MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JANUARY 7 to APRIL 7, 1931

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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

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ATTORNEY GENERAL—PAUL W. VOORHIES, DETROIT.

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13.	PARM C. GILBERT,	TRAVERSE CITY.
14.	JOHN VANDERWERP,	MUSKEGON.
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36.	GLENN E. WARNER,	PAW PAW.
37.	BLAINE W. HATCH,	MARSHALL.
38.	JESSE H. ROOT,	MONROE.
39.	GEORGE A. RATHBUN,	TECUMSEH.
40.	HENRY H. SMITH,	CARO.

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DONALD VAN ZILE, CHRISTOPHER E. STEIN,
JOHN A. BOYNE, THOMAS M. COTTER,
W. McKAY SKILLMAN, HENRY S. SWEENY,
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SHERMAN D. CALLENDAR, JOHN J. MAHER, } TRAFFIC AND ORDINANCE DIVISION.

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JANUARY TERM, 1931.*

CARROLLTON ACCEPTANCE CO. *v.* RUGGLES MOTOR TRUCK CO.

1. FRAUDS, STATUTE OF—SALES.
   Sale of parts for trucks manufactured especially for buyer and not suitable for sale to others in regular course of business falls within exception to statute of frauds (3 Comp. Laws 1915, § 11835, subd. 2).

2. SALES—RESERVATION OF TITLE—DEPARTURE FROM OFFER.
   Where goods were shipped by seller with sight draft attached, contrary to buyer's order, and draft was not paid, title remained in seller, and therefore buyer is not liable for goods not delivered (3 Comp. Laws 1915, § 11851, subd. 1).

3. CONTRACTS—OFFER AND ACCEPTANCE—DEPARTURE FROM OFFER.
   Material departure from terms of offer invalidates offer as made and results in counter proposition, which, unless accepted, cannot be enforced.

Appeal from Saginaw; Browne (Clarence M.), J. Submitted October 14, 1930. (Docket No. 71, Calendar No. 35,179.) Decided January 7, 1931.

Bill by Carrollton Acceptance Corporation against Ruggles Motor Truck Company for appointment of a receiver. Perfex Corporation and Detroit Steel Products Company filed claims for goods alleged to have been sold to receiver. From an order disallowing claims, claimants appeal. Affirmed.

* Continued from Vol. 252.

Humphrey, Grant & Henry, for appellants.

O'Keefe & O'Keefe, for appellee receiver.

BUTZEL, C. J. On the application of plaintiff, a receiver was appointed by the circuit court for the county of Saginaw, in chancery, for the Ruggles Motor Truck Company, defendant. He was authorized to continue the business as a going concern, employ labor, purchase material in the usual course of trade, and do all things necessary to manufacture motor trucks. The receiver from time to time gave orders to Perfex Corporation and Detroit Steel Products Company, claimants and appellants. The nature of the claims and the defenses to them are so similar that they may be treated as one, except as otherwise indicated. In each instance orders for materials were given by the receiver on printed forms, which contained the following provisions:

"No drafts will be honored.

"Monthly statement must be rendered promptly. * * *

"Order must be acknowledged promptly.

"Raise objections, if any, before proceeding to execute."

The orders called for radiators, springs, and parts thereof especially designed and manufactured by claimants for Ruggles Motor Trucks in accordance with the blueprints furnished prior to the receivership. The goods were shipped from time to time by claimants on entirely different terms than those specified in the orders. Instead of extending credit to the receiver, a sight draft was drawn on him in each instance and sent for collection with the attached bill of lading, indorsed in blank, and

with instructions to the carrier to notify the receiver. A large number of these drafts were not honored. Upon the receiver's failure to pay the drafts, the shipments in some way not disclosed by the record, but presumably through the action of the carrier, were sent to a storage warehouse in Saginaw. In one instance the receiver wrote to one of the claimants that he had taken up one of the drafts and expected to take up another one very shortly. He also wrote the other claimant that he expected to take up all of the drafts shortly as a reorganization was in process. The record, however, does not show that the receiver agreed to waive the terms as set forth in the orders.

Each claimant has filed a claim for the price of the goods sent in the manner indicated. It claims that upon the delivery of the goods to the carrier the title passed to the receiver, subject to a lien that claimant retained solely as security. The receiver, however, claims that there was never an acceptance of the orders as given; that each order was in excess of $100, and could not be enforced because the contract did not comply with the statute of frauds; that the title never passed to the receiver, but remained in the claimants, so that, even if the order had been accepted, the claimants could only have recovered for damages caused by breach of contract and not for the value of the goods; that claimants are precluded from suing for breach of contract because they did not take advantage of an opportunity to sell the goods to others. The judge of the lower court held that the title to the goods never passed, and that claimants could not recover for the price of the goods, nor could they recover for breach of contract, because the testimony shows that the goods could have been sold

without loss. Claimants have appealed from the order of disallowance.

The case falls within the exception to the statute of frauds: When goods are manufactured by seller especially for the buyer and are not suitable for sale to others in the regular course of the seller's business. Subdivision 2, section 11835, 3 Comp. Laws 1915. The goods were manufactured solely for the particular kind of trucks made by defendant. The only parties disclosed by the record, as interested in purchasing the goods after the receiver's refusal to pay the drafts, were the purchaser of the assets at the receiver's sale, who continued to make and assemble Ruggles trucks, and also another company dealing in service for those models of cars and trucks the manufacture or assembly of which had been discontinued by the original manufacturer thereof.

The other question, however, is more difficult. Subdivisions 1 and 2 of section 20 of the uniform sales act, section 11851, 3 Comp. Laws 1915, provide as follows:

"(1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

"(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill

of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract."

As Professor Williston has pointed out in his work on Sales (2d Ed.), Vol. 2, § 560-b, these provisions of the act present a troublesome problem for it is at times difficult to tell whether the title has passed or whether it is held solely as security. In the present instance, however, orders specifying certain terms were sent by the receiver to claimants. They did not accept them but made a counter-order by sending the goods on different terms. There is no showing that the minds of the parties met and that there was a contract. At most, it can be said that the goods were sent to the receiver with an offer that upon payment of the drafts the title would pass to him. Until he did so, the title remained in the claimants. Under subdivision 1 of section 20 of the Uniform Sales Act, *supra,* the title remained in the claimants. Any material departure from the terms of an offer invalidates the offer as made and results in a counter proposition, which, unless accepted, cannot be enforced. *Baird* v. *Pratt,* 78 C. C. A. 515 (148 Fed. 825, 10 L. R. A. [N. S.] 1116); *St. John Brothers Co.* v. *Falkson,* 237 Mass. 399 (130 N. E. 51); *Williams* v. *Emerson-Brantingham Implement Co.* (Mo. App.), 198 S. W. 425.

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

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

CITY OF DETROIT *v.* JUDGE OF RECORDER'S COURT OF CITY OF DETROIT.

1. MUNICIPAL CORPORATIONS—DEDICATION—HIGHWAYS AND STREETS—REVERSIONARY INTEREST—WAIVER—ACCEPTANCE OF PLAT—ABANDONMENT.

   Reservation by dedicators of plat of strip of land in middle of street for ornamental purposes, with right to abutting owners to vacate street if city failed to maintain strip in ornamental manner, did not of itself empower city to abandon it at will, but dedication must be presumed to be subject to city's right, under its charter (Act No. 326, Local Acts 1883, chap. 7, § 33, as amended by Act No. 544, Local Acts 1887), to abandon strip, and acceptance of plat and dedication did not constitute waiver of said right.

2. PLEADING—DISMISSAL AND NONSUIT—MOTION TO DISMISS—ASSUMPTION.

   In disposing of motion to quash petition for condemnation of land to widen city street, court must assume that facts set forth in petition are true and that necessity to condemn may be established.

3. EMINENT DOMAIN—NECESSITY JURY QUESTION.

   In proceedings to condemn land to widen city street, question of necessity must be determined by jury.

4. SAME—CONDEMNATION OF PUBLIC LAND MUST BE AUTHORIZED BY LEGISLATURE.

   Condemnation for public purpose of land already used for public purpose must be authorized by legislature, if proposed use materially interferes with present use.

5. SAME—PRIVATE RIGHTS IN ORNAMENTAL STRIP OF LAND.

   Rights of owners of reversion and abutting owners in strip of land in middle of street reserved by dedicators for ornamental purposes constitute private property, which must be acquired by city before strip may be used for street purposes.

On right of city to set aside portion of street for park strips, see annotation in 20 L. R. A. (N. S.) 593.

6. MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—RIGHT TO CONTROL STREETS.

Under the Constitution (section 28, art. 8), right to control of streets, alleys, and public places is reserved to cities, villages, and townships.

7. SAME—EMINENT DOMAIN—HIGHWAYS AND STREETS—DETROIT CHARTER.

Under charter of city of Detroit, adopted pursuant to so-called home-rule act, common council of said city has right to condemn private property for street purposes.

8. EMINENT DOMAIN—HIGHWAYS AND STREETS.

Proceedings by city of Detroit to condemn ornamental strip of land in middle of street for purpose of widening street were properly brought under Act No. 149, Pub. Acts 1911, § 2, where owners of reversion and abutting property owners had property rights in said strip.

9. SAME—ATTEMPT TO PURCHASE UNNECESSARY.

It was unnecessary to first attempt to purchase reversionary interest and rights of abutting property owners in strip of land in middle of street reserved for ornamental purpose before beginning proceedings to condemn said strip for purpose of widening street.

10. MANDAMUS—MOTION TO DISMISS CONDEMNATION PROCEEDINGS—REVIEW.

Where, in reviewing order dismissing petition to condemn land to widen city street, only questions of law are raised, and mandamus is effective, mandamus is permitted, as against objection that it is not proper remedy.

Mandamus by City of Detroit, a municipal corporation, to compel John V. Brennan, judge of the Recorder's Court of the City of Detroit, to vacate an order dismissing petition in proceedings to condemn certain land for street purposes. Submitted October 21, 1930. (Calendar No. 35,310.) Writ granted January 7, 1931. Rehearing denied June 1, 1931.

Arthur F. Lederle (*Clarence E. Wilcox,* of counsel), for plaintiff.

Leo Kuschinski, for defendant.

BUTZEL, C. J. In 1894 the trustees of the owners subdivided and recorded a plat of that part of Brush Farm lying between Brady street and Alexandrine avenue in the city of Detroit. It consisted of a parcel of property some 900 feet in length and 411 feet or thereabouts in width. A strip of land 60 feet in width and 900 feet in length was reserved in the middle of the subdivision and dedicated to the public use as a "park for the adornment of the highway and for no other purpose whatever." The subdivision was so laid out that Brush street, then already an important thoroughfare, running in a northerly and southerly direction, made a slight jog at the entrance of each end of the subdivision and then continued in the form of two roadways, each 23 feet in width along the east and west sides of this ornamental strip or park. Thus the roadways became a part of Brush street.

On the east and west sides of the roadways, after provision was made for sidewalks, etc., the plat of the subdivision provided for building lots, each approximately 50 feet in width. The dedication required that this 60 foot strip, running along the middle of the subdivision, be set out by a landscape gardener and maintained in an ornamental manner, and that if the city should fail to keep the strip in a condition for the use as set forth, then the owners of a majority of the feet of land fronting on the street would have the right to vacate the street and revoke the dedication, except as to the 60 foot strip along the middle thereof. No provision was made in the dedication as to what should happen to the 60 feet strip in the event of the city's failure to carry out the terms of the dedication.

At the time of the dedication, the city of Detroit was operating under the provisions of a charter (Act No. 326, Local Acts 1883), chapter 7, § 33, of which (as amended by Act No. 544, Local Acts 1887) also provided that the common council might "alter, vacate or abolish * * * public grounds or spaces within said city." The reservation in the dedication by the grantors, in which they provided for the contingency of the abandonment of the ornamental strip or park, did not of itself empower the city to abandon it at will. *Douglass* v. *Montgomery,* 118 Ala. 599 (24 South. 745, 43 L. R. A. 376). Nevertheless, when considered in connection with the power which, under the charter at the time of the dedication, the council had to alter, vacate or abolish public grounds, it must be presumed that the dedication was subject to the city's right to abandon the strip. There was no waiver of such right when the city accepted the plat and dedication.

The subject of the present controversy is the 60-foot ornamental strip which the city now wishes to use for the purpose of widening Brush street instead of for the adornment of the highway. Since 1894 Detroit has grown from a comparatively small city of less than 250,000 inhabitants to one of over 1,600,000. Brush street has become one of its most important thoroughfares. It runs from the Brush street depot adjoining the Detroit river to the northerly part of the city. It is a through street, before entering which vehicles approaching from a side street must stop. It is claimed that the 23-foot roadways have become entirely too narrow to accommodate the very heavy traffic that travels on them, and particularly so since the character of the street has changed as set forth in petitioner's brief.

Upon an attempt being made by the board of public works of the city of Detroit to remove the trees and shrubbery from this ornamental strip and to grade it to the street level for the purpose of including it as part of Brush street, injunctive relief was sought by some of the abutting property owners. A permanent injunction was issued by the circuit court for the county of Wayne restraining the city from taking this strip for street purposes without first appropriating by condemnation proceedings the rights of the abutting property owners. Thereupon, the common council of the city of Detroit, its legislative body, adopted a resolution declaring that it was necessary to widen the street and ordering that proceedings be brought to condemn the right and title of all abutting property owners and persons interested in the strip. The corporation counsel began condemnation proceedings in the recorder's court for the city of Detroit wherein the city is the petitioner and the owners of the abutting property and of the reversion, are the respondents. On a motion to quash by one of the respondents, the judge of the recorder's court entered an order dismissing the petition, on the ground that there was no power of eminent domain that can be exercised by the city in order to condemn property that is already being used for public purposes. Mandamus is sought in the present case to compel the judge to set aside this order and proceed with the trial of the case.

For the purpose of considering this motion to quash, a court must assume that the facts set forth in the petition are true and that necessity to condemn may be established. In order to more clearly bring out these facts, reference is made to petitioner's brief, wherein certain facts, that can be

readily observed, are set forth. The entire character of the neighborhood in which the subdivision is located has changed. All the lots on both the east and west sides of the subdivision have been built upon. A large portion of the lots on the west side of the street is occupied by Harper hospital, one of the largest hospitals in the city of Detroit, whose new addition, being the main building, with the adjoining grounds, now front on Brush street. Necessarily a very large number of vehicles come to the hospital's entrance on Brush street. On one corner on the east side of the street there is also the Dunbar hospital for colored people. In addition to this, two gas stations occupy corners, and an undertaking establishment and two commercial buildings occupy other lots. It can also be readily seen that the ornamental strip is too narrow for general park purposes. It was dedicated for "the adornment of the highway and for no other purpose." On the question of necessity, the claim may be made that instead of the strip adorning the highway, it has become an obstruction to the safety of persons and vehicles using the street. In any event, the question of necessity must be determined by the jury. Assuming that such necessity exists, we are confronted with the question whether, under the circumstances, the law prevents the exercising of the right of eminent domain by the city for the purpose of acquiring the rights of respondents in this strip of property which was dedicated for another purpose.

The instant case must be distinguished from those in which one public corporation is attempting to exercise its power of eminent domain in order to appropriate for a different use property used by and belonging to another public corporation. If the second use materially interferes with the first, pro-

ceedings to condemn property already used for a public purpose must have been authorized by the legislature. *Matter of City of Buffalo,* 68 N. Y. 167; *Rutland-Canadian R. Co.* v. *Railway Co.,* 72 Vt. 128 (47 Atl. 399); *Sabine, etc., R. Co.* v. *Railway Co.,* 92 Tex. 162 (46 S. W. 784).

We are not considering the right of the city to put to a different use the whole or part of a large public park in which the courts have generally held that each and every citizen has an interest. There is no question of fraud or abuse of discretion by the common council of the city of Detroit. The instant case pertains solely to a narrow strip of land which may have become an obstruction to traffic to the extent of its 900 feet of length of what otherwise is a broad street or boulevard for many miles. In the exercise of its police power and the regulation of the city's traffic and looking after the safety of life, limb, and property of its citizens, has the city a right to change this strip from an ornamental park into part of a roadway? Had the city acquired this strip by condemnation proceedings or purchase, or in any other manner, without restrictions, there would be no question of its right to make this change. *Village of Riverside* v. *MacLain,* 210 Ill. 308 (71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164); *Seattle Land & Improvement Co.* v. *City of Seattle,* 37 Wash. 274 (79 Pac. 780); *Spires* v. *City of Los Angeles,* 150 Cal. 64 (87 Pac. 1026, 11 Ann. Cas. 465). To take an extreme illustration: Had commons been purchased by the city for pasture purposes or a smaller strip for a horse trough, there is no question but such purposes would have had to give way to the far greater needs of a metropolitan city. The city has control of its public places under its charter. The city did acquire this

strip of land subject at the time of the dedication to the right under the charter to alter, vacate, or abolish its public places, but also subject to certain rights of the reversioners and abutting property owners, should the ornamental strip or park be abandoned. The property was not turned over to the city by congress for an express purpose, so that it cannot be used for a street, as was the case in *Board of Education* v. *Detroit,* 30 Mich. 505. It falls rather within the rule of *Hinchman* v. *Detroit,* 9 Mich. 103, and *Riggs* v. *Board of Education,* 27 Mich. 261, if the rights of respondents are appropriated after necessity is found and compensation made.

In coming to our conclusion, we find that there are only three parties interested in this proceeding, the city, the owners of the reversion, and the abutting property owners. The city would have a right to alter or change this ornamental strip into a street had it the consent of the owners of the reversion and the abutting property owners, which it is attempting to secure in the present proceedings. Any rights that the owners of the reversion and abutting property owners have in said strip or ornamental park constitute private property.

The city is attempting to secure and pay for such private property through condemnation proceedings. This is a proper method of acquiring these rights. The judge of the lower court, in quashing the petition, based his decision largely on cases where, without any legislative grant, one public corporation was attempting to condemn property belonging to another public corporation and used for public purposes, or where the rights of abutting property owners were not respected. In the present case the city is attempting to condemn the private

interests of the reversioners and abutting property owners so that it will put itself in the same position as if it had owned the property free from all claims of others and thus be able to use the property for such greater demands as have been occasioned by the growth of the city, the change in the neighborhood and the necessities in the case.

Under section 27, art. 8, of the Constitution of the State of Michigan:

"The Legislature shall not vacate nor alter any road laid out by the commissioners of highways, or any street, alley or public ground in any city or village or in any recorded town plat."

Under section 28 of the same article, it is provided that:

"The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships."

Under section 4, subdivision (k), Act No. 279, Pub. Acts 1909, as amended by Act No. 5, Pub. Acts 1913, the same being the home rule act (1 Comp. Laws 1929, § 2228 *et seq.* See § 2235), under which the city is organized:

"Each city may in its charter provide: * * *

"(k) For the purchase and condemnation of private property for any public use or purpose within the scope of its powers."

Under the condemnation act, section 2, Act No. 149, Pub. Acts 1911, under which the proceedings are brought, it is provided that:

"The term 'private property' as herein used shall include lands, tenements, hereditaments and tangible and intangible property whether real, personal or mixed."

Under the charter of the city of Detroit, adopted by the people on June 25, 1918, the common council has the legislative power to provide for the management and control of all property, including streets, alleys, and other public places dedicated to its use or under its jurisdiction. Paragraph (g), section 12, chap. 1, tit. 3, Detroit city charter. It further has the right to condemn private property for its use. We believe that, under the provisions quoted, as applied to the facts in this case, the proceedings were properly brought for the purpose of condemning private property of respondents so that the city might change the purpose of the strip from that of an adornment of the highway to one of necessity, provided that the jury finds necessity, and awards the respondents in the condemnation suit such compensation as may be found due them.

Claim is made that mandamus is not the proper method of appeal to this court. As questions of law are solely raised in the present case and mandamus is effective, we will permit it.

It was unnecessary to first attempt to purchase the rights of respondents in advance of the filing of the petition, as is claimed. *Department of Conservation* v. *Hane,* 248 Mich. 473.

A writ will issue directing the respondent judge of the recorder's court to reinstate the petition and proceed with the trial of the case.

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

GRINNELL REALTY CO. *v.* GENERAL CASUALTY & SURETY CO.

1. PRINCIPAL AND SURETY—VARIANCE.
   Where there is no question that bond was meant to cover particular note, variance of two days between date of note and date stated in bond is not of sufficient importance to affect surety's obligation.

2. USURY—CORPORATIONS—CONTRACTS.
   Usurious payment by corporation does not affect legality of transaction.

3. PRINCIPAL AND SURETY—CONTRACTS.
   Surety company adopting its own wording in bonds is bound thereby.

4. SAME—DISTINCTION BETWEEN "PAID" AND "GRATUITOUS" SURETIES.
   Where, in action on surety company's bond, both the nature of defendant's business and transaction in question show that it was not acting gratuitously, there is no merit in its claim that distinction in regard to liability of "paid" surety and that of "gratuitous" one should not apply.

5. SAME—VARIANCE—LIABILITY OF GRATUITOUS SURETY NOT EXTENDED.
   Under law merchant, liability of gratuitous surety will not be extended to contract varying in slightest degree from one for performance of which he became bound.

6. SAME—LIABILITY OF PAID SURETY—RELEASE.
   Paid surety, in order to be released from obligation by some slight deviation from contract by obligee, must show damage therefrom.

7. SAME—DAMAGE TO PAID SURETY BY VARIANCE NOT PRESUMED.
   There is no presumption that paid surety was harmed by slight deviation from contract by obligee, nor is suggestion of mere contingencies or possibilities sufficient to release surety.

Extension of time of payment of indebtedness as discharging surety, see annotation in 2 A. L. R. 1569.

8. SAME—DAMAGE MUST BE SHOWN.
   Paid surety is not relieved from obligation except where it is shown that there is material departure from contract which resulted in injury to surety.

9. SAME—EXTENSION OF TIME FOR PAYMENT.
   Mere extension of time for payment does not discharge paid surety unless it can be shown that it suffered therefrom.

Error to Wayne; McMahon (Maurice H.), J. Submitted October 15, 1930. (Docket No. 94, Calendar No. 35,130.) Decided January 7, 1931.

Assumpsit by Grinnell Realty Company, a Michigan corporation, against General Casualty & Surety Company, a Michigan corporation, on a contract of surety. From directed verdict and judgment for plaintiff, defendant brings error. Affirmed.

Arthur J. Adams, for plaintiff.

Wilkinson, Lowther, Wilkinson & O'Connell (*Kirkland, Fleming, Green & Martin* and *Frederick J. Ward,* of counsel), for defendant.

BUTZEL, C. J. H. S. Robinson & Company, a Michigan corporation, on September 29, 1928, borrowed from Grinnell Realty Company, plaintiff, the sum of $20,000, and on December 7, 1928, the further sum of $118,000. In each instance it gave its promissory note. The first note provided for serial payments each month and the balance at the end of ten months. It also contained an acceleration clause by which the entire balance would become immediately due in case of failure to make the monthly payments. The second note was payable three months after its date, with interest. Each note was secured by a separate surety bond in which the bor-

rower is the principal, the General Casualty & Surety Company, defendant herein, the surety, and plaintiff, the obligee. The bond securing payment of the first note provided for notice to the surety in the event of any default, but the surety would remain bound in the event of only a partial payment being made and new notes given for the unpaid balance.

The bond securing the $118,000 loan contained the following clause:

"In the event that the Grinnell Realty Company, its successors or assigns, should accept partial payment of said note and accept a new note for any unpaid balance, then this bond is to remain in full force and virtue to guarantee payment of such new note and likewise to remain in full force and virtue to guarantee any subsequent note or notes which are accepted in further renewals or partial renewals, provided, however, notice will be given to the surety of any partial payment and/or any renewals or extensions and the amount and term thereof."

Defendant corporation claims it is released from liability on the first bond given for the $20,000 note because the date of the note was erroneously stated in the bond as October 1, 1928, the date the money was loaned, instead of September 29, 1928, the date of the note. There is no question but that the bond was meant to cover this particular note. The variance is not of sufficient importance so as to affect the defendant's obligation.

The sum of $8,000 was deducted from the $118,000 loan and kept by the plaintiff as a bonus, in accordance with an agreement with the borrower. This was usurious, but it did not affect the legality of the transaction, as it was paid by a corporation. *Thomas* v. *Union Trust Co.*, 251 Mich. 279. When

the $118,000 note became due at the end of the three months' term, borrower paid plaintiff in cash an additional bonus of $8,500 in consideration of the renewal of the loan. This again was usurious, but paid by a corporation. A new note was executed, payable $25,000 on April 12, 1929; $40,000 on May 12, 1929, and $53,000 with interest from March 12, 1929, on June 12, 1929. The new note contained an acceleration clause which provided that in the event of a default in the payment of any installments, the entire unpaid balance would become due and payable at once. Defendant was notified of the renewal of the loan and consented to it. The notice gave the "term" of the renewal note and complied with the provisions of the bond. On April 12, 1929, when the first payment of $25,000 on the renewal note became due, borrower gave plaintiff its checks for $5,000 payable April 16, 1929; $10,000 on April 17, 1929, and $10,000 payable on April 18, 1929. These checks were dishonored. On April 25, 1929, plaintiff received $15,000 in payment of the first two checks. Borrower asked plaintiff for more time in which to make payment of the balance of $10,000. Defendant surety company was notified of the default in the payment of the $25,000 and also of the acceptance of the $15,000 and acknowledged receipt of such notice. There was also a conference between plaintiff and defendant in regard to the default, for the letter confirming the acceptance of the $15,000 by the surety company refers to the oral conversation. Notwithstanding the fact that the note provided that the entire amount of the loan should become due in the event of any default, plaintiff agreed with borrower to wait until May 4, 1929, for the payment of the balance of $10,000 still due on the $25,000 payment.

There was no new note taken nor any formal document executed nor any consideration paid for the extension. Plaintiff testified that no new arrangements were made, and it supposed that in the event the $10,000 was paid on May 4th, the note would be reinstated for the balance. The surety company knew that payments were not being promptly made and that plaintiff was exercising forbearance in attempting to collect the balance. Irrespective of whether the action on the part of plaintiff amounted to an extension or not, there is absolutely no testimony to show that the defendant was in any way damaged thereby.

In order to indemnify defendant surety company against loss, the borrower at the time the bonds were executed, turned over to it shares of stock, at that time of a value of more than twice the aggregate amount of the loans made by plaintiff. There were considerable negotiations between plaintiff and defendant after the borrower made no further payments on the loans. The borrower became bankrupt, and the stock held by defendant as security became of very little, if any, value. Suit was brought by plaintiff against defendant on the bonds. Defendant claimed that it should have been notified of the borrower's payment of the bonus in each instance and particularly upon the renewal of the note. There is no doubt but that defendant looked to its security in assuming this large risk. It adopted its own wording in the bonds and is bound thereby. It could have inserted such provisions both in the bonds and the application for them, so as to have been fully apprised of all of the details of the transactions between the parties. It only demanded that plaintiff notify it of the renewal and the "term." This plaintiff did. Defendant further

claimed that there was no positive testimony to show that it was a paid surety, and that the distinction in regard to the liability of a "paid" surety from that of a "gratuitous" one should not apply. Both the nature of defendant's business and the transaction itself show that it was not acting gratuitously. Defendant further claims that it was released from liability on account of plaintiff's agreement to wait for the $10,000 payment until May 4th with the understanding on plaintiff's part that if this payment was made the loan would be reinstated. No agreement was made to that effect. In any event, the remaining payments would become due within a very short period thereafter. Assuming that there was an extension, there is no testimony whatsoever to show that defendant was in any way injured. Plaintiff was endeavoring to collect the note. Had it been successful, it also would have been to the advantage of defendant.

Under the law merchant, the liability of a gratuitous surety will not be extended to a contract which in the slightest degree varies from the one for the performance of which he became bound. The risk he runs will not be increased in any manner without his consent, nor will the possibility of his immediately protecting himself in the event of default be lessened. Strict rules of law, which sometimes almost seemed harsh, frequently relieved him from his obligation on account of some very slight deviation from the contract by the obligee. The surety's liability was limited in all cases to the strict letter of his bond. In time, however, sureties began to exact compensation, commensurate with the risk they assumed, and surety companies were organized for profit. They charged premiums so as to make their business a profitable one. They drafted their own

bonds and inserted therein such conditions as they thought necessary to properly protect themselves. The law thereupon recognized the difference between gratuitous and paid sureties and required that paid sureties, in order to be released from the obligations of their bond must show that they were damaged by some slight deviation from the contract by the obligee. Their bond was looked upon as one of insurance or indemnity instead of one of suretyship. There is no presumption that a paid surety was harmed, nor is the suggestion of mere contingencies or possibilities sufficient. *Philadelphia* v. *Fidelity & Deposit Co.*, 231 Pa. 208 (80 Atl. 62, Ann. Cas. 1085). It is not relieved from its obligations except when it is shown that there is a material departure from the contract which resulted in some injury to the surety. *Gunsul* v. *American Surety Co. of New York*, 308 Ill. 312 (139 N. E. 620). The mere extension of time in payment does not discharge a paid surety unless it can be shown that it suffered from the extension. *Standard Salt & Cement Co.* v. *National Surety Co.*, 134 Minn. 121 (158 N. W. 802). In *People, ex rel. Townsend, etc., Co.*, v. *Bowen*, 187 Mich. 257, the court said:

"The record contains no evidence that the extension of time granted by the plaintiff to Bowen actually operated to the injury of the defendant bonding company. It seems clear that the old rule applicable to private gratuitous bondsmen is not applicable, where the bond is furnished by a surety company for hire. This view of the rule is indicated by our holding in *Cox* v. *Fidelity & Deposit Co. of Maryland*, 157 Mich. 59, where this court used the following language:

" 'We think the rule of law that bondsmen are treated as a favored class should receive extremely cautious application to contracts like the one at bar,

which is but one of a very large and rapidly growing class where the surety undertakes its liability for hire, and purely as a matter of business, and not of accommodation.' ''

In *Realty Construction Co.* v. *Kennedy,* 234 Mich. 490, the judge charged the jury that if there was any deviation from the contract, the surety was not liable. The jury found for the plaintiff and the surety appealed. The court said:

''This charge was more favorable to defendant than it should have been. It is not enough that there is a deviation from the terms of the contract, but it must be a material deviation with a paid surety, and one which results in injury to it in order to release it from liability.''

At the close of the testimony of the instant case in the lower court, the court directed a verdict in favor of plaintiff against the defendant, in the sum of $116,496. The judgment on the verdict is herewith affirmed, with costs to plaintiff.

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

VILLAGE OF RIVERVIEW *v.* A. G. LIGGETT & SONS CO.

1. HIGHWAYS AND STREETS—HIGHWAY BY USER.

Extent to which road is used does not govern in determining whether it exists by user, but it is sufficient if it was used as much as business of surrounding population required.

2. SAME—STATUTES.

In suit to enjoin obstruction of highway, evidence *held*, sufficient to establish highway by user, under 1 Comp. Laws 1915, § 4307.

3. JUDGMENT—EVIDENCE—HIGHWAY BY USER.

Decree in former suit that road exists by user has some evidentiary value in present suit involving same road, although not binding because between different parties.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted October 29, 1930. (Docket No. 7, Calendar No. 34,676.) Decided January 7, 1931.

Bill by Village of Riverview and others against A. G. Liggett & Sons Company, a Michigan corporation, and another to enjoin obstruction of a highway. Decree for plaintiffs. Defendants appeal. Affirmed.

Ralph B. Clark, for plaintiffs.

Atkinson, O'Brien, Clark & Ortman (*Frank W. Atkinson*, of counsel), for defendants.

BUTZEL, C. J. The sole question in this case is whether the easterly terminus of Mud road, now known as Sibley road, in the township of Monguagon, Wayne county, Michigan, has through user become a public highway under section 4307, 1 Comp. Laws 1915. This road is 66 feet in width and runs in an easterly and westerly direction for a distance of several miles along section lines. The northerly 33 feet of the road lie in section 5, and the southerly 33 feet in section 8 of the township. It is the only road to the water front for a considerable distance north and south of it. The portion of the road in dispute never was dedicated or condemned. It is admitted that it is a public highway up to several hundred feet of Monguagon creek, a tributary of the Detroit river, by which name it is also frequently

called. The south side of the road lies in the village of Sibley, and the north side in the village of Riverview. These two villages are the plaintiffs in the case.

The A. G. Liggett & Sons Company, a corporation engaged in boat building, together with A. G. Liggett, its president, are the defendants. They claim to own both sides of the most easterly part of the property claimed as a road and leading to the waterfront. They maintain their boat works on this property. They attempted to use the waterfront along the disputed strip of land for their plant, whereupon the plaintiffs brought injunction proceedings. A decree was rendered in plaintiffs' favor; it not only permanently enjoined defendants from obstructing the road but also annulled that part of a recorded plat known as the Riverview Manor Subdivision, wherein it was sought to subdivide that portion of the road leading to the waterfront.

The case solely presents a question of fact. Defendants claim that there never has been a public user of the road in the vicinity of and abutting the waterfront; that whatever use was made by the public was an extremely limited one; that the road was occasionally used at nighttime by violators of the liquor law and without defendants' knowledge; that the use made during the daytime was with the consent and permission of defendants and their grantors; that the approach to the waterfront was marshy and not suited for public travel during the larger part of the year, and that the very nature of the ground, particularly up to recent years, showed that it could not have been used as a road.

Plaintiffs, on the other hand, showed that for over 50 years the strip of land has been used as a con-

tinuous road right up to the waterfront; that the farmers used it without permission or objection on the part of anyone; that they brought tank wagons to the waterfront in times of drought in order to take water to their farms; that they brought their cattle to the waterfront in order to water them; that they used the road for the purpose of hauling ice from the river, to go fishing, etc. The vicinity in question is very sparsely populated and it would naturally follow that the road could not have been used to a great extent even if it had been regularly dedicated as a public road. The correct rule is stated in *Village of Grandville* v. *Jenison,* 84 Mich. 54:

"The extent to which a road is traveled does not govern. The law does not fix the number who must travel upon a road in order to determine whether it exists by user. It must be used by the public, and the public are all who have occasion to use it. In the case of *Baldwin* v. *Herbst,* 54 Iowa, 168 (6 N. W. 257), it was held that it would be sufficient to constitute a highway by user if it was traveled over as much, or about as much, as it would have been if it was laid out by the statute, and traveled as much as the circumstances of the surrounding population, and their business, required."

The testimony as to the use of the road is conflicting, but we can not overlook the following facts: A map of the township, appearing in the Burton Atlas of 1876, and introduced in testimony, shows the easterly terminus of the road to be the river or creek. The marking on the map shows the shore line of the entire vicinity to be marshy ground. The Sauer map, published in 1893, likewise produced in evidence, also shows the road ended at the water edge. The road also was the subject of former

litigation between the Monguagon township board and others, and while the decree would not be binding upon the present defendants, who were not parties to the former suit, nevertheless, the decree has some evidentiary value. In that suit, No. 64881 in the circuit court for the county of Wayne, in chancery (*Lester* v. *Ellery*), the decree entered on January 22, 1919, held that the terminus of Mud road was the center of Monguagon creek, a branch of the Detroit river, and that said creek was a navigable stream, and that the defendant in that suit had no interest in said public highway and particularly the portion thereof extending to the center of said Monguagon creek. What is still more persuasive, however, is the undisputed testimony in the present case that the water main, which is part of the water system of the village of Sibley, was built along the road in question and a fire hydrant was constructed along the disputed strip in front of defendants' property. Further, that the main trunk line of the sewer system which serves the village of Sibley was built under this road. It runs up to and empties into the Monguagon creek. It was further shown that while the excavation for the sewer was being dug, a section of what appeared to be an old corduroy road was found below the surface. The records of Monguagon township further show that both in 1916 and 1919 a small sum of public money was expended for work on the disputed strip of the road.

Defendants show that the only objection they made to the building of the sewer was that they protested against the outlet at the terminus of the road solely because they did not want the stream polluted in front of their boat works. They made no other objections to any of these improvements.

Taking all these facts into consideration, and further, that the trial judge heard and saw all of the witnesses, we are led to the conclusion that he was correct in granting a decree as prayed for by the plaintiffs, which decree is affirmed, with costs to plaintiffs.

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

SHAPERO *v.* GASSEL.

VENDOR AND PURCHASER—FRAUD—FALSE REPRESENTATIONS NOT RELIED ON NO DEFENSE TO ACTION FOR PURCHASE PRICE.

In action on note given as part of purchase price of lease of apartment house and furnishings, defense of fraud in misrepresenting character of tenants is not available, where false representations, if made, were not relied on by defendant, who knew all about apartment and character of neighborhood.

Error to Wayne; Browne (Clarence M.), J., presiding. Submitted October 15, 1930. (Docket No. 79, Calendar No. 35,018.) Decided January 7, 1931.

Assumpsit by Paul Shapero against Gavil Gassel on a promissory note. Judgment for plaintiff. Defendant brings error. Affirmed.

Irwin I. Cohn (*Sidney J. Karbel,* of counsel), for plaintiff.

Louis Rosenzweig, for defendant.

BUTZEL, C. J. Fannie Shapero, herein called vendor, was the lessee of a building containing 50 apartments, known as the Knollwood, in the city of Detroit, Michigan. She was also the owner of the furnishings. She interested Gavil Gassel, the defendant, in the purchase of the lease, and he made frequent visits of inspection of the building during a period of three to five months immediately prior to acquiring the lease and the furnishings from her. He claims, and she denies, that she made verbal representations as to the respectable character of the tenants. The record shows that he did not rely upon such representations, even if they were made.

Vendor also gave defendant with the assignment of the lease a supplemental agreement which contained her guaranty that nothing had been done by the tenants which would result in padlock proceedings by State or Federal authorities. In payment for the assignment of the said lease and furnishings, defendant turned over to vendor residence property of the claimed value of $21,000 and also his notes, one for $2,000 and one for $3,000. The latter note was to mature in 15 months, but it was agreed that it should be made out for five consecutive periods of three months each, and that it be renewable at the end of each period upon the payment of $100 on the principal, together with interest, and the delivery of a new note for the balance. This note is the subject of the controversy in the present suit. It was discounted by vendor at a Detroit bank, where vendor also discounted the renewals at the end of each three months' period when defendant paid $100 and interest on the principal and executed a new note for the balance.

Defendant took possession of the premises, and, with his sons, who were put in charge, continued to manage the property and receive the profits therefrom. He claims that shortly after he took possession, he found that the apartments were infested with prostitutes, bootleggers, and gamblers, and that, owing to the arrests that had been made of tenants, padlock proceedings were threatened. He promised the police department of the city of Detroit to get rid of the undesirable tenants. According to the testimony of his son, 50 tenants were removed within a short time after possession was taken. Inasmuch as there were 50 apartments, it would seem as if almost all of the tenants were removed and new ones substituted. Irrespective of what was done, the character of the place did not improve, for the police records show a long list of arrests and in many cases convictions of tenants for offenses that occurred after defendant purchased the property. There is also testimony that defendant expressed himself as satisfied with his bargain, and further, that he made an effort to dispose of the lease, etc., at a profit. Padlock proceedings were brought a considerable period after defendant acquired the lease for offenses committed after vendor had sold the lease to him. A decree was entered long after defendant had disposed of his interests. Defendant remained in possession of the property for approximately one and one-half years. He finally surrendered the lease and turned the furnishings over to the owner of the property for a consideration of $1,000 and the release from liability for rent for one month and six days.

After the 15 months, when the last renewal note became due, defendant refused to make further payment. Thereupon one Paul Shapero, plaintiff here-

in, who is a brother-in-law of vendor, purchased the past-due note from the bank and paid for it with his own note. He brought suit against defendant. It is claimed that plaintiff is not an innocent purchaser for value. There is no doubt but that the bank was a *bona fide* purchaser in the first instance. It is claimed that the bank was notified by the defendant that he claimed fraud, and that it thereupon became the bank's duty to apply the credit balance due vendor towards the payment of the note. It is unnecessary to discuss this claim, for the case may be disposed of the same as if plaintiff were merely an assignee of the bank after the maturity of the note and with full knowledge of defendant's claims. Defendant pleaded the general issue, and gave notice that he had been defrauded by vendor's false representations, and that his damages were in excess of plaintiff's claim in this action. The testimony further shows that defendant has brought an independent action against vendor for damages on account of her alleged fraud, and defendant has thus chosen his remedy and cannot bring this suit for the same action. We shall not discuss this question, for vendor is not a party to these proceedings, and they are no bar to such subsequent suit. It will serve no useful purpose to detail more facts. The case was tried without a jury, and the circuit judge made 34 findings of fact and 19 of law. We shall only discuss a few of the findings of fact.

The court, after hearing the testimony in the present case, found that defendant was not induced to purchase the lease by any fraudulent representations, and that he acted with his eyes open; knew the kind of lease it was, the character of the neighborhood, and all the facts concerning the apartment building. This disposes of the question of fraudu-

lent representations, irrespective of whether the other findings are correct or not. A judgment was rendered against defendant for the balance of the principal of the note and interest. It is affirmed, with costs.

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

STEELE *v.* SEXTON.

1. CERTIORARI—MANDAMUS—FINDING OF FACT NOT REVIEWABLE.
   On certiorari to review denial of writ of mandamus, finding of fact by court below, supported by evidence, may not be reviewed.

2. MANDAMUS—SCHOOLS AND SCHOOL DISTRICTS—VALIDITY OF STATUTE.
   Mandamus is proper remedy to test validity of action of school authorities in withholding credits from high school pupil violating general school law (chapter 33, pt. 2, Act No. 319, Pub. Acts 1927) prohibiting membership in high school fraternities, sororities, etc., by high school pupils.

3. STATUTES—TITLE—CONSTITUTIONAL LAW—SCHOOLS AND SCHOOL DISTRICTS—HIGH SCHOOL FRATERNITIES.
   Subject-matter of chapter 33, pt. 2, Act No. 319, Pub. Acts 1927, prohibiting membership in high school fraternities, sororities, etc., by high school pupils is embraced in title of act, and therefore act is not unconstitutional.

Constitutionality of law forbidding students affiliating with secret society, see annotation in 7 L. R. A. (N. S.) 352; L. R. A. 1915D, 588.

As to regulations as to school or college fraternities, see annotation in 27 A. L. R. 1074.

4. CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT—SCHOOLS AND SCHOOL DISTRICTS.

Withholding credits from high school pupil violating general school law prohibiting membership in high school fraternities, sororities, etc., by high school pupils is not cruel and unusual punishment within meaning of Constitution.

5. SAME—"DUE PROCESS"—EQUAL PROTECTION OF LAW.

Withholding credits from high school pupil violating general school law prohibiting membership in high school fraternities, sororities, etc., by high school pupils does not violate "due process" clause of Fourteenth Amendment to Federal Constitution, nor is pupil thereby denied equal protection of laws.

6. SAME—CLASS LEGISLATION.

Provision of general school law prohibiting membership in high school fraternities, sororities, etc., by high school pupils is not class legislation within inhibition of Constitution.

7. SCHOOLS AND SCHOOL DISTRICTS—HIGH SCHOOL FRATERNITIES—VALIDITY OF STATUTE.

General school law (Act No. 319, Pub. Acts 1927, chap. 33, pt. 2) prohibiting membership in high school fraternities, sororities, etc., by high school pupils is valid.

CLARK, McDONALD, and POTTER, JJ., dissenting.

Certiorari to Ingham; Collingwood (Charles B.), J. Submitted October 21, 1930. (Calendar No. 35,221.) Decided January 7, 1931.

Mandamus by Verne Steele, Jr., by next friend, to compel J. W. Sexton, superintendent of public schools of city of Lansing, Michigan, and others to grant school credits. Plaintiff reviews denial of writ by certiorari. Affirmed.

Joseph W. Planck (*Carl H. Reynolds,* of counsel), for plaintiff.

Warner & Watson (*J. E. Converse,* City Attorney, of counsel), for defendants.

WIEST, J. By writ of certiorari we here review denial of a writ of mandamus in the circuit court.

Plaintiff, while a student in the central high school of the city of Lansing, became a member of an association or student fraternity styled "Phi Epsilon." The general school law, chapter 33, pt. 2, Act No. 319, Pub. Acts 1927 (2 Comp. Laws 1929, §§ 7664–7667), made it unlawful for him to join or belong to any school fraternity or student secret society, gave the school board power to suspend or expel a violator, and declared it illegal for school officials to give an offender credit for a subject pursued or to graduate such an one. Plaintiff was in the senior class. The school officers found plaintiff guilty upon his own confession, permitted him to pursue his studies, but refused him credits and a graduation diploma. In the circuit court plaintiff was denied a writ of mandamus commanding the defendants to award him school credits and a graduation diploma. Testimony was taken in the circuit court and the court found:

"That Verne Steele admitted before the superintendent of schools and the principal of the high school that he was a member of the Phi Epsilon fraternity; that he knew that the fraternity was being maintained contrary to the said law and against the rules and regulations of the school authorities of the city of Lansing; that he knew the penalties for being affiliated with such fraternity."

This finding, having support of evidence, cannot in this proceeding be reviewed.

It was claimed in the circuit, and is claimed here by defendants, that plaintiff had no remedy by writ of mandamus. Mandamus is a proper remedy. *Valentine* v. *Independent School District,* 187 Iowa, 555 (174 N. W. 334, 6 A. L. R. 1525).

Counsel for plaintiff contend that:

"The statute applies only to secret societies and petitioner was not a member of a secret society."

This is answered by the following provision of the statute:

"A public school fraternity, sorority, or secret society, as contemplated by this act, is hereby defined to be any organization whose active membership is composed wholly or chiefly of pupils of the public schools of this State and perpetuating itself by taking in additional members from the pupils enrolled in the public schools on the basis of the decision of its membership rather than upon the right of any pupil who is qualified by the rules of the school to be a member of and take part in any class or group exercises," etc. (2 Comp. Laws 1929, § 7664).

Counsel for plaintiff contend that the mentioned statute is unconstitutional and void for the following reasons:

"1. The subject-matter of chapter 33 is not germane to and is not embraced in and covered by the title of Act No. 319.

"2. The withholding of school credits earned and the prohibition as to graduation of any person who shall violate the act constitutes 'cruel and unusual punishment.'

"3. Relator is deprived of 'liberty' without due process of law.

"4. Relator is deprived of 'property' without due process of law.

"5. Relator is denied the 'equal protection of the laws.'"

The title to the act embraced legislation for the establishment and regulation of public schools, inclusive of rights, powers, duties, and privileges, to-

gether with penalties for violations. The purpose actuating the legislature is found in the following declaration in the act:

"Every such fraternity, sorority, and secret society as herein defined is declared an obstruction to education, inimical to the public welfare, and illegal."

There is no merit in the first point.

Plaintiff was not suspended or expelled. He has not been deprived of education in the high school, for he has been permitted to take the course, but only denied credits for the last semester and graduate diploma. School credits involve deportment, subordination to discipline, and obedience to rules and regulations established by the legislature for the promotion of the best interests of the public schools and good order therein. Plaintiff joined the fraternity in defiance of the law, exhibits no contrition, and now wants his will, and not the law, to prevail. Loss of right to school credits and a graduate's diploma, based upon a wilful violation of the statute does not, by any stretch of imagination, constitute cruel and unusual punishment.

The remaining three reasons invoke the Fourteenth Amendment to the Federal Constitution.

It was well said in *University of Mississippi* v. *Waugh,* 105 Miss. 623, 633 (62 South. 827, L. R. A. 1915 D, 588, Ann. Cas. 1916 E, 522):

"The Fourteenth Amendment to the Constitution of the United States was never intended to act as an accomplice to any young man who wanted to take advantage of the gratuitous advantages offered the youths to obtain an education and yet refuse to obey and submit to the disciplinary regulations enacted by the legislature for the welfare of the institutions of learning. The right to attend the educational in-

stitutions of the State is not a natural right. It is a gift of civilization, a benefaction of the law. If a person seeks to become a beneficiary of this gift, he must submit to such conditions as the law imposes as a condition precedent to this right. The act in question is not class legislation. It is quite the reverse, and seeks to destroy the possibility of the existence of any class at the educational institutions. No State or Federal Constitution is violated by this act in any way. Complainant is not deprived of any constitutional right, unless complainant can be said to have a constitutional right to breach the discipline of the school and set at naught the laws of the State."

That case, so far as it involved the Fourteenth Amendment, was reviewed in *Waugh* v. *University of Mississippi,* 237 U. S. 589 (35 Sup. Ct. 720), and affirmed. The court stated among other things:

"It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the university was established by the State and is under the control of the State, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions."

Plaintiff also contends that the statute "is class legislation in that it unfairly and unreasonably discriminates against him and other public school students and in favor of pupils in private, parochial, and denominational schools." There is no merit in this.

An examination of reported cases discloses that for many years educators, in behalf of educational efficiency, have endeavored to suppress membership of pupils in school fraternities. By the great weight of authority the statute is valid. See *Wilson* v. *Board of Education,* 233 Ill. 464 (84 N. E. 697, 15 L. R. A. [N. S.] 1136, 13 Ann. Cas. 330); *University of Mississippi* v. *Waugh, supra; Waugh* v. *University of Mississippi, supra; Sutton* v. *Board of Education,* 306 Ill. 507 (138 N. E. 131); *Wayland* v. *Hughes,* 43 Wash. 441 (86 Pac. 642); *Lee* v. *Hoffman,* 182 Iowa, 1216 (166 N. W. 565, L. R. A. 1918 C, 933); *Bradford* v. *Board of Education,* 18 Cal. App. 19 (121 Pac. 929).

The determination in the circuit court is affirmed, with costs to defendants.

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

POTTER, J. (*dissenting*). I dissent from the opinion of Justice WIEST. It is probably true this case is not, in itself, important, but the principles involved are far-reaching. We have those who believe the individual belongs to the State, and those who believe the State and its government belong to the people. The old conception that the king could do no wrong, was the source of sovereignty, and the individual subject possessed only those rights countenanced by sufferance of arbitrary power was shot to pieces on the battle-fields of the Revolution by those who maintained that governments derive their just powers from the consent of the governed.

In *Pierce* v. *Society of Sisters,* 268 U. S. 510 (45 Sup. Ct. 571, 39 A. L. R. 468), involving the validity of the compulsory school law of Oregon, it was contended that as to minors the State stands in the

position of *parens patriæ* and may exercise unlimited control over their conduct and the liberty and right of those who assume to deal with them. This was the dream of Plato's Ideal Commonwealth, the basis of the Spartan system of state socialism, German Kultur, and the Marxian philosophy upon which modern Russian sovietism is built, and is the basis of the reasoning to support the law here involved. The court did not uphold this contention, but said:

"The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

In *Meyer* v. *State of Nebraska,* 262 U. S. 390 (43 Sup. Ct. 625, 29 A. L. R. 1446), it is said:

"For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. * * * The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution."

The Michigan public school system, founded on that of Prussia, is rooted in the Constitution and laws of the State. It is made the duty of the legislature to continue a system of primary schools whereby education of pupils shall be provided without charge for tuition; children between the ages of 7 and 16 years shall be in attendance, and a parent who neglects or refuses to cause the attendance of his children may be prosecuted and convicted of a misdemeanor.

Chapter 33 of the school code provides (2 Comp. Laws 1929, §§ 7664–7667):

"SECTION 1. It shall be unlawful for any pupil of the elementary school and the high school of the public schools or any other public school of the State comprising one or all of the twelve grades in any manner to organize, join, or belong to any high school fraternity, sorority, or any other secret society. A public school fraternity, sorority, or secret society, as contemplated by this act, is hereby defined to be any organization whose active membership is composed wholly or chiefly of pupils of the public schools of this State and perpetuating itself by taking in additional members from the pupils enrolled in the public schools on the basis of the decision of its membership rather than upon the right of any pupil who is qualified by the rules of the school to be a member of and take part in any class or group exercises designated and classified according to sex, subjects required by the course of study, or program of school activities fostered and promoted by the school board and superintendent of schools for city and graded schools and by the school board and county commissioner of schools for all schools not employing a superintendent of schools. Every such fraternity, sorority, and secret society as herein defined is declared an obstruction to education, inimical to the public welfare, and illegal.

"SEC. 2. It shall be the duty of each school board to prohibit the organization or operation of such fraternity, sorority, or other secret society within the school system over which it has jurisdiction and it may suspend or expel from the school or schools under its control any and all pupils who shall be or remain members of, or who shall join or promise to join, or shall become pledged to become members of, or who shall solicit any other person to join or promise to join, or be pledged to join, any public school fraternity, sorority, or secret society declared by section one hereof to be illegal.

"SEC. 3. It shall be illegal to give credit for a subject pursued, to promote from grade to grade or to graduate any person who shall knowingly violate the provisions of this act, or having violated it shall persist in its violation. Any credit given contrary to the provisions hereof shall not be accepted by any other school or educational institution within this State.

"SEC. 4. Any school official or member of any school board or other person violating or knowingly permitting or consenting to any violation of the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars for each offense."

There is no claim the pupil asking relief did not attend the public schools, did not complete the course of study prescribed therein, is not, so far as educational qualifications are concerned, entitled to graduate, in any event, entitled to credit for the work he has done or that his fraternalistic activity interfered in any way with his education or with his study. Under the school system pupils are graded and classified. When a prescribed subject is passed a pupil is entitled to credit therefor. Intelligence,

ability, and scholarship may, in some cases, be made the basis of admission to our colleges, normal schools, and universities, but the usual and ordinary way is by presentation of certified credits from a recognized high school or other accredited preparatory school. These school credits are not an infallible index to intelligence, knowledge, or character, but they are the recognized legal evidence and practical test, in our educational system, of the right to enter institutions of so-called higher learning.

The respondents have no personal interest in this case. They seek to justify their conduct under the statutes above quoted. They claim the right to deny to a pupil who has the requisite educational qualifications the right of graduation and the right to credit for his educational accomplishments, the right to the beneficial use of what he has earned, solely because it is claimed he belongs to or has belonged to a high school fraternity. They are entirely within their rights, if this legislation is valid.

This legislation goes beyond the legitimate sphere of State regulation, attempts by legislative fiat to proscribe certain social activities and declare them an obstruction to education, inimical to public welfare, and illegal. It authorizes the board of education to expel pupils who belong to such societies, declares it illegal, and hence a misdemeanor, for the board of education to give credit for a subject pursued, promote from grade to grade, or graduate any person, who shall knowingly belong to such social organization. If this legislation is valid, then it is competent to provide by law that students in our colleges and universities shall not belong to the Masons, Knights of Columbus, Odd Fellows, Elks or any other secret fraternal society; to say by legislative declaration that those who attend the

Methodist, Catholic, Presbyterian, Congregational, or other churches may not be given credit for studies pursued in the public schools, or may not attend them at all, or be graduated therefrom; to declare that those who attend a Sunday school maintained by any of these or any other religious organizations, shall not be entitled to the ordinary benefits of our public educational institutions. The legislature may deny education, or the evidences of public instruction, to those who play football, baseball, billiards, golf, cards, checkers, tennis, croquet, or authors. If the legislature may proscribe one social activity or one kind of social organization, it may in its discretion proscribe any other. If the State cannot do it because of the Fourteenth Amendment to the Constitution of the United States, the Federal government cannot because of the Fifth Amendment. *Farrington* v. *Tokushige,* 273 U. S. 284 (47 Sup. Ct. 406).

The State has broad powers, but parents still have some control over their children, who are not yet wards of the State, as in Sparta or Soviet Russia. The State may well prescribe that pupils shall attend public or private schools, shall not be raised in ignorance, shall have opportunities for education, but neither the legislature nor the school authorities have a right to dictate or interfere with the activities of the pupil when not in school. He is then under parental care. As said in *State, ex rel. Stallard,* v. *White,* 82 Ind. 278 (42 Am. Rep. 496):

"If mere membership in any of the so-called Greek fraternities may be treated as a disqualification for admission as a student, in a public school, then membership in any other secret or similar society may be converted into a like disqualification,

and in this way discriminations might be made against large classes of the inhabitants of the State, in utter disregard of the fundamental ideas upon which our entire educational system is based."

If the legislation here involved is constitutional, then it is competent for the legislature to prescribe that pupils in the public schools, colleges, normal schools, and universities shall not attend theaters or prayer meetings, dances or public worship.

It is the policy of our law to promote public education, but there are fields of individual liberty, protected by the Constitution, into which the State may not enter. Such constitutional regulations are made to protect the minority against the vindictiveness or caprice of the majority, and the minority one day may be the majority the next. Public education has its legitimate sphere, but the child, except when in school or on his way to or from there, is not under control of school authorities. The board of education ought not to be constituted social snoopers; they cannot be authorized by law to control the activities of pupils out of school which activities in no way interfere with the educational activities of the pupil in school. The credits which a pupil has earned are valuable. These credits are property. This law arbitrarily interferes with the sphere of individual liberty guaranteed by the Constitution, seeks to establish unjust, unreasonable, and arbitrary rules of social conduct, and deprives the pupil and his parents of property in violation of the Constitution of this State and of the Fourteenth Amendment of the Constitution of the United States. It is invalid. The writ of mandamus should issue.

CLARK and MCDONALD, JJ., concurred with POTTER, J.

PIERCE *v.* SMITH.

1. TRUSTS—SUPPORT OF BENEFICIARY.
   Trustee *ex maleficio* of trust fund is not entitled to any part of corpus of fund for support of beneficiary who was entitled to one-half of income for that purpose, especially where he was allowed all of the income, and no application was ever made to court for further allowance.

2. EXECUTORS AND ADMINISTRATORS—PARTIES—TRUSTS—CONSTRUCTIVE TRUST.
   Where court decree constituted fund constructive trust in hands of husband and wife, estate of deceased wife was not necessary party to suit against husband to enforce trust.

3. TRUSTS—CONSTRUCTIVE TRUST—BONDS.
   Where court decree adjudged certain funds to be constructive trust in hands of holders and ordered same to be turned over on execution of bond, existence of trust did not await giving of bond, and trust did not fail because bond was not given.

Appeal from Eaton; McPeek (Russell R.), J. Submitted November 5, 1930. (Docket No. 181, Calendar No. 34,947.) Decided January 7, 1931.

Bill by Emma Mae Pierce against Edward L. Smith and another to enforce a trust and for an accounting. Decree for plaintiff. Defendant Smith appeals. Affirmed.

Burton G. Cameron and *Elmer N. Peters,* for plaintiff.

Howard W. Cavanagh and *Joseph W. McAuliffe,* for defendant Smith.

WIEST, J. In April, 1917, a decree was entered in the circuit court for the county of Eaton, in chancery, adjudging plaintiff herein to be the equitable owner of $3,400 in money, and a note for $4,600, secured by a mortgage on real estate, in the

hands of defendant Edward L. Smith and his then wife, Cora A. Smith, and ordered the same to be turned over by them to plaintiff upon execution of a bond by plaintiff in the sum of $10,000, to insure the keeping of the fund intact during the lifetime of Margaret C. Pierce, who was given one-half of the income for her support. In the course of this opinion we speak of the money, note, and mortgage as the fund. The bond was not given and the fund was not turned over to plaintiff. Mrs. Pierce having died, plaintiff filed the bill herein to obtain the fund. Mrs. Cora A. Smith is also dead. Defendant Smith appealed from a decree ordering him to transfer the fund to plaintiff.

The record discloses that the decree in 1917 was based upon a finding that the fund was procured by Edward L. and Cora A. Smith in fraud of plaintiff, and the decree constituted the fund a constructive trust fund with Edward L. and Cora A. Smith, trustees *ex maleficio*.

Margaret C. Pierce, life beneficiary of one-half of the income from the trust fund, lived with defendant Smith up to the time of her death, and Mr. Smith claims that a reasonable charge for her care and keep exceeds the amount of the trust fund, and he should be permitted to keep the fund. The court allowed credit to Mr. Smith of all the income. The 1917 decree provided:

"If it should become necessary for the comfortable support and maintenance of said Margaret C. Pierce that she be given a larger allowance of said income, she be and hereby is permitted and authorized to apply to this court for a further allowance out of said fund."

No such application was ever made. Mrs. Pierce also received a pension. Defendant Smith, as a trustee *ex maleficio*, can be awarded no part of the

corpus of the fund the court of equity decreed to belong to plaintiff. We think the receipt by him of the income was all the credit he was entitled to have. The note and mortgage were taken in the names of Edward L. Smith and Cora A. Smith, and it is claimed that the estate of Cora A. Smith is a necessary party to this suit.

The 1917 decree divested all rights of the Smiths to the fund and vested the same in the plaintiff herein subject to the right of Mrs. Pierce to have one-half of the income, and directed a transfer by Edward L. and Cora A. Smith to plaintiff upon the execution of the mentioned bond, and, if they refused or neglected to make the transfer, then a copy of the decree might be recorded to operate as such. A copy of the decree was recorded. The fund is still intact. The estate of Cora A. Smith has no interest in the fund and was not a necessary party to this suit. The surviving trustee can and must obey the decree.

It is claimed, in behalf of defendants, that "The trust sought to be created by the first decree never came into existence." Counsel is in error. The court of equity declared the trust, and, until the bond was given or Mrs. Pierce died, Edward L. Smith held the fund as trustee *ex maleficio*. The trust did not await the giving of the bond for the bond was only to keep the trust fund intact if and when turned over to the plaintiff herein.

The trust has not failed. We find no laches barring plaintiff from recovering the fund.

Defendant Grohens was dropped from the case.

The decree is affirmed, with costs against defendant Edward L. Smith.

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

BOCINSKI *v.* KRZEMINSKI.

1. JUDGMENT—RES ADJUDICATA—MOTION TO DISMISS.
Res adjudicata may not be raised by motion to dismiss, because motion is heard upon allegations in bill, but where bill by reference incorporates former adjudications, then *res adjudicata* based thereon may be urged by motion to dismiss.

2. SAME.
Unappealed judgment of restitution in summary proceeding to recover possession under forfeiture of land contract is *res adjudicata* in suit to have deed and contract back decreed to constitute mortgage.

3. VENDOR AND PURCHASER—REDEMPTION—JUDGMENT.
Bill to redeem from forfeiture of land contract may not be withheld until all methods of attack are litigated and adjudged futile.

Appeal from Wayne; Miller (Guy A.), J. Submitted October 8, 1930. (Docket No. 35, Calendar No. 35,175.) Decided January 7, 1931.

Bill by George Bocinski and another against Ignacy Krzeminski and others to declare a deed and land contract a mortgage and to set aside a judgment of restitution. Decree for defendants. Plaintiffs appeal. Affirmed.

Harry J. Lippman, for plaintiffs.

Murrl E. Dikeman, for defendants.

WIEST, J. This is a bill to have a warranty deed, given to a contractor, under a contract to erect a

building upon the lot deeded, and a land contract given by the grantee to the grantors, decreed to constitute a mortgage, and to set aside a judgment of restitution under the land contract, and, if such cannot be done, then to grant plaintiffs the right to redeem from forfeiture of the land contract. If the deed and land contract cannot be decreed to constitute a mortgage, then there can be no right to redeem from the forfeiture of the land contract because of former adjudications between these same parties. In the circuit the bill was dismissed upon motion.

It was held in *Vyse* v. *Richards,* 208 Mich. 383, and *Red Star Motor Drivers' Ass'n* v. *City of Detroit,* 244 Mich. 480, that *res adjudicata* may not be raised by motion to dismiss. The reason for this is that a motion to dismiss is heard upon the allegations in the bill. If the bill, by reference, incorporates former adjudications then the reason for the rule is absent, and the adjudications, identified by the bill, are before the court, and *res adjudicata* based thereon may be urged by motion to dismiss. The bill in the instant case, by apt reference thereto and for the purpose of collateral attack thereon, brought to the record former judicial proceedings between the parties and adjudications therein. Among such we mention the following: A summary proceeding by defendants Pluta to recover possession, under forfeiture by plaintiffs of the very land contract plaintiffs now want declared to be in the nature of a mortgage; judgment of restitution and no appeal taken. Later plaintiffs herein, by bill in equity, attacked the summary proceeding judgment, but made no claim that the land contract was in the nature of a mortgage. The bill was dismissed under a holding that plaintiffs' remedy was by appeal.

Then an application was made by plaintiffs herein for a belated appeal. This was denied. An application was then made to this court for a writ of mandamus directing the circuit court to allow a belated appeal. The writ was denied and reasons stated. *Bocinski* v. *Wayne Circuit Judge,* 250 Mich. 286.

Plaintiffs are assignees of the vendees' interest under a land contract given by defendants Krzeminski to Walter and Rose Hojnacki, who had conveyed to the Krzeminskis by warranty deed. The building contract providing for such deed and land contract, and the deed and land contract, in pursuance thereof, as set out in the bill, preclude a holding that the deed and land contract constitute a mortgage. Besides, the judgment in the summary proceeding, based on the land contract, is, by reason of no appeal, *res adjudicata.*

The dismissed bill sought no relief by way of redemption, and the instant bill is not upon newly-discovered matter but a mere prolongation of litigation between these parties. A bill to redeem cannot be withheld until all methods of attack are litigated and adjudged futile. Plaintiffs have had their day in court.

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

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

BUTZEL, C. J. (*concurring*). At times this court has permitted redemption from a harsh foreclosure where the equities appealed to the conscience of the court and where parties acted promptly and made a tender or its equivalent in recognition of the rights of others as judicially determined. Such is not the present case. I, therefore, concur in the result.

FECTEAU v. FRIES.

1. MORTGAGES—PURCHASE-MONEY MORTGAGE—PRIORITY.
   Purchase-money mortgage recorded on same day has priority over another mortgage given by purchaser before acquiring title to one furnishing money to make cash payment, although latter was first recorded.

2. SAME—NOTICE.
   Person furnishing money to make cash payment and taking mortgage therefor from purchaser before latter had title must be held to have knowledge of giving of purchase-money mortgage where represented at transaction when latter mortgage was given.

3. SAME—NOTICE—PRIORITY—ASSIGNMENTS.
   Where two mortgages covering same property were acknowledged and recorded same day, record disclosing that one was given to mortgagor's grantor and was in nature of purchase-money mortgage was sufficient to put assignee of other mortgage on inquiry as to priority of mortgages.

4. SAME—ASSIGNMENTS.
   Assignee of mortgage has no greater rights than assignor.

Appeal from Wayne; Bell (Frank A.), J., presiding. Submitted October 7, 1930. (Docket No. 25, Calendar No. 35,112.) Decided January 7, 1931.

Bill by George Fecteau and another against Harry A. Fries and others to foreclose a purchase-money mortgage. Cross-bill by defendant Kate B. Wolfenden to foreclose another mortgage. Each mortgagee claimed priority. From decree granting foreclosure of both but denying priority to either, plaintiffs and defendant Wolfenden appeal. Modified and affirmed.

Priority of purchase-money mortgage over previous conveyance of property by mortgagor, see annotation in 25 A. L. R. 92.

Edward B. Benscoe (*Herbert M. Eiges,* of counsel), for plaintiffs.

Miller, Canfield, Paddock & Stone, for defendant Wolfenden.

WIEST, J. The bill in this case was filed to foreclose a purchase-money mortgage. By cross-bill defendant Wolfenden asked foreclosure of another mortgage. Both mortgages were given by defendant Fries. Each mortgagee claims priority. The circuit judge held that both mortgages arose out of a single transaction; there was no priority, and decreed foreclosure of both and a division *pro rata* of the proceeds of sale. Both mortgagees appealed.

Defendant Fries desired to purchase several lots in the city of Detroit, owned by plaintiffs, and, requiring money to make part payment, applied to defendant Patterson for a loan, and, on the 6th day of August, 1926, was granted a loan of $7,500, and on that day executed a note and a mortgage to Patterson upon the land he expected to purchase. On the 11th day of August, 1926, at the noon hour, parties to the transaction, or their agents, met, and plaintiffs delivered to Fries a deed of the premises and Fries executed and delivered to them a purchase-money mortgage in the sum of $24,000. Mr. Patterson's representative was present, and at the same time Mr. Fries acknowledged execution of the Patterson mortgage. Mr. Fries at that meeting paid plaintiffs $5,000, obtained by him through the Patterson mortgage. The deed from plaintiffs to Fries and the mortgage from Fries to Patterson were recorded at one o'clock, and the purchase-money mortgage from Fries to plaintiffs was recorded 20 minutes later. Plaintiffs claim that their purchase-

money mortgage, known to be such by defendant Patterson, takes priority regardless of time of recording, also that the Patterson mortgage was executed before the mortgagor therein had title. Defendant Patterson, in September, 1926, assigned his mortgage to defendant Wolfenden, and it is urged that time of recording gives priority to the Patterson mortgage, and, also, that defendant Wolfenden was a good-faith purchaser bound only by what the registry record disclosed. We think plaintiffs' purchase-money mortgage has priority.

When Fries executed the Patterson mortgage on August 6, 1926, he had no title. Defendant Fries applied to Patterson for a loan with which to pay a part of the purchase price, and, before he acquired title, executed a mortgage to Patterson. The legal effect of this is stated in *Turk* v. *Funk,* 68 Mo. 18 (30 Am. Rep. 771). We quote from the syllabus:

"A mortgage given to a vendor to secure an unpaid balance of purchase money of land and recorded on the same day, has priority of one which is given by the vendee, before he has concluded the purchase, to a person who furnishes him the money to make the cash payment, notwithstanding the latter is recorded first."

The mortgage to Patterson could not insert itself between the deed to Fries and the purchase-money mortgage by Fries to plaintiffs. The holding in *Dusenbury* v. *Hulbert,* 59 N. Y. 541, fits the case at bar. We quote:

"The deed and Bowen (Fecteau) mortgage executed at the same time are to be construed together as one instrument. They constitute an indivisible act. There never was a moment between the seisin and mortgage when LaGrange (Fries) could en-

cumber the estate to the exclusion of the latter, and it follows that a prior mortgage could not insert itself between them."

The rule is well stated in a note in 25 A. L. R. p. 92, as follows:

"Where one who has conveyed before he had title gives a purchase-money mortgage upon acquiring the title, the cases agree that the title subsequently acquired does not inure to the benefit of the prior grantee or mortgagee, as against the holder of the purchase-money mortgage."

In *United States* v. *Railroad,* 12 Wall. (U. S.) 362, the rule was stated as follows:

"A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase-money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase-money. And in such cases a failure to register the mortgage for purchase-money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors."

The law fixed the status of the two mortgagees, and registry could not and did not bring about any change.

Under the evidence, defendant Patterson must be held to have had actual knowledge of the giving and

the character of the mortgage to plaintiffs. Time of registry of the mortgages is not decisive of any issue here involved. The purchase-money mortgage to plaintiffs took effect instantaneously, and was entitled to priority on account of its being a part of one and the same transaction by which seisin was acquired by the mortgagor.

Defendant Fries was not at any time seized of the title in a manner that could inure to the benefit of the Patterson mortgage. There was no intention to vest the title free from incumbrances in defendant Fries. Mr. Patterson's mortgage was but revived subject to the mortgage for the purchase-money.

Plaintiffs' purchase-money mortgage, having been executed and acknowledged by defendant Fries on the same day that he acknowledged Patterson's mortgage, and both mortgages covering the same property, and the record disclosing at the time of the assignment of the Patterson mortgage to defendant Wolfenden that plaintiffs' mortgage was given to the mortgagor's grantor was sufficient to put defendant Wolfenden upon inquiry, and, had she inquired, she would have ascertained the fact that plaintiffs' mortgage was a purchase-money mortgage and the Patterson mortgage was executed before the mortgagor therein had title. Defendant Wolfenden has no greater rights than her assignor.

The decree in the circuit is modified to accord with this opinion. If, upon sale, there is a surplus, defendant Wolfenden, under her mortgage, may take to the extent of the sum due. Plaintiffs will recover costs against defendant Wolfenden.

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

MARSHALL *v.* DEMAGNASSUN.

1. DEEDS—TRICK—FORGERY.

Where grantors' acknowledgment was taken by notary three days after date of deed and after they had examined it, their claim that their signatures were obtained by trick amounting to forgery, is untenable, although grantee was guilty of fraud in the transaction.

2. SAME—CANCELLATION OF INSTRUMENTS.

Where grantors knew that they were signing deed, they are not entitled to have it set aside as constructive forgery, as against good-faith purchasers from grantee, although latter was guilty of fraud.

3. TRUSTS—CONSTRUCTIVE TRUSTS.

Constructive trusts are sometimes declared by court of equity and impressed on funds in hands of one who should be decreed trustee *ex maleficio*.

4. SAME—DEEDS—GOOD-FAITH PURCHASER NOT TRUSTEE EX MALEFICIO.

Purchaser of land may not be deemed trustee *ex maleficio*, establishing constructive trust, where he acted in good faith, although his grantor may have been guilty of fraud.

Appeal from Wayne; Webster (Clyde I.), J. Submitted October 30, 1930. (Docket No. 178, Calendar No. 34,103.) Decided January 7, 1931.

Bill by George R. Marshall and another against Arthur DeMagnassun and others to declare a deed void. Decree for defendants. Plaintiffs appeal. Affirmed.

Edmund M. Sloman, for plaintiffs.

Robert J. Hanley, for defendant Sternberg.

Signature to deed obtained by fraud as forgery, see annotation in 56 A. L. R. 582.

Jorgensen & Alexander, for defendant Smith.

Walter E. Daines, for defendants Smart.

WIEST, J. Claiming that, in 1926, defendant DeMagnassun obtained their signatures to a deed by trick, and, therefore, the instrument was no better than a forgery (*Horvath* v. *National Mortgage Co.,* 238 Mich. 354 [56 A. L. R. 578]), plaintiffs filed the bill herein to have the deed adjudged void and subsequent purchasers without title.

The evidence does not admit of a finding that the signatures of plaintiffs were procured by trick or in a manner constituting the deed, in effect, a forgery, but clearly establishes a fraud perpetrated by DeMagnassun and rendered possible by the gullibility and misplaced confidence of plaintiffs. The case is like that of *Kuczewski* v. *DeMagnassun,* 242 Mich. 296 (57 A. L. R. 756).

Plaintiffs owned a house and lot in the city of Detroit worth $4,800, subject, however, to a mortgage of $1,000, and had sold the premises on land contract, upon which about $3,800 remained unpaid, and desired to sell their vendors' interest. Defendant DeMagnassun, styling himself manager of the American Discount Company, advertised that the company would buy land contracts at a small discount. Plaintiffs read the advertisement, visited the office of DeMagnassun, taking with them their land contract and abstract of title, and, after some negotiations, an agreement in writing was signed by the parties, under which plaintiffs, in consideration of $3,161.18, agreed to convey to the American Discount Company their interest. The same day plaintiffs signed an assignment of the land contract to DeMagnassun and received a note for $3,111.18, payable in two weeks, less $50, deducted for an un-

paid paving tax, and also signed a warranty deed, conveying their title to DeMagnassun. Mr. Marshall died before the hearing. Mrs. Marshall was a witness and admitted that the deed to DeMagnassun bore the signatures of her husband and herself, but said she did not know that, among the papers she signed, there was a deed, and, in her behalf, the theory is advanced that, in signing the transfer of the land contract, the deed, without her knowledge, was slipped among the papers. This theory is rendered untenable by the testimony of defendant Samuel Sternberg, an attorney, that he visited plaintiffs at their home, three days after the date of the deed, and took their acknowledgment after they had examined the deed, previously signed by them. DeMagnassun was also present. Mr. Sternberg was made a defendant, but the evidence disclosed that he acted only in the capacity of a notary, and there was no good reason for making him a party defendant.

We cannot find that plaintiffs' signatures were procured by trick in the sense of an artifice or deceitful contrivance keeping from plaintiffs knowledge that they were signing a deed. Under the evidence, plaintiffs unwittingly dealt with a scoundrel who was too wily to resort to constructive forgery when it was not necessary. Plaintiffs thought they were dealing with an honest man, and they trusted him too far, for his wicked scheme was to induce them to openly place their property in his name so that he might sell the same and pocket the proceeds.

The day that DeMagnassun received the assignment of the land contract he offered the same for sale to defendant Fred L. Smith. Mr. Smith had his attorneys examine the title and purchased the land contract interest and the title to the property

from DeMagnassun. Thereafter DeMagnassun left for parts unknown, and, while named a party defendant, was not brought in by process nor did he appear.

Defendants Thomas G. and Jennie E. Smart are purchasers from Fred L. Smith, and their good faith is unquestioned.

In behalf of plaintiffs it is claimed that defendant Smith, at the time of his purchase, was put upon inquiry by the fact that at that time the assignment of the land contract had not been acknowledged, and he was advised by his attorneys:

"You should have the assignment notarized as you know many of your clients wish to record the land contract and assignments, which they cannot do if same are not acknowledged. You should check up from the Highland Park State Bank as to the balance due upon this mortgage and the deed from Marshall to DeMagnassun to yourself. Inasmuch as this abstract was certified on January 2nd, we advise the same caution in respect to this deal as to any others, that is, that you should have Miss Nadell from your office, or ourselves, check up the reception books and see if any instruments have been received for recording since the date of certification."

Later, and before purchase by Mr. Smith, the proper certificate of acknowledgment was supplied upon the assignment by the notary. We find nothing in this requiring Mr. Smith to verify the signatures to the instrument. Had he verified the signatures he would have found them all genuine.

Counsel for plaintiffs contends that defendant Smith, under the doctrine of constructive trusts, should be made to account to plaintiffs for the moneys he received from defendants Smart. Constructive trusts are sometimes declared by the court

of equity and impressed upon funds in the hands of one who should be decreed a trustee *ex maleficio*. Plaintiffs have not established the essential elements calling for the application of the doctrine of constructive trusts. Defendant Smith was a good-faith purchaser. This ends the case.

The decree in the circuit court is affirmed, with costs to defendants Sternberg, Smith, and Smart.

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

MANUFACTURERS FOUNDRY CO. *v.* CITY OF HOLLAND.

1. MUNICIPAL CORPORATIONS—HOLLAND CHARTER—VACATING STREET.
   Under its charter, city of Holland had power to vacate part of street.

2. SAME—VACATING STREET—NULLIFICATION.
   That asserted purpose, inducing vacation of street, and acted on by city council, was made in good faith, forbids nullification by reason of subsequent events.

3. SAME—RECORD—PUBLIC IMPROVEMENT.
   Failure of city council to recite in record that it deemed vacation of part of street public improvement was not fatal to vacation if in fact it necessarily so found.

4. SAME—ADVISABILITY OF VACATING STREET NOT REVIEWABLE.
   Neither advisability or purpose of vacating part of street is subject to review by court unless vacation was abuse of power or brought about by fraud.

Reversion of title to original grantors upon vacation of public highway, see annotation in 18 A. L. R. 1008; 42 A. L. R. 236.

5. SAME—QUIETING TITLE—DEFENSES—REVERSION—PARTIES.
In suit against city to quiet title to part of street vacated by council and quitclaimed to plaintiff's grantor, city may not urge reversion to city's grantors, where they are not parties.

6. SAME—VACATING STREET—CONSIDERATION.
There is no merit in city's contention that vacation of part of street was without consideration, where property rights in another strip of land were acquired by abutting owner and opened as way in place of that vacated.

7. SAME—EXPEDIENCY OF VACATING STREET.
Vacation of part of street to allow enlargement of manufacturing plant of abutting owner was matter of expediency and within power vested in city council.

8. SAME—VACATION OF STREET MAY NOT ARBITRARILY BE SET ASIDE BY LATER COUNCIL.
Where city council, in exercise of vested power, vacated part of street and quitclaimed it to abutting owner, later council, believing that mistake had been made, may not arbitrarily set aside said action at expense of abutting owner.

Appeal from Ottawa; Pugsley (Earl C.), J., presiding. Submitted October 17, 1930. (Docket No. 107, Calendar No. 35,256.) Decided January 7, 1931.

Bill by Manufacturers Foundry Company, a Michigan corporation, against City of Holland, a municipal corporation, to enjoin interference with possession of a vacated portion of a street. Decree for plaintiff. Defendant appeals. Affirmed.

Robinson & Parsons, for plaintiff.

Charles H. McBride, for defendant.

WIEST, J. The bill herein was filed to enjoin defendant city and its officers from interfering with plaintiff's possession of premises, formerly a part of Ninth street in the city of Holland, and vacated

by the city council in 1920, and now claimed to be owned by plaintiff, and to quiet its title thereto. Defendant appealed from a decree granting the relief asked by plaintiff.

In behalf of the city, it is claimed that in 1897 the land was deeded to the city "to be used for the purpose of a public street and for no other purposes," and that the vacating of a part thereof by the city council was an abuse of discretion and void, and, if valid, plaintiff acquired no rights thereunder.

In 1920 owners of property in the vicinity petitioned the council to vacate the part of the street here involved, and it was vacated by that body. It was then believed that a contemplated enlargement of the Western Foundry Company plant (plaintiff's predecessor) would require that portion of the street, and public travel could be diverted and served by extending a 30-foot way to connect with Eighth street, near the point of vacation. The Western Foundry Company agreed to acquire property rights and open the way in case of vacation of the street. This was satisfactory to the adjacent property owners and the city council, and, upon vacation of the street, was carried out, and the city, by quitclaim deed, conveyed the vacated part of the street to the Western Foundry Company, at that time the abutting proprietor. The Western Foundry Company did not enlarge its manufacturing plant, and September 24, 1928, deeded its property, including the vacated part of the street, to the Manufacturers Foundry Company, plaintiff herein.

It is claimed in behalf of the city that highway and other needs now call for use of the strip in suit, and that its vacation was not specifically declared a public improvement by the council; that no consideration passed to the city; that the vacation was

induced by false and fraudulent representations of intended and needful use of the strip, and that, under the terms of the deed to the city, the strip, if it ceased to be used for the purpose of a public street, reverted to the grantors in such deed and could not vest in the abutting proprietors or be conveyed by the city, and, by cross-bill, asked that the quitclaim deed be declared void.

Under the city charter, the council, in 1920, had power to vacate the part of the street. The fact that the asserted purpose, inducing vacation, and acted upon by the city council, was made in good faith, forbids nullification by reason of subsequent events. It was believed at the time of the vacation that an expansion of the manufacturing plant would soon be made, and, when made, it would be necessary to occupy the strip vacated. The anticipated expansion has not yet come about. This, however, does not in and of itself restore the street.

But it is said that the charter conferred power upon the city council to "close, vacate, or abolish any highway, street or alley in the city whenever they shall deem the same a public improvement," and this required a recital that the council deemed the vacation a public improvement, and no such recital appears in the record of the proceedings of the council. The failure to so recite was not fatal if, in fact, the council necessarily so found. The advisability of the vacation is not subject to our review, neither is the purpose thereof, unless the act of vacation was an abuse of power or brought about by fraud. *Tomazewski* v. *Palmer Bee Co.*, 223 Mich. 565; *Phelps* v. *Stott Realty Co.*, 233 Mich. 486.

The city may not urge in defense reversion of the strip to the grantors in the deed to the city, for the grantors are not parties to this suit, and the decree

herein only quiets title as against assertion of title by the city. There is no merit in the point that the vacation was without consideration.

The circuit judge was right in holding that the vacation of the portion of the street in question was a matter of expediency and within power vested in the council, and, having been decided adversely to the present contentions of the city by the action of the council in 1920, is not a question for the court to decide at this time. There is also force in the following statement made by the court below:

"Neither am I inclined to think that cities may exercise their powers, as was done in this case by closing a street, and thereby vest, by operation of law, the title of the street in abutting property owners, confirm such action by a deed of the street to the abutting property owners, and then, a few years later, when a later council believe that a mistake has been made, arbitrarily decide that their predecessors in office did an unwise thing, and arbitrarily set aside their actions at the expense of abutting property owners."

The action of the council of defendant city in 1920 was valid.

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

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

McMORRAN *v.* CLEVELAND-CLIFFS IRON CO.

1. NUISANCE—FUEL DOCK.
   Fuel dock for purpose of supplying vessels with coal is not nuisance *per se*.

2. SAME—WHETHER FUEL DOCK NUISANCE DEPENDS ON OPERATION.
   Whether fuel dock is nuisance *per accidens* depends on showing that dust, noise, and vibration are more than merely incident to proper and skilful operation, considering vicinage.

3. SAME—HAMMERING ON STEEL CHUTES ENJOINED.
   Use of sledge hammer in dislodging clogged coal by hammering on steel chutes and bins in operating fuel dock was properly enjoined at instance of adjoining residents although district was not strictly residential.

4. SAME—OVERLAPPING WATERFRONT BY VESSELS NOT NUISANCE.
   That vessels at fuel dock, because of their length, overlap adjoining waterfront, constitutes no nuisance.

5. SAME—SMOKE FROM SMOKESTACKS OF VESSELS.
   Smoke from smokestacks of boats at fuel dock is but incident of navigation and may not be enjoined by residents.

6. SAME—NOISE—USE OF PROPER MACHINERY SKILFULLY MANAGED MAY NOT BE ENJOINED.
   Use of unloading machinery on vessel at fuel dock, if proper and managed with skill, may not be enjoined at instance of residents in vicinity, although noise therefrom interferes with their comfort and sleep.

7. EVIDENCE—JUDICIAL NOTICE—COAL DUST.
   It is common knowledge that coal cannot be handled without discharging dust.

8. NUISANCE—VIBRATION FROM VESSEL BEYOND INJUNCTIVE RESTRAINT.
   Vibration occasioned by vessels coming to fuel dock is but incident of navigation and beyond injunctive restraint.

As to whether nuisance resulting from smoke alone is subject to injunctive relief, see annotation in 39 L. R. A. 551; 6 A. L. R. 1575.

Appeal from St. Clair; Robertson (William), J. Submitted October 14, 1930. (Docket No. 78, Calendar No. 35,208.) Decided January 7, 1931.

Bill by David McMorran and others against Cleveland-Cliffs Iron Company, a foreign corporation, and Port Huron Coal & Dock Company, a Michigan corporation, to enjoin an alleged nuisance. Decree for plaintiffs. Defendants appeal. Affirmed in part, reversed in part.

Avery & Covington, for plaintiffs.

Walsh, Walsh & O'Sullivan (*Andrews & Belden,* of counsel), for defendants.

WIEST, J. Defendants appealed from a decree adjudging some of the operations of their fueling dock on the St. Clair river in the city of Port Huron a nuisance.

For many years there has been maintained a fueling dock at the place in question, supplying vessels and other consumers with coal. Steamships have supplanted sailing vessels and this has created an increased demand for coal by vessels plying the Great Lakes. This demand has led to larger supplies of coal being unloaded at the dock from carrying vessels, the handling and storage thereof, the supplying of vessels therewith, and the installation of modern machinery and devices for speedy movement thereof. The coaling dock is favorably located for vessels delivering and taking on coal. At the time the fueling dock was located, and for years thereafter, the locality was but sparsely settled, and, even now, by reason of industries and railroad tracks, it cannot be termed a strictly residential district. The neighborhood of the dock, especially

along the river bank, has been built up for residence purposes to quite an extent, and several owners of near-by residences claim that smoke from vessels at the dock, coal dust arising from handling of the coal, and noise and vibration seriously injure their property rights and interfere with their enjoyment of their homes.

The circuit judge found:

"Adjoining defendants' property on the north are situated the power plant of the St. Clair Tunnel Company and the substation of the Detroit Edison Company. Immediately north of these plants are the depressed railroad tracks of the Pere Marquette Railroad. These tracks are also used by the Grand Trunk Railway, and lead into the freight and switching yards of these two railroads. The river front, east of Military street, from the substation of the Detroit Edison Company north to the mouth of Black river is used and occupied by railroad tracks, freight terminals, a small dry dock and other business enterprises. Military street north of defendants' property is largely occupied by high class residences for several blocks.

"The plaintiffs have either built or acquired their homes since the location of a coal yard and dock at this point and all knew of the existence of such business at this site at the time they bought or built their homes.

"The character of the business done at defendants' plant has changed from domestic trade and a comparatively small boat business, to one consisting almost exclusively of boat trade of rather large dimensions, and consequently the machinery and equipment has gradually changed from horse power to steam power until at present the plant is operated principally by electrical equipment.

"The defendant Cleveland Cliffs Company took possession of this coal business in 1926 and at once

began to improve its equipment and general condition. They have equipped their plant with the most modern, up-to-date machinery, operated by electricity, and have done and are doing everything they deem possible to lessen the annoyance to the neighborhood occasioned by dirt and noise. They have a large investment in this plant and are conducting a large and important business and one necessary to the vessel interests of the Great Lakes. This plant, designed for use as it is, must of necessity be upon the banks of the river St. Clair, and in order to economically and efficiently fulfil the requirements as designed, it must be equipped as it is, and now it ranks as one of the best on the Great Lakes.

"Some of the dust, smoke and soot complained of comes from boats passing up and down the river St. Clair, not connected with the business of these defendants; some from the manufacturing plants across the river and located in Sarnia, Ontario, and some from the passing of trains immediately to the north of and in close proximity to this neighborhood. * * *

"The cause of complaint is not that the coal yard and dock exists, but it is due to the fact that the business has increased to such an extent that it has necessitated larger, heavier and more powerful machinery to properly handle the greatly increased volume of coal and that this enlargement of the business has caused the annoyances complained of.

"The preponderance of evidence shows that since defendants have taken over the coal dock and yard, dust and noise have greatly increased."

The decree enjoined defendants from:

"1. Using a sledge hammer or other instrument in dislodging the clogged coal by hammering on the steel chutes and bins.

"2. Permitting boats to so lie at their dock as to extend in front of plaintiffs' property and allow

smoke from the smokestacks of said boats to enter plaintiffs' homes.

"3. Operating the unloading device of the steamer 'Fontana,' or any other steamboat, at said yard and dock, unless the same is in such repair so that it will not annoy plaintiffs and interfere with their comfort and sleep by reason of noise made by the machinery of said device.

"4. Making a disturbing noise by dropping coal from the elevating device into the bins and chutes.

"5. Permitting excessive dust to emanate from said yard and dock to the annoyance and discomfort of plaintiffs."

The fuel dock is not a nuisance *per se*. Whether it is a nuisance *per accidens* depends upon a showing that the dust, noise, and vibration are more than merely incident to the proper and skilful operation of the business. *Chesapeake, etc., R. Co.* v. *Scott,* 197 Ky. 636 (247 S. W. 735). The vicinage is an element to be considered. Persons who built residences in the vicinity of the established fueling dock can neither expect nor have the quiet and freedom from annoyances that they would have elsewhere.

When the fueling dock was installed due regard was had for the fitness of the location. It was not then an intrusion into an established residence district. But, even so, if plaintiffs afterward located their residences in the vicinity and chose to reside in close proximity thereto they are not deprived of all redress. They must submit to the dust, noise, and vibration incident to the proper and skilful operation of the business, but nothing more.

Counsel for defendants ask this question:

"May the courts of Michigan, on complaint of private citizens who have constructed homes since

the *establishment* of this fueling dock, treat the noise and dust resulting from proper operations of that dock in obtaining coal and in fueling vessels, as constituting a nuisance, and, in effect, enjoin the operation of the dock itself?"

And assert this answer:

"Any interference with the *reasonable* and *proper* operation of this fueling dock would be an obstruction to navigation and interstate commerce, and the regulation of interstate commerce is a subject reserved to the Federal government and is beyond the jurisdiction of the State courts."

The question, so far as necessary, will be answered in the course of this opinion.

Plaintiffs do not ask that the fueling dock and business be abandoned, and the relief granted in the circuit does not abate the business unless it can be said that the regulations imposed reach such result.

Every judge appreciates the force of the following remarks of Justice Sharswood in *Wier's Appeal,* 74 Pa. St. 230, 241:

"The great difficulty in all cases of this character is not in the ascertainment of the true rule of equity, but in the application of that rule to the facts. While it may be easy to draw the line between what is and what is not a nuisance, which equity ought to enjoin, it is by no means so easy to determine whether the circumstances of any particular case ought to place it on one side or the other of that line. It is rare that any number of men will be found to agree in their judgment upon such a question. * * * There is a very marked distinction to be observed in reason and equity between the case of a business long established in a particular locality, which has become a nuisance from the growth of population and the erection of dwellings in prox-

imity to it, and that of a new erection threatened in such a vicinity."

