *on deposit or for collection.*" We think it is a strained and untenable conclusion to hold that the Schweizer notes were not "items on deposit" in plaintiffs' account. Clearly and conclusively they were, and no other conclusion is justified by this record.

The circuit judge correctly found that the notice in the pass book under the testimony in this case constitutes a contract between depositors and the bank. Contracts between a bank and its depositors should be required to be performed and must be construed in the same way as contracts between

other parties. 3 R. C. L. p. 450. A bank deposit may be subject to any agreement which a depositor and the bank may make with respect to it so long as the rights of third parties are not injuriously affected thereby. 7 C. J. p. 642. If plaintiffs had possessed actual knowledge of the printed notice in their deposit book, without question they would be bound thereby. We think under the circumstances of this case plaintiffs cannot be heard to say they did not have knowledge of this phase of their contractual relation with the defendant bank. They had been banking with the defendant bank for upwards of ten years. Their pass book in which this item was entered had been used by them for upwards of four years and contained a record of approximately 250 deposits. They are chargeable at least with constructive notice, on the same theory and for the same reason that a depositor who receives his return checks and his pass book is bound by the entries therein in the event he fails within a reasonable time to examine it, if to hold otherwise works a prejudice to the bank. *Leather Manufacturers' Bank* v. *Morgan,* 117 U. S. 96 (6 Sup. Ct. 657). See, also, note and numerous citations in 7 C. J. p. 638. We have recently held a depositor owes his bank the duty to use ordinary care in examining the returned checks and statements. *Detroit Piston Ring Co.* v. *Wayne County, etc., Bank,* 252 Mich. 163, 179. It is equally true that a depositor is bound to use ordinary care and diligence in becoming informed of the contents of reasonable provisions plainly printed in his pass book which constitute a part of the contractual relation between himself and the bank.

For the reasons indicated the judgment entered in the circuit court must be set aside. The case is

remanded to the circuit court, with direction to enter judgment for defendant. Appellant will have costs of this court.

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

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## SHARRAR *v.* WAYNE SAVINGS ASSOCIATION.

1. PARTIES—ASSIGNMENTS—REAL PARTY IN INTEREST—STATUTES.
   Where an assignment is such that satisfaction of judgment obtained by assignee will discharge defendant from his obligation to assignor, for the purpose of suit the assignee is the real party in interest and may maintain an action in his own name (3 Comp. Laws 1929, § 14010).

2. JUDGMENT—TRIAL—DIRECTED VERDICT.
   Defendant's motion for directed verdict, on retrial, was properly denied, where trial judge followed rule laid down in former decision.

3. APPEAL AND ERROR—DIRECTED VERDICT.
   In reviewing denial of defendant's motion for directed verdict, testimony must be construed most favorably to plaintiff.

4. CONTRACTS—RESCISSION—LACHES—RATIFICATION.
   In action for membership fees paid to savings and loan association, on rescission of membership contracts for misrepresentations of defendant's agents, defendant's motion for directed verdict on ground of laches and ratification, *held*, properly denied.

5. FRAUD—PRINCIPAL AND AGENT—PRINCIPAL LIABLE FOR AGENT'S FRAUD.

Where defendant ratified the acts of its agents by accepting the fruits of their activities, it is responsible for their fraud regardless of its actual knowledge or active participation therein.

Error to Wayne; Miller (Guy A.), J. Submitted April 21, 1931. (Docket No. 47, Calendar No. 35,426.) Decided June 1, 1931.

Assumpsit by Ruby L. Sharrar against Wayne Savings Association, Percy Emery, receiver, to recover membership fees, individually and as assignee of certain subscribers to stock on the rescission of membership contracts. Judgment for plaintiff. Defendant brings error. Affirmed.

*Charles H. Goggin,* for plaintiff.

*Fred L. Warner,* for defendant.

NORTH, J. The facts and circumstances giving rise to this litigation appear in *Sharrar* v. *Wayne Savings Ass'n,* 246 Mich. 225. Since our former decision the case has been retried in the circuit. At the conclusion of the proofs each party moved for a directed verdict. The jury was discharged, and upon findings by the court plaintiff had judgment. Defendant reviews by writ of error.

One of defendant's grounds urged in support of its motion that verdict be directed against plaintiff was that "she is not the real party in interest and cannot maintain this action in her own name on behalf of all these parties. * * * Therefore, the only interest she has in the case is the interest of her own claim amounting to some $126 with interest."

Plaintiff brought this suit to recover membership fees paid to defendant by herself and 42 others who prior to the suit had assigned to plaintiff their respective claims in the following manner:

"For a valuable consideration to me paid, I, the undersigned, do hereby sell, assign, transfer and set over to Ruby L. Sharrar, all my right, title and interest in and to a certain claim in amount indicated below, which I hold against the Wayne Savings Association, a corporation, and do hereby authorize said assignee to institute suit in his name for the collection thereof."

On the second trial plaintiff voluntarily abandoned a number of the claims. The circuit judge disallowed 11; but rendered judgment in plaintiff's favor for the balance of the claims, totaling $3,170.69. It is defendant's contention that, except as to plaintiff's individual claim, her recovery was in violation of 3 Comp. Laws 1929, § 14010, which with certain exceptions not here important provides that "every action shall be prosecuted in the name of the real party in interest." On this phase of the case plaintiff testified:

"*Q.* That is the understanding, is it, that if anything is recovered in this suit that the expense will be deducted *pro rata* and the balance distributed among the members?

"*A.* Yes.

"*Q.* Then the only interest you have in this is to bring the suit and recover what that membership fee was?

"*A.* Yes, sir."

Thus we have presented the question as to whether plaintiff as an assignee can successfully maintain this suit as "the real party in interest." We think this is not an open question in this State.

We are committed to the proposition that where an assignment is such that satisfaction of the judgment obtained by the assignee will discharge the defendant from his obligation to the assignor, for the purpose of the suit the assignee is the real party in interest and may maintain an action in his own name. Under the record in this case it cannot be questioned that recovery against defendant by Mrs. Sharrar will constitute satisfaction of the respective claims of her assignors. In a recent decision we said:

"The rule stated in *Barak* v. *Detroit Apartments Corp.*, 232 Mich. 59, 61, is that the statute (3 Comp. Laws 1929, § 14010) authorizes a person to sue as the real party in interest if he can legally discharge the debtor and the satisfaction of judgment rendered will operate as such discharge, notwithstanding that the amount recovered may be for the benefit of another." *Johnson* v. *National Fire Ins. Co.*, 254 Mich. 126.

Defendant's motion for a directed verdict on the ground that the misrepresentations relied upon by plaintiff and her assignors "were mere sales talks or statements by the agents to encourage subscriptions," was not well founded. This phase of the litigation was discussed by Justice FEAD in our former opinion and a proper rule was there laid down. It was followed by the circuit judge in the second trial. He passed upon the testimony, allowed some of the claims and disallowed others. We find no reason in this record for disturbing the circuit judge's decision.

Defendant also sought a directed verdict on the ground of laches and ratification. Plaintiff's course of conduct was largely governed by the final determination of the secretary of State to abide by his

decision that defendant could not establish branches outside of Wayne county. This information was finally and definitely ascertained by Mr. Sharrar, who seems to have been acting in behalf of plaintiff and her assignors, on or about May 26, 1926. Suit was started January 15, 1927. In the meantime these claims were assigned to plaintiff and demand made upon defendant for repayment of the membership fees involved. On this phase of the record, as well as others having to do with defendant's motion for a directed verdict, the testimony must be construed most favorably to plaintiff. The circuit judge correctly refused to direct a verdict either on the ground of laches or ratification. In this connection we have also considered appellant's claim as to laches or ratification being a defense in consequence of which the circuit judge should have disallowed either plaintiff's individual claim or the claim of any of her assignors. We find no reason for reversing his holding in this regard as to any of the individual claims for which recovery was had.

Appellant claims error in the exclusion of certain testimony offered for the purpose of showing that the misrepresentations on which plaintiff relied for recovery were made by defendant's agents (if made at all) without authority so to do or knowledge thereof on the part of the directors of the defendant company. There was no error in this ruling. Defendant ratified the doings of its agents by accepting the fruits of their activities; and regardless of its actual knowledge or active participation in the frauds perpetrated defendant is responsible therefor. *Chaffee* v. *Raymond,* 241 Mich. 392; *Upell* v. *Bergman,* 246 Mich. 82.

Appellant's brief reviews to some extent the record of each of the separate claims on which the

circuit judge rendered judgment for plaintiff, and urges that such judgment was against the great weight of evidence. In this connection it is urged that the defendant did maintain a branch office at Alma in accordance with its agreement. On substantially the same record as we now have before us, we held otherwise in our former decision, and no reason now appears for reversing that determination. As noted above, some of the claims assigned to plaintiff were abandoned, some were disallowed by the trial judge, and recovery was had on 20 of the claims. We have reviewed the record carefully as to each of the claims on which recovery was had, and in each instance find testimony which sustains the judgment rendered.

There are numerous other assignments of error in the record relative to the admissibility of evidence. We deem it unnecessary to review them in detail. Most of the objections are not well founded. The others are largely based upon the objection that the testimony was hearsay. These objections were made while the case was on trial before the jury. If the case had finally been submitted to the jury some of these objections might have been of more serious consequence. However, the suit was finally submitted for determination by the circuit judge without a jury; and under the circumstances we are well satisfied that no prejudicial error resulted from any of the rulings on evidence of which complaint is made. We find nothing in this record which would justify a retrial. The judgment is affirmed, with costs to appellee.

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

## HAARA *v.* VREELAND.

1. TRIAL—TAKING TESTIMONY IN REFERENCE TO DRAWING WHICH HAS LITTLE MEANING IN PRINTED RECORD NOT COMMENDED.

   Practice of taking testimony by reference to a drawing or outline, and which has little or no meaning when read from the printed record, is not to be commended.

2. MOTOR VEHICLES—NEGLIGENCE—CONTROL OF CAR—PRESUMPTIONS.

   Automobile driver not able to stop his car or bring it under control within range of his vision may be assumed to have been guilty of negligence.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—TRIAL—QUESTION FOR JURY.

   Where testimony on question as to whether plaintiff's decedent was guilty of contributory negligence was such that minds of reasonable men might come to different conclusion, issue of fact was presented for jury.

4. APPEAL AND ERROR—DETERMINATION OF FACT BY JURY BINDING ON APPELLATE COURT.

   Determination of jury on issue of fact is binding on appellate court unless contrary to overwhelming weight of evidence.

5. TRIAL—INSTRUCTIONS—APPEAL AND ERROR.

   Trial court's use of word "slightest," in charging jury as to burden of proof on plaintiff to show that her decedent "was free from any negligence which contributed to the injury, and when I say any negligence I mean even the slightest," *held*, not error as used in context, and especially in view of subsequent instruction properly defining negligence and contributory negligence.

6. SAME.

   Trial court's use of words "as a matter of law," in instructing jury "if you find that at the time of the collision there was no tail light on the trailer and the lack of such tail light was one of the causes of such collision, then the said H. (decedent) was, as a matter of law, guilty of contributory negligence," *held*, not error, since court clearly submitted question to jury as issue of fact.

Error to Washtenaw; Sample (George W.), J. Submitted April 16, 1931. (Docket No. 118, Calendar No. 35,525.) Decided June 1, 1931.

Case by Cenia Maria Haara, administratrix of the estate of Leo Benhard Haara, against W. Vreeland and others for personal injuries resulting in the death of plaintiff's decedent. Judgment for defendants. Plaintiff brings error. Affirmed.

*Chas. A. Bartanen,* for plaintiff.

*Reading & Reading,* for defendants.

NORTH, J. Plaintiff, as administratrix of the estate of her husband, Leo Benhard Haara, brought this suit against the defendants to recover damages incident to the death of Mr. Haara which was caused by an automobile collision. The jury found for defendants and plaintiff has appealed. The main questions presented are that the verdict was contrary to the great weight of the evidence, and the trial court erred in charging the jury in the manner hereinafter noted.

On January 1, 1929, plaintiff's decedent and a helper were operating a truck with a trailer traveling in a westerly direction upon U. S. 112 at a point about one and a half miles east of the village of Allen. By reason of snow and ice this paved highway at the place in question was slippery and these vehicles stalled when part way up a long hill. Before coming to a full stop the truck and trailer backed some little distance down the hill and in so doing came to a position where they extended from the southerly side of the pavement in a northwesterly direction to a point within three or four feet of the northerly side. This happened shortly

before five o'clock in the morning while it was still dark. Plaintiff's decedent at once placed a lighted red lantern some distance west and at the top of the hill to warn approaching traffic. There is a dispute in the testimony as to whether the trailer at the time of the accident carried a lighted tail light; and the testimony as to there having been other lights on the rear or right-hand side of the trailer, which might have been visible to traffic approaching from the east, as printed in this record, is very indefinite and unsatisfactory. Evidently witnesses in giving testimony referred to a drawing or outline. Decedent's helper testified:

"There were three green lights, and *here* was a red light, on the corner. One green light over *here* and one red light *here,* there were four lights. * * * There was a red light hanging over *here* and a red light hanging over *here,* that is, on the side towards the ditch."

Testimony so taken conveys little or no definite meaning when read from the printed record; and the too prevalent practice of taking testimony in this manner is not to be commended. These vehicles stood in the position indicated 25 or 30 minutes prior to the approach of defendant's automobile. As Mr. Haara and his helper were attempting to place a chain on the right-hand rear wheel of the truck, the helper observed an automobile belonging to Mr. Leon J. Vreeland and driven by Mr. Gross approaching from the east. Robert Vreeland, the son of Mr. Leon J. Vreeland, was riding in this car. Mr. Vreeland, Sr., was following some little distance behind in another automobile which he was driving for delivery to Chicago. Upon seeing the approaching vehicle, the helper warned Mr. Haara who thereupon seized a lighted red lantern and

moved quickly to a point near the right-hand front wheel of the trailer at which instant the collision seems to have occurred. Mr. Haara was seriously injured and died while *en route* to the hospital.

At the time of the accident it was snowing intermittently; and the driver of defendant's machine testified that as he approached the point of accident he saw "a big mass in the road;" the snow just lifted for a second; that he tried to stop but the road was slippery, his automobile skidded, and the collision with the trailer occurred. The impact was substantially at the right front wheel of the trailer. Other detailed circumstances may be omitted because the case can be disposed of upon the assumption that the driver of defendant's car was guilty of negligence in driving at such a rate of speed that he was not able to stop his car or bring it under control within the range of his vision. Appellant's contention that the verdict of the jury is against the great weight of evidence will be controlled by the determination as to whether the record discloses a question of fact for the jury as to Mr. Haara's contributory negligence. It is appellees' contention that in this regard there was an issue of fact because of the conflict in the testimony as to whether the trailer, at the time of the accident, was carrying a lighted tail light or was otherwise properly lighted; and because of the testimony showing that Mr. Haara immediately before the collision moved from a place of comparative safety into the pathway of the approaching car; and further, because Mr. Haara did not timely see the approaching automobile and give warning of the dangerous situation.

As to each of the claimed grounds of contributory negligence there was testimony in consequence of which the minds of reasonable men might come to a

different conclusion. Therefore an issue of fact as to the controlling question of Mr. Haara's contributory negligence was presented. This phase of the case was fairly submitted to the jury, and upon this review we do not find that the verdict in favor of the defendants was contrary to the overwhelming weight of evidence. The determination of the jury is binding on the appellate court. *Hillman Twp. Bd.* v. *Empire Mut. F. Ins. Co.*, 253 Mich. 394; *Gorman* v. *Jaffa*, 248 Mich. 557.

One of the two remaining alleged errors on the part of the trial court is based upon the use of the word "slightest" in the following portion of the charge:

"If you find that the defendant was guilty of negligence and find that by a preponderance of the proof, the burden being upon the plaintiff to establish it by such a rule, by such preponderance, and you find that the plaintiff at the same time was free from any negligence which contributed to the injury and when I say any negligence, I mean even the slightest, and find this by a preponderance of the proof as well, then you will pass to the question of whatever damages were suffered."

Without holding that the exact wording of the charge is an accurate statement of the law, we are of the opinion that at least as used in the context of the charge it was not prejudicial. The quoted sentence is from the very early part of the charge where the court was obviously attempting to lay before the jury a general outline of the issues involved. In the same paragraph he further stated:

"You will let me state that so that there will be no doubt about the question and that the court will not be misunderstood. That the two things the burden is upon the plaintiff to establish, the two things: First, that the defendant was guilty of

negligence. Second, that the plaintiff was free from negligence; and establish these two things by a preponderance of the proof, before you pass to the assessment of damages."

In the next paragraph the court properly defined negligence and contributory negligence, and particularly applied the same test as to what constituted negligence on the part of the defendant and as to what constituted contributory negligence on the part of Mr. Haara.

The remaining asserted error involves the following portion of the charge to the jury:

"If you find that at the time of the collision there was no tail light on the trailer and the lack of such tail light was one of the causes of such collision, then the said Haara was, as a matter of law, guilty of contributory negligence and the plaintiff cannot recover in this case and your verdict shall be for the defendant."

Appellant asserts that the court erred in using in the above context the expression "as a matter of law." Had this expression when so used meant that the court held *as a matter of law* that Mr. Haara was guilty of contributory negligence, it would have been error. Clearly the court did not so use the expression. Instead he submitted this question to the jury as an issue of fact and the thought obviously conveyed to the jurors was that if they found there was no tail light on the trailer and that this circumstance was a cause of the collision, then under the law plaintiff's decedent was guilty of contributory negligence and could not recover. In such a statement there is no error.

The judgment entered in the lower court is affirmed, with costs to appellees.

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

## CHANLER *v.* VENETIAN PROPERTIES CORP.

1. EQUITY—CLEAN HANDS—RESCISSION.
   Purchaser of apartment building guilty of fraudulently misrepresenting to vendor his financial standing does not come into court with clean hands, and therefore is not entitled to equitable relief of rescission on ground of vendor's fraud.

2. BROKERS—PRINCIPAL AND AGENT.
   Broker making alleged fraudulent misrepresentations to vendee as to property sold, *held*, under evidence, to have been acting as vendor's agent.

3. SAME—ACCEPTANCE OF SERVICES.
   Vendor accepting and paying for services of broker in sale of property is bound by representations made by him in negotiating and consummating sale.

4. VENDOR AND PURCHASER—FRAUD—MATERIAL MISREPRESENTATIONS.
   Misrepresentations by vendor's agent, in sale of apartment house, as to annual cost of insurance, fuel, and taxes were material.

5. SAME—RESCISSION—FRAUD—LACHES.
   Purchasers of apartment house who brought suit for rescission on ground of fraud in about seven months after they took possession were not guilty of laches, where knowledge of fraud came to them only by degrees, and suit was instituted as culmination of numerous misrepresentations.

6. CONTRACTS—FRAUD—RESCISSION—LACHES.
   If defrauded person rescinds with reasonable promptness after discovering fraud, he is not guilty of laches.

7. VENDOR AND PURCHASER—EQUITY—CLEAN HANDS—PARTIES NOT ENTITLED TO EQUITABLE RELIEF AFFORDED RIGHTS AS IN LAW ACTION.
   In vendee's suit for rescission on ground of fraud, and vendor's cross-bill for foreclosure, where neither party comes into court with clean hands, but unusual conditions are presented, final adjudication is made which affords parties substantially same rights they would have had incident to termination of contract in action at law.

Appeal from Wayne; McPeek (Russell R.), J., presiding. Submitted April 23, 1931. (Docket No. 102, Calendar No. 35,608.) Decided June 1, 1931.

Bill by Harold G. Chanler and another against Venetian Properties Corporation and another to rescind a land contract on the ground of fraud. Cross-bill by defendant corporation for foreclosure. Decree for plaintiffs. Defendant corporation appeals. Reversed and remanded.

*Manchester, Zirkalose & Smith* (*C. F. Gates, C. D. Wernette,* and *Harrison T. Watson,* of counsel), for plaintiffs.

*Bulkley, Ledyard, Dickinson & Wright* (*Harold R. Smith* and *R. William Rogers,* of counsel), for defendant corporation.

NORTH, J. By their bill of complaint plaintiffs seek rescission of a land contract by which they purchased from the defendant a 67-apartment building known as the Venetian Garden Apartments in Detroit. The total consideration was $400,000. Plaintiffs received an initial credit of $80,000 in consideration of a transfer of their vendees' interest in a land contract for the purchase of real estate located in Kent county. This interest, however, was transferred direct from plaintiffs to a real estate agency in payment of its commission for consummating this sale of the Venetian Garden Apartments. The remaining $320,000 was payable in monthly installments of $1,800 during the first year of the contract and somewhat larger monthly payments thereafter. Plaintiffs base their right to relief on alleged fraudulent misrepresentations. We quote from their brief:

"The outstanding representations are the number of apartments, the condition of the apartments, the size of the apartments, the monthly and annual income, the cost of insurance, the cost of coal, the cost of light and power and the amount of taxes."

The defendant answered, and in a cross-bill alleged that plaintiffs were in default in the payments due under the contract, and prayed for foreclosure and the appointment of a receiver.

In reporting his findings of fact and conclusions of law, the circuit court commissioner, to whom the case was referred, held that plaintiffs were not in court with clean hands, found against plaintiffs' contention of fraud, and recommended dismissal of plaintiffs' bill of complaint. He also found defendant was entitled to foreclosure as prayed in its cross-bill.

Plaintiffs excepted to the commissioner's findings of fact and conclusions of law and after hearing before the circuit judge decree was entered sustaining plaintiffs' contention, granting cancellation, and giving plaintiffs a lien upon the property for $76,406.05 which he found due from defendant to plaintiffs. Defendant has appealed.

At the threshold of plaintiffs' case we are confronted with defendant's contention that plaintiffs are not in court with clean hands and therefore are not entitled to equitable relief. This is based upon defendant's claim that incident to the negotiations leading to the purchase of this property by plaintiffs and as bearing upon their acceptability as contract purchasers of this valuable income-producing apartment, Mr. Chanler submitted to defendant or its agent a financial statement. From this statement Chanler appeared to be worth upwards of $100,000 exclusive of the property transferred as an initial

payment in this transaction. At first Chanler admitted he signed this financial statement, and he made a pitiful attempt by his own testimony to establish the truth of certain of the items contained therein. As to other substantial items he frankly admitted the statement to be wholly false; $75,100 of this financial showing consisted of equities in two pieces of real estate in which Chanler had no interest whatever. Later he testified that the signature attached to this statement was not his. Without reviewing in detail the testimony pertinent to this phase of the case, suffice it to say we have no doubt as to the genuineness of Chanler's signature on this financial statement, or that it was submitted to and considered by the defendant's officers in connection with the consummation of the contract with plaintiffs. The falsity of the financial statement is clearly established by the record. Defendant's officers considered it and relied upon it. It had a very material bearing upon the transaction in that a contract purchaser of income-producing property who has substantial independent means is obviously much more acceptable than one who is financially irresponsible. This not only bears upon the prospective ability of the purchaser to perform; but in the event of nonperformance and foreclosure of the contract a decree for deficiency could not be enforced against a financially irresponsible vendee. We are constrained to hold that because of their failure to come into court with clean hands plaintiffs are not entitled to equitable relief; and it follows that the bill of complaint must be dismissed.

Because of alleged fraudulent misrepresentations made by the agent through whom this sale was consummated, it becomes necessary to determine the controverted question as to which of these parties

the agent represented. Review of the record establishes the fact that the real estate agency was acting in behalf of defendant. It must be so held because defendant accepted the services rendered by the agency and paid for it by turning over to the agency the initial contract payment, which was made by the transfer of a vendee's interest fixed at $80,000 in resort property located in Kent county, Michigan, and known as the Maston Lake property. Further, in a written agreement executed by it at the time, defendant definitely recited it was "indebted to" the agency "for its commission in effecting a sale of Venetian Garden Apartments." It follows that the defendant is bound by the representations made by the employees or representatives of this real estate agency in negotiating and consummating this sale to plaintiffs.

In this connection, the agent furnished plaintiffs with a "set-up" containing the following pertinent information relative to the Venetian Garden Apartments:

67 Apartments—lot 120 x 150—built-in tub and shower baths—pedestal washstands—16, 5 rooms and bath—51, 4 rooms and bath—total rooms 67.

INCOME—present income $3,335 monthly, annually $40,020.

EXPENSES—salaries $2,280—insurance $320—water $339.44—coal (200 tons at $7) $1,400—light and power $900—city, State and county taxes $5,785—total expenses $11,024.44.

NET INCOME—$28,995.56.

While we are not at all impressed with plaintiffs' claim as to some of the alleged misrepresentations made by defendant's agent, as to the other items we think it clearly appears that the agent made material false representations to plaintiffs by which they

were deceived. We will not review all of the claims of fraud, but note briefly only the following:

Insurance: $320 was the represented cost, obviously per year. The undisputed proof shows that between January and August, 1929, this item amounted to $1,368.06.

Fuel: Represented cost was $1,400 per year. The record discloses that defendant's agent expended from July to December, 1928, inclusive, for "fuel burned" $1,347.52. From January 15, 1929, during the balance of the heating season plaintiffs' fuel expense was in excess of $1,500.

Taxes: The "set-up" delivered to plaintiffs fixed this item at $5,785. In fact the 1928 taxes amounted to $6,559.51; and taxes for 1929 to $6,476.19.

These discrepancies were very material; and the false representation of defendant's agent relative thereto cannot be palliated. Defendant urges that the delay of plaintiffs after discovering these misrepresentations before moving for rescission constituted laches barring equitable relief. We cannot so hold. Plaintiffs went into possession of this property January 15, 1929. Their bill of complaint was filed August 29, 1929. Full knowledge of the above misrepresentations and of others which we do not detail came to plaintiffs only by degrees. It is fair to infer from this record that it was the culmination of the numerous misrepresentations which finally caused plaintiffs to seek rescission.

"The law does not require action to rescind before the defrauded person is reasonably certain that he has been defrauded. If he acts with reasonable promptness thereafter, it is sufficient. The law of laches should be used as a shield and not as a sword." *Barron* v. *Myers,* 146 Mich. 510.

See, also, *Adams* v. *Grant,* 247 Mich. 60; *Lurie* v. *Schoenberg,* 252 Mich. 90.

We think the record sustains the finding of the circuit judge that plaintiffs relied upon the above-noted misrepresentations and they were deceived thereby and defrauded in consequence thereof. It follows that the defendant must be charged with the fraud which its agent perpetrated. Thus we have in this case the rather anomalous situation of two opposing litigants in equity neither of whom in a technical sense is entitled to relief, because neither is in court with clean hands. Were it not for unusual conditions here presented, each would be summarily dismissed from court. But by reason of their having instituted this suit, plaintiffs are responsible for this proceeding being in the court of equity. At the time the suit was commenced the defendant unquestionably had a legal right to proceed at law to terminate this contract on which plaintiffs were then in default. While this suit was pending defendant could not proceed at law because it was restrained by order of the court. Plaintiffs continued to collect rentals for these apartments until September 28, 1929, when a receiver was appointed. The trial judge found, and we think correctly so, that plaintiffs have collected rentals from this property to the amount of $6,642.84 in excess of their disbursements. Further, plaintiffs continued to occupy one of the apartments rent free until they were ordered to vacate by the circuit court, August 15, 1930. Not only is this property under receivership, but it is subject to an underlying mortgage of $160,000. And in the event of default and foreclosure of this mortgage, which would be the natural result of delay in final decision of the controversy now before the court, the interest of all the parties concerned would be cut off. Hence we think a final adjudication should be here made which will afford each of these

parties substantially the same rights as they would have had incident to the termination of this contract by proceedings at law. To accomplish this purpose, a decree of foreclosure may be taken by defendant for the unpaid portion of the contract price with interest, unpaid items of insurance or taxes, if any, which plaintiffs should have paid under the terms of their contract; but plaintiffs will have 30 days from and after the date of the decree within which to pay defendant the amount so found due with accrued interest thereon as a condition of reinstatement of the contract. To obtain a result substantially in conformity with termination of the contract by proceedings at law, defendant will not be permitted to take a deficiency decree upon foreclosure. Subject to the above determination by this court, the case must be remanded to the circuit court for the purpose of supervising and making final disposition of the receivership pending herein. Costs to appellant.

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

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PENINSULAR STATE BANK *v.* MILLER.

MORTGAGES—ACCOUNTING.

In suit to foreclose mortgage, where the issue was as to amount due, and the credit to be given defendant for certain notes, the decree of the court below as to amount due is affirmed.

Appeal from Wayne; Dingeman (Harry J.), J. Submitted April 14, 1931. (Docket No. 86, Calendar No. 35,169.) Decided June 1, 1931.

Bill by Peninsular State Bank of Detroit, a Michigan corporation, against Frank P. Miller and another to foreclose a mortgage, for an accounting, and other relief. From decree entered, defendants appeal. Affirmed.

*Donnelly, Donnelly & Munro* and *Louis F. Dahling,* for plaintiff.

*Albert McClatchey* and *Harry J. Weber,* for defendants.

SHARPE, J. The bill of complaint herein was filed on February 17, 1922, to foreclose a real estate mortgage, executed by the defendants on August 21, 1918, to secure the payment of a promissory note of the same date in the sum of $30,000; $25,720.45 was alleged to be due thereon. The answer was, in effect, an admission of the allegations in the bill, except as to the amount due. The matter was referred to circuit court commissioner Nicol for the taking of proofs. On their submission to the trial court, he filed an opinion finding $18,095.30 to be due on the mortgage and for other charges incurred by the plaintiff in the preservation of its lien, and entered the usual decree for sale in default of the payment thereof. Defendants have appealed.

Amber A. Miller is the wife of Frank P. Miller. He is hereafter referred to as the defendant. It is his claim that the proof submitted on the accounting shows that the mortgage had been fully paid at the time the bill was filed. He claims that certain notes were wrongfully charged to his account, and that the amount thereof should have been credited to him

in the accounting. These are spoken of as the "Block Notes," and amounted to $2,531.52. These notes were originally given by defendant to the W. D. Block Motor Company in the purchase of an automobile, and were discounted by that company with the plaintiff. Subsequently, defendant gave plaintiff his own notes to take them up. This was done at the request of plaintiff's vice-president. Defendant, when first interrogated relative to them, said: "That had nothing to do with the contract account, but you at least deducted it. We are allowing you for that." He later objected to the allowance because the notes given to the Block company had not been delivered to him. They were later produced and put in evidence. Under the circumstances, we think these notes were properly chargeable to the defendant in the accounting.

Defendant claims that, while the note secured by the mortgage is in the sum of $30,000, another note which he calls "collateral" was also at that time executed for $25,000 for the same indebtedness, and that the proceeds of the latter were all that he received. His testimony to that effect is based on his recollection alone. That it is faulty is quite clearly shown. Walter G. Toepel, a vice-president of the plaintiff at that time, testified that he had charge of the matter, and that the $30,000 note was the only one executed in connection with the mortgage security. It also appears from the books of the plaintiff that $5,000 of this money was placed to the credit of defendant in a special account, and $25,000 to the credit of his general account.

These are the only items in the accounting which are directly challenged by defendant. It follows that the decree is affirmed, with costs to appellee.

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

SILVERSTEIN *v.* BERMAN.

MECHANICS' LIENS—EXCESSIVE AMOUNT—BAD FAITH—TIME TO FILE—DISMISSAL.

Suit to foreclose mechanic's lien was properly dismissed where evidence showed that claim was filed in bad faith for excessive amount, and also that claim was not filed within statutory 60-day period (3 Comp. Laws 1929, § 13105).

Appeal from Wayne; Jayne (Ira W.), J. Submitted April 22, 1931. (Docket No. 99, Calendar No. 35,343.) Decided June 1, 1931.

Bill by Nathan Silverstein against Harry Berman and others to foreclose a mechanic's lien. From decree of dismissal, plaintiff appeals. Affirmed.

*Kennary, Minardo & Sklar* (*John Sklar,* of counsel), for plaintiff.

*Fixel & Fixel,* for defendant.

NORTH, J. This is primarily a bill to foreclose a mechanic's lien. The trial court dismissed the bill of complaint, finding that plaintiff had in bad faith filed a claim of lien for an excessive amount and also that the claim of lien was not filed within the 60-day statutory period (3 Comp. Laws 1929, § 13105). Plaintiff has appealed. We quote briefly from the opinion filed by the circuit judge:

"The court finds on the controverted issues, that the lien of Nathan Silverstein was filed for the sum of $10,288; whereas it appears from the bill of complaint and the undisputed testimony that the amount

claimed due on the property in question was $8,058.48, and that the lienor was aware of the excess. The court concludes as a matter of law that this is an amount substantially greater than the amount due to the lien claimant and is contrary to the provision of 3 Comp. Laws 1915, § 14800 (3 Comp. Laws 1929, § 13105). This statement of an amount 25 per cent. in an excess of the actual amount claimed was not made in good faith but in an effort to aid the plaintiff in securing payment for work done on another job which he was doing for the defendant.

"The court finds as a fact that the plaintiff has not sustained the burden of proof in showing that the lien was filed within 60 days of the completion of the last work. The testimony is very much in dispute, but the burden is upon the plaintiff. The court, therefore, concludes as a matter of law that the lien fails on that account."

Was the claim of lien as to amount made in good faith? In his original bill of complaint plaintiff admitted he had filed a claim of lien for $10,288 which should have been for only $8,058.48. He alleged this error was "wholly unintentional" and that the claim of lien for the larger amount "was made honestly and in good faith." After the proofs were taken, and over the objection of the defendants Berman, plaintiff was permitted to change his position and amend his bill by alleging that there was still due him on this job $10,412.48 instead of $8,058.48. This alleged balance of the account was thus increased on the theory and claim that Silverstein was legally entitled to apply certain payments by Berman on another job which Silverstein was doing for Berman and on which Silverstein had waived claim of lien, instead of applying such payments on the job incident to which he now seeks to enforce this lien. We think this was an after-

thought. The facts do not justify plaintiff's claim, and the circuit judge correctly so found.

Was the claim of lien filed too late? Relying upon entries made by him in a time book, Rubin Kaplan, who had the plumbing contract, swore that this work was finished February 25, 1928. Admittedly this was the last work done under the Silverstein contract with Berman; and it was more than 60 days prior to the filing of the claim of lien on May 2, 1928.

A further review of the record would not be helpful. We have given it careful consideration and are satisfied that the decree must be affirmed. Appellee will have costs.

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

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GRAND RIVER AVENUE CHRISTIAN CHURCH *v.* BERKSHIRE LIFE INSURANCE CO.

1. CONSTITUTIONAL LAW — MORTGAGES — FORECLOSURE — PERSONAL NOTICE—STATUTES—REPEAL.

   Act No. 16, Pub. Acts 1926, Ex. Sess., repealing Act No. 383, Pub. Acts 1925, requiring personal notice of foreclosure of mortgage by advertisement, changed remedy merely, and therefore did not deny mortgagor due process of law or impair obligation of contract in regard to mortgage executed before repealing statute was enacted.

2. SAME—POSSESSION—REMEDY.

   Provisions affecting possession of mortgaged premises are matters of substance, but those affecting the remedy in order to secure possession may be changed from time to time.

3. MORTGAGES—FORECLOSURE BY ADVERTISEMENT—PERSONAL NOTICE—REPEAL OF STATUTE.

In foreclosure of mortgage by advertisement after repeal of Act No. 383, Pub. Acts 1925, by Act No. 16, Pub. Acts 1926, Ex. Sess., it was not necessary to serve notice of foreclosure sale personally or by registered mail on occupants of premises (3 Comp. Laws 1929, § 14427).

4. SAME—SALE AS ENTIRETY PROPER WHERE LOT LINES DISREGARDED AND SEPARATE SALE IMPOSSIBLE WITHOUT LESSENING SECURITY.

Where mortgaged property consisting of several city lots was improved by building thereon without regard to lot lines, so that it could not be sold separately without lessening the value of the security, it was properly sold as entirety (3 Comp. Laws 1929, § 14431).

Appeal from Wayne; Merriam (DeWitt H.), J. Submitted April 14, 1931. (Docket No. 73, Calendar No. 35,513.) Decided June 1, 1931.

Bill by Grand River Avenue Christian Church, a Michigan corporation, against Berkshire Life Insurance Company, a Massachusetts corporation, to set aside mortgage foreclosure proceedings. Bill dismissed. Plaintiff appeals. Affirmed.

*Edward N. Barnard,* for plaintiff.

*Miller, Canfield, Paddock & Stone,* for defendant.

BUTZEL, C. J. On November 27, 1925, plaintiff, a corporation organized for ecclesiastical purposes under the laws of this State, borrowed from defendant Berkshire Life Insurance Company, a Massachusetts corporation, the sum of $75,000 to complete the construction of a new church building and stores attached thereto. In order to secure the loan, plaintiff gave defendant a mortgage on the property on which the building under construction, the old church building, an oil station, etc., were situated. Its description is as follows:

"Lots numbered one (1), two (2), three (3) and four (4) of Allendale Subdivision of the southerly ten (10) feet of lot four (4) and lots seven (7), eight (8), eleven (11) and twelve (12) of Tireman's Subdivision of part of lot five (5) of Subdivision of quarter sections 50, 51 and 52, Ten Thousand Acre Tract and fractional section 3 town two (2) south range 11 east, Greenfield, according to the plat thereof recorded in the office of the register of deeds for said county of Wayne in liber 23 of plats on page 70, said premises being located in the city of Detroit, Wayne county, Michigan."

The mortgage contained the usual power of sale in the event of default in payments. Plaintiff defaulted in its payments and foreclosure proceedings by advertisement were instituted. On November 12, 1928, the premises were sold as an entirety to defendant for the amount due on the mortgage. Exactly one year later, on the last day of redemption from sale, plaintiff filed a bill asking that the foreclosure proceedings be set aside and the sale held for naught. Plaintiff claims it is entitled to the relief sought, because (a), there was no service of notice of foreclosure on the occupants of the premises as provided for by the law in force at the time the mortgage was given; and (b), the property was not sold in separate parcels but as an entirety.

(a) At the time of the execution of the mortgage, the statute providing for foreclosure by advertisement (Act No. 383, Pub. Acts 1925), required personal or registered mail service of the notice of foreclosure upon occupants of the mortgaged premises. This act was approved May 27, 1925, and went into effect August 27, 1925, two months prior to the execution of the mortgage. The act, however, was short-lived and was repealed at an extra session of the legislature by Act No. 16, Pub. Acts 1926, which, according to its provisions, took immediate effect.

The sole purpose of this act was to repeal Act No. 383, Pub. Acts 1925, and in referring to it, provided that:

"Any proceedings to foreclose a mortgage since said act became effective shall not be held invalid because of failure to comply with any provision thereof."

Plaintiff asserts that, notwithstanding said repealing act, it was nevertheless absolutely necessary to comply with the provisions of the repealed act in order to foreclose a mortgage given while said act was in full force and effect; that said Act No. 383, *supra,* gave a substantive right to mortgagors in providing that occupants of premises must be duly served either personally or by registered mail with notice of foreclosure sale 30 days before the date of the sale. It is admitted that no such notice was given. The record shows that plaintiff was duly advised by numerous letters that foreclosure proceedings were about to be begun, and later was informed when the equity of redemption would expire. Plaintiff does not claim surprise, lack of knowledge, or any fraudulent conduct on the part of the defendant. It insists, however, that foreclosure by advertisement is a harsh remedy provided by statute and that any deviation from the prescribed procedure at the time the mortgage is given vitiates the entire proceedings; that the right to be informed by service of the notice of foreclosure proceedings is a substantial one that accrued at the time that the mortgage was given and that such right could not be abrogated by statute; and that in taking away this right, the repealing statute was unconstitutional in that it deprived plaintiff of its rights without due process of law, impaired the obligation of the contract, and was an *ex post facto* law. The procedural change in doing away with service of notice

made a change in the remedy but did not deprive plaintiff of any substantial right. The foreclosure proceedings were legal and proper. It was not necessary to follow the provisions of the repealed law in regard to the remedy.

Plaintiff relies mainly on the case of *Cargill* v. *Power,* 1 Mich. 369. In that case, the legislature sought to cut down the time of equity of redemption from two years to one year, and it was held that this could not be done so as to effect the foreclosure of a mortgage executed prior to the time that the act became effective. In the instant case, however, the change was merely in procedure. No rights have been taken away from plaintiff. The remedy merely has been changed. Provisions affecting possession of mortgaged premises are matters of substance, but those affecting the remedy in order to secure possession may be changed from time to time. In *Sturges* v. *Crowninshield,* 4 Wheat. (U. S.) 122, 200, the court said:

"Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

In *Mundy* v. *Monroe,* 1 Mich. 68, it was said:

"It seems to be conceded by all who have written on this subject, that where the law sought to be invalidated affects the remedy only, and does not touch the right of the party secured by the contract, it is not repugnant to that provision of the Constitution which declares that no State shall pass any law impairing the obligation of contracts."

In *State Savings Bank* v. *Matthews,* 123 Mich. 56, it was held that the statute which amended the mortgage foreclosure law by authorizing a sale after the lapse of six months (instead of one year as theretofore provided) from the filing of the bill, but al-

lowed the mortgagor six months from the time of sale to redeem at any time, affected the remedy only. It did not impair the obligation of the contract in existing mortgages foreclosed under the amended act. The court quoted the following rule, laid down in *Tennessee* v. *Sneed,* 96 U. S. 69:

"The rule seems to be that in modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right."

For other cases providing that the remedy as to existing causes of action may be changed provided that they do not create, enlarge, or destroy any substantial rights, see *Judd* v. *Judd,* 125 Mich. 228; *C. H. Little Co.* v. *L. P. Hazen Co.,* 185 Mich. 316. In *Conley* v. *Barton,* 260 U. S. 677 (43 Sup. Ct. 238), the court, in holding that a law requiring the filing of an affidavit within three months after the expiration of the redemption was remedial and valid as to mortgages executed prior to the enactment of the law, said:

"It is recognized that the legislature may modify or change existing remedies or prescribe new modes of procedure without impairing the obligation of contracts if a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract."

In *James* v. *Stull,* 9 Barb. (N. Y.) 482, the law affecting the method of foreclosure by advertisement was changed after the mortgage was given by shortening the length of the time of publication from 24 weeks to 12 weeks. The court, in holding that the constitutional rights of the mortgagor were not violated, said:

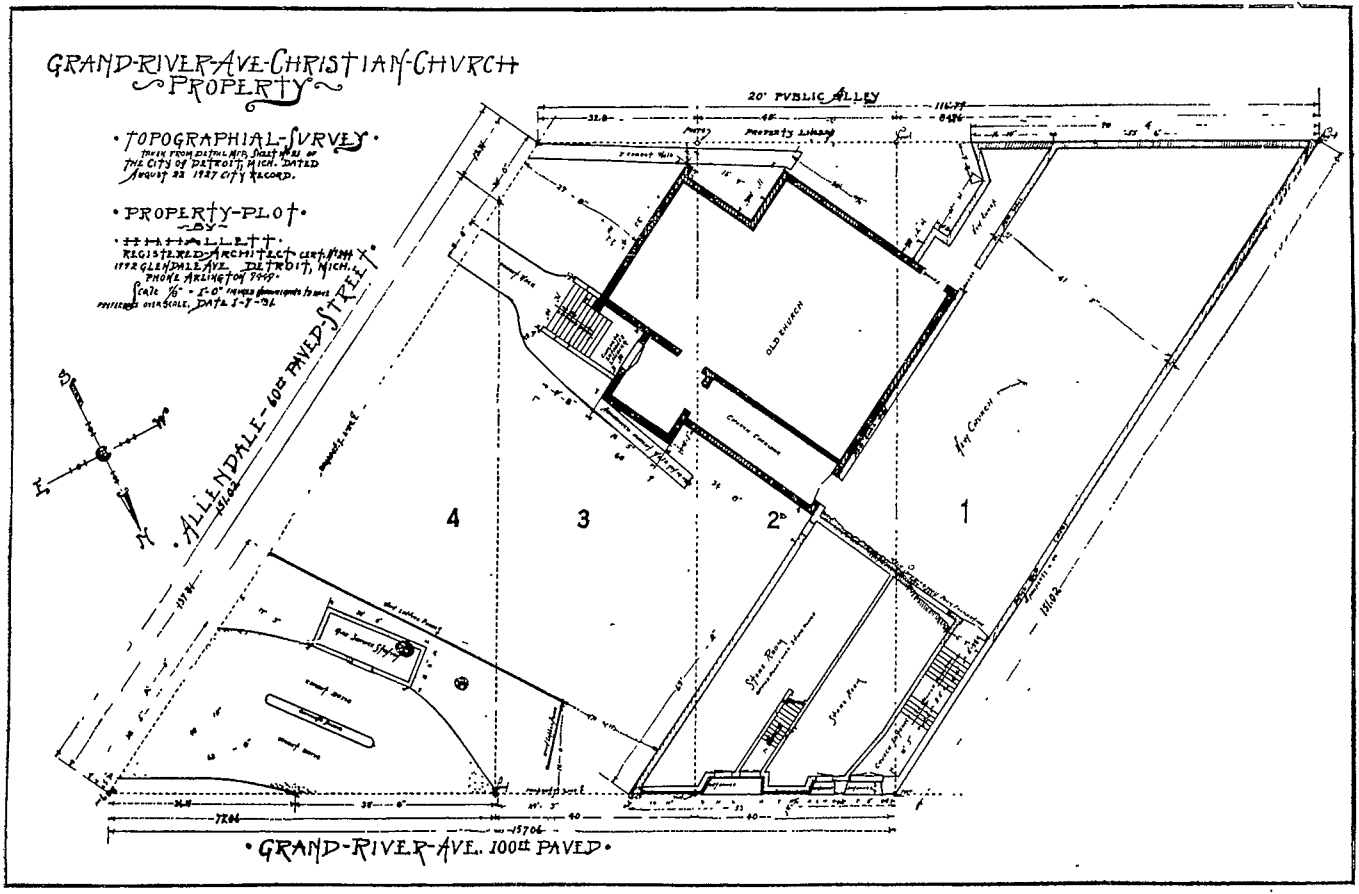
"To hold this act unconstitutional would be to deny to the legislature, virtually, all power to legislate in regard to the practice of courts and proceedings on the part of creditors, to collect debts;—a power which must always exist and be frequently called into exercise in every commercial and advancing community, to meet peculiar exigencies, and keep the organization of courts and their proceedings in harmony with the demands of business and the substantial progress of society."

To like effect are *Strand* v. *Griffith,* 63 Wash. 334 (115 Pac. 512); *Hopkins* v. *Jones,* 22 Ind. 310. In the instant case, it was not necessary to serve the notice of foreclosure sale personally or by registered mail on the occupants of the premises, and the repeal of Act No. 383, Pub. Acts 1925, in no way affected plaintiff's rights.

(b) The other question raised by plaintiff is whether the mortgaged premises should not have been sold in separate parcels instead of as an entirety. Section 14431, 3 Comp. Laws 1929, provides as follows:

"If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as one parcel, they shall be sold separately, and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the costs and expenses allowed by law but if distinct lots be occupied as one parcel, they may in such case be sold together."

The description of the plot and the individual lots can best be seen from the map (Exhibit 8), which is appended to this opinion. The property consists of four lots situated on the southwest side of Grand River avenue at the corner of the north side of Allendale avenue. Lots 1 and 4 are triangular in shape; lots 2 and 3 are both rectangular, except


GRAND-RIVER-AVE-CHRISTIAN-CHURCH
PROPERTY
• TOPOGRAPHIAL-SURVEY •
TAKEN FROM OFFICIAL MAP ON FILE IN THE CITY OF DETROIT, MICH. DATED August 23 1927 CITY RECORD.
• PROPERTY-PLOT •
BY
REGISTERED ARCHITECT
1172 GLENDALE AVE. DETROIT, MICH.
PHONE ARLINGTON 7995
Scale 1/8" - 1'-0" unless otherwise noted
PREFERRED WORK SCALE, DATE 5-7-28
20' PUBLIC ALLEY
ALLENDALE - 60ft PAVED STREET
OLD CHURCH
New Church
Sunday School
Store Room
4
3
2
1
• GRAND-RIVER-AVE. 100ft PAVED •

(497)

that a small portion of lot 3 is lopped off. The lots adjoin one another and constitute one piece of property, which fronts 157.06 feet on Grand River avenue, 137.31 feet on Allendale avenue, 116.77 feet on the alley in the rear, and 151.02 feet on the most westerly side.

In erecting the buildings and improvements upon the property, the original lot lines have been completely lost sight of. Each building or improvement is situated on parts of more than one lot and none of them occupy the whole of one or more lots. The old church of plaintiff with the entrance facing on Allendale avenue, and a walk leading to the street, occupies parts of lots 2, 3, and 4. The new church and stores occupy parts of lots 1, 2, and 3. The vacant plot occupies parts of lots 2, 3, and 4. The walk from Allendale avenue to the old church also leads to the new church. The oil station occupies parts of lots 3 and 4. The stores fronting on Grand River avenue on the northwesterly side of the lot, although separated from the new church by a fire wall, are part of the same structure. The most westerly ten feet or thereabouts of the store building consists of a long hallway leading into the new church with a rather elaborate front entrance on Grand River avenue. The upper floor of the store building is not occupied, but may be rented for general purposes. The larger part of the basement under the stores is used by the tenants of the stores. The rear portion of the basement, however, is walled off and used by the church as a kitchen.

At the time the mortgage was given, the old church and the oil station stood on the premises. The oil station was not occupied by the tenant now in possession. The tenant of the oil station was required to pay taxes on the property occupied by it, the remaining property being used for church

purposes and exempt from taxation. There is situated on the oil station a small concrete one-story building, with the gasoline pumps in front and oil and gasoline tanks sunk below the ground level. The intake pipes for the gasoline are in the rear of the property. The oil station is fenced off by a lattice fence. It is uncertain from the manner in which it is occupied just what property is leased to the oil station. The city tax receipts would indicate that it has a frontage of 90 feet on Grand River avenue, 53 feet on Allendale avenue, and 18 feet on the northwest side. The lattice fence appears to be 56 feet from Allendale avenue, but the lower court found that the station used some of the property in the rear of the fence for its intake pipes to the storage plants; that the lease covered only 76 feet on Grand River avenue and 45 feet on Allendale avenue; that it was offered by the plaintiff's real estate agents as a piece having a frontage of 75 feet on Grand River avenue. A former lease submitted to the tenants calls for 78 feet on Grand River avenue. It is thus impossible to tell just exactly what should be included for the oil station.

The testimony further shows that if the shallow piece of property fronting on Grand River avenue and used by the oil station were treated as a separate parcel and cut off from the deep lots, the value of the remaining property would be diminished much more than the amount realizable from the sale of the oil station; that the only way of realizing the greatest amount from the property would be to combine the oil station property with that in the rear, in accordance with the plan under which the property was subdivided and as described in the mortgage; that the property occupied by the oil station is irregularly shaped, unplatted, and covers parts of several lots, and the exact amounts that

should be allotted to the oil station are indefinite. Even were plaintiff's theory correct, just what to do with the vacant piece of property in the rear of the oil station remains an uncertainty. Whether it should be sold as a separate parcel or in conjunction with the oil station or with the church, we would be unable to determine from the record. The difficulty would become still greater if it were necessary to sell as a separate unit the store building, part of which consists of the main entrance of the new church.

Plaintiff stresses its claim that it was the legal duty of defendant to sell the oil station separately, but pays no attention whatsoever to the lines of the lots as described in the mortgage and plat. The testimony shows that the sale of parts of the several lots described in the mortgage would most seriously impair the value of the remaining property, realize less on the mortgage debt, and change the security as given by the mortgagor. It was further shown that there was another oil station in the vicinity and that the corner was far too valuable to be used permanently for an oil station. If plaintiff is correct in its theory, then the building and leasing of a cheap lunch stand, shoe shining parlor, or almost any other kind of temporary structure, commonly known as a "taxpayer" on the front part of a corner lot, without any regard to the lot lines as described in the mortgage and plat, would obligate the mortgagee to sell such front part of the property for whatever could be obtained for it and the rear part for far less than it would be worth if combined with a part of the property having a valuable frontage. We can readily see how the contract rights of the mortgagee would be thus seriously impaired by lessening the value of the security. We are not con-

sidering a case where a lot or lots used and leased for distinct purposes in their entirety were required to be separately sold. Many cases are cited by plaintiff where the situation is entirely different; they are not applicable to the present case. We believe that the rule laid down by Mr. Justice FEAD in the case of *Security Trust Co.* v. *Sloman,* 252 Mich. 266, is the correct one and is controlling in the present situation. In that case, the question was a practical one. The court said:

"While a mortgagor's right of redemption of part of the premises is to be safeguarded, it is not superior to the right of the mortgagee to collect the debt. We think the premises constituted one known parcel, and the sale as such was proper."

It is claimed that this latter case was a foreclosure in equity and not at law under 3 Comp. Laws 1929, § 14627. It will be found, however, that the provisions in regard to sale, while not identical, are similar. Distinctions without differences are pointed out to us. The practical application in each case depends upon the facts. In the instant case, the only practical and proper way in which the property could be sold was to follow the lines of the lots as described in the mortgage, and, inasmuch as the lines had been obliterated by the improvements, it was proper to sell the property as an entirety.

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

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

WINDISCH *v.* MORTGAGE SECURITY CORP. OF AMERICA.

1. EQUITY—MAXIMS.
   One who seeks equity must do equity.

2. SAME—CORPORATIONS—LICENSES.
   Mortgagor is not entitled to cancel mortgage in equity on ground that mortgagee, a foreign corporation, was not licensed to do business in this State (2 Comp. Laws 1929, § 10118 *et seq.*), where his bill contains no offer to do equity.

3. CORPORATIONS—FOREIGN CORPORATIONS—LICENSES.
   That foreign corporation has carried on business in this State without being licensed does not under all circumstances bar it from obtaining legal redress in courts of this State.

4. USURY—MORTGAGES—CANCELLATION.
   Mortgagor not offering to do equity is not entitled to cancellation of mortgage on ground of usury.

5. MORTGAGES—FORECLOSURE—ADVERTISEMENT—NOTICE.
   In foreclosure of mortgage by advertisement under 3 Comp. Laws 1929, § 14427, mortgagors living on property are not entitled to actual notice; constructive notice by publication and posting notice on premises being sufficient.

Appeal from Wayne; Miller (Guy A.), J. Submitted April 9, 1931. (Docket No. 57, Calendar No. 35,568.) Decided June 1, 1931.

Bill by William J. Windisch and another against Mortgage Security Corporation of America, a Virginia corporation, and others to set aside foreclosure proceedings and cancel a mortgage. Bill dismissed. Plaintiffs appeal. Affirmed.

*Bratton & Bratton,* for plaintiffs.

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Right to cancellation of contract made with foreign corporation because it has not complied with the laws entitling it to do business within the State, see annotation in 21 L. R. A. (N. S.) 707.

*Sempliner, Dewey, Stanton & Bushnell* (*D. Neil Reid,* of counsel), for defendants.

NORTH, J. Appellants filed a bill of complaint in the circuit court of Wayne county, in chancery, wherein they sought to have the appellees restrained from making any claim to certain property by reason of a mortgage given thereon by appellants to the Mortgage Security Corporation of America, or by reason of the sheriff's sale incident to the foreclosure of such mortgage. The plaintiffs in the bill of complaint also seek cancellation of the mortgage and of the sheriff's deed given on foreclosure. Briefly the reasons set up in the bill of complaint in consequence of which the plaintiffs asserted the right to the relief prayed are that the Mortgage Security Corporation of America is a foreign corporation which was not and is not licensed under the statute to do business in Michigan (2 Comp. Laws 1929, § 10118 *et seq.*); that the mortgage was usurious; and that the foreclosure proceeding and sale were void because notwithstanding plaintiffs were living on the property involved, they were given no notice of the foreclosure proceeding. The defendants appeared and as a part of their answer moved to dismiss plaintiffs' bill of complaint on the ground that it contained no offer to do equity by way of offering repayment of money actually received incident to the loan and interest at the legal rate accrued thereon. Upon hearing this motion the plaintiffs elected to stand upon their bill of complaint as filed and declined to amend by embodying an allegation offering to do equity. The circuit judge granted defendants' motion to dismiss. The plaintiffs' appeal is now before us.

Plaintiffs are seeking equitable relief. It is needless to cite authorities to the effect that one who

seeks equity must do equity. Plaintiffs admit their indebtedness to the Mortgage Security Corporation of America to the amount of several thousand dollars advanced them as a mortgage loan, and that the mortgage (in the form of a trust deed) which they seek to have canceled was given as security. As noted, such cancellation is sought on the ground that the mortgagee was doing business in Michigan illegally and that the terms of the mortgage loan are usurious. Under the holdings in this State, plaintiffs cannot be granted relief which is so plainly inequitable and unconscionable. The mere fact that a foreign corporation has carried on business in this State without being duly licensed so to do does not under all circumstances bar it from obtaining legal redress in the courts of this State. *Rex Beach Pictures Co.* v. *Garson Productions,* 209 Mich. 692; *Hallet & Davis Piano Co.* v. *Droste,* 213 Mich. 381; *Mojonnier Bros. Co.* v. *Detroit Milling Co.,* 233 Mich. 312; *Lu-Mi-Nus Signs Co.* v. *Regent Theatre Co.,* 250 Mich. 535. We know of no authority which relaxes the rule that a plaintiff in equity must do equity simply because the defendant is a foreign corporation carrying on business without a license in the jurisdiction.

"Where it is sought to cancel a contract on the ground of the noncompliance of a foreign corporation with the laws entitling it to do business, the usual rule applies that he who seeks the cancellation of an instrument must restore what is received under it, and it has been held that in a case where a person has secured a loan from a noncomplying foreign corporation and has failed to pay the same as provided for by his contract, even though the corporation has failed to qualify as provided by law in order to entitle it to do business in the State, the borrower will not be heard in a court of equity

to admit the contract and the indebtedness, and at the same time prosecute his action to cancel the mortgage given to secure the indebtedness, simply because the corporation failed to comply with the statute in qualifying to do business." 12 R. C. L. p. 89.

"We can not assent to the proposition that a person can obtain another's money, upon the faith and assurance of a mortgage security, and, the next moment after securing and appropriating it, go into a court of conscience, and ask that court to cancel the security as a cloud on his title, still retaining the money, and making no offer to repay the money he has received, with lawful interest." *George* v. *New England Mortgage Security Co.*, 109 Ala. 548 (20 South. 331).

See, also, *Ross* v. *New England Mortgage Security Co.*, 101 Ala. 362 (13 South. 564); *Hanchey* v. *Southern Home Bldg. & Loan Ass'n*, 140 Ala. 245 (37 South. 272). To the same effect see *Tarr* v. *Western Loan & Savings Co.*, 15 Idaho, 741 (99 Pac. 1049, 21 L. R. A. [N. S.] 707 [note]); *Ray* v. *Home & Foreign Investment & Agency Co.*, 98 Ga. 122 (26 S. E. 56).

Plaintiffs' claim for relief on the ground of usury contravenes numerous holdings of this court.

"Usury statutes, being penal in character, must be strictly construed, and unless the statute takes away equitable rights it follows that they remain. He who asks equity must do equity." *Vandervelde* v. *Wilson*, 176 Mich. 185.

See, also, *McTavish* v. *Green*, 220 Mich. 606; *Stiglitz* v. *Weinstein*, 227 Mich. 691.

Appellants' contention that they were not in default when foreclosure was instituted is not sustained by the record. The remaining ground upon which appellants assert they are entitled to relief

is that, notwithstanding they were living on the property subjected to the foreclosure, "no notice of the said foreclosure proceeding was given or attempted to be given plaintiffs, or either of them." The answer to this contention is that the foreclosure was by advertisement under the statute which requires only publication and posting of notice on the premises. 3 Comp. Laws 1929, § 14427. Plaintiffs were not entitled to actual notice, but only the constructive notice specified in the statute. There is no showing of failure in the foreclosure proceeding to comply with the statutory requirements. See *Grand River Avenue Christian Church* v. *Berkshire Life Ins. Co.*, *ante*, 480.

We find nothing in this record which relieves plaintiffs from offering to do equity as a condition of being granted equitable relief. The decree of the circuit judge dismissing the bill of complaint is affirmed, with costs to the appellees.

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

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CHERRY *v.* BOARD OF HOME MISSIONS OF REFORMED CHURCH IN UNITED STATES.

1. INJUNCTION—COVENANTS—BUILDING RESTRICTIONS—EQUITY.
Whether court of equity will grant or withhold injunctive relief respecting observance of building restrictions depends on the accomplishment of equitable result in light of all circumstances surrounding particular case.

2. SAME—ENLARGEMENT OF EXISTING VIOLATION.
   Erection of proposed church building which will more nearly conform to building restrictions than present unsightly structure which has been maintained for eight or nine years in violation of building restrictions without complaint from property owners may not be enjoined on ground that it is enlargement or extension of existing violation of building restrictions.

3. COVENANTS—INJUNCTION—ACQUIESCENCE—ESTOPPEL.
   To extent that property owners have for long time acquiesced in violation of building restrictions they are estopped from asking injunctive relief.

4. INJUNCTION—COVENANTS—ACQUIESCENCE—EQUITY.
   Property owners who have acquiesced in maintenance of unsightly church building for eight or nine years in violation of building restrictions are not equitably entitled to restrain erection of more sightly church building on same site; especially where it will not work hardship or damage to them.

Appeal from Wayne; Miller (Guy A.), J. Submitted April 22, 1931. (Docket No. 85, Calendar No. 35,591.) Decided June 1, 1931.

Bill by George H. Cherry and others against Board of Home Missions of the Reformed Church in the United States, a Pennsylvania corporation, and others to enjoin violation of building restrictions. From decree for plaintiffs, defendants appeal. Reversed.

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

*Wetherbee & Wetherbee,* for defendants.

NORTH, J. Plaintiffs' bill of complaint was filed for the purpose of securing a decree by which defendants would be enjoined "from proceeding with the erection of the church building and appurtenances thereto upon lots 367, 368 and 369" of

Coonley's subdivision in the city of Detroit, and "from violating in any manner whatsoever the building restrictions pertaining to and adherent to the premises herein described." As to the plaintiffs other than William L. Grindell and Bernice Grindell, the bill of complaint was dismissed by decree in the lower court; and there has been no appeal from this portion of the decree. Hence we are here concerned only with the case as presented by the plaintiffs Grindell. As to them the relief sought was decreed; and the defendants, hereinafter referred to in the singular as the Reformed Church, have appealed.

The three lots involved face on Dexter boulevard just south of its intersection with Joy road. Together they constitute a parcel substantially 100 feet by 120 feet. Coonley's subdivision is composed of 395 lots, 51 of which are vacant. With the exception of defendant's property, the buildings on this subdivision have been restricted to residential purposes in conformity with provisions in the deeds conveying the lots. Defendant's deeds contain like restrictions hereinafter quoted. In 1922 representatives of the defendant contemplated purchasing the lots in question for a church site. They were informed of the building restrictions, and sought releases from certain lot owners. They obtained 17 such releases. These included the adjacent property on both sides of the church site. Such a release was not solicited from the plaintiffs Grindell, who are husband and wife, and owners of lot 332. This lot faces on Clairmont avenue and is 138 feet west of the street intersection next south of the church site. A building permit was obtained October 25, 1922, which is the approximate date on which defendant received deeds to the church lots. The material

portion of the building restrictions contained in these deeds is as follows:

"Until January 1, 1944, and no longer * * * no structures shall be built upon any lot in the said Coonley's subdivision except for dwelling house purposes only, having at least two stories in height and their appurtenant outbuildings, or an approved type of bungalow which must be first approved by the party of the first part. * * *

"On lots fronting on Dexter boulevard, nothing allowed, but single houses to cost not less than $4,000; double houses to cost not less than $5,500; duplex or two flat, to cost not less than $5,000 to be built of solid brick, stone, cement, brick, or stone veneer or stucco, and no such house shall be built nearer than 30 feet of the front lot line."

The defendant purchased a church building of the fabricated knockdown type, and completed its erection on the site in December, 1922. This building is 25 x 60 feet, one story in height, so located that it occupies the rear portion of each of the three lots and faces on Joy road. Together with the expense of erection and the equipment in connection therewith it cost substantially $6,000. It has been used continuously for church and Sunday school purposes to the present time.

In 1927 and 1928 public announcements were made of defendant's plan to erect a new and permanent church edifice on its property. This new building, as planned, would face Dexter boulevard. The estimated cost is about $100,000. At least pending construction of the new edifice it is the plan that defendant's present structure shall remain intact. In September, 1928, notice was served by the Coonley Subdivision Association upon defendant of objection to violation of the building restrictions.

About that time the pastor of the church secured the signatures of upwards of 100 property owners in this subdivision waiving objection to the erection of the church building. Defendant began excavating for the new building, and on February 21, 1930, plaintiffs filed the bill of complaint herein.

The following recital in his decree discloses the basis of the circuit judge's decision:

"The proposed erection of a large church building as aforementioned would be an extension and enlargement of the past and present use of the lots and premises * * * from that use already made of said lots and premises by defendants * * * concerning which past and present use the plaintiffs may not now complain, having by their silence waived their rights so to do."

The decree as entered vests in the defendant the right to continue the present use of its property for church purposes and to do such things as may be necessary for the upkeep and maintenance of its present church structure; but any extension thereof or replacements by a more permanent or larger church building is enjoined. In arriving at his conclusion the circuit judge seems to have relied much upon *Austin* v. *Van Horn,* 245 Mich. 344; *Boston-Edison Protective Ass'n* v. *Goodlove,* 248 Mich. 625, and other like decisions in restriction cases.

Courts of equity in passing upon cases of this character grant or withhold injunctive relief depending upon the accomplishment of an equitable result in the light of all of the circumstances surrounding the particular case. *Putnam* v. *Ernst,* 232 Mich. 682. The issue here presented is this: Under the particular circumstances disclosed by this record, should the defendant be enjoined from erecting a new and somewhat larger church building on

this property which they have used and occupied for church purposes without complaint since 1922.

It is of prime importance to note that by the decree from which plaintiffs have not appealed defendant has the right to continue its present church activities, which of course includes any additional use of its church property by reason of growth of the congregation, if any. In this connection it must be borne in mind that the restrictions invoked by plaintiffs expire by their own limitations in 1944. Thus the question narrows down to a determination whether, after all, plaintiffs will be materially injured by the erection of the new church edifice now rather than in 1944, the defendant in the meantime having the right to use its somewhat unsightly and so-called temporary structure.

We are not impressed with plaintiffs' claim that defendant's building program will constitute an extension of the violation of the building restrictions which has already been countenanced. It is true the new building as planned will be somewhat larger, will occupy a different portion of the lots and will face on Dexter boulevard instead of Joy road. But a church is a church; and it cannot well be asserted that only so much of a church site as is actually occupied by the edifice located thereon is used for church purposes. It is common practice to use the adjacent lot area for parking purposes. It is by no means uncommon for outdoor church gatherings to make use of the whole or any part of the church yard. Defendant clearly has the right so to use its premises. Admittedly there would be a limit beyond which defendant would not be allowed to go as to the character of the building it might erect on this site in lieu of its present church. Its present building conforms to the set-back re-

quirements; and we assume violation of these provisions is not contemplated by the erection of the new building. The owner of the adjacent property, who will be most affected by the proposed change, has consented thereto. The record contains the architect's drawings of the proposed church and concerning it the circuit judge in his opinion said:

"It is my personal opinion that the erection of the building in question would improve the neighborhood instead of being a detriment to it. The building itself, as indicated in the exhibits, would be a beautiful and sightly structure, and the present structure is quite the reverse. * * * The evidence discloses that there would be no material detriment to any of the parties plaintiffs from the immediate construction of this particular structure."

To some extent the claim is stressed that, inasmuch as the present church faces on Joy road, defendant should not be permitted to erect a new church edifice facing on Dexter boulevard. This goes to the fact that Dexter boulevard is much more strictly a residential thoroughfare than Joy road. If plaintiffs' property was situated on Dexter boulevard some favorable consideration might be given to their contention in this regard; but as noted above their property is some distance west of the next corner south of the church property. We find nothing in this record which furnishes equitable grounds for a decree that defendant's new edifice may not face on either of these streets. Even as bearing upon the parking situation, it matters little and perhaps not at all whether the new church faces the one street or the other, because entrance on one street has little or no effect on the matter of parking on the other. While we consider it of no particular importance, it may be noted that as platted defend-

ant's lots face Dexter boulevard. We think its rights in this particular are not materially affected by the fact that its present church edifice erected on the rear of its lots faces Joy road. The proposed church building will more nearly conform to the building restrictions than the present structure; and the erection of the former will have no more tendency to abrogate the restrictions in this subdivision than the maintenance of the latter.

Investigation of the decisions of this court will uniformily disclose that injunctive relief has been denied when to grant it would have been inequitable or when those applying therefor have estopped themselves by their conduct or their inaction. In the cases relied upon by the trial court the parties against whom injunctive relief was granted sought by an enlargement or an extension of an existing violation of building restrictions to bring about a more objectionable, more aggravated, or more damaging condition than already existed. In this particular we think the present case is readily distinguishable. Defendant's new building, as found by the circuit judge, will not work a hardship or a damage to the parties plaintiffs, or, so far as the record shows, to any other property holder in this subdivision; especially in view of the fact that defendant now has the right to carry on its church activities on its present site. Without complaint from plaintiffs or other property owners in the subdivision, defendant has carried on its activity at this location for the last eight or nine years. In so doing it has acted openly and has in no way secreted or attempted to cover up its obvious intention of permanently using this site for its church work. It has become established in this locality, and presumably could not change its location except at a substan-

tial financial sacrifice and possibly other disadvantages. The circuit judge was obviously reluctant to grant plaintiffs relief; but felt constrained to do so because of our decision in *Boston-Edison Protective Ass'n* v. *Goodlove, supra,* and other cognate cases. In view of the facts presented in the instant case, we think our holding here in no way conflicts with that in the *Goodlove case.* We there held that to the extent plaintiffs had for a long time acquiesced in defendant's violation of the restrictions they were estopped from asking injunctive relief. We hold only that in the instant case. The equities here presented are not such as justify granting to plaintiffs the relief prayed.

The decree of the lower court will be reversed, and one entered here dismissing plaintiffs' bill of complaint, with costs of both courts.

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

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WILSON *v.* WILSON.

1. DIVORCE—WIFE'S LIEN ON HUSBAND'S PROPERTY NOT ABROGATED BY THEIR REMARRIAGE.

   Wife's lien on husband's property established by divorce decree does not become abrogated by their remarriage.

2. SAME—PARTIES—HUSBAND AND WIFE.

   Wife's suit to enforce lien on husband's property established by divorce decree, after their remarriage and separation but while they are still husband and wife, need not be brought by next friend (3 Comp. Laws 1929, § 14013).

3. HUSBAND AND WIFE—WIFE'S RIGHT TO ENFORCE LIEN ON HUSBAND'S PROPERTY.

Wife could maintain suit to enforce lien on husband's property established by divorce decree, after their remarriage and separation, notwithstanding his willingness to support her (3 Comp. Laws 1929, § 14014).

Appeal from Gratiot; Searl (Kelly S.), J. Submitted April 23, 1931. (Docket No. 168, Calendar No. 35,268.) Decided June 1, 1931.

Bill by Florence Wilson against John A. Wilson to foreclose a lien on certain real estate established in a divorce decree. Decree for plaintiff. Defendant appeals. Affirmed.

*D. L. Johnson,* for plaintiff.

*Kenneth B. Montigel,* for defendant.

NORTH, J. The main question presented on this appeal is clearly outlined and a proper decision reached in the following portion of the circuit judge's opinion:

"In this cause plaintiff filed her bill to foreclose a lien on certain real estate belonging to defendant, alleging that said lien was established in a divorce decree made May 8, 1928, in this court, and that there is now due upwards of $400. Defendant answered admitting these facts, but alleging that since the entry of said decree the identical parties have remarried, and that therefore the lien has become abrogated. * * *

"The facts as agreed upon by the attorneys for the respective parties are, that at the time the divorce decree was made, defendant, John A. Wilson, was required to pay to plaintiff, Florence Wilson, the sum of $600 in full of dower rights and also her rights in certain real estate then held by the en-

tirety; and that plaintiff was required to and did release her interest in all this real estate, and that the lien now sought to be enforced is for a portion of said $600, that it covers the property formerly held by the entirety. It was also agreed that the parties have since remarried and have again separated, but are still husband and wife. This brings us squarely to the question of whether plaintiff by her last marriage to defendant and subsequent cohabitation with him lost the right to enforce the lien given her in the divorce decree. * * *

"In the case at bar the plaintiff released all her interest in the real estate held by the entirety at the time the divorce decree was made. When she married the defendant the last time she did not become reinvested with her interest in that real estate, and to now hold that she lost her lien but did not receive back what she had released would be inequitable. If dower only was involved, a different result might be reached.

"At the time of this last marriage the parties were in law strangers to each other. The plaintiff might have sold her lien to some outside party, and in such case the remarriage of these parties would have had no effect upon it. If defendant at the time of this last marriage desired to have this lien released he should have made some new arrangement with his former wife by which she would have been reinvested with her interest in the land, with right of survivorship, in consideration of giving up her lien. He did not see fit to do that, and to now wipe out her lien and leave him sole owner of the land with a possible dower interest only in his wife would be unfair to her, and should not be done unless some positive rule of law requires it. No such rule has yet been laid down in this State; and hence an order may be made in accordance with this opinion."

As bearing upon the above question, see *Miller* v. *Miller,* 227 Mich. 684; *Kistler* v. *Kistler,* 141 Wis.

491 (124 N. W. 1028); *In re Mallory's Estate,* 300 Pa. 217 (150 Atl. 606); *Brenner* v. *Brenner,* 48 Ind. 262. For a contrary holding, see *Carson* v. *Carson,* 143 Okla. 274 (288 Pac. 475).

Appellant's contention that since plaintiff was a married woman her suit should have been brought by a next friend is not tenable. 3 Comp. Laws 1929, § 14013. Nor are we in accord with his further assertion that since defendant was willing to support his wife she could not maintain a suit against him for the recovery of her separate property. The right which plaintiff seeks to enforce is based upon contract. It is a property right which was acquired by her previous to her present marriage to defendant. By reason of defendant's default a right of action has accrued to her.

"Whenever a cause of action shall accrue to, or arise against any married woman, she may sue or be sued in the same manner as if she were sole." 3 Comp. Laws 1929, § 14014.

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

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

ROSLOWSKI *v.* SZTABA.

PLEDGES—PAYMENT—ASSIGNMENTS—MORTGAGES.

Debtors' contention that their assignment of their vendee interest in land contract and bill of sale of personal property was given to creditors as security only and not in payment of debt, *held,* not established by evidence.

Appeal from Macomb; Reid (Neil E.), J. Submitted April 14, 1931. (Docket No. 87, Calendar No. 34,293.) Decided June 1, 1931.

Bill by Ludwick Roslowski and another against Rafal Sztaba and another for an accounting, to declare an interest in property, and for other relief. Decree for plaintiffs. Defendants appeal. Reversed, and bill dismissed.

*Anthony Nelson,* for appellants.

NORTH, J. Defendants have appealed from a decree granting plaintiffs relief prayed in a controversy arising out of the following facts and circumstances: On and prior to November 29, 1921, plaintiffs were the holders of a vendee interest in farm property located in Macomb county. On that date and in consideration of a loan, plaintiffs gave their promissory note to defendants for $2,900 payable one year from date. On March 31, 1922, plaintiffs gave defendants another note for $490, payable in eight months. Payment was secured by the assignment to defendants of plaintiffs' vendee interest in the farm property. Neither of these obligations was

paid. On December 12, 1922, in an effort to adjust their matters, the parties met in an attorney's office in Mt. Clemens. This litigation arises out of their disagreement as to the nature of the transaction then and there consummated. It is defendants' claim that plaintiffs desired to dispose of their interest in the farm property and to pay their indebtedness to defendants; that an agreement was reached whereby plaintiffs made another assignment of their vendee interest in the farm property to defendants and also gave defendants a bill of sale of the personal property on the farm in consideration of defendants canceling plaintiffs' indebtedness and for the further consideration of $1,000, $200 of which was paid by defendants to plaintiffs in cash and payment of the remaining $800 was secured by a chattel mortgage on the farm stock and equipment. Defendants assert that consummation of this transaction in this manner vested them with the absolute ownership of the vendees' interest in the land contract and of the personal property subject to plaintiffs' chattel mortgage.

On the other hand plaintiffs assert the arrangement above outlined, in connection with which possession of the property was delivered to defendants, was consummated only as a means to further secure payment of plaintiffs' indebtedness to defendants, and it was understood between the parties at the time that upon payment of plaintiffs' indebtedness their property would be restored to them. Plaintiffs assert that they were unskilled in business matters, that they were without funds, and were induced to make this arrangement because of defendants' threat to institute an attachment proceeding and to take plaintiffs' property from them. As noted above, the trial court accepted plaintiffs' construc-

tion and construed the transaction of December 12, 1922, as resulting in an "equitable" mortgage covering plaintiffs' property and securing payment of their indebtedness to defendants, and decreed the amount of such indebtedness to be $10,309.89. This included payments made on the contract by defendants, taxes, etc. Payment was ordered and in case of nonpayment right of sale on foreclosure was decreed to defendants.

A thorough consideration of the record has forced us to accept defendants' contention. There is a sharp conflict in the testimony on this phase of the case, but with the exception of some rather limited testimony of admissions against interest claimed to have been made by the defendants, the testimony of the plaintiff Roslowski, which is conflicting in itself, stands practically uncorroborated. In support of the contrary claim of the defendants, the following facts appearing from the record may be noted:

(a) The assignment of plaintiffs' vendee interest, hereinafter quoted, is an unconditional assignment.

(b) The bill of sale of the personal property on the farm from plaintiffs to defendants is also absolute and unconditional.

(c) To secure the payment of the balance of $800 due to plaintiffs from defendants incident to this transaction, the latter took a note for one year bearing six per cent. interest from defendants, payment being secured by a chattel mortgage covering personal property on the farm.

(d) Immediately after this $800 note fell due, plaintiffs instituted proceedings to foreclose the chattel mortgage.

(e) Immediately after the transaction of December 12, 1922, plaintiffs delivered possession of the farm and the personal property to defendants who

have continued in such possession. Some of plaintiffs' personal property was not wholly paid for when turned over to defendants, but the latter seem to have taken the property subject to the indebtedness and subsequently paid the same.

(f) Defendants have made all payments on the land contract since the assignment and also all taxes on the property. Prior to the transaction of December 12th, defendants had been given an assignment of plaintiffs' vendee interest in the land contract to secure payment of previous loans from defendants to plaintiffs. This unquestionably was a conditional assignment. It was destroyed by the attorney at the time of the transaction of December 12th. This attorney represented both parties, and it is difficult to understand why he would destroy the former assignment of plaintiffs' vendee interest and prepare a second one unless the second assignment was of a different character and for a different purpose.

(g) It is also difficult to understand why the attorney, if the transaction was of the character asserted by the plaintiffs, made no mention of that fact in any of the instruments executed by the parties, nor did he prepare and have executed for plaintiffs' protection an instrument signed by defendants setting forth plaintiffs' right (if such there was) to reconveyance or reassignment of the property upon payment of certain sums or certain items to defendants.

(h) Defendants have not only kept up payments on the contract and also taxes; but in the meantime (and apparently with plaintiffs' knowledge) have made permanent improvements upon the property among which was the bringing under cultivation of about 30 acres of farm land which theretofore was unproductive.

(i) At the time of this transaction plaintiffs had first attempted to secure for their interest the payment of $2,000 by defendants. There was consider-

able negotiation between the parties, plaintiffs reducing the offer to $1,500, $1,300, then $1,200 and finally to $1,000, which was accepted by defendants. This $1,000, together with the indebtedness against the property, seems to have been a fair consideration therefor. But local improvements together with a general rise in property values resulted in a rapid increase in the value of this property during the years 1923 and 1924. Plaintiffs' bill was not filed until May 27, 1925, notwithstanding they had been aware that defendants claimed to be the absolute owners of this property since some time in 1923.

We forego noting other like aspects of the record. The testimony of Mr. and Mrs. Sztaba that the property was unconditionally sold to them is not only corroborated by that of their son Anthony, but also by that of Frank Mackowiecki and Frank Godyana, who were disinterested witnesses. The attorney who represented all the parties in the transaction of December 12, 1922, testified that he had no recollection of the details beyond those in the papers prepared at the time. From the agreement of December 12, 1922, executed by both plaintiffs and defendants, we quote the following:

"And the said second parties desiring to pay up the indebtedness evidenced by the notes above mentioned, have this day assigned all of their right, title and interest in and to the property above described and to the land contract above stated, together with the advantages to be derived therefrom. And the said second parties have this day given to the said first parties a bill of sale of all stock, tools, farm implements, and produce, all crops planted and growing, all the goods and chattels now on the farm premises in said township of Sterling, Macomb county, Michigan, for the sum of $1,000, payable as follows: $200 on this date, receipt of which is

hereby acknowledged and the balance of $800 payable one year from date with interest at 6 per cent. per annum, according to the terms of a certain promissory note bearing even date herewith and secured by a chattel mortgage on all of the stock hereby bargained and sold to the said first parties by the bill of sale as above stated."

There can be no particular advantage in reducing transactions to written agreements if on slight pretext and with uncertain showing the terms of such written instruments are to be wholly disregarded by the parties and set aside by courts. For the reasons above indicated, we find that plaintiffs are not entitled to the relief prayed. A decree may be taken dismissing the bill of complaint, with costs of both courts.

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

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## EASTCOTT *v.* METAL CRAFT CO.

1. NUISANCE—INJUNCTION—RESIDENTIAL DISTRICT—FACTORY—EQUITY.

   While property owners, who purchased their home after adjacent building had been converted into factory in a district which is neither restricted nor strictly residential, are not entitled to that degree of protection from nuisance created by factory they might receive in strictly residential district, they are entitled to relief to the extent that their rights have been invaded.

As to whether noise with or without vibration incident to lawful industrial business constitutes a nuisance, see annotation in 17 L. R. A. (N. S.) 287; 44 L. R. A. (N. S.) 236; 23 A. L. R. 1408.

2. SAME—EQUITABLE RELIEF.

Decree granting relief from nuisance created by factory adjacent to plaintiffs' home is modified, on appeal, with right reserved to them to again apply to court for further relief in case changes required are insufficient to give them the relief to which they are equitably entitled.

Appeal from Wayne; Runnels (Herbert W.), J., presiding. Submitted April 17, 1931. (Docket No. 131, Calendar No. 34,962.) Decided June 1, 1931.

Bill by Thomas Eastcott and another against Metal Craft Company, a Michigan corporation, and another to abate a nuisance arising from the operation of a machine shop. Decree for plaintiffs. Defendants appeal. Modified and affirmed.

*Tilden M. Gallagher,* for plaintiffs.

*Carey, Armstrong, Weadock & Essery,* for defendants.

NORTH, J. By the bill of complaint filed herein on August 1, 1929, the plaintiffs asked the abatement of a nuisance alleged to have resulted from defendants' manner of maintaining and operating a machine shop or factory immediately adjacent to plaintiffs' residence. Defendants' factory is located at 3546 National avenue, Detroit, Michigan, this being at the corner of National avenue and Brainard street. Plaintiffs' residence is located immediately south of defendants' building and distant therefrom only six feet. Defendants purchased their property in 1923. There was then located thereon a one-story building 30 by 60 feet originally designed for use as a church. Defendants immediately after

their purchase installed therein several machines and began manufacturing various metal parts for automobiles, stampings, mouldings, etc. In 1925 plaintiffs purchased the property where they now reside. It was then being operated as a rooming house, and plaintiffs have continued that activity. Shortly after plaintiffs purchased, defendants increased the capacity of their plant by adding a second story to their building. Again in 1928 defendants extended their plant by erecting a two-story brick building fronting on Brainard street and adjacent to the rear of the other building. The additions were constructed without complaint from plaintiffs. Before plaintiffs purchased their property Mr. Eastcott made some investigation as to the character of defendants' business but does not seem to have obtained any very definite information. Defendants' plant and the conduct of its business brought forth no objection from plaintiffs until shortly before the filing of the bill of complaint in 1929. The record discloses that defendants added to their machine equipment from time to time and that two of their largest punch presses are located on the south side of their original building. These machines are placed on reinforced concrete foundations extending some distance into the ground for the obvious purpose of minimizing vibration. They have been in their present location since April, 1925, which was prior to the time plaintiffs purchased their property. A third machine of like type was similarly located in defendants' plant in March, 1928. While these are the largest machines in defendants' factory, it seems to appear from the record that they are not the largest type of machine of this class. This particular part of defendants' equipment and its method of operation is of par-

ticular importance in this case, because in plaintiffs' brief it is stated:

"The nuisance consists in the operation of certain heavy punch presses located along the southerly wall, and as to these, and these only relief (by the court's decree) was obtained."

Plaintiffs do not urge that they are entitled to have defendants enjoined from operating this manufacturing plant, but rather to have its operation so regulated that the nuisance of which complaint is made will be abated. It is plaintiffs' claim that the objectionable condition arising from the running of the plant has gradually increased until it has become a *nuisance per accidens*. The alleged situation is thus outlined in plaintiffs' brief:

"In 1927, the noise and pounding grew worse, though the vibration was slight; more machinery was installed. During the latter part of 1927, and the early part of 1928, noise, vibration and smoke increased gradually. The vibration, of which more especial complaint is made, developed in the winter of 1928, and the spring of 1929. Mr. Eastcott first observed damaging effects, from vibration, in 1928–1929."

It was after first noticing the alleged damage from vibration that complaint of the existing conditions was made by plaintiffs to defendants. Plaintiffs claim that in the summer of 1929 the trouble became acute. There is some testimony that additional presses were moved into the factory during the latter year. After hearing testimony somewhat at length and viewing the premises of the respective parties, the trial judge entered a decree for the plaintiffs, and defendants have appealed. It is mainly appellants' contention that the decree is over

severe and inequitable in what it requires of appellants by way of abating the nuisance and also that it is vague and uncertain in its terms to the extent that it is impossible for them to determine what is required to comply with its conditions. The decree requires appellants to construct:

"A solid, as near as possible, sound-proof wall in the place of the old south wall of the said factory adjacent to plaintiffs' premises so that all windows and openings are eliminated and so that noise and vibrations caused by the operation of such factory cease. And * * * that the said defendants * * * remove the three heavy punch presses * * * from the south side of defendants' factory, and that the same be placed upon cork-based concrete, sound-proof foundations upon the north side of said defendants' factory building so that the heavy punch presses will not be adjacent to plaintiffs' premises, and to eliminate any noise or vibration on the south side of defendants' factory."

From a careful review of this record we are of the opinion that less drastic requirements will afford plaintiffs all of the relief they are equitably entitled to receive. In arriving at a fair and equitable disposition of the conflicting claims of these parties, it must be borne in mind that plaintiffs purchased their property after this factory was established in its present location. While there are no other manufacturing activities of the same or of a similar type in the immediate vicinity, there are other commercial activities. The locality is not only unrestricted, but its development is far from being strictly residential. The situation is one in which plaintiffs are not entitled to a decree which will afford them that high degree of protection they might receive in a strictly residential district. On

the other hand, it clearly appears that in the manner of operating their plant the defendants have invaded plaintiffs' rights and they are entitled to relief.

We are impressed with the fact that no seriously objectionable results seem to have come from the operation of the two punch presses which have been located where they now are on the southerly side of defendants' premises since 1925; and also with the fact that if these presses were moved in accordance with the trial court's decree they would still be in the same portion of defendants' building and not more than 20 or 25 feet from their present location. It hardly seems that material benefits would result from so slight a change. Nor do we think that the installation of a third punch press of a like character on the southerly side of defendants' factory should necessarily materially aggravate the condition of which plaintiffs complain, especially if these machines are properly operated. It clearly appears from the record that plaintiffs' grievance is materially increased during the summer months when defendants' factory is operated with one or more of the five windows facing plaintiffs' house open and when the ventilating fan located on this side of defendants' building is in operation. There is some complaint that the southerly wall of defendants' building, which is constructed of twelve-inch cement blocks, plastered on the inside, is defective, and that this results in unnecessary damage to plaintiffs. We think the objectionable conditions will be largely overcome if defendants are required to install double windows in the original factory building adjacent to plaintiffs' property, and to keep such windows closed at all times and to remove the ventilating fan in this wall. That further, the defend-

ants should be required to repair any defects in the south wall of their building in the way of cracks or otherwise which aggravate the condition of which plaintiffs complain; and to use reasonable care in the manner of operating the three punch presses above particularly referred to with the view to minimizing the resultant vibration; and that they otherwise use all reasonable care in the operation of their factory to avoid unnecessary interference with plaintiffs' full enjoyment of their property either because of unnecessary noise, vibration, dust, or odors from defendants' factory. The defendants should not be required to subject themselves to the expense of relocating their machines or of building a new south wall nor to the disadvantage of entirely shutting off the light from this side of their building until it has been more conclusively established that a reasonable protection of plaintiffs' rights requires one or more of such changes.

The decree of the lower court will be modified, and a decree in accordance with this opinion entered in this court; but the modified decree will also provide that if the provisions therein are inadequate to afford plaintiffs the relief to which they are equitably entitled, such decree upon application to the circuit court, in chancery, and upon proper showing, may be modified in accordance with what may then appear to be the equities in the case. No costs will be awarded in this court.

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

CONROY *v.* FOSTER.

1. BILLS AND NOTES—HOLDER IN DUE COURSE.
In action on promissory note by purchaser, finding of trial court that plaintiff was holder in due course of said note, *held,* sustained by evidence.

2. SAME—CONSIDERATION—NOTICE.
Claim by maker of promissory note that purchaser, at time of purchase, knew that the consideration therefor was an executory oral agreement to convey title to land covered by land contract, and therefore note was void, *held,* not sustained by evidence.

Error to Calhoun; Hatch (Blaine W.), J. Submitted April 21, 1931. (Docket No. 164, Calendar No. 35,471.) Decided June 1, 1931.

Assumpsit by John Conroy, as assignee, against Jay B. Foster on a promissory note. Judgment for plaintiff. Defendant brings error. Affirmed.

*Joseph W. McAuliffe,* for plaintiff.

*N. A. Cobb,* for defendant.

FEAD, J. Plaintiff sued defendant on a promissory note given by the latter to Ada T. Lewis on March 1, 1928, for $824.28 with interest at seven per cent. per annum, due 30 days after date. Before maturity and for a valuable consideration plaintiff purchased this note. Under his plea of general issue defendant gave notice of two defenses: (1) That no consideration passed from the payee of said note to defendant; and (2) that defendant had set-offs and counterclaims against said note of

Failure of executory consideration for bill or note as affecting purchaser with knowledge of the character of the consideration, see annotation in 46 L. R. A. (N. S.) 862; L. R. A. 1915F, 1203.

which plaintiff had notice at the time he purchased the instrument. The circuit judge, who heard the case without a jury, rendered judgment for plaintiff, and defendant has appealed.

Appellant's brief presents the following questions:

"(1) Was the plaintiff in this cause a *bona fide* purchaser without notice?

"(2) Is a purchaser of a note from the vendor under a land contract who knew that the consideration for the note was an executory oral agreement of the vendor to convey the title to property covered by the land contract assigned to the purchaser as part of the transaction and to be by him conveyed to the vendee upon payment, a *bona fide* purchaser?"

As bearing upon the first question the following facts are pertinent. Mrs. Lewis was the owner in fee of a parcel of real estate which had been sold upon a land contract in which she held the interest of vendor. Twelve hundred dollars remained unpaid on this contract. Mrs. Lewis entered into an oral agreement with defendant to deed to him this parcel of land subject to the contract sale and to assign to him her vendor's interest in the land contract upon his paying the $800 note in suit. Before this note matured plaintiff purchased it of Mrs. Lewis at a discount of $50. At the time of plaintiff's purchase Mrs. Lewis' attorney informed plaintiff that payment of the Foster note was secured by a deed and land contract. Plaintiff did not see these instruments until a day or so later, at which time they were delivered to him together with a conveyance to him of the property and an assignment of the vendor's interest in the land contract. Obviously this was done both for the purpose of giving plaintiff security for the payment of the

Foster note and to enable him to convey the real estate and assign the vendor's interest in the land contract to Mr. Foster upon the payment of his note in accordance with the original agreement with Mrs. Lewis. It is appellant's claim that because the oral agreement between himself and Mrs. Lewis involved the transfer of an interest in land it was void and therefore his note was without consideration; and also that because the circumstances above outlined in connection with the giving of the note were called to plaintiff's attention at the time he purchased the instrument it lost its quality of negotiability and it therefore became subject to the same set-offs and counterclaims that it would have been in the hands of the original payee. The record discloses that at the time plaintiff purchased this note and prior thereto appellant held counterclaims against Mrs. Lewis in substantial amounts. Testimony taken before the circuit judge sustains his finding on this phase of the case, which in part is as follows:

"I therefore find that it has been established by a preponderance of the evidence in said case that the plaintiff, John Conroy, took said note on March 21, 1929, in good faith and for value, and that at the time he took in same, the note was complete and regular on its face; that he had no notice of any infirmities in said note, or defects in the title of Ada T. Lewis; that by reason thereof, plaintiff is a holder in due course of said note free from the defenses which defendant has sought to raise in this case, and is entitled to recover thereon."

Question number two, above quoted from appellant's brief, is based upon the hypothesis that plaintiff, at the time he purchased this note, "knew that the consideration for the note was an executory oral

agreement of the vendor to convey the title to property covered by the land contract.'' The testimony in the case disproves this assumption, and the circuit judge properly so found. The judgment of the lower court is affirmed, with costs to appellee.

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

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*In re* DETROIT PROPERTIES CORP.

1. LICENSES—CORPORATIONS—PRIVILEGE FEE—EXCISE TAX ON FRANCHISE ''TO DO.''

   Corporation privilege fee is excise tax, not on right to be corporation, but on activities of corporation in exercise of its corporate franchise, or on franchise ''to do,'' not on franchise ''to be'' (2 Comp. Laws 1929, § 10140).

2. SAME—TAX IS IMPOSED ON RIGHT TO TRANSACT, NOT ON ACTUAL TRANSACTION.

   Actual transaction of business by domestic corporation is not condition of privilege tax, but it is imposed on right to transact business (2 Comp. Laws 1929, § 10140).

3. CORPORATIONS—RECEIVERS—LICENSES—WHEN RECEIVER LIABLE FOR FRANCHISE TAX.

   Receiver of corporation is liable for franchise or privilege tax where he operates the business of the corporation under order of court, since he is exercising the franchise ''to do,'' and whether it be private corporation or public utility is immaterial.

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Imposition of franchise or excise tax on corporation in hands of receiver, see annotation in 18 A. L. R. 700; 26 A. L. R. 426.

4. SAME—ON RECEIVERSHIP FRANCHISES PASS TO CONTROL OF COURT.
On receivership, corporation is not divested of its franchises, nor do they lapse, but court merely takes them into its custody for a time; the franchise "to do" passing into control of court.

5. SAME—RECEIVER IS OFFICER OF COURT.
Receiver of corporation is creature or officer of court, and is not agent of corporation.

6. SAME—RECEIVER TAKES PLACE OF CORPORATION AND OFFICERS.
Receiver of corporation conducting its business takes place of corporation and its officers for purpose of performing necessary corporate duties and functions, and has same powers for such purposes, but he cannot act in excess of corporate powers, and court cannot invest him with authority to that extent.

Certiorari to Corporation Tax Appeal Board. Submitted April 7, 1931. (Docket No. 9, Calendar No. 35,451.) Decided June 1, 1931.

Union Guardian Trust Company, receiver of the Detroit Properties Corporation, a Michigan corporation, was ordered to pay an annual privilege fee by the Secretary of State. Receiver appealed to Corporation Tax Appeal Board, where the order of the Secretary of State was affirmed. Receiver reviews affirmance of the order by certiorari. Affirmed.

*Beaumont, Smith & Harris* (*M. S. Harlan* and *Richard W. Larwin,* of counsel), for plaintiff.

*Paul W. Voorhies,* Attorney General, and *Charles Rubiner,* Assistant Attorney General (*Alice E. Alexander,* of counsel), for defendant.

FEAD, J. This is certiorari to the corporation tax appeal board to review affirmance of a levy of corporation privilege tax by the secretary of State.

The Detroit Properties Corporation was incorporated under the laws of this State to buy and hold

real estate, stocks, bonds, or other securities and to deal in the same. A bill of complaint was filed against it by a creditor, alleging, in substance, that the corporation was solvent but confronted with immediate financial embarrassment and praying, among other things, for the appointment of a receiver, with authority to continue the business of the defendant and "to protect and preserve its franchise and privileges." The court appointed Union Guardian Trust Company temporary receiver with the usual powers and also authority—

"in general to operate the business of the defendant as fully as the defendant operated same and in the manner best calculated in the opinion of the receiver to fully protect that business, to the end that the business of the defendant may be preserved as well as its assets."

The issue is whether the corporation is subject to the privilege fee which, by 2 Comp. Laws 1929, § 10140, every domestic corporation is required to pay "for the privilege of exercising its franchise and of transacting its business within this State," and which accrued after the appointment of the receiver and its taking control of the corporate property and business. The question is one of first impression with this court.

The privilege fee is an excise tax, not upon the right to be a corporation, but upon the activities of the corporation in the exercise of its corporate franchise, or, as it is sometimes expressed, upon the franchise "to do," not upon the franchise "to be." *Union Steam Pump Sales Co.* v. *Secretary of State,* 216 Mich. 261, 272; *In re Detroit & Windsor Ferry Co.,* 232 Mich. 574; *In re Truscon Steel Co.,* 246 Mich. 174; *Cobbs & Mitchell* v. *Corporation Tax Appeal Board,* 252 Mich. 478, 481. Actual transaction

of business by a domestic corporation is not a condition of the tax. It is imposed on the right to transact. *In re G. H. Hammond Co.,* 246 Mich. 179; 2 Comp. Laws 1929, § 10140.

In all the cases cited or found, where the power to impose a similar tax during receivership has been denied, it has appeared that the corporation was insolvent, or in process of liquidation, or had been prohibited by law or injunction from exercising its franchises, or the proceedings were for dissolution, the receiver was not operating the business, and the life or right of the corporation to do business had ceased. *Jones* v. *Winthrop Savings Bank,* 66 Me. 242; *Johnson* v. *Johnson Brothers,* 108 Me. 272, 296 (80 Atl. 741, 750, Ann. Cas. 1913 A, 1303); *State* v. *Bradford Savings Bank,* 71 Vt. 234 (44 Atl. 349); *Commonwealth* v. *Lancaster Savings Bank,* 123 Mass. 493; *Greenfield Savings Bank* v. *Commonwealth,* 211 Mass. 207 (97 N. E. 927); *Keeney* v. *Dominion Coal Co.* (D. C. [Ohio]), 225 Fed. 625; *State of Ohio* v. *Harris* (C. C. A.), 229 Fed. 892.

In holding a receiver liable for a tax "for the privilege of operation of the street railway in public ways" in *Collector of Taxes* v. *Railway,* 234 Mass. 336, 342 (125 N. E. 614), the court used language applicable to all the above cases:

> "There are numerous cases which have held that a corporation in the hands of a receiver is not subject to a franchise tax. Those are cases, however, where the corporation has been prohibited by law or by injunction from exercising its franchises and the receiver is not using them, or the corporation is in process of liquidation."

The cases in which the power to tax has been upheld are many, but some of them have aspects which

cause them to be more or less distinguishable from that at bar.

In some States the tax is on the franchise of the corporation "to be" and seems to be collectible until legal dissolution or its equivalent. *Kirkpatrick* v. *Board of Assessors,* 57 N. J. Law, 53 (29 Atl. 442); *In re United States Car Co.,* 60 N. J. Eq. 514 (43 Atl. 673); *Duryea* v. *American Woodworking Machine Co.* (D. C. [N. J.]), 133 Fed. 329; *Conklin* v. *United States Shipbuilding Co.* (D. C. [N. J.]), 148 Fed. 129; *In re Malko Milling & Lighting Co.* (D. C. [Md.]), 32 Fed. (2d) 825; *State* v. *Bradley,* 207 Ala. 677 (93 South. 595, 26 A. L. R. 421).

In some other States statutes provide for the collection of such taxes from a receiver. The courts, however, have not laid decision upon the ground that such special provision created the liability of the receiver for franchise taxes, but have founded liability upon general principles as well. *Bright* v. *State of Arkansas* (C. C. A.), 249 Fed. 950; *Armstrong* v. *Emmerson,* 300 Ill. 54 (132 N. E. 768, 18 A. L. R. 693). In Ohio, where such a statute exists, it has been held, in conformity with the rule elsewhere, that an insolvent corporation which could not exercise its franchise is not subject to the tax when under receivership. *Keeney* v. *Dominion Coal Co., supra; State of Ohio* v. *Harris, supra.* But where the receiver continued the business of the corporation, the tax was sustained. *Morley* v. *Cleveland Hippodrome Co.,* 23 Ohio C. C. (N. S.) 295; *Gerke Brewing Co.* v. *Kuerze,* 7 Ohio App. 37; *Guardian Savings & Trust Co.* v. *Templar Motors Co.,* 116 Ohio St. 95 (155 N. E. 691).

The New York statute, Cahill's Consol. Laws of New York, 1930, Chap. 61, § 209, usually reported in the cases as "Consol. Laws, C. 60," provides a

tax on corporations generally, "for the privilege of exercising its franchise in this State in a corporate or organized capacity;" and for railroad companies in substantially the same language (Chap. 61, § 184). See *People* v. *State Tax Comm.*, 189 App. Div. 347 (178 N. Y. Supp. 486). It is held that the tax may be levied during a receivership when the receiver is authorized to carry on the business of the corporation. *Central Trust Co.* v. *Railroad Co.*, 110 N. Y. 250 (18 N. E. 92, 1 L. R. A. 260); *People* v. *State Tax Comm., supra; New York Terminal Co.* v. *Gaus*, 204 N. Y. 512 (98 N. E. 11); *People* v. *Hopkins* (C. C. A.), 18 Fed. (2d) 731; *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.* (D. C. [N. Y.]), 8 Fed. (2d) 305. See, also, *New York Trust Co.* v. *Island Oil & Transportation Co.* (D. C. [N. Y.]), 7 Fed. (2d) 416; *Philadelphia & R. R. Co.* v. *Commonwealth*, 104 Pa. 80.

To complete the review of authorities, we are informed by counsel that the Federal district court of the western district of Michigan and the standing master in chancery of the eastern district, in unreported cases, have sustained the Michigan tax under conditions similar to those at bar.

It appears, then, that the courts are unanimous in holding a receiver liable for the franchise or privilege tax where he operates the business of the corporation. May the rule be sustained in principle?

Plaintiffs seek to draw a distinction between public utility corporations with special and public functions and private corporations, but we do not find that the courts have done so, except in *Mather's Sons' Co.'s Case*, 52 N. J. Eq. 607 (30 Atl. 321), where it was pointed out that the receiver of a public utility corporation must pay the tax because it is his duty to preserve the franchise, while the receiver of

a private corporation pays only as long as he uses the franchise, and, when the corporation is adjudged insolvent, the obligation ceases; and in master's report in *Providence Engineering Corp.* v. *Downey Shipbuilding Corp., supra,* p. 308, where the distinction was denied. A private corporation obtains its powers from the State, as does a public utility, and if the receiver uses the franchise of the corporation when he carries on the business, there is no basis for the distinction claimed.

Plaintiffs also stress *United States* v. *Whitridge,* 231 U. S. 144 (34 Sup. Ct. 24), in which the court held that the Federal corporation tax is not assessable while the corporation is under receivership. The decision has been cited in many of the cases upon the instant question and variously distinguished. We have not discovered that it has been held authority by any court for denial of the right to levy a franchise tax on a corporation under receivership, although there is *dictum* to that effect. *In re Continental Candy Co.* (D. C. [N. Y.]), 291 Fed. 773; *Bright* v. *State of Arkansas, supra.* In the latter case it was held not controlling of the instant question, as against the weight of authority and uniformity of decision. Fundamentally, in *United States* v. *Whitridge,* the court held that the Federal tax was not upon the corporate franchise or right to do business, but upon the act of doing business by the corporation itself. The opinion demonstrates that the ruling was a special construction of a special law with a special background and purpose and was not founded upon, and did not establish, general principles applicable to other laws.

The cases holding that a trustee in bankruptcy is not liable for the tax are not pertinent. They point out that, unlike a receiver, the trustee takes the

whole title to the corporate property, and, in operating the business, he does so as an individual, and does not exercise the corporate franchises. *In re Continental Candy Co., supra; In re Century Silk Mills* (D. C. [N. Y.]), 12 Fed. (2d) 292.

On receivership, the corporation is not divested of its franchises, nor do they lapse. The court merely takes them into its custody for a time. The franchise "to do" passes to control of the court. *Detroit, etc., R. Co.* v. *Campbell,* 140 Mich. 384; *Grand Rapids Trust Co.* v. *Carpenter,* 229 Mich. 491; *United States* v. *Whitridge, supra.*

The receiver is the creature or officer of the court and is not an agent of the corporation. *Face* v. *Hall,* 183 Mich. 22. But when he is authorized to carry on the business of the corporation, his authority does not come wholly or solely from the equity powers or jurisdiction of the court. The grant of corporate powers is a legislative function. The court, out of its own powers, cannot confer them upon an individual. It could not authorize the receiver to conduct a business not within the corporate charter. The power of the court to authorize the receiver to continue the business of the corporation exists only because the court has become the custodian of the corporate franchises. In so authorizing, it merely directs the person who shall exercise powers belonging to the corporation by legislative grant.

"The receiver of a corporation, conducting its business, takes the place of the corporation and its officers for the purpose of performing the necessary corporate duties and functions, and has the same powers for such purposes, while on the other hand, he cannot act in excess of the corporate powers and the court cannot invest him with authority to that extent." 14–A C. J. p. 1005.

So it follows that, in conducting the business under order of court, the receiver is exercising the franchise "to do" of the corporation. Substantially all the above authorities sustaining the tax so hold. See, also, *State* v. *Sessions,* 95 Kan. 272, 278 (147 Pac. 789).

The tax is on the franchise, and, as the franchise is being exercised by the receiver, the tax is valid. This ruling is confined to the case before us and without prejudice to the contentions of counsel as to liability under other circumstances.

The determination of the board is affirmed.

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

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BURGESS *v.* FORSHAR.

1. BANKS AND BANKING—ACCEPTANCE OF DEPOSITS—SOLVENCY.
   Acceptance of deposits by bank is representation of its solvency.

2. SAME—INSOLVENCY—LEGAL RESERVE.
   That bank's reserve may fall below amount which it is required by law to maintain is not in itself proof of its insolvency, but if bank officials are unable to secure funds to meet deficiency, it is insolvent, notwithstanding its assets are much greater than its liabilities, and it may be closed by State banking commissioner.

3. SAME—WHEN BANK INSOLVENT—DEPOSITS—TRUST FUNDS.
   Before bank, whose reserve has fallen below legal limit, is declared insolvent, justifying treatment of general deposit as trust fund, it must appear that the bank officers had no reasonable hope or expectation that their efforts to place bank on sound financial standing would prove successful, and that suspension of business was inevitable.

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As to right of depositor to rescind or claim trust in respect of a deposit because of insolvency of bank when it was made, see annotation in 20 A. L. R. 1206; 25 A. L. R. 728; 37 A. L. R. 620.

4. SAME—INSOLVENCY—NOTICE.

Suit to declare deposit in bank a trust fund giving depositor preference over other creditors of the bank was properly dismissed, where, at time deposit was made, bank's officers did not know that it was insolvent, although the amount of its reserve was below legal limit.

Appeal from Sanilac; Boomhower (Xenophon A.), J. Submitted April 21, 1931. (Docket No. 162, Calendar No. 35,337.) Decided June 1, 1931.

Bill by Guy H. Burgess, treasurer of Marion township, Sanilac county, against John N. Forshar, receiver of State Bank of Deckerville, to declare deposits of township funds a preferred claim against assets of the bank. Bill dismissed. Affirmed.

*Alex. B. Simonson,* for plaintiff.

*Robert J. West,* for defendant.

SHARPE, J. The State Bank of Deckerville closed its doors and ceased to do business on January 5, 1927. On February 11th, the circuit court for the county of Sanilac, in chancery, appointed a receiver for said bank. The defendant Leon O. Wentworth is now acting as such. The plaintiff was treasurer of the township of Marion, in that county, in 1926 and 1927. During the latter part of December, 1926, and on January 3 and 4, 1927, he made deposits in the said bank to the amount of about $5,000. It is his claim that the officers of the bank, at the time his deposits were accepted, knew that it was insolvent, and in the bill of complaint here filed on December 3, 1928, he seeks to have these moneys declared to be held in trust and to be a preferred claim in the disbursements of the receiver.

The proofs were taken in open court, after which a decree was entered dismissing the bill. Plaintiff has appealed.

The acceptance of deposits by a bank is a representation of its solvency. Its customers have the right to expect that their checks will be honored when presented for payment. But, in order to do business, the bank must make loans of the moneys so deposited at an interest rate which will insure it a profit over and above its operating expenses. Applications for loans and the security offered therefor must be passed upon by its officials. There is a limitation on the amount of such loans by the reserve which the law requires to be maintained to meet withdrawals. That the reserve may fall below the requirement is not in itself proof of insolvency. The duty then devolves upon its officials to secure funds by the collection of the loans made, or from other sources, to meet the deficiency. If unable to do so, the bank is insolvent and may be closed by the State banking commissioner. But before such action is taken, in order that a general deposit shall be treated as a trust fund, it must appear that the officers had no reasonable hope or expectation that their efforts to place the bank on a sound financial standing would prove successful. It must also appear to them that it is reasonably apparent that the bank will be unable to meet its obligations as they mature, and that suspension of its business is inevitable; in other words, that it is hopelessly insolvent. Our attention has not been called to any decision of this court, nor have we been able to find one, in which the identical question here presented was considered, although the opinions in *Perley* v. *County of Muskegon,* 32 Mich. 132 (20 Am. Rep. 637), *Stone* v. *Jenison,* 111 Mich. 592 (36 L. R. A. 675),

and *Commissioner of Banking* v. *Chelsea Savings Bank,* 161 Mich. 691, may be read with profit. The rule stated is, we think, a general one and supported by the great weight of authority. See the cases reported in *Steele* v. *Commissioner of Banks,* 240 Mass. 394 (134 N. E. 401, 20 A. L. R. 1203), *Raynor* v. *Scandinavian-American Bank,* 122 Wash. 150 (210 Pac. 499, 25 A. L. R. 716), and *Washington Shoe Manfg. Co.* v. *Duke,* 126 Wash. 510 (218 Pac. 232, 37 A. L. R. 611), and the annotations appended thereto.

The question here presented is, as stated by plaintiff's counsel: "Was the State Bank of Deckerville, to the knowledge of its officers, hopelessly insolvent" at the time these deposits were made by plaintiff?

The trial court found that this bank had been reorganized in 1925 "and many thousands of dollars contributed to its capital." He also found that at the time it closed "its assets, as shown by its records, amounted to about $100,000 more than its liabilities." In the opinion filed he said:

"After the reorganization of the bank, the officers were of the opinion that the financial status of the bank was sound and that it would be able to carry on successfully, but, being a country bank, it had considerable money tied up in real estate and real estate mortgages. Real estate values were depreciating rapidly in the vicinity about that time; this was especially true of farm lands. It was difficult for the bank to realize upon its mortgages and the farmers, being in a financial slump, could not meet their obligations on notes to the bank. Notwithstanding these handicaps, the bank successfully met this condition and paid its obligations in the face of a steady withdrawal of its deposits until the very hour it closed its doors. The officers and men in charge fully expected to be able to meet the unusual

run on this bank, until word was received on the afternoon of January 5, 1927, that the officers of the bank were unable to realize on their assets to meet the emergency."

While the assets as shown were more than the liabilities, the withdrawals were such as to keep the reserve below the legal requirements. This condition existed for some little time before the bank closed, during which the officers were making earnest endeavors to dispose of securities. Fred J. Kemp, who had been cashier from September 1, 1925, until the bank closed, testified at length as to the efforts made to prevent a failure. On Monday, January 3d, he succeeded in getting a meeting of several of the bankers in Sanilac, Huron, and St. Clair counties, at Port Huron, to consider the situation. His purpose was to induce them to pay cash for certain of the securities of the Deckerville bank, and thus bring its reserve up to the requirement. He testified that most of the bankers present agreed to do so, but their agreement was contingent upon the action of certain parties in Detroit. He was able to dispose of about $25,000 of liberty bonds, and increased the reserve to that amount. He remained in Port Huron the next day, and on the 5th, when he got to the bank, he found that there had been a "gradual withdrawal" of deposits during his absence, but all checks presented were cashed until after the noon hour, when he received a telephone call from Detroit informing him that they would not receive the aid they expected from that source. Soon thereafter the doors of the bank were closed and the State banking department notified. Its suspension was in no way due to any unlawful act of its officers or board of directors. The evidence, con-

sidered as a whole, we think justified the following statement by the trial court:

"Under the state of facts as shown by the evidence in this case, it would appear to this court that where a bank continued to accept deposits and pay out deposits, even during a severe run on the bank, while the officers were fully expecting to meet the emergency, there cannot be said to be fraud in accepting deposits in the usual course of business before discovering the emergency could not be met by the bank."

We cannot but conclude that until noon of January 5th the officers were hopeful, in fact had much confidence, that the bank would receive such assistance from other banks and men of means that its reserve would be increased to the requisite amount and that the withdrawals would not necessitate the closing of the bank.

It follows that the deposits made by the plaintiff, not being special (*Perley* v. *County of Muskegon, supra*), were not received by the bank under such circumstances as to constitute a trust fund and give the plaintiff a preference over the other creditors of the bank as to them.

The decree is affirmed, with costs to appellee.

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

TAKACS *v.* FORD MOTOR CO.

MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—DECLARATIONS—HEARSAY—DIRECTED VERDICT.

In action against employer for negligent death of plaintiff's decedent, claimed to have been caused by gas inhaled when he opened furnace door, testimony as to decedent's declarations that he had inhaled gas and that it had made him sick, no part of *res gestæ*, was incompetent as hearsay, and in absence of competent evidence verdict was properly directed for defendant.

Error to Wayne; Webster (Clyde I.), J. Submitted April 9, 1931. (Docket No. 38, Calendar No. 35,470.) Decided June 1, 1931. Rehearing denied September 10, 1931.

Case by Julia Takacs, special administratrix of the estate of Stephen Takacs, deceased, against the Ford Motor Company, a Delaware corporation, for negligent injuries resulting in the death of plaintiff's decedent. Directed verdict and judgment for defendant. Plaintiff brings error. Affirmed.

*Joseph Fabian,* for plaintiff.

*Longley & Middleton,* for defendant.

FEAD, J. The action is for damages for negligent injuries resulting in the death of Stephen Takacs while an employee of the defendant. Decedent's work was at a furnace. It is claimed that when he opened the door of the furnace gas came out, he inhaled it, it caused him discomfort and illness over a considerable period of time, and finally resulted in

his death. Claim for workmen's compensation was made, but denied by the department of labor and industry for lack of proof of accidental injury in the employment.

There was evidence that on one occasion a "gas and smoke smell" came out of the furnace while decedent was taking iron out of it. The only testimony offered that he had inhaled gas and it had made him sick was that of his own declarations, no part of the *res gestæ*, and, therefore, incompetent as hearsay.

The medical evidence was that the cause of death was cerebral hemorrhage. There was no testimony that death was caused by the inhalation of gas nor that the furnace was negligently constructed, equipped, or operated.

The court properly directed the verdict and entered judgment for defendant. Affirmed.

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

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## VILLAGE OF DURAND *v.* LOVE.

1. MUNICIPAL CORPORATIONS—ORDINANCE ATTEMPTING TO CONFER ARBITRARY AUTHORITY VOID.

   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.

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Validity of municipal ordinance forbidding or restricting repairs of wooden building within fire limits, see annotation in 26 A. L. R. 1219; 56 A. L. R. 878.

2. SAME—REFERENCE TO PUBLIC RECORD.

While ordinance may refer to public record already established by lawful authority and become effective without publication of such record as part of ordinance, it may not at the same time establish a paper as a public record and also incorporate it as part of ordinance by reference merely.

3. SAME—PUBLICATION.

Village ordinance published without incorporating map defining fire limits was void for want of publication, where map was drafted solely for purpose of ordinance, and therefore was not public record to which reference would have been permissible.

Appeal from Shiawassee; Collins (Joseph H.), J. Submitted April 21, 1931. (Docket No. 23, Calendar No. 35,486.) Decided June 1, 1931.

Bill by Village of Durand, a municipal corporation, against B. P. Love to abate a nuisance. Bill dismissed. Plaintiff appeals. Affirmed.

*Seth B. Terry* (*George W. Cook,* of counsel), for plaintiff.

*Matthews, Hicks & Des Jardins,* for defendant.

FEAD, J. This is a bill to abate, as a nuisance, a wooden building moved from one location to another within the fire limits of the village of Durand, in violation of an ordinance. The ordinance declares such building a public nuisance and requires its abatement on order of the common council. The authority to adopt such ordinance is conferred by 1 Comp. Laws 1929, §§ 1549, 1667 *et seq.*

Section 8 of the ordinance deals with wooden buildings. Among other things, it declares it unlawful to remove such a building from one location to another within the fire limits "without first having obtained from the chairman of the building commit-

tee of said village (a permit) in writing so to do." No qualifications or standard of building proper to be removed nor conditions or restrictions on the discretion of the chairman to grant or deny such permits are provided, as they are in connection with permit in other sections of the ordinance. It thus appears to have been the intention, as it is the obvious construction, that the authority attempted to be conferred on the chairman by section 8 was unlimited and arbitrary. Section 8, therefore, is void. *Harrigan & Reid Co.* v. *Burton,* 224 Mich. 564 (33 A. L. R. 142).

It is further contended that the whole ordinance is invalid for want of publication. Section 1 reads:

"SEC. 1. That all that portion of the village of Durand described and shown on a certain map and blue print marked 'Exhibit A' now on file in the office of the clerk of said village the same being a part of this ordinance, be and the same is hereby designated and declared to be the fire limits of the village of Durand."

Exhibit A was not published with the ordinance. Counsel for plaintiff urges that its publication was not necessary because it was a public record to which the ordinance could refer without publication of it.

An ordinance sometimes may refer to a public record already established by lawful authority and become effective without publication of such record as part of the ordinance. But Exhibit A was drafted solely for the purpose of the ordinance and to define the fire limits, had no prior official approval and had no purpose, use, force, or official sanction except as it was given by and as part of the ordinance. An ordinance cannot at the same time establish a paper

as a public record and also incorporate it by reference as a previously established public record. Without publication of the map, the ordinance was not published in full, did not comply with the statute, and is void. *Thompson Scenic R. Co.* v. *McCabe,* 211 Mich. 133.

Decree dismissing the bill affirmed, with costs.

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

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HERBERT *v.* ROSEN.

1. JUSTICES OF PEACE—INFORMALITY OF PLEADING TOLERATED BUT NOT ENCOURAGED.

   While informality of pleading in justice's court is tolerated, it is not to be encouraged.

2. BILLS AND NOTES—PLEADING—FRAUD—EVIDENCE—NOTICE OF FALSITY OF REPRESENTATIONS NECESSARY.

   In action on promissory note, it was not error for court of common pleas to refuse to hear testimony of representations claimed by defendant to have been fraudulent, where notice of special defense did not allege falsity of said representations, and there was no motion to amend, or offer of proof.

Case-made from Wayne; Moll (Lester S.), J. Submitted April 21, 1931. (Docket No. 60, Calendar No. 35,548.) Decided June 1, 1931.

Assumpsit by Eugenia Herbert against Robert Rosen on a promissory note in court of common pleas. Judgment for plaintiff. Defendant appealed

to circuit court. Directed verdict and judgment for plaintiff. Defendant brings case-made. Affirmed.

*Orville H. Foster, Jr.,* for plaintiff.

*Harold N. Harris,* for defendant.

FEAD, J. Plaintiff had directed verdict in suit on a $400 promissory note given by defendant as part purchase price of office equipment and good will of the medical practice of Dr. Leo H. Herbert, deceased. In common pleas court, defendant, with the general issue, gave notice of special defense of fraud, alleging that in the negotiation of the sale it was represented to him that Dr. Herbert had had an income of over $1,200 per month from his practice, and that defendant, although he had ten years' experience and an enviable reputation and used his best efforts, was unable to earn more than $40 per month during six months' practice at the location.

On the trial, the court refused to receive testimony of representations of Dr. Herbert's income because the notice did not allege their falsity. Defendant made no motion to amend nor offer of proof.

Defendant relies on *Chicago Bldg. & Manfg. Co. v. Yell,* 129 Mich. 517, in which it was held not error to admit proof of fraud under an imperfect notice in justice's court. Informality of pleading in justice's court is tolerated, but it is not to be encouraged. It is not error for the court to refuse to hear testimony upon a claim which is not alleged to have merit, by pleading, motion to amend or offer of proof.

Judgment affirmed, with costs.

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

BARKOVITS *v.* VERES.

1. EXCHANGE OF PROPERTY—RESCISSION—FRAUD.
   Parties trading farm for city property, who knew at time of trade that some rooms of city property had been padlocked by Federal authorities, were properly denied rescission on ground of fraud.

2. INJUNCTION—BOND MAY BE REQUIRED.
   Bond may be ordered as condition of issuance of temporary injunction.

3. SAME—PARTY ASKING INJUNCTION MAY REFUSE IT ON CONDITION IMPOSED.
   Party asking injunction has option of taking it on condition imposed or of refusing it.

Appeal from Wayne; Hawley (Royal A.), J., presiding. Submitted April 15, 1931. (Docket No. 100, Calendar No. 35,574.) Decided June 1, 1931.

Bill by Arpad Barkovits and another against Mike Veres and another to enforce contract for exchange of property. Cross-bill by defendants for rescission of contract. Decree for plaintiffs. Defendants appeal. Modified and affirmed.

*Edward N. Barnard,* for appellants.

FEAD, J. March 12, 1929, plaintiffs traded the contract interest in a Detroit restaurant and rooming property and $2,325 cash to defendants for a contract interest in a farm. Defendants took possession of the city property and were to retain possession of the farm until about April 15th to hold

an auction sale. Defendants decided not to complete the trade and refused to give plaintiffs possession of the farm.

Plaintiffs brought this suit in equity to enforce possession. Defendants filed answer and cross-bill praying rescission for fraud in that some of the rooms in the city property had been padlocked by the Federal authorities under the prohibition law. The evidence was quite conclusive that defendants knew the situation when they traded and the court properly rejected their claim of fraud. Decree was entered for plaintiffs.

When the bill was filed, a temporary injunction was issued *ex parte* prohibiting defendants from interfering with plaintiffs taking possession of the farm. Defendants moved to dissolve the injunction and in turn asked for a temporary injunction restraining plaintiffs from interfering with defendants' possession of the farm. Upon hearing, the court ordered—

"that the defendants and cross-plaintiffs do forthwith pay to the clerk of this court the sum of $2,000 *received by them in the transaction,* to be held by the clerk pending the final disposition and decree in this cause;"

and further, that the temporary injunction be dissolved; that each retain possession of the property traded by him; that a temporary injunction issue restraining plaintiffs from disturbing defendants' possession of the farm; and that a temporary injunction issue restraining defendants from disturbing plaintiffs' possession of the city property.

In the final decree the court ordered that the $2,000 deposited by defendants be recognized as a cash bond to secure plaintiffs from damages they might suffer from dissolution of the original injunc-

tion and the return of defendants to possession of the farm property. No damages were proved, found, or assessed by the court. Plaintiffs filed no brief in support of this provision of the decree.

A bond may be ordered as a condition of the issuance of a temporary injunction. If ordered, the party asking injunction has the option of taking it on the condition imposed or of refusing it. The order here did not offer defendants such option nor apprise them that the cash deposit was intended or would be held as a bond on injunction. On the contrary, the language indicates that the deposit was required as a sort of tender on the rescission prayed by defendants.

We think the decree must be modified to order return of the deposit to defendants, and, as so modified, is affirmed, with costs of this court to defendants.

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

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## HAKE v. YOUNGS.

1. WITNESSES—OPINION EVIDENCE—LAYING FOUNDATION—MENTAL COMPETENCY.

   Unless lay witnesses give facts upon which their conclusions as to person's mental incompetency are based, their testimony is inadmissible, under objection.

2. EXCHANGE OF PROPERTY—RESCISSION—MENTAL COMPETENCY—BURDEN OF PROOF.

Finding of court below that plaintiff, seeking rescission of contract for exchange of property on ground of mental incompetency, had not met burden of proof, *held*, sustained by record.

3. CONTRACTS—RESCISSION—EQUITY—INADEQUACY OF CONSIDERATION.

Mere inadequacy of consideration, unless so gross as to shock the conscience of the court, is not ground for rescission.

4. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Motion for new trial on ground of newly-discovered evidence was properly denied, where some of it was merely cumulative, as to other there was lack of showing of diligence, or affidavits failed to state specifically anticipated testimony.

Appeal from Wayne; McMahon (Maurice H.), J. Submitted April 8, 1931. (Docket No. 24, Calendar No. 35,417.) Decided June 1, 1931.

Bill by Harry Hake, by next friend, against Bert Youngs and another to set aside an exchange of real estate on the ground of plaintiff's mental incompetency. Bill dismissed. Plaintiff appeals. Remanded to take further proofs.

*Yerkes, Goddard, McClintock & Shreve,* for plaintiff.

*Albert McClatchey* and *Harry J. Weber,* for defendants.

FEAD, J. This is a bill to set aside, for plaintiff's claimed mental incompetency, a trade of his 80-acre farm in Wayne county and a five-year lease on another 40 acres with option to purchase at $10,000, for defendants' property in Ypsilanti.

Plaintiff is 61 years old. He likes to live in a wagon instead of a house. For about nine years he

worked in Ypsilanti, housecleaning, and used defendants' property for headquarters for his wagon. Periodically for several years he made offers to defendant Youngs to purchase part of the city property or trade 40 acres of his farm for it. At times plaintiff enlisted the aid of one Griffin, a friend of his, who had a second-hand store on the premises, to help him in securing a trade. Their efforts were unsuccessful. The store was renting at $600 per year, the rest of the property was vacant. The value was not satisfactorily shown, but apparently runs from $12,000 to $20,000. It is under mortgage of $1,200. Youngs said he had refused an offer of a trade at $35,000. Plaintiff thought it was worth 40 acres of his land.

During plaintiff's sojourn in Ypsilanti, George Hake, his brother, and next friend in this suit, managed the farm, securing tenants and collecting the rent of $400 per year. About three years prior to the trade, plaintiff moved to the farm and since has managed it himself and continued to live in his wagon. He also at times, through Griffin, has tried to make a trade with Youngs.

On February 4, 1929, plaintiff gave one McKinney a 30-day option to purchase the farm at $500 per acre. Several witnesses testified it was worth that price. In March, plaintiff told Griffin to offer defendant 60 acres of the farm on a trade. Griffin communicated with Youngs, they visited the farm on March 5th, and, after negotiations, the trade was agreed upon as above stated. Plaintiff told Youngs of the option to McKinney expiring the next day. Youngs talked with McKinney and said he (Youngs) would honor the option if sale was made.

Youngs, Griffin, and plaintiff went to an attorney at Ypsilanti, who drafted deeds for them according

to their instructions. Youngs could not find his old deeds and obtained the descriptions of the property, which were by metes and bounds, from tax receipts. Plaintiff's deed to defendants and the lease were executed and left with the attorney to be delivered when he should check up the descriptions of defendants' land from the records. He later checked them, and, on March 7th, defendants executed their deed to plaintiff and received from the attorney and recorded plaintiff's deed to them.

March 6th, McKinney claimed to have a purchaser for the farm. He went to the attorney's office and there saw plaintiff's conveyances to defendants. Nevertheless (and he does not explain why) he took a contract of purchase of the farm from plaintiff to himself and another. No money was paid down nor the name of the real purchaser disclosed. He suggested to plaintiff that his trade to defendants be rescinded. Plaintiff went to Ypsilanti on March 7th, found that his deed to defendants had been delivered and Youngs had gone to Detroit to get it recorded. When Youngs returned from Detroit he refused to trade back.

Plaintiff and McKinney talked with George Hake, told him of the trade, and plaintiff asked him to begin suit to set aside the deeds. March 20th, proceedings were commenced in probate court to declare plaintiff mentally incompetent, and an order to that effect was entered later.

The testimony of plaintiff's mental condition was both medical and lay. Four doctors examined him after the trade. Two testified each way. Several reputable lay witnesses gave opinion that plaintiff was mentally competent. McKinney thought he was when he executed the option. Several witnesses thought plaintiff was incompetent. Some testified that plaintiff had the reputation of being incom-

petent. Most of their testimony would have been inadmissible under objection because they did not give facts upon which they based their conclusions. Plaintiff had had a credit of about $1,000 at a bank and his brothers had asked the banker not to permit him to withdraw money without their consent. However, they took no action before the trade to have him declared mentally incompetent. George Hake said plaintiff sometimes bought trinkets, such as cheap watches and jewelry. Some of the witnesses said he talked childishly. Aside from those assertions and plaintiff's inclination to live in a wagon, the record is practically devoid of facts indicating departure from the normal.

Plaintiff was sworn as a witness. The record of his testimony shows that his answers were as direct and intelligent as those of any other witness subjected to a long examination. The circuit judge was impressed with his competency from personal observation, and the record fully sustains his finding that plaintiff had not met the burden of proof of mental incompetency.

Plaintiff further claimed Youngs represented that the trade was purely tentative and he had ten days in which to accept or reject it. Plaintiff had been engaged in other real estate transactions involving deeds and abstracts and the testimony is convincing that the instruments as drafted by the attorney were those desired by the parties, and they knew their effect.

The testimony is persuasive that plaintiff was extremely desirous of obtaining the Youngs property, that he had little faith in McKinney making a sale of the farm, and that he made the exchange freely and knowingly.

From the testimony, there appears to be considerable discrepancy in the values of the properties ex-

changed. Had defendant urged or induced plaintiff to make the exchange, the difference in values would be more important. Mere inadequacy of consideration, unless it be so gross as to shock the conscience of the court, is not ground for rescission. *Albright* v. *Stockhill,* 208 Mich. 468. Values were not discussed by the parties nor representations made. As plaintiff for years had been attempting to make the trade, was fully acquainted with the property, and was mentally competent to judge its worth to him, the difference in values does not justify relief to him.

Plaintiff made motion for rehearing on the ground of newly-discovered evidence. The motion was not sufficient under well-settled rules. Some of the new evidence claimed was merely cumulative. As to the balance, there was lack of showing of diligence in obtaining the witnesses or the affidavits failed to state specifically the anticipated testimony so its value could be appraised.

In one respect, however, the motion needs attention. It is alleged by plaintiff's counsel that, on checking the records and the plat of the Ypsilanti property, which defendants had agreed to convey in the trade, they found that part of it had been omitted from defendants' deed to plaintiff and another part was not owned by defendants. There is no denial of this claim in the record.

The cause will be remanded to the circuit court, with directions to take proofs on such claimed deficiencies of defendants' deed to plaintiff, and to report the same to this court with the opinion of the chancellor thereon.

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

REICHERT *v.* MIDLAND COUNTY SAVINGS BANK.

*In re* GALLAGHER.

1. BANKS AND BANKING—INSOLVENCY—TRUSTS—PREFERRED CLAIM.
   Deposit in bank for purpose of furthering transaction between depositor and another becomes impressed with trust, entitling depositor to preference over general creditors where bank becomes insolvent.

2. SAME—ASSIGNMENTS—DRAFTS.
   Drafts drawn by bank but not presented before it suspended operations did not deplete its balance in drawee bank, because they did not constitute assignment of any part of it (2 Comp. Laws 1929, § 9376).