In line with this see *Gilbert* v. *Showerman,* 23 Mich. 448.

1. We take up and will now consider the restraint imposed. The use of a sledge hammer in dislodging clogged coal has been discontinued. It is claimed that this practice was indulged by employees without authority, and, when noticed, was stopped. It should have been noticed earlier. It must remain stopped. The decree in this respect is affirmed.

2. Defendants' fueling dock is 445 feet long. Many vessels are longer. There is a strong current in the river and some vessels at the fueling dock, because of their length, overlap adjoining waterfront. This constitutes no nuisance. If such is an actionable trespass (a point we do not decide), the remedy is at law. On the subject see *Sherlock* v. *Bainbridge,* 41 Ind. 35, 46 (13 Am. Rep. 302); *Wellington* v. *Cambridge,* 214 Mass. 35 (100 N. E. 1096).

In *Pollock* v. *Cleveland Ship Building Co.,* 56 Ohio St. 655, 673 (47 N. E. 582), it was held:

"The mooring of vessels there, though they did overlap in front of plaintiff's land, did not constitute trespasses, and the plaintiff, under the facts found, has no standing in a court of equity to enjoin such use."

The damage, if any, occasioned by such overlapping is not common to all the plaintiffs.

Smoke from smokestacks of boats at the fueling dock is but an incident of navigation. Some of the boats are owned by defendants and others stop there to receive fuel. To restrain vessels engaged in navigation and interstate commerce from emit-

ting smoke at the dock, to the annoyance of plaintiffs, would not only interfere with rights of navigation but as well destroy the business carried on at the dock. In the course of navigation vessels may traverse any part of the river and the incident of smoke from their consumption of fuel, even though an annoyance to residents along the shore, justifies no injunction.

3. The steamer Fontana has been sold, and, it is said, will no longer carry coal to the dock. The decree, however, restrains defendants from operating the unloading device of any other steamboat unless the same is in such repair so that it will not annoy plaintiffs and interfere with their comfort and sleep by reason of noise made by the machinery. If the unloading machinery upon any vessel at the dock is proper and managed with skill, the use thereof may not be enjoined, even though the noise therefrom interferes with the comfort and sleep of plaintiffs.

4. Defendants have installed modern elevating appliances for unloading coal. It is true that the dropping of coal from the elevating devices in the bins and chutes occasions noise. Such noise is occasioned in the use of the most modern appliances and plaintiffs have not established improper equipment and lack of skill in operation.

5. Dust arising from the handling of coal. The coal is wet down before delivery at the dock, and coal upon the dock and hoisted to bins for delivery therefrom by chutes to vessels desiring to fuel cannot be wet down because it increases the weight of the coal, and this is not permissible. It is common knowledge that coal cannot be handled without discharging dust. Every housewife knows this. The decree restrained the emanation of "excessive dust," recognizing that some dust is inevitable.

We are unable to find that defendants in handling the coal are employing improper methods, or operating in an unskilful manner.

Plaintiffs also complained of vibration occasioned by vessels coming to the dock. This is but an incident of navigation and beyond injunctive restraint.

The decree restraining the use of sledge hammers is affirmed, and in all other respects reversed. Defendants will recover costs.

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

SHIFFMAN v. TURNER.

1. Brokers—Commissions—Contracts—Consideration.
   Execution of lease by landlord to lessees of doubtful financial ability, on broker's assurance that they were financially able to perform, afforded sufficient consideration for broker's agreement to wait for part of his commission until lessees demonstrated ability to perform.

2. Same—When Entitled to Commission.
   Broker is entitled to commission only when he produces person willing, ready, and able to perform.

3. Same.
   Broker is not entitled to commission for procuring tenants who executed 20-year lease but were unable to pay taxes agreed, unable to pay first month's rent, and never went into possession, since they were not able to perform.

Error to Wayne; Warner (Glenn E.), J., presiding. Submitted October 9, 1930. (Docket No. 46, Calendar No. 35,041.) Decided January 7, 1931. Rehearing denied April 7, 1931.

As to what constitutes performance by real estate broker of contract to find a purchaser or effect an exchange of his principal's property, see annotation in 44 L. R. A. 616; 1 A. L. R. 523.

Assumpsit by David J. Shiffman against Annie C. Turner for broker's commission for obtaining tenants. Judgment for defendant. Plaintiff brings error. Affirmed.

Friedman, Meyers & Keys, for plaintiff.

Frederic T. Harward, for defendant.

WIEST, J. In this suit plaintiff seeks to recover a commission, claimed to have been earned by him in procuring tenants for defendant's commercial premises at the northwest corner of Washington boulevard and Michigan avenue in the city of Detroit. The tenants were Louis R. Cohn and Israel Zilber.

Some time in January, 1929, the proposed tenants paid defendant $1,000, and were given a receipt which recited that $9,000 more should be paid at the time of the execution of a lease, and set up the terms of a lease for 20 years, and also stated:

"In consideration of the services rendered by David J. Shiffman in connection herewith, I agree to pay him the regular real estate board commission therefor payable in the following manner: One-third of such commission at the time of the payment of the additional nine thousand ($9,000) dollars; one-third thereof upon September 1, 1929, and one-third thereof on or before December 1, 1929."

Within a few days defendant's husband, who handled the matter, heard a rumor about a bankruptcy proceeding which led him to think that the proposed lessees might not be financially responsible, and, not wanting to execute a lease to them, he tendered back the $1,000, and, only upon assurance made by plaintiff that the proposed lessees were

financially able to perform the terms of the lease and that plaintiff would get no commission after the first payment of one-third thereof unless the proposed tenants carried out the terms of the lease, defendant executed the lease, and, upon receipt of the $9,000, wrote out the following receipt, and it was signed by plaintiff:

"4,666.66 January —, 1929.

"Received of Annie C. Turner, the sum of four thousand six hundred and sixty-six and 66/100 dollars, being for one-third (⅓) of real estate commission as agent for effecting the foregoing lease, a like amount to be paid me on Sept. 1, 1929, and a further like amount to be paid me on Dec. 1, 1929, provided all conditions and terms of said lease as this day signed have been complied with by lessees on the dates said payments fall due, said last payment to be in full of all commissions due me."

Plaintiff admits signing the receipt, but claims that, while he glanced it over, he did not notice its terms. Under the evidence plaintiff is bound by the terms of the receipt unless the agreement therein, with reference to commission, was without consideration. Upon this question many cases are cited, but, in the last analysis, the law must be applied with reference to the particular facts before us.

Plaintiff claims that he procured for defendant tenants ready, willing, and able to lease the premises for the term of 20 years, beginning on the first day of September, 1929, to pay $20,000 to stand as security, to pay $50,000 per year for the first five years, $55,000 a year for the next ten years, and $60,000 a year for the last five years, and also pay all taxes, assessments, or levies, general and special, ordinary and extraordinary, including water rates,

and prior to July 25, 1929, pay defendant five-sixths of the taxes assessed against the premises for the year 1929–1930 for city taxes.

Defendant's suspicion that the lessees might not be financially able to perform the terms of the lease appears, by reason of subsequent events, to have been well founded. The lessees never took possession, and defaulted in the payment of the stipulated July taxes, and their lease was forfeited. It is evident that the lease would not have been executed except for the assurance made by plaintiff and his agreement to let two-thirds of his commission await demonstration of ability of the lessees to perform. Plaintiff, by the mentioned assurance and agreement, induced defendant to execute the lease. This afforded sufficient consideration for plaintiff's agreement. But beyond this, plaintiff did not procure tenants ready, willing, and able to enter into and perform the mentioned lease. In this jurisdiction we accord much significance to the ability of lessees to perform an undertaking brought about by the efforts of a broker and for the accomplishment of which he claims a commission.

As said by the circuit judge in his findings:

"The broker is entitled to a commission when he produces a person who is willing, ready, and able to perform his part of the contract. It is not sufficient that the customer is willing and ready, but is not able to consummate. Were Messrs. Cohn and Zilber able to fill their part of this agreement? They were not able to pay the taxes which they agreed to pay prior to July 25, 1929; they were not able to pay the rent for the first month; they did not obtain the key to the building or enter into possession of the property; their term as tenants did not commence. They were not able to perform and the plaintiff is not entitled to recover. *Morgan* v. *Zan-*

ger, 188 Mich. 212; *Frischkorn Real Estate Co.* v. *Hinckley,* 227 Mich. 399; *Ladd* v. *Bolema,* 246 Mich. 32; 4 R. C. L. p. 307, § 49."

The judgment is affirmed, with costs to defendant.

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

O'CONNOR *v.* VANDER VEEN.

1. PARTNERSHIP—LIABLE FOR PARTNERSHIP MATERIAL ORDERED BY PARTNER.

   Seller of material ordered by partner for partnership had right to look to partnership for pay, although unaware of partnership relation at time material was furnished.

2. GARNISHMENT—RECEIVERS.

   Writ of garnishment against debtor, issued after appointment of receiver without permission of court, fastened no lien and worked no preference.

3. MUNICIPAL CORPORATIONS—RIGHT OF MATERIALMAN TO LOOK TO SURETIES ON CONTRACTOR'S BOND—NOTICE.

   Where company furnishing cement for city paving contract failed to give city notice as required by Act No. 384, Pub. Acts 1925, it could not look to sureties on contractor's bond given to protect materialmen.

4. SAME—JURISDICTION—PLEADING—PARTIES.

   Where city, sureties, and materialman intervened or were impleaded in receivership proceedings against paving contractor, and evidence was offered on issue of materialman's right to look to sureties on contractor's bond, court had jurisdiction to make adjudication denying such right on finding that materialman had failed to give statutory notice to city.

Appeal from Kent; Perkins (Willis B.), J. Submitted October 31, 1930. (Docket No. 31, Calendar No. 34,869.) Decided January 7, 1931.

Bill by William G. O'Connor against Howard VanderVeen for appointment of a receiver and an accounting of partnership funds. Upon petition of the City of Grand Rapids, a municipal corporation, debtor, Wabash Portland Cement Company, and others, creditors and sureties, were impleaded. From decree disallowing preference to the Cement company's claim, it appeals. Affirmed.

McAllister & McAllister, for receiver.

Travis, Merrick, Johnson & McCobb, for Wabash Portland Cement Company.

William J. Landman, for intervening defendants Loomis & Mauzy.

Norris, McPherson, Harrington & Waer, for intervening defendant Hartford Accident & Indemnity Co.

Knappen, Uhl, Bryant & Snow, for intervening defendants P. W. O'Connor, P. Van Dommelen and W. H. Anderson.

WIEST, J. This is an appeal by the Wabash Portland Cement Company from a decree adjudging it to be a general and not a preferred creditor of O'Connor & VanderVeen, a copartnership. The cement company asserts preference because of reliance upon individual contracts, as hereinafter mentioned, without knowledge of the partnership, and, therefore, claims right to look to individual assets

of O'Connor and VanderVeen and come ahead of general creditors of the copartnership. Other claims of the cement company will be mentioned in the course of this opinion.

Plaintiff filed the bill herein to dissolve the copartnership, have an accounting, restrain VanderVeen from collecting from the city, and for the appointment of a receiver to take charge of the partnership affairs, complete the city contracts, collect the contract prices, and pay the creditors.

Plaintiff entered into separate contracts to pave eight streets in the city of Grand Rapids. Defendants P. W. O'Connor, Peter Van Dommelen, and W. H. Anderson were sureties upon his bonds, given in compliance with the provisions of Act No. 384, Pub. Acts 1925 (3 Comp. Laws 1929, §§ 13132–13136). Defendant VanderVeen entered into separate contracts to pave four streets in the city of Grand Rapids. Defendant Hartford Accident & Indemnity Company was surety upon his bonds. After entering into the mentioned individual contracts, plaintiff and defendant VanderVeen pooled their interests by way of a copartnership. Thereafter each ordered material from defendant Wabash Portland Cement Company and used the same indiscriminately in carrying out the contracts with the city.

The court appointed defendant Grand Rapids Trust Company receiver, and empowered it to take over the business and complete the contracts of O'Connor & VanderVeen and ordered all creditors to file their claims with the receiver. The receiver continued with the paving contracts, and filed a petition setting forth that certain moneys were due from the city and asked the court to order the city to pay such moneys to the receiver. In answer to

the petition, the city averred claims pending for labor and materials, and, by petition, asked that all creditors be impleaded as parties defendant, have their claims determined, and that the city be allowed to pay into court any balance due under the contracts. This was done.

After appointment of the receiver, the Wabash Portland Cement Company brought suit against defendant VanderVeen, secured a judgment, and caused a writ of garnishment to be issued against the city of Grand Rapids. In response to the writ, the city made disclosure, denying indebtedness to defendant VanderVeen, except conditionally, averred the pendency of the chancery suit and the appointment of a receiver and restraint imposed upon paying any money to defendant VanderVeen. No further proceedings were had under the garnishment. The court appointed a special master to hear claims and report thereon. The Wabash Portland Cement Company presented and verified its claim against the partnership, but later amended the claim as follows:

"That the materials furnished by this claimant, out of which its claim against the partnership in the amount of eleven thousand one hundred forty-five and 48-100 dollars ($11,145.48) arose, were furnished to William G. O'Connor and to Howard VanderVeen as individuals; that Portland cement was furnished by this claimant to William G. O'Connor to the value of three thousand nine hundred eighty-nine and 29-100 dollars ($3,989.29), and to Howard VanderVeen to the value of seven thousand one hundred fifty-six and 19-100 dollars ($7,156.19).

"That the cement so furnished to William G. O'Connor and to Howard VanderVeen as individuals, was thereafter used by the partnership composed of William G. O'Connor and Howard Vander-

Veen, whereby and whereupon the said partnership became indebted to the said Wabash Portland Cement Company, claimant herein, in the sum of $11,145.48, no part of which has been paid.

"That this claim is made against the said partnership without in any way releasing the said William G. O'Connor and Howard VanderVeen from their liability as individuals to Wabash Portland Cement Company."

The master allowed the claim in full against the copartnership, made report to the court of such fact, and the report was confirmed.

It is the claim of the Wabash Portland Cement Company:

"1. That it extended credit to William G. O'Connor and Howard VanderVeen as individuals, having no knowledge of any alleged copartnership between them, and consequently that it has preferred claims against the funds derived from the individual contracts of these parties, which claims are prior to those of partnership creditors or to the rights of the receiver.

"2. That it has a valid garnishment against the funds derived from the contracts of Howard VanderVeen which gives it a lien on said funds prior to all other parties.

"3. That the court had no jurisdiction in this case to pass upon the liability of the sureties."

If the material was ordered by one partner for the business of the partnership, and so used, the cement company had a right to look to the partnership for pay, even though unaware of the partnership relation at the time of furnishing the material. *Hudson Letter Co.* v. *Racette,* 244 Mich. 144.

The cement was furnished after the formation of the copartnership, and the evidence discloses facts

from which the cement company was bound to notice that it was furnishing material to a copartnership.

At the time the writ of garnishment issued the receiver was empowered to reduce to his possession any and all money due from the city under the paving contracts, and the Wabash Portland Cement Company had no right to attempt interference therewith by writ of garnishment, unless permitted to do so by the court. No such permission was asked or granted, and counsel for the receiver contends that, under such circumstances, the taking out and serving the writ was a contempt of court. Counsel cites High on Receivers (4th Ed.), § 164:

"Thus, one who, with full knowledge of the appointment of a receiver, attempts by garnishee proceedings to reach credits which are due to the receiver, but of which he has not yet obtained possession, will be punished for contempt of court."

This text is fully supported by *Richards* v. *People,* 81 Ill. 551, cited by the author. We need but say that the writ of garnishment fastened no lien and worked no preference.

Was the court in error in adjudging that the Wabash Portland Cement Company, by reason of failure to give the notice required by Act No. 384, Pub. Acts 1925 (3 Comp. Laws 1929, §§ 13132–13136), could not look to the sureties on the bonds given by the contractors to protect the materialmen?

The city intervened and impleaded the sureties. The sureties intervened and filed answers presenting the questions of their rights and liabilities. The Wabash Portland Cement Company intervened, and, by its pleading, claimed right to recover against the sureties.

Evidence was introduced upon the question of the liability of the sureties, and the court adjudged liability as to creditors giving the statutory notice and found that the Wabash Portland Cement Company had not given the required notice to the city, and, therefore, that company could not look to the sureties.

The pleadings presented the question, and evidence having been offered upon such issue, the court had jurisdiction to make the adjudication.

The decree in the circuit is affirmed, with costs against the Wabash Portland Cement Company.

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

PEOPLE *v.* WUDARSKI.

1. CRIMINAL LAW—WEIGHT OF EVIDENCE.
   In trial for robbery armed, verdict of guilty cannot be said to be against great weight of evidence, because defense of *alibi* was supported by evidence.

2. SAME—INSTRUCTION ON ALIBI.
   Instruction that *alibi* is defense difficult to disprove was not erroneous, notwithstanding notice in writing of intention to claim such defense is required by statute (section 20, chap. 8, Act No. 175, Pub. Acts 1927, as amended by Act No. 24, Pub. Acts 1929).

3. SAME—INTEREST OF ACCUSED.

In criminal case, jury may be instructed to take into consideration, in weighing testimony given by accused, interest he has in result.

4. SAME—COMMENT OF COURT ON EVIDENCE.

Under section 29, chap. 8, Act No. 175, Pub. Acts 1927, judge in charge to jury in criminal case may make such comment on evidence, testimony, and character of witnesses as in judge's opinion interest of justice may require, but he should make it clear that he is merely stating his opinion, and not directing jury to be guided by it.

5. SAME—INSTRUCTION—OPINION OF JUDGE.

Instruction in criminal case calling jury's attention to accused's previous record, and stating that judge would be reluctant to believe accused's testimony as against that of officers was not erroneous where judge further stated that he was only expressing his opinion, and that jury had duty of determining disputed issues of fact (section 29, chap. 8, Act No. 175, Pub. Acts 1927).

WIEST and MCDONALD, JJ., dissenting.

Error to Wayne; Webster (Arthur), J. Submitted October 16, 1930. (Docket No. 157, Calendar No. 35,024.) Decided January 7, 1931.

Chester Wudarski and Nick Fill were convicted of robbery armed. Affirmed.

S. Brooks Barron, for appellants.

Wilber M. Brucker, Attorney General, *James E. Chenot,* Prosecuting Attorney, and *W. Gomer Krise,* Assistant Prosecuting Attorney, for the people.

CLARK, J. Defendants were convicted of robbery armed. The defense was, chiefly at least, an *alibi.* A grocery clerk was sent by his employer to a bank to cash some checks. He parked the car near the bank, got the cash, put it in his pocket, and re-

turned to the car, when, as he testified, the three defendants got into the car, compelled him by use of revolvers to drive into an alley, where the robbery occurred.

The clerk identified all of the defendants. Testimony of another witness also tends to connect defendants with the crime. With this testimony were claimed admissions and confessions of defendants.

The defense was supported by testimony, but we cannot say the verdict is against the great weight of the evidence.

The concluding statement of the judge in his instruction, respecting the defense of *alibi,* is:

"In this connection, however, I charge you that in considering the evidence offered upon the question of *alibi,* you should remember that it is a defense which is difficult to disprove."

A like instruction in *People* v. *Tice,* 115 Mich. 219 (69 Am. St. Rep. 560), was held not erroneous. But it is argued that, since section 20, chap. 8, Act No. 175, Pub. Acts 1927, as amended by Act No. 24, Pub. Acts 1929 (3 Comp. Laws 1929, § 17313), requires notice in writing of intention to claim such defense, a contrary holding should now be made. In spite of the statute, the defense remains difficult to disprove.

Error is assigned on the following from the charge:

"Now, in my opinion, you should carefully analyze this testimony of the respondents and find out whether it is true or not. I should be very reluctant to believe the testimony of a respondent under such circumstances as surrounded us here in this case. The respondent who took the stand is, as I have already pointed out to you, under inducement to tell

that story which will best suit his purposes at this time. In addition to that the evidence shows in this case, as I recall, or there is evidence in this case with reference to his previous record, he having pleaded guilty to a serious crime, and I should be very reluctant to weigh his testimony as against the testimony of these officers from Cleveland and from Hamtramck, and believe the testimony of that witness alone as against the statements of these officers. They appeared upon the stand. They testified, testified very frankly, as it seemed to me, and I should prefer to believe testimony of that character as against testimony of the respondents under the circumstances.

"Now, I am stating to you only my impression, my opinion, if you please. After all, you, as jurors, should analyze this testimony very carefully and remember throughout that you have the duty to perform and not the court, of determining these disputed issues of fact."

The question is whether the trial judge abused the right given him by section 29, chap. 8, Act No. 175, Pub. Acts 1927 (3 Comp. Laws 1929, § 17322):

"The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require."

It is settled law that in a criminal case the jury may be instructed to take into consideration, in weighing the testimony given by the accused, the interest he has in the result. *People* v. *Calvin,* 60 Mich. 113.

In *People* v. *Lintz,* 244 Mich. 603, it was held:

"In expressing an opinion, he should make it clear to the jury that he is merely stating his opinion, and not directing them to be guided by it. They must

be given to understand that they are to decide the facts on their own view of the evidence, and that the opinion is expressed only as an aid to them in so doing. He may call the attention of the jury to particular facts; marshal and sum up the evidence relating to each issue to be determined; comment upon the tendency, force, and comparative weight of conflicting testimony bearing upon them, and point out any matter which legitimately affects the testimony of a witness or his credibility. And it is his duty to do so, under the statute, when in his opinion their consideration by the jury is necessary and will lead to a just verdict, providing always that he makes it plain to the jury that his comment and opinion on the facts is not controlling, and that the ultimate determination is left to them.''

The instruction apparently follows the quoted holding, and is held not to be erroneous. See *People* v. *Goldberg,* 248 Mich. 553; *People* v. *Cabassa,* 249 Mich. 543.

A study of the record indicates no abuse of discretion in this regard.

We find no reversible error.

Judgment affirmed.

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

NORTH and FEAD, JJ., concurred in the result.

WIEST, J. (*dissenting*). The instruction to the jury went beyond permissible comment on the evidence and the testimony and character of witnesses and transgressed the field of legitimate argument ever permitted the prosecuting officer. It is not proper comment for the judge to urge reasons for discrediting witnesses. The comment by the judge must be impartial, else there is danger of recur-

rence to the vice disclosed in the old State trials of England.

My views are well expressed in *Weare* v. *U. S.*, 1 Fed. (2d) 617 (C. C. A. 8th Circuit):

"In reading portions of the instructions, it would be difficult to tell whether one were reading the instructions of a court or the argument of a prosecutor. . As a sample of their argumentative nature, we quote the following: 'As I recollect it, when these men were put in jail, one of them put in jail that day and the other one the day before, they were searched. Would such things as that match box and that tobacco can escape the observation of the investigating officer? If he had any sense at all, wouldn't he have found those things? They wouldn't have to go into a man's shoes to determine whether he had a match box on his person. If he had it in his shoe, he would have crushed it. They couldn't get that match box in his shoe. That is my view. Would these things have escaped the searching officer when he searched them before they were put in jail that day? Now, they search them when they put them in jail.'

"Other remarks were made by the court equally objectionable, which it is not necessary to set out. The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty. It was a palpable attempt to usurp the function of the jury as to fact questions and to impose the will and desire of the court upon it, and to interfere with the independent judgment of the jurors. Under the Constitution one accused of crime is entitled to a determination by a jury of the fact questions involved. The jury can easily be misled by the court. Its members are sensitive to the opinion of the court, and it is not a fair jury trial when the court turns from the legitimate instructions as to the law to argue the facts in favor of the

prosecution. The government provides an officer to argue the case to the jury. That is not a part of the court's duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument. We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion, and that they should follow their own judgment."

The conviction should be reversed, and a new trial granted.

McDONALD, J., concurred with WIEST, J.

FIRST NATIONAL BANK OF WYANDOTTE *v.* COMMON COUNCIL OF CITY OF DETROIT.

1. MANDAMUS—TAXATION—DEDUCTION—REMEDY.

   Mandamus will not issue to compel city of Detroit and its board of assessors to make deductions from tax roll after it has been confirmed and passed out of their control (Detroit Charter, tit. 6, chap. 2, §§ 5, 6).

2. SAME—REFUND OF TAXES—REMEDY—DETROIT CHARTER.

   Provision of Detroit city charter (title 6, chap. 4, § 30) that council may provide by ordinance for refund of taxes illegally assessed or collected is not self-executing, and in absence of passage of such ordinance, refund may not be compelled by mandamus.

3. SAME.

Mandamus will not issue where it will be unavailing.

4. SAME—AVAILABILITY OF MANDAMUS—STARE DECISIS.

Citation of cases wherein availability of remedy by mandamus was not raised cannot have effect of making mandamus availing in case where question is raised and when it is in fact and law unavailing.

ON MERITS.

5. TAXATION—DEDUCTION—SPECIFIC TAX.

Stockholder of national bank is entitled, in fixing assessed value of shares, to deduction of credits secured by lien on real property on which specific tax had been paid under Act No. 91, Pub. Acts 1911 (1 Comp. Laws 1915, § 4268 *et seq.*).

6. SAME—DISCRIMINATION—CONSTITUTIONAL LAW—DOUBLE TAXATION—STATUTES.

Provision of Act No. 322, Pub. Acts 1929, for taxation of national bank stock without allowing deduction of credits secured by lien on real property on which specific tax had been paid is void as discriminating against national bank stock in violation of Federal statute (12 USCA § 548), and is also void as double taxation under State Constitution (article 10, § 3).

Certiorari to Wayne; Campbell (Allan), J. Submitted October 7, 1930. (Calendar No. 35,142.) Decided January 7, 1931.

Mandamus by the First National Bank of Wyandotte, Michigan, and Luther S. Trowbridge, Jr., administrator of the estate of John J. Harris, deceased, a stockholder, against the Common Council and the Board of Assessors of the City of Detroit to show cause why deductions from assessments should not be made for certain credits. Judgment for plaintiffs. Defendants bring certiorari. Reversed.

Stevenson, Butzel, Eaman & Long (Thomas G. Long, of counsel), for plaintiffs.

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

CLARK, J. The board of assessors of the city of Detroit assessed, in April, 1930, shares of capital stock of the plaintiff, First National Bank of Wyandotte, Michigan, without making any deduction in respect of credits, being a large sum, consisting of bonds, notes, and other indebtedness secured by lien upon real property, upon which specific tax had been paid under Act No. 91, Pub. Acts 1911 (1 Comp. Laws 1915, § 4268 *et seq.,* 1 Comp. Laws 1929, § 3640 *et seq.*).

Plaintiff bank and the other plaintiff, one of its stockholders, appealed in writing and in due form to the common council of the city. The appeal was denied on April 29, 1930. The common council confirmed the assessment rolls on May 1, 1930. On April 30, 1930, plaintiffs filed in the circuit court petition for writ of mandamus. Order to show cause issued returnable May 9, 1930. Answer and plea and hearing were on the return day. Plaintiffs had judgment on May 22, 1930. Defendants review on certiorari.

Decision of a preliminary question disposes of the case. Is mandamus a proper remedy?

The charter provides (title 6, chap. 2, § 4) that the board of assessors, having completed the review and correction of the assessment rolls, shall sign "and on the third Tuesday of April in each year return the same to the common council," being in 1930, April 15th.

The charter further provides (title 6, chap. 2, §§ 5, 6) that the common council, after receiving the assessment rolls, shall, at 10 o'clock in the morning of the first succeeding day, proceed to consider the

same, and that such consideration and the hearing of appeals may be continued from session to session for a period of not exceeding 16 days after the date of the delivery of the rolls to the council, and that—

"After due consideration thereof, said rolls shall be fully and finally confirmed by the council, and shall remain as the basis, according to property valuation, of all taxes to be levied and collected in the city until another assessment shall have been made and confirmed as herein provided."

Such confirmation, as has been said, was on May 1, 1930. The position of the defendants, board of assessors and common council, is that, after May 1, 1930, and at the time of hearing and of judgment, they had no power to make the change sought by the plaintiffs, the assessment rolls not being then under their control, or the control of either of them. But plaintiffs contend there is still power in the common council, in this regard, under the charter (title 6, chap. 4, § 30) which is:

"SEC. 30. The common council may also provide and ordain by ordinance, that whenever it shall appear that any taxes or assessments have been illegally assessed or collected, the common council may, by a vote of two-thirds of all the members-elect, direct and cause the amount so collected to be refunded out of the contingent fund, or in case it has not been collected, to vacate the assessment, and fix upon an amount, to be received in full of such tax or assessment, and no such action on the part of the council, under such ordinance, shall in any way affect or invalidate any other tax or assessment assessed, levied, or collected in said city."

It is not urged that, pursuant to this section, any ordinance, so authorized, has been passed by the

council and approved by the mayor, nor does it appear in the record. The section is not self-executing.

On this record it must be held that, at the time of the judgment in mandamus, neither the board of assessors nor the common council had authority to do that which they were commanded. It is a general rule that mandamus will not issue where it will be unavailing. A case quite closely in point is *W. A. Sturgeon & Co.* v. *Board of Assessors,* 159 Mich. 199.

Counsel for plaintiffs cite a number of cases in which, in like circumstances, the writ has issued, among them: *Union Trust Co.* v. *Detroit Common Council,* 170 Mich. 692; *Detroit Trust Co.* v. *Detroit Common Council,* 170 Mich. 701; *Stroh* v. *City of Detroit,* 131 Mich. 109; *Standard L. & A. Ins. Co.* v. *Board of Assessors,* 95 Mich. 466; *Latham* v. *Board of Assessors,* 91 Mich. 509. The trial judge also cited and relied on some of them in an opinion filed. That there is a considerable number of such cases lends substance to the view that they establish the rule of law accepted by the trial court. But in those cases the question of remedy was not raised. It is raised, briefed, and relied on in the case at bar. And the cases cannot have the effect of making mandamus here availing when it is in fact and law unavailing.

If the question were merely technical, we would be disposed to base decision on the other serious and meritorious questions presented, but consideration which, of necessity, shows the judgment to be without advantage is not technical.

The matter of adequate legal remedy is discussed in *W. A. Sturgeon & Co.* v. *Board of Assessors, supra.*

A majority of the court think a brief advisory opinion on the merits may aid in determining rights and save further litigation.

Respecting double taxation, the rule relied on by defendants is perhaps the rule of most jurisdictions and is stated in 37 Cyc. p. 821:

"Since the capital of a corporation, which is its property, is a distinct and separate thing from the interests of the stockholders, represented by the shares they severally hold, and since the principle which forbids duplicate taxation is not violated, at least according to the decisions in many States, by assessing the capital to the corporation and the shares to their holders, it follows that shares of stock in a domestic or foreign corporation may properly be assessed for taxation to their holder at the place of his domicile, irrespective of the taxes which may be imposed on the corporation itself in respect to its capital or franchises."

This is not the rule in Michigan.

It was said in *Stroh* v. *City of Detroit, supra*:

"The taxation of shares to the shareholder, and property to the corporation, is clearly double taxation, within the spirit of the constitutional provision, and while we appreciate the fact that the shareholders and the corporation are different entities in the law, and that shares of stock are recognized as property, and distinct from the corporate property, it is plain that the shareholders are the corporation, and that they are the owners of its property. The Constitution does not permit the taxation of both property and shares, and we must, if possible, give such a construction to the law as to make it reconcilable with the Constitution."

See, also, *Thrall* v. *Guiney*, 141 Mich. 392 (113 Am. St. Rep. 528); *Detroit Citizens Street R. Co.* v. *Com-*

mon Council, 125 Mich. 673, 694 (84 Am. St. Rep. 589).

The plaintiff stockholder was entitled, in fixing assessed value of his shares, to proper deduction in respect of credits secured by lien upon real property upon which specific tax had been paid under Act No. 91, Pub. Acts 1911 (1 Comp. Laws 1915, § 4268 *et seq.,* 1 Comp. Laws 1929, § 3640 *et seq.*). *Union Trust Co.* v. *Detroit Common Council, supra.*

The State Constitution (section 3, art. 10) requires that there be a uniform rule of taxation, and this forbids double taxation. *Stroh* v. *City of Detroit, supra.*

The assessment of the shares of capital stock in the bank was made pursuant to Act No. 322, Pub. Acts 1929 (1 Comp. Laws 1929, § 3396), which provides for the taxation of—

"All shares in banks and trust companies organized under the laws of this State or by authority of the United States at their cash value, after deducting the assessed value of all real property owned or leased by any such banks and trust companies, * * * also deducting that proportion of the par value of all securities issued by the United States government, or by any Federal land bank or joint stock land bank, or by any State, or any county, township, city, village, school district, or any political subdivision thereof owned by any such banks and trust companies that the capital, surplus, and undivided profits bear to the capital, surplus and undivided profits and deposits. The cash value of each share shall be determined by adding together the capital stock, surplus and undivided profits, deducting therefrom the items aforesaid, and dividing the result by the number of shares into which the capital stock is divided."

12 USCA § 548, provides:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. * * *

"In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks."

The record shows much moneyed capital in competition with the business of plaintiff national bank, and which capital in being assessed may have exemption under the law of the State of credits secured by lien upon real property upon which specific tax has been paid under Act No. 91, Pub. Acts 1911 (1 Comp. Laws 1915, § 4268 *et seq.*, 1 Comp. Laws 1929, § 3640 *et seq.*), an exemption which said Act No. 322 denies to the shares in plaintiff bank.

So it appears that the Act No. 322 discriminates against shares in plaintiff national bank in violation of the Federal statute cited; also, that it seeks, as above stated, to impose a double tax, contrary to State Constitution. Act No. 322 is in this respect invalid.

Judgment reversed.

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

EQUITABLE & CENTRAL TRUST CO. *v.* COMMON COUNCIL OF CITY OF DETROIT.

This case is controlled by *First National Bank of Wyandotte* v. *Detroit Common Council, ante,* 89.

Certiorari to Wayne; Campbell (Allan), J. Submitted October 7, 1930. (Calendar No. 35,143.) Decided January 7, 1931.

Mandamus by the Equitable & Central Trust Company, a Michigan corporation, Harry Allen, and other stockholders, against the Common Council and Board of Assessors of the City of Detroit to show cause why deductions from assessments should not be made for certain credits. Judgment for plaintiffs. Defendants bring certiorari. Reversed.

Stevenson, Butzel, Eaman & Long (*Thomas G. Long,* of counsel), for plaintiffs.

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

McDONALD, J. In its facts and applicable law, this case is precisely like that of *First National Bank of Wyandotte* v. *Detroit Common Council.* The decision in that case reported *ante,* 89, is controlling of the questions here involved.

The writ of mandamus is denied.

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

FIRST NATIONAL BANK OF WYANDOTTE *v.* BOARD OF STATE TAX COMMISSIONERS.

EQUITABLE & CENTRAL TRUST CO. *v.* SAME.

These cases are controlled by *First National Bank of Wyandotte* v. *Detroit Common Council, ante,* 89.

Separate petitions for mandamus by the First National Bank of Wyandotte, a national banking corporation, and others, and Equitable & Central Trust Company, a Michigan corporation, against the Board of State Tax Commissioners of the State of Michigan, to show cause why deductions from assessments should not be made for certain credits. Submitted October 7, 1930. (Calendar Nos. 35,144, 35,145.) Writs denied January 7, 1931.

Stevenson, Butzel, Eaman & Long (*Thomas G. Long,* of counsel), for plaintiffs.

Wilber M. Brucker, Attorney General, and *Paul G. Eger* and *Charles Rubiner,* Assistants Attorney General, for defendant.

Meredith P. Sawyer, amicus curiæ.

SHARPE, J. These cases involve the same assessments under consideration in motions Nos. 171 and 172 (*First National Bank of Wyandotte* v. *Common Council, ante,* 89, and *Equitable & Central Trust Co.* v. *Common Council, ante,* 97, respectively), in which opinions are handed down herewith.

After confirmation of the assessment rolls by the common council, review was had by the defendant

commission under the provisions of section 4151, 1 Comp. Laws 1915, and the assessment as made was confirmed. Mandamus is here asked to compel the defendant board to grant the same relief sought by the plaintiffs in those cases. An answer has been filed to the order to show cause, in which the board insists that the assessment as made was in conformity with the statute.

For the reason stated in the opinion of Mr. Justice CLARK, the writs are denied.

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

TIMMERMAN *v.* BULTMAN.

1. EXCEPTIONS, BILL OF—EXTENSION OF TIME FOR SETTLING—MOTION FOR NEW TRIAL.

   Motion to amend findings of court under Circuit Court Rule No. 45, in case tried without jury, should be treated as motion for new trial under 3 Comp. Laws 1915, § 12634, and time for settling bill of exceptions governed thereby.

2. LICENSES—BLUE SKY LAW—LIABILITY OF EMPLOYER FOR SALESMAN'S FRAUD AFTER DISCHARGE.

   Where customer's dealings with salesman licensed under blue sky law (Act No. 220, Pub. Acts 1923) took place after his discharge but before his license was canceled, his employer is liable for his fraudulent acts.

3. SAME—NECESSITY TO CANCEL LICENSE ON DISCHARGE OF SALESMAN.

   Stock dealer, to relieve himself from fraudulent acts of salesman after his discharge, must surrender to securities commission salesman's license for cancellation.

Error to Ottawa; Cross (Orien S.), J. Submitted October 7, 1930. (Docket No. 14, Calendar No. 35,020.) Decided January 7, 1931.

Assumpsit by Henry Timmerman against Richard H. Bultman and others for an amount due on fraudulent sale of corporate stock. Judgment for defendants Henry L. Doherty & Company and Fidelity & Deposit Company of Maryland, Inc. Plaintiff brings error. Reversed, and judgment ordered entered for plaintiff.

Dilley & Dilley, for plaintiff.

Diekema, Kollen & Ten Cate, for defendants Henry L. Doherty & Company and Fidelity & Deposit Company of Maryland, Inc.

SHARPE, J. The material facts in this case differ from those considered by this court in *Timmerman* v. *Bultman,* 243 Mich. 344, and *Timmerman* v. *Henry L. Doherty & Co.,* 246 Mich. 19, in the following particulars only: Bultman, upon inquiry of the plaintiff, stated that he was the salesman of Doherty & Co. (hereafter called the defendant), and the defendant claims that Bultman was discharged by it prior to the transaction between him and the plaintiff. The trial court, before whom the case was tried without a jury, found that Bultman was discharged on October 22, 1926, and that plaintiff's dealings with him were had on November 16th of that year. For that reason he concluded that defendant was not liable, and entered a judgment in its favor, of which plaintiff seeks review by writ of error.

1. *Motion to Dismiss.* Before considering the question thus presented, a preliminary matter must

be disposed of. On September 6, 1930, the defendant filed a motion in this court to strike the bill of exceptions from the files and dismiss the writ of error, for the reasons:

(1) "Because the bill of exceptions was not signed within the time provided by law."

(2) "Because the printed and manuscript record shows that no final judgment has been returned."

This motion was held in abeyance to be considered and disposed of with the case on review. We were unwilling to dismiss for the second reason assigned if a judgment had in fact been entered. A certified copy thereof, furnished at our request by the clerk of the circuit court, is now on file in this court. It forms no part of the bill of exceptions, but should have been inserted in the printed record, and we treat it as a part thereof.

At the time of the entry of the judgment, on December 28, 1929, the trial court filed findings of fact and conclusions of law pursuant to the written request therefor of the plaintiff's attorney. On January 5, 1930, the plaintiff filed "Proposed Amendments to Findings." The term of Judge Cross, who heard the case and entered the judgment, expired on December 31, 1929. His successor, Judge Miles, had acted as one of the attorneys for the plaintiff. A hearing on the proposed amendments to the findings was had before Judge Pugsley, of the 27th Judicial Circuit. On March 25, 1930, he entered an order refusing to amend the findings. The plaintiff on the same day filed exceptions to the order so made and to the findings made by Judge Cross. On April 9, 1930, plaintiff noticed the bill of exceptions for settlement on April 14th, and it was settled on that day over defendant's objection "that the time has expired in which same could be legally settled."

Proposed amendments to findings are provided for in Circuit Court Rule No. 45. It appears that plaintiff has fully complied with the requirements thereof. Under section 12634, 3 Comp. Laws 1915, the trial court or judge thereof may allow "such time as shall be deemed reasonable" to settle a bill of exceptions—

"*Provided,* That no more than twenty days shall be allowed for such purpose, except upon the production of a certificate from the stenographer of said circuit stating that the party desiring such extension has ordered a transcript of the testimony necessary for the preparation of said bill of exceptions, and that the same will be furnished as soon as possible by said stenographer. If a motion for a new trial is made within said twenty days, and such motion be denied the time to settle a bill of exceptions may be extended twenty days from the date of such denial without the production of such certificate."

The question here presented is whether the filing of proposed amendments to the findings made by the court, on trial without a jury, is, in legal effect, the making of a motion for a new trial. The confusion arises over the fact that the provision for amendments is made by rule of court and that for motion for new trial by statute.

The reason for providing that the time for perfecting the bill of exceptions shall not begin to run until the motion for a new trial, if seasonably made, is disposed of, is apparent. The litigant dissatisfied with the verdict and the judgment entered thereon should not be put to the expense of procuring a transcript of the record until the motion is disposed of, because, if granted, he would thereby incur a needless expense. The same reasoning applies when amendments to the findings are proposed. If

granted, in this case the judgment would necessarily have been set aside and one entered in favor of the plaintiff. If denied, the judgment would stand as entered, but the appellant might include the proceedings had thereon in the bill of exceptions and allege error thereon, and he need not have noticed the bill for settlement while such proceedings were pending. In our opinion, the motion to amend the findings should be treated as a motion for a new trial and be governed by the provisions relative thereto. It follows that the motion to dismiss is denied.

2. *Discharge of Bultman.* The finding that Bultman was discharged by the defendant on October 22, 1926, is supported by the evidence. The contract between them was made in writing on August 1, 1926, and provided that it might be terminated at any time by either party upon written notice to the other.

Act No. 220, Pub. Acts 1923 (2 Comp. Laws 1929, § 9769 *et seq.*), created the Michigan securities commission. It provides for the licensing of persons who desire to engage in the business of dealing in securities or of selling or soliciting the sale thereof in this State. The terms "dealer" and "salesman" are defined therein. Every applicant for a dealer's license must accompany his application with a bond in the sum of $10,000, "conditioned upon the faithful compliance with the provisions of this act by said dealer and all salesmen registered by him." These licenses run from July 1st to June 30th of the succeeding year, "and shall be upon such forms as may be prescribed by the commission. * * * The salesman's license shall be issued to the dealer with whom he is registered, and retained by said dealer."

Bultman applied for a license as a salesman on August 2, 1926. His application was indorsed by

the defendant with a statement that he was then in its employ, and that he was "honest, truthful, of good reputation and entirely worthy of the license for which he applies." The license was issued on August 12, 1926. On the bottom of it appeared the following printed notation, "This license must be retained by the dealer."

Russell S. Williams, "field manager of H. L. Doherty Company, having charge of sales activities in western Michigan," testified that on October 23, 1926, he discharged Bultman "orally and verbally, and wrote him a letter to that effect when I returned to Grand Rapids." Plaintiff urges that the discharge, to be operative, must have emanated from an officer of the company. We are unwilling to rest decision upon this claim. On October 23, 1926, Williams wrote Alfred Rice, "district representative for the State of Michigan for Henry L. Doherty & Company," with headquarters in Detroit, as follows:

"With regard to the situation at Holland, I have found it necessary to let Mr. Bultman go. I have done this for the reason that I discovered some transactions in the town of Fennville, handled by Mr. Bultman in a manner that would not be sanctioned by the House."

After stating the things done by Bultman which prompted his action, the letter concluded:

"I have let Mr. Bultman go for the reason that I am sure we have no place in our organization for a salesman who is not absolutely honest and above board. Will you therefore advise New York to strike Mr. Bultman's name from our roll."

On April 21, 1927, about six months thereafter, the defendant wrote the commission, stating that Bultman was in its employ up to November 1, 1926, "at which time he was dismissed," and asked if he

still held a license in Michigan; "also the date on which Mr. Bultman's 1926 license was canceled." In reply thereto, the commission informed defendant "that Mr. Bultman was licensed for you in this State August 12, 1926, and his license has never been canceled." On April 29th the company wrote the commission: "We are attaching hereto license to sell securities issued to Richard H. Bultman. Mr. Bultman left our employ on November 1st, but through error, we did not return the license to you for cancellation." On May 4th the commission advised the company that the license had been canceled.

Bultman's dealings with plaintiff on which his cause of action is founded occurred in November, 1926, after his discharge, but before the surrender of or cancellation of his license. We have set forth the facts at some length as we think they have a bearing upon the effect which should be given to the discharge.

The purpose of Act No. 220, above referred to, is well stated in its title:

"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."

The last sentence in section 3 thereof reads as follows:

"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 legislature realized that the salesmen who in most cases deal directly with the persons having such securities for sale, or who desire to purchase them, have opportunity to perpetrate the frauds

which the law seeks to prevent, and so provision was made that they should be licensed, and that the dealer's bond should guarantee their faithful compliance with the law. The statute does not in express terms provide for the cancellation of a salesman's license by the commission on its return to it by the dealer. But such return automatically works a cancellation or revocation, for the reason that, when it is returned to the commission, there is no longer a license in the hands of the dealer under which the salesman has any authority to act.

It is urged that the plaintiff did not consult the records of the commission or rely upon them in his dealings with Bultman. These are records kept in a public office, and open to the inspection of all who have occasion to examine them. Prudence, perhaps, should cause those dealing with a person representing himself to be a salesman to ascertain the truth of his statement in that respect. If he does not, he acts at his peril. The fact that there is a public record of the authority of the salesman to act, in itself, justifies greater reliance being placed upon his representation that he is legally licensed. But when the fact appears, as it does here, that, had such an inspection been made by the plaintiff, it would have revealed the truth of Bultman's statement, we are of the opinion that the record may be resorted to by plaintiff to establish the then existence of the relationship.

The purpose of the license under the statute is to afford protection to any person dealing with a salesman. The defendant by its bond guaranteed that Bultman would perform his duties as such in compliance with the law. It discovered that he was not doing so; that he had been engaged in transactions "that would not be sanctioned" by the defendant; that he was "not absolutely honest and above

board." It very properly discharged him, but, on doing so, its officials owed a duty to the public, and among them the plaintiff, as well as to its stockholders, to terminate his right and authority to further act as such by the surrender of his license, which, under the statute, it had retained in its possession. It did not do so for more than six months thereafter, and in the meantime Bultman, representing himself to be defendant's salesman, committed the fraud upon plaintiff on which this action is founded. Had it done so, Bultman thereafter would have acted as an unlicensed salesman and been subject to the penal provisions of section 31 (see 2 Comp. Laws 1929, § 9801 and note thereto) of the act.

A fair consideration of the purposes of the act, and of the relationship of dealer and salesman therein provided for, leads us to the conclusion that, in order for the dealer to relieve himself from the fraudulent acts of the salesman after his discharge, he must surrender to the commission the salesman's license issued by it, which he has retained in his possession.

It follows that the findings of the trial court should have been amended as proposed by plaintiff, and that the court should have concluded as a matter of law that plaintiff was entitled to a judgment in the amount claimed by him. The judgment entered is reversed and set aside, with costs to plaintiff. The amendments will be treated as now made, and the case remanded to the circuit court with direction to enter a judgment for the plaintiff for the sum of $2,700 and interest thereon from the 16th day of November, 1926, and costs to be taxed.

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

SCHROETENBOER *v.* BULTMAN.

This case is controlled by *Timmerman* v. *Bultman, ante, 99.*

Error to Ottawa; Cross (Orien S.), J. Submitted October 7, 1930. (Docket No. 15, Calendar No. 35,021.) Decided January 7, 1931.

Assumpsit by John H. Schroetenboer, and another against Richard H. Bultman and others for an amount due on fraudulent sale of corporate stock. Judgment for defendants Henry L. Doherty & Company and Fidelity & Deposit Company of Maryland, Inc. Plaintiffs bring error. Reversed, and judgment ordered entered for plaintiffs.

Dilley & Dilley, for plaintiffs.

Diekema, Kollen & Ten Cate, for defendants Henry L. Doherty & Company and Fidelity & Deposit Company of Maryland, Inc.

NORTH, J. The opinion handed down herewith in *Timmerman* v. *Bultman, ante,* 99, is controlling in the instant case. The record is remanded to the circuit court with direction to set aside the judgment heretofore entered in favor of defendants and to enter judgment therein in favor of plaintiffs and against defendants for $666, with interest at five per cent. per annum computed from January 23, 1927. Plaintiffs will have costs of both courts.

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

NIENHUIS *v.* BULTMAN.

This case is controlled by *Timmerman* v. *Bultman, ante,* 99.

Error to Ottawa; Cross (Orien S.), J. Submitted October 7, 1930. (Docket No. 16, Calendar No. 35,022.) Decided January 7, 1931.

Assumpsit by Peter M. Nienhuis against Richard H. Bultman and others for an amount due on fraudulent sale of corporate stock. Judgment for defendants Henry L. Doherty & Company and Fidelity & Deposit Company of Maryland, Inc. Plaintiff brings error. Reversed, and judgment ordered entered for plaintiff.

Dilley & Dilley, for plaintiff.

Diekema, Kollen & Ten Cate, for defendants Henry L. Doherty & Company and Fidelity & Deposit Company of Maryland, Inc.

FEAD, J. This case is similar to and is ruled by the decision in *Timmerman* v. *Bultman, ante,* 99, handed down herewith.

Judgment reversed and cause remanded to the circuit court, with instructions to enter judgment for plaintiff in the sum of $2,120, with interest at five per cent. from February 16, 1927. Plaintiff will have costs of both courts.

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

KARWICK *v.* GRAJEWSKI.

1. MUNICIPAL CORPORATIONS—RECALL ELECTION—COMPLIANCE WITH STATUTE.

   Genuineness of signatures to recall petition may not be challenged except by matter appearing on face of petition, where there was showing by affidavit that signatures were genuine, as required by Act No. 44, Pub. Acts 1917.

2. SAME—CITY CLERK MAY NOT DETERMINE SUFFICIENCY OF REASONS FOR RECALL.

   City clerk has no authority under statute to determine sufficiency of reasons stated for recall of mayor; that being question for courts on proper proceedings by interested elector.

3. SAME—SUFFICIENCY OF SIGNATURES TO BE DETERMINED FROM PETITION AND POLL LISTS.

   Duties of city clerk in regard to petition for recall of mayor are entirely ministerial, and in determining whether petition contains requisite number of signatures with residence, street number, ward, and voting precinct of signers, he must make canvass from petition itself, except that he may examine poll lists of city to determine number of electors voting for governor at last preceding election.

4. MANDAMUS—ANSWER—PLEA.

   On mandamus to compel city clerk to call election for recall of mayor, allegation in answer to show cause that many signatures appear more than once was too indefinite to require plea thereto.

5. MUNICIPAL CORPORATIONS—RECALL ELECTION—CLERK'S DUTY TO CALL ELECTION.

   Where petition for recall of mayor filed with city clerk contained sufficient number of signatures and on its face complied with statute (Act No. 44, Pub. Acts 1917) it was duty of clerk to call election.

Certiorari to Wayne; Campbell (Allan), J. Submitted December 2, 1930. (Calendar No. 35,294.) Decided January 7, 1931.

Mandamus by John W. Karwick and another to compel Michael J. Grajewski, Jr., to call a recall election. From an order denying the writ, plaintiffs bring certiorari. Reversed.

Peter P. Boyle (*John J. Adamski,* of counsel), for plaintiffs.

William Cohen, for defendant.

MCDONALD, J. The plaintiffs filed petitions with the city clerk to recall the mayor of Hamtramck, Michigan. The clerk refused to call an election. The plaintiffs petitioned the circuit court for a writ of mandamus. An order to show cause was issued. On the hearing the writ was denied. The plaintiffs here seek to review the judgment of denial by certiorari.

The issue involves the powers and duties of the city clerk under the recall statute, Act No. 44, Pub. Acts 1917 (1 Comp. Laws 1929, §§ 3383, 3384, 3385), the applicable parts of which are as follows:

"SEC. 2. * * * Petitions demanding the recall of the mayor shall be filed with the city clerk. The petition shall be signed by at least twenty-five per centum of the number of electors who voted for the governor at the last preceding election in the election district of the official sought to be recalled. * * * Said petition, or part thereof, shall be printed or typewritten and shall state clearly the reason or reasons for said demand. The signatures thereto shall be in writing and shall state the ward, precinct and street number or township in which said petitioner lives. The circulator of the petition, or his agent or representative thereof, shall attach thereto the affidavit that the said signatures are the signatures of qualified electors; that they are genuine and made in good faith for the purposes set

forth in said petition but no such petition shall be circulated against any officer until he has actually performed the duties of his office for a period of forty-five days for a legislative office, and three months for any other office.

"SEC. 3. Whenever a petition signed as provided in section two of this act is filed against any officer, a special election shall be called within five days thereafter by the official with whom such petition shall have been filed."

The city clerk claims very wide authority under this statute in determining whether he should call an election. He claims the right to investigate the genuineness of the signatures and any matter relating to fraudulent signing or circulation of the petition. He claims the right to determine whether the reasons for recall are sufficient in law and the right to consider extrinsic evidence in canvassing the petition.

As to investigating the genuineness of the signatures, it will be noted the statute provides that there shall be attached to the petition an affidavit showing that the signatures are genuine; that they are of qualified electors and made in good faith for the purposes set forth in the petition. This showing by affidavit is at least *prima facie* evidence of the genuineness of the signatures and cannot be challenged except by matter appearing on the face of the petition. It cannot be disproved by extrinsic evidence. The language of the court in *Thompson* v. *Secretary of State,* 192 Mich. 512, is applicable here and we think it decisive of this question. That case involved the powers and duties of the secretary of State in canvassing petitions for a referendum on an act of the legislature. It was claimed that there was gross fraud in procuring signatures to the peti-

tions; that many of the signers were not qualified electors and that names were written on the petition by the circulators without the consent of those who were purported to have signed them. The court said:

"The duties charged upon the secretary by the referendum section of the Constitution are purely ministerial, and his action must be based upon the face of the petition as it is received at his office. Other evils of a serious nature might result if initiative and referendum petitions could be held up pending investigations of uncertain length, and those evils were undoubtedly in mind when the constitutional amendment was framed and adopted without making provisions for such an investigation. * * * He must canvass the petition as it is filed in his office and can look no further."

The statute gives the city clerk no authority to determine the sufficiency of the reasons stated for recall. That is a question which the courts will determine on proper proceedings by any interested elector. In support of his authority to determine whether the reasons are sufficient, the defendant cites *Newberg* v. *Donnelly,* 235 Mich. 531, and *People* v. *O'Hara,* 246 Mich. 312, but in neither of these cases was that question raised or considered by the court.

The recall statute vests no discretion in the city clerk or other official with whom the petitions are required to be filed. His duties are entirely ministerial. They are confined to such an investigation only as will enable him to determine whether the petitions contain the requisite number of signatures with the residence, street number, ward, and voting precinct of the signers. Excepting that he may examine the poll lists of the districts of the city of Hamtramck to determine the number of electors vot-

ing for governor at the last preceding election, he must make the canvass from the petition itself.

The requisite number of signatures to a petition for the recall of the mayor of Hamtramck is 1,632. The petition filed contained 2,413 names verified as genuine by the circulators in the form required by the statute. With one exception, the various reasons assigned by the clerk for refusing to call an election relate to defects not appearing on the face of the petition. The exception is the allegation in the answer to show cause that many signatures appear more than once. The truth of this allegation may be determined from the face of the petition. If the clerk examined the petition he must have known exactly how many names appeared more than once. His indefinite statement in the allegation was not sufficient to require a plea thereto on the part of the plaintiff. No plea was filed. None was necessary. The petition contained the requisite number of names. It was the duty of the clerk to call an election.

The judgment of the circuit court is reversed, and the cause remanded with directions to issue the writ of mandamus as prayed, but without costs.

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

FEIERABEND *v.* MANISTEE CIRCUIT JUDGE.

JUDGMENT—SETTING ASIDE DEFAULT—AFFIDAVIT OF MERITS.

Under Circuit Court Rule No. 32, § 4, showing of defendants' defense in action at law by affidavit of merits as prescribed by Circuit Court Rule No. 34, is condition precedent to right to have default and judgment based thereon set aside.

Mandamus by Fred C. Feierabend and another to compel Hal L. Cutler, Manistee circuit judge, to set aside a judgment based on plaintiffs' default in an action at law. Submitted December 9, 1930. (Calendar No. 35,308.) Writ denied January 7, 1931.

Frank A. Ruddy (*Joseph Sanders,* of counsel), for plaintiffs.

Howard L. Campbell and *Max C. Hamlin,* for defendant.

POTTER, J. Plaintiffs seek mandamus to compel respondent to set aside an order denying petitioners' motion to set aside their default, and a judgment rendered against them thereon, in the circuit court of Manistee county where they were defendants, in a suit at law, on the ground their default was improperly entered. Respondent's return shows no affidavit of merits was filed by petitioners, who were defendants, at any time. The form and contents of an affidavit of merits is prescribed by Circuit Court Rule No. 34. The procedure to set aside a default in actions at law is prescribed by section 4, Circuit Court Rule No. 32, which provides:

"In actions at law, the party desiring to have a default set aside shall, as soon as practicable after

he shall know or have reason to believe that the default has been filed, file and serve an affidavit of merits, and make application to the court to have the default set aside.''

It would be useless to set aside petitioners' default and the judgment entered thereon against them, if they do not have a meritorious defense to plaintiffs' claim. The showing of defendants' defense, by an affidavit of merits, is a condition precedent to their right to have the default and judgment based thereon set aside. It was not complied with. Writ denied, with costs.

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

BENNETT *v.* KOWENSTRAT.

ASSAULT AND BATTERY—DEFENSES—EVIDENCE—PLAINTIFF'S REPUTATION NOT IN ISSUE.

In action for assault and battery, where plaintiff's character as law-abiding citizen was not in issue under pleadings, admission of testimony that his reputation was bad was reversible error.

Error to Wayne; Collins (Joseph H.), J., presiding. Submitted October 24, 1930. (Docket No. 64, Calendar No. 35,224.) Decided January 7, 1931.

Case by John Bennett against Bernhard J. Kowenstrat for assault and battery. Judgment for defendant. Plaintiff brings error. Reversed.

Harry J. Lippman, for plaintiff.

MCDONALD, J. This is an action for damages resulting from an assault and battery. The defendant claims justification by way of self-defense. Judgment was entered for the defendant on a verdict of no cause of action. The plaintiff has brought error.

The first assignment discussed relates to the ruling of the court in admitting evidence that the reputation of the plaintiff as a law-abiding citizen was bad.

Testimony as to his reputation was not admissible. It was not an issue in this case. If it were bad, the defendant did not know it, and, if he did not know it, his conduct at the time of the assault could not have been influenced thereby. In *Culley* v. *Walkeen,* 80 Mich. 443, it is said:

"In ordinary actions of assault and battery we have held that character was not in issue, unless made so by the pleadings. *Fahey* v. *Crotty,* 63 Mich. 383 (6 Am. St. Rep. 305). Where justification, by way of self-defense, is pleaded, it is competent to show the character of the opposite party as to being quarrelsome or otherwise, when such fact has been brought to the knowledge of the defendant prior to the assault complained of. *Galbraith* v. *Fleming,* 60 Mich. 403. But unless such fact, within the knowledge of another person, is brought to the knowledge of defendant before the affray, it could not possibly have influenced his mind or actions, and would be irrelevant."

Other and later cases might be cited all of which hold that, before such testimony is admissible, it

must appear the defendant had knowledge of his adversary's bad reputation as a peaceable and law-abiding citizen. The nature and effect of such testimony, if improperly admitted, constitutes reversible error.

There are no other assignments of merit. The judgment is reversed, with costs to the plaintiff. A new trial is granted.

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

BUNTING BRASS & BRONZE CO. *v.* LIBERMAN & GITTLEN METAL CO.

SALES—BREACH OF CONTRACT—DAMAGES.

Buyer's damages for seller's failure to deliver brass according to contract was difference between contract price and current price or market value at time and place of delivery.

Error to Kent; Dunham (Major L.), J. Submitted October 22, 1930. (Docket No. 124, Calendar No. 35,055.) Decided January 7, 1931.

Assumpsit by Bunting Brass & Bronze Company, an Ohio corporation, against Liberman & Gittlen Metal Company, a Michigan corporation, for damages for breach of a contract to sell a quantity of brass. Judgment for plaintiff. Defendant brings error. Affirmed.

Knappen, Uhl, Bryant & Snow, for plaintiff.

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

POTTER, J. Plaintiff recovered judgment against defendant in the sum of $1,936.98, and costs. Defendant brings error.

Plaintiff's buyer called defendant's seller by telephone and bought approximately 15 ton of brass. Defendant acknowledged the purchase by plaintiff and sale by defendant by letter. It said:

"As per telephone conversation of even date, we herewith, confirm our sale and your purchase of * * * one car approximately 15 ton consisting of hard brass bushings and similar material at 12¼¢."

Plaintiff sent a written order to defendant in which there was an error. At defendant's request this order was changed from the erroneous amount of 60,000 pounds to read 30,000 pounds. Defendant did not ship the brass within a reasonable time. Plaintiff asked for shipment, and defendant asked for additional time to make shipment, which was granted by plaintiff. When defendant neglected and refused to ship the brass, plaintiff notified it that if the brass was not shipped plaintiff would be compelled to go into the open market to purchase brass and hold defendant liable for the difference between the contract price and the price it was compelled to pay.

Defendant not furnishing the brass, plaintiff bought it in the open market, paying a higher price; sued and recovered judgment for the difference between the contract price and the current price or market value of the brass, at the time and place of

delivery. This was the proper measure of damages. Judgment affirmed, with costs.

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

MILLIGAN *v.* RAPPAPORT.

1. MECHANICS' LIENS—OWNER'S ADDRESS IN STATEMENT NOT ESSENTIAL—FORM OF STATEMENT PERMISSIVE.
   Under 3 Comp. Laws 1915, § 14800, as amended by Act No. 304, Pub. Acts 1925, address of owner in statement of lien is not essential to validity thereof; form of statement being permissive and not mandatory.

2. CONTRACTS—IMPLIED PROMISE TO PAY—CONSIDERATION.
   Furnishing material to improve owners' property in response to their written order therefor was sufficient consideration to uphold their implied promise to pay therefor.

3. PAYMENT—BY CONTRACTOR WOULD DISCHARGE OWNER.
   Payment by contractor for material ordered by owners, although he was not party to contract therefor, would operate to discharge their obligation to pay.

4. CONTRACTS—FAILURE TO PAY—RELEASE.
   Failure of contractor to pay for material ordered by owners would not release them from their obligation to pay.

5. MECHANICS' LIENS—SUFFICIENCY OF CONTRACT.
   Furnishing material to contractor to improve owners' property in response to their written order to do so was sufficient contract to support lien therefor.

Payment by volunteer or stranger not a party to the original undertaking as discharging obligation, see annotation in 23 L. R. A. 120.

Appeal from Wayne; Jayne (Ira W.), J. Submitted October 21, 1930. (Docket No. 85, Calendar No. 35,117.) Decided January 7, 1931.

Proceedings by Eloise Milligan against Samuel Rappaport and others to foreclose a mechanic's lien. Ernest W. Scheurman, as assignee of Acme Lumber Company, intervened and filed cross-bill against plaintiff and other defendants to foreclose another mechanic's lien. Decree for cross-plaintiff. Defendants Rappaport and American Employers Insurance Company appeal. Affirmed.

Shapero & Shapero, for appellants.

Frank B. Ferguson and *R. Wendell Brown,* for cross-plaintiff.

POTTER, J. Cross-plaintiff and appellee intervened in proceedings to foreclose a mechanic's lien and filed an answer in the nature of a cross-bill to foreclose a lien of cross-plaintiff and appellee.

The case here involved is in reality one brought by the Acme Lumber Company by Ernest W. Scheurman, assignee, against Samuel Rappaport and Lena Rappaport, his wife, whereby cross-plaintiff seeks to establish and foreclose a mechanic's lien against defendant.

The facts are stipulated. Defendants Rappaport signed a paper as follows:

"Detroit, Mich. Sept. 15, 1926.

"ACME LUMBER COMPANY,
Detroit, Michigan.

"Dear Sirs:

"You will please furnish such lumber and other building material as may from time to time be ordered for the erection, alteration or improvement

of a certain building located on lot 588 on the northwest corner of Wildemere and Cortland.

"All material is to be ordered by Abraham Galper or his duly authorized agent and he agrees to pay all bills for material hereunder as follows:

"When first mortgage is closed not later than completion of building.

"All material to be billed as per estimate dated or (in case of no estimate) at prices prevailing September 15, 1926.

"Respectfully,
"Husband, SAMUEL RAPPAPORT,
"Wife, LENA RAPPAPORT,
"Address, 1370 Penobscot Bldg.

"Witnesses:
"ROBERT CURLETT,
"H. DWORKIN.

"Subscribed and sworn to before me this 20th day of September, 1926.

"ROBERT C. CURLETT,
"Notary Public,
"Wayne County, Mich.

"My Commission expires October 6, 1929.
"References:
"AMERICAN STATE BANK, Main Office."

Between September 15, 1926, and March 8, 1927, the Acme Lumber Company furnished material on the building being erected by Samuel Rappaport and wife. The value of such material was $5,189. March 8, 1927, the Acme Lumber Company filed a claim of lien. February 16, 1927, Eloise Milligan commenced suit to foreclose a mechanic's lien against the same property and filed a notice of *lis pendens*. September 15, 1926, the title to the premises was in Paul C. Dulitz. Defendant and wife were purchasing the premises under a written land contract. On May 21, 1927, the Acme Lumber Company filed a petition to intervene, and on May 23d

filed an answer in the nature of a cross-bill. No *lis pendens* was filed by the Acme Lumber Company or Scheurman, its assignee. Abraham Galper was the general contractor for the erection of the building and there was no written contract between Galper and defendants. The case was referred to a circuit court commissioner, who filed written findings of fact and law, and the case was heard in the circuit court, where a decree for plaintiff was entered against defendants Rappaport for $5,189 and costs. Defendants appeal, claiming the agreement signed by defendants Rappaport above quoted does not constitute a contract or dealing between the Acme Lumber Company and defendants; it is not a contract pursuant to which the improvement was made; the claim of lien filed by the Acme Lumber Company was defective because it did not contain the address of the owners of the property; the contract of the Acme Lumber Company having been with Abraham Galper, and, the statement of lien having stated the contract was made with Samuel Rappaport and Lena Rappaport, the lien was invalid; and the cross-bill to foreclose the lien was not filed by any person competent to file the same.

The statute provides that a materialman who wishes to avail himself of the provisions of the lien statute—

"shall make and file in the office of the register of deeds, in the county or counties in which said real estate, house, building, structure or improvement to be charged with the lien is situated, a just and true statement or account of the demand due him, over and above all legal set-offs, setting forth the time when such materials were furnished or labor performed, and for whom, and containing a correct description of the property to be charged with the

lien, and the name of the owner, part owner or lessee, if known, which statement shall be verified by affidavit." Section 14800, 3 Comp. Laws 1915, as amended by Act No. 304, Pub. Acts 1925.

Both the section above quoted and the amendment of 1925 say the "statement *may be in the following form.*" The form in Act No. 304, Pub. Acts 1925, provides for the owner's address. Section 14800, 3 Comp. Laws 1915, does not. The address of the owner is not essential to validity of the lien. Liens were upheld under section 14800, 3 Comp. Laws 1915. The public are not interested therein. The language of the statute is permissive and not mandatory. If the legislature intended no statement of lien should be valid unless the owner's address was furnished in the statement filed by the lien claimant, it could have used mandatory language or expressly denied the validity of the claimed lien unless such address was a part of the filed statement. It did neither. The form of the statement of lien was sufficient.

Plaintiff stands in the place of the Acme Lumber Company, the materialman furnishing the material which defendants ordered. When the Acme Lumber Company, in response to the written order given by defendants, furnished the material to improve their property, a consideration sufficient to uphold their implied promise to pay therefor was created. Page on Contracts (2d Ed.), § 514; *Rood* v. *Jones,* 1 Doug. 188; *Steep* v. *Harpham,* 241 Mich. 652.

"The rule of law in reference to the sufficiency of the consideration, seems to be that it must arise, either, first, by reason of a benefit to the party promising, or, at his request, to a third person, by the act of the promisee; or, secondly, on occasion of the latter sustaining any loss or inconvenience,

or subjecting himself to any charge or obligation, at the instance of the person making the promise, although such person obtain no advantage therefrom." *Rood* v. *Jones, supra.*

"Plaintiff must have lost something or defendant gained something in order to furnish a consideration." *Steep* v. *Harpham, supra.*

Defendants stipulated the materials were to be furnished as ordered by one Galper or his agent, the contract providing Galper was to pay all bills. Galper was the contractor for the erection of the building, but he did not sign the written contract or order. He did not promise and agree to pay for the materials ordered. If Galper was the contractor, defendants could protect themselves against liens by cross-plaintiff by requiring a sworn statement from Galper in pursuance of section 14799, 3 Comp. Laws 1915. If Galper paid cross-plaintiff, though he was not a party to the contract, such payment would operate to discharge *pro tanto* defendants' obligation to pay. 48 C. J. p. 589; 21 R. C. L. pp. 31, 32; *Braun* v. *Cox,* 202 Iowa, 1244 (211 N. W. 891); *Crumlish's Adm'r* v. *Central Imp. Co.,* 38 W. Va. 390 (18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872); *Wallingford* v. *Alcorn,* 75 Okla. 295 (183 Pac. 726); *Smader* v. *Columbia Wisconsin Co.,* 188 Wis. 530 (205 N. W. 816).

The failure to pay by one not a party to a contract does not operate to release a party to the contract, to whom the consideration moved, from his obligation to pay and discharge the same. We think the contract sufficient to support plaintiff's lien. The other questions raised are not important. The decree of the trial court is affirmed, with costs.

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

THOMPSON *v.* WALKER.

1. STIPULATIONS—DAMAGES.

Where counsel agreed in open court as to amount of verdict in case plaintiff should recover, verdict for amount agreed on cannot be said to be erroneous, in absence of proof of plaintiff's damages.

2. EVIDENCE—BOOKS OF ACCOUNT—SUMMARIES OF VOLUMINOUS DOCUMENTS ADMISSIBLE.

Where books of account, papers, or other documents submitted to jury are too voluminous to admit of separate presentation, abstracts, conclusions, or summaries may be submitted together with originals, even though prepared in advance.

3. SAME—AUDITOR MAY TESTIFY AS TO CONTENTS OF BOOKS INTRODUCED.

Auditor may not testify, from examination of books, in advance, what they would show if introduced, but books must be introduced in evidence and he may testify to what they show.

4. TRUSTS—FIDUCIARY RELATION.

One occupying position of trust and confidence may not act where duty is opposed to interest.

5. CORPORATIONS—TRUSTS—OFFICERS HAVE TRUST RELATION.

Officers and directors of corporation have its affairs committed to their charge upon trust and confidence that they will be cared for and managed for common benefit of all stockholders.

6. SAME—DUTY TO STOCKHOLDERS.

It is of essence of trust committed to officers and directors of corporation that it be so managed as to produce to each stockholder best possible return for his investment.

7. SAME—ILLEGAL PURPOSE—INCORPORATION NO DEFENSE FOR PROMOTERS.

When real purpose of forming corporation is to use it for illegal purpose, fact of incorporation will not avail promoters as defense in action against them to recover money obtained by such methods.

On the question as to liability of directors of corporation for secret profits, see annotation in 25 L. R. A. 90; 18 L. R. A. (N. S.) 1110.

On duty and liability of directors of corporation generally, see annotation in 55 L. R. A. 751.

As to right of subscriber to rescind subscription to stock on the ground of fraud, see annotation in 33 L. R. A. 721.

8. SAME—SECRET PROFITS.
Promoters of corporation are not entitled to secret profits.

9. SAME—DUTY TO MINORITY STOCKHOLDERS.
Where one man or family controls corporation, it is especially true that it must be managed in utmost good faith as to minority stockholders.

10. FRAUD—CORPORATIONS—PARTIES.
In action against promoters of corporation for fraud in sale of its stock, corporation was not necessary party.

11. SAME—GOOD FAITH NO DEFENSE IF STATEMENTS FALSE.
Controlling stockholders, directors, officers, and promoters of corporation owed duty to act in utmost good faith to see that statements made by them to prospective stockholders were true, and it is no defense, in action thereon, that they believed the statements, when made, to be true, or that they acted in good faith, if in fact statements were false.

Error to Shiawassee; Collins (Joseph H.), J. Submitted October 24, 1930. (Docket No. 4, Calendar No. 35,023.) Decided January 7, 1931.

Case by Adelbert D. Thompson and another against Adolph R. Walker and others for fraud in the sale of corporate stock. Judgment for plaintiffs. Defendants bring error. Affirmed.

Matthews, Hicks & Des Jardins (*Pulver & Bush*, of counsel), for plaintiffs.

Galpin, Smedley & Dunn (*Butterfield, Keeney & Amberg*, of counsel), for defendants.

POTTER, J. June 25, 1929, plaintiffs, who had been stockholders in the A. R. Walker Candy Corporation, brought suit against defendants by declaration containing three counts, one of which charged defendants obtained plaintiffs' property and money by fraud and deceit; another charged

fraud and deceit, plaintiffs' resulting injury, and waived the tort and counted in assumpsit; to which was added the common counts in assumpsit. The declaration sets forth the claimed fraud, false representations, and deceit with particularity. Defendants pleaded the general issue and gave notice of the statute of limitations, laches of plaintiffs, ratification of the acts of defendants by plaintiffs, and their estoppel; the acts complained of were the acts of the corporation and not the acts of the defendants individually; claiming plaintiffs' right of action was prohibited by section 11983, 3 Comp. Laws 1915, and plaintiffs' rights of action, if any, were several and not joint and could not be recovered upon under the declaration. The suit was dismissed as to Frances Thompson and proceeded as to Adelbert D. Thompson, plaintiff, who recovered a judgment against defendants A. R. Walker, Harriett Walker, Jacob J. Kooman, and Amos L. Merrick, for conspiracy to defraud plaintiff, in the sum of $1,318.60. Defendant Maxine Walker DePree had judgment of no cause of action. A motion for a new trial was made and denied, and defendants, other than Maxine Walker DePree, bring error. Appellants claim no liability for fraud could be shown against them, unless there was proof of a sham corporation, made use of by defendants, in a conspiracy to defraud; that there was no proof of a sham corporation made use of by defendants in a conspiracy to defraud, and a verdict should have been directed for appellants. Complaint is also made of errors committed in the admission of testimony; recovery in the absence of proof of damages to plaintiff; and erroneous recovery permitted with respect to the purchase of stock in 1921 and 1923.

It was agreed between counsel on the trial in open court that, in event plaintiff should recover on

all counts, the amount of the verdict should be $1,318.60, being interest of $208.60 and principal paid $1,110.00. The verdict returned by the jury was that appellants were guilty of conspiracy to defraud plaintiff in the amount of $1,318.60. This disposes of the assignment that recovery was erroneously allowed, in the absence of proof of damages to plaintiff.

Appellants claim a large part of the testimony, permitted to go to the jury, was erroneously admitted. Their objections are principally aimed at the testimony of the auditor who made an examination of the original books of the various Walker corporations produced by the trustee in bankruptcy of the last one, and testified to his conclusions therefrom. The record books of the several corporations were introduced, showing the record of the stockholders' meetings of the several corporations, of the meetings of the directors, and the books of account of the several corporations were also admitted in evidence. Where the books of account, papers, or other documents submitted to a jury are too voluminous to admit of separate presentation, abstracts, conclusions, or summaries may be submitted together with the originals, even though such abstracts, conclusions, or summaries may have been prepared in advance.

The auditor could not testify from his examination, in advance, of the books, what they would show, if introduced in evidence. It is the books, the contents of which may be summarized, which must be present in court, and introduced in evidence, and the witness may testify to what the books show. He could not invade the province of the jury, who were to pass upon and determine the facts. The auditor could not testify to anything beyond what

was shown from an examination of the books themselves, but he could testify as to his compilations, computations, and conclusions therefrom, or the aggregate amount of any specific items shown thereby. The process of binding component facts into a more concise and general statement is a mere mechanical process. *Doland* v. *Grand Valley Irrigation Co.*, 28 Colo. 150 (63 Pac. 300); *Culver* v. *Marks*, 122 Ind. 554 (23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377); *State* v. *Brady*, 100 Iowa, 191 (69 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 560); *Howard* v. *McDonough*, 77 N. Y. 592.

The A. R. Walker Candy Company was originally a copartnership. In 1911, a corporation was organized with an authorized capital stock of $75,000, $47,000 of which was issued, to take over the property and business of the copartnership. Of this stock, A. R. Walker held 2,800 shares; Lucy R. Fischer 600 shares; E. A. Fischer 600 shares; R. L. Fischer 600 shares; and A. R. Walker, trustee, 100 shares. The corporation continued to do business. Its last annual report to the secretary of State, made as of December 31, 1918, shows it had 7,400 shares of the par value of $10 each outstanding, or $74,000 in par amount of its stock. It had assets of $81,127.04 and liabilities of $24,500, making net assets of $56,627.04; so that each $10 share of its capital stock outstanding was worth $7.65 or $2.35 per share less than par. Its net capital assets of $56,627.04 show a deficit existed of the difference between the net capital assets and the capital stock outstanding, of $17,372.96.

A corporation was organized under the laws of Delaware in December, 1919, and the property of the Michigan corporation turned over to it. At the time this was done the value of the assets of the

Michigan corporation, as turned over to the Delaware corporation, were written up on the books of the latter corporation to $230,520.65, an increase of $173,893.61. As a result of this writing up the books of the Delaware corporation, the deficit of $17,372.96, which existed on the books of the Michigan corporation at the close of business December 31, 1918, was made into a surplus on the books of the Delaware corporation, when opened, of $10,032.13. The Delaware corporation continued to do business. By February 3, 1921, it was in straitened circumstances. It then owed $111,000 in borrowed money, and at the annual meeting of the stockholders held on that date dividends on the common stock for that year were passed. May 12, 1921, another Michigan corporation was organized, with an authorized capital of $700,000, of which $450,000 was subscribed and $361,200 paid in; divided into 50,000 shares of common stock at $10 a share and 20,000 shares of preferred stock at $10 a share; $311,200 of common stock and $50,000 par value of the preferred stock was paid in by the transfer to the new Michigan corporation of the property and assets of the Delaware corporation, above referred to. At the annual meeting of the corporation in 1922, the question of annual dividends was again discussed, and it was decided to declare such dividend, and A. R. Walker, Harriett Walker, and Maxine Walker DePree, owning a majority of the common stock outstanding, offered to take $8,000 of their dividends in preferred stock, in order to make a dividend possible, without seriously affecting the working capital of the business. This offer was accepted and carried out by the board of directors. In 1922, Curtis R. Gray was employed as a salesmanager. At the January, 1923,

meeting of the corporation, a reorganization of the business was approved; a new Michigan corporation was organized February 1, 1923, with a capital stock of $1,000,000 and 200 shares of no par value. The $1,000,000 of capital stock was all preferred, divided into 100,000 shares of the par value of $10 each. The amount subscribed was $554,030 and 155,403 shares of no par value. The property of the 1921 Michigan corporation was turned over to the new Michigan corporation at a valuation of $664,007.35; the voting power of the stock of the corporation being vested in the no par stockholders. In the new corporation, A. R. Walker took 26,000 shares of preferred stock and 126,000 shares of no par value. Defendant Merrick took 600 shares of preferred stock and 600 shares of no par value. Defendant Kooman took 600 shares of preferred stock and 600 shares of no par value, and defendant Merrick as trustee took 27,603 shares of preferred stock and 27,603 shares of no par value. All of this stock was paid for by the transfer, to the 1923 Michigan corporation, of the property and assets of the Michigan corporation of 1921. The assets of the 1921 Michigan corporation were written up on the books of the new 1923 corporation, organized as of February 1, 1923, so as to show a net increase in the fixed and intangible assets of $203,601.86, of which $180,824.93 was good will. The total appreciation of assets through these various corporate reorganizations show they were written up on the books of the company $688,527.07. As against this sum there are deductions of $50,917.32, making a total net appreciation of $637,609.75. This represents arbitrary appreciation of the property. Plaintiff claims a watering of the stock of the 1923 corporation by this amount, and that, by fraudulent manip-

ulation, the books showed a surplus of $539,576.23, when, in fact, such surplus was unearned and supported only by this arbitrary inflation in value of the assets of the corporation.

At the time notice was given of the meeting of the stockholders of the 1921 corporation, for the purpose of reorganization, nothing was contained therein which indicated the 1923 corporation would issue and deliver a total of 100,000 shares of no par value to defendants A. R. Walker, Amos L. Merrick, Jacob J. Kooman, and Curtis R. Gray to be delivered to them, or to their assigns, in consideration of appreciated good will, new processes, and formulas, for promotion, and other expenses in connection with the organization of the new corporation, and in additional consideration of the exchange of stock held by them in the 1921 corporation. Nevertheless this action was taken, and, in view of the amount of no par value stock issued, this 100,000 shares of no par value stock was sufficient to control the affairs of the corporation. Defendant A. R. Walker had 126,000 shares of no par value stock in his name, and this of itself was sufficient to give him control of its affairs.

Plaintiff showed defendants took from the several corporations, which they dominated, $194,876.23 in dividends and $152,074.99 in salaries, that none of these dividends, declared and taken, were actually earned, but were the result of a surplus artificially created by writing up the valuation of the assets on the books of the several successive corporations. Plaintiff claims the several corporations were at all times a family affair, dominated and controlled by A. R. Walker and his family, for their use and benefit, and used and manipulated by him and them, as an instrument of fraud in procuring plaintiff's

money; that defendant A. R. Walker, who knew the condition of the company, obtained from it its most valuable tangible assets by purchase, representing, in the preliminary negotiations and its final consummation, both the buyer and the seller at the same time; that the 20,000 shares of preferred stock and 20,000 shares of no par value stock surrendered by him to the corporation, in consideration of the conveyance to him, by the corporation, of the Muskegon plant, worth a substantial sum, was merely taking the property of the corporation for worthless stock, supported by arbitrary artificial inflation, of the value of its tangible and intangible assets; that, representing and controlling both the buyer and the seller, he obtained the Hanselman Candy Company plant, at Kalamazoo, which belonged to the corporation, from the corporation, for substantially less than it cost, and that, representing both the buyer and the seller, he obtained the St. Joseph plant of the corporation, from it, by the prepayment and surrender of $150,000 in mortgage bonds and debenture notes which, in the then condition of the corporation, could not and would not have been paid at maturity, and having thus obtained the high salaries and extensive dividends and valuable property of the corporation, so that it was without tangible assets, he permitted it to belong to the stockholders —a sinking concern, for which, in bankruptcy, those who had, in reliance of the false and fraudulent statements of appellants, invested their money therein, obtained nothing.

One who occupies a relation of trust and confidence is forbidden to act where duty is opposed to interest, fidelity to cupidity, integrity to personal gain. The officers and directors of a corporation have its affairs committed to their charge upon the

trust and confidence they will be cared for and managed, within the limits of the powers conferred by law upon the corporation, for the common benefit of all the stockholders. *Ten Eyck* v. *Railroad Co.,* 74 Mich. 226 (3 L. R. A. 378, 16 Am. St. Rep. 633). It is the essence of this trust that it shall be so managed as to produce to each stockholder the best possible return for his investment. *Miner* v. *Belle Isle Ice Co.,* 93 Mich. 97 (17 L. R. A. 412). When the real purpose for which a corporation is formed is to use it as an instrumentality in the accomplishment of an illegal purpose, the fact of incorporation will not avail the promoters as a defense in a suit against them to recover money obtained from plaintiff by such methods. 14 C. J. p. 61. Promoters of a corporation are not entitled to secret profits. *Garber* v. *Town,* 208 Mich. 1. It is especially true, where one man or family controls and dominates a corporation, that he, or they, must act in the utmost good faith in the control and management of the corporation as to minority stockholders.

The corporation was not a necessary party to this suit. The plaintiff claims appellants represented to him the corporation, in which he purchased stock, had grown, out of earnings, from a $6,000 concern to a plant and business worth over $500,000; that the common stock, in 1904, was $6,000, and in 1921 was $500,000; that the corporation had earned, every year, 20 per cent. on the invested capital, for a period of the past five years; that the average yearly earnings, on the invested capital in the company, for 19 years, had been 70.9 per cent.; that the dividends for a period of 12 years had averaged 31.8 per cent. per year and these representations were relied upon by him in investing his money, and that such representations were false and he was de-

ceived thereby. There was evidence these statements were made by appellants, were relied upon by plaintiff, were false, and that plaintiff lost the money invested by him in reliance thereon. The suit was against appellants, in their individual capacity, for false and fraudulent representations. As controlling stockholders, directors, officers, and promoters of the 1923 corporation, they owed a duty to act in the utmost good faith, to see to it that statements made by them to prospective stockholders to procure money by and from the sale of stock in the corporation to them were true. It is no defense that appellants believed the statements, when made, to be true, or that they acted in good faith in making such statements. The result to plaintiff, from their falsity, was the same whether appellants acted in good faith or bad faith. *Angell* v. *Loomis,* 97 Mich. 5.

No testimony was introduced by appellants. The facts, on the record, stand undisputed. They are, we think, sufficient to raise a question for the jury. The case was submitted by the trial court in a careful and comprehensive charge, upon which no error is assigned. Appellants are bound by the verdict. Judgment is affirmed, with costs.

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

DAVEY *v.* SANDERS.

1. CONTRACTS—ORAL CONTRACT—WEIGHT OF EVIDENCE.
   In action for breach of oral contract to prepare plans and specifications and erect building, finding that contract as claimed by plaintiff was made, *held*, not against great weight of evidence.

2. DAMAGES—TRIAL—INSTRUCTION—REQUEST TO CHARGE.
   Defendant's requested instruction, in action for breach of oral contract, that, if jury found contract to prepare plans and specifications and erect building was made, as claimed by plaintiff, verdict must be for nominal damages only, was properly refused, where there was evidence that value of plaintiff's services in preparing plans and specifications and his expenses in connection therewith amounted to substantial sum.

3. SAME—EXCESSIVE VERDICT—ARCHITECTS.
   Where, in action by architect for breach of contract to prepare plans and specifications and erect building for certain price, he would have been entitled to recover for value of services already performed and also for prospective profits, verdict for value of services alone cannot be said to be excessive.

Error to Wayne; Collins (Joseph H.), J., presiding. Submitted October 30, 1930. (Docket No. 119, Calendar No. 35,141.) Decided January 7, 1931.

Assumpsit by Frank P. Davey against James C. Sanders for breach of contract. Judgment for plaintiff. Defendant brings error. Affirmed.

Wm. Henry Gallagher (*John Panchuk,* of counsel), for plaintiff.

Robert M. Brownson and *Kenneth Murray,* for defendant.

SHARPE, J. It is plaintiff's claim that he and defendant entered into an oral contract whereby he agreed to prepare plans and specifications for and to erect a six-story building for defendant in Detroit for the sum of $204,720; that he prepared the plans and specifications, and they were approved by defendant, but that defendant thereafter unlawfully refused to permit him to further perform. He claimed damages in the sum of $31,972. Defendant pleaded the general issue, with a verified notice attached, denying the execution of the alleged contract.

The plaintiff had verdict for $7,370. On defendant's motion for a new trial, the court required plaintiff to remit the excess of $6,141.60, which he did, and judgment was entered for that amount. Defendant seeks review by writ of error.

The jury found that the contract as claimed by plaintiff was made. We cannot say that this finding was against the great weight of the evidence. The court declined to charge, as requested by defendant, that, if they so found, their verdict must be for nominal damages only. The plaintiff testified that the value of his services and those in his employ in the preparation of the plans and specifications, making arrangements for the removal of the building then on the lot, obtaining estimates of the cost of materials, and the advice he gave the defendant relative thereto, was the sum of $6,000. From his cross-examination it appeared that the usual fee charged by architects is three per cent. of the cost of the building. It is apparent that the $6,000 item and the interest thereon was that allowed by the jury to the plaintiff. As a condition precedent to the denial of a new trial, the court required plaintiff to remit all in excess of the three per cent., which he

did. It is apparent that nothing was allowed for loss of profits.

In *United States* v. *Behan,* 110 U. S. 338 (4 Sup. Ct. 81), it appeared that a contract was let for the improvement of a harbor, and, while the work was in progress, it was ordered stopped. The contractor claimed damages for the value of the work done and his prospective profits. The court said:

"The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract."

In *Periodical Press Co.* v. *Sherman-Elliott Co.,* 143 Minn. 489 (174 N. W. 516, syllabus), the rule is thus stated:

"Where a contract is repudiated after one of the parties has been to an expense in part performance or in preparing for performance such expense can be recovered, also the net profits, if any are proven."

See, also, *American Can Co.* v. *Garnett* (C. C. A.), 279 Fed. 722; *Kansas City Structural Steel Co.* v. *Athletic Bldg. Ass'n,* 297 Mo. 615 (249 S. W. 922).

Counsel for defendant, however, insist that what plaintiff has expended towards performance would not include "what an architect would charge for the work" of preparing the plans and specifications. The plaintiff, on direct examination, testified that

$6,000 was "the fair value of the services actually performed." Reference to an architect's charges for such services was brought out on cross-examination. The plaintiff had been a student in engineering at the University of Michigan. He had performed services as a construction engineer for the United States government in the Philippine Islands. He had constructed several large hotels and apartment buildings in Detroit and elsewhere. It cannot well be said on this record that the sum awarded him was against the great weight of the evidence.

The judgment is affirmed.

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

PEOPLE *v.* BROW.

1. BAIL—DISCHARGED ON IMPOSITION OF SENTENCE.

Obligation of sureties on bail bond of accused required them to have him in court until his case was finally determined by imposition of sentence, but it terminated when sentence was imposed.

2. SAME—COURT WITHOUT AUTHORITY TO CONTINUE BOND AFTER SENTENCE IMPOSED.

Court has no authority to continue in force bail bond of accused beyond imposition of sentence without consent of sureties.

Pronouncement of judgment or sentence in criminal case as affecting liability of sureties on bail bond, see annotation in 20 A. L. R. 629.

3. SAME—ORDER CONTINUING BOND AFTER SENTENCE IMPOSED NOT BINDING ON SURETIES WITHOUT THEIR CONSENT.

Sureties on bail bond of accused, who were not in court when bond was ordered continued after imposition of sentence, and who did not consent thereto, were not bound by order of continuance.

Error to Leelanau; Gilbert (Parm C.), J. Submitted October 16, 1930. (Docket No. 148, Calendar No. 34,646.) Decided January 7, 1931.

Assumpsit by the People of the State of Michigan against Noe Brow and another on a recognizance. Directed verdict and judgment for plaintiff. Defendants bring error. Reversed, and judgment ordered entered for defendants.

Wilber M. Brucker, Attorney General, and *C. J. Cole,* Prosecuting Attorney for the people.

John W. Patchin, for defendants.

MCDONALD, J. Nelson St. John was arrested on a charge of having unlawfully in his possession a quantity of intoxicating liquor. He was held to the circuit court of Leelanau county on bond in the penal sum of $1,500 with defendants as sureties. There he appeared, answered the information with a plea of not guilty, was tried, and convicted. On May 24, 1928, he was sentenced to imprisonment in the State prison at Jackson, the sentence to begin the 1st day of July, 1928. At the same time it was ordered that his bond continue in full force and effect. He was allowed his liberty until the 1st day of July to accommodate him in arranging his business affairs, with the understanding that he would report to the sheriff at that time for execution of his sentence. He failed to report, and departed the ju-

risdiction. His bond was duly estreated and this suit begun against the sureties.

On the trial the defendants moved for a directed verdict in their favor for several reasons, the principal one of which was that their obligations on the bond were satisfied when sentence was imposed. The court held to a different view, and directed a verdict for the plaintiff. The defendants have brought error.