3. SAME—DEPOSIT IN SPECIFIC TRUST—NOT CONVERTIBLE INTO GENERAL DEPOSIT WITHOUT DEPOSITOR'S CONSENT.
   Bank having received deposit in specific trust for purpose of furthering transaction between depositor and another could not lawfully convert it into general one without consent of depositor.

4. SAME—DEPOSIT IN SPECIFIC TRUST PREFERRED CLAIM.
   Deposit received by bank in specific trust, which was identified and came intact into hands of bank's receiver, is preferred claim.

Appeal from Midland; Houghton (Samuel G.), J., presiding. Submitted April 22, 1931. (Docket No. 42, Calendar No. 35,566.) Decided June 1, 1931.

In receivership proceedings of the Midland County Savings Bank, a corporation, R. W. Gallagher, trustee, petitioned for the allowance of a preferred claim. Decree for claimant. Defendant appeals. Affirmed.

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Trust or preference in respect of money placed in bank for purpose of transaction with third person where bank subsequently becomes insolvent, see annotation in 31 A. L. R. 472; 39 A. L. R. 930; 56 A. L. R. 386; 60 A. L. R. 336.

*Gilbert W. Hand* (*Clark & Henry,* of counsel), for appellant.

*F. H. Dodds, Maurice F. Hanning,* and *Holliday, Grossman & McAfee,* for appellee.

FEAD, J. In March, 1929, J. C. Arthurs contracted to drill an oil well for Sias Oil Development Company, payment therefor to be made in five installments, as the work progressed. April 16th, claimant Gallagher, trustee, mailed defendant bank a $11,125 check, the proceeds to be held by the bank in escrow and to be paid Arthurs as installments became due under his contract. April 19th, the bank acknowledged receipt of the check and stated:

"The money is being placed in escrow in the form of five certificates of deposit from R. W. Gallagher, trustee, to J. C. Arthurs (as per contract), payable as follows," etc.

The bank held the certificates, and, on April 29th, sent two of them to Arthurs. They were not cashed because, on April 30th, defendant bank suspended operations and later a receiver was appointed for it.

It was conceded that, on receiving the check, the bank deposited it with its correspondent, First National Bank of Bay City, and had credit therefor; and that from April 16th to the closing of defendant bank the credit of the latter on the books of the former was always greater than the amount of the check. However, by reason of drafts written, but not presented, the books of defendant bank showed its credit at the First National Bank reduced below that amount on April 27th and 30th. The receiver took custody and control of the account and received an amount in excess of the Gallagher check, either by way of cash or credit on a note owing by defend-

ant bank to the First National Bank, charged by the latter to the account after the receiver was appointed.

The question is whether the deposit is a preferred claim against the receiver.

The general rule, as stated in 31 A. L. R. 473, is:

"It may be stated as a general rule that where a deposit is made in a bank with the distinct understanding that it is to be held by the bank for the purpose of furthering a transaction between the depositor and a third person, or where it is made under such circumstances as give rise to a necessary implication that it is made for such a purpose, the deposit becomes impressed with a trust which entitles the depositor to a preference over the general creditors of the bank where it becomes insolvent while holding the deposit."

See, also, 39 A. L. R. 930; 57 A. L. R. 386; 60 A. L. R. 336.

The drafts drawn by defendant bank, but not presented before it suspended operations, did not deplete its balance with the First National Bank below the amount of Gallagher's check, because they did not constitute assignment of any part of it. *Sunderlin* v. *Mecosta County Savings Bank,* 116 Mich. 281; 2 Comp. Laws 1929, § 9376.

As the fund deposited was traced, identified, and came intact into the hands of the receiver, it was a preferred claim, unless the parties intended it otherwise than in the nature of a special deposit or as a trust. *Board of Fire & Water Com'rs* v. *Wilkinson,* 119 Mich. 655 (44 L. R. A. 493); *Sherwood* v. *Central Mich. Savings Bank,* 103 Mich. 109; *Gillen* v. *Wakefield State Bank,* 246 Mich. 158; *American Employers Ins. Co.* v. *Maynard,* 247 Mich. 638; *Glerum* v. *Spencer,* 251 Mich. 163.

Appellant contends that the parties intended the deposit as general, not in trust, but as creating merely the relation of creditor and debtor, because (a) it was not technically an escrow, (b) the check was deposited in the correspondent bank subject to draft, and (c) defendant bank wrote negotiable certificates of deposit for it.

In calling the deposit an escrow, the parties were not speaking technically nor concerned with the niceties of legal terminology and distinctions. They were using a common word, as it is commonly employed by laymen in commercial transactions, to characterize the deposit as of a special nature in which the depositee was a stakeholder or trustee.

The parties to a special deposit in a bank ordinarily do not contemplate that the bank shall set aside specific currency to be held in its vault, but that it will collect outside checks in the usual manner through correspondents upon whose books they have credit. The practice here followed was usual, showed no intention on the part of the bank to change its agreement and convert the deposit into a general one; nor, having received it in specific trust, could it lawfully have so converted it without consent of the depositor.

The writing of the certificates of deposit was for convenience in bookkeeping. They were not issued as negotiable paper, as they were not delivered to the depositor. The fact that the bank informed Gallagher that the account was so handled did not evidence an intention to modify the contemporaneous specific agreement that the deposit was in trust; nor did it have such legal effect. *Hudspeth* v. *Union Trust & Savings Bank,* 196 Iowa, 706 (195 N. W. 378, 31 A. L. R. 466); *Shopert* v. *Indiana Nat. Bank,* 41 Ind. App. 474 (83 N. E. 515); *Ander-*

*son* v. *Pacific Bank*, 112 Cal. 598 (44 Pac. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228); *Woodhouse* v. *Crandall*, 197 Ill. 104 (64 N. E. 292, 58 L. R. A. 385); *Blummer* v. *Scandinavian American State Bank of Badger*, 169 Minn. 89 (210 N. W. 865); *State* v. *State Bank of Wahoo*, 42 Neb. 896 (61 N. W. 252).

Judgment that the claim is preferred is affirmed, with costs.

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

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JACOBSON *v.* NEWMAN.

1. GARNISHMENT—ASSIGNMENT OF CLAIM AGAINST GARNISHEE—NOTICE.

   To save himself from double liability, garnishee was required to give notice of assignment of claim against him, although he received notice after service of garnishee summons.

2. SAME.

   Where garnishee was notified of assignment of judgment debtor's claim against him after he had been served with summons in garnishment, his payment to judgment creditor's attorney without judgment in garnishment against him is no defense to action by assignee of judgment debtor's claim against him (3 Comp. Laws 1929, § 16209).

3. ASSIGNMENT FOR BENEFIT OF CREDITORS.

   Specific assignment for benefit of one or limited number of creditors is valid.

4. SAME—WHEN ASSIGNMENT MAY BE ATTACKED.
Assignment for benefit of certain creditors may be attacked only as fraud upon creditors and at suit of creditors.

Error to Wayne; Richter (Theodore J.), J. Submitted April 28, 1931. (Docket No. 126, Calendar No. 35,185.) Decided June 1, 1931.

Assumpsit by Harry Jacobson and others, as assignees, against Aaron Newman upon a book account. Judgment for plaintiffs. Defendant brings error. Affirmed.

*Grosner & Burak,* for plaintiffs.

*Benjamin B. Stepsay* and *Aaron Droock,* for defendant.

FEAD, J. Defendant owed M. Fiol, of New York, $210.75. Defendant's brother Meyer sued Fiol in justice's court in Detroit and garnisheed defendant. Five days later, defendant was served with notice that Fiol's claim against him had been assigned to plaintiff, who resides in New York. Two days later he filed disclosure admitting the indebtedness and gave notice that plaintiff claimed the fund. Meyer took judgment against Fiol, and, thereafter, without judgment in garnishment against defendant, the latter paid Meyer's attorney the amount. The assignment had been executed some months before. This suit is by the assignee on the original debt.

Defendant pleaded the garnishment in bar. To save himself from double liability he was required to give notice of the assignment, although received by him after service of garnishee summons. *Tabor* v. *VanVranken,* 39 Mich. 793; *Metz Manfg. Co.* v. *Holbeck,* 247 Mich. 241. For several reasons, de-

fendant's payment to Meyer's attorney did not constitute a defense to action by the assignee. *Stone* v. *Dowling,* 119 Mich. 476; *Button* v. *Trader,* 75 Mich. 295; *Union Bank* v. *Hanish,* 97 Mich. 404; 3 Comp. Laws 1929, § 16209.

Defendant claims the assignment was invalid because not in conformity with the laws of New York governing general assignments for the benefit of creditors. Fiol compromised with certain of his creditors and assigned his book accounts in trust for their benefit. He retained some property and had other creditors. A "specific assignment for the benefit of one or a limited number of creditors" is valid. *Royer Wheel Co.* v. *Fielding,* 101 N. Y. 504 (5 N. E. 431); *Dodge* v. *McKechnie,* 156 N. Y. 514 (51 N. E. 268); *Warner* v. *Littlefield,* 89 Mich. 329.

Moreover, the assignment may be attacked only as a fraud upon creditors and at suit of creditors. *Knower* v. *Central National Bank,* 124 N. Y. 552 (27 N. E. 247, 21 Am. St. Rep. 700); *Butler* v. *Wendell,* 57 Mich. 62 (58 Am. Rep. 329).

The other assignments of error discussed in defendant's brief are without merit and need no elaboration. Those not discussed are not considered.

Judgment affirmed, with costs.

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

JAERLING *v.* LONGSDORF.

1. REFORMATION OF INSTRUMENTS—LAND CONTRACTS—MUTUAL MISTAKE.

Land contract was properly reformed to correct description in name of subdivision, where there was no question as to property intended to be conveyed, and mistake was mutual clerical error.

2. VENDOR AND PURCHASER—RESCISSION.

Vendee is not entitled to rescission of contract for purchase of several lots because vendors deeded one lot to another, where at time of suit they had reacquired title.

3. APPEAL AND ERROR—PLEADING—AMENDMENT.

Vendors' cross-bill praying only for reformation of contract is considered amended, on appeal, to support decree for payments due, where amount thereof is not disputed.

Appeal from Wayne; Lamb (Fred. S.), J., presiding. Submitted April 14, 1931. (Docket No. 72, Calendar No. 34,019.) Decided June 1, 1931.

Bill by John P. Jaerling against Curtis H. Longsdorf and others to rescind a land contract. Decree for defendants on cross-bill for reformation of the contract. Plaintiff appeals. Affirmed.

*J. Lynn Fewlass,* for plaintiff.

*Ralph B. Clark,* for defendants.

FEAD, J. This is a bill by plaintiff, as vendee, for rescission of a land contract, and cross-bill by defendants for its reformation.

The contract described the premises as:

"Lots Nos. 235, 222, 228, 243, 234, Pennsylvania Park Subdivision of part of the N. W. ¼ of section 6, T. 4 S., R. 11 E., village of Riverview, Monguagon township, Wayne county, Mich."

The description is correct except that the recorded name of the subdivision is "Clarence W. Carkeek's Pennsylvania Park Subdivision." There was no question of the identity of the property. With the name of the subdivision corrected, the contract would describe the property defendants intended to sell and plaintiff intended to buy. The mistake was a mutual clerical error. The court properly reformed the contract to correct the description.

After the contract was made, defendants deeded one of the lots to a third person. The conditions were not shown. When plaintiff discovered it he made no further payments, but did not attempt rescission. Defendants brought suit in justice's court for recovery of installments due, had reacquired title, offered there to hand the deed to plaintiff, and had title when this suit was commenced. Plaintiff made no case for rescission.

Defendants had decree for reformation and also for a sum due on the contract, although the cross-bill did not pray for a money judgment. The contract showed the payments made and there is no claim that the amount decreed is not correct. The cross-bill will be considered as amended to support the decree, and it is affirmed, with costs.

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

## CITY OF ALLEGAN *v.* IOSCO LAND CO.

1. EMINENT DOMAIN—CONSTITUTIONAL LAW—STATUTES—MUNICIPAL CORPORATIONS.

   Authority of cities to "acquire" public utilities under article 8, § 23, of the Constitution, does not include power of condemnation, but such power must be found in statutes.

2. SAME—LEGISLATURE HAS POWER TO GRANT RIGHT OF CONDEMNATION TO CITIES.

   Constitution left unimpaired power of legislature to grant or withhold from cities power of condemnation, although constitutional power of condemnation was refused (articles 8, 13).

3. MUNICIPAL CORPORATIONS—RIGHT OF CITIES TO ACQUIRE WATER POWER.

   Constitutional right of cities to acquire public utilities outside corporate limits includes water power with usual accompaniment of floodage (article 8, § 23).

4. EMINENT DOMAIN—MUNICIPAL CORPORATIONS—AMENDMENT OF CHARTER.

   Amendment of city charter under home rule act (1 Comp. Laws 1929, § 2236, subd. [3]), authorizing city to acquire by purchase or condemnation public utility by three-fifths vote of electors is not invalid because electors were not required to vote specifically on whether utility should be acquired by condemnation.

5. MUNICIPAL CORPORATIONS—AMENDMENT OF CHARTER.

   Piecemeal amendments of existing city charters, without previous revision or incorporating mandatory provisions of home rule act are now permissible.

6. EMINENT DOMAIN—MUNICIPAL CORPORATIONS—STATUTES—REPEAL BY IMPLICATION.

   Authority granted city to acquire public utility and water power rights within corporate limits of city (1 Comp. Laws 1929, § 2271) by purchase or condemnation does not modify earlier section (2236) authorizing establishment of water power outside city; there being no repugnancy.

7. SAME—PERMISSION OF STATE HIGHWAY COMMISSIONER TO FLOOD LAND SHOULD BE ALLEGED.

In view of mandatory character of 1 Comp. Laws 1929, § 4546, municipality seeking to condemn water power rights for public utility must be legally authorized to make improvement, and therefore its petition for condemnation should have alleged that permission of State highway commissioner had been obtained.

8. SAME—SINGLE CONDEMNATION PROCEEDINGS MUST COVER ALL LANDS SOUGHT.

Single proceeding must cover all lands sought to be condemned by city for public utility (1 Comp. Laws 1929, § 3784 *et seq.*)

9. APPEAL AND ERROR—EMINENT DOMAIN—CONSOLIDATION OF SEVERAL PROCEEDINGS.

Consolidation of several proceedings by city to condemn land for public utility may not be had in Supreme Court, where some of parties involved are not before court.

Certiorari to Allegan; Miles (Fred T.), J. Submitted April 10, 1931. (Docket No. 63, Calendar No. 35,395.) Decided June 1, 1931.

Condemnation proceedings by City of Allegan, a municipal corporation, against Iosco Land Company, a corporation, and others to acquire land and water rights for a municipal hydroelectric plant. From order denying motion to quash petition, defendants bring certiorari. Reversed.

*Leo W. Hoffman, Clare E. Hoffman,* and *Perle L. Fouch,* City Attorney, for plaintiff.

*Walter D. Kline, E. W. Stone,* and *Bernard J. Onen,* for defendants.

FEAD, J. This is review of an order denying motion to quash a petition for condemnation of certain lands lying outside the city limits of Allegan, desired by plaintiff for the construction of a municipal

hydroelectric plant to furnish light and power to the inhabitants of the city. The project includes the building of a dam and flowage of over 1,500 acres of land. Other phases of the controversy have been before this court in *Consumers Power Co.* v. *City of Allegan,* 248 Mich. 34.

Plaintiff relies for its authority to condemn on certain statutes and charter provisions, and particularly on the Constitution, Art. 8, § 23:

"SEC. 23. Subject to the provisions of this Constitution, any city or village may acquire, own and operate either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof; and may also sell and deliver water, heat, power and light without its corporate limits to an amount not to exceed twenty-five per cent. of that furnished by it within the corporate limits; and may operate transportation lines without the municipality within such limits as may be prescribed by law: *Provided,* That the right to own or operate transportation facilities shall not extend to any city or village of less than twenty-five thousand inhabitants."

Defendants contend that such section gives cities power only to purchase utilities, and that there is an implied constitutional prohibition against the legislature granting them authority to condemn as to outside water power and lands, because, in the constitutional convention, a proposal was presented to give cities power to condemn for such specific purposes and it was defeated after spirited discussion. 2 Debates, Const. Con., pp. 869–871, 1208–1215, 1350–1356.

In the convention, the subject of the authority to be given cities under section 23 and the subject of

eminent domain, article 13, were closely related. 1 Debates, Const. Con., pp. 357, 731; 2 *Id.*, p. 1350, Mr. Stewart. The rejection of the proposal, as well as some of the discussion (2 Debates, Const. Con., p. 869, Mr. Thew), indicates that the grant of power in section 23 to cities to "acquire" public utilities was not understood or intended to include the power of condemnation. Had it been the intention to give cities constitutional power of eminent domain, it would have been provided in article 13, or definitely expressed in article 8. We are of the opinion that the authority to "acquire" in article 8, § 23, does not include power of condemnation, and that such power in plaintiff must be found in the statutes.

Despite the defeat in the convention of the proposal to give cities such right of condemnation, no relevant restriction appears in the Constitution on the sovereign power of eminent domain vested in the legislature. The result is that, although the convention refused to give cities a constitutional power of condemnation, which would be beyond control of the legislature, it left unimpaired the power of the legislature to grant or withhold it. There were too many good lawyers in the convention to justify an implication that the obvious effect of what the convention did was not intended.

In these respects, the constitutional debates illuminate, but do not change, the natural construction of the section as adopted.

Defendants contend that article 8, § 23, was intended to permit cities to establish steam plants or small works outside their corporate limits, but was not designed to authorize flowage of land. The language suggests no such limitation. Floodage is a usual accompaniment of water power. The right to acquire utilities outside the city would be of little

worth if it did not include water power, the preferred means of generating electric current, where feasible. The constitutional debates on the subject revolved around power plants then already established for lighting purposes by cities and villages outside their limits. As proposed to the convention, this section did not contain the clause "either within or without its corporate limits," and, in the discussion upon the omission, which was cured by amendment, 2 Debates, Const. Con., p. 824, the necessity for such clause was emphasized to provide for the acquisition of such outside water power. 2 Debates, Const. Con., p. 822 *et seq.* Defendants' contention is not tenable.

Acting under the home rule act, 1 Comp. Laws 1929, chap. 49, plaintiff adopted an amendment to its charter substantially as permitted by 1 Comp. Laws 1929, § 2236, subd. (3):

"SEC. 4-f. Each city may in its charter provide: * * * Water, light, heat, power, transportation; referendum. (3) For the purchase and condemnation of private property for any public use or purpose within the scope of its powers; also for the acquirement, ownership, establishment, construction and operation, either within or without its corporate limits, of public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof, for domestic, commercial and municipal purposes; and for the sale and delivery of water, heat, power and light without its corporate limits to an amount not to exceed twenty-five per centum of that furnished by it within its corporate limits for like purposes; and for the operation of transportation lines without the municipality and within ten miles from its corporate limits: *Provided,* That the right to own or operate such transportation facilities shall not extend to any

city of less than twenty-five thousand inhabitants according to the last preceding United States census, or local census taken by authority of a resolution of the legislative body of such city. The acquirement of any such utility together with all properties, franchises, and rights necessary for its establishment, ownership, construction, operation, improvement, extension and maintenance, whether such properties, franchises and rights are situated within or without the corporate limits of such city, may be either by purchase or condemnation. If by condemnation, the provisions of act number one hundred forty-nine of the public acts of Michigan, approved March twenty-five, nineteen hundred eleven, entitled, 'An act to provide for the condemnation by State agencies and public corporations of private property for the use or benefit of the public and to define the terms "public corporations," "State agencies," and "private property," as used herein,' or such other appropriate provisions therefor as exist or shall be made by law, may be adopted and used for the purpose of instituting and prosecuting such condemnation proceedings: *Provided, however,* That no such public utility shall be so acquired unless the proposition to do so shall have first received the affirmative note of three-fifths of the electors of such city voting thereon, at a regular or special municipal election."

The essential difference between the statute and the charter is that, instead of the last proviso, the city adopted the following:

"But no such public utility shall be acquired unless authorized by a three-fifths vote of the electors voting thereon at a regular or special election."

Defendants contend that under the rule of "last antecedent" the word "so" in the last proviso of the statute refers only to condemnation, so that the

section requires the electors to vote specifically upon whether a utility shall be acquired by condemnation; and the charter provision is invalid because it omitted the word "so."

Under article 8, § 25, of the Constitution, a three-fifths vote of the electors is necessary to authorize a city to "acquire" a utility. If that means that the legislature could authorize its condemnation without such vote, an inadmissible construction, the proviso might be said to have been inserted to make the condition uniform as to purchase and condemnation. Both purchase and condemnation are so commonly employed in acquiring property for public improvements that it would be difficult to imagine that the legislature intended to require the electors to approve a precise method of acquisition rather than to grant the council power to acquire, leaving to it the method which may be advisable or necessary under the circumstances. The more sensible construction is that the legislature incorporated the constitutional mandate in the statute in order to require charters to clearly express the essential of exercise of the power of acquisition, not merely its incidents, purchase or condemnation. *Consumers Power Co.* v. *City of Allegan, supra.*

Furthermore, the structure of section 4-f(3) as a whole quite conclusively demonstrates that the legislature did not have in mind the precise rule of "antecedent subjects" in drafting the statute. Such rule would be equally applicable to the preceding proviso regarding transportation, and, if there applied, would result in the unconstitutional permission to a city to acquire a transportation utility wholly within its corporate limits, although the city be under 25,000 population.

We think the charter amendment as adopted by plaintiff is within the statutory authorization.

Piecemeal amendments of existing city charters, without previous revision or incorporating the mandatory provisions of the home rule act, are now permissible. *Common Council of Detroit* v. *Engel,* 187 Mich. 88.

Section 35 of the home rule act, 1 Comp. Laws 1929, § 2271, provides that any city may acquire by purchase or condemnation, when authorized by the electors, "any public utility and any water power and water rights for the use of such city within the corporate limits of said city." Defendants contend that this section, being later in the act than section 2236 and being specific, modifies the earlier and general section and constitutes an implied prohibition against establishment of water power outside the city. There is no repugnancy. Section 35 is a general grant of the power described in it to cities regardless of their charters. Section 4-f(3) grants cities the right to exercise the power described in it if they so provide by charter.

1 Comp. Laws 1929, § 4546, provides:

"Hereafter, no person, firm, corporation, or municipality shall artificially alter the stage of water or widen or deepen the channel of any watercourse, except drains established by public authority, without first securing a legal permit therefor from the commissioner or commissioners having jurisdiction over all the bridges and culverts on or over said watercourse, or the portion thereof affected by such proposed change."

It is claimed by defendants, but seems to be doubted by plaintiff, that the proposed improvement is within this statute and requires a permit from the State highway commissioner. Plaintiff has not alleged in its petition that it has such permit. In view of the mandatory character of the statute, section 4546, and the consideration that, before a prop-

erty owner may be required to defend against condemnation proceedings, the municipality should be legally authorized to make the improvement, we think the permission of the State highway commissioner, if necessary, should have been alleged in the petition. *Clay* v. *Pennoyer Creek Improvement Co.*, 34 Mich. 204; *Fox* v. *Holcomb*, 34 Mich. 298; *contra, Denver Power & Irrigation Co.* v. *Railroad Co.*, 30 Colo. 204 (69 Pac. 568, 60 L. R. A. 383). Under 1 Comp. Laws 1929, § 3795, the petition may be amended, but we cannot do so because the record does not show the fact for an amendment.

This proceeding covers only part of the land sought for the project. Other condemnation proceedings were begun for other portions. The action is under Act No. 124, Pub. Acts 1883, 1 Comp. Laws 1929, § 3784 *et seq.*, is indivisible, and a single proceeding must cover all the lands sought to be condemned. *Common Council of Houghton* v. *Huron Copper Mining Co.*, 57 Mich. 547; *Kundinger* v. *City of Saginaw*, 59 Mich. 355; *Marquette & Southeastern R. Co.* v. *Longyear*, 133 Mich. 94.

Plaintiff has moved in this court for consolidation of the several proceedings. The others are not here. It also appears from affidavits that all or some of the others have been dismissed and new condemnation proceedings begun. We cannot order consolidation.

In view of the state of the record, the order is reversed, and petition quashed, with costs.

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

## BLISS PETROLEUM CO. *v.* MCNALLY.

1. CORPORATIONS—LIABILITY OF DIRECTORS SELLING OWN PROPERTY TO CORPORATION—MEASURE OF DAMAGES.
   Where directors sell their own property to corporation through their own action or influence as officers, and corporation does not repudiate purchase, they are liable, not upon theory of secret profit, but for fraud or excessive price, and measure of damages is difference between price paid by corporation and fair value of property.

2. SAME—DIRECTORS OWE CORPORATION GOOD FAITH AND HONEST SERVICE.
   Directors owe corporation good faith and honest service.

3. SAME—DIRECTORS ACT IN TRUST CAPACITY.
   If directors undertake to acquire property for corporation, they act in trust capacity in acquiring it, and express direction by corporation to them to purchase is not requisite of liability in this respect.

4. SAME—MINES AND MINERALS—DUTY OF DIRECTORS.
   That directors of oil corporation have right to deal personally in oil leases does not modify their duties as directors when their transactions touch corporation itself.

5. SAME—OBLIGATIONS AND LIABILITIES OF DIRECTORS TO CORPORATION ARISE OUT OF TRUST DUTIES.
   Obligations and liabilities of directors in purchasing property for, or selling their own property to, corporation, arise out of their trust duties in dealing fairly with corporation.

6. SAME—RULE OF SECRET PROFIT—MEASURE OF DAMAGES.
   If directors purchase personally, with intention to sell to corporation, or while purporting to act as corporation officers, whole benefit inures to corporation under rule of secret profit, and they are liable for price paid by corporation less cost to them.

7. SAME—SECRET PROFIT—QUESTION FOR JURY.
   In action by oil corporation against directors for secret profits on oil leases purchased by them and sold to corporation, testimony *held*, to present issues of fact for jury.

8. SAME—DECLARATION—SUFFICIENCY.

While declaration, in action by corporation against directors for secret profits, was not quite specific, in view of distinction between directors' liability for secret profits and their liability for fraud or excessive price, it is *held,* sufficient, in absence of motion for greater particularity.

9. SAME—RESOLUTIONS AUTHORIZING CORPORATION TO SUE DIRECTORS.

Resolutions authorizing corporation to sue directors for secret profits are immaterial, where defendants do not deny authority of corporation to sue.

Error to Genesee; Parker (James S.), J. Submitted April 16, 1931. (Docket No. 116, Calendar No. 34,921.) Decided June 1, 1931.

Case by Bliss Petroleum Company, a Michigan corporation, against Thomas McNally and others as its directors to recover alleged secret profits in corporate transactions. Judgment for plaintiff. Defendants bring error. Reversed, and new trial ordered.

*Cook, Sheppard & Stipes,* for plaintiff.

*Frank A. Rockwith* (*Guy W. Selby* and *Robert J. Curry,* of counsel), for defendants.

FEAD, J. Plaintiff is a Michigan corporation, organized in September, 1925. In 1926, the directors were defendants, E. C. Vandewalker, now dead, P. T. Slattery, and C. H. Bliss. Defendant Wilson was director, secretary, and manager of the company.

August 14, 1926, Wilson, acting for himself, the other defendants, Slattery, and Vandewalker, secured an oil and gas lease from Herman Oehring and wife, took it in the name of John Hopkins, now dead, and, on August 18th, at a regular meeting of

the board of directors at which only defendants, Slattery, and Vandewalker were present, sold it to the corporation for 3,600 shares of stock, worth $1 per share.

November 1, 1926, Wilson, acting as before, obtained an oil and gas lease from Ed Engel, also running to Hopkins, and, at a regular meeting of the board of directors, at which only defendants and Slattery were present, sold it to the corporation for $7,200.

The leases cost defendants $1 each, besides some expense in procuring them. The corporation has not rescinded the purchases. It has drilled on the premises and both leases have producing wells. There is no claim of actual money loss to plaintiff.

This action is to recover from defendants the value of the stock and money paid for the leases, on the theory that they constituted secret profits of directors in corporate transactions. The court directed a verdict for plaintiff for such amount.

Counsel do not disagree upon the general rules governing the duties of fidelity, fairness, and frankness owing to a corporation by directors, their liability for secret profits, and their right, under proper circumstances, to sell to the corporation. However, the mere recognition of these general rules is not sufficient. There is need to be specific. The difference between damages recoverable for improper sale and as secret profits is not always clear, and it appears to us that the testimony here demanded a sharper discrimination between the private rights and official obligations of directors than seems to have been suggested by counsel to the trial court.

There was testimony that Wilson was an officer in two other oil companies and a real estate dealer handling leases, and was so known to plaintiff; that

it was distinctly understood, when he was made manager, that he was not expected to acquire leases for plaintiff; that in 1926 plaintiff was not in the market seeking leases as it already had more lands than it had funds to drill; that the Oehring and Engel leases were taken by Wilson in the course of independent and personal dealings, in harmony with his agreement with plaintiff; that he and the other defendants and associates had been engaged together for some time in independent dealing in such leases; that they did not obtain the leases with the intention of selling them to plaintiff; that after the leases had been procured, subsequent events convinced defendants and their associates that they were valuable to plaintiff and funds could be raised on them for immediate drilling; and defendants made the sale in good faith and for the advantage of plaintiff.

This testimony presented an issue of fact which called for application of the rule on sale of property. When directors sell their own property to a corporation, through their own action or influence as officers, or without disclosing their interest, and the corporation does not repudiate the purchase and rescind, the directors are liable not upon the theory of secret profits (*Highland Park Investment Co.* v. *List,* 27 Cal. App. 761 [151 Pac. 162]), but for fraud or excessive price, and the measure of damages is the difference between the price paid by the corporation and the fair value of the property. *Garber* v. *Town,* 208 Mich. 1, 12; *Danville, H. & W. R. Co.* v. *Kase,* 17 Phila. 332, same case, 39 Atl. (Pa.) 301; *Dean* v. *Shingle,* 198 Cal. 652 (246 Pac. 1049, 46 A. L. R. 1156); *Parker* v. *Nickerson,* 137 Mass. 487; 14A C. J. p. 116.

There was also testimony that Wilson claimed to the lessors that he was representing the corporation

in negotiating the leases, the corporation was to be the real lessee, and the intervention of Hopkins was merely a customary way of taking oil leases to a corporation. Wilson denied this. There were further facts and circumstances from which it reasonably could be inferred that defendants procured the leases for the purpose and with the intention of selling them to plaintiff.

Directors owe the corporation good faith and honest service. Good faith includes not only personal upright mental attitude and clear conscience, but also intention to observe legal duties. Honest service includes elimination of private gain in corporate transactions conducted by directors and not approved by other authorized disinterested officers, with full knowledge of the facts. If directors undertake to acquire property for the corporation, they act in a trust capacity in acquiring it. Express direction by the corporation to them to purchase is not a requisite of liability in this respect. Nor does the fact that they have a right to deal personally in leases modify their duties as directors when their transactions touch the corporation itself. Their obligations and liabilities arise out of their trust duties in dealing fairly with the corporation. If they purchase personally, with the intention to sell to the corporation, or while purporting to act as corporation officers, the whole benefit of the purchase inures to the corporation and the rule of secret profits applies. In such case, the rule of damages is that directors would be liable for the price paid by the corporation less the cost of the lease to them. *Badger Oil & Gas Co.* v. *Preston,* 49 Okla. 270 (152 Pac. 383); *Douglass-Whisler Brick Co.* v. *Simpson,* 233 Pa. 515 (82 Atl. 759); *Parks* v. *Hughes,* 145 La. 222 (82 South. 202); *Redhead* v. *Parkway Driving Club,* 148 N. Y. 471 (42 N. E.

1047); *Loewer* v. *Lonoke Rice Milling Co.*, 111 Ark. 62, 74 (161 S. W. 1042); *Spaulding* v. *North Milwaukee Town Site Co.*, 106 Wis. 481, 493 (81 N. W. 1064); *Parker* v. *Nickerson, supra.* Of interest generally are: *Southwestern Portland Cement Co.* v. *Latta & Harper* (Tex. Civ. App.), 193 S. W. 1115, 1131; *Ruethel Mining Co.* v. *Thorpe,* 9 Ont. W. R. 942; *Drennen* v. *Southern States Fire Ins. Co.*, 164 C. C. A. 616 (252 Fed. 776); *Great Luxembourg R. Co.* v. *Magnay,* 25 Beav. 586 (53 Eng. Rep. Repr. 761); *New York Trust Co.* v. *American Realty Co.*, 244 N. Y. 209 (155 N. E. 102); *United Zinc Companies* v. *Harwood,* 216 Mass. 474 (103 N. E. 1037, Ann. Cas. 1915 B, 948); *Citizens Development Co.* v. *Kypawva Oil Co.*, 191 Ky. 183 (229 S. W. 88); *Bennett* v. *Havelock Elec. Light & Power Co.*, 21 Ont. L. R. 120; *Earle* v. *Burland,* 27 Ont. App. 540, affirmed 13 Can. R. App. Cas. 418; *Stanley* v. *Luse,* 36 Ore. 25 (58 Pac. 75); 4 Fletcher Encyc. Corporations, § 2318; 14A C. J. p. 115.

We think the testimony presented issues of fact for the jury.

At the trial, complaint was made of the declaration, but, while not quite specific in view of the above distinctions, it states a cause of action, and, in the absence of motion for greater particularity, is sufficient. Resolutions authorizing commencement of this suit were admitted in evidence. Defendants claim there was no denial of the authority of the corporation to sue. If that be so, the resolutions were immaterial.

Judgment is reversed, and new trial ordered, with costs.

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

## SMILANSKY v. MANDEL BROS.

1. CORPORATIONS—FOREIGN CORPORATIONS—LICENSES—RIGHT TO RECOVERY.

   That part of contract by foreign corporation not authorized to do business in this State to sell and install furniture, furnishings, decorations, etc., for hotel, which covered intrastate business, was illegal, and no action could be maintained thereon (2 Comp. Laws 1929, §§ 10118, 10120, 14027).

2. CONTRACTS—ILLEGAL TRANSACTION—CONSIDERATION.

   Illegal transaction cannot constitute good consideration for promise.

3. SAME—REPEATING VOID PROMISE.

   If connection between original illegal transaction and new promise can be traced, it cannot form basis of recovery, for repeating void promise cannot give it validity.

4. SAME—SETTLEMENT OF LITIGATION AS CONSIDERATION.

   Ordinarily, settlement of litigation is sufficient consideration for new promise, but where litigation is to enforce illegal contract, new promise to perform same contract does not change nature of obligation, nor can it be permitted to circumvent statute adopting public policy.

5. CORPORATIONS—FOREIGN CORPORATIONS—BILLS AND NOTES—MORTGAGES—INTRASTATE BUSINESS.

   Notes and mortgage, as far as they cover sums charged upon intrastate business by foreign corporation not authorized to do business in this State, are not enforceable (2 Comp. Laws 1929, § 14027).

6. SAME—HOW CHARACTER OF TRANSACTION DETERMINED.

   Whether transaction by foreign corporation not authorized to do business in this State is interstate or intrastate in character must be determined by things done as well as agreement therefor.

7. PAYMENT—APPLICATION—CORPORATIONS.

   Foreign corporation not authorized to do business in this State could not apply payments to illegal intrastate items of transaction rather than to legal interstate items without consent of debtors, because right of creditor to apply payments to specific accounts does not extend to illegal items representing

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Validity of new contract based on compromise of illegal contract, see annotation in 9 L. R. A. (N. S.) 568.

Effect of agreement by foreign corporation to install article within the State to bring transaction within State control, see annotation in 11 A. L. R. 622, 623.

transactions prohibited by statute (2 Comp. Laws 1929, § 14027).

8. SAME—APPLICATION PRO RATA TO LEGAL AND ILLEGAL ITEMS.

Payments made to foreign corporation not authorized to do business in this State intended to be credited upon whole consideration without preference to items, should be applied *pro rata* upon legal interstate and illegal intrastate items.

9. CORPORATIONS—FOREIGN CORPORATIONS—CONTRACT CONTAINING LEGAL AND ILLEGAL ITEMS—DIVISIBILITY.

If contract respecting transaction including both interstate and intrastate items by foreign corporation not authorized to do business in this State is indivisible between interstate and intrastate business, it is not entitled to sue upon any part of it (2 Comp. Laws 1929, § 14027).

10. CONTRACTS—VALID PART OF CONTRACT MAY BE SUED ON IF DIVISIBLE.

If any part of contract in violation of statute is valid it will avail *pro tanto* though another part of it be prohibited by statute, provided the statute does not either expressly or impliedly render whole void, and provided sound part can be separated from unsound, and enforced without injustice to defendant.

11. SAME—DIVISION OF LEGAL FROM ILLEGAL ITEMS.

Division of claim into good and bad items is done from practical rather than technical considerations, unless contract otherwise demands.

12. CORPORATIONS—FOREIGN CORPORATIONS—RECOVERY MAY BE HAD FOR LEGAL ITEMS OF ILLEGAL CONTRACT.

Where illegal items of intrastate business in transaction by foreign corporation not authorized to do business in this State can be segregated from legal interstate items, recovery may be had for latter, especially where no injury results to debtor or its guarantor, as they are called upon to meet only legal obligations (2 Comp. Laws 1929, § 14027).

13. COMMERCE—INTERSTATE COMMERCE—DELIVERY—CORPORATIONS—FOREIGN CORPORATIONS.

Installation of furniture sold by foreign corporation not authorized to do business in this State is not illegal, but is mere incident of delivery which is part of interstate commerce.

Appeal from Wayne; McMahon (Maurice H.), J. Submitted April 22, 1931. (Docket No. 109, Calendar No. 35,625.) Decided June 1, 1931.

Bill by Louis Smilansky against Mandel Brothers, a foreign corporation, and Elless Company, a Michigan corporation, to restrain foreclosure of a mortgage by advertisement. Cross-bill by defendant Mandel Brothers against plaintiff and other defendant to foreclose a mortgage. Decree for cross-plaintiff. Plaintiff and defendant Elless Company appeal. Modified and affirmed.

*J. Shurly Kennary,* for appellants.

*Goodenough, Voorhies, Long & Ryan,* for appellee.

FEAD, J. As the pleadings finally stand, this suit is by cross-plaintiff Mandel Brothers for judgment against defendant Elless Company and plaintiff on certain promissory notes executed by them, and for decree of foreclosure of real estate mortgage given by plaintiff to secure the notes. Mandel Brothers had decree for the whole amount claimed.

The question is whether cross-plaintiff, a foreign corporation not authorized to do business in this State, may maintain the suit.

August 9, 1922, cross-plaintiff contracted to sell and install furniture, furnishings, decorations, etc., to an approximate amount of $230,000, in the Whittier Hotel at Detroit, owned by defendant Elless Company. Plaintiff executed the contract on behalf of defendant and also personally to guarantee its performance. The specific items were to be listed on "Mandel Brothers' General Form Contracts," which by reference were made part of the parent contract. Further purchases were provided for on similar *memoranda,* which were to be likewise part of the agreement. Approximately $325,000 of purchases were so listed, the prices of the items appearing in the *memoranda.* The sum of $150,000 was

paid on the contract and $150,000 of notes given before any goods were delivered.

In 1924, the Elless Company defaulted in payment of notes. December 18th, a new agreement was made, reciting that the debt was $139,000, that Elless Company claimed a credit of $6,000 and damages for improper work, and it was agreed that defendant and plaintiff should execute new notes for $139,000, $100,000 to be secured by mortgage executed by plaintiff, and that the claim for credit be adjusted by arbitration if they could not agree.

In 1926, payments were again in default. Mandel Brothers began suit against plaintiff and defendant in Chicago, but obtained no service on them, and garnisheed the proceeds of a bond issue on the Whittier Hotel. The court dismissed the suit, holding the fund not garnishable, and Mandel Brothers appealed. The parties negotiated, and, on November 3d, after allowing a credit of $5,000, the notes and mortgage at bar, aggregating about $100,000, were executed. In consideration, all litigation between the parties was dismissed.

Cross-plaintiff states it was conceded in circuit court that part of the total account represented interstate business, part intrastate transactions, and two items, carpets and furniture, were in dispute, both of which it claims were interstate. Plaintiff and defendant do not attack cross-plaintiff's analysis of the account in this respect except to contend that the furniture item was intrastate.

The first question is whether the adjustment of November, 1926, cleared the transaction of the statutory prohibition against cross-plaintiff maintaining the suit.

Under 2 Comp. Laws 1929, §§ 10118, 10120, a foreign corporation transacting business in Michigan

without having been admitted thereto, is subject to a penalty, as well as to 3 Comp. Laws 1929, § 14027, which reads:

"SEC. 19. But when, by the laws of this State, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law, and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act."

So far as the transaction at bar covered intrastate business, it was illegal in this State, and no action could be maintained upon it. *Seamans* v. *Temple Co.*, 105 Mich. 400 (28 L. R. A. 430, 55 Am. St. Rep. 457); *People's Mutual Benefit Society* v. *Lester*, 105 Mich. 716; *Swing* v. *Cameron*, 145 Mich. 175 (9 L. R. A. [N. S.] 417, 9 Ann. Cas. 332).

The rule, as stated in *Comstock* v. *Draper*, 1 Mich. 481 (53 Am. Dec. 78), is:

"It is a well settled doctrine in the English and American books, that an illegal transaction cannot constitute a good consideration for a promise. If the connection between the original illegal transaction and the new promise can be traced, if the latter is connected with and grows out of the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery, for repeating a void promise cannot give it validity."

See, also, *Rhoades* v. *Malta Vita Pure Food Co.*, 149 Mich. 235; *Armstrong* v. *Toler*, 11 Wheat. (U. S.) 258; 13 C. J. p. 509; 6 R. C. L. p. 698.

Ordinarily, the settlement of litigation is sufficient consideration for a new promise. But where the

litigation is to enforce an illegal contract, a new promise to perform the same contract does not change the nature of the obligation. *Union Collection Co.* v. *Buckman,* 150 Cal. 159 (88 Pac. 708, 9 L. R. A. [N. S.] 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609); 12 C. J. p. 334; nor can it be permitted to circumvent a statute adopting a public policy.

In *Missouri Fidelity & Casualty Co.* v. *Art Metal Construction Co.* (C. C. A.), 242 Fed. 630, relied on by cross-plaintiff, no statute like section 14027 was involved, and the defense was interposed by a third party guarantor of the account after the work had been completed. Usually the obligation of such third party is deemed too remote from the illegal transaction to be tainted by it. See discussion in *Armstrong* v. *Toler, supra,* and *McMullen* v. *Hoffman,* 174 U. S. 639 (19 Sup. Ct. 839). Here the new engagement was by the identical parties to the original contract, to provide payment of moneys owing thereon. The notes and mortgage, as far as they cover sums charged upon the intrastate business, evidence a "liability or obligation * * * arising out of" violation of the law by cross-plaintiff. *People's Mutual Benefit Society* v. *Lester, supra.* The defense of the statute is open to plaintiff and defendant.

Cross-plaintiff, on the theory that the contract was severable, assumed to apply payments on intrastate items, and claims the account as it now stands is wholly for interstate business. Plaintiff and defendant did not authorize nor consent to such application of payments and say the contract is indivisible and suit may not be maintained for any part of it.

We need not determine whether the contract is technically inseparable as regards the rights and obligations of the parties. While the agreement is

of consequence in ascertaining the character of a transaction, its form is not determinative of the question before us, because parties cannot so enlarge or restrict the statute. The character of the transaction must be determined from the things done as well as the agreement therefor.

Even if the contract were divisible, cross-plaintiff was not justified in applying payments to intrastate items without consent of the debtors, because the right of a creditor to make application of payments to specific accounts does not extend to illegal items representing transactions prohibited by statute. 21 R. C. L. pp. 93, 94; 48 C. J. p. 650; *Armour Packing Co.* v. *Vinegar Bend Lbr. Co.*, 149 Ala. 205 (42 South. 866, 13 Ann. Cas. 951, note). From the original contract and the subsequent conduct of the parties, it is also beyond argument that they intended payments to be credited upon the whole consideration without preference to items. So far as payments may be divided among items, the application must be *pro rata.*

If the contract, especially the consideration, were indivisible in fact between interstate and intrastate business, cross-plaintiff would not be entitled to sue upon any part of it. *Haughton Elevator & Machine Co.* v. *Detroit Candy Co.*, 156 Mich. 25; *Andrews* v. *Colonial Theater Co.*, 283 Fed. 471. But where, as here, the contract permits an accurate division of the whole transaction into interstate and intrastate items and the precise apportionment of the consideration to each, may suit be brought upon the legal portion? The question seems to be one of first impression.

The contract is partly illegal in this State, not because of immorality or inherent vice, but because of the statute. In such case it is said:

"The rule with respect to contracts in violation of the statute has been declared to be that if any part of an agreement is valid, it will avail *pro tanto*, though another part of it may be prohibited by statute, provided the statute does not, either expressly or by necessary implication, render the whole void, and provided the sound part can be separated from the unsound, and enforced without injustice to the defendant." 6 R. C. L. p. 814.

See, also, 24 L. R. A. (N. S.) 942, note; 26 L. R. A. (N. S.) 106, note; 13 C. J. p. 515.

"But where a claim consists of several distinct items, some good and others bad, or where the transaction is of such a nature that the good part of the consideration may be separated from the bad, the common law discriminates between them, by permitting a recovery for the former while it repudiates the latter." *Chase's Executors* v. *Burkholder,* 18 Pa. 48, 52.

The division of the claim into good and bad items is done from practical rather than technical considerations unless the contract otherwise demands. *Carleton* v. *Woods,* 28 N. H. 290; *Walker* v. *Lovell,* 28 N. H. 138 (61 Am. Dec. 605); *Boyd* v. *Eaton,* 44 Me. 51 (69 Am. Dec. 83); *Shaw* v. *Carpenter,* 54 Vt. 155 (41 Am. Rep. 837). Such method of division is particularly appropriate at bar because neither the protection of parties nor preservation of courts from enforcement of illegal claims demands a technical treatment of the contract, and "it often has been pointed out that commerce among the States is a practical not a technical conception." *Davis* v. *Commonwealth of Virginia,* 236 U. S. 697 (35 Sup. Ct. 479).

The portions of the instant contract and transaction which our statute condemns may be definitely identified and segregated so that only interstate commerce items remain. As the statute does not in-

terfere with interstate commerce, such segregation is logical. From recovery thereon, no injury can result to plaintiff and defendant, as they are called upon to meet only their legal obligations; the policy of the State is maintained, because no recovery is allowed for prohibited acts; the statute is kept in its intended and constitutional bounds, and the result is appropriate to a court of equity. We think the inhibition of the statute to sue should be confined to those portions of the transaction of which intrastate acts are an integral part.

The remaining question is whether the furniture item was interstate commerce. That part of the contract included installation, which consisted of uncrating the furniture, putting it in rooms, attaching mirrors, assembling beds, dusting and polishing and removing marks or soils.

All of these things were—

"dissociated from any attempt to connect them with or make them a part in the State of property which had not and could not have been the subject of interstate commerce." *Browning* v. *City of Waycross,* 233 U. S. 16 (34 Sup. Ct. 578).

They were mere incidents of delivery, which is a part of interstate commerce. *Rath Packing Co.* v. *General Cold Storage Co.,* 222 Mich. 315; *Caldwell* v. *North Carolina,* 187 U. S. 622 (23 Sup. Ct. 229); *Vulcan Steam Shovel Co.* v. *Flanders,* 205 Fed. 102; *Puffer Manfg. Co.* v. *Kelly,* 198 Ala. 131 (73 South. 403).

The decree will be modified in accordance with this opinion, and affirmed, with costs of this court to plaintiff.

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

*In re* HARRAND.

1. HABEAS CORPUS—JUDGMENT—RES JUDICATA—CONTEMPT.
   Judgment in circuit court denying writ of *habeas corpus* inquiring into imprisonment of plaintiff for contempt of court is *res judicata* of validity of imprisonment unless reversed.

2. CRIMINAL LAW—CONSTITUTIONAL LAW.
   Statute compelling one to be witness against himself, or to incriminate himself, is unconstitutional (Const., art. 2, § 16).

3. CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION.
   It is duty of court to adopt construction, if admissible, which will uphold validity of statute.

4. SAME—WITNESSES.
   One required to answer statutory questions under 2 Comp. Laws 1929, § 9182, is only a witness, and as such has all the rights against self-incrimination which any witness possesses (3 Comp. Laws 1929, §§ 16268, 17203, 17435).

5. SAME—STATUTE PRESUMED CONSTITUTIONAL—WITNESSES.
   It must be presumed that, in enacting 2 Comp. Laws 1929, § 9182, requiring one to answer statutory questions, legislature had in mind, and did not intend to violate, constitutional rights of witnesses.

6. SAME—STATUTES—CONSTRUCTION—WITNESSES.
   Language of 2 Comp. Laws 1929, § 9182, requiring one to "answer fully and fairly such questions," while unfortunate and somewhat misleading, does not require one to testify against himself, but means that magistrate has jurisdiction to commit both for refusal to answer proper questions, and for patent evasion of disclosure evident from witness' own testimony.

7. SAME.
   2 Comp. Laws 1929, § 9182, requiring one to answer statutory questions, properly construed, is constitutional.

8. CRIMINAL LAW—JUSTICES OF PEACE—JURISDICTION.
   Justice's court is of inferior and limited jurisdiction confined strictly to power conferred, and is to be exercised in prescribed manner.

9. SAME—INQUISITORIAL PROCEEDING BEFORE JUSTICE MANDATORY AND JURISDICTIONAL.
   Statutory conditions of inquisitorial proceeding before justice of peace are mandatory and jurisdictional, and he may not scramble his jurisdiction or proceedings (2 Comp. Laws 1929, § 9182).

10. STATUTES—WITNESSES—CIVIL ACTION.
   Proceeding with relation to person intoxicated in public place, provided by 2 Comp. Laws 1929, § 9182, considered civil as to him, is by complaint, subpœna, and interrogation for discovery and apprehension of others.

11. SAME—CONSTRUCTION—ACCUSED MAY NOT BE INTERROGATED AS WITNESS.
   One arrested and brought before justice of peace charged with intoxication in public place, and pleading guilty, may not be required under 2 Comp. Laws 1929, § 9182, to disclose from whom and conditions under which he procured his liquor, since person so interrogated is entitled to testify with freedom and rights of witness assured of statutory immunity, and not "under shadow of a policeman's club" or jail sentence.

12. CONTEMPT—JUSTICES OF PEACE—REFUSAL OF ACCUSED TO ANSWER STATUTORY QUESTIONS.
   Where person interrogated under 2 Comp. Laws 1929, § 9182, by justice of peace was before him under criminal proceeding charged with intoxication in public place, and not as witness for discovery and apprehension of others, said justice was without jurisdiction to commit accused on contempt for refusing to answer statutory questions telling from whom and conditions under which he obtained his liquor.

Certiorari to Wexford; Lamb (Fred S.), J. Submitted April 16, 1931. (Docket No. 156, Calendar No. 35,474.) Decided June 1, 1931.

*Habeas corpus* proceedings to secure the release of Frank Harrand, held for contempt by judge of recorder's court of Cadillac in refusing to answer

questions pursuant to 2 Comp. Laws 1929, § 9182. Writ denied. He brings certiorari. Reversed, and discharge ordered.

*Arthur W. Penny,* for appellant.

*Paul W. Voorhies,* Attorney General, *William H. Yearnd,* Prosecuting Attorney, and *E. J. Millington,* for appellee.

FEAD, J. This is certiorari to review denial of *habeas corpus* issued to inquire into the imprisonment of Frank Harrand in the common jail of Wexford county.

November 8, 1930, criminal complaint, in usual form, was made before E. J. Millington, judge of the recorder's court of the city of Cadillac and having the jurisdiction of a justice of the peace, charging Harrand with the crime of being intoxicated at a public dance. The prosecuting attorney of the county indorsed on the complaint a direction to issue a warrant. Criminal warrant was issued, Harrand was arrested, brought before the court, arraigned, admitted his intoxication, and the magistrate immediately propounded to him the statutory questions set up in 2 Comp. Laws 1929, § 9182. Upon the magistrate finding that he had "refused to answer fully and fairly such questions, on oath," Harrand was committed to the county jail for contempt until he should "answer the questions propounded to him as to when, where, and of whom he procured the liquor which led to his intoxication as aforesaid."

After denial of *habeas corpus* in circuit court, Harrand and his attorney voluntarily appeared before the magistrate to purge the contempt, but were unsuccessful, and he was "remanded" to jail.

At such hearing other witnesses were sworn. It is urged that this proceeding constituted an acceptance and approval of the judgment of denial of the writ and the case now is moot. The record is that (except for bail allowed by this court pending review) Harrand is in jail under the original commitment, which has not been discharged. The judgment in circuit court is *res judicata* of the validity of such imprisonment unless reversed. Review confined to subsequent proceedings would not affect it. If the imprisonment be illegal, Harrand's only means of discharge from jail is on review of the judgment on *habeas corpus*.

It is contended the act is invalid because it compels a person to be a witness against himself, contrary to the Constitution, art. 2, § 16. The statute (2 Comp. Laws 1929, § 9182) reads:

"SEC. 36. Whenever complaint shall be made by any person on oath before any justice of the peace or other officer or magistrate, having jurisdiction, that any person is found intoxicated or has been intoxicated in any hotel, store, place of business, public building, street, alley, highway, or other public place, it shall be the duty of such justice, municipal or police court, to issue a subpœna to compel the attendance of such person so found intoxicated, or who has been intoxicated, as aforesaid, to appear before the justice or court issuing the same, to testify in regard to the person or persons of whom, and the time when, and the place where, and the manner in which the liquor producing his intoxication was procured; and if such person, when subpœnaed, shall neglect or refuse to obey such writ, the said justice or court who issued the same shall have the same power and authority to compel the attendance of the person so subpœnaed and to enforce obedience to such writ as in other civil cases. Whenever the person so subpœnaed shall appear before the jus-

tice or court to testify as aforesaid, said magistrate shall question him and the person so subpœnaed shall be required to answer on oath questions relating to when, where, and of whom he procured, obtained or received the liquor or beverage, the drinking of which contributed to the intoxication mentioned in this complaint. And if such person shall refuse to answer fully and fairly such questions, on oath, he shall be punished and dealt with in the same manner as for a contempt of court in other cases. If it shall appear from the testimony of such person that any of the offenses specified in this act have been committed, such justice or court shall make a true record of the same and cause it to be subscribed by such witness; and the said testimony or answers, when subscribed as aforesaid, shall be deemed a sufficient complaint to authorize the issuing of a warrant to arrest any person or persons who may appear from said complaint to be guilty of having violated any of the provisions of this act. Any person arrested on a warrant issued pursuant to the provisions of this section shall be brought before the justice or court issuing the same, and all subsequent proceedings in such suit or prosecution shall be governed by the rules of the law applicable thereto, as in other criminal cases: *Provided,* That the person so testifying under the provisions of this section shall not be held or prosecuted for the intoxication concerning which such testimony shall be given."

If the act compels a person to incriminate himself, it is unconstitutional. *In re Dewar,* 102 Vt. 340 (148 Atl. 489). But such construction, while possible, is not imperative, and it is the duty of the court to adopt a construction, if admissible, which will uphold the validity of the statute.

The statute sets up an inquisitorial proceeding for the discovery of crime and apprehension of

offenders, in the class with inquest, grand jury, and criminal complaint made on information and belief with witnesses summoned in support before a warrant is issued. The person proceeded against is a witness, no more nor less. Not only does the general language of the statute so treat him, but the remedies are appropriate to such character. The process for his attendance is subpœna, and, upon failure to obey it, attendance is compelled as in "other civil cases." On refusal to answer, "he shall be punished and dealt with in the same manner as for a contempt of court in other cases." Turning to the law governing "other cases" before justices and magistrates, we find that the witness may be committed, until he shall answer, for refusal to answer "any pertinent or proper question." 3 Comp. Laws 1929, §§ 16268, 17203, 17435. It is only because he is a witness that indefinite imprisonment may be imposed for his failure to answer questions. Being only a witness, he has all the rights against self-incrimination which any witness possesses.

The immunity from prosecution provided in the statute does not impair the right against self-incrimination because it is not complete. *Counselman* v. *Hitchcock,* 142 U. S. 547 (12 Sup. Ct. 195). It must be presumed that the legislature had in mind, and did not intend to violate, the constitutional rights of witnesses in enacting the law. So the limited nature of the immunity, especially when contrasted, for instance, with that of witnesses before a one-man grand jury, 3 Comp. Laws 1929, § 17220, emphasizes the intention of the legislature not to infringe upon the constitutional privilege.

The language of the clause "answer fully and fairly such questions" is unfortunate, as it has mis-

led counsel for both parties into the notion that the magistrate is empowered to try as an issue and render judgment upon the credibility and fairness of the witness and the fullness of the information he discloses, even taking testimony of other witnesses therefor; and it is contended that, under such power, the magistrate may require a person to testify against himself on peril of violating the injunction to answer fully and fairly to the satisfaction of the justice. To so construe the clause would not only endanger the constitutional right, but, in substance, would permit the magistrate to try the person for perjury or an unnamed offense and commit him to an indefinite term in jail. The meaning of the language is that the magistrate has jurisdiction to commit both for refusal to answer proper questions at all and for patent evasion of disclosure evident from the witness' own testimony. Otherwise it confers no power to try and punish him.

We think the law, properly construed, is constitutional.

In this case nothing appears in the record to indicate that Harrand was required to incriminate himself nor that his commitment was for any cause other than refusal to answer proper questions.

It is further urged that the commitment was invalid because the proceeding was not commenced by complaint and subpœna as required in section 9182. A justice's court is of inferior and limited jurisdiction and is confined strictly to the power conferred on it by law, to be exercised in the prescribed manner. The statutory conditions of an inquisitorial proceeding before a justice are mandatory and jurisdictional. *In the Matter of John Morton,* 10 Mich. 208.

The law provides two distinct proceedings with relation to a person intoxicated in a public place. One is criminal, by complaint, warrant, and trial, for his punishment. The other, under section 9182, considered by the legislature civil as to him, is by complaint, subpœna, and interrogation, for the discovery and apprehension of others. A justice cannot scramble his jurisdiction or proceedings. Could he, on civil declaration setting up commission of a crime, sentence defendant; or, on criminal warrant stating a ground for damages, render civil judgment? To get closer home, if the proceedings against Harrand had been by complaint and subpœna, could he have been sentenced for the intoxication merely because he was in the presence of the court? The obvious answer is equally applicable to the situation at bar.

We cannot agree with counsel that the manner or character in which a person interrogated is brought before a magistrate is unimportant and merely of form. The statute confers no general jurisdiction to discover crime, but merely the power to discover it in a specific way. By arrest on a criminal warrant, Harrand had been prosecuted for the intoxication, and had lost the benefit of the statutory immunity. In fact, his prosecution had gone further than mere arrest, as it is merely a play upon words to say that he had not pleaded guilty to the warrant. A layman, unversed in court procedure, would hardly be expected to know the technical difference, if there is any, between the effect of his admitting intoxication when arraigned, and using the word "guilty" in answering the charge. The person interrogated is entitled to testify with the freedom and rights of a witness, assured of the statutory immunity, and it is not unimportant to him, the public, or the person he may accuse, that he be not required

to give evidence "under the shadow of a policeman's club" or a sentence to jail.

The judgment will be reversed, and Harrand discharged from custody.

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

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GOOD HOUSEKEEPING SHOP *v.* SMITTER.

1. TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION.
   Each case of unfair competition is determined upon its own facts, and relief is based upon principles of common business integrity.

2. SAME—ACTUAL COMPETITION NECESSARY.
   Essential point of unfair competition is actual competition, shown from specific instances or as a natural tendency of defendant's act.

3. SAME—INJUNCTION—UNFAIR COMPETITION.
   Corporation operating chain stores under trade-name is not entitled to enjoin partnership's use of same trade-name, where nearest store is 100 miles away, there is no actual competition, no natural tendency to competition, and even possibility of competition is remote; and other circumstances usually attending unfair competition are absent.

4. SAME—NO MONOPOLY OF USE OUTSIDE OWN MARKET.
   Trade name or mark, unlike patent, carries no monopoly of use beyond market of person claiming it.

5. SAME—USE OF CELEBRATED NAME BY ANOTHER MAY BE ENJOINED WHEN PUBLIC IS DECEIVED.
   Where outstanding and widely-known name, made valuable by owner, is being pirated for purpose of deceiving public,

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Right to protection against use of trade-mark or trade name beyond the territory in which plaintiff operates, see annotation in 36 A. L. R. 922.

its use may be enjoined even in territory where owner did not have established place of business and there is no actual competition.

6. SAME—INJUNCTION NOT WARRANTED WHERE PUBLIC NOT DECEIVED.

Corporation using trade-name which has not attained great celebrity is not entitled to enjoin partnership's use of same name in territory where corporation has no place of business, and where public is not deceived into believing that when trading with partnership they are trading with corporation.

7. SAME—INJUNCTION NOT WARRANTED ON GROUND OF POTENTIAL EXPANSION.

Corporation operating chain stores under trade-name is not entitled to enjoin partnership's use of same name 100 miles away on ground of modern business tendencies and that it is entitled to protection within field of potential expansion; especially where name adopted had been made valuable by another.

8. CORPORATIONS—RIGHT TO NAME—UNFAIR COMPETITION.

In absence of statute, one corporation could take name of another, unless prohibited under doctrine of unfair competition (2 Comp. Laws 1929, § 9955).

9. TRADE-MARKS AND TRADE-NAMES—CORPORATIONS—UNFAIR COMPETITION.

There being no statutory prohibition against use of corporation's name by partnerships or individuals, rules of unfair competition are controlling.

10. CORPORATIONS—USE OF NAME.

Right of corporation to use of its name is same as that of individual.

11. SAME—STATE MERELY AUTHORIZES USE OF NAME—DOES NOT ADJUDGE IT LEGAL.

When State grants charter to corporation, it merely authorizes use of name in legal manner, but it does not adjudge name to be legal, nor decree that its use throughout State will be lawful.

12. SAME—MONOPOLY OF NAME—UNFAIR COMPETITION.

Corporation is entitled to monopoly of its name only so far as justified by doctrine of unfair competition.

13. TRADE-MARKS AND TRADE-NAMES—CORPORATIONS—UNFAIR COMPETITION—INJUNCTION.

If corporation takes and uses business name of partnership or individual in manner resulting in unfair competition, court will restrain it, or if it already has similar name, corporation will be prohibited from invading territory of partnership or individual.

Appeal from Kent; Brown (William B.), J. Submitted April 17, 1931. (Docket No. 135, Calendar No. 35,571.) Decided June 1, 1931.

Bill by the Good Housekeeping Shop, a Michigan corporation, against Jacob E. Smitter and another, doing business as the Good Housekeeping Shop to enjoin the use of said name. Bill dismissed. Plaintiff appeals. Affirmed.

*Anderson, Wilcox, Lacy & Lawson* (*Dunham, Cholette & Allaben,* of counsel), for plaintiff.

*Eerde W. Hoogsteen,* for defendants.

FEAD, J. This is a suit by plaintiff, a Michigan corporation of Detroit, to enjoin defendants, a partnership of Grand Rapids, from using the name "The Good Housekeeping Shop." Defendant Smitter has since purchased his partner's interest and continues the business under the same name.

Good Housekeeping is probably the foremost household magazine in the country. It maintains a Good Housekeeping Institute which tests household devices and advertises approval of those found worthy. It has no part in their vending, but, because of the integrity and great circulation of the magazine, its approval is very valuable. Recognizing this, several stores throughout the country have

adopted the name used by the parties to this suit. The Easy Washer is one of the approved devices.

Plaintiff began business as a partnership in Detroit in 1919, incorporated in 1920, and expanded its business until, when defendants took the name, it had six branch stores in Detroit, others at Mt. Clemens (established in 1922), Flint (1923), Pontiac (1924), Hamtramck (1926), Port Huron (1928), Ann Arbor (1928, but under the name of Easy Washer Shop), and had formed a Canadian corporation to conduct a store at Windsor, Ontario. It has exclusive agency for the Easy Washer in its territory. The washer is its principal article of sale. It handles a number of the other larger household devices of national market, some of which bear the approval of the Good Housekeeping Institute. It does a gross business of $2,000,000 per year, the approved articles representing about 75 per cent. It spends large sums in advertising in Detroit newspapers and by radio. Some of the advertising is national, in the respect that part of the expense is paid by manufacturers, and some is local to plaintiff. The newspapers have some circulation in Grand Rapids and the radio can be heard there.

Plaintiff's advertisements are directed to the trade of its own territory. It has made no attempt to advertise or seek business in the Grand Rapids district. The testimony does not indicate that, by unusual methods of business or otherwise, it has acquired a distinctive personality which has projected itself beyond the immediate range of its trade. The natural tendency of the name selected by it would be to render it more difficult for plaintiff to attain a wide personal reputation because of the greater celebrity of the magazine. There was no evidence or tendency to indicate that plaintiff is so

well known in Grand Rapids that persons dealing with defendant would think they were dealing with plaintiff.

In 1928 defendant and his partner established their store at Grand Rapids, with exclusive agency of the Easy Washer in Kent county, selling articles approved by Good Housekeeping Institute, and other goods. In general, the goods are of the same class as plaintiff handles, but not wholly. When they took the name, they knew of plaintiff and also of other similar stores and thought the Good Housekeeping appellation would be a valuable asset. If defendant has had any benefit from plaintiff's advertisement, it has been accidental and casual.

Plaintiff relies on the doctrine of unfair competition, the general rules of which are well known and uniformly established. 38 Cyc. p. 756; 26 R. C. L. p. 875. Each case is determined upon its own facts and relief is based upon the principles of common business integrity. 26 R. C. L. p. 881. An essential point here is that, in order that there may be unfair competition, there must be actual competition, shown from specific instances or as a natural tendency of defendant's act. 38 Cyc. p. 760; 26 R. C. L. p. 876; 25 L. R. A. 190; 2 L. R. A. (N. S.) 964, note; 36 A. L. R. 919, note.

There has been no actual competition between plaintiff and defendant. Plaintiff's nearest store is 100 miles from defendant's. Neither has mail order business in the territory of the other. Neither has discovered an instance of overlapping trade.

Nor is there a natural tendency to competition. In fact, even the possibility is remote. In the sale of their principal article, each is restricted by the manufacturers to definite territorial limits. The other articles are well known, widely sold, handled

by other merchants in the cities where plaintiff and defendant operate, and in other cities and villages lying between. There is no reason why a purchaser in the territory of either should buy from the other.

A trade name or mark, unlike a patent, carries no monopoly of use beyond the market of the person claiming it. *Benioff* v. *Benioff,* 64 Cal. App. 745 (222 Pac. 835); *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403 (36 Sup. Ct. 357); *Ball* v. *Broadway Bazaar,* 121 App. Div. 546 (106 N. Y. Supp. 249); *Rice & Hutchins* v. *Vera Shoe Co.* (C. C. A.), 290 Fed. 124. An exception to the rule has been made where an outstanding and widely known name, made valuable by the owner (*i. e.,* Hudson Bay Company), was pirated for the purpose of deceiving the public in a territory where the company did not have an established place of business and where it was claimed there was no actual competition. *Governor & Company* v. *Hudson Bay Fur Co.,* 33 Fed. (2d) 801.

Plaintiff has not attained the necessary personal celebrity to warrant application of this exception nor did defendant take the name for the purpose of deceiving the public into believing that when trading with him they were trading with plaintiff.

It may be added that the other circumstances usually attending unfair competition are absent. There has been no confusion in the affairs of the parties, no deception of the public, no invasion of plaintiff's business by defendant, no past injury to plaintiff, nor damage to it in prospect.

Plaintiff, however, argues for "protection within the field of potential expansion" on the ground of modern business tendencies.

We may recognize the modern tendency to establish chain stores. Whatever their economic effect,

chain stores have neither legal virtue nor vice different from any other business. They may be established and expand in a lawful manner, but they cannot demand that the rights of partnerships or persons shall be circumscribed in their favor. The doctrine of unfair competition affords full protection against the wrongs of competitors. Neither corporations nor individuals can expect favoritism from the law.

The facts here lend no support to the contention. While plaintiff states it has a plan of expansion which includes the opening of a store in Grand Rapids, the plan is not definite as to time, and, upon present considerations, it would not establish such store unless it could obtain the local exclusive agency for the Easy Washer, now held by defendant. Stripped of fine words, the prayer is for a monopoly of the name, made valuable by another, when no element of unfair competition justifies it and the law on the subject denies the right to it.

The language in *Rice & Hutchins* v. *Vera Shoe Co., supra,* involving a kindred subject, is pertinent:

"The adoption of a trade-mark does not project the right of protection in advance of the extension of the trade, or operate as a claim of territorial rights over areas into which it thereafter may be deemed desirable to extend the mark owner's trade."

See, also, *Ambassador Hotel Corp.* v. *Hotel Sherman Co.,* 226 Ill. App. 247.

Plaintiff's final contention is that incorporation gives it the exclusive right to use of the name in this State.

Under 2 Comp. Laws 1929, § 9955, no other domestic corporation of this State may take the same or a similar name. Were it not for the statute, an-

other corporation could take the name unless prohibited under the doctrine of unfair competition. *Nebraska Loan & Trust Co.* v. *Nine,* 27 Neb. 507 (43 N. W. 348, 20 Am. St. Rep. 686). There being no statutory prohibition against its use by partnerships or individuals, the rules of unfair competition are controlling.

The right of a corporation to the use of its name is the same as that of an individual. 38 Cyc. p. 819; 26 R. C. L. pp. 860, 887; *Armington* v. *Palmer,* 21 R. I. 109 (42 Atl. 308, 43 L. R. A. 95, 79 Am. St. Rep. 786). When a State grants a charter to a corporation, it merely authorizes the use of the name in a legal manner. The incorporators select the name. The State does not adjudge it to be legal, nor decree that its use throughout the State will be lawful. *Children's Bootery* v. *Sutker,* 91 Fla. 60 (107 South. 345, 44 A. L. R. 698). The corporation is entitled to monopoly of the name only so far as justified by the doctrine of unfair competition. 38 Cyc. p. 726.

If a corporation takes and uses the business name of a partnership or individual in a manner which results in unfair competition, the court will restrain it. *Children's Bootery* v. *Sutker, supra;* 16 Ann. Cas. 596, note; 26 R. C. L. p. 888; or, if it already has a similar name, the corporation will be prohibited from invading the territory of a partnership. *Eastern Outfitting Co.* v. *Manheim,* 59 Wash. 428 (110 Pac. 23, 35 L. R. A. [N. S.] 251). Counsel attack the latter case, but it was distinguished without disapproval in *Groceteria Stores Co.* v. *Tibbett,* 94 Wash. 99 (162 Pac. 54; L. R. A. 1917 C, 955).

So, a corporation cannot enjoin the use of a similar name by another corporation (in the absence of statute) or by a partnership or person where the

business of the latter does not encroach upon the trade of the former and constitute unfair competition. 26 R. C. L. pp. 887, 889; 35 L. R. A. (N. S.) 251, note; *Bingham School* v. *Gray*, 122 N. C. 699 (30 S. E. 304, 41 L. R. A. 243).

Decree dismissing the bill is affirmed, with costs.

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

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RACHO *v.* BEACH.

1. TRUSTS—EVIDENCE—FRAUDS, STATUTE OF.
   In absence of fraud, accident, or mistake, parol testimony is inadmissible to establish trust in real estate (3 Comp. Laws 1929, § 13411).

2. SAME—EQUITY—FRAUD.
   Where title to real estate has been obtained through fraud, misrepresentation, concealment, undue influence, duress, or other similar circumstances which render it unconscionable for holder of legal title to retain property, and there are no intervening rights of *bona fide* purchasers, equity will impress constructive trust on property.

3. DEEDS—FRAUD—RECONVEYANCE—EQUITY.
   Where defendant by fraud induced plaintiff to deed real estate to him, its reconveyance was properly decreed.

Appeal from Wayne; Dehnke (Herman), J., presiding. Submitted April 22, 1931. (Docket No. 3, Calendar No. 35,369.) Decided June 1, 1931.

Degree of parol proof necessary to establish trust in real property, see annotation in 23 A. L. R. 1500 *et seq.*

Bill by Sophia Racho against Paul L. Beach for reconveyance of real estate. Decree for plaintiff. Defendant appeals. Affirmed.

*Carey J. Cole* and *Bessie M. McDonald,* for plaintiff.

*Ralph B. Clark,* for defendant.

BUTZEL, C. J. Sophia Racho, plaintiff, upon the death of her husband, became the owner of farm land that rapidly grew to be very valuable for subdivision purposes on account of its vicinity to Detroit. The property was syndicated and sold. She remained a member of the syndicate and from time to time realized large sums from it. With part of the proceeds, she purchased a tract of land not far from Detroit and having a frontage of 250 feet on Telegraph Road at the corner of Eureka Road, both paved superhighways. Three houses and a garage were erected upon the property. One house was occupied by plaintiff, the other two by her two married daughters. A son-in-law conducted the garage. Plaintiff's contentment and happiness over her material prosperity were short lived, for not only did her wealth wane, but she was overcome by far greater misfortune. Both her son Howard and son-in-law were arrested, charged with serious crimes. Howard was convicted of robbery and sentenced to a long term of imprisonment. Howard, while in jail awaiting trial, made the acquaintance of defendant, Paul L. Beach, a fellow prisoner. Plaintiff also met Beach a number of times while visiting Howard in jail. Beach was charged with having given a worthless check in order to purchase an automobile which he drove out of the State. He

was finally apprehended in El Paso, Texas, brought back to Detroit, and lodged in jail. He remained there three or four weeks before plaintiff met him. He and Howard had become friends and he seems to have made a very good impression upon plaintiff, for on March 23, 1926, shortly after meeting him, she paid the sum of $200 in order to secure a bail bond by virtue of which defendant was released from custody. Subsequently, he paid the worthless check and the charge against him was dismissed. Upon his release, he seemed at once to have ingratiated himself into plaintiff's favor, for, as she stated, she soon depended upon him to assist her in her business affairs and to take Howard's place in the management of her property.

Plaintiff is a woman of 59 years, with a very meagre education. She scarcely can read typewritten documents. She soon relied entirely upon defendant's business advice and direction, and on June 2, 1927, gave him a written power of attorney. It authorized him to look after all of her real estate and her equity in the syndicate, collect all moneys to become due her, deposit them in the bank, invest the moneys so collected, pay her taxes, bring and defend suits and act for her in such matters as might require her personal attention. The following month, on July 5, 1927, defendant, on the plea that he wanted to go on surety bonds, persuaded plaintiff to execute unto him a warranty deed to the Telegraph and Eureka Road property. Plaintiff claims that defendant told her he would deed it back any time she so requested. She produced corroborative testimony to this effect. No moneys were passed by defendant to plaintiff, nor was any document executed by him showing that he held the property in trust or that he would return it on demand. De-

fendant claims that at the time of the execution of the deed plaintiff was indebted to him in the sum of $8,000, for which he held her note; that shortly thereafter he gave her the sums of $7,100 and $3,400, both evidenced by checks signed by him. On the checks there is appropriate writing tending to show that they were given in relation to the property, and the last check indicates that it was given as the balance due on the purchase price. The two checks and note aggregate $18,500, which may be somewhat near the value of the property.

Plaintiff claims that she neither owed defendant any money whatsoever, received none from him, except several smaller sums that he had collected for her, does not remember giving a note or receiving the checks, and if she did, she simply indorsed them the same as all other documents he presented to her, and returned them to defendant; that she signed her name whenever and wherever directed by him, and that he secured the deed to the property by fraud. She filed a bill to secure a reconveyance of the property. Defendant, after securing the deed, insured the house in which plaintiff lived in his own name and recovered $4,000 insurance when the house burned down. The record is not clear as to the collection of the insurance. Possibly this is owing to the fact that it seems to have been admitted by both parties. No objection was made to the finding of the trial judge nor does defendant's attorney raise it, in the statement of the questions involved, at the beginning of his brief.

The trial judge, after listening to voluminous testimony and seeing the witnesses, entered a decree ordering a reconveyance of the property and the payment of the $4,000 insurance to plaintiff. Defendant has appealed.

The case almost exclusively involves questions of fact. We are much impressed with the opinion of the trial court and were it not for its length, we would adopt it as our own. We only mention a few of the pertinent facts.

Defendant acknowledged his previous arrests for speeding, drinking, fighting, and a subsequent arrest for giving a worthless check, and again still later, for disposing of a diamond ring to which he had no title. He had posed as an unmarried man and presented the ring to a young woman. Upon securing its return, he claims that in a fit of anger he threw the ring into the street. He also testified that he had been engaged in transporting liquor. Notwithstanding the fact that he first met plaintiff when he was in jail on account of passing a worthless check, he claims that at that time he was worth thousands of dollars represented by deposits in banks, liberty bonds in a safety deposit vault, and moneys in a safe. He, however, did not produce any bank books showing such credits or any physical proofs of ownership of a safety deposit box nor did he give any other facts that at all impress us with his claim that he had any moneys whatever. When asked why he did not pay the worthless check and thus endeavor to secure his release, he stated that he was not guilty of the crime charged; that it was agreed at the time the check was given it was to be held and not used until later; and that he preferred to remain in jail so as to increase the damages in a false imprisonment suit he proposed bringing later on. He does not show that any such suit was ever begun.

When plaintiff first met defendant, she had $14,242 on deposit in the banks. A short time later, after defendant had become her confidential agent,

she had a balance of $7 left. Although plaintiff testified she had deposited all her moneys in the banks, her bank books produced show no such sums as defendant swears he paid her. She admits going to the bank with defendant and signing her name to some papers as requested by him. Defendant also claims that plaintiff borrowed $6,500 from his mother. Were this true, plaintiff in a very few months would have spent nearly $40,000, consisting of the balances in her banks, $6,500 claimed by defendant to have been borrowed by plaintiff from his mother, and the $18,500 that defendant claims to have paid her as hereinbefore stated. There is nothing to show such expenditures. Defendant makes the claim that plaintiff does not come into court with clean hands, and that $4,000 of the amount involved or some other sums was used by the plaintiff to bribe witnesses against her son to leave the State. A receipt of such alleged witnesses was produced, but it is so indefinite in character as to be almost meaningless. In it two parties acknowledge the receipt of some moneys from plaintiff. Her signature is also attached to the receipt. In answer to her denial that she paid witnesses any sums whatsoever, defendant testified that he and plaintiff together paid the witnesses. Even were this true it would not excuse defendant's fraudulent conduct in obtaining plaintiff's property. It would appear as if some money of an indefinite amount had been paid by plaintiff, but whether she was being blackmailed or what actually happened we can not determine from the testimony.

Defendant does show that he deposited sums of $7,100 and $3,600 in his bank, but the bank statements also show that the sums of $7,100 and $3,400 were withdrawn the very same days these deposits

were made, so that the bank balance remained almost the same at the end of each of these days as they were the previous days. His bank deposit slips were not produced, nor was there any corroborative testimony produced by defendant showing that plaintiff received the moneys on the checks. Counsel for each party had previous dealings with the other party, and frequently questions were asked that had nothing to do with the issues involved. They seemed to be more in the nature of testimony given by the attorneys than answers to questions. The trial judge stated that he permitted a wide latitude in an equity suit so that he might study the character of the witnesses while the testimony was being given and also to obtain such further light as might be possible.

Defendant also claimed that plaintiff deeded the property to him because she wanted to put the property beyond the reach of her creditors on account of a suit against her arising out of an automobile accident. Plaintiff flatly denies that there is any truth in this claim. She further showed that she was protected by automobile insurance. Other minor questions were raised which we do not believe it is necessary to discuss.

The sole question of law raised is whether, in view of the fact that plaintiff admitted that she deeded the property to defendant with only an alleged verbal agreement on his part to reconvey upon request, she is precluded from demanding such reconveyance on account of the statute of frauds (3 Comp. Laws 1929, § 13411). It is true that in the absence of fraud, accident, or mistake, parol testimony is inadmissible to establish a trust in real estate. *Elson* v. *Elson,* 245 Mich. 205. However, when it is shown that title has been obtained through fraud, misrep-

resentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property, and there are no intervening rights of *bona fide* purchasers, equity will impress a constructive trust on the property and turn it over to the one to whom it rightfully belongs. *Morris* v. *Vyse,* 154 Mich. 253 (129 Am. St. Rep. 472); *Biddle* v. *Biddle,* 202 Mich. 160, 167, and cases therein cited. This rule has been frequently applied in cases of agents who take advantage of their fiduciary relationship and thus secure the property of their principal. *Moore* v. *Mandlebaum,* 8 Mich. 433; *Beedle* v. *Crane,* 91 Mich. 429; *Salliotte* v. *Dollarhite,* 211 Mich. 269, 272.

The decree in favor of plaintiff is affirmed, with costs.

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

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RICHMAN *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. APPEAL AND ERROR—DIRECTED VERDICT.
   In reviewing judgment on verdict directed for defendant, evidence most favorable to plaintiff must be accepted.

2. RAILROADS—NEGLIGENCE—FAILURE TO HAVE LIGHTS AND SOUND WARNING.
   Failure to have lights on locomotive and to sound whistle on approaching crossing constitute negligence.

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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.

3. SAME—CONTRIBUTORY NEGLIGENCE—DUTY OF ONE CROSSING TRACKS.

Law imposes care upon person approaching railroad crossing, and it is his duty to carefully observe and ascertain whether he can safely proceed to cross tracks.

4. SAME—EVIDENCE—PHYSICAL FACTS.

Mere statement of automobile driver that he looked before proceeding to cross tracks does not overcome physical facts of case.

5. SAME—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.

Automobile driver struck by locomotive at crossing was guilty of contributory negligence as matter of law, where it appears from physical facts that had he looked properly he would have seen the oncoming train and could have prevented accident, notwithstanding his testimony that he looked before proceeding and saw no train approaching.

Error to Wayne; Murphy (Alfred J.), J. Submitted April 8, 1931. (Docket No. 25, Calendar No. 35,464.) Decided June 1, 1931.

Case by Joseph Richman against Detroit, Grand Haven & Milwaukee Railway Company, a corporation, for personal injuries received in a railway crossing accident. Directed verdict and judgment for defendant. Plaintiff brings error. Affirmed.

*Sol Blumrosen*, for plaintiff.

*Frederic T. Harward* (*William W. MacPherson*, of counsel), for defendant.

BUTZEL, C. J. For upwards of four years, plaintiff resided on the Adams road near its intersection with Woodward avenue, in the village of Birmingham, Michigan. To enter the Adams road from Woodward avenue, one must cross five tracks of two rails each. The two most westerly tracks adjoin Woodward avenue and are exclusively for street

railway purposes. The three more easterly ones belong to defendant, or other affiliated railroad companies. The easterly and westerly railroad tracks are used to set out cars and also to enable trains to pass one another. The railroad track between these latter two is used as a main line for through traffic.

Plaintiff was familiar with the tracks, for he crossed them daily. The railroad was not required by any legal authority to keep a watchman at the crossing and it was unguarded. The Adams road crosses the tracks at an angle of 45 degrees. The distance between the railroad tracks is 9½ feet, and between the rails of each track approximately five feet. Plaintiff was possessed of good sight and had no physical impediments.

Inasmuch as the verdict was directed in favor of defendant, the evidence most favorable to plaintiff must be accepted. At about 9:30 p. m. on June 16, 1926, he drove a Ford car along Woodward avenue, and turned in a northeasterly direction on to Adams road. As he approached the street car tracks, he stopped his car, and, seeing that no street cars were approaching, crossed the street car tracks and again stopped at the first or more westerly railroad tracks. He saw a long freight train standing on this track. The rear of the caboose on the south end of the train was approximately five feet north of Adams road. The plaintiff stopped his car, and as he looked and listened, a man came out of the rear door of the caboose, descended to the ground from the west side of the train, motioned, and called out to plaintiff, "Come on." The testimony does not show that the man had any lantern, wore a cap, uniform, or other insignia of a railroad employee. He was in no way identified as an agent or employee of defendant. Plaintiff claims that he looked in both directions before proceeding across the track. There was also

an engine standing on the fifth or most easterly of the three railroad tracks. Plaintiff's lights were shining in a northeasterly direction, from which a train was coming. After receiving the word from the man who emerged from the caboose, plaintiff speeded up his car and as he drove on to the fourth or middle railroad track the front part of his car was struck by the locomotive of a south-bound train belonging to defendant. Plaintiff sustained injuries for which he brought suit. He claims that the moving train had no lights and sounded no whistle. This would constitute negligence on the part of defendant.

At the conclusion of testimony on behalf of plaintiff, defendant, after producing only one witness to show the lay of the tracks, asked for a directed verdict in its favor. The trial judge held plaintiff guilty of contributory negligence, and directed a verdict against him.

The invitation by the man who came from the caboose, and who was a stranger as far as the record shows, did not completely relax plaintiff's duty to exercise due care and caution in crossing the other railroad tracks. An ordinarily prudent man would have looked carefully before proceeding. The man who came out of the caboose had his back turned to the more easterly tracks, and his statement indicated that the train with the caboose had come to a standstill.

Notwithstanding the fact that plaintiff claims that the locomotive of the south-bound train on the middle railroad track bore no headlight, and that he looked both north and south before he crossed the track, the very fact that the locomotive bore down upon him almost immediately upon his reaching the track, and struck the front part of his automobile, shows that he would have seen the oncoming train

had he looked properly. Without taking into consideration the fact that the track was near Woodward avenue, which is illuminated, for this is not disclosed by the record, as the judge stated, nevertheless the headlights of the car were turned partly in the direction from which the train was coming. Plaintiff testified that it was light enough for him to see the man coming out of the caboose on the freight train, although he was five feet away from the Adams road. If he had looked he would necessarily have seen the approaching train.

The law imposes care upon the person approaching a railroad crossing. It was plaintiff's duty to carefully observe and ascertain whether he could safely proceed in a northeasterly direction across the second railroad track. His mere statement that he looked does not overcome the physical facts of the case. As was said in *Baker* v. *Delano,* 191 Mich. 204:

"This testimony also makes the conclusion irresistible that if the deceased had stopped, looked, and listened, it would have been a physical impossibility for him not to have been aware of the approach of the engine, no matter whether the bell was being rung or the lights were burning. There was no obstruction to his view for 500 feet along the tracks in the direction from which the engine was coming. A stop for a moment, or a momentary glance, would have apprised him of the danger. We see no escape from the conclusion that the circuit judge was clearly right in holding that the deceased was guilty of contributory negligence."

In *Ackerman* v. *Railroad Co.,* 249 Mich. 693, this court said:

"Plaintiffs recognize the general rule that one about to cross a railroad track must look for ap-

proaching trains while he is in a place of safety and has an unobstructed view. But their position is that they used due care in that they looked and listened, saw sufficient clear track to induce a prudent man to believe he could cross in safety, could have crossed had not the train approached at an excessive rate of speed, the rough road took their attention, and these circumstances made the question of negligence one for the jury.

"The general duty to look is not a mere element of due care, to be weighed with other circumstances in determining negligence. In the words of Mr. Justice WIEST in *Rosencranz* v. *Railroad Co.*, 244 Mich. 137, it is a 'standard of conduct, based on a rule of reasonable care, to which all drivers of motor vehicles must conform or bear the consequences.' * * *

"In this case plaintiffs had an unobstructed view, and there was nothing to throw them off guard. They had ample opportunity to see the approaching train and to stop in a place of safety, not only before they reached the tracks, but even after they had crossed the west-bound track. *Downey* v. *Railway Co.*, 230 Mich. 243; *Brady* v. *Railway Co.*, 248 Mich. 406. Exceptional circumstances necessary to modify the standard of conduct were not present. The language in *McGee* v. *Railway Co.*, 102 Mich. 107 (26 L. R. A. 300, 47 Am. St. Rep. 507), is particularly applicable:

> "'It will not do to say that he has discharged his responsibility in case of an accident by looking when some feet away, for he may miscalculate the distance and the speed of the car. To avoid danger, he must look just before he enters upon the track.'

"Plaintiffs are chargeable with contributory negligence of their driver, and the judgment is affirmed."

See, also, *Rosencranz* v. *Railroad Co.*, 244 Mich. 137; *DeJager* v. *Andringa*, 241 Mich. 474; *Brady* v. *Railway Co.*, 248 Mich. 406; *Baltimore & Ohio R.*

*Co.* v. *Goodman,* 275 U. S. 66 (48 Sup. Ct. 24, 56 A. L. R. 645).

The court was correct in directing a verdict in favor of defendant. The judgment is affirmed, with costs.

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

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TRANSCONTINENTAL INSURANCE CO. *v.* BERENS.

1. MOTOR VEHICLES—LIABILITY OF OWNER—PRESUMPTIONS.
   To overcome presumption created by 1 Comp. Laws 1929, § 4648, that son was driving father's truck with his knowledge and consent, evidence must be direct, positive, and credible.

2. SAME—QUESTION FOR JURY.
   Whether son was driving father's truck with his knowledge and consent, *held,* properly presented to jury under evidence.

Case-made from Allegan; Miles (Fred T.), J. Submitted April 10, 1931. (Docket No. 52, Calendar No. 35,508.) Decided June 1, 1931.

Case by Transcontinental Insurance Company, as assignee, against Harry and John Berens. Judgment for plaintiff against both defendants. Defendant John Berens brings case-made. Affirmed.

*Jarrett N. Clark,* for plaintiff.

*Leo W. Hoffman* and *Clare E. Hoffman,* for appellant.

BUTZEL, C. J. Plaintiff Transcontinental Insurance Company, upon payment of a loss, took an assignment of the claim, and brought suit to recover the damages arising out of a collision of the car of its assured with a truck owned by John Berens, and driven by his son Harry Berens, defendants herein. The jury rendered a verdict against both defendants, and John Berens appeals from the judgment rendered thereon. He claims that he is not liable under that part of 1 Comp. Laws 1929, § 4648, which provides:

"The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle * * * (when it) is being driven with his or her express or implied consent or knowledge. It shall be presumed that such motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of said injury by his * * * son * * * or other immediate member of the family."

He insists that there was positive testimony showing that the car was not driven with his express or implied knowledge or consent, that thus the statutory presumption had been overcome, and that the trial judge erred in not directing a verdict as requested in his favor.

The son testified that up to the time of his marriage, about eight months prior to the collision, he had resided at his father's home and driven his father's car; that he had not done so since he had married and established his own home some distance away; that he "was stuck" four or five miles from his father's home, and went there and took the truck. The father's testimony is brief and is herewith set forth in full:

"I am the father of Harry and the owner of the truck involved in this suit.

"*Q.* Did you ever give Harry Berens any permission or consent to his taking that truck?
"*A.* I did not.
"*Q.* Did you ever give Harry Berens any permission or consent to use your truck?
"*A.* I did not.
"*Q.* Were you home when he came and got it?
"*A.* I wasn't around the house.
"*Q.* Did you see him take it?
"*A.* No.
"*Q.* Did you know he had it at that time?
"*A.* Not at that time.
"*Q.* You learned that later?
"*A.* I learned that later, yes, sir."

*Cross-examination* by Mr. Jarrett N. Clark:

"I have owned an automobile, I think the first one in 1923.
"*Q.* And from that time on, you have let Harry drive your automobile?
"*A.* The first car I did.
"*Q.* Did you ever tell Harry that he couldn't drive your automobile?
"*A.* Which automobile?
"*Q.* Any?
"*A.* Sometimes I did.
"*Q.* When did you do that?
"*A.* I don't remember.
"*Q.* That was only once in a while or a special occasion?
"*A.* I don't know.
"*Q.* Well, isn't it a matter of fact, Mr. Berens, and didn't you tell your brother, Fred Berens, the township clerk of Blendon township of Ottawa county, that Harry came to you and asked for this truck and you told him he could take it, but be careful and not have any accidents?
"*A.* I don't know that any such thing happened.
"*Q.* Did you ever have a talk with your brother about that?
"*A.* I don't know.

"*Q.* Would you say you didn't?

"*A.* I don't remember.

"*Q.* Isn't it a fact, Mr. Berens, that Harry did ask you for that truck, and you let him take it to go and get the truck that was stuck over somewheres else?

"*A.* No.

"*Q.* You knew he had it, didn't you?

"*A.* Afterwards.

"*Q.* Before he took it, didn't you know it?

"*A.* No.

"*Q.* Did you send word to him and tell him to bring the truck back?

"*A.* I telephoned him.

"*Q.* Where did you telephone him?

"*A.* From my home.

"*Q.* Where to?

"*A.* Byron Center. I think he lived there at that time.

"*Q.* Why did you call up over the telephone then to Byron Center?

"*A.* I had to use it.

"*Q.* Oh, you had to use the truck?

"*A.* Yes, sir.

"*Q.* That is the only reason that you wanted it, to use the truck, and you were hauling gravel into the township, weren't you?

"*A.* I had to the next day.

"*Q.* The next day, and you wanted him to bring the truck back the next day, or in time so you could use it the next day, is that correct? That is the only reason why you wanted it back, so you could use it in drawing gravel for the township the next day? Say yes or no, please.

"*A.* Yes."

*Re-direct examination* by Mr. Leo W. Hoffman:

"*Q.* How did you learn that your son had the truck?

"*A.* From my wife.

"*Q.* She told you?

"*A.* She told me."

In order to overcome the statutory presumption, the evidence must be of a direct, positive, and credible character. The rule is stated by Mr. Justice NORTH in *Wehling* v. *Linder,* 248 Mich. 241, 243:

"One who is driving a motor vehicle incident to the owner's business is presumed to be duly authorized to so drive the vehicle; but it is the established law in this State that such a presumption prevails in favor of the litigant relying thereon only so long as that phase of the case is not covered by testimony to the contrary. *Gillett* v. *Michigan United Traction Co.,* 205 Mich. 410; *Union Trust Co.* v. *Car Co.,* 219 Mich. 557; *Depue* v. *Schwarz,* 222 Mich. 308; and *Noonan* v. *Volek,* 246 Mich. 377. If the testimony opposed to the presumption is clear, positive, and uncontradicted, it becomes the duty of the trial judge to direct a verdict if the issue is a controlling one in the case. *Union Trust Co.* v. *Car Co., supra.*"

A review of the quoted testimony shows that it is not clear, positive, and uncontradicted, so as to overcome the presumption, and it became the duty of the trial judge to submit the question to the jury. This he did in a proper charge, and the jury rendered a verdict against both defendants.

The judgment is affirmed, with costs to plaintiff.

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

CONVERSE *v.* HERP.

CONTRACTS—RESCISSION—MENTAL COMPETENCY.

In suit to recover amount furnished by plaintiff toward home for his half-niece, her husband, and daughter, where evidence shows that at time of transaction plaintiff was mentally competent and was not taken advantage of, but that it was agreed he should be paid four per cent. upon amount advanced during his lifetime, and at his death obligation should end, decree of court below dismissing suit is modified, on appeal, and remanded to court below to determine amount of interest due.

Appeal from Kent; Perkins (Willis B.), J. Submitted April 14, 1931. (Docket No. 89, Calendar No. 35,484.) Decided June 1, 1931.

Bill by James Converse against Edwin J. Herp and others for an accounting, to secure a lien on real estate, and other relief. Bill dismissed. Modified and remanded.

*William J. Landman,* for plaintiff.

*Linsey, Shivel & Phelps* and *John H. Vander Wal,* for defendant Mildred Herp.

BUTZEL, C. J. Plaintiff James Converse is a half-uncle of Mildred Herp, who, with her husband, Edwin J. Herp, and their young daughter, Coleta, are defendants herein. Plaintiff, at the age of 78 or thereabouts, went to live with defendants. He was a Civil War veteran with some means. He was extremely fond of Coleta, and wanted her to be the object of his benefactions. Two years after he went

to live with the Herps, they purchased a home at 234 Prospect street, in Grand Rapids, Michigan, for the sum of $3,725. Plaintiff furnished $2,000 of this sum. Title was taken in the name of Mr. and Mrs. Herp. Later, it was deeded to a third party, who in turn deeded it back to plaintiff, Mr. and Mrs. Herp, and Coleta, as joint tenants. Plaintiff claims in his bill of complaint, that, in consideration of contributing the $2,000, Mr. and Mrs. Herp were to furnish him room and board at the rate of $30 a month, and pay him four per cent. per annum on the $2,000. The record indicates that interest was to be paid to plaintiff during his lifetime and that upon his death this obligation was to end. Plaintiff lived with the Herps for some time, and intermittently would leave them and then return again. The latter part of the year in which plaintiff acquired his interest in the property, he deeded it to the Herps and took back a mortgage for $500. Subsequently, he discharged the mortgage. Plaintiff claims that he was suffering from very high blood pressure and was not in mental condition to know what he was doing or to resist the importunities of Mrs. Herp when he deeded his interest in the property and also when he discharged the mortgage.

In his bill, he asks for a decree for the $2,000 and interest, also the sum of $200 he contributed towards the purchase of an automobile, a like sum for money he loaned to Mr. and Mrs. Herp to make repairs, also various additional amounts represented by personal loans to Mr. Herp. He further asks that the repayment be secured by a lien against the interest of Mr. and Mrs. Herp in the real estate.

Plaintiff finally left the Herp home in the midst of much domestic discord between Mr. and Mrs. Herp, which culminated in the divorce court. In the

divorce decree in the lower court, Mrs. Herp was awarded the property on which plaintiff claims a lien. The decree was subsequently set aside in this court and the divorce bill dismissed. See *Herp* v. *Herp, ante,* 33. While the appeal was pending in this court, plaintiff's case was heard. Mr. Herp appeared as witness for plaintiff and seemed anxious that plaintiff recover the amount claimed, but that it be paid out of the property awarded Mrs. Herp. He thus sought to avoid liability on his part. The trial judge concluded from the testimony that plaintiff's suit was largely brought through Herp's assistance, and that it was a by-product of the bitterness engendered in the divorce proceedings. He rendered a decree dismissing the bill.

On reading the record, we are impressed with the fact that plaintiff was a bright, old gentleman, with a good memory and well able to take care of himself; that he was not in any way taken advantage of, although he may not have been treated with such kindness as his generosity deserved. His testimony is positive in stating that he furnished the money to help Coleta, and that he wanted her to have an interest in the property, and that he was purchasing such interest for her and helping the family along. Except for the $2,000 put into the home and $200, a gift or contribution towards the purchase of an automobile, the other items claimed by plaintiff were personal loans, for the recovery of which he has an adequate remedy at law. The testimony shows that plaintiff was to receive the sum of four per cent. per annum on $2,000 during the balance of his lifetime, and that the obligation to pay interest was not discharged by the giving of the quitclaim deed, the mortgage, and its discharge. On October 8, 1928, several years after the execution of all these papers,

defendant Mildred Herp paid plaintiff interest, and plaintiff executed a receipt showing that interest was still being paid.

No objection was made to the jurisdiction of the court. The giving of the deed and the discharge of the mortgage show that plaintiff surrendered his interest and lien on the property. The obligation to pay the interest on $2,000 during plaintiff's lifetime and a debt of $200 for money loaned by plaintiff to defendants to repair the house, however, were not discharged.

Plaintiff, therefore, should have a money decree without a lien on the real estate for the repayment of the interest and the $200 loaned to Mr. and Mrs. Herp. This is without prejudice also to plaintiff's right to recover $400, which he claimed he loaned to Mr. Herp alone, and for the recovery of which he may have an adequate remedy at law. The case is remanded to the trial court for the purpose of determining the amount of interest thus due, and entering a decree in accordance with this opinion. It is modified to this extent; otherwise it is affirmed, with costs to plaintiff.

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

NEW YORK LIFE INSURANCE CO. *v.* ABROMIETES.

INSURANCE—LIFE INSURANCE—PRINCIPAL AND AGENT—EFFECTIVE DATE OF POLICY NOT POSTPONED BY AGENT'S NEGLECT TO INDORSE PAYMENT ON APPLICATION.

Where life insurance policy provided that if, at time of making application, full amount of premium was paid, receipt attached thereto was given to assured, and payment indorsed on application, policy should become effective from date of application, assured may not be deprived of benefit of said provision by failure of insurer's agent to make such indorsement and execute proper receipt; payment at time of making application not being disputed.

Appeal from Wayne; Hawley (Royal A.), J., presiding. Submitted April 16, 1931. (Docket No. 120, Calendar No. 35,614.) Decided June 1, 1931.

Bill by New York Life Insurance Company, a New York corporation, against Antonnina Abromietes, beneficiary, to annul a life insurance policy. Crossbill by defendant for money decree of face value of policy. Decree for plaintiff. Defendant appeals. Reversed.

*Thomas A. E. Weadock,* for plaintiff.

*Uno S. Heggblom,* for defendant.

BUTZEL, C. J. Sam Rosko, agent of plaintiff, New York Life Insurance Company, interviewed defendant Antonnina Abromietes in regard to taking out

As to effect of stipulation in application or policy of life insurance that it shall not become binding unless delivered to insured while in good health, see annotation in 17 L. R. A. (N. S.) 1144; 43 L. R. A. (N. S.) 725; L. R. A. 1916F, 171.

an insurance policy on the life of her sister, Tillie Witer, a school girl of 14 years of age who was living with, and being supported by, defendant. The latter postponed taking out the policy for a month because she did not have the money with which to pay the first premium. On June 7, 1927, Rosko called on defendant and the application was duly signed by assured. Defendant claims that at the same time the first premium was paid in cash. Plaintiff admits the receipt of the premium and does not deny that it was paid when the application was made. On June 11, 1927, the assured was examined by a medical examiner of plaintiff, who found her to be in good health. She was attending school. Several days later, however, on June 14 and 15, 1927, she consulted a physician, who found that she had symptoms of miliary bilateral tuberculosis. On June 20 or 21, 1927, a policy for $1,000, dated June 15, 1927, was delivered to defendant. A few days later assured was sent to a sanitarium. On June 29, 1927, she was removed in a state of coma to a hospital in Detroit where the following day she died from tuberculosis complicated with meningitis and pneumonia.

The record does not show that assured had any disease or knowledge thereof either on the date she was examined by the plaintiff's physician or when the insurance was first solicited or when the application was signed and the premium paid. The policy contained the following provisions:

"9. It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been

treated by any physician since his medical examination; PROVIDED, HOWEVER, THAT IF THE APPLICANT, AT THE TIME OF MAKING THIS APPLICATION, PAYS THE AGENT IN CASH THE FULL AMOUNT OF THE FIRST PREMIUM FOR THE INSURANCE APPLIED FOR IN QUESTIONS 2 AND 3 AND SO DECLARES IN THIS APPLICATION AND RECEIVES FROM THE AGENT A RECEIPT THEREFOR ON THE RECEIPT FORM WHICH IS ATTACHED HERETO, AND IF THE COMPANY, AFTER MEDICAL EXAMINATION AND INVESTIGATION, SHALL BE SATISFIED THAT THE APPLICANT WAS, AT THE TIME OF MAKING THIS APPLICATION, INSURABLE AND ENTITLED UNDER THE COMPANY'S RULES AND STANDARDS TO THE INSURANCE, ON THE PLAN AND FOR THE AMOUNT APPLIED FOR IN QUESTIONS 2 AND 3, AT THE COMPANY'S PUBLISHED PREMIUM RATE CORRESPONDING TO THE APPLICANT'S AGE, THEN SAID INSURANCE SHALL TAKE EFFECT AND BE IN FORCE UNDER AND SUBJECT TO THE PROVISIONS OF THE POLICY APPLIED FOR FROM AND AFTER THE TIME THIS APPLICATION IS MADE, WHETHER THE POLICY BE DELIVERED TO AND RECEIVED BY THE APPLICANT OR NOT."

The provision in capital letters is particularly referred to.

The trial judge found from the testimony that the premium was paid at the time the application was made. It is evident that no receipt on the form attached to the application was given defendant nor did the assured indorse on the printed form in the application the fact that she had paid the first premium. The parts of the application containing such forms were removed by the Detroit office of the plaintiff, because they had never been executed, and an appropriate indorsement explaining the removal was stamped on the application. There is no question but that the assured consulted a physician after the application was signed. This was prior to the date of the policy. Plaintiff tendered to defendant a

return of the premium paid by her, and upon her refusal to accept it, filed a bill to annul the policy because the assured consulted a physician after the date of the application but prior to the date and delivery of the policy. Defendant claims that under the quoted clause of the application, which is attached to and made a part of the policy, the insurance became effective from the date of the application; that the payment of the first premium in cash made the policy effective from such date, notwithstanding that no receipt on the form attached to the application was produced nor any indorsement by assured on the application shown. In her cross-bill defendant asks a decree ordering that plaintiff pay her the amount of the policy. Plaintiff's counsel concede that if it is not entitled to a decree voiding the policy, then it is obligated to pay defendant the amount of the policy. No question was raised as to the jurisdiction of the court. The trial judge found in plaintiff's favor and rendered a decree annulling the policy. Defendant appeals.

Were it not for the proviso in the part of the policy hereinbefore quoted, plaintiff would be relieved from liability under the policy, because of the fact that the assured consulted a physician after the application, but prior to the issuance of the policy. The leading case is that of *Stipcich* v. *Metropolitan Life Ins. Co.*, 277 U. S. 311 (48 Sup. Ct. 512), in which the court said:

"It was shown on the trial by uncontradicted evidence that after his application Stipcich consulted two physicians and that they told him that an operation for the removal of the ulcer was necessary. * * * Here both by the terms of the application and familiar rules governing the formation of contracts no contract came into existence until the de-

livery of the policy, and at that time the insured had learned of conditions gravely affecting his health, unknown at the time of making his application.

"Insurance policies are traditionally contracts *uberrimae fidei* and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option. *Carter* v. *Boehm,* 3 Burrows, 1905 (97 Eng. Rep. Repr. 1162); *Livingston* v. *Maryland Insurance Co.,* 6 Cranch (U. S.), 274; *McLanahan* v. *Universal Insurance Co.,* 1 Pet. (U. S.) 170; *Phœnix Life Insurance Co.* v. *Raddin,* 120 U. S. 183, 189 (7 Sup. Ct. 500); *Hardman* v. *Firemen's Insurance Co.,* 20 Fed. 594."

The record does not disclose the reason for the proviso. Undoubtedly making a policy effective from the date of the application is of very great advantage to the assured. Such a policy should be more attractive to the assured and salable by the insurer. We can also see the advantage of having the first premium paid promptly and the right of an insurance company to positive proof of payment of the premium at the time of the application. However, we are not ruling on a case where it is denied that the first premium was paid at the time of the application or where the failure to produce the receipt or the indorsement or the lack of them might be of very great importance in determining whether the first premium was paid or not.

In the present case, the assured and defendant were dealing with plaintiff's agent. The record indicates that the parties were foreigners and that neither the assured nor her sister were experienced in business. It seems more than probable that both the receipt and the indorsement on the application

would have been executed had their importance or necessity been made known to assured or defendant by plaintiff's agent. In securing the application, he was acting for plaintiff. Although he had no right to alter the terms of the contract, his neglect or omission to give the receipt and see to it that the indorsement be made on the application should not be attributable to defendant. See *Hoyle* v. *Grange Life Assurance Ass'n,* 214 Mich. 603, 607. At least, plaintiff should not profit by such neglect or omission in view of the fact that it shows no resulting loss or damage and admits the payment of the first premium at the time the application was signed.

Under the circumstances of the present case, defendant is entitled to recover the amount of the policy and interest. The decree of the lower court is reversed, and the case remanded for the entry of a proper decree, in accordance with this opinion. Defendant will recover costs.

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

TRADER *v.* TRADER.

DIVORCE—EXTREME CRUELTY—NONSUPPORT.

Decree to wife in her suit for divorce on grounds of extreme cruelty and nonsupport, *held,* justified by record.

Appeal from Ottawa; Vanderwerp (John), J., presiding. Submitted April 23, 1931. (Docket No. 79, Calendar No. 35,579.) Decided June 1, 1931.

Bill by Lorine M. Trader against Albert C. Trader for divorce. Decree for plaintiff. Defendant appeals. Modified and affirmed.

*Leo W. Hoffman* and *Clare E. Hoffman* (*Carl E. Hoffman,* of counsel), for plaintiff.

*Robinson & Parsons,* for defendant.

BUTZEL, C. J. Lorine M. Trader, plaintiff, charging cruelty and nonsupport, brought suit for divorce against defendant, Albert C. Trader. The parties were married in Chicago in 1908 and are respectively 42 and 43 years of age. Three sons, under 16 years of age, and respectively 15, 11, and 7 years old, are now living with, and being supported by, plaintiff. A son 20 years of age also lives with plaintiff.

Defendant was formerly a baggage man on a railroad. Over 10 years ago the parties moved to Ottawa county in this State, where they purchased a 15¾-acre farm for $4,800. They both contributed towards it. There is a $2,000 mortgage against the farm. Defendant alleges the farm is worth less

than $7,000. It is assessed at $2,000. Defendant for a time worked for plaintiff's father, but when the latter's factory was shut down over seven years ago, defendant did not secure any other position. The family soon thereafter became destitute, and their credit was shut off. In order to help support them, plaintiff returned to Chicago, where she averaged $60 a week as a milliner. She continually sent money to defendant in order to maintain the family and a part of the time to pay for a housekeeper. Defendant admits that she contributed over $3,000 for these purposes. He constantly wrote to her for more money. The children continued to live with defendant on the farm while plaintiff remained the breadwinner. Defendant, although strong and able-bodied, seemed unwilling or unable to secure a position and provide for the family. He attributes his remissness to the present unemployment situation, but his idleness began many years prior thereto, and has continued ever since.

Plaintiff finally returned home, but soon thereafter left defendant, and took the three children under 16 years of age with her to Wayne, Michigan, where they all live with her father. She supports herself and the children with the aid of her father and her 20-year old son. The lower court granted plaintiff a decree of divorce, and defendant has appealed.

On motion in this court to compel defendant to pay towards plaintiff's expenses on the appeal, it was stated in the accompanying affidavit, and not denied by defendant, that although defendant had been ordered to pay $7.50 a week for the support of the children *pendente lite* and also an attorney's fee, he had not made any payment whatsoever in almost the year that has elapsed since the entry of the

order. While the nonsupport charge must be entirely founded on facts that occurred prior to the filing of the bill, nevertheless the conduct of the defendant in not obeying the court's order and thus contributing towards the family's support tends to confirm our opinion, after reading the record, that defendant is guilty of nonsupport, and that the court was correct in granting plaintiff a decree.

Plaintiff also charges defendant with extreme cruelty, principally on account of using obscene and vile language, and making opprobrious charges. It is claimed that plaintiff did not have such a refined and sensitive nature so as to be seriously affected by defendant's misconduct in this regard. Details are unnecessary. Even were there any doubt as to the charges of cruelty, defendant's expressions to the children and in their presence, and his absolute failure and neglect to provide support for his wife and children, leave no room for doubt but that the trial judge was correct in granting the divorce.

The trial judge in the final decree ordered defendant to pay $1.50 a week for the support of each of the minor children until each reaches the age of 16. He gave the farm, subject to the mortgage, to plaintiff. He also gave her certain personal property in the home, and one-half of the household furniture. He also permitted defendant to retain his one-third interest in the equity in a Chicago building, mortgaged for $5,000 and estimated to be worth $11,000. Its real worth was not shown. He was also permitted to keep the cow, pigs, farm tools, and a Ford truck and a Dodge sedan. Defendant claims that he owes $750, but about one-half of this consists of past-due interest on the mortgage and back taxes on the farm. Plaintiff, however, should pay the back interest and taxes, and further, in

order not to increase defendant's indebtedness, plaintiff should pay him the sum of $350. This sum may be paid by crediting him with an equivalent amount on the sums due from him to plaintiff for the support of the children under the court's order and on the costs of the lower court and this court. In all other respects the decree is affirmed, with costs to plaintiff.

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

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O'NEALL v. HER.

1. DESCENT AND DISTRIBUTION—OMISSION OF CHILD FROM WILL—STATUTES—EVIDENCE.

On question as to whether mother's omission to provide in will for daughter by former marriage was unintentional (3 Comp. Laws 1929, § 15550), trial court properly permitted jury to consider not only will itself but also extrinsic evidence.

2. SAME—SUFFICIENCY OF EVIDENCE.

Verdict of jury that mother's omission of daughter's name from will was intentional, *held*, supported by evidence.

Error to Kent; Dunham (Major L.), J. Submitted April 21, 1931. (Docket No. 90, Calendar No. 35,501.) Decided June 1, 1931.

Petition by Alvina O'Neall in the probation of the estate of her mother, Friderike Her, deceased, against Charles F. Her, administrator, and others

for a portion of the estate under 3 Comp. Laws 1929, § 15550. Petition dismissed. Plaintiff appealed to the circuit court. Judgment for defendants. Plaintiff brings error. Affirmed.

*William J. Landman,* for plaintiff.

*Rodgers & Dunn,* for defendants.

BUTZEL, C. J. Friderike Her, testatrix, was first married to Conrad Rieboldt and bore unto him three children; Elizabeth, who is now known as Alvina O'Neall, and is the plaintiff herein, Frederick, who died, leaving three children, and Dorothy, who is known as Dorothy Her, which name she assumed. Plaintiff was born in 1875. Her parents were divorced the year following her birth, and she was taken to the home of Carl Bartell and wife, who named her Alvina Bartell, although they never adopted her. She remained with them until she reached the age of 17, when she married a Mr. Bishop, and subsequently moved to Chicago.

In 1878 testatrix remarried and became the wife of Adam Her of Grand Rapids. In 1888 or thereabouts, plaintiff visited the Her home over the Christmas period, but after several weeks, plaintiff's mother, the testatrix, told her that there were too many in the family, that some one would have to go to work, and plaintiff thereupon returned to the Bartell home where she remained until her marriage. Bishop died in 1916, and in 1924 plaintiff married William O'Neall, of Chicago, where she now resides.

Plaintiff's mother, after her marriage to Adam Her, became the mother of five more children, four of whom are now living. They are Charles F. Her, Mamie Anderson, Minnie Woolson, and Clara

Mackey, who, together with plaintiff's sister, Dorothy, are the defendants in the present case. Dorothy Rieboldt always remained with her mother, became a member of the Her household, and was known as Dorothy Her and treated by Adam Her the same as his own children.

At the time of plaintiff's birth and for many years thereafter, the Rieboldt and the Her families were poor and it was economic pressure that prompted plaintiff's mother to give up her child in the first instance and let her go to strangers. The Her family worked hard; Dorothy helped her father in the meat business; the mother took in washings; and it was through frugality and hard work that Adam and Friderike Her together accumulated an estate of $30,000 or thereabouts. The testimony shows that after plaintiff was first placed with others, her mother occasionally saw her in Grand Rapids, but after she married Bishop and moved to Chicago, all association ceased. For 33 years prior to the execution of the will in question in this case, plaintiff and testatrix had not met. They did not correspond with one another, nor did they even exchange an occasional card. They both acted as if they were permanently and absolutely estranged from one another. They did meet subsequent to the execution of the will, but it was not changed.

On or about the 8th day of May, 1929, Adam and Friderike Her called upon an attorney in Grand Rapids and instructed him to draw wills that were almost identical. Adam Her executed his will on the 8th day of May, 1929, and testatrix signed hers the following day. In neither will are either plaintiff or the children of Frederick Rieboldt specifically mentioned. Their names are omitted. Each will provides that the property be trusted to Charles F.

Her for the support of the surviving spouse, upon whose death the property is to go to the children, who are, however, specifically named in another clause. The pertinent provisions in the will of Adam Her are as follows:

"(c) Upon my death if my wife does not survive me, after satisfying the provisions hereinbefore set forth, I direct my trustee to divide the balance of this trust fund into as many portions of equal value as I have children, whose names I have hereinafter mentioned and to dispose of the same as hereinafter provided.

"(d) I have the following children. Dorothy Her, Charles F. Her, Mamie Anderson, Minnie Woolson and Clara Mackey.

"It is my will and I wish that Dorothy Her shall be considered in every respect as my child, and no questions shall be raised in the distribution of the share bequeath to her by reason of any illegality of adoption, or any other question affecting her parentage, and shall be treated as though she was a child of the blood, in the distribution as herein provided for.

"(e) When my trustee shall have converted by sale or otherwise all of the estate into money, which it is my will and I direct shall be done with all convenient speed, but not at the sacrifice of any value by reason of haste in such conversion, that when said estate shall be so converted by my said trustee, the said trustee is hereby directed to pay each child in sub-paragraph "d" named, an equal proportion thereof, that is to say, the said trust estate shall be divided into five parts, and I give, devise and bequeath to Dorothy Her, and to her heirs and assigns forever one-fifth (1/5) part of the entire of said trust estate.

"To Charles F. Her and to his heirs and assigns forever one-fifth (1/5) part of the entire of said trust estate.

"To Mamie Anderson and to her heirs and assigns forever one-fifth (1/5) part of the entire of said trust estate.

"To Minnie Woolson and to her heirs and assigns forever one-fifth (1/5) part of the entire of said trust estate.

"To Clara Mackey and to her heirs and assigns forever one-fifth (1/5) part of the entire of said trust estate."

Testatrix's will is similar to Adam's in all respects, except that the word "husband" is substituted for "wife" and the short clause, providing that Dorothy Her is to be considered in every respect as a child, is omitted.

Adam predeceased Friderike, and upon her death and the filing of her will for probate, plaintiff filed a petition in the probate court for Kent county asking that she be given the same share of the estate of testatrix as if the latter had died intestate. She based her application upon 3 Comp. Laws 1929, § 15550, which provides that a child shall be entitled to such a share if it appears that such an omission from the will was not intentional but made by mistake or accident. Upon appeal to the circuit court from the order denying the petition by the probate court, the trial judge refused to hold that the omission of plaintiff's name from her mother's will was unintentional and to direct a verdict. He submitted the question to the jury, who found against plaintiff's contentions.

Plaintiff has appealed to this court, the sole question raised being whether the lower court erred in not holding that "the omission was by mistake or accident and was not intentional." Our attention is called to clause "c" wherein the testatrix states that her estate is to be divided into as many portions of equal value as she has children, whose names are

thereinafter mentioned. The will then proceeds to name the children, but omits that of plaintiff. It must be noted, however, that a subsequent clause of the will provides that a share of one-fifth each shall go respectively to each of those five children who are specifically named.

Plaintiff relies on the case of *Bachinski* v. *Bachinski's Estate,* 152 Mich. 693 (125 Am. St. Rep. 427), where, however, under an entirely different state of facts, it was also held that the fact of a mistake may be proved by extrinsic evidence. The court said:

"A rule that the question must be determined 'from the four corners of the instrument' would render the statute of little value. In reason and common sense resort must be had to extrinsic evidence. The intent cannot often appear from the will itself. See note to *Thomas* v. *Black,* 8 Am. Prob. Rep. 340 (113 Mo. 66 [20 S. W. 657]), where numerous authorities are cited; *Coulam* v. *Doull,* 133 U. S. 216 (10 Sup. Ct. 253)."

In *Re Stebbins' Estate,* 94 Mich. 304 (34 Am. St. Rep. 345), where a granddaughter sought to share in her grandfather's estate by virtue of the same statute, the court said:

"There was testimony in the case in reference to the circumstances attending the making of the will; the relationship and condition of the parties; the affection existing between them; the extent and frequency of their visits and correspondence; the age of the testator; his mental and physical condition, as evidenced not only by the will itself, and by the peculiarity of some of its provisions, but also by his feeble condition about the time the will was made, and his death shortly afterwards. This class of testimony was all competent for the jury to con-

sider, and from it they had a right to determine the questions submitted to them by the court. The relation of the testator to the objects of his bounty, and to this granddaughter, as well as his intelligence, his mental and physical condition, and the circumstances connected with the making of the will, are all proper matters for consideration by the jury. *Buckley* v. *Gerard,* 123 Mass. 8; *Converse* v. *Wales,* 4 Allen (86 Mass.), 512; *Ramsdill* v. *Wentworth,* 101 Mass. 125; *Peters* v. *Siders,* 126 Mass. 135 (30 Am. Rep. 671); *Prentis* v. *Bates,* 93 Mich. 234 (17 L. R. A. 494), and cases cited. And the omission to provide may be shown to be unintentional either by the terms of the will or by extrinsic parol evidence. *Wilson* v. *Fosket,* 6 Metc. (47 Mass.) 400 (39 Am. Dec. 736)."

The same question arose in *Carpenter* v. *Snow,* 117 Mich. 489 (41 L. R. A. 820, 72 Am. St. Rep. 576), where the court said:

"Extraneous testimony was taken, which, if competent, shows that Mr. Snow intended to give all his property to his wife to the exclusion of his children, having confidence in her management of the property, and her sharing it with the children. While this testimony may be competent to show that the omission to provide for Clara was not unintentional, we do not think it competent to show that the testator did not intend to provide for his unborn children.

"The provisions of the statute applying to the facts disclosed by this record are as follows:

"2 How. Stat. § 5809 (see 3 Comp. Laws 1929, § 15549), provides:

" 'When any child shall be born after the making of his father's will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, and the share of such child shall be as-

signed to him as provided by law in case of intestate estates, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child.'

"Section 5810 (re-enacted in 3 Comp. Laws 1929, § 15550) provides:

" 'When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section.'

"It will be noticed the language in the two sections with reference to showing the intention of the testator is not at all alike. In the last-named section it is not required that the omission to provide must be shown by the will itself to be intentional. This section has been construed by this court in *Re Stebbins' Estate,* 94 Mich. 304 (34 Am. St. Rep. 345), where it is held the question as to whether omission to provide for a child in the will was intentional or otherwise is a question of fact which may be submitted to a jury."

The trial judge was correct in submitting the question of whether the omission was intentional or not to the jury, and permitting them to consider not only the will itself but also extrinsic evidence. The verdict of the jury holds that the omission was intentional. It is fully supported by the evidence. The judgment in favor of defendants is affirmed, with costs.

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

THEATRE EQUIPMENT ACCEPTANCE CORP. *v.* BETMAN.

REPLEVIN—ASSIGNMENTS—JURISDICTION—SUFFICIENCY OF AFFIDAVIT AND WRIT.

Where declaration was sufficient, court acquired jurisdiction in replevin action, although affidavit and writ of replevin did not describe plaintiff as assignee of defendant's mortgagee.

Error to Wayne; Merriam (DeWitt H.), J. Submitted April 17, 1931. (Docket No. 136, Calendar No. 35,374.) Decided June 1, 1931.

Replevin by Theatre Equipment Acceptance Corporation, assignee, against Annie Betman, as New Hancock Theatre, and others to recover certain theatre equipment. Plaintiff reviews order dismissing the action by error. Reversed, and remanded.

*Wynn, Zinn & Freimuth,* for plaintiff.

*E. A. Fink* and *Lodge & Brown* (*Arthur H. Rice,* of counsel), for defendants.

BUTZEL, C. J. Defendant Annie Betman, doing business as the New Hancock Theatre, gave a chattel mortgage in part payment for chattels she purchased from the National Theatre Supply Company. Plaintiff Theatre Equipment Acceptance Corporation brought a replevin suit to recover possession of the chattels described in the mortgage. In an amended declaration, timely filed, it described itself as an assignee of the National Theatre Supply Com-

pany. In neither the affidavit, writ, nor the first declaration filed, did it describe itself as such assignee. Defendant pleaded the general issue, gave notice that it never had any dealings with plaintiff, that there was no default in payments on the mortgage, and claimed a large amount as damages for the alleged unlawful taking.

Defendant Betman filed a motion to dismiss the entire cause of action because plaintiff is not described as assignee of the National Theatre Supply Company in either the affidavit or writ of replevin. It is claimed that for this reason the court did not acquire jurisdiction. The trial court granted the motion, dismissed the action with costs, and ordered that defendants' damages be assessed. Only one question raised need be discussed.

Attention is called to the case of *Warren* v. *Dwyer,* 91 Mich. 414, where, in an action in trover brought by the assignee of a mortgage, it was held unnecessary to aver the assignment in the declaration. The court said:

"It is further contended that, as the plaintiff did not allege in his declaration the assignments of the mortgagees' right of action to him, they could not be introduced in evidence; that he could not recover under his declaration, which was in the usual form in trover, under the proofs in the case; citing the following cases: *Draper* v. *Fletcher,* 26 Mich. 154; *Rose* v. *Jackson,* 40 Mich. 30; *Altman* v. *Fowler,* 70 Mich. 57; *Blackwood* v. *Brown,* 32 Mich. 104; *Cilley* v. *Van Patten,* 58 Mich. 404; *Dayton* v. *Fargo,* 45 Mich. 153. These cases do not apply. In replevin and trover there is an authorized form of declaration for each action which is ordinarily used, and which has been held sufficient in each respectively. These declarations do not undertake to notify defendant of the nature of the plaintiff's title, or what

are the evidences of it. These are matters of evidence merely. *Harvey* v. *McAdams,* 32 Mich. 472; *Myres* v. *Yaple,* 60 Mich. 339; *Williams* v. *Raper,* 67 Mich. 427; *Hutchinson* v. *Whitmore,* 90 Mich. 255 (30 Am. St. Rep. 431)."

The declaration being sufficient in the instant case, and the affidavit and writ conforming with the declaration, the replevin proceedings were properly begun, the court acquired jurisdiction, and the motion to quash should have been denied. The order of the lower court is reversed, with costs, the case remanded to the circuit with directions to enter an order denying the motion, and proceed with the trial.

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

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THOMPSON *v.* CIHAK.

1. SCHOOLS AND SCHOOL DISTRICTS—ELECTIONS—BONDS—INITIALING BALLOTS.

   Failure of inspectors to initial ballots cast at election held under 2 Comp. Laws 1929, § 7487, for purpose of authorizing bond issue by school district, did not void election, in absence of fraud or mandatory law commanding initialing.

2. SAME—QUALIFICATIONS OF ELECTORS PROPERLY INQUIRED INTO.

   In proceedings attacking validity of election authorizing bond issue by school district, trial court properly inquired into qualifications of alleged unqualified electors and how those unqualified voted.

3. ELECTIONS—UNQUALIFIED ELECTOR REQUIRED TO DISCLOSE HOW HE VOTED.

Person who admits that he voted without proper qualifications may, in judicial proceeding, be required to disclose how he voted.

4. SCHOOLS AND SCHOOL DISTRICTS—ELECTIONS—PERMITTING UNQUALIFIED PERSONS TO VOTE.

That election inspectors permitted unqualified persons to vote does not invalidate election, unless it is affirmatively shown that such wrongful vote overturned declared result of election.

5. SAME—FAILURE TO TAKE OATH AS INSPECTORS—ELECTIONS—IRREGULARITIES.

Where school district officers took oath of office, their failure to take oath as inspectors of school bond election, which was part of their duties, was mere irregularity which did not invalidate election.

6. SAME—FAILURE TO APPOINT FOURTH INSPECTOR—IRREGULARITIES.

Failure of school district officers, acting as inspectors of school bond election, to appoint fourth inspector, was mere irregularity which did not invalidate election, in absence of request by electors that such appointment be made.

7. ELECTIONS—IRREGULARITIES—PUBLIC POLICY.

To hold that slight irregularities, for which voters are not to blame, invalidates election, is contrary to public policy.

8. SAME—IRREGULARITIES—MANDATORY PROVISIONS—FRAUD—COERCION.

Unless irregularities consist of failure to observe mandatory provisions, neglect to follow which will invalidate election, they will be overlooked, in absence of fraud or coercion.

Appeal from Muskegon; Vanderwerp (John), J. Submitted April 22, 1931. (Docket No. 80, Calendar No. 35,584.) Decided June 1, 1931.

Bill by John Thompson and others against Frank J. Cihak and others, school district officers of Fractional School District No. 2 of Laketon and Muskegon townships, to restrain issuance of bonds. Decree for defendants. Plaintiffs appeal. Affirmed.

*Joseph T. Riley,* for plaintiffs.

*Alexis J. Rogoski,* for defendants.

BUTZEL, C. J. Plaintiffs, residents and taxpayers of Fractional School District No. 2 of Laketon and Muskegon townships, Muskegon county, Michigan, brought suit against defendants, as officers of the school district, to restrain the issuance of $12,500 of bonds for building an addition to a schoolhouse. Plaintiffs claim that the special election held for the purpose of authorizing the bond issue was conducted without complying with the provisions of the law and should be held for naught. It is conceded that due notice of the election was posted, that printed ballots, properly worded, were furnished the electors, and that there was no fraud or oppression exercised. The three defendant officers acted as inspectors of election. There was no demand that a fourth inspector be appointed from the voters, and none was appointed. The inspectors were not sworn. The ballots were not initialed. A poll list was kept in duplicate by one of the inspectors and contains the names of the voters as given the night of the election. There were 50 ballots cast in favor of the bonding proposition, 46 against it, and three were properly thrown out as nonindicative of the choice of the electors. Plaintiffs claim the election void on account of the failure to appoint a fourth election inspector, the omission of the oath, and of the initialing of the ballots cast. They further claim that unqualified persons were permitted to vote. These persons are designated by name in the bill of complaint. At the hearing the trial judge permitted testimony to be introduced in order to determine whether such persons were qualified or not. Those found not to have been qualified, testified how

they voted. Of the nine votes cast by such illegal voters, three were in favor of the bonding proposition, and six against it. The final result, after deducting these votes from the count of the inspectors, showed that 47 voted in favor of the proposition, and 40 against it. The trial judge held that the objections raised were only irregularities that did not affect the result of the election, and that inasmuch as no fraud was shown, the election was valid and the bonding proposition carried by a majority of votes. Plaintiffs have appealed, and the issuance of the bonds has been stayed until the final outcome of the suit.

The election was held in accordance with the provision of the law which governs the issuing of bonds by school districts (2 Comp. Laws 1929, § 7487), and which does not make the initialing of ballots mandatory. It would have been better practice to have initialed them, but in the absence of fraud and a mandatory law commanding the initialing of ballots, the failure to initial them did not void the election.

It was also proper for the trial court to inquire into the qualifications of voters alleged to have been disqualified, and if they did not have the right to vote, to ascertain how they voted. A person who admits that he voted without proper qualifications may, in a judicial proceeding, be required to disclose how he voted. *Gardner* v. *Board of School District No. 6, Township of Leoni,* 248 Mich. 134. Nor will the fact that election inspectors permitted unqualified persons to vote invalidate the election unless it is affirmatively shown that such wrongful vote overturned the declared result of the election. *Sargent* v. *City of Santa Fe,* 24 N. M. 411 (174 Pac. 424).

The failure to take the oath of office under the circumstances of this case will not invalidate the election. The inspectors had taken the oath of office when they became officers of the school district, and the conduct of an election of this kind was part of their duties. Voters will not be disfranchised by the irregularity claimed. *Davis* v. *Town of Saluda,* 147 S. C. 498 (145 S. E. 412); *State, ex rel. City of Memphis,* v. *Hackman,* 273 Mo. 670, 700 (202 S. W. 7, 15). In the latter case, the court, in holding that failure of the judges of the election to take the oath of office did not affect the election, said:

"The reasoning in support of this conclusion is that, although not sworn to, the judges were *de facto* officers and acted as such, as in the case of judicial officers acting under like circumstances, and that their acts will therefore not be held invalid."

The failure of the district board to appoint a fourth inspector to be selected by the qualified voters present was merely an irregularity, in view of the fact that the voters did not make such a selection or ask that one be made. This is not a case where demands properly made by qualified voters were refused by the officials in charge, as in *Heims* v. *School District No. 6 of Davison Twp.,* 253 Mich. 248.

In *Ward* v. *Kropf,* 120 N. Y. Supp. 476, affirmed in 143 App. Div. 919 (127 N. Y. Supp. 1148), an election was held valid where, contrary to a village charter, a board of trustees appointed two election inspectors both from the same party instead of one from each party. In *Ryan* v. *Mayor, etc., of Tuscaloosa,* 155 Ala. 479 (46 South. 638), an election was upheld although the mayor, instead of the council, as provided by law, appointed the inspectors. The

court stated that when an election is conducted by *de facto* officers, it will be upheld unless actual fraud or misdemeanor is imputed in the conduct or result of the election.