The condition of the bond was that Nelson St. John should be at the courthouse when required and to—

"then and there answer to an information to be filed against him for the offense above mentioned, and to do and receive what shall by the court be then and there enjoined upon him and shall not depart the court without leave."

The defendants' obligations under the conditions of this bond required them to have their principal in court until his case was finally determined. It was terminated when sentence was imposed. The court had no authority to continue the bond in force beyond that time without the consent of the sureties. They were not present when sentence was imposed, and did not consent. Therefore they were not bound by the order of continuance. In *Ex Parte Williams,* 114 Ala. 29 (22 South. 446), it was said:

"The principle of the law is, that when bail is given and accepted, the custody of the prisoner is transferred from the officer of the law, to that of his sureties. * * * Whenever a party is convicted and sentenced, he is no longer in the custody of his bail, but is in the custody of the proper officer of the law, and the bail are thereby discharged by the operation of law without a formal order to that effect. The condition of the bond then will have been

fully complied with. The mere appearance of the defendant at court for trial, or his presence during trial, or a mistrial, will not operate to discharge the bail. The obligation of a proper bail bond binds the sureties, at least, until after the verdict of the jury; but when the sentence of the law is pronounced, the officer of the law is charged with its due execution. The bail have no further control over the custody of their principal, and cannot be longer held responsible.''

To the same effect is *Ford* v. *State,* 100 Ark. 515 (140 S. W. 734); *Beasley* v. *State,* 134 Tenn. 660 (185 S. W. 687); *Roberts* v. *Gordon, Governor,* 86 Ga. 386 (12 S. E. 648); Stearns on Suretyship (3d Ed.), p. 400.

We have found no Michigan decision wherein this question has been considered, but the principle enunciated in the cases above cited seems to be in accord with reason and justice, and is supported by the best authority.

The judgment is reversed, with costs to the defendants, and the case remanded for entry of judgment in their favor.

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

ROCKWELL *v.* GRAND TRUNK WESTERN RAILWAY CO.

1. MASTER AND SERVANT—LIABILITY OF MASTER FOR ACTS OF SERVANT TEMPORARILY LENT.

   If relation of master and servant was suspended while servant was temporarily assisting another, master would not be liable for servant's acts.

2. SAME—RIGHT TO CONTROL.

   Where master hires or lends servant to another for particular work and resigns control over servant while performing that work, he ceases to be servant of original master and becomes servant of one to whom he is hired or lent.

3. SAME—TEST OF RELATION.

   Where servant is hired or lent to another, in determining whose servant he is, test is as to who has right to control him.

4. SAME—NEGLIGENCE—RAILROADS.

   Where railroad company, owning electric crane which it furnished to consignees to unload freight, paid operator, had right to discharge him, and consignee had no control over crane or operator except by way of signals to indicate direction of hoisting, operator was servant of railroad company, rendering it liable for his acts.

5. NEGLIGENCE—RAILROADS—QUESTION FOR JURY.

   Where testimony was conflicting as to whether operator of electric crane owned by railroad company disregarded signals in unloading steel beams, resulting in injury to truckman, question of operator's negligence was for jury.

6. SAME—CONTRIBUTORY NEGLIGENCE.

   Where testimony was conflicting as to whether truckman was warned of danger and disregarded it, resulting in his injury, question of his contributory negligence was for jury.

7. SAME—PROXIMATE CAUSE.

   Though plaintiff's negligence may not be proximate cause, it is contributory negligence if it contributes to cause.

On the question as to test of the existence of relation of master and servant, see annotation in 37 L. R. A. 38; 55 A. L. R. 1263.

8. SAME.

Contributory negligence is negligence of plaintiff which operates with negligence of defendant in producing injury; plaintiff's negligence combined with defendant's negligence being proximate cause of injury.

9. SAME.

Contributory negligence of plaintiff necessarily implies negligence on part of defendant; theory being that defendant's negligence causes injury, and plaintiff's negligence contributes to it.

10. APPEAL AND ERROR—TRIAL—INSTRUCTION—CONTRIBUTORY NEGLIGENCE.

In action for personal injury, court's failure to define contributory negligence, and instruction, in effect, that plaintiff's negligence would not be contributory negligence unless it was sole proximate cause of injury was reversible error.

Error to Genesee; Black (Edward D.), J. Submitted October 8, 1930. (Docket No. 29, Calendar No. 35,155.) Decided January 7, 1931.

Case by George F. Rockwell against the Grand Trunk Western Railway Co., a corporation, for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed, and new trial granted.

C. A. Withey and *C. A. Bishop,* for plaintiff.

Frederic T. Harward and *H. V. Spike* (*Brownell & Gault,* of counsel), for defendant.

MCDONALD, J. This action was brought to recover damages for injuries received by the plaintiff on May 28, 1928, while assisting in the unloading of a car of steel beams in the defendant's yards in the city of Flint, Michigan.

The defendant maintains an electric crane for unloading of heavy freight. The plaintiff was engaged in the trucking business. On the day of the

accident, he was engaged by a bridge contractor to unload a car of I-beams and haul them to the site of the bridge. As the beams were being unloaded, the plaintiff stood near the center of the car toward the north side. The beams were being raised by the crane and deposited on some timbers on the ground beside the car. As one of the beams was being lifted, it was swung over against the plaintiff and seriously injured him. The facts will be more fully stated as we proceed with the discussion of the questions involved. It is sufficient at this time to say that the plaintiff claims he was free from contributory negligence; that defendant was negligent in furnishing an incompetent employee to operate the crane; that the operator was negligent in placing the lifting fulcrum, or trolley of the crane, beyond the beam and over toward the plaintiff; that it was his duty to operate the crane when signaled, and, instead of lifting the beam straight up as he was signaled to do, he negligently swung it to the side and against the plaintiff.

It was the defendant's claim that the crane was furnished for the convenience of the consignees, whose business it was to unload the freight; that in unloading the steel beams it furnished a competent man to operate the crane, and that, in doing this particular work, he was the servant of the plaintiff, and that therefore defendant was not liable for his negligent acts; that the operator was not negligent, and that the plaintiff's injuries were caused solely by his own negligence.

On these issues the jury gave the plaintiff a verdict for $28,000. After disposing of the usual motions, the court entered judgment on the verdict. The defendant has brought error, requesting a reversal on the following grounds:

1. That as a matter of law Mr. Lewis, the operator of the crane, was the servant of the plaintiff while assisting in the unloading of the steel, and therefore it was not liable for his acts.

If the defendant is held liable its liability must rest on the existence of a relation of master and servant between it and the operator of the crane at the time of the accident. He was its general servant. But if, under the circumstances, that relation was suspended while the servant was temporarily assisting the plaintiff in unloading the car, the defendant could not be held liable for his acts while so engaged. It is a well-settled rule of law that when one person hires or lends his servant to another for some particular work and resigns full control over him while performing that work, he ceases for the time to be the servant of the original master and becomes the servant of the party to whom he is hired or lent. In determining whose servant he was the test is, who had the right to control him. In 18 R. C. L. p. 784, § 244, it is stated:

"But to avoid liability the original master must resign full control of the servant for the time being. It is not sufficient that the servant is partially under the control of another."

This principle from the quoted text was followed in *Janik* v. *Ford Motor Co.,* 180 Mich. 557 (52 L. R. A. [N. S.] 294, Ann. Cas. 1916A, 669), and is supported by numerous authorities from other jurisdictions. In *Standard Oil Co.* v. *Anderson,* 212 U. S. 215 (29 Sup. Ct. 252), it was said:

"In many of the cases the power of the substitution or discharge, the payment of wages and other circumstances bearing upon the relation are dwelt upon. They however are not the ultimate facts, but only those more or less useful in determining

whose is the work and whose is the power of control. * * *

"To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."

In *W. S. Quinby Co.* v. *Estey,* 221 Mass. 56 (108 N. E. 908), it was said:

"The original master remains liable and the employee remains his agent, unless the authority to direct and control the servant in all the details of the transaction is surrendered to some other person, so that the business in which the servant is engaged is no longer the business of his general employer, but is in all respects the business of the person to whom he is sent."

In the instant case the defendant furnished the crane to increase its business in the carrying of heavy weight. It selected a man who had been instructed in its use to care for and operate it. He had exclusive control and management of it. While operating it, he was engaged in the furtherance of the defendant's business. He did nothing that the plaintiff was required to do. He knew the safe way and the unsafe way to operate it. He was selected by the defendant, paid by the defendant, and could be discharged whenever it pleased the defendant. The plaintiff had no control over the crane or the operator except that by signals he could direct when and in what direction the beams should be hoisted. Beyond this he was not allowed to interfere with its operation. In *Johnson* v. *Netherlands American Steam Navigation Co.,* 132 N. Y. 576 (30 N. E. 505),

a similar question was before the court. It was there said:

"It is quite apparent that it was the intention of the defendant to retain charge of the steam power and winch and operate it through its own servants and employees. And the fact that the winchman received orders from the plaintiff when to hoist and when to lower, under the circumstances in this case, does not operate to change his relations to the defendant as his servant."

And in *W. S. Quinby Co.* v. *Estey, supra,* the court said:

"If the servant remains subject to the general orders of the man who hires and pays him, he is still his servant, although specific directions may be given him by another person from time to time as to the details of the work and the manner of doing it."

In the instant case, the question was submitted to the jury, and we think the evidence justified them in finding that, in doing the work in which he was engaged at the time of the accident, the operator of the crane was the defendant's servant.

2. It was not shown that defendant was negligent. The defendant's servant, Lewis, had control of the crane. He owed to the plaintiff the duty of complying with all signals given as to when and how the beams should be hoisted. It was charged, and the plaintiff's testimony shows, that he disregarded a signal to lift a beam straight up, and, instead, lifted it sideways, thereby causing the injury to the plaintiff. This testimony was disputed by the defendant, and therefore became a question for the jury. It was sufficient to justify the court in submitting it.

3. The plaintiff was guilty of contributory negligence as a matter of law. The defendant claims that the plaintiff was familiar with the dangers attending the unloading of heavy freight by means of a crane; that he negligently took an unsafe position on the car; that Mr. Lewis warned him of the danger before he started to hoist the beam which injured him; that the plaintiff disregarded the warning and remained in a position of danger. The plaintiff sought to show that, except for the negligence of the defendant, his position on the car was not dangerous; he denies that he received any warning from the operator, and insists that he had a right to assume the operator would comply with the signals and would not swing the beam against him. In these circumstances, the question of contributory negligence was for the jury.

4. The court erred in his instructions to the jury as to contributory negligence. In his charge he said that it was necessary for the plaintiff—

"not only to show that the defendant was guilty of negligence, but he must also show himself free from what is known as contributory negligence, that is, that the negligence of the plaintiff was [not] the proximate cause of the injury."

This instruction was emphasized by frequent repetitions throughout the charge. It did not give a correct definition of contributory negligence. When the court said that contributory negligence is the proximate cause, he implied that there is no other cause, that it was the sole cause. Though plaintiff's negligence may not be the proximate cause, it is contributory negligence if it contributes to the cause. Contributory negligence is negligence of the plaintiff which operates with the negligence of the defendant in producing the injury. Where

there is contributory negligence, the plaintiff's negligence combined with the defendant's negligence is the proximate cause of the injury. The negligence of each may be a proximate cause but neither can be the cause or sole cause. Contributory negligence necessarily implies negligence on the part of the defendant. The theory is that the defendant's negligence causes the injury and the plaintiff's negligence contributes to it. Probably something of this kind was in the mind of the court in *McKeller* v. *Township of Monitor,* 78 Mich. 485, where it was said:

"We think the jury may not have understood the court upon the question of the plaintiff's negligence, as he failed to distinguish between negligence which caused the injury and negligence which contributed to it."

In the instant case, the court's instruction, in effect, was that the plaintiff's negligence would not be contributory unless it was the sole proximate cause of the injury. The jury must have understood it that way. No other inference was probable. Contributory negligence is only one element of proximate cause. That term is not generally understood by the lay mind, and the court ought to have defined it especially as to its connection with contributory negligence. A similar instruction was held to be erroneous and prejudicial in *Wastl* v. *Railway Co.,* 24 Mont. 159 (61 Pac. 9). In that case it was said:

"The jury are told that, though the plaintiff was negligent, he was not precluded from a recovery unless his negligence was the proximate cause of the injury. The use of the article 'the' with its specifying and particularizing force as opposed to the indefinite article 'a,' which should have been used, excludes the idea of any other concurring cause.

* * * From the particular phrase in which the definite 'the' is used, the jury could, and perhaps did, infer that the plaintiff, though guilty of negligence which could be called an approximate cause of the injury, should nevertheless be held not barred, unless the proof showed that his negligence was the sole causal agency in producing the injury."

Under the proofs in the instant case, contributory negligence was a close question. The instruction complained of gave the plaintiff an unfair advantage, and therefore was prejudicial.

Other questions are not likely to arise on a second trial, and do not require discussion. The judgment is reversed, with costs to the defendant, and a new trial is granted.

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

SCHEMPF *v.* NEW ERA LIFE ASS'N.

1. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.
In action by beneficiary on benefit certificate, insurance company's agents are precluded by Act No. 245, Pub. Acts 1881, from testifying to matters equally within knowledge of deceased; beneficiary being assign of deceased and protected by act.

2. JUDGMENT—SUMMARY JUDGMENT—AFFIDAVIT OF MERITS.
Affidavits of merits in opposition to motion for summary judgment do not comply with Circuit Court Rule No. 34, where affiants are not competent to testify to statements contained therein.

3. INSURANCE—FRAUD—MATERIAL FACTS.
In action on benefit certificate, claim that it was obtained by misrepresentation as to material facts is good defense, if proved.

4. JUDGMENT—SUMMARY JUDGMENT—WITNESSES.
On hearing of motion for summary judgment, court may, in its discretion, require production of witnesses for oral examination in open court.

5. SAME—ABUSE OF DISCRETION.
Refusal of court to take testimony offered for purpose of supplying insufficiencies of affidavits of merits in opposition to motion for summary judgment was abuse of discretion, where witnesses were then in courtroom.

Error to Jackson; Simpson (John), J. Submitted October 30, 1930. (Docket No. 115, Calendar No. 35,223.) Decided January 7, 1931.

Assumpsit by Charles L. Schempf as beneficiary of a benefit certificate against New Era Life Association. Summary judgment for plaintiff. Defendant brings error. Reversed, and new trial granted.

Blackman & Williams, for plaintiff.

Whiting, Kleinstiver & Aubrey and *Dale Souter,* for defendant.

McDONALD, J. The defendant brings error to review a summary judgment for the plaintiff, who brought suit as beneficiary to recover upon a benefit certificate issued by the defendant upon the life of his mother, Carrie L. Schempf, who died March 24, 1929. The defendant filed plea of the general issue, with notice of special defense that the certificate was issued on written application in which the insured falsely represented material facts in regard to her condition of health and illnesses during five

years prior thereto, which rendered the certificate void.

The plaintiff made a motion for summary judgment supported by his affidavit and that of James W. Williams, one of his attorneys. The defendant filed three affidavits of merits in opposition to the motion. The court held that defendant's affidavits did not show a meritorious defense, and granted the motion for summary judgment.

The applicable portion of Circuit Court Rule No. 34 relative to affidavits of merits reads as follows:

"The facts so stated shall be the personal knowledge of the affiant, shall be set forth in the affidavit with particularity, and the affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto."

The defendant's affidavits do not comply with this portion of Circuit Court Rule No. 34. In fact, as to matters equally within the knowledge of the deceased, all of the affiants, being agents of the defendant, are precluded from testifying. The plaintiff, as beneficiary, is an assign of the deceased, and assigns are protected parties under the statute. Perkins, Evidence by Survivor, § 85, pp. 117, 118.

Under the amendment of 1881, Act No. 245, page 335 (see 3 Comp. Laws 1929, § 14219), in proceedings by or against corporations, their agents are prohibited from testifying to matters which, if true, were equally known to the deceased. A discussion of this act and applicable cases will be found in the excellent work of Judge Perkins on Evidence by Survivor, § 109, p. 161.

In the instant case, the three affiants in the affidavits of merits are agents of the defendant corpora-

tion. If sworn as witnesses, they could not competently testify to any matter stated in their affidavits, which, if true, was equally within the knowledge of the deceased.

The affidavit of Ora L. Bilsborrow contains no statement that she could competently testify to if sworn as a witness on the trial. She took the insured's application and her affidavit sets forth the representations she (insured) made relative to her condition of health and illnesses, etc.

The affidavit of Joseph Kurzynowski says he interviewed doctors and examined records and charts in hospitals from which he undertakes to inform the court as to the condition of insured's health during the five years prior to her application for insurance. If sworn as a witness, he would not be allowed to testify to any of the matters stated in his affidavit.

The affiant Gaylord Nelson, general secretary of the defendant, begins his affidavit by saying that he has charge of the files and records of the company and follows with a recital of the contents of the application showing the representations made by the insured, and, as proof of their falsity, calls attention to the investigations made at the hospitals by an agent, to letters he had received from doctors, and to the certificate of death. If sworn as a witness, he could not testify to the representations in the application, or to the result of the agent's investigation, or to what doctors told him, or to the contents of the death certificate.

These affidavits were of no assistance to the court in determining whether there was a real defense to the action. In its plea, the defendant claimed that the benefit certificate was void because obtained by misrepresentations as to material facts.

That would be a good defense if proved, but, on this record for summary judgment, it stood as nothing more than a claim unsupported by any showing that it was real. There was no evidence before the court of any defense which, if established, would defeat plaintiff's right of recovery. In view of this fact, the court rightly held that the motion for summary judgment should be granted. But, before judgment was entered, counsel for the defendant, who were present when the court announced its decision, requested permission to present additional proofs by oral testimony of witnesses who were then in the courtroom. The court refused to take the proffered testimony, and entered judgment for the plaintiff.

It is true that the rule and statute contemplate a showing of merits by affidavit, but, on the hearing of any motion, where a question of fact in involved, the court may, in its discretion, require production of witnesses for oral examination in open court. 3 Comp. Laws 1915, § 12580.

Summary proceedings are convenient and useful, but they should not be employed to work an injustice. Under the circumstances of this case, we think the court abused its discretion in refusing to take the testimony of witnesses offered for the purpose of supplying the insufficiencies of the affidavits.

The judgment is reversed, and a new trial granted, without costs to either party.

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

JACKSON REINFORCED CONCRETE PIPE CO. *v.* CENTRAL CONTRACTING & ENGINEERING CO.

1. JUDGMENT—SUMMARY JUDGMENT—AFFIDAVIT OF MERITS—GARNISHMENT.

   Affidavit of merits showing that defendant had been garnisheed in independent action brought against plaintiff was insufficient to prevent entry of summary judgment under 3 Comp. Laws 1915, § 12581, and Circuit Court Rule No. 34, as amended.

2. SAME—DOUBLE LIABILITY.

   Entry of summary judgment against defendant after it had been garnisheed in independent action against plaintiff would not subject defendant to double liability, since it could apply for stay of execution and thus protect its rights.

3. SAME—SUMMARY JUDGMENT—GOOD FAITH AND MERITS OF DEFENSE IS TEST.

   Statutory test in determining whether motion for summary judgment should be denied is good faith and merits of defense as disclosed by showing made.

Error to Macomb; Reid (Neil), J. Submitted October 10, 1930. (Docket No. 68, Calendar No. 35,095.) Decided January 7, 1931.

Assumpsit by the Jackson Reinforced Concrete Pipe Company, a Michigan corporation, against the Central Contracting & Engineering Company, a Michigan corporation, and the Metropolitan Casualty Insurance Company of New York, statutory guarantor, for building materials. Summary judgment for plaintiff. Defendant insurance company brings error. Affirmed.

George A. Henigan, for plaintiff.

John Hal Engel (*Edmund E. Shepherd,* of counsel), for defendant.

NORTH, J. Plaintiff, having furnished the Central Contracting & Engineering Company with building materials and not having been paid therefor, brought suit for the purchase price. The Metropolitan Casualty Insurance Company was the statutory guarantor of the engineering company in performing a public work (3 Comp. Laws 1915, § 14827 *et seq.* [3 Comp. Laws 1929, § 13132 *et seq.*]). A plea of general issue with notice was filed. Plaintiff filed a motion for summary judgment. This motion was granted April 26, 1930, and judgment was taken for $3,461.64. The day before judgment was entered appellant filed the following affidavit in opposition to plaintiff's motion:

"STATE OF MICHIGAN,
"County of Wayne — ss.

"John Wirt Wilmer of the city of Detroit, Wayne county, Michigan, being first duly sworn, deposes and says that he is the representative of the Metropolitan Casualty Insurance Company of New York, a corporation, defendant in the above entitled cause, located at the city of Detroit, Wayne county, Michigan.

"That he has been served by a writ of garnishment of which the attached is a true copy, said service having been made upon the undersigned on the 25th day of April, A. D. 1930, at Detroit, Wayne county, Michigan.

"Further deponent sayeth not.

(Sg'd): "JOHN WIRT WILMER."

Appellant's motion to set aside the judgment was denied. The insurance company as appellant by assignments of error has raised the question of the trial court's right to enter the summary judgment in view of its showing in opposition thereto. From the showing made by the appellant in the circuit

court it appears that the McGregor & Reading Company had brought suit against the plaintiff herein and had served a garnishee summons upon appellant. The garnishee defendant's liability, if any, arose out of the same transaction involved in the instant case. The question thus presented is the right of a court to enter summary judgment against a defendant who has been garnisheed in an independent suit brought against the plaintiff in the case first instituted. In contending that the court under such circumstances should not enter a summary judgment, appellant relies upon *Grosslight* v. *Crisup,* 58 Mich. 531, and *Burt* v. *Wayne Circuit Judge,* 82 Mich. 251.

"An affidavit of merits filed by defendant to prevent entry of summary judgment under 3 Comp. Laws 1915, §§ 12581, 12582, to comply with Circuit Court Rule No. 34, as amended, must set forth the relevant facts upon which the defense is based, so that the court can determine whether there is a real defense to the action, and, where no facts are stated from which the court can make such determination, there is no error in entering summary judgment." *Warren Webster & Co.* v. *Pelavin,* 241 Mich. 19 (syllabus).

It is too clear for argument that the showing made in opposition to plaintiff's application for a summary judgment did not comply with the statutory requirement or the provision of the rule (3 Comp. Laws 1915, § 12581 [3 Comp. Laws 1929, § 14260]; and Circuit Court Rule No. 34, as amended). Appellant cannot be held liable in the garnishment proceeding unless it is liable to plaintiff in the instant case. The showing made in opposition to the motion for summary judgment amounts to a con-

fession of liability rather than a showing that it "has a defense to the action upon the merits."

Appellant asserts that the ruling of the trial court may subject it to double liability, since it may be compelled to pay both plaintiff's judgment in the instant case and also a judgment rendered against it as garnishee defendant in the second case. But as against this possible contingency, it is obvious that if there is occasion for so doing appellant may apply to the court for a stay of execution against it, and by so doing fully protect its rights. Such practice would not prevent plaintiff from obtaining a summary judgment and execution against the Central Contracting & Engineering Company to which it is clearly entitled. The *Grosslight Case* and the *Burt Case, supra,* cited by appellant, were decided over 40 years ago under very different rules of pleading and practice than now prevail, and before the advent of summary judgments. A further distinction is that in those cases the garnishment proceeding was against the sole defendant; but here we have two defendants, only one of which is a party to the garnishment. Instead of a motion to vacate the judgment, which was properly denied, appellant should have moved for a stay of execution as to itself. This motion the trial court would have granted or denied, depending on the good faith and merits as disclosed by the showing made, which is the statutory test in summary judgment proceedings. See 3 Comp. Laws 1915, § 12582 (3 Comp. Laws 1929, § 14261).

The judgment entered in the lower court is affirmed, with costs to appellee.

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

AIKEN *v.* PEOPLES.

1. PRINCIPAL AND AGENT—RATIFICATION—AGENT'S POWER TO BIND PRINCIPAL.

In action for consideration for assignment of land contract to defendant and another, where defendant was not party to agreement, the only ratification necessary to be shown, to justify recovery, was that parties acting for defendant in transaction had power to bind her.

2. SAME—TIME FOR PERFORMANCE.

That consideration for assignment of the contract was to be in form of promissory note, which was never executed, and that defendant's ratification of transaction came after expiration of time for delivery of note, would not release her, since delivery of note would not have constituted payment but was mere evidence of the debt, and therefore it cannot be said that ratification came after time for performance had passed.

3. SAME—AGENTS' POWER MAY NOT BE DISAVOWED AFTER CONFIRMATION.

Principal who for months confirmed agents' acts and led other parties to transaction to rely thereon may not later disavow agents' power and repudiate liability.

Error to St. Clair; George (Fred W.), J. Submitted October 14, 1930. (Docket No. 77, Calendar No. 35,203.) Decided January 7, 1931.

Assumpsit by James P. Aiken and another against Earle A. Peoples and others for a sum due on a land contract. From judgment for defendant Flora M. Stortz, plaintiff brings error. Reversed, and judgment ordered entered for plaintiff.

Walsh, Walsh & O'Sullivan, for plaintiffs.

Stewart & Black, for defendant Flora M. Stortz.

NORTH, J. This suit is against Clara B. and Flora M. Stortz only, service not having been obtained on the other defendants. Plaintiffs as assignees of the vendors were the owners of the vendors' interest in a land contract on property in Detroit. The defendants in connection with one Walkley, who appears to have been engaged in the business of buying and selling land contracts, had been dealing to some extent in real estate and land contracts. On March 28, 1929, the defendant Clara B. Stortz and Walkley called upon plaintiffs and entered into an arrangement whereby they agreed they would give to plaintiffs on the following day a $1,400 note signed by these defendants in consideration of the land contract first above mentioned being assigned and delivered to Mr. Walkley. The note was not given and this suit was brought to recover the amount thereof with accrued interest. The circuit judge who heard the case without a jury rendered a judgment in behalf of plaintiffs and against the defendant Clara B. Stortz but denied recovery as against Flora M. Stortz. By proper exceptions to the court's finding of facts and law the plaintiffs are reviewing on writ of error the refusal of the court to enter judgment against the defendant Flora M. Stortz.

There is a dispute in the testimony as to whether before plaintiffs delivered the contract Flora M. Stortz agreed over the telephone to give the note. On this issue of fact the circuit judge found against the plaintiffs; but we think the case is controlled by another phase of the record.

The undisputed testimony shows that before assigning and delivering the contract both Walkley

and Clara B. Stortz promised plaintiffs a note for $1,400 signed by the two defendants would be given the following day. The relation of Walkley to these defendants, particularly Flora M. Stortz, at the time of this transaction is rather clearly indicated in the latter's testimony in part as follows:

"During the time I was doing business with Walkley he had the general handling of my affairs. He was authorized to take care of my contracts for me and buy new ones for me. I was merely supplying the money. We supplied the money. He was authorized to buy and sell these contracts on my account. He handled our matters and had authority to do so. That was true during 1928 and the early part of 1929. It was also true in March, 1929. He had authority to buy these contracts according to his best judgment during that time. He was handling our affairs. We turned our affairs over to him and he handled them and we gave him power and authority to handle them."

Plaintiffs assert the right to recover against Flora M. Stortz on the ground that even though she was not a party to the agreement at the time it was entered into she subsequently ratified and confirmed it. Flora's own testimony on this phase of the case in part reads:

"*Q.* Did you afterwards tell her (Mrs. Aiken) you would give her a note?

"*A.* Later on.

"*Q.* How long was that?

"*A.* It was within two weeks or longer. The note was never executed. * * * She (Mrs. Aiken) called me on the telephone and asked me if I would sign that $1,400 note. I don't remember when it was; it may have been within two weeks. I said I would. * * * She (Mrs. Aiken) said Clara and

Mr. Walkley told her we would give her a $1,400 note. * * * My sister told me about the $1,400 note first. * * * After Clara Stortz had told me about this promise that I was to give Mrs. Aiken a note for $1,400, Mrs. Aiken came in and referred to it and I said I understood that was the arrangement. I at that time made no protest about giving it. * * *

"*Q.* You understood it was arranged at that meeting (March 28, 1929) that you and your sister were to give it?

"*A.* Yes. * * *

"*Q.* As I understand it now and afterwards when you heard that the arrangement had been made, you were willing to give the note?

"*A.* Yes sir. * * *

"*Q.* When was it you decided you would not give the note?

"*A.* Several months afterward."

The circuit judge found that plaintiffs' claim of ratification by Flora M. Stortz was not established because at the time of the claimed confirmation "the time for performance, namely, the delivery of the note, had already passed." In his opinion the trial judge cited and seems to have relied upon 2 C. J. p. 516 and *Slocum* v. *Gilman,* 84 Hun, 405 (32 N. Y. Supp. 297).

We think the circuit judge was in error. To justify recovery against the defendant Flora M. Stortz, the only ratification necessary to be shown was that of her sister Clara's and Mr. Walkley's power to bind her, Flora, to pay the consideration for the assignment and delivery of the contract to Walkley. That this obligation was to be evidenced by a promissory note which was to be delivered to plaintiffs on the following day was merely an incident to the transaction. The timely delivery of the note would

not have constituted payment and satisfaction of the obligation. The note would have been but the written evidence of the debt. Plaintiffs are not asking specific performance of the execution and delivery of this note. They want satisfaction of the obligation incident to which the note was to have been given. Flora M. Stortz ratified and confirmed the authority of her sister and Walkley to bind her to pay the consideration for the transfer of the contract. The record does not show for what length of time the note was to have been given, and hence, even if it is of importance, it cannot be said that her ratification of their power to bind her to pay the consideration did not occur until after "the time for performance" had passed. Under Flora's own testimony, plaintiffs were led for months before her disavowal to rely upon her confirmation of the contract entered into by her sister and Walkley as her agents; and we think under her own testimony she should have been found liable to plaintiffs.

The judgment of the lower court in favor of the defendant Flora M. Stortz will be reversed, the case remanded to the circuit court with instructions to set aside the judgment in favor of this defendant and to enter one on the record against her and in favor of plaintiffs. Costs of both courts to be taxed in favor of appellants.

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

CITY INVESTMENT CO. *v.* WEATHERWAX.

1. BILLS AND NOTES—FRAUD—EVIDENCE—SUFFICIENCY.
   In action on mortgage notes given incident to purchase of Florida real estate, defense of fraud is not established where there was no proof of misrepresentation as to material existing fact upon which defendants relied, and no evidence of seller's bad faith in making statements of values or in declarations of promissory character.

2. SAME—CONSIDERATION.
   In action on mortgage notes given incident to purchase of Florida real estate, defense of lack of consideration, *held*, under circumstances, not tenable.

Error to Jackson; Parkinson (James A.), J. Submitted October 29, 1930. (Docket No. 128, Calendar No. 34,967.) Decided January 7, 1931. Rehearing denied April 7, 1931.

Assumpsit by City Investment Company, a Florida corporation, against Clyde E. Weatherwax and another on mortgage notes. Judgment for defendants. Plaintiff brings error. Reversed, and judgment ordered entered for plaintiff.

J. Adrian Rosenburg and *Harold M. Shapero,* for plaintiff.

D. S. Frackelton and *Whiting, Kleinstiver & Aubrey,* for defendants.

NORTH, J. Plaintiff as assignee of Richard L. Heverle instituted this suit in the circuit court of Jackson county to recover on three mortgage notes signed by defendants aggregating upwards of $60,000. The mortgage incident to which these notes were given covered real estate in Fort Myers, Florida. The defense was recoupment based on the

claim that the notes were procured by fraud, which is outlined in the notice under the plea and hereinafter noted. It is admitted that plaintiff holds these notes subject to the same defenses that could be urged against the payee. The jury found for the defendants. At the close of the proofs plaintiff moved for a directed verdict, and, after verdict, for judgment *non obstante*. Both motions were denied, and judgment for no cause for action entered. Plaintiff reviews by writ of error.

Being interested in the Florida real estate boom, defendants, in August, 1925, went to Fort Myers, Florida. There they entered into negotiations for the purchase of real estate with Mr. Alexander S. Lindenfeld and Henry Colquitt, who were in the real estate business. Through these agents defendants purchased at a price of $130,000 property belonging to Richard L. Heverle, the record title to which was in Colquitt's name. The written offer and acceptance was dated August 17, 1925. The property purchased consisted of about an acre and a half of land, centrally located in Fort Myers and supposedly highly desirable for subdividing into lots to be used for business purposes. Five thousand dollars accompanied defendants' written offer, and, if the transaction was consummated, $25,000 additional was to be paid within 30 days from the date of the instrument, making a cash payment of $30,000. The balance was payable in one, two, three, and four years and secured by a mortgage back on the property.

Defendants claim that Colquitt and Lindenfeld defrauded them by falsely representing that the land involved was worth $250,000 and they could resell this property for the defendants at a price of $250,000 before the first mortgage note fell due,

and also by representing, as defendant Matthews testified—

"that this was a piece of business property * * * and that it could be turned over readily, that it ought—that it could be turned in less than 30 days; in fact, it was the fastest type of moving property in Ft. Myers. * * *

"Mr. Colquitt told us that because of its location this property could be turned very readily and that it would—it could be turned quickly, enough so in fact that we would not have to make our second payment (referring to first note)—our first payment, and probably could be sold so that we would not have to make the balance of our cash payment."

Being called by the defendants for cross-examination under the statute, Mr. Lindenfeld, who during the trial was a guest in the home of one of the defendants, testified:

"*Q.* Did Colquitt ever say to you if you promised these men you could resell this property for $250,000 you could get them to buy it for $130,000?

"*A.* Words to that effect. * * *

"*Q.* Did you ever hear him (Colquitt) tell Mr. Heverle that he made these promises to these defendants, to resell the property for $250,000?

"*A.* Why, yes; Mr. Heverle was quite often in the office. He knew all about the dealings. * * *

"*Q.* Did you hear Mr. Colquitt tell Mr. Heverle that he had agreed to sell this property here in suit, to the syndicate for $250,000 so that Weatherwax and Matthews would not have to pay their notes?

"*A.* Yes; I stated so. * * *

"*Q.* Prior to August 17, 1925, * * * you and Colquitt told Weatherwax and Matthews that you would sell this property for $250,000, either to an individual or to a syndicate, is that right?

"*A.* Yes. To induce them to purchase the property."

Colquitt and Lindenfeld were entitled to a commission of $6,500. At Colquitt's request or by reason of an agreement with defendants this amount was deducted from the $30,000 cash payment, and in consideration thereof the defendants agreed that Colquitt and Lindenfeld should have an interest in the profits ultimately derived from a resale of the land. On October 5, 1925, defendants paid the balance of the cash payment, $18,500. In September, 1925, Colquitt and wife executed and acknowledged a deed to defendants, but Weatherwax and Matthews did not execute the mortgage back to Colquitt and sign the mortgage notes until November 30, 1925. By this date defendants had learned that this property was already incumbered by two mortgages, the first for $6,000 and the second mortgage for $8,500. The matter of these mortgages, obtaining an abstract of title, and other details prolonged the time of closing the deal from August 17th to November 30, 1925, which was much more than the 30 days originally contemplated. In the meantime the parties concerned were talking and planning a resale of the property for $250,000. A plan for a syndicate to take over the property on the basis of ten units of $25,000 each was formed. It was hoped that this might be consummated early enough so that the papers which had passed between the defendants and Colquitt might be disregarded and title transferred direct from Colquitt to the syndicate, it being a part of the plan that the defendants' investment should be repaid to them out of down payments from members of the syndicate. The plan was partially carried out. Practically all of the units in the syndicate were placed, but not all the sales were fully consummated. From money thus received there was paid to these defendants nearly $24,000. At this time Mr. Matthews was in the Col-

quitt office working as a real estate salesman and had somewhat to do with collecting money from those who had taken shares in the syndicate. On March 25, 1926, he wrote Mr. Weatherwax at Jackson, Michigan:

"We have not been able to close any more units since I saw you, but are working consistently on it."

In February, 1926, or shortly thereafter, the Florida boom began to hit the rocks. The syndicate plan was not consummated before May, 1926. It was then discovered that there was some irregularity in the manner in which Heverle's wife had executed the deed from Heverle to Colquitt. It seems to have been arranged between the parties to disregard this conveyance to Colquitt and the mortgage and notes which defendants already had executed and delivered to him, and in lieu thereof Heverle and wife were to deed direct to defendants and they in turn would execute another mortgage and notes to Heverle. This was done May 20, 1926, but the instruments were dated back as of October 1, 1925. Four mortgage notes were given to Heverle by the defendants as follows: $10,500 due October 1, 1926; three $25,000 notes due respectively October 1, 1927, 1928, and 1929. This suit is based upon the first two notes and a balance unpaid on the third.

In January, 1927, the plaintiff herein purchased the first mortgage on this property and later foreclosed it. The second mortgage had been paid in the meantime from money received from the syndicate sales. Heverle bought the property at the mortgage sale for $50,000, and under order of the court in the foreclosure proceeding the balance left from this amount after paying the foreclosed mortgage was applied in payment of defendants' note to Heverle due October 1, 1929, and $14,034.55 was

applied on the note due October 1, 1928. By this method Heverle repossessed himself of title to the land unincumbered by any of the transactions above noted. But prior to the foreclosure Heverle's attorney wrote defendants:

"An immediate foreclosure proceeding will be necessary, unless you were willing to convey back the premises to Mr. Heverle for the surrender of your notes in the amount of $85,000."

Of this proposition defendants' counsel say in their brief:

"They (defendants) did not avail themselves promptly of the opportunity. Such a course would have ended this litigation."

Before the foreclosure proceeding, Mr. Matthews had returned to Jackson, Michigan, but he was kept in touch with the situation by correspondence with both Colquitt and Heverle. As late as November, 1926, Matthews was evidently attempting to work out some plan whereby these defendants, as well as the investors in the syndicate proposition, could save or to some degree protect their interest. This is plainly shown by Matthews' letters written to Colquitt and Heverle as well as by other testimony in the record. On November 2, 1926 (nearly a year after these defendants signed the first mortgage and notes and six months after they gave the substitute mortgage to Heverle), Matthews wrote to Colquitt, addressing him as "Dear Henry" and said:

"We have got no new plans here with respect to this property, but if Mr. Heverle concludes to proceed (with foreclosure) in the matter, naturally we will have to do likewise in order to protect ourselves."

November 20, 1926, Matthews wrote Heverle about the pending matters. Matthews was instru-

mental in having a Mr. Thompson go from Michigan to Florida at that time in the hope and expectation that he could be interested in the proposition. This letter in part reads:

"Mr. Thompson has evidenced his belief in Fort Myers by already investing considerable sums of money there and I hope that on this trip he will still continue his good feelings toward your good town. Am sure, Mr. Heverle, I can rely on you to give him the true conditions as you see them, he will appreciate it as he thinks very well of you and your judgment.

"Have written Henry today, advising him as to the present situation and asking him to take it up immediately with the syndicate holders, if they wish to protect the monies they have already paid in.

"Between Mr. Thompson or the syndicate holders, it seems as though we ought to be able to satisfy you, Mr. Heverle, in some way very quickly. However, should the worst come to pass and we not be able to consummate a finished program acceptable to you, you will find their (that) it is not necessary to go to foreclosure proceedings in order to get the property back.

"You have certainly treated us fairly and squarely from the beginning of our relations and we want to show you our appreciation in a small way, by deeding the property back without any expense to you, in the event it cannot be handled in any other way."

Still later (December 26, 1926) Matthews again wrote to Colquitt. This letter contains the following:

"I have written and wired you asking what the syndicate holders and yourselves intended to do in regard to making further payments in order to protect the interests of all concerned, but to date have not received any reply. Now, Henry, the time has

come when we must know what you folks intend to do, if you have abandoned the proposition then it will be up to us to protect our rights the best way possible, if you have not abandoned it and wish to protect the monies you have paid over to us thus far, then make us a proposition and we will give you an answer immediately as to whether we go alone or whether we go with the syndicate. * * *

"We have shown our disposition to do what was right in every way and have tried to work out a solution fair and equitable to all."

We have quoted from these letters somewhat at length because from them, as well as from other testimony, it conclusively appears that months after these defendants had full knowledge of all the material facts and circumstances which they now set up as constituting the alleged fraud, they were going ahead with their original plan of selling this property at a substantial profit. All the facts material to the alleged fraud were fully known to the defendants before they executed and delivered the notes in suit. Both Mr. Weatherwax and Mr. Matthews were experienced business men. They had made previous investments in Florida real estate. They saw and investigated this property before purchasing. They were dealing with Mr. Heverle and his agents at arm's length. Evidently all were overconfident, they overestimated Florida property values and did not anticipate the turn of the tide. On September 11, 1925, Matthews wrote a letter to Lindenfeld in which he indicated that a prospective sale of this property for $200,000 would not be satisfactory because the proposed price was too small when compared with figures at which other properties there were then selling. As noted, the defendants continued in the contemplated plan of resale for months after they had full knowledge of the truth

as to the value of the land involved and of every other material misrepresentation. In so doing they acted in reliance upon their own judgment.

When construed in the light most favorable to defendants, this record does not sustain their claim of fraud. There is no proof of a misrepresentation as to a material existing fact upon which defendants relied in consummating this purchase and giving these notes. There is no evidence of bad faith in making statements of values or in declarations of a promissory character. It is unfortunate that the defendants made a bad bargain, but that fact does not constitute a legal defense. We have given consideration to defendants' claim of failure of consideration for the notes in question, but under the circumstances disclosed by this record the claimed failure of consideration is not tenable. These defendants are bound by repeated decisions of this court in which the controlling principles of law have been stated and restated; and there is no need of repeating them again. See *Sutton* v. *Benjamin,* 231 Mich. 153; *Feldpausch* v. *Hendershot,* 245 Mich. 694; *Burlingame* v. *Taylor Realty Co.,* 247 Mich. 109; *Balcom* v. *Fortin,* 248 Mich. 397; *Candler* v. *Heigho,* 208 Mich. 115; *Southern Development Co.* v. *Silva,* 125 U. S. 247 (8 Sup. Ct. 881).

These defendants to some extent also relied upon alleged estoppel and release. These defenses are without merit and will not be reviewed. The case is remanded to the circuit court of Jackson county, with instructions to set aside the judgment heretofore entered and to enter judgment for plaintiff for the unpaid portion of the mortgage notes, with accrued interest. Plaintiff will have costs of both courts.

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

WATSON-HIGGINS MILLING CO. *v.* GRACZYK.

1. APPEAL AND ERROR—NEW TRIAL—QUESTION REVIEWABLE.
   Question of trial court's authority to grant new trial, not passed on in circuit court, is not properly before Supreme Court.

2. EVIDENCE—SALES—PAROL EVIDENCE.
   Buyer's written confirmation of terms of purchase of carload of rye and seller's written invoice conforming therewith constituted final agreement which could not be changed by proof of prior parol agreement.

3. SAME—ADMISSIONS IN PLEA BINDING.
   Under Circuit Court Rule No. 23, § 6, statement of fact set forth in notice added to plea is treated as admission by defendant and need not be proved by plaintiff.

4. PLEADING—ADMISSIONS—ESTOPPEL.
   Seller's plea in exact conformity as to price and quality of carload of rye with buyer's written acceptance and seller's written invoice estops seller from claiming inconsistent bargain on basis of minimum price.

Case-made from Allegan; Cross (Orien S.), J. Submitted October 10, 1930. (Docket No. 57, Calendar No. 34,930.) Decided January 7, 1931.

Assumpsit in justice's court by the Watson-Higgins Milling Company, a corporation, against William Graczyk, trading as Dorr Elevator Company, for shortage in the sale of rye. Judgment for defendant. Plaintiff appealed to the circuit. Judgment *non obstante veredicto* for plaintiff on second trial. Defendant reviews by case-made. Affirmed.

Linsey, Shivel & Phelps, for plaintiff.

Leo W. Hoffman and *Clare E. Hoffman* (*Carl E. Hoffman,* of counsel), for defendant.

NORTH, J. Plaintiff company was engaged in the milling and wholesale grain business in Grand Rapids. Defendant was a grain buyer at Dorr, Michigan. On June 23, 1925, Mr. Higgins of the plaintiff company telephoned defendant and negotiated the purchase of a car of rye which defendant had for sale. Plaintiff claims the agreement was for 1,100 bushels of No. 2 rye at $1.02 per bushel. But defendant asserts that there was the further provision in the sales agreement that in case the rye did not grade as No. 2 he was to have "a dollar a bushel for it anyway."

Plaintiff was to give shipping directions, and accordingly telephoned defendant July 3 to bill the car Monday morning (July 6th) to plaintiff at Richmond, Virginia. This was done. When telephoning shipping directions plaintiff claims defendant said he was a little doubtful whether the car would grade No. 2 or 3 and that plaintiff then told defendant if it graded No. 3 a reasonable margin would have to be allowed for the difference. Plaintiff forwarded to defendant a confirmation of the sale which recited it was for 1,100 bushels of No. 2 rye at $1.02 per bushel, and further specified "Destination weight and inspection final. Under Federal supervision when obtainable." This confirmation was dated June 23, 1925, and received by defendant the following day, more than ten days before defendant shipped the grain. Following shipment defendant sent plaintiff a written invoice for one car No. 2 milk rye, 1,150 bushels, price $1.02 f. o. b. Dorr. Defendant's draft on plaintiff for the invoice price less five per cent. was paid by plaintiff July 9, 1925.

On arrival at Richmond the car was weighed and found to contain about 50 bushels less than invoiced. It was inspected by a Federal grain inspector, found to be musty, and graded as No. 4. Plaintiff claims he sold the carload at the best obtainable price and at the direction of the defendant. Defendant denies the latter assertion. The transaction resulted in a net loss to plaintiff of $284.92. Suit was brought in justice's court by plaintiff against defendant for this amount and accrued interest. The defendant prevailed, and plaintiff appealed. In the circuit court verdict was rendered in favor of the defendant December 16, 1927. Four days later plaintiff filed a motion for a new trial. It was submitted June 13, 1929, and a new trial granted June 25, 1929. After the jury was drawn for a second trial of the case in the circuit defendant's counsel announced that he wanted to make and file a motion, stating "we object to the trial proceeding because the court had no authority to grant a new trial at the time a new trial was granted." It seems to have been arranged to take this matter up at some later time but no further action was taken. At the conclusion of proofs on this second trial plaintiff's counsel moved for a directed verdict. This was taken under advisement by the court, and a verdict of no cause for action rendered. Thereafter the court granted plaintiff's motion and entered judgment for $300 in favor of plaintiff *non obstante veredicto.* The defendant reviews on case-made.

Defendant's contention that the circuit judge had no jurisdiction to grant a new trial was not passed upon in the circuit; and it is not properly before us for review.

In entering judgment *non obstante,* the circuit judge in part based his ruling on the ground that

the verbal arrangement between these parties was subsequently embodied in plaintiff's written confirmation and defendant's written invoice, and that the terms of these instruments controlled. In this he was correct. As noted, defendant received plaintiff's confirmation more than ten days prior to shipment. At no time did he complain that it did not conform to the oral offer and acceptance; and later defendant invoiced the grain on the same terms as to grade and price embodied in the confirmation. His draft with bill of lading attached was for five per cent. less than total price, which conforms to plaintiff's claim, but cannot be reconciled with defendant's contention that at most the price of this grain was to be reduced from $1.02 to $1 per bushel, except on the assumption that destination weight was to control. This quite conclusively indicates that defendant had in mind the provision in plaintiff's acceptance that destination weight and inspection were to be final. We think this record shows the parties adopted and acted upon the sales agreement as embodied in plaintiff's acceptance and defendant's bill of lading. The terms of these written instruments are final and they cannot be changed by proof of a prior parol agreement.

This court has said one cannot "reduce his oral agreement to writing, formally execute or accept and keep it, and at a later time ignore the solemn writing, and bring an action upon a preliminary agreement. This would be an innovation that would render written contracts no better than oral ones, and practically make them subject to variation and contradiction by parol, and, by indirection, evade one of the best and most uniformly settled rules of law." *Kleis* v. *Niagara Fire Insurance Co.*, 117 Mich. 469. See, also, *National Cash Register Co.* v. *Dehn*, 139 Mich. 406.

The rule embodied in the foregoing decisions must prevail; otherwise in cases wherein, as here, the buyer has no opportunity for inspection, he will become an easy victim of fraud and left wholly without the protection afforded by the written instruments which evidence the agreement between him and the seller as to quantity, quality, and price. Until delivery of the signed acceptance, this contract of sale was within the statute of frauds and not binding upon either of the parties. It would be a dangerous doctrine to hold that the terms of a void oral agreement could vary or control the subsequent valid written agreement between the parties. In the instant case these controlling written instruments conclusively established plaintiff's right to prevail.

The circuit judge also held that by the terms of the defendant's plea in justice's court, and under which the case was tried in the circuit, he admitted the correctness of plaintiff's contention as to the terms of this transaction. The record of the plea is as follows:

"The defendant appeared personally and specially by his attorney, Clare E. Hoffman, and claimed that the rye was No. 2 grade, as per invoice, and that it was sold f. o. b. Dorr, Michigan, at $1.02 for No. 2 rye; that the rye was not musty and not short in weight at time of loading."

This plea is in exact conformity as to price and quality with plaintiff's acceptance and defendant's invoice. Defendant's pleading estops him from claiming an inconsistent bargain on the basis of a minimum price of $1 per bushel.

"Any statement of fact set forth in a notice added to a plea shall be treated as an admission by the de-

fendant and need not be proved by plaintiff." Circuit Court Rule No. 23, § 6.

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

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

CROFF *v.* DEVRIES.

1. APPEAL AND ERROR—DIRECTED VERDICT.
   In reviewing judgment on directed verdict against plaintiff, every reasonable inference tending to support plaintiff's claim should be drawn.

2. MOTOR VEHICLES—NEGLIGENCE—PRINCIPAL AND AGENT.
   Evidence of arrangement between finance company's agent and automobile purchaser that latter should drive car to garage and leave it there until he had made past-due payment did not establish that finance company took possession and that purchaser was its agent in driving car to garage, rendering it liable for his negligent act.

3. MASTER AND SERVANT.
   Servant is one over whom master has control.

4. APPEARANCE—WAIVER—PROCESS.
   By entering general appearance and filing plea of general issue, defendant waived any defect or irregularity in service made upon him (3 Comp. Laws 1915, § 12430).

5. PROCESS—VALIDITY OF SERVICE RAISED BY MOTION TO DISMISS.
   Validity of service on defendant may be raised only by motion to dismiss (3 Comp. Laws 1915, § 12456).

Error to Kent; Brown (William B.), J. Submitted October 22, 1930. (Docket No. 125, Calendar No. 35,264.) Decided January 7, 1931. Rehearing denied February 27, 1931.

Case by Mary Emeline Croff, administratrix of the estate of Harry Vincent Yeakey, deceased, against Henry DeVries and General Motors Acceptance Corporation for the negligent killing of plaintiff's decedent. Directed verdict and judgment for defendants. Plaintiff brings error. Reversed as to defendant DeVries. Affirmed as to defendant General Motors Acceptance Corporation.

Dunham, Cholette & Allaben, for plaintiff.

Amos F. Paley, for defendant General Motors Acceptance Corporation.

SHARPE, J. Plaintiff's decedent, while walking across a street in the city of Grand Rapids, was struck by an automobile, driven by the defendant DeVries, and sustained injuries resulting in his death. The trial court directed a verdict for the defendant General Motors Acceptance Corporation on the ground that no legal liability attached to it for the negligence of DeVries. He also directed a verdict for DeVries. Plaintiff seeks review of the judgment entered by writ of error.

DeVries had purchased a second-hand automobile from the Thompson-Lockerby Company and had given a chattel mortgage on it to secure a part of the purchase price. The mortgage was duly assigned to the acceptance corporation. When but $5 remained unpaid thereon, a representative of the corporation, Earl London, called at the home of

DeVries one morning to secure payment of it. DeVries, called for cross-examination, testified:

"*Q.* Did you have any talk with Mr. London at that time about making a payment?

"*A.* Yes.

"*Q.* And Mr. London told you that you would have to take care of this back payment or he would have to take the car back, didn't he?

"*A.* No, not just exactly.

"*Q.* What did he say?

"*A.* Mr. London told me, he says, 'Now'—

"*Q.* Before you get to that, Mr. London told you, did he not, that he would have to take the car down to the Thompson-Lockerby garage, didn't he?

"*A.* No. Mr. London asked me if I would take the car down to the Thompson-Lockerby garage until I had that $5 paid.

"*Q.* He asked you to take the car down there, did he?

"*A.* Yes, sir.

"*Q.* And he told you he wanted you to leave the car down there until you had the balance paid, is that right?

"*A.* Well, I don't know. We made an agreement, together, see?

"*Q.* He asked you to take the car down to the Thompson-Lockerby Company, didn't he?

"*A.* Yes, sir; he asked me when I would do that.

"*Q.* And he asked you to leave the car there until you had made the payment, isn't that right?

"*A.* Yes, sir.

"*Q.* And he told you when you had the balance of the contract paid, you could get the car back, is that right?

"*A.* Sure.

"*Q.* And that until you paid the balance of the payments back, you could not get the car back?

"*A.* He didn't say nothing about that."

London, also called for cross-examination, testified:

"*Q.* Your work was not only to collect payments, but it was where you deemed it necessary to repossess cars that were in default?

"*A.* Yes.

"*Q.* Now, it is true in repossessing automobiles, you have done in the past, the car is ordinarily repossessed and placed in the garage where it was originally purchased; isn't that true?

"*A.* It is under ordinary conditions, yes.

"*Q.* Ordinarily that is true, isn't it?

"*A.* Yes. I went out alone to Mr. DeVries' home. I drove there in my car.

"*Q.* On this particular morning, you suggested to Mr. DeVries, that he take the car down to the Thompson-Lockerby garage, didn't you?

"*A.* Yes, that was their agreement.

"*Q.* And you so stated to him?

"*A.* I suggested it.

"*Q.* And you were the one who suggested the place where the car should be taken, weren't you?

"*A.* Not necessarily. We agreed upon that ourselves, Mr. DeVries was to take it to the Thompson-Lockerby.

"*Q.* But you were the one that suggested Thompson-Lockerby garage?

"*A.* Certainly.

"*Q.* So the car was taken to the Thompson-Lockerby garage because of your designating the place?

"*A.* It was not taken there.

"*Q.* I say, the designation of the Thompson-Lockerby garage was made by you, wasn't it?

"*A.* I would say yes.

"*Q.* In other words, you were the one who mentioned Thompson-Lockerby garage as the place where the car was to be taken; you asked that it be taken there.

"*A.* I suggested taking it there.

"*Q.* And you also suggested to him that the car should be left there until he had made the final payment?

"*A.* I didn't say anything about that. I told him that the car—that he should store his car there, and he could come up that afternoon and make the payment to our office.

"*Q.* You asked him to keep the car there, did you?

"*A.* I asked him to place the car there.

"*Q.* And to leave the car there until he made the final payment?

"*A.* There wasn't anything said about that.

"*Q.* What was said about final payment?

"*A.* He thought that it would be possible for him to have that that afternoon.

"*Q.* And you told him when he made the final payment you would go down and get the car; isn't that right?

"*A.* Well, I think that was necessary. He understood that."

To warrant us in reversing the judgment entered in favor of the acceptance corporation, we must hold that, based upon this testimony, the jury might have found as a fact that at the time of the collision it had possession of the car and that DeVries was acting as its servant or agent in driving it. Plaintiff had to rely on the testimony of DeVries and London to establish her claim in this respect. We should therefore draw every reasonable inference from their testimony tending to support it. They were both very cleverly cross-examined by plaintiff's counsel. But, when we carefully analyze their statements, we are forced to the conclusion, as was the trial court, that London did not take possession of the car at the home of DeVries. What was there

said amounted to no more than an arrangement between them that DeVries would drive his car to the garage and leave it there until he had paid the $5 yet due on the chattel mortgage. DeVries was in no way deprived of his possession of the car. London could not legally have taken possession of the car without the assent of DeVries. A servant is one over whom the master has control. The action of DeVries in driving the car to the garage was a voluntary one on his part. His failure to do so could not have resulted in his discharge from the service of the acceptance corporation, as the relation of master and servant did not exist.

Error is assigned upon the action of the court in directing a verdict in favor of the defendant DeVries and entering a judgment in his favor thereon. While the judgment as entered was the usual one in favor of both defendants, the trial court in directing such verdict stated that he did so "on account of lack of legal service."

DeVries was a resident of Ottawa county. The record does not disclose where service was made upon him, but the statement of the court would indicate that it was made in that county under the provisions of section 12430, 3 Comp. Laws 1915. He, however, entered a general appearance, and filed a plea of the general issue, and by so doing waived any defect or irregularity, if there was any, in the service made upon him. *Hempel* v. *Bay Circuit Judge,* 222 Mich. 553; *Fisher* v. *Fisher,* 224 Mich. 147. It would seem that the validity of the service in such cases can only be raised by a motion to dismiss. *Rosenthal* v. *Rosenthal,* 151 Mich. 493; *DeVelin* v. *Wayne Circuit Judge,* 211 Mich. 56.

The verdict and judgment in favor of DeVries will be set aside, with costs as against him, and a

new trial ordered. The judgment in favor of the acceptance corporation is affirmed, with costs against appellant.

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

BALL *v.* REILLY.

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

1. WILLS—CONSTRUCTION—INTENT.
   In construing will, intent of testator should be ascertained from consideration of entire instrument.

2. SAME—ESTATE CONVEYED—ESTATES IN COMMON—JOINT TENANCY—STATUTES.
   Rule as to ascertaining testator's intent from will in devising real estate to two or more persons is qualified by 3 Comp. Laws 1915, § 11562, providing that such devises shall be construed to create estates in common unless expressly declared to be in joint tenancy.

3. SAME—CONSTRUCTION.
   Devise to three daughters with provision that if either married she was to receive $500 and property was to be held by last single daughter forever, was devise of one-third interest to each to be divested on marriage, and last single one should own property, so that, where none of them subsequently married, each owned undivided one-third interest, which, unless disposed of by will, descended to heirs.

On the general rule as to ascertainment of intention of testator in interpretation and construction of will, see annotation in 11 L. R. A. (N. S.) 67, 515; 54 A. L. R. 97.

4. CANCELLATION OF INSTRUMENTS—DEEDS—FRAUD.

In suit for cancellation of deed to nephew and niece, conclusion of court below that there was no fraud and that grantor was of sound mind when deed was executed, *held*, justified by record.

5. EQUITY—ACCOUNTING.

Decree providing that grantee account to grantor's estate for rents collected during lifetime of grantor, who retained life estate, did not provide for accounting of money received from "miscellaneous sources."

6. EXECUTORS AND ADMINISTRATORS—EQUITY—ACCOUNTING—PARENT AND CHILD.

That aged aunt turned over rental checks to nephew, who looked after her business, and that he deposited some of them in his account in bank, is insufficient in itself to warrant charging his estate with amount thereof, especially where both are now deceased, and their relationship was intimate, almost that of parent and child.

7. SAME—CONTRACTS.

Decree providing that estates of nephew and niece account to estate of deceased aunt for rentals collected, *held*, not justified, in absence of evidence showing enforceable agreement that rents should be paid to aunt, and especially in view of fact that she had previously quitclaimed to them all her interest in leased property.

Appeals from Wayne; Law (Eugene F.), J., presiding. Submitted October 23, 1930. (Docket Nos. 135, 136, Calendar Nos. 35,156, 35,157.) Decided January 7, 1931.

Bill by Cora Beattie Ball, administratrix of the estate of Margaret Beattie, deceased, and individually against Raymond W. Reilly and others to set aside a deed to realty and for an accounting. Decree for defendants. Plaintiff appeals. Affirmed.

Bill by Detroit & Security Trust Company, guardian of the estate of Martha Beattie, a mentally incompetent person, now prosecuted by Guardian

Trust Company, special administrator of the estate of Martha Beattie, deceased, against Raymond W. Reilly and others to set aside a deed to realty and for an accounting. Money decree for plaintiff. Plaintiff and certain of the defendants appeal. Reversed, and bill dismissed.

Schmalzriedt, Frye, Gramse & Frye (*Armstrong & Meade,* of counsel for Union Guardian Trust Company), for plaintiff Ball.

Dykema, Jones & Wheat, for defendants Reilly and Smith.

Lucking, Van Auken & Sprague, for defendants Chope, Good, and Bloom.

Frank I. Kennedy, for defendant Union Guardian Trust Company, successor to Union Trust Company.

SHARPE, J. Robert Beattie died, testate, on August 17, 1868, leaving a widow and nine children him surviving. His estate has never been closed. On March 6, 1929, the plaintiff, Cora Beattie Ball, a granddaughter, was appointed administratrix *de bonis non* with the will annexed.

One of the paragraphs of his will, apparently drawn by himself, reads as follows:

"I give to my three daughters, Margt. Beattie, Eliza Beattie & Jane Beattie otherwise Reilley, the brick house & lot on Woodward avenue

"Subject to fulfill all the conditions of the contract I made with Mr. Jas. Mott Williams and if either of them Mary to get five hundred Dollars in cash paid them out of sd. property and be then held by the last single daughter for ever."

The contract with Mr. Williams was executed on July 17, 1865. In it the vendor agreed to convey to

the deceased what is now known as No. 2234 on Woodward avenue in Detroit for $1,300. It is now said to be worth more than $100,000. The daughters above named paid the $500 to Mr. Williams, and he executed a deed to them as devisees of the deceased, containing the following recital:

"This deed is made in pursuance and in performance of a certain contract bearing date July 17th, in the year of our Lord eighteen hundred sixty-five, between said J. Mott Williams and one Robert Beattie now deceased, of whom the parties of the second part are devisees and also in pursuance of the last will and testament of said Robert Beattie now on file and of record in the probate office of Wayne county, Michigan."

Ball v. *Reilly.*

The first question presented in this case is what construction shall be placed on the above language in the will. The plaintiff claims that a joint tenancy with right of survivorship was created, while the defendants insist that, as neither of the daughters thereafter married, the estate created was one of tenancy in common.

The cardinal rule to be employed in the construction of a will is to ascertain the intent of the testator from a consideration of the entire instrument. This rule may be said to be somewhat qualified by the provisions of our statute (3 Comp. Laws 1915, § 11562 [3 Comp. Laws 1929, § 12964]) which reads as follows:

"All grants and devises of lands, made to two or more persons * * * shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy."

In *Hoyt* v. *Winstanley,* 221 Mich. 515, 519, it was said:

"Estates in joint tenancy are not favored. Since the enactment of our statutes, all presumptions are against them."

And in *Kemp* v. *Sutton,* 233 Mich. 249, 258:

"But devises of land to two or more persons must be construed to create estates in common unless expressly declared to be in joint tenancy, except as to mortgages, devises or grants in trust, or to executors or to husband and wife."

With these rules of construction in mind, let us examine the provisions of this will and the conditions under which it was made by the testator. He made bequests of other property to his wife and to all of his other children. There was upon the lot in question a combination store and dwelling. These three daughters were then conducting a millinery and dressmaking business in the store, and the family, including the father, mother, a son, and these three, and another daughter, lived in the rooms above. The daughter Jane, a widow, had two children, William and Lizzie Reilly. His will contained the following provision as to them:

"My two grandchildren Wm. & Lizzie Reilley is to be kept by Margt. Eliza & Jane Reilly educated and shared out of their part as liberal as they can afford."

His intention, we think, was apparent. He expected that these three daughters would continue their business in the store, and desired that each should have an undivided one-third interest in the property. But, in the event that either of them married, the business and family relationship would be likely to be thereby severed, and in that event the

one first marrying should receive from the others $500, and the one next marrying should receive from the unmarried one $500, and the unmarried one in that event would own the property. Neither of them subsequently married, and on the death of each of them her undivided one-third interest, unless disposed of by will, descended to her heirs.

This conclusion is somewhat strengthened by a somewhat similar, but plainer, provision in the will reading as follows:

"I give to my wife the brick house, No. 14 on Montcalm street on west half of Lot 44 of Lothrop Subdivision of Park lots During her Natural life and to my two Daughters Nancy Beattie and Martha Beattie at her decease and if either of them mary to get five hundred Dollars in cash paid in one year after the other to have the sd. house & Lot on which it is build for ever."

Jane Beattie Reilly died in May, 1907. Her estate was probated, and her interest in this property passed to her children, William and Lizzie. Eliza died in August, 1907. In 1882 she had executed a will, devising all of her property to her sisters Margaret and Martha. After the death of Jane and Eliza, Margaret rented this property, and she and her sister Martha, who had been living with her, purchased a home on Temple avenue, in Detroit, and went there to live.

On August 10, 1915, Margaret executed a warranty deed to her nephew, William Reilly, and his sister, Lizzie, then married to a man named Chope, of an "equal undivided two-thirds part" of the lot on Woodward avenue, reserving to herself the use and occupation thereof during her lifetime. She at that time owned but a one-half interest therein. The consideration expressed was "one dollar and other

valuable considerations." On October 31, 1921, Martha conveyed by quitclaim deed all her interest in this property to the same grantees and for a like consideration. Margaret passed away in 1927. She was then 97 years of age. Martha died in 1929. Both William Reilly and Lizzie Chope were deceased at the time of the trial of these cases. Raymond W. Reilly is the executor of his estate, and Robert L. Chope of hers, and the property is now in their possession.

Plaintiff seeks to have the first of these two deeds set aside. It is her claim that the relationship of William E. Reilly to these grantors was of such a fiduciary character that the burden is cast upon the executors of both estates to establish their validity. The trial court, while conceding this claim, found that the deeds "were made without any undue influence, coercion or fraud;" that "these women, at the time these deeds were executed, were both of sound mind," and that there was "not a scintilla of testimony but what they were procured in a fair and honest way." He further said:

"We have to revert to the relation of these two sisters to the grantees in the deed. When the will of Robert Beattie was executed on the first day of March, A. D. 1867, he said, 'my two grandchildren, William and Lizzie Reilly is to be kept by Margaret, Eliza and Jane Reilly, educated and share out of their part as liberally as they can afford.' Now, these two children, William Reilly and his sister, Lizzie Chope, were practically brought up by these ladies, and the provision in the will, amounting to a command, was that these sisters should take care of these children, and they did take care of them; they lived with them, as the testimony shows, for a good many years until they were married, and I don't think any fraud can be inferred under the circum-

stances of the case. Fraud is not easily inferred. It has to be proven or shown in some way, and I believe from the testimony that these grantors in these two deeds, Margaret and Martha Beattie, did just as they wanted to do when they made these two deeds."

Consideration of the testimony relating to the preparation and execution of these deeds satisfies us that he reached the right conclusion. See *In re Luders' Estate,* 238 Mich. 87; *Smith* v. *Smith,* 222 Mass. 102 (109 N. E. 830).

He further found that there was proof that William Reilly had collected rentals from this property during the time that Margaret was entitled to the use and occupation thereof under the reservation in her deed, and decreed that an accounting thereof should be had by a circuit court commissioner. Pursuant thereto, such accounting was had by Commissioner Markley, who, after taking the proofs submitted, made report on January 23, 1930. He found that:

"William E. Reilly, in his lifetime, received the following sums of money belonging to Margaret Beattie, during the period from January 1, 1921, to February 28, 1927, to-wit:

"From miscellaneous sources.....	$10,346.90
"As rental from the Woodward avenue property, directly traceable to his account.....	10,487.50
"Or a total of.....	$20,834.40

"Against this, no credits have been proven by competent evidence, and the foregoing sum is the amount in which the estate of William E. Reilly is indebted to the estate of Margaret Beattie, deceased, by reason of this accounting."

The representatives of the Reilly estate filed exceptions to this report. They insist that the decree did not provide for an accounting of the money received from "miscellaneous sources," and that the proof submitted did not justify the finding of the amount collected by him as rentals. Plaintiff thereupon moved to amend the decree so as to provide for an accounting of the money received by Reilly, which resulted in the finding of money received by him from "miscellaneous sources," and also moved for confirmation of the report as made.

In the meantime, Judge Law of the 31st judicial circuit, who had made the decree, had resigned, and Hon. Fred W. George had been appointed as his successor. The several motions were submitted to him, and he filed an opinion in which he declined to amend the decree as requested. He found that the money received from "miscellaneous sources" was not a proper charge against Reilly under the decree and that the proof submitted to the commissioner did not justify the finding as to the rentals received by him. His findings were by stipulation incorporated into a supplementary decree, and are before us on this appeal.

The motion to amend the decree was, we think, properly denied. Provision for an accounting in this respect was not made in the original decree, nor do we think from the opinion filed by Judge Law that he intended that such an accounting should be had. Without amendment, the commissioner was not empowered to take an accounting as to the money received by Reilly from "miscellaneous sources," and in our opinion the evidence did not warrant the amendment. This item was properly disallowed.

As to the rental charge, Judge George refers at some length to the finding of Judge Law that no fiduciary relation existed between Margaret Beattie and William Reilly. He then says:

"The opinion of Judge Law finds that Margaret Beattie and her cotenants in the Woodward avenue property were charged with the education and support of William E. Reilly and Lizzie A. Chope, who were nephew and niece of Margaret Beattie, by the will of Robert Beattie, under which instrument Margaret Beattie claimed one-half interest in the property. Between 1867 and the date of the death of Margaret Beattie in 1927, William E. Reilly, Lizzie A. Chope, and Margaret Beattie maintained the ordinary relations of parent and child. In view of this relation which existed over such a long and extended period of time without proof of any complaints or quarrels upon the part of or among any of the persons concerned, it should take very clear and convincing proof to sustain the contention of the plaintiff that whenever Margaret Beattie delivered a check to William E. Reilly to be cashed, he retained the entire amount for his own account unless he could produce a receipt showing delivery or expenditure of the amount of such check. Instead of this required clear and convincing proof, the plaintiff has only shown that rental checks throughout the entire period were delivered to Margaret Beattie and were indorsed by her and that thirty-seven (37) out of fifty-two (52) of such checks were later indorsed by William E. Reilly and deposited to his account. But plaintiff has failed to show that William E. Reilly did not deliver the money therefor to Margaret Beattie, or expend the money at her direction or upon her behalf. This omission appears to me to be fatal to plaintiff's contention and particularly so in view of the testimony of the witnesses for the defendant which shows without con-

tradiction that William E. Reilly did deliver to her all of the monies which were not expended for her account and that the living expenses at the home maintained by her were very largely met from the rental and income of the Woodward avenue property."

We are impressed that he reached the right conclusion. William Reilly, as before stated, passed away before the hearing. That he was looking after his aunt's business, collecting her rents in part, paying the taxes, etc., quite clearly appears. But the fact that checks for rent, payable to her, were turned over to him and deposited in his account in the bank was not sufficient in itself to warrant the court in charging his estate with the amount thereof. It is usually difficult, if not impossible, to take a fair account of the dealings between two parties after both are deceased, and this was particularly so in this case on account of the intimate relationship between them, almost that of parent and child. It follows that the decree in this case is affirmed, with costs to appellees.

Detroit & Security Trust Co. v. *Reilly.*

In this case, which was submitted with the foregoing, it appears that the plaintiff, on April 26, 1928, was appointed guardian of the estate of Martha Beattie, at that time found to be mentally incompetent. In the bill filed it seeks to invalidate the deed executed by Martha on October 31, 1921, above referred to. It was denied this relief. This deed was executed under quite similar conditions to those attendant upon the execution of the deed from Margaret, and we affirm the decree in this respect without further discussion.

An accounting by the estates of William E. Reilly and Lizzie A. Chope of moneys received by them, or

either of them, which belonged to Martha Beattie during her lifetime, was also sought. The decree provided for such an accounting, and one was had, and, in the supplementary decree which followed, the executors of the Reilly and Chope estates were each ordered to pay to the plaintiff the sum of $4,050, this being the amount of the rents collected from this property between the death of Margaret in 1927 and the death of Martha in 1929. We find no sufficient evidence to establish an enforceable agreement that these rents should be paid to Martha during this time. She had, as already stated, quit-claimed all her interest in this property to William E. Reilly and Lizzie Chope in 1921. On the death of Margaret, in 1927, the title to this property vested in William E. Reilly and Lizzie Chope and their heirs.

A decree may be here entered dismissing the bill of complaint in this case, with costs to defendants.

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

WEBB *v.* KNAUSS.

1. LANDLORD AND TENANT—INCONSISTENT REMEDIES—FORFEITURE—WAIVER—ESTOPPEL.

   Lessor, by electing to proceed against all parties as tenants to enforce payment of taxes and insurance after serving notice of forfeiture of lease for unauthorized assignment, thereby waived forfeiture.

2. SAME—FORFEITURE—WAIVER.

   Forfeiture declared by lessor for unauthorized assignment of lease may be waived by prosecuting to conclusion inconsistent remedy.

As to what amounts to a violation of a covenant in lease against assignment or sale, see annotation in 14 L. R. A. (N. S.) 1200.

3. ACTION — CUMULATIVE REMEDIES — INCONSISTENT REMEDIES — WAIVER—ESTOPPEL.

Right to use cumulative remedies does not permit or enable one to resort to inconsistent remedies, nor does it obviate defense of waiver or estoppel.

4. ESTOPPEL—CONTRACTS—INCONSISTENT CLAIMS.

One may not repudiate contract and claim under it at same time.

Error to Wayne; Hart (Ray), J., presiding. Submitted October 23, 1930. (Docket No. 50, Calendar No. 35,199.) Decided January 7, 1931.

Summary proceedings by Ann Webb against Augusta M. Knauss and others to regain possession of leased premises. Judgment for defendants. Plaintiff brings error. Affirmed.

Lucking, Van Auken & Sprague (*LeRoy C. Lyon,* of counsel), for plaintiff.

Hollis Harshman and *Herman H. Greenberg,* for defendant Knauss.

NORTH, J. In 1917, the plaintiff entered into a 99-year lease with Edith M. Unger covering property located on Third avenue, Detroit, Michigan. The lease provides:

"The said lessee further covenants and agrees that she will not assign or transfer this lease without the written consent of said lessor; provided, however, that nothing herein contained shall prohibit the said lessee from subletting the whole or any portion of said premises. * * *

"It is further agreed that all the covenants, agreements, conditions and undertakings herein contained shall extend to and be binding upon the representatives, heirs, executors, administrators, suc-

cessors and assigns of the respective parties hereto as if they were in all cases named, and all of said covenants shall be construed as covenants running with the land."

In referring hereinafter to the defendants or appellees we do not include Mildred M. Lee or the Consolidated Products Company. They are subtenants and will not be affected.

In September, 1917, the lessee assigned to Louis M. Knauss, who agreed to perform all the covenants and stipulations to be performed in the lease. Plaintiff consented to this assignment in writing. About two years later Louis M. Knauss died and his widow, Augusta M. Knauss, succeeded to his rights as lessee. No question is raised but that she thus became the assignee of this leasehold interest. In 1927, by an instrument in the form of a sublease and for a consideration of $7,500, Mrs. Knauss transferred the unexpired portion of her leasehold to the defendants Milo R. Houghten and Harvey G. Houghten. In effect this was an assignment and will be so treated. *Lee* v. *Payne,* 4 Mich. 106; 16 R. C. L. p. 832. Later in the same year the Houghtens assigned to defendant Eula B. Flint. They also executed another assignment to Eula B. Flint and Elmer W. Mulford. Neither plaintiff nor her agent knew of these assignments at the time they were made; but before February 8, 1930, plaintiff and her representative became fully advised relative to them. On the last-mentioned date plaintiff served a notice on the defendants herein to terminate the tenancy by reason of nonpayment of rent from June 1, 1929, to date of notice. The rental was at the rate of $175 per month, payable in advance on the first of each month. On February 13, 1930, proceedings before a circuit court commissioner were

instituted which resulted in a judgment in favor of Mrs. Webb fixing the unpaid rent in the sum of $1,664.10. This amount was paid by Mrs. Knauss to the commissioner and by him turned over to the plaintiff, March 13, 1930, and it constituted payment in full of rent to March 1, 1930. On the date of the notice mentioned (February 8, 1930) another notice was served on defendants advising them of default in the payment of taxes as well as of rent, and that unless payment was made within 30 days from date of service plaintiff would terminate the lease and repossess the premises.

Later, and on March 12, 1930, plaintiff served on defendants notice of a forfeiture of this lease and a demand for possession because of the assignment by the defendant Augusta M. Knauss to the Houghtens without plaintiff's consent. There was also embodied in this notice the further reason of nonpayment of taxes. Summary proceedings were instituted March 14, 1930. An appeal from the commissioner's court was taken to the circuit court and a hearing had before the circuit judge without a jury. Judgment was there rendered in favor of the defendants and plaintiff reviews by writ of error. The only brief in behalf of defendants is that of Mrs. Knauss, who seems to claim she still has some interest in this lease on the ground that the assignment by her was procured by fraud.

It seems to be assumed by all the parties that prosecution of this complaint was based solely on plaintiff's claim of right to terminate the lease because it had been assigned in violation of its terms and not because of the nonpayment of taxes or insurance by the lessee as required by the lease. As a matter of fact, at a still later date plaintiff instituted a third proceeding before the commissioner based

upon the nonpayment of taxes and insurance; and while the instant case was on trial in the circuit a judgment was rendered by the circuit court commissioner in favor of plaintiff and against these defendants. This judgment fixed the amount of taxes and insurance for which these defendants were liable as $2,008.05.

As noted, in the case we are reviewing plaintiff claims that the assignment of the lease without her consent rendered the lease void and that she is entitled to recover possession. As against this contention the defendants assert (1) that plaintiff having consented to the first assignment of this lease could not thereafter successfully assert forfeiture based upon a subsequent assignment without her consent; and (2) that because plaintiff instituted legal proceedings to enforce the payment of rent, taxes, and insurance after she was fully informed of the facts which constitute the alleged forfeiture, she waived any right she might otherwise have to rely upon and enforce such forfeiture.

We will first consider the latter contention. By accepting rent to March 1, 1930, plaintiff accepted rent for these premises which was due February 1, 1930, but which in fact was for occupancy of the premises after the date of the notice to quit, February 8, 1930. In addition to this, based on her last notice to the defendants incident to nonpayment of taxes and insurance, plaintiff instituted a suit against them in the commissioner's court. This was on the theory that they were still her tenants and must either pay the taxes and insurance as provided in the lease, the amount of which she had fixed in this last proceeding at $2,008.05, or surrender possession. Presumably this amount was paid to her. Otherwise she would have obtained possession in

that suit, in which event the instant case would become moot. All this occurred after plaintiff had given the notice of forfeiture on which she must rely in order to prevail in this case. We are mindful of the fact that, except as above noted, the circuit court commissioner's judgment fixed the amounts of rents, taxes, and insurance which were due before she gave notice on which she now relies. But we think that fact does not obviate the waiver. We are not concerned with what might have been the effect, if any, of voluntary payment by the lessee of past-due rent or past-due taxes or insurance. Nor is it of consequence that plaintiff might claim Mrs. Knauss was liable for the payment of these items under the terms of her lease. As to the other defendants, plaintiff could not make such a claim unless she acknowledged the validity of the assignments which she here assails. The waiver or estoppel which we think prevents plaintiff from taking judgment arises from her conduct in electing after her notice of forfeiture to proceed against all of the defendants as her tenants in the commissioner's court and in taking a judgment against them which would terminate the tenancy on which that proceeding was based unless they paid the amounts fixed by the commissioner. Such a judgment must have been founded upon recognition by plaintiff of the assignments of the lease. If plaintiff intended to rely upon forfeiture of the lease because of noncompliance with the clause requiring the lessee to pay taxes and insurance, the judgment in the commissioner's court should have been one for possession without provision for payment. It was within plaintiff's power to waive the forfeiture which she had declared, and this could have been accomplished

by prosecuting to a conclusion an inconsistent remedy.

"Forfeiture may be waived. *Krell* v. *Cohen,* 214 Mich. 590. Commencement of suit for foreclosure of vendor's lien is a waiver by vendor of prior forfeiture. *Old Second National Bank* v. *Savings Bank,* 115 Mich. 548." *Chicago Boulevard Land Co.* v. *Apartment Garages,* 245 Mich. 448.

As to all of these defendants plaintiff elected to prosecute to conclusion an inconsistent remedy. It is true plaintiff's lease expressly provided that her remedies against lessees were cumulative and not exclusive of any other remedies allowed by law. But the right to use cumulative remedies does not permit or enable one to resort to inconsistent remedies, nor does it obviate the defense of waiver or estoppel. It is elementary that one cannot repudiate a contract and claim under it at the same time. *Alpena Lumber Co.* v. *Fletcher,* 48 Mich. 555. We have recently held that:

"One may not take contradictory positions in asserting a right in court by asserting a right in one action which is negatived by the right as asserted in another action." (Syllabus) *Washburn* v. *Peck,* 245 Mich. 351.

The circuit judge based his decision, in part at least, on a determination that plaintiff had resorted to inconsistent remedies. This holding was correct. Other questions are presented by the record, but we need not consider them because the issue reviewed is controlling. Judgment is affirmed, with costs to Mrs. Knauss.

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

JARMOSZKO *v.* MYSLYWIEC.

MASTER AND SERVANT—NEGLIGENCE—DIRECTED VERDICT.

In employee's action for injury to hand, based on employer's alleged negligence in failing to warn of danger in operating electrically driven meat grinder, judgment for defendant on directed verdict is affirmed by equally divided court.

Error to Kent; Perkins (Willis B.), J. Submitted October 21, 1930. (Docket No. 114, Calendar No. 35,096.) Decided January 7, 1931.

Case by Isadore Jarmoszko against William Myslywiec for personal injuries received while operating a meat grinder. Directed verdict and judgment for defendant. Plaintiff brings error. Affirmed by an equally divided court.

Cornelius Hoffius and *Dorr Kuizema,* for plaintiff.

Linsey, Shivel & Phelps, for defendant.

FEAD, J. Plaintiff, 21 years of age, while working for defendant, had his hand injured in an electrically driven meat grinding machine, and brought this action for damages. The court directed a verdict for defendant. The question is whether, as a matter of law, defendant was not guilty of negligence in not warning plaintiff of hidden dangers of the machine and instructing him in its operation. The testimony favorable to plaintiff must be taken as true.

The meat was put into a hopper some four inches square at the top, went down four to six inches to an auger which revolved and carried the meat

On duty of master providing machine of standard make and in common use to equip same with safety device or guard, see annotation in 16 L. R. A. (N. S.) 128, 144; 36 A. L. R. 1477.

against knives, and then it was forced through a plate with holes gauged to a desired size. Sometimes it was necessary to force the meat down the hopper and a wooden plunger was usually employed for that purpose. Defendant furnished no such plunger to plaintiff.

Plaintiff had worked in meat markets for two years but always in the front shop. He had operated small grinding machines with tall hoppers and always with plungers. He had never operated a large machine, and told defendant that he had had no experience with them. He was instructed by defendant to mix ice with the meat and grind it three times, once with a coarse plate and twice with a fine plate. He ground it once, changed the plate and ran it through a second time. The meat became mushy, like soft ice cream. While he was grinding it the third time the machine clogged and the meat bubbled up in the hopper. He looked for a plunger but found none nor anything he could use to press down the meat. He tried a broom handle, but it pushed through the meat and did not start it. He then pressed it with the flat of his hand, it gave way suddenly and drew his fingers into the auger.

Plaintiff knew the ordinary dangers of the machine, that if his fingers got into the auger he would be injured, and that the safe way to press down the meat was with a plunger. He did not know that, when the machine became clogged, the meat might then give way suddenly and let his hand fall into the grinder.

Several butchers testified that when the meat is fine, if the machine clogs, especially if it works rapidly, an air pocket may form over the auger and this condition is dangerous, because, when the meat afterward starts down, it descends abruptly and

may carry the hand with it. It is a danger which they have learned from experience and is so well known that butchers have developed a technique in using their hand to press down the meat when they do not want to bother with a plunger or it is not handy. Some, among them defendant, use the doubled up fist, which is too large to go down the hopper, and others use the flat of the hand, with the thumb locked over the rim to prevent the hand being drawn into the auger. The machine upon which plaintiff was working ran faster than such machines ordinarily do. The employee is presumed to see and understand all obvious dangers that a prudent person of his age, capacity, and experience would see and understand, and the owner owes no duty to warn him against them. 39 C. J. p. 499. But he owes the duty to warn of dangers which are not obvious to such a person. *Frost* v. *Clement,* 225 Mich. 267.

While plaintiff knew the ordinary perils of the machine, the danger of the sudden dropping of the soft meat, which was recognized by experienced butchers as a special and hidden danger to be appreciated only from experience, was unknown to plaintiff, and he was not instructed in the peril or manner of handling it. The case is analogous to *Frost* v. *Clement, supra,* where, while the ordinary dangers of an edging machine were open to observation, the fact that, when the saws were in motion, a suction was created sufficient to draw in a man's hand at a distance of four to five inches, was a hidden peril, and failure to warn an inexperienced employee against it was held to be negligence.

Under the circumstances, we think it was a question for the jury whether defendant owed plaintiff the duty of warning.

Judgment should be reversed, and new trial ordered, with costs.

CLARK, McDONALD, and NORTH, JJ., concurred with FEAD, J.

WIEST, J. I do not think any actionable negligence was established. A meat grinder is a common household utensil. Every one knows that a meat grinder will cut fingers poked in it, and housewives do not have to be warned of that fact. Want of warning to plaintiff to keep his fingers out of the machine was not negligence. The grinder was of standard make. Was it negligence not to provide a suitable stick to press down the meat in the hopper? In *O'Connor* v. *Webber*, 239 N. Y. 191 (146 N. E. 200, 36 A. L. R. 1473), too short a stick was provided, the auger flipped it and let the hand of a 14-year old boy operator fall into the hopper and the revolving screw cut off his fingers. The grinder described in that case tallies with the grinder in the case at bar. The court held there was no negligence and no liability. If there was no negligence in not furnishing a suitable stick, there certainly was no negligence in not furnishing any stick.

I am not impressed by the theory that an air pocket formed in meat the consistency of "soft ice cream," and when plaintiff pressed upon the top the mass suddenly fell and let his fingers reach the auger. No one knows whether the accident happened in that way, and I think there should be something of more probative force than a mere theory.

The judgment for the defendant is affirmed, with costs against plaintiff.

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

In re COOTS' ESTATE.

1. WILLS—REMAINDERMEN—CLASS.
   Where will provided that, after death of life tenant without issue, nephews and nieces named and described specifically should take remainder of estate in equal shares, they did not take as class.

2. SAME—DESCENT AND DISTRIBUTION—CONTINGENT REMAINDER.
   Where will gave contingent remainder to nephews and nieces named and described specifically, the estate of each was descendible, devisable, and alienable (3 Comp. Laws 1915, §§ 11531, 11553).

3. SAME—REMAINDERS.
   Under 3 Comp. Laws 1915, §§ 11529, 11560, all future estates dependent upon precedent estates are classed as remainders, and are governed by same laws.

4. SAME—EXECUTORY DEVISE—CONTINGENT REMAINDER—DESCENT AND DISTRIBUTION.
   Executory devise, being possibility coupled with interest, has same incidents of descendibility, devisability, and assignability as contingent remainder.

5. SAME—WHEN CONTINGENT REMAINDER VESTS.
   Unless will bespeaks different intention, where remainder is contingent on life tenant's dying without issue or lineal heirs, no estate vests in remaindermen until happening of contingency.

6. SAME—REMAINDERMEN DYING BEFORE HAPPENING OF CONTINGENCY TAKE NO INTEREST.
   Where remainder was contingent on life tenant's dying without issue or lineal heirs, remaindermen who died before life tenant took no interest, and therefore their heirs, legatees, and assigns take nothing through them as remaindermen.

7. SAME—LAPSED LEGACY FALLS INTO RESIDUE.
   Where legacy other than in residuary clause lapses or is void, it falls into residue.

On the rule as to devolution of lapsed portion under residuary clause of will, see annotation in 44 L. R. A. (N. S.) 811; 28 A. L. R. 1237.

As to when a testamentary gift may be construed as one to a "class," see annotation in L. R. A. 1918B, 234.

8. SAME—INTESTATE ESTATE—LAPSED LEGACY.

Lapsed legacy or devise of portion of residuary estate, where legatees or devisees take in common, does not inure to benefit of survivors, but becomes intestate estate.

9. SAME.

Where remainder was contingent upon life tenant's dying without issue or lineal heirs, shares of remaindermen taking in common who died before life tenant became intestate property.

Error to Wayne; Moynihan (Joseph A.), J. Submitted October 28, 1930. (Docket No. 47, Calendar No. 35,149.) Decided January 7, 1931. Rehearing denied April 7, 1931.

The probate court for the county of Wayne having entered an order assigning residue of the estate of Walter H. Coots, deceased, Arthur J. Oldfield and others appealed to the circuit court. Judgment affirming order of probate court is reviewed by Arthur J. Oldfield and others by error. Reversed.

John W. Gilmore, for appellant Arthur J. Oldfield.

Hobart B. Hoyt, for appellant Gertrude Oldfield Day.

Lucking, Van Auken & Sprague, for appellant George C. Oldfield.

Corliss, Leete & Moody (*Alexander P. Leete,* of counsel), for appellants Detroit Y. M. C. A. and State Association of Y. M. C. A.'s of the State of Michigan.

Charles F. Delbridge (*W. Leo Cahalan, Charles P. Dunn, David Mackay,* and *Roger B. Hull,* of counsel), for Charles Frederick Coots, Grace Coots, Esther Davidson, executrix, and *in pro. per.*

Trowbridge, Lewis & Watkins (*James K. Watkins* and *Frederick W. Seitz,* of counsel), for John W. Coots.

FEAD, J. This is review of an order of probate court, affirmed by the circuit court, assigning residue of the estate of Walter H. Coots, deceased. The will was executed in 1901, devised a life estate in trust to testator's wife and son William, and to the survivor of them, the son being then 44 years of age, and provided:

"Ninth. Upon the decease of both my said wife and son, I give and bequeath the estate and property held in trust as aforesaid during their lives, in manner following:

"(a) To the widow of my said son, Elizabeth Compton Coots, the sum of ten thousand dollars ($10,000) as above provided.

"(b) To the child or children of my said son, or their heirs by right of representation, all of the rest, residue and remainder of said property and estate, in equal shares.

"(c) In case my said son shall die without leaving issue or lineal heirs, I direct that all of the rest, residue and remainder of said property and estate, after the payment of said sum of ten thousand dollars, ($10,000) to the widow of my said son, shall be divided equally among William J. Coots, son of my brother John, Nellie L. Coots Daly, daughter of my brother John; Walter M. Coots, son of my deceased brother Charles; Arthur J. Oldfield, George C. Oldfield, Walter J. Oldfield and Gertie Oldfield, children of my sister Hannah, in equal shares."

The will elsewhere contained a like bequest to Elizabeth Coots on her husband's death, if his mother survived him. William survived his mother, and died in 1927, aged 70 years, without issue or lineal heirs. Testator's brother and sister and the three Coots children survived the wife but predeceased William. The four Oldfields survived him. The order appealed from assigned the residue to the

seven nephews and nieces and their legal representatives. Appellees take through the deceased Coots children. Appellants are surviving Oldfields and representatives of heirs of testator. With the exception of a few shares of corporate stock the estate was in real property and the will contemplated that most of it be held intact until final division on death of the wife and son. The question is whether the shares of the residue devised to the deceased Coots niece and nephews passed to their respective heirs, devisees, and assigns, became intestate property going to testator's heirs, or devolved upon the four Oldfields as survivors of a class or as residuary legatees.