In the final analysis, we must consider the fact that this election was honestly and fairly conducted. Slight irregularities are more than apt to creep into the procedure. As a rule those in charge of such an election are not lawyers. When, as in this case, even doubt is raised in the briefs presented as to which law the election should have followed, it is evident that a knowledge of the law and its details is frequently not possessed by the officers and electors in a fractional school district, whose honesty and fairness are not even remotely questioned. To hold that slight irregularities, for which the voters were not to blame, should invalidate the election, is contrary to public policy. Unless the irregularities consist of failure to observe mandatory provisions, the neglect to follow which will invalidate the election, they will be overlooked, in the absence of fraud or coercion.

In *Lindstrom* v. *Board of Canvassers of Manistee County,* 94 Mich. 467 (19 L. R. A. 171), it is said:

"It may be stated, as a general rule, that the provisions of law relating to the manner of conducting elections will not be held so far mandatory as that a departure therefrom will result in the disfranchisement of a district or a class of voters, or the defeat of a candidate himself free from fraud, except in cases where the legislative intent that such departure shall have that effect is clearly and unequivocally expressed. This is a rule which has been applied in this State.

"In *People* v. *Bates,* 11 Mich. 362 (83 Am. Dec. 745), it appeared that tickets cast for city officers were not found in the box provided for that purpose,

but were found in the State and county box, and were counted by the inspectors. It was said by the court that the two elections, though held upon the same day, were distinct and independent of each other, as much as if they had happened on different days.

" 'But, though thus distinct, and the ballots to be deposited in separate boxes, yet as both were held together under the supervision of the same inspectors, with both boxes before them for the reception of ballots, the inspector receiving the ballot might be liable, by honest mistake, occasionally to deposit a ballot in the wrong box; and, if he understood that the ballots found in the wrong box were in no case to be counted, he might do the same thing for a fraudulent purpose. But the elector is not to be deprived of his vote either by the mistake or fraud of the inspector in depositing it in the wrong box, if the intention of the voter can be ascertained with reasonable certainty. To hold otherwise would be to give more effect to the letter than to the manifest purpose of the statute.'

"In *Adsit* v. *Secretary of State,* 84 Mich. 420 (11 L. R. A. 534), it was held that the vote of the people could not be defeated by the failure on the part of the secretary of State to give notice of an election, and that the provision requiring such notice was directory, merely, and not mandatory.

"So it is stated generally in McCrary on Elections (3d Ed.), § 193:

" 'Those provisions of a statute which affect the time and place of the election, and the legal qualifications of the electors, are generally of the substance of the election, while those touching the recording and return of the legal votes received, and the mode and manner of conducting the mere details of the election, are directory. The principle is that irregularities which do not tend to affect results are not to defeat the will of the majority; the will of

the majority is to be respected, even when irregularly expressed. The officers of election may be liable to punishment for a violation of the directory provisions of a statute, yet the people are not to suffer on account of the default of their agents.' ''

See, also, *Abbott* v. *Montcalm County Canvassers*, 172 Mich. 416.

The election is held to be valid, and the decree of the lower court is affirmed. As the case is one of public interest, no costs will be allowed.

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

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KIRKER *v.* LARSON.

1. PLEADING—FRAUD—ASSUMPSIT—JUDGMENT.
   Where declaration contained two counts in fraud and one in assumpsit, finding by trial judge that defendant was guilty of fraud removed all uncertainty on what counts judgment was based.

2. EXECUTION—FRAUD—AMENDMENT OF FINDINGS—WILFUL INTENT TO DEFRAUD.
   Judgment for fraud remained one in tort, although trial judge amended his findings by stating that defendant did not make representations with specific and wilful intent to defraud.

3. ARREST—FRAUD—CAPIAS AD RESPONDENDUM.
   Under 3 Comp. Laws 1929, § 14007, one defrauded may bring action on case for fraud or one in assumpsit arising out of implied promise of repayment on account of fraud, and in either case, on proper declaration and affidavit being filed, *capias ad respondendum* will issue.

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Order of arrest or *capias respondendum* as condition of right to body execution, see annotation in L. R. A. 1915A, 706.

4. ASSUMPSIT—FRAUD—PLEADING—ADDING COMMON COUNTS NOT IMPROPER.

It was not improper to add common counts to special count in assumpsit arising out of implied promise of repayment on account of fraud.

5. SAME.

It would not have been proper to sue on common counts without special count in action for fraud.

6. SAME—ADDING COMMON COUNTS SURPLUSAGE.

In action for fraud, adding common counts to special count in fraud neither added to nor subtracted from other claims in declaration, where defendant was specifically found guilty of fraud, but had effect of surplusage.

7. ARREST—CAPIAS AD RESPONDENDUM—NO DISTINCTION BETWEEN WILFUL TORTS AND OTHERS.

Under 3 Comp. Laws 1929, § 14075, providing when case may be started by writ of *capias ad respondendum* on tort claims, no distinction is made between torts that are wilful and those that are not.

8. SAME—CONSTITUTIONAL LAW—FRAUD.

Judgment for fraud in inducing contract does not arise *ex contractu*, and therefore issuance of *capias ad respondendum* in such case does not violate Constitution (article 2, § 20).

9. SAME—AFFIDAVITS—ALLEGATION OF WILFUL FRAUD NOT NECESSARY.

Affidavit in support of writ of *capias ad respondendum* was sufficient without allegation that fraud, on which judgment was based, was wilful.

Appeal from Wayne; Moll (Lester S.), J. Submitted April 14, 1931. (Calendar No. 35,545.) Decided June 1, 1931.

Case by John G. Kirker and others against Clarence E. Larson for fraudulent representations inducing exchange of real estate. Judgment for plaintiffs affirmed on condition it be reduced by remittitur. From order denying motion to recall body execution issued thereunder, defendant appeals. Affirmed.

*Lynch & Hinks,* for plaintiffs.

*Monaghan, Crowley, Reilley & Kellogg* (*Stanley E. Beattie,* of counsel), for defendant.

BUTZEL, C. J. A judgment in tort in favor of plaintiffs Kirker against defendant Larson was affirmed by this court on condition that the amount thereof be reduced by the filing of proper remittitur (see *Kirker* v. *Larson,* 252 Mich. 136). The declaration filed in the lower court contained two counts in fraud and one in assumpsit, all relating to the same transaction. The assumpsit count was based upon an implied promise to repay the damages caused by the fraud; it ended with the common counts. The case was tried without a jury and the trial court specifically found defendant liable for fraud. The court said:

"It is just as much a legal fraud for one to make statements of which he has no knowledge or in reckless disregard of the truth as to make statements knowing them to be false."

There not having been any election or waiver of counts by plaintiffs, nor any general verdict by a jury, but a finding by the trial judge that defendant was guilty of fraud, it removed all uncertainty on what counts the judgment was based. It was on the fraud counts, and not on the common counts, of the declaration. On defendant's motion, the trial judge amended his findings by stating that defendant did not make any representations with specific and wilful intent to defraud. The judgment, however, remained one in tort.

Plaintiffs sued out a *capias ad satisfaciendum* or body execution. Defendant appeals from the order denying a motion to recall this body execution. He

claims that by combining the counts in tort with the one in assumpsit, plaintiffs waived the right to the issuance of a body execution; that on account of the court's amended findings the defendant was not guilty of specific and wilful intent to defraud; that the prohibition of the Constitution of the State of Michigan against imprisonment for debt protects defendant from being taken on a body execution.

Under 3 Comp. Laws 1929, § 14007, plaintiffs might have brought an action on the case for fraud or one in assumpsit arising out of an implied promise of repayment on account of the fraud. In either case, upon a proper declaration and affidavit being filed, a *capias ad respondendum* could have been issued. 3 Comp. Laws 1929, § 14074; *Mintz* v. *Jacob,* 163 Mich. 280. It was not improper to add the common counts to the special count in assumpsit arising out of implied promises of repayment on account of fraud. *First National Bank* v. *Steel,* 136 Mich. 588; *Hogle* v. *Meyering,* 161 Mich. 472. It would not have been proper to sue on the common counts without a special count. *Burchy* v. *Carpenter,* 181 Mich. 78. In the present case, as defendant was specifically found guilty of fraud, the common counts neither added to nor subtracted from the other claims set forth in the declaration and had the same effect as if they were surplusage.

Section 14075, 3 Comp. Laws 1929, in providing when a case may be started by a writ of *capias ad respondendum* on tort claims, states:

"Personal actions may be commenced by *capias ad respondendum* in cases of claims for damages, other than those arising upon contract, express or implied, in like manner as stated in the preceding section."

No distinction is made in this section between torts that are wilful and those that are not; apparently all torts are included. Furthermore, it would be exceedingly difficult to determine when a misrepresentation was wilful and when it was not.

The objection is made by defendant, however, that article 2, § 20, of the Constitution of Michigan, prohibits the issuance of a *capias ad respondendum* in this case. It provides:

"No person shall be imprisoned for debt arising out of, or founded on a contract, express or implied, except in cases of fraud or breach of trust, or of moneys collected by public officers or in any professional employment."

In the instant case the judgment did not arise *ex contractu*. It was one in tort, *i. e.*, fraud in inducing a contract. It is true that a contract is involved but the wrong is the fraud from which damages resulted. In *Forsythe* v. *Washtenaw Circuit Judge*, 180 Mich. 633 (L. R. A. 1915A, 706), the court stated:

"It is obvious that the plaintiff in the principal case might have proceeded against relator under the Constitution as well as under the statute cited, *supra*, by causing to issue a writ of *capias ad respondendum* as commencement of suit."

The mere fact that the tort in the present case was an unintentional one does not change the nature of the wrong from a tort to a debt arising out of a contract.

Even had the liability of defendant arisen out of contract, "cases of fraud" are excepted from the quoted constitutional prohibition. There is no indication that cases involving unintentional fraud

were intended to be excepted. The affidavit in support of a writ of *capias ad respondendum* is sufficient without an allegation that the fraud was wilful. The order of the circuit judge refusing to quash the *capias ad satisfaciendum* is affirmed, with costs to plaintiffs.

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

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MACLEOD *v.* HAMILTON.

1. VENDOR AND PURCHASER—LAND CONTRACTS—DESCRIPTION—SURPLUSAGE.
   Where lots conveyed in land contract were described as being in "Beech Hill Park subdivision," when in fact there is no such subdivision, but lots are in "Beech Hill subdivision," and there is no difficulty in locating them from other description, word "Park" is treated as surplusage.

2. SAME—RELEASE OF LOTS—ADDITIONAL PAYMENTS.
   Where vendee was in default in payments as well as taxes he was not entitled to release of lots because of payments on contract, since they were not "additional" payments provided for in contract commanding release of lots.

3. EASEMENTS—DRAINS—ABANDONMENT.
   Easement granted county for purpose of drain may be extinguished by abandonment of purpose or by renunciation showing that other means employed serve purpose.

4. SAME—EASEMENT FOR PARTICULAR PURPOSE—TERMINATION.
   Grant of easement for particular purposes terminates as soon as such purposes cease to exist, are abandoned, or are impossible.

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Extinguishment of easement by abandonment, see annotation in 1 A. L. R. 886; 66 A. L. R. 1103.

5. SAME—DRAINS—ABANDONMENT—CLOUD ON TITLE.

Grant of easement for drainage purposes only was abandoned by establishment of drain elsewhere, right of way ceased, and easement is but cloud on title.

6. VENDOR AND PURCHASER—FORECLOSURE—CLOUD ON TITLE—RESCISSION.

Where abandoned easement is cloud on title, vendor is not entitled to foreclose land contract until cloud is removed, but it constitutes no justification for rescission by vendee.

7. COSTS.

Where both parties appeal without avail, neither are awarded costs.

Appeal from Oakland; Doty (Frank L.), J. Submitted April 21, 1931. (Docket No. 58, Calendar No. 35,535.) Decided June 1, 1931.

Bill by Mary T. MacLeod against Claude F. Hamilton to foreclose a land contract. Cross-bill by defendant for rescission. From decree dismissing both bill and cross-bill, both parties appeal. Affirmed.

*Dykema, Jones & Wheat,* for plaintiff.

*Robert M. Drysdale,* for defendant.

WIEST, J. The bill herein was filed to foreclose a land contract. Defendant, by answer, set up that the grantor did not have a marketable title because of an easement for a drain granted the county of Oakland in 1876, and, by cross-bill, asked rescission for that reason and because of an alleged slight shortage of land and the refusal of plaintiff to release lots. There was also the claim by defendant that the lots were described as "in Beech Hill Park subdivision," and there is no such subdivision. In fact the lots are in "Beech Hill subdivision,"

and the circuit judge considered the word "park" surplusage, "because the quarter sections, township and county were named and there would be no difficulty in locating the premises." With this holding we agree.

The circuit judge also held:

"The claim as to the discrepancy in measurements is rather indefinite and uncertain; the surveyor didn't find any alignments from which he made his measurements, but took fence lines and there was no testimony as to how long the fences had been recognized as lines between the properties."

The alleged shortage was about seven and one-half inches on the west side of certain lots in the subdivision.

The contract contained the following release clause:

"Any residence lot in said subdivision to be released upon the additional payment of one and one half times the *pro rata* proportion that the lots bear to the balance due upon said lots and two times the *pro rata* proportion for lots on Maple Road when said deeds are called for."

Defendant admits default in payments as well as taxes, but asks for release of lots because of payments made under the contract. Such payments were not "additional" payments commanding release of lots. The decree, dismissing the cross-bill and denying relief to defendant, is affirmed.

The circuit judge stated:

"The plaintiff is attempting to foreclose her land contracts and should be in a position to tender defendant a deed carrying marketable title in accordance with the contracts signed by the parties. It is admitted that she is unable to do that at this time.

"No claim was ever made by the defendant of any discrepancies in description or any fault found in the title until after suit to foreclose the contracts was started. However, that does not relieve plaintiff from the necessity of being in a position to deliver deeds showing marketable title and before she can attain a position to foreclose the contracts she must be in such a position."

For that reason plaintiff's bill was dismissed without prejudice.

The easement was granted by deed, executed July 14, 1876, and released and conveyed to the county of Oakland "the right of way and the necessary lands for the construction of the said watercourse, ditch or drain and for no other purpose whatever across and over the lands of the which they have control." This easement touched but a slight part of the subdivision. No ditch or drain was ever constructed under the easement and the proposed drainage was provided elsewhere. For 54 years this easement has been dormant and renounced by the county in the establishment of the drainage elsewhere. Such an easement as this can be extinguished by abandonment of purpose or by renunciation showing that other means employed serve the purpose.

It is settled law that:

"A grant of an easement for particular purposes having been made, the right thereto terminates as soon as the purposes for which granted cease to exist or are abandoned or are impossible." *Chicago & N. W. Ry. Co.* v. *Sioux City Stockyards Co.*, 176 Iowa, 659 (158 N. W. 769).

The grant was of an easement for drainage purposes only, and when the contemplated purpose was abandoned by establishment of the drain elsewhere

the right of way ceased and the easement was but a cloud. Upon this subject see *California & N. R. Co.* v. *Mecartney,* 104 Cal. 616 (38 Pac. 448); *Bangs* v. *Potter,* 135 Mass. 245; *Batchelder* v. *State Capital Bank,* 66 N. H. 386 (22 Atl. 592).

While such is the rule, it does not save plaintiff's case, but does prevent rescission by defendant. This suit is to foreclose and not to remove a cloud on the title. The county of Oakland is not a party to this suit, and is entitled to a day in court. The mere record of the outstanding easement is sufficient to command assurance to defendant against the contingencies of a law suit. *Platt* v. *Newman,* 71 Mich. 112. The easement is undoubtedly moribund, and, under the evidence, constitutes no justification for rescission by defendant, but does require plaintiff, before exacting performance by defendant, to be in a position to tender a marketable title. The plaintiff can remove the cloud, now of record, and file a new bill to foreclose.

The decree in the circuit is affirmed. Both parties having appealed, without avail, neither can have costs.

Butzel, C. J., and Clark, McDonald, Potter, Sharpe, North, and Fead, JJ., concurred.

MACLEOD *v.* HAMILTON.

This case is controlled by *MacLeod* v. *Hamilton, ante,* 653.

Appeal from Oakland; Doty (Frank L.), J. Submitted April 22, 1931. (Docket No. 59, Calendar No. 35,536.) Decided June 1, 1931.

Bill by Mary T. MacLeod against Claude F. Hamilton to foreclose a land contract. Cross-bill by defendant for rescission. From decree dismissing both bill and cross-bill, both parties appeal. Affirmed.

*Dykema, Jones & Wheat,* for plaintiff.

*Robert M. Drysdale,* for defendant.

PER CURIAM. This case is a companion of *MacLeod* v. *Hamilton, ante,* 653, and is ruled thereby. Affirmed accordingly. No costs.

## SMITH v. DETROIT TRUST CO.

EXECUTORS AND ADMINISTRATORS—FINAL DISTRIBUTION.

On application of executors for final distribution of estate, the court was not bound to follow previous consent decree entered during course of administration of estate, regardless of subsequent matters properly affecting rights on final distribution.

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted April 23, 1931. (Docket No. 159, Calendar No. 35,655.) Decided June 1, 1931.

Bill by Harold R. Smith against Detroit Trust Company, a Michigan corporation, as guardian of certain minors' estates, and others to declare an ademption of part of a share of his sister, Margaret S. Rosevear, in their father's estate. During pendency thereof, plaintiff and defendant trust company, as executors of the father's estate, filed their final account. From allowance thereof and order of distribution, plaintiff appealed to the circuit court. Consolidation of the two actions was there had by consent and consent decree entered distributing the estate. Subsequent final accounts were then made and the case is here on appeal of plaintiff from order distributing estate differing from terms of consent decree. Affirmed.

*Bulkley, Ledyard, Dickinson & Wright,* for plaintiff.

*Clark, Klein, Ferris, Cook & Williams* (*Robert C. Winter,* of counsel), for defendant Margaret S. Rosevear.

WIEST, J. Plaintiff, a devisee and legatee under the probated will of his father, filed a bill in the circuit court to have it decreed that the share of his sister Margeret S. Rosevear, also a devisee and legatee, had been in part adeemed. While the suit was pending an executors' account was filed in the probate court, followed by allowance and order of distribution under the will, except as to the widow, who had elected to take under the statute. Plaintiff herein appealed from that order to the circuit court. By consent the chancery suit and the appeal from the probate court were consolidated. The parties interested in the cases so consolidated reached a settlement agreement and stipulated the form of a decree, and this the court entered April 19, 1929. No appeal was taken from the decree.

October 2, 1929, plaintiff and his coexecutor, Detroit & Security Trust Company, petitioned the circuit court to allow their accounts as executors, to order distribution in accordance with the consent decree, and close the estate. October 23, 1929, the accounts of the executors were allowed, but, in ordering distribution of the estate, the court departed from the stipulated decree by directing the widow of the deceased to pay certain amounts to the devisees. The amounts, so ordered, were necessary to pay a portion of the fees of attorneys allowed by the court. February 25, 1931, plaintiff herein moved the court to modify that order on the ground that it subjected the share of the widow to the payment of $1,750, contrary to the terms of the consent decree, and, as that decree had become final by lapse of time without motion for rehearing, the court was without jurisdiction to modify or change the terms thereof. This motion was denied, and the appeal we are now considering followed.

Plaintiff has acquired the interest of his mother in the real estate involved. Plaintiff, as an executor, asked the court to order distribution of the estate. This involved rights of legatees under the will and rights of the widow under the statute. Fees of attorneys, representing various parties and allowed by the court, totaled $7,850. After the consent decree the executors found it necessary to prepare two new accounts before they could distribute the estate. These accounts disclosed that the money in the estate had been used for administration expenses which did not include the fees of the attorneys in the litigation commenced by plaintiff. The executors did not have money in the estate out of which to pay the widow's proportionate share of the attorneys' fees, and before the court could make order of distribution, it was necessary to determine the widow's proportionate share of the attorneys' fees. The decree of April 19, 1929, entered in accordance with the agreement of the parties, carried no sanctity beyond that of other decrees. Upon application of the executors for final distribution of the estate, the court, presided over by the same judge, was not bound to follow the previous decree, entered during the course of administration of the estate, regardless of subsequent matters properly affecting rights upon final distribution.

We do not find it necessary to pass upon the point that the motion to modify the order of October 23, 1929, was made too late to be considered by the court. The motion to modify was properly overruled, and the order denying the motion is affirmed, with costs against plaintiff.

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

*In re* SMITH'S ESTATE.

SMITH *v.* DETROIT TRUST COMPANY.

This case is controlled by *Smith* v. *Detroit Trust Co., ante,* 659.

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted April 23, 1931. Docket No. 160, Calendar No. 35,656.) Decided June 1, 1931.

In the matter of the estate of Elmer L. Smith, deceased, Harold R. Smith and Detroit Trust Company, a Michigan corporation, executors, filed their final account. From allowance thereof and order of distribution, Harold R. Smith appealed to the circuit court. Consolidation was there had with pending suit between Harold R. Smith and defendant, Detroit Trust Company, as guardian of certain minors' estates, relating to an ademption of the share of defendant Margaret S. Rosevear, sister, and consent decree entered. Subsequent final accounts were then made by Smith and his co-executor, and the case is here on appeal of Smith from order distributing estate differing from terms of consent decree. Affirmed.

*Bulkley, Ledyard, Dickinson & Wright,* for plaintiff.

*Clark, Klein, Ferris, Cook & Williams* (*Robert C. Winter,* of counsel), for defendant Margaret S. Rosevear.

PER CURIAM. This case is a companion of *Smith* v. *Detroit Trust Co., ante,* 659, and is ruled thereby. Affirmed accordingly, with costs to plaintiff.

BUTZEL, C. J., did not sit.

## WISNIEWSKI *v.* WISNIEWSKI'S ESTATE.

1. LIMITATION OF ACTIONS—CONTINUOUS SERVICE.
   Claim for continuous service rendered under oral contract and not closed until within six years before presentation is not barred by statute of limitations.

2. HUSBAND AND WIFE—HUSBAND MAY WAIVE CLAIM FOR WIFE'S SERVICES IN HOME.
   Rule that services of wife in and about the home belong to husband may be waived by him.

3. SAME—WIFE ENTITLED TO RECOVER FOR SERVICES IN HOME WHERE HUSBAND CONSENTED.
   Where contract for wife's services in home was made with her by express consent of her husband, she is entitled to recover therefor.

4. WITNESSES—HUSBAND AND WIFE—"OPPOSITE" PARTY—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.
   In wife's claim against estate of husband's father for services rendered under oral contract, husband, who was not party to contract, was not "opposite" party within meaning of statute (3 Comp. Laws 1929, § 14219), and therefore his testimony was not barred because equally within knowledge of deceased.

Error to Wayne; Sample (George W.), J., presiding. Submitted April 21, 1931. (Docket No. 7, Calendar No. 35,487.) Decided June 1, 1931.

Claim by Mary Wisniewski against the estate of Joseph Wisniewski, deceased, for care and maintenance of deceased's daughter. From disallowance of the claim in probate court, plaintiff appealed to the circuit court. Judgment for plaintiff. Defendant appeals. Affirmed.

*L. Eugene Sharp* (*Gladys Catherwood,* of counsel), for plaintiff.

*Abbott & Coulter,* for defendant.

WIEST, J. This is a claim against an estate for care and maintenance of a daughter of the deceased from the time she was six years of age until she was 16; from October 1, 1913, to December 22, 1923, under an oral agreement for compensation at $5 per week, no part of which was paid. Trial was by jury with verdict and judgment thereon for plaintiff. Plaintiff is the wife of a son of the deceased, and the little girl was cared for and supported in the home of plaintiff and her husband.

Defendant gave notice of the statute of limitations, and contends that in no event can plaintiff recover for support furnished more than six years before filing the claim. Under the alleged contract the pay at the rate of $5 per week was for a continuous service which was rendered and not closed until within six years before presentation of the claim. The point is without merit. *Carter* v. *Carter,* 36 Mich. 207.

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 the home, and, therefore, in law, the claim is that of the husband. The evidence justified the jury in finding that the contract was made with plaintiff, not only by express consent of her husband to that effect, but, as well, in directing his father to make the contract with her. The rule that services of the wife in and about the home belong to the husband is not one beyond the power of the husband to waive. A husband may, by his consent, permit the wife to contract for special services to be rendered another in their home and to receive pay therefor. Cogent reasons existed for consent in this instance by plaintiff's husband; the little girl was his sister; her mother was dead; she needed a

home and a woman's care and oversight, he was incapacitated by long-continued illness from earning enough to maintain his home and his wife was, in fact, the breadwinner.

The court instructed the jury to disallow the claim if the contract was between plaintiff's husband and his father. The court also instructed the jury:

"If you find that it was a joint contract between Frank Wisniewski and Mary Wisniewski, in which Frank Wisniewski, the husband, did not waive his right to remuneration, then you would also disallow the claim."

Objection was made to any testimony by the husband of plaintiff. The testimony of Frank Wisniewski, on direct examination, did not come within the statute (3 Comp. Laws 1929, § 14219) prohibiting an opposite party from testifying to matters equally within the knowledge of the deceased, so the objection, when made, was properly overruled. On cross-examination, however, Frank Wisniewski gave contradictory testimony. No motion was made to strike out all of his testimony, and his re-direct examination again disclosed the inapplicability of the statute. We find no request for instruction to the jury on this subject. The court was right under the state of the record at the time the ruling was made. The verdict was not excessive in amount nor against the clear weight of evidence.

The record presenting no reversible error, the judgment is affirmed, with costs to plaintiff.

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

## CHURCH *v.* STATE HIGHWAY DEPARTMENT.

1. EMINENT DOMAIN—STATE HIGHWAY COMMISSIONER—HIGHWAYS AND STREETS—EFFORT TO PURCHASE.

   State highway commissioner, under constitutional provision, may not take, under power of eminent domain, without compensation being first made or secured, and under legislative mandate he is required to make an effort to agree with owners upon compensation by way of purchase (1 Comp. Laws 1929, § 3884 *et seq.*)

2. SAME—AGREEMENT TO PURCHASE.

   Under powers conferred by Constitution and statute, State highway commissioner has right to agree with owners upon compensation for land taken for highway purposes and method of ascertaining same, and, when done in good faith, agreement is binding on commissioner and State.

3. SAME—COMPENSATION—AWARD BY ARBITRATOR.

   Where part of large brick house stood on land needed for highway purposes, State highway commissioner could agree with owner to move house and for appointment of arbitrator to fix damage, if any, in moving, and, in absence of fraud, award of arbitrator should be paid.

4. STATES—CONFIRMATION OF ARBITRATOR'S AWARD NOT SUIT AGAINST STATE.

   Petition in circuit court by landowners for confirmation of arbitrator's award in connection with taking land for highway purposes pursuant to agreement with State highway commissioner, is not suit against State.

5. EMINENT DOMAIN—AWARD NOT EXCESSIVE IN ABSENCE OF FRAUD.

   Purchase price of land taken for highway purposes, determined under method agreed upon by owners and State highway commissioner, may not be declared excessive by court, in absence of showing of fraud.

6. SAME—POWER OF COURT TO CONFIRM AWARD.

   Where agreement by owners and State highway commissioner provided for confirmation by circuit court of arbitrator's award for land taken for highway purposes, State may not contend that court had no power to confirm award.

7. SAME—APPROVAL BY ADMINISTRATIVE BOARD—SURPLUSAGE.
Approval of said agreement by State administrative board may not have been required, but, if surplusage, furnishes no reason against its validity.

Error to Ingham; Collingwood (Charles B.), J. Submitted April 17, 1931. (Docket No. 137, Calendar No. 35,028.) Decided June 1, 1931.

Frank E. Church and another presented their petition to the circuit court for confirmation of an award of damages pursuant to a contract for purchase of an easement for highway purposes with the State Highway Department. Defendant reviews order of confirmation by error. Affirmed.

*Shields, Silsbee, Ballard & Jennings* (*Harris E. Thomas,* of counsel), for plaintiffs.

*Paul W. Voorhies,* Attorney General, and *Kit F. Clardy,* Assistant Attorney General, for defendant.

WIEST, J. Act No. 352, Pub. Acts 1925, amended by Act No. 92, Pub. Acts 1927 (1 Comp. Laws 1929, § 3884 *et seq.*), empowered the State highway commissioner to purchase and condemn private property for highway purposes in the name of the State and enjoined purchase by agreement when possible.

The widening of the highway known as M.O. 33–14, between the cities of Lansing and East Lansing, required taking land owned by Frank E. and Bertha L. Church, styled plaintiffs herein, upon which stood the front 17 feet of their large brick dwelling house. Compensation for the house was a subject of discussion, the negotiation finally culminating in a written agreement, executed by the owners and the State highway commissioner, and

approved by the State administrative board, whereby the owners were to grant, convey, and duly acknowledge an easement in, over, and upon their land needed for widening of the highway, and the State highway commissioner, in consideration of the easement, agreed to move the house to a new location upon plaintiffs' remaining land and to fully restore it and its accessories, agreeable to Warren S. Holmes, an architect who was selected "to be their arbitrator," to determine whether the house, upon removal, and its accessories were fully restored, and if not, to fix the compensation to be made to plaintiffs. The agreement also provided that the architect have all the powers of an arbitrator under the arbitration statutes of this State and his award might be confirmed "as provided by said statutes." If 17 feet of the front of the house had been removed, the remainder would have been worthless, except for junk, and had the rule for determining compensation, in case of condemnation, been employed, the commissioner would have had to pay the value of the whole house. *City of Detroit* v. *Loula,* 227 Mich. 189. It was evidently believed by the commissioner that the house could be moved at less expense than its value, and this would have proved true had not damage been occasioned to the building in the course of moving.

The job of moving was let to a private company, and, when the architect was called to view the building after the moving, he found it seriously damaged and its accessories not restored, and, upon detailed specifications, awarded the owners $24,250, and filed the award in court. Thereupon the owners, in accordance with the terms of the agreement, petitioned the court to confirm the award and this was done

over objections of the State, and the matter is here for review.

The commissioner was under a constitutional prohibition not to take, under the power of eminent domain, without compensation being first made or secured and the legislative mandate to make an effort to agree with the owners upon compensation by way of purchase. Under delegated power to take by purchase, and constitutional mandate to pay just compensation, the commissioner had a right to agree with the owners upon compensation and the method or means of amicably ascertaining the same, and, if this was done in good faith, and the compensation was so fixed, the commissioner may not repudiate or the State assert immunity. If compensation is not by agreement then the law points out the method and means for ascertainment thereof. In the instance at bar, the matter never reached the stage calling for adoption of the statutory procedure for determining the compensation. The law regulating the procedure in case of inability to agree upon the compensation has no applicability to an amicable agreement.

Employment by the commissioner of delegated power to take and all procedure to such end is in behalf of, and not against, the State. There is no merit in the claim that this is in the nature of a suit against the State without leave of the State. This is in no sense a suit against the State, but is a taking of plaintiffs' property in behalf of the State, and the phase before us is no more than that of according the owners of the property compensation fixed under an agreement for its purchase. Plaintiffs' property could not be taken without compensation being first made or secured. An agree-

ment secured compensation to be made. Such compensation has been awarded, and if the State keeps the property the compensation must be paid.

But, it is said that the compensation is excessive. No fraud is shown. The purchase price has been determined under the method agreed upon and we must let all parties abide the agreement unless it was illegal. The agreement was out of the ordinary, but not illegal. Except for the contract provision to such end, we might have difficulty in finding authority for filing the award in the circuit court and having confirmation thereof, but the contract covers all this, and, while there is no precedent and this situation will probably not again arise, we cannot refuse the aid of the court invoked by the parties. The parties having agreed otherwise, we ought not to remit the plaintiffs to suit upon the award or a bill in equity for specific performance. The parties agreed upon a method for enforcing payment of the purchase price, and the State ought not to be permitted to stand upon the technicality that, if the award be held good, an action should be brought upon the award, and the circuit court had no power, even by agreement of the parties, to confirm the award.

The approval of the agreement by the administrative board, evidenced by the signatures of the governor and secretary of the board, may not have been required, but, if surplusage, furnishes no reason against the validity of the contract.

The order of confirmation is affirmed, with costs.

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

SLATTERY *v.* HARTFORD-CONNECTICUT TRUST CO.

1. ADOPTION—FINDING IMPLIES PROOF OF FACTS ADJUDGED.
   Order of adoption being in judicial proceeding, finding of court implies proof of facts therein adjudged.

2. SAME—PROCEEDING STATUTORY.
   Adoption of children is purely statutory in this State (3 Comp. Laws 1929, § 15952).

3. SAME—STATUTORY PROVISIONS MUST BE COMPLIED WITH.
   If statutory provisions regulating adoption of children are not complied with, adoption fails.

4. SAME—CONSENT NECESSARY TO JURISDICTION IF REQUIRED BY STATUTE.
   Since consent lies at foundation of statutes of adoption, if they require it to be given, jurisdiction of subject-matter cannot be acquired without it.

5. SAME—FACTS OBVIATING NECESSITY OF CONSENT MUST BE SHOWN.
   Where certain facts obviate necessity of consent, existence of these facts must be shown.

6. SAME—COLLATERAL ATTACK—JURISDICTION.
   Adoption will be upheld, as against collateral attack, unless want of jurisdiction is affirmatively shown.

7. SAME—ABANDONMENT—CONSENT.
   To obviate consent of father to adoption by abandonment, such abandonment must exist at time of adoption.

8. SAME—STATUTES—CONSENT—SHOWING AS TO ABANDONMENT.
   Statute of adoption in effect in 1891 did not require that evidence showing abandonment, or even fact of abandonment, be set forth in adoption instrument, or that particular reason excusing consent of other parent be given.

9. SAME—JURISDICTION—RECITATIONS IN ADOPTION INSTRUMENT AS TO ABANDONMENT AND CONSENT.
   Adoption instrument stating that mother had sole custody of child, and giving her consent to adoption, conferred jurisdiction on court under statute in effect in 1891, although no fact excusing consent by father was asserted.

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As to necessity of notice to parents before adoption of child, see annotation in 24 A. L. R. 416 *et seq.*

Constitutionality of statute permitting adoption of child without consent of parents, see annotation in 18 L. R. A. (N. S.) 927.

10. SAME—CONSENT OF FATHER—ABANDONMENT.
Consent of father to adoption of child was not necessary in 1891 if he had abandoned child.

11. SAME—FACT OF ABANDONMENT SHOWN BY ADJUDICATION.
Fact of abandonment of child by father must have been found by court in adoption proceedings, where it adjudged that mother was sole custodian of child and possessed due authority to execute adoption instrument.

12. SAME—FATHER ALONE COULD COMPLAIN OF WANT OF NOTICE TO HIM.
If father was entitled to notice of adoption proceedings, he alone could complain of want of notice.

13. SAME—VALIDITY OF ADJUDICATION MAY NOT BE ATTACKED AFTER LAPSE OF 34 YEARS.
Adopted child, who was necessary party to adoption proceedings wherein probate court had jurisdiction of subject-matter, could not, after lapse of 34 years, question validity of adjudication, however erroneous in point of fact or law.

Appeal from Kent; Perkins (Willis B.), J. Submitted April 7, 1931. (Docket No. 14, Calendar No. 35,497.) Decided June 1, 1931. Rehearing denied September 10, 1931.

Bill by Oscar Clarence Slattery, otherwise known as Oscar Clarence Cress, against Hartford-Connecticut Trust Company, administrator of the estate of Edward A. Slattery, deceased, and others to set aside articles of adoption. Decree for plaintiff. Defendants Hartford-Connecticut Trust Company and Delphine Slattery appeal. Reversed.

*Butterfield, Keeney & Amberg* (*Harry Shulsky* and *Arthur L. Shipman,* of counsel), for plaintiff.

*Norris, McPherson, Harrington & Waer* (*Benjamin Slade,* of counsel), for defendants Hartford-Connecticut Trust Company and Slattery.

*Julius J. Herscher,* for defendants Weirich and Cress.

WIEST, J. This is an appeal from a decree of the circuit court for the county of Kent, in chancery, vacating an adjudication of adoption of a minor child in the probate court of that county 34 years ago.

Plaintiff herein is 42 years of age, and was nearly seven years of age at the time of adoption. He waited 20 years, after reaching full legal age, before filing the bill and had been fully aware of his adoption for 29 years, the record of which was in the county where he resided. Before plaintiff was born his mother filed a bill against his father for divorce on the ground of extreme cruelty. An answer to the bill was filed by his father. Before the hearing of the divorce case plaintiff was born, and the bill was amended to allege his birth and pray for his custody. At the hearing his father was found guilty of extreme cruelty and the parties were, by decree, divorced on July 20, 1889. The decree also adjudged Edwin Slattery, father of plaintiff herein, an unsuitable person to have the child, then three months and 27 days of age, and awarded his mother his care, custody, and education until 14 years of age. The decree did not award alimony or support money for the child. At the time of the decree plaintiff's father resided out of the State, and so resided until his death, and never contributed anything toward the support of his former wife and his child. He ignored their existence, remarried in another State, and died intestate in the State of Connecticut in January, 1930, leaving there a widow and a considerable estate; hence this suit for revocation of the adoption.

September 23, 1891, the mother of plaintiff married George H. Cress, and January 22, 1896, she and Mr. Cress acknowledged and filed in the probate

court an instrument for the adoption of plaintiff by Mr. Cress. That instrument stated:

"That whereas the said party of the first part is the mother of a minor child, to-wit: Oscar Clarence Slattery born March 23d, A. D. 1889, whereby the custody and possession of said child belongs to and remains with said first party hereto, * * * and whereas the said Louisa Cress party of the first part, and mother of said child as aforesaid, has and does by these presents give her full and free consent to such adoption of said child by said party of the second part."

Plaintiff, then nearly seven years of age, gave consent in writing to the adoption. The same date the order of adoption was made and entered in the probate court, from which order we quote the following:

"That said Louisa Cress is the mother of said infant. That * * * whereby the said Louisa Cress is become sole custodian of said infant, possessing due authority to execute said instrument, * * * And it further appearing to the court that the said George Henry Cress is a suitable and proper person to have the custody, care and rearing of said child, and that said instrument is executed in good faith and in due form, according to the statute in such case made and provided.

"Therefore, it is ordered, adjudged and decreed," etc.

It will be noted that in the adoption instrument no fact, excusing consent of the father, such as abandonment of the child by him, was asserted, but only a conclusion, and in the probate court order no facts were stated "whereby" the mother had become the sole custodian of the child and vested with authority to execute the instrument. The mentioned points

are relied upon as grounds for vacating the adoption.

The omission in the instrument of adoption is the more serious question, for, the order of adoption being in a judicial proceeding, the finding implies proof of facts therein adjudged. Adoption of children is purely statutory in this State, having no common-law background. If the statutory provisions regulating adoption of children are not complied with, adoption fails. *Albring* v. *Ward,* 137 Mich. 352. Consent lies at the foundation of statutes of adoption, and if they require it to be given, the jurisdiction of the subject-matter cannot be acquired without it; where certain facts obviate the necessity of consent, the existence of these facts must be shown. Must the fact, obviating consent, be stated at length in the instrument of adoption as well as in the judicial finding? The modern tendency of the courts is away from the harsh doctrine that nothing will be presumed in favor of jurisdiction and that all must appear of record, else the adoption is void.

"The better rule would seem to be that the adoption will be upheld as against a collateral attack unless the want of jurisdiction is affirmatively shown." 1 C. J. p. 1394.

The law applicable to this case is so well stated in *Wilson* v. *Otis,* 71 N. H. 483 (53 Atl. 439, 93 Am. St. Rep. 564), that we quote liberally therefrom:

"But it is insisted that the judge of probate had no jurisdiction to decide the question presented, or to render a judgment thereon, because it does not affirmatively appear in the record that the mother of the boy consented in writing to the adoption, as required by the statute. * * * This fact, however,

is not necessarily essential to the exercise of jurisdiction by the probate court. If the parent has abandoned the child for three years, his consent to adoption proceedings is rendered unnecessary by the statute. * * * It is for the court, after having acquired jurisdiction by the filing of an appropriate petition, to decide in the first instance whether the parent has consented to a decree of adoption; if not, whether there is any valid excuse for his non-action, as death, insanity, or other disability; or whether he has so far abandoned his parental duties for three years as to render his consent unnecessary. These, with other preliminary questions that might be suggested, must be determined upon evidence and a hearing by the judge, after he has acquired jurisdiction of the general subject-matter of the petition. The filing of the petition and the appearance of proper parties gave him, under the statute * * * power to act judicially. * * * The court was not asked to do what it had no judicial power to do under any circumstances. It became its duty to act upon the subject-matter presented, and to receive evidence upon all material questions suggested, among others upon the question of abandonment as an excuse for the failure of the mother to consent to a decree of adoption. * * * If its decision was erroneous upon this question, the error did not render the proceedings absolutely void * * * so that they might be disregarded in a collateral suit. The error, if there was one, was correctable by appellate procedure, and does not prove a want of jurisdiction in the probate court. * * *

"Nor does the absence in the petition of an allegation of abandonment, or of the mother's consent, affect the question of general jurisdiction. It is not necessary that the petition should contain a full statement of all facts essential to a decree. It might seriously fail in this respect, or be demurrable, and

still state a case calling for and requiring the exercise of the judicial power of the court. The test has been said to be, not whether it states a perfect case, but whether the court has the power to grant the relief sought in a proper case. Van Fleet, Collateral Attack, § 61. If upon a petition for adoption which omits these allegations the court finds the fact of abandonment, as well as other necessary facts, its decree of adoption is valid. The judgment or decree necessarily implies a finding of all material facts not inconsistent with the record, one of which may be the fact of abandonment."

We may assume, for the purpose of considering the point, that the sole reason obviating consent by the father was his alleged abandonment of the child. Such abandonment, of course, must have existed at the date of the adoption. The statute, in force at that time, did not require that the evidence showing abandonment, or even the fact of abandonment, be set out in the adoption instrument, or that the particular reason, excusing consent of the other parent, be given. The present statute (3 Comp. Laws 1929, § 15952) requires an allegation "in the instrument of adoption that the other parent has abandoned such child for the period of one year last preceding the date of filing the instrument of adoption." The instrument of adoption gave the probate court jurisdiction in the premises.

But it is contended that, in the eye of the law, there was no abandonment of the child by the father because custody, care, and maintenance of the child was with the mother, citing *People* v. *Dunston,* 173 Mich. 368 (42 L. R. A. [N. S.] 1065). That was a criminal case under a penal statute. If we apply the rule of that case to this case we only find that the judge of probate was in error in holding otherwise.

The statute did not provide for notice to the father. The initial step, giving the probate court jurisdiction of the subject-matter, was properly taken by the mother. In the exercise of jurisdiction, so conferred, the probate court had to determine whether the necessary parties in interest were before the court. Consent by the father was not necessary if he had abandoned the child. The fact of abandonment must have been found, for it was adjudged that the mother was the sole custodian of the child and possessed due authority to execute the instrument of adoption. If it be held that the father was entitled to notice, then he alone could complain of want of notice, and, for 34 years after the adoption and to the time of his death, he made no such complaint. The father never questioned the validity of the adoption, and, by lapse of time, he was barred from seeking revocation thereof, had he so desired, and plaintiff is equally barred.

Plaintiff was a necessary party to the proceeding in the probate court, for his welfare was the very substance thereof. The probate court had jurisdiction of the subject-matter and to make adjudication, and the adjudication made, however erroneous in point of fact or law, cannot, after the lapse of 34 years, be now questioned by plaintiff.

The decree in the circuit court is reversed, and the bill dismissed, with costs against plaintiff.

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

SIEGMEYER *v.* SMALL.

1. INJUNCTION—FAILURE TO GIVE STAY BOND.
Failure to give stay bond justified release of injunction staying summary proceedings, but not dismissal of bill.

2. JUDGMENT—FORMER ADJUDICATION MUST BE PLEADED IN BAR.
Former adjudication must be pleaded in bar, and cannot be considered under special appearance and motion to dismiss.

3. EQUITY—JUDGMENT—DISMISSAL.
Bill by vendee for accounting under land contract and to enjoin summary proceedings by vendor was properly dismissed, where judgment in summary proceedings had passed against plaintiff.

Appeal from Oakland; Doty (Frank L.), J. Submitted April 8, 1931. (Docket No. 28, Calendar No. 35,345.) Decided June 1, 1931.

Bill by Mathilde Siegmeyer against Charles E. Small for an accounting under a land contract and to enjoin summary proceeding of ouster. Bill dismissed. Plaintiff appeals. Affirmed.

*Louis B. Ver Wiebe,* for plaintiff.

*Earl L. Phillips,* for defendant.

WIEST, J. Plaintiff filed the bill herein to have the amount due under a land contract determined and to restrain a summary proceeding brought to oust her from the premises. Defendant, under special appearance, moved to dismiss the bill because of former adjudication between the parties in the same court, failure of plaintiff to give a bond upon

staying by injunction the summary proceeding, and plaintiff had an adequate remedy at law. The motion was granted, and plaintiff reviews by appeal.

Failure to give a stay bond justified release of the injunction, but not dismissal of the bill. Former adjudication must be pleaded in bar, and cannot be considered under a special appearance and motion to dismiss. The court was in error in adjudging that a former adjudication barred this suit. Such an issue required a plea in bar and proof in support thereof. *Vyse* v. *Richards,* 208 Mich. 383; *Red Star Motor Drivers' Ass'n* v. *City of Detroit,* 244 Mich. 480; *Chatham-Trenary Land Co.* v. *Swigart,* 245 Mich. 430.

The record before us contains the bill of complaint and special motion. The bill of complaint does not present the question of former adjudication. Extrinsic proof was necessary. In the summary proceeding judgment passed against plaintiff, and the bill herein was filed just before writ of restitution could have been issued. The bill was properly dismissed. See *Bassett* v. *Trinity Building Co., ante,* 207; *Pariseau* v. *Trinity Building Co., ante,* 213.

For the reason mentioned, the decree is affirmed, with costs to defendant.

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

## WIENER v. VALLEY STEEL CO.

1. GARNISHMENT—DISCLOSURE—APPEARANCE—DEFAULT.
   Letter written by garnishee defendant to clerk of court denying indebtedness to principal defendant was not disclosure required by statute (3 Comp. Laws 1929, § 14857), but, as an act in behalf of appearance, on filing in the case, it commanded notice by plaintiff, at least to extent of moving that it be stricken from files before entry of default.

2. SAME—JUDGMENT—DEFAULT BASED ON FILES AND RECORDS.
   Before entering default, examination of files is required, since default is based on files and records and failure of garnishee to file its appearance and disclosure.

3. SAME—APPEARANCE—SUFFICIENCY OF SERVICE.
   Filing of letter written by garnishee defendant to clerk of court denying indebtedness to principal defendant, in response to service of writ, bars garnishee from questioning sufficiency of officer's return of service.

4. COURTS—ORDER OF CIRCUIT JUDGE NOT REVIEWABLE BY ANOTHER IF ORIGINAL JUDGE AVAILABLE.
   Order of circuit judge setting aside garnishee defendant's default may not be reviewed by any other circuit judge while judge making order is available.

Appeal from Wayne; Miller (Guy A.), J. Submitted April 15, 1931. (Docket No. 91, Calendar No. 35,592.) Decided June 1, 1931.

Garnishment proceedings by Norman H. Wiener, doing business as Albion Iron & Metal Company, against Valley Steel Company, an Ohio corporation, principal defendant, and M. Cohen & Sons Company, an Ohio corporation, garnishee defendant. Judgment against garnishee defendant is reviewed by it on appeal. Reversed, and new trial granted.

*Morris Garvett,* for plaintiff.

*Butzel, Levin & Winston* (*Soltz & Morris* and *Carl L. Whitchurch,* of counsel), for garnishee defendant.

WIEST, J. This is an appeal by a garnishee defendant. The garnishee, a foreign corporation, instead of making the disclosure required by statute (3 Comp. Laws 1929, § 14857), sent a letter to the clerk of the court denying indebtedness to the principal defendant. This letter was filed in the case March 5, 1926. The plaintiff entered default of the garnishee defendant, for want of disclosure, on April 1, 1926, and again on November 30, 1926. May 21, 1930, plaintiff sent notice to the garnishee defendant of entry of such judgment and that, at the expiration of 60 days from the entry thereof, application would be made to the court for judgment against the garnishee defendant. June 20, 1930, the garnishee defendant filed a motion to set its default aside. This motion was heard by Judge Boomhower of the 24th circuit, sitting in the third circuit, and "counsel appearing for both interested parties and an oral argument having been had on said motion," the default was set aside and leave to file disclosure granted. July 1, 1930, a disclosure in due form, denying liability, was filed. No review of the order setting aside the default was had. The garnishee issue came to trial before Judge Miller on November 12, 1930. Upon motion of plaintiff he set Judge Boomhower's order aside, restored the default, and entered judgment against the garnishee defendant. This appeal followed.

The letter was not a disclosure, but would have constituted an appearance by the garnishee defend-

ant had notice thereof been given the attorneys for the plaintiff. As an act in behalf of appearance, upon filing in the case, it commanded notice by plaintiff, at least to the extent of moving that it be stricken from the files before entry of default. Before entering default, an examination of the files was required. The default entered was based upon the files and records and failure of the garnishee "to file its appearance and disclosure." Had notice of the filing of the letter been served upon attorneys for plaintiff, the garnishee defendant would have been entitled to notice of the default. 3 Comp. Laws 1929, § 14121, and cases cited in the footnotes. The filing of the letter, in response to the service of the writ, bars the garnishee from now questioning the sufficiency of the officer's return of service. Whether Judge Boomhower, in setting aside the default, considered it void under the state of the record at the time of entry, and, therefore, the limitation of time by rule did not apply, is not disclosed. If Judge Boomhower acted without jurisdiction, plaintiff should have moved him to vacate the order and have reviewed in this court, in case of refusal. Review could not be made by any other circuit judge while Judge Boomhower was available.

The judgment against the garnishee defendant is reversed, and a new trial granted, with costs against plaintiff.

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

KRAUSE *v.* RETTY.

1. BILLS AND NOTES—HOLDER IN DUE COURSE—LIABILITY OF ACCOMMODATION MAKER.

In action on promissory note by holder in due course, accommodation maker is liable, even though holder knew, at time of taking note, that maker was only accommodation maker (2 Comp. Laws 1929, §§ 9277, 9278).

2. SAME—QUESTION FOR JURY.

In action by holder of promissory note against accommodation maker, whether plaintiff was holder in due course, *held*, question of fact for jury.

Error to Wayne; Murphy (Alfred J.), J. Submitted April 22, 1931. (Docket No. 66, Calendar No. 35,481.) Decided June 1, 1931.

Assumpsit by Jack Krause against Victor Retty and another on a promissory note. Judgment for defendant Retty. Plaintiff brings error. Reversed, and new trial granted.

*Stanley S. Krause* (*Edmund E. Shepherd,* of counsel), for plaintiff.

*Hugh C. Chedester,* for defendant Retty.

WIEST, J. October 30, 1928, defendant Retty, as an accommodation, signed a note for $700, payable in 90 days, to the order of defendant Fire. Plaintiff brought this suit as an alleged good-faith purchaser of the note, for value, from Fire before maturity.

At the trial it was established that Retty was an accommodation maker, and the court instructed the jury as follows:

"Now, members of the jury, since that was an accommodation note, it is incumbent upon the plain-

As to what circumstances are sufficient to put a purchaser of accommodation paper on inquiry in order to secure rights of *bona fide* holder, see annotation in 29 L. R. A. (N. S.) 385.

tiff, Krause, before you may rightfully give Krause a verdict in his favor, that he satisfy you that he is what is called in the law, the holder in due course of that note. Now, what is meant by that? By that is meant that he must show that he is a good faith holder of that note, that he acquired it for value, that he parted with a consideration for it, and did it without any knowledge of the fact that it was an accommodation note between Retty and Fire.

"Therefore, to entitle the plaintiff to your verdict, he must satisfy you by a fair preponderance of the evidence that he is the holder in due course, that he acquired it for value received and in good faith. If the evidence satisfies you of that, the plaintiff should have your verdict.

"What does the defendant contend? The defendant contends that being an accommodation note the circumstances of the case as revealed by the testimony, show that the plaintiff Krause is not a holder in due course, and that he did not acquire it in good faith for a valuable consideration."

If plaintiff was a holder, before maturity, in due course and for value, defendant Retty was liable on the instrument, even though plaintiff knew him to be an accommodation maker. Upon this we quote 2 Comp. Laws 1929, § 9277:

"Absence or failure of consideration is matter of defense as against any person not a holder in due course."

And section 9278:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

The court was in error in instructing the jury that, before plaintiff was entitled to a verdict, the burden was on him to show that he not only acquired the note for value and parted with a consideration for it, but as well did so "without any knowledge of the fact that it was an accommodation note between Retty and Fire." Whether plaintiff was a holder in due course was a question of fact for the jury. If plaintiff was a holder in due course it was no defense to show that defendant Retty was an accommodation maker.

For the error pointed out, the judgment is reversed, and a new trial granted, with costs to plaintiff.

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

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## McCLURE *v.* EDWARD J. MEYER SOUTHFIELD WOODS CORPORATION.

1. VENDOR AND PURCHASER—DEFAULT—RELEASE OF LOTS.

   Assignee of vendee is not entitled to benefit of provision in contract for release of lots by vendor on payment of additional sums, where it was in default in contract payments.

2. SAME—FORECLOSURE—APPLICABILITY OF RULE REQUIRING SALE IN INVERSE ORDER OF ALIENATION.

   In suit by vendor to foreclose land contract against lots under contract of sale by vendee, but not released by vendor because of vendee's default, and therefore title had not passed, rule requiring sale in inverse order of alienation is not applicable.

3. Same—Vendor Not Required to Adjust Equities Between Vendee and its Contract Vendees.

Vendor foreclosing land contract requiring release of lots on payment of additional sums, was not required, before or during foreclosure, to adjust equities between vendee and its land contract vendees.

4. Same—Default—Effect of Release of Lots.

Release of lots pursuant to contract did not cut off vendor's right to foreclosure on all lots not released on vendee's default in payments.

5. Same—Statutory Provisions for Foreclosure of Mortgages Not Applicable to Land Contracts.

Proceedings to foreclose land contracts are not regulated by statutory provisions with respect to foreclosure of mortgages.

6. Same—Foreclosure Against Lots Sold by Vendee—Equity.

In suit by vendor to foreclose land contract against lots under contract of sale by vendee, decree ordering such lots sold subject to balance to become due on land contract, to satisfy amount past due, from which purchasers have not appealed, worked no harm to vendee.

Appeal from Wayne; Jayne (Ira W.), J. Submitted April 14, 1931. (Docket No. 75, Calendar No. 35,375.) Decided June 1, 1931.

Bill by John W. McClure and others against Edward J. Meyer Southfield Woods Corporation, a Michigan corporation, and others to foreclose a land contract. Decree for plaintiffs. Defendant corporation appeals. Affirmed.

*Sempliner, Dewey, Stanton & Bushnell* (*Arthur F. Neef* and *D. Neil Reid,* of counsel), for plaintiffs.

*William S. McDowell,* for defendant corporation.

Wiest, J. This is foreclosure of a land contract for payments in default, there being no acceleration provision.

Defendant Edward J. Meyer Southfield Woods Corporation is assignee of the vendee, and admits default in payments, but, notwithstanding, claims right to have lots released under terms of the contract. The contract described a single parcel of land and contained an agreement that the vendors would join in a plat subdividing the parcel into lots. The tract was subdivided into lots, and plaintiffs joined in executing the plat. The land contract also provided:

"It is further agreed that the parties of the first part will release any lot or lots of any subdivision to be made of said premises or any part thereof, from the liens, terms or provisions of this contract on the payment, to apply on principal on the basis of ten ($10) dollars per front foot, such payments not to be considered a part of the regular yearly payments mentioned in this contract, but as additional payments on principal."

Some lots were sold by the vendee and released by the vendors, and some were sold, and because of default in payments under the land contract, releases were refused.

After the bill was filed, plaintiffs joined purchasers of lots as defendants and later dismissed them from the case. The decree found $59,386.82, due for payments in default, interest, and taxes, granted 30 days' time for payment, mentioned the fact of the subdivision of the tract into lots, release of some lots, provided for release of other lots upon payment for the same by the purchasers thereof, within 30 days, and directed sale of the premises, not so released, as an entirety, subject to $40,665, unpaid, but not then due on the contract. The Edward J. Meyer Southfield Woods Corporation

appealed. Purchasers of lots, made defendants and then dismissed, have not appealed.

Defendant claims the right to have lots released, regardless of default in contract payments. This is contrary to the express terms of the contract, and to our holding in *Pine Shores Realty Co.* v. *Parker,* 253 Mich. 300.

The decree gave lot purchasers an opportunity to save their interests; they have not appealed, and their dismissal, as defendants, worked no harm to defendant corporation. The decree excepted from sale lots released. Other lots, under contract of sale by defendant, were properly withheld from release by reason of defendant's default; therefore, title had not passed and the rule requiring sale in inverse order of alienation was not applicable. Plaintiffs were not required, before or during foreclosure, to adjust the equities between the defendant corporation and its land contract vendees, nor, by release of lots, had they cut off their right to foreclosure on all the lots not released. Lots not released before sale were ordered sold "in their entirety," and were sold, by designated lot numbers, to plaintiffs subject to the balance to become due on the land contract.

Defendant contends that the lots could only be sold separately, citing *Jerome* v. *Coffin,* 243 Mich. 324 (a mortgage foreclosure), where this court applied the statutory provision (3 Comp. Laws 1929, § 14431), regulating sales under mortgage foreclosure. Proceedings to foreclose land contracts are not regulated by statutory provisions with respect to foreclosure of mortgages. *Jones* v. *Bowling,* 117 Mich. 288; *Drysdale* v. *P. J. Christy Land Co.,* 248 Mich. 184; *Craig* v. *Black,* 249 Mich. 485.

The interest decreed to be sold, and sold, was the equitable title of the vendee, and this was sold to satisfy the amount past due. We repeat, that purchasers from the vendee of lots not released by the vendor were accorded opportunity to pay and obtain releases, and no such purchaser has appealed. This record discloses no reason for disturbing the decree in the circuit court, and it is affirmed, with costs to plaintiffs.

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

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BUCUSS *v.* SCHULER.

VENDOR AND PURCHASER—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Measure of damages for vendor's breach of contract to convey land is difference between market value of land at time of breach and contract price thereof.

Appeal from Muskegon; Vanderwerp (John), J. Submitted April 23, 1931. (Docket No. 117, Calendar No. 35,636.) Decided June 1, 1931. Rehearing denied September 10, 1931.

Assumpsit by Charles E. Bucuss and another against Mathilda Schuler for breach of a contract to convey land. Judgment for plaintiffs. Defendant appeals. Reversed, and new trial granted.

*Alexis J. Rogoski,* for plaintiffs.

*Turner, Engle & Cochran,* for defendant.

Measure of recovery by vendee under executory contract for purchase of real property where vendor is unable or refuses to convey, see annotation in 48 A. L. R. 14.

WIEST, J. Defendant owned 103 acres of land in the township of Laketon, Muskegon county. February 14, 1928, she gave an oil and gas lease, covering the tract, to certain parties for a term of one year or, "as long thereafter as oil and gas, or either of them is produced from the leased premises by the lessees." August 10, 1928, with such lease outstanding, she sold five acres of the tract to plaintiffs under land contract for $900, of which $100 was paid down and $10, or more, to be paid per month. The next month oil was discovered in the township, and, December 5, 1928, a producing oil well was upon defendant's property not covered by the land contract. This well extended the oil and gas lease indefinitely, and barred defendant from conveying title in fee simple to plaintiffs, as agreed in the land contract. January 30, 1929, speculation in oil leases in the vicinity became rife and bonuses for such leases were offered and plaintiffs tendered full payment of the land contract and demanded full title. Defendant could not convey title, except subject to the oil lease she had granted others. Thereupon plaintiffs brought this suit to recover damages for breach of the land contract, and had verdict and judgment for $4,790, predicated upon the claim that, on January 30, 1929, full title would have enabled them to obtain from $1,000 to $1,500 per acre as bonus for an oil lease. Defendant, by appeal, contends that such damages are purely speculative and the true measure, not shown at the trial, is the market value of the land at the date of the breach, less the contract price. Defendant's breach of the contract is admitted, and the question presented is the measure of damages.

Courts of this country have expressed great diversity of opinion on this subject. See 48 A. L.

R. 12. Much of the dispute in the case at bar centers upon what is meant by loss to plaintiffs of their bargain.

Defendant, of course, was aware of the oil lease she had executed a few months previously. The life of that lease, beyond a year, was contingent. That fact, however, is of no help to defendant, for she unconditionally contracted full title to plaintiffs. The record does not disclose bad faith or fraud and cannot be supplemented by reference to *Schuler* v. *Bucuss,* 253 Mich. 479, where we denied reformation of this land contract. Plaintiffs' bargain was to have title in fee to this five acres of land upon payment of $900. The bargain was lost on January 30, 1929. The bargain was worth at that time the market value of the land less what they had to pay. See *Hammond* v. *Hannin,* 21 Mich. 374 (4 Am. Rep. 490). See, also, *Allen* v. *Atkinson,* 21 Mich. 351; *Way* v. *Root,* 174 Mich. 418; *Bugajski* v. *Siwka,* 200 Mich. 415; *Droppers* v. *Marshall,* 203 Mich. 173 (4 A. L. R. 1266).

The rule applicable to the case at bar is well expressed in the following quotation from *Matthews* v. *LaPrade,* 144 Va. 795, 808 (130 S. E. 788):

"The measure of damages a vendee is entitled to recover when he brings himself within the exceptions to the general rule in cases of this character; namely, if the jury believed from the evidence that the defendant acted in bad faith; or knew, or should have known, that he could not comply with his undertaking; or if his contract required the consent or signature of a third person to render his deed effective; or if he made the contract without title in the land, in expectation of subsequently being able to acquire it, and was unable to fulfill by reason of causes so known, as the want of concurrence of a

third person; the plaintiff is entitled to recover as general damages the difference, if any, between the contract price and the market price at the time of the alleged breach, or in other words, for the loss of his bargain."

Under this record plaintiff was not entitled to recover damages of the nature awarded. The court excluded testimony offered by defendant relative to plaintiffs' purpose in purchasing.

In *Kelly* v. *Simon* (Tex. Civ. App.), 262 S. W. 202, a vendor was unable to deliver marketable title because of an outstanding oil lease. In that case the vendee contended that he was entitled to recover the profits he might have made from a resale of the property. The court stated:

"There is no merit in this contention, for there is neither allegation nor proof of fraud inducing the contract, and it is not pretended at the time the contract was made that such special damages might probably accrue. * * *

"* * * To recover special damages, it must be alleged and proven that it was the purpose and intention of the appellant (vendee) to resell the property at some enhanced value, known to the appellees (vendor) at the time of making the contract."—Citing, among other cases, *Hammond* v. *Hannin, supra.*

We do not think the record sustains the contention that the parties "necessarily contemplated that the approximate result of a failure on defendant's part to convey the land to plaintiffs free from an oil and gas lease would be to deprive plaintiffs of any bonus or income they might receive from leasing the land for oil and gas, and would operate to deprive plaintiffs of the benefit of their bargain." Plaintiffs received no offer of bonus for an oil lease,

and the fact that bonuses were offered for oil leases on other lands is too speculative to warrant a finding that, had plaintiffs' land been free, a bonus in like sum, or in any sum, would have been obtainable by plaintiffs. If the land in question was actually in demand for oil production purposes at the time of the breach this should have been reflected in the market value and established by proof, and it was error to permit recovery otherwise.

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

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

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DOOR *v.* VALLEY LUMBER CO.

1. MOTOR VEHICLES—NEGLIGENCE—FAILURE TO SOUND WARNING.
   Driver of truck seeing girl coasting on sidewalk, but having no reason to suspect that she would turn into street, was not guilty of negligence in failing to sound warning signal.

2. SAME—DIRECTED VERDICT.
   In action for death of girl four years and three months old, caused by her coasting in cart from sidewalk into street and running into side of truck, evidence *held,* to negative negligence on part of truck driver.

Case-made from Kent; Brown (William B.), J. Submitted April 10, 1931. (Docket No. 53, Calendar No. 35,523.) Decided June 1, 1931.

Case by Henry Door, administrator of the estate of Ilene Door, a deceased minor, against Valley Lumber Company, a Michigan corporation, and another for personal injuries resulting in the death of

plaintiff's decedent. Directed verdict and judgment for defendants. Plaintiff appeals. Affirmed.

*Leo W.* and *Clare E. Hoffman,* for plaintiff.

*Dunham, Cholette & Allaben,* for defendants.

WIEST, J. The morning of May 21, 1929, between the hours of eight and nine o'clock, Ilene Door, four years and three months of age, was coasting in a little cart on the sidewalk along the north side of Johnson street in the city of Grand Rapids. She was going west, slightly down grade, and suddenly turned into a paved driveway leading from the sidewalk to the curb, a distance of five feet, also down grade, and her cart went upon the pavement, ran into the side of a truck going west upon the proper side of the street, and she was killed. This suit was brought against the owner and driver of the truck to recover damages under the death act. At the close of proofs, the circuit judge directed a verdict in favor of defendants. The child was too young to be guilty of contributory negligence, and, upon review, we pass upon the question of whether there was negligence on the part of the driver of the truck.

Witnesses to the accident fully described the happening. The truck was driven at a speed of about 15 miles per hour on the proper side of the street, ten feet from the curb, and, when it was ten feet from the drive, the cart suddenly turned from the sidewalk, down the drive to the street pavement, the truck driver swerved his truck away from the approaching cart and applied the brakes, but the cart had such momentum that it carried the child to collision with the side of the truck, just forward of the rear wheel. The driver of the truck saw the girl

coasting on the sidewalk but had no reason to anticipate that she would turn down the drive and into the street. As soon as she turned into the drive and it was apparent that the speed of the cart would carry her into the street he swerved his truck away from her approach and applied the brakes. It would have been useless to sound a warning signal when the girl turned into the drive, and while she was coasting on the sidewalk no signal was called for.

Cases involving instances of children in the roadway have no application. The driver was guilty of no violation of law.

In *Hyde* v. *Hubinger*, 87 Conn. 704 (87 Atl. 790), a child, a few months over four years of age, was struck by an automobile while in a public street. What the court there said applies to this case:

"No evidence was offered from which the jury could reasonably have found negligent conduct on the defendant's part. There was an entire absence of testimony that he was traveling at an excessive speed, that he did not have his car under suitable control, or that he failed to exercise due care in any respect or at any time. There was no testimony to indicate that the plaintiff had left the sidewalk, where he was just before the accident, until the moment before he was hit, or that there was anything in the situation which called for special precaution on the defendant's part to avoid the accident which was not taken. On the contrary, the evidence indicates strongly that the plaintiff did not leave the walk, or come into a position of danger, or of apparent danger, until the defendant's car was so close to him that no reasonable efforts on its driver's part could have avoided running him down."

The evidence in the case at bar negatives negligence on the part of the truck driver.

The judgment is affirmed, with costs to defendants.

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

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MOREHEAD MANFG. CO. *v.* WASHTENAW CIRCUIT JUDGE.

1. CORPORATIONS—SALARIES OF OFFICERS—EXCESSIVENESS.
   Whether salaries paid to officers of corporation are excessive may be determined on hearing on merits.

2. SAME—ULTRA VIRES ACTS—TEMPORARY RECEIVER.
   Loans by corporation to officers, whether valid or void, which have not jeopardized the company or interests of stockholders, do not justify appointment of temporary receiver; but further loans of like character, if *ultra vires*, may be enjoined.

3. SAME—COURT MAY ORDER DIVIDEND TO BE PAID.
   Upon proper showing, courts may order directors of corporation to declare dividend out of surplus profits.

4. SAME—DISCRETION OF OFFICERS INTERFERED WITH ONLY IF ABUSED IN BAD FAITH.
   Court is loath to interfere with discretion vested in corporation's officers to declare dividend out of surplus profits unless it clearly appears that discretion is, in bad faith, abused.

5. SAME—COURT MAY RESTRAIN DISSIPATION OF PROFITS.
   Court may restrain dissipation of corporation's surplus profits and direct retention thereof in proper case to await judgment of court as to whether same, or some part, should be dispensed in dividends.

6. SAME—APPOINTMENT OF TEMPORARY RECEIVER NOT WARRANTED.
   Failure of corporation's officers to declare dividend and their *ultra vires* acts do not warrant appointment of temporary receiver, where corporation is going concern with large surplus, and its interests and that of stockholders are not jeopardized.

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Discretion of directors or corporation as to declaring or paying dividends, or as to place, time and manner of payment, see annotation in 55 A. L. R. 44 *et seq.*

Mandamus by Morehead Manufacturing Company, a Michigan corporation, and its officers to compel George W. Sample, Washtenaw circuit judge, to set aside an order appointing a temporary receiver of plaintiff corporation. Submitted April 21, 1931. (Calendar No. 35,456.) Writ granted June 1, 1931.

*Douglas, Barbour & Wing* (*Harold B. Desenberg,* of counsel), for plaintiffs.

*Cavanaugh & Burke, Louis E. Burke,* and *Jacob F. Fahrner* (*Carl A. Lehman,* of counsel), for defendant.

WIEST, J. Leonard B. Orloff filed a bill in the Washtenaw circuit against the Morehead Manufacturing Company and its officers, in which he alleged mismanagement and *ultra vires* acts by the corporate officers, the existence of surplus profits maintained for the benefit of majority stockholders, and arbitrary refusal to devote the same to payment of dividends, and prayed for restraint, by injunction, the appointment of a temporary receiver for the corporation, and a decree directing dividends to be paid out of the surplus. Restraint was imposed by injunction. Defendants were required to show cause why a receiver should not be appointed, hearing was had thereon, testimony was taken, and the court appointed a temporary receiver "to take full possession of all the property and assets of said Morehead Manufacturing Company, * * * and to have charge and control of, and to operate the business of the said Morehead Manufacturing Company, * * * until the further order of this court."

Upon petition, in behalf of the corporation, we issued our order to the circuit judge to show cause

why he should not set aside the order appointing a receiver. The corporation is a going concern, and, upon a capitalization of $45,000, has paid munificent dividends and accumulated a surplus of $258,665.94. In 1930, it paid a dividend of 35 per cent., in 1929, 45 per cent., and in 1928, 150 per cent. This last was really for 1928, 1927, 1926, and 1925, having been delayed by proceedings in court. Plaintiff obtained 50 shares of the stock from his wife on August 30, 1930, and September 26, demanded that the surplus be distributed to the stockholders, and, October 4th, filed the bill.

The corporation manufactures steam specialties. There are few stockholders and the directors own nearly all of the stock and feel that the welfare of the business and its expansion or adjustment to present industrial conditions require maintenance of the surplus.

The president and general manager receives a salary of $15,000, and also has 15 per cent. on dividends paid. The treasurer receives a salary of $3,600 per year and the secretary $5,350. These salaries are asserted to be excessive. The treasurer borrowed $15,000 from the company, he owns 1,600 shares of stock and put up collateral security for the loan. The son of the treasurer borrowed $5,000 and gave collateral security. Comparatively small loans were made to employees in order to preserve the sales organization. It is claimed that such loans to officers of the company were *ultra vires,* and evidence an intention to maintain the surplus for private convenience.

Whether the salaries paid the officers are excessive or not must await the hearing on the merits. The loans to officers, whether valid or void, have not jeopardized the company or the interests of

stockholders to an extent justifying a receiver. Further loans of like character, if *ultra vires,* can be enjoined.

Upon a proper showing, courts may order the directors of a corporation to declare a dividend out of surplus profits. This court so ordered in *Dodge* v. *Ford Motor Co.,* 204 Mich. 459 (3 A. L. R. 413). We are not, at this time, concerned with the question of when such may be ordered, and merely state that, while the court has power, it will not infringe upon the discretion vested in corporate officers, and in any instance is loath to act unless it is clearly made to appear that the discretion is, in bad faith, abused. This subject, however, is far removed from the action taken in the case at bar in the appointment of a temporary receiver of a successful corporation and placing all its affairs in charge of an officer of the court. Courts may restrain dissipation of surplus profits and direct the retention thereof in a proper case to await the judgment of the court as to whether the same, or some part thereof, should be dispensed in dividends. But no court, upon the record before us, should appoint a temporary receiver. The order appointing a temporary receiver ought not to have been granted, constitutes an unwarranted interference with corporate power, supplants corporate management without need, and is highly detrimental to the corporate existence.

The circuit judge is directed to vacate the order appointing a temporary receiver. Plaintiff herein will recover costs against plaintiff in the equity suit.

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

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ACTION.

1. Requisite to proceeding under declaratory judgment law (3 Comp. Laws 1929, § 13903) is actual controversy over specific issue to be set up in pleadings so that binding declaration of rights may be made thereon. *Village of Grosse Pointe Shores* v. *Ayres*, 58.
2. Said proceeding is special, is not substitute for regular actions, and is not exercise of general equity jurisdiction in which court may grant consequential relief under general prayer or on general equitable considerations. *Id.*
3. In proceeding under declaratory judgment law (3 Comp. Laws 1929, § 13903), court will not decide as to future rights, especially where, by reason of extraneous circumstances creating estoppel or otherwise, the situation may become so changed that declaration now might be obsolete when need for it arises. *Id.*
4. Where defendant corporation planned merger with another company and offered either cash or stock for shares surrendered, and plaintiff stockholder, on surrendering her shares,

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by mistake signed option to receive stock, she may not maintain action for cash so long as said option stands. *Van Wie* v. *Fidelity Trust Co.*, 108.

5. Where automobile owner assigned all of its claim for damages by collision to insurance company which paid the loss, and owner makes no claim for damages other than that assigned, there was no splitting of cause of action. *National Liberty Ins. Co.* v. *Foth*, 153.

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3. If statutory provisions regulating adoption of children are not complied with, adoption fails. *Id.*
4. Since consent lies at foundation of statutes of adoption, if they require it to be given, jurisdiction of subject-matter cannot be acquired without it. *Id.*
5. Where certain facts obviate necessity of consent, existence of these facts must be shown. *Id.*
6. Adoption will be upheld, as against collateral attack, unless want of jurisdiction is affirmatively shown. *Id.*
7. To obviate consent of father to adoption by abandonment, such abandonment must exist at time of adoption. *Id.*
8. Statute of adoption in effect in 1891 did not require that evidence showing abandonment, or even fact of abandonment, be set forth in adoption instrument, or that particular reason excusing consent of other parent be given. *Id.*

ADOPTION—Continued.

9. Adoption instrument stating that mother had sole custody of child, and giving her consent to adoption, conferred jurisdiction on court under statute in effect in 1891, although no fact excusing consent by father was asserted. *Id.*

10. Consent of father to adoption of child was not necessary in 1891 if he had abandoned child. *Id.* 672.

11. Fact of abandonment of child by father must have been found by court in adoption proceedings, where it adjudged that mother was sole custodian of child and possessed due authority to execute adoption instrument. *Id.*

12. If father was entitled to notice of adoption proceedings, he alone could complain of want of notice. *Id.*

13. Adopted child, who was necessary party to adoption proceedings wherein probate court had jurisdiction of subject-matter, could not, after lapse of 34 years, question validity of adjudication, however erroneous in point of fact or law. *Id.*

ADVANCES—See RECEIVERS (9, 12).

ADVERTISING SALE—See CONSTITUTIONAL LAW (8); RECEIVERS (4).

ADVERTISING SIGNS—See LANDLORD AND TENANT (3).

AFFIDAVIT OF MERITS—See JUDGMENT (9); SET-OFF AND RECOUPMENT (1).

AFFIDAVITS—See ARREST (1, 4); REPLEVIN.

AGENCY—See PRINCIPAL AND AGENT.

AGREEMENT TO PURCHASE—See EMINENT DOMAIN (8).

AGREEMENT TO RECONVEY—See FRAUDULENT CONVEYANCES (16–18).

ALIBI—See CRIMINAL LAW (1, 2).

ALMSGIVING—See CHARITIES (1).

AMENDMENT—See APPEAL AND ERROR (4, 20); EMINENT DOMAIN (3); EXECUTION (2); MUNICIPAL CORPORATIONS (7).

AMOUNT DUE—See MORTGAGES (4).

ANSWER—See EXCEPTIONS, BILL OF (2).

ANTECEDENT DEBT—See FRAUDULENT CONVEYANCES (4).

APPEAL AND ERROR.

1. In reviewing judgment *non obstante veredicto* for defendants, Supreme Court must accept plaintiff's version of facts, in view of jury's verdict in its favor. *O'Toole & Nedeau Co.* v. *Boelkins,* 44.

APPEAL AND ERROR—Continued.

2. In reviewing denial of defendant's motion for judgment *non obstante veredicto,* in action for personal injuries, on ground that plaintiff was guilty of contributory negligence, it is assumed that there was proof of defendant's negligence, and plaintiff's version of contested facts is accepted as settled by verdict of jury. *Rice* v. *Goodspeed Real Estate Co.,* 49.

3. Where, in trial had without jury, no exceptions to court's findings were seasonably filed, judgment stands if sustained by findings. *J. R. Watkins Co.* v. *Rich,* 82.

4. Request for amendment of declaration in Supreme Court is denied, where amendment would be no help to plaintiff. *Van Wie* v. *Fidelity Trust Co.,* 108.

5. Where, in action on fire insurance policy, testimony by plaintiff as to his arrest by fire marshal when he went to meet adjuster in response to telephone call was objected to, but no ruling asked for, no motion to strike made, and no request to charge made in reference thereto, question of its admissibility was not saved for review. *Johnson* v. *National Fire Insurance Co.,* 126.

6. In action against trustee and sureties on two bonds given by trustee, where judgment was against surety on second bond only, from which plaintiff did not appeal, question of concurrent liability is not before Supreme Court. *Smith* v. *McCluskey,* 145.

7. In reviewing judgment for defendant on directed verdict, the testimony and its legitimate inferences most favorable to plaintiff must be accepted. *National Liberty Ins. Co.* v. *Foth,* 152.

8. In action for damages resulting from automobile collision, inferences which might be drawn from testimony tending to relieve defendant of negligence and to show that driver of plaintiff's car was negligent may not be considered, on review, in view of fact that verdict for defendant was directed. *Id.*

9. Where, in action for personal injuries received in automobile accident, in cross-examining defendant's witness, plaintiff's counsel asked proper question, answer thereto indicating that defendant carried insurance was not reversible error. *Deffenbaugh* v. *Inter-State Motor Freight Corp.,* 180.

10. Supreme Court assumes that jury followed instructions of trial court to entirely disregard fact that defendant carried automobile insurance, unintentionally brought into case on cross-examination. *Id.*

11. Whether trial court erred in denying motion for new trial on ground that verdict was excessive is not open to review, where no reasons were filed by court for overruling motion and none were requested. *Id.*

12. Where record shows that verdict was not enhanced by admission of improper testimony, judgment is affirmed, although it would have been reversed had it been for unduly large amount. *Harker* v. *Bushouse,* 198.

APPEAL AND ERROR—Continued.

13. Where plaintiffs did not appeal from decree holding that their right to rescission of land contract was lost by laches and payments made after discovery of misrepresentations, Supreme Court may not hold otherwise. *McHugh* v. *Trinity Building Co.*, 202.

14. Where trial court instructed jury that vehicle driver had right to drive to left of center of street if he had to do so to avoid cars parked on right side, court's failure to repeat same, in instruction immediately following, on duty, under city ordinance, to keep to right of center, was not prejudicial. *Palazzolo* v. *Sackett*, 289.

15. In reviewing judgment on directed verdict in favor of defendant, testimony must be considered in light most favorable to plaintiffs. *Braendle* v. *Drum*, 372.

16. Appeal from an order denying defendant's motion for summary judgment on its claim by way of counterclaim and recoupment is dismissed, where leave to appeal was neither applied for nor granted (Mich. Court Rules, No. 60, § 3). *Hermesmeyer* v. *Northwestern Investment Co.*, 384.

17. Supreme Court's action in not striking from files appellant's brief for failure to comply with Michigan Court Rules, No. 69 must not be taken as precedent, but said rule must be complied with. *Bruce* v. *Henry Ford Hospital*, 394.

18. In reviewing denial of defendant's motion for directed verdict, testimony must be construed most favorably to plaintiff. *Sharrar* v. *Wayne Savings Ass'n*, 456.

19. Determination of jury on issue of fact is binding on appellate court unless contrary to overwhelming weight of evidence. *Haara* v. *Vreeland*, 462.

20. Vendors' cross-bill praying only for reformation of contract is considered amended, on appeal, to support decree for payments due, where amount thereof is not disputed. *Jaerling* v. *Longsdorf*, 558.

21. Consolidation of several proceedings by city to condemn land for public utility may not be had in Supreme Court, where some of parties involved are not before court. *City of Allegan* v. *Iosco Land Co.*, 561.

22. In reviewing judgment on verdict directed for defendant, evidence most favorable to plaintiff must be accepted. *Richman* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 607.

See CONTRACTS (33); COSTS (2); EVIDENCE (2); JUDGMENT (3–6); LIBEL AND SLANDER (7); MASTER AND SERVANT (11); MOTOR VEHICLES (13, 14); TRIAL (3, 4); VENDOR AND PURCHASER (1).

APPEARANCE—See GARNISHMENT (3–5).

APPLICATION—See INSURANCE (16); PAYMENT.

APPRAISED VALUE—See EXECUTORS AND ADMINISTRATORS (1).

APPROVAL OF DEPARTMENT OF LABOR AND INDUSTRY—See MASTER AND SERVANT (18–20).

APPURTENANCES.

A thing is appurtenant to something else when it stands in the relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter. *McClintic-Marshall Co.* v. *Ford Motor Co.*, 306.

See EASEMENTS (3); MECHANICS' LIENS (10).

ARBITRARY AUTHORITY—See MUNICIPAL CORPORATIONS (3).

ARBITRATION AND AWARD—See EMINENT DOMAIN (9, 11); STATES.

ARREST.

1. Under 3 Comp. Laws 1929, § 14007, one defrauded may bring action in case for fraud or one in assumpsit arising out of implied promise of repayment on account of fraud, and in either case, on proper declaration and affidavit being filed, *capias ad respondendum* will issue. *Kirker* v. *Larson*, 648.
2. Under 3 Comp. Laws 1929, § 14075, providing when case may be started by writ of *capias ad respondendum* on tort claims, no distinction is made between torts that are wilful and those that are not. *Id.* 649.
3. Judgment for fraud in inducing contract does not arise *ex contractu*, and therefore issuance of *capias ad respondendum* in such case does not violate Constitution (article 2, § 20). *Id.*
4. Affidavit in support of writ of *capias ad respondendum* was sufficient without allegation that fraud, on which judgment was based, was wilful. *Id.*

ASSAULT WITH INTENT TO RAPE—See CRIMINAL LAW (1).

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Specific assignment for benefit of one or limited number of creditors is valid. *Jacobson* v. *Newman*, 555.
2. Assignment for benefit of certain creditors may be attacked only as fraud upon creditors and at suit of creditors. *Id.* 556.

ASSIGNMENTS—See ACTION (5); BANKS AND BANKING (11); CONTRACTS (17); GARNISHMENT (1, 2); LANDLORD AND TENANT (7); MASTER AND SERVANT (17); PARTIES (1, 3, 4); PLEDGES; REPLEVIN; VENDOR AND PURCHASER (7).

ASSUMPSIT.

1. It was not improper to add common counts to special count in assumpsit arising out of implied promise of repayment on account of fraud. *Kirker* v. *Larsen*, 649.
2. It would not have been proper to sue on common counts without special count in action for fraud. *Id.*

ASSUMPSIT—Continued.

3. In action for fraud, adding common counts to special count in fraud neither added to nor subtracted from other claims in declaration, where defendant was specifically found guilty of fraud, but had effect of surplusage. *Id.*

See ARREST (1); FRAUDULENT CONVEYANCES (14); PLEADING (2); SET-OFF AND RECOUPMENT.

ASSUMPTION OF RISK—See MASTER AND SERVANT (2, 4, 6).

ATTORNEY AND CLIENT.

Where defendant's attorney died after pleadings were filed and cause at issue, and after lapse of three years cause was proceeded with without notice to defendant to appoint another attorney, as required by 3 Comp. Laws 1929, § 13589, it was abuse of judicial discretion to deny defendant's motion, made before case was closed, for continuance in order that he might secure an attorney. *Mowat* v. *Walsh*, 302.

ATTORNEY'S FEES—See COSTS (1).

ATTRACTIVE NUISANCE—See NEGLIGENCE (5–8).

AUCTION—See RECEIVERS (1).

AUTHORITY TO FLOOD LAND—See EMINENT DOMAIN (5).

AUTHORITY TO USE NAME—See CORPORATIONS (48).

AUTOMOBILE INSURANCE—See APPEAL AND ERROR (10); INSURANCE (6–8).

BAD FAITH—See MECHANICS' LIENS (11).

BAILMENTS.

1. Where automobile owner habitually left his car in parking lot after day parking hours as stated in parking ticket were over, and no extra charge was made therefor, said time limit for day parking became inoperative through conduct of parties, and therefore did not limit the bailment. *General Exchange Ins. Corp.* v. *Service Parking Grounds, Inc.*, 1.
2. Where automobile, parked in enclosed lot for which fee was charged and ticket given, was not returned to owner, burden was on parking company to show, in action for value of car, not only that it was stolen, but that company was not negligent. *Id.*
3. It was parking company's duty to see that car was not removed except upon surrender of ticket. *Id.*
4. Word "damage," as used in 1 Comp. Laws 1929, § 4796 *et seq.*, relating to liability of owner of place where cars are accepted for hire for any damage to them while in his possession, is construed to cover total loss of car. *Id.*
5. *Onus* of exoneration for failure to return automobile parked in enclosed lot for hire is on parking company under 1 Comp.

BAILMENTS—Continued.

Laws 1929, § 4796 *et seq.*, and is not met by evidence tending to show that car was stolen, where it failed to show that it was not negligent. *Id.*

6. In action against parking company for value of automobile left with it for hire and not returned to owner, showing that car was stolen does not excuse defendant, where undisputed evidence shows that, under the circumstances, defendant was negligent in its care of car. *Id.* 2.

BALLOTS—See SCHOOLS AND SCHOOL DISTRICTS (1).

BANKRUPTCY—See CORPORATIONS (9, 11, 15, 16).

BANKS AND BANKING.

1. Notice printed in bank pass book stating that checks, drafts, notes, etc., when deposited are received for collection only, constitutes contract between depositor and bank which is not affected by fact that, for convenience, bank carried note so deposited in its discount ledger. *Davidow* v. *Bank of Detroit*, 447.
2. Mere fact that depositors were allowed to check against credit resulting from note deposited with bank for collection does not change import of transaction, but note remains property of depositors, and where it was dishonored their account was properly charged with amount thereof. *Id.*
3. Depositors who had been using bank pass book for upwards of four years are bound by notice printed therein, notwithstanding their testimony that their attention had not been called thereto previous to transaction involved; they being chargeable at least with constructive notice. *Id.*
4. Bank deposit may be subject to any agreement which depositor and bank may make with respect thereto, so long as rights of third parties are not injuriously affected thereby. *Id.*
5. Depositor is bound to use ordinary care and diligence in becoming informed of contents of reasonable provisions plainly printed in pass book which constitute part of the contractual relation between himself and the bank. *Id.*
6. Acceptance of deposits by bank is representation of its solvency. *Burgess* v. *Forshar*, 531.
7. That bank's reserve may fall below amount which it is required by law to maintain is not in itself proof of its insolvency, but if bank officials are unable to secure funds to meet deficiency, it is insolvent, notwithstanding its assets are much greater than its liabilities, and it may be closed by State banking commissioner. *Id.*
8. Before bank, whose reserve has fallen below legal limit, is declared insolvent, justifying treatment of general deposit as trust fund, it must appear that the bank officers had no reasonable hope or expectation that their efforts to place bank on sound financial standing would prove successful, and that suspension of business was inevitable. *Id.*

BANKS AND BANKING—Continued.

9. Suit to declare deposit in bank a trust fund giving depositor preference over other creditors of the bank was properly dismissed, where, at time deposit was made, bank's officers did not know that it was insolvent, although the amount of its reserve was below legal limit. *Id.* 532.
10. Deposit in bank for purpose of furthering transaction between depositor and another becomes impressed with trust, entitling depositor to preference over general creditors where bank becomes insolvent. *Reichert* v. *Midland Co. Savings Bank,* 551.
11. Drafts drawn by bank but not presented before it suspended operations did not deplete its balance in drawee bank, because they did not constitute assignment of any part of it (2 Comp. Laws 1929, § 9376). *Id.*
12. Bank having received deposit in specific trust for purpose of furthering transaction between depositor and another could not lawfully convert it into general one without consent of depositor. *Id.*
13. Deposit received by bank in specific trust, which was identified and came intact into hands of bank's receiver, is preferred claim. *Id.*

See BILLS AND NOTES (7); GIFTS; RECEIVERS (11).

BILLS AND NOTES.

1. Presentment for payment is necessary to hold indorser, unless waived (2 Comp. Laws 1929, §§ 9319, 9331). *Krenerick* v. *Horton,* 12.
2. Where, at time payees signed indorsement on back of promissory note, there was no previous indorsement, and printed waiver of protest, demand, and notice of nonpayment printed on back was not stricken out by them, but they merely added thereto instructions as to payment above their indorsement, they waived notice of presentment and dishonor. *Id.*
3. In action brought to enforce payment of unsecured promissory note in hands of payee or assignee, rule that law presumes payment is not applicable, but in such case payment is made matter of affirmative defense (Mich. Court Rule No. 23, § 3), and burden of proof is on defendant. *Smith* v. *McCluskey,* 145.
4. That note was fraudulently obtained does not necessarily render it void in hands of holder. *National Bank of Commerce of Detroit* v. *B. W. Marr & Co.,* 333.
5. An indorsee of commercial paper has no right to disregard any circumstances known to him calculated to lead a prudent man to suspect that the indorser might be acting in fraud of his principal. *Id.*
6. If promissory note was valid as against the maker, his liability would remain though it was fraudulently indorsed and transferred, since it would make no difference to him who held the note. *Id.*

BILLS AND NOTES—Continued.

7. Where promissory note payable to corporation was fraudulently obtained from maker, and transferred to bank by indorsement of corporation's president, who used the proceeds to pay personal obligations, the bank, which had notice from the face of the note that it belonged to corporation, was not an innocent holder for value. *Id.*

8. Before indemnifying bond may be required under 3 Comp. Laws 1929, §§ 14209, 14210, in suit involving lost promissory note, it must affirmatively appear that said note was negotiable. *Bowen* v. *Mohrhardt*, 409.

9. In action on promissory note by purchaser, finding of trial court that plaintiff was holder in due course of said note, *held*, sustained by evidence. *Conroy* v. *Foster*, 520.

10. Claim by maker of promissory note that purchaser, at time of purchase, knew that the consideration therefor was an executory oral agreement to convey title to land covered by land contract, and therefore note was void, *held*, not sustained by evidence. *Id.*

11. In action on promissory note, it was not error for court of common pleas to refuse to hear testimony of representations claimed by defendant to have been fraudulent, where notice of special defense did not allege falsity of said representations, and there was no motion to amend, or offer of proof. *Herbert* v. *Rosen*, 541.

12. In action on promissory note by holder in due course, accommodation maker is liable, even though holder knew, at time of taking note, that maker was only accommodation maker (2 Comp. Laws 1929, §§ 9277, 9278). *Krause* v. *Retty*, 684.

13. In action by holder of promissory note against accommodation maker, whether plaintiff was holder in due course, *held*, question of fact for jury. *Id.*

See BANKS AND BANKING (1, 2); CORPORATIONS (20, 21, 42); FRAUD (3–5); MORTGAGES (4); PRINCIPAL AND SURETY (7).

BLUE SKY LAW—See CORPORATIONS (22–26).

BONA FIDES OF TRANSACTION—See FRAUDULENT CONVEYANCES (6).

BONDS—See BILLS AND NOTES (8); GIFTS (1–3, 5); INJUNCTION (4, 6); PRINCIPAL AND SURETY (2, 4–7, 12–14, 16, 17); SCHOOLS AND SCHOOL DISTRICTS (1, 2, 4).

BOULEVARDS—See HIGHWAYS AND STREETS (11, 12, 14).

BOUNDARIES.

1. Where parties agree upon definite monuments which fix the boundaries of a parcel of land conveyed by one or the other, such monuments should control. *Nordberg* v. *Todd*, 440.

BOUNDARIES—Continued.

2. Where the testimony established definite monuments, testimony of the parties relative to the area of the land contained within the boundaries is not conclusive, especially in view of the rule of law that quantity in any description must generally give way to fixed lines and monuments. *Id.*

BREACH OF CONTRACT—See CONTRACTS (5, 6); CORPORATIONS (16); PRINCIPAL AND SURETY (1, 3, 4); VENDOR AND PURCHASER (21).

BREACH OF POLICY—See INSURANCE (6–8).

BREACH OF TRUST—See EXECUTORS AND ADMINISTRATORS (1).

BRIEFS—See APPEAL AND ERROR (17).

BROKERS.

1. When offer to purchase property was accepted by owners' agent, as he was authorized in writing to do, the commission which owners had agreed to pay to person securing purchaser was earned. *Meginnity* v. *Pike*, 376.
2. Where acknowledgment was made in writing by owners' agent that plaintiffs had taken advantage of the offer made by owners to pay a commission to the person securing a purchaser for their property, and that plaintiffs were entitled to such commission, a privity of contract was created between plaintiffs and owners enforceable in action at law. *Id.*
3. Where three owners agreed in writing to pay commission to person procuring purchaser for their property, each agreeing to pay one-third thereof, plaintiffs securing purchaser, who were paid two-thirds of said commission by two owners, were entitled to recover the other one-third from other owner. *Id.*
4. Broker making alleged fraudulent misrepresentations to vendee as to property sold, *held*, under evidence, to have been acting as vendor's agent. *Chanler* v. *Venetian Properties Corp.*, 468.
5. Vendor accepting and paying for services of broker in sale of property is bound by representations made by him in negotiating and consummating sale. *Id.*

See INSURANCE (11, 12).

BUILDING COMMITTEE—See MUNICIPAL CORPORATIONS (3).

BUILDING RESTRICTIONS—See COVENANTS; INJUNCTION (1–3).

BUILDINGS—See LICENSES (1); MECHANICS' LIENS (5–8).

BURDEN OF PROOF—See BAILMENTS (2, 5, 6); BILLS AND NOTES (3); DIVORCE (4); EXCHANGE OF PROPERTY (2); FRAUDULENT CONVEYANCES (2, 3, 6); TRIAL (3).

CANCELLATION OF INSTRUMENTS.

Bill in equity praying rescission proceeds on theory that there has been no rescission, not on theory that rescission has already been accomplished. *McHugh* v. *Trinity Building Co.*, 202.

See USURY.

CANDIDATE FOR PUBLIC OFFICE—See LIBEL AND SLANDER (5, 9).

CAPIAS AD RESPONDENDUM—See ARREST.

CASH—See ACTION (4).

CELEBRITY—See TRADE-MARKS AND TRADE-NAMES (6).

CERTIFICATES OF DEPOSIT—See TENDER (2, 3).

CERTIORARI—See FRAUDULENT CONVEYANCES (9).

CHAIN STORES—See TRADE-MARKS AND TRADE-NAMES (3, 7).

CHANGE OF CONDITIONS—See EQUITY (1).

CHANGE OF PLEA AFTER SENTENCE—See CRIMINAL LAW (4–6).

CHARACTER—See LIBEL AND SLANDER (4).

CHARITIES.

1. That word "charity" has well-understood meaning may be implied from use of word "charitable," without defining it, in connection with word "hospitals" in article 8, § 11, State Constitution, and in many statutes, and, when so used, has much broader significance than when used in common parlance applying to almsgiving alone. *Bruce* v. *Henry Ford Hospital*, 395.
2. The test as applied to a gift is whether it is charitable in its nature. *Id.*
3. The test which determines whether a hospital is charitable is its purpose, that is, whether it is maintained for gain, profit, or advantage; and the purpose is to be determined, in case the hospital is incorporated, not only from its powers as defined in its charter, but also from the manner in which it is conducted. *Id.*
4. Corporation organized under 2 Comp. Laws 1915, § 9054 *et seq.*, not for pecuniary profit, but to construct and maintain a hospital on land donated for that purpose with money also donated "for the care and relief of indigent and other sick, infirm, or injured persons," and which accepts persons for treatment regardless of their ability to pay (there usually being a large operating deficit), is a charitable hospital, and therefore not liable for the negligence of its employees. *Id.*

CHARTERS—See CHARITIES (3); CORPORATIONS (48); EMINENT DOMAIN (3); MUNICIPAL CORPORATIONS (7).

CHATTEL MORTGAGES—See MORTGAGES (1–3).

CHURCHES—See INJUNCTION (2, 3).

CITIES—See APPEAL AND ERROR (21); COURTS (2, 3); EMINENT DOMAIN (1–6); MUNICIPAL CORPORATIONS (6, 7).

CIVIL ACTION—See STATUTES (1).

CLAIM OF LIEN MUST FOLLOW CONTRACT—See MECHANICS' LIENS (4).

CLASS LEGISLATION—See CONSTITUTIONAL LAW (3).

CLEAN HANDS—See EQUITY (13); VENDOR AND PURCHASER (10).

CLEAR VIEW—See MOTOR VEHICLES (3).

CLOUD ON TITLE—See EASEMENTS (8); VENDOR AND PURCHASER (14).

COASTING ON SIDEWALK—See MOTOR VEHICLES (20, 21).

COERCION—See ELECTIONS (3).

COLLATERAL ATTACK—See ADOPTION (6).

COLLECTION—See BANKS AND BANKING (1, 2).

COMMERCE.

Installation of furniture sold by foreign corporation not authorized to do business in this State is not illegal, but is mere incident of delivery which is part of interstate commerce. *Smilansky* v. *Mandel Bros.*, 576.

COMMISSIONS—See BROKERS (1–3); INSURANCE (11, 13, 15).

COMMON COUNTS—See ASSUMPSIT.

COMMON-LAW RIGHT OF ACTION—See CONSTITUTIONAL LAW (1).

COMMON PLEAS COURT—See BILLS AND NOTES (11); CONSTITUTIONAL LAW (5); JUSTICES OF PEACE (1).

COMPARATIVE NEGLIGENCE—See MASTER AND SERVANT (7).

COMPENSATION—See EMINENT DOMAIN (7–9).

COMPETITION—See CONTRACTS (15, 16); PARTNERSHIP (4); SPECIFIC PERFORMANCE; TRADE-MARKS AND TRADE-NAMES (1–3).

COMPLIANCE WITH COURT RULES—See APPEAL AND ERROR (17).

COMPROMISE AND SETTLEMENT—See CONTRACTS (30); INSURANCE (8); VENDOR AND PURCHASER (3).

COMPUTATION OF DAMAGES—See DAMAGES (2).

CONCLUSION OF WITNESS—See LIBEL AND SLANDER (5).

CONCURRENT LIABILITY—See APPEAL AND ERROR (6).

CONDITIONS—See DEEDS (3).

CONDITION SUBSEQUENT—See DEDICATION (1–3, 5, 6); DEEDS (2); HIGHWAYS AND STREETS (2).

CONFIRMATION OF ARBITRATOR'S AWARD—See EMINENT DOMAIN (11); STATES.

CONFIRMING SALE—See CORPORATIONS (3); RECEIVERS (3, 4, 6).

CONSENT—See ADOPTION (4, 5, 7–10); BANKS AND BANKING (12); CORPORATIONS (4); HUSBAND AND WIFE (6); LANDLORD AND TENANT (7); MOTOR VEHICLES (18, 19); VENDOR AND PURCHASER (7).

CONSENT DECREES—See DIVORCE (3); EXECUTORS AND ADMINISTRATORS (2).

CONSEQUENTIAL DAMAGES—See MOTOR VEHICLES (14).

CONSEQUENTIAL RELIEF—See ACTION (2).

CONSIDERATION—See BILLS AND NOTES (10); CONTRACTS (14, 27–30); FRAUDULENT CONVEYANCES (4, 5, 7, 11, 17, 18); INSURANCE (14); PAYMENT (2); PRINCIPAL AND SURETY (10, 11).

CONSOLIDATION OF SEVERAL PROCEEDINGS—See APPEAL AND ERROR (21).

CONSORTIUM—See HUSBAND AND WIFE (3); MOTOR VEHICLES (14).

CONSPIRACY—See FRAUD (6, 7).

CONSTITUTIONAL LAW.

1. Existing right of action which has accrued to a person under rules of common law or in accordance with its principles is vested property right which may not be destroyed or impaired by legislation. *Devlin* v. *Morse*, 113.
2. Although Act No. 260, Pub. Acts 1929, has an amendatory effect upon certain local acts, it is not an amendatory act in a constitutional sense requiring referendum vote (article 5, § 30), because it is independent and general in form, is not amendatory or supplementary in language, and operates alike on existing and future courts established under general or local law. *Kates* v. *Reading*, 159.
3. Nor is said act a local act because the standard of population adopted by it renders it applicable only to the city of Detroit; there being a reasonable relation between population and the object of the act. *Id.*
4. Act No. 260, Pub. Acts 1929, does not violate the home-rule act in that it deprives the city of Detroit of the right to regulate its minor courts, since such courts are not solely of municipal concern, but are instrumentalities for exercise of sovereign power, and are of such interest to the whole State that, in absence of constitutional limitation, the legislative power may not be subordinated to local considerations or authority. *Id.*
5. Act No. 260, Pub. Acts 1929, consolidating courts of justices of the peace in cities of prescribed population into one court named common pleas court, is valid. *Id.*

CONSTITUTIONAL LAW—Continued.

6. The legislature may not interfere with the judicial power vested in courts by State Constitution. *Harker* v. *Bushouse*, 187.

7. In so far as subdivision 6, § 33, chap. 2, pt. 3, Act No. 154, Pub. Acts 1929, prohibiting any reference to insurance in action at law for damages, attempts to control judicial power, it is void, since naming insurance company may become necessary on *voir dire*. *Id.*

8. Act No. 16, Pub. Acts 1926, Ex. Sess., repealing Act No. 383, Pub. Acts 1925, requiring personal notice of foreclosure of mortgage by advertisement, changed remedy merely, and therefore did not deny mortgagor due process of law or impair obligation of contract in regard to mortgage executed before repealing statute was enacted. *Grand River Avenue Christian Church* v. *Berkshire Life Ins. Co.*, 480.

9. Provisions affecting possession of mortgaged premises are matters of substance, but those affecting the remedy in order to secure possession may be changed from time to time. *Id.*

10. It is duty of court to adopt construction, if admissible, which will uphold validity of statute. *In re Harrand*, 584.

11. One required to answer statutory questions under 2 Comp. Laws 1929, § 9182, is only a witness, and as such has all the rights against self-incrimination which any witness possesses (3 Comp. Laws 1929, §§ 16268, 17203, 17435). *Id.*

12. It must be presumed that, in enacting 2 Comp. Laws 1929, § 9182, requiring one to answer statutory questions, legislature had in mind, and did not intend to violate, constitutional rights of witnesses. *Id.*

13. Language of 2 Comp. Laws 1929, § 9182, requiring one to "answer fully and fairly such questions," while unfortunate and somewhat misleading, does not require one to testify against himself, but means that magistrate has jurisdiction to commit both for refusal to answer proper questions, and for patent evasion of disclosure evident from witness' own testimony. *Id.*

14. 2 Comp. Laws 1929, § 9182, requiring one to answer statutory questions, properly construed, is constitutional. *Id.*

See ARREST (3); CHARITIES (1); COURTS (2, 3); CRIMINAL LAW (3, 7); EMINENT DOMAIN (1, 2, 7, 8); HIGHWAYS AND STREETS (3); JUDGMENT (1, 2); MUNICIPAL CORPORATIONS (6); STATUTES (2).

CONSTRUCTION OF CONTRACT—See CONTRACTS (1, 3, 12); PRINCIPAL AND SURETY (8–10, 13, 15, 16).

CONSTRUCTION OF DEED—See PLEADING (1).

CONSTRUCTION OF POLICY—See INSURANCE (9).

CONSTRUCTION OF STATUTE—See BAILMENTS (4); CONSTITUTIONAL LAW (10, 13, 14); FRAUDULENT CONVEYANCES (13); STATUTES (2).

CONSTRUCTIVE NOTICE—See BANKS AND BANKING (3); EQUITY (5); MORTGAGES (7).

CONSTRUCTIVE TRUST—See TRUSTS (2).

CONTEMPT.

Where person interrogated under 2 Comp. Laws 1929, § 9182, by justice of peace was before him under criminal proceeding charged with intoxication in public place, and not as witness for discovery and apprehension of others, said justice was without jurisdiction to commit accused on contempt for refusing to answer statutory questions telling from whom and conditions under which he obtained his liquor. *In re Harrand*, 585.

See HABEAS CORPUS.

CONTINGENCY—See LICENSES (1).

CONTINUANCE—See ATTORNEY AND CLIENT.

CONTINUED PATRONAGE OF PUBLIC—See CONTRACTS (13).

CONTINUOUS SERVICE—See LIMITATION OF ACTIONS.

CONTRACTS.

1. If there is occasion for construing contract, its terms must be interpreted most strongly against those by whom it was drafted. *Amick* v. *Hickey*, 37.
2. Equity may not create contracts for litigants any more than may courts of law. *Id.*
3. Where contract for payment of compensation to income tax experts provided that they were to have certain per cent. of saving legally effected by manner of reporting profit on certain transaction, and agreement contemplated that tax payments thereon would be made over series of years, computation should be had as if payments had been made as contemplated, although they might not actually have been so made. *Id.* 38.
4. Courts should not look with favor on claims of those who seek to evade their obligations in the form of options by avoiding optionees until time of performance has expired. *O'Toole & Nedeau Co.* v. *Boelkins*, 44.
5. Provision in contract for termination at option of party is valid, but where relationship is commercial and does not involve fancy, taste, sensibility, judgment, or other personal features, option may be exercised only in good faith. *J. R. Watkins Co.* v. *Rich*, 82.
6. Finding of trial court that plaintiff did not act in good faith in exercising option to terminate contract, *held*, warranted by testimony. *Id.*
7. In action on parol contract for sale of goods, finding of trial judge that, under contract, buyer had right of rejection, *held*, supported by evidence and course of dealings between parties. *Shirell* v. *Roesink*, 106.

CONTRACTS—Continued.

8. Meeting of the minds of the parties upon all essential points is necessary to constitute valid contract. *International Transportation Ass'n* v. *Bylenga*, 236.

9. One who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms. *Id.*

10. General rule that one who signs a contract will not be heard to say that he did not read it is not applicable where neglect to read is not due to carelessness alone, but was induced by some stratagem, trick, or artifice on the part of the one seeking to enforce the contract. *Id.*

11. Where plaintiff sent to defendants a communication containing a clipping descriptive of defendants' business, asking permission to print same in its publication, and no reference to charge therefor was made in the letter proper, but the offer to print for charge was made in upper right-hand corner of sheet to which clipping was attached, which defendants' manager failed to read, his signature thereto was obtained by fraud, and no valid contract resulted. *Id.*

12. Contract for sale of truck, business, and good will is construed most strongly against seller, who prepared and delivered it to purchaser. *Colton* v. *Duvall*, 346.

13. Good will is based upon prospective profits to result from voluntarily continued patronage of public, and indicates that value which inheres in the fixed and favorable consideration of customers arising from an established and well-conducted business. *Id.*

14. Consideration paid for truck and business is sufficient to support sale and transfer of good will. *Id.* 347.

15. Public policy requires that, when a man has created a business which he wants to sell, he should have the right to sell it in the most advantageous way, and to preclude himself from re-engaging in business directly competitive with that sold. *Id.*

16. Contract in connection with sale of business and good will not to re-engage in business directly competitive with that sold is valid and enforceable in equity, where the restraint is only partial and is limited to particular place. *Id.*

17. One who sells business and good will may not derogate from his own assignment, nor is he at liberty to destroy what he transferred, or depreciate what he sold. *Id.*

18. There is an implied covenant on the sale of the good will of the business that the seller will not solicit the custom which is paid for and parted with. *Id.*

19. Purchaser of good will of business is entitled to injunction restraining seller from re-engaging in same business in same locality. *Id.*

20. Where defendant was induced to become a member of a syndicate organized to purchase land under false representa-

CONTRACTS—Continued.

tions that the price to be paid was the same price paid to the owners, he was justified in refusing further to perform on discovery of the fraud. *Crowley* v. *McCullough,* 362.

21. Refusal by a member of a syndicate to make further payments to its trustee after discovery of fraud, and notice attached to his plea, in an action against him for payments due, that he would seek recovery of the amounts paid by him, amounted to repudiation of his rights under the syndicate agreement, entitling him to recovery without tendering back what he had received, since he had nothing of value relating to the transaction which he could tender back. *Id.*

22. That defendant relied on the integrity of the trustee, who induced him to join a syndicate by fraudulent representations, rather than on talk he heard about the club to which they both belonged, may not be relied on to sustain the claim that defendant was guilty of laches; especially where trustee reassured defendant after he had heard said talk. *Id.*

23. Contract to sell personalty along with real estate on certain conditions as to payment is not severable unless made so by the contract. *Draper* v. *Nelson,* 380.

24. Where contract for sale of land and personal property provided that personal property should be maintained during life of contract at not less than present amount, title thereto did not pass, although purchaser was given possession, and, therefore, when he defaulted, vacated the premises, and took the personalty with him, he became liable for its value. *Id.*

25. In action for membership fees paid to savings and loan association, on rescission of membership contracts for misrepresentations of defendant's agents, defendant's motion for directed verdict on ground of laches and ratification, *held,* properly denied. *Sharrar* v. *Wayne Savings Ass'n,* 456.

26. If defrauded person rescinds with reasonable promptness after discovering fraud, he is not guilty of laches. *Chanler* v. *Venetian Properties Corp.,* 468.

27. Mere inadequacy of consideration, unless so gross as to shock the conscience of the court, is not ground for rescission. *Hake* v. *Youngs,* 546.

28. Illegal transaction cannot constitute good consideration for promise. *Smilansky* v. *Mandel Bros.,* 575.

29. If connection between original illegal transaction and new promise can be traced, it cannot form basis of recovery, for repeating void promise cannot give it validity. *Id.*

30. Ordinarily, settlement of litigation is sufficient consideration for new promise, but where litigation is to enforce illegal contract, new promise to perform same contract does not change nature of obligation, nor can it be permitted to circumvent statute adopting public policy. *Id.*

31. If any part of contract in violation of statute is valid it will avail *pro tanto* though another part of it be prohibited by

CONTRACTS—Continued.

statute, provided the statute does not either expressly or impliedly render whole void, and provided sound part can be separated from unsound, and enforced without injustice to defendant. *Id.* 576.

32. Division of claim into good and bad items is done from practical rather than technical considerations, unless contract otherwise demands. *Id.*

33. In suit to recover amount furnished by plaintiff toward home for his half-niece, her husband, and daughter, where evidence shows that at time of transaction plaintiff was mentally competent and was not taken advantage of, but that it was agreed he should be paid four per cent. upon amount advanced during his lifetime, and at his death obligation should end, decree of court below dismissing suit is modified, on appeal, and remanded to court below to determine amount of interest due. *Converse* v. *Herp,* 618.

See ACTION (4); ARREST (3); BANKS AND BANKING (1, 4, 5); CORPORATIONS (16, 41, 44, 45); FRAUD (3); FRAUDS, STATUTE OF (2, 3); INSURANCE (11–15); MASTER AND SERVANT (10, 17); MECHANICS' LIENS (4, 7); PRINCIPAL AND SURETY (1–4); REFORMATION OF INSTRUMENTS (1); SALES; VENDOR AND PURCHASER (7).

CONTRIBUTORY NEGLIGENCE—See APPEAL AND ERROR (2); LANDLORD AND TENANT (2); MASTER AND SERVANT (3, 5–7); MOTOR VEHICLES (4, 9, 15); NEGLIGENCE (1–4, 9); RAILROADS (3–5).

CONTROL OF CAR—See MOTOR VEHICLES (17).

CONTROL OVER STREETS—See MUNICIPAL CORPORATIONS (2).

CONVERSION—See CONTRACTS (24); MORTGAGES (3).

CONVEYANCE—See EASEMENTS (3).

CONVEYANCE TO RELATIVE—See FRAUDULENT CONVEYANCES (1, 4–7).

CORPORATIONS.

1. 3 Comp. Laws 1929, § 15325, providing that court may vacate order of dissolution and revive corporation is inclusive in its terms, and is applicable to dissolution proceedings under section 15310. *In re Newbrough,* 171.

2. Under 3 Comp. Laws 1929, § 15325, hearing on petition for return of assets to corporation is not matter of right, but court, if such petition shall be deemed sufficient, may make an order for hearing thereon, so that hearing, as well as return of property, is discretionary. *Id.*

3. Refusal of court to grant hearing on petition for return of assets to corporation (3 Comp. Laws 1929, § 15325), was not abuse of discretion, where petition was filed day before time set for confirmation of sale of its assets and upon which hearing was not moved until after sale had been confirmed and closed. *Id.*

CORPORATIONS—Continued.

4. When corporation is dissolved by order of court, creditors may rely upon estate being liquidated in orderly manner and their participating in residue, and it would be abuse of discretion to permit stockholders to further hazard its property without consent of creditors or their immediate insurance against loss. *Id.*

5. Where petition by certain stockholders for return of assets to corporation (3 Comp. Laws 1929, § 15325), filed after receiver's sale, failed to allege such assurance of successful reorganization with security to creditors as would have justified the court in granting it, there was no abuse of discretion in denying hearing thereon. *Id.*

6. In a suit by stockholders against directors of a corporation on the ground of fraudulent representations in the sale of stock, and, by amended bill, for fraudulent and negligent misconduct in conducting the corporation's business, elimination of proof of said fraudulent representations, *held*, justified, in view of prayer for relief in amended bill and statement of plaintiff's counsel as to issues involved in court below. *Curtiss* v. *Wilmarth*, 242.

7. Finding of court below as to amount of loss sustained by corporation due to failure of certain director to account for corporate stock sold by him, *held*, supported by evidence. *Id.* 243.

8. Finding of court below that no intentional fraud or misconduct is chargeable to defendant directors, *held*, justified by evidence. *Id.*

9. Stockholders having knowledge of facts claimed to show fraudulent and negligent misconduct of directors in conducting corporation's business before discharge of corporation's trustee in bankruptcy, rendering said directors liable to account for money so lost, had duty to present said facts in bankruptcy court so that trustee could have recovered said money and used it for purpose of further satisfying creditors' claims. *Id.*

10. Stockholders are equally interested with directors in the performance by the corporation of its duty to pay its creditors. *Id.*

11. Stockholders having knowledge of facts rendering directors liable to corporation for negligence in handling its business may not sit quietly by and allow proceedings in bankruptcy to be concluded whereby creditors receive but a small part of their claims, and thereafter bring suit to recover the money due the corporation by reason of said negligence and themselves benefit thereby to the exclusion of the creditors. *Id.*

12. Stockholders are not creditors of corporation as that word is generally understood. *Id.*

13. Stockholders do not sue in their own right, but in that of corporation, since cause of action is asset of corporation. *Id.*

CORPORATIONS—Continued.

14. Stockholders may not bring suit on corporation's cause of action unless they have requested directors to bring it in name of corporation, except where brought to recover money lost to corporation through directors' negligence. *Id.* 244.

15. Since all of the assets of insolvent corporation, including right to recover money lost to it through directors' negligence, passed to trustee in bankruptcy, corporation could not thereafter maintain suit thereon, in absence of claim that trustee was in any way chargeable with negligence complained of. *Id.*

16. Where contract was made primarily for benefit of corporation and only indirectly for benefit of stockholders, before latter may prosecute claim based on its breach, after corporation becomes insolvent, demand must first be made on receiver or trustee in bankruptcy to bring suit. *Id.*

17. Where corporation is insolvent, stockholder may not maintain suit to hold directors liable for fraud unless he alleges that the relief asked for will be of some benefit to him, *i. e.*, that there will be a surplus for stockholders after creditors are paid. *Id.*

18. Corporations act only by their officers and agents. *National Bank of Commerce of Detroit* v. *B. W. Marr & Co.*, 333.

19. The president of a corporation has no implied power to bind the corporation by his signature. *Id.*

20. There is no presumption that the president of a corporation has a right to use a note belonging to the corporation, or the proceeds thereof, to pay his individual debt. *Id.*

21. President's indorsement on a note belonging to the corporation was not binding on it in absence of authority of president to so indorse it or ratification by the corporation. *Id.*

22. Units issued by syndicate organized to purchase real estate and which represent an equitable interest in property are "securities" within the meaning of the blue sky law (2 Comp. Laws 1929, § 9769 *et seq.*), requiring approval by the securities commission. *Freeze* v. *Smith*, 386.

23. One agreeing in writing to act as trustee for syndicate organized to purchase real estate, units of which are to be sold to the public, is chargeable with knowledge as to whether provisions of blue sky law have been complied with relative to sale of such securities. *Id.*

24. Trustee of syndicate organized to purchase real estate, who told prospective purchaser of unit therein that he had authorized salesmen making sale to accept money therefor, was acting as agent of the syndicate, and thus participated in making the sale, rendering him liable for violation of the statute (2 Comp. Laws 1929, § 9788) whether he profited thereby or not. *Id.*

25. Language "pre-organization certificate or pre-organization subscription," as used in 2 Comp. Laws 1929, § 9770, subd.

CORPORATIONS—Continued.

(c), has no application to units offered for sale by syndicate organized to purchase real estate. *Id.*

26. In action to recover purchase price of unit sold by syndicate organized to purchase real estate in violation of blue sky law, tender back of what plaintiffs had received, made in court after action was brought, was sufficient under the statute (2 Comp. Laws 1929, § 9788). *Id.*

27. That foreign corporation has carried on business in this State without being licensed does not under all circumstances bar it from obtaining legal redress in courts of this State. *Windisch* v. *Mortgage Security Corp. of America*, 492.

28. Receiver of corporation is liable for franchise or privilege tax where he operates the business of the corporation under order of court, since he is exercising the franchise "to do," and whether it be private corporation or public utility is immaterial. *In re Detroit Properties Corp.*, 523.

29. On receivership, corporation is not divested of its franchises, nor do they lapse, but court merely takes them into its custody for a time; the franchise "to do" passing into control of court. *Id.* 524.

30. Receiver of corporation is creature or officer of court, and is not agent of corporation. *Id.*

31. Receiver of corporation conducting its business takes place of corporation and its officers for purpose of performing necessary corporate duties and functions, and has same powers for such purposes, but he cannot act in excess of corporate powers, and court cannot invest him with authority to that extent. *Id.*

32. Where directors sell their own property to corporation through their own action or influence as officers, and corporation does not repudiate purchase, they are liable, not upon theory of secret profit, but for fraud or excessive price, and measure of damages is difference between price paid by corporation and fair value of property. *Bliss Petroleum Co.* v. *McNally*, 569.

33. Directors owe corporation good faith and honest service. *Id.*

34. If directors undertake to acquire property for corporation, they act in trust capacity in acquiring it, and express direction by corporation to them to purchase is not requisite of liability in this respect. *Id.*

35. That directors of oil corporation have right to deal personally in oil leases does not modify their duties as directors when their transactions touch corporation itself. *Id.*

36. Obligations and liabilities of directors in purchasing property for, or selling their own property to, corporation, arise out of their trust duties in dealing fairly with corporation. *Id.*

37. If directors purchase personally, with intention to sell to corporation, or while purporting to act as corporation officers, whole benefit inures to corporation under rule of secret profit,

CORPORATIONS—Continued.

and they are liable for price paid by corporation less cost to them. *Id.*

38. In action by oil corporation against directors for secret profits on oil leases purchased by them and sold to corporation, testimony *held*, to present issues of fact for jury. *Id.*

39. While declaration, in action by corporation against directors for secret profits, was not quite specific, in view of distinction between directors' liability for secret profits and their liability for fraud or excessive price, it is *held*, sufficient, in absence of motion for greater particularity. *Id.* 570.

40. Resolutions authorizing corporation to sue directors for secret profits are immaterial, where defendants do not deny authority of corporation to sue. *Id.*

41. That part of contract by foreign corporation not authorized to do business in this State to sell and install furniture, furnishings, decorations, etc., for hotel, which covered intrastate business, was illegal, and no action could be maintained thereon (2 Comp. Laws 1929, §§ 10118, 10120, 14027). *Smilansky* v. *Mandel Bros.*, 575.

42. Notes and mortgage, as far as they cover sums charged upon intrastate business by foreign corporations not authorized to do business in this State, are not enforceable (2 Comp. Laws 1929, § 14027). *Id.*

43. Whether transaction by foreign corporation not authorized to do business in this State is interstate or intrastate in character must be determined by things done as well as agreement therefor. *Id.*

44. If contract respecting transaction including both interstate and intrastate items by foreign corporation not authorized to do business in this State is indivisible between interstate and intrastate business, it is not entitled to sue upon any part of it (2 Comp. Laws 1929, § 14027). *Id.* 576.

45. Where illegal items of intrastate business in transaction by foreign corporation not authorized to do business in this State can be segregated from legal interstate items, recovery may be had for latter, especially where no injury results to debtor or its guarantor, as they are called upon to meet only legal obligations (2 Comp. Laws 1929, § 14027). *Id.*

46. In absence of statute, one corporation could take name of another, unless prohibited under doctrine of unfair competition (2 Comp. Laws 1929, § 9955). *Good Housekeeping Shop* v. *Smitter*, 593.

47. Right of corporation to use of its name is same as that of individual. *Id.*

48. When State grants charter to corporation, it merely authorizes use of name in legal manner, but it does not adjudge name to be legal, nor decree that its use throughout State will be lawful. *Id.*

CORPORATIONS—Continued.

49. Corporation is entitled to monopoly of its name only so far as justified by doctrine of unfair competition. *Id.*

50. Whether salaries paid to officers of corporation are excessive may be determined on hearing on merits. *Morehead Manfg. Co.* v. *Washtenaw Circuit Judge,* 697.

51. Loans by corporation to officers, whether valid or void, which have not jeopardized the company or interests of stockholders, do not justify appointment of temporary receiver; but further loans of like character, if *ultra vires,* may be enjoined. *Id.*

52. Upon proper showing, courts may order directors of corporation to declare dividend out of surplus profits. *Id.*

53. Court is loath to interfere with discretion vested in corporation's officers to declare dividend out of surplus profits unless it clearly appears that discretion is, in bad faith, abused. *Id.*

54. Court may restrain dissipation of corporation's surplus profits and direct retention thereof in proper case to await judgment of court as to whether same, or some part, should be dispensed in dividends. *Id.*

55. Failure of corporation's officers to declare dividend and their *ultra vires* acts do not warrant appointment of temporary receiver, where corporation is going concern with large surplus, and its interests and that of stockholders are not jeopardized. *Id.*

See ACTION (4); BILLS AND NOTES (7); CHARITIES (3, 4); COMMERCE; EQUITY (15); LICENSES (2, 3); PAYMENT; PRINCIPAL AND SURETY (11, 12); RECEIVERS (2, 4, 6–8); TRADE-MARKS AND TRADE-NAMES (3, 6–9).

CORPUS—See RECEIVERS (7, 8).

COSTS.

1. In fixing costs in equity case court below should have followed former Circuit Court Rule No. 64, and fixed attorney's fee at $30 instead of at $75. *Nordberg* v. *Todd,* 440.

2. Where both parties appeal without avail, neither is awarded costs. *MacLeod* v. *Hamilton,* 654, 658.

See SET-OFF AND RECOUPMENT (2).

COUNTIES—See EASEMENTS (6); HIGHWAYS AND STREETS (8, 10); PAUPERS.

COUNTY ROAD COMMISSION—See HIGHWAYS AND STREETS (8, 10).

COURT RULES—See APPEAL AND ERROR (16, 17); BILLS AND NOTES (3); COSTS (1); RECEIVERS (7, 8).

COURTS.

1. A court consists in its jurisdiction and functions and not in its title or name. *Kates* v. *Reading,* 158.

2. Under the Constitution (article 7, § 1), the legislature may provide for courts in cities by means of justices of the peace

COURTS—Continued.

or otherwise, at its discretion; and in view of exception in section 16, jurisdiction of justices' courts is not exclusive. *Id.*

3. Constitution does not prohibit the legislature from establishing new courts in cities and vesting in them the jurisdiction of justices of the peace. *Id.*

4. Order of circuit judge setting aside garnishee defendant's default may not be reviewed by any other circuit judge while judge making order is available. *Wiener* v. *Valley Steel Co.*, 681.

See CONSTITUTIONAL LAW (2, 4–6); EMINENT DOMAIN (11); FRAUD (6); JUSTICES OF PEACE (1); REFORMATION OF INSTRUMENTS (2); SPECIFIC PERFORMANCE.

COVENANTS.

To extent that property owners have for long time acquiesced in violation of building restrictions they are estopped from asking injunctive relief. *Cherry* v. *Board of Home Missions of Reformed Church in United States*, 497.

See CONTRACTS (18); INJUNCTION (1–3).

CREDITORS—See CORPORATIONS (4, 5, 9–12, 17); FRAUDULENT CONVEYANCES (1, 2, 4–12, 14–18).

CRIMINAL LAW.

1. In prosecution for assault with intent to rape, requested instruction that, where testimony is directly conflicting and both versions as given cannot be true, and there is reasonable doubt as to which story is true, it is jury's duty to accept that version which is consistent with innocence of defendant, should have been given, or instruction equally informative, where evidence supporting defendant's *alibi* and improbabilities disclosed by testimony of prosecutrix made requested instruction peculiarly applicable. *People* v. *Crofoot*, 167.

2. If testimony supporting *alibi* accomplishes no more than to create reasonable doubt, defendant is entitled to acquittal. *Id.*

3. Right of trial by jury is constitutional. *People* v. *Rucker*, 342.

4. To permit change of plea after sentence involves setting aside the judgment of the court and is not favored. *Id.*

5. Where there was doubt of truth of defendant's plea of guilty to charge of robbery armed, it was duty of trial judge, on application of defendant's attorney before sentence, to vacate plea of guilty, direct entry of plea of not guilty, and order trial. *Id.*

6. At any time before sentence, plea of guilty may be changed by court to one of not guilty. *Id.*

7. Statute compelling one to be witness against himself, or to incriminate himself, is unconstitutional (Const., art. 2, § 16). *In re Harrand*, 584.

CRIMINAL LAW—Continued.

8. Justice's court is of inferior and limited jurisdiction confined strictly to power conferred, and is to be exercised in prescribed manner. *Id.* 585.

9. Statutory conditions of inquisitorial proceeding before justice of peace are mandatory and jurisdictional, and he may not scramble his jurisdiction or proceedings (2 Comp. Laws 1929, § 9182). *Id.*

See CONTEMPT; STATUTES (2).

CROSS-EXAMINATION—See APPEAL AND ERROR (9, 10).

CROSSING—See MOTOR VEHICLES (1–4, 7–9, 15).

CROSSING ACCIDENT—See RAILROADS (2–5).

CUMULATIVE EVIDENCE—See NEW TRIAL (4).

CUSTODY OF CHILD—See ADOPTION (9, 11); DOMICILE; JUDGMENT (2).

DAMAGES.

1. Verdict of $35,000 for injuries to young man 21 years of age, which resulted in permanent mental and physical impairment, may not be said to be excessive, where it is well within the evidence. *Deffenbaugh* v. *Inter-State Motor Freight Corp.*, 180.

2. In an action on a contract guaranteeing payment of principal and interest due under a land contract, the amount of the mortgage tax, which plaintiff was obliged to pay to forfeit the land contract, as required by the contract of guaranty, and also the amount of general taxes and delinquent installments, were properly included in the judgment. *Rose* v. *Ramm*, 259.

3. Verdict of $4,500 for serious and permanent injuries to right knee of three-year old boy, causing him great pain and suffering, may not be said to be excessive, where well within the evidence, and there is no claim that jury were influenced by partiality or prejudice. *Palazzolo* v. *Sacket*, 290.

See ACTION (5); APPEAL AND ERROR (11); BAILMENTS (4); CORPORATIONS (32, 37); EMINENT DOMAIN (9, 10); EQUITY (7); LIBEL AND SLANDER (1–4, 6–8, 10, 11); MOTOR VEHICLES (4); NEW TRIAL (1, 2); PARTIES (3); PRINCIPAL AND SURETY (17); SET-OFF AND RECOUPMENT (1); VENDOR AND PURCHASER (21).

DANGEROUS CONDITION OF PREMISES—See NEGLIGENCE (2–4).

DEATH—See ATTORNEY AND CLIENT; GIFTS (1–3, 5); MASTER AND SERVANT (4, 7, 8, 13, 23); NEGLIGENCE (7).

DEBT—See FRAUDS, STATUTE OF (1).

DECLARATION—See CORPORATIONS (39); REPLEVIN.

DECLARATIONS—See MASTER AND SERVANT (23).

DECLARATORY JUDGMENTS—See ACTION (1–3); DEDICATION (1).

DEDICATION.

1. In proceeding by village under declaratory judgment law (3 Comp. Laws 1929, § 13903) for declaration of rights under deeds dedicating lands for highway purposes, under pleadings and admissions issue presented is validity of conditions subsequent in effective dedication to plaintiff. *Village of Grosse Pointe Shores* v. *Ayres,* 58.
2. Question of fraud of village in accepting dedication of lands for highway purposes with conditions subsequent after advice of counsel that said conditions were void and would not affect grant, although defendants had insisted upon rejection of deeds in case conditions were not satisfactory, *held,* not within scope of proceeding under defendants' pleadings. *Id.*
3. In present proceeding, under pleadings and proofs, only controversy between parties is in respect to installation of gas, water, lighting, and telephone systems in east parkway of highway, and said controversy presents specific and only issue. *Id.* 59.
4. Dedication of land for purpose of highway, carries right to public travel and also use for all present and future agencies commonly adopted by public authority for benefit of people, such as sewer, water, gas, lighting, and telephone systems. *Id.*
5. Condition in deed dedicating land for street prohibiting its use for such purposes as sewer, water, gas, etc., is void as against public policy or as inconsistent with grant. *Id.*
6. Where condition in dedication for street is void as against public policy or as inconsistent with grant, dedication is effective but condition is inoperative. *Id.*

See HIGHWAYS AND STREETS (1, 2, 12–14).

DEEDS.

1. Destruction of unrecorded deed did not restore title to grantor, but it remained in grantee. *Detroit & Security Trust Co.* v. *Gitre,* 66.
2. Language in the habendum clause of a deed conveying land as a gift to be used for hospital purposes providing that in case of failure to so use it for certain period it shall revert to grantors, their heirs, etc., does not render the gift void, but under said language a determinable fee was created. *Bruce* v. *Henry Ford Hospital,* 395.
3. A deed may not be delivered in escrow to the grantee; when there is valid delivery by grantor to grantee it is impossible to annex a condition thereto, and delivery vests title in grantee although it may be contrary to the intention of the parties. *Commercial State Savings Bank* v. *Bird,* 418.
4. Where defendant by fraud induced plaintiff to deed real estate to him, its reconveyance was properly decreed. *Racho* v. *Beach,* 600.

See DEDICATION (2); ELECTION OF REMEDIES (2); FRAUDULENT CONVEYANCES (1, 15); PLEADING (1).

DEFAULT—See CONTRACTS (24); COURTS (4); GARNISHMENT (3, 4); VENDOR AND PURCHASER (13, 15, 16, 18).

DEFECTIVE RAILROAD TRACK AND MOTOR CAR—See MASTER AND SERVANT (2, 3).

DEFINITION—See CHARITIES (1).

DELIVERY—See COMMERCE; DEEDS (3); GIFTS.

DEMAND—See BILLS AND NOTES (2); CORPORATIONS (16).

DEMAND ARISING FROM JUDGMENT—See SET-OFF AND RECOUPMENT (2).

DEPOSITOR—See BANKS AND BANKING (1–5, 10, 12).

DEPOSITS—See BANKS AND BANKING (1, 2, 4, 6, 8–10, 12, 13).