The will bears the stamp of professional craftsmanship, and probably was drafted by the able lawyer who witnessed it. We must assume that it expresses testator's whole intention. It is a natural instrument and we would defeat testator's intention by reading into it esoteric purposes. The distribution of estate was upon the basis of family justice. Testator's first concern was to provide a life income to his wife and son, with remainder to the direct line of blood. He recognized an obligation to his son's wife by substantial bequest to her on the son's death. Realizing that the direct line might fail, the lack of devise to testator's brother and sister, which would have resulted in inequality as among the nephews and nieces, who were most likely of the relatives to survive the wife and son, and the devise directly to the younger generation in equal shares, demonstrate testator's intention to equitably distribute his estate among the natural objects of his bounty, giving each a separate part. Testator intended the distribution as set out to be the last expression of his will, upon the hypothesis

or hope that all remaindermen would take personally, as no provision was made for the contingency of any of them failing to survive the wife and son. By failing to provide for such contingency, testator must be deemed to have intended that future eventualities which would change the plan as written should be taken care of by the law. The contention that testator intended to keep the property within the group of remaindermen and that the survivors of them would take the whole estate is not supported by the language or scheme of the will and is contrary to the plainly intended equality and finality of division. The will evidences no intention to treat the nephews and nieces as a class, with rights of survivorship, and, as they were named and described specifically and no open end was left to eject any of those designated or to admit others, they did not take as a class. *In re Ives' Estate,* 182 Mich. 699; *Wessborg* v. *Merrill,* 195 Mich. 556 (L. R. A. 1918E, 1074); *In re Hunter's Estate,* 212 Mich. 380.

Concededly, the estate given to the nephews and nieces was a contingent remainder. 3 Comp Laws 1915, § 11531 (3 Comp. Laws 1929, § 12933). The estate of each was descendible, devisable, and alienable. 3 Comp. Laws 1915, § 11553 (3 Comp. Laws 1929, § 12955). The latter statute, however, did not enlarge the estate given, but merely established some of its incidents. Each remainderman "could grant or devise no better or greater estate than he himself held; and any alienation or devise made by him would be defeated and destroyed by the same contingency which would have defeated his interest had he not disposed of it." *Fitzhugh* v. *Townsend,* 59 Mich. 427, 436.

The essential question is whether, in their lifetimes, the deceased remaindermen took a vested in-

terest in the contingent remainder, which passed to their heirs, legatees, or assigns and ripened into a fee in possession on happening of the contingency of the death of testator's son without lineal heirs; or, to express it another way, whether their survival of testator's son was a condition precedent to the remainder vesting in them.

The rule in Massachusetts is that, in similar circumstances, the remainder vests in the remaindermen at the death of the testator, subject to being divested by the happening of the contingency. *Trumbull* v. *Trumbull,* 149 Mass. 200 (21 N. E. 366, 4 L. R. A. 117); *Hills* v. *Barnard,* 152 Mass. 67 (25 N. E. 96, 9 L. R. A. 211). This rule is criticized in 23 R. C. L. p. 552.

Our statutes governing real estate, 3 Comp Laws 1915, § 11519 *et seq.* ([3 Comp. Laws 1929, § 12921 *et seq.*] title 14, chap. 62, Rev. Stat. 1846), were adopted from New York, but without prior decisions of court which are applicable here. Appellees strongly urge the New York rule announced in *Hennessy* v. *Patterson,* 85 N. Y. 91, and followed in other cases to the same result although, in some instances, the court called the remainder vested and, in others, contingent. *Guaranty Trust Co.* v. *Curry,* 134 Misc. Rep. 99 (234 N. Y. Supp. 329); *In re Banker's Will,* 248 N. Y. 596 (162 N. E. 539).

The rule announced in the *Hennessy Case* was that, upon the death of testator, the contingent remainderman takes a vested right in the remainder which is descendible, devisable, and alienable and which culminates in full title on happening of the contingency, where the will does not affirmatively show an intention that survival of the life tenant is a condition of the remainderman's taking.

Appellants contend that the question is foreclosed by the decision of this court in *Hadley* v. *Henderson,* 214 Mich. 157. That case established a rule of property, and, unless it is distinguishable in principle, not merely superficially on the facts, it is controlling. In the briefs in the *Hadley Case,* the Massachusetts rule was urged, but that of New York was not. Only two of appellee's claims of distinction merit discussion.

It is argued that the *Hadley Case* concerned the right to take personal property, a money bequest, and the present case involves real estate. That such difference might be of consequence was not suggested in the *Hadley* opinion. The court applied to the bequest the law of real estate, both statutory and by citation of decision. Moreover, the rules governing future interests in real and personal property are substantially the same. 23 R. C. L. p. 525; *Wessborg* v. *Merrill, supra; Winslow* v. *Goodwin,* 7 Metc. (48 Mass.) 363.

It is further urged that in the *Hadley Case* the intermediate estate was a defeasible fee instead of a true life estate as at bar. Technically, this resulted in the legacy over being in the nature of an executory devise rather than of a true remainder. 2 Washburn on Real Property (6th Ed.), § 1739. By our statutes, all future estates, dependent upon precedent estates, are classed as remainders, 3 Comp. Laws 1915, §§ 11529, 11560 (3 Comp. Laws 1929, §§ 12931, 12962), and are governed by the same laws. Regardless of statute, an executory devise, being a possibility coupled with an interest, has the same incidents of decendibility, devisability, and assignability as a contingent remainder. 9 R. C. L. p. 66; 11 R. C. L. p. 484; 18 C. J. p. 821; 21 C. J. p. 998; *Hennessy* v. *Patterson, supra.* In the

Hadley Case the court applied the statutes and decisions involving true remainders and used the fee character of the intermediate estate only to emphasize that no interest in the contingent estate could vest in the legatee until the death of the intermediate tenant.

The basis of decision in *Hadley* v. *Henderson,* however, was the adoption and promulgation of a rule that, where the will is silent as to testator's intention in that respect, it is a condition precedent to the remainderman's taking any vested interest in such a contingent remainder that he survive the life tenant. The court found in the will—

"nothing to indicate an intention that on the death of the legatee before Charles the legacy should pass or be payable to her heirs, assigns or personal representatives. We must therefore apply the rules of construction applicable to such bequests."

This principle is the antithesis of the rule in New York and also excludes the Massachusetts doctrine. Upon authority of the *Hadley Case* the rule in this State is that, unless the will bespeaks a different intention, no estate vests in a contingent remainderman until the happening of the contingency, where the remainder is contingent on the life tenant dying without issue or lineal heirs, because survival of the life tenant by the contingent remainderman is a condition precedent to the latter's taking.

We must hold that the deceased contingent remaindermen took no interest in the remainder, and, therefore, that their heirs, legatees, and assigns take nothing through them as remaindermen.

Where a legacy other than in the residuary clause lapses or is void, it falls into the residue. *In re Ives' Estate, supra; Clark* v. *Mack,* 161 Mich. 545

(28 L. R. A. [N. S.] 479). But a lapsed or ineffectual legacy or devise of a portion of the residuary estate itself, where the legatees or devisees take in common, does not inure to the benefit of the survivors, but the interest of the deceased becomes intestate estate and passes to the next of kin or heirs at law of the testator. 44 L. R. A. (N. S.) 811, note; 28 R. C. L. p. 338; 40 Cyc. p. 1951; *State* v. *Holmes*, 115 Mich. 456. The shares of residue represented by the three Coots children, who predeceased William, became intestate property and are to be distributed as such to the heirs at law of the testator.

It would seem hardly necessary to reiterate what this and other courts have said an infinite number of times, that rules of law of the sort herein dealt with always give way to the expressed intention of the testator, if lawful.

The order of assignment will be reversed, and a new one entered in accordance with this opinion, but without costs.

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

NAUDZIUS *v.* LAHR.

1. CONSTITUTIONAL LAW—STATUTES.
   Statute may not be declared unconstitutional merely because court may deem it unjust or unwise, nor unless it is in violation of applicable constitutional restrictions.

2. SAME—FUTURE TORT ACTION NOT PROPERTY RIGHT.
   Right of action for tort to happen in future is not property, and may be abrogated by legislature.

On liability of owner or operator of automobile for injury to guest, see annotation in 20 A. L. R. 1014; 26 A. L. R. 1425; 40 A. L. R. 1338; 47 A. L. R. 327; 51 A. L. R. 581; 61 A. L. R. 1252; 65 A. L. R. 952.

Validity of statute making owner liable for injuries by automobile being used by another, see annotation in 45 L. R. A. (N. S.) 699; 61 A. L. R. 866.

3. INFANTS—DISABILITY OF MINOR.
Legislature may remove disability of minor to contract.

4. MOTOR VEHICLES—STATUTES—ORDINARY NEGLIGENCE—GUESTS—MINORS—CONSTITUTIONAL LAW.
Act No. 19, Pub. Acts 1929, amending Act No. 302, Pub. Acts 1915 (motor vehicle law), and abolishing right of action by guest for ordinary negligence of owner or operator, is not based on theory of contract, agency, or waiver, nor is there any constitutional objection rendering it inapplicable to minors.

5. INFANTS—WARD OF STATE.
While infant is something of ward of State, it is by trust voluntarily assumed and declared by State.

6. CONSTITUTIONAL LAW—FEDERAL CONSTITUTION—RIGHTS PROTECTED.
Equality of rights protected by Michigan Constitution is same as that preserved by Fourteenth Amendment to Federal Constitution.

7. SAME—MOTOR VEHICLES PROPERLY CLASSIFIED APART FROM OTHER VEHICLES.
Motor car presents social, financial, and governmental problems which justify the legislature in reasonably classifying it apart from other vehicles in enactment of laws.

8. MOTOR VEHICLES—CONSTITUTIONAL LAW—STATUTES—GUESTS—ORDINARY NEGLIGENCE.
Act No. 19, Pub. Acts 1929, amending Act No. 302, Pub. Acts 1915 (motor vehicle law), and abolishing right of action by guest for ordinary negligence of owner or operator, is not unconstitutional as arbitrary class distinction between motor vehicles and those propelled by humans or animals, or as between gratuitous and paying passengers in same situation (Const. Mich., art. 2, § 16, Federal Constitution, 14th Amendment).

9. STATUTES—WISDOM OF STATUTE FOR LEGISLATURE.
Whether statute will produce greater evils than those sought to be remedied goes to wisdom and not validity of law, and is for legislature and not court to consider.

10. CONSTITUTIONAL LAW—STATUTES—CLASS LEGISLATION.
Classification need not be made to operate with mathematical nicety, and is not invalid because in practice it results in some inequality.

11. STATUTES—IMMEDIATE EFFECT.

If subject of statute given immediate effect by legislature has real and substantial relation to public peace, health, or safety, all doubt should be resolved in favor of legislative judgment that it is "immediately necessary" within meaning of Constitution (article 5, § 21).

12. SAME—PUBLIC SAFETY—IMMEDIATE EFFECT.

Statute which tends to discourage collusion and fraud in litigation is obviously pertinent to public safety, and court may not say, beyond doubt, that it was not immediately necessary to that end (Const. Mich., art. 5, § 21).

13. SAME—TITLE OF ACT—MOTOR VEHICLES—GUESTS—ORDINARY NEGLIGENCE.

Title of motor vehicle law (Act No. 302, Pub. Acts 1915) being sufficient to cover provisions as to conditions and remedies of civil liability, Act No. 19, Pub. Acts 1929, amending said act and abolishing right of action by guest for ordinary negligence of owner or operator is not unconstitutional as embracing subject-matter not expressed in title (Const. Mich., art. 5, § 21).

14. SAME—CONSTRUCTION—ORDINARY NEGLIGENCE—GUESTS—WORDS AND PHRASES—GROSS NEGLIGENCE.

Objection that terms "gross negligence" and "wilful and wanton misconduct," as used in Act No. 19, Pub. Acts 1929, abolishing right of action by guest for ordinary negligence of owner or operator of motor car, are so uncertain as to render act inoperative is not tenable; said terms being familiar in legal nomenclature and having often been defined and discussed by courts.

15. PLEADING—DECLARATION—NEGLIGENCE—GROSS NEGLIGENCE.

Declaration charging that defendant requested his brother, 17 years old, to drive motor car, knowing that brother was inexperienced, unskilful, and incompetent to drive; that brother drove at excessive rate of speed, and, by reason of inexperience, lack of skill, and incompetency, lost control of car, resulting in injury to plaintiff, does not charge more than ordinary negligence.

16. MOTOR VEHICLES—NEGLIGENCE.

One may be guilty of negligence who permits an incompetent person to drive an automobile, especially when owner remains in car and fails to protest against reckless driving.

17. PLEADING—NEGLIGENCE—GROSS NEGLIGENCE.
To constitute charge of gross negligence or wanton or wilful misconduct, facts lifting owner's faults above ordinary negligence must be set out.

18. SAME—NEGLIGENCE—GROSS NEGLIGENCE—GUESTS.
In action by guest against owner of automobile, declaration charging negligence in allowing incompetent brother to drive and that he drove at excessive speed, charges no more than ordinary negligence, and plaintiff's right to recover is therefore barred by Act No. 19, Pub. Acts 1929.

19. MOTOR VEHICLES—NEGLIGENCE—GROSS NEGLIGENCE—GUESTS—PROXIMATE CAUSE—STATUTES.
Even if automobile owner's negligence in permitting incompetent brother to drive, resulting in injury to guest passenger, was gross negligence, it would not be actionable under Act No. 19, Pub. Acts 1929, if driver was guilty of no negligence or was guilty of only ordinary negligence, since defendant's prior gross negligence would not be proximate cause, not having had any effect on accident.

20. SAME—PLEADING—GROSS NEGLIGENCE—PROXIMATE CAUSE.
In action by guest against owner of automobile for negligence in allowing incompetent brother to drive, resulting in injury to plaintiff, declaration must properly charge defendant's fault both as gross negligence or wanton and wilful misconduct and as proximate cause of accident or charge driver with gross negligence or wanton and wilful misconduct causing injury, in order to recover under Act No. 19, Pub. Acts 1929.
McDONALD, J., dissenting in part.

Certiorari to Kent; Brown (William B.), J. Submitted October 22, 1930. (Docket No. 129, Calendar No. 35,052.) Decided January 23, 1931.

Case by Albina Naudzius, a minor, by her guardian, and also as assignee, against Allen Lahr for personal injuries received while riding in defendant's automobile as a guest passenger. Defendant reviews order denying motion to dismiss by certiorari. Reversed.

John J. Smolenski (*William K. Clute,* of counsel), for plaintiff.

Dilley & Dilley (*Brown, Kelley & Warner,* of counsel), for defendant.

Rodgers & Dunn and *Dunham, Cholette & Allaben,* as *amici curiæ.*

FEAD, J. Plaintiff is 16 years old. Her declaration charges that on August 18, 1929, while she was riding as a gratuitous passenger in defendant's automobile on the highway, she was injured as a consequence of defendant's negligence, both ordinary and gross. Defendant moved to dismiss the declaration on the ground that it did not charge actionable gross negligence, and that defendant was not liable for ordinary negligence because of Act No. 19, Pub. Acts 1929, amending Act No. 302, Pub. Acts 1915 (3 Comp. Laws 1929, § 4648), for the regulation of motor vehicles and their operators upon the highways, by adding to the section declaring the civil remedies for injury, the proviso:

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

The act was given immediate effect; otherwise its effective date would have been August 28, 1929. Plaintiff contends both that the act is uncon-

stitutional and it could not constitutionally be given immediate effect. The circuit court held with plaintiff on both contentions and denied defendant's motion.

Plaintiff claims the act violates the following constitutional provisions:

"All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Constitution of Michigan, art 2, § 1.

"No person shall be * * * deprived of life, liberty or property, without due process of law." Constitution of Michigan, art. 2, § 16. See Constitution of United States, Am. 14.

"Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." Constitution of United States, Am. 14.

In view of the argument, we again call attention to the rule that a statute cannot be declared unconstitutional merely because the court may deem it unjust or unwise, nor unless it is in violation of applicable constitutional restrictions. *Burrows* v. *Delta Transportation Co.,* 106 Mich. 582 (29 L. R. A. 468); *Daugherty* v. *Thomas,* 174 Mich. 371 (45 L. R. A. [N. S.] 699, Ann. Cas. 1915A, 1163); *Bowerman* v. *Sheehan,* 242 Mich. 95 (61 A. L. R. 859).

Plaintiff contends:

(1) The abolition of the right of action for ordinary negligence deprives plaintiff of a right of property without due process of law.

A right of action for a tort to happen in the future is not property, and may be abrogated by the legislature. *Mackin* v. *Detroit-Timkin Axle Co.,* 187 Mich. 8; *Wall* v. *Studebaker Corp.,* 219 Mich. 434; 12 C. J. p. 972; *Silver* v. *Silver,* 280 U. S. 117 (50 Sup. Ct. 57, 65 A. L. R. 939).

(2) Plaintiff's remedy for tort cannot be abolished because, being a minor, she could not relieve defendant from liability on the ground of contract or agency.

The legislature may remove the disability of a minor to contract (*Wall* v. *Studebaker Corp., supra*); but the instant act is not based on any theory of contract, agency, or waiver. It operates of its own force as an exercise of legislative power. While the infant is something of a ward of the State, it is by a trust voluntarily assumed and declared by the State, and counsel have cited or stated no authority or principle which, under our Constitution, indicates that the legislature is restricted in making such laws applicable to minors as well as adults.

(3) The act establishes unreasonable, arbitrary, and unlawful classes of persons having immunity under the statute and of persons deprived of remedy, in distinguishing:

(a) Between motor cars and vehicles propelled by humans or animals.

(b) Between gratuitous and paying passengers in the same situation.

The equality of rights protected by our Constitution is the same as that preserved by the Fourteenth Amendment to the Federal Constitution. *In re Fox's Estate,* 154 Mich. 5. The standards of classification are:

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause

merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (31 Sup. Ct. 337, Ann. Cas. 1912C, 160).

It would be threshing old straw to discuss the accepted fact that the motor car has presented social, financial, and governmental problems which justify the legislature in reasonably classifying it apart from other vehicles in the enactment of laws. [L. R. A. 1918D, 134, note.]

A few courts have held that, where no statute permits it, a gratuitous passenger may not recover against his host except for gross negligence or wilful misconduct. *Massaletti* v. *Fitzroy*, 228 Mass. 487 (118 N. E. 168, L. R. A. 1918C, 264, Ann. Cas. 1918B, 1088); *Epps* v. *Parrish*, 26 Ga. App. 399 (106 S. E. 297); *Saxe* v. *Terry*, 140 Wash. 503 (250 Pac. 27); 20 A. L. R. 1018, note; 61 A. L. R. 1254, note.]

Can a state of facts be conceived which would form a reasonable basis for the classification at bar?

Generally, gratuitous passengers are relatives or friends. Exceptionally, they are mere acquaintances, invited chance pedestrians, or those who deliberately solicit rides. Since the rule of liability was announced in *Roy* v. *Kirn*, 208 Mich. 571, there has been considerable litigation between guests and hosts. Some between husband and wife or other close relatives has found its way to this court. [*Harvey* v. *Harvey*, 239 Mich. 142; *Riser* v. *Riser*,

240 Mich. 402; *Farthing* v. *Hepinstall,* 243 Mich. 380. In many, probably most, of the cases between relatives or friends, the real defendant is an insurance company. Ordinary negligence is not hard to prove if guest and host co-operate to that end. It is conceivable that such actions are not always unattended by collusion, perjury, and consequent fraud upon the court. While we may accept the contention that paid insurers are not objects of special consideration by the legislature, it is inadmissible for the court to consider a law from the viewpoint that they are not entitled to a proper trial and honest determination of liability in a lawsuit. Nor are insurance companies alone interested in the question. The results of verdicts are mirrored in insurance rates, and the law provides a possible reason in the purse of the motor owning public, most of whom carry liability insurance. It is not inconceivable that some passengers who solicit rides may manufacture claims for liability. Groups of young folks, engaged upon a joint enterprise of social enjoyment in a borrowed car, have been known to combine to charge the owner for an accident. The law also has social features. It is well known that drivers hesitate to take neighbors for a ride or to assist on his way a weary traveler because of potential liability for injuries. Few, if indeed any, of these features seem to have manifested themselves in the use of other vehicles than motor cars. Perhaps the legislature also had other reasons for the law. In view of the abundance of personal injury litigation from the operation of motor cars and the conditions readily conceivable as pertinent to the relation of guest passenger in them, which litigation and conditions seem to be substantially absent from the use of other vehicles, it cannot be said that the classifica-

tion at bar was arbitrary and without reasonable basis.

Whether the feared evils of the act will produce carelessness in driving and overshadow the evils sought to be remedied by it goes to the wisdom, not the validity, of the law, and is for the legislature, not this court, to consider. The legislature has the right to experiment to attain a desired result.

In *Silver* v. *Silver,* 280 U. S. 117 (50 Sup. Ct. 57, 65 A. L. R. 939), in sustaining a similar statute as not in violation of the Fourteenth Amendment, the court said:

"As the record does not disclose the constitutional grounds on which the appellant challenged the validity of the statute, our review will be limited to the single question arising under the Federal Constitution which was considered in the opinion of the court below. * * * We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object. * * *

"The use of the automobile as an instrument of transportation is peculiarly the subject of regulation. We cannot assume that there are no evils to be corrected or permissible social objects to be gained by the present statute. We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation. In some jurisdictions it has been judicially determined that a lower standard of care should be exacted where the carriage in any type of vehicle is gratuitous. * * * Whether there has been a serious increase in the evils of vexatious litigation in this class of cases,

where the carriage is by automobile, is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts.

"It is said that the vice in the statute is not that it distinguishes between passengers who pay and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say *a priori* that the classification is one forbidden as without basis, and arbitrary. * * *

"Granted that the liability to be imposed upon those who operate any kind of vehicle for the benefit of a mere guest or licensee is an appropriate subject of legislative restriction, there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the legislature must be held rigidly to the choice of regulating all or none. * * * In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. * * * It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs."

The classification of passengers upon the payment of fares also has a basis in reason. The distinction between paying and gratuitous service is recognized in other branches of the law, "as, for example, between the gratuitous bailee and the bailee for hire, the common carrier and the private carrier, and innkeeper and the ordinary social

host." *Silver* v. *Silver,* 108 Conn. 371 (143 Atl. 240, 65 A. L. R. 943).

Our statutes differentiate in many ways between a commercial vehicle in which passengers are carried for hire and a private car used for the owner's personal business or pleasure. The classification, then, amounts, in substance, to one between passengers in commercial and private vehicles. When the relations between car owner and purchaser are on a money basis, collusion between them to manufacture a case would be exceptional; at least, it would not be likely to become so common as to be a general practice or public evil. An isolated instance of gratuitous passenger riding in a commercial car or a paying guest in a private car is not fatal to the law under the rule that the classification need not be made to operate with mathematical nicety and is not invalid because in practice it results in some inequality.

As evil may be conceived which the act tends to remedy, the classification cannot be said to be arbitrary but must be held to have a basis for legislative action. To repeat:

"It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs." *Silver* v. *Silver,* 280 U. S. 117 (50 Sup. Ct. 57, 65 A. L. R. 939).

(4) That the act could not constitutionally be given immediate effect because it was not "immediately necessary for the preservation of the public peace, health or safety." Constitution of Michigan, art. 5, § 21.

It is not the province of the court to attempt to accurately ascertain and adjudicate the immediate

necessity of the terms of the particular act, but if the subject of the law has a real and substantial relation to public peace, health, or safety, all doubt will be resolved in favor of the legislative judgment that it is "immediately necessary." *Attorney General* v. *Lindsay,* 178 Mich. 524; *People* v. *Urcavitch,* 210 Mich. 431; *People* v. *Stambosva,* 210 Mich. 436; *Newberry* v. *Starr,* 247 Mich. 404, 407.

"Public safety has to do not only with the safety and protection of persons, but also of their property." *Industrial Bank* v. *Reichert,* 251 Mich. 396, 400.

"Laws in regard to 'public safety' are allied in their application to those enacted to promote the public peace, preserve order and provide that security to the individual which comes from an observance of law." *State, ex rel. Pollock,* v. *Becker,* 289 Mo. 660, 705 (233 S. W. 641).

An act which tends to discourage collusion and fraud in litigation is obviously pertinent to public safety and we cannot say, beyond doubt, that it was not immediately necessary to that end.

(5) That the amendment is broader than the title, and is void as a law embracing more than one object to be expressed in the title. Constitution of Michigan, art. 5, § 21.

The original law was entitled:

"An act to provide for the * * * regulation of motor vehicles * * * upon the highways of this State and of the operators of such vehicles," etc.

The title is sufficient to cover provisions as to the conditions and remedies of civil liability. *Flower* v. *Witkovsky,* 69 Mich. 371, 375; *Jasnowski* v. *Board of Assessors,* 191 Mich. 287.

(6) That the terms "gross negligence" and "wilful and wanton misconduct" are so uncertain as to render the act inoperative.

The terms are familiar in legal nomenclature and often have been defined and discussed by the courts. *Simon* v. *Railway,* 196 Mich. 586; *Montgomery* v. *Booming Co.,* 88 Mich. 633, 644 (26 Am. St. Rep. 308); *Gibbard* v. *Cursan,* 225 Mich. 311; *Lett* v. *Summerfield & Hecht,* 239 Mich. 699. The point is untenable. *People* v. *McMurchy,* 249 Mich. 147. We think the act is constitutional and was legally given immediate effect. The remaining question is as to the charge of gross negligence in the declaration.

The gross negligence charged against defendant was that he requested and caused his brother Clarence to drive the car, knowing that Clarence was 17 years old and an inexperienced, unskilful, and incompetent person to drive an automobile. It further charged that defendant remained in the car, that Clarence was driving at an excessive rate of speed, and, by reason of his inexperience, lack of skill, and incompetency, he lost control of the car, it left the pavement and went into the ditch, injuring plaintiff. The declaration does not charge Clarence with more than ordinary negligence.

One may be guilty of negligence who permits an incompetent person to drive an automobile, especially when the owner remains in the car and fails to protest against reckless driving. *People* v. *Ingersoll,* 245 Mich. 530. To constitute a charge of gross negligence or wanton or wilful misconduct, the facts lifting the owner's faults above ordinary negligence must be set out. Such facts are not stated in this declaration and the charge here made against the defendant is no more than ordinary negligence.

However, we think the declaration is insufficient for another reason. The statute is specific in eliminating ordinary negligence as a basis of liability and requiring the actionable gross negligence or wilful or wanton misconduct to be a proximate cause of the accident. Even if defendant's negligence in permitting Clarence to drive was gross, it would not be actionable if Clarence was guilty of no negligence. *Riser* v. *Riser, supra.* Upon the same reasoning, if the accident was caused only by ordinary negligence on the part of the driver, defendant's gross negligence in permitting him to drive could not have been a proximate cause of the injury. In other words, if Clarence's ordinary negligence be eliminated as a cause, defendant's prior gross negligence had no effect upon the accident.

The declaration must properly charge defendant's fault both as gross negligence or wanton and wilful misconduct and as a proximate cause of the accident or Clarence with gross negligence or such misconduct causing the injury.

The order of the circuit court will be reversed and one entered dismissing the declaration, with leave to file a new one within 15 days, with costs to defendant.

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

McDONALD, J. (*dissenting in part*). I concur with my Brother, Justice FEAD, in holding that the act in question is constitutional and should be sustained, but I cannot concur in his conclusion that it was competent for the legislature to give it immediate effect.

In section 21, art. 5, of the Michigan Constitution, it is provided:

"No act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same is passed, except that the legislature may give immediate effect to acts making appropriations and acts immediately necessary for the preservation of the public peace, health or safety, by a two-thirds vote of the members elected to each house."

When this provision was considered by the constitutional convention of 1907 and 1908, the following explanation of its purpose was made by Mr. Holmes, speaking for his committee:

"*Mr. Holmes:* * * * This section has been somewhat changed from the original, with a view of preventing so many measures going through the legislature and being given immediate effect. The committee has provided in this section that only in cases of absolute emergency shall any bill be given immediate effect, and then only by a two-thirds vote of each house." 1 Constitutional Debates, pp. 194, 195.

By adopting this provision, the people intended to stop the practice of giving immediate effect to acts by merely a two-thirds vote which was permitted under the earlier Constitution; and to restrict the authority of the legislature solely to acts "making appropriations and acts immediately necessary for the preservation of the public peace, health or safety."

It is the duty of this court to see to it that this plain mandate of the people is obeyed by the legislature. *Attorney General* v. *Lindsay,* 178 Mich. 524.

It will be noted from the language used in the constitutional provision that, to justify the giving of

immediate effect to an act, it is not sufficient that it be necessary to preserve the public peace, health, or safety, but it must be "immediately necessary," and, as explained by those who framed it, "immediately necessary" was intended to mean the existence of an "absolute emergency."

There must have been an impending, immediate danger to the public peace, health, or safety which the legislature intended to avert by giving immediate effect to this statute. I do not understand my Brother to claim that giving it immediate effect was necessary to preserve the public peace or health, but he does claim that an absolute emergency existed as to public safety which made it necessary for the legislature to take immediate action; that, if the statute had been allowed to take the usual course and become effective 90 days from the close of the legislative session, something would have happened to injure the public safety. The act was passed in 1929 and up to that time we had managed to get along very well as the law then was without serious injury to the public safety. Some may have thought that the law was unfair to the owners and operators of automobiles in holding them liable to guest passengers, but no one seems to have had the remotest idea that it was destructive of the public safety until the legislature so declared. In his effort to sustain the legislature, my Brother indulges in various fanciful speculations as to what may have been in the legislative mind, but fails to point out any constitutional reason for its action. It may be true that they saw an Indian behind every tree ready to tomahawk the public, but that would not be sufficient reason for giving this act immediate effect, because it bears no relation to the public safety. Its purpose was not to avert a threatened

danger to the public. Its purpose, as shown by the act itself, was to relieve automobile owners and operators from liability for ordinary negligence while transporting guest passengers. If the purpose had been to increase their liability, and thereby afford greater protection to the people, it might be said that the act bears some relation to public safety. But in view of its plain purpose and intended effect, it is ridiculous to contend that it does. It has no more to do with public safety than has the rule in Shelley's case. But going beyond the constitutional requirements, my Brother considers the act as a safety measure from the standpoint of public morals. In concluding his argument, he says:

"An act which tends to discourage collusion and fraud in litigation is obviously pertinent to public safety and we cannot say, beyond doubt, that it was not immediately necessary to that end."

His reference to collusion and fraud, upon which his conclusion rests, seems to be based upon the following statement, which shows a misunderstanding of the facts:

"Since the rule of liability was announced in *Roy* v. *Kirn,* 208 Mich. 571, there has been considerable litigation between guests and hosts. * * * It is conceivable that such actions are not always unattended by collusion, perjury, and consequent fraud upon the court."

In the first place, the statement that "there has been considerable litigation between guests and hosts" since the case of *Roy* v. *Kirn, supra,* is not borne out by the records of this court. *Roy* v. *Kirn* was decided 12 years ago, and from that time to the present my Brother is able to cite but four cases involving litigation by guest passengers. Four cases in 12 years, even though attended by collusion,

fraud, and perjury, are hardly sufficient to create an "absolute emergency" involving the public safety. Further, what right has this court to assume that actions by guest passengers are attended by collusion, fraud, and perjury. There is no justification for any such assumption appearing in or outside of the record. But there is no need to speculate on public morals. In determining the right of the legislature to give immediate effect to this act, we need not go beyond a consideration of the act itself, which is expressive of the legislative intent and purpose. Its purpose was not to avert a danger immediately threatening public safety. There existed no constitutional reason for giving it immediate effect.

Retaining, as I do, the most profound respect for the judgment of my learned associate, I am compelled, nevertheless, in this case to dissent, sincere in the belief that, if his opinion on the constitutionality of the immediate effect clause of the statute were adopted, it would establish a harmful precedent in that it would eliminate for all useful purposes the constitutional restriction placed on the legislature's authority to give immediate effect to its acts and would permit it to ride at will over the plain mandate of the people as expressed in their Constitution.

The act itself is valid, and as it is now in effect by reason of the expiration of 90 days from the close of the legislative session, the immediate effect provision is only important for its bearing on the rights of the plaintiff in the instant case. The circuit judge was wrong in holding the act invalid. He was right in holding that the legislature was without authority to give it immediate effect. As he reached the right result in denying the motion to quash, the judgment should be affirmed, and the case remanded for trial.

DREYFUS *v.* DARONCO.

1. MOTOR VEHICLES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

   Whether pedestrian struck and injured by automobile traveling on wrong side of street was guilty of contributory negligence in failing to look in that direction before attempting to cross street, *held*, under circumstances, question for jury.

2. SAME—WRONG SIDE OF ROAD.

   That approaching street car temporarily prevented automobile driver from crossing to proper side of street would not excuse his negligence in continuing on wrong side, resulting in injury to pedestrian, since it was his duty to stop and allow street car to pass.

3. SAME—FAILURE TO SOUND HORN.

   Where there was evidence that automobile driver was on wrong side of street when he ran into and injured pedestrian, and that, although he saw pedestrian, he gave no warning of his approach, trial court properly refused to hold that there was no evidence of his negligence.

4. EVIDENCE—REMARKS OF EYEWITNESS INADMISSIBLE.

   Testimony as to remark of eyewitness to automobile accident that driver was on wrong side of street was inadmissible.

5. APPEAL AND ERROR—HARMLESS ERROR.

   Error in admitting testimony as to remark of eyewitness to automobile accident that driver was on wrong side of street was harmless, where driver himself had testified that he was on wrong side.

Error to Gogebic; Driscoll (George O.), J. Submitted October 30, 1930. (Docket No. 175, Calendar No. 35,178.) Decided January 23, 1931.

Case by Alphonse H. Dreyfus against John Daronco for personal injuries received in an automobile accident. Judgment for plaintiff. Defendant brings error. Affirmed.

On duty of pedestrian before crossing street to look for vehicles approaching on intersecting street, see annotation in 9 A. L. R. 1248; 44 A. L. R. 1299.

Sol Blumrosen and *Jones & Patek,* for plaintiff.

Waples & Waples (*Stephens, Sletteland & Sutherland,* of counsel), for defendant.

McDONALD, J. The plaintiff was injured in an automobile accident on Silver street in the city of Ironwood, Michigan, and has brought this suit to recover his damages. Silver street runs east and west through and between Hurley, Wisconsin, and Ironwood, Michigan. A single street car track runs along the center of the street dividing it into the north half which is used by the west-bound traffic and the south half which is used by the east-bound traffic. A bridge over the Montreal river connects the two cities. In crossing the bridge, all vehicles keep to the north of the railway track. Because of this, automobiles coming from the west into Ironwood, after crossing the bridge, swing to the south across the railway track onto the south side of Silver street where east-bound traffic is required to travel. It is the plaintiff's claim that, on the day of the accident, the defendant, driving a truck, came from the west across the bridge into Ironwood, and, instead of crossing the railway track onto the south side of the street, where there was a well-defined lane of travel for east-bound traffic, he continued east on the wrong side and ran into plaintiff as he was about to cross.

The defendant admits that he was on the north half of the street, which was the wrong side for traffic going in the direction in which he was driving, but he denies that his truck hit the plaintiff. It is his claim that when he was about 25 feet from the plaintiff, he saw him come out from between two cars parked at the north curb of the street; that he

immediately sounded his horn and applied his brakes; that, in attempting to avoid being hit, the plaintiff jumped to the left and fell down on the pavement and that, if he suffered any injuries, they were caused by his own negligence in failing to look toward the west before attempting to cross the street.

The issues presented by these claims were submitted to the jury. The plaintiff received a verdict on which judgment was entered. The defendant has brought error.

The following questions require discussion:

1. Should the court have directed a verdict for the defendant on the ground that plaintiff was guilty of contributory negligence as a matter of law?

The defendant rests his claim as to plaintiff's negligence on the fact that he stepped into the street from the north curb without looking to the west; that it was daylight; that there was nothing to obstruct his view of the approaching car, and that, if he had looked, he would have been able to avoid the injury. The plaintiff excuses his failure to look to the west because of the fact that he was in the north half of the street and had a right to assume that cars approaching from the west would not travel on that side. He was not guilty of contributory negligence as a matter of law if he failed to look in the direction where automobiles may not travel without violating the law of the road. The entire situation as presented by the evidence made his negligence a question for the jury. The court did not err in submitting it.

2. Did the court err in refusing to direct a verdict on the ground that there was no evidence of negligence on the part of the defendant?

The undisputed evidence is that he was traveling on the wrong side of the road at the time of the accident. In his testimony he explains that, after he had passed over the bridge, he did not cross to the south, which was his right side of the road, because he saw a street car approaching from the east and continued on the wrong side until it had gone by. In the meantime the accident happened. The fact that a street car was approaching did not relieve him of negligence in traveling on that part of the street where he might not travel without violating the law of the road. Rather than to continue on the wrong side, it was his duty to stop and allow the street car to pass. Especially would this be true if, as the plaintiff claims, there was a well defined lane of travel where cars going in his direction were accustomed to cross. There was also evidence that when he hit the plaintiff he was driving five or six feet from the north curb, and that, though he saw him, he did not sound his gong or give any warning of his approach. His own testimony clearly shows that he was where he had no right to be at the time of the accident. The court did not err in refusing to hold that there was no evidence of his negligence.

3. Complaint is made of the ruling of the court in refusing to strike out the testimony of an eyewitness to the accident who testified that, at the time, he said to two gentlemen who were standing there:

"I made the remark to them that he was on the wrong side of the road."

This testimony was not admissible, and should have been stricken out, but, in view of the fact that defendant himself had testified that he was on the wrong side of the road, its admission must be treated as harmless error.

No other questions require discussion. We find no reversible error. The judgment is affirmed, with costs to the plaintiff.

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

NATIONAL ADJUSTING ASS'N *v.* DALLAVO.

1. CHAMPERTY AND MAINTENANCE—STATUTES.
   Defense of champerty does not exist in Michigan, except as specified in 3 Comp. Laws 1929, § 13600.

2. CORPORATIONS—FOREIGN CORPORATION—RIGHT TO MAINTAIN ACTION ON ISOLATED TRANSACTION.
   Foreign corporation may bring action without first qualifying to do business in State under 2 Comp. Laws 1929, § 10118, in order to assert its rights arising out of isolated transaction conducted in State by agent.

Error to Wayne; Martin (William H.), J., presiding. Submitted December 26, 1930. (Docket No. 184, Calendar No. 34,852.) Decided January 23, 1931.

Assumpsit by National Adjusting Association, an Illinois corporation, against Joseph Dallavo on a collection contract. Directed verdict and judgment for plaintiff. Defendant brings error. Affirmed.

George O. Hansen, for plaintiff.

Peter P. Boyle, for defendant.

BUTZEL, C. J. Plaintiff, National Adjusting Association, an Illinois corporation, is engaged in making commercial collections. It sent its solicitor to defendant, who was in the lumber business in Sibley, Michigan, and succeeded in obtaining from him a written contract, dated June 25, 1924, by which plaintiff was given full power and authority to collect and settle certain accounts listed in the agreement. The contract was sent to plaintiff's Chicago office for approval.

The contract provided that plaintiff should be entitled to a docket fee of $.50 for each claim, and in addition 50 per cent. of the first $100, and 10 per cent. of all amounts in excess of $100 collected on each claim, and 50 per cent. of all amounts collected on outlawed claims or by partial payments. It also provided that plaintiff after employing reasonable means for collecting any claim might place it in the hands of counsel for collection, in which event plaintiff assumed the responsibility of costs, but received a commission of 50 per cent. of all amounts collected.

The record makes up in brevity for what it lacks in clarity and detail. It only shows this single transaction carried on by plaintiff in the State of Michigan. As far as the record goes, the letters were mailed to the debtors from Chicago, and plaintiff in one instance consulted a Chicago attorney in regard to a claim. Whether due to plaintiff's effort or not, a number of accounts embraced in the contract were paid, so that plaintiff would be entitled to commissions amounting to $481, and interest

amounting to $96.20, unless defendant has a meritorious defense.

The trial judge directed a judgment for this amount and costs in plaintiff's favor. Defendant claims error in that the contract was champertous, and therefore void, and also that plaintiff has never qualified as a foreign corporation to do business in the State of Michigan, and for this reason is unable to enforce its contracts in the courts of this State. There is also some claim that defendant was deceived in signing the contract, and an application for bond of the National Surety Company made contemporaneous with the contract.

The defense of champerty does not exist in the State of Michigan. While there is some uncertainty whether it ever existed, as far as contracts made with others than attorneys, it does not exist today except as specified in 3 Comp. Laws 1929, § 13600. Referring to this act, it was said in the case of *Wildey* v. *Crane,* 63 Mich. 720:

"If the common-law doctrine of champerty was in force in this State previous to the passage of this act, it was repealed by its passage, and no longer exists in this State. When the legislature enacted that lands in the adverse possession of another might be conveyed, and also that choses in action might be assigned, and actions maintained in the name of the assignee, such legislation virtually repealed the common law relating to champerty; and the statute above cited seems to have been passed in view of the decision of this court in *Backus* v. *Byron,* 4 Mich. 535, and the doubts existing upon the subject, so as to settle the question in accordance with the course of legislation already enacted, and in harmony therewith."

The only other question is whether plaintiff is precluded from bringing suit on account of its failure to qualify as a foreign corporation in the State of Michigan. We are not confronted with a situation where there has been a series of transactions by a foreign corporation, nor where plaintiff established an agency or opened a branch office in this State. No act whatsoever on its part in this State is shown except the exclusive one of soliciting and entering into the contract on which this suit is brought. While the law properly demands that a foreign corporation must first obtain a certificate of authority to do business within this State (2 Comp. Laws 1929, § 10118) before it may make a valid contract in this State, it may bring suit without first qualifying in order to assert its rights arising out of an isolated transaction conducted in this State by an agent of the foreign corporation. *C. H. Knight-Thearle Co.* v. *Hartline,* 233 Mich. 53; *Neyens* v. *Worthington,* 150 Mich. 580 (18 L. R. A. [N. S.] 142); *International Fuel & Iron Corp.* v. *Donner Steel Co., Inc.,* 242 N. Y. 224 (151 N. E. 214); *Penn Collieries Co.* v. *McKeever,* 183 N. Y. 98 (75 N. E. 935, 2 L. R. A. [N. S.] 127).

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

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

KING-BLAIR CO. *v.* SCHLOSS.

1. SPECIFIC PERFORMANCE—OPTION FOR EXTENSION OF LEASE—LANDLORD AND TENANT.

Where lessee surrendered part of leased premises and expended substantial sum of money in improving leasehold premises in consideration of option for extension of lease, it is entitled to specific performance, although option prepared and signed by lessors was not signed by lessee.

2. SAME—NOTICE—ESTOPPEL.

Lessee's right to specific performance of option for extension of lease should not be defeated by its technical violation of lease, where it had continued during whole period without objection by lessors, who had notice thereof.

Appeal from Wayne; Runnels (Herbert W.), J., presiding. Submitted January 8, 1931. (Docket No. 61, Calendar No. 35,404.) Decided January 23, 1931. Rehearing denied April 9, 1931.

Bill by King-Blair Company, a Michigan corporation, against Albert W. Schloss and another for specific performance of an option for extension of a lease. Decree for plaintiff. Defendants appeal. Affirmed.

Lightner, Oxtoby, Hanley & Crawford, for plaintiff.

Stevenson, Butzel, Eaman & Long (*Rockwell T. Gust* and *Victor W. Klein,* of counsel), for defendants.

NORTH, J. Plaintiff occupies property fronting on Woodward avenue in Detroit as tenant of de-

fendants under a 15-year lease which expires May 1, 1931. The leased property is a four-story store building. The lessors reserved in the lease a right to construct upon this building four additional stories. This they decided to do in 1922. As a means of securing space in which to install a stairway and an elevator for the use of tenants in the newly-constructed upper stories, defendants desired to secure from plaintiff a release of a portion of the rented premises. At the same time plaintiff was desirous of securing an option from defendants for a ten-year extension of the leasehold term; and plaintiff also desired to make alterations and improvements in the portion occupied by it. These alterations would require an expenditure of more than $50,000. After agreeing upon the details of these transactions, the parties secured the service of an attorney in reducing to writing their respective undertakings and obligations. Two instruments were prepared. One covered the rights and duties of the parties incident to the construction of the additional four stories and plaintiff's proposed alterations. It is referred to as the building agreement. The other instrument embodied the so-called option for the extension of plaintiff's lease for an additional term of ten years. Both of the written instruments were properly executed by the defendants and left by them in the hands of the attorney to be delivered to plaintiff upon being signed by it. Defendants by letter notified plaintiff of the execution and delivery of these instruments to the attorney. Plaintiff neglected to go to the attorney's office to sign the instruments and secure delivery to it of duplicate copies. However, the agreement between the parties relative to the construction of the additional four stories was carried out, the work

being completed in 1923. Plaintiff had previously completed its alterations and improvements. Incident to defendants' construction work, which was more difficult and took more time than the parties contemplated, plaintiff sustained a substantial damage to its business in addition to that anticipated by the parties. Urging this as a reason, plaintiff repeatedly solicited defendants to give it an option to extend its lease for a still longer period, 20 or 30 years. The defendants declined to grant this further optional extension, and, instead, rather insistently endeavored to induce plaintiff to also take a lease of the four upper stories for which defendants had not been able to secure tenants. Plaintiff declined entering into a lease for the upper portion of the building on the terms defendants demanded. These negotiations and solicitations continued along from time to time until the latter part of 1924. In November of that year plaintiff wrote Mr. Schloss and attempted to secure delivery of the signed option. This was refused and subsequently the bill of complaint in this case was filed for the purpose of securing specific performance. In the circuit court plaintiff was granted the relief sought, and defendants have appealed.

The defense is urged that the agreement for the optional extension was never consummated between these parties since it was not signed by plaintiff nor delivered to it by the attorney to whom it was entrusted. Defendants assert plaintiff was unwilling to accept the ten-year option, that it did not do so, but, instead, was insisting upon an option for a longer term. But plaintiff contends that the ten-year option had already been granted to it, and it was attempting to secure one for an additional period. While this option in form was prepared for

the signature of each of the parties, in fact it was practically a unilateral undertaking, not binding upon plaintiff except it saw fit to exercise the option on the terms and conditions therein specified. Consideration of the record in the case leads to the conclusion that the so-called construction agreement and option were incident to and a part of the same transaction; and that plaintiff had the right to rely upon the fulfillment of the agreements entered into in its expenditure of a substantial sum of money in altering and improving the leasehold premises. Notwithstanding the construction agreement was not signed by plaintiff, as noted above, the work was fully performed and resulted in defendants taking a substantial portion of plaintiff's leased premises. The option as prepared and executed by defendants embodies the terms agreed upon by the parties, and it was given incident to and as a part of a transaction which resulted in ample consideration for the option passing from plaintiff to defendants. At no time did plaintiff renounce or disclaim its rights under the option. Instead, it sought a still longer term. On this phase of the case, the circuit judge found:

"A part of the consideration for the extension of the lease was the delivering over to the defendants a portion of the leased premises—certain floor space, certain show windows, and a change in the elevator system, all made necessary by its probable occupancy by some other tenant or tenants. This consideration has all passed to the defendants."

The record sustains the above finding; and renders the option binding upon defendants notwithstanding neither it nor the construction agreement was signed by plaintiff.

The further defense is urged that by the terms of the option itself it is binding upon the defendants only on the following conditions embodied therein:

"It is distinctly understood that the second party or such successor as under the terms of said lease is lawfully permitted, shall be entitled to take advantage of said option only on the condition that the terms, stipulations and conditions of said leasehold instruments at all times have been fulfilled and complied with by the tenants, and that at the time of the giving of notice of acceptance of such option there shall be no default in respect of the relations of the tenant to the landlord."

As stated in their brief, defendants' contention is:

"Plaintiff had been and was at the time of the institution of this suit, and at the time of the trial in default under the terms and covenants of its lease, the performance of and the compliance with such covenants having been specifically made a condition precedent to the right to exercise the option."

In this connection the defendants rely upon the provision in the lease that, with certain exceptions not here pertinent, the basement and ground floor of the leased building were to be used expressly and solely by the second party for a retail clothing store. The lease also provided that plaintiff might retail "such other goods as are generally sold in such retail clothing stores of high class and character." It is undisputed that for at least two years prior to the trial of this case a part of the basement had been sublet by plaintiff to the Nunn-Bush Shoe Company and another portion to Henry the Hatter. It goes without saying that this subletting was at least a technical violation of the lease. However,

it appears beyond question that this subletting was known to defendants and continued during the whole period without objection. No claim is made that occupancy by these subtenants is in any way detrimental to defendants' interest. The conditions of which they now seek to take advantage existed during the period defendants were endeavoring to lease the whole premises to plaintiff. While perhaps it was not necessary as a matter of pleading, it may be noted that this so-called violation of plaintiff's lease was not mentioned in defendants' answer, nor was it at all stressed at the time testimony was taken in the circuit court. It is obviously an afterthought, under the circumstances somewhat technical, and it would be inequitable to permit defendants to use it as a means of depriving plaintiff of its valuable rights under the option which it now seeks to have specifically enforced. A careful review of the record leads to the conclusion that a just and equitable determination of the controversy between these parties was made by the decree of the circuit court. It is affirmed, with costs to appellee.

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

HEIMS *v.* SCHOOL DISTRICT NO. 6 OF DAVISON TWP.

1. STATUTES—SPECIAL ACT EXCEPTION TO GENERAL.

Special act including same matter as general act must be taken as intended to constitute exception thereto; intention of conflict not being presumed.

2. SCHOOLS AND SCHOOL DISTRICTS—GRADED SCHOOL DISTRICTS—AUTHORITY TO ISSUE BONDS.

Authority of graded school districts to issue bonds to erect schoolhouses is governed by chapter 12, pt. 2, Act No. 319, Pub. Acts 1927.

3. SAME—RIGHTS OF ELECTORS TO FIX AMOUNT.

Under Act No. 319, Pub. Acts 1927, part 2, chap. 12, assembled electors at special election of graded school district to authorize issuance of bonds to erect new schoolhouse had right to reject estimate of school board as to amount necessary to be raised and fix new amount to be voted on, and also had right to select one inspector of election, and denial of said rights by inspectors of election appointed by school board invalidated election.

Appeal from Genesee; Gadola (Paul V.), J. Submitted January 15, 1931. (Docket No. 163, Calendar No. 35,331.) Decided January 23, 1931.

Bill by Fred Heims and others against School District No. 6 of Davison township and others to enjoin the issuance of bonds on the district. Decree for defendants. Plaintiffs appeal. Reversed.

Farley & Elliott, for plaintiffs.

Guy W. Selby, for defendants.

FEAD, J. School district No. 6 of Davison township in Genesee county is a graded school district. At a special election, the electors voted to borrow $110,000 on bonds of the district, to erect and furnish a new school house. This suit is brought by 41 taxpaying electors of the district to enjoin issuance and sale of the bonds on the ground of invalidity of the election.

The inspectors of election were three persons appointed by the board of education. When they had organized and were ready to proceed, plaintiff

Lillian Heims offered two resolutions successively, each to the effect that the amount of loan to be submitted be $70,000, one resolution providing an interest rate of not to exceed five per cent. and the other four per cent. per annum. The inspectors declared the resolutions out of order, and refused to submit them to the assembled electors. No amount was submitted to or voted on by the electors present, but the sum on the ballot was that estimated by the board of education. Neither by the record nor briefs are we informed whether the ballots stated an interest rate.

Plaintiffs contend the election was governed in all respects by chapter 12, pt. 2, Act No. 319, Pub. Acts 1927 (2 Comp. Laws 1929, § 7486 *et seq.*), which applies to graded school districts, and provides that the district board and one person selected by the qualified voters present at the meeting shall constitute the inspectors of election, that the district shall determine the rate of interest, and—

"the district board, or board of education, shall estimate the amount of money necessary to be raised and shall state their estimate in the notices of the annual or special meeting, at which the question of borrowing money and issuing bonds shall be submitted to the people; and at said meeting the voters shall have power to ratify by vote aforesaid the estimate of the district board, or board of education, or to fix a new limit on the amount to be borrowed and for which bonds may be issued."

Defendants admit that the election was not conducted as required by chapter 12, but assert that such chapter had been superseded by chapter 7, 2 Comp. Laws 1929, § 7446 *et seq.*, under which they had acted. Chapter 7 provides that the board of education of any district, except primary school

districts, "may form said district into one or more voting precincts," and, when that is done, shall provide for the registration of voters, shall appoint three electors to compose a board of election inspectors, and otherwise provides for the conduct of elections. A resolution forming the district into one voting precinct had been adopted by defendant board. It is contended that the right of the assembled electors to reject the estimate of the board and to fix a new bond limit was abrogated by this action, as the election thereby became governed exclusively by the provisions of chapter 7 because of the language in section 7 thereof:

"In any school district coming within the provisions of this chapter, and having an annual meeting at which all the voters may assemble for the consideration of questions which may come before them, the board of education shall determine what questions and propositions, unless otherwise provided by law, other than the issuance of bonds that must be submitted to the vote of the electors of the district voting in precincts as herein provided for, and all other questions, propositions, and matters upon which action by a vote of the electors of the district is required or necessary, shall be acted upon at the annual meeting of the voters of the district, or at a special meeting thereof, called and held as provided by law."

It is a rule of statutory construction—

"that where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision,

especially when such general and special acts or provisions are contemporaneous, as the legislature are not presumed to have intended a conflict.'' *Crane* v. *Reeder,* 22 Mich. 322, 333; *Woodworth* v. *City of Kalamazoo,* 135 Mich. 233, 237; *Edwards* v. *Auditor General,* 161 Mich. 639.

The rule is particularly applicable here. Act No. 319 is a consolidation of a large number of school laws. It divides school districts into seven classes, ranging from primary to metropolitan. It recognizes the diversity among districts and sets up a number of provisions applicable specially and exclusively to certain classes, others optional to acceptance by districts, and still others applicable to all. Thus, in part 1, special provisions are made for the authorization and issuance of bonds, with different powers and limitations applying to different classes of districts. Those not so treated, as graded school districts, find their whole authority to issue bonds to erect schoolhouses in chapter 12 of part 2. The scheme of the act demonstrates the intention that where special provisions are made upon a subject or for a particular class of district they are superior to general provisions upon the same subject or for districts generally unless the contrary plainly appears.

When adopted, chapter 7 is special and superior to chapter 12 on the conduct of elections, and governs the appointment of election inspectors. Chapter 12 is special and superior upon the essentials of the issuing of bonds, including the right of assembled voters to reject the estimate of the board and to fix a new limit on the amount to be borrowed, and also on the right of the qualified electors to select an inspector of election.

The question is not before us whether the failure to submit the amount to the assembled voters would

have been more than a mere irregularity, not invalidating the election, if no demand therefor had been made. In this instance, the demand was made by qualified electors and refused by the officials in charge. The right of the assembled voters to a discussion and determination of the amount of bonds to be voted upon is a substantial one, and, where properly demanded, cannot be considered a nonessential. The resolutions should have been put, and, if carried, the amount and rate of interest approved should have been inserted in the ballot at the election.

Failure of the officials to submit to the assembled electors the resolutions offered invalidated the election.

The decree dismissing the bill will be set aside and one entered for an injunction declaring the election void and restraining issuance of the bonds, with costs.

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

BOGACKI *v.* GREAT-WEST LIFE ASSURANCE CO.

1. STATUTES—CONSTRUCTION—INSURANCE—INCONTESTABLE CLAUSE.
   Comp. Laws Supp. 1922, § 9100(147), providing that life insurance policy shall be incontestable after two years from its date, with certain exceptions, condones no fraud, but merely operates in nature of statute of limitations.

Defense of want of insurable interest as affected by incontestable clause in policy, see annotation in 42 L. R. A. 247; 5 L. R. A. (N. S.) 747.

Effect of incontestable clause on provision in life or accident policy in relation to military service, see annotation in 15 A. L. R. 1283.

2. LIMITATION OF ACTIONS—FRAUD.
Law tolerates no fraud, yet frequently permits time to operate as bar to its assertion.

3. STATUTES—CONSTRUCTION—EXCEPTIONS.
Construction of statute providing that life insurance policy shall be incontestable after two years from its date, with certain exceptions, falls within rule that inclusion of exception excludes everything else.

4. INSURANCE—LIFE INSURANCE—DEFENSE OF PUBLIC POLICY NOT AVAILABLE AFTER DESIGNATED PERIOD.
Claim by insurer that life insurance policy is against public policy and therefore void is contest required by Comp. Laws Supp. 1922, § 9100(147) to be made within designated period, and may not be urged thereafter.

5. SAME—CONTEST LIMITED TO EXCEPTIONS STATED IN STATUTE.
After lapse of two years, contest of life insurance policy is limited to exceptions stated in statute (Comp. Laws Supp. 1922, § 9100 [147]).

Appeal from Wayne; O'Brien (Ernest A.), J. Submitted October 21, 1930. (Docket No. 116, Calendar No. 34,808.) Decided January 23, 1931.

Bill by Gertrude Bogacki, administratrix of the estate of Stanley Bogacki, deceased, against the Great-West Life Assurance Company, a Canadian corporation, and Charles Elson, to obtain insurance under a policy issued by defendant company. Cross-bill by defendant company denying liability and by defendant Elson to obtain the insurance. Decree dismissing plaintiff's bill and defendant Elson's cross-bill. Defendant Elson appeals. Reversed, and relief granted to defendant Elson.

Joseph B. Beckenstein (*Wm. Henry Gallagher* and *John Sklar,* of counsel), for appellant.

Walters, Carmichael & Head, for appellee Great-West Life Assurance Company.

WIEST, J. The Great-West Life Assurance Company, on December 14, 1922, upon his application, issued to Stanley Bogacki a life insurance policy for $15,000, with Charles Elson "copartner," beneficiary. The policy contained the following provision:

"Incontestability. This policy shall be incontestable after one year from date of issue except for nonpayment of premium."

The statute in force at that time provided:

"No policy of life insurance shall be issued in this State, unless the same shall contain the following provisions: * * *

"Third. A provision that the policy shall constitute the entire contract between the parties and shall be incontestable after two years from its date, except for nonpayment of premium and except for violations of the conditions of the policy relating to naval and military services in time of war." Comp. Laws Supp. 1922 § 9100 (147).

Bogacki died February 26, 1925. Premiums were paid by Elson to the time of the death of Bogacki. Plaintiff, as administratrix of the estate of Bogacki, filed the bill herein to obtain the insurance, making Elson, the beneficiary, and the insurance company defendants. Elson, by cross-bill, sought decree in accordance with the provisions of the policy, and set up the incontestability provision. The insurance company, by cross-bill, asserted that the policy was void because Bogacki was under guardianship as a spendthrift and could not make a lawful contract of partnership or of life insurance in 1922; averred that no partnership relation existed between Elson and Bogacki at any time; that Elson was the moving party and payer of the premiums on the policy, and

that Elson did not have an insurable interest in the life of Bogacki.

The insurance company contends that:

"The incontestable clause does not bar the appellee assurance company from the benefit of the defense that the policy was not a contract of insurance but was a gambling or wagering contract, contrary to public policy, and not affected by the statute."

In the circuit court the bill of plaintiff and the cross-bill of Elson were dismissed, and, under the cross-bill of the insurance company, the policy was adjudged void and the premiums paid awarded the insurance company as damages. Elson appealed.

At the threshold of the case we must decide whether the insurance company, under the statute and the incontestability clause in the policy, can urge the invalidity of the contract after the expiration of the statutory period.

Counsel for the insurance company tacitly admit that the only defense is that the contract of insurance was a gamble or wager and a violation of public policy, and, therefore, is not barred by the statute. It is urged that the statute must be strictly construed and as not taking away such a defense.

The statute condones no fraud; it merely operates in the nature of a statute of limitations. The law tolerates no fraud, yet frequently permits time to operate as a bar to its assertion. The shade between actual fraud and a violation of public policy in life insurance contract relations is not so pronounced as to justify application of the statute to the one and not to the other. The statute carries the only permissible exceptions to its bar and its construction falls within the rule that the inclusion of

an exception excludes everything else. The term "incontestable" covers all grounds of contest not specifically excepted. The invocation of public policy by the insurance company, in order to have relief from its contract of insurance, is a contest the statute requires to be made within a designated period and not to be urged thereafter. Insurance contracts have radically departed from common-law conception of public policy. If the contract conflicts with modern morals or contravenes the established interests of society, then it violated public policy. The same may be said, however, of actual fraud. The application and the policy disclosed no violation of public policy. The contest is upon extrinsic facts.

We think the true rule is found in *Wright* v. *Mutual Benefit Life Ass'n of America*, 118 N. Y. 237, 241 (23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749), in that case:

"The defendant also offered to show that the beneficiary, Houghton, had no insurable interest in the life of the insured, in short, that it was a speculative and fraudulent scheme, devised and practiced by Houghton, to secure an advantage to himself upon the life of Wright which must soon terminate from the diseases he was then afflicted with."

The court stated, in sustaining the exclusion of such offer, the following (p. 242):

"It is to be presumed that the defendant had some purpose when it offered to the insured a contract containing the stipulation and that the stipulation itself had some meaning. * * * It is not a stipulation absolute to waive all defenses and to condone fraud. On the contrary, it recognizes fraud and all other defenses but it provides ample time and opportunity within which they may be, but beyond which they

may not be, established. It is in the nature of and serves a similar purpose as statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which to apply for redress on account of it and in the law requiring prompt application after its discovery, if one would be relieved from a contract infected with fraud. The parties to a contract may provide for a shorter limitation thereon than that fixed by law and such an agreement is in accord with the policy of statutes of that character. * * *

"While fraud is obnoxious and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement, to the effect that if cause be not found and charged within a reasonable and specific time, establishing the invalidity of the contract of insurance, it should thereafter be treated as valid."

See, also, 5 Cooley's Briefs on Insurance (2d Ed.), p. 4501.

In *Harrison* v. *Provident Relief Ass'n*, 141 Va. 659, 674 (126 S. E. 696, 40 A. L. R. 616), it was stated:

"And, finally, it is said that to permit a recovery in this case would be against public policy. If this were ever true, it is not now; our statute, section 4228 of the code, in sympathy with the current of general law, declares that such contests shall no longer be tolerated after a reasonable time for full investigation has passed without protest.

"This and kindred laws are wise statutes of limitation. Insurance companies should not be permitted with shut eyes to receive in silence the profits of their contracts and to grow articulate only when called upon to pay."

In *Midland National Bank* v. *Dakota Life Ins. Co.*, 277 U. S. 346 (48 Sup. Ct. 532), the court did no more than to state:

"Whether if such evidence had been offered, it should have been excluded because of the provisions of the North Dakota statutes making policies incontestable after two years, or for other reasons, compare *Finnie* v. *Walker* (C. C. A.), 257 Fed. 698 (5 A. L. R. 831), we have no occasion to consider."

In *Powell* v. *Mutual Life Ins. Co.*, 313 Ill. 161 (144 N. E. 825, 36 A. L. R. 1239), the question we are now considering was not involved, but the court did let fall the following remark:

"This clause amounts to an agreement between the insurer and the insured that after the expiration of such period the company shall be estopped from contesting the policy or setting up any defense, except such as may be reserved therein or such as is allowed on the ground of public policy."

Our statute no longer leaves it to an agreement of the parties, but specifically requires that it be in the policy. Public policy, at the best, is somewhat nebulous; is subject to legislative regulation, and, whatever may be said in opinions about the right to contest on the ground of public policy where the incontestability clause was merely by agreement, has no applicability in case the legislature has made such a provision a part of the contract. We, therefore, get no help from *Clement* v. *New York Life Ins. Co.*, 101 Tenn. 22 (46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650); *Bromley's Adm'r* v. *Washington Life Ins. Co.*, 122 Ky. 402 (92 S. W. 17, 5 L. R. A. [N. S.] 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685).

In *Anotil* v. *Manufacturers' Life Ins. Co.*, 24 App. Cases (1899), 604, the privy council, in reviewing

the decision of the supreme court of Canada (28 Can. S. C. 103), stated that the parties could not by agreement defeat the general principles of public policy.

The incontestability statute of this State expresses public policy on the subject, and, after the lapse of two years, contest is limited to the exceptions stated in the statute.

The decree in the circuit is reversed, and a decree will be entered here dismissing the plaintiff's bill and the cross-bill of defendant insurance company, and granting the relief prayed in the cross-bill of defendant Elson. Defendant Elson will recover costs against the Great-West Life Assurance Company.

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

CITY OF MUSKEGON HEIGHTS *v.* DANIGELIS.

1. MUNICIPAL CORPORATIONS—AUTHORITY TO ISSUE BONDS—"CALAMITY"—"EMERGENCY."

   Distress of inhabitants of city due to widespread unemployment constitutes "calamity" within meaning of home-rule act, justifying city council in declaring emergency existed requiring issuance of bonds to relieve said distress under provisions of its charter and 1 Comp. Laws 1929, §§ 2231, 2241, subd. e.

2. ACTION—DECLARATORY JUDGMENTS—APPLICABILITY OF STATUTE.

   Where controversy existed between city and certain taxpayers as to validity of bonds issued by city to relieve distress and suffering due to unemployment of inhabitants, and issues of fact were presented, evidence taken, and points of law raised in circuit court, Act No. 36, Pub. Acts 1929, authorizing courts of record to make binding declaration of rights, was applicable.

On the question as to what is "emergency" which will authorize an extra tax, see annotation in 52 L. R. A. (N. S.) 676; 17 A. L. R. 586.

Appeal from Muskegon; Vanderwerp (John), J. Submitted February 14, 1931. (Docket No. 167, Calendar No. 35,561.) Decided February 23, 1931.

Bill by City of Muskegon Heights against George Danigelis and another to declare a bond issue valid under the declaratory judgment act (3 Comp. Laws 1929, § 13903 *et seq.*). From decree declaring the bonds valid, defendants appeal. Affirmed.

William J. Balgooyen, for plaintiff.

Lou L. Landman, for defendants.

Ganson Taggart, amicus curiæ.

WIEST, J. This is a proceeding under Act No. 36, Pub. Acts 1929 (3 Comp. Laws 1929, § 13903 *et seq.*), authorizing courts of record to make binding declarations of rights.

A controversy exists relative to the validity of bonds authorized by the city of Muskegon Heights to raise money for the relief of destitute inhabitants. The city petitioned the circuit court to make a declaration of rights in the premises and summoned two principal taxpayers to reply and present issuable questions. Issues of fact were presented, evidence taken, points of law raised, and the court found the bonds valid. We review by appeal.

Widespread and acute distress exists among unemployed inhabitants of the city. This was brought to the attention of the city council by many taxpayers. The budget fund for relief of the poor was exhausted. In November, 1930, the city council declared the existence of an emergency justifying the issuance of bonds to the amount of $25,000, and so legislated under authority assumed to be given by subdivision 3, § 91, chap. 9, city charter.

The city operates under a home-rule charter. The bidder, acting upon the advice of counsel, declined to take the bonds because of questioned validity thereof. The city charter, chap. 9, § 91, provides:

"The city commission is hereby authorized to borrow money, and issue bonds for the payment therefor for the following purposes: * * *. (3) For emergency purposes in accordance with the provisions of the home rule act of the State of Michigan."

The home rule act, 1 Comp. Laws 1929, § 2231, provides:

"Each city may in its charter provide:

"(1) For the borrowing of money on the credit of the city and issuing bonds therefor, for any purpose within the scope of its powers: Provided, That the net bonded indebtedness incurred for all public purposes shall not at any time exceed ten per centum of the assessed value of all the real and personal property in the city: Provided further, That in case of fire, flood or other calamity, the legislative body may borrow for the relief of the inhabitants of the city and for the preservation of municipal property, a sum not to exceed one-fourth of one per centum of the assessed value of all the real and personal property in the city, due in not more than three years, even if such loan would cause the indebtedness of the city to exceed the limit fixed in its charter."

This statute places a limitation upon bonded indebtedness, permits extension in case of fire, flood, or other calamity, but then only for the relief of the inhabitants or preservation of municipal property. The home rule act, 1 Comp. Laws 1929, § 2241, subd. (e), clothed the municipal legislative body with power to authorize an issue of emergency bonds as defined by the act, without any action by the elec-

tors. If the distress of the unemployed inhabitants of the city constituted a condition or situation coming within the term "calamity," as employed in the statute, then the bonds, as authorized, are valid. Can it be said that the term "calamity," as employed in the statute, relates to a condition not occasioned by a disaster but under which deep distress is occasioned many inhabitants? The statute provides for relief in case of fire. Such relief, of course, does not extend to compensation for loss of property, but only to alleviation or prevention of suffering occasioned by such a disaster. In case of flood the municipality restores no private loss but may extend relief to distressed inhabitants. On the other hand the term "calamity" is found in the statute in the company of other terms, clearly indicating physical causes occasioning human want and suffering. If the term "calamity" is held to point solely to a disaster or catastrophe occasioning human distress, and, therefore, to exclude relief of acute misery arising from want occasioned by lack of employment, then the bonds are invalid.

The legislature mentioned two causes possible of occasioning acute distress, and then, to cover other causes entailing distress, employed the generic term "or other calamity." A decimating pestilence requiring cessation of business, causing unemployment and consequent deprivation of means of livelihood, and occasioning misery and distress for want of sustenance, would constitute a calamity justifying relief beyond sending around a wagon, as in olden times, and crying "bring out your dead." The legislature had the purpose of permitting measures to relieve widespread suffering occasioned by any acute cause, depriving inhabitants of means of support and entailing misery. The statute contemplates

the occurrence of an unexpected event of sufficient magnitude to cause widespread want and consequent suffering to inhabitants.

"Calamitas," the Latin forerunner of the word "calamity," appears in Calepini's Dictionarium Octo Linguarum (Ed. 1620), and is there defined in English to denote "miserie, calamitie, the breaking of the stalkes of cornes by tempest." In Richardson's dictionary it is stated: "A calamity then, primarily, is that which destroys the standing corn; then—any injury, hurt, mischief, damage, loss, misfortune." At an early date the term was coined to express the loss of food occasioned by drought or storm, and resulting in human suffering. Webster's New International Dictionary (Ed. 1926), under the head "Calamity," states: "A state of deep distress or misfortune, produced by some adverse circumstance or event; misery. * * * Any great misfortune or cause of loss or misery;—usually an event or disaster that produces extensive evil." See, also, 9 C. J. p. 1116.

We hold the term, as employed in the statute, is not limited to distress occasioned by physical forces, but extends to an overwhelming adversity, such as widespread inability to obtain employment and distress occasioned thereby. This construction rightly accords to the members of the legislature humanitarian intent.

This brings us to the question of whether an emergency existed justifying issuance of the bonds.

The city council deemed "that the exhaustion of funds for relief of city poor constituted an emergency." The distress among inhabitants was acute and occasioned by an extraordinary event; want and misery, occasioned by unemployment, was widespread and demanded prompt alleviation. The fund

for the relief of the poor was exhausted, and the winter season at hand. The city council was confronted by a most serious condition existing among inhabitants, as disclosed by the proofs, and there existed an emergency justifying resort to the extraordinary method for relief of misery authorized by the statute and the city charter.

Defendants contend that this proceeding does not come within the provisions of the act authorizing courts of record to make binding declarations of rights.

Under former practice a friendly suit would have been brought, entertained, and right in the matter adjudicated. Now, under the declaratory judgment act, there is presented issuable questions of fact and law of great public moment, and, if the act is to serve at all, it must be permitted to serve in this instance.

The authorized bonds are valid, and the decree in the circuit court is affirmed. No costs.

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

SCHLICKENMAYER *v.* CITY OF HIGHLAND PARK.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PRESUMPTION THAT DECEASED WAS IN PERFORMANCE OF DUTIES.

Nightwatchman employed by city to guard concrete mixer and other tools used in connection with improvement of street, who, while walking about in immediate vicinity of his employment, was struck by automobile and fatally injured, is presumed to have been in performance of his duties, in absence of testimony to contrary, entitling widow to award under workmen's compensation act.

Generally as to application of workmen's compensation acts to night watchman, see annotation in 6 A. L. R. 578; 13 A. L. R. 512.

Certiorari to Department of Labor and Industry. Submitted October 7, 1930. (Docket No. 13, Calendar No. 34,899.) Decided February 27, 1931.

Agnes Schlickenmayer presented her claim against the City of Highland Park for the accidental death of her husband, John J. Schlickenmayer, while in the employ of defendant. Defendant reviews an award to plaintiff by certiorari. Affirmed.

L. J. Carey, for plaintiff.

Claude H. Stevens, City Attorney, and *Earl B. Young,* Assistant City Attorney, for defendant.

POTTER, J. Defendant brings certiorari to review an award to plaintiff, widow of deceased, of compensation, by the department of labor and industry. Deceased, at the time of his injury, was employed by defendant as a nightwatchman to guard a concrete mixer, keep children away from it at night, guard defendant's tools and other city property from being stolen, and take care of lanterns, all used in connection with the improvement of Oakland avenue in defendant city. Plaintiff's decedent was struck by an automobile while on Oakland avenue and so seriously injured he died in the hospital. The presumption of due care attended deceased, who was injured on Oakland avenue in the immediate vicinity of his employment. No one who saw the accident testified. *Mynning* v. *Railroad Co.,* 64 Mich. 93 (8 Am. St. Rep. 804); *Adams* v. *Iron Cliffs Co.,* 78 Mich. 271 (18 Am. St. Rep. 441); *Van Doorn* v. *Heap,* 160 Mich. 199; *Hills* v. *Blair,* 182 Mich. 20; *Baker* v. *Delano,* 191 Mich. 204; *Patterson* v. *Wagner,* 204 Mich. 593; *Gillett* v. *Michigan United Traction Co.,* 205 Mich. 410. Defendant offered tes-

timony to show the injured man, on his way to the hospital, in response to questions put to him, said he was injured by being struck by an automobile while crossing the street to get some tobacco. It contends this testimony was admissible and was sufficient to overcome the presumption of due care and show the injury to plaintiff's decedent did not arise out of and in the course of his employment. This testimony was excluded by the department of labor and industry.

The right of plaintiff to compensation was not, in his lifetime, vested in deceased. It was not the property of plaintiff's decedent. He had no interest in it. It did not pass to plaintiff from him upon his death,—it was not part of his estate. It did not come to plaintiff as an heir. It did not exist at common law. Plaintiff's right to compensation arises from the statute. Decedent's death gave rise "to a new and original cause of action or claim in favor of his widow." *Curtis* v. *Slater Construction Co.,* 202 Mich. 673. Upon the death of decedent his right to be awarded compensation ceased. Plaintiff's right to compensation is a new and original liability, cast by the statute on the employer—an additional trade risk. To be entitled to compensation it was incumbent upon plaintiff to present her claim and obtain an award by the department of labor and industry, just as a soldier's widow must present and obtain allowance of her claim to a widow's pension, to be entitled thereto. Common law rights, liabilities, remedies, and procedure are not involved. The statute deals with compensation, not damages; awards, not judgments. *Andrejwski* v. *Wolverine Coal Co.,* 182 Mich. 298 (Ann. Cas. 1916D, 724); *Mackin* v. *Detroit-Timkin Axle Co.,* 187 Mich. 8;

Curtis v. *Slater Construction Co., supra.* The admissions of deceased in his lifetime, if made, were not made in relation to any property of declarant in which plaintiff subsequently acquired an interest. There is no privity of interest between her and deceased. Jones Commentaries on Evidence (1st Ed.), § 239; *Kansas City Southern Ry.* v. *Leslie,* 112 Ark. 305 (167 S. W. 83, Ann. Cas. 1915B, 834); *Marks* v. *Reissinger,* 35 Cal. App. 44 (169 Pac. 243); *Dowell* v. *City of Raleigh,* 173 N. C. 197 (91 S. E. 849); *Eldridge* v. *Barton,* 232 Mass. 183 (122 N. E. 272).

"Privity denotes mutual succession or relationship to the same rights of property. Privies are those who have mutual or successive relationship to the same right of property or subject-matter, such as 'personal representatives, heirs, devisees, legatees, assignees, voluntary grantees or judgment creditors or purchasers from them with notice of the facts.'" Jones Commentaries on Evidence (1st Ed.), § 239.

See, also, Greenleaf on Evidence (16th Ed.), §§ 189, 523; Story's Equity Pleadings (8th Ed.), § 165; *Haley* v. *Bagley,* 37 Mo. 363; *Henry* v. *Woods,* 77 Mo. 277.

In *Kansas City Southern Ry.* v. *Leslie, supra,* which arose under the Federal employers' liability act, 45 USCA §§ 51–59, it was held the admissions of decedent tending to show he was injured because of his own negligence were not admissible against claimant.

"The legal rights of the heirs or representatives of a deceased person seeking to recover for his death resulting from the wrongful act of another, while growing out of the injury causing the death, are independent of that fact, and cannot be defeated or affected by anything the deceased can say or do." *Marks* v. *Reissinger, supra.*

In *Dowell* v. *City of Raleigh, supra,* a case of death by wrongful act, it is said:

"The declaration of the intestate as to the condition of the wagon was incompetent. It was not a declaration against interest, as at that time he had no interest to serve or disserve. He had no cause of action himself, as his death was instantaneous, nor did he even have any interest in this cause of action. It is one not known to the common law, but created by the statute, and the beneficiaries take, not by any inheritance or succession from him, but solely because they are named in the statute as the recipients of the fund recovered for the death caused by defendant's negligent or wrongful act. The cause of action never arose until the death of the intestate, and then not to him, but to those who are designated by the statute to take the fund recovered. They acquire their right by the statute alone and not because of any privity with the intestate, for none such exists between them, in any proper sense of that term."

In *Eldridge* v. *Barton, supra,* suit was brought both under the death act and the survival act. It is said:

"On the counts for death however the plaintiff is not acting in the interest of the estate of Barzillai Eldridge. The damages recovered thereunder would not be assets of the estate in the hands of the administrator, but would be in the nature of a fine which the State imposes upon one whose negligence caused the death of the intestate and which is given as a gratuity to the next of kin. * * * In the present action these next of kin are not in privity with, nor claiming under the intestate; and hence the admission made by him does not bind the plaintiff administrator so far as he is suing for their benefit."

The award of the department of labor and industry is affirmed, with costs.

MCDONALD, J., concurred with POTTER, J.

NORTH, J. (*concurring in affirmance*). I concur in affirming the award on the ground that, regardless of the admissibility of declarations of plaintiff's decedent, the record is ample to sustain the commissioners' finding, which, in part, is as follows:

"He (plaintiff's decedent) was simply walking about in the immediate vicinity of his employment. He was hit by an automobile, a hazard of his employment, while on the street at the immediate place of his employment. Then how can it be said, simply because at that time he might have been temporarily on a mission of his own of this character that he did not receive an injury arising out of and in the course of his employment? To deny compensation for such a reason would be to place a construction upon this language of the statute so strict that it would be shocking to one's sense of justice. He was not in the store but on the street, his place of employment, when injured."

The foregoing might be amplified by noting that deceased at the time of the accident was within such a distance from the machinery and lamps which it was his duty to watch that he might well have been and presumably was in the performance of the duties for which he was employed. There is no direct testimony to the contrary, and none of a circumstantial nature which is at all persuasive. The finding of the commission to that effect is binding upon us.

Decision in the instant case does not necessitate determination of the admissibility of decedent's statements either as *res gestæ* or as declarations against interest.

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

JOHNSON *v.* FOLWELL-AHLSKOG CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DISCONTINUING PAYMENTS—BURDEN OF PROOF.
   Employer petitioning to stop compensation payments to injured employee on ground that disability has ceased, has burden of establishing its claim.

2. SAME—FINDING SUPPORTED BY TESTIMONY FINAL.
   On certiorari to review award of department of labor and industry, based on finding of partial disability, if testimony supports said finding, award must be affirmed.

3. SAME—PARTIAL DISABILITY.
   Testimony that, while injured employee is able to do light work, and has mowed lawns and dusted furniture in store, he cannot labor full time and is unable to return to his former or like employment, justified finding of department that he is partially disabled.

Certiorari to Department of Labor and Industry. Submitted January 7, 1931. (Docket No. 48, Calendar No. 35,277.) Decided February 27, 1931.

Jesse Johnson was awarded compensation against the Folwell-Ahlskog Company, employer, and Hartford Accident & Indemnity Company, insurer. From an order denying defendants' petition to stop payment, they bring certiorari. Affirmed.

Wm. K. Clute, for plaintiff.

McAllister & McAllister, for defendants.

WIEST, J. This is review by certiorari of the denial by the department of labor and industry of

defendants' petition to stop payment of compensation to plaintiff because of his recovery.

October 15, 1926, plaintiff was in the employ of defendant Folwell-Ahlskog Company and engaged in construction work when a piece of timber fell on his left heel, fracturing the oscalcis bone. By agreement he was awarded compensation of $14 a week. From time to time efforts were made to stop compensation, and, on March 1, 1930, the petition herein was filed. The deputy commissioner stopped compensation. Upon review the commission reversed the order of the deputy, found partial recovery, and continued the compensation at the rate of $7 per week. At the hearing defendants had the burden of establishing the fact that plaintiff's disability had ceased. *Warner* v. *Railway Co.*, 248 Mich. 60.

If the testimony supports the holding of the commission we must affirm. The testimony has been read with care, and supports the finding of the commission.

Plaintiff is able to do light work, and has mowed lawns and dusted furniture in a store, but cannot labor full time and is unable to return to his former or like employment.

Affirmed, with costs against defendants.

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

HUNT *v.* F. R. PATTERSON CONSTRUCTION CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—STATUTE OF LIMITATIONS.

Where injured employee's actual disability did not develop within six months after accident, of which employer had notice, claim for compensation filed within three months after disability manifested itself to such extent that employee was compelled to quit work was filed within statutory period (2 Comp. Laws 1915, § 5445, as amended by Act No. 64, Pub. Acts 1919).

Certiorari to Department of Labor and Industry. Submitted January 6, 1931. (Docket No. 11, Calendar No. 35,220.) Decided February 27, 1931.

Clarence B. Hunt presented his claim against F. R. Patterson Construction Company for an accidental injury while in its employ. Award to plaintiff is reviewed by defendant and Employers' Liability Assurance Corporation, insurer, by certiorari. Affirmed.

Ernest P. La Joie, for plaintiff.

G. Wilson Gloster, for defendants.

SHARPE, J. The plaintiff, while in the employ of the Patterson company as an elevator operator, on May 17, 1929, was injured by being struck in the side by a box which he was endeavoring to load upon the elevator from a truck. He was treated by a physician furnished by defendant. He soon after

Time within which notice must be given or other steps taken in action for compensation under workmen's compensation acts, see annotation in L. R. A. 1917D, 138; L. R. A. 1918E, 559.

returned to work, but at times suffered pain. On January 16, 1930, while working for another party, his condition became such that he was compelled to quit work, and on March 3, 1930, he filed a claim for compensation under the workmen's compensation law (2 Comp. Laws 1929, § 8407 *et seq.*).

The Patterson company had filed a report of non-compensable accident on June 1, 1929, and afterwards, and on February 25, 1930, a report of compensable accident. A hearing was had before a deputy commissioner. The defendants, on March 31st, filed a denial of the claim (1) because plaintiff was not disabled, and (2) because he did not receive an accidental injury arising out of and in the course of his employment, and later, on April 19th, amended it to deny that notice of the claim was filed within the statutory period.

The deputy commissioner awarded compensation for 15 weeks and 2 days, from January 16, 1930, at $18 per week, in all $276. On appeal to the department, this award was affirmed. Defendants seek review by certiorari.

The error here relied on is that plaintiff's claim is barred by the statute. Section 5445, 2 Comp. Laws 1915, provides that notice of an injury must be given to an employer within three months, and that the claim for compensation must be made within six months after the happening thereof. This section was amended by Act No. 64, Pub. Acts 1919, by adding thereto a proviso, which is quoted at length in *White* v. *Morgan & Wright,* 217 Mich. 499, 502, and need not be here repeated.

While the record discloses that plaintiff suffered pain at times after the accident, he was not compelled to quit work entirely until January 15, 1930. It was apparently not thought at first that his in-

jury was serious, and so the report of noncompensable accident was made. But the Patterson company, doubtless after investigation, made a report of compensable accident on February 25, 1930, in which it stated that plaintiff had sustained an injury to his back and right side on May 17, 1929. The defendants, while not insisting that plaintiff's condition at the time of hearing was not the result of the injury sustained by him on that date, strenuously urge that his injury was apparent during the first six months thereafter, and that his failure to then make claim precludes his recovery.

From the proofs submitted, the department found:

"While plaintiff testifies that he has had pains, off and on, since the accidental injury, there is no proof of the loss of any actual time until January 15th of this year, at which date he was obliged to discontinue his employment, he claims, on account of the original injury. His contention in this respect is not disputed by any testimony in the case. It is substantiated, also, by the report of compensable accident which was filed on the 26th day of last February, just 30 days previous to the time of plaintiff's filing his notice and application for adjustment of claim.

"Inasmuch as the actual disability or incapacity did not develop or make itself manifest within the six months after the happening of the accident, but did develop and make itself manifest on January 15, 1930, and plaintiff filed his notice and application within three months thereafter, this defense is not tenable."

There was evidence to support this finding. The facts are quite similar to those appearing in *White* v. *Morgan & Wright, supra,* wherein the effect of this proviso was considered. Many persons afflicted

with a slight ailment causing pain and distress do not regard it seriously. They expect that it will soon pass away. Such action on the part of an employee inures to the benefit of his employer. It is apparent that plaintiff felt that he had no ground for complaint against his employer until his condition necessitated his quitting work, and he was then informed by the doctor whom he consulted, and whose evidence is undisputed, that he was suffering from the effect of the injury received on May 17, 1929.

The award is affirmed.

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

LEFFLER *v.* MORTON SALT CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CAUSE OF DEATH—CONFLICTING TESTIMONY PRESENTS QUESTION OF FACT.

Where doctors disagreed as to cause of employee's death, and attending physician certified cause of death as cerebral apoplexy induced by alcoholism, but two doctors testified that in their opinion accidental injury resulting in amputation of left arm was contributing cause, question of cause of death was one of fact for department of labor and industry.

Certiorari to Department of Labor and Industry. Submitted January 13, 1931. (Docket No. 87, Calendar No. 35,102.) Decided February 27, 1931.

Marie, John, and Elvina Leffler presented their claim against Morton Salt Company, for the accidental death of Henry Leffler, husband and father, while in defendant's employ. Award to plaintiffs. Defendant brings certiorari. Affirmed.

Henry R. Baird (*Don R. Carrigan,* of counsel), for plaintiffs.

Cady & Pepper (*George D. Anthony,* of counsel), for defendant.

FEAD, J. Decedent Henry Leffler, 51 or 52 years of age, had worked for defendant for several years as a common laborer. On June 9, 1927, he was given a physical examination by defendant's plant physician, who certified him in normal health. On June 20th, he sustained an accident in his employment which so crushed and lacerated his left arm that amputation above the elbow became necessary. He remained in the hospital until July 3d, when he was taken to his home. His arm was dressed frequently thereafter to and including August 18th by the plant physician, and, during the latter's temporary absence, by the surgeon. Leffler recovered sufficiently to be able to get about the home and streets. Early in the morning of August 19th he arose, but was very sick. The plant physician was called, made two visits an hour apart, but Leffler died. The doctor certified the cause of his death as cerebral apoplexy, induced by alcoholism. Plaintiffs, Leffler's dependents, were awarded compensation for his death. The question is whether there was any evidence before the board from which it could find that the accident to the arm was a contributing cause of death.

The case rests largely in medical testimony. The doctors agreed that the cause of death could have been surely determined only by autopsy. There was no autopsy. So the cause of death rests wholly in medical opinion. The doctors agreed that the immediate cause of death was apoplexy. They disagreed on the secondary cause.

The attending physician testified that on August 19th he found Leffler under the influence of liquor and was told by Mrs. Leffler that her husband had been out the night before and had come in drunk at two o'clock in the morning. The physicians who supported his opinion of the cause of death assumed a condition of acute alcoholic indulgence sufficient to produce apoplexy.

Mrs. Leffler denied both the fact of her husband's intoxication on August 19th and the statements claimed to have been made by her. Much evidence was taken of Leffler's habits of drinking, and it was in sharp dispute. The compensation board discredited the testimony of the attending physician as to the conditions he claimed to have found on the morning of August 19th, and held with Mrs. Leffler and her supporting witnesses on this issue. The resolving of the issue in favor of plaintiffs would tend to impeach the opinion that alcoholism was the inducing cause of the apoplexy.

Two other doctors were of the opinion that the accident was a contributing cause, and may have been the sole cause, of the apoplexy. They said they took into account the result of the physical examination of Leffler on June 9th, the character of his injury, testimony that the wound was discharging pus when he left the hospital, that matter appeared upon the bandages, that the number of dressings indicated unsatisfactory healing, that Leffler had

much pain which caused him to lose sleep, his appearance on the morning of his death as described by the attending physician, the result of such examination, testimony as to his drinking habits, and the other evidence.

The examination of the doctors was exhaustive and covered a wide range. They expressed their opinions as to the general causes of apoplexy and the effect of various conditions, upon which there was testimony, in relation to it.

The whole record renders particularly applicable the statement in *Vogeley* v. *Detroit Lumber Co.*, 196 Mich. 516, that where the doctors disagree as to the cause of death, it is a question of fact for the board.

The award is affirmed, with costs.

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

BARTHOLOMEW *v.* SALVATION ARMY.

1. TRUSTS—POWER TO CONVEY.

Where trustee had power to transfer to beneficiary or to his children, or either of them, whole or any part of trust funds or property, trust funds did not belong to said children, but they belonged to trust estate with power in trustee to pay and transfer them to beneficiary or to his children or either of them.

2. MORTGAGES—FORECLOSURE—RIGHTS OF REMAINDERMEN—REDEMPTION—ESTOPPEL.

Where remaindermen joined with life tenant in mortgaging property, and, on foreclosure and expiration of redemption period, aided in conveying it to life tenant and wife, claim of remaindermen that said conveyance was mere redemption from mortgage foreclosure is without merit, since it created estate by entireties, which is inconsistent with and repugnant to any interest of remaindermen, and they are therefore estopped from complaining of result they aided to produce.

Appeal from Wayne; Smith (Guy E.), J., presiding. Submitted October 29, 1930. (Docket No. 174, Calendar No. 35,253.) Decided February 27, 1931.

Bill by Clarence C. Bartholomew and others against the Salvation Army, a Michigan corporation, to declare the interests of the parties in certain real estate. Decree for plaintiffs. Defendant appeals. Reversed.

Robert M. Brownson (*Kenneth Murray,* of counsel), for plaintiffs.

Henry H. Roberts (*Clark, Klein, Ferris, Cook & Williams* and *Frank I. Kennedy,* of counsel), for defendant.

CLARK, J. Albert M. Bartholomew died in 1884, leaving a will by which he devised and bequeathed a portion of his estate to trustees to have rents, income, and profit for use and benefit of his son, William E. Bartholomew, or his issue or children as to trustees shall seem best, and to pay or transfer, if trustees shall deem advisable, to said William E. or to his children, or either of them the whole or any part of the trust funds or property.

The family of William E. was his wife, Alice E., and their children, Clarence C., John B., Grace A.

(who died in 1902 unmarried and without issue), Sarah Lois, Maud M. Locklin (mother of plaintiff Vivian G. Dauer and now deceased), and Florence E. Thomas.

In the course of time the trustees named were succeeded by the wife of William E., said Alice E. Bartholomew, as sole trustee. In 1899, in execution of the trust, she conveyed home property, lot 7, north of Fort street, of the plat of C. Moran farm, Detroit, to William E. Bartholomew for life, with remainder over to the six children above named. In the same year, William E. and Alice E., his wife, and the six children named, who, it appears, were of full age, joined in mortgaging the property described to Leonard D. Jenney for $2,000. Default soon followed, as did foreclosure and sale, and purchase by Jenney. The period of redemption expired and Jenney had title.

Soon thereafter, and on September 14, 1903, William E. and his wife, Alice E., and children, who, with William E., were all the surviving beneficiaries of the trust, conveyed by deed a certain lot 12, trust property, to Jenney, and on the same day Jenney and wife entered into a land contract, with William E. and Alice E., his wife, as purchasers, covering both said lots 7 and 12, the purchase price being $2,587.50, a very little more than the amount paid by Jenney as purchaser at the mortgage sale.

In February, 1906, lot 12 was sold and conveyed by the Jenneys and by William E. and Alice E., his wife, and the proceeds, $368.19, applied on the contract. The purchasers were soon in default and the Jenneys in 1907 filed bill to foreclose the land contract. To raise money, Alice E., as trustee, sold and conveyed other trust property to one Carroll and William E. and Alice E., his wife, and the re-

maindermen, children surviving, also joined in conveying. The funds were handled by the attorney for the said grantors, and he paid to the Jenneys the whole sum then due on the contract, $2,745.08, and the Jenneys accordingly deeded, on December 9, 1908, said lot 7 to William E. and Alice E., his wife, which deed was recorded December 18, 1908.

Alice E. Bartholomew died August 10, 1910. William E. Bartholomew died August 30, 1919, leaving a will by which he devised and bequeathed comparatively small sums to his children, Sarah Lois, John B., Clarence C., and Maud M., and the full residue to Florence E. and Sarah Lois. In the inventory of his estate was included said lot 7. In August, 1923, Florence E. and Sarah Lois, as residuary legatees under the will, conveyed by deed lot 7 to Harry L. Schellenberg, who died December 23, 1924. By his will, lot 7 was devised to defendant, the Salvation Army.

Plaintiffs Clarence C. and John B. Bartholomew and Vivian G. Dauer, daughter of Maud M., deceased, filed this bill to have decree that the deed by the Jenneys to William E. and Alice E., his wife, of lot 7 was a mere redemption from the mortgage foreclosure and for the benefit of the remaindermen. Plaintiffs had decree. Defendant has appealed.

Plaintiffs offer no contribution of any share of the sum paid to the Jenneys to procure the land contract and later the deed for lot 7, for the reason, as they say, that the life tenant paid nothing of his own, but trust funds were used. The trust funds did not belong to the children of William E. Bartholomew or to plaintiffs. They belonged to the estate with power in the trustee to pay and transfer them to William E. or to his children or either of them.

Plaintiffs invoke the rule that a life tenant who allows the property to be sold for satisfaction of an incumbrance cannot acquire title adverse to remaindermen by purchasing at the sale or through an intermediary or by obtaining title acquired by another purchaser at such sale.

Passing the question of laches, we think plaintiffs estopped to invoke such rule.

The Jenneys did not convey to William E. Bartholomew, the life tenant. They by contract agreed to convey and later did convey by deed to William E. Bartholomew and Alice E. Bartholomew, his wife. This created an estate by entireties, and the survivor would succeed to the whole title, so that if William E. died first, Alice E. would have whole title. Such conveyance is inconsistent with and repugnant to any thought of remainder over to plaintiffs. Plaintiffs, the children, the remaindermen, aided in producing such conveyance to William E. and Alice E. Alice E. was not a beneficiary of the trust. She could not use trust funds to procure title in herself or in herself and husband. So the conveyance of lot 12 was by all parties in interest, including remaindermen, the children, to Jenney, and the purpose of the deed was to devote such property to the contract of purchase of lot 7 in favor of William E. Bartholomew and Alice E., his wife, and the money arising from sale of lot 12 was so used.

Again, the money to pay up the contract and to take deed of lot 7 in name of William E. and Alice E., his wife, was provided by a sale of trust property in which all parties in interest, including the remaindermen, the children, joined in conveying. And the attorney for the grantors in such conveyance, the remaindermen, the children, actually paid

the money that deed might pass of lot 7 to William E. and Alice E., his wife.

The remaindermen actively, and on this record knowingly, cut off right of remainder. Plaintiffs, as remaindermen, are estopped to complain of a result they thus aided to produce.

Reversed. Bill dismissed, with costs.

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

MOECKEL *v.* DIESENROTH.

1. SALES—WARRANTY—STATEMENT IN AUCTION BILL.
   Where auction bill offering milch cows for sale contained no express statement that they were sound, there was no warranty of general condition or health.

2. SAME—IMPLIED WARRANTY.
   Where cattle offered for sale in auction bill were grouped according to purpose, seller is impliedly charged with notice that purchaser purchasing from group described as milch cows, with no other declared purpose, would buy for use as milch cows, with implied warranty by seller that they were reasonably fit for that purpose (2 Comp. Laws 1929, § 9454).

3. SAME—BREACH OF IMPLIED WARRANTY—CONTAGIOUS ABORTION.
   Presence of contagious abortion in cow described by seller as milch cow and purchased for that purpose, which disease affects milk so that it is unfit for human use or disturbs ability of cow to freshen and continue production of milk, is breach of implied warranty that said cow is reasonably fit for its purpose as milch cow.

4. SAME—DAMAGES—RESCISSION.
   Breach of warranty does not ordinarily entitle purchaser to abatement of whole purchase price in absence of rescission.

As to liability of vendor of diseased live stock in absence of special warranty, see annotation in 29 L. R. A. (N. S.) 202.

Advertisement by seller as affecting rights of parties to sale of live stock, see annotation in 28 A. L. R. 1001.

5. SAME.

Breach of implied warranty that cows sold as milch cows were reasonably fit for that purpose did not entitle purchaser to damages in full, where there was testimony that they had some value for beef, in absence of rescission.

Error to Washtenaw; Sample (George W.), J. Submitted October 23, 1930. (Docket No. 173, Calendar No. 35,244.) Decided February 27, 1931.

Assumpsit by O. F. Moeckel against Lucy Diesenroth and another on a promissory note given in payment for cattle. Judgment for defendants. Plaintiff brings error. Reversed.

James J. Noon and *Frank B. DeVine,* for plaintiff.

Louis E. Burke, for defendants.

FEAD, J. The action is on a promissory note for $417, given by defendants for the price of six cows they purchased from plaintiff at an auction sale. The defendants gave notice of several special defenses, but the case was presented to this court on the issue of breach of warranty of the six cows. There was no rescission of the sale. Defendants had verdict of a jury and judgment of no cause of action. Plaintiff contends the court erred in denying his motion for a directed verdict, and, later, for a new trial.

No verbal representations were made, but defendants' claim rests wholly upon the language of the auction bill advertising the sale, which reads in part:

"20 cows, mostly Jerseys. All giving milk or heavy springers."

Defendants say those words meant the cows were sound, healthy, and would give wholesome milk. Plaintiff contends they were merely descriptive of a specific condition of the cows, and did not constitute a warranty of health or quality.

There was sufficient testimony to submit to the jury defendants' claim that the cows were infected with a disease known as contagious abortion when they were purchased, that such disease causes cows to lose their calves oftener than is normal and renders the milk dangerous for use by human beings, and that at least four of the cows purchased by defendants from plaintiff aborted. There was also testimony that, despite the disease, the meat is salable.

The case does not fall within *Groves* v. *Jones*, 252 Mich. 446, as the testimony did not show that plaintiff knew the cows were diseased when sold.

The whole property offered at the sale, as described in the auction bill, was:

"20 cows, mostly Jerseys. All giving milk or heavy springers. Some with calves by side. Ages, 3 to 7 years. 26 Heifers Jerseys—some Guernseys and Durhams. Ages, 1½ to 3 years. 36 steers short yearling Herfords. All cattle recently T. B. tested."

As there was no express statement in the bill that the cows were sound, or the equivalent, there was no warranty of general condition or health. 24 R. C. L. p. 202; 35 Cyc. p. 388; 29 L. R. A. (N. S.) 202, note.

The grouping of the animals in the auction bill, especially as to the cows and heifers, indicated a difference in their use and value, and constituted an offer by plaintiff of each group for its indicated purpose. The description of the group out of which defendants purchased had direct and special refer-

ence to the stage of milk production of the cows and distinguished them as milch cows. In offering them for such particular purpose, the seller was impliedly charged with notice that a purchaser, who should rely upon the offer and declare no other specific object, would buy them for use as milch cows, so the sale carried the implied warranty that they were reasonably fit for that purpose.

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose." 2 Comp. Laws 1929, § 9454.

The ordinary use of a milch cow is to produce milk for human consumption. The presence of a disease which affects the animal in this respect to an unreasonable degree is a breach of the implied warranty that it is reasonably fit for its purpose as a milch cow, whether it spoils the milk for human use or disturbs the ability to freshen and continue the production of milk. We think this is the character of the warranty contained in the auction bill, and defines the issue for the jury.

A breach of warranty does not ordinarily entitle the purchaser to abatement of the whole purchase price in the absence of rescission. In this case, it was shown that the cows had value for beef, and damages in the full amount of the note were not proved.

Judgment reversed, and new trial ordered, with costs.

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

PARSONS *v.* PARSONS.

DIVORCE—DIVISION OF PROPERTY MODIFIED.

Decree of divorce awarding to wife household furniture and $3,000 equity in home owned by entireties, which is practically all of husband's property, is modified, on appeal, and home ordered sold and proceeds divided equally between them after expenses, taxes, and interest on mortgage are paid; wife to have household goods, and husband released from temporary alimony.

Appeal from Kent; Perkins (Willis B.), J. Submitted January 13, 1931. (Docket No. 113, Calendar No. 35,327.) Decided February 27, 1931.

Bill for divorce by Irene M. Parsons against Charles H. Parsons. Decree for plaintiff. Defendant appeals from portion of decree involving division of property. Modified and affirmed.

Horace T. Barnaby, for plaintiff.

McAllister & McAllister, for defendant.

WIEST, J. This is an appeal by defendant from that part of a decree of divorce awarding plaintiff the household furniture and the equity of the parties in their home, the title to which is held by the entirety.

The award strips defendant of all property. The parties were married in March, 1923. There are no children. Plaintiff is 32 and defendant is 37 years of age. Plaintiff is a "general merchandiser," has followed that calling for some time, and earns from

$15 to $30 per week. Defendant is a bricklayer and interested with his father in cement work and contracting. For the year preceding the hearing, except for three weeks, defendant was without work. The partnership, of which he is a member, is engaged in litigation, having 15 lawsuits pending, and, if all are won, there will be nothing for the partners. Plaintiff rents the home, reserving a room for herself, which she occupies when not out of the city selling goods. The household furniture cost upward of $1,500, but, of course, has now no such sale value. The equity in the home was mainly a gift from defendant's father, and is of the value of about $3,000 above taxes due and interest unpaid. Defendant owes $205 temporary alimony. These parties have not much property, but, under the circumstances, it ought not all to be given plaintiff. The decree of divorce is affirmed, and the award of alimony and dower rights modified as follows:

The real estate to be sold and the proceeds, less expenses of sale, taxes unpaid, and interest due on the mortgage, to be divided equally between the parties.

Plaintiff to have all of the household furniture, but, in consideration thereof, defendant is released from paying the temporary alimony.

Neither party will recover costs.

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

PEOPLE *v.* JAGOSZ.

1. CRIMINAL LAW—NEW TRIAL—WEIGHT OF EVIDENCE.
   In absence of motion for new trial, Supreme Court may not pass upon question of whether verdict is against great weight of evidence.

2. SAME—LEADING QUESTIONS.
   Suggestive and leading questions by prosecuting attorney, in prosecution for rape, where not objected to, disclose no error.

3. RAPE—INSTRUCTIONS—DEFINING ATTEMPT TO RAPE.
   Where, in prosecution for rape, trial judge fully defined essentials of rape consummated, it was not necessary to repeat elements of rape attempted.

4. SAME—DEFINING ASSAULT AND BATTERY.
   In prosecution for rape, apt illustration of assault and battery by trial judge instead of definition thereof, was sufficient; if further instruction was desired, counsel should have made request therefor.

5. SAME—TRIAL—INSTRUCTION AS TO LESSER OFFENSES.
   Instruction in prosecution for rape which left it open to jury to acquit or find defendants guilty of rape or one of lesser offenses is not open to criticism that it led jury to believe that only one verdict, that of guilty, could be rendered.

6. SAME—CRUEL AND UNUSUAL PUNISHMENT.
   In view of fact that statute (3 Comp. Laws 1929, § 16727) provides imprisonment for life or any such period as court in its discretion shall direct for crime of rape, sentence of imprisonment from 12 to 30 years does not constitute cruel and unusual punishment.

7. CRIMINAL LAW—DELAY IN IMPOSING SENTENCE.
   Delay of 63 days after conviction of rape in imposing sentence does not constitute error, in absence of showing of cause therefor.

Error to Macomb; Reid (Neil E.), J. Submitted January 15, 1931. (Docket No. 146, Calendar No. 34,999.) Decided February 27, 1931.

Joseph Jagosz and Joseph Lesniak were convicted of rape. Affirmed.

Gronkowski & Gryczka, for appellants.

Paul W. Voorhies, Attorney General, *Emerson R. Boyles,* Deputy Attorney General, *Earle M. French,* Prosecuting Attorney, and *Donald C. Trombley,* Assistant Prosecuting Attorney, for the people.

WIEST, J. Defendants were convicted of the crime of rape. Errors assigned present no reversible error.

No objections to testimony were made at the trial, no requests to charge presented, and no motion for a new trial made. In the absence of a motion for a new trial we may not pass upon the question of whether a verdict was against the great weight of evidence. In case a new trial is moved on such ground and denied, we review the decision of the circuit judge and look into the evidence, otherwise not. *People* v. *Sekelyn,* 217 Mich. 341; *People* v. *Reed,* 225 Mich. 305. Suggestive and leading questions by the prosecuting attorney to the complaining witness were not objected to and disclose no error.

The trial judge laid the issues of fact before the jury, defined the essentials of the crime of rape, assault with intent to commit rape, and assault and battery. The court did not give technical definitions of the lesser offenses. Having fully defined the elements of rape consummated, it was not necessary to repeat the elements of rape attempted. Instead

of defining assault and battery the court gave an apt illustration. If more was desired counsel should have made request.

Counsel now appearing in behalf of defendants had no part in the trial. Change of counsel, however, works no change in law or procedure.

The court, after defining the issues relative to rape and the lesser offenses, stated to the jury:

"If you fail to find the defendants guilty it would be your duty to return a verdict of not guilty; if you find beyond a reasonable doubt that the defendants are guilty there is no consideration that will excuse you from rendering a verdict of guilty. You have no right to consider sympathy; you have no right to consider possible penalty; you have no right to consider any or either of these things, excepting to impress upon your minds the gravity and seriousness of the matter and the necessity upon your part of exercising good judgment in the matter; but if convinced beyond a reasonable doubt of the guilt of the accused, you have only one verdict to render, and that is a verdict of guilty."

The instruction left it to the jury to acquit or find defendants guilty of rape or one of the lesser offenses and is not open to the criticism that it led the jury to believe that one verdict, and only one verdict, and that a verdict of guilty, could be rendered. There was no error in the instruction.

It is claimed that the sentences to imprisonment from 12 to 30 years constitute cruel and unusual punishment. There is no merit in this. The statute (3 Comp. Laws 1915, § 15211 [3 Comp. Laws 1929, § 16727]) provides imprisonment for life or any such period as the court in its discretion shall direct.

Sixty-three days after the convictions the court imposed sentences. Cause for the delay does not appear. There was no error in the delay.

Affirmed.

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

GEORGE v. DANIELS.

1. BOUNDARIES—ACQUIESCENCE.

To establish boundary line by acquiescence, there must exist doubt or dispute as to where line is, and resolving of doubt or composing difference by agreement upon line.

2. SAME.

Where doubt existed as to location of boundary line, but no showing was made that said doubt had been composed by agreement, tacit or otherwise, boundary by acquiescence has not been established.

Appeal from Branch; Johnson (Clayton C.), J. Submitted January 14, 1931. (Docket No. 131, Calendar No. 35,271.) Decided February 27, 1931.

Bill by William M. George and another against J. E. Daniels and another to enjoin the cutting of a tree near a boundary line. Decree for plaintiffs. Defendant Daniels appeals. Reversed.

H. H. Palmer, for plaintiffs.

Frank C. Sherman (*Howard W. Cavanagh* and *Walter P. North,* of counsel), for defendant Daniels.

WIEST, J. A large maple tree stands in front of lot 163, of the northern division of the village of Quincy. Lot 163 is at the northeast corner of Chicago and Arnold streets, and defendant's chain of title calls for the west half and the west eight feet in width of the east half of the lot. Plaintiffs' chain of title calls for the east half of the lot, less the mentioned eight feet. Defendant has a gasoline filling station on his lot and the maple tree stands in the way of a suitable approach to his place of business, and, having obtained permission from the village authorities, he was about to remove the tree when plaintiffs filed the bill herein to enjoin him, claiming that the tree is on the division line, if extended into the street, and, therefore, the tree, or at least one-half of it, is in front of their property. A temporary injunction saved the tree, and the suit developed into a division-line controversy. The circuit judge found that the maple tree marked the division line by reason of adverse possession by plaintiffs, and entered decree to such effect, but dismissed the bill as to the village. Defendant Daniels appealed.

The division line has not been established by adverse possession, and the court below was in error in holding that it had been so fixed. The claim of adverse possession by plaintiffs is abandoned in this court.

Has the division line been fixed at the tree by acquiescence? The plat of the northern division of the village, executed and recorded in 1856, gives no dimensions to lot 163, or scale, monuments, metes or bounds, and nothing from which a survey can be made.

Until 1916, there was a common interest in the owners of each part of the lot and no occasion for any controversy over the division line. Defendant purchased in 1927. The record discloses that, instead of the establishment of the division line by acquiescence, there has existed a controversy over the division line. Since plaintiffs purchased in 1916, there has been doubt as to where the division line is, and acts by plaintiffs in accord with their claim that the tree marks the line, but there is no showing that the doubt about the line has been composed by agreement, tacit or otherwise.

We said in *Hanlon* v. *Ten Hove,* 235 Mich. 227 (46 A. L. R. 788):

"We have quite uniformly held that the agreement made the basis of such acquiescence should be one based on a doubt or dispute between the parties as to where the line is and a resolving of the doubt or the composing of their differences by an agreement upon a line."

In the case at bar the doubt existed; there was dispute about the line but never a composing of the dispute by an agreement upon the line. There is a marked difference between title by adverse possession and establishment of a division line by acquiescence; in the one case the possession must have been hostile, and in the other a doubt composed by agreement.

There is no occasion to recite the testimony. We cannot hold that the division line has been fixed by acquiescence.

The bill is dismissed, with costs to defendant.

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

WILLIS *v.* WILLIS' ESTATE.

1. WILLS—EXECUTORS AND ADMINISTRATORS—CONTRACT FOR SERVICES—ACCEPTANCE.

   Under contract to compensate by will married woman for her services, it was not necessary that testator inform her of provision made for her so that she be given opportunity to accept or reject same, because such opportunity was afforded when will was probated.

2. SAME—MARRIED WOMEN.

   Married woman accepting provision for herself and husband in will for her services is bound thereby unless will gave estate to husband and nothing to her.

3. HUSBAND AND WIFE—LIFE ESTATE BY ENTIRETIES.

   Life estate granted husband and wife by entireties accords all usufructs to husband, and therefore wife takes nothing.

4. SAME—SURVIVORSHIP NECESSARY ELEMENT OF ESTATE BY ENTIRETIES.

   Life estate granted husband and wife is by entireties if it does not end until death of survivor, but if life estate ends at death of either tenant there exists no estate by entireties, because without right of survivorship there exists no estate by entireties.

5. WILLS—EXECUTORS AND ADMINISTRATORS—LIFE ESTATE IN COMMON—ACCEPTANCE.

   Where will devised life estate in common to husband and wife as compensation for wife's services to testator, her acceptance thereof is bar to claim against estate for said services, since she received valuable estate as compensation therefor.

Error to Wayne; Smith (Guy E.), J., presiding. Submitted January 6, 1931. (Docket No. 19, Calendar No. 35,338.) Decided February 27, 1931.

In the matter of the estate of Merritt Willis, deceased, Lizzie Willis presented her claim for per-

On the question as to creation of estate by entirety, see annotation in 30 L. R. A. 306 *et seq.;* 33 L. R. A. (N. S.) 166.

sonal services. Judgment for plaintiff. Defendant brings error. Reversed.

John B. McIlwain and *George E. Eckert,* for plaintiff.

Dykema, Jones & Wheat, for defendant.

WIEST, J. This is a claim against an estate for personal services rendered the deceased by his sister-in-law, a married woman. The services were rendered and were not gratuitous, but compensation was left to the bounty of the deceased to be awarded by will. In his will the deceased provided:

"I give, devise and bequeath the use of the premises located at 4009–11 Livernois avenue to Peter Willis and Elizabeth Willis to be held by them until the death of one of said parties, at which juncture said property is to fall into the residue of said estate."

The will was probated, and claimant and her husband are enjoying the use and occupation of the premises and the considerable revenue afforded by two stores and many rentable rooms. The will was executed November 3, 1927. The testator died February 3, 1928. March 18, 1927, claimant and her husband signed the following statement and release:

"Whereas, Merritt Willis, is and has been a resident of the city of Detroit for a long period of time, residing at 4011 Livernois avenue, Detroit, Michigan.

"And whereas, his brother, Peter Willis and Elizabeth Willis, did on the 20th day of Dec., 1924, come to live with him at the above address, and are now living with him as aforesaid, and whereas, the said Merritt Willis has been paying all the bills in

connection therewith of every nature and whereas, the said Peter Willis and his wife, Elizabeth, have so resided without the expenditure of any money, with the exception of a personal nature, such as clothes, and whereas, their daughter, Sadia Willis, has also resided with them for some period of time.

"Now therefore, in consideration of the sum of one ($1) dollar, and other valuable considerations to them in hand paid by Merritt Willis, the receipt whereof is hereby acknowledged, the said Peter Willis and Elizabeth Willis do each individually and jointly hereby release the said Merritt Willis from every and all claims of any nature whatsoever that they may now have or may hereafter acquire by reason of their living in the home of the said Merritt Willis and by reason of their relations as aforesaid."

Claimant's husband testified:

"I asked him what reasons he wanted us to sign that for, and he said he would make a new will. To save trouble, he said he would make a new will to secure Mrs. Willis and me what is due to her. * * *

"I didn't say a word. I went over there and signed it."

The release stated facts established by evidence.

The circuit judge instructed the jury:

"If you find from the evidence in this case that at the time the plaintiff signed the release dated March 18, 1927, Merritt Willis was indebted to plaintiff for the services rendered him as his housekeeper under the agreement to pay her for her services but for which he had not paid, and that she signed the release at his request and on reliance on his assurances that it was not to beat her out of her pay for services but that he was going to make a new will, and this was to save any trouble; giving her to understand at the time that she would be provided for in the will, and that in signing the said re-

lease she did not intend to relinquish her right to payment for her services, and if you further find that she was not thereafter informed by Merritt Willis of any provision he had made for her, or was going to make for her, giving opportunity to accept or reject the same in lieu of the amount due her for services, then I instruct you that this release would not be binding or a bar to her right to recover payment for such services.

"I instruct you as a matter of law that the bequest in the will to Peter and Elizabeth, his wife, of use of the premises at Livernois street, to terminate at the death of either one of them, did not convey any separate estate or interest to Elizabeth Willis, as under the law such a bequest vests the right to the use, and premises, and rents and profits of the property in Peter Willis alone, and not in husband and wife jointly."

Manifestly compensation was to be awarded by will. It was not necessary that testator inform claimant of the provision made for her in the will and give her "opportunity to accept or reject the same." Such opportunity was afforded when the will was probated, and at that time claimant elected to take under the will, and she is bound by such election unless the will gave her and her husband a life estate by entirety, and, therefore, accorded her husband all the usufructs. The circuit judge, in the quoted instruction, considered that the life estate was one by entirety, and, therefore, claimant received nothing. The court was in error.

It is true that a life estate granted a husband and wife is by entirety if it does not end until death of the survivor. *Truitt* v. *City of Battle Creek,* 205 Mich. 180. But if a life estate ends at the death of either tenant, as in the case at bar, then there exists no estate by entirety. Without right of survivor-

ship there is no estate by entirety. By the terms of the devise the life estate will end at the death of either tenant. Under the devise claimant and her husband are tenants in common and claimant, as a cotenant, by acceptance under the will, has received a valuable estate as compensation for services rendered the deceased.

Under the evidence, the court should have granted defendant's motion for a directed verdict.

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

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

PINE SHORES REALTY CO. *v.* PARKER.

1. VENDOR AND PURCHASER—MODIFICATION OF CONTRACT—SUMMARY PROCEEDINGS.

   Modification of terms of payment under land contract, if made and performed by vendees, is defense in summary proceedings by vendor to obtain possession.

2. SAME—RESCISSION—FRAUD.

   If vendor, by accepting payments in accordance with terms stated by his attorney, ratified claimed modification of land contract and then repudiated modification, it constituted no fraud relating back to origin of contract, and therefore afforded no ground for rescission.

3. SAME—MODIFICATION OF CONTRACT.

If acceptance by vendees of offer by vendor's attorney modified time and terms of payment due under land contract, it called for unconditional performance by vendees.

4. SAME—ASSIGNMENTS—FORFEITURE—PARTIES—SUMMARY PROCEEDINGS.

Failure of vendor to give notice of forfeiture to vendees' assignee and to make assignee party defendant in summary proceedings may be urged on trial of case.

5. SAME—RESCISSION—FRAUD.

Vendees' suit for rescission of land contract and recovery of money paid thereunder was properly dismissed, where bill confessed default in payments, and fraud was predicated upon breach of alleged modification of contract by vendor.

Appeal from Charlevoix; Gilbert (Parm C.), J. Submitted January 9, 1931. (Docket No. 73, Calendar No. 35,292.) Decided February 27, 1931.

Bill by Pine Shores Realty Company, a Michigan corporation, and others, against John H. Parker to rescind a land contract, enjoin summary proceedings, and for other relief. Plaintiffs appeal from an order dismissing the bill. Affirmed.

Smith & Searl, for plaintiffs.

J. M. Harris, for defendant.

WIEST, J. The bill in this case was filed to rescind a land contract, recover money paid, obtain damages, have a vendee's lien, and restrain a summary proceeding. On motion of defendant the bill was dismissed for want of equity and plaintiffs remitted to remedy, if any, at law.

The land contract was executed May 1, 1926, with defendant as vendor and plaintiffs Buys and White vendees. June 2, 1926, the vendees assigned their

interest in the contract to plaintiff Pine Shores Realty Company. The land contract called for partial payments, which were made for a time and then there was default, and subsequent payments of smaller amounts made, it is claimed, in accord with terms stated in a letter written by defendant's attorney after notice of default had been given. The payments so made did not meet the terms of the land contract, and defendant commenced a summary proceeding to oust plaintiffs. Claiming that acceptance of the money paid in accord with the terms stated in the attorney's letter and known to defendant (the letter having been written in his presence), and then commencing the summary proceeding, constituted a fraud upon them, and, therefore, grounds for rescission, plaintiffs filed this bill.

Consideration is limited to allegations in the bill, the land contract annexed thereto, and the assignment, by the vendees, to the Pine Shores Realty Company.

May 2, 1928, the attorney for defendant wrote James and John Buys and Mr. White a letter, from which we quote:

"Your contract with John Parker for the purchase of the property known as Springwater Beach resort, has been the subject of discussion with me personally since last October. The record discloses that there is not one payment provided for in this contract that has been met on time. There is now due on the contract for interest, $643.50. Besides that, you are in arrears for $3,000 of the payment due August 1, 1927. Mr. Mitchell is here this morning and proposes to pay Mr. Parker on account of this contract, $643.50 interest, and $1,000 on principal, provided that he releases nine lots, the release of which amounts to $1,500. The 1927 tax has been returned. Mr. Parker would be obligated, under the

terms of his contract, to release these lots, provided the contract was not in arrears, and would do it without question. * * *

"I am advising now, and, so far as I am concerned, this is final, that if Mr. Parker is paid on or before the 9th day of May the interest due him, now computed to the first of May at $643.50 and $1,500 on the principal, that he will wait until August first for the balance of this payment, or $1,500.

"On the payment of the balance of this past due payment, and interest on the $1,500 from May first to August first, then Mr. Parker will revise the contract if you desire, and, if you elect to do so, give you a deed and take a mortgage, or an amendment to the contract making the balance of the payments smaller and extending the time for completion of the payments, with provision that you may pay up at any time.

"Failing to do this, I will bring suit for Mr. Parker against the purchasers under the contract individually for the recovery of the payments and interest now due.

"On payment of the $2,143 on or before May 9, 1928, Mr. Parker will agree in writing to release the lots and apply the release price on the payment of the $1,500 extended to August 1, 1928."

The bill alleges:

"The terms of the offer made in such letter were accepted by plaintiffs, who, in pursuance thereof and in reliance thereon, paid to defendant the following sums: May 8, 1928, six hundred forty-three dollars and fifty cents ($643.50) interest and fifteen hundred dollars ($1,500) principal; May 17, 1928, one hundred ($100) for the release of lot 87, which payment by the terms of said letter of May 2d was to apply on the $1,500 due August 1st. On or about August 1, 1928, plaintiffs paid to defendant the sum of $1,200. All of said payments were accepted by the defendant. Plaintiffs thereupon requested de-

fendant to release certain lots which had been resold by them and which, under the terms of said contract and of said letter, they were entitled to have released to them. Defendant, however, wrongfully refused to execute said releases or deeds. Plaintiffs then informed the defendant that they were able and willing to pay to him the balance of three hundred dollars ($300) due August 1st, under the terms of said letter if he would perform the agreements on his part to be performed and execute said releases and deeds, but defendant refused to do so."

Modification of terms of payment under the contract, if made and performed, was a defense to be made at law in the summary proceeding. If defendant, by accepting payments, made in accord with the terms stated by his attorney, ratified the claimed modification of the contract, and then repudiated the modification, it constituted no fraud relating back to the origin of the contract and afforded no ground for rescission. No fraud was alleged impeaching the original contract. Assuming, but not deciding, that acceptance of the offer in the letter modified the time and terms of payments due under the contract, then, it certainly called for unconditional performance by plaintiffs. Plaintiffs attached a condition to the payment of the last $300. While in arrears plaintiffs could not demand the release of any lots. The mentioned condition was not justified, and, at the time of the filing of the bill herein, plaintiffs were in default.

Failure to make the assignee of the vendees a party defendant in the summary proceeding, if fatal, can be urged in the trial of that case, and so can the failure, if any, to give notice of forfeiture to the assignee.

The bill states no ground for rescission of the original contract, nor of the contract if modified as claimed, confesses default in payments, alleges modification by forbearance of defendant and gratuitous departure from strict performance, and predicates fraud upon breach of the alleged modification. If such warrants rescission, recapture of payments, damages and a vendee's lien, then a vendor imperils a valid contract by later extending grace to the vendee. Of course, rescission cannot be had in the summary proceeding; nor can it be had under the bill herein.

The decree in the circuit court is affirmed.

Plaintiffs may, within 15 days, if advised that the bill can be amended so as to state a case, in view of this opinion, amend the bill.

Defendant will recover costs.

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

In re MCBRIDE'S ESTATE.

1. HUSBAND AND WIFE—DOWER RIGHTS GIVE WIFE NO RIGHT TO PAYMENTS ON LAND CONTRACT.

   That wife having inchoate dower right in husband's land joined with him in executing land contract thereon, would give her no right to payments either before or after husband's death.

2. SAME—ESTATES—MERGER OF FEE AND LIFE ESTATE—USE AND OCCUPATION.

   Quitclaim of life estate to fee owner and wife did not modify fee, but it either merged life estate in fee, or, at most, carried use and occupation of premises to husband and wife during lifetime of life tenant; fee remaining in husband.

3. ESTATES—ONLY ONE ESTATE IN FEE SIMPLE EXISTS.
There can exist but one estate in fee simple to a particular parcel of land.

4. SAME—HUSBAND AND WIFE—LIFE ESTATES.
If quitclaim of life estate to fee owner and wife passed estate to them independent of fee, it ended with death of life tenant.

5. HUSBAND AND WIFE—LIFE ESTATE BY ENTIRETIES.
Husband is entitled to all benefits of life estate held by him and his wife by entireties.

6. SAME—VENDOR AND PURCHASER—INTEREST IN LAND CONTRACT BELONGS TO HUSBAND'S ESTATE WHERE FEE WAS IN HIM.
Where fee owner and wife executed contract for sale of land to which he and his wife had life estate during lifetime of life tenant, and life tenant died before husband, all sums due under contract passed to administrator of husband's estate as personalty.

Error to Oakland; Gillespie (Glenn C.), J. Submitted January 13, 1931. (Docket No. 92, Calendar No. 35,210.) Decided February 27, 1931.

In the matter of the estate of Joseph McBride, the administrator listed the vendor's interest in a land contract as an asset of the estate. From a judgment affirming such action, his widow, Anna Elizabeth McBride, brings error. Affirmed.

Louis H. Wolfe (*Leopold D. Mayer,* of counsel), for appellant.

Patterson & Patterson, for appellee.

WIEST, J. In 1914, Joseph McBride owned in fee, subject to a life estate in Stephen S. Cooper, a parcel of land in Troy township, Oakland county. In 1924, Mr. Cooper quitclaimed his life estate to McBride and wife. In January, 1925, Mr. McBride

sold the premises on land contract to Isaac Dreifuss. Mrs. McBride joined with her husband in executing the land contract. Mr. McBride died intestate in February, 1929. Mr. Cooper died in February, 1927. The administrator of Mr. McBride's estate listed the amount unpaid on the land contract as an asset of the estate. Mrs. McBride objected to such listing on the ground that, under the law, the amount unpaid on the land contract belonged to her, and, by writ of error, reviews judgment to the contrary.

When the land contract was executed Mrs. McBride had an inchoate right of dower in the premises. This gave her no right to the payments on the land contract, either before or after her husband's death. *Marshall* v. *Reed,* 237 Mich. 336.

The quitclaim of the life estate by Cooper to the fee owner and his wife did not at all *modify* the fee; it either merged the life estate in the fee, or, at the most, being to the fee owner and his wife, carried use and occupation of the premises during the lifetime of Mr. Cooper. There can exist but one estate in fee simple to a particular parcel of land. Such estate was in Mr. McBride. If the quitclaim by Cooper of his life estate passed an estate to Mr. and Mrs. McBride, independent of the fee, it ended with the death of Mr. Cooper. Mr. Cooper died before Mr. McBride. Mr. and Mrs. McBride did not sell the land as tenants by the entirety, for Mrs. McBride held no such estate therein. Mrs. McBride joined in the land contract to release her inchoate right of dower and to permit use and occupation by the vendee during the lifetime of Mr. Cooper. If the quitclaim of the life estate by Mr. Cooper vested that estate in Mr. and Mrs. McBride as tenants by the entirety, then, during the lifetime of Mr. Cooper, Mr. McBride was entitled to all benefits thereunder,

and, inasmuch as the life estate ended with the death of Mr. Cooper and before the death of Mr. McBride, we cannot hold that Mrs. McBride takes the whole or any part of the payments upon the land contract after the death of Mr. McBride. Mr. McBride, owner of the fee, was the vendor in the land contract, and, upon his death, all sums unpaid thereon passed to the administrator of his estate as personalty. *Detroit Trust Co.* v. *Baker,* 230 Mich. 551. This holding disposes of all questions requiring discussion.

The judgment in the circuit is affirmed, with costs against appellant.

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

KIRBY *v.* SAGINAW HOTELS CO.

1. CORPORATIONS—RIGHT OF CONSOLIDATION—STATUTES.

   Under Act No. 84, Pub. Acts 1921, giving to corporations right of consolidation by three-fourths vote of capital stock (part 1, chap. 3, § 2), and providing that corporations whose act of incorporation is repealed shall be subject to provisions of said act (part 5, chap. 3, § 2), corporation organized previous to enactment of said statute has right of consolidation.

2. SAME—CONFERRING RIGHT TO CONSOLIDATE TAKES NOTHING FROM PREVIOUS CORPORATE POWERS.

   Conferring on corporations organized under other statutes which are repealed the right to consolidate takes nothing from cor-

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On the question as to right of corporations to consolidate, see annotation in 52 L. R. A. 369 *et seq.*

porate powers, rights, privileges, and immunities theretofore enjoyed and reserved to them under the statute (Act No. 84, Pub. Acts 1921, part 5, chap. 3, § 2).

3. SAME—CONSOLIDATION BY LESS THAN UNANIMOUS VOTE—STATUTES.

Stockholder acquiring corporate stock after legislature had conferred on corporation right to consolidate may not complain that consolidation with another corporation was not by unanimous vote of stockholders, where statute was complied with.

Appeal from Saginaw; Martin (William H.), J. Submitted October 30, 1930. (Docket No. 131, Calendar No. 35,269.) Decided February 27, 1931. Rehearing denied June 1, 1931.

Bill by Edith E. Kirby against Saginaw Hotels Company, Inc., and others to set aside a consolidation of corporations and for other relief. Decree for plaintiff. Defendants appeal. Reversed.

O'Keefe & O'Keefe, for plaintiff.

Humphrey, Grant & Henry, for defendants.

CLARK, J. Plaintiff acquired from her husband, in 1923, 834 shares of capital stock in Franklin Hotel Company, a corporation organized under Act No. 232, Pub. Acts 1903 (2 Comp. Laws 1915, § 9017 *et seq.*).

Act No. 84, Pub. Acts 1921 (2 Comp. Laws 1929, § 9943 *et seq.*), repealed Act No. 232 and many other acts, and, in chapter 3, pt. 1 (2 Comp. Laws 1929, §§ 9961–9969), gave right of consolidation.

In 1928, Franklin Hotel Company, whose corporate purpose was to do a hotel business, was consolidated with Saginaw Hotels Company, a corporation, organized under said Act No. 84, whose corporate purpose was as its name implies. Plaintiff,

the dissenting stockholder, did not consent to consolidation; she declined expressly. Later she filed this bill to set aside consolidation, for accounting, and for other relief. She had decree from which the company produced by consolidation, Saginaw Hotels Company, Inc., and said Saginaw Hotels Company have appealed.

If Franklin Hotel Company had statutory right of consolidation, it was conferred by Act No. 84, Pub. Acts 1921. Appellee argues the right was not so conferred. The question is on the last section of the act. The section provides that all corporations whose act of incorporation is repealed by this act shall hereafter be subject to the provisions of this act, and the section saves to such corporations powers, rights, privileges, and immunities conferred by the act under which incorporation was had. Conferring on such corporations the right to consolidate takes nothing from the corporate powers, rights, privileges, and immunities theretofore enjoyed. Act No. 84, Pub. Acts 1921, gave to Franklin Hotel Company right of consolidation under the act, which is by a vote of at least three-fourths of the legally issued capital stock. The right of consolidation was in such company at the time plaintiff acquired her stock, at the time she became a stockholder.

Passing the question of the authority of the legislature, under its reserved power (art. 12, sec. 1, State Constitution) to alter, amend, repeal, or abrogate all rights, privileges, or franchises of a corporation, we consider whether plaintiff may complain, having acquired her stock after the legislature had conferred on the corporation the right of consolidation. Under the weight of authority she may not.

From 14 A. C. J. p. 1060, the following:

"A consolidation of private corporations requires the unanimous consent of the stockholders unless a provision for consolidation without such unanimous consent of stockholders may be read into the contract by which the status of the stockholder was acquired, as when a statute existing at the time of subscription or at the time of the purchase of the shares authorized a consolidation with the assent of a specified proportion of stockholders, or when the corporate charter, or an amendment thereto, enacted under the reserved power of the legislature to amend, expressly authorizes consolidation without the unanimous consent of the stockholders."

And from 7 R. C. L. p. 167:

"A subscription to the stock of the corporation is deemed to be made subject to the right of an amendment to the charter permitting a consolidation of the corporation with another corporation, and a consolidation effected pursuant to a statute subsequently enacted is valid even as against a stockholder who does not consent to the amendment or the consolidation effected pursuant thereto. *A fortiori* is this true where the dissenting stockholder acquired his interest in the constituent company, whose consolidation is opposed, after the amendatory statute authorizing the consolidation was enacted; thus entering the company with such a statute existing the complaining stockholder necessarily did so subject to the provisions thereof and has no ground of complaint."

See 7 Fletcher Cyc. Corp., § 4685; note, 52 L. R. A. 384; note, 19 Am. & Eng. Ann. Cas. 1266; *Colgate* v. *U. S. Leather Co.*, 73 N. J. Eq. 72 (67 Atl. 657); 75 N. J. Eq. 229 (72 Atl. 126, 19 Ann. Cas. 1262); *Mayfield* v. *Alton Ry. Gas, etc., Co.*, 198 Ill. 528 (65 N. E. 100); *Bish* v. *Johnson*, 21 Ind. 299.

It is suggested that consolidation was produced by fraud, but this calls for no discussion.

Plaintiff has established no infirmity in the consolidation and no just cause for complaint.

Reversed, and bill dismissed, with costs.

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

CURTIS *v.* CURTIS.

1. DIVORCE—FILING SECOND DECREE AFTER ENROLLMENT OF FIRST.
   If irregularity in filing second decree in divorce suit after enrollment of first decree avoided second one, it leaves first decree unaffected.

2. SAME—APPEAL AND ERROR.
   Denial of defendant's motion to strike second decree in divorce suit from record is immaterial, where it would have availed him nothing had his motion been granted.

3. SAME—NOTICE.
   Defendant husband appearing by attorney in divorce suit is entitled to notice of all subsequent proceedings.

4. CONTEMPT—DIVORCE—NOTICE OF COURT ORDER.
   Husband appearing in divorce suit by attorney and having actual notice of decree against him for support of child was properly adjudged guilty of contempt, where he wilfully disobeyed said order, notwithstanding irregularity consisting of want of notice to him of settlement and signing decree (3 Comp. Laws 1929, §§ 12773, 12775).

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted January 15, 1931. (Docket No. 158, Calendar No. 35,332.) Decided February 27, 1931.

In divorce proceedings by Yvonne Curtis against Harry Curtis, defendant was adjudged guilty of contempt for failure to pay money for support of child. Defendant appeals. Affirmed.

Ernest C. Sneed, for plaintiff.

George K. Williams (*Louis H. Wolfe* and *Leopold D. Mayer,* of counsel), for defendant.

WIEST, J. Defendant, by appeal, brings to review a decretal order adjudging him guilty of contempt for refusing to pay money for the support of his minor child.

December 20, 1920, plaintiff and defendant were divorced by decree of the Wayne circuit court, and defendant was adjudged to pay to plaintiff $7.50 per week for the support of their child. January 10, 1921, the decree was enrolled. January 26, 1921, another decree, carrying the date of the first decree, was filed. This decree also dissolved the marriage, awarded plaintiff the care, custody, and maintenance of the minor child, and ordered defendant to pay to the clerk of the court, for the support of the child, the sum of $7.50 per week, commencing December 20, 1920. Both decrees ordered defendant to pay the same amount and for the same purpose. It was irregular to file the second decree after enrollment of the first. If the irregularity be held to void the second decree (a point we do not decide), it leaves the first decree unaffected, and, as that awarded what defendant has been adjudged in contempt for

not paying, he cannot escape. Defendant's motion to strike the second decree from the record was denied. If the motion had been granted it would have availed defendant nothing. He has not been injured. Without injury the technicality is of no decisive moment. *Michigan Insurance Co.* v. *Whittemore,* 12 Mich. 427; *In re Allen's Estate,* 240 Mich. 661.

Defendant attacks both decrees for want of notice of settlement and signing. Defendant appeared by attorney in the divorce case, and was, therefore, entitled to notice of all subsequent proceedings. His affidavit states that he had no notice of the decrees, and the calendar entries disclose no proof of service. The notice, if given, was to his attorney, and there is no showing made by the attorney of want of notice. If we assume want of notice and subsequent irregularity, it does not help defendant.

In *Union Trust Co.* v. *Detroit Trust Co.,* 240 Mich. 646, the notice of settlement of the decree was bad, because too short, and, therefore, no notice, but Mr. Justice CLARK, speaking for the court, said:

"There is no showing of prejudice. * * * It is not contended that the decree was not proper and correct on the pleadings and proofs then before the court. The court ought not to set aside a decree for a harmless irregularity, or just to attain perfection of record. It ought also to be made to appear that the irregularity affected injuriously the interest of a party."

Counsel for defendant contend:

"To sustain contempt proceedings, notice of the entry of a decree is a jurisdictional prerequisite."

The statute, 3 Comp. Laws 1929, § 12775 (3 Comp. Laws 1915, § 11445), obviates need of notice when there is personal service of process or appearance.

In *Herman* v. *Wayne Circuit Judge,* 236 Mich. 604, we held that this section "necessarily implies that the statute and court rules relative to essential notices have been observed, because, if observed, then full notice is given." This, however, does not help defendant, for actual notice of the decree and of his obligation thereunder was most forcibly brought home to him.

We quote from the calendar entries appearing in the record:

"1921. * * *

"Jan. 27. Petition for attachment, signed and filed.

"Jan. 27. Order for attachment signed and filed; * * *

"Apr. 27. Attachment returned, served and filed, * * *

"1922.

"Apr. 28. Petition and order to show cause signed, filed and entered.

"Sept. 9. Petition for attachment filed.

"Sept. 9. Order for attachment signed, * * *

"1923.

"Oct. 12. Petition for attachment filed.

"Order for attachment signed, filed and entered. * * *

"1929.

"Dec. 10. Petition for attachment filed.

"Dec. 10. Order for attachment signed and filed.

"1930.

"Apr. 5. Recognizance bond filed."

Defendant testified:

"I remember proceedings before Judge Jayne of the circuit court. He asked me if I have $100, and I told him yes. Well, he told me to pay it to the friend of the court, $100.

"*Q.* Did he say what that $100 was for?

"*A.* He didn't say anything and I didn't either. He just asked me if I had $100 and I had to pay it. Well I had $50 of it and I paid him $50, the next day, or paid the friend of the court $50.

"*Q.* Did Judge Jayne tell you that it was on the decree of divorce?

"*A.* No. He did not. He said it was alimony, that is all. Back alimony. I didn't have a chance to say anything about it. * * *

"*Q.* You were ordered to pay $10 a week, were you not at the time you paid the $50 before Judge Jayne?

"*A.* I don't know, but he ordered me to pay $100. Then I paid regularly in 1922. Then I stopped again because I came back here to Detroit and I supposed she left the country. I was sure about it."

This man knew all about the decree. Defendant's claims that he supposed plaintiff and the child were in France, and that he was not permitted to see the child or learn where the child was, are not convincing. He made no effort to see the child. At one time he agreed to go and see the child and then gave as an excuse for not going that he had to make a trip to Chicago. He has not purged himself of the contempt. He has been wilfully disobedient to the order of the court and has shamelessly neglected his child.

The order appealed from is affirmed, with costs against defendant.

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

STATE OF MICHIGAN *v.* JOHNSON.

1. JUDGMENT—RES JUDICATA—PUBLIC OFFICERS—LIABILITY FOR SALARY ILLEGALLY PAID.

   Decision of Supreme Court that superintendent of public instruction was not legally entitled to additional salary for services as director of vocational education (Act No. 149, Pub. Acts 1919), or as director of vocational rehabilitation (Act No. 211, Pub. Acts 1921), is controlling in action against him by State to recover money so illegally paid to him.

2. PUBLIC OFFICERS—ACCOUNTING FOR MONEY EXPENDED—STATUTES.

   Failure of superintendent of public instruction to make report to county treasurer of money received for purpose of defraying expenses of teachers' county institutes, as required by statute (2 Comp. Laws 1915, §§ 5974, 5977), does not render him liable therefor, in absence of showing of loss to county by reason thereof.

3. SAME—LIABILITY FOR MONEY DEPOSITED IN PERSONAL ACCOUNT.

   Superintendent of public instruction is liable for money received by him in his official capacity and deposited in his personal account, for which he has not satisfactorily accounted.

Error to Ingham; Collingwood (Charles B.), J. Submitted January 7, 1931. (Docket No. 33, Calendar No. 35,137.) Decided February 27, 1931.

Assumpsit by the State of Michigan against Thomas E. Johnson, former superintendent of public instruction, to recover moneys unlawfully retained while an incumbent of said office. Judgment for plaintiff. Defendant brings error. Affirmed in part. Reversed in part.

Paul W. Voorhies, Attorney General, and *William J. Galbraith,* Special Assistant Attorney General, for plaintiff.

Carl H. Reynolds, for defendant.

CLARK, J. The State sued defendant Thomas E. Johnson, former superintendent of public instruction, to recover of him certain sums averred to have been received and retained by him unlawfully, while he was an incumbent of the office, and had judgment in a trial without a jury. Defendant brings error.

The judgment has four elements, all of which are challenged.

The first claim is salary received by defendant, beyond the salary of his office as fixed by law, as director of vocational education under Act No. 149, Pub. Acts 1919 (2 Comp. Laws 1929, §§ 7712–7722), from July, 1922, to September, 1926, averred to be the total sum of $6,375. The second claim is salary received by defendant beyond the salary of his office as fixed by law, as director of vocational rehabilitation under Act No. 211, Pub. Acts 1921 (2 Comp. Laws 1929, §§ 7723–7738), from January, 1925, to September, 1926, averred to be the total sum of $2,100. That judgment was rendered rightly against defendant on these claims is settled by *People, ex rel. Johnson,* v. *Coffey,* 237 Mich. 591 (52 A. L. R. 1).

The third claim is a certain total sum received from four certain county treasurers pursuant to 2 Comp. Laws 1915, chapter 116, § 5974, relating to teachers' institutes, quoting:

"(5974) SEC. 5. For the purpose of defraying the expenses of rooms, fires, lights, or other necessary charges, and for procuring teachers and lecturers, the said superintendent, or the person duly authorized by him to conduct said institute, may demand of the county clerk of each county for the benefit of which the institute is held, who shall thereupon draw an order on the county treasurer of his county

for such sum, not exceeding the amount of the institute fund in the county treasury, as may be necessary to defray the expenses of said institute; and the treasurer of said county is hereby required to pay over to said superintendent or duly appointed institute conductor, from the institute fund in his hands, the amount of said order."

The duty to account for such funds is set forth by 2 Comp. Laws 1915, § 5977, same chapter, quoting:

"(5977) SEC. 8. The superintendent of public instruction, or the conductor of the institute by him appointed, drawing money from the county treasurer, under section five of this act, shall, at the close of each institute, furnish to the county treasurer, vouchers for all payments from the same in accordance with this act, and he shall return to the county treasurer whatever of the amount that may remain unexpended, to be replaced in the institute fund."

The record is that Mr. Johnson received the money, and used it in meeting proper expenses of the particular teachers' institutes. No receipts or vouchers, showing the payments, were filed with the several county treasurers. He filed the receipts and vouchers in the office of the superintendent of public instruction. It is the State's contention that, as he has failed to account by filing the vouchers or receipts with the county treasurers, he is liable for the whole sum received, notwithstanding the record showing that he used the moneys for the lawful purposes for which they were provided. The contention is not sustained. The statute provides no penalty for failure to so account to the county treasurers, and no penalty may be supplied. He did not obey the law, but no loss or damage on that account is shown.

If a village treasurer were to fail to make his annual account and report to the common council, could a judgment, for that reason and in disregard of his lawful disbursements, be taken against him for the total of all sums received by him during the year? Surely not. Nor will judgment lie here.

We quote syllabus of *Bocard* v. *State, ex rel. Stevens, Trustee,* 79 Ind. 270:

"The failure of a township trustee to make an annual report of the receipts and expenditures of his township does not render him liable on his bond, unless some injury resulted to the township or other party interested by reason of such failure."

The fourth claim is a check for $822.68 to Mr. Johnson from Michigan State Teachers' Association deposited in his personal special bank account. He asserts that this account was for the convenience of his office, and that the funds were used for proper public purposes. The finding of the trial court that this sum so deposited by defendant in a personal account had not been satisfactorily accounted for, and that defendant is liable therefor, is not against the weight of the evidence, and must be sustained.

Judgment as to first, second, and fourth claims is affirmed, and, as to third claim, reversed. No costs.

Remanded for judgment.

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

PEOPLE v. BURREL.

CRIMINAL LAW—RAPE—STATUTORY RAPE—ACCESSORY—KNOWLEDGE THAT OFFENSE IS TO BE COMMITTED NECESSARY.

That statutory rape was committed in back seat of automobile by another would not render owner and driver of car guilty of said offense, as accessory, in absence of showing by prosecution that he had knowledge that said offense was to be committed; mere knowledge of what was happening when offense was being committed being insufficient to render him guilty (Act No. 175, Pub. Acts 1927, chap. 7, § 39).

Error to Berrien; White (Charles E.), J. Submitted January 15, 1931. (Docket No. 147, Calendar No. 35,029.) Decided February 27, 1931.

Cleveland Burrel was convicted of statutory rape. Reversed, and defendant discharged.

Charles W. Gore, for appellant.

Paul W. Voorhies, Attorney General, *Harold J. Waples,* Assistant Attorney General, and *Wilbur M. Cunningham,* Prosecuting Attorney, for the people.

CLARK, J. Defendant was convicted of statutory rape, of having carnal knowledge of a female under the age of 16 years. 3 Comp. Laws 1915, § 15211. To review judgment he brings error.

The prosecution is predicated on section 39, chap. 7, Act No. 175, Pub. Acts 1927:

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted,

indicted, tried and on conviction shall be punished as if he had directly committed such offense."

One Bracken, a young married man, had sexual intercourse with the girl, and pleaded guilty of the offense. Defendant had nothing to do with her. The question is whether defendant did procure, counsel, aid, or abet in the commission of the crime.

Defendant and Bracken lived at Benton Harbor. The girl lived just out of the city. She and Bracken were friendly. She had written him letters and had given him a photograph of herself. Defendant had an automobile. One evening Bracken had an engagement to meet the girl, and asked defendant to drive him out on the south side of the city. They went to a gasoline station. Bracken purchased gasoline. He directed the driving to a place where the girl got into the car and Bracken got into the back seat with her. Defendant drove a number of miles. Bracken was "loving" the girl. Defendant, as further directed, drove onto a dark road and stopped the car, leaving the motor running. Bracken had intercourse with the girl in the back of the car. Defendant sat in the front seat with arms over the steering wheel and his head resting on his arms. He said nothing to the girl, and took no part in the affair. The girl made no outcry, except to say, "Don't," once or twice to Bracken, and this seems from prompting of modesty rather than from thought of resistance. It is not known that defendant heard her—he says he did not. There is nothing in the record to show directly or by reasonable inference that defendant knew, when taking Bracken and the girl into the car and while driving, that Bracken intended statutory rape, if he did so intend, nor can such knowledge be inferred on this record. The mere fact that Bracken went riding with the girl does not support an inference of intended rape.

There is nothing in the record showing that defendant knew, after the car was stopped, what was happening in the back of the car, except what may be inferred, if anything. The case against defendant is that he, without knowledge of criminal purpose of Bracken, drove the car as directed, and that his guests had intercourse while in his car.

If defendant had knowingly provided and driven his car for Bracken to commit statutory rape, he might be held under the statute, as in *People* v. *Wood,* 56 Cal. App. 431 (205 Pac. 698), where one who procured a room for another knowing it was to be used to commit such offense was held as a principal. *State* v. *Pickel,* 116 Wash. 600 (200 Pac. 316, 204 Pac. 184); *People* v. *Chapman,* 62 Mich. 280 (4 Am. St. Rep. 857); *State* v. *Jackson,* 65 N. J. Law, 105 (46 Atl. 764). But, as it is not shown he had such knowledge, he ought not to be held.

If it be inferred that, after stopping the car, he knew what his guests were doing in the back of the car, it makes no difference, and as to this, we quote from 1 Cyc. Crim. Law (Brill), § 233:

"Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent."

If defendant is to be held on the result of the adventure, then he could be held likewise if the result had been an act of gross indecency, a taking of indecent liberties, or even murder.

Reversed, and defendant discharged.

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

HAMILTON MANFG. CO. *v.* POLL.

1. INJUNCTION—PATENTS—DECREE SHOULD BE DEFINITE.
   Decree enjoining infringement of patent should be definite and certain in its terms, so that defendants may know what they are restrained from doing.

2. PATENTS—INJUNCTION—DECREE IN GENERAL TERMS TOO INDEFINITE.
   Decree enjoining in general terms infringement by defendants of plaintiff's claims of patent is reversed, on appeal, where contest was narrowed on hearing to alleged infringement of automatic steering device on planting machine manufactured by plaintiff, on which it has patent.

Appeal from Allegan; Miles (Fred T.), J. Submitted January 9, 1931. (Docket No. 66, Calendar No. 35,214.) Decided February 27, 1931.

Bill by the Hamilton Manufacturing Company, a Michigan corporation, against Louis Poll and others, doing business under the assumed name of the Holland Celery Planter Company, to enjoin the infringement of a patent. Decree for plaintiff. Defendants appeal. Reversed, and remanded to take further proof, and for proper decree.

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

Diekema, Kollen & Ten Cate, for defendants.

CLARK, J. The bill was filed to enjoin infringement of patent and for other relief. Plaintiff had decree. Defendants have appealed.

The contest was narrowed at the hearing to alleged infringement of claims to an automatic steering device on a planting machine manufactured and sold by plaintiff on which plaintiff has patent No. 1,723,073. It is thus claimed:

"A frame having a swivel yoke and a caster wheel in said yoke, a guide wheel pivotally connected to said yoke and positioned ahead of said caster wheel and adapted to travel in a guide furrow."

Defendants also make and sell planting machines on which is an automatic steering device employing most of the elements combined in plaintiff's device, except the guide wheel, which is omitted, and, instead, a bent rod is used. The rod is attached to the hubs of the caster wheel instead of to the yoke as in plaintiff's device.

The question is whether defendants by their steering device have infringed plaintiff's claims of patent on its steering device. The decree enjoins in most general terms infringement by defendants of plaintiff's claims of patent; but the real question above stated is not determined. Plaintiff has not appealed. We think the matter of such importance to the parties that it should be determined. On the record and briefs before us we should decline to attempt to determine it.

Decree should be definite and certain in its terms that defendants may know what they are restrained from doing. 32 C. J. p. 368; *Ballentine* v. *Webb,* 84 Mich. 38 (13 L. R. A. 321). And see Walker on Patents (6th Ed.), § 697.

On the question of infringement, attention is called to Walker on Patents (6th Ed.), chap. 18; *Rathbun* v. *Wolverine Metal Specialties Co.,* 240 Mich. 603; *Case* v. *Brown,* 2 Wall. (U. S.) 320.

The decree in general terms requires defendants, pursuant to an assignment, to turn over to plaintiff any and all improvements to plaintiff's device. It does not specify any such improvement. The record is that defendants have no improvement.

There is some evidence, perhaps, that defendants in some instances have used plaintiff's steering device on their machines. If so, concededly, this should be enjoined.

Counsel raise no question of jurisdiction of the State court to determine infringement, but attention is called to *Paul* v. *Collins*, 191 Mich. 113.

The decree is set aside and the cause remanded, with leave to take further proof, and for proper decree. Costs to abide result.

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

MEZAK *v.* FOX.

1. EXCHANGE OF PROPERTY—RESCISSION—FRAUD.
   In suit for rescission of contract for exchange of property, holding of court below that fraud was established, *held*, justified by record.

2. SAME—TENDER IN BILL SUFFICIENT.
   Where plaintiffs in suit for rescission by court of contract for exchange of property on ground of fraud made full tender in their bill, no other tender was necessary.

3. SAME—LACHES—RETAINING POSSESSION AFTER SUIT FOR RESCISSION STARTED.

Claim by defendants that plaintiffs in suit for rescission are guilty of laches because they retained possession of property received after starting suit and making tender is without merit, since it was upon them to stand to their tender, save property, and restore what of value they had received in case they prevailed.

4. SAME—DECREE FOR RESCISSION PROPERLY TOOK ACCOUNT OF DISBURSEMENTS, BENEFITS, ETC.

In decreeing rescission of contract for exchange of property for fraud and to restore *status quo*, court properly took account of disbursement, benefits, and the like, as between parties.

Appeal from Kalamazoo; Weimer (George V.), J. Submitted January 20, 1931. (Docket No. 20, Calendar No. 35,131.) Decided February 27, 1931.

Bill by Stephen Mezak and another against Jeremiah Grant Fox and another for rescission of contract for exchange of real and personal property. Decree for plaintiffs. Defendants appeal. Affirmed.

Glenn R. Faling (*Harry C. Howard,* of counsel), for plaintiffs.

Clarence A. Bradford, for defendants.

CLARK, J. On March 25, 1929, plaintiffs sold and conveyed to defendants certain pieces of real estate or their equities therein and certain personal property in exchange for other real estate and personal property conveyed and sold by defendants to plaintiffs.

The property so transferred to plaintiffs was, as described by appellants, "the water power grist and flour mill and business located at the hamlet of Howardsville, in the county of St. Joseph," together with all grains, furniture, tools, etc., in the mill.

Plaintiffs commenced operating the mill on March 29, 1929, or perhaps a little later, and filed this bill for rescission on the ground of fraud on May 21, 1929. Plaintiffs had decree. Defendants have appealed.

The allegations of fraud relate chiefly to representations of income of the business, and to state, condition, repair, and utility of the property. There is much testimony *pro* and *con* on the issue of fraud. To set it forth will profit no one. We think, as did the trial court, fraud clearly established.

Plaintiffs, in their bill for rescission, made full tender. No other tender was necessary in this suit in which rescission by the court is prayed. *Witte* v. *Hobolth,* 224 Mich. 286.

Defendants argue that plaintiffs are guilty of laches in holding possession of the mill after suit was started. Defendants did not accept tender. It was upon plaintiffs then to stand to their tender, to save the property, so that, if they prevailed in the suit and the court required equity at their hands, they might restore what of value they received in the transaction. The argument has no merit. 3 Black on Rescission and Cancellation (2d Ed.), § 625; *O'Neill* v. *Kunkle,* 244 Mich. 653; *Augustyn* v. *Zawacki,* 250 Mich. 218.

In decreeing rescission and to restore *status quo,* the court properly took account of disbursements, benefits, and the like as between the parties. 3 Black on Rescission and Cancellation (2d Ed.), § 634 *et seq.*

No other question calls for discussion.

Decree affirmed. Costs to plaintiffs. Cause remanded.

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

EARL FRUIT CO. *v.* HERNDON FRUIT CO.

1. SALES—PRINCIPAL AND AGENT—APPEAL AND ERROR.
   In action for purchase price of carload of grapes claimed to have been sold to defendant through broker, question of fact as to whether purchase was made from plaintiff or from broker personally, *held,* rightly decided in favor of plaintiff.

2. APPEAL AND ERROR—FINDING OF COURT ON QUESTION OF FACT BINDING WHERE SUPPORTED BY EVIDENCE.
   In action for purchase price of carload of grapes claimed by plaintiff to have been diverted to another dealer on account of defendant, finding of trial court on question of fact, where supported by evidence, may not be disturbed by appellate court.

Error to Ingham; Collingwood (Charles B.), J. Submitted January 9, 1931. (Docket No. 74, Calendar No. 35,211.) Decided February 27, 1931.

Assumpsit by Earl Fruit Company, a California corporation, against Herndon Fruit Company, a Michigan corporation, for sale price of grapes. Judgment for plaintiff. Defendant brings error. Affirmed.

Carl H. Reynolds, for plaintiff.

Shields, Silsbee, Ballard & Jennings, for defendant.

CLARK, J. Plaintiff sued to recover sale price of two carloads of grapes received by defendant, and had judgment in a trial without a jury. Defendant brings error.

The cars were sold through Hoien, a broker at Lansing. As to first car, defendant contends that it bought from Hoien personally, not from plaintiff. Plaintiff contends it sold to defendant through Hoien as agent.

The evidence *pro* and *con* presented a question of fact, which the court rightly decided in favor of plaintiff.

The other car was diverted to a dealer in Jackson. Was this for the account of defendant, or of plaintiff, or Hoien? The trial judge found the diversion was for account of defendant, who must look to the dealer in Jackson, and that defendant is indebted to plaintiff for the price of the fruit. The evidence sufficiently supports the finding, and it may not be disturbed.

Affirmed.

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

DAVIS *v.* COHEN.

1. INNKEEPERS—STATUTES—CONSTRUCTION.
   Statute limiting liability of innkeeper (2 Comp. Laws 1929, § 8803) is in derogation of common law, and must be strictly construed.

2. APPEAL AND ERROR—EVIDENCE—SAVING QUESTION FOR REVIEW.
   Error in admission of hearsay testimony may not be considered by Supreme Court, where it was received without objection.

On liability of innkeeper for loss of money, jewelry or other valuables of his guest left with him for safe keeping, see annotation in 53 A. L. R. 1050.

3. INNKEEPERS—GUESTS—BAILMENTS—DEMAND—WAIVER.
   Formal demand by guest for return of property left with innkeeper was waived by his statement to guest's husband, in response to inquiry, in effect, that he could not and would not comply with demand for its return.

4. SAME—PRIMA FACIE CASE—DUTY OF DEFENDANT TO GO FORWARD WITH EVIDENCE.
   In action by guest under 2 Comp. Laws 1929, § 8804, for value of property left with innkeeper, *prima facie* case was made by showing that property was left in innkeeper's possession and refusal or neglect to return on demand, and it was upon defendant to go forward with evidence and show that loss was not caused by theft or negligence of himself or any of his servants.

5. SAME—PLAINTIFF'S PRIMA FACIE CASE MUST BE MET BY DEFENDANT.
   In said action, mere statement in plaintiff's proof that loss was due to robbery does not exonerate defendant, and his failure to prove that robbery was not committed by him or any of his servants entitled plaintiff to recover.

Error to Van Buren; Warner (Glenn E.), J. Submitted January 13, 1931. (Docket No. 94, Calendar No. 35,300.) Decided February 27, 1931.

Case by Mollye Davis against Irving I. Cohen for the value of property left with him as innkeeper. Judgment for plaintiff. Defendant brings error. Affirmed.

David Anderson, for plaintiff.

W. J. Barnard and *George F. Classon,* for defendant.

CLARK, J. Plaintiffs Davis were guests in defendant's hotel. They left a diamond and some money in the hotel safe, which were not returned. Having heard a rumor that a robbery of the safe was being

asserted by defendant, Mr. Davis asked defendant what he was going to do about it. Defendant replied that the safe had been robbed, and the matter was for the insurance company.

Nearly a year later plaintiffs began this suit asking judgment for value of the property. Mr. Davis was dropped as a party. Mrs. Davis had verdict and judgment for $250 (maximum amount under statute, 2 Comp. Laws 1915, § 6929 [2 Comp. Laws 1929, § 8803]). Defendant brings error.

Liability is asserted, and defended against, under the statute and not under the common law, on assumed or perhaps conceded compliance with the statute. Beale on Innkeepers, § 413. Our statute limiting the liability of an innkeeper is in derogation of the common law, and must be strictly construed. 14 R. C. L. pp. 528, 529; *Rubenstein* v. *Cruikshanks,* 54 Mich. 199 (52 Am. Rep. 806); *Stoll* v. *Almon C. Judd Co.,* 106 Conn. 551 (138 Atl. 479, 53 A. L. R. 1042).

Testimony of unsworn statements, hearsay, was received without objection. Hence, no point as to its competency is considered here. *Hadden* v. *Shortridge,* 27 Mich. 211.

A more formal demand by plaintiff for the property was waived by defendant by his stating, in response to plaintiff's above inquiry, in effect, that he could not and would not comply with such demand. *Galvin* v. *Galvin Brass & Iron Works,* 81 Mich. 16.

Plaintiff made a *prima facie* case by showing the property in defendant's possession and refusal or neglect to return on demand. *Benjamin* v. *Colonial Hotel Co.,* 268 Pa. 459 (112 Atl. 54, 20 N. C. C. A. 590); *Huckins Hotel Co.* v. *Hooper,* 44 Okla. 307 (144 Pac. 177); *Baehr* v. *Downey,* 133 Mich. 163 (103 Am. St. Rep. 444); *Thomas Canning Co.* v. *Railway Co.,* 211 Mich. 326; 32 C. J. p. 560.

Accordingly, it would be upon defendant to go forward with the evidence to show that the loss was not caused "by the theft or negligence of the innkeeper or any of his servants" (quoting from 2 Comp. Laws 1915, § 6930 [2 Comp. Laws 1929, § 8804], limiting liability of innkeepers), but defendant contends this not applicable here as plaintiff in making her case and in her effort to show demand or waiver thereof, adduced evidence that the cause of the loss was a robbery, and, in effect, established affirmatively that defendant is not liable.

The onus of exoneration upon a defendant, after the making of *prima facie* case against him, as stated by the statute, is to show that the loss was not caused "by the theft or negligence of the innkeeper or any of his servants."

It is considered that the word robbery was used in its commonly accepted sense as a theft or larceny of property from the person or in the immediate presence of another, accomplished by violence or putting in fear.

The mere statement in plaintiff's proof that the loss was due to a robbery is not an exoneration of defendant. It must be further shown (omitting the matter of negligence, not argued in briefs) that defendant or any of his servants was not the robber.

So when plaintiff rested, having made a *prima facie* case, defendant was not exonerated by her having adduced some evidence of the naked fact of robbery. It was upon defendant to go forward with evidence as stated.

Defendant was the only defense witness. His testimony is that he was told of the robbery; that he was not in the hotel when it happened, and came upon call an hour or two later. There was no exoneration of his employees.

There was failure of proof respecting exoneration. Plaintiff established her case, a *prima facie* case, sufficient to sustain verdict, and which was not overthrown by evidence of defendant. *Purity Ice Cream Co.* v. *Adams Express Co.*, 217 Mich. 593; 49 C. J. p. 1347.

Remaining assignments examined present no reversible error.

Affirmed.

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

MORRIS *v.* BARKER.

1. JUDGMENT—OPEN TO COLLATERAL ATTACK IF VOID.
   Decree is open to collateral attack if void.

2. INJUNCTION—BOND—DAMAGES—JURISDICTION OF COURT TO DETERMINE DAMAGES.
   Where further proceedings under judgment for possession of premises were enjoined on filing of bond (3 Comp. Laws 1915, § 12667) for damages, and injunction was later dismissed, circuit court had authority to determine damages without reference to circuit court commissioner (section 12668).

3. JUDGMENT—RECITALS—SURPLUSAGE.
   Recitals in decree which are outside issue presented may be rejected as surplusage without voiding decree.

4. SAME—COLLATERAL ATTACK.
   That decree for damages is excessive because of erroneous computation would not render it void but only voidable, and therefore it would not be open to collateral attack on said ground.

5. PRINCIPAL AND SURETY—DECREE AGAINST PRINCIPAL NOT OPEN TO COLLATERAL ATTACK.

In action against surety on injunction bond for damages assessed against principal by court, decree determining damages is not open to collateral attack, even if it is excessive by reason of erroneous computation (3 Comp. Laws 1915, § 12667).

Error to Wayne; Pugsley (Earl C.), J., presiding. Submitted January 14, 1931. (Docket No. 137, Calendar No. 35,180.) Decided February 27, 1931. Rehearing denied June 1, 1931.

Assumpsit by William C. Morris and another against Julia M. Barker as surety on an injunction bond. Judgment for plaintiffs. Defendant brings error. Affirmed.

Hatfield, Hall & Wood, for plaintiffs.

Bratton & Bratton (*Louis E. Burke,* of counsel), for defendant.

CLARK, J. In this action on an injunction bond, plaintiffs had judgment. Defendant brings error.

Plaintiffs were vendors and one Marr and his wife purchasers in a land contract of land in Detroit, the price being $62,000; $5,000 paid down. Vendors instituted proceeding for possession before a circuit court commissioner, and had judgment. Writ of restitution issued. The Marrs filed bill for rescission, to enjoin further proceedings in the law action, and for other relief. The injunction issued. Defendant became surety on the bond. 3 Comp. Laws 1915, § 12667 (3 Comp. Laws 1929, § 14355). The conditions of the bond:

"Now, therefore, the conditions of this bond are such that in the event it is later found or adjudicated that the injunction or restraining order should

not have been issued or that the plaintiffs were not entitled to the relief prayed for in the bill of complaint, the plaintiffs will pay any damages or costs assessed against them and this obligation to be void; otherwise, to remain in full force and virtue."

The penalty is $6,000. To the bill of complaint, plaintiffs here filed answer and what is called a cross-bill, the only parts of which here noticed are allegations of loss and damage by being kept out of the property, and prayer for allowance thereof. The bill of complaint was dismissed. The court took testimony respecting the damages, and entered decree that the Marrs, principals in the injunction bond, pay to plaintiffs here $10,046.36.

The defense here is a collateral attack on such decree. If the decree be void it is open to the attack. It is urged that the court was without jurisdiction to enter a decree for the damages, because the matter was not referred to a circuit court commissioner as provided by 3 Comp. Laws 1915, § 12668 (3 Comp. Laws 1929, § 14356). The section further provides, however, that the damages may be ascertained in such manner as the court shall direct. Clearly the court might itself determine damages without reference to a commissioner. There was jurisdiction to enter decree. *Lothrop* v. *Southworth,* 5 Mich. 436. Certain recitals in the decree, seemingly prepared by counsel, are outside the issue presented for decision. They will be rejected as surplusage. 21 C. J. p. 655; *Ombrello* v. *Railway Co.,* 252 Mich. 396.

It is urged that in assessing damages and in computing the same, certain items were included improperly, and that the computation is erroneous, and, hence, that the decree is largely excessive in amount. This complaint appears to be meritorious.

But this law court cannot afford relief. If for the reason stated the decree were void, it would be open to this collateral attack. But, assuming that it is erroneous, as urged, it is merely voidable, and hence not open to the collateral attack here attempted. 34 C. J. p. 564; *Sauer* v. *Detroit Fidelity & Surety Co.*, 237 Mich. 697 (51 A. L. R. 1485); *Eureka Iron & Steel Works* v. *Bresnahan,* 66 Mich. 489.

The obligation of the surety is quoted above from the bond. In this regard we quote from *Lothrop* v. *Southworth, supra:*

"This obligation was broken as soon as a decree awarding damages was made, and the execution thereon returned unsatisfied. It did not extend back of the decree, and relate to matters upon which it was founded. The condition was broken upon nonpayment, and the proof of the breach maintains the action. This is the rule in all cases. * * * He (surety) can, therefore, raise no question of the correctness of the decree, nor impeach it in this collateral proceeding. If he apprehends any fraudulent collusion between the parties to the decree, his remedy is in chancery for relief against the bond."

No reversible error is presented by the assignments.

Judgment affirmed.

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

RIBBLE *v.* BURNHAM.

1. INJUNCTION—RIGHT TO ENJOIN TRESPASS.
   One in actual possession of land, claiming title, may maintain suit to enjoin repeated trespass.

2. DEDICATION—ACCEPTANCE—HIGHWAYS AND STREETS—TRESPASS—INJUNCTION.
   One in possession of strip of land under quitclaim deed is entitled to enjoin repeated trespass by one claiming right to use it as road or street, in absence of evidence that claimed offer of dedication had ever been accepted by proper public authorities or that it had been kept in repair or taken in charge by them.

3. SAME—ACCEPTANCE BY PROPER AUTHORITIES NECESSARY.
   Acceptance of dedication of road or street must be by highway commissioner, township board, or other proper municipal highway authorities; tax assessor having no authority to accept dedication, assessment for taxes is unimportant.

4. HIGHWAYS AND STREETS—MERE USE BY PUBLIC INSUFFICIENT.
   Mere fact that public uses way will not make it public way; but there must be more, such as keeping in repair or adoption by public authorities.

Appeal from Lapeer; Smith (Henry H.), J. Submitted January 16, 1931. (Docket No. 88, Calendar No. 35,227.) Decided February 27, 1931.

Bill by Clarence T. Ribble against Arthur F. Burnham and another to enjoin trespass on a strip of land. Decree for plaintiff. Defendants appeal. Affirmed.

Theodore D. Halpin, for plaintiff.

Herbert W. Smith, for defendants.

As to effect of limited use by public of way as an acceptance of dedication, see annotation in 22 L. R. A. (N. S.) 1114.

CLARK, J. Plaintiff owns and is in possession of a house and lot facing west on Territorial road in unplatted portion of village of Metamora. The defendants own and possess a house and lot just north of plaintiff's property. Between the two properties is a disputed strip 50 feet in width. Plaintiff alleges that he owns it and has had possession of it for many years. Defendants assert that the strip is a public highway and claim no right in it "except as a citizen." Plaintiff filed this bill to enjoin repeated trespasses by defendants, and for other relief. Plaintiff had decree. Defendants have appealed.

The history of the strip begins in 1873, when a predecessor in title received deed of the lot now owned by plaintiff, in which, added to the description, is the following: "A road or street 50 feet wide to be opened and so kept always along the north side of above described land." This recital was carried in the deeds in successive conveyances until in later years a quitclaim deed of the strip appeared and deeds following covered the lot and the strip, omitting recital respecting road or street. Whether plaintiff can show perfect record title to the disputed strip is not here important. In defendants' chain of title there is no reference to the strip.

The weight of evidence is that plaintiff was in actual possession claiming title. This was sufficient to enable him to maintain this suit to enjoin repeated trespass. 32 C. J. p. 130; *Diamond Match Co.* v. *Village of Ontonagon*, 72 Mich. 249.

Plaintiff contends there is no dedication to public use, and that the original deed created no more than a private easement. Also, that if offer to dedicate be assumed, there was no acceptance of the offer by

public authorities. Passing the matter of alleged dedication, including use, the record is practically barren of evidence to show acceptance, and the decision of the trial judge on this question must be sustained. In *South Branch Ranch Co.* v. *Emery,* 191 Mich. 188, it was held that the mere fact that the public uses a way will not make it a public way; there must be more; it must be kept in repair or taken in charge and adopted by the public authorities. The reason for this holding is fully discussed in that case and in later cases citing it. The acceptance must be by highway commissioner, township board, or other proper municipal highway authorities. A tax assessor cannot accept dedication (*Murphey* v. *Township of Lee,* 239 Mich. 551), so alleged matter of assessment for taxes is not important.

Decree here will be conclusive as between the parties. That it may not be conclusive as to the proper municipality is not a point in the case.

Affirmed. Costs to plaintiff.

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

In re SLEPSKI'S ESTATE.

1. WILLS—COMPETENCY—EVIDENCE—OPINION EVIDENCE.

Where testator did not dictate will, but had written list of legacies not prepared by himself from which will was drawn, there was no such dictating of will by him requiring consecutive thought showing mental competency as to exclude opinion evidence that he was not mentally competent.

Insane delusions as affecting testator's mental capacity, see annotation in 27 L. R. A. (N. S.) 62; L. R. A. 1915A, 458.

2. SAME—QUESTION FOR JURY.
Conflicting testimony as to mental competency of testator at time will was made presented question of fact for jury.

3. SAME—WEIGHT OF EVIDENCE.
Verdict that testator was incompetent to make will, *held*, not against great weight of evidence.

Error to Wayne; Webster (Arthur), J. Submitted January 20, 1931. (Docket No. 78, Calendar No. 35,414.) Decided February 27, 1931. Rehearing denied June 1, 1931.

Alexandra Grabinski presented for probate an instrument alleged to be the last will and testament of Maciej A. Slepski. Anna Slepski and another filed notice of protest. Upon certification to the circuit court, judgment was entered for contestants. Proponent brings error. Affirmed.

Davidow & Davidow, for appellant.

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

CLARK, J. Contest on the will of Maciej A. Slepski, who died in May, 1929, resulted in verdict rejecting the will, and judgment thereon. The proponent brings error.

At the trial, proponent invoked the rule of *Spratt* v. *Spratt*, 76 Mich. 384, followed in many cases, to the effect that where a person has in fact dictated a will disposing of all his property by successive bequests and devises requiring consecutive thought and the exercise of memory, mere opinion evidence that he was not competent to do what he had in fact done is entitled to no weight.

The trial judge held the rule not applicable on the facts for it appeared that testator, when he

went to the lawyer to make will, had with him a written list of the different legacies, and, except for the wife, whom, it is said, testator wished to exclude, the will was drawn accordingly. Testator did not prepare such writing. The record does not show who did it. It is clear, therefore, that the judge was right in declining to apply the stated rule.

The outstanding evidence of contestants is that testator had paresis, with attendant loss of brain and consequent impairment of mind, that its destructive processes are progressive over a rather long period, and that, in 1926, when the will was made, he lacked requisite mental competency. This evidence is chiefly from medical witnesses, some of whom had attended testator. There is, of course, conflict and inconsistency in testimony. Proponent had evidence tending to show mental competency at the time in question. There is no escape from an issue of fact, and the verdict of the jury is not against the great weight of the evidence.

The case was tried fairly and carefully by both court and counsel. We find no error.

Judgment affirmed.

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

WOLVERINE CIGAR CO. *v.* KNOPPOW.

1. PARTNERSHIP—DISSOLUTION—ASSUMPTION OF DEBTS—NOTICE.
   In suit against partners jointly and severally, evidence *held*, to support finding of trial court that plaintiffs were seasonably notified of dissolution of partnership and that obligations had been assumed by partner continuing business.

2. SAME—MATERIAL CHANGE IN PAYMENT OF DEBT.
   Evidence *held*, to support finding of trial court that, after dissolution of partnership and assumption of obligations by partner continuing business, there was material change in nature and time of payment thereof.

3. SAME—ASSUMPTION OF DEBTS—DISCHARGE OF PARTNER—STATUTES.
   Under uniform partnership law (2 Comp. Laws 1929, § 9876, subd. 3), where there was material alteration in nature and time of payment of partnership obligation assumed by continuing partner on dissolution, partner who withdrew is discharged from liability.

4. PAYMENT—APPLICATION OF PAYMENTS MADE WITHOUT DIRECTION.
   Payments made by debtor without direction as to application may be applied by creditors as they please, and where applied on open account, debits are discharged in order of time in which they occurred.

5. PARTNERSHIP—PAYMENT—OPEN ACCOUNT—DISCHARGE OF PARTNERSHIP DEBT.
   Where creditors of partnership, after dissolution and assumption of partnership debts by continuing partner, added new purchases to partnership debt, carrying it as open account, and credited payments, which were in excess of partnership debt, in reduction thereof, partnership debt was fully paid.

Error to Wayne; Smith (Guy E.), J., presiding. Submitted January 7, 1931. (Docket No. 38, Calendar No. 35,110.) Decided February 27, 1931.

As to application of payments to debts assumed on dissolution of partnership, see annotation in 9 L. R. A. (N. S.) 94.

Assumpsit by Wolverine Cigar Company, a copartnership, against Knoppow & Drabkin, a copartnership consisting of Max Knoppow and Abraham L. Drabkin, for merchandise sold and delivered. Judgment for plaintiffs against defendant Knoppow. From judgment for defendant Drabkin, plaintiffs bring error. Affirmed.

Leon Dreifuss (*Milton B. Safier,* of counsel), for plaintiffs.

Butzel, Levin & Winston (*Chris M. Youngjohn,* of counsel), for defendant Drabkin.

MCDONALD, J. This is a suit to recover for merchandise sold and delivered. The plaintiffs were engaged in the business of selling cigars, tobacco, and candy at wholesale in the city of Detroit. The defendants owned and operated a drug store. They became partners in the drug business in June, 1923. At that time defendant Knoppow, who had previously conducted the business in his individual capacity, owed the plaintiffs $217.41. The partnership assumed this indebtedness and continued to do business with the plaintiffs. In May, 1924, it was dissolved. Defendant Drabkin withdrew. Knoppow assumed all existing partnership obligations and continued to purchase merchandise from plaintiffs on credit until he went out of business on April 1, 1925, at which time there was owing to the plaintiffs $1,172.58. In this suit they seek to hold the partners jointly and severally liable for the entire indebtedness on the theory that they had no notice or knowledge of the partnership dissolution and of the agreement that Knoppow was to assume the indebtedness, and that they did not consent to

release Drabkin. The defendant Knoppow admits that he is liable for the amount claimed, but Drabkin contends that the indebtedness incurred before the dissolution of the partnership had been paid before the time of suit, and that he is not liable for that which afterward accrued because plaintiffs had knowledge of the dissolution and the partners' agreement in relation to their liability to creditors. The issue was tried by the court without a jury. Findings of fact and conclusions of law were filed, on which judgment for $1,172.58 was entered against defendant Knoppow, and no cause of action as to Drabkin. The plaintiffs have brought error.

The question is whether the defendant Drabkin was discharged from liability to the plaintiffs under the facts as presented in the record.

The uniform partnership law, section 36, subd. 3, Act No. 72, Pub. Acts 1917 (2 Comp. Laws 1929, § 9876), provides:

"Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations."

Did the plaintiffs have knowledge of the dissolution and of the agreement that Knoppow had assumed the payment of existing partnership obligations?

The evidence strongly supports the finding of the court that they were seasonably notified by Mr. Drabkin and Morris Winstune, Knoppow's bookkeeper. In addition to the testimony of these two witnesses, the course of dealing between the plaintiffs and Knoppow, after Drabkin's retirement, is

rather conclusive on the question of their knowledge of the dissolution. While Drabkin was a member of the partnership, the plaintiffs billed all invoices for merchandise to "Knoppow and Drabkin," and checks in payment were signed by both members of the firm. After the dissolution, all invoices were billed to Knoppow, and payments were made in checks signed by him alone. In respect to plaintiffs' knowledge, there was ample evidence to support the court's findings.

Did the plaintiffs consent to a material alteration in the nature or time of payment of the obligations assumed by Knoppow?

The record shows that during the time Drabkin was a member of the firm, payments were regularly made to the plaintiffs. These payments were by check and corresponded in amount with the invoices. They were credited to specific items of merchandise. Soon after Drabkin's retirement, Knoppow ceased to make regular remittances, and such payments as were made were not credited by the plaintiffs to specific items of goods purchased by him, but were applied to his open account in reduction of the outstanding balance, in which was included the obligation of the partnership. From this it is apparent that the plaintiffs treated past and present indebtedness as obligations of Knoppow. After Drabkin withdrew from the firm, they made a material change in the nature and time of payment of the obligation assumed by Knoppow. The court correctly so found.

In estimating Knoppow's balance from time to time, the partnership indebtedness, which was not carried on the plaintiffs' books as a separate item, was added as new purchases were made, and reduced as remittances were received. In other

words, the partnership obligation was intermingled with Knoppow's general account. He made payments from time to time without directing as to how they should be applied. The plaintiffs could have applied them as they pleased. They applied them on the open account. From these facts the trial court held that the payments must be applied to the debits in the order of time in which they occurred, and that therefore the partnership debt had been fully paid when Knoppow ceased to do business with the plaintiffs. His holding is supported by the rule announced in *Mauro* v. *Davie,* 236 Mich. 309.

The judgment is affirmed, with costs to the defendant Drabkin.

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

GRAND HAVEN STATE BANK *v.* CHURCH.

FRAUDULENT CONVEYANCES—INTENT TO DEFRAUD CREDITORS—CONSIDERATION.

Transfer to daughter by father, who was in failing financial circumstances, of all of his property in consideration of his support and maintenance, was properly adjudged to have been in fraud of creditors, where father remained in possession, collected rents, and retained proceeds, and no support was furnished by daughter; especially where father's testimony shows actual intent to defraud.

Appeal from Kent; Dunham (Major L.), J. Submitted January 15, 1931. (Docket No. 99, Calendar No. 35,377.) Decided February 27, 1931.

Judgment creditor's bill by Grand Haven State Bank, a Michigan banking corporation, against Fred J. Church and others in aid of execution and to discover assets. Decree for plaintiff against defendants Church and Wilson. Defendant Church appeals. Affirmed.

Arnold Levandoski and *Irving H. Smith,* for appellant.

Louis H. Osterhous, for appellee.

McDONALD, J. This is a judgment creditor's bill filed in aid of execution and to discover assets of the judgment debtor.

The plaintiff recovered a judgment on two renewal notes against Howard L. McCarrick and defendant Fred J. Church for $6,848.32 and costs amounting to $20. Executions issued thereon were returned *nulla bona.* An alias execution then issued to the sheriff of Kent county who levied on the interest of defendant Church in certain real estate in the city of Grand Rapids. This property had been conveyed previously by deed to his daughter, defendant Ethelyn E. Wilson. Later he gave her stock and bonds of the approximate value of $9,000 under an agreement that, for this consideration and in consideration of the deed to the real estate previously conveyed, she should support him during the balance of his life. The plaintiff claims that both transactions are void because fraudulent as to creditors, and asks to have them set aside and applied

in satisfaction of the judgment. The defendants Church and Wilson, answering, denied that the conveyance and transfer were fraudulent, and alleged that they were executed and delivered for a valuable consideration before the indebtedness on which the plaintiff's judgment is based was incurred. On the hearing, the court dismissed the bill as to the Grand Rapids National Bank, and set aside the conveyance of the real estate and transfer of the personal property on the ground that they were void as to creditors. The defendant Church has appealed.

We will first consider the conveyance of the real estate by defendant Church to his daughter. Was it fraudulent as to creditors?

In his brief, the defendant states the consideration to be as follows:

"His consideration in making this conveyance was two-fold; namely, in reliance upon his daughter's business ability, to provide himself with support and maintenance for the rest of his life without work and worry, and to insure whatever might remain thereof, after his death, being held in trust for his grandchildren in California, whose mother, his daughter, was dead, and whose father was worthless. Defendant was a widower and had no home, and of course, wished to provide himself with one with his daughter."

A few months after the conveyance was made, the agreement to support was reduced to writing and signed by Church and his daughter. At that time, he transferred to her the balance of his property consisting of stocks and bonds. In the written agreement, it was declared that the transfer of this property and the previous conveyance of the real estate should constitute the consideration for the

daughter's promise to support him during the balance of his life. He was a witness on the hearing of this case and testified on direct examination as to his purpose in making this agreement. He said:

"*Q.* At the time you made this agreement did you make it for the purpose of evading payment of any of the debts you had?

"*A.* Why, I lost so much money, beaten out of it, I did not feel really I was safe in having anything with me in my hands."

This testimony, which shows an actual intent to defraud, is in harmony with all the circumstances attending the two transactions complained of. The daughter, who is grantee in the deed, lives in Detroit. Her father lives in Grand Rapids. The real estate conveyed is in Grand Rapids. It consists of an apartment house valued by Church at about $10,000. He remained in possession, collected the rents, and retained the proceeds. The daughter paid nothing. She gave him no support. It was not necessary, for, at the time he made the deed, he was active in business and was drawing a salary of $50 a week besides the rents from his apartment house. The deed was given when he was in failing financial circumstances. It was recorded, apparently in anticipation of liability, a few weeks before his business went into the hands of a receiver. The plaintiff was a creditor at the time. The record presents a clear case of a debtor fraudulently placing his property beyond reach of his creditors for the purpose of evading his debts. The trial court correctly disposed of the issue. The decree is affirmed, with costs against the defendant Church.

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

NELSON *v.* GREAT NORTHERN LIFE INSURANCE CO.

INSURANCE—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—LOSS OF HAND—TOTAL DISABILITY.

Where injury to insured resulted in amputation of right arm above elbow, it was not loss of hand within meaning of accident policy defining such loss as severance at or above wrist joint, but was loss of arm for which no indemnity was provided, and therefore insured is entitled to indemnity provided for total disability rather than that provided for specific loss of hand; that insured was totally disabled from carrying on business he was formerly engaged in not being disputed.

Error to Gogebic; Driscoll (George O.), J. Submitted January 13, 1931. (Docket No. 80, Calendar No. 35,164.) Decided February 27, 1931.

Assumpsit by Robert A. Nelson against Great Northern Life Insurance Company, a Wisconsin corporation, on an insurance policy for total disability. Judgment for plaintiff. Defendant brings error. Affirmed.

Leonard J. McManman, for plaintiff.

Waples & Waples (*Helmer, Moulton, Whitman & Holton,* of counsel), for defendant.

MCDONALD, J. This is an action to recover total disability benefits under an insurance policy issued by the defendant, May 27, 1926. The policy schedules the indemnities in two classes. Part "A" provides for certain specific losses, one of which is the loss of a hand dismembered by severance "at or above wrist." Part "B" provides a monthly in-

As to what constitutes total disability within meaning of life insurance policy, see annotation in 38 L. R. A. 529; 23 L. R. A. (N. S.) 352; 29 L. R. A. (N. S.) 635; 34 L. R. A. (N. S.) 126; L. R. A. 1917B, 108; 24 A. L. R. 203; 37 A. L. R. 151; 41 A. L. R. 1376; 51 A. L. R. 1048.

demnity of $100 for partial or total disability. The following provision should be noted:

"No payment of monthly indemnity will be made in case of any loss enumerated in Part A."