DESCENT AND DISTRIBUTION.

1. On question as to whether mother's omission to provide in will for daughter by former marriage was unintentional (3 Comp. Laws 1929, § 15550), trial court properly permitted jury to consider not only will itself but also extrinsic evidence. *O'Neall* v. *Her*, 631.
2. Verdict of jury that mother's omission of daughter's name from will was intentional, *held*, supported by evidence. *Id.*

DESCRIPTION—See BOUNDARIES (2); REFORMATION OF INSTRUMENTS (3); REPLEVIN; VENDOR AND PURCHASER (12).

DESTRUCTION OF DEED—See DEEDS (1); FRAUDULENT CONVEYANCES (1).

DETERMINABLE FEE—See DEEDS (2).

DETOUR—See HIGHWAYS AND STREETS (5).

DETROIT—See CONSTITUTIONAL LAW (3, 4).

DEVIATION FROM CONTRACT—See PRINCIPAL AND SURETY (2)

DIRECTED VERDICT—See APPEAL AND ERROR (7, 8, 15, 18, 22); CONTRACTS (25); JUDGMENT (10); MASTER AND SERVANT (23); MOTOR VEHICLES (4, 8, 9, 21); RAILROADS (5); TRIAL (1, 4); WILLS (2).

DIRECTORS—See CORPORATIONS (6–11, 14, 15, 17, 32–40, 52).

DISCHARGE—See MORTGAGES (1); PARTIES (4); PRINCIPAL AND SURETY (1, 11).

DISCLOSED PRINCIPAL—See PRINCIPAL AND AGENT.

DISCLOSURE—See GARNISHMENT (3, 4).

DISCOUNT LEDGER—See BANKS AND BANKING (1).

DISCOVERY—See CONTEMPT; STATUTES.

DISCRETION OF COURT—See CORPORATIONS (2); NEW TRIAL (1).

DISCRETION OF OFFICERS—See CORPORATIONS (53).

DISHONOR—See BANKS AND BANKING (2); BILLS AND NOTES (2).

DISMISSAL—See EQUITY (16); INJUNCTION (6); MASTER AND SERVANT (19).

DISMISSAL AND NONSUIT—See MECHANICS' LIENS (11).

DISSIPATION OF PROFITS—See CORPORATIONS (54).

DISSOLUTION—See CORPORATIONS (1, 4); PARTNERSHIP (4); SPECIFIC PERFORMANCE.

DISSOLUTION OF ATTACHMENT—See FRAUDULENT CONVEYANCES (9).

DIVIDENDS—See CORPORATIONS (52–55).

DIVISIBILITY—See CONTRACTS (31, 32); CORPORATIONS (44).

DIVISION OF PROPERTY—See DIVORCE (9).

DIVORCE.

1. Jurisdiction of chancery courts in divorce cases in this State is purely statutory, and not within original cognizance of such courts. *Herp* v. *Herp*, 33.
2. There are three parties to every divorce proceeding—husband, wife, and State. *Id.*
3. Consent decrees may not be granted in divorce proceedings. *Id.*
4. In wife's suit for divorce on ground that husband had grossly or wantonly and cruelly refused or neglected to provide her with suitable maintenance (3 Comp. Laws 1929, § 12729), burden was on her to establish said fact. *Id.*
5. Where wife's income was not less than $100 per month for period covered by bill of complaint, during which time she made no demand upon husband for money except to send him bill for coal, which he is paying, her proof was insufficient to entitle her to decree of divorce on ground that husband had grossly or wantonly and cruelly refused or neglected to provide her with suitable maintenance (3 Comp. Laws 1929, § 12729). *Id.* 34.
6. Where divorce decree did not dispose of lot owned by the parties by entireties, they held title thereafter as tenants in common (3 Comp. Laws 1929, § 12767). *Angeloff* v. *Smith*, 99.
7. Wife suing for divorce asks for equitable relief and appeals to conscience of court, and, if her conduct is inequitable, court could refuse to grant her relief. *Gee* v. *Gee*, 415.
8. Where wife induced husband to convey to her property standing in their joint names, and concealed from him her intention of abandoning him as soon as this was done, her action in suing for divorce after obtaining the property was a fraud on him. *Id.*

DIVORCE—Continued.

9. Where wife fraudulently concealed from husband her intention of abandoning him until after she had obtained title to property standing in their joint names, when she brought suit for divorce, decree granting divorce to her, from which he does not appeal, properly ordered property sold and proceeds divided between them. *Id.*
10. Wife's lien on husband's property established by divorce decree does not become abrogated by their remarriage. *Wilson* v. *Wilson,* 504.
11. Wife's suit to enforce lien on husband's property established by divorce decree, after their remarriage and separation but while they are still husband and wife, need not be brought by next friend (3 Comp. Laws 1929, § 14013). *Id.*
12. Decree to wife in her suit for divorce on grounds of extreme cruelty and nonsupport, *held,* justified by record. *Trader* v. *Trader,* 628.

See DOMICILE; EQUITY (5); FRAUDS, STATUTE OF (1); HUSBAND AND WIFE (4); JUDGMENT (1).

DOMICILE.

1. Although domicile of infant, until emancipation, is that of father, yet when divorce has been granted to mother and unrestricted custody of infant awarded to her, infant's domicile thereafter becomes that of mother. *In re Volk,* 25.
2. Where mother, awarded unrestricted custody of infant son by decree of court in Ohio, moved to this State, infant became domiciled here, became ward of this State, and was no longer subject to courts of Ohio. *Id.*

See JUDGMENT (2).

DOUBLE LIABILITY—See GARNISHMENT (1).

DRAFTS—See BANKS AND BANKING (11).

DRAINS—See EASEMENTS (6, 8).

DRAWINGS—See TRIAL (2).

DRILL—See MASTER AND SERVANT (3).

DRIVING ON LEFT SIDE OF STREET—See APPEAL AND ERROR (14); MOTOR VEHICLES (16).

DUE PROCESS—See CONSTITUTIONAL LAW (8).

DURESS—See TRUSTS (2).

DUTY OF DIRECTORS—See CORPORATIONS (33, 35, 36).

DUTY OF STOCKHOLDERS—See CORPORATIONS (9).

DUTY TO PAY CREDITORS—See CORPORATIONS (10).

EARNINGS—See PARTNERSHIP (2).

EASEMENTS.

1. Right acquired in writing by manufacturing company to construct for use by its employees and others an underpass under land owned by railroad companies and the city amounted to more than a license and was in nature of an easement for the benefit of particular land, but it is limited to such land and to purposes of the grant. *McClintic-Marshall Co.* v. *Ford Motor Co.*, 305.
2. An easement is a right which one proprietor has to some profit, benefit, or lawful use, out of, or over, the estate of another proprietor. *Id.* 306.
3. Easement in nature of right to construct and maintain underpass under land of others constitutes incorporeal right attached to and belonging with the grantee's real property to which it is annexed, and though it might pass as an incident to it, it is a species of servitude incapable of existence separate and apart from the particular land to which it is annexed, and therefore may not be conveyed separate from the land to which it is appurtenant, nor converted into an easement in gross. *Id.*
4. Where purpose of underpass constructed under city street and railroad companies' land by manufacturing company was to facilitate speed and safety of city street cars and of persons going to and from said company's plants, its uses are *quasi*-public in character. *Id.*
5. In suit to restrain defendants' use of joint driveway, decree in their favor setting forth limits of easement in driveway acquired by prescription, *held*, supported by evidence. *Engel* v. *Gildner*, 361.
6. Easement granted county for purpose of drain may be extinguished by abandonment of purpose or by renunciation showing that other means employed serve purpose. *MacLeod* v. *Hamilton*, 653, 658.
7. Grant of easement for particular purposes terminates as soon as such purposes cease to exist, are abandoned, or are impossible. *Id.*
8. Grant of easement for drainage purposes only was abandoned by establishment of drain elsewhere, right of way ceased, and easement is but cloud on title. *Id.* 654.

See APPURTENANCES; MECHANICS' LIENS (3, 7, 10); VENDOR AND PURCHASER (14).

EFFECTIVE DATE OF POLICY—See INSURANCE (16).

EFFORT TO PURCHASE—See EMINENT DOMAIN (7).

ELECTION INSPECTORS—See SCHOOLS AND SCHOOL DISTRICTS (3–5).

ELECTION OF REMEDIES.

1. Mere starting of action at law or suit in equity does not constitute election of remedy. *Hartford Accident & Indemnity Co.* v. *Jirasek,* 131.
2. Suit to set aside deed as in fraud of creditors is not barred by previous action at law by plaintiffs against grantor. *Id.*

ELECTIONS.

1. Person who admits that he voted without proper qualifications may, in judicial proceeding, be required to disclose how he voted. *Thompson* v. *Cihak,* 642.
2. To hold that slight irregularities, for which voters are not to blame, invalidates election, is contrary to public policy. *Id.*
3. Unless irregularities consist of failure to observe mandatory provisions, neglect to follow which will invalidate election, they will be overlooked, in absence of fraud or coercion. *Id.*

See EMINENT DOMAIN (3); SCHOOLS AND SCHOOL DISTRICTS.

ELEVATOR—See LANDLORD AND TENANT (1, 2); NEGLIGENCE (1).

EMINENT DOMAIN.

1. Authority of cities to "acquire" public utilities under article 8, § 23, of the Constitution, does not include power of condemnation, but such power must be found in statutes. *City of Allegan* v. *Iosco Land Co.,* 560.
2. Constitution left unimpaired power of legislature to grant or withhold from cities power of condemnation, although constitutional power of condemnation was refused (articles 8, 13). *Id.*
3. Amendment of city charter under home rule act (1 Comp. Laws 1929, § 2236, subd. [3]), authorizing city to acquire by purchase or condemnation public utility by three-fifths vote of electors is not invalid because electors were not required to vote specifically on whether utility should be acquired by condemnation. *Id.*
4. Authority granted city to acquire public utility and water power rights within corporate limits of city (1 Comp. Laws 1929, § 2271) by purchase or condemnation does not modify earlier section (2236) authorizing establishment of water power outside city; there being no repugnancy. *Id.*
5. In view of mandatory character of 1 Comp. Laws 1929, § 4546, municipality seeking to condemn water power rights for public utility must be legally authorized to make improvement, and therefore its petition for condemnation should have alleged that permission of State highway commissioner had been obtained. *Id.* 561.
6. Single proceeding must cover all lands sought to be condemned by city for public utility (1 Comp. Laws 1929, § 3784 *et seq.*). *Id.*
7. State highway commissioner, under constitutional provision, may not take, under power of eminent domain, without compensation being first made or secured, and under legislative

EMINENT DOMAIN—Continued.

mandate he is required to make an effort to agree with owners upon compensation by way of purchase (1 Comp. Laws 1929, § 3884 *et seq.*). *Church* v. *State Highway Dept.*, 666.

8. Under powers conferred by Constitution and statute, State highway commissioner has right to agree with owners upon compensation for land taken for highway purposes and method of ascertaining same, and, when done in good faith, agreement is binding on commissioner and State. *Id.*

9. Where part of large brick house stood on land needed for highway purposes, State highway commissioner could agree with owner to move house and for appointment of arbitrator to fix damage, if any, in moving, and, in absence of fraud, award of arbitrator should be paid. *Id.*

10. Purchase price of land taken for highway purposes, determined under method agreed upon by owners and State highway commissioner, may not be declared excessive by court, in absence of showing of fraud. *Id.*

11. Where agreement by owners and State highway commissioner provided for confirmation by circuit court of arbitrator's award for land taken for highway purposes, State may not contend that court had no power to confirm award. *Id.*

12. Approval of said agreement by State administrative board may not have been required, but, if surplusage, furnishes no reason against its validity. *Id.* 667.

See APPEAL AND ERROR (21).

ENFORCEABILITY—See MECHANICS' LIENS (7–9).

ENFORCEMENT OF RIGHTS—See EQUITY (1, 12).

ENLARGEMENT OF EXISTING VIOLATION—See INJUNCTION (2).

ENTRY OF JUDGMENT—See EXCEPTIONS, BILL OF.

EQUITIES—See VENDOR AND PURCHASER (17).

EQUITY.

1. Doctrine of laches is founded on long inaction to assert right, attended by such intermediate change of conditions as renders it inequitable to enforce the right. *Angeloff* v. *Smith*, 99.

2. Where right is not executory one but is vested legal title, doctrine of laches has little, if any, application, and this is particularly true where title is of record for world to see. *Id.*

3. Right to relief is not lost through nonaction during minority, as laches does not run against infant. *Id.*

4. Where grantee recognized that plaintiff had right in lot, necessity of asserting it by action was obviated. *Id.*

5. Divorced wife is not barred by laches from asserting her right to lot owned by her and husband as tenants in common, and conveyed by husband alone, where part of time she was minor, defendant's grantor recognized her right, and she commenced

EQUITY—Continued.

suit soon after learning of conveyance to defendant, who bought with constructive notice of her title. *Id.*

6. Bill in equity praying rescission of land contract gave court jurisdiction. *McHugh* v. *Trinity Building Co.*, 202.

7. Under bill for rescission of land contract and other relief, if equity demands affirmance and damages instead, it may be so decreed, and court is not required to remit plaintiffs to action at law. *Id.* 203.

8. A judgment in a court of law will not be set aside by a court of equity unless it is so manifestly wrong that it is against good conscience. *Bassett* v. *Trinity Building Co.*, 207.

9. In order to set aside a judgment of law in equity, there must be ignorance of the defense when the judgment was rendered, diligence on the part of complainant, and the fact that adequate relief cannot be had at law. *Id.*

10. A court will not set aside a judgment because it was founded on a fraudulent instrument, perjured testimony, or for any matter if these questions were actually presented or considered in the case which resulted in the judgment assailed. *Id.* 208.

11. Where plaintiffs in suit for rescission of land contract have failed to make out a case for equitable relief, and the sole relief given them is a money judgment which cannot be satisfied out of the property in question, equity will not keep jurisdiction, but the case should be transferred to the law side of the court. *Id.*

12. Rights of a member of a syndicate organized to purchase land could be enforced only by bill in equity. *Crowley* v. *McCullough*, 362.

13. Purchaser of apartment building guilty of fraudulently misrepresenting to vendor his financial standing does not come into court with clean hands, and therefore is not entitled to equitable relief of rescission on ground of vendor's fraud. *Chanler* v. *Venetian Properties Corp.*, 468.

14. One who seeks equity must do equity. *Windisch* v. *Mortgage Security Corp. of America*, 492.

15. Mortgagor is not entitled to cancel mortgage in equity on ground that mortgagee, a foreign corporation, was not licensed to do business in this State (2 Comp. Laws 1929, § 10118 *et seq.*), where his bill contains no offer to do equity. *Id.*

16. Bill by vendee for accounting under land contract and to enjoin summary proceedings by vendor was properly dismissed, where judgment in summary proceedings had passed against plaintiff. *Siegmeyer* v. *Small*, 679.

See ACTION (2); CANCELLATION OF INSTRUMENTS; CONTRACTS (2, 16, 27); COSTS (1); DEEDS (4); DIVORCE (7–9); ELECTION OF REMEDIES (1); FRAUD (6); FRAUDULENT CONVEYANCES (14, 15); INJUNCTION (1, 3); JUDGMENT (3); MASTER AND SERVANT (19); NUISANCE; PLEADING (1); REFORMATION OF INSTRUMENTS (2); TRUSTS (2); USURY; VENDOR AND PURCHASER (10, 20).

ESCROWS—See DEEDS (3); FRAUDULENT CONVEYANCES (16).

ESTABLISHED BUSINESS—See CONTRACTS (13).

ESTATES OF DECEDENTS—See RECEIVERS (9–12).

ESTOPPEL—See ACTION (3); BAILMENTS (1); COVENANTS; INSURANCE (4); TENDER (3, 4).

EVASION OF DISCLOSURE—See CONSTITUTIONAL LAW (13).

EVIDENCE.

1. In action for personal injuries received in automobile accident, evidence that defendant carried insurance is inadmissible. *Deffenbaugh* v. *Inter-State Motor Freight Corp.*, 180.
2. In personal injury case, evidence as to immaterial and collateral matters which tends to show plaintiff's poverty and enlist sympathy of jury should be excluded. *Harker* v. *Bushouse*, 198.
3. Court takes judicial notice that drop in price of products in the fall of 1920 and thereafter was not confined to the business of the company involved in instant case. *Curtiss* v. *Wilmarth*, 243.
4. Hospital records of a patient were properly rejected, in absence of proof as to their correctness. *In re Sachs' Estate*, 358.

See ADOPTION (1, 8); APPEAL AND ERROR (5, 7–9, 12, 15, 18, 19, 22); BAILMENTS (5, 6); BANKS AND BANKING (7); BILLS AND NOTES (9–11); BOUNDARIES (2); BROKERS (4); CONTRACTS (6, 7, 33); CORPORATIONS (6–8); CRIMINAL LAW (1, 2); DAMAGES (1, 3); DESCENT AND DISTRIBUTION; DIVORCE (5); EASEMENTS (5); FRAUD (3, 5); FRAUDULENT CONVEYANCES (3, 5, 6); INSURANCE (5, 8); LIBEL AND SLANDER (1–6, 10); MASTER AND SERVANT (12, 13, 23); MECHANICS' LIENS (11); MOTOR VEHICLES (14, 18, 19, 21); NEGLIGENCE (9); NEW TRIAL; PARTNERSHIP (1); PLEDGES; PRINCIPAL AND SURETY (4, 5, 7); RAILROADS (4, 5); TRIAL (2); TRUSTS (1); VENDOR AND PURCHASER (3); WILLS; WITNESSES (2).

EXCEPTIONS, BILL OF.

1. Where appealing party has filed certificate of stenographer showing that transcript of testimony has been ordered he is entitled, on *ex parte* application made within 20 days after entry of judgment, to 60-day extension of time for settlement of bill of exceptions (former Circuit Court Rule No. 66, subd. 2; 3 Comp. Laws 1915, § 12634). *Fry* v. *Wayne Circuit Judge*, 102.
2. On mandamus to compel circuit judge to extend time, beyond 20 days after entry of judgment, for settlement of bill of exceptions and to move for new trial, Supreme Court must accept answer of judge. *Id.*

EXCEPTIONS, BILL OF—Continued.

3. Mandamus will not issue to compel circuit judge to extend time, beyond 20 days after entry of judgment, for settlement of bill of exceptions and to move for new trial, where stenographer's certificate showing that transcript of testimony had been ordered was not filed within 20 days after entry of judgment, although counsel had said certificate in his possession and motion for extension was made within 20 days. *Id.*

EXCEPTIONS TO FINDINGS—See APPEAL AND ERROR (3).

EXCESSIVE AWARD—See EMINENT DOMAIN (10).

EXCESSIVE CLAIM—See MECHANICS' LIENS (11).

EXCESSIVE SALARIES—See CORPORATIONS (50).

EXCESSIVE VERDICT—See APPEAL AND ERROR (11); DAMAGES (1, 3); LIBEL AND SLANDER (10, 11).

EXCHANGE OF PROPERTY.

1. Parties trading farm for city property, who knew at time of trade that some rooms of city property had been padlocked by Federal authorities, were properly denied rescission on ground of fraud. *Barkovits* v. *Veres,* 543.
2. Finding of court below that plaintiff, seeking rescission of contract for exchange of property on ground of mental incompetency, had not met burden of proof, *held,* sustained by record. *Hake* v. *Youngs,* 546.

EXCISE TAX—See LICENSES (2).

EXCUSE FOR NONPAYMENT—See VENDOR AND PURCHASER (2).

EXECUTION.

1. Executions between same parties may be set off against each other by the sheriff (3 Comp. Laws 1929, § 14550). *Cross* v. *Hickey,* 331.
2. Judgment for fraud remained one in tort, although trial judge amended his findings by stating that defendant did not make representations with specific and wilful intent to defraud. *Kirker* v. *Larson,* 648.

See FRAUDULENT CONVEYANCES (9); MECHANICS' LIENS (2); SET-OFF AND RECOUPMENT (2).

EXECUTORS AND ADMINISTRATORS.

1. Where administratrix sold estate's real estate for sum substantially in excess of appraised value, and used proceeds to pay estate's debts, the sale was properly held valid by the trial court, although the property was deeded to her the same day by her daughter, who was the purchaser, where there was no showing of inadequacy of consideration, and no claim made of fraud or breach of trust. *Soleau* v. *Soleau,* 344.

EXECUTORS AND ADMINISTRATORS—Continued.

2. On application of executors for final distribution of estate, the court was not bound to follow previous consent decree entered during course of administration of estate, regardless of subsequent matters properly affecting rights on final distribution. *Smith* v. *Detroit Trust Co.*, 659, 662.

EXECUTORY ORAL AGREEMENT—See BILLS AND NOTES (10).

EXEMPLARY DAMAGES—See LIBEL AND SLANDER (7, 8).

EXEMPTIONS—See FRAUDULENT CONVEYANCES (8).

EXPERT WITNESSES—See WILLS (1).

EXPIRATION OF LICENSE—See PRINCIPAL AND SURETY (17).

EXPRESSION AS TO FUTURE PROFITS—See FRAUD (4).

EXTENSION OF TIME—See EXCEPTIONS, BILL OF.

EXTREME CRUELTY—See DIVORCE (12).

FACTORY—See NUISANCE.

FAILURE TO APPOINT FOURTH INSPECTOR—See SCHOOLS AND SCHOOL DISTRICTS (5).

FAILURE TO READ—See CONTRACTS (9–11).

FAILURE TO SOUND WARNING—See MOTOR VEHICLES (20).

FALLING ASLEEP AT WHEEL—See MOTOR VEHICLES (6).

FATHER—See DOMICILE (1).

FEDERAL EMPLOYERS' LIABILITY ACT—See MASTER AND SERVANT (2, 6, 7).

FEELINGS, INJURY TO—See LIBEL AND SLANDER (11).

FELLOW SERVANT—See MASTER AND SERVANT (6, 7).

FILES OF CASE—See GARNISHMENT (3, 4).

FINAL DISTRIBUTION—See EXECUTORS AND ADMINISTRATORS (2).

FINANCIAL STANDING—See EQUITY (13).

FINDING OF COURT—See ADOPTION (1, 11); APPEAL AND ERROR (3); BILLS AND NOTES (9); CONTRACTS (6, 7); CORPORATIONS (7, 8); EXCHANGE OF PROPERTY (2); EXECUTION (2); FRAUDULENT CONVEYANCES (9); PARTNERSHIP (1–3); PLEADING (2); PRINCIPAL AND SURETY (4).

FINDING OF DEPARTMENT—See MASTER AND SERVANT (12, 13, 17).

FIRE INSURANCE—See APPEAL AND ERROR (5); INSURANCE (1–5); PARTIES (1).

FIRE LIMITS—See MUNICIPAL CORPORATIONS (3, 5).

FIRE MARSHAL—See APPEAL AND ERROR (5).

FIRST PREMIUM—See INSURANCE (16).

FLOODAGE—See EMINENT DOMAIN (5); MUNICIPAL CORPORATIONS (6).

FLOWERS—See HIGHWAYS AND STREETS (14).

FORECLOSURE—See CONSTITUTIONAL LAW (8); MECHANICS' LIENS (11); MORTGAGES (2–7); VENDOR AND PURCHASER (5, 10, 14, 16–20).

FOREIGN CORPORATIONS—See COMMERCE; CORPORATIONS (27, 41–45); EQUITY (15); PAYMENT.

FOREIGN COURTS—See JUDGMENT (1, 2).

FORFEITURE OF LAND CONTRACT—See DAMAGES (2).

FORMER ADJUDICATION MUST BE PLEADED IN BAR—See JUDGMENT (11).

FORM OF RECEIPT—See GIFTS (3).

FRANCHISES—See CORPORATIONS (28, 29).

FRAUD.

1. Mere mistake is not fraud. *Van Wie* v. *Fidelity Trust Co.*, 108.
2. Party may not gain benefit by its own fraud. *Avery* v. *Midwest Commercial Credit Co.*, 324.
3. In actions on promissory notes given by certain members of syndicate as their *pro rata* share of payment on contract for purchase of land, defense of fraud in misrepresenting purchase price of said land, *held*, not supported by evidence. *Detroit & Security Trust Co.* v. *Echternkamp*, 369.
4. Expressions of confidence that venture would prove a wonderful success are insufficient to sustain claim of fraud in defense to actions on promissory notes. *Id.*
5. Claim, in defense to actions on promissory notes, that defendants as members of syndicate were induced to invest in enterprise by payee, who then appropriated to his own use funds belonging to syndicate, *held*, not supported by evidence. *Id.*
6. Courts are not much concerned with working out equities or doing exact justice between coconspirators who have deliberately defrauded a third person and later have been compelled by the court's decree to reimburse their victim. *Reinert* v. *Roberts*, 433.
7. Defendants who conspired together and perpetrated a fraud upon plaintiffs were properly held personally liable for plaintiffs' loss. *Id.*

FRAUD—Continued.

8. Wife of defendant guilty of defrauding another should not be held personally liable therefor, in absence of testimony that she knew of said fraud, was a party thereto, or that she in any way benefited thereby. *Id.*

9. Decree that defendants are personally liable in the sum of $3,620.28 for fraud perpetrated on plaintiffs is modified, on appeal, and amount thereof reduced to $2,928.73; and title of real estate involved is vested in plaintiffs subject to contract rights of vendees. *Id.*

10. Where defendant ratified the acts of its agents by accepting the fruits of their activities, it is responsible for their fraud regardless of its actual knowledge or active participation therein. *Sharrar* v. *Wayne Savings Ass'n*, 457.

See ARREST (1, 3, 4); ASSIGNMENT FOR BENEFIT OF CREDITORS (2); ASSUMPSIT; BILLS AND NOTES (4–7, 11); BROKERS (4, 5); CONTRACTS (10, 11, 20–22, 26); CORPORATIONS (6, 8, 9, 17, 32, 39); DEDICATION (2); DEEDS (4); DIVORCE (8, 9); ELECTIONS (3); EMINENT DOMAIN (9, 10); EQUITY (10, 13); EXCHANGE OF PROPERTY (1); EXECUTION (2); EXECUTORS AND ADMINISTRATORS (1); MORTGAGES (3); PLEADING (2); PRINCIPAL AND AGENT; RECEIVERS (8); SCHOOLS AND SCHOOL DISTRICTS (1); TRADE-MARKS AND TRADE-NAMES (5, 6); TRUSTS (1, 2); VENDOR AND PURCHASER (4, 5, 8–10).

FRAUDS, STATUTE OF.

1. Oral agreement of husband to put all of his property in joint names of himself and wife, in connection with their reconciliation after wife had filed suit for divorce, did not give her title or create debt from husband to her. *Detroit & Security Trust Co.* v. *Gitre*, 66.

2. Parol contract for sale of goods of value of $100 or upwards, to be delivered at some future time, may be validated by acceptance of part of the goods (2 Comp. Laws 1929, § 9443), but in such case the contract is the parol agreement and not the order made out by seller's agent and not signed by buyer. *Shirek* v. *Roesink*, 105.

3. If goods are to be manufactured by seller especially for buyer, and are not suitable for sale to others in ordinary course of seller's business, then verbal contract is valid (2 Comp. Laws 1929, § 9443, subd. 2). *Id.* 106.

4. Lease for five years with right to landlord after two and one-half years to cancel on six months' notice created tenancy for five years upon condition, and therefore statute of frauds (3 Comp. Laws 1929, § 13411) requiring it to be in writing is applicable. *Barth* v. *Women's City Club*, 270.

5. Since lease for five years has to be in writing to be valid (3 Comp. Laws 1929, § 13411), surrender of it when the unexpired term is more than a year must also be in writing. *Id.*

See INSURANCE (14); LANDLORD AND TENANT (5, 6); TRUSTS (1).

FRAUDULENT CONVEYANCES.

1. Where, at time judgment debtor deeded property to his nephew he had previously deeded it to his brother, which deed was destroyed without recording, debtor had no interest to convey, and therefore second deed was not in fraud of his creditors. *Detroit & Security Trust Co.* v. *Gitre,* 66.

2. Where, in judgment creditors' suit to reach property claimed to have been conveyed by judgment debtor in fraud of creditors, plaintiffs made *prima facie* case, burden rested on defendants to show that conveyance was *bona fide* (3 Comp. Laws 1929, § 14617). *Id.*

3. Although presumption created by statute vanishes and is not to be weighed against evidence when defendants make showing of *bona fide* conveyance by credible evidence, yet this does not relieve them of burden of producing evidence of existence of every essential of good faith. *Id.*

4. Where no rights of creditors intervene, transfer from father to son in payment of services is lawful and adequacy of consideration unimportant, but where creditors are interested, transaction is subject to close scrutiny and fairness of consideration is material, and where it assumes to be in payment of antecedent debt, consideration must not be disproportionately small as compared with value of property or obligation obtained (3 Comp. Laws 1929, § 13394). *Id.*

5. Where property conveyed by father to son in consideration of latter's services was far outside ordinary run of human experience, court may not take judicial notice of adequacy, but affirmative evidence is required to justify holding that it was fair, in suit to set conveyance aside as in fraud of creditors. *Id.* 67.

6. Burden of showing that conveyance of property by father to son was *bona fide* and not in fraud of creditors (3 Comp. Laws 1929, § 14617) was not met by testimony that it was in consideration of son's services, where property was worth much more than such services ordinarily would be worth, and there was no proof of value of said services. *Id.*

7. Agreement by son to support his mother did not furnish consideration for conveyance to him of father's property as against rights of latter's creditors. *Id.*

8. Aside from exemptions allowed by law, all property of debtor is subject to claims of creditors, and those claims may not be defeated by conveyance which secures to debtor future fruits of property. *Id.*

9. On certiorari to review order of court below dissolving attachment levied on property claimed to have been conveyed in fraud of creditors, on petition of grantee under 3 Comp. Laws 1929, § 14810, order is set aside on finding that said conveyance was void. *Id.* 68.

10. Debtor has right to give preference to certain of his creditors if he so desires. *Hartford Accident & Indemnity Co.* v. *Jirasek,* 131.

FRAUDULENT CONVEYANCES—Continued.

11. Under uniform fraudulent conveyance act (3 Comp. Laws 1929, § 13392 *et seq.*), conveyance which rendered grantor insolvent was fraudulent as to creditors if made without fair consideration. *Id.*

12. Purpose of uniform fraudulent conveyance act is to make available to a "creditor," as defined in the act, an adequate remedy which theretofore was not available until the creditor had first reduced his claim to judgment. *Id.*

13. Uniform fraudulent conveyance act is remedial, and should be given liberal construction. *Id.*

14. Where conveyance claimed to have been given to secure certain creditors rendered grantor insolvent, court of equity has jurisdiction of whole subject-matter in litigation in suit by other creditors attacking said conveyance as fraudulent as to them, and it is immaterial whether their right to recover from grantor is based on fraud and deceit or on assumpsit upon waiver of tort (3 Comp. Laws 1929, § 13392 *et seq.*). *Id.*

15. Where, in suit to set aside deed as in fraud of creditors, it appears that said deed constitutes valid mortgage lien prior to plaintiffs' claim, and that grantor by said conveyance was rendered insolvent, determination of amount of secured indebtedness should be made, and grantor's equity, if any, subjected to plaintiffs' claim (3 Comp. Laws 1929, § 13392 *et seq.*). *Id.*

16. Where corporation was financially unable to repurchase certain of its stock as it had agreed to do, and the principal stockholder, wishing to preserve the credit of the company, took the stock and in consideration therefor conveyed certain real estate under agreement that it was to be delivered in escrow, and reconveyed to him within certain period on payment of purchase price, and the parties apparently acted in good faith, grantee having no notice of insolvency of either corporation or grantor, said conveyance cannot be said to have been in fraud of creditors. *Commercial State Savings Bank* v. *Bird*, 418.

17. The right secured to grantor by said agreement to have the property reconveyed on payment of specified amount did not have the effect of hindering and delaying grantor's creditors, where there was sufficient consideration and title passed immediately to grantee. *Id.*

18. Where property conveyed by debtor has no value in excess of that paid for it by grantee, there is no interest which grantor's creditors are entitled to reach under agreement between grantor and grantee that latter would reconvey within certain period on payment of purchase price. *Id.*

See ELECTION OF REMEDIES (2).

FUEL—See VENDOR AND PURCHASER (8).

FULL FAITH AND CREDIT—See JUDGMENT (1, 2).

FURNITURE—See COMMERCE; CORPORATIONS (41).

FURTHER COMPENSATION—See MASTER AND SERVANT (20).

FUTURE FRUITS OF PROPERTY—See FRAUDULENT CONVEYANCES (8).

FUTURE RIGHTS—See ACTION (3).

GARNISHMENT.

1. To save himself from double liability, garnishee was required to give notice of assignment of claim against him, although he received notice after service of garnishee summons. *Jacobson* v. *Newman*, 555.
2. Where garnishee was notified of assignment of judgment debtor's claim against him after he had been served with summons in garnishment, his payment to judgment creditor's attorney without judgment in garnishment against him is no defense to action by assignee of judgment debtor's claim against him (3 Comp. Laws 1929, § 16209). *Id.*
3. Letter written by garnishee defendant to clerk of court denying indebtedness to principal defendant was not disclosure required by statute (3 Comp. Laws 1929, § 14857), but, as an act in behalf of appearance, on filing in the case, it commanded notice by plaintiff, at least to extent of moving that it be stricken from files before entry of default. *Wiener* v. *Valley Steel Co.*, 681.
4. Before entering default, examination of files is required, since default is based on files and records and failure of garnishee to file its appearance and disclosure. *Id.*
5. Filing of letter written by garnishee defendant to clerk of court denying indebtedness to principal defendant, in response to service of writ, bars garnishee from questioning sufficiency of officer's return of service. *Id.*

See COURTS (4); JUDGMENT (9).

GAS—See DEDICATION (3–5); MASTER AND SERVANT (23).

GASOLINE—See NEGLIGENCE (7, 8).

GENERAL ACT—See CONSTITUTIONAL LAW (2, 3).

GIFTS.

1. Where bank claimed that donor left with it certain bonds to be delivered to his great grandchildren at his death, it is essential to validity of said gifts that donor voluntarily delivered the bonds to the bank for the donees with intention of relinquishing control and passing title to them. *Clough* v. *First National Bank of Paw Paw*, 298.
2. Where donor, with intention to make gift of certain bonds to his great grandchildren at his death, made delivery to bank for that purpose, and bank accepted the trust, nothing further was necessary on part of donor to complete the gift. *Id.*
3. That bank, in accepting trust of holding certain bonds till donor's death and then delivering them to donees, used printed form of receipt containing language not directly applicable to

GIFTS—Continued.

transaction, is not fatal to its validity, where intention of donor to make gift to donees is clear and unmistakable. *Id.* 299.

4. Delivery to bank, *held*, sufficient to support gift. *Id.*

5. Where delivery of bonds to bank to be delivered to donees at donor's death passed present title to donees, fact that possession was postponed until donor's death did not make transaction testamentary in character. *Id.*

See CHARITIES (2, 4); DEEDS (2).

GOOD FAITH—See CONTRACTS (5, 6); EMINENT DOMAIN (8); FRAUDULENT CONVEYANCES (2, 3, 16); INSURANCE (8); LIBEL AND SLANDER (8); MOTOR VEHICLES (11).

GOODS MANUFACTURED ESPECIALLY FOR BUYER—See FRAUDS, STATUTE OF (2, 3).

GOOD WILL—See CONTRACTS (12–14, 16–19); PARTNERSHIP (4).

GRANDCHILDREN—See GIFTS (1, 2).

GRASS—See HIGHWAYS AND STREETS (14).

GRATUITOUS SURETY—See PRINCIPAL AND SURETY (10, 13).

GREAT GRANDCHILDREN—See GIFTS (1, 2).

GROSS NEGLIGENCE—See MOTOR VEHICLES (5).

GUARANTY—See DAMAGES (2).

GUEST PASSENGER—See MOTOR VEHICLES (5, 6).

HABEAS CORPUS.

Judgment in circuit court denying writ of *habeas corpus* inquiring into imprisonment of plaintiff for contempt of court is *res judicata* of validity of imprisonment unless reversed. *In re Harrand*, 584.

HABENDUM CLAUSE—See DEEDS (2).

HALLWAY—See LANDLORD AND TENANT (1).

HEARING—See CORPORATIONS (2, 3, 5, 50).

HEARSAY—See LIBEL AND SLANDER (4); MASTER AND SERVANT (23).

HIGHWAYS AND STREETS.

1. Land dedicated for parkway purposes in street is ordinarily part of street and governed by laws applicable thereto rather than those applicable to parks. *Village of Grosse Pointe Shores* v. *Ayres*, 59.

2. Grant of land to village for purpose of highway established its character as such, and provisions in grant restricting its use to parkway are ineffectual restrictions upon use and control of street by village. *Id.*

HIGHWAYS AND STREETS—Continued.

3. Control of streets conferred on village by Constitution and statutes is to be used by authorities for public good as need arises, and may not be bartered away. *Id.*

4. When State highway department closes road only partly, but it is open to use of public, as matter of right, for purposes of vehicular travel, it remains highway (1 Comp. Laws 1929, § 4693[n]), and department may make regulations as to its use which are binding on public if they are posted on road (sections 4629, 4630). *Shoniker* v. *English*, 76.

5. Detour established by State highway department under authority of 1 Comp. Laws 1929, § 4629, becomes part of main road, and part temporarily cut off remains highway if open to travel, subject to such use and regulations as may be adopted and posted, but it loses special character attached to road from which it was taken. *Id.*

6. Regardless of testimony of highway officials as to superiority of roads, stop sign established by authority is imperative. *Id.*

7. In suit by adjoining landowners against highway commissioner to restrain trespass on land alleged to have been abandoned as highway, decree in favor of defendant is affirmed, on appeal. *Littlejohn* v. *Corey*, 111.

8. The board of county road commissioners is the agency through which the county's activities relative to highways are carried on (1 Comp. Laws 1929, § 3994). *Hatch* v. *Muskegon Co. Supervisors*, 255.

9. 1 Comp. Laws 1929, § 2415, authorizing township boards to provide for artificially lighting highways, has reference to township highways only, and not to county highways. *Id.*

10. Appropriate action by the county road commission and the board of supervisors to raise money by taxation for the purpose of artificially lighting county roads in certain congested and dangerous localities is within the scope of the statutory duty imposed upon them to keep county roads "in condition reasonably safe and fit for public travel" (Const., Art. 8, § 26; 1 Comp. Laws 1929, § 3995), and therefore the levy of taxes for said purpose is legal. *Id.*

11. While the word "boulevard" has not been exactly defined, to the popular mind and understanding it suggests, at least, a broad and attractive highway, designed and used for the transportation of persons and things. *Theisen* v. *City of Detroit*, 338.

12. In dedication of plat, where the streets were laid out as such, there was nothing significant in designating them as "boulevards." *Id.*

13. Private individuals may not, as against the public, after the dedication of land as a street and acceptance by the proper authorities, take back the land so dedicated or any rights therein. *Id.*

14. Persons interested in plat may not, on their own initiative, after streets have been dedicated to the public, change them

HIGHWAYS AND STREETS—Continued.

to boulevards by making park places in the middle of them, and by planting grass, shrubs, and flowers. *Id.*

See DEDICATION; EASEMENTS (4); EMINENT DOMAIN (7–11); MOTOR VEHICLES (1–4); MUNICIPAL CORPORATIONS (2); STATES.

HINDERING CREDITORS—See FRAUDULENT CONVEYANCES (17).

HOLDER IN DUE COURSE—See BILLS AND NOTES (4, 7, 9, 12, 13).

HOME-RULE ACT—See CONSTITUTIONAL LAW (4).

HOME-RULE CITIES—See EMINENT DOMAIN (3); MUNICIPAL CORPORATIONS (7).

HOSPITAL RECORDS—See EVIDENCE (4).

HOSPITALS—See CHARITIES (1, 3, 4); DEEDS (2); PAUPERS.

HOTELS—See CORPORATIONS (41).

HUSBAND AND WIFE.

1. Right of married woman to earnings acquired by her as result of her personal efforts (3 Comp. Laws 1929, § 13061) covers services performed by her for others than the family as well as apart from her household duties. *Detroit & Security Trust Co.* v. *Gitre,* 67.
2. The statute (3 Comp. Laws 1929, § 13061) does not convert marital relationship into business partnership nor raise money debt from husband to wife for her services to him, even though they take her outside the strict ambit of domestic circle, and consist of aid to him in business. *Id.*
3. Since the passage of married woman's act, neither husband nor wife may recover for loss of consortium in this State. *Harker* v. *Bushouse,* 198.
4. Wife could maintain suit to enforce lien, on husband's property established by divorce decree, after their remarriage and separation, notwithstanding his willingness to support her (3 Comp. Laws 1929, § 14014). *Wilson* v. *Wilson,* 505.
5. Rule that services of wife in and about the home belong to husband may be waived by him. *Wisniewski* v. *Wisniewski's Estate,* 663.
6. Where contract for wife's services in home was made with her by express consent of her husband, she is entitled to recover therefor. *Id.*

See DIVORCE (10, 11); EQUITY (5); FRAUD (8); FRAUDS, STATUTE OF (1); INSURANCE (3, 4); MOTOR VEHICLES (14); WITNESSES (2).

HYPOTHETICAL QUESTIONS—See WILLS (1).

ILLEGAL TRANSACTION—See CONTRACTS (28–30); CORPORATIONS (41, 45).

IMPLIED COVENANTS—See CONTRACTS (18).

IMPLIED PROMISE—See ARREST (1); ASSUMPSIT (1).

IMPROVEMENTS—See EMINENT DOMAIN (5); MUNICIPAL CORPORATIONS (2); VENDOR AND PURCHASER (3, 4).

INADEQUACY OF CONSIDERATION—See CONTRACTS (27).

INADEQUATE VERDICT—See NEW TRIAL (1, 2).

INCOME TAX REPORT—See CONTRACTS (3); LIBEL AND SLANDER (2); REFORMATION OF INSTRUMENTS (1).

INCORPOREAL RIGHT—See EASEMENTS (3).

INDEMNIFYING BONDS—See BILLS AND NOTES (8).

INDEPENDENT CONTRACTOR—See MASTER AND SERVANT (9, 10).

INDIGENT PERSONS—See PAUPERS.

INDIVIDUAL DEBT—See CORPORATIONS (20).

INDORSEMENTS—See BILLS AND NOTES (1, 2, 5–7); CORPORATIONS (21); INSURANCE (16); TENDER (2).

INFANTS—See DAMAGES (3); DOMICILE; EQUITY (3, 5); JUDGMENT (2); MASTER AND SERVANT (22); MOTOR VEHICLES (20, 21); NEGLIGENCE (5–8).

INFERENCES—See APPEAL AND ERROR (7, 8); PRINCIPAL AND SURETY (12).

INITIALING BALLOTS—See SCHOOLS AND SCHOOL DISTRICTS (1).

INJUNCTION.

1. Whether court of equity will grant or withhold injunctive relief respecting observance of building restrictions depends on the accomplishment of equitable result in light of all circumstances surrounding particular case. *Cherry* v. *Board of Home Missions of Reformed Church in United States*, 496.

2. Erection of proposed church building which will more nearly conform to building restrictions than present unsightly structure which has been maintained for eight or nine years in violation of building restrictions without complaint from property owners may not be enjoined on ground that it is enlargement or extension of existing violation of building restrictions. *Id.* 497.

3. Property owners who have acquiesced in maintenance of unsightly church building for eight or nine years in violation of building restrictions are not equitably entitled to restrain erection of more sightly church building on same site; especially where it will not work hardship or damage to them. *Id.*

4. Bond may be ordered as condition of issuance of temporary injunction. *Barkovits* v. *Veres*, 543.

INJUNCTION—Continued.

5. Party asking injunction has option of taking it on condition imposed or of refusing it. *Id.*
6. Failure to give stay bond justified release of injunction staying summary proceedings, but not dismissal of bill. *Siegmeyer* v. *Small*, 679.

See CONTRACTS (16, 19); CORPORATIONS (51, 54); COVENANTS; EASEMENTS (5); EQUITY (16); HIGHWAYS AND STREETS (7); JUDGMENT (3); NUISANCE; TRADE-MARKS AND TRADE-NAMES (3, 5–7, 9).

INNOCENCE—See CRIMINAL LAW (1).

INQUISITORIAL PROCEEDING BEFORE JUSTICE—See CRIMINAL LAW (9).

INSANE PERSONS—See INSURANCE (1, 3, 4).

INSOLVENCY—See BANKS AND BANKING (6–10); CORPORATIONS (15–17); FRAUDULENT CONVEYANCES (11, 14–16); RECEIVERS (2, 7, 8).

INSTRUCTIONS—See APPEAL AND ERROR (10, 14); CRIMINAL LAW (1); LIBEL AND SLANDER (8, 9); TRIAL (3, 4).

INSURANCE.

1. Insured person who is insane is excused from submitting proof of loss, since such action on his part would be nullity. *Valisano* v. *Continental Insurance Co.*, 122.
2. Whether insurance companies waived proof of loss by offering to pay certain sum and no more, *held*, question of fact for jury. *Id.*
3. Where husband was insane, and no guardian appointed, wife had right and duty to conserve his property by taking out insurance thereon, and, after its destruction by fire, to attempt to adjust loss. *Id.*
4. Where insurance companies recognized wife's right and authority to take out insurance on insane husband's property and to adjust loss, they may not later object thereto. *Id.*
5. Whether proof of loss was waived by insurer, *held*, properly submitted to jury under conflicting testimony. *Johnson* v. *National Fire Insurance Co.*, 126.
6. Refusal of insurance company to defend actions against insured for damages caused by insured truck, which was its duty to do under the policy, under erroneous impression that the policy did not cover particular truck involved, was breach of policy. *Elliott* v. *Casualty Ass'n of America*, 282.
7. Where it was insurer's duty, under the policy, to defend actions against insured truck owner, breach of said duty was not excused because insured refused to sign agreement releasing insurer from liability in action against it under the policy. *Id.*

INSURANCE—Continued.

8. Where insurer wrongfully refuses to defend actions against insured, and latter defends and in good faith makes settlement thereof, he may recover amount paid in such settlement, unless it is shown that there was in fact no liability, or that amount paid was excessive; such settlement, in absence of proof to contrary, being evidence of liability, and amount thereof. *Id.*

9. Language used in insurance policy should be so construed, if possible, as to make policy of some value to insured. *Id.* 283.

10. Satisfaction of judgments against insured by promissory notes was sufficient compliance with requirements of policy to entitle insured to recover same against insurer. *Id.*

11. Where insurance agent's contract with branch manager of life insurance company was terminated, and he thereafter ceased to represent said company, he would not be entitled to compensation by way of commissions on a policy subsequently written by it even though it appeared he was the efficient means of consummating the bargain. *Morehead* v. *Reem,* 351.

12. Where, at time insurance agent's contract was terminated, prospect on which he had been working had made no application for insurance, but later made application and policy was written, said agent was not agent of company at time policy was written, did not produce the business, and therefore he was not entitled to commissions thereon, as against the company. *Id.*

13. Agreement between life insurance agents as to division between them of commissions to be paid on prospective business, not consented to by the branch manager under whom they worked, would have no binding effect on him. *Id.*

14. Such contract, to be effective, must, under the statutes, be in writing and signed by the party to be charged, and be based on a valuable consideration. *Id.*

15. Where insurance agent, after termination of his contract, in writing released his right to all future commissions, including certain prospect on which he and another agent had been working, he is barred from recovering from said other agent or the branch manager a percentage of commissions paid on a policy thereafter issued to said prospect. *Id.*

16. Where life insurance policy provided that if, at time of making application, full amount of premium was paid, receipt attached thereto was given to assured, and payment indorsed on application, policy should become effective from date of application, assured may not be deprived of benefit of said provision by failure of insurer's agent to make such indorsement and execute proper receipt; payment at time of making application not being disputed. *New York Life Ins. Co.* v. *Abromietes,* 622.

See ACTION (5); APPEAL AND ERROR (9, 10); CONSTITUTIONAL LAW (7); EVIDENCE (1); MASTER AND SERVANT (17); MOTOR VEHICLES (10–13); PARTIES (1, 3); PRINCIPAL AND SURETY (15); VENDOR AND PURCHASER (8).

INTENT—See CONTRACTS (3, 23); DEEDS (3); DESCENT AND DISTRIBUTION; DIVORCE (8, 9); GIFTS (1, 3); PRINCIPAL AND SURETY (16); SALES.

INTEREST IN PROPERTY—See MECHANICS' LIENS (2, 5).

INTERSTATE COMMERCE—See COMMERCE; CORPORATIONS (43–45); PAYMENT.

INTERVENING ACT—See NEGLIGENCE (7).

INTOXICATING LIQUORS—See CONTEMPT; MOTOR VEHICLES (6); STATUTES.

INTRASTATE BUSINESS—See CORPORATIONS (41–45); PAYMENT.

IRREGULARITIES—See ELECTIONS (2, 3); SCHOOLS AND SCHOOL DISTRICTS (4, 5).

ISSUES OF FACT—See TRIAL (1).

JOINT DRIVEWAY—See EASEMENTS (5).

JUDGMENT.

1. Decree granted in divorce suit by court of competent jurisdiction in another State at time when both parties were residents thereof must be given full faith and credit in this State under Federal Constitution (article 4, § 1). *In re Volk*, 25.
2. Orders made by court in Ohio relative to custody of infant after latter became domiciled in this State do not constitute judgments which must be given full faith and credit under Federal Constitution (article 4, § 1). *Id.*
3. Where bill for rescission of land contract and for other relief was filed before judgment was rendered in action at law on contract, and, although said action was allowed to proceed to judgment, summary action thereon was restrained, said judgment may not be held *res judicata* of equity suit, although not appealed from. *McHugh* v. *Trinity Building Co.*, 202.
4. A judgment in an action at law from which no appeal is taken becomes *res judicata* as to subject-matter involved. *Bassett* v. *Trinity Building Co.*, 207.
5. Where the very questions presented in suit to rescind a land contract and for other relief were litigated as far as one defendant is concerned in an action at law from which no appeal was taken, they became *res judicata*. *Id.* 208.
6. When an appellate court speaks, such holding is the law of the case in all subsequent proceedings of the case in both the trial and appellate courts. *Palazzolo* v. *Sackett*, 289.
7. Decision of Supreme Court that verdict was not against the weight of the evidence is binding on trial court, on retrial, unless the record is materially different. *Id.*
8. Where record on retrial was substantially the same as on the first trial, decision of Supreme Court that verdict for plaintiff

JUDGMENT—Continued.

was not against weight of evidence was law of case, and therefore trial court was in error in setting aside verdict for plaintiff and granting new trial on ground that it was against weight of evidence. *Id.*

9. In action for rent due under lease, affidavit of merits showing that defendant had been garnisheed for rent due plaintiff is insufficient to prevent entry of summary judgment. *Cross* v. *Hickey*, 330.

10. Defendant's motion for directed verdict, on retrial, was properly denied, where trial judge followed rule laid down in former decision. *Sharrar* v. *Wayne Savings Ass'n*, 456.

11. Former adjudication must be pleaded in bar, and cannot be considered under special appearance and motion to dismiss. *Siegmeyer* v. *Small*, 679.

See ADOPTION (13); APPEAL AND ERROR (3, 12); CRIMINAL LAW (4); DAMAGES (2); DIVORCE (3, 6, 11, 12); EQUITY (8–11, 16); EXCEPTIONS, BILL OF; GARNISHMENT (4); HABEAS CORPUS; INSURANCE (10); PLEADING (2); RECEIVERS (10); SET-OFF AND RECOUPMENT; VENDOR AND PURCHASER (1, 6).

JUDGMENT NON OBSTANTE—See APPEAL AND ERROR (1, 2).

JUDICIAL NOTICE—See EVIDENCE (3); FRAUDULENT CONVEYANCES (5).

JUDICIAL POWER—See CONSTITUTIONAL LAW (6, 7).

JURIES—See CRIMINAL LAW (3); MOTOR VEHICLES (10, 12, 13).

JURISDICTION—See ADOPTION (4, 6, 9, 13); CONSTITUTIONAL LAW (13); CONTEMPT; COURTS (1–3); CRIMINAL LAW (8, 9); DIVORCE (1); EQUITY (6, 11); FRAUDULENT CONVEYANCES (14); JUDGMENT (1); REPLEVIN.

JUSTICES OF PEACE.

1. Act No. 260, Pub. Acts 1929, consolidating courts of justices of the peace in cities of prescribed population into one court named common pleas court, does not legislate justices of the peace out of office, but continues justices' courts under another name and form without creating a new court. *Kates* v. *Reading*, 158.

2. While informality of pleading in justice's court is tolerated, it is not to be encouraged. *Herbert* v. *Rosen*, 541.

See CONSTITUTIONAL LAW (4, 5); CONTEMPT; COURTS (2, 3); CRIMINAL LAW (8, 9); STATUTES (2).

KU KLUX KLAN—See LIBEL AND SLANDER (5).

LACHES—See ADOPTION (13); APPEAL AND ERROR (13); CONTRACTS (22, 25, 26); EQUITY (1–5); VENDOR AND PURCHASER (9).

LAND CONTRACTS—See APPEAL AND ERROR (13); BILLS AND NOTES (10); DAMAGES (2); EQUITY (6, 7, 11, 16); JUDGMENT (3, 5); PLEDGES; PRINCIPAL AND SURETY (10); REFORMATION OF INSTRUMENTS (3); VENDOR AND PURCHASER (1, 3, 5, 10–13, 15–21).

LANDLORD AND TENANT.

1. Landlord is not required to light hallway after regular hours although tenants are permitted to use building and elevator if they so desire, in absence of provision therefor in lease; there being no common-law or statutory duty in regard thereto. *Rice* v. *Goodspeed Real Estate Co.*, 49.
2. Tenant familiar with surroundings, who entered unlighted vestibule for purpose of taking elevator to his office after hours, as was his custom, and who, while attempting to locate elevator cage, fell down elevator shaft, door to which had been left open, was guilty of contributory negligence as matter of law. *Id.* 50.
3. Writing which purports to "let and lease and give * * * exclusive permission" to defendant to erect and maintain signs on roof of plaintiff's building, and which gives defendant mere permission under owner to have and maintain signs on roof without conferring possession of premises on defendant, is a license and not a lease. *Lewis* v. *Baxter Laundries*, 216.
4. Action under declaration as for rent may not be maintained against licensee. *Id.*
5. Offer by lessee in letter to lessor to surrender lease in conformity with oral understanding, which was not accepted by lessor, did not constitute valid surrender of lease. *Barth* v. *Women's City Club*, 270.
6. Landlord may not by writing surrender to himself tenant's estate, but surrender, to be valid, must be by tenant in writing. *Id.*
7. Where lease prohibited assignment without lessor's consent in writing, valid assignment required lessor's written consent. *Mooradian* v. *Petroff*, 278.

See FRAUDS, STATUTE OF (4, 5); JUDGMENT (9); NEGLIGENCE (1); SET-OFF AND RECOUPMENT (1).

LAND NOT SUBJECT TO LIEN—See MECHANICS' LIENS (10).

LAW OF CASE—See JUDGMENT (6–8).

LAYING FOUNDATION—See WITNESSES (1).

LEAVE TO APPEAL NECESSARY—See APPEAL AND ERROR (16).

LEGAL RESERVE—See BANKS AND BANKING (7, 9).

LETTER TO CLERK OF COURT—See GARNISHMENT (3).

LIABILITY OF OWNER—See MOTOR VEHICLES (18).

LIBEL AND SLANDER.

1. In action for libel, where plaintiff claimed damages to his business as real estate dealer by reason thereof, he was properly allowed to testify as to volume of his business for six months preceding publication of libel and for same period succeeding publication. *Poleski* v. *Polish American Publishing Co.*, 15.

2. While plaintiff's income tax report for year he claims to have suffered loss because of libel was admissible in evidence on question of damages, in action therefor, it did not render incompetent his own testimony as to loss of profits. *Id.*

3. In action for libel, testimony by plaintiff as to conversation with prospective customer who stated he would not have anything to do with plaintiff because of charges appearing in libelous article was admissible in evidence as tending to establish plaintiff's general claim of damage by showing particular instance. *Id.*

4. In action for libel, witnesses were properly permitted to testify as to what other persons had said to them relative to alleged libelous article, because, while such testimony may be said to be of hearsay character, it is nevertheless competent, in actions of this kind, to show extent and effect of publication of libelous article, and it is also competent as tending to sustain plaintiff's allegation of general damage to his reputation, character, and business. *Id.* 16.

5. In action for publication of libelous article in Polish newspaper charging plaintiff, who was candidate for public office, with conspiring with members of Ku Klux Klan against Polish people, it was competent for witness, who was shown to have special knowledge on subject, to testify that feeling among rank and file of Polish citizens was very bitter against Ku Klux Klan, giving reasons therefor. *Id.*

6. It is competent and material for plaintiff in action for libel to show conditions under which libelous article was published, especially where such conditions have bearing on extent of injury sustained by him in consequence thereof. *Id.*

7. Where, in action for libel, trial court explained to jury that exemplary or punitive damages had to do with "injury to feelings," and defendant made no request for further definition or explanation thereof, its claim of error for court's failure to define said terms is without merit. *Id.*

8. In action against publishing company for publishing libelous article, where plaintiff claimed both exemplary and actual damages, defendant was not entitled to instruction that if it acted in good faith it could not be found guilty of malice and verdict should be in its favor, because even if it acted in good faith and without malice it would still be liable for actual damages sustained by plaintiff. *Id.*

9. In action against publishing company for publishing article libeling plaintiff, who was candidate for public office, trial court's instruction to jury in respect to privilege and de-

LIBEL AND SLANDER—Continued.

fendant's good faith in publishing it in belief it was for public good, *held*, to fully protect defendant's rights. *Id.* 17.

10. In action for libel, where there is decided conflict in testimony and wide latitude in issue submitted to jury, court should not substitute its judgment as to measure of damages for that of jury. *Id.*

11. In action against publishing company for libel, where plaintiff claimed that unjustified and vicious attack was made upon him prompted by malicious motive of giving defendant's president advantage over plaintiff in political contest, verdict of $5,000 for property damage, which was well within range of testimony, and $10,000 for injury to feelings may not be said to be so excessive as to require reversal. *Id.*

See SET-OFF AND RECOUPMENT (1).

LICENSES.

1. Generally, buildings erected on lands of another under leave or license so to do, in furtherance of the purposes of the permissive use and occupation, remain personal property and may be removed by the lessee or licensee at any time during his occupancy, or, if such occupancy or right of occupancy terminate on a contingency, within a reasonable time thereafter. *McClintic-Marshall Co.* v. *Ford Motor Co.*, 307.

2. Corporation privilege fee is excise tax, not on right to be corporation, but on activities of corporation in exercise of its corporate franchise, or on franchise "to do," not on franchise "to be" (2 Comp. Laws 1929, § 10140). *In re Detroit Properties Corp.*, 523.

3. Actual transaction of business by domestic corporation is not condition of privilege tax, but it is imposed on right to transact business (2 Comp. Laws 1929, § 10140). *Id.*

See CORPORATIONS (27–29, 41, 43, 45); EASEMENTS (1); EQUITY (15); LANDLORD AND TENANT (3, 4); NEGLIGENCE (6); PRINCIPAL AND SURETY (17).

LIEN NOT ENFORCEABLE AGAINST PART—See MECHANICS' LIENS (7, 8).

LIENS—See DIVORCE (10, 11); HUSBAND AND WIFE (4); MUNICIPAL CORPORATIONS (1); RAILROADS (1); STREET RAILWAYS.

LIENS ATTACH TO LAND AS WELL AS BUILDING—See MECHANICS' LIENS (5).

LIFE INSURANCE—See INSURANCE (11, 13, 16).

LIGHTING COUNTY ROADS—See HIGHWAYS AND STREETS (10).

LIGHTING HALLWAY—See LANDLORD AND TENANT (1).

LIGHTING SYSTEM—See DEDICATION (3–5).

LIGHTING TOWNSHIP ROADS—See HIGHWAYS AND STREETS (9, 10).

LIGHTS—See RAILROADS (2).

LIMITATION OF ACTIONS.

Claim for continuous service rendered under oral contract and not closed until within six years before presentation is not barred by statute of limitations. *Wisniewski* v. *Wisniewski's Estate,* 663.

See MASTER AND SERVANT (15, 16).

LIMITATIONS OF GRANT—See EASEMENTS (1).

LOANS TO OFFICERS—See CORPORATIONS (51).

LOCAL ACTS—See CONSTITUTIONAL LAW (2, 3).

LOSS OF SLEEP—See MOTOR VEHICLES (6).

LOST INSTRUMENTS—See BILLS AND NOTES (8).

MACHINERY—See PARTNERSHIP (4); PRINCIPAL AND SURETY (3); SPECIFIC PERFORMANCE.

MALICE—See LIBEL AND SLANDER (8, 11).

MANDAMUS—See EXCEPTIONS, BILL OF (2, 3).

MANDATORY PROVISIONS—See ELECTIONS (3); MUNICIPAL CORPORATIONS (7).

MAP—See MUNICIPAL CORPORATIONS (5).

MARRIED WOMAN'S ACT—See HUSBAND AND WIFE (3).

MASTER AND SERVANT.

1. Decision in *Thomas* v. *Morton Salt Co.,* 253 Mich. 613, holding that workmen's compensation act is applicable, and denying right to maintain action at law, is controlling of instant case. *Pringle* v. *Morton Salt Co.,* 179.
2. Under Federal employers' liability act (45 USCA, §§ 51–59), it was duty of section foreman to report to railroad company defects in rails of track and in wheels of motor car, which were of long standing, and call for repairs, and by his failure to do so he assumed the risk incident to use in defective condition. *Thrall* v. *Pere Marquette Ry. Co.,* 197.
3. Section foreman who had heavy drill placed on rear of motor car with defective wheels, and who then directed car to be run backward over defective track, was guilty of want of due care for his own safety. *Id.*
4. Since section foreman's own negligence does not relieve him from risks he had assumed, and risks so assumed may not be made basis of actionable negligence, recovery for his accidental death may not be had unless railroad company was negligent in some respect outside of risks assumed by him. *Id.*
5. Contributory negligence on part of section foreman could not arise out of his acts alone. *Id.*

MASTER AND SERVANT—Continued.

6. Negligence of fellow servant is not within rule of assumed risk barring recovery and is within rule of contributory negligence not barring recovery under Federal employers' liability act. *Id.*

7. If section foreman's death was caused in part by negligence of fellow servant, recovery might be had under Federal employers' liability act notwithstanding foreman was himself negligent and had assumed certain risks which contributed to accident, but in such case recovery could be had only for proportional amount bearing true relation to negligence attributable to both. *Id.*

8. Death of an employee from peritonitis caused by ruptured bowel brought on probably by lifting 100-pound sacks of sugar, which he was employed to do, was not accidental within the meaning of the workmen's compensation act, in absence of evidence of any unusual, fortuitous, or unexpected happening which caused the injury. *Sinkiewicz* v. *Lee & Cady*, 218.

9. Where plaintiff contracted in writing to take roofing jobs in certain territory for certain period, for which defendant was to furnish material and pay plaintiff so much per square, and plaintiff was to employ at his own expense all help and discharge same at will, and have complete supervision and control over them, he was not an employee within the meaning of the workmen's compensation act, but was an independent contractor. *McCormick* v. *Sears, Roebuck & Co.*, 221.

10. Whether relationship of master and servant exists is to be measured by terms of contract when in writing, and where contract provided that contractor was to control the workmen and the work, said relationship is not established by actual acts of interference by owner with workmen and manner of doing work; right to interfere and to control being the test and not the fact of actual interference. *Id.*

11. Whether injured employee's wife had authority to sign application for review of order by deputy commissioner stopping compensation payments, not having been questioned at hearing before department, may not be raised in Supreme Court. *Rose* v. *Stevens & Wood*, 224.

12. Where there was evidence sustaining the findings of the department, its order continuing compensation payments to injured employee was justified. *Id.*

13. Finding of the department of labor and industry that employee's death arose out of and in course of his employment, supported by competent testimony, is conclusive. *Sharp* v. *Grand Rapids Trust Co.*, 226.

14. Rules of the department of labor and industry which are reasonable and within its power to make are binding, not only on the department and litigants, but also on the Supreme Court. *Id.*

15. Under rules of the department of labor and industry, the statute of limitations may not be urged as defense to claim

MASTER AND SERVANT—Continued.

for compensation unless reasonably definite notice thereof is given. *Id.*

16. Indefinite assertion by defendant that proper claim for compensation was not made is not sufficient notice to plaintiff that defendant intended to rely on the defense that the claim for compensation was not filed within the statutory period. *Id.*

17. Finding of department of labor and industry that decedent was employee of partnership, although contract for construction of building on which he was working at time of accident was in name of individual partner and no written assignment thereof to the partnership was ever made, *held*, justified under the evidence, warranting an order of the department for payment of compensation by partnership's insurer. *Flint* v. *Van Maanen*, 230.

18. Settlement receipt signed by injured employee has no binding effect until approved by the department of labor and industry. *Lacombe* v. *Birds Eye Veneer Co.*, 233.

19. Suit to set aside, on ground of fraud, settlement receipt signed by injured employee was properly dismissed where said receipt was never approved by the department of labor and industry and therefore had no binding effect. *Id.*

20. Agreement for compensation to be paid to injured employee by employer's insurer, approved by the department of labor and industry and not changed, continues in effect, so that employee's petition for further compensation on unauthorized discontinuance of payments, and its denial by deputy commissioner, are of no force and effect. *Id.*

21. Master is not liable for negligent acts of his servant unless at the time the servant is acting within scope of his employment or within his actual authority. *Chajnacki* v. *Dougherty*, 296.

22. Where truck driver had been instructed by his employer not to allow any one to ride on truck, driver's act in inviting boy to ride was not within scope of his employment, and therefore employer was not liable for driver's negligence in starting truck and injuring boy while he was trying to board it. *Id.*

23. In action against employer for negligent death of plaintiff's decedent, claimed to have been caused by gas inhaled when he opened furnace door, testimony as to decedent's declarations that he had inhaled gas and that it had made him sick, no part of *res gestæ*, was incompetent as hearsay, and in absence of competent evidence verdict was properly directed for defendant. *Takacs* v. *Ford Motor Co.*, 537.