At the time the policy was issued, the plaintiff was engaged in the automobile repair business. On November 7, 1929, he was accidentally shot in the right arm, and his injury resulted in an amputation about two and one-half inches above the elbow. Claiming that he was entitled to indemnity under Part "B" of the policy, as for total disability, he began this action to recover $100 per month from the date of accident to the commencement of suit. The defendant contended that its sole liability was under Part "A" for the loss of a hand, which, as there specified, was three-tenths of $2,000, the principal sum of the policy. On the trial, at the close of the plaintiff's case and again when all of the proofs were in, the defendant moved for a directed verdict on the ground that, under the evidence, the plaintiff's damages were recoverable under Part "A" of the policy for the loss of a hand, and that, therefore, he could not recover under Part "B" for total disability. The motion was refused, and the cause submitted to the jury. The plaintiff received a verdict on which judgment was entered. The defendant has brought error.

If the plaintiff lost a hand, he cannot recover for total disability, so, the question to be determined is whether, as a result of his accidental injury, the plaintiff suffered the loss of a hand within the meaning of Part "A" of the policy.

This question can be determined from the language of the policy. It says:

"Loss shall mean, with regard to hands and feet, dismemberment by severance at or above wrist or ankle joint."

Counsel disagree as to the meaning to be given to the word "above." It is claimed by counsel for the defendant that it refers to any place between the wrist and shoulder, from which he concludes that the severance of plaintiff's arm two and one-half inches above the elbow joint constitutes the loss of a hand. The question is not what the word literally or figuratively means, but what was it intended to mean in the connection in which it was used in the policy. It was used in connection with the wrist joint, and it is very apparent that, in so using it, the insurer intended to convey the idea that the wrist joint must be included in the severance or there could be no recovery for the loss of a hand. Above the wrist is here meant just far enough above to include the joint in the severance. It is not meant that severance at the shoulder or above the elbow would constitute the loss of a hand. We think the words used fairly express the purpose of the insurer, which was to limit its liability to the loss of a hand severed in such a way as to include the wrist. In some respects this case is similar to *Kangas* v. *Standard Accident Insurance Co.*, 138 Minn. 418 (165 N. W. 268, L. R. A. 1918 B, 504). In that case, the policy provided for specific losses and for total disability. The plaintiff was accidentally injured by being hurled against and under a passing train in such a manner that his left arm was crushed and the fingers of his right hand mangled. It became immediately necessary to amputate the fingers of the right hand and the left arm near the shoulder. The court stated the issue as follows:

"The decisive question is: Did the total disability give rise to a monthly accident indemnity within the meaning of the policy, or is the plaintiff limited to an indemnity for the specific loss of his left hand, under the provisions of part 2 of the policy?"

There, as in this case, the policy provided that to constitute the loss of a hand it must be severed at or above the wrist joint. The court denied the defendant's contention that plaintiff had lost a hand within the meaning of part 2 of the policy and permitted a recovery for total disability on the ground that he had suffered the loss of an arm for which no provision was made in the policy under the head of specific losses.

So, in the instant case, the plaintiff did not lose a hand within the meaning of Part "A" of the policy. He lost an arm, for which no provision was made in the schedule enumerating indemnity for specific losses. Therefore he is not barred by the policy from recovering for total disability. That he is totally disabled from carrying on the business he was engaged in at the time the policy was issued and at the time of the accident, is not disputed. We find no error.

The judgment is affirmed, with costs to the plaintiff.

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

MARSHALL FIELD & CO. *v.* HIMELSTEIN.

1. EXECUTORS AND ADMINISTRATORS—ORDINARILY ADMINISTRATOR HAS NO AUTHORITY TO CONTINUE INTESTATE'S BUSINESS.
   Except by order of court, direction in will, or by consent of all parties interested, administrator has no authority to continue business which was being conducted by intestate when he died.

2. SAME—POWER TO BIND ESTATE.
   Administrator continuing intestate's business without authority has no power to bind estate.

3. SAME—JUSTICES OF PEACE—JURISDICTION—STATUTES.
   Where administrator continues intestate's business without authority, justice's court has jurisdiction in action against him personally for merchandise bought in connection with said business, notwithstanding 3 Comp. Laws 1929, § 15982, providing that no justice of peace shall have cognizance of actions against executors or administrators as such, since in contracting said debt he was acting as individual and not in representative capacity.

Case-made from Kent; Perkins (Willis B.), J. Submitted January 9, 1931. (Docket No. 75, Calendar No. 34,137.) Decided February 27, 1931.

Assumpsit by Marshall Field & Company, an Illinois corporation, against Harry Himelstein in justice's court for goods sold and delivered. Judgment for plaintiff. Defendant appealed to circuit court. Judgment for plaintiff is reviewed by case-made. Affirmed.

Travis, Merrick & Johnson, for plaintiff.

Samuel H. Himelstein, for defendant.

As to power of court to permit carrying on business of estate by executor or administrator, see annotation in 40 L. R. A. (N. S.) 210.

McDONALD, J. This is an action for goods sold and delivered. At the time the indebtedness was incurred the defendant was administrator of the estate of Abraham Himelstein, deceased. After qualifying as such, he continued the business in which his intestate was engaged when he died. He purchased merchandise from the plaintiff on credit, failed to pay the account when due, and was sued personally in justice's court. He moved to dismiss on the ground that the justice's court had no jurisdiction. Judgment went against him. He appealed to the circuit, where his motion was renewed and denied. The case was then tried by the court without a jury, and resulted in a judgment for the plaintiff. The defendant has brought error, his principal ground for reversal being that the justice's court has no jurisdiction of this action because of section 14169, 3 Comp. Laws 1915 (3 Comp. Laws 1929, § 15982), the applicable part of which reads:

"No justice of the peace shall have cognizance of * * * actions against executors or administrators as such, except in cases specially provided by law," etc.

Except by order of the court, direction in a will, or by consent of all the parties interested, an administrator has no authority to continue the business which was being conducted by his intestate when he died. Having no such authority, it is his duty to liquidate the estate without undue delay. *Swaine* v. *Hemphill,* 165 Mich. 561.

In the instant case, defendant had no authority to continue the business. It was a personal undertaking altogether outside of his duties as administrator. He was not acting for his estate. He could not bind it by any of his contracts. His creditors

could not sue him in his representative capacity. Their only remedy would be in an action against him personally. Such is the action in this case. Is the justice's court without jurisdiction to hear it? The statute bars jurisdiction in cases only when the action is against the administrator "as such." It does not deny jurisdiction when the action is against the administrator personally for a debt which does not arise out of the administration of the estate but is wholly disconnected therewith. In determining the question of jurisdiction in such cases, the controlling fact is whether the subject-matter of the suit is connected with the administration of the estate, and whether the estate would be affected by the judgment. If it is in no way involved, there is no reason why the justice's court cannot take cognizance of the action. Such was the holding in *Basom* v. *Taylor,* 39 Mich. 682. In that case, action was brought in justice's court against the administrators for the distributive shares of an estate in the amounts adjudged by the probate court. It was held that the justice's court had no jurisdiction because the action was brought against the administrators officially to reach assets of the estate in their hands. The administration of the estate was involved. If judgment were obtained and paid, it would diminish the assets of the estate, for the administrators would be entitled to credit for such payment in their final settlement in probate court. For these reasons the court held the claim was in fact against the estate and could not be prosecuted in justice's court. The theory of the law in denying jurisdiction to justice's courts is well stated in *Wells* v. *Newkirk,* 1 Johnson's Cases (N. Y.), 228. It does not apply to the instant case. In conducting the business without authority, the defendant here

was not performing any duty as administrator. His contracts were not binding on the estate. His creditors could not look to the estate for payment of his debts. He alone was liable, and, if he paid for any goods received while conducting the business, the probate court could not reimburse him out of the assets of the estate. The plaintiff could not sue him in his representative capacity. His only remedy was an action against him as an individual. The statute does not deny jurisdiction to justice's courts where action is brought against an administrator personally on a claim in no way connected with his official duties. On the facts in the case before us, we think the justice's court had jurisdiction and that the action was properly brought.

Other alleged errors do not require discussion. They are without substantial merit.

The judgment is affirmed, with costs to the plaintiff.

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

MICHIGAN LOAN ASS'N *v.* CAHILL.

1. CONTRACTS—BILLS AND NOTES—EVIDENCE—PRESUMPTIONS.
   Promissory note given by borrower to loan association licensed under Act No. 317, Pub. Acts 1921, to take place of usurious notes, is best evidence of transaction, and, in absence of showing to contrary, court will assume that it was voluntarily signed.

Waiver of usury by renewal or other executory agreement, see annotation in 13 A. L. R. 1213.

2. USURY—BILLS AND NOTES—SMALL LOANS—STATUTES.
   Where notes containing usurious charges were surrendered by loan association licensed under Act No. 317, Pub. Acts 1921, and new note given by borrower for amount of money actually borrowed with legal interest, it is free from taint of usury, and therefore valid and enforceable.

3. LICENSES—SMALL LOANS—FAILURE TO COMPLY WITH STATUTE—BILLS AND NOTES.
   Promissory note given by borrower to loan association licensed under Act No. 317, Pub. Acts 1921, for money borrowed with legal interest, is not void because of failure of association to deliver to borrower statement provided for in section 14 of said statute; no such intent being expressed in act.

Error to Jackson; Simpson (John), J. Submitted January 23, 1931. (Docket No. 121, Calendar No. 35,430.) Decided February 27, 1931.

Assumpsit by Michigan Loan Association of Jackson, Michigan, a corporation, against Edward J. Cahill, Jr., and others on a promissory note. Judgment for plaintiff. Defendant brings error. Affirmed.

Bisbee, McKone, Wilson & King, for plaintiff.

James J. Noon and *C. G. Parshall,* for defendants.

MCDONALD, J. This is an action on a promissory note for $1,850 payable in three and a half years with interest at seven per cent.

The plaintiff is licensed to conduct what is called a small loan business under Act No. 317, Pub. Acts 1921, as amended by Act No. 181, Pub. Acts 1925 (3 Comp. Laws 1929, § 12198 *et seq.*). The defendant Edward J. Cahill, Jr., was engaged in the automobile business. He was financed by the plaintiff in various transactions, three of which are connected with the note in suit. In the first transaction,

the plaintiff loaned him $300 and took his note for that amount bearing interest at 3½ per cent. a month; in the second, it loaned him $600 and took his note for $726, the excess charged being what the plaintiff terms a "finance fee;" the third transaction involved a loan of $995. A finance fee of $205 was charged and a note taken for $1,200. As the result of a controversy over the payment of these notes, the note in suit was given. It is the defendants' claim that, though this note appears to be fair and valid on its face, it is void and unenforceable for two reasons, first, because it embodies the three previous transactions which were usurious and void, and, second, because the plaintiff did not furnish the statement required by section 14 of the statute under which it was operating. It is the plaintiff's claim that failure to furnish such statement did not affect the validity of the note; that the note in suit did not carry over the usury with which the previous notes were tainted; that in fixing the amount, for the payment of which it was given, all usury was eliminated and only the actual loans were included, and, therefore, it is valid and enforceable. On the trial, at the close of the proofs, both parties moved for a directed verdict. The court granted plaintiff's motion. To review the judgment entered, the defendants brought error.

The statute under which the plaintiff is licensed to do business permits it to charge 3½ per cent. a month interest on loans of $300 or less, and not more than seven per cent. on loans above that amount. It further provides:

"If interest or charges in excess of those permitted by this act shall be charged, contracted for or received, the contract of loan shall be void and

the licensee shall have no right to collect or receive any principal, interest or charges whatsoever."

As the plaintiff might legally charge 3½ per cent. interest a month on the $300 loan, that transaction was not usurious. But the interest charged on the other two notes was clearly usury and rendered them void and unenforceable either as to principal or interest. These notes were not paid. The parties got together in an agreement to settle the entire indebtedness for $1,850. The original notes were surrendered and a new note for $1,850 was executed by the defendants. In saying that the defendants agreed to give this note in settlement, we are not overlooking their claim that it was procured by threat. We find nothing in the record to support this claim. The note is the best evidence of the agreement, and, in the absence of any showing to the contrary, we will assume that it was voluntarily signed by the defendants. It is conceded that this new obligation does not contain any of the interest charges or so called financing fees of the previous transactions. Defendant Edward J. Cahill, Jr., so testified. The amount of the note represents only the actual sums loaned. All usury was eliminated.

In *Smith* v. *Stoddard,* 10 Mich. 148 (81 Am. Dec. 778), there was involved a usurious contract. The parties came to a settlement and a new obligation was given which included no usury. The court said:

"When parties have actually paid the usurious interest, and then come to a *bona fide* settlement, and make new securities which include nothing but an actual loan, and are not meant as mere evasions, we do not think the new contract can be regarded as either usurious in itself, or based on a usurious consideration."

And in *Gladwin State Bank* v. *Dow,* 212 Mich. 521 (13 A. L. R. 1233), it was said:

"Courts have uniformly held that there may be such a settlement between the parties as purges the transaction of its usurious taint. What must be done to so purge the transaction is a matter upon which the authorities differ. One way of purging the contract of the usurious taint was pointed out in *Carr* v. *Taylor,* 62 N. Y. Supp. 849. * * * It is said in 39 Cyc. p. 1002:

"'The general principle determining when an indebtedness infected with usury is to be deemed disinfected may be stated as follows: If the tainted obligation is with the full knowledge and consent of the borrower, finally canceled or abandoned, and a new obligation, containing no part of the usury, is executed in legal form, and supported solely by the moral obligation resting upon the borrower to pay the money actually received with legal interest thereon, such new obligation is valid and enforceable.'"

The note in suit was entirely purged of the usury adhering to the previous notes. The defendant Cahill was under no obligation to pay them. He abandoned them and consented to a new obligation in which he promised to pay the money he had actually borrowed with legal interest. In view of these facts, the new obligation does not fall within that provision of the statute which renders void all loans bearing an unlawful interest.

The defendants' second contention is that the note is void because the plaintiff did not comply with section 14 of Act No. 181, Pub. Acts 1925 (3 Comp. Laws 1929, § 12211), which reads:

"Every licensee shall: Deliver to the borrower at the time a loan is made, a statement in the English language showing in clear and distinct terms the amount and date of the loan and of its maturity, the nature of the security, if any, for the loan, the name and address of the borrower and of the licensee, and the rate of interest charged. Upon

such statement there shall be printed in English a copy of section thirteen of this act."

Section 13 provides that the loan or security shall be void and unenforceable in case of excessive interest charges, but nowhere in the act is it indicated that the legislature intended to void the loan for failure to furnish the statement required by section 14. It surely was not intended to permit a borrower to escape the payment of a legal debt because such a statement was not furnished. It does not go to the substance of the transaction but was merely intended as evidence to the borrower that he was not assuming an obligation to pay unlawful interest. It was not a requirement that affects the validity of a loan.

We think the trial court correctly disposed of the issue in rendering judgment for the plaintiff for the money actually loaned with interest at 7 per cent.

The judgment is affirmed, with costs to the plaintiff.

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

POLLY *v.* CHAROUHIS.

1. PRINCIPAL AND AGENT—FRAUD—PRINCIPAL NOT LIABLE FOR AGENT'S FRAUD BEFORE BECOMING AGENT.

   Principal is not liable where agent makes false representations before becoming agent and without principal's knowledge or participation therein.

2. BROKERS—PRINCIPAL AND AGENT—FRAUD.

   Where owner did not list property with broker, did not employ him to sell it, and had no knowledge of his efforts to sell it, false representations made by him to prospective purchaser

were not made as owner's agent, and owner is not liable therefor, although sale was afterward made by broker acting for both parties.

3. SAME—ADMISSIONS—EVIDENCE.

Admission by owner that broker was his agent in selling property may not be taken as admission that broker was agent in making false representations of which owner had no knowledge before broker actually became agent.

Error to Genesee; Parker (James S.), J. Submitted January 6, 1931. (Docket No. 22, Calendar No. 35,347.) Decided February 27, 1931.

Case by Warry H. Polly and another against William J. Charouhis for false representations of defendant's alleged agent in the exchange of real estate. Judgment for plaintiffs. Defendant brings error. Reversed.

Neithercut & Neithercut, for plaintiffs.

Farley & Elliott, for defendant.

McDONALD, J. This is an action to recover damages for false representations claimed to have been made by an agent of defendant in the exchange of certain real estate located in the city of Flint, Michigan.

The material facts are substantially as follows:

Prior to March 21, 1929, the plaintiffs owned an interest in real estate property in the city of Flint. They desired to exchange it. For this purpose they listed it with O. L. & J. J. Welch Company, real estate brokers. Mr. C. A. Walker was employed by the Welch Company. He represented the plaintiffs in making the exchange in question He knew about defendant's property and took them to see it. While there, he falsely represented the dimensions of the

lot and led them to believe it was much larger than it actually was. Subsequently he interviewed the defendant and an exchange was agreed upon. A writing was signed by the parties in which each agreed to pay a commission. A few months later, the plaintiffs first learned that Walker had falsely represented the dimensions of the lot and that they had been defrauded. They brought this suit to recover their damages on the theory that Walker was defendant's agent in exchanging his property, and that, though the defendant may not have been aware of his fraudulent conduct, he is responsible for the representations made by his agent while acting within the scope of his authority.

On the trial, at the close of the proofs, defendant moved for a directed verdict in his favor alleging as reasons therefor:

"1. That the evidence did not show any agency agreement between the defendant and Walker at the time the representations were made, that whatever representations were made, were made by Walker to the plaintiffs as his own principals, and

"2. For the reason that where a real estate agent is employed by two parties to make a deal and each pays him a commission, neither party can claim damages against the other for representations made by the agent."

The motion was denied, and the issue submitted to the jury. The plaintiff recovered a verdict and judgment which the defendant reviews on error.

The evidence is undisputed that the alleged representations were made by Walker, that they were false, and were relied on by plaintiffs to their damage. There is no evidence that the defendant made any representations directly to the plaintiffs or that he authorized Walker to make any or was aware

that he had done so. If he must respond in damages to the plaintiffs, it is on account of the fraud of Walker, if Walker was his agent. The controlling question is whether such an agency existed at the time the representations were made.

In bringing about the exchange of properties, Mr. Walker acted for the plaintiffs as their agent. There is no question about that. They admit it. But they say he also represented the defendant, and made the representations as his agent. The defendant had no business with them directly. They did not see him during the negotiations or at the time the exchange was consummated. The business was all carried on by Walker. The evidence is undisputed that the representations were made two or three weeks before the deal was closed. Mrs. Polly so testified. It is also undisputed that the defendant did not list his property with the brokers; that he did not employ Mr. Walker to sell or exchange it, and that he knew nothing about the transaction until the day before the agreement was signed. It follows that Walker was not his agent at the time he made the false representations. If it can be said that Walker ever became his agent in bringing about the exchange of his property, he could not be held liable for representations made two or three weeks before the agency began. In *Boss* v. *Tomaras,* 251 Mich. 469, it was said:

"A principal is not liable where the agent makes the representations before becoming his agent and without his participation in them (*Webb* v. *Johnston,* 246 Mass. 229 [140 N. E. 814])."

We have not overlooked the testimony of Mr. Polly as to an alleged confession of agency by the defendant. It appears that after the plaintiffs had taken possession of defendant's property, they were

called upon to pay for the replacing of some window glass. Walker had told them the defendant would pay this item of expense. Mr. Polly testified that the defendant said, "Walker had nothing to do with it, except to sell the place." This statement is taken as an admission of Walker's agency. If it can be so considered, it is in no way inconsistent with the testimony showing that Walker was not his agent at the time he made the representations complained of. If he ever became defendant's agent, it was when the agreement was made in which defendant promised to pay a commission. There is no evidence of any such relation before that time. We think decision in this case must rest on the undisputed evidence that Walker was not defendant's agent at the time he made the representations. It follows that the trial court erred in refusing defendant's motion for a directed verdict. 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.

PEOPLE *v.* TODARO.

SAME *v.* DE PIAZZI.

1. CRIMINAL LAW—WITNESSES.
   People are under no obligation to produce unknown witnesses.

2. SAME—INDORSING NAMES OF WITNESSES.
   There was no error in indorsing as witness on information during trial name of one of the officers making arrest (Act No. 175, Pub. Acts 1927, chap. 7, § 40).

3. SAME—COMMENTS OF JUDGE—TRIAL.

There was no error in trial court's comments on evidence, where jury were informed that they were advisory merely, that jury were sole judges of facts, and that they had full power to use their own judgment as to facts and testimony without necessarily following anything trial judge might say.

4. SAME—EVIDENCE—HEARSAY.

In prosecution for robbery armed, testimony by officer arresting defendant that some one in room where robbery occurred remarked, referring to defendant as one of the robbers, "That is one of them," was admissible if made by one of the robbers or one of the robbed.

5. SAME—EVIDENCE—STATEMENTS MADE IN PRESENCE OF ACCUSED.

Statements made in presence or hearing of party to be affected thereby under circumstances from which his acquiescence in their truth may be fairly inferred, though not expressed, are admissible in evidence and entitled to consideration by jury in accordance with what they find to be facts.

6. SAME—EVIDENCE—IRRESPONSIVE ANSWER.

Voluntary and irresponsive answer to proper question does not ordinarily constitute error.

7. SAME—REQUEST TO CHARGE—MISCARRIAGE OF JUSTICE.

Where no request to charge was made in relation to irresponsive answer to proper question, case is not reversed therefor; especially where it does not affirmatively appear that miscarriage of justice resulted therefrom (3 Comp. Laws 1929, § 17354).

BUTZEL, C. J., and WIEST, J., dissenting in part.

Error to Wayne; Miller (Guy E.), J. Submitted October 16, 1930. (Docket Nos. 160, 161, Calendar Nos. 35,047, 35,048.) Decided February 27, 1931. Rehearing granted Todaro June 1, 1931.

Joseph Todaro and Dominick De Piazzi were convicted of robbery armed. Affirmed.

Chawke & Sloan, for appellant Todaro.

Frank S. Valenti and *Donald McGaffey,* for appellant De Piazzi.

Wilber M. Brucker, Attorney General, *James E. Chenot,* Prosecuting Attorney, and *Donald F. Welday,* Assistant Prosecuting Attorney, for the people.

POTTER, J. Defendants were informed against, tried jointly with other defendants, convicted of robbery armed, and bring error.

October 27, 1929, at 3848 High Street, Ecorse, a house of prostitution and cabaret was in operation and many of its inmates and patrons present. At about 1:45 a. m., at an apparently concerted signal, the inmates and patrons were held up and robbed. The police were called, five officers responded, several arrests were made, and a part of the spoils of the robbery recovered. Defendants were present at the time of the robbery. De Piazzi claims he was there as a patron, did not participate in the robbery, but was himself held up and robbed. He denied acquaintance with the other defendants and testified he was arrested in the front room of the house, where he was talking with a girl. The officer making the arrest testified he was arrested on the front porch, behind a swinging hammock, near which, soon afterwards, a revolver was found. De Piazzi was searched after his arrest but nothing was found on him. Todaro, after the officers arrived, was seen hiding behind the door of a lavatory. A pistol was found on a washboard of a sink past which Todaro went from the room where the holdup and robbery took place to this lavatory. Todaro denied acquaintance with the other defendants, protested his innocence, claimed he heard a shot, and hid because he thought there was a raid or a holdup. He was searched but nothing found on him.

The other defendants who were jointly indicted with De Piazzi and Todaro, denied acquaintance

with each other or with De Piazzi and Todaro, participation in the robbery, and protested their innocence.

It is claimed the people failed to produce all the *res gestæ* witnesses whose testimony was not cumulative. The record does not show who these witnesses were. No subpœna was refused defendants. The people sought to subpœna several witnesses, claimed to have been present at the holdup and robbery, but were unable to locate them. The people are under no obligation to produce unknown witnesses.

The court charged the jury:

"It is the duty of the people to produce all available eyewitnesses or excuse their nonproduction in a proper way. It was the duty of the people to produce the witnesses whose names are indorsed on the information. Certain of those witnesses have not been produced. There has been testimony here offered of efforts to locate these witnesses with witness subpœnas for the purpose of bringing them into court and putting them on the stand in order that you might hear their stories. Now, if that was a reasonable effort, if the prosecution has shown reasonable pains to find those witnesses and bring them here, then that duty has been discharged. But if the prosecution has not used due diligence, and has failed to produce testimony which would be material and which would assist in unraveling this charge, then that duty has not been discharged. And that is a matter which it is fair and right for the members of the jury to take into consideration in determining the outcome of the case."

Complaint is made that the name of the witness Sage was indorsed on the information during the trial. The witness was one of the officers who made the arrest. His name should have been in-

dorsed on the information. Section 40, chap. 7, Act No. 175, Pub. Acts 1927 (3 Comp. Laws 1929, § 17254), provides:

"Names of other witnesses may be indorsed before or during the trial by leave of the court and upon such conditions as the court shall determine."

Under the circumstances the indorsement of the name of the witness Sage on the information was not error. *People* v. *Tamosaitis,* 244 Mich. 258.

In submitting the question of De Piazzi's guilt to the jury, the court charged that if they believed the testimony of the arresting officer, that defendant was arrested on the front porch, hiding behind the swinging hammock, they would be justified in concluding he sought refuge there and was hiding, and in coming to the conclusion the pistol found on the front porch near where he was arrested was his pistol, placed there by him when he was seeking to escape the officers and the responsibility for the holdup and robbery; but, that defendant disputed and denied the testimony of the officer as to the way in which the arrest took place and said he never had a pistol on his person and didn't take any part in the holdup.

The court further charged:

"It is for you to determine whether the fact is that he did run away and hide in that front room, whether it was his pistol, and whether he secreted the pistol there in order that he might not be found with it on his person. If you find that he did run away and that he did hide the pistol and that he did have a pistol then the fact of his seeking escape, the fact of his secreting himself and the fact of his having a pistol, are all circumstances which bear upon the question of guilt or innocence and which it is necessary for you to take into considera-

tion in determining the question of his connection with this affair."

The trial court's comments upon the evidence are criticized. In *People* v. *Lintz,* 244 Mich. 603, this court construing the statute (3 Comp. Laws 1929, § 17322), among other things, said:

"In expressing an opinion, he should make it clear to the jury that he is merely stating his opinion, and not directing them to be guided by it. They must be given to understand that they are to decide the facts on their own view of the evidence, and that the opinion is expressed only as an aid to them in so doing. He may call the attention of the jury to particular facts; marshal and sum up the evidence relating to each issue to be determined; comment upon the tendency, force, and comparative weight of conflicting testimony bearing upon them, and point out any matter which legitimately affects the testimony of a witness or his credibility. And it is his duty to do so, under the statute, when in his opinion their consideration by the jury is necessary and will lead to a just verdict, providing always that he makes it plain to the jury that his comment and opinion on the facts is not controlling, and that the ultimate determination is left to them. The material facts in controversy upon which there is a conflict of evidence must not be assumed by him to have been proven. It is for the jury to say whether or not the evidence is sufficient to establish such facts, and they are the sole judges of the credibility of the witnesses and the weight of the testimony."

The trial court in the instant case said:

"The members of the jury are the sole judges of the facts in the case, are the sole judges of the truth or falsity of all the testimony in the case and the opinion or comment of the judge in charging the

jury upon any question of fact is to be taken by the members of the jury as advisory merely. It is their full power and privilege to disagree with any such comment and disregard it. The comment of the trial judge in criminal cases on the testimony and evidence is merely advisory and you as members of the jury have full power, and I want you to remember it carefully during the entire charge because the entire charge on the facts is subject to this. The members of the jury have full power to use their own judgment as to the facts and the testimony without regard or without necessarily following anything that the trial judge may say. * * *

"You are the sole judges of the testimony, of the facts. You are the sole judges of the truth of the testimony. You are the sole judges of the facts in the case. But, in endeavoring to sift out where the truth lies, it is reasonable and right that all of the testimony of all of the witnesses be compared. In passing upon the truthfulness of any witness or of all the witnesses, the stories that they tell are naturally to be considered. The way in which those stories are told is also to be considered. The intrinsic probability or improbability of what they say, of the stories as they tell them, is to be considered and the way in which the testimony of the witnesses accords with the probabilities and human experience and agrees with the other evidence in the case and with the testimony of other witnesses, are also matters to be considered. The interest which any witness has, and this applies to the officers in the case, to the witnesses and to the defendants, the interest which any witness has in the outcome of the case is to be considered as bearing upon the probability of his telling the truth or not telling the truth."

Error is assigned upon the failure to strike the answer of Lieutenant Sage to the effect that he

arrested appellant Todaro after he heard someone say, "That is one of them."

"*Q.* How did you happen to arrest this man?

"*A.* He was hiding behind the door there.

"*Mr. Tatti:* I object to that. He don't know of his own knowledge whether the man was hiding behind a door. I ask that the remark be stricken out.

"*The Court:* The answer may stand.

"He was in this lavatory alone—there was nobody in it, the door was open and he was back of the door.

"*Q.* How did you happen to go in there and look behind that door?

"*A.* We had five and I went in there and I found him and I brought him out and somebody says 'that is one of them.'"

Objection was made by defendants to this testimony and the court requested to strike it out. The refusal of the court to strike it is urged as error.

At the time of Todaro's arrest there were present, the police, the robbers, and the robbed. It is shown the remark objected to was not made by any of the officers. It must have been made by one of the robbers or one of the robbed. If by one of the robbers it was admissible, *People* v. *Dow,* 64 Mich. 717 (8 Am. St. Rep. 873); if by one of the robbed it was likewise admissible, *People* v. *Johnson,* 186 Mich. 516; *Merkle* v. *Twp. of Bennington,* 58 Mich. 156, 163 (55 Am. Rep. 666); *Herrick* v. *Wixom,* 121 Mich. 384; 2 Wigmore on Evidence (2d Ed.), § 1142.

When the statement was made "that is one of them" it does not appear Todaro said anything in response. He claims he was frightened at the time. He protested his innocence to the officers, as did defendants from whose possession the officers recovered the stolen property. The conduct, de-

meanor, and statements of all the defendants was similar. It was for the jury to say whether the statement was made in the presence and hearing of the accused under such circumstances that his acquiescence therein could be inferred from his conduct and demeanor and failure to reply or respond thereto. When statements are made in the presence or hearing of a party to be affected thereby under circumstances from which his acquiescence in their truth may be fairly inferred, though not expressed, they are admissible in evidence and entitled to little or much consideration by the jury in accordance with what they find to be the facts. 1 Greenleaf on Evidence (16th Ed.), § 197; 2 Wigmore on Evidence (2d Ed.), § 1072; 2 Wharton, Criminal Evidence (10th Ed.), § 679; *Dawson* v. *Hall,* 2 Mich. 389; *People* v. *Courtney,* 178 Mich. 137.

The answer complained of was not responsive to any question put to the witness Sage. It was a voluntary statement by him. The question asked the witness was proper. A voluntary and irresponsive answer to a proper question does not ordinarily constitute error. *People* v. *Wilson,* 133 Mich. 517. No motion was made to strike out the testimony because the answer was irresponsive. *People* v. *Meert,* 157 Mich. 93.

"A witness cannot put error into a case by an unauthorized remark, neither called out by a question nor sanctioned by the judge; and if what he does or says improperly is likely to do much mischief, it is presumed the judge will apply the proper corrective in his instructions if requested to do so." *People* v. *Mead,* 50 Mich. 228.

No request to charge was made, on behalf of defendant Todaro, to the trial court, in relation to this testimony. The witness was fully cross-examined

as to the source of this remark by counsel for defendant. It was apparent the witness knew little about the identity of the person who may have made it. The jury, during its deliberations, came into court and discussed various propositions. This does not appear to have been one of them.

Section 26, chap. 9, Act No. 175, Pub. Acts 1927 (3 Comp. Laws 1929, § 17354), provides:

"No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this State in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

It does not affirmatively appear that this, or any of the other errors complained of, resulted in a miscarriage of justice. Judgment affirmed.

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

WIEST, J. (*dissenting in part*). Under the opinion in *People* v. *Wudarski, ante,* 83, I find no reversible error in De Piazzi's case.

In Todaro's case it was prejudicial error to permit the arresting officer to testify that, when he brought Todaro from the lavatory, some one, whom he did not see or know, said: "That is one of them." It was a hearsay accusation and identification by an unknown person, and, of course, there was no opportunity afforded to test the truth thereof.

Ages before, Sir Walter Raleigh, in 1603, was denied the right by Chief Justice Popham, to be confronted with his accusers; it was, and ever since then has been, the right of an accused, as declared by article 2, § 19, of the Constitution of Michigan, "to be confronted with the witnesses against him." Raleigh urged:

"If there be but a trial of five marks at common law, a witness must be deposed. Good my Lords, let my accuser come face to face, and be deposed."

Chief Justice Popham refused, and, in passing sentence, gave the following reason:

"It now comes in my mind, why you may not have your accuser come face to face: for such an one is easily brought to retract, when he seeth there is no hope of his own life." 1 Hargrave's State Trials (Ed. 1776), p. 212.

The hearsay testimony supplied the prosecution with an essential item of proof, singling out Todaro as a hold-up man and refuting his claim that he was a patron of the house.

For the error mentioned, Todaro's conviction should be set aside, and a new trial granted.

BUTZEL, C. J., concurred with WIEST, J.

KUSCHINSKI *v.* COHN.

COHN *v.* KUSCHINSKI.

APPEAL AND ERROR—CASE NOT SETTLED AND SIGNED BY JUDGE BRINGS NOTHING TO APPELLATE COURT.

Where case was not settled and signed by trial judge or any one else, in accordance with Circuit Court Rule No. 66, there is nothing before Supreme Court to consider.

Appeals from Wayne; Covert (Frank L.), J., presiding. Submitted January 9, 1931. (Docket Nos. 68, 69, Calendar Nos. 35,033, 35,034.) Decided February 27, 1931. Rehearing denied June 1, 1931.

Bill by Leo Kuschinski and another against Morris Cohn to enjoin disturbance of plaintiffs' peaceable possession of premises.

Bill by Morris Cohn against Casper Kuschinski and another to set aside a mortgage foreclosure and for other relief. Appeals by Kuschinskis from decrees entered. Dismissed.

Leo Kuschinski, for appellants.

Kennary, Minardo & Sklar, for appellee.

POTTER, J. In neither of these cases was a case settled and signed by the trial judge, nor any one else, in accordance with Circuit Court Rule No. 66, then in force. There is, therefore, nothing before us to consider. Appeals dismissed, with costs to appellee.

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

LIDTKA *v.* WAGNER.

1. MOTOR VEHICLES—LIABILITY OF OWNER—CONSENT OF OWNER.
   In order to render owner of automobile liable for negligence of driver under Act No. 56, Pub. Acts 1927, § 29, it is not necessary that particular driver be known to owner and his consent to such driver be given; implied consent being sufficient.

2. SAME—NEGLIGENCE OF PROSPECTIVE PURCHASER.
   Whether owner of automobile was liable for personal injuries resulting from collision while car was being driven by prospective purchaser in another city, to which salesman had taken it, *held*, under evidence, question for jury, although owner had no knowledge of said prospective purchaser and did not assent to his driving (Act No. 56, Pub. Acts 1927, § 29).

Error to Calhoun; Hatch (Blaine W.), J. Submitted January 22, 1931. (Docket No. 79, Calendar No. 35,233.) Decided February 27, 1931.

Case by Ella Lidtka against Rufus R. Wagner and others for personal injuries received in an automobile collision. Judgment for plaintiff. Defendants bring error. Affirmed.

John A. Wagner and *R. G. Leitch*, for plaintiff.

Rodgers & Dunn (*Howard W. Cavanagh* and *Walter P. North*, of counsel), for defendants.

POTTER, J. Plaintiff sued defendants to recover damages resulting from an injury in an automobile collision. Plaintiff, at the time of the injury, was riding in an automobile with one Glenn Worth, an automobile salesman in Battle Creek. While going

On validity of statute making owner liable for injury by automobile which was being used by another, see annotation in 45 L. R. A. (N. S.) 699; L. R. A. 1918A, 918; 61 A. L. R. 866.

in a westerly direction on U. S. 12 between Marshall and Battle Creek, the car in which plaintiff was riding was struck by a car driven by Ray Eagy, defendant, going east on U. S. 12 toward Marshall. The defendants Wagner Bros. operated a garage in Kalamazoo. They owned an Auburn automobile which they desired to sell. Their salesman, Mr. Lawrence, was acquainted with Mr. Badger at Battle Creek, who operated a garage, and asked him if he, Badger, knew of anyone who might be interested in this particular automobile. Lawrence was told by Mr. Badger that he, Badger, knew a party who might be interested in it, and Lawrence brought the car to Battle Creek from Kalamazoo, was introduced to Mr. John Eagy, a son of the defendant Ray Eagy, the prospective customer, who took the car and drove it and then took it back to the Badger garage in Battle Creek. The next day John Eagy, accompanied by his father, defendant Ray Eagy, went to Badger's garage where the salesman in charge told them to take the car out and try it. John Eagy was driving the car when they left the garage, but let his father, who desired to purchase a car, drive it, and, while the father was driving it, the accident occurred. The important question is whether or not the defendant Wagner Bros. may, under the circumstances, be held liable. It is well settled that it is not necessary a particular driver must be known to the owner of the car and his driving assented to by the other. *Kerns* v. *Lewis,* 246 Mich. 423. The statute, Act No. 56, Pub. Acts 1927, § 29, 1 Comp. Laws 1929, § 4648, provides:

"The owner shall not be liable, however, unless said motor vehicle is being driven with his or her express or implied consent or knowledge.

"Implied authority is to be gathered from facts and circumstances, and is usually a question for the jury. When one invests another with general authority and discretion, and it is exercised in the due course and furtherance of the principal's business, the latter is not relieved from the consequences of a mistake of judgment of the agent, either as to the extent of his authority or the manner of exercising it, as against third persons, nor is the authority to be limited to the principal's unexpressed intention." *Kerns* v. *Lewis*, 249 Mich. 27.

We think there was sufficient evidence to take the case to the jury as to the defendant Wagner Bros. None of the other assignments of error are important. Judgment affirmed, with costs.

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

VILLAGE OF SPRING LAKE *v.* THUM.

PARTITION—AWARD OF COMMISSIONERS.

Decree of court below modifying and affirming award of commissioners in partition proceedings is affirmed on appeal; question in dispute being one of fact.

Appeal from Ottawa; Miles (Fred T.), J. Submitted January 16, 1931. (Docket No. 100, Calendar No. 35,389.) Decided February 27, 1931.

Bill by Village of Spring Lake, a municipal corporation, against Otto Thum and another for partition of real estate. From decree for partition, defendants appeal. Affirmed.

Louis H. Osterhous, for plaintiff.

Knappen, Uhl, Bryant & Snow, for defendants.

POTTER, J. Plaintiff, a tenant in common with defendant Otto Thum, of real estate bordering Spring lake, in Ottawa county, filed a bill against defendant Otto Thum and wife for partition thereof. After answers filed by defendants, a stipulation was entered into providing for the appointment by the trial court of three commissioners in partition. Such commissioners were appointed, made partition of the premises, and, upon the coming in and filing of their report, defendants filed exceptions thereto, and the trial court, after hearing the same, modified the report of the commissioners by giving defendants more land than was awarded them by the commissioners, and defendants appeal. The question in dispute is one of fact. Considering all the evidence, we think the conclusion arrived at by the trial court substantially correct, and its decree is affirmed, with costs.

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

TER KEURST *v.* ZINKEWICZ.

1. HOMESTEADS—CONTRACT INTEREST—VENDOR AND PURCHASER.
Homestead right attaches to house and lot being purchased on contract, where purchaser is living there with his family.

2. SAME—CONVEYANCE—HUSBAND AND WIFE—SIGNATURE OF WIFE NECESSARY.
Under Constitution (article 14, § 2), alienation of homestead by owner, if married, is void without signature of wife.

3. SPECIFIC PERFORMANCE—HOMESTEADS—HUSBAND AND WIFE.
Married man is not entitled to specific enforcement of contract for exchange of equities in land, where the equity he agreed to convey is homestead, and conveyance is not signed by wife.

Appeal from Kent; Dunham (Major L.), J. Submitted January 9, 1931. (Docket No. 76, Calendar No. 35,267.) Decided February 27, 1931.

Bill by Henry Ter Keurst against John Zinkewicz and others for specific performance of an agreement to exchange equities in land. Decree for plaintiff. Defendants appeal. Reversed.

P. A. Hartesvelt, for plaintiff.

Michael Garvey, for defendants.

POTTER, J. Plaintiff, vendee under a written contract to purchase real estate in Grand Rapids, traded such vendee's interest for defendants' vendee's interest in a written contract to purchase a farm in Plainfield township, Kent county. Defendant Frueh was the broker who got the parties together. The contract of plaintiff was assigned by him alone.

The contract of defendants was assigned by them and delivered to Frueh. Plaintiff took possession of the farm. Defendants took possession of the Grand Rapids real estate and leased the same to plaintiff, who paid a substantial sum as rent. Frueh refused to deliver defendants' assignment of their contract of purchase to plaintiff. Plaintiff filed a bill to compel such delivery. From a decree for plaintiff defendants appeal; claiming the assignment from plaintiff was not signed by his wife; that the property which plaintiff was purchasing and in which he had a vendee's interest constituted a homestead, and that without the signature of the wife the assignment of the contract was void and the transaction within the statute of frauds.

It is undisputed that plaintiff, at the time of the assignment of his vendee's interest in the land contract under which he was purchasing the house in Grand Rapids, was living with his wife and family in the house thereon, which was being occupied as a homestead, and that his wife refused to sign the assignment of the land contract. She never gave up possession of the house. Plaintiff's homestead right attached to the land in Grand Rapids which he was purchasing on land contract though he had only a vendee's interest therein. *McKee* v. *Wilcox,* 11 Mich. 358 (83 Am. Dec. 743); *Lozo* v. *Sutherland,* 38 Mich. 168; *Allen* v. *Cadwell,* 55 Mich. 8; *Stanton* v. *Hitchcock,* 64 Mich. 316 (8 Am. St. Rep. 821); *Allen* v. *Crane,* 152 Mich. 380 (16 L. R. A. [N. S.] 947). Under the Constitution, "Alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of his wife to the same." Constitution of Michigan, art. 14, § 2.

Plaintiff's attempted assignment was invalid. He was not, at the time of filing the bill of complaint

herein, entitled to the relief prayed or any part thereof. Decree is reversed, and bill dismissed, with costs.

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

HOWCROFT *v.* HOWCROFT.

DIVORCE—ALIMONY—DIVISION OF JOINT PROPERTY.

Divorce decree to wife awarding her $11,992.10, and husband $6,196.04 of joint property is affirmed, on appeal by wife, where record shows that although she inherited about $4,000, the rest is the result of their joint efforts, and she has in her own name, in addition to award by court, money and property of value of $7,659.25, making her total holdings $19,651.35, as against husband's $6,196.04.

Appeal from Wayne; Webster (Arthur), J. Submitted January 6, 1931. (Docket No. 25, Calendar No. 35,316.) Decided February 27, 1931.

Bill for divorce by Emma M. Howcroft against Herbert Howcroft. Plaintiff appeals from portion of decree providing for division of property. Affirmed.

Schmalzriedt, Frye, Granse & Frye, for plaintiff.

Wiley, Streeter, Smith & Ford, for defendant.

POTTER, J. Plaintiff sought divorce from defendant and a division of property. From a decree for plaintiff she appeals. No complaint is made of that part of the decree granting plaintiff divorce. Plaintiff inherited about $4,000. The rest of the property involved is the result of the efforts of the parties, who owned jointly property valued at $18,788.14. Plaintiff had on deposit in her own name $7,159.25, and owned two lake lots valued at $500, a total of $7,659.25. This property she kept. The trial court divided the property held jointly, and gave plaintiff property on Seminole avenue, Detroit, valued at $10,000, furniture and fixtures valued at $1,000, and money in the hands of the receiver $992.10, less receiver's expenses, $50, or $942.10, a total of $11,992.10 of the joint property, and gave defendant title to the property on Mt. Elliott avenue, Detroit, sold on land contract, on which there was yet due $6,196.04, so the total property holdings of the respective parties were, plaintiff, $19,651.35, defendant $6,196.04. Defendant has not appealed.

Decree affirmed, with costs to defendant.

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

HUGHES *v.* WM. F. V. NEUMANN & SONS.

1. SALES—RESCISSION—FRAUD—WAIVER.

Purchaser of automobile who within week knew of seller's false representations in connection with sale thereof, but thereafter made payments and continued to use car for about 90 days, waived right to rescind on ground of fraud.

As to effect of use of automobile or truck as waiver of right to rescind contract or sale, see annotation in 34 A. L. R. 547.

2. SAME—REPRESENTATIONS OF PROMISSORY CHARACTER NOT BASIS OF FRAUD.

Promise by seller of automobile to give purchaser enough law business to enable him to pay part of purchase price, being promissory in character, may not be made basis of rescission for fraud.

3. SAME—EQUITY—RESCISSION NOT WARRANTED IN ABSENCE OF OFFER TO DO EQUITY.

Where, in suit by purchaser for rescission of contract for purchase of automobile on ground of fraud, plaintiff's bill does not offer to place defendant *in statu quo*—does not offer to do equity—plaintiff is not entitled to rescind.

Appeal from Wayne; Driscoll (George O.), J., presiding. Submitted January 7, 1931. (Docket No. 54, Calendar No. 35,325.) Decided February 27, 1931. Rehearing denied June 1, 1931.

Bill by Ben C. Hughes against William F. V. Neumann & Sons, a Michigan corporation, to rescind a contract for the purchase of an automobile. Decree for plaintiff. Defendant appeals. Reversed.

Patrick H. O'Brien, for plaintiff.

David I. Hubar (*Milton M. Maddin,* of counsel), for defendant.

POTTER, J. Plaintiff filed a bill to rescind a contract in writing for the purchase of a second-hand Pierce Arrow automobile, for defendant's alleged fraud and misrepresentation. The fraud charged is said to have consisted:

a. Of a representation by defendant that the car was a 1926 model when it was a 1925 model;

b. That defendant would not record the contract between the seller and plaintiff when in fact it was at once recorded; and

c. That defendant promised to give plaintiff law business sufficient so he could earn therefrom one-half the payments to become due on the contract of purchase of the automobile.

The claims of plaintiff are disputed by defendant. Apart from the dispute, it clearly appears plaintiff knew within a week after the contract was made it was recorded, and that the car which he received from defendant was a 1925 model instead of a 1926 model. He kept the car, used it in his business approximately 90 days and paid three payments thereon after this time, and thereby waived the right of rescission on the grounds of fraud, ratified the contract, and is estopped from asserting this fraud in this suit.

Plaintiff's claim he was to have a certain amount of law business from defendant to enable him to pay a part of the contract price is promissory in character and cannot be made the basis of fraud. Plaintiff's bill does not offer to place the defendant *in statu quo*—does not offer to do equity—notwithstanding he brings the bill for rescission. Under the circumstances, we think the plaintiff not entitled to rescind. The decree of the trial court is reversed, with costs, and the bill dismissed.

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

BALTZER *v.* RUTT.

LICENSES—CORPORATIONS—BLUE SKY LAW—LIABILITY OF ACCOMMODATION INDORSERS.

Where corporate stock was sold in violation of blue sky law (2 Comp. Laws 1929, § 9769 *et seq.*), its delivery to purchaser constituted no consideration for notes given in payment therefor, and accommodation indorsers on said notes may not be held liable, where sale has been voided and stock tendered back.

Error to Kent; Perkins (Willis B.), J. Submitted January 20, 1931. (Docket No. 18, Calendar No. 35,333.) Decided February 27, 1931. Rehearing denied June 1, 1931.

Assumpsit by George R. Baltzer against G. H. Rutt, Andrew A. Scott, C. E. Rutt, and C. Sophus Johnson on promissory notes given for the sale of corporate stock. Judgment for plaintiff. Defendants Scott and Johnson bring error. Reversed as to appellants.

Joseph R. Gillard (*George S. Baldwin,* of counsel), for appellants.

K. B. Matthews, for appellee.

POTTER, J. Plaintiff sued defendants G. H. Rutt, Andrew A. Scott, C. E. Rutt, and C. Sophus Johnson, in assumpsit on three promissory notes of $2,500 each, dated September 1, 1928, due in 90 days after date, with interest at 7% per annum. Two of such notes were payable to plaintiff; one was payable to K. L. Ashbacker; all of them were signed

by G. H. Rutt as maker. One of the notes given to plaintiff as payee was indorsed on the back by Andrew A. Scott, C. E. Rutt, and C. Sophus Johnson. The other was indorsed by K. L. Ashbacker in addition to the other indorsers. The note payable to Ashbacker was indorsed by Scott, C. E. Rutt, and Johnson and without recourse by Ashbacker and H. M. Hallett. The notes were not paid when due, and, upon suit being instituted thereon, defendants Scott and Johnson appeared, pleaded the general issue, and gave notice that, as to them, the notes were void because they were accommodation indorsers without consideration, and known to be such by plaintiff, who was estopped from claiming otherwise; that the indorsements, as to them, were procured by fraud and conspiracy, without consideration, in violation of the so-called blue sky law of Michigan (2 Comp. Laws 1929, § 9769 *et seq.*). There was judgment for plaintiff and defendants bring error. They claim that even though plaintiff's claim be taken as true, the notes were given in payment of stock purchased by defendants from Rutt who was a broker for plaintiff, the transaction was void under the blue sky law, the stock for which the notes were given not having been approved by the Michigan securities commission. It is conceded there was no approval of the stock for which plaintiff claims the notes were given by the Michigan securities commission. When the corporation, the sale of whose stock is involved, was organized, 375 shares of its stock were taken in the name of Mr. G. H. Rutt, with the understanding that when the stock was sold the proceeds derived from the sale thereof were to go into the corporate treasury to finance the corporation. In *Barth* v. *Klicpera,* 248 Mich. 460, it is said:

"There was no approval of the stock by the securities commission, and there were repeated sales of stock made by defendant Klicpera for the purpose of financing the corporation. It is manifest that the stock was in the name of Mr. Klicpera to enable him to dispose thereof as he found opportunity, and employ the avails in financing the corporation. The sale to plaintiff was in violation of the statute. Sales made in violation of the statute are voidable at the election of the purchaser, and, if voided and tender back is made, the amount paid for the stock may be recovered. The statute penalizes violations of its provisions, and awards a specific civil remedy for recovering the money paid, and such remedy is exclusive. At the election of the purchaser the statute makes it the duty of the seller to repay what he has received and grants an action for the recovery of the money or other consideration *had and received.* It is optional with the purchaser to retain the stock, or tender it back and be entitled to recover what has been paid. The right to rescind the purchase is statutory, and involves no issue of fraud, actual or constructive."

Under the undisputed facts, the stock, not having been approved by the Michigan securities commission, was illegally issued, its delivery to defendants constituted no consideration for the indorsement of the notes in question, and appellants have a right to a discharge of liability on their indorsements, having tendered back to plaintiff the stock which was turned over to them for that purpose by defendant G. H. Rutt. As this disposes of the case, it is unnecessary to consider the other assignments of error. Judgment reversed, and judgment of no cause of action entered under Rule No. 79 for appellants, with costs.

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

DAMMAN *v.* MERCIER-BRYAN-LARKINS BRICK CO.

SALES—IMPLIED WARRANTY.

Where buyer ordered stock brick of specific kind for veneer purposes, there was no implied warranty of its fitness for that purpose (2 Comp. Laws 1929, § 9454); fitness for purpose indicated being determined by buyer under circumstances.

Error to Wayne; Doty (Frank L.), J., presiding. Submitted January 7, 1931. (Docket No. 49, Calendar No. 35,387.) Decided February 27, 1931.

Assumpsit by Archiel Damman against Mercier-Bryan-Larkins Brick Company, a Michigan corporation, on an implied warranty of quality and fitness of brick. Judgment for plaintiff. Defendant brings error. Reversed.

Joseph L. Ruby (*Maxwell S. Friedland* and *John H. Schneider,* of counsel), for plaintiff.

Richard I. Lawson and *William B. Giles,* for defendant.

POTTER, J. Plaintiff sued defendant to recover damages for breach of an implied warranty of quality and fitness of brick purchased by plaintiff from defendant, counting on section 11846, 3 Comp. Laws 1915 (2 Comp. Laws 1929, § 9454). From a judgment for plaintiff, defendant brings error.

Plaintiff "ordered 12,000 stock brick to be used for brick veneer purposes." He claims the brick,

being ordered for a specific purpose, there was an implied warranty the brick delivered were proper for that purpose; the determination of their fitness for the specific purpose being left by the contract to the seller. Defendant claims there was an order for 12,000 brick of a particular specific kind known as stock brick, that the term "stock brick" is a well-known trade name, and though defendant knew such brick were to be used for brick veneer purposes, there was no implied warranty of fitness for any purpose, the quality being determined by the plaintiff's order for a particular specific kind and quality of brick, and whether they were fit for the purposes indicated was determined by the buyer. If one orders No. 3 Hemlock to build a water tank and No. 3 Hemlock is delivered, can he find fault because the lumber is shaky, full of knots and unsuited for the purpose of building a water tank? Certainly not. We think there was no implied warranty of fitness of stock brick for veneer purposes.

Judgment reversed, with costs; no new trial ordered.

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

HILLMAN TOWNSHIP BOARD *v.* EMPIRE MUTUAL FIRE INSURANCE CO.

1. INSURANCE—FIRE INSURANCE—USE OF BUILDING.
   Use of insured building as public hall was within terms of insurance policies describing it, among other things, as hall.

2. SAME—BREACH OF CONDITION—EFFECT OF REPEAL OF STATUTE.
   Rights of insured and insurer which became fixed while Act No. 264, Pub. Acts 1921, was in force, are not affected by its repeal.

3. SAME—BURDEN OF SHOWING BREACH ON INSURER.
   In action on fire insurance policies, where insurer claims breach of condition, it has duty of showing that there was causal relation between breach and loss (Act No. 264, Pub. Acts 1921).

4. APPEAL AND ERROR—QUESTION OF FACT.
   Where evidence presented question of fact for jury, its determination is binding on appellate court.

5. VENUE—CHANGE OF VENUE—SPECIAL MOTION.
   Ordinarily, application for change of venue is special motion requiring four-day notice together with copies of affidavits upon which motion is based (Circuit Court Rule No. 38 [old rule], now Court Rule No. 34).

6. SAME—DISCRETION OF COURT.
   Granting or refusing change of venue rests in sound judgment and discretion of trial court, and its action will not be disturbed, on review, in absence of showing of abuse of discretion.

7. SAME—JURORS—PUBLICITY—ABUSE OF DISCRETION.
   Denial of motion for change of venue in civil case, on ground that jurors had read newspaper articles discussing case, *held*, not abuse of discretion.

8. INSURANCE—TRIAL—INSTRUCTIONS.
   In action on fire insurance policies on town hall, where insurer claimed breach of condition in that building was used as public hall, charge of court in reference thereto, *held*, war-

ranted under the circumstances; insurer's agent having had full knowledge of use and character of building, which was not misdescribed in policies.

Error to Montmorency; Smith (Fred P.), J. Submitted January 16, 1931. (Docket No. 37, Calendar No. 35,349.) Decided February 27, 1931.

Assumpsit by Hillman Township Board and another against Empire Mutual Fire Insurance Company, a Michigan corporation, on two policies of fire insurance. Judgment for plaintiffs. Defendant brings error. Affirmed.

Carl R. Henry (*Guy D. Henry,* of counsel), for plaintiff.

Kinnane & Leibrand (*Elmer G. Smith,* of counsel), for defendant.

POTTER, J. Plaintiffs sued defendant to recover their loss and damage, alleged to have been insured against, by defendant, resulting from the burning of a hall at Hillman, Michigan. Defendant pleaded the general issue and gave notice that at the time of the fire a picture show was being operated in the building insured in violation of Act No. 257, Pub. Acts 1913 (2 Comp. Laws 1929, § 8867 *et seq.*); plaintiffs were guilty of gross negligence causing the loss; the building insured was occupied for other purposes than those for which it was insured, and plaintiffs negligently permitted a motion picture machine to be operated therein, by an incompetent person, in violation of law.

Defendant issued two policies, one to the township board of Hillman township, and the other to Hillman township, and for this reason both are named

as plaintiffs. Suit was brought in the name of the insured as stated in each of the policies of insurance. One policy described the property as "The two story, stucco frame, metal roof building used as the town's officers' offices, hall and voting place;" the other described the property as "the two-story, metal roof, stucco, frame building used as a hall." Both policies were written by John Pettinger, agent for defendant, who testified he was familiar with the premises covered by the policies, had been in the hall prior to the fire, and thought he was in the hall when he solicited the insurance. The policies do not misdescribe the property insured or its use. Its use as a public hall at the time of the fire was within the terms of the policies. Much testimony was taken on the trial, which resulted in a verdict and judgment for plaintiffs. Defendant brings error.

If there was substantial evidence tending to support the verdict, it cannot be set aside, even though upon the record we might be in doubt as to the ultimate facts. The determination of such facts must be based upon the evidence and found by the jury. It was the theory of defendant, on the trial, that at the time of the fire a moving picture machine was being operated in the building, and by reason of the ignition of the films of this motion picture machine, the fire was generated which burned the building; and the moving picture films unlawfully established an increased hazard, not included in the risk taken by the insurer. On the other hand, plaintiffs contended, and introduced evidence tending to show, the presence of the moving picture machine and the films used in its operation had nothing to do with the fire; the building caught fire in the attic, the steel ceiling became so hot the paint began to fall off and the fire dropped down from the attic before

the films of the moving picture machine took fire. It was plaintiffs' claim, and they introduced testimony tending to show, that though the moving picture machine had been operated, that part of the program of entertainment in progress when the fire occurred in which the moving picture machine was used had been concluded some time before fire was discovered; that all of the reels or films had been taken out of the machine and all but two placed in metal containers; that two of the films were rolled up on the table near the machine; that these films became ignited from sparks and burning embers from the attic falling thereon; that the burning films were extinguished by use of a chemical fire extinguisher; that the fire in the attic burned through the roof; the water pressure was off by reason of the repair of the water mains in the village, the people were unable to get water on the fire until it was too late, and as a result the fire destroyed the building; that the presence of the moving picture films in the building neither caused the fire nor contributed to increase the hazard. Defendant claims the picture films caused the fire. Plaintiffs claim the fire burned the building and contents, including the picture films.

Act No. 264, Pub. Acts 1921, provided:

"No policy of fire insurance shall hereafter be declared void by the insurer for the breach of any condition of the policy if the insurer has not been injured by such breach, or where a loss has not occurred during such breach, and by reason of such breach of condition."

This statute was in force at the time the fire occurred, June 5, 1929, although it is said to have been repealed by amendments to the insurance code of 1929, 3 Comp. Laws 1929, § 12572. Such repealing

act did not go into effect until August 28, 1929, and the rights of the parties had been fixed while the act of 1921 was in force. The statute above quoted has been considered and construed, and, briefly stated, it became the duty of defendant to show there was a causal relation between the breach of the condition of the policy by the insured and the loss to the insurer. *Yearnd* v. *Northern Insurance Co.,* 241 Mich. 413, 245 Mich. 566. Whether there was such causal connection between the alleged breach of condition of the policy and the loss to the insurer was a question of fact for the jury, under the evidence. The jury determined this disputed question of fact in favor of plaintiffs, and we are bound to give effect to such finding.

The defendant, when this case was called for trial, made an application for a change of venue, claiming public sentiment was hostile to defendant and it did not discover the reason for such hostility until the day before, when its attorney read newspaper comments on the case. Motions for change of venue were, at the time this case was tried, governed by Circuit Court Rule No. 38, which is now Michigan Court Rule No. 34. Ordinarily, applications for change of venue are special motions and four days' notice must be given, together with copies of the affidavits upon which the motion is based. *Peterson* v. *St. Clair Circuit Judge,* 143 Mich. 79. But conceding the defendant acted as soon as it was possible to act, the granting or refusal to grant a change of venue rested in the sound judgment and discretion of the trial court. As said in *Rachow* v. *Charlevoix Circuit Judge,* 209 Mich. 157:

> "It is discretionary with the trial court to grant a change of venue, and courts of review will not disturb the action of the trial court in the exercise of such discretion except in cases of plain abuse."

It is claimed some of the jurors read newspapers containing articles discussing the fire and resulting litigation. In *People* v. *Rich,* 237 Mich. 481, and *People* v. *Connors,* 251 Mich. 99, applications were made for change of venue in criminal cases upon the ground some of the jurors had read the newspapers. The court observed that this was a time of great publicity, that every criminal case was discussed in the newspapers and that it was no reason why a juror could not sit in the case that he had read newspaper comments. A juror is not disqualified in a criminal case even though he may have formed an opinion from what he has read, if, notwithstanding that, he can hear the evidence and the charge of the court and render a fair and impartial verdict according to the law and the evidence. 3 Comp. Laws 1929, § 17303.

If, where human liberty is involved, a reading of newspapers is not sufficient to disqualify a juror, how, in a civil case, can it amount to a disqualification? The trial court did not abuse its discretion in refusing a change of venue.

Complaint is made of the argument of plaintiffs' counsel. There was nothing inflammatory about such argument. It was a clear and concise statement of what plaintiffs claimed. Complaint is made of the charge of the court in relation to this building being used as a public hall and for public purposes other than as a town hall. Under the circumstances the charge of the court was warranted. Defendant's agent knew all about the building, the purposes for which it was used, and its character. One of the policies sued upon not only described the building as one used as the town's officers' offices, but as a hall and voting place, and the other described it as used as a hall. From the terms of these policies defendant must be held to have had full

knowledge of the use and character of the building insured. We have been unable to discover any reversible error on the trial, and judgment is affirmed, with costs.

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

CHRISTIAN *v.* AMSTER.

1. FORCIBLE ENTRY AND DETAINER—FORCE MUST HAVE BEEN USED OR THREATENED.

   In order to maintain action for forcible entry and detainer, entry or detainer must have been riotous, or personal violence must have been used or threatened, or conduct of defendant must have been such as to inspire terror or alarm.

2. SAME—DIRECTED VERDICT.

   In action for forcible entry and detainer, where there was no evidence that any force or violence was offered, verdict should have been directed in favor of defendant.

Error to Van Buren; Warner (Glenn E.), J. Submitted January 14, 1931. (Docket No. 117, Calendar No. 35,314.) Decided February 27, 1931.

Action by Elmer Christian against Joe Amster for forcible entry and detainer. Judgment for plaintiff. Defendant brings error. Reversed.

Lewis R. Williams and *H. H. Adams,* for plaintiff.

W. J. Barnard and *C. W. Benton,* for defendant.

POTTER, J. Plaintiff sued defendant for forcible entry and detainer. From a judgment for plaintiff, defendant brings error. Viola Nottingham traded her farm for a stock of goods in Lawton, she giving to defendant a chattel mortgage on the stock of goods and fixtures acquired. Plaintiff, a son-in-law of Mrs. Nottingham, assumed to run the store. Plaintiff was arrested and held in jail in Allegan county for causes disconnected with this case or defendant, who, claiming the stock of goods was run down, went to see Mrs. Nottingham who owned it, and plaintiff's wife, and stated to them he was going to foreclose the chattel mortgage and take the place over. After some negotiations, Mrs. Nottingham gave defendant a bill of sale of the chattel mortgaged property, taking back from defendant an agreement that if the stock sold, within 30 days, for more than the chattel mortgage and expenses of operation, she was to have such balance. Defendant, at the time he went to the store to foreclose his chattel mortgage, was accompanied by an officer named Moody. Neither defendant nor Moody offered any force or violence toward Mrs. Nottingham, defendant and Mrs. Nottingham being friendly, and the most that Mrs. Christian, plaintiff's wife, says, is that defendant, while talking with her, shook his finger at her. Plaintiff was not there. He was in jail. At the conclusion of plaintiff's case, defendant moved for a directed verdict. This was denied, the case submitted to a jury and a verdict rendered for plaintiff.

Nothing constitutes a forcible entry which would not have been indictable at common law. *Davis* v. *Ingersoll,* 2 Doug. 372; *Marsh* v. *Bristol,* 65 Mich. 378; 26 C. J. p. 803. The entry or detainer must have been riotous, or personal violence must have

been used or threatened or the conduct of the defendant must have been such as to inspire terror or alarm. There must have been force used or threatened against the person.

In *Davis* v. *Ingersoll, supra,* it is said:

"The complaint should contain the same substantive allegations that would be requisite in an indictment predicated upon the same statute; and the complainant should be held to the same proof, substantially, that would be necessary to justify a conviction upon an indictment."

In *Harrington* v. *Scott,* 1 Mich. 17, it is said:

"The summary proceeding provided by our statute is a substitute for a proceeding by indictment in England; it is in its nature a criminal proceeding, and the same proof is required to convict a party under such a proceeding, as would be required to convict him if indicted. * * * There should have been proof of such facts as would amount to a breach of the peace; there is an entire absence of proof going to show, either that the entry was made by the defendants with strong hand and multitude of people, or that the premises were with strong hand detained by them."

In *Shaw* v. *Hoffman,* 25 Mich. 162, it is said:

"The statute was not intended to apply to a mere trespass, however wrongful; but the entry or the detainer must be riotous, or personal violence must be used or in some way threatened, or the conduct of the parties guilty of the entry or detainer must be such as in some way to inspire terror or alarm in the persons evicted or kept out—in other words, the force contemplated by the statute is not merely the force used against, or upon, the property, but force used or threatened against persons, as a means, or for the purpose, of expelling or keeping out the prior possessor."

Defendant's motion for a directed verdict should have been granted. It is unnecessary to consider the other assignments of error. Judgment reversed, with costs.

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

BEACOCK v. PEOPLES LUMBER CO.

1. VENDOR AND PURCHASER—RESCISSION—EQUITY—COURT DETERMINES TERMS OF RESCISSION.

   Where facts pleaded and stipulated by parties lay foundation for exercise by court of equity of right to decree rescission of land contract, it was for court to determine terms and conditions under which rescission should be had.

2. SAME—STIPULATIONS.

   In suit by vendees to rescind land contract and recover payments made, vendor's claim that if rescission is decreed additional testimony should be taken to determine value of real estate given by vendees as part payment is without merit, where stipulation between parties fixes its value.

3. SAME—RESCISSION—LIENS.

   Upon rescission of land contract on ground of fraud, vendees are entitled to lien for money found to be due to them.

Appeal from Wayne; Parker (James S.), J., presiding. Submitted January 14, 1931. (Docket No. 140, Calendar No. 35,376.) Decided February 27, 1931. Rehearing denied June 1, 1931.

Bill by John Ivan Beacock and another against Peoples Lumber Company, a Michigan corporation, and another to rescind a land contract.

Assumpsit in Detroit Common Pleas Court by Peoples Lumber Company, a Michigan corporation, against John I. Beacock for payments due under the land contract. Judgment for defendant. Plaintiff appealed to the circuit court.

Bill by Peoples Lumber Company, a Michigan corporation, against John Ivan Beacock and another to foreclose the land contract.

By stipulation all three causes were consolidated. Decree for plaintiffs Beacock. Defendant Peoples Lumber Company appeals. Affirmed.

Miller, Canfield, Paddock & Stone, for plaintiffs.

Samuel D. Frankel, for defendant.

POTTER, J. September 10, 1929, John I. Beacock and Phyllis Beacock, his wife, purchased of the Fidler Construction Company, for an agreed price of $16,500, real estate described in a land contract on that date made between the parties; $2,000 in cash and property was paid down, the balance was to be paid at the rate of $135 a month. October 28, 1929, the Fidler Construction Company conveyed its interest in the premises and assigned its interest in the land contract to Peoples Lumber Company. Beacock and wife, claiming the house on the premises purchased was not as represented, refused to make further payments until the defects therein were remedied. January 2, 1930, Peoples Lumber Company sued John I. Beacock in the Detroit common pleas court to recover the instalments due on the contract November 15 and December 15, 1929. This case was tried, a verdict for defendant had, a motion for a new trial made and denied, and the

case appealed by plaintiff to the circuit court. February 15, 1930, John I. Beacock and wife filed a bill to rescind the contract and recover the amount paid by them thereon. February 18, 1930, Peoples Lumber Company filed a bill against John I. Beacock and wife to foreclose the land contract. These cases all being in the circuit court, a stipulation in writing was made between the attorneys for the respective parties and filed, entitled in all of them, September 11, 1930. This stipulation sets up that:

"By the terms of the contract the Beacocks agreed to pay $16,500, of which the down payment was $1,000 in cash and lot No. 1,582 of Arthur J. Scully's Eastern Super-highway No. 1, village of Lochmoor, Wayne county, Michigan, upon which lot the Beacocks owed a principal balance of $1,085.12 and had paid $800, in principal, interest and taxes, their vendee's interest being accepted by the Fidler Construction Company at a valuation of $1,000; down payment in the amount of $2,000 being shown by the contract. This lot has a present cash value of $700; and if sold on time, a value of $1,000. The balance upon the Fidler contract was payable in monthly installments of $135, payable on the 15th day of every month."

The Beacocks "discovered certain defects in the premises, as follows:

"1. Defective piping and improperly constructed chimney made it impossible adequately to heat the house, it being impossible to heat certain rooms to more than 50 degrees Fahrenheit. The result was suffering, illness of the Beacock children, and greatly increased expense for coal.

"2. The plaster was cracked in many places about the house.

"3. The weather stripping was improperly installed so that the house was draughty.

"4. The floors were warped and uneven in many places.

"5. The iron railing in the front porch came loose and one of the front steps was broken.

"6. The concrete in the garage contained a large crack.

"7. The concrete side drive sank and receded from the house.

"8. The frigidaires were not paid for and repossession was threatened.

"9. One F. D. Hilgendorf filed a mechanic's lien upon the premises for $378, lien No. 51572.

"10. The Commercial Mortgage Company started proceedings to foreclose its second mortgage upon the premises.

"The Beacocks had been induced to enter into said land contract by representations of the Fidler Construction Company that the house was well constructed and in a sound and tenantable condition; that all installation and appliances, such as frigidaires, were fully paid for; that all laborers, materialmen, etc., upon the job had been duly paid; that the two mortgages upon the premises would be duly paid according to their terms. Immediately upon discovering the falsity of these representations, the Beacocks refused to make further payments upon the contract until the defects were rectified. The Peoples Lumber Company indicated a willingness to repair the piping in conjunction with the heating plant but demanded possession of the premises for three or four days in order to do this and a general release of all claims in respect to defects in the premises."

A decree was entered by the trial court in favor of the Beacocks. Peoples Lumber Company appeals.

Appellant claims rescission is discretionary with the court; it may be denied on the basis of facts arising subsequent to the filing of the bill; and if rescission is decreed, the Peoples Lumber Company

should be charged with the market value of the vacant lot equity as of September 10, 1929; that to determine such value it is necessary to take additional testimony and under no circumstances are plaintiffs entitled to a personal judgment against defendant and appellant.

The facts pleaded and stipulated lay the foundation for the exercise by a court of equity of its right to decree rescission. Nothing else is involved in the case. If rescission was granted, it was for the court to determine the terms and conditions under which such rescission should be had. The stipulation of the parties fixes the present cash value of the real estate given in payment by plaintiffs for the property in question. There is no doubt that upon rescission of a contract like that involved, plaintiffs are entitled to a lien for the money found to be due them. *Witte* v. *Hobolth,* 224 Mich. 286; *German Bundesheim Society* v. *Schmidt,* 242 Mich. 139; *Younger* v. *Caroselli,* 251 Mich. 533.

We find no error in the decree of the trial court, which is affirmed, with costs.

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

VAN HORN *v.* HERNDON.

1. VENDOR AND PURCHASER—INSANE PERSONS—VOIDABLE CONTRACT.
Contract to sell land executed by one later judicially declared insane was at most voidable.

2. SAME—CANCELLATION OF INSTRUMENTS—FRAUD—RATIFICATION—TENDER.
Suit by heirs of vendor to set aside land contract, voidable on ground of fraud, was properly dismissed, where plaintiffs were represented in probate court by able counsel, made no claim of fraud until more than five years after death of vendor, and in meantime had ratified contract by accepting from administrator of vendor's estate their share of payments received on contract, and made no tender of it back.

Appeal from Wayne; Carr (Leland W.), J., presiding. Submitted January 23, 1931. (Docket No. 135, Calendar No. 35,441.) Decided February 27, 1931.

Bill by Harold C. Van Horn and others against Robert Herndon and another to cancel a land contract. Decree for defendants. Plaintiffs appeal. Affirmed.

James Gibbons (*Andrew G. Stevenson,* of counsel), for plaintiffs.

Retan & Zeleznik, for defendant Herndon.

POTTER, J. Elizabeth Van Horn in her lifetime owned 20 acres of land in Brownstown township, Wayne county, Michigan, which she sold in September, 1922, to defendant Robert Herndon on land

contract. Later both Elizabeth Van Horn and her daughter, defendant Estelle Van Horn, were judicially declared insane and confined to the Michigan State Hospital at Pontiac. After the death of Elizabeth Van Horn, an administrator of her estate was appointed by the probate court of Washtenaw county. The title to the real estate of the deceased passed to and vested in plaintiffs and defendant Estelle Van Horn. The administrator was not a proper party plaintiff to attempt to set aside the land contract made by Elizabeth Van Horn in her lifetime; the plaintiffs and defendant Estelle Van Horn were. The contract of Elizabeth Van Horn was at most voidable. Plaintiffs were represented in the probate court of Washtenaw county in the administration of the estate of Elizabeth Van Horn by able counsel. If plaintiffs claimed fraud in the sale of the real estate by the deceased, it was their duty to act promptly. Plaintiffs did nothing. The administrator collected the amount due on the contract for the sale of the land and distributed the amount collected, less the expenses of administration, to the parties entitled thereto, the plaintiffs receiving upwards of $2,000 on the distribution of the estate of Elizabeth Van Horn.

More than five years elapsed after the death of Elizabeth Van Horn before the filing of the bill of complaint in this case. No tender back of the proceeds of the contract received from the administrator of Elizabeth Van Horn's estate by plaintiffs is made. Plaintiffs seek to keep the money paid them by the administrator and set aside the contract under which defendant paid it to him. Conceding everything claimed by plaintiffs, they have ratified the contract, taken their respective shares of the

money paid by defendant Herndon under it to the administrator from him, and make no tender of it back. They have ratified the contract now sought to be set aside. The trial court arrived at a correct conclusion. Decree affirmed, with costs.

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

PEOPLE *v.* MARCUS.

1. CRIMINAL LAW—CROSS-EXAMINATION—COLLATERAL MATTERS—DISCRETION OF COURT.

   Right of cross-examination in relation to collateral matters rests in discretion of trial court.

2. SAME—TRIAL—INSTRUCTIONS—DUTY TO PRODUCE RES GESTÆ WITNESSES.

   Where, in prosecution for robbery armed, complaining witness did not know names or whereabouts of certain persons who witnessed holdup, and investigation by police disclosed that they had left State, failure of trial court to instruct jury, as requested, that it was duty of prosecution to produce all *res gestæ* witnesses was not error.

3. SAME—ROBBERY ARMED—INSTRUCTIONS ON DEFENSE OF ALIBI.

   In prosecution for robbery armed, where defense was *alibi*, trial court was not in error in instructing jury that *alibi* is defense easy to prove and hard to disprove, and therefore they should be careful and cautious in examining evidence in regard thereto; especially where further instruction was given that if defense of *alibi* raised reasonable doubt of defendant's guilt he should be acquitted.

4. SAME—EVIDENCE—CREDIBILITY OF WITNESSES.
   Testimony by police officer relating to conversation between him and certain of defendant's *alibi* witnesses, *held*, properly received for its bearing on their credibility.

5. SAME—APPEAL AND ERROR.
   Defendant may not complain of introduction by prosecution of letter claimed to have been sent to defendant under another name, where defendant's counsel asked to have it introduced.

6. SAME—CROSS-EXAMINATION.
   Testimony brought out on legitimate cross-examination of co-defendant, tending to show commission of another offense, was not prejudicial to defendant, where it did not concern him but related to codefendant, who was acquitted.

7. SAME—TRIAL—CROSS-EXAMINATION.
   Where defendant had an office, desk, chairs, hat tree, and some blank envelopes and paper, but had no stock of goods, and, although he claimed to have a partner, did not know his address, there was no error in asking him if the office was maintained as a blind.

8. SAME—ARGUMENT OF COUNSEL—APPEAL AND ERROR.
   Complaint that argument of prosecutor was inflammatory may not be considered by Supreme Court, where argument is not in record.

9. SAME—GREAT WEIGHT OF EVIDENCE.
   Where there was ample evidence of defendant's guilt, determination of facts was for jury, and verdict of guilty may not be said to be against great weight of evidence.

10. SAME—APPEAL AND ERROR.
    That codefendant was acquitted may not be considered as bearing on guilt or innocence of defendant, where there was testimony relating to codefendant which had no bearing on guilt or innocence of defendant.

11. SAME—REASONABLE DOUBT.
    Where there was no error in charge of court on presumption of innocence, reasonable doubt, character, *alibi*, and defendant's testimony, there is no merit in defendant's claim that verdict of guilty is not in accordance with doctrine of reasonable doubt.

Error to Recorder's Court of Detroit; Brennan (John V.), J. Submitted January 15, 1931. (Docket No. 152, Calendar No. 35,298.) Decided February 27, 1931.

Jerry Marcus and James O'Grady were charged with robbery armed. Defendant Marcus brings error. Affirmed.

Norman H. Magel, for appellant.

Paul W. Voorhies, Attorney General, *Harry S. Toy,* Prosecuting Attorney, and *John T. Meier,* Assistant Prosecuting Attorney, for the people.

POTTER, J. Defendant and appellant, Jerry Marcus, was arrested, informed against jointly with one O'Grady, and convicted of robbery armed. The person robbed was the complaining witness, Frank O'Leary. Defendant brings error.

Defendant complains that the trial court limited the cross-examination by his counsel of the people's witnesses. The matters sought to be inquired about were collateral. The right to cross-examine in relation to them rested in the discretion of the trial court. There was no abuse of discretion.

Defendant complains the trial court did not charge the jury with reference to *res gestæ* witnesses. Complaining witness operated a cigar store. Some customers, claimed to have been actors in a nearby theater, were in the store when the holdup occurred. The complaining witness did not know their names or where they were. The robbery occurred January 8, 1930, complaint was made January 10, 1930. The police began investigating the case on the same date. They sought to locate these witnesses, and found on inquiry at the theater their

contract with the theater had expired and the witnesses had left the State. Under such circumstances, laid before the jury, the people could not produce them and defendant was not prejudiced by the action of the trial court in relation thereto.

The defendant, notwithstanding proof in support of his *alibi,* notice of which had been given, was identified as the robber, not only by the complaining witness but by others.

Complaint is made of the court's charge upon the subject of *alibi* as follows:

"An *alibi* is a legitimate defense; that is, it is a lawful defense. An *alibi* is, however, a defense that is easily proven and hard to disprove. Therefore, you will be careful and cautious in examining the evidence in regard to the *alibi.* I instruct you, however, that if the evidence of the defendant's *alibi* raises a reasonable doubt of the defendant's guilt in your minds, you will acquit him."

There is no error in this. *People* v. *Resh,* 107 Mich. 251; *People* v. *Portenga,* 134 Mich. 247; *People* v. *Trzil,* 235 Mich. 469.

Complaint is made of the testimony of a police officer relating to a conversation between himself and Ida Hanson and Doris Hansen, defendant's lady friends, *alibi* witnesses. The statement sworn to, if made, bore on the credibility of the *alibi* witnesses and was properly received. *People* v. *Tice,* 115 Mich. 119, 221 (69 Am. St. Rep. 560). There was testimony tending to show defendant, at about the time of the robbery, was registered at a Detroit hotel under the name of Gordon. The introduction by the people of a letter addressed to Gordon at the hotel and obtained by the police from the hotel clerk is complained of. The question whether this letter was admissible or not is rendered unimportant by

the fact defendant's counsel asked to have it introduced.

It is claimed there was testimony offered tending to show the commission of another offense. This testimony was based upon the cross-examination of defendant O'Grady and related to his concern in such alleged offense. It did not concern appellant. O'Grady was acquitted. Such testimony did not prejudice defendant and was well within the scope of legitimate cross-examination of O'Grady.

Complaint is made of the suggestion by the people that defendant's maintenance of an office was a blind. Defendant had a desk, four chairs, a hat tree, and some blank envelopes and paper in this alleged office. He claimed to have a partner but did not know his address. He had no stock of goods. One Murphy, an *alibi* and good character witness for defendant, lived at the same address as defendant's lady friends, *alibi* witnesses. Murphy did not go back to the office after defendant's arrest.

Under the facts disclosed, there was no error in asking if the office was maintained as a blind.

Complaint is made of the inflammatory argument of the prosecuting attorney. The argument complained of is not in the record and cannot be considered. It is contended the verdict was against the great weight of the evidence. There was ample evidence of defendant's guilt and the determination of the facts was for the jury.

Complaint is made that O'Grady, informed against jointly with appellant, was acquitted. There was testimony relating to O'Grady which had no bearing upon the guilt or innocence of appellant. We cannot consider the fact that O'Grady was found not guilty as bearing upon the guilt or innocence of defendant. It is claimed the verdict was not in accordance with

the doctrine of reasonable doubt. The trial court charged the jury upon the questions of presumption of innocence, reasonable doubt, good character, *alibi,* and the testimony of defendant. We find no error in the charge. None of the assignments of error warrants a reversal. Conviction affirmed.

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

DETROIT & SECURITY TRUST CO. *v.* TULLER HOTEL CO.

MORTGAGES—FORECLOSURE—SALE—CONFIRMATION OF SALE.

Where foreclosure of mortgage on hotel was in equity, and those interested had notice of sale and reasonable time in which to refinance, if possible, order confirming sale should not be set aside and resale ordered because of deficiency, in absence of guaranty that on resale property will bring more than on sale already had.

Appeal from Wayne; Webster (Arthur), J. Submitted February 18, 1931. (Docket No. 168, Calendar No. 35,577.) Decided February 27, 1931.

Foreclosure proceedings by Detroit & Security Trust Company, a Michigan corporation, against Tuller Hotel Company, a Michigan corporation, and others. From an order confirming sale to plaintiff for less than amount due, defendant William H. Lalley, receiver, appeals. Affirmed.

Wiley, Streeter, Smith & Ford, for plaintiff.

Abram W. Sempliner and *Edward N. Barnard,* for defendant Lalley.

POTTER, J. This is an appeal by the receiver of the Tuller Hotel Company, a Michigan corporation, from an order of the trial court confirming the sale, on mortgage foreclosure, of the Tuller Hotel Company property, in Detroit, September 3, 1930, for $3,015,194.15. At the time of the sale there was due on the mortgage, principal and interest and costs of foreclosure and sale, $3,781,262.30, leaving a deficiency, resulting from the foreclosure sale, of $766,068.15. Before the general creditors can receive anything, if this sale is set aside and a resale ordered, the property would have to bring an amount sufficient to cover the deficiency of $766,068.15, taxes and accumulated penalties of approximately $400,000 and the additional bond interest and costs of approximately $10,000, or more than $1,000,000, in addition to the price realized at the sale under consideration. The bondholders who, if this sale is confirmed, stand to lose the amount of the deficiency, $766,068.15, are asking confirmation of the present sale. There are appraisals indicating the property is worth more than the sale price, but these were made by experts in the heyday of material prosperity and paper profits, when it was claimed we had reached a new era of prosperity and all things were valued on a new and permanently higher plateau of prices; before the late price deflation and comparative cessation of speculative mania. If made now, such estimates of value would have to be made in the light of the present more settled value of property. No one has guaranteed the property will bring more than it was sold for at the sale under

consideration if ordered resold. We cannot, on the record, hold this property was sold for a grossly inadequate price. The sale was public. No one was prevented from raising the mortgagee's bid. The mortgage was foreclosed in equity. Everyone interested knew the property was to be sold at forced sale. They had a reasonable time to refinance. Conditions have not been favorable to it. Under the circumstances we are not satisfied, if this property was ordered resold, a greater amount would be realized from such sale than it brought on the sale under consideration. The decree of the trial court is affirmed.

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

OYLER *v.* FENNER.

SPECIFIC PERFORMANCE—ORAL CONTRACTS—PARTIAL PERFORMANCE—STATUTE OF FRAUDS.

Specific performance of oral contract to purchase land on condition that vendees improve property and pay taxes was properly decreed by court below, where vendees had partially performed by making improvements and paying taxes.

Appeal from Muskegon; Vanderwerp (John), J. Submitted January 22, 1931. (Docket No. 112, Calendar No. 35,406.) Decided February 27, 1931.

Bill by Charles L. Oyler and another against Catherine Fenner for specific performance of an oral land contract. Decree for plaintiffs. Defendant appeals. Affirmed.

Cross, Foote & Sessions and *Myrten W. Davie,* for plaintiff.

John A. McLaughlin and *Alexis J. Rogoski,* for defendant.

SHARPE, J. In this case the trial court filed the following opinion:

"The bill in this cause was filed to enforce an alleged oral agreement relating to land, partially performed. The plaintiffs were husband and wife, but are now divorced. Mrs. Oyler is a daughter of the defendant. The plaintiffs claim that in 1907 the defendant entered into a verbal contract with them for the sale of the property involved in the case and described in the bill of complaint, for $1,800, to be paid $100 in cash at the time the contract was to be signed and $100 each year thereafter without interest, on condition that plaintiffs should improve the property and pay the taxes thereof. The defendant denies this claimed arrangement and in her behalf it is contended that if a contract is established in the opinion of the court, it should be with the condition that the plaintiffs pay the amount of the same with interest payable annually from time contract was made.

"I have carefully gone over the arguments of counsel and considered the testimony given upon the hearing, and I am convinced that the oral contract was entered into as claimed by the plaintiffs. I am also convinced that plaintiffs have partially performed the contract; that they have made improvements upon the property, and have paid taxes from time to time upon the property, although not

directly to the tax collector, but most of the time through Mrs. Fenner. Plaintiffs produced one receipt given by the defendant, Mrs. Fenner, to Charles Oyler on April 18, 1924, for the sum of $40, stated to be taxes for 1923. If the parties were not related it might be considered improbable that Mrs. Fenner should agree to sell the property without interest, but, considering the testimony that she stated her other children had not paid interest on moneys advanced to them, it throws a different light upon the situation. The property is now worth, according to disinterested and reliable witnesses, from $1,500 to $1,800, although there has been considerable activity in the vicinity of this land on account of the oil development there.

"I am of the opinion that the plaintiffs are entitled to a decree enforcing the oral contract, inasmuch as I hold it has already been partially performed by them. The decree to be on the condition that the plaintiffs pay to the clerk of this court within 30 days from the filing of the decree the sum of $1,500 with legal interest from the date of the decree. The decree also to provide that defendant shall execute to plaintiffs a warranty deed of the premises, subject to taxes and the acts of plaintiffs and that in default of the execution of such deed that the decree stand in lieu thereof with permission to record the same in the register of deeds' office. The plaintiffs will recover costs of suit to be taxed."

The findings therein are fully supported by the proofs submitted. We adopt this opinion as our own, and affirm the decree entered pursuant thereto, with costs to appellees.

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

DE LOCKERBY *v.* D'ARCHANGELO.

1. APPEAL AND ERROR—DIRECTED VERDICT.

   In reviewing directed verdict in favor of defendants, testimony must be viewed in light most strongly tending to support plaintiff's claim.

2. EXCHANGE OF PROPERTY—FRAUD—REPRESENTATIONS BY THIRD PERSON—PRINCIPAL AND AGENT.

   Rule that statement by owner, made during negotiations for exchange of property, that it was worth sum in excess of its real value does not amount to fraud, applies only to statements made by parties themselves, and not to one made by third person acting on behalf of party claiming to have been defrauded.

3. SAME—BROKERS—PRINCIPAL AND AGENT—FRAUD—AGENT MUST ACT IN GOOD FAITH.

   Broker acting as agent in exchange of real estate is charged with duty of protecting principal's interests, and he must act in good faith in representing value of respective properties.

4. BROKERS—FRAUD—LIABILITY OF BROKER ACTING AS AGENT.

   Where, in exchange of real estate, broker represented to his principal that property he was receiving was worth $7,000, when in fact it was worth only $3,000, broker is liable in action for damages unless jury find from evidence that he acted in good faith and honestly believed representations to be true.

5. EXCHANGE OF PROPERTY—FRAUD—LIABILITY OF OWNER.

   Owner of property, who deeded it to plaintiff and received in exchange therefor property from third party who received plaintiff's property, is not liable in action for fraud in misrepresenting value of his property, in absence of showing that he had ever seen plaintiff's property or had any knowledge of its value.

Case-made from Kent; Perkins (Willis B.), J. Submitted January 13, 1931. (Docket No. 107, Calendar No. 35,393.) Decided February 27, 1931.

Case by Ivan De Lockerby, administrator of the estate of Minor Walcott, deceased, against Antonio D'Archangelo and others for fraud in the exchange of real estate. Judgment for defendants. Plaintiff brings case-made. Reversed as to defendant Joseph J. Bauser. Affirmed as to other defendants.

Dorr Kuizema, for plaintiff.

Francis Williams, for defendants D'Archangelo.

Willard McIntyre, for defendants Bauser.

SHARPE, J. On August 1, 1929, a deal was consummated whereby Minor Walcott conveyed to one Stevens 27½ acres of land in the township of Ada, in Kent county; Stevens conveyed to the defendants D'Archangelo a house and lot on Norwood avenue, in the city of Grand Rapids, and Mr. and Mrs. D'Archangelo conveyed to Walcott a lot, on which was a building used as a restaurant and residence, in the city of Grand Haven. The exchange of properties was brought about by the defendant Joseph J. Bauser, a real estate agent in the city of Grand Rapids. Mr. Walcott died soon thereafter at the age of 81 years. The plaintiff, a son-in-law, was duly appointed administrator of his estate with the will annexed. He brings this action against Mr. and Mrs. D'Archangelo and Mr. and Mrs. Bauser to recover damages, based upon fraudulent representations claimed to have been made by them as to the value of the Grand Haven property. The trial court, at the conclusion of plaintiff's case, directed a verdict for the defendants, on which a judgment was entered. Plaintiff seeks review by case-made.

The deceased and his wife and his son Emmet had lived upon this small farm about eight years. The

wife died about a month before the exchange of properties was made. A housekeeper was thereafter employed. The father had been blind for several years. He was receiving a pension of $90 per month as a civil war veteran. Emmet had spent some time in the Kalamazoo State Hospital in 1926, and before that in similar institutions in Illinois and Ohio. But little produce had been grown upon the farm. The father was anxious to exchange it for property out of which Emmet could make a living. Bauser's attention was directed to it by an advertisement in a newspaper. He visited the property, saw the deceased and Emmet, and was told by the deceased "if you can make a good trade like Emmet wants, go ahead and do it." He suggested several deals which were not satisfactory. A few days before the exchange was consummated, he and Emmet visited the Grand Haven property. It consisted of a lot, located near the factory district, on which was a one-story cement block building, containing some living rooms and a room with a counter, in which soft drinks and tobacco and candy were sold.

A verdict for defendants having been directed, the testimony must be viewed in the light most strongly tending to support plaintiff's claim. Emmet testified that, when they visited the Grand Haven property and looked through it, "Mr. Bauser recommended it very highly. He said he believed that would be a good proposition there, no reason why it wouldn't be a good income there. * * * He said it was worth about $7,000. * * * I had to take Mr. Bauser's word for it."

As to the statements of Mr. and Mrs. D'Archangelo, he testified:

"It is hard to recall the conversation, but Mr. and Mrs. D'Archangelo recommended the place very

highly and spoke of a lot of things that we could buy there cheap at a discount and make a lot of money on it. They said they had been doing quite a business there in serving meals. Mr. D'Archangelo, the owner of the premises, said that. Mrs. D'Archangelo didn't say anything to me. She went through the rooms and showed us the rooms. She said those rear rooms there were rented to some Detroit people that was tourists. She said we could do quite a good business there with tourists. Mr. D'Archangelo said his property was worth about $7,000."

The deceased had listed his farm property with Bauser to be sold for $8,000. Emmet testified that his father "consented to drop down to $7,000 to make an even trade all the way around;" that he presumed he had some influence in securing such consent.

Frank L. Brooks, a real estate broker of Grand Rapids, testified that in his judgment the farm of 27½ acres was worth $300 per acre.

Ralph E. Brandau, engaged in "real estate insurance" in Grand Rapids, testified that its fair market value was about $7,000.

Two witnesses, engaged in the real estate business in Grand Haven, testified that the market value of the property there was about $3,000.

On the evidence submitted, the jury would have been justified in finding that the deceased parted with property worth $7,000 and received therefor property worth $3,000. That both he and Emmet relied upon the defendant Bauser to see that their interests were protected in the deal is apparent. He was engaged in the real estate business. He secured a listing of the property from the deceased, the sale price being $8,000. He was looked upon by them as a man in their employ, and, after the deal was completed, he received a commission on the sale of the

farm property of $330. Both the deceased and his son Emmet no doubt felt that they could rely on his judgment that the farm and the Grand Haven property were of about the same value, and that the latter was reasonably well suited to the purpose for which the exchange was made. That Emmet was no judge of the value of property must have been apparent to Bauser. He did not see any business being done about the place at Grand Haven when he was there; he made no inquiries as to the amount of business that had been done; did not ask to see any books which would reveal it, but apparently wanted to get away from the farm, and on the assurances of value and the condition of the business concluded that it would be a good deal for his father to make, and so advised him.

While this court has held that—

"a statement by defendants, made during negotiations for the exchange of their farm, that it was worth a sum in excess of its real value did not amount to fraud." *Bowen* v. *Stocklin,* 215 Mich. 341 (syllabus)—

the rule thus stated applies only to statements made by the parties themselves, and not to one made, as here, by a third person acting on behalf of the party claiming to have been defrauded. To relieve the defendant Bauser of responsibility, a jury must find from the evidence submitted that he acted in good faith and honestly believed that the statements made by him were true. He was not selling his own property to the deceased. He was acting as agent for him in the sale of his farm, and was charged with the duty of protecting his interests, and should not have induced him by a false statement to exchange it for property of about one-half its value.

As to D'Archangelo, a different question is presented. He had never seen the farm of the deceased, and did not exchange his property for it. He had no knowledge of its value. At Bauser's request, he assisted in completing the deal by conveying the property at Grand Haven to the deceased and receiving in exchange therefor a conveyance of property in Grand Rapids from Stevens. The record does not disclose that he had any knowledge of the purpose of the deceased in effecting the exchange or, as before stated, of the value of his farm. What he said about value may fairly be said to be within the holding in the *Bowen Case* above quoted. There is usually a distinction between market value and the trade-in value a man puts upon his property. This defendant's only concern was the value of the property he was to receive from Stevens, and in our opinion the trial court committed no error in directing a verdict in his favor. The record contains no justification for making either his wife or Mrs. Bauser parties defendant. As to these three, the judgment is affirmed, with costs. As to Mr. Bauser, it is reversed, with costs, and a new trial granted.

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

ANCIENT ORDER OF GLEANERS *v.* ZELUFF.

INSURANCE—CHANGE OF BENEFICIARY—SIGNATURE OF INSURED—ADOPTION OF SIGNATURE.

Where insured obtained from local secretary of mutual benefit association blank application for change of beneficiary, and later returned it to secretary and her husband, stating that she had signed it, and they both signed as witnesses thereto, if signature was not that of insured her action constituted adoption of it as her own, and gave it same force and effect as if written by her own hand.

Appeal from Lenawee; Rathbun (G. Arthur), J. Submitted January 9, 1931. (Docket No. 70, Calendar No. 35,407.) Decided February 27, 1931.

Bill of interpleader by Ancient Order of Gleaners, a Michigan corporation, against Leo Zeluff and Celia La Bounty to determine rights of defendants to a matured benefit certificate. From decree dividing fund, defendant Zeluff appeals. Reversed.

L. L. Watkins, for appellant.

Wood & Williams, for appellee.

SHARPE, J. Anna Zeluff, the mother of the defendants, Leo Zeluff and Celia LaBounty, was the holder of a benefit certificate in the Ancient Order of Gleaners on July 22, 1929, in which the defendants were named as beneficiaries. She stated to Martha Lowe, the secretary of the local Arbor at Ridgeway, that she desired to change the beneficiary. On the above date, Mrs. Lowe furnished her with a blank application for that purpose. She took it into

a nearby store, and brought it out with her name signed to it and handed it to Mrs. Lowe, who, with her husband, was sitting in an automobile, and told them she had signed it, and both of them signed as witnesses thereto. In it she requested the change of beneficiary from the son and daughter to the son alone. When she first spoke to Mrs. Lowe about the change, she delivered her certificate to her, and Mrs. Lowe then sent the certificate and application to the company, and the change of beneficiary was then made by the officers of the company.

Anna Zeluff passed away on the 31st day of August, 1929. The daughter making claim to an undivided one-half of the money payable on the certificate, the plaintiff filed the bill of interpleader herein, and asked to have their respective rights thereto determined. The testimony submitted was as noted above.

The trial court, after comparing the signature of the deceased with others, said to be written by her, although no proof thereof appears in the record, was of the opinion that the signature on the application was not that of deceased, and ordered the fund to be equally divided between the two defendants.

The testimony of Mr. and Mrs. Lowe is in no way disputed. If the signature was not that of deceased, her act in taking the application into the store, bringing it to Mrs. Lowe, and stating to her and her husband that the signature thereon was hers, was an adoption of it as her own and gave it the same force and effect as if written in her own hand.

"In our opinion, the signature of the grantor in a deed, written by another at his request, or, though written without his knowledge, if adopted by him as his own, has the same validity as if written by his own hand." *Nye* v. *Lowry,* 82 Ind. 316, 320.

In our opinion there was a valid change of beneficiaries from that of the son and daughter to the son alone. The decree entered will be reversed and set aside, with costs against the defendant Celia LaBounty, and one may be here entered, finding that the son, Leo Zeluff, is the sole beneficiary, and ordering the proceeds of the certificate now in the hands of the clerk of the court to be paid to him.

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

JOHNSON *v.* IRONSIDE.

1. JOINT ADVENTURES—PARTNERSHIP—TRUSTS—COMPENSATION FOR SPECIAL SERVICES—IMPLIED CONTRACT.

   Under common law, persons engaged in joint adventure relating to single transaction were regarded as partners, and, as general rule, were held not entitled to compensation for services rendered beyond share of profits received, with the exception that, in case one partner performed unusual services in behalf of partners at their request, law implied agreement to compensate him therefor.

2. TRUSTS—ACCOUNTING—ALLOWANCE FOR TRUSTEES' SERVICES—DISCRETION OF COURT.

   In suit for accounting by trustees, where question of compensation for their services is not regulated by statute or otherwise, equity court should exercise just discretion and make or withhold allowance as particular circumstances require.

3. SAME—ESTOPPEL.

   Where certain persons, engaged with others in joint adventure, acted as trustees, giving much of their time and performing valuable services for the others as well as themselves, equity court was warranted in holding them entitled to compensa-

tion therefor, in suit against them for accounting; and that they were mistaken as to their personal rights, as against the others, would not bar their right to compensation.

4. SAME—DISCRETION OF COURT.

Allowance of compensation for services to certain joint adventurers acting as trustees for all, *held*, within discretion of trial court, and not to be interfered with, on appeal, in absence of showing abuse of discretion.

Appeal from Barry; Hawley (Royal A.), J., presiding. Submitted January 14, 1931. (Docket No. 141, Calendar No. 35,465.) Decided February 27, 1931.

Bill by Aben E. Johnson and others against Gordon Ironside and others for an accounting of profits. Petitions after decree by defendants and Kim Sigler for compensation for services. From an order granting relief prayed, plaintiffs and defendants Cook, Ironside, and Stebbins appeal. Affirmed.

Travis, Merrick, Johnson & McCobb, for plaintiffs.

Kim Sigler, for defendants.

SHARPE, J. After decree in this court affirming that rendered in the circuit court (249 Mich. 35), application was made to the trial court for an allowance to William R. Cook, Gordon Ironside, Fred Stebbins, and Andrew Dooley for services and expenses rendered the syndicate, and for an allowance to Mr. Sigler for services as their attorney.

After a hearing at which the plaintiffs were represented by counsel and proof in the form of affidavits submitted, the trial court awarded to Cook and Ironside, who were the so-called trustees of the syndicate, the sum of $4,000; to Mr. Stebbins the sum of $500; to Mr. Dooley $300; and to Mr. Sigler the sum

of $1,000. From this order both the plaintiffs and the applicants Cook, Ironside, and Stebbins appeal. The allowance to Mr. Sigler does not seem to be contested.

This order was made by Judge Hawley, who tried the case and who was familiar with the proofs then submitted and the nature and amount of the services rendered by the applicants. It is attacked by the plaintiffs for three reasons:

(1) That the services were rendered in a joint enterprise, without contract or specific promise of remuneration.

(2) That the applicants, as found by this court, were unfaithful to their trust and forfeited any right to compensation.

(3) That the awards are excessive.

1. Under the common law, persons engaged in a joint adventure relating to a single transaction were regarded as partners, and, as a general rule, were held not entitled to compensation for services rendered beyond a share of the profits received.

In 33 C. J. p. 860, it is said:

"Unless the contract so provides, no member of a joint adventure is entitled to any compensation for services rendered by him toward the common enterprise, and the fact that one of them is appointed the manager thereof does not change the rule."

But exceptions to this rule as to partners were made in cases where one partner performs unusual services in behalf of the partnership at the request of the others, and in such cases the law will imply an agreement to compensate him therefor.

In *Arthur* v. *McCallum,* 195 Mich. 618, 622, it was said:

"In the absence of agreement, one partner cannot collect pay for services performed for the copartner-

ship; each partner is presumed to devote his time, skill, and endeavor to the partnership business and this without compensation, other than his share of the profits. But it does not follow that the court is precluded from taking into consideration all the surrounding facts and circumstances of the case, the course of dealing between the partners, the reasonableness or unreasonableness of the claim made, the probabilities arising out of the conduct of the business, in determining whether such agreement exists."

The relationship of the parties to this joint adventure was quite fully stated in our former opinion. It was there said that, although Cook and Ironside "were not named as trustees nor their powers stated, but they confessedly held as trustees and afterwards acted as such, with power to sell." As to the compensation to which trustees are entitled, this court said in *Henderson* v. *Sherman,* 47 Mich. 267, 276:

"The accepted rule in this country, however, is, in case the matter is not otherwise regulated by statute, for courts of equity to exercise a just discretion and make or withhold allowance as they consider the particular circumstances require."

This relationship continued from October, 1925, until November, 1927, when the moneys in question in this suit were received by Cook. It clearly appears that these men gave much of their time and performed valuable service for the others interested in the joint adventure as well as themselves, and in our opinion the trial court was warranted in holding that they are entitled to compensation therefor.

As to the awards to Stebbins and Dooley, the trial court in its decree found that the Lois Hobbs and Marian Hinkle permits, taken in the name of Steb-

bins and Dooley, were held by them as "constructive trustees although the word trustees was not added after the name of either Andrew Dooley or Fred Stebbins." In our opinion they were entitled to a reasonable allowance for the services rendered as such.

2. It is urged that "the defendants have forfeited any right to compensation by reason of their infidelity to the syndicate."

In the opinion filed by the trial court before decree, when referring to the acts of the defendants, he said:

"I think that they make this claim in all sincerity and in entire good faith, but in my judgment mistakenly. They neither actually consummated such purchase, nor did they have the right to do so for their own benefit without first communicating full information concerning such permits to each and all the other members of the Cook-Ironside syndicate and obtaining the consent to such purchase from each and all the members thereof. This they failed to do."

While this court held that in what they did they "violated a trust to plaintiffs which renders them accountable to the latter for profits," and that they "therefore, took subject to the right of the others to participate in all the benefits of the transaction," their liability was said to rest upon the ground of a breach of legal duty. This court was not required to find, nor did it find, that these defendants acted in bad faith or committed an intentional fraud upon the plaintiffs.

The good faith in which they made their claim is further illustrated by the fact that several months before this suit was begun, but after they had received the moneys in controversy, they caused their

attorney to write to the plaintiffs, saying that rumors had come to him that the plaintiffs claimed to have an interest therein; that it was "the desire of those having this matter in charge to be absolutely fair" in the matter, and that the moneys received had been deposited in the bank in the name of Mr. Cook as trustee and would remain there for some time.

The service they rendered inured to the benefit of the syndicate, and we do not think that their mistaken conception of their personal rights in the proceeds as against those of the plaintiffs should act as a bar to the allowance of compensation therefor.

3. Were the sums awarded unreasonable? No contention is made that the allowances to Stebbins and Dooley and attorney Sigler are unreasonable. Defendants insist that all of the allowances made, except that to Mr. Sigler, are inadequate. In *Re Shailer Estate,* 172 Mich. 600, 611, wherein a similar question was considered, this court said:

"In any event, the allowance of a claim to compensation by a trustee is a discretionary matter, and we have no disposition to disagree with the finding of the learned circuit judge upon this point."

The trial court was familiar with the facts as disclosed in the record. Upon the hearing of the motion he stated as to the claims of Cook and Ironside "that nothing more definite is necessary." After a careful consideration of the claims of both parties in this respect, we are unwilling to interfere with the discretion exercised by him in fixing such amounts.

The order appealed from is affirmed, but without costs to either party.

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

PEOPLE *v.* DEAN.

1. CRIMINAL LAW—TESTIMONY AS TO OTHER OFFENSES WITH OTHER PERSONS.

Generally, prosecution may not prove commission of another and distinct offense against another party, though of same kind with that charged, for purpose of rendering it more probable in minds of jury that defendant committed offense charged, unless it is admissible under criminal code (3 Comp. Laws 1929, § 17320).

2. SAME—CRIMINAL CODE.

In prosecution for committing act of gross indecency with boy in violation of 3 Comp. Laws 1929, § 16851, defendant's "motive, intent, the absence of, mistake or accident on his part" was not involved, nor may it be said that in committing said offense he was acting in conformity with any "scheme" or "plan" theretofore formulated by him, and therefore testimony of other similar offenses committed with other persons previous to commission of offense charged was not admissible under criminal code (3 Comp. Laws 1929, § 17320).

3. SAME—ACTS OF GROSS INDECENCY—TESTIMONY AS TO OTHER OFFENSES.

In prosecution for committing act of gross indecency with boy in violation of 3 Comp. Laws 1929, § 16851, admission of testimony of other similar offenses committed with other boys previous to commission of offense charged was reversible error.

Error to St. Joseph; Brown (William B.), J., presiding. Submitted January 15, 1931. (Docket No. 153, Calendar No. 35,299.) Decided February 27, 1931.

Dr. Ray E. Dean was convicted of committing an act of gross indecency with a boy. Reversed, and new trial granted.

George H. Arnold, Edward H. Andrews, and *Harry C. Howard,* for appellant.

Paul W. Voorhies, Attorney General, *M. M. Larmonth,* Assistant Attorney General, and *Lawrence W. Neindorf,* Prosecuting Attorney, for the people.

SHARPE, J. The information in this case charged the defendant with the commission of an act of gross indecency with one Charles Wells, a boy 17 years of age, in violation of section 15511, 3 Comp. Laws 1915 (3 Comp. Laws 1929, § 16851). He reviews his conviction thereof by writ of error.

The prosecution was permitted to prove the commission of similar acts by the defendant with several other boys at times before the charge herein was laid. This evidence was received over objection, and error is assigned thereon.

In *People* v. *Swift,* 172 Mich. 473, it was held that in such cases testimony of previous acts of misconduct between the same parties similar to the one relied on for conviction was admissible, under the authority of the early case of *People* v. *Jenness,* 5 Mich. 305, 324. But the same Justice who wrote the opinion in the *Jenness Case* (CHRISTIANCY) in *People* v. *Schweitzer,* 23 Mich. 301, 304, said:

"The general rule is well settled that the prosecution are not allowed to prove the commission of another and distinct offense, though of the same kind with that charged, for the purpose of rendering it more probable in the minds of the jury that he committed the offense for which he is on trial; and this would be the natural and inevitable effect upon the minds of the jury, of the admission of such evidence, on whatever ground or pretense it might be admitted; and the defendant would thus be prejudiced on the trial of the offense charged, by proof which he

has no reason to anticipate, of an offense for which he is not on trial, and to which, when properly called upon to defend, he may have a perfect defense."

The rule thus stated has been consistently adhered to by this court. Our last expression relating thereto will be found in *People* v. *Cowles,* 246 Mich. 429.

But, in the opinion of the trial court, this testimony was rendered admissible by the provision in our criminal code (Act No. 175, Pub. Acts 1927, chap. 8, § 27, 3 Comp. Laws 1929, § 17320), which reads as follows:

"In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

Counsel for the prosecution urge that in placing a construction upon the language of this section we should consider the law as it existed prior thereto; the evident purpose of the legislature and the mischief sought to be remedied. *Michigan Dairy Co.* v. *Runnels,* 96 Mich. 109; *Laing* v. *Township of Forest,* 139 Mich. 159.

The question of defendant's "motive, intent, the absence of, mistake or accident on his part" is clearly not involved in the charge as laid. Neither do we think that it can be said that in the commission of the crime charged he was acting in conformity with any "scheme" or "plan" theretofore formulated by him, or that proofs of similar acts

with others in any way tend to inform the court or jury as to his "system" in doing the act complained of.

An exception to the general rule excluding such testimony is noted by Mr. Wigmore in volume 1 of his work on Evidence (2d Ed.), § 302:

"Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (*i. e.* as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it in another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (*i. e.* discharge towards the same object, A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, *i. e.* a deliberate discharge at A."

In *People* v. *Luce,* 210 Mich. 621, it was held (syllabus):

"Where defendant denied committing the offense with complaining witness 'or anybody else,' it was permissible to cross-examine him thereon, but on his denial of the commission of a like offense with a certain other child it was error to permit the other child to testify to its commission, although the jury were instructed to consider it only as bearing on his credibility."

An enlightening discussion of the question here presented appears in 29 Michigan Law Review, p. 473 *et seq.* The cases in the footnotes appended thereto

may be read with profit. In one of them (*Wentz* v. *State* [Md.], 150 Atl. 278), the accused was charged with the crime of incest (cohabiting with his own daughter), and it was held that the admission of testimony of a similar act with another daughter was reversible error.

The only apparent reasoning on which this testimony can be said to be relevant is that it tends to establish a disposition on the part of the defendant to commit such an act. If admissible for that purpose, other larcenies might be proven in a case where a man was charged with that offense, and other assaults, bigamies, rapes, etc., in like cases.

That the defendant committed similar offenses with other boys has no direct tendency to show that he committed that with which he is charged, which had no connection with them. By the admission of such testimony, he is, in effect, called upon to defend against charges, without notice that he would be required to meet them. Where the charge involves conduct with the same person, as in the *Swift Case*, he may, on the preliminary examination, elicit the fact that such testimony will be relied upon by the prosecution and be prepared to meet it as best he may.

The only purpose of submitting such proof in this case was to render it more probable in the minds of the jury that the defendant committed the offense with which he is charged, and on reason as well as authority it was not admissible for that purpose.

The judgment is reversed and set aside and a new trial granted. The defendant, if imprisoned, will be remanded to the custody of the sheriff to await such trial.

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

BOARD OF EDUCATION OF FORDSON SCHOOL DISTRICT OF CITY OF DEARBORN *v.* CITY OF DEARBORN.

MUNICIPAL CORPORATIONS—VACATING STREET—WHEN ACTION REVIEWABLE BY COURTS.

Where there was honest dispute as to advisability of vacating part of street to enlarge size of school playground by acquisition of certain lots across street, city council's action denying school board's petition to vacate may not be said to amount to abuse of discretion, and therefore is not reviewable by courts.

Appeal from Wayne; Dehnke (Herman J.), J., presiding. Submitted January 7, 1931. (Docket No. 39, Calendar No. 34,960.) Decided February 27, 1931.

Bill by Board of Education of the Fordson School District of the City of Dearborn, a municipal corporation, against the City of Dearborn, a municipal corporation, to vacate a portion of a street and alley. From decree for defendant, both parties appeal. Affirmed.

Davidow & Davidow, for plaintiff.

James E. Greene, Corporation Counsel (*Austin & Newman,* of counsel), for defendant.

SHARPE, J. Plaintiff sought vacation of a part of Haggerty avenue in the city of Dearborn in order to increase the size of its property fronting thereon by the acquisition of certain lots across the street therefrom. Its petition therefor to the common council of defendant city was denied.

The question here presented is whether such action on the part of the council was an abuse of the discretion vested in that body by the law. *Tomazewski* v. *Palmer Bee Co.*, 223 Mich. 565; *In re Spears*, 227 Mich. 525; *In re Petition of Hendricks to Vacate Street*, 251 Mich. 336. In the first of these cases it was said:

"In the absence of clear abuse of discretion or fraud the courts may not review the action of the council determining the necessity of vacating streets."

The plaintiff desired to secure the land across the street for playground purposes. The street, if vacated, would, of course, add to the size thereof. But this in itself would not warrant vacation. The practicability of constructing an underground passage was the subject of much discussion. Many of the witnesses believed that to be the best solution of the problem. The necessity of continuing the use of the avenue as a through street in this growing part of the city was a subject on which the witnesses differed.

The action of the council was concurred in by the unanimous vote of all the members present.

The trial court, who heard and saw the witnesses and viewed the premises, found that "there was an honest dispute as to the merits of this proposition." The evidence supports this finding, and under it the plaintiff was not entitled to the relief prayed for.

The decree entered dismissing the bill is affirmed. As it appears that the defendant also appealed from certain orders made by the court, no costs will be allowed.

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

HUCKLE *v.* MT. FOREST RABBITRIES.

1. PROCESS—FOREIGN CORPORATIONS—SERVICE ON SECRETARY OF STATE—INTENT OF STATUTE.

   In action against foreign corporation, service of process on secretary of State made outside of his office was not proper service, under 3 Comp. Laws 1929, §§ 14094, 14095, 14097; intent of statute (section 14097) being that service be made in official's office.

2. SAME—SERVICE OUTSIDE COUNTY—STATUTES.

   Where service on foreign corporation was void, service on other defendants outside county, being dependent thereon, was also void (3 Comp. Laws 1929, § 14090).

Error to Superior Court of Grand Rapids; Verdier (Leonard D.), J. Submitted January 16, 1931. (Docket No. 95, Calendar No. 35,432.) Decided February 27, 1931.

Assumpsit by Elizabeth P. Huckle, individually and as administratrix of her husband's estate, against Mt. Forest Rabbitries, a Michigan corporation, Mt. Forest Fur Farms of America, a Delaware corporation, and others. From an order to dismiss, plaintiff brings error. Affirmed.

Charles G. Turner and *Smith & Searl,* for plaintiff.

Sempliner, Dewey, Stanton & Bushnell (*William H. Messinger* and *Arthur F. Neef,* of counsel), for defendants.

SHARPE, J. The summons issued herein was served upon the defendant Mt. Forest Fur Farms, a Delaware corporation, by delivery of a copy thereof

to John S. Haggerty, the then secretary of State of the State of Michigan, at the city of Grand Rapids, in said State. Thereafter service was had upon the Mt. Forest Rabbitries, a Michigan corporation, by delivery of a copy to Milton S. Bangs, its president, and upon Mr. Bangs personally, at the city of Detroit.

The defendants moved to dismiss; the Mt. Forest Fur Farms for the reason that the delivery to the secretary of State was not made in his office at the capitol in the city of Lansing, and the other defendants because they had not been served in the county of Kent. These motions were granted and the action dismissed. Plaintiff seeks review by writ of error.

Act No. 206, Pub. Acts 1901, as amended by Act No. 310, Pub. Acts 1907 (2 Comp. Laws 1915, § 9063 *et seq.*) prescribed the terms and conditions under which foreign corporations might be admitted to do business in this State. The first section required the corporation to file "evidence of appointment of an agent in this State to accept service of process on behalf of said corporation." Section 10, added by Act No. 3, Ex. Sess. 1907 (2 Comp. Laws 1915, § 9072), provided that—

"Service of process may also be made upon any officer or agent of such corporation in this State, or service may be made upon the secretary of State, who shall immediately notify the corporation thus served, by mailing notice thereof and a copy of such process to its address. There shall be paid to the secretary of State at the time of such service a fee of five dollars, which sum may be taxed as costs to the plaintiff in case he prevails in the proceeding."

The purpose of this section is apparent. It obviated the necessity of finding an officer or agent

of the company or the person appointed by it to accept service.

These provisions were superseded by the following sections of the judicature act (Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1929, § 13522 *et seq.*):

"14094 Foreign corporations; service on officer or agent. SEC. 31. In all cases where suit is brought against a foreign corporation, process may be served upon any officer or agent of such corporation within this State, and any person representing such corporation in any capacity, shall be deemed an agent within the meaning of this section. If such corporation has a legally designated agent or attorney in this State, appointed in pursuance of statute for that purpose, service of process may also be made upon such agent or attorney. * * *

"14095 Same; service on secretary of State, fee. SEC. 32. In all cases of foreign corporations, which have paid a franchise fee to the secretary of State, and been admitted by him to do business in this State, in addition to the other methods of service of process herein provided, service of process may also be made upon the secretary of State. There shall be paid to the secretary of State at the time of such service a fee of three dollars, which sum may be taxed as costs to the plaintiff, in case he prevails in the proceedings.

"14097 Service on State officer; duplicate service by registered mail. SEC. 34. In all cases where process is served upon the commissioner of insurance, secretary of State, or any other State officer as such agent, such service shall be made in duplicate upon such officer, or his deputy, or in their absence, upon the person in charge of his office; and one of the duplicate copies so served shall forthwith be forwarded by registered mail, postage prepaid, and directed to the secretary or corresponding officer of the defendant."

The purpose of section 14097 is also, we think, apparent. Section 4790 of the 1929 compilation provides for service on the secretary of State in an action against a nonresident owner or operator of a motor vehicle; section 9787 provides for service upon nonresidents in certain cases by service upon the chairman of the securities commission; section 9821, for service in certain cases upon the commissioner of the State bank department; section 12233, for service upon certain foreign investment companies by service upon the secretary of State; and section 14096 for service upon insurance companies in certain cases by service upon the commissioner of insurance. It was doubtless made to appear to the members of the legislature that much inconvenience resulted from the requirement that service must be had upon these officials personally, and so provision was made that such service might also be made upon their deputies "or in their absence" upon the person in charge of their office.

In our opinion section 14097 clearly indicates an intent that service should be made in the office of the official so that one of the duplicate copies may be there filed and a record made of the forwarding of the other duplicate "by registered mail, postage prepaid" to the proper officer of the corporation. If service may be made upon the secretary of State outside of his office, it may also be so made upon his deputy, and yet the statute provides that it may be made only "upon the person in charge of his office" in the event of "their absence" therefrom. Section 14095 provides that at the time of such service a fee of three dollars shall be paid to the secretary of State. Of this an entry must be made in his books, and the moneys so received deposited in the State treasury. When a fee is required by law to be paid

to an official for services to be performed by him in his office, it should be there paid to him, and not on the street or in any other place that he may be found. A contrary holding will, in many cases, be likely to result in confusion, and in some cases, doubtless, in an unintentional neglect of duty on his part.

It follows from what has been said that proper service was not made on the Delaware corporation. The right to serve the other defendants outside the county of Kent being dependent thereon (3 Comp. Laws 1929, § 14090), the order of dismissal as to all of them is affirmed, with costs to appellees.

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

SHULTZ *v.* MCCARTY.

1. APPEAL AND ERROR—EQUITY—DUTY OF SUPREME COURT TO WEIGH EVIDENCE.

   While on appeal in equity case due weight should be given to advantage which trial judge had in seeing and hearing witnesses, Supreme Court is not thereby relieved from duty of exercising its own judgment in passing on weight of evidence.

2. EXCHANGE OF PROPERTY—RESCISSION—FRAUD.

   That plaintiffs, in exchange of properties, made unfortunate investment, would not entitle them to equitable relief of rescission, unless they were defrauded.

3. SAME—FALSE REPRESENTATIONS.

   Where defendant's books showed that, for several months previous to its sale, theater was being operated at profit represented, said representation may not be found to be false because previous to that time it had been operated at loss.

4. SAME—BOOSTING VALUES FOR TRADING PURPOSES.

Where plaintiff was experienced in valuing properties, looked over property he was to receive several times, and was not deceived by price represented as its value, he is not entitled to rescind contract for exchange on ground of fraud, although price was boosted somewhat for trading purposes; price fixed on his property being of same kind.

Appeal from Kent; Brown (William B.), J. Submitted January 9, 1931. (Docket No. 77, Calendar No. 35,390.) Decided February 27, 1931.

Bill by John G. Shultz and another against Nathan L. McCarty and another for rescission of a contract to exchange parcels of real estate. Decree for plaintiffs. Defendants appeal. Reversed.

Richard L. Newnham (*John J. McKenna,* of counsel), for plaintiffs.

Eerde W. Hoogsteen (*Frank Post,* of counsel), for defendants.

SHARPE, J. On October 23, 1929, the plaintiff Mrs. Schultz conveyed a lot on which was a three-family flat building and a vacant lot, in the city of Grand Rapids, to the defendants, and received in exchange therefor an assignment to the plaintiffs of the equity of the defendants in the Galewood Theater property in that city. On November 30th following, the plaintiffs filed the bill of complaint herein, alleging fraudulent representations as to the value and income of the theater property, and praying for rescission of the contract and the restoration of the property conveyed. They had decree as prayed for, and defendants have appealed therefrom.

Plaintiffs' attention was first called to the theater property by an advertisement inserted in a Grand Rapids paper on October 12, 1929, reading as follows:

"Theater for sale or trade for income property in the fastest growing suburb of Grand Rapids, brick and concrete construction, is operating at a good profit. Good place for party that likes theater work. Call 78879."

Mr. Shultz called up the number given and talked with Mr. McCarty, and, as a result thereof, the plaintiffs drove to the theater and there met McCarty. He showed them about the theater, in which moving pictures were then being exhibited, and a restaurant attached thereto. He informed them that he had an equity of $14,000 in the property, and that there was $23,700 unpaid on the contract. A few days later, they again visited the theater, and McCarty, in answer to a question, said that the theater "was making from $50 to $75 a week beyond its expenses." Soon thereafter, the defendants looked over the flat building and the lot, and the deal was consummated by an exchange of conveyances on October 23d. Plaintiffs took possession of the theater a few days later, and operated it until December 2d. On December 13th their attorney wrote Mr. McCarty, informing him that they repudiated the contract, and that he could take possession of the theater. No tender of the key was made to him. This suit was commenced, as before stated, on November 30th.

While this court always gives due weight to the advantage which a trial judge has in seeing and hearing the witnesses, we are not relieved thereby from the duty of exercising our own judgment in passing upon the weight of the evidence in the case. *Emery* v. *Emery,* 181 Mich. 146; *Oliver* v. *Baldwin,* 201 Mich. 336.

The plaintiffs have doubtless made a very unfortunate investment, but, unless defrauded by the defendants, they are not entitled to the relief sought. McCarty admits that he said to plaintiffs that his

profit in operating the theater was from $50 to $75 per week. He purchased the equity in this property in January, 1929. He ran it about two months, and then leased it. He took it back in May, 1929, and, while it made no profit for a time, his books, put in evidence, show that it was operated at the profit stated for several months before the sale to plaintiffs.

While the plaintiffs claim they sustained a loss during the time they operated it, the evidence discloses a reason therefor. They had no experience in handling such property; at times neglected to heat it properly; at one time advertised in front of the building that a certain picture was being exhibited when, in fact, it was not, and otherwise conducted it in a manner that lost the public support on which its success depended. Mr. Shultz testified:

"I made up my mind that I had been defrauded and went to see a lawyer about a week after I got the theater * * * ;" that he "did not make any more money than enough to cover the expenses,"—

and yet he admitted that he told McCarty that he was making a profit, and in an attempt to sell it he stated to one man that "it was a good paying proposition," and to another that "it was paying between 50 to 75 dollars a week." His excuse for making such statements is that "I didn't want to let anybody know that I was stung." It also appears that he advertised the property for sale in a Grand Rapids paper on November 11th, 12th, and 13th as a "Community theater in fast growing suburb, operating under good profit," and that on November 22d he listed it for sale with the defendant McCarty. This evidence, when fairly considered, does not warrant a finding that the statement made by McCarty to the plaintiffs that the theater was being operated at a profit was untrue.

Shultz also testified that McCarty stated to him that he had $14,000 invested in the property, and it is urged that this statement was untrue and was made with intent to deceive the plaintiffs, and was relied on by them. This sum, added to the amount then due on the land contract, amounted to about $38,000. Mr. Shultz testified that he had theretofore had experience in placing values upon property; that he looked the theater property over several times before he bought it.

"*Q.* And when you bought it you bought it for $38,000, didn't you?

"*A.* Yes, sir.

"*Q.* And you thought it was worth it at that time, didn't you?

"*A.* No.

"*Q.* Why did you buy it if you didn't think it was worth it?

"*A.* Well, I bought it because I figured the business would pay for it.

"*Q.* Then it would be worth it?

"*A.* No.

"*Q.* Well, you bought something that was not worth it, business and all included?

"*A.* Yes, sir."

McCarty also admits making this statement, and offered proof of the truth thereof. He made the deal for it with a man named Crothers. Crothers testified that he got the property in a trade, paying therefor about $33,500, and that he added $2,076.95 in its equipment; that he "sold it to McCarty * * * in a trade, partly trade and partly cash for $36,000."

McCarty testified that he paid Crothers $1,500 in cash, transferred to him a house and lot valued at $8,500, and two lots valued at $1,000; that he reduced the amount due on the contract by payment of $1,300, and that he added improvements and equipment to the theater of the value of $1,652.80.

These sums make a total of $13,952.80. While the values placed upon these properties were no doubt what is called "trading" values, it must be borne in mind that the values placed by the plaintiffs on their properties were also of the same kind. In *Albright* v. *Stockhill,* 208 Mich. 468, 479 (a case similar in many respects to that before us), this court said:

"Both of the parties had a good opportunity to examine each other's property and to determine what there was in it, and they both took advantage of that opportunity. * * * Mere expressions or matters of opinion as to values, upon which men might fairly and honestly differ, cannot be made the basis of fraudulent representations."

The applicable rule is also clearly stated in *Oliver* v. *Baldwin, supra* (syllabus):

"Canceling an executed contract is an exertion of the most extraordinary power of a court of equity, and ought not to be exercised except in a clear case, and never for an alleged fraud unless the fraud be made clearly to appear; never for alleged false representations unless their falsity is certainly proved, and unless the plaintiff has been deceived and injured by them."

In our opinion no such fraudulent representations were made as warranted the decree for rescission. The conclusion thus reached renders it unnecessary to consider the question of the affirmance of the contract by plaintiffs after having ascertained the facts on which they now rely for rescission.

The decree appealed from is reversed and set aside, and one may be here entered dismissing the bill of complaint, with costs of both courts to the defendants.

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

SHANK *v.* LIPPMAN.

In re DEWEY'S CLAIM OF LIEN.

ATTORNEY AND CLIENT—LIEN FOR SERVICES.

Order of court below impressing lien on judgment for attorney's services for amount claimed is affirmed, on review.

Error to Wayne; Dingeman (Harry J.), J. Submitted January 6, 1931. (Docket No. 26, Calendar No. 35,356.) Decided February 27, 1931.

Action by Mary Shank against Harry J. Lippman resulted in judgment for plaintiff. Fred G. Dewey, attorney for plaintiff, filed claim of lien upon the judgment for services rendered. Order for petitioner is reviewed by plaintiff by writ of error. Affirmed.

Stanley J. Domzalski, for plaintiff.

Harry J. Lippman, in pro. per.

Sempliner, Dewey, Stanton & Bushnell (*Arthur F. Neef,* of counsel), for lien claimant.

SHARPE, J. Fred G. Dewey, while a member of the firm of Campbell, Dewey, Stanton & Bushnell, attorneys of Detroit, performed legal services for the plaintiff, Mary Shank, which resulted in a judgment in her favor against the defendant in the sum of $3,350, which has not been paid. On March 5, 1930, Mr. Dewey filed an affidavit in the cause, setting up the contract of employment, averring that there was then due thereunder the sum of $1,284.10 and interest thereon, and alleging that the claim therefor had

been assigned to him. An order to show cause why said claim should not be declared a lien upon the judgment was thereupon issued and served upon the plaintiff. She appeared by her present attorney, declined to frame an issue, and insisted that the court was without jurisdiction in this proceeding to determine the amount of her liability for the legal services performed or to impress such amount as a lien upon the judgment.

After the submission of evidence, an order was entered fixing the fee as claimed and making it a lien upon the judgment, of which plaintiff seeks review by writ of error.

"The law creates the lien of a solicitor upon the judgment or fund resulting from his services. As a general rule, if the demand is reduced to a judgment against the client, the lien is lost." *Wipfler* v. *Warren,* 163 Mich. 189, 194.

See, also, *Minor* v. *Fick,* 225 Mich. 325.

The evidence justified the finding of the court as to the amount due by her, and the law warranted the impressing of the same as a lien upon the judgment in her favor.

The order entered is affirmed, with costs to Mr. Dewey.

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

CITY OF DETROIT *v.* TOWNSHIP OF REDFORD.

1. MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—DIVISION OF PROPERTY—STATUTES.

   In absence of express statutory provision, municipal corporation annexing territory of another municipality is not entitled to division and participation in latter's personal property.

2. STATUTES—CONSTRUCTION.

   Where wording of statute is unambiguous, there is no room for construction.

3. MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—CONSTRUCTION OF STATUTE.

   Provision of home rule act (1 Comp. Laws 1929, § 2250) for division of real property where territory is annexed to another municipality, being plain and unambiguous, may not be extended by court by application of rules of construction to include personal property also, under provision of another statute (sections 2334–2344).

4. SAME—DIVISION OF PERSONAL PROPERTY.

   Where territory from township was annexed to city under home-rule act (1 Comp. Laws 1929, § 2250), city was not entitled to division and participation in township's personal property.

Appeal from Wayne; Smith (Guy E.), J., presiding. Submitted January 14, 1931. (Docket No. 123, Calendar No. 35,365.) Decided February 27, 1931.

Bill by City of Detroit, a municipal corporation, against Township of Redford, a municipal corporation, and others for an accounting of corporation assets incident to annexation proceedings. Decree for defendant municipality. Plaintiff appeals. Affirmed.

Paul T. Dwyer, Assistant Corporation Counsel (*Clarence E. Wilcox,* of counsel), for plaintiff.

Fred Dye, for defendant.

NORTH, J. The city of Detroit filed this bill of complaint to compel an accounting and the payment to it by defendant township of money which plaintiff claims is due to it incident to two annexation proceedings; one in 1923, the other in 1926. Plaintiff's bill was dismissed and it has appealed. The facts are stipulated. If plaintiff's contention is sustained its proportionate share of the township's personal property because of the 1923 annexation will be $15,773.22, and incident to that of 1926, $63,283.47. Detroit is incorporated under the so-called home-rule act (chapter 49, §§ 2228–2274, 1 Comp. Laws 1929); and the parties agree that both annexation proceedings "were taken and had in accordance with the provisions for annexation" prescribed in the home-rule act.

Plaintiff alleges that under sections 3452–3462, 1 Comp. Laws 1915 (§§ 2334–2344, 1 Comp. Laws 1929) it is entitled to a division of the township's personal property on the basis of the relative value of the taxable property in the annexed area to that of the whole township. But defendant maintains that the above cited statutory provisions have no application because the annexation proceedings were under the home-rule act, and that this act, which is complete in itself, provides for a division of the real property owned by the township affected by the annexation, but contains no provision for a division or an apportionment of the township's personal property. Defendant therefore contends it cannot be required to account to plaintiff.

The statute under which plaintiff asserts its right is Act No. 38, Pub. Acts 1883, as amended by Act No. 51, Pub. Acts 1887, and Act No. 290, Pub. Acts 1909. The home-rule act was also passed by the legislature of 1909, Act No. 279, Pub. Acts 1909; and further, it may be noted, the 1909 amendment to Act No. 38, Pub. Acts 1883, was approved by the governor on the same day that he approved the home-rule act, June 2, 1909. The issue before us is this: Should the provisions of the 1883 act as amended be read into or in connection with the home-rule act of 1909, or should the latter enactment be held to be complete in itself in the particulars here involved?

We may start with the established legal proposition that, in the absence of express statutory provision, annexation of territory from another municipality does not result in a right to a division of and a participation in the personal property of such municipality. *School District of Saginaw* v. *District No. 6,* 231 Mich. 664, and cases cited. As noted, there is no provision in the home-rule act for apportionment of the personal property of the municipality from which the annexed territory is taken; hence plaintiff can take nothing in this suit unless the provision for a division of personal property contained in the amended act of 1883 (section 2334, 1 Comp. Laws 1929) is read into or as a part of the home-rule act. It becomes a matter of statutory construction. The pertinent and quite conclusive rules may be stated thus:

(1) If the wording of the statute is unambiguous there is no room for construction. *In re Merrill,* 200 Mich. 244; *Farm Products Co.* v. *Jordan,* 229 Mich. 235.

(2) The terms of a statute cannot be extended by construction beyond the obvious import of its lan-

guage. *Morrill* v. *Seymour,* 3 Mich. 64; *Meister* v. *People,* 31 Mich. 99.

(3) If a statute is plain and not ambiguous and upon its face is full and complete it will not be assumed that the legislature made a mistake and used one word where it intended to use another. *People* v. *Crucible Steel Co.,* 150 Mich. 563.

(4) If a statute covers the whole subject there is no room for any other rule by implication. *Keeler* v. *Dawson,* 73 Mich. 600.

(5) Express mention in a statute of one thing implies the exclusion of other similar things, *expressio unius est exclusio alterius. Marshall* v. *Railway Co.,* 201 Mich. 167 (8 A. L. R. 435).

(6) Courts cannot attach provisions not found therein to an act of the legislature because they have been incorporated in other similar acts. *State* v. *Sparrow,* 89 Mich. 263.

Section 14 of the home-rule act (section 2250, 1 Comp. Laws 1929) provides:

"And whenever part of a city, village or township is annexed to a city, the *real* property in the territory annexed which belongs to the city, village or township, from which it is taken shall be sold * * * and that portion of the proceeds of such sale shall be paid to the city acquiring such territory which shall be in the same ratio to the whole amount received as the assessed valuation of the taxable property in the territory annexed bears to the assessed valuation of the taxable property in the entire city, village or township from which said territory is taken."

There is no ambiguity in the foregoing provision, and its plain meaning cannot be altered by application of rules of construction. The statute obviously and plainly provides for a division of real property and of real property only. As above stated, the

legislature at the same session amended the 1883 act in which it provides in cases of annexation for a division of both real and personal property. It would be over presumptuous to assume that it was a mistake or an oversight on the part of the legislature that the home-rule act provides for apportionment of real property located in the annexed territory only. Especially is this so since in the same paragraph from which the above quotation is taken it is expressly provided that where by annexation the whole of another municipality is taken over, the city to which it is annexed succeeds "to the ownership of *all the property*" of the annexed territory. This latter provision plainly includes both the real and personal property; but in cases of partial annexation the right of property division is expressly confined to *real* property located in the annexed territory. We have no right to strike this limitation out of the statute.

If the home-rule act contained no provision at all as to the division of property there might be more force in plaintiff's contention that it is entitled to enforce its claim under the act of 1883 as amended. But since there is a provision in the home-rule act as to the apportionment of property, to hold that plaintiff may recover under the other statute would be to extend the terms of the home-rule act and to read into it a provision of substantial importance not embodied therein by the legislature. The two annexations here involved were consummated under the home-rule act, and plaintiff's rights are controlled thereby. 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.

COOK *v.* SCHWEMLER.

1. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—EVIDENCE—ADULTERY.

   In action for alienation of wife's affections, where count charging adultery was withdrawn by plaintiff, rulings of court as to admissibility of evidence, *held*, not prejudicial error, although court may have been overcautious in desiring to eliminate testimony from which inference of adultery might be drawn.

2. EVIDENCE—ORAL EVIDENCE—AMBIGUOUS EXPRESSIONS.

   Generally, ambiguous written expressions are subject to explanation by oral testimony.

3. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—EVIDENCE—EXPLANATION OF WRITTEN STATEMENT.

   Where, in action for alienation of wife's affections, letter from defendant to plaintiff's wife was introduced in evidence, defendant was properly allowed to explain that statement therein that he could write a lot of stuff did not mean mushy stuff.

4. NEW TRIAL—WEIGHT OF EVIDENCE.

   Motion for new trial on ground that verdict for defendant was against great weight of evidence was properly denied.

Error to Oakland; Doty (Frank L.), J. Submitted January 7, 1931. (Docket No. 41, Calendar No. 35,170.) Decided February 27, 1931.

Case by Herbert P. Cook against Theodore Schwemler for alienation of his wife's affections. Judgment for defendant. Plaintiff brings error. Affirmed.

R. D. Patterson (*N. Calvin Bigelow,* of counsel), for plaintiff.

A. Floyd Blakeslee, for defendant.

NORTH, J. Plaintiff's suit is for damages resulting from an alleged alienation of his wife's affections. Defendant had judgment, and plaintiff reviews by writ of error.

The assignments of error relate largely to rulings on the admissibility of evidence. At the beginning of the trial plaintiff dismissed the count in his declaration charging adultery. For the most part the rulings of which appellant complains seem to have been prompted by the trial court's desire to eliminate any testimony offered by plaintiff from which an inference of adultery might be drawn. In some instances the court may have been overcautious but we do not think prejudicial error resulted.

Plaintiff produced in evidence three letters written to his wife by defendant; and in one of these defendant wrote: "You no I could rite a hole lots of stuff." Over objection defendant was allowed to testify that in so writing he did "not mean mushy stuff." Plaintiff's contention is that it was not competent for defendant to explain orally the meaning of this expression in his letter. There is no merit to this objection as applied to an indefinite or ambiguous written statement such as quoted. There seems to be no good reason for applying stricter rules of evidence and construction to written instruments which are pertinent to cases of this character than is applied to instruments creating contractual relations and governing the rights of the parties. The general rule is that ambiguous written expressions are subject to explanation by oral testimony. Often this is the only means of developing the truth which enables courts and juries to place the correct construction on the ambiguous written expression. *Sturges* v. *Railway Co.*, 166 Mich. 231; Potter, Michigan Evidence, § 392. In *Backman* v. *Holman*,

92 Wash. 227 (159 Pac. 125), this rule was applied in a suit for alienation of affections.

The three letters above referred to, when considered in the light of the close friendship which existed for years between plaintiff's family and that of defendant, lose very much of the evidentiary force which plaintiff would attach to them. Except for these letters plaintiff's testimony stands uncorroborated. His tendency to distort minor incidents is disclosed by his cross-examination. The verdict was not against the weight of evidence, and the trial court's so holding incident to the denial of plaintiff's motion for a new trial was correct.

We have considered other questions raised by the assignments of error. They are without merit. Judgment is affirmed, with costs to the appellee.

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

PRAY *v.* TICKNOR.

MUNICIPAL CORPORATIONS—COUNTY OFFICERS—FEES—SALARY—STATUTES.

Under Act No. 480, Local Acts 1907, providing for payment of salaries to various officers of Washtenaw county, power conferred upon board of supervisors was limited to fixing salary in lieu of fees, and therefore board did not have power to grant county clerk salary of $2,100 per year and right to retain all fees collected in his office; Act No. 193, Pub. Acts 1921, not being applicable to said county.

Certiorari to Washtenaw; Brown (William B.), J., presiding. Submitted January 6, 1931. (Calendar No. 34,840.) Decided February 27, 1931.

Mandamus by Claramon L. Pray, clerk of Washtenaw county, against Frank H. Ticknor, treasurer of Washtenaw county, to compel payment of certain fees. Judgment for defendant is reviewed by plaintiff by certiorari. Affirmed.

George J. Burke and *Carl A. Lehman,* for plaintiff.

Carl H. Stuhrberg, for defendant.

NORTH, J. Plaintiff herein served as county clerk of Washtenaw county for the years 1925, 1926, 1927, and 1928. By this mandamus proceeding he seeks to compel the payment of $5,104.24 to him by the county treasurer, this amount being fees collected by the plaintiff as county clerk during the years 1925 and 1926 and by him paid over to the treasurer. The relief sought was denied in the circuit, and plaintiff reviews by certiorari.

Prior to plaintiff's first term as county clerk, the board of supervisors of Washtenaw county, at its October, 1924, session, by resolution, fixed the salaries of the respective county officers. This matter was referred to a committee. The committee's report, which contained a schedule of proposed salaries, was adopted. The pertinent portion provides: "County Clerk—$2,100 and fees fixed by law." Throughout his first term in office for the years 1925 and 1926, plaintiff drew his salary monthly on the basis of one-twelfth of $2,100; and he also prepared monthly a check for the fees incident to each marriage license in excess of 50 cents, hunting licenses, fishing licenses, and naturalization proceedings. These checks were presented to and signed by the

county treasurer and the fees above noted were thus paid to plaintiff in addition to his fixed salary. During 1925 and 1926, plaintiff did not present any claim for any other fees collected through his office; but in January, 1927, he demanded payment of all other fees which he had turned over to the treasurer. This demand was refused, and plaintiff brought mandamus.

In supplemental briefs, counsel for the respective parties have presented their views on statutory limitations pertinent to the power of the board of supervisors of Washtenaw county to compensate the county clerk by both a salary and fees. Act No. 480, Local Acts 1907, contains provisions applicable to Washtenaw county alone. It provides for the payment of salaries to the various county officers and that "such compensation shall be in full for all services for which the county may be liable and in lieu of all fees which are fixed by law or otherwise." The clerk's salary is fixed in the act at not less than $1,800 nor more than $2,000, to be determined by the board of supervisors; and in the event of no action by the supervisors the maximum amount is to be paid. It also provides that the county clerk "shall collect all fees required by law * * * and pay the same to the county treasurer on or before the last day of each month." Section 4 provides that all money received by the treasurer by virtue of this act shall be credited to the general fund.

By Act No. 193, Pub. Acts 1921, the legislature empowered the board of supervisors of each county of this State to direct the payment to the county clerk and other county officers out of the general fund "such salaries as said board may deem proper;" but this act obviously did not become operative in Washtenaw county, because it spe-

cifically provides "that nothing herein contained shall apply to counties now operating under any local or special act."

We think it is plain that the power conferred upon the board of supervisors of Washtenaw county was limited to fixing a salary in lieu of fees, and that the board did not have the power, as plaintiff contends, to grant him a salary of $2,100 per year and the right to retain all the fees collected in his office. We may also add that, without regard to the statutory limitations above noted, we think the construction placed by the circuit judge on the 1924 resolution of the Washtenaw county supervisors was correct. The order entered in the circuit court denying plaintiff's application for mandamus is affirmed. Appellee will have costs.

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

MILLER v. MILLER.

1. DIVORCE—DESERTION.

To entitle husband to decree of divorce on ground of desertion, he must establish by competent proof cessation of cohabitation, abandonment by wife without fault on his part, and that separation was against his will and desire.

2. SAME—SEPARATION BY AGREEMENT NOT DESERTION.

Where finding of trial court that wife did not desert husband but that they separated pursuant to agreement is sustained by record, husband's suit for divorce on ground of desertion was properly dismissed.

Appeal from Washtenaw; Sample (George W.), J. Submitted January 13, 1931. (Docket No. 108, Calendar No. 35,250.) Decided February 27, 1931.

Bill for divorce by Charles B. Miller against Alvine Beaulieu Miller on the ground of desertion. From decree dismissing bill, plaintiff appeals. Affirmed.

Carl A. Lehman, for plaintiff.

William M. Laird, for defendant.

NORTH, J. By his bill of complaint plaintiff seeks a divorce from the bonds of matrimony on the ground of desertion. The decree denied the relief sought. Plaintiff has appealed.

A complaining party is not entitled to a decree of divorce for desertion unless he establishes by competent proof (1) cessation of cohabitation, (2) abandonment by his spouse without fault on complainant's part, and (3) that the abandonment or separation was against the will and desire of the party seeking the decree.

The circuit judge found: "That the said defendant did not desert the said plaintiff but that said parties separated pursuant to an agreement entered into between them," etc. We have reviewed the record carefully. It abundantly sustains the above finding. The decree is affirmed, with costs to appellee.

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

JOHNSON *v.* BOARD OF COUNTY ROAD COMMISSIONERS OF ONTONAGON COUNTY.

1. MUNICIPAL CORPORATIONS—COMMON LAW LIABILITY—GOVERNMENTAL FUNCTION.

   At common law, governmental agency in performance of governmental function did not become liable in damages for its negligent performance.

2. SAME—NEGLIGENCE—STATUTES—CONSTRUCTION.

   Statutes imposing liability on governmental agency for negligence in performance of governmental function are in derogation of common law, and therefore are strictly construed.

3. SAME—HIGHWAYS AND STREETS—MAINTENANCE OF TRUNK LINE HIGHWAY GOVERNMENTAL FUNCTION.

   Board of county road commissioners in removing snow from trunk line highway under agreement for maintenance entered into with State highway commissioner pursuant to 1 Comp. Laws 1929, §§ 4425, 4426, was acting as governmental agency in hands of State highway commissioner, and therefore is not liable for negligent operation of snowplow used in said work.

4. SAME—BURDEN OF PROOF—PROFITABLE CONSIDERATION.

   In action against board of county road commissioners for negligent operation of snowplow on trunk line highway, plaintiff has burden of proving allegation in his declaration, which is essential to recovery, that defendant entered into contract with State highway commissioner to perform said work upon profitable consideration rather than as governmental agency.

5. SAME—INCIDENTAL INCOME IN PERFORMING GOVERNMENTAL FUNCTION.

   Municipal corporations and other governmental agencies when performing purely governmental function do not lose their immunity from liability for its negligent performance merely because they derive income therefrom, provided income is only incidental to main purpose of so functioning and aimed at covering cost of undertaking; but municipality may be held to respond in damages for negligent act of agent or employee incident to voluntary activity undertaken for its own profit and commercial in character.

Error to Ontonagon; Driscoll (George O.), J. Submitted January 7, 1931. (Docket No. 21, Calendar No. 35,254.) Decided February 27, 1931. Rehearing denied June 1, 1931.

Case by Walter Johnson against Board of County Road Commissioners of Ontonagon County for personal injuries sustained by being struck with a snowplow. Judgment for plaintiff. Defendant brings error. Reversed, and judgment ordered entered for defendant.

Galbraith & McCormack, for appellant.

Van Slyck & Bay (*E. L. Kennedy,* of counsel), for appellee.

NORTH, J. Plaintiff sued defendant to recover damages for injuries sustained by plaintiff in consequence of his being struck by defendant's snowplow. At the time of the accident defendant's snowplow in charge of its employee was being used to remove the snow from trunk line M-26 in Ontonagon county. This work was being done by defendant under contract with the State highway commissioner. Plaintiff had verdict and judgment. Defendant has appealed.

Incident to a motion for directed verdict both at the close of plaintiff's case and at the close of all the proofs, and also incident to its motion for a new trial, defendant urged that it was entitled to a directed verdict because at the time of the accident it was engaged in the exercise of a governmental function. Defendant relies upon *Gunther* v. *Bd. of Rd. Com'rs of Cheboygan Co.,* 225 Mich. 619, and other decisions of like character. On the other hand, plaintiff contends that the case cited is not applicable and controlling for two reasons. (1) That the

statute under which the contract with the State highway commissioner was made is materially different than that involved in the *Gunther Case,* and (2) defendant in the instant case derived a profit from performance of its contract and therefore cannot claim exemption from liability on the ground that it was engaged in the performance of a governmental function. In this particular plaintiff relies upon *Foss* v. *City of Lansing,* 237 Mich. 633 (52 A. L. R. 185), and other like authorities.

The contract in the instant case was entered into under Act No. 17, Pub. Acts 1925 (1 Comp. Laws 1929, §§ 4425, 4426). In part it provides:

"The State highway commissioner is hereby authorized to contract with boards of county road commissioners, township boards, or with any other person, persons, firm or corporation for the construction, improvement and maintenance of trunk line highways, or he may do such work on State account."

The contract under which defendant was operating in the *Gunther Case* was entered into under section 4, Act No. 19, Pub. Acts 1919 (1 Comp. Laws 1929, § 4418), which in part reads:

"Contracts and agreements between the State highway commissioner and the boards of county road commissioners, the boards of commissioners of the good road districts, and the township boards of any township, providing for the construction, improvement and maintenance of roads in accordance with the provision hereof, are hereby expressly authorized."

The important change affected by the 1925 act was that the entire cost of constructing, improving, and maintaining trunk line highways was placed upon the State, thereby relieving the counties and

townships of the portion of such cost imposed upon them by the 1919 act. Appellee's counsel point out that the above-quoted portion of the 1925 act expressly authorizes contracts with private persons, firms, or corporations; and that this provision was not contained in the quoted portion of section 4, Act No. 19, Pub. Acts 1919. But the power of the commissioner to enter into contracts with bidders other than the governmental agencies named is necessarily implied from section 9 of the 1919 Act, as amended by Act No. 257, Pub. Acts 1921 (1 Comp. Laws 1929, § 4423). It is there provided that the governmental agencies named in section 4 may contract with the State highway commissioner for performing work of this character under the commissioner's direction and supervision "at any price below that of the lowest responsible bidder." We do not think the enactment of the 1925 statute was intended to or did result in any material change affecting the liability or nonliability of defendant. At common law a governmental agency in the performance of a governmental function did not become liable in damages for its negligent performance. 43 C. J. pp. 921, 922, citing many decisions of this and other courts of last resort. Statutes imposing liability in such cases are in derogation of common law and therefore are strictly construed. *Miller* v. *City of Detroit,* 156 Mich. 630 (132 Am. St. Rep. 537, 16 Ann. Cas. 832). While the contention now under consideration was not there presented, it may be noted that since the enactment of the 1925 statute we have said in *Re Claim of Moross Against Hillsdale Co.,* 242 Mich. 277, that a county could not be held liable for damages resulting from the negligent manner in which its county road commissioners carried on the governmental function of constructing or repairing highways.

The further question is presented by plaintiff's contention that defendant cannot claim exemption from liability because it was performing this service under a contract for a consideration and a resulting profit. Defendant herein at the time of the accident was operating under a cost-plus contract with the State highway commissioner. The contract contains two paragraphs providing for actual reimbursement to defendant for expenditures incurred in the work. The third paragraph provides fixed rentals for use of equipment furnished and used by defendant. The fourth paragraph contains the following provision: "to pay to said party of the second part as an overhead and supervision charge an amount equal to 5.5 per cent. of the total paid under paragraphs one, two and three above, plus an amount equal to 5.5 per cent. of the cost to the State of materials purchased by it and furnished to the second party for use in the performance of this contract." Plaintiff contends that by reason of the provisions in the fourth paragraph it must be concluded that a profit would result to the defendant from performance of work under this contract; and that by reason thereof defendant should be held to be engaged in a commercial enterprise rather than in the performance of a governmental function.

This contract in several particulars is decidedly unlike those usually consummated with independent contractors. It requires the defendant herein to "appoint a superintendent of maintenance satisfactory to the party of the first part, who shall * * * perform said work at the time and in the manner specified by the party of the first part." It also requires defendant to "employ only workmen skilled in their various duties;" and further, defendant agrees in this contract upon request of the State highway commissioner to discharge any person

found to be incompetent or negligent in the performance of his work and not to re-employ such person except with the written consent of the State highway commissioner. Also the wages to be paid and the materials to be purchased are to be such as are agreed to by the State highway commissioner; and by his power of approval reserved in the contract the commissioner controls the type and number of units of equipment to be furnished by the defendant for this work. We think these features of the contract quite conclusively indicate that the defendant board of road commissioners is only a governmental agency in the hands of the State highway commissioner used in the discharge of certain governmental duties, *i. e.* the repair and maintenance of State highways. The 5.5 per cent. above actual cost allowed for "overhead and supervision charge" may or may not result in a net profit. The contract clearly contemplates the keeping of books and the rendering of accounts as well as the employment of a superintendent. And it is obvious that defendant has a substantial investment in its equipment. Whether the fixed rentals cover income on investment and depreciation of equipment, as well as cost of maintenance and operation, the record does not disclose. Plaintiff's declaration alleges that defendant entered into this contract "upon *profitable* consideration." While authority to the contrary may be found, we think the burden of proving this allegation, which is essential to plaintiff's right of recovery, is upon plaintiff. *City of Akron* v. *Butler,* 108 Ohio St. 122 (140 N. E. 324). No proof was offered to sustain plaintiff's allegation of profit; and defendant's motion for a directed verdict at the close of the proofs should have been granted on the ground that the board of county road commissioners was engaged in

the performance of a governmental function at the time and place of the accident.

On this phase of the case it may also be noted that municipal corporations and other governmental agencies when performing a purely governmental function do not lose their immunity from liability for its negligent performance merely because they derive an income therefrom, provided the income is only incidental to the main purpose of so functioning and aimed at covering the cost of the undertaking. *Curran* v. *City of Boston,* 151 Mass. 505 (24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465); *Bolster* v. *City of Lawrence,* 225 Mass. 387 (114 N. E. 722, L. R. A. 1917 B, 1285); *Bell* v. *City of Cincinnati,* 80 Ohio St. 1 (88 N. E. 128, 23 L. R. A. [N. S.] 910). On the other hand, a municipality may be held to respond in damages for the negligent act of its agent or employee incident to a voluntary activity undertaken for its own profit and commercial in character. *Bolster* v. *City of Lawrence, supra.* In *Gunther* v. *Bd. of Rd. Com'rs of Cheboygan Co., supra,* this court said:

"The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is, there is no liability; if it is not, there may be liability. That it may be undertaken voluntarily and not under compulsion of statute is not of consequence." (*Bolster* v. *City of Lawrence, supra.*)

We find nothing in this record indicating that defendant was engaged in an enterprise which inured especially to its own corporate benefit. Instead, all of its activities had to do with the construction or maintenance of the public highways, which is the performance of a public duty. In the cases relied upon by plaintiff a very different situation is pre-

sented. In *Rowland* v. *Kalamazoo Sup'ts of Poor,* 49 Mich. 553, the defendant county superintendents of the poor were engaged in farming; and in the *Foss Case,* defendant was engaged in buying, fattening, and selling hogs. In *Ostrander* v. *Lansing,* 111 Mich. 693, and *Hodgins* v. *Bay City,* 156 Mich. 687 (132 Am. St. Rep. 546), the defendants were engaged in matters relating to local government, and at least in the latter case derived an income therefrom. There are other cognate cases which are readily distinguishable in like manner. We are mindful that plaintiff here asserts that defendant conducted a garage where its road machinery was repaired; but this activity was also confined solely to its use in connection with the public work.

We are unable to find any fact or circumstance in this record which distinguishes it from the *Gunther Case* wherein it was held that a board of county road commissioners in performing maintenance work on a trunk line highway was performing a governmental function and that therefore the defendant board was not "liable for injuries caused by the negligent operation of a truck by one of its agents, in the absence of a statute creating such liability." See, also, *Longstreet* v. *County of Mecosta,* 228 Mich. 542; *In re Claim of Moross Against Hillsdale Co., supra.*

It becomes unnecessary to consider other questions presented by the record. The judgment entered in the circuit court must be vacated, and a judgment entered there for defendant, with costs of both courts. The case is remanded for that disposition.

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

SLUMPFF *v.* McGUIRE & HANSEN.

1. EXEMPTIONS—HOUSEHOLD GOODS—CONSTRUCTION OF STATUTE.
Statute exempting household goods should be liberally construed in favor of householder.

2. SAME—HOUSEHOLD ARTICLES OF ORNAMENTAL CHARACTER EXEMPT.
That household article is not only item of furniture or utility but is also ornamental in character and of value somewhat in excess of bare necessity of its character, does not place it beyond scope of exemption statute.

3. SAME—EXPENSIVE FLOOR RUGS.
Floor rugs, although more expensive than those in common use, are household goods of such character that judgment debtor is entitled to select exemption therefrom under statute (3 Comp. Laws 1915, § 12858, subd. 7).

4. SAME—DAMAGES FOR WRONGFUL LEVY—STATUTES.
Where levy and sale of household goods occurred while 3 Comp. Laws 1915, § 12858, subd. 7, was in force, householder's exemption was limited to $250, and therefore in action for damages for wrongful levy his damages are limited to said amount, although at time of trial statute had been amended increasing exemption to $500 (3 Comp. Laws 1929, § 14578).

Error to Wayne; Merriam (DeWitt H.), J. Submitted January 23, 1931. (Docket No. 165, Calendar No. 35,184.) Decided February 27, 1931.

Case by Fred Slumpff against McGuire & Hansen, Inc., a Michigan corporation, and Joseph Perkins, constable, for wrongful levy upon exempt household goods. Judgment for plaintiff. Defendants bring error. Reduced and affirmed.

Robbins & Schuur, for plaintiff.

Tilden M. Gallagher (*Edmund E. Shepherd,* of counsel), for defendants.

NORTH, J. The defendant McGuire & Hansen, a Michigan corporation, as a judgment creditor of the plaintiff herein, through the defendant Perkins, acting as constable, levied upon and sold two floor rugs belonging to plaintiff. These rugs cost $775 when originally purchased, and were found by the circuit judge to have been worth $400 at the time of the levy and sale. Incident to this levy the constable failed to make an inventory and have an appraisal made, and he did not afford the judgment debtor any opportunity to secure his exemption from the goods levied upon (3 Comp. Laws 1915, §§ 12861, 12862 [3 Comp. Laws 1929, §§ 14581, 14582]). Plaintiff herein, being a resident householder, claimed he was entitled to an exemption under the statute providing for such in cases of levies upon "household goods, furniture and utensils." He brought this suit to recover the damage he sustained by reason of being deprived of such right. The case was tried by the court without a jury. Plaintiff had judgment for $400. Defendants have appealed and present two contentions.

(1) Appellants assert as a matter of law that rugs of such value are luxuries, articles of ornamentation or works of art and are not within the exemption statute covering "household goods, furniture and utensils." They quote and rely upon various authorities of the following character:

"The exemption is ordinarily expressly limited to necessary articles, the implication being one of necessity for the support of the debtor's family. * * * Superfluities, however, and articles of luxury, fancy and ornament, are excluded." 25 C. J. p. 42,

citing *Hitchcock* v. *Holmes,* 43 Conn. 528. See, also, note No. 68, p. 42.

The fact that a household article is not only an item of furniture or utility but is also ornamental in character and of a value somewhat in excess of a bare necessity of its character, we think does not place it beyond or outside the scope of the exemption statute. The statute should be liberally construed in favor of the householder. *Wilson* v. *Bartholomew,* 45 Mich. 41; *Fischer* v. *McIntyre,* 66 Mich. 681. As evidenced by legislation hereinafter noted, as well as other legislation, the modern tendency is to extend rather than to limit exemptions. In *Dunlap* v. *Edgerton,* 30 Vt. 224, it has been fittingly said:

"Chairs, tables, bedsteads, sofas, carpets and looking glasses clearly come within the provisions of the statute; and yet there is a wide range in the style and cost of such articles, some being cheap, plain and for common use, some others expensive, elegant and ornamental."

Nonetheless, they still come within the householder's exemptions. The circuit judge was right in holding that these rugs taken from among plaintiff's household effects were of such a character that he was entitled to select an exemption therefrom.

(2) Appellants also assert as a matter of law that at the time the constable seized plaintiff's property the latter's exemption of this character by statute was limited to $250. In this defendants are correct. The levy and sale of plaintiff's goods occurred some time prior to June 9, 1929. Plaintiff's exemption was fixed in amount by the statute then in force (3 Comp. Laws 1915, § 12858). This section was amended by Act No. 87, Pub. Acts 1929, increasing the exemption to $500; but this act did not become

effective until August 28, 1929 (3 Comp. Laws 1929, § 14578). Plaintiff claims that because his suit for damages was not instituted until after the 1929 act became effective, his exemption was $500, and therefore he could recover the full value of the household goods taken, which the court fixed at $400. In sustaining this claim on the part of plaintiff the circuit judge was in error. The extent of plaintiff's damage was determined by the value of the property he was entitled to claim as an exemption at the time he should have been permitted to make such an exemption. This was limited to $250.

The case will be remanded to the circuit court, with direction to reduce the judgment as of the date when originally entered to $250 and costs in the circuit court. Appellants will have costs in this court.

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

PEOPLE *v.* GIBSON.

1. HOMICIDE—CORPUS DELICTI—MOTOR VEHICLES—INTOXICATING LIQUORS—INVOLUNTARY MANSLAUGHTER.

   In prosecution for negligent homicide under 3 Comp. Laws 1929, §§ 16743–16745, evidence that defendant was driving automobile while under influence of intoxicating liquor at time of homicide, as charged, *held*, sufficient to sustain conviction of involuntary manslaughter.

2. CRIMINAL LAW—RES GESTÆ WITNESSES—FAILURE TO PRODUCE.

   Showing made by prosecutor that he was unable to produce some of the *res gestæ* witnesses, *held*, to justify submission to jury question of whether their absence was satisfactorily explained.

Error to Recorder's Court of Detroit, Traffic and Ordinance Division; Callender (Sherman D.), J. Submitted January 15, 1931. (Docket No. 154, Calendar No. 35,348.) Decided February 27, 1931. Rehearing denied June 1, 1931.

Matthew Gibson was convicted of involuntary manslaughter. Affirmed.

J. H. M. Alexander, for appellant.

Paul W. Voorhies, Attorney General, *Harry S. Toy,* Prosecuting Attorney, and *Philip J. Neudeck,* Assistant Prosecuting Attorney, for the people.

NORTH, J. Defendant herein, while driving an automobile on Garfield avenue in the city of Detroit, struck and killed a boy about 14 years of age. Defendant was charged with involuntary manslaughter; but under Act No. 98, Pub. Acts 1921 (3 Comp. Laws 1929, §§ 16743–16745), the jury found him guilty of the included lesser offense, negligent homicide. He reviews by writ of error.

Appellant first contends that the *corpus delicti* was not established. We do not so find. On the contrary the record contains testimony tending to establish every element of the offense charged.

Witnesses whose testimony disclosed that they were familiar with the smell of intoxicating liquors testified that immediately after the accident they detected such an odor on defendant's breath. At least one witness testified on cross-examination that he saw defendant walk "unsteady," and that he talked to defendant and "he had a little difficulty in his speech;" and further: "I claim that I smelled what they call moonshine whisky. I am quite familiar with that." The information charges defend-

ant was "under the influence of intoxicating liquor" at the time of the homicide. The foregoing testimony of which appellant complains was competent and material.

Not all the *res gestæ* witnesses were called, but the prosecuting attorney made a showing which disclosed inability to produce the others. In this connection the court charged the jury:

"That it is the duty of the prosecution in a homicide case to summon all the eyewitnesses to the crime, and if the prosecution fails to do so and the absence of such witnesses is not satisfactorily explained or excused, then you, as jurors, are at liberty to draw the inference * * * that if such witnesses were produced their testimony would be unfavorable to the people's case."

There is no disposition to depart from the established law of this State.

"In cases of homicide, and in other cases where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called by the prosecution, unless, possibly, when too numerous; and the fact that the witness may not be favorable to the prosecution is no excuse for not calling him. * * * A public prosecutor is * * * as much bound to protect the innocent as to pursue the guilty, and he has no right to suppress testimony" (syllabus). *Wellar* v. *People,* 30 Mich. 16.

However, in the instant case the prosecutor made a showing which we think the trial judge was justified in accepting, especially in view of the subsequent charge to the jury. While defendant claimed to be surprised by the nonappearance of these witnesses whose names were indorsed on the informa-

tion, no application for a continuance was made. We think the rights of the accused were fully protected and no error committed.

Several other questions are raised by defendant's assignments of error. We have given each of them careful consideration and find them to be without merit. The record discloses no prejudicial error. The judgment of the lower court is affirmed.

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

SCHULER *v.* BUCUSS.

1. REFORMATION OF INSTRUMENTS—MISTAKE.
   Written instruments entered into between competent parties should not be altered or reformed on theory of mistake unless mistake is mutual and evidence so clear as to establish right to relief beyond cavil.

2. SAME—VENDOR AND PURCHASER—EVIDENCE—SUFFICIENCY.
   In suit by vendor to reform land contract so that instead of conveying premises "free and clear of and from all liens and incumbrances" as called for, conveyance would be subject to pre-existing oil and gas lease, holding by trial court that plaintiff had failed to establish her right to relief, *held*, justified by record.

Appeal from Muskegon; Vanderwerp (John), J. Submitted January 9, 1931. (Docket No. 86, Calendar No. 35,412.) Decided February 27, 1931.

Bill by Mathilda Schuler against Charles E. Bucuss and another to enjoin a suit at law and to reform a land contract. Decree for defendants. Plaintiff appeals. Affirmed.

Turner, Engle & Cochran, for plaintiff.

Alexis J. Rogoski, for defendants.

NORTH, J. Plaintiff herein seeks to restrain the prosecution of a suit at law instituted against her by the defendants herein and to obtain reformation of a land contract. Her bill of complaint was dismissed, and she has appealed. As the owner of a parcel of land near Muskegon, Michigan, plaintiff entered into an oil and gas lease covering the premises. Thereafter, and on August 10, 1928, she contracted with these defendants to sell to them five acres out of this parcel. The contracts were prepared by plaintiff's agent, a scrivener who had served her in similar capacity for a number of years. The undisputed testimony discloses that all the parties to the contract and the scrivener knew at the time the instruments were prepared of the outstanding oil and gas lease. Plaintiff claims it was understood and agreed between herself and the vendees that it was not necessary to mention the oil and gas lease in the contract they were then entering into and that in event oil and gas were produced on plaintiff's property defendants should have their proportionate share of the royalties. She is seeking in this proceeding, on the ground of mistake, to have her contract with the defendants reformed so that the sale of the parcel to defendants shall be made subject to the oil and gas lease; and she further asks that the reformed contract be specifically performed.

Defendants assert that at the time of closing the land contract plaintiff represented to them that the gas and oil lease would expire in two weeks and prior to the time the defendants would become entitled to a deed. Defendants further claim that they relied upon plaintiff's representation and they would not have entered into the terms of the contract had they understood or been advised that upon taking the deed their property would be subject to plaintiff's prior lease. The suit at law instituted by defendants herein against plaintiff was to recover damages because of plaintiff's inability upon tender of the purchase price to convey the premises which she had contracted to sell to them "free and clear of and from all liens and incumbrances." It is the prosecution of this suit that plaintiff here seeks to have enjoined.

The law is thoroughly settled that solemnly written instruments entered into between competent parties should not be altered or reformed on the theory of mistake except the mistake is mutual and the evidence so clear as to establish the right to relief beyond cavil. *Youell* v. *Allen,* 18 Mich. 107; *Long* v. *Bibbler,* 225 Mich. 261; *Retan* v. *Clark,* 220 Mich. 493; *DeGood* v. *Gillard,* 251 Mich. 85. We have reviewed the record with care, and are satisfied that the circuit judge, who had the advantage of seeing as well as hearing the witnesses, was right in holding that plaintiff did not establish her right to relief. His decree dismissing plaintiff's bill of complaint is affirmed, with costs to appellees.

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

MOUNT IDA SCHOOL FOR GIRLS *v.* ROOD.

1. CONTRACTS—BREACH—REMEDY—DAMAGES.

   In Michigan, it is rule of law, and rule of procedure or remedy, that party to executory contract may always stop performance by other party and refuse further to perform on his part, and thereafter he is liable only for damages for breach of contract.

2. SAME—CONTRACT PRICE RECOVERABLE ONLY ON PERFORMANCE NOT ON BREACH.

   Contract price is recoverable only on theory of performance, and never on theory of inability to perform, so that, although defendant prevented performance by breaching contract, he is not liable for contract price, but only for damages.

3. SAME—PERFORMANCE IN FOREIGN STATE—REMEDY FOR BREACH.

   That parties contemplated performance of contract in foreign State does not affect rule that remedy in this State for breach of executory contract is limited to damages for breach.

4. SAME—CONSIDERATION—INDEPENDENT CONTRACT.

   Father's promise to pay certain amount for his daughter's board and tuition at boarding school for school year is consideration for school's undertaking, and does not constitute independent contract.

5. SAME—BURDEN OF PROVING DAMAGES.

   In action by boarding school for father's breach of executory contract to pay certain amount for daughter's board and tuition for school year, where daughter attended school only part of year, plaintiff has burden of proving amount of damages; that contract was indivisible in that it provided for both board and tuition, rendering it difficult to determine damages, would not change rule and render defendant liable for entire amount.

6. SAME—PLAINTIFF HAS BURDEN OF ESTABLISHING RIGHT TO RECOVER AND EXTENT OF RECOVERY.

   Plaintiff suing for breach of executory contract has burden of establishing not only right to recover but also extent of recovery.

7. SAME—DIRECTED VERDICT.
   Where, in action for breach of executory contract, plaintiff offered no proof of damages resulting from breach, judgment was properly entered for defendant.

8. CONFLICT OF LAWS—REMEDY GOVERNED BY LEX FORI.
   In recognizing and enforcing laws of foreign State, courts are disinclined to overrule positive laws of forum, and such foreign laws will never be given effect when they contravene fixed policy of law of forum, whether such policy is found in statutory enactments or not.

Error to Kent; Dunham (Major L.), J. Submitted January 16, 1931. (Docket No. 96, Calendar No. 35,370.) Decided February 27, 1931.

Assumpsit by Mount Ida School for Girls, Inc., a Massachusetts corporation, against Edward A. Rood on a boarding school contract. Judgment for defendant. Plaintiff brings error. Affirmed.

Butterfield, Keeney & Amberg, for plaintiff.

Smith & Searl, for defendant.

NORTH, J. Defendant herein signed a proposed contract with plaintiff under which defendant's minor daughter was to attend plaintiff's school for girls in Massachusetts during the school year of 1926 and 1927. Defendant signed the contract in Michigan. Thereupon it was forwarded to plaintiff in Massachusetts and there accepted by it. Defendant's contract was to pay for his daughter's board and tuition for the school year, amounting to $1,200. He paid $50 with the application and $500 November 3, 1926. The balance was payable $350, January 1, 1927, and $300, February 1, 1927. Defendant's daughter attended the school until the Christmas vacation, but she did not return for the remaining portion of the school year. On January 2, 1927, plaintiff was notified by defendant that his daughter

would not return. Defendant did not pay the $650 which accrued in 1927. After the expiration of the school year plaintiff brought suit to recover the balance of the contract price. On trial before the court without a jury, plaintiff planted its right to recover solely upon defendant's contract to pay. At the conclusion of plaintiff's proof, the court granted defendant's motion to dismiss because plaintiff had offered no proof of damages resulting from the breach of the contract. Judgment was entered in favor of defendant. The plaintiff appeals.

The trial court made and filed the following conclusions of law:

"(a) The refusal of the defendant to send his daughter back to school was a breach of the contract which was then executory.

"(b) On account of the breach, the plaintiff never has performed its contract.

"(c) The contract is a Massachusetts contract, but the remedy for the breach of the contract is to be governed by the laws of Michigan, where the suit was brought.

"(d) In Michigan the remedy for the breach of an executory contract which has not been performed is not the balance due on the contract, but the damages that follow from the breach.

"(e) There being no proof of any damages arising to the plaintiff because of the breach, it cannot recover in this action, and the judgment is therefore to be for the defendant with costs."

We think the foregoing conclusions of law and the disposition made of this case are fully sustained by *Walton School of Commerce* v. *Stroud,* 248 Mich. 85; *International Textbook Co.* v. *Schulte,* 151 Mich. 149; and *International Text-book Co.* v. *Marvin,* 166 Mich. 660. We would be disposed to rest decision on citation of these cases were it not for the fact that

counsel for appellant strenuously insist that the instant case can be and should be distinguished from the *Stroud Case.* They urge this upon the following grounds:

(1) The instant case, unlike the *Stroud Case,* is based upon a contract not only made in and controlled by the laws of another State, but the contract also was to be performed in such other State, *i.e.,* in Massachusetts.

(2) Plaintiff is entitled to recover upon defendant's independent promise to pay the contract price, regardless of nonperformance by plaintiff.

(3) That notwithstanding this contract covers both board and tuition, it is an indivisible contract, and plaintiff is entitled to recover the full consideration.

(4) *Prima facie* plaintiff should be allowed to recover the full contract price, subject only to plaintiff's right to reduce the amount recoverable because of plaintiff's having benefited by defendant's renunciation; and the burden of such showing is on the defendant.

Touching the first of appellant's contentions above noted, it is claimed that the contract in the instant case was not only made in Massachusetts and its construction controlled by the laws of that State, but it was to be actually performed in Massachusetts. Appellant's counsel attempt to distinguish the above noted Michigan correspondence school cases by asserting that performance in those cases was in Michigan instead of the State wherein the contract was consummated. If this distinction is of consequence, we think counsel's contention cannot be sustained. It is true in the correspondence school cases that the materials to be furnished by the school were to be forwarded to the student in Michigan. But at least in some of such cases (*Inter-*

national Textbook Co. v. *Schulte, supra; International Text-book Co.* v. *Marvin, supra*) the forwarding was by mail, in which cases the plaintiff *prima facie* performed its full part of the contract by mailing with postage prepaid in the foreign State. Thus performance in such cases, at least *prima facie,* was fully completed in the State where plaintiff was domiciled the same as was contemplated in the instant case; and in principle the Michigan cases of this character cannot be distinguished from plaintiff's case.

Further, this question was considered and squarely passed upon in the *Stroud Case* in terms amply sufficient to be here controlling. It was there announced, with authorities cited to support the proposition, that in Michigan it is a rule of law, and we think a rule of procedure or remedy, that a party to an executory contract may always stop performance by the other party and refuse further to perform on his part, and after his refusal he is *"liable only upon the breach of the contract;"* and further, quoting from cases cited, it is said: *"The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform."* Mr. Justice POTTER, writing for the court, in commenting upon this phase of the case aptly said:

"Plaintiff contracted with defendant with full knowledge of defendant's rights which it must be presumed to know. It knew that defendant had a right to renounce the contract and refuse to perform further and that he thereafter was liable only for damages for breach of contract. * * *

"By comity, citizens of Illinois may sue in the courts of Michigan, but the law of Illinois has no extraterritorial force. The courts of this State may not be used to prosecute to effect a cause of action

in a manner contrary to the laws of Michigan. A foreign citizen cannot avail himself in the courts of this State of remedies which are denied to our own citizens."

Not only are the courts of this State committed to the foregoing propositions of law; but as is revealed by the instant case, the remedy provided enables courts to arrive at a just result between the parties litigant. In this case, if plaintiff's contention were accepted, it would recover from defendant the cost to it of boarding defendant's daughter for the unexpired portion of the school year; but confessedly plaintiff has not and will not furnish this item. In other words, plaintiff is here asking the courts of this State to enforce payment for something which it has not and will not furnish to or for defendant. The Michigan rule relegating plaintiffs in such cases to an action for damages for breach of contract obviates such an illogical and unjust result but affords such plaintiffs full compensation for the loss sustained. As stated in the *Stroud Case,* the law "aims at compensation of the injured party —to make him whole." Much of appellant's brief is devoted to the proposition that the measure of damage is fixed by the law of the place of performance, not by the *lex fori.* But we are not here concerned with that proposition of law. Instead the question is: What *remedy* do the courts of Michigan provide for such cases? Plaintiff is here asserting its right to a remedy by means of which it can recover the full contract price. The courts of Michigan do not provide such a remedy. Clearly the question is one of remedy only, not one relating to the measure of damages; and the remedy is governed by *lex fori.* Since the law of this State has fixed the remedy provided in such cases, plaintiff must be content with such remedy if it elects to prosecute

its claim in the courts of this jurisdiction; and the rule is not affected by the fact, if it is a fact, that the parties contemplated performance of their executory contract in Massachusetts. But in this connection it may be noted that, so far as appears from the record, the contract does not specifically provide that payment, which plaintiff is now seeking to enforce in Michigan, was to be made in Massachusetts.

Appellant's counsel also stress the proposition that "defendant's promise to pay the agreed price is an independent promise," and therefore the contract price may be recovered without showing plaintiff's performance of the contract itself. At best, as applied to the instant case and others of like character, the assertion that defendant's promise to pay constitutes an independent contract is no more than a legal fiction. Confessedly defendant's promise to pay is the consideration for plaintiff's undertaking. It is as much part and parcel of the contract in suit as is the consideration a part of any simple contract. Cases will be found, some have been cited by appellant, wherein defendant's undertaking is embodied in a separate instrument, for example, a promissory note. See *International Accountants Society* v. *Maxwell,* 236 Ill. App. 627. In such cases it is literally true that the promisor's undertaking is embodied in an independent, separate contract. The case before us is not such. This question was squarely ruled upon in *International Text-book Co.* v. *Jones,* 166 Mich. 86; and the plaintiff's claim of right to recover on the theory of an independent promise was rejected. It was there said:

"The plaintiff unequivocally renounces any claim that this action is based on a breach of the contract by defendant. He rests it on the claim that the contract contained an unqualified promise to pay," etc.

We are mindful of plaintiff's contention that the instant contract covering both board and tuition is indivisible, and that there would be difficulty in determining the exact amount saved to plaintiff by reason of its not having furnished defendant's daughter with board. We think this does not change the rule of law that plaintiff must prove the amount of its damages. It has been repeatedly applied by the courts of this State to contracts which were indivisible in the same sense appellant contends this contract is indivisible. *Wigent* v. *Marrs,* 130 Mich. 609; *International Textbook Co.* v. *Schulte, supra.* Plaintiff's counsel cite and quote from cases wherein it is held "that the burden was on the defendant to prove the benefit ensuing to the plaintiff by the defendant's renunciation, and in the absence of proof of such a benefit that the sums stipulated for had to be paid." It is sufficient to say that the established rule of law in Michigan is otherwise. The burden is upon plaintiff not only to establish a right to recover but likewise to establish the extent of recovery. In our recent decision in the *Stroud Case* we quoted with approval from *International Textbook Co.* v. *Schulte, supra,* the following:

"Defendant having repudiated and refused to receive whatever was to be furnished to him, plaintiff is relieved from some of this expense. The facts are within its knowledge. It did not supply the evidence necessary to the fixing of its damages."

The holding in both the *Stroud Case* and the *Schulte Case* was that because of the failure to furnish proof of the amount of plaintiff's damages, the plaintiff could not recover. We can conceive of no good reason why the burden of proof in such a case should be shifted to the defendant. Producing this

proof may be difficult for a plaintiff, but clearly it would be much more difficult for a defendant.

There is a wealth of authority both Federal and State, holding that, in recognizing and enforcing the laws of a foreign State, courts are disinclined to overrule the positive law of the forum; and such foreign laws will never be given effect when they contravene the fixed policy of the law of the forum, whether such policy is found in statutory enactments or not. See 5 R. C. L. p. 911 and numerous cases cited.

"It is a universally established rule that the affording of *remedies* in one State for enforcing a contract made in another depends entirely upon judicial comity, and that the *remedies* and procedure are therefore governed entirely by the *lex fori.* * * * The *lex fori* prevails over the *lex rei sitæ,* the *lex loci contractus,* the *lex loci solutionis,* and all other laws so far as concerns matters that relate to the *remedy* as distinguished from the substantive contract." 5 R. C. L. pp. 941–943, citing *Bank of U. S.* v. *Donnally,* 8 Pet. (U. S.) 361; *Scudder* v. *Union Nat'l Bank,* 91 U. S. 406; *Third Nat'l Bank* v. *Steel,* 129 Mich. 434 (64 L. R. A. 119); *Stack* v. *Detour Lumber & Cedar Co.,* 151 Mich. 21 (16 L. R. A. [N. S.] 616, 14 Ann. Cas. 112), and many other authorities. See, also, Dicey and Keith, Conflict of Laws (3d Ed.), p. 761.

We think the *Stroud Case,* which is the last expression of this court touching this phase of the law, cannot be differentiated from the instant case, and we find no occasion for departing from our former holdings. Judgment entered in the circuit court is affirmed, with costs to appellee.

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

BLANCHARD *v.* CITY OF DETROIT.

1. MUNICIPAL CORPORATIONS—TAXATION—LIENS—INVOLUNTARY PAYMENT.

   Assessment paid after levy becomes lien on property is paid involuntarily.

2. SAME—SPECIAL ASSESSMENTS—PROTEST—REFUND—STATUTES.

   Recovery of special assessments paid involuntarily is in no way affected by 1 Comp. Laws 1929, § 3444, requiring written protest as condition precedent to recovery of sums paid for general taxes.

3. SAME—PAYMENT WITHOUT PROTEST—LIENS—INVOLUNTARY PAYMENT.

   That special assessments were paid without protest does not render payment voluntary, where levy had become lien on property.

4. SAME—REFUND UNDER DETROIT CHARTER.

   Under Detroit city charter (title 6, chap. 4, § 30) and ordinance adopted in conformity therewith, taxes illegally assessed and involuntarily paid should be repaid to those from whom they have been wrongfully exacted by the city.

5. SAME—RECOVERY OF TAX INVOLUNTARILY PAID—STATUTES.

   If payment of tax is involuntary, in absence of statutory provision to contrary, it may be recovered, although there is no express statutory provision therefor.

6. SAME—REMEDY—CLAIM FOR REFUND REJECTED BY CITY MAY BE TAKEN TO COURTS.

   Where claim for refund of special assessments involuntarily paid was first made to city council and rejected, it could be asserted in courts; remedy by action of council not being exclusive.

7. SAME—BOULEVARD PAVING—REFUND.

   In suit to vacate special assessments for paving boulevard, which under Detroit charter should be paid from general fund, and for refund of installments already paid, decree was properly entered in favor of plaintiffs.

Appeal from Wayne; Moll (Lester S.), J. Submitted January 14, 1931. (Docket No. 142, Calendar No. 35,433.) Decided February 27, 1931.

Bill by F. N. Blanchard and others against the City of Detroit, a municipal corporation, and Charles L. Williams, city treasurer, to vacate a special assessment of paving taxes and for other relief. Decree for plaintiffs. Defendants appeal. Affirmed.

Carl B. Grawn and *Hayes & Maurer,* for plaintiffs.

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

NORTH, J. By their bill in chancery plaintiffs seek to restrain the city of Detroit and its treasurer from enforcing payment of special assessments made against their respective properties incident to widening and paving Chicago boulevard, to have their properties decreed not to be subject to assessment for such widening or paving, and that the defendants be decreed to return to the respective plaintiffs the accrued installments paid by each of them. Plaintiffs were granted the injunctive relief sought and defendants were decreed to refund to them the assessments they had paid for paving, but not for the widening of the boulevard. The repayments decreed aggregate upwards of $30,000. Defendants have appealed.

The facts and circumstances out of which this litigation arises are the same as those in *Doherty* v. *City of Detroit,* 244 Mich. 660. We will not detail them here. The decree of the trial court follows and is fully sustained by the decision in the *Doherty Case,* with the exception of that portion which pro-

vides for repayment of the paving assessments to plaintiffs. That question was not presented to this court in the *Doherty Case*. The time of these various payments extends from 1924 to 1927. All of them preceded the decision in the *Doherty Case*. None of them were made under protest; but all were made with the belief on the part of both plaintiffs and defendants that the assessments as levied were valid and binding upon the respective parcels of property, and after the assessments, if valid, became a lien upon the land. The sole question presented by this record is the right of the defendants to have repayment decreed.

Plaintiffs claim that the special assessments paid by them under an invalid levy after such assessments became a lien upon their properties may be recovered, notwithstanding payment was without protest. In asserting that such payments were involuntarily made and are recoverable they rely largely upon *Newberry* v. *City of Detroit,* 184 Mich. 188, and authorities therein cited.

The defendants contend that these assessments were voluntarily paid by plaintiffs and cannot be recovered; and further, that in any event plaintiffs cannot recover because no provision is contained either in the Detroit charter or in the statutes of this State under which the city is bound to repay these special assessments. In this particular they cite *Reliance Auto. & Supply Co.* v. *City of Jackson,* 244 Mich. 232, and other authorities.