MATERIAL MISREPRESENTATIONS—See VENDOR AND PURCHASER (8).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See WITNESSES (2).

MAXIMS—See EQUITY (14, 15).

MEASURE OF DAMAGES—See CORPORATIONS (32, 37); LIBEL AND SLANDER (10); VENDOR AND PURCHASER (21).

MECHANICS' LIENS.

1. The mechanics' lien law is framed upon the theory that those who perform work or furnish material which enters into and enhances the value of improvements on real estate are entitled to a preferred claim against and a lien upon the specific property presumably bettered by the performance of such labor and the furnishing of such materials. *McClintic-Marshall Co.* v. *Ford Motor Co.*, 305.
2. Any interest which the owner, part owner, or lessee may have is sufficient to sustain mechanics' lien, provided the interest is such that it can be assigned, transferred, mortgaged, or sold under execution. *Id.*
3. Where railroad companies and city granted to manufacturing company right to contruct underpass under their lands to be used in connection with grantee's lands, neither grantors' land nor said easement is subject to mechanics' lien for labor or materials used in constructing said underpass. *Id.* 306.
4. Claims of lien claimants under mechanics' lien law must follow the contract. *Id.*
5. Under mechanics' lien law (3 Comp. Laws 1929, § 13101 *et seq.*), liens attach not only to the buildings erected, but to the interest of the party erecting them, the owner, part owner, or lessee, in the real estate. *Id.*
6. If the person contracting for the erection of the building has no legal title to the land, the lien attaches to the structure erected, and the court may order sale of the building separately if severable from the land. *Id.* 307.
7. Where underpass constructed by manufacturing company under lands of others was also partly on its own land, but construction was under one contract, it must be considered as one piece of work, and if liens exist they must be against entire structure. *Id.*
8. Mechanic's lien may not be enforced against part of an entire building. *Id.*
9. Since right to enforce lien by sale of the property to which it attaches is its essential characteristic, liens in abstract are nonexistent; lien that is unenforceable being a nullity. *Id.*
10. Easement granted to manufacturing company to erect underpass under lands of grantors, to be used as appurtenance thereto and to grantee's land, is not subject to mechanic's lien, because not capable of mortgage, sale, or alienation separate and distinct from the land to which it is appurtenant, and if detached it ceases to exist. *Id.*
11. Suit to foreclose mechanic's lien was properly dismissed where evidence showed that claim was filed in bad faith for excessive amount, and also that claim was not filed within statutory 60-day period (3 Comp. Laws 1929, § 13105). *Silverstein* v. *Berman*, 478.

See RAILROADS (1).

MEETING OF MINDS—See CONTRACTS (8).

MENTAL COMPETENCY—See CONTRACTS (33); EXCHANGE OF PROPERTY (2); WILLS; WITNESSES (1).

MINES AND MINERALS—See CORPORATIONS (35, 38).

MISAPPROPRIATION OF FUNDS—See FRAUD (5).

MISCONDUCT OF DIRECTORS—See CORPORATIONS (6, 8, 9).

MISREPRESENTATIONS—See APPEAL AND ERROR (13); FRAUD (3); VENDOR AND PURCHASER (8, 9).

MISTAKE—See ACTION (4); FRAUD (1); REFORMATION OF INSTRUMENTS (1, 3); TRUSTS (1).

MOMENTARY FORGETFULNESS—See NEGLIGENCE (4).

MONOPOLY OF NAME—See CORPORATIONS (49); TRADE-MARKS AND TRADE-NAMES (4).

MONUMENTS—See BOUNDARIES.

MORTGAGES.

1. If tender was made of amount due under chattel mortgage before property was sold, and refused by holder of mortgage, mortgage lien would thereby be discharged. *Avery* v. *Midwest Commercial Credit Co.*, 324.
2. Under chattel mortgage to be foreclosed by sale of property at either public or private sale, mortgagor is entitled to redeem therefrom upon paying, at any time before sale, the amount due. *Id.*
3. Where mortgagor was ready, able, and willing to make tender of amount due under chattel mortgage about to be foreclosed, and went to holder's office to make tender, when he was falsely told by its agent that property had been sold, court must treat case as if tender had been made and lien discharged, and therefore subsequent sale of property was conversion, for which holder is liable. *Id.*
4. In suit to foreclose mortgage, where the issue was as to amount due, and the credit to be given defendant for certain notes, the decree of the court below as to amount due is affirmed. *Peninsular State Bank* v. *Miller*, 475.
5. In foreclosure of mortgage by advertisement after repeal of Act No. 383, Pub. Acts 1925, by Act No. 16, Pub. Acts 1926, Ex. Sess., it was not necessary to serve notice of foreclosure sale personally or by registered mail on occupants of premises (3 Comp. Laws 1929, § 14427). *Grand River Avenue Christian Church* v. *Berkshire Life Ins. Co.*, 481.
6. Where mortgaged property consisting of several city lots was improved by building thereon without regard to lot lines, so that it could not be sold separately without lessening the value of the security, it was properly sold as entirety (3 Comp. Laws 1929, § 14431). *Id.*

MORTGAGES—Continued.

7. In foreclosure of mortgage by advertisement under 3 Comp. Laws 1929, § 14427, mortgagors living on property are not entitled to actual notice; constructive notice by publication and posting notice on premises being sufficient. *Windisch* v. *Mortgage Security Corp. of America,* 492.

See CONSTITUTIONAL LAW (8, 9); CORPORATIONS (42); EQUITY (15); FRAUDULENT CONVEYANCES (15); PLEDGES; USURY; VENDOR AND PURCHASER (19).

MORTGAGE TAX—See DAMAGES (2).

MOTHER—See DOMICILE.

MOTION TO DISMISS—See JUDGMENT (11).

MOTOR VEHICLES.

1. Generally, automobile which is required to stop at crossing yields right of way to other car approaching on intersecting street. *Shoniker* v. *English,* 76.
2. Where automobile drivers approaching intersection were both required to stop, one because of requirement of statute, and other because of stop sign established by authority, it was duty of both to stop, regardless of which technically had right of way. *Id.*
3. Stop sign on highway is warning of possible danger, and imposes duty not only to stop vehicle, but also to make reasonable observation of intersecting highway at place where view is clear and to keep car under such control as will enable driver to stop at once if observation discloses approaching vehicles. *Id.*
4. Drivers of automobiles in collision at highway intersection where both were required to stop and have cars under control were both guilty of contributory negligence as matter of law, barring their right to recover for damages so inflicted. *Id.* 77.
5. Guest passenger's common-law right of action based on ordinary negligence of automobile owner, which accrued before enactment of Act No. 19, Pub. Acts 1929, relieving automobile owners from liability to gratuitous guests except for injuries occasioned by "gross negligence or wilful and wanton misconduct," was not destroyed or affected by said statute. *Devlin* v. *Morse,* 113.
6. Automobile owner who had taxed his powers of endurance with intoxicating drink and loss of sleep so that he fell asleep at steering wheel while driving guest passenger to her home, resulting in her injury, was guilty of actionable negligence. *Id.*
7. Automobile driver approaching intersection on pavement must be assumed to have seen automobile approaching on cross road and about to enter pavement in front of him. *National Liberty Ins. Co.* v. *Foth,* 152.

MOTOR VEHICLES—Continued.

8. If automobile approaching pavement on cross road was running at such rate of speed that it indicated driver did not intend to stop, but planned on entering pavement in front of defendant's car, jury might have found that defendant was negligent in failing to reduce his speed at time when application of brakes would not have caused his car to skid in front of plaintiff's car, and therefore directed verdict in favor of defendant was error. *Id.*

9. Where automobile collision was caused by defendant's car skidding in front of plaintiff's car when defendant applied his brakes to avoid hitting car entering pavement from cross road, question of negligence of both plaintiff and defendant, under the circumstances, should have been submitted to jury, and therefore directed verdict in favor of defendant was error. *Id.* 153.

10. In action for injuries received in automobile accident, unless question of insurance is brought into case on *voir dire* for purpose of influencing jury, it is not reversible error *Harker* v. *Bushouse,* 187.

11. Error will result if question in regard to insurance is not asked in good faith. *Id.*

12. In action for injuries received in automobile accident, plaintiff has right to ascertain on *voir dire* whether any members of jury belong to mutual automobile insurance company in which defendant is insured, but proper method of interrogating jury should be followed. *Id.*

13. Interrogating jury on *voir dire* as to whether they were members of mutual automobile insurance company was not error, where question was propounded in correct form, there was no studied effort to repeat it, and question of insurance was not again referred to during trial. *Id.*

14. In action for injuries received in automobile accident, admission of evidence tending to show that plaintiff lost his home and the society and companionship of his wife as result of his injuries was error, where no consequential damages were set forth in declaration. *Id.*

15. In action by pedestrian for personal injuries inflicted by defendant's automobile at street crossing, questions of driver's negligence and plaintiff's contributory negligence were properly submitted to jury, where testimony was conflicting. *Gray* v. *Elliott,* 275.

16. Where bus driver, on dark, rainy night, turned out to left-hand side of pavement to pass car in front of him, causing a car coming from the opposite direction to swerve in front of plaintiffs' car, which resulted in collision and injuries to plaintiffs, questions as to whether bus driver was guilty of negligence under the circumstances, and, if so, whether such negligence was the proximate cause of the accident, should have been submitted to the jury. *Braendle* v. *Drum,* 372.

MOTOR VEHICLES—Continued.

17. Automobile driver not able to stop his car or bring it under control within range of his vision may be assumed to have been guilty of negligence. *Haara* v. *Vreeland*, 462.

18. To overcome presumption created by 1 Comp. Laws 1929, § 4648, that son was driving father's truck with his knowledge and consent, evidence must be direct, positive, and credible. *Transcontinental Ins. Co.* v. *Berens*, 613.

19. Whether son was driving father's truck with his knowledge and consent, *held*, properly presented to jury under evidence. *Id.*

20. Driver of truck seeing girl coasting on sidewalk, but having no reason to suspect that she would turn into street, was not guilty of negligence in failing to sound warning signal. *Door* v. *Valley Lumber Co.*, 694.

21. In action for death of girl four years and three months old, caused by her coasting in cart from sidewalk into street and running into side of truck, evidence *held*, to negative negligence on part of truck driver. *Id.*

See APPEAL AND ERROR (9, 10, 14); BAILMENTS; CONSTITUTIONAL LAW (7); EVIDENCE (1); PARTIES (3).

MUNICIPAL CORPORATIONS.

1. Enforcement of claims against municipal corporations, townships, cities, and villages is governed by 3 Comp. Laws 1929, § 14690. *McClintic-Marshall Co.* v. *Ford Motor Co.*, 305.

2. City has reasonable control over its public streets, and has right to grade, pave, and otherwise improve them, and to assess the abutting property owners for cost and expense of same. *Theisen* v. *City of Detroit*, 339.

3. 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*, 538.

4. While ordinance may refer to public record already established by lawful authority and become effective without publication of such record as part of ordinance, it may not at the same time establish a paper as a public record and also incorporate it as part of ordinance by reference merely. *Id.* 539.

5. Village ordinance published without incorporating map defining fire limits was void for want of publication, where map was drafted solely for purpose of ordinance, and therefore was not public record to which reference would have been permissible. *Id.*

6. Constitutional right of cities to acquire public utilities outside corporate limits includes water power with usual accompaniment of floodage (article 8, § 23). *City of Allegan* v. *Iosco Land Co.*, 560.

MUNICIPAL CORPORATIONS—Continued.

7. Piecemeal amendments of existing city charters, without previous revision or incorporating mandatory provisions of home-rule act are now permissible. *Id.*

See CONSTITUTIONAL LAW (3, 4); COURTS (2, 3); DEDICATION (1, 2); EASEMENTS (1, 4); EMINENT DOMAIN (1–6); HIGHWAYS AND STREETS (2, 3); MECHANICS' LIENS (3); PAUPERS.

MUTUAL INSURANCE COMPANY—See MOTOR VEHICLES (13).

MUTUAL MISTAKE—See REFORMATION OF INSTRUMENTS (1, 3).

NAMES—See CORPORATIONS (46–49); REFORMATION OF INSTRUMENTS (3).

NEGLIGENCE.

1. Tenant who was permitted to use elevator after regular hours of closing, and who had been in habit of doing so, was bound to exercise greater degree of care for his own safety when he found vestibule in darkness instead of lighted as was customary. *Rice* v. *Goodspeed Real Estate Co.*, 49.
2. One is required to make reasonable use of his faculties of sight, hearing, and intelligence to discover dangerous conditions to which he is or may become exposed. *Id.*
3. One who knows or in exercise of ordinary care should have known of existence of danger from which injury might reasonably be anticipated and who by voluntary acts or omissions exposes himself to such danger is guilty of negligence, if under the circumstances an ordinarily prudent person would not have incurred the risk of injury which such conduct involved. *Id.*
4. Momentary forgetfulness of or inattention to a known danger may, and usually does, amount to negligence. *Id.*
5. Although doctrine of "attractive nuisance" has been recognized and applied in this State, it has not been permitted to seriously impair the rule that property owner owes no duty to protect trespassers, adult or infant, from injury other than wanton or wilful. *Le Duc* v. *Detroit Edison Co.*, 86.
6. Where child is where he has right to be, as in street or as licensee on private premises, and his trespass is technical rather than wilful, *i. e.*, consists of playing with or taking the property of another as the spontaneous and natural act of an irresponsible child immediately attracted to the object, recovery for his injury is not barred by the trespass. *Id.*
7. Where immediate cause of injury resulting in death of plaintiff's decedent was act of other boys taking defendant's gasoline and their negligence in spilling it over decedent, their acts control plaintiff's right of recovery, because, even if defendant was negligent in leaving gasoline in work cart in the neighborhood, the intervening acts of the boys broke the legal connection between defendant's conduct and the injury unless they were irresponsible agents or mere conduits to carry effect of defendant's negligence to decedent. *Id.*

NEGLIGENCE—Continued.

8. Where defendant left work cart containing gasoline on parkway between sidewalk and street, and boys playing in neighborhood secured key, opened faucet, and obtained gasoline which was accidentally spilled on one of them, resulting in fire which caused his death, defendant is not liable therefor, even if negligent, because the cart did not constitute attractive nuisance, and trespass of boys in opening faucet and taking gasoline was actual and not technical. *Id.*
9. Where testimony on question as to whether plaintiff's decedent was guilty of contributory negligence was such that minds of reasonable men might come to different conclusion, issue of fact was presented for jury. *Haara* v. *Vreeland,* 462.

See APPEAL AND ERROR (2, 8); BAILMENTS (2, 3, 5, 6); CHARITIES (4); CONTRACTS (10); EVIDENCE (2); LANDLORD AND TENANT (1, 2); MASTER AND SERVANT (4, 6, 7, 21–23); MOTOR VEHICLES (1–9, 15–17, 20, 21); PRINCIPAL AND SURETY (17); RAILROADS (2); RECEIVERS (8); TRIAL (3, 4).

NEGLIGENCE OF DIRECTORS—See CORPORATIONS (6, 7, 9, 11, 14, 15).

NEGOTIABLE INSTRUMENTS—See BILLS AND NOTES (8).

NEPHEW—See FRAUDULENT CONVEYANCES (1).

NEWLY-DISCOVERED EVIDENCE—See NEW TRIAL (3, 4).

NEW TRIAL.

1. Court has discretion to grant new trial where, in view of evidence, verdict is inadequate. *Deffenbaugh* v. *Inter-State Motor Freight Corp.,* 180.
2. Where, in personal injury case, evidence showed that plaintiff received very serious injuries, verdict of $5,000 was properly set aside as inadequate. *Id.*
3. Motion for new trial based on affidavits of persons that if called as witnesses they would dispute defendant's testimony was properly denied, where said testimony if given would not warrant a change in the decision arrived at. *Crowley* v. *McCullough,* 362.
4. Motion for new trial on ground of newly-discovered evidence was properly denied, where some of it was merely cumulative, as to other there was lack of showing of diligence, or affidavits failed to state specifically anticipated testimony. *Hake* v. *Youngs,* 546.

See APPEAL AND ERROR (11); EXCEPTIONS, BILL OF (2, 3); JUDGMENT (8).

NEXT FRIEND—See DIVORCE (11).

NONSUPPORT—See DIVORCE (12).

NOTICE—See ADOPTION (12); ATTORNEY AND CLIENT; BANKS AND BANKING (1, 3, 9); BILLS AND NOTES (2, 5, 7, 10, 11); CONSTITUTIONAL LAW (8); CONTRACTS (21); CORPORATIONS (23); EQUITY (5); FRAUD (10); FRAUDS, STATUTE OF (4); GARNISHMENT (1–3); MASTER AND SERVANT (15, 16); MORTGAGES (5, 7); PRINCIPAL AND SURETY (11); RECEIVERS (2, 3); VENDOR AND PURCHASER (7).

NUISANCE.

1. While property owners, who purchased their home after adjacent building had been converted into factory in a district which is neither restricted nor strictly residential, are not entitled to that degree of protection from nuisance created by factory they might receive in strictly residential district, they are entitled to relief to the extent that their rights have been invaded. *Eastcott* v. *Metal Craft Co.*, 513.
2. Decree granting relief from nuisance created by factory adjacent to plaintiffs' home is modified, on appeal, with right reserved to them to again apply to court for further relief in case changes required are insufficient to give them the relief to which they are equitably entitled. *Id.* 514.

OATH OF OFFICE—See SCHOOLS AND SCHOOL DISTRICTS (4).

OCCUPANCY—See LICENSES (1).

OFFICERS—See CORPORATIONS (18–21, 31, 32, 37, 50, 51, 53).

OIL LEASES—See CORPORATIONS (35, 38).

OIL WELLS—See PRINCIPAL AND SURETY (3, 4).

OMISSION OF CHILD FROM WILL—See DESCENT AND DISTRIBUTION.

OPINION EVIDENCE—See WILLS (1); WITNESSES (1).

"OPPOSITE" PARTY—See WITNESSES (2).

OPTIONS—See ACTION (4); CONTRACTS (4–6); REFORMATION OF INSTRUMENTS (2); TENDER (4).

ORAL AGREEMENT—See FRAUDS, STATUTE OF (1); LANDLORD AND TENANT (5); LIMITATION OF ACTIONS; WITNESSES (2).

ORDER OF CIRCUIT JUDGE NOT REVIEWABLE BY ANOTHER—See COURTS (4).

ORDINANCES—See MUNICIPAL CORPORATIONS (3–5); PRINCIPAL AND SURETY (17).

OWNERSHIP OF BUSINESS INCLUDES BANK ACCOUNT—See RECEIVERS (11).

PADLOCKED PROPERTY—See EXCHANGE OF PROPERTY (1).

PAID SURETY—See PRINCIPAL AND SURETY (2, 10–17).

PAIN AND SUFFERING—See DAMAGES (3).

PARKING LOT—See BAILMENTS.

PARKWAY—See DEDICATION (3); HIGHWAYS AND STREETS (1, 2, 14); NEGLIGENCE (8).

PAROL CONTRACT—See CONTRACTS (7); FRAUDS, STATUTE OF (2, 3).

PARTIALITY—See DAMAGES (3)

PARTIES.

1. Absolute assignment to vendees by vendors of their interest in claim under fire insurance policy, made after loss occurred, vested entire claim in vendees, so that they became sole parties in interest. *Johnson* v. *National Fire Insurance Co.*, 126.
2. 3 Comp. Laws 1929, § 14010, authorizes person to sue as real party in interest if he can legally discharge debtor and satisfaction of judgment rendered will operate as such discharge, notwithstanding amount recovered may be for benefit of another. *Id.*
3. Where insurance company paid owner for damages to his automobile by collision and took assignment of all of owner's claims therefor, insurance company was real party in interest and could maintain suit in its own name. *National Liberty Ins. Co.* v. *Foth*, 153.
4. Where an assignment is such that satisfaction of judgment obtained by assignee will discharge defendant from his obligation to assignor, for the purpose of suit the assignee is the real party in interest and may maintain an action in his own name (3 Comp. Laws 1929, § 14010). *Sharrar* v. *Wayne Savings Ass'n*, 456.

See ADOPTION (13); APPEAL AND ERROR (21); COSTS (2); DIVORCE (2, 11); REPLEVIN.

PARTLY CLOSED HIGHWAY—See HIGHWAYS AND STREETS (4, 5).

PARTNERSHIP.

1. In suit for accounting of partnership business, finding of court below that partnership existed, *held*, justified by evidence. *Bowen* v. *Mohrhardt*, 408.
2. Finding of court below that defendant agreed to give plaintiff certain per cent. of earnings of business for year as recompense for delaying date when partnership was to become effective, is affirmed, on appeal. *Id.*
3. Finding of court below that defendant agreed that increase in plaintiff's salary should be allowed as from time he began work is affirmed, on appeal. *Id.* 409.
4. Partner who sold his interest in business, including good will, but who did not agree not to re-engage in business and who remained in purchaser's employ, could use the knowledge he

PARTNERSHIP—Continued.

there acquired in order to build a machine which would compete with his employer's machine in the market, after leaving his employ, unless it infringed upon the latter's design, for which a patent had been applied and was afterward obtained; no other trade secrets being involved. *Richards* v. *Kline*, 426.

See HUSBAND AND WIFE (2); MASTER AND SERVANT (17); SPECIFIC PERFORMANCE; TRADE-MARKS AND TRADE-NAMES (6–9).

PART PERFORMANCE—See FRAUDS, STATUTE OF (2).

PASS BOOK—See BANKS AND BANKING (1, 3, 5).

PASSING TITLE—See CONTRACTS (24); FRAUDULENT CONVEYANCES (17); GIFTS (1, 5); SALES.

PATENTS—See PARTNERSHIP (4); SPECIFIC PERFORMANCE.

PATRONAGE OF PUBLIC—See CONTRACTS (13).

PAUPERS.

County to which indigent persons were removed for hospital treatment after they became indigent is not liable to the hospital for such treatment (2 Comp. Laws 1929, § 8274). *Butterworth Hospital* v. *Sup'ts of Poor of Kent Co.*, 117.

PAYMENT.

1. Foreign corporation not authorized to do business in this State could not apply payments to illegal intrastate items of transaction rather than to legal interstate items without consent of debtors, because right of creditor to apply payments to specific accounts does not extend to illegal items representing transactions prohibited by statute (2 Comp. Laws 1929, § 14027). *Smilansky* v. *Mandel Bros.*, 575.

2. Payments made to foreign corporation not authorized to do business in this State intended to be credited upon whole consideration without preference to items, should be applied *pro rata* upon legal interstate and illegal intrastate items. *Id.* 576.

See BILLS AND NOTES (1–3); CONTRACTS (23); GARNISHMENT (2); INSURANCE (10, 16); PLEDGES; VENDOR AND PURCHASER (1, 4).

PEDESTRIAN—See MOTOR VEHICLES (15).

PERFORMANCE—See CONTRACTS (4); VENDOR AND PURCHASER (3).

PERITONITIS—See MASTER AND SERVANT (8).

PERJURY—See EQUITY (10).

PERMANENT INJURIES—See DAMAGES (1, 3).

PERMISSION—See LANDLORD AND TENANT (3).

PERSONAL INJURIES—See APPEAL AND ERROR (2, 9); DAMAGES (1, 3); EVIDENCE (1, 2); MOTOR VEHICLES (11, 12, 14–16); NEW TRIAL (2).

PERSONAL NOTICE—See CONSTITUTIONAL LAW (8); MORTGAGES (5, 7).

PERSONAL SURETY FOR HIRE—See PRINCIPAL AND SURETY (11).

PERSONALTY—See LICENSES (1).

PHYSICAL FACTS—See RAILROADS (4, 5).

PLATS—See HIGHWAYS AND STREETS (12, 14).

PLEADING.

1. While plaintiffs' bill for construction of deed does not specifically ask for reformation, such relief might well be granted under their prayer for general relief, and especially where the issue of reformation is definitely raised by defendant's cross-bill wherein reformation of the deed is prayed. *Nordberg* v. *Todd*, 440.
2. Where declaration contained two counts in fraud and one in assumpsit, finding by trial judge that defendant was guilty of fraud removed all uncertainty on what counts judgment was based. *Kirker* v. *Larson*, 648.

See ACTION (1); APPEAL AND ERROR (20); ARREST (1); ASSUMPSIT; BILLS AND NOTES (3, 11); CONTRACTS (21); CORPORATIONS (17); CRIMINAL LAW (4–6); DEDICATION (1–3); EMINENT DOMAIN (5); JUDGMENT (11); JUSTICES OF PEACE (2); LANDLORD AND TENANT (4); MOTOR VEHICLES (14); VENDOR AND PURCHASER (2).

PLEDGES.

Debtors' contention that their assignment of their vendee interest in land contract and bill of sale of personal property was given to creditors as security only and not in payment of debt, *held*, not established by evidence. *Roslowski* v. *Sztaba*, 508.

POPULATION—See CONSTITUTIONAL LAW (3, 5); JUSTICES OF PEACE (1).

POSSESSION—See BAILMENTS (4); CONSTITUTIONAL LAW (9); CONTRACTS (24); GIFTS (5); LANDLORD AND TENANT (3).

POSTING—See HIGHWAYS AND STREETS (4, 5); MORTGAGES (7).

POSTPONEMENT OF POSSESSION—See GIFTS (5).

POTENTIAL EXPANSION—See TRADE-MARKS AND TRADE-NAMES (7).

POVERTY—See EVIDENCE (2).

POWER OF COURT TO CONFIRM AWARD—See EMINENT DOMAIN (11).

POWERS OF RECEIVERS—See RECEIVERS (7, 8).

PRACTICE—See TRIAL (2).

PREFERENCES—See BANKS AND BANKING (9, 10, 13); FRAUDULENT CONVEYANCES (10); MECHANICS' LIENS (1); PAYMENT (2).

PREJUDICE—See DAMAGES (3).

PREMIUM—See INSURANCE (16).

PRE-ORGANIZATION CERTIFICATE OR SUBSCRIPTION—See CORPORATIONS (25).

PRESCRIPTION—See EASEMENTS (5).

PRESENTMENT—See BILLS AND NOTES (1, 2).

PRESUMPTIONS—See BILLS AND NOTES (3); CONSTITUTIONAL LAW (12); CORPORATIONS (19, 20); FRAUDULENT CONVEYANCES (3); MOTOR VEHICLES (7, 17, 18); PRINCIPAL AND SURETY (7).

PRIMA FACIE CASE—See BAILMENTS (5, 6); FRAUDULENT CONVEYANCES (2).

PRINCIPAL AND AGENT.

In absence of fraud, agent acting for disclosed principal is not liable to third party. *Van Wie* v. *Fidelity Trust Co.*, 108.

See BILLS AND NOTES (5); BROKERS (1, 2, 4, 5); CORPORATIONS (18, 23, 24); FRAUD (10); INSURANCE (11–13, 15, 16); MORTGAGES (3); VENDOR AND PURCHASER (8).

PRINCIPAL AND SURETY.

1. Where dealer in merchandise arbitrarily and illegally terminated and breached contract to sell goods to salesman on credit, sureties thereon were discharged from liability. *J. R. Watkins Co.* v. *Rich*, 82.

2. Where bond for performance of construction contract is executed by paid surety, latter is not released from liability by departure in execution of contract unless variation is material and operates to injury of surety. *Becker-Boter Oil & Gas Co.* v. *Massachusetts Bonding & Insurance Co.*, 94.

3. If contractor's delay in drilling oil well was caused by breakdown of machinery and reasons other than owner's failure to pay installment due, and latter had reason to fear well would not be completed although substantial sum had been paid on contract, it was justified in demanding assurance that work would be prosecuted diligently if money was paid, and such insistence was for benefit and not injury of contractor's surety. *Id.*

4. In action by owner against surety on oil well contractor's bond, finding of trial court that contractor had breached contract, entitling plaintiff to recover, *held*, not against great weight of evidence. *Id.*

5. In action against trustee and sureties on his bonds, finding of trial judge that securities as listed by trustee in his report were owned by him at time second bond was approved by

PRINCIPAL AND SURETY—Continued.

probate court, *held*, not against great weight of evidence. *Smith* v. *McCluskey*, 145.

6. While it is generally accepted rule that it is not prudent to invest trust funds in unsecured promissory notes, yet if such note was paid to trustee after his bond was given, the surety thereon would be liable to account for its proceeds on default of trustee. *Id.*

7. In action against trustee and sureties on his bonds, where surety disclaimed liability for amount of unsecured promissory note accepted by trustee, trial court properly held that there was presumption that note had been paid to trustee in absence of showing to contrary by production of note itself or other evidence repelling said presumption. *Id.*

8. Construction of contract of guaranty, if uncertain, must be against party drafting it. *Rose* v. *Ramm*, 259.

9. Specific enumeration of conditions which would render contract of guaranty void impliedly excludes other agreements from having effect of discharging it. *Id.*

10. One who conveyed his vendor's interest in a land contract, and, as part consideration, executed a contract guaranteeing payment of principal and interest, is not a gratuitous surety, and therefore not entitled to a strict construction of the contract. *Id.*

11. Failure to give notice of default of principal does not discharge a paid surety unless loss is shown therefrom, and this applies to personal sureties who receive consideration as well as to corporations engaged in the business of suretyship for hire. *Id.*

12. Inference may be drawn that corporation acting as surety on taxicab owner's bond was so acting for hire. *City of Detroit, for use of Watson*, v. *Blue Ribbon Auto Drivers' Ass'n*, 263.

13. Bonds of sureties for hire are more strictly construed against them than are bonds against gratuitous sureties. *Id.*

14. Surety for hire adopting its own wording in bond is bound thereby. *Id.*

15. Obligation of surety for hire is in nature of insurance, and in construction of such contracts courts usually invoke rules applicable to insurance. *Id.*

16. Bond given by surety for hire to afford protection to general public, if its terms permit, should be so construed as to accomplish that purpose. *Id.*

17. Where surety for hire on taxicab operator's bond did not limit its liability to license period, but liability was assumed for damages "to any person or property caused by the negligent operation of such taxicab," and the bond also provided that the surety would be liable in case taxicab was operated in violation of ordinance, the surety was liable for damages caused by negligent operation of taxicab after expiration of license in violation of city ordinance. *Id.*

See APPEAL AND ERROR (6).

PRIVATE SALE—See RECEIVERS (2, 4).

PRIVILEGE—See LIBEL AND SLANDER (9).

PRIVILEGE FEE—See LICENSES (2, 3).

PRIVITY OF CONTRACT—See BROKERS (2).

PROBATE COURT—See ADOPTION (13).

PROCESS—See GARNISHMENT (1, 2, 5).

PROCURING CAUSE—See INSURANCE (11, 13).

PROFITS—See EASEMENTS (2); LIBEL AND SLANDER (2); RECEIVERS (10, 12).

PROMISSORY NOTE—See INSURANCE (10); PRINCIPAL AND SURETY (6, 7).

PROOF OF FACTS ADJUDGED—See ADOPTION (1).

PROOF OF LOSS—See INSURANCE (1, 2, 5).

PROSPECTIVE BUSINESS—See INSURANCE (13, 15); LIBEL AND SLANDER (3).

PROSPECTIVE PROFITS—See CONTRACTS (13).

PROTEST—See BILLS AND NOTES (2).

PROXIMATE CAUSE—See MOTOR VEHICLES (16); NEGLIGENCE (7).

PUBLICATION—See LIBEL AND SLANDER (1, 4–6, 8, 9); MORTGAGES (7); MUNICIPAL CORPORATIONS (5).

PUBLIC PLACES—See CONTEMPT.

PUBLIC POLICY—See CONTRACTS (15, 30); DEDICATION (5, 6); ELECTIONS (2).

PUBLIC RECORDS—See MUNICIPAL CORPORATIONS (4, 5).

PUBLIC SALE—See RECEIVERS (1).

PUBLIC UTILITIES—See APPEAL AND ERROR (21); EMINENT DOMAIN (1, 3–6); MUNICIPAL CORPORATIONS (6).

QUALIFICATIONS OF ELECTORS—See SCHOOLS AND SCHOOL DISTRICTS (2, 3).

QUANTITY IN DESCRIPTION GIVES WAY TO FIXED LINES AND MONUMENTS—See BOUNDARIES (2).

QUASI-PUBLIC USE—See EASEMENTS (4).

QUESTION FOR JURY—See APPEAL AND ERROR (19); BILLS AND NOTES (12); CORPORATIONS (38); DESCENT AND DISTRIBUTION (1); INSURANCE (2); LIBEL AND SLANDER (10); MOTOR VEHICLES (9, 15, 16, 19); NEGLIGENCE (9); TRIAL (4).

QUESTION FOR REVIEW—See APPEAL AND ERROR (5, 6, 11); MASTER AND SERVANT (11).

RAILROADS.

1. Laborers and materialmen doing work for or furnishing material to railroad companies are protected under 2 Comp. Laws 1929, §§ 11394–11396, and not under the mechanics' lien law. *McClintic-Marshall Co.* v. *Ford Motor Co.*, 305.
2. Failure to have lights on locomotive and to sound whistle on approaching crossing constitute negligence. *Richman* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 607.
3. Law imposes care upon person approaching railroad crossing, and it is his duty to carefully observe and ascertain whether he can safely proceed to cross tracks. *Id.* 608.
4. Mere statement of automobile driver that he looked before proceeding to cross tracks does not overcome physical facts of case *Id.*
5. Automobile driver struck by locomotive at crossing was guilty of contributory negligence as matter of law, where it appears from physical facts that had he looked properly he would have seen the oncoming train and could have prevented accident, notwithstanding his testimony that he looked before proceeding and saw no train approaching. *Id.*

See EASEMENTS (1, 4); MASTER AND SERVANT (2, 4); MECHANICS' LIENS (3).

RANGE OF VISION—See MOTOR VEHICLES (17).

RAPE—See CRIMINAL LAW (1).

RATIFICATION—See CONTRACTS (25); CORPORATIONS (21); FRAUD (10).

REAL ESTATE DEALER—See LIBEL AND SLANDER (1).

REAL PARTY IN INTEREST—See PARTIES.

REASONABLE DOUBT—See CRIMINAL LAW (1, 2).

REASONABLE TIME—See LICENSES (1).

RECEIPT—See GIFTS (3); INSURANCE (16).

RECEIVERS.

1. "Public sale," under 3 Comp. Laws 1929, § 15355, is synonymous with "public auction" under section 15354. *In re Newbrough*, 170.
2. Where sale by receiver of assets of insolvent corporation was at private sale, and was so treated by the court, 3 Comp. Laws 1929, § 15355, providing for 14 days' notice of public sale, was not applicable. *Id.*
3. Where no objection was made at hearing that notice of confirmation of sale was insufficient under 3 Comp. Laws 1929, § 15355, the point was waived. *Id.*

RECEIVERS—Continued.

4. Where confirmation of sale of corporation's assets by receiver was objected to by certain stockholders on ground that sale was not properly advertised, but no constructive criticism was offered, trial court did not abuse its discretion in holding advertising sufficient, especially where sale was private, in which case advertisement is not required by law. *Id.*

5. Where there appears to be no possibility of new sale of assets at sufficient price to pay all debts and leave balance for stockholders, objection by certain stockholders that sale price is inadequate is without much force. *Id.*

6. Where stockholders objecting to confirmation of sale of corporation's assets by receiver on ground of inadequacy of price gave no assurance to court that other bids would be secured, court did not abuse its discretion in confirming sale, especially where value was not so inadequate as to shock conscience of court. *Id.*

7. Receiver of insolvent corporation appointed by circuit court is arm of the court, and derives his authority from the statutes and rules of court, the order appointing him, and specific orders which may from time to time be made by court of his appointment. *Woodliff* v. *Frechette,* 328.

8. Receiver of insolvent corporation as such has right to sue directors for discovery, to recover money claimed to have been lost through their fraud and negligence, and it is not necessary that he be specially authorized by the court to bring such suit (former Circuit Court Rule No. 61; Michigan Court Rule No. 53). *Id.*

9. Under decree requiring receiver to report to court true and complete accounting of deceased's business and of net profits earned since his death under management of his wife, her claim for advances to business prior to husband's death was properly disallowed. *Union Trust Co.* v. *Marsh,* 402.

10. Wife's claim, in accounting for profits of husband's business under her management since his death, that she had established the business and that her husband had made no contribution thereto, was properly rejected as having been litigated in prior suit. *Id.*

11. Decree determining that business claimed by wife belonged to husband's estate included account in bank in name of business, although it was not specifically referred to in decree. *Id.*

12. In accounting by wife for profits of husband's business since his death, advances by her to husband's children and grandchildren were properly disallowed. *Id.* 403.

See BANKS AND BANKING (10, 13); CORPORATIONS (3, 5, 16, 28–31, 51, 55).

RECITATIONS IN ADOPTION INSTRUMENT—See ADOPTION (9).

RECONVEYANCE—See DEEDS (4).

REDEMPTION—See MORTGAGES (2, 3).

REFERENCE TO PUBLIC RECORD—See MUNICIPAL CORPORATIONS (4, 5).

REFERENDUM—See CONSTITUTIONAL LAW (2).

REFORMATION OF INSTRUMENTS.

1. Where certain factors, omitted by mistake from contract for compensation to be paid to income tax experts for making defendant's income tax report in such way as to legally effect saving in tax paid on profit made on certain transaction, were essential to making computation of said compensation due under the contract in manner parties had in mind, contract was properly reformed by court below to include said necessary factors. *Amick* v. *Hickey*, 37.
2. Option required to be in writing may be reformed by decree in equity, on proper showing, but law court has no such power. *Van Wie* v. *Fidelity Trust Co.*, 108.
3. Land contract was properly reformed to correct description in name of subdivision, where there was no question as to property intended to be conveyed, and mistake was mutual clerical error. *Jaerling* v. *Longsdorf*, 558.

See APPEAL AND ERROR (20); PLEADING (1).

REGISTERED MAIL—See MORTGAGES (5).

REGULATION—See HIGHWAYS AND STREETS (4, 5).

REIMBURSEMENT—See FRAUD (6).

RELEASE—See INJUNCTION (6); INSURANCE (7, 15); PRINCIPAL AND SURETY (2); VENDOR AND PURCHASER (13, 15–18).

RELIEF—See CORPORATIONS (27); VENDOR AND PURCHASER (10).

REMARRIAGE—See DIVORCE (10, 11); HUSBAND AND WIFE (4).

REMEDIAL STATUTES—See FRAUDULENT CONVEYANCES (13).

REMEDY—See CONSTITUTIONAL LAW (8, 9); FRAUDULENT CONVEYANCES (12).

REMOVAL OF BUILDINGS—See LICENSES (1).

REMOVAL OF PAUPERS—See PAUPERS.

RENUNCIATION—See EASEMENTS (6).

REPEAL—See CONSTITUTIONAL LAW (8); EMINENT DOMAIN (4); MORTGAGES (5).

REPEATING VOID PROMISE—See CONTRACTS (29).

REPLEVIN.

Where declaration was sufficient, court acquired jurisdiction in replevin action, although affidavit and writ of replevin did not describe plaintiff as assignee of defendant's mortgagee. *Theatre Equipment Acceptance Corp.* v. *Betman*, 639.

REPUTATION—See LIBEL AND SLANDER (4).

REQUESTS TO CHARGE—See LIBEL AND SLANDER (7).

RESCISSION—See APPEAL AND ERROR (13); CANCELLATION OF INSTRUMENTS; CONTRACTS (11, 21, 22, 25–27, 33); CORPORATIONS (26); EQUITY (6, 7, 11, 13); EXCHANGE OF PROPERTY; JUDGMENT (3, 5); VENDOR AND PURCHASER (3–5, 7, 9–11, 14).

RESERVES—See BANKS AND BANKING (7–9).

RES GESTÆ—See MASTER AND SERVANT (23).

RESIDENTIAL DISTRICT—See NUISANCE (1).

RES JUDICATA—See HABEAS CORPUS; JUDGMENT (3–6); RECEIVERS (10).

RESOLUTIONS AUTHORIZING CORPORATION TO SUE DIRECTORS—See CORPORATIONS (40).

RESTAURANT BUSINESS—See VENDOR AND PURCHASER (7).

RESTRAINT OF TRADE—See CONTRACTS (15, 16, 19).

RESTRICTIONS—See DEDICATION (5, 6); HIGHWAYS AND STREETS (2).

RETRIAL—See JUDGMENT (6–8).

RETURN OF ASSETS—See CORPORATIONS (2, 3).

REVERSIONARY CLAUSE—See DEEDS (2).

REVIVING CORPORATION—See CORPORATIONS (1, 4, 5).

RIGHT OF ACTION—See CONSTITUTIONAL LAW (1); HUSBAND AND WIFE (4); MOTOR VEHICLES (5).

RIGHT OF WAY—See HIGHWAYS AND STREETS (6); MOTOR VEHICLES (1, 2).

RIGHT TO DO BUSINESS—See CORPORATIONS (41); EQUITY (15).

ROOFING JOBS—See MASTER AND SERVANT (9).

ROOF SIGNS—See LANDLORD AND TENANT (3).

RULES OF DEPARTMENT OF LABOR AND INDUSTRY—See MASTER AND SERVANT (14, 15).

SALARY—See PARTNERSHIP (3).

SALE AS ENTIRETY—See MORTGAGES (6).

SALE BY ADMINISTRATRIX TO HERSELF—See EXECUTORS AND ADMINISTRATORS (1).

SALE IN INVERSE ORDER OF ALIENATION—See VENDOR AND PURCHASER (16).

SALE OF ASSETS—See CORPORATIONS (3, 5); RECEIVERS (2–6).

SALES.

Generally, when one has agreed to sell and the other to buy a specific and designated article, the title passes to the purchaser at once unless the contract indicates the intention to have been otherwise. *Draper* v. *Nelson*, 380.

See CONTRACTS (12, 14); FRAUDS, STATUTE OF (2, 3).

SALESMAN—See PRINCIPAL AND SURETY (1).

SATISFACTION—See INSURANCE (10); PARTIES (2).

SAVING QUESTION FOR REVIEW—See APPEAL AND ERROR (5, 11).

SAVINGS AND LOAN ASSOCIATIONS—See CONTRACTS (25).

SCHOOLS AND SCHOOL DISTRICTS.

1. Failure of inspectors to initial ballots cast at election held under 2 Comp. Laws 1929, § 7487, for purpose of authorizing bond issue by school district, did not void election, in absence of fraud or mandatory law commanding initialing. *Thompson* v. *Cihak*, 641.
2. In proceedings attacking validity of election authorizing bond issue by school district, trial court properly inquired into qualifications of alleged unqualified electors and how those unqualified voted. *Id.*
3. That election inspectors permitted unqualified persons to vote does not invalidate election, unless it is affirmatively shown that such wrongful vote overturned declared result of election. *Id.* 642.
4. Where school district officers took oath of office, their failure to take oath as inspectors of school bond election, which was part of their duties, was mere irregularity which did not invalidate election. *Id.*
5. Failure of school district officers, acting as inspectors of school bond election, to appoint fourth inspector, was mere irregularity which did not invalidate election, in absence of request by electors that such appointment be made. *Id.*

SCOPE OF ACCOUNTING UNDER DECREE—See RECEIVERS (9).

SCOPE OF EMPLOYMENT—See MASTER AND SERVANT (21, 22).

SECRET PROFITS—See CORPORATIONS (32, 37–40).

SECTION FOREMAN—See MASTER AND SERVANT (2–5, 7).

SECURITIES—See CORPORATIONS (22, 23); PRINCIPAL AND SURETY (5).

SECURITY—See MORTGAGES (6).

SELF-INCRIMINATION—See CONSTITUTIONAL LAW (11, 13); CRIMINAL LAW (7); STATUTES (2).

SELLER MAY NOT DESTROY THING SOLD—See CONTRACTS (17).

SENTENCE—See CRIMINAL LAW (4–6).

SERVITUDE—See EASEMENTS (3).

SET-OFF AND RECOUPMENT.

1. Damages resulting from slander may not be set off in defense of action of assumpsit, and therefore affidavit of merits containing allegations of plaintiff's slander of defendant with resulting damage is insufficient to prevent entry of summary judgment in action for rent due under lease.—*Cross* v. *Hickey*, 330.

2. While demand arising from judgments for costs may be set off by defendant in action of assumpsit, it is not necessary to establish defendant's right of set-off, since defendant could issue execution on these judgments (3 Comp. Laws 1929, § 14132). *Id.* 331.

See APPEAL AND ERROR (16); EXECUTION (1).

SETTING ASIDE PLEA OF GUILTY—See CRIMINAL LAW (5, 6).

SETTLEMENT RECEIPT—See MASTER AND SERVANT (18, 19).

SEVERABILITY—See CONTRACTS (23, 31); EASEMENTS (3); MECHANICS' LIENS (6, 10); MORTGAGES (6).

SEWER SYSTEM—See DEDICATION (3–5).

SHARES OF STOCK—See ACTION (4).

SHERIFF—See EXECUTION (1).

SHRUBS—See HIGHWAYS AND STREETS (14).

SIGNATURE—See CONTRACTS (11); CORPORATIONS (19); MASTER AND SERVANT (11).

SINGLE CONDEMNATION PROCEEDING MUST COVER ALL LANDS SOUGHT—See EMINENT DOMAIN (6).

SLANDER—See LIBEL AND SLANDER.

SOVEREIGN POWER—See CONSTITUTIONAL LAW (4).

SPECIAL APPEARANCE—See JUDGMENT (11).

SPECIAL PROCEEDING—See ACTION (2).

SPECIFIC ENUMERATION—See PRINCIPAL AND SURETY (9).

SPECIFIC ISSUE—See ACTION (1).

SPECIFIC PERFORMANCE.

Suit for specific performance of partnership dissolution agreement was properly dismissed, where the only issue presented was whether machine manufactured and sold by defendant in competition with plaintiff's business was infringement on patent obtained by plaintiff, since such issue should be determined in suit brought therefor in proper court. *Richards* v. *Kline*, 426.

SPEED—See MOTOR VEHICLES (8).

SPLITTING CAUSE OF ACTION—See ACTION (5).

STATE AS PARTY—See DIVORCE (2).

STATE BANKING COMMISSIONER—See BANKS AND BANKING (7).

STATE HIGHWAY COMMISSIONER—See EMINENT DOMAIN (5, 7–11); HIGHWAYS AND STREETS (4, 5).

STATES.

Petition in circuit court by landowners for confirmation of arbitrator's award in connection with taking land for highway purposes pursuant to agreement with State highway commissioner, is not suit against State. *Church* v. *State Highway Dept.*, 666.

See EMINENT DOMAIN (11)

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

1. Proceeding with relation to person intoxicated in public place, provided by 2 Comp. Laws 1929, § 9182, considered civil as to him, is by complaint, subpœna, and interrogation for discovery and apprehension of others. *In re Harrand*, 585.

2. One arrested and brought before justice of peace charged with intoxication in public place, and pleading guilty, may not be required under 2 Comp. Laws 1929, § 9182, to disclose from, whom and conditions under which he procured his liquor, since person so interrogated is entitled to testify with freedom and rights of witness assured of statutory immunity, and not "under shadow of a policeman's club" or jail sentence. *Id.*

See ACTION (1, 3); ADOPTION (2–4, 8, 9); ARREST (1, 2); ATTORNEY AND CLIENT; BAILMENTS (4, 5); BILLS AND NOTES (1, 8, 12); CONSTITUTIONAL LAW (2–14); CONTEMPT; CONTRACTS (30, 31); CORPORATIONS (1–3, 5, 22–26, 41, 42, 44–46); CRIMINAL LAW (7, 9); DEDICATION (1); DESCENT AND DISTRIBUTION (1); DIVORCE (1, 4–6, 11); EMINENT DOMAIN (1, 3–8); EQUITY (15); EXECUTION (1); FRAUDULENT CONVEYANCES (4, 6, 9, 11–15); GARNISHMENT (2, 3); HIGHWAYS AND STREETS (3–5, 8–10); HUSBAND AND WIFE (1, 2, 4); INSURANCE (14); JUSTICES OF PEACE (1); MECHANICS' LIENS (1, 11); MORTGAGES (5–7); MOTOR VEHICLES (2, 5, 18); MUNICIPAL CORPORATIONS (1); PARTIES (2, 4); PAUPERS; PAYMENT (1); RAILROADS (1); RECEIVERS (1–3, 7); SCHOOLS AND SCHOOL DISTRICTS (1); SET-OFF AND RECOUPMENT (2); STREET RAILWAYS; TRUSTS (1); VENDOR AND PURCHASER (19); WITNESSES (2).

STATUTORY PROVISIONS MUST BE COMPLIED WITH—See ADOPTION (3).

STAY BOND—See INJUNCTION (6).

STENOGRAPHER'S CERTIFICATE—See EXCEPTIONS, BILL OF (1, 3).

STOCKHOLDERS—See CORPORATIONS (4–6, 9–14, 16, 17, 51, 55); RECEIVERS (4–6).

STOLEN CAR—See BAILMENTS (2, 5, 6).

STOP SIGN—See HIGHWAYS AND STREETS (6); MOTOR VEHICLES (2, 3).

STREET CROSSING—See MOTOR VEHICLES (15).

STREET RAILWAYS.

Those who furnish labor and material to street railways are protected under 2 Comp Laws 1929, § 11397, and not under the mechanics' lien law. *McClintic-Marshall Co.* v. *Ford Motor Co.*, 305.

See EASEMENTS (4).

SUGAR—See MASTER AND SERVANT (8).

SUITABLE MAINTENANCE—See DIVORCE (4, 5).

SUMMARY JUDGMENT—See APPEAL AND ERROR (16); JUDGMENT (9); SET-OFF AND RECOUPMENT (1).

SUMMARY PROCEEDING—See EQUITY (16); INJUNCTION (6).

SUPERVISORS, BOARD OF—See HIGHWAYS AND STREETS (10).

SURETY—See PRINCIPAL AND SURETY.

SURETY FOR HIRE—See PRINCIPAL AND SURETY (2, 10–17).

SURPLUSAGE—See ASSUMPSIT (3); EMINENT DOMAIN (12); VENDOR AND PURCHASER (12).

SURPLUS PROFITS—See CORPORATIONS (52–54).

SURRENDER OF LEASE—See FRAUDS, STATUTE OF (5); LANDLORD AND TENANT (5, 6).

SUSPENSION OF BUSINESS—See BANKS AND BANKING (8, 11).

SYMPATHY—See EVIDENCE (2).

SYNDICATE—See CONTRACTS (20–22); CORPORATIONS (22–26); EQUITY (12); FRAUD (3, 5).

TAXATION—See HIGHWAYS AND STREETS (10).

TAXES—See DAMAGES (2); VENDOR AND PURCHASER (1, 8, 13).

TAXICAB OPERATORS—See PRINCIPAL AND SURETY (12, 17).

TECHNICAL TRESPASS—See NEGLIGENCE (6).

TELEPHONE SYSTEM—See DEDICATION (3–5).

TEMPORARY RECEIVER—See CORPORATIONS (51, 55).

TENANTS BY ENTIRETIES—See DIVORCE (6).

TENANTS IN COMMON—See DIVORCE (6); EQUITY (5).

TENDER.

1. Where defendants prevented plaintiff from making tender by failing to be at home as agreed, tender should be considered same as it would have been made to defendants in person and without objection by them that it was not legal tender. *O'Toole & Nedeau Co.* v. *Boelkins*, 44.
2. Certificate of deposit indorsed in blank is legal tender, in absence of objection thereto. *Id.*
3. Defendants' failure to be present as agreed, when plaintiff would have tendered certificates of deposit as payment, estops defendants from claiming that, if present, they would have objected to such tender as being legally insufficient. *Id.*
4. Optionee may not be deprived of his rights under option by optionor's avoiding him until time for performance expired and then claiming that tender, if made as intended, would have been objected to as legally insufficient; especially where tender as intended to be made would have been sufficient in absence of objection thereto. *Id.*

See CONTRACTS (21); CORPORATIONS (26); MORTGAGES (1, 3).

TERMINATION—See CONTRACTS (5, 6); EASEMENTS (6–8); PRINCIPAL AND SURETY (1); VENDOR AND PURCHASER (10).

TEST OF RELATIONSHIP—See MASTER AND SERVANT (10).

TIME FOR FILING STATEMENT OF LIEN—See MECHANICS' LIENS (11).

TITLE—See DEEDS (1); FRAUD (9); FRAUDS, STATUTE OF (1); MECHANICS' LIENS (6); TRUSTS (2); VENDOR AND PURCHASER (11, 16).

TORTS—See ARREST (2); ASSUMPSIT (1, 2); EXECUTION (2); FRAUDULENT CONVEYANCES (14).

TOWNSHIPS—See HIGHWAYS AND STREETS (9).

TRADE-MARKS AND TRADE-NAMES.

1. Each case of unfair competition is determined upon its own facts, and relief is based upon principles of common business integrity. *Good Housekeeping Shop* v. *Smitter*, 592.
2. Essential point of unfair competition is actual competition, shown from specific instances or as a natural tendency of defendant's act. *Id.*
3. Corporation operating chain stores under trade-name is not entitled to enjoin partnership's use of same trade-name, where nearest store is 100 miles away, there is no actual

TRADE-MARKS AND TRADE-NAMES—Continued.

competition, no natural tendency to competition, and even possibility of competition is remote; and other circumstances usually attending unfair competition are absent. *Id.*

4. Trade name or mark, unlike patent, carries no monopoly of use beyond market of person claiming it. *Id.*

5. Where outstanding and widely-known name, made valuable by owner, is being pirated for purpose of deceiving public, its use may be enjoined even in territory where owner did not have established place of business and there is no actual competition. *Id.*

6. Corporation using trade-name which has not attained great celebrity is not entitled to enjoin partnership's use of same name in territory where corporation has no place of business, and where public is not deceived into believing that when trading with partnership they are trading with corporation. *Id.* 593.

7. Corporation operating chain stores under trade-name is not entitled to enjoin partnership's use of same name 100 miles away on ground of modern business tendencies and that it is entitled to protection within field of potential expansion; especially where name adopted had been made valuable by another. *Id.*

8. There being no statutory prohibition against use of corporation's name by partnerships or individuals, rules of unfair competition are controlling. *Id.*

9. If corporation takes and uses business name of partnership or individual in manner resulting in unfair competition, court will restrain it, or if it already has similar name, corporation will be prohibited from invading territory of partnership or individual. *Id.* 594.

TRADE SECRETS—See PARTNERSHIP (4).

TRANSFER TO OTHER SIDE OF COURT—See EQUITY (11).

TRESPASS—See HIGHWAYS AND STREETS (7); NEGLIGENCE (5–8).

TRIAL.

1. Directed verdict in favor of plaintiff was proper where it was justified even if certain issues of fact presented in the case were resolved in favor of defendant. *Rose* v. *Ramm,* 259.

2. Practice of taking testimony by reference to a drawing or outline, and which has little or no meaning when read from the printed record, is not to be commended. *Haara* v. *Vreeland,* 462.

3. Trial court's use of word "slightest," in charging jury as to burden of proof on plaintiff to show that her decedent "was free from any negligence which contributed to the injury, and when I say any negligence I mean even the slightest," *held,* not error as used in context, and especially in view of subsequent instruction properly defining negligence and contributory negligence. *Id.*

TRIAL—Continued.

4. Trial court's use of words "as a matter of law," in instructing jury "if you find that at the time of the collision there was no tail light on the trailer and the lack of such tail light was one of the causes of such collision, then the said H. (decedent) was, as a matter of law, guilty of contributory negligence," *held,* not error, since court clearly submitted question to jury as issue of fact. *Id.*

See APPEAL AND ERROR (10, 14); CRIMINAL LAW (1); JUDGMENT (7, 10); LIBEL AND SLANDER (7–9); MOTOR VEHICLES (13); NEGLIGENCE (9); RECEIVERS (3).

TRICK—See CONTRACTS (10).

TRUCK DRIVER—See MASTER AND SERVANT (22).

TRUSTEE—See CONTRACTS (21, 22); CORPORATIONS (9, 15, 16, 23, 24); PRINCIPAL AND SURETY (5–7).

TRUST FUNDS—See BANKS AND BANKING (8, 9).

TRUSTS.

1. In absence of fraud, accident, or mistake, parol testimony is inadmissible to establish trust in real estate (3 Comp. Laws 1929, § 13411). *Racho* v. *Beach,* 600.

2. Where title to real estate has been obtained through fraud, misrepresentation, concealment, undue influence, duress, or other similar circumstances which render it unconscionable for holder of legal title to retain property, and there are no intervening rights of *bona fide* purchasers, equity will impress constructive trust on property. *Id.*

See BANKS AND BANKING (8, 10, 12, 13); CORPORATIONS (34, 36); GIFTS (2, 3); PRINCIPAL AND SURETY (5–7).

ULTRA VIRES ACTS—See CORPORATIONS (51, 55).

UNAUTHORIZED DISCONTINUANCE OF PAYMENTS—See MASTER AND SERVANT (20).

UNAUTHORIZED SALE—See CORPORATIONS (24).

UNDERPASS—See EASEMENTS (1, 3, 4); MECHANICS' LIENS (3, 7, 10).

UNDUE INFLUENCE—See TRUSTS (2).

UNEXPIRED TERM OF LEASE—See FRAUDS, STATUTE OF (5).

UNFAIR COMPETITION—See CORPORATIONS (46, 49); TRADE-MARKS AND TRADE-NAMES (1–3, 5–9).

UNIFORM FRAUDULENT CONVEYANCE ACT—See FRAUDULENT CONVEYANCES (11–15).

UNQUALIFIED ELECTORS—See ELECTIONS (1); SCHOOLS AND SCHOOL DISTRICTS (2, 3).

UNSECURED PROMISSORY NOTE—See PRINCIPAL AND SURETY (6).

USE OF NAME—See CORPORATIONS (47, 48); TRADE-MARKS AND TRADE-NAMES (3–9).

USES OF STREET—See DEDICATION (4).

USURY.

Mortgagor not offering to do equity is not entitled to cancellation of mortgage on ground of usury. *Windisch* v. *Mortgage Security Corp. of America*, 492.

VACATING STREET—See HIGHWAYS AND STREETS (13).

VARIATION OF CONSTRUCTION CONTRACT—See PRINCIPAL AND SURETY (2).

VENDOR AND PURCHASER.

1. In suit involving land contract, where it does not appear in record that tax has been paid, but plaintiffs' brief states that tax was paid and county treasurer's certificate was filed in law action on contract, decree is withheld until it is made part of record by stipulation of counsel or filing of such certificate in this court. *McHugh* v. *Trinity Building Co.*, 202.
2. Where defendants filed answer in nature of cross-bill, alleging default and praying for foreclosure, an answer thereto was demanded, and it was not answered by merely denying that defendants were entitled to relief prayed for; but this is of little moment where plaintiffs admitted nonpayment, alleged excuse, and asked for relief. *Id.*
3. In vendees' suit for rescission of land contract and other relief where it appears that agreement in writing was entered into that plaintiffs would accept the property on condition that certain repairs and improvements were made by vendor, testimony, *held*, sufficient to establish that agreement on part of vendor was fully performed. *Pariseau* v. *Trinity Building Co.*, 213.
4. Where vendees, after discovering misrepresentations as to property sold and defects in building, agreed in writing to accept the property on condition that certain repairs and improvements were made, and thereafter continued to make payments, they thereby waived, not only the right to rescind, but also the fraud. *Id.*
5. Where, in vendees' suit for rescission of land contract, it appears that fraud of vendor relied on was waived, vendor is entitled, on cross-bill, to decree of foreclosure of vendor's lien. *Id.*
6. Vendor, by taking judgment for installments of purchase price past due, with interest, did not thereby waive its vendor's lien. *Id.*
7. Purchaser of lease and restaurant business who undertook to secure lessor's written consent to assignment to him of lease had no legal ground for rescinding the contract because he

VENDOR AND PURCHASER—Continued.

failed to secure consent of assignment satisfactory to him, where no notice of such failure was given to seller or opportunity afforded him to secure it; and especially where purchaser was offered proper written consent and refused to accept it. *Mooradian* v. *Petroff*, 278.

8. Misrepresentations by vendor's agent, in sale of apartment house, as to annual cost of insurance, fuel, and taxes were material. *Chanler* v. *Venetian Properties Corp.*, 468.

9. Purchasers of apartment house who brought suit for rescission on ground of fraud in about seven months after they took possession were not guilty of laches, where knowledge of fraud came to them only by degrees, and suit was instituted as culmination of numerous misrepresentations. *Id.*

10. In vendee's suit for rescission on ground of fraud, and vendor's cross-bill for foreclosure, where neither party comes into court with clean hands, but unusual conditions are presented, final adjudication is made which affords parties substantially same rights they would have had incident to termination of contract in action at law. *Id.*

11. Vendee is not entitled to rescission of contract for purchase of several lots because vendors deeded one lot to another, where at time of suit they had reacquired title. *Jaerling* v. *Longsdorf*, 558.

12. Where lots conveyed in land contract were described as being in "Beech Hill Park subdivision," when in fact there is no such subdivision, but lots are in "Beech Hill subdivision," and there is no difficulty in locating them from other description, word "Park" is treated as surplusage. *MacLeod* v. *Hamilton*, 653, 658.

13. Where vendee was in default in payments as well as taxes he was not entitled to release of lots because of payments on contract, since they were not "additional" payments provided for in contract commanding release of lots. *Id.*

14. Where abandoned easement is cloud on title, vendor is not entitled to foreclose land contract until cloud is removed, but it constitutes no justification for rescission by vendee. *Id.* 654.

15. Assignee of vendee is not entitled to benefit of provision in contract for release of lots by vendor on payment of additional sums, where it was in default in contract payments. *McClure* v. *Edward J. Meyer Southfield Woods Corp.*, 686.

16. In suit by vendor to foreclose land contract against lots under contract of sale by vendee, but not released by vendor because of vendee's default, and therefore title had not passed, rule requiring sale in inverse order of alienation is not applicable. *Id.*

17. Vendor foreclosing land contract requiring release of lots on payment of additional sums, was not required, before or during foreclosure, to adjust equities between vendee and its land contract, vendees. *Id.* 687.

VENDOR AND PURCHASER—Continued.

18. Release of lots pursuant to contract did not cut off vendor's right to foreclosure on all lots not released on vendee's default in payments. *Id.*

19. Proceedings to foreclose land contracts are not regulated by statutory provisions with respect to foreclosure of mortgages. *Id.*

20. In suit by vendor to foreclose land contract against lots under contract of sale by vendee, decree ordering such lots sold subject to balance to become due on land contract, to satisfy amounts past due, from which purchasers have not appealed, worked no harm to vendee. *Id.*

21. Measure of damages for vendor's breach of contract to convey land is difference between market value of land at time of breach and contract price thereof. *Bucuss* v. *Schuler*, 690.

See BROKERS (5); CONTRACTS (24); EQUITY (13, 16).

VENDOR'S LIEN—See VENDOR AND PURCHASER (5, 6).

VESTED TITLE—See EQUITY (2).

VESTIBULE—See LANDLORD AND TENANT (2); NEGLIGENCE (1).

VOIR DIRE EXAMINATION—See CONSTITUTIONAL LAW (7); MOTOR VEHICLES (10, 12, 13).

WAIVER—See BAILMENTS (1); BILLS AND NOTES (1, 2); FRAUDULENT CONVEYANCES (14); HUSBAND AND WIFE (5, 6); INSURANCE (2, 5); RECEIVERS (3); VENDOR AND PURCHASER (4–6).

WARNING—See RAILROADS (2).

WATER—See DEDICATION (3–5).

WATER POWER—See EMINENT DOMAIN (4, 5); MUNICIPAL CORPORATIONS (6).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (19); JUDGMENT (7, 8); PRINCIPAL AND SURETY (4, 5).

WIFE'S LIEN ON HUSBAND'S PROPERTY NOT ABROGATED BY THEIR REMARRIAGE—See DIVORCE (10); HUSBAND AND WIFE (4).

WIFE'S SERVICES—See HUSBAND AND WIFE (1, 2, 5, 6).

WILFUL FRAUD—See ARREST (4).

WILFUL INTENT TO DEFRAUD—See EXECUTION (2).

WILFUL TORTS—See ARREST (2).

WILLS.

1. Testimony by a medical expert, who had never seen or heard of testator in his lifetime, that testator was incompetent to make a will, given in response to a hypothetical question based on no facts tending to show testator's mental incompetency, was not evidence. *In re Sachs' Estate*, 358.

WILLS—Continued.

2. Where no one acquainted with testator testified to anything indicating either mental incompetency or undue influence, and the scrivener who drew the will, the subscribing witnesses who were old friends of testator, and the doctors who treated him all testified that he was mentally competent, a verdict for proponents was properly directed. *Id.* 359.

See DESCENT AND DISTRIBUTION.

WITNESSES.

1. Unless lay witnesses give facts upon which their conclusions as to person's mental incompetency are based, their testimony is inadmissible, under objection. *Hake* v. *Youngs*, 545.

2. In wife's claim against estate of husband's father for services rendered under oral contract, husband, who was not party to contract, was not "opposite" party within meaning of statute (3 Comp. Laws 1929, § 14219), and therefore his testimony was not barred because equally within knowledge of deceased. *Wisniewski* v. *Wisniewski's Estate*, 663.

See CONSTITUTIONAL LAW (11–14); CONTEMPT; CRIMINAL LAW (7); LIBEL AND SLANDER (5); STATUTES; WILLS (2).

WOODEN BUILDINGS—See MUNICIPAL CORPORATIONS (3).

WORDS AND PHRASES—See BAILMENTS (4); CHARITIES (1); CONTRACTS (13); CORPORATIONS (22); EASEMENTS (2); HIGHWAYS AND STREETS (11); RECEIVERS (1).

WORK AND LABOR—See LIMITATION OF ACTIONS.

WORKMEN'S COMPENSATION ACT—See MASTER AND SERVANT (1, 8–13, 17, 18).

WRITTEN CONSENT TO ASSIGNMENT—See LANDLORD AND TENANT (7); VENDOR AND PURCHASER (7).

WRONG SIDE OF ROAD—See APPEAL AND ERROR (14).