There having been no material changes in the Detroit city charter in the meantime, under the decision in the *Newberry Case* these assessments must be held to have been paid involuntarily. See, also, *Pere Marquette R. Co.* v. *Ludington,* 133 Mich. 397; *Detroit Lumber Co.* v. *Arbitter,* 252 Mich. 99; and

extensive note in 64 A. L. R. 9, 112. Regardless of statements in some of the earlier decisions of this court which may seem to sustain a contrary holding, it is and for years has been the settled law of this State that an assessment paid after the levy became a lien upon the property is paid involuntarily. See *Newberry Case, supra.* Recovery of such special assessments is in no way affected by the statute (1 Comp. Laws 1929, § 3444) requiring a written protest as a condition precedent to the recovery of sums paid for general taxes. *Taylor* v. *Township of Avon,* 73 Mich. 604; *Thompson* v. *City of Detroit,* 114 Mich. 502. Plaintiffs herein paid the respective installments of these assessments without protest, but that circumstance does not render the payment voluntary. *Cox* v. *Welcher,* 68 Mich. 263 (13 Am. St. Rep. 339), and *Pere Marquette R. Co.* v. *Ludington, supra.* Defendants' contention that these assessments were voluntarily paid cannot be sustained.

As noted, defendants further contend that plaintiffs cannot recover because no provision for such recovery is contained in the Detroit city charter or in the statutory provisions of this State. We think a complete and conclusive answer to this contention is afforded by provisions of the Detroit charter and ordinance found in this record. The charter provides:

"The common council may also provide and ordain by ordinance, that whenever it shall appear that any taxes or assessments have been illegally assessed or collected, the common council may, by a vote of two-thirds of all the members-elect, direct and cause the amount so collected to be refunded out of the contingent fund, or in case it has not been collected, to vacate the assessment, and fix upon an amount, to be received in full of such tax or assess-

ment, and no such action on the part of the council, under such ordinance shall in any way affect or invalidate any other tax or assessment assessed, levied, or collected in said city." Detroit City Charter (1930 Revision), title 6, chap. 4, § 30.

An ordinance was adopted in conformity with the charter; and we think these provisions of the charter and the ordinance should be construed to mean not only that taxes illegally assessed and involuntarily paid may be refunded or repaid to those from whom they have been wrongfully exacted but that there shall be repayment by the city. If payment of a tax is involuntary, in the absence of statutory provision to the contrary, it may be recovered, although there is no express statutory provision therefor.

"It is a well settled rule that 'money got through imposition' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.'" *Ward* v. *Love Co.*, 253 U. S. 17 (40 Sup. Ct. 419), citing cases.

Reliance Auto. & Supply Co. v. *Jackson, supra,* which appellants cite in support of their contention, differs from the instant case by reason of the Detroit charter and ordinance provisions above quoted. The record in the *Reliance Auto. Case* did not disclose a provision of this character in the Jackson charter. This was noted by Mr. Justice POTTER, who stated:

"Special assessments paid may not be recovered, though paid under protest, except in accordance with the statute. Our attention is called to no provision in the charter of the city of Jackson authorizing the payment of special assessments or any part thereof

under protest and the recovery of moneys paid therefor by suit."

The above should be construed to mean no more than that under the facts presented by the record in that particular case recovery could not be had for the special assessments paid. It may also be noted that there is a further material distinction between these two cases which is plainly pointed out in the concurring opinion of Mr. Justice WIEST. It is unnecessary to repeat it here.

While it seems difficult to reconcile it with appellant's contention that the Detroit charter "contains no provision requiring the city to refund illegal special assessments levied for local public improvements and voluntarily paid," it is also here asserted by appellants that the provisions made in the Detroit charter and ordinance for refunding or repaying assessments illegally collected are exclusive of all other remedies; and "the courts have no jurisdiction to curtail the power invested in the common council of said city by said provisions of its charter and ordinances to adjust and refund taxes and assessments illegally assessed and collected by the city." The claim that such jurisdiction or power is vested exclusively in the Detroit common council cannot be sustained. Neither the charter nor any statutory provision in this State lodges in the council such *exclusive* authority. In the instant case, plaintiffs' claims were first submitted to the council and rejected by it. The claims having thus been rejected, plaintiffs' right to assert any appropriate remedy in the courts cannot be doubted.

The decree entered in the circuit court is affirmed, with costs to appellees.

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

DOMZALSKI *v.* VER HOVEN.

1. EVIDENCE—HEARSAY—PERSONAL INJURIES.
   In action for injuries received by fall into open stairway leading to basement at rear of defendant's garage when plaintiff went there in nighttime for toilet purposes on claimed direction of defendant's employee, which he denied, his testimony that defendant had instructed him not to allow rear of premises to be used for toilet purposes was inadmissible as hearsay.

2. APPEAL AND ERROR—EVIDENCE—HEARSAY—HARMLESS ERROR.
   Error in admission of hearsay testimony by defendant's employee that defendant had instructed him not to allow rear of premises to be used for toilet purposes was not prejudicial, where court instructed jury that employee was in actual charge of building, and if he directed plaintiff to go to rear it would not make any difference whether he had actual authority from defendant or not.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK.
   Even if plaintiff was directed to go to rear of defendant's garage in nighttime for toilet purposes without warning him to look out for open stairway leading to basement, it was his duty to look in front of him and see where he was going, and to exercise ordinary care.

4. APPEAL AND ERROR.
   Where, in action for personal injuries, questions of fact were properly submitted to jury, verdict in favor of defendant should not be disturbed, on review, without justification therefor.

Error to Wayne; Miller (Guy A.), J. Submitted January 16, 1931. (Docket No. 27, Calendar No. 35,231.) Decided February 27, 1931.

Case by Walter H. Domzalski against Bernard J. Ver Hoven for personal injuries received while on

the latter's premises. Judgment for defendant. Plaintiff brings error. Affirmed.

Harry J. Lippman, for plaintiff.

Payne & Payne (*Edmund E. Shepherd,* of counsel), for defendant.

NORTH, J. Plaintiff, being in need of tire service, drove his automobile into defendant's garage located in Detroit. While repairs were being made plaintiff went outside and to the rear of the building for the purpose of urinating. As he stepped around the southwest corner of the garage he fell into an open stairway which leads to the basement. Because of the injuries thus sustained plaintiff brought this suit against defendant, who was the owner of the garage. On trial by jury defendant had verdict, upon which judgment was entered. Plaintiff has appealed.

The stairway at the rear of the building was about 16½ feet from the entrance to the garage. This entrance was electrically lighted both outside and in. There were no lights between the entrance and the rear corner or at the rear of the building. Plaintiff asserts it was very dark there; but defendant claims it was partially lighted by inside electric lights shining through rear windows. After arranging for tire service with the man in charge at the time, plaintiff claims he asked this employee for permission to use the toilet, but was told "someone was in there" and further that the employee said to plaintiff: "Go on around to the rear of the building." This conversation was denied by the employee. Plaintiff went outside and west along the south side of the building. At the rear corner he turned to his right and walked or fell into the stairway. It was of

cement construction substantially flush with the ground level, three or four feet in width and about seven feet deep. There were guard rails on the side and one end of the stairway but none at the top of the steps, the point where plaintiff fell. Plaintiff asserts that he was an invitee on defendant's premises and defendant was negligent in failing to properly guard this open stairway or to properly light this portion of his premises; and also that defendant's employee was negligent in directing or inviting plaintiff to go there, without warning him of the unsafe condition of this portion of defendant's premises.

As noted, defendant denies that plaintiff was either expressly or impliedly given permission to go to the rear of the building for any purpose. Defendant also contends that the stairway was properly guarded and the premises sufficiently lighted, and that plaintiff's fall was due to his own negligence.

Appellant presents 35 assignments of error. The first six have to do with rulings as to admissibility of evidence. The remainder largely relate to the charge to the jury and the court's refusal to charge as requested by plaintiff.

The testimony discloses that there are two toilets in defendant's place of business. Both defendant and his employee were permitted to testify that the former had given the latter instructions not to allow the rear of defendant's premises to be used for toilet purposes. As to plaintiff this was hearsay and should not have been received; but in this connection the court charged the jury:

"Mr. Crane (the employee) was there in the apparent charge of the building and was in actual charge of the building, and therefore, if he directed Mr. Domzalski to go around back of the building

on to that part of the premises, it was within the apparent scope of his authority and it does not make any difference whether he had actual authority from Mr. Ver Hoven or not."

Considering all the record, we think it cannot be said that but for this bit of hearsay testimony a different result would have been obtained. Many of appellant's assignments, relating to refusal to give his requests or to the charge as given, are predicated upon his contention "that the plaintiff was not bound to exercise ordinary care" to ascertain or observe any dangerous condition "if * * * he was invited to use the rear of the premises." Instead of so holding the trial court charged the jury:

"He (the plaintiff) could not * * * turn around the corner going north around the rear wall of the building with his eyes shut, either literally or figuratively, it was his duty to exercise ordinary care, the ordinary care that any person would exercise, and even though the representative of Mr. Ver Hoven, Mr. Crane, did fail to tell him that there was a staircase there and that it was dangerous and he would have to look out for it. * * * It was his duty to look in front of him and see where he was going and exercise ordinary care."

This was a correct statement of the law applicable to this case. *Brown* v. *Berles,* 234 Mich. 353; *Evans* v. *Orttenburger,* 242 Mich. 57. The charge of the court fully and fairly submitted to the jury the following questions of fact: (1) Did defendant's agent invite plaintiff to go to the rear of the garage? (2) Was the stairway, considering all physical conditions, a place of danger? (3) Was defendant or his employee guilty of negligence? and (4) Was plaintiff guilty of contributory negligence? The verdict of the jury was against the plaintiff. We have con-

sidered all the questions raised by appellant's assignments of error but find no justification for disturbing the judgment entered in the circuit court. It is affirmed, with costs to appellee.

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

PITTSBURGH PLATE GLASS CO. *v.* ART CENTRE APARTMENTS.

1. EVIDENCE—PAROL EVIDENCE—WAIVER OF LIEN—AMBIGUOUS WRITING—INTENT—MECHANICS' LIENS.

   Where waiver executed by materialman providing for waiver of liens for materials furnished "at any time heretofore" bore two dates, it was ambiguous, and parol evidence was admissible to show intent of parties as to date it became effective.

2. MECHANICS' LIENS—WAIVER—CONSIDERATION.

   Where, on execution by materialman of waiver of lien for materials furnished to subcontractor, latter was paid substantial sum, there was consideration for waiver, although materialman was paid nothing on account.

3. CANCELLATION OF INSTRUMENTS—WAIVER OF LIEN.

   Carelessness or inadvertence on part of one executing written instrument does not justify courts in decreeing its nullification in whole or in part.

4. MECHANICS' LIENS—WAIVER OF LIEN—REVIVAL.

   Mechanic's lien once waived may not be revived in absence of express agreement binding upon those whose interests are adversely affected.

5. SAME—WAIVER OF LIEN BARS CLAIM.

Where materialman executed waiver of lien for material furnished or delivered "heretofore or at any time hereafter," its claim of lien for material furnished should have been denied.

Appeal from Wayne; Jayne (Ira W.), J. Submitted January 20, 1931. (Docket No. 43, Calendar No. 35,379.) Decided February 27, 1931.

Bill by Pittsburgh Plate Glass Company, a Pennsylvania corporation, against Art Centre Apartments, Inc., a Michigan corporation, and others to foreclose a mechanic's lien.. Cross-bill by defendants Robert and Otto Ernst, doing business as Ernst Fuel & Supply Company, to foreclose a mechanic's lien. Decree for plaintiff and cross-plaintiffs is reviewed by defendant on appeal. Decree for plaintiff affirmed. Decree for cross-plaintiffs reversed.

John McNeil Burns (*Cyril E. Bailey,* of counsel), for plaintiff.

Butzel, Levin & Winston, for cross-plaintiff.

Behr & Coolidge, for defendant.

NORTH, J. Plaintiff's bill was filed to foreclose a materialman's lien on property owned by the Art Centre Apartments, a Michigan corporation. The defendants Ernst, doing business as the Ernst Fuel & Supply Company, by cross-bill, also seek to foreclose a lien for materials furnished. The Art Centre Apartments, hereinafter referred to as the defendant, has appealed from a decree fixing the amount and allowing foreclosure of the foregoing liens. Defendant contends plaintiff's lien was allowed in an excessive amount, and that the Ernst lien should be wholly disallowed.

Pittsburgh Plate Glass Company's Lien. On three occasions the glass company executed releases of its claim of lien; and the controversy presented involves a determination of the force and effect to be given to these releases. The total amount of plaintiff's account for materials furnished to one of the contractors on this work is $5,650.78. It acknowledges payment on account of $2,800 and claims a lien for the balance, $2,850.78. This claim was allowed by the circuit judge together with interest and costs, making a total of $3,413.49.

Plaintiff's first waiver or release was dated October 28, 1926, and it covered all materials supplied to the contractor to that date. Incident to this release plaintiff received $800 on account. Plaintiff's second release bore date of December 24, 1926. By this instrument, in consideration of $2,000 to be paid on its account, plaintiff stipulated: "we do hereby *partially* waive, release and relinquish any and all claims or right of lien which we now have or which may hereafter accrue upon the premises," etc. This release was made in anticipation of and for the purpose of securing a payment in the form of a promissory note of $2,000 on plaintiff's account. It also appears from the record that on this same date defendant's agent, who had charge of payments on construction accounts, prepared and submitted to plaintiff a waiver of lien known in this record as Exhibit 8. This waiver provided for a full release by plaintiff of all claim of lien for materials theretofore furnished or that might thereafter be furnished. Plaintiff struck this provision out, and in lieu thereof inserted a provision that it covered "partially" materials furnished "up to and including Nov. 25, 1926." Defendant's agent refused to accept this waiver and withheld delivery of the

$2,000 note. Thereafter, and on January 17, 1927, plaintiff executed and delivered to the property owner's agent another release of lien, Exhibit 6. This waiver, like the others, was prepared by filling in blanks on a printed form. On the date line at the top Exhibit 6 reads: "Detroit, Michigan, November 26th, 1926." On the date line at the bottom it recites its execution on "this 17th day of January A. D. 1927." It provides for a waiver of lien for materials furnished "at any time heretofore" and just following this provision the expression "or at any time hereafter" is stricken out. Simultaneously with the execution and delivery of Exhibit 6, defendant prepared and took from plaintiff an agreement (Exhibit 7) to accept the $2,000 note as the equivalent of cash; and it is therein recited that plaintiff has received on account $800 in cash and the $2,000 note, totaling $2,800, "to the extent of which the undersigned (plaintiff) hereby waives all lien against said buildings and premises."

It is defendant's contention that Exhibit 6 unambiguously and conclusively recites its execution and delivery on the 17th of January, 1927, and constitutes a release of claim of lien by plaintiff for all materials furnished to that date. Defendant contends that this instrument became effective on the date of its delivery, and that because it is unambiguous its terms cannot be varied by extraneous testimony. If this contention were sustained plaintiff's lien for materials furnished after January 17, 1927, would amount to only $333.30.

On the other hand, plaintiff contends that because of its being dated both as of November 26, 1926, and as of January 17, 1927, Exhibit 6 is ambiguous, and its effective date may be explained by and determined from competent testimony. It further contends this instrument was executed simultaneously

with Exhibit 7 and the two instruments are part of the same transaction, and should be construed together. They were delivered simultaneously with the note for $2,000 (which is a part of the $2,800 payment acknowledged in Exhibit 7) dated December 24, 1926. Plaintiff claims that the $2,800 specified in Exhibit 7 in round numbers paid its account in full to November 25, 1926, that the parties so understood the transaction and that from all the circumstances disclosed its waiver of lien should be held to cover only $2,800 of its account, and it should be decreed to have a lien for the balance, amounting to $2,850,78 together with accrued interest and costs. The circuit judge sustained plaintiff's contention and decreed a lien in the amount of $3,413.49. Under the circumstances of this case we think the waivers of lien should be held to be cumulative, that the waiver, bearing two different dates (Exhibit 6), is ambiguous, and that the evidence sustains plaintiff's contention as to the proper construction to be placed thereon. As to the Pittsburgh Plate Glass Company's lien, the decree of the lower court is affirmed, with costs of this court to plaintiff; and the decree of this court will also run against appellant's surety.

Ernst Fuel & Supply Company's Lien. This cross-plaintiff, a copartnership, furnished materials to Ralph Dupont, the plastering contractor. Dupont did not complete his contract. When he left the job he owed the Ernst company on this account $2,500. Thereafter the Ernst company furnished additional materials to the amount of $1,488.73 direct to the owner, but they were all billed to Dupont. The circuit judge decreed a lien to the copartnership in this latter amount with accrued interest and costs.

Defendant claims this cross-plaintiff expressly waived its right to a lien. The record discloses that subsequent to the furnishing of the first materials

by this copartnership, and on August 10, 1926, it executed and delivered to defendant's agent a waiver of lien in which it released "any and all lien or claim or right of lien * * * on account of labor or materials, or both, furnished or *which may be furnished* by the undersigned to or on account of, or for said buildings or premises; and hereby authorize said owner * * * to plead this waiver and release in bar of any suit or suits brought by the undersigned * * * to establish a lien upon said premises * * * or to charge the same with any lien for labor and material done, performed or furnished or delivered * * * *heretofore or at any time hereafter.*" The cross-plaintiff seeks to avoid the effect of this waiver by asserting there was no consideration therefor. This contention cannot be sustained. The undisputed record discloses that on the date this waiver was executed and delivered to defendant's agent, defendant through its financial agent paid $5,000 to the contractor Dupont to whom cross-plaintiff was furnishing materials. The undisputed record is that defendant would not have authorized this payment except on condition of the execution and delivery of cross-plaintiff's waiver of lien. This constitutes ample consideration for the waiver, notwithstanding Dupont did not at this time pay cross-plaintiff anything on his account. It may be unfortunate that cross-plaintiff waived its right to a lien for any and all materials furnished at any time on this job in the manner above noted; but carelessness or inadvertence on the part of one executing a written instrument does not justify courts in decreeing its nullification in whole or in part. We do not think the construction of the waiver above quoted is in any way altered by the subsequent waivers of liens given by cross-plaintiff and accepted by de-

fendant's agent. If once waived, a mechanic's lien cannot be revived in the absence of an express agreement binding upon those whose interests are adversely affected. *Blakeley* v. *Moshier,* 94 Mich. 299. It follows that the portion of the decree of the circuit judge giving cross-plaintiff a lien must be reversed, and the claim of lien denied, with costs of this court to appellant.

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

PEOPLE *v.* ROBINSON.

1. CRIMINAL LAW—NEGLIGENT HOMICIDE—NEGLIGENCE—MOTOR VEHICLES—DRIVING WHILE SLEEPY.

   One who undertakes to drive motor vehicle on highway while physically weary and sleepy from his own voluntary acts is guilty of negligence within meaning of negligent homicide statute (3 Comp. Laws 1929, §§ 16743–16745).

2. SAME—TRIAL—INSTRUCTIONS.

   In prosecution for negligent homicide under 3 Comp. Laws 1929, §§ 16743–16745, based on death from collision of passenger in defendant's automobile, request to charge that defendant should not be found guilty if collision occurred while he was asleep due to fatigue and weariness, was properly rejected.

3. EVIDENCE—JUDICIAL NOTICE—MOTOR VEHICLES.

   Danger of driving automobile on highway by one not in possession of his faculties is matter of common knowledge.

4. CRIMINAL LAW—MISCARRIAGE OF JUSTICE—APPEAL AND ERROR.

   Where defendant's own testimony shows that in his conviction of negligent homicide there was no miscarriage of justice, assign-

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Negligence of person operating automobile while intoxicated, see annotation in L. R. A. 1917A, 313.

Driving automobile while intoxicated as substantive criminal offense, see annotation in 42 A. L. R. 1498; 49 A. L. R. 1392.

ments of error relating to admission and rejection of testimony and to charge of court, *held,* not prejudicial, although they have some merit and under other circumstances might require reversal.

5. SAME—COSTS AS CONDITION OF PROBATION.
Costs imposed as condition of probation under criminal code (3 Comp. Laws 1929, § 17373) are not governed by rules for taxation of costs imposed as part of sentence, but they may be summarily fixed at amount sufficient to reimburse county for all expenses incurred in connection with apprehension, examination, trial, and probationary oversight of probationer.

6. SAME—EXCESSIVE COSTS.
Costs of $200 imposed as condition of defendant's probation under criminal code (3 Comp. Laws 1929, § 17373) after conviction of negligent homicide (sections 16743–16745) are not excessive.

7. SAME—PROBATION SUBSTITUTE FOR IMPRISONMENT—SENTENCE.
Probation is substitute for imprisonment; being conditional suspension of sentence.

8. SAME—CONDITIONS OF PROBATION MAY BE ALTERED.
Conditions of probation may be altered or amended at court's discretion.

9. SAME—PROBATION—IMPRISONMENT—SENTENCE.
Where convicted person is placed on probation, imprisonment may not be imposed until probation is revoked or terminated.

WIEST and POTTER, JJ., dissenting in part.

Error to Allegan; Miles (Fred T.), J. Submitted January 15, 1931. (Docket No. 150, Calendar No. 35,226.) Decided February 27, 1931.

Maurice Robinson was convicted of negligent homicide. Conviction affirmed, and case remanded for proper judgment.

W. J. Barnard, for appellant.

Paul W. Voorhies, Attorney General, and *Harry Pell,* Prosecuting Attorney, for the people.

McDONALD, J. The defendant was convicted on a charge of negligent homicide arising out of the operation of an automobile upon a public highway in such a manner as to cause the death of one John Hanold.

The people's testimony tends to show that on the evening of May 17, 1929, the defendant, in company with John Hanold and another young man, attended a dance near Benton Harbor, Michigan, where they remained until two o'clock in the morning. While there they drank some beer. The defendant says he had about three glasses. When the dance was over they drove to Muskegon. There they loitered about visiting friends until four o'clock in the afternoon, when they started for home. They drank beer before leaving. On the way home defendant was driving. He got on the wrong side of the road and collided with a car approaching from the opposite direction. In the collision John Hanold was killed.

The theory of the defense is expressed in the following request to charge:

"You are instructed that if the respondent, Maurice Robinson, was tired, worn out, and lost consciousness by falling suddenly to sleep and the impact or collision occurred in consequence thereof, then your verdict should be not guilty in this case. You are instructed in view of the previous language that the negligent homicide statute (3 Comp. Laws 1929, §§ 16743–16745) is predicated on negligence; or, in other words, a failure to use care and caution that the ordinary prudent man would use and that where the cause was brought about by the respondent's falling to sleep on account of being worn out and weariness and in consequence thereof suddenly falls asleep, then there can be no negligence within the meaning of the negligent homicide statute, and your verdict should be not guilty. In other words, if the

sole proximate cause of the collision in this case was caused by the respondent being worn out, fatigued and losing consciousness by falling asleep, then there is no criminal negligence."

This request is not a correct statement of the law in regard to the negligence of one falling asleep while driving an automobile. He may not always be chargeable with negligence for what he does while asleep, but the rule is different where he voluntarily puts himself in such a physical condition that he cannot stay awake. The danger of driving an automobile on the highways by one who is not in possession of his faculties is a matter of common knowledge. This defendant knew that he had been going without sleep, that he had been drinking that which would disturb his faculties, and that he was not in a fit condition to drive a car. An ordinarily prudent man would have known it. An ordinarily prudent man would have known that this or some other accident would probably happen while driving in that condition. So, under the circumstances as shown by his own evidence, the defendant was negligent in falling asleep. He was negligent in trying to drive a car when a man of ordinary prudence would have known it was not safe for him to do so. It was negligent for him to drive when he was weary and sleepy. It was his duty to stop driving until he had overcome his weariness and regained control of his faculties. The court did not err in refusing to submit the defendant's theory on the question of negligence. The evidence sustains the jury's finding.

Those assignments of error relating to the admission and rejection of evidence and to the charge of the court do not require discussion. Some of them have merit and might require reversal were it not that the material facts which the jury were called

upon to determine are not seriously disputed. The defendant's testimony alone shows that in his conviction there was no miscarriage of justice. None of the alleged errors was prejudicial.

The remaining question relates to the following condition of probation:

"Seventh—that the respondent shall pay costs of $200 and serve 60 days in the county jail."

The defendant claims that the court was without authority to tax any greater amount of costs than are taxable in ordinary criminal cases, citing *People* v. *Wallace,* 245 Mich. 310. But these costs are imposed as a condition of probation and are not governed by the rules for the taxation of costs imposed as a part of sentence. In the new criminal code, section 3, chap. 11, Act No. 175, Pub. Acts 1927 (3 Comp. Laws 1929, § 17373), it is provided that if the court, in fixing the conditions of probation, requires the probationer to pay costs, they may be summarily fixed at an amount sufficient to reimburse the county for all expenses incurred in connection with the "apprehension, examination, trial and probationary oversight of the probationer."

The costs imposed in this case are authorized by the above section of the code and are not excessive. But the court was wrong in requiring the defendant to serve 60 days in jail as a condition of probation. Probation is a substitute for imprisonment. It is a conditional suspension of sentence. It is applied on the theory that, if allowed to retain his liberty and be at large among the people under certain regulations and supervision, the convicted person will not engage in a criminal course of conduct. The court entered an order placing the defendant on probation. Imprisonment cannot be imposed until the

probation is revoked or terminated. The statute provides that the conditions of probation may be altered or amended at the court's discretion.

The judgment of conviction is affirmed, and the case remanded with directions to enter proper judgment.

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

WIEST, J. (*concurring in affirmance in part*). I concur in affirmance of the conviction, but think the amount of costs, imposed in the order of probation, not justified by the provision of the criminal code.

The expense of arrest, costs of examination before the magistrate, and costs of the trial may be summarily estimated and imposed, but there may not be included "coroner's fees, per diem compensation of the jurors and subsistence of the prisoner," as mentioned in the prosecutor's brief. If such items are included we will have a new meaning for the term "costs." Expenses of the established judicial system cannot be taxed as costs incident to any trial; neither may the board and lodging of a prisoner while awaiting trial.

In *People* v. *Wallace,* 245 Mich. 310, and again in *People* v. *Davis,* 247 Mich. 672, we held that costs in criminal cases must bear a true relation to the expense of prosecution. This still holds good, and costs are expenses incident to a prosecution, and not inclusive of any of the expenses of holding required terms of the circuit court.

The costs should be redetermined in accord with this opinion.

POTTER, J., concurred with WIEST, J.

PLANT *v.* LANGDON.

CANCELLATION OF INSTRUMENTS—DEEDS—ESTATES BY ENTIRETIES—MENTAL COMPETENCY.

Suit by children to set aside transfer of real property by their mother, creating estate by entireties in herself and husband, was properly dismissed where testimony of disinterested witnesses is convincing that at time of execution of deed mother was mentally competent.

Appeal from Allegan; Miles (Fred T.), J. Submitted January 8, 1931. (Docket No. 63, Calendar No. 35,207.) Decided February 27, 1931.

Bill by William Plant and others against Frank A. Langdon and another to set aside a transfer of real estate. Bill dismissed. Plaintiffs appeal. Affirmed.

Don E. Minor and *Irving H. Smith,* for plaintiffs.

Fidus E. Fish, for defendant Langdon.

FEAD, J. This is a bill to set aside a transfer of real estate by Emma Langdon to herself and her husband, defendant Frank A. Langdon, by the entireties. Mrs. Langdon was 67 years old. Langdon was her fifth husband. Plaintiffs are her children.

For some time during 1927 and the spring of 1928, Mrs. Langdon had been ailing, with a high blood pressure. On March 14, 1928, she had a stroke which left her in an almost helpless physical condition. She gradually improved, however, and, during the

summer, was able to get about. In September she had a second stroke and died.

The deeds were executed April 24, 1928. On April 23d, she sent for her banker, voluntarily told him she wanted her husband to have the right to draw upon her account and executed an instrument to that effect. On April 24th, she sent for her attorney, discussed with him the disposition of her personal property in case she died intestate, was satisfied with the distribution provided by law, and instructed him to prepare papers to provide a transfer of real estate so that the title would devolve finally on the survivor of herself and husband. These instructions were given in the absence of the husband.

Testimony, conflicting and in detail, was given of Mrs. Langdon's physical and mental condition. It is not necessary to set it up. Mrs. Langdon's mental competency at the time of the execution of the deed was shown by the testimony of the scrivener, his wife, the attending physician, the banker, and other disinterested witnesses. The testimony is convincing.

Decree sustaining the deed is affirmed, with costs.

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

JONES *v.* WAYNE CIRCUIT JUDGE.

1. LANDLORD AND TENANT—LESSOR'S DUTY TO KEEP INTACT FUND DEPOSITED AS SECURITY.

   Where lessee under terms of long-time lease deposited fund with lessor as security for faithful performance of lessee's agreements thereunder, duty of lessor to keep fund intact depends on contract.

2. SAME—CONSTRUCTION OF LEASE—INTEREST—LANDLORD'S RIGHT TO USE SECURITY.

   Fair construction of terms of lease requiring lessor to pay interest on fund deposited with him by lessee as security for faithful performance of his agreements thereunder is that lessor is entitled to use of fund.

3. SAME—RESCISSION OF LEASE.

   Failure of lessor to keep intact fund deposited with him by lessee as security for faithful performance of lessee's agreements thereunder does not constitute ground for rescission of lease by lessee, where lessor is required to pay interest on said fund.

4. JUDGMENT—SUMMARY JUDGMENT—AFFIDAVIT OF MERITS.

   Plaintiff's motion for summary judgment should have been granted where it appears that averments in defendant's affidavit of merits, even if true, would not constitute defense to plaintiff's cause of action.

Mandamus by Henry Kirkland Jones, Jr., to compel Victor D. Sprague, acting Wayne circuit judge, to grant a motion for summary judgment in an action to collect rent. Submitted January 6, 1931. (Calendar No. 35,399.) Writ granted February 27, 1931.

Miller, Canfield, Paddock & Stone, for plaintiff.

Prentis, Fitch & Carpenter, for defendant.

FEAD, J. Plaintiff moved for summary judgment on a claim for rent due on a 99-year lease, from March to September, 1930, inclusive, at $1,250 per month. The motion was supported by affidavit that defendant had admitted the sum owing and conceded he had no defense. Defendant pleaded the general issue, with notice of two special defenses discussed below. His affidavit opposing summary judgment did not controvert the claimed admissions by him but denied liability solely on the ground of his special defenses.

The first special defense was that, under the lease, the claim for rent must be submitted to arbitration. This defense is so completely devoid of merit that discussion of it is unnecessary.

The second special defense was that, with the filing of the plea, defendant had rescinded the lease. When the lease was executed, defendant "paid to and deposited with" the lessors $2,083.34, to be held—

"by lessors as security for the faithful performance by lessee of his covenants and agreements hereunder until the completion of the new building, free of liens, in the manner and time required by clause 14 hereof; at which time said balance, with interest at the rate of four per cent. per annum from the date of such deposit shall be credited by lessors upon the rent next thereafter falling due hereunder. In case of any deposit by lessee hereunder at any time prior thereto, lessors shall have the right to apply said balance to any damages suffered by them by reason of such default."

The lessors agreed to hold and dispose of the deposit as provided in the lease. Defendant averred

that plaintiff, who was an original lessor and subsequently acquired full title, had not kept the deposit intact, and, because of such failure, defendant had rescinded the lease and plaintiff was entitled to recover nothing on the rent.

We need not determine whether the deposit is to be called a bailment, 36 C. J. p. 303; a security, *Moskin* v. *Goldstein,* 225 Mich. 389; a pledge, *In re Frey,* 26 Fed. (2d) 472; a debt, *In re Banner,* 149 Fed. 936; an indemnity, *In re Sherwoods, Inc.,* 127 C. C. A. 304 (210 Fed. 754, Ann. Cas. 1916 A, 940); or in the nature of a trust, *Alumor Garage* v. *Stivers,* 128 Misc. Rep. 400 (218 N. Y. Supp. 683). The names given the funds in these cases were convenient terms used in declaring the rights under the circumstances rather than definitive or descriptive words determinative of the rights.

In no case cited has it been held that failure to keep the deposit intact is ground for rescission. The largest effect given such failure seems to have been to hold it a conversion of the fund, entitling the lessee to set it off against a claim for rent, but without discharging his obligation to renew the fund in accordance with the conditions of the lease if he retains possession. *Atlas* v. *Moritz,* 217 App. Div. 38 (216 N. Y. Supp. 490).

The duty of the landlord to keep the fund intact depends upon the contract. Here, the deposit was to be kept for an indefinite time and the lessor was chargeable with interest thereon. It can hardly be said that it was intended he should keep the fund idle at a loss to himself. The fair construction of the lease arising out of the lessor's obligation to pay interest is that he was entitled to use the fund pending its application to the lease purposes. *Colantuoni* v. *Balene,* 95 N. J. Eq. 748 (123 Atl. 743).

In either event, no principle has been suggested by counsel or occurs to this court which would justify the lessee in rescinding the lease for failure to keep the deposit intact, at least until the lessor fails to apply it as provided in the contract.

Failure to keep the deposit intact did not constitute ground for rescission by defendant. It appearing that the averments in defendant's affidavit of merits, even if true, would not constitute a defense to plaintiff's cause of action, summary judgment for plaintiff should have been entered.

The writ of mandamus will issue, with costs.

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

SWAINSTON *v.* KENNEDY.

1. MOTOR VEHICLES—NEGLIGENCE—DUTY OF DRIVERS APPROACHING INTERSECTION.

   Automobile drivers approaching street intersection at right angles to each other are each required to use such care under circumstances as would be required of ordinarily prudent person to avoid collision; and each may assume that other will conduct himself as reasonably prudent driver would under like circumstances.

2. SAME—EXCESSIVE SPEED—FAILURE TO LOOK AND ACCORD RIGHT OF WAY.

   Testimony that automobile driver approached street intersection at excessive speed, that he neglected to make proper obser-

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On the question as to liability for collision between automobiles, or an automobile and another vehicle at or near corner of street or highways, see annotation in L. R. A. 1916A, 745.

vations, and that he failed to accord right of way to driver first entering intersection, *held*, sufficient to justify finding of jury that he was guilty of negligence.

3. SAME—FAILURE TO LOOK SECOND TIME.

Whether automobile driver was guilty of contributory negligence in proceeding to cross intersection in front of approaching automobile 250 feet from intersection when he was only 40 feet from it was question for jury; that he did not look again before proceeding to cross being insufficient to establish his contributory negligence as matter of law.

Error to Muskegon; Vanderwerp (John), J. Submitted January 7, 1931. (Docket No. 42, Calendar No. 35,263.) Decided February 27, 1931.

Case by Beatrice Swainston against Frederick T. Kennedy and another for personal injuries resulting from an automobile accident. Judgment for plaintiff. Defendants bring error. Affirmed.

Galpin, Smedley & Dunn, for plaintiff.

Travis, Merrick, Johnson & McCobb, for defendants.

FEAD, J. Plaintiff recovered damages for injuries sustained in a collision between an automobile, driven by her husband and in which she was riding, and one owned by defendant company, driven on its business by defendant Kennedy. The question is whether the court should have directed a verdict for defendants on the ground of their freedom from negligence or of contributory negligence of plaintiff's husband, attributable to plaintiff.

The accident occurred at the intersection of Houston and Fourth streets in Muskegon in the afternoon of a clear, dry day. Each street is paved 30 feet wide. Plaintiff's husband drove south on Fourth

street at the rate of 12 to 14 miles per hour. At the first opportunity and when 40 to 45 feet north of the crossing, he looked to the west and saw defendant's car 250 feet from the intersection. He then looked to the left. He thought there was no danger, and proceeded without varying his speed and without again looking to the right. His car was struck by defendant's at the rear wheel when the front end was about at the south curb line of the crossing, was turned completely around and thrown across the street to the east curb. Defendant's car passed on, made a right-hand turn at the east corner, jumped a five inch curb and ran over the sidewalk upon a lawn. Defendant Kennedy did not see the Swainston car until he was from 6 to 10 feet from it. Under plaintiff's testimony, Kennedy drove about four times as fast as Swainston, because he traveled four times as far in the same time.

The case is not one for the discussion of authorities but for the application of the familiar rules that each driver was bound to make the observations at the intersection which, and to see and to do what, an ordinarily prudent person would have made, seen, and done, and each could assume that the other would conduct himself as a reasonably prudent driver, unless, until, and in so far as a reasonably prudent person would have apprehended to the contrary.

The jury could fairly find Kennedy guilty of negligence in driving at an excessive rate of speed, neglecting to make proper observations, and failing to accord plaintiff's car the right of way as the first to enter the intersection.

Swainston's observation to the right was not prolonged. He was not sure that the car he saw, which the jury could find was defendant's, was moving,

although he thought it was. But his decision to proceed was based upon the belief that defendant's car was approaching and was supported by the fact that it was much farther from the intersection than his own and by his qualified right to assume that Kennedy would approach at a lawful rate of speed, that he would make proper observations, and, seeing plaintiff in the intersection, would accord him the right of way. While these considerations did not, as a matter of law, justify Swainston in proceeding, they cast the issue of his care in so doing into the realm of fact for the jury. His failing to look to the right a second time did not establish his negligence as a matter of law. *Lefevre* v. *Roberts,* 250 Mich. 675.

Judgment is affirmed, with costs.

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

McKIMMY *v.* CONDUCTORS PROTECTIVE ASSURANCE CO.

1. INSURANCE—EMPLOYMENT INSURANCE—EXCEPTIONS—"WILFUL," "INTENTIONAL," "INVITING," DEFINED.

Exceptions to policy insuring railroad employee against loss of job except in case of his "wilfully inviting his own discharge" operates only when insured intentionally gives occasion for his discharge; "wilful" meaning "intentional;" and "inviting" meaning, among others, "to tempt; to give occasion for or opening to."

2. SAME—WILFUL AND INTENTIONAL ACT.

That railroad employee brought action for personal injuries against his employer without first presenting his claim to its claim department did not establish that he was "wilfully inviting his own discharge" within exception to policy insuring him against loss of his job, in absence of showing that he knew or intended that his failure to seek compromise of his claim would result, or be likely to result, in his dismissal.

3. SAME—EVIDENCE—CUSTOMS AND USAGES.

Where exception in policy insuring railroad employee against loss of job applies only to his own acts, knowledge of custom which would imperil his job must be brought home to him before testimony of said custom would be admissible in action by him on policy.

Error to Gladwin; Smith (Guy E.), J. Submitted January 13, 1931. (Docket No. 109, Calendar No. 35,284.) Decided February 27, 1931.

Assumpsit by Henry E. McKimmy against Conductors Protective Assurance Company, a Michigan corporation, on an employment insurance policy. Judgment for plaintiff. Defendant brings error. Affirmed.

Pierson & McLaughlin, for plaintiff.

John C. Shaffer (*Roy W. Scott,* of counsel), for defendant.

FEAD, J. Defendant issued to plaintiff a policy insuring him, among other things, against "loss of job by discharge." The policy further provided:

"4. No indemnity will be paid the insured for loss of job on account of * * *, or in any way wilfully inviting his own discharge or removal from service."

Plaintiff was working for the Pere Marquette Railroad Company, was injured, and commenced suit without first submitting the claim to his employer for adjustment. He was discharged:

"On account of engaging an attorney to prosecute a claim suit against this company without giving the claim department an opportunity to handle the case in the usual manner, you are hereby dismissed from the service of this company."

Defendant's principal point is that an insured has wilfully invited his own discharge within the meaning of the policy if the employer is justified in dismissing him.

The policy is not ambiguous. It did not insure against wrongful discharge only. Wilful means intentional. *Nunn* v. *Drieborg,* 235 Mich. 383. "Inviting" has many meanings, among them being to "tempt; to give occasion for or opening to." Webster's International Dictionary. The exception in the policy here relied upon operates only when the insured intentionally gives occasion for his discharge, either for the purpose of being dismissed or appreciating that it is likely to so result. There was no showing that plaintiff knew or intended that his failure to seek compromise of his claim would result, or be likely to result, in his dismissal.

The court sustained an objection to an inquiry made of the trainmaster whether failure to submit the claim for settlement was a customary ground for dismissal. Defendant did not follow up the question with an offer to show that plaintiff had actual or probable knowledge of such a custom, if there was one. As the exception in the policy applies only to the acts of the insured, knowledge of a custom which would imperil his job must be brought home to him.

Under the circumstances, the court did not err in sustaining the objection.

Had motion therefor been made, plaintiff would have been entitled to a directed verdict. So, defendant was not prejudiced by submission of an undisputed question of fact to the jury.

Judgment for plaintiff will be affirmed, with costs.

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

CASE *v.* HARRAH.

1. WOODS AND FORESTS—STANDING TIMBER.
   Standing timber is real estate.

2. LOGS AND LOGGING—CONTRACTS—LAW OF CASE.
   Contract for sale of all timber on certain land, *held*, to fix rule of action for parties thereto and law of case.

3. SAME—RIGHT TO CUT BEFORE PAYMENT.
   Contract for sale of all timber standing, lying, and being on certain described lands, with right to remove timber "so cut" on payment of agreed price per thousand feet, is construed to permit buyer to cut timber before paying therefor.

4. WOODS AND FORESTS—LOGS AND LOGGING.
   Timber cut from land is personal property.

5. LOGS AND LOGGING—CONTRACTS—CONSTRUCTION—CUT TIMBER—SECURITY—TAXES.
   Where contract for sale of timber provided that it should not be removed until paid for, that all timber not released should be security for purchase price, and that buyer would pay taxes on land until timber was removed, cut timber was included in security, and buyer was liable for taxes on land where timber was cut but not paid for or released.

Appeal from Alger; Runnels (Herbert W.), J. Submitted January 13, 1931. (Docket No. 102, Calendar No. 35,321.) Decided February 27, 1931.

Bill by Fred S. Case, receiver for Richard W. Nebel and Thomas G. Sullivan, against Charles W. Harrah and others for an accounting under a timber cutting contract. Decree for plaintiff. Defendants appeal. Affirmed.

McDonald & Kaltz (*Glenn W. Jackson,* of counsel), for plaintiff.

Welsh, Bebout, Hill & Lee, for defendants.

POTTER, J. Plaintiff files his bill herein as receiver against defendant for an accounting, to compel a refund of money paid for taxes, to cut off by foreclosure and sale defendants' rights in the timber in question, and for other relief. From a decree for plaintiff, defendants appeal. Defendant Harrah entered into a written contract with Thomas G. Sullivan as follows:

"This agreement made this fourteenth day of August, nineteen hundred twenty, between Thomas G. Sullivan, a widower of Munising, Michigan, and Charles W. Harrah, of Detroit, Michigan.

"Witnesseth: The said Sullivan hereby agrees to sell and convey to the said Harrah all of the timber standing, lying and being on the following described lands, situated in Alger and Schoolcraft counties in the State of Michigan, and more fully described as follows:

"In town 47 north, range 13 west; the west half of section 3; the east half and the northwest quarter of section 4; the northwest quarter of section 5; the northeast quarter of section 6; the east half of section 9; and the west half of section 10; being in Schoolcraft county.

"In town 48 north, range 13 west; the northeast quarter of northwest quarter of section 29; the southeast quarter of section 31; the southwest quarter of section 32; and the south half of section 33.

"In town 48 north, range 14 west; the west half of the west half of section 27; the northeast quarter of the northeast quarter, and southeast quarter, the north half of the southwest quarter, and the southeast quarter of the southwest quarter of section 28, the west half of the southwest quarter and the north half of section 33; the west half of the northwest quarter of section 34; the southeast quarter of the northwest quarter of section 36.

"In town 48 north, range 15 west; the east half, the southwest quarter, and the west half of the northwest quarter of section 36, being in Alger county.

"Containing in all three thousand nine hundred fifteen and 35-100 acres, more or less, according to Government survey, for the sum of ($1) dollar and other valuable consideration, to be paid as follows:

"Five thousand ($5,000) dollars on delivery of this contract; twenty thousand ($20,000) dollars on or before thirty (30) days from the date hereof; a note for twenty thousand ($20,000) dollars payable on or before one year from date hereof and a note for the balance of nineteen thousand four hundred forty-four ($19,444) dollars payable on or before two years from date hereof, with interest at six per cent. (6%) per annum.

"It is understood that the said Harrah has the right for twenty years (20) from date hereof, to remove said timber from said lands and said Harrah agrees to pay all taxes that may be assessed against said lands and timber. At any time that the said Harrah notifies the said Sullivan that he has removed the timber from any descriptions or description by registered letter, he no further has to pay the taxes on the descriptions that he has notified said Sullivan of and has no further rights to any

timber that might be on said lands that are so reported to said Sullivan. The said Sullivan guarantees that the title to this property is perfect and that there are no unpaid taxes thereon. It is understood that the said Harrah shall be allowed to cut the said timber by paying to the said Sullivan the sum of ten ($10) dollars for each thousand feet board measure so cut and before removal of any of the timber from said lands and the said money so paid shall be applied hereon.

"In case of failure on the part of the said Harrah to carry out his part of this contract, the five thousand ($5,000) dollars paid to bind this bargain, shall be forfeited to the said Sullivan. All timber not so released as stated herein shall be held as collateral security to the note above mentioned.

"This agreement shall bind the heirs, executors and assigns of both parties hereto.

"(Signed) THOMAS G. SULLIVAN.
"(Signed) CHARLES W. HARRAH."

This contract was recorded in the office of the register of deeds of Alger county.

Prior to making this contract Sullivan procured some money from Richard W. Nebel under circumstances discussed in *Nebel* v. *Sullivan,* 245 Mich. 642. Nebel brought suit against Sullivan to recover his share of the profits resulting from Sullivan's sale of the timber to Harrah. Defendant Harrah filed an answer in the nature of a cross-bill seeking to rescind the contract on account of Sullivan's alleged fraud. By the decree in that case plaintiff was appointed receiver to collect and enforce, by suit or otherwise, the amount due on the contract, to receive the balance due from Harrah to Nebel and Sullivan upon the purchase price of the timber sold to him, and for other purposes.

Plaintiff was compelled to pay taxes on the lands involved to prevent losing them on tax sale. The

amount paid is not in dispute. Defendants contend the standing timber was real estate; the contract constituted a sale with an attempted reservation of a lien which should have been foreclosed as a mortgage; the notes of Harrah were, under the contract, payment, and not promises to pay; the statute of limitations had run against plaintiff's right of action on any of the notes; the payment of taxes gave the payer thereof no lien on the timber therefor; the decree in *Nebel* v. *Sullivan* above referred to did not hold the defendant Harrah liable for any amount under the contract above quoted; plaintiff has a complete and adequate remedy at law and defendants could not be sued in chancery in Chippewa county.

Standing timber is real estate. Defendant Harrah entered into a contract in writing which has been held valid. This contract fixes the rule of action for the parties thereto and the law of the case. Sullivan agreed to sell and convey to Harrah all the timber standing, lying and being on certain lands containing 3,915.35 acres more or less. The consideration was to be paid, $5,000 on delivery of the contract; $20,000 in 30 days from date; a note of $20,000 payable on or before one year from date, and a note for $19,444 payable on or before two years from date. Harrah was given the right for 20 years to remove the timber from the lands described in the contract. He was to pay the taxes assessed against the lands and timber. Whenever timber was removed from a particular description, Harrah was to notify Sullivan of its removal and was not thereafter to be liable for taxes thereon, and was to have no further rights in the lands or timber on the particular description released.

The contract contained a clause:

"It is understood that the said Harrah shall be allowed to cut the said timber by paying to the said Sullivan the sum of ten ($10) dollars for each thousand feet board measure so cut and before removal of any of the timber from said lands and the said money so paid shall be applied hereon."

The contract also contained a clause:

"All timber not so released as stated herein shall be held as collateral security to the note above mentioned."

The standing timber on the land in question was at all times security for the performance by defendant Harrah of the contract. He had a right to cut and remove the timber from the land on paying $10 for each thousand feet board measure *so cut*, and before the removal of any of the timber from the lands. A fair construction of the contract which covered timber "standing, lying and being" on the lands in question is that defendant Harrah could cut timber therefrom before paying therefor. The contract provides the measurement of the timber so cut is to be by board measure. The rate of payment is fixed at $10 for each thousand feet board measure *so cut*. If cut, the timber was personal property. It would be no longer real estate. The contract provides that even if so cut the timber cannot be removed from said lands until paid for. It still constitutes security to the vendor for the payment of the purchase price and this is consistent with the purpose of the contract. We find no error in the decree of the trial court, which is affirmed, with costs.

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

BRAND *v.* TEAGAN.

1. PROCESS—RIGHT OF LITIGANT TO SELECT SERVER.
   Right of litigant to select process server in justice's court is substantial one.

2. SAME—CONTROL OF SERVICE BY COURT—STATUTE.
   Neither court nor officer thereof may control service of process except when authorized by statute.

3. SAME—COMMON PLEAS COURT—DELIVERY OF PROCESS TO OFFICER OTHER THAN ONE DESIGNATED.
   Where certain constable was designated by litigant in præcipe to serve process, diversion of process to other constables was not within lawful power of judge, clerk, or deputy clerks of common pleas court of Detroit instituted under 3 Comp. Laws 1929, § 16369 *et seq.*

4. SAME—OFFICE PLAN AS TO SERVING PROCESS.
   Although clerk of common pleas court of Detroit has broad discretion in adoption, continuance, and change of *modus operandi* of his office in serving process, there are essentials which must be included in any plan.

5. SAME—DUTY OF CLERK TO ISSUE PROCESS.
   On filing præcipe and receiving fees, clerk of common pleas court of Detroit has legal duty to issue process, which includes its delivery for service, and public has right to rely on plan of delivery adopted and customary in the office.

6. SAME—DUTY OF CLERK TO FOLLOW PLAN ADOPTED.
   Whether plan adopted for service of process in common pleas court of Detroit is for convenience of clerk or that of public, clerk may not have secret exception to it which deprives litigant of prompt delivery of process with opportunity for service by constable of his selection.

7. SAME—BREACH OF DUTY TO ISSUE PROCESS.
   Refusal of clerk of common pleas court of Detroit to deliver process to constable designated in præcipe for service, in accordance with plan of office, and failure to deliver it to litigant, constituted breach of clerk's legal duty to issue process.

8. SAME—CONSTABLES—INTERFERENCE WITH EXERCISE OF OFFICE. Refusal of judge and clerk of common pleas court of Detroit to deliver process to duly qualified constable designated in præcipe to serve same constituted interference with constable's right to exercise of his office and perquisites thereof.

9. INJUNCTION—CONSTABLES—PARTIES—RIGHT TO MAINTAIN SUIT. Constable designated in præcipe to serve process has special, personal, and financial interest in performance by court clerk of his legal duty to deliver such process to him for service, and therefore he is proper party to maintain suit to enjoin judge and clerk from interfering with exercise of his office and perquisites thereof by refusing to deliver to him such process.

Appeal from Wayne; Merriam (DeWitt H.), J. Submitted January 9, 1931. (Docket No. 45, Calendar No. 35,357.) Decided February 27, 1931.

Bill by William Brand against William Teagan, clerk of the common pleas court for the city of Detroit, and Arthur E. Gordon, presiding judge, to enjoin interference with certain process directed to be served by plaintiff. Bill dismissed. Plaintiff appeals. Reversed.

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

Goodenough, Voorhies, Long & Ryan, for defendants.

FEAD, J. In August, 1929, under Act No. 260, Pub. Acts 1929 (3 Comp. Laws 1929, § 16369 *et seq.*), the common pleas court for the city of Detroit was instituted, supplanting the justice's court, but, except in a few respects, with the same jurisdiction, practice, and procedure. Defendant Arthur E. Gordon is presiding judge. Defendant William Teagan

is clerk of the court and has several deputies who do the detail work.

The court and clerk have continued the practice long obtaining in the justice's court in the issuance of process. Plaintiff or his attorney files in the clerk's office a præcipe for a writ and pays the court and service fees. The præcipe contains a space for the designation of the constable or other officer whom the plaintiff desires to make service. For convenience, each constable has a box in the clerk's office into which are put the writs he is designated to serve. In due course of routine a deputy clerk prepares the writ and puts it in the box bearing the officer's name.

About 25 constables are regularly engaged in serving process of the court. There are occasional black sheep in the flock. The court has adopted a rule providing for trial, before three judges, of any constable against whom written complaint shall be made and his temporary suspension from the right to serve its process in case of conviction. Another remedy for misconduct by a constable is provided by law through removal by the governor. 1 Comp. Laws 1929, § 3353.

Plaintiff was a regularly elected constable, duly qualified according to law, and had served process of the justice's court of Detroit for some years. When the common pleas court was instituted, defendants, each assuming full responsibility, gave orders that plaintiff was to be permitted to serve no more process of the court. No written complaint against him had been filed nor trial had under the rule or statute. Defendants were moved to the action because of verbal complaints made against plaintiff, and, upon investigation, they became satisfied he was not a fit person to serve process. After

the orders were communicated to the deputy clerks they gave plaintiff no writs to serve, but in cases where the præcipes designated him to make service, they canceled the directions and gave the process to other officers. By this procedure plaintiff was deprived of substantial fees and he brought this suit in equity to enjoin defendants from refusing to deliver writs to him when he was designated in the præcipes. The court dismissed his bill after hearing.

In taking summary action, defendants evidently acted in good faith and for a laudable purpose. But whether they were justified in fact is not the issue. The question is one of legal authority of the clerk to refuse delivery of the requested writs to plaintiff.

The right of a litigant to select a process server in justice's court is a substantial one. He is interested in the officer's diligence, discretion, and integrity, and also in the responsibility of his bond, both to secure proper service of his writ and to save himself from the liability sometimes imposed upon litigants for wrongful acts of an officer. The court, much less an officer thereof, cannot control the service of process except when authorized by statute. *Bowie* v. *Brahe,* 2 Abb. Prac. Rep. (N. Y.) 161. The diversion to other officers of process directed to plaintiff in the præcipes was not within the lawful power of defendants or the deputy clerks.

Defendants' principal point is that the plan of handling the process was a mere accommodation to litigants, that the clerk is under no legal duty to allow constables space in his office for process boxes, to deposit the process therein, nor otherwise to act as intermediary for delivery of writs to constables, and, as it is a mere courtesy, it may be granted or withheld by the clerk at his pleasure. The point is only partly sound. Undoubtedly the clerk has a

broad discretion in the adoption, continuance, and change of a *modus operandi* of his office, but there are essentials which must be included in any plan. On filing the præcipe and receiving the fees the clerk has the legal duty to issue the process, which includes its delivery for service. The public has the right to rely upon the plan of delivery adopted and customary in the office. A change in the plan, not brought to the attention of litigants, is justifiable only if the clerk assumes the active duty to otherwise deliver the process. Whether the plan is for his own convenience or that of the public, the clerk cannot have a secret exception to it which deprives the litigant of a prompt delivery of process with opportunity for service by a constable of his selection. In refusing to deliver writs to plaintiff, who was named in the præcipes as agent of litigants to receive and serve them, contrary to the plan of the office relied on by the public, and failing to make actual delivery to the litigant, his attorney or agent, the clerk breached his legal duty to issue the process.

Defendants' action constituted an interference, at least in part, with the right of plaintiff to the exercise of his office and the perquisites thereof. He has a special, personal, and financial interest in the performance of the legal duty of the clerk in the delivery of process directed to him, and is a proper party to maintain suit.

The decree dismissing the bill is reversed, without costs, but injunctive relief cannot now be granted by this court as plaintiff's term of office has expired.

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

WEAVER *v.* SHEVITZ.

1. EXECUTORS AND ADMINISTRATORS—PARTIES—FORECLOSURE—MORTGAGES.
   Neither foreign executor nor his assignee may maintain proceeding in this State to foreclose real estate mortgage belonging to decedent, but proceeding must be brought by administrator appointed in this State.

2. SAME—REAL PARTY IN INTEREST—ASSIGNMENTS.
   Administrator appointed under ancillary probate in this State was real party in interest in proceedings to foreclose mortgage belonging to decedent, even if distribution agreement and order of probate court in foreign State amounted to assignment.

Appeal from Wayne; Hart (Ray), J., presiding. Submitted January 14, 1931. (Docket No. 124, Calendar No. 35,453.) Decided February 27, 1931.

Bill by Ronald R. Weaver, administrator of the estate of William H. Miller, deceased, against Jacob Shevitz and others to foreclose a mortgage on real estate. Decree for plaintiff. Defendants appeal. Affirmed.

Matthew H. Bishop, for plaintiff.

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

FEAD, J. This is a suit for foreclosure of a real estate mortgage. The only question is whether the plaintiff is the real party in interest.

The mortgage was executed in 1917 to William Miller, a resident of Pennsylvania. Mr. Miller died in a few months and his will was probated in the orphans' court of his domicile. Some time later his

widow and children executed a distribution agreement different from the terms of the will and providing that the estate be assigned to the Armstrong County Trust Company to pay debts and hold the balance, the income to be paid the mother during her lifetime and at her death the *corpus* to be divided among the children. An order of court was made in harmony with the terms of the agreement, and directed the executors to transfer the estate to the trust company, which was done. Mrs. Miller died in 1924. A partial distribution was made shortly thereafter, and again in 1925, the note and mortgage at bar being the only property since retained by the trust company.

In 1928, ancillary probate was had in Wayne county in this State, and plaintiff appointed administrator. The trust company assigned the mortgage to him. He commenced this suit.

Defendants' contention is that the distribution agreement and order of court thereon constituted an assignment of the mortgage to the children of decedent and that they are the proper parties to foreclose. Assuming, although it may be seriously doubted, that the proceedings in Pennsylvania constituted such assignment, nevertheless defendants' contention is untenable. Neither a foreign executor nor his assignee can maintain proceedings in this State to foreclose a real estate mortgage belonging to decedent. The proceeding must be brought by an administrator appointed in this State. *Reynolds* v. *McMullen,* 55 Mich. 568 (54 Am. Rep. 386); *McIntire* v. *Conrad,* 93 Mich. 526.

Plaintiff is the real party in interest and decree of foreclosure is affirmed, with costs.

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

PEOPLE v. BROWN.

1. WEAPONS—REGULATION—CONSTITUTIONAL LAW—POLICE POWER.
   State has police power to reasonably regulate right to bear arms (Const. art. 2, § 5).

2. SAME—RIGHT TO BEAR ARMS.
   Constitutional right to bear arms is not limited to militiamen nor military purposes, but extends to every person, including foreigners, right to possess revolver for legitimate defense of person and property, subject, however, to valid exercise of police power of State to regulate carrying of firearms.

3. SAME—CHARACTER AND USE OF WEAPONS MAY BE RECOGNIZED.
   Police power of State to regulate bearing of arms is not restricted to establishment of conditions under which all sorts of weapons may be privately possessed, but it may take account of character and use of weapons and interdict those whose customary employment by individuals is to violate the law.

4. SAME—REGULATION—CURBING CRIME—CONSTITUTIONAL LAW.
   3 Comp. Laws 1929, §§ 16751, 16753, relative to manufacturing, selling, possessing, and carrying firearms or dangerous weapons is within reasonable and constitutional exercise of police power of State to curb crime, and does not infringe constitutional right of individuals to bear arms (Const. art. 2, § 5).

5. CRIMINAL LAW—HABITUAL OFFENDER STATUTE.
   Charge of habitual offender under 3 Comp. Laws 1929, § 17341, includes both identity of person alleged to have committed other felonies and fact of prior convictions.

6. SAME—PLEA OF GUILTY.
   Acknowledgment by defendant that he was person charged with fourth felony in supplemental information under 3 Comp. Laws 1929, § 17341, was insufficient plea of guilty to warrant conviction, where record does not show compliance with statutory duty of court to inform defendant of his rights nor plea of guilty to charge.

The question as to constitutional right to bear arms, see annotation in 3 L. R. A. (N. S.) 168; 20 L. R. A. (N. S.) 1007; 36 L. R. A. (N. S.) 115; L. R. A. 1917C, 63.

Error to Jackson; Simpson (John), J. Submitted January 15, 1931. (Docket No. 144, Calendar No. 34,893.) Decided February 27, 1931.

Bernard Brown was convicted of possessing a dangerous weapon and of a fourth felony. Affirmed as to possession of a dangerous weapon. Reversed as to fourth felony.

Frank L. Blackman, for appellant.

Paul W. Voorhies, Attorney General, *H. D. Boardman,* Prosecuting Attorney, and *Owen Dudley,* Assistant Prosecuting Attorney, for the people.

FEAD, J. Defendant was convicted on both counts of an information charging him (a) with carrying a dangerous weapon, a blackjack, in an automobile, 3 Comp. Laws 1929, § 16753, and (b) with possessing and having in possession a blackjack contrary to the provisions of section 3, Act No. 206, Pub. Acts 1929 (3 Comp. Laws 1929, § 16751). He and another man had the blackjack and a rifle in an automobile. Supplemental information was filed, and, as on plea of guilty, he was convicted of being a fourth offender and sentenced to life imprisonment.

Defendant contends that the statutes under which he was convicted are invalid as contravening section 5, art. 2, of the State Constitution, which reads:

"SEC. 5. Every person has a right to bear arms for the defense of himself and the State."

The penalty for the violation of each statute is the same. Section 16751 includes the offense charged as under section 16753. If the former is constitutional, the latter must be, if and in so far as it is applicable to the weapon herein involved.

Section 16751 reads in part:

"SEC. 3. It shall be unlawful within this State to manufacture, sell, offer for sale or possess any machine gun or firearm which can be fired more than sixteen times without reloading or any muffler, silencer, or device for deadening or muffling the sound of a discharged firearm, or any bomb, or bomb shell, blackjack, slung shot, billy, metallic knuckles, sand club, sand bag, or bludgeon or any gas ejecting device, weapon, cartridge, container, or contrivance designed or equipped for or capable of ejecting any gas which will either temporarily or permanently disable, incapacitate, injure or harm any person with whom it comes in contact."

The statute applies to all persons except peace officers, certain manufacturers, military, and licensed persons, and contains no limitations of place, time, purpose, or use. It prohibits the possession of the enumerated weapons by anyone, other than an excepted person, in private as well as in public, in the home or elsewhere, and whatever the purpose and contemplated use.

It is generally recognized that the constitutional declaration, in both Federal and State constitutions, of the right to bear arms had its origin in the fear of the American colonists of a standing army and its use to oppress the people, and in their attachment to a militia composed of all able-bodied men. Probably the necessity of self-protection in a frontier society also was a factor.

Some courts have been so impressed with the historical background that they have held that the constitutional protection covers the bearing of such arms only as are a customary part of the equipment of a militiaman; and, in *City of Salina* v. *Blaksley*, 72 Kan. 230 (83 Pac. 619, 3 L. R. A. [N. S.] 168, 115

Am. St. Rep. 196, 7 Ann. Cas. 925), it was decided that the legislature may prohibit the bearing of arms anywhere except in a military organization provided for by law. It is interesting to note that pistols and revolvers seem to have given these courts trouble in the application of the militia test. On the other hand, some courts, for various reasons, have extended the protection to weapons of all descriptions. The authorities cannot be reconciled except in respect of the proposition that, regardless of the basis of the right to bear arms, the State, nevertheless, has the police power to reasonably regulate it. 28 Harvard Law Review, 473; *Aymette* v. *State,* 21 Tenn. 154; *Nunn* v. *State,* 1 Ga. 243; *Ex Parte Thomas,* 1 Okla. Cr. 210 (97 Pac. 260, 20 L. R. A. [N. S.] 1007); 40 Cyc. p. 853; 14 L. R. A. 600; 32 L. R. A. 606; 3 L. R. A. (N. S.) 168; 20 L. R. A. (N. S.) 1007; 36 L. R. A. (N. S.) 115; L. R. A. 1917C, 60, and notes.

When the bulwark of State defense was the militia, privately armed, there may have been good reason for the historical and military test of the right to bear arms. But in this State the militia, although legally existent, and composed of all able-bodied male citizens of Michigan and those of foreign birth who have declared their intention to become citizens, 1 Comp. Laws 1929, § 629, is practically extinct, and has been superseded by the National guard and reserve organizations. If called to service the arms are furnished by the State, 1 Comp Laws 1929, § 633. In times of peace the militia, as such, is unarmed and the historical test would render the constitutional provision lifeless.

The protection of the Constitution is not limited to militiamen nor military purposes, in terms, but extends to "every person" to bear arms for the "defense of himself" as well as of the State. This

includes the right of a foreigner to possess a revolver for the legitimate defense of his person and property, subject, however, to the valid exercise of the police power of the State to regulate the carrying of firearms. *People* v. *Zerillo,* 219 Mich. 635 (24 A. L. R. 1115).

Some arms, although they have a valid use for the protection of the State by organized and instructed soldiery in times of war or riot, are too dangerous to be kept in a settled community by individuals, and, in times of peace, find their use by bands of criminals and have legitimate employment only by guards and police. Some weapons are adapted and recognized by the common opinion of good citizens as proper for private defense of person and property. Others are the peculiar tools of the criminal. The police power of the State to preserve public safety and peace and to regulate the bearing of arms cannot fairly be restricted to the mere establishment of conditions under which all sorts of weapons may be privately possessed, but it may take account of the character and ordinary use of weapons and interdict those whose customary employment by individuals is to violate the law. The power is, of course, subject to the limitation that its exercise be reasonable and it cannot constitutionally result in the prohibition of the possession of those arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property.

We find no decisions in point upon an identical constitutional provision, but in *People* v. *Persce,* 204 N. Y. 397 (97 N. E. 877), it was held that the legislature may prohibit the possession of—

"instruments (a slungshot) which are ordinarily used for criminal and improper purposes and which

are not amongst those ordinary legitimate weapons of defense and protection which are contemplated by the Constitution and the bill of rights."

See, also, *People, ex rel. Darling,* v. *Warden,* 154 App. Div. 413 (139 N. Y. Supp. 277); *Andrews* v. *State,* 50 Tenn. 165 (8 Am. Rep. 8). And in *State* v. *Duke,* 42 Tex. 455, the court said:

"The arms which every person is secured the right to keep and bear (in the defense of himself or the State, subject to legislative regulation), must be such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State."

The list of weapons in section 16751, *supra,* is significant and demonstrates a definite intention of the legislature to protect society from a recognized menace. It does not include ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure. It is a partial inventory of the arsenal of the "public enemy," the "gangster." It describes some of the particular weapons with which he wars on the State and reddens his murderous trail. The blackjack is properly included in the list of outlawed weapons. As defined in Encyclopædia Britannica, it is—

"a bludgeonlike weapon consisting of a lead slug attached to a leather thong. The more carefully constructed black jacks contain a spring within the handle which serves to ease the effect of the impact upon the wrist of the one who wields the weapon. The blackjack has the reputation of being a characteristic weapon of urban gangsters and rowdies."

The statute does not infringe upon the legitimate right of personal or public defense but is within the

reasonable and constitutional exercise of the police power of the State to curb crime.

Defendant challenged the supplemental procedure, charging him with being a fourth offender, on motion for a new trial, on the ground that no plea of guilty had been entered by him and no trial had, as shown by the records of the court.

The statute, 3 Comp. Laws 1929, § 17341, requires (a) the court shall inform defendant of the allegations contained in the supplemental information, and (b) of his right to be tried as to the truth thereof according to law, (c) that defendant be required to say whether he is the same person as charged in the information, and (d) that he plead guilty or be convicted, before he may be sentenced under it. The charge of habitual offender includes both the identity of the person alleged to have committed other felonies and the fact of his prior convictions.

The record of arraignment was:

"Bernard Brown, the defendant in this cause, having been duly arraigned at the bar in open court on a supplemental information charging fourth felony and the said information having been read to the defendant and the said defendant having been asked if he is the same person mentioned in the said information, and acknowledging that he is the same person, it is ordered now here that the said plea be, and the same is hereby accepted."

The record of sentence reads:

"Bernard Brown, the defendant in this cause, having been upon his plea of guilty convicted of the crime of fourth felony as appears by the record thereof," etc.

The statement of plea of guilty in the entry of sentence refers back to the record as made. The

record as made does not show a compliance with the statutory duty of the court to inform the defendant of his rights nor a plea of guilty to the charge. It shows no more than that defendant acknowledged he was the person charged in the supplemental information, not that he admitted being the person charged in the previous offenses alleged therein nor that he had been convicted thereof. In *People* v. *Palm,* 245 Mich. 396, the situation was different, as the record there recited that the defendant had pleaded guilty and that "said plea of guilty was voluntarily and understandingly tendered." It was not without some hesitation that the record was held sufficient in that case, as not affirmatively showing the statute had not been complied with. The ruling should not be extended. In this case, the record fails to show a plea of guilty covering the elements of the offense.

We appreciate that this ruling may seem technical, and, in the instant case, may have no greater result than a retreading of formal ground. But the practice as outlined in the statute affords such opportunity for misunderstanding by a defendant, unless its effect is clearly explained to him, and the consequences of conviction of being a habitual offender are so serious that the procedure should be strictly pursued and the record of the court should show, in essentials at least, its observance.

The conviction by the jury is affirmed. The supplemental procedure and sentence are reversed and the cause remanded to the circuit court to pass sentence, without prejudice to such renewal of proceedings under the habitual criminal law as may be presented to it.

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

BROD *v.* DETROIT LIFE INSURANCE CO.

1. INSURANCE—CONSTRUCTION OF POLICY.
   In action on insurance policy which is not ambiguous, there is no occasion for application of rule that it will be construed most strongly against insurer.

2. SAME—DISABILITY INSURANCE—TOTAL AND PERMANENT DISABILITY COEXISTENT.
   Where disability insurance policy by its terms is not straight disability contract, but requires that disability to be compensable shall be both total and permanent, both elements must coexist.

3. SAME.
   Temporary total disability, followed by only partial disability, is not within benefits of policy requiring disability to be both total and permanent to be compensable.

4. SAME—PROOF OF TOTAL AND PERMANENT DISABILITY REQUIRED.
   Although insured was totally disabled for year he is not entitled to benefits under disability policy requiring proof that disability is total and will presumably be for life, in absence of showing of probable duration of total disability or that such showing had been made in his proof of claim.

Error to Wayne; Richter (Theodore J.), J. Submitted January 16, 1931. (Docket No. 155, Calendar No. 35,329.) Decided February 27, 1931.

Assumpsit by Harry Brod against Detroit Life Insurance Company, a Michigan corporation, on a life insurance policy for disability benefits. Judgment for defendant. Plaintiff brings error. Affirmed.

Leon Dreifuss (*Milton B. Safier,* of counsel), for plaintiff.

As to what constitutes disability within meaning of accident or health policy, see annotation in 38 L. R. A. 529; 23 L. R. A. (N. S.) 352; 29 L. R. A. (N. S.) 635; L. R. A. 1917B, 108.

Butzel, Levin & Winston (*Chris M. Youngjohn*, of counsel), for defendant.

FEAD, J. May 7, 1925, defendant issued to plaintiff a life insurance policy, with a supplemental agreement attached, containing the provision:

"After one full year's premium shall have been paid and before default in the payment of any subsequent premium hereon, if the insured under the above numbered policy, prior to attaining the age of sixty years at nearest birthday and while this policy is in full force, shall furnish due proof to the company at its home office, that he has become totally and permanently disabled by bodily injury or disease, so that he is and presumably will be permanently, continuously and wholly prevented thereby for life from performing any work for compensation, gain or profit, or from following any gainful occupation, and that such disability has then existed continuously for not less than sixty days, the company will grant the following benefits: * * *

"2. Income to insured: Six months after the receipt of said due proof of disability, the company will pay to the insured if then living, and such disability still continue—one thousand—dollars and a like sum annually thereafter during the life of the insured and the continuance of his disability."

Plaintiff is manager of a corporation conducting several retail stores in Detroit. On September 19, 1925, he had an operation. He was confined to the hospital and his home for a time and then was able to get about. He claims he was wholly incapacitated from work for a year and that, since then, although he has been able to conduct his business, he has been prevented, by the effect of the operation, from doing some of his work. Within the year after the operation, plaintiff filed proof of claim. Defendant de-

nied liability, and this suit is to recover $1,000 for total disability for one year. The court directed a verdict for defendant.

We will assume that plaintiff's testimony raised an issue of fact for the jury upon his claim that he was totally disabled from work for a year and has been partially incapacitated since.

The policy is not ambiguous and there is no occasion for the application of the rule that it will be construed against the insurer. It is not a straight disability contract. It requires that the disability, to be compensable, shall be both total and permanent. Both elements must coexist. *Shipp* v. *Metropolitan Life Ins. Co.*, 146 Miss. 18 (111 South. 453). A temporary total disability, even for a year, followed by only partial disability, is not within the benefits. *Ginell* v. *Prudential Life Ins. Co.*, 237 N. Y. 554 (143 N. E. 740), reversing 205 App. Div. 494 (200 N. Y. Supp. 261).

Plaintiff made no showing at the trial, by medical opinion or otherwise, of the probable duration of his total disability, nor did he present testimony that he had made such showing in his proof of claim. While it is true that the time a disability will run can not be foretold with certainty, there are possibilities and probabilities in connection with injuries and diseases which may be measured more or less accurately by standards based upon experience and which may be shown in evidence. Plaintiff's proof failed entirely in the essential that total disability would "presumably" be for life, as required by the policy.

Judgment is affirmed, with costs.

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

BANK OF COMMERCE *v.* TERNES COAL & LUMBER CO.

1. ASSIGNMENTS—NOTICE—SUFFICIENCY.
   Notice of assignment of account sufficient to direct purchaser's attention to prior rights or equities of third persons and to enable him to ascertain their nature by inquiry is sufficient.

2. SAME—FINDING OF COURT—APPEAL AND ERROR.
   In assignee's action on account for carload of lumber shipped to defendant, where there was ample testimony to show that it received notice of assignment before making payment to assignor, finding of trial judge in accordance therewith is not disturbed, on review.

3. APPEAL AND ERROR—WRONG CLASSIFICATION OF FINDING.
   Classifying finding of law as one of fact by trial judge will not disturb result, notwithstanding wrong classification.

Error to Wayne; Houghton (Samuel G.), J., presiding. Submitted January 29, 1931. (Docket No. 8, Calendar No. 35,319.) Decided February 27, 1931.

Assumpsit by Bank of Commerce, Eugene, Oregon, a corporation, as assignee of the Ball Lumber Company, against Ternes Coal & Lumber Company, a corporation, for a carload of lumber. Judgment for plaintiff. Defendant brings error. Affirmed.

Trowbridge, Lewis & Watkins (*Frederick C. Gielow,* of counsel), for plaintiff.

Payne & Payne (*Edmund E. Shepherd,* of counsel), for defendant.

BUTZEL, C. J. Ball Lumber Company of Eugene, Oregon, assigned its account for a carload of lumber

shipped defendant Ternes Coal & Lumber Company, to the Bank of Commerce, of Eugene, Oregon, plaintiff herein. The bank passed credit on its books to shipper for $775. A written assignment was executed near the bottom of the face of the original invoice in the following form:

"For value received we hereby assign to the Bank of Commerce, of Eugene, Oregon, all our right, title and interest in and to the within account.

"Executed in triplicate this 24 day of June, 1920.

"BALL LUMBER COMPANY,
"(A Corporation)
"O. H. BALL,
"By O. H. BALL, President."

(Seal)

The assignment takes up approximately one-fourth of the face of the invoice and also of the copy sent defendant. Plaintiff's president testified that he sent defendant a letter together with the original bill of lading and a duplicate copy of the invoice containing a typewritten copy of the assignment sealed with the corporate seal of the Ball Lumber Company. No testimony was given as to the contents of the letter nor was the original or a copy thereof produced. Although the transaction occurred in June, 1920, and the case was begun in October of the following year, the trial did not take place until June, 1930, over ten years after the transaction took place. The lapse of time made proofs difficult for both parties.

Defendant claims that it received no letter from plaintiff until after paying the bill. It admits, however, receiving the invoice which contained the underwriting, showing a complete copy of the assignment and sealed with the corporate seal of the Ball

Lumber Company. Although defendant claims that the assignment was never brought to its notice, and, therefore, it is not bound, it produced the invoice containing the copy of the assignment at the trial. It bears defendant's rubber stamp showing that it was received "June 29, a. m." at the office of the president. Another rubber stamp shows that it was checked on August 12, 1920, by the car checker. Four lines of rubber stamp show other entries in the car book, etc. A statement of the amount of the freight paid by defendant was entered in ink on the invoice and deducted from the amount due before payment.

Either defendant failed to notice the copy of the assignment which is so manifestly apparent, or, when it came to payment, overlooked the fact that the account had been assigned. It sent its remittance direct to the Ball Lumber Company for the aggregate amount due on the invoice in question, plus the amount due on another bill for lumber not assigned to plaintiff and owing to the Ball Lumber Company.

Plaintiff brought suit for the amount of the account assigned to it. The case was tried without a jury. The trial judge found in favor of plaintiff for the full amount of its claim and interest.

Defendant appeals, and claims that it had no knowledge of the assignment; that the notice was insufficient to put it on its guard; that the character of the instrument constituting the assignment was insufficient; that the conduct of the seller and purchaser was such as to preclude plaintiff from recovery and so as to excuse the defendant from not paying plaintiff. The real question is whether defendant received a sufficient notice of the assignment so as to be bound. This is largely a question of fact which was decided by the judge who heard the tes-

timony and saw such witnesses as were produced. Some of the testimony was taken by deposition.

As Mr. Justice CHRISTIANCY stated in *Willcox* v. *Hill,* 11 Mich. 256:

"It is *notice,* not *knowledge,* which is required; and it can only be required to be such as men usually act upon in the ordinary affairs of life; * * * and whatever is sufficient to direct the attention of a purchaser to the prior rights or equities of third persons, and to enable him to ascertain their nature by inquiry, should be held sufficient."

The question of whether defendant received notice of the assignment became largely one of fact. There was ample testimony to show that it received such notice, and the findings of the trial judge will not be disturbed.

Complaint is made that the trial judge found as a finding of fact instead of law that the copy of the invoice received by defendant containing a copy of the assignment constituted sufficient notice showing that the plaintiff was the owner of the account formerly owned by the Ball Lumber Company. Classifying a finding as one of law instead as one of fact will not disturb the result, notwithstanding the wrong classification. *Taylor* v. *Gladwin,* 40 Mich. 232.

The judgment is affirmed, with costs.

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

KELLY *v.* LOFTS.

1. MOTOR VEHICLES—OWNERSHIP—TRANSFER—CERTIFICATE OF TITLE.
Under 1 Comp. Laws 1929, § 4660, legal ownership of automobile may not be returned to seller without proper transfer of certificate of title.

2. SAME—SALES—FRAUD—RESCISSION—RECOUPMENT—DAMAGES.
In action by seller on note given for purchase price of automobile, purchaser, who had not rescinded contract by proper transfer of certificate of title, and who therefore still owns car, is entitled to recoup damages for seller's fraudulent representations.

Case-made from Oceana; Pugsley (Earl C.), J. Submitted January 6, 1931. (Docket No. 17, Calendar No. 35,330.) Decided February 27, 1931.

Assumpsit in justice's court by Burt O. Kelly against Ben Lofts on a promissory note given in payment for an automobile. Plaintiff appealed to circuit court from judgment for insufficient amount. Judgment for defendant on plea for recoupment is reviewed by plaintiff by case-made. Affirmed.

Hinds & Kelly, for plaintiff.

F. E. Wetmore, for defendant.

BUTZEL, C. J. Plaintiff, an automobile dealer, in order to sell defendant a used car, took him for a demonstration ride. After the car had proceeded but a short distance, it began to emit steam. Plaintiff told defendant that this was caused by the neglect of his employees to put water into the radiator.

Defendant claims that plaintiff also assured him that the car was in good condition and that, relying upon this representation, he purchased the car on July 12, 1929. He paid for it by turning over to plaintiff an old car, the sum of $25 in cash, and his note for $328, payable in monthly installments of $20.50 each.

Almost immediately after the purchase, defendant found that the car continued to steam, and particularly so when it was driven rapidly or for any distance. Defendant thereupon complained to plaintiff, who stated that all the car needed was another block, which he would secure if defendant would pay the cost of installation. After a delay which ran until the beginning of September, a block was put in, but the car still would go only a short distance without steaming up. According to defendant's testimony, plaintiff again assured him that the car would be all right. Shortly after the block was installed, defendant made two payments amounting to $41. He claims, however, that he continued to have the same difficulty with the car, and that it was practically worthless. Finally the end of November, he towed it over to plaintiff's place of business, but made no demand for the return of the old car he had traded in. The following spring plaintiff sued defendant on the note in the justice's court. An appeal was taken to the circuit court, where defendant filed a plea in which he claimed there was failure of consideration. He also asked for a judgment of $66 in recoupment for the cash paid to plaintiff. The plea is quite crude and anomalous and does give some justification to plaintiff's claim that there was an attempted rescission which defendant may be precluded from asserting, on account of hav-

ing made payments after the fraud was ascertained. It is unnecessary to determine this question. The trial court found, as the attorneys for both parties claim, that there was no rescission because defendant kept the certificate of title to the car. The legal ownership of the car could not be returned to plaintiff without a proper transfer of certificate of title. 1 Comp. Laws 1929, § 4660; *Endres* v. *Mara-Rickenbacker Co.*, 243 Mich. 5.

As there was no rescission according to the findings of the trial court, defendant was entitled to show his damages on account of plaintiff's fraudulent representation. The jury found that defendant still owned the car. It awarded him $66 on his plea in recoupment. This judgment is affirmed, with costs.

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

MARTIN *v.* WASHTENAW CIRCUIT JUDGE.

1. COURTS—CIRCUIT COURT STENOGRAPHER IS COURT OFFICER.
   Official circuit court stenographer is officer of court as far as furnishing transcript of testimony is concerned.

2. APPEAL AND ERROR—EXTENSION OF TIME FOR PERFECTING APPEAL—ABUSE OF DISCRETION.
   Where delay in perfecting appeal was caused by failure of court stenographer to furnish transcript of testimony within exten-

sion period, refusal of court to grant further extension because motion therefor was not made prior to final day of extension was abuse of discretion.

Mandamus by Harry G. Martin to compel George W. Sample, Washtenaw circuit judge, to grant an extension of time to settle a bill of exceptions. Submitted January 6, 1931. (Calendar No. 35,305.) Writ granted February 27, 1931.

Minor A. Sweet, for plaintiff.

Cavanaugh & Burke and *Louis E. Burke,* for defendant.

BUTZEL, C. J. Harry G. Martin, petitioner, seeks mandamus to compel respondent to sign and enter an order extending the time of settling transcript of evidence on appeal. Petitioner as plaintiff brought suit against Richard Kearns *et al.* in the circuit court for the county of Washtenaw, in chancery. On May 24, 1930, a decree was filed from which petitioner sought an appeal. Petitioner caused the affidavit of the official court stenographer certifying that a transcript had been ordered to be filed and secured an *ex parte* order extending the time for perfecting the appeal to and including the 12th day of August, 1930. He paid the stenographer a deposit of $15 on the cost of the transcript. On June 19, 1930, he received a letter from the stenographer stating that she was spending her summer vacation in Europe and would be unable to furnish the transcript until her return the latter part of September. On the 13th day of August, 1930, petitioner mailed a stipulation to counsel for defendants, and a proposed order to that effect, extending the time for perfecting the appeal to October 12th;

he explained to them the reasons for the delay. Attorneys for defendants refused to sign the stipulation. Thereupon, on the 18th day of August, 1930, petitioner filed a motion to extend the time. He stated in proper form all the facts regarding the appeal and the delay caused through no fault of his own. He gave due notice of the motion to opposing counsel. The motion was heard on August 27th. Respondent denied the motion for the sole reason that there was not a sufficient showing why the motion had not been made prior to the 12th day of August, 1930, the date to which the time for perfecting the appeal had in the first instance been extended.

The stenographer was an officer of the court as far as furnishing the transcript was concerned. *Michigan Guaranty Corp.* v. *Saginaw Circuit Judge,* 234 Mich. 581. The court should have granted petitioner's motion for an extension of time, and the refusal amounted to an abuse of discretion. On his showing he was entitled to an extension of time until the stenographer could furnish a transcript upon her return in September. Inasmuch as a considerable delay has been caused on account of the mandamus proceeding, the time for perfecting the appeal should be extended to 30 days from the time of the filing of this opinion. In case of respondent's failure to do so, mandamus will issue.

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

RIESS *v.* OLD KENT BANK.

1. MORTGAGES—TAXATION—FAILURE TO PAY TAX.
   Failure to pay mortgage tax does not render mortgage void, but makes it unenforceable.

2. SAME—EXTENDING SECURITY TO FUTURE DEBTS.
   Parties to mortgage originally intended to secure particular debt may extend security to different debt or future advances, as far as their respective rights are concerned, so long as third parties are not prejudiced.

3. SAME.
   Where mortgage securing specific debt was also intended to cover future debts, land contracts given as additional security are properly held as security for additional loan, although not mentioned in note, and original loan has been paid in full.

Appeal from Kent; Brown (William B.), J. Submitted January 15, 1931. (Docket No. 52, Calendar No. 35,328.) Decided February 27, 1931. Rehearing denied June 25, 1931.

Bill by John J. Riess, executor of the estate of Robert W. Brown, deceased, against Old Kent Bank, a Michigan banking corporation, to discharge a real estate mortgage. Bill dismissed. Plaintiff appeals. Affirmed.

George C. Brown, for plaintiff.

Travis, Merrick, Johnson & McCobb, for defendant.

BUTZEL, C. J. On July 3, 1923, Robert W. Brown (now deceased) of Grand Rapids, borrowed from

the Old National Bank, of the same place, the sum of $8,000, and secured its repayment by a mortgage on a large number of lots in a Grand Rapids subdivision owned by him. The loan was payable 90 days after date. The mortgage provided that upon payment of the amount secured by it, according to the terms of a promissory note of even date, the note and mortgage should cease and become null and void. For 13 successive periods of 90 days each, the note was renewed. Partial payments were made from time to time. The amount of the renewal note corresponded with the balance due thereon. Each note otherwise was in substantially the same form as that of December 20, 1926, which is referred to in this opinion as Exhibit "A," and reads as follows:

"Grand Rapids, Michigan, 12–20, 1926.
"Due March 20–21. No. 5431.

"Ninety days after date, for value received, I promise to pay to the order of The Old National Bank of Grand Rapids, Michigan, at its office, fifty-nine hundred dollars $5,900, with interest at the rate of 6 per annum from date of maturity.

"The undersigned has deposited with the said bank as collateral security for the payment of the above note and all other liabilities, absolute or contingent, present or future, of the undersigned to the said bank, the property described below, which collateral with any other collateral hereafter given in substitution therefor, or in addition thereto, on default in payment of any debt secured thereby, the holder is authorized to sell without demand or notice; at public or private sale, and at its option to purchase on such sale. In case of decline in the value of the collateral at any time held for any of said liabilities, or in case of the debtor's insolvency, the bank shall have the right, in its discretion, to call for additional satisfactory security, and upon failure to immediately furnish the same, may proceed

to sell said collateral and apply the proceeds thereon. The bank shall have a lien upon and the right to hold and apply at any time, its own indebtedness or liability to the maker hereof, as security for or payment of any liability due or to become due from the maker hereof.

"Description of Collateral.

"Real Estate mortgage, R 6500. JCB

"Name, Robert W. Brown, 335 Adelia Street, Sarasota, Fla.

"Indorsements on Exhibit A:

"Paid 4–19–27, $1,000.
"5–5–27, $1,100.
"5–16–27, $500.
"6–3–27, $300.
"8–15–27, $400.
"8–27–27, $250.
"9–29–27, $275.
"10–21–27, $200.
"11–17–27, $350.
"12–17–27, $150.
"3– 1–28, $200.
"5–11–28, $325.
"7– 3–28, $100.
"8–14–28, $300.
"10–3–28, $125.
"10–30–28, $150.
"11–30–28, $175."

On June 30, 1925, when but a small portion of the original loan had been paid off, an additional loan of $3,500 was made by the bank to Brown. Payments were made from time to time so that on November 9, 1926, there was still $2,800 due on this loan. This amount, with interest, is still due and unpaid. Both the original and renewal notes representing this additional loan contained no reference to collateral security. Another loan was also made to Brown, but evidently it was paid as defendant in

its answer only claims that $2,800 and interest is still due.

Brown also turned over to the bank certain executory land contracts in which he was vendor, for the sale of lots that, except in few instances, were covered by the mortgage. The contracts for those lots covered by the mortgage were subsequently returned to Brown. Some on which there are amounts still due remain in the bank's possession. Proceeds from collections on the land contracts were applied to reduce the mortgage loan. The trial judge held that the contracts were turned over to the bank as additional security. A special deposit was also opened for the amounts collected on the contracts and an annotation was made on the account so as to prevent any withdrawals from it without the consent of the bank. Approximately $900 is now in this deposit. Upon Brown's death plaintiff, John J. Riess, was appointed executor of his estate. He brings this suit in that capacity. The Old National Bank was succeeded by the Old Kent Bank, defendant herein. On account of Brown's death, plaintiff was unable to show the purpose of turning the contracts over to the bank. Defendant claims that its inability to give more positive testimony is due to the fact that its former officer who had charge of the loan is no longer in its employ. He did not testify. Plaintiff claims that the bank received the contracts solely for collection, but defendant claims that they were turned over to it as additional security. The bank returned the contracts for the lots not covered by the mortgage. The mortgage contains no release clause. As the bank collected payments from the vendees on the contracts and thus substituted the amounts it received for its mortgage security, the natural conclusion would be that the

contracts were given as additional security. The original $8,000 secured by the mortgage has been paid in full, but the sum of $2,800, with interest due on the additional loan, is still unpaid.

There being insufficient assets to pay the creditors of Brown's estate, plaintiff filed the bill of complaint in the present case for the purpose of obtaining a discharge of the mortgage, the return of the land contracts together with the amount held by the bank as a special deposit and consisting of payments made on land contracts. The trial judge entered a decree dismissing the bill. He held that the mortgage was still in full force and effect and that the land contracts were given as security for the loan.

Plaintiff claims that the mortgage could not be security for any amount over $8,000 as no mortgage tax was paid on any such excess. Defendant asked for no affirmative relief and only defended against plaintiff's claims. The failure to pay a mortgage tax does not render the instrument void, but makes it unenforceable without payment of such tax. *Kerschensteiner* v. *Northern Michigan Land Co.*, 244 Mich. 403.

Exhibit "A" provided that it was secured by the mortgage and also by any other collateral that might be given in addition thereto, all of which were security for the payment of the note and of all other liabilities from Brown to the bank, both absolute or contingent, present or future. On June 30, 1925, when the $3,500 note was given, the bank held a note similar to Exhibit "A."

We are not confronted in the present case with any intervening equities. We need only consider the effect of the note and the mortgage between the parties thereto. Our attention is directed to the case of *Carroll* v. *Chauret,* 241 Mich. 338, where

there was an inconsistency between the amount of the note and of the mortgage collateral thereto. The note was executed by husband and wife. The mortgage was for a definite amount on their homestead property owned by them as tenants by the entireties. The note was for a like amount and also for such other sums that might become due on an open account. An attempt was made to hold the mortgage as security for goods sold by the mortgagee to the husband and charged solely to his account. It was held that inasmuch as the wife could not become surety for the future debts of her husband, neither the note or mortgage was binding upon her for more than amount stated in the mortgage.

Our attention is further called to the case of *Continental Bank* v. *Kowalsky,* 247 Mich. 348. There again there was an inconsistency between the amount of the mortgage and of the note. The purchasers not only relied upon the amount as stated in the mortgage but on making inquiry were told that the mortgage stated the correct amount of the indebtedness. We held that the purchasers, whose rights had intervened, were only bound by the amount stated in the mortgage. Neither of these cases present a situation where the sole question is between the original parties or their executors and successors.

The question is whether the original parties to a mortgage may, for a consideration, extend it so as to become and remain security for obligations in addition to the one described in the mortgage when there are no intervening rights or equities and no one has been misled. In *Perrin* v. *Kellogg,* 38 Mich. 720, it was held that, as long as third parties were not prejudiced, the mortgagor could agree that the mortgage should also secure an additional debt. It

is well settled by the weight of authority that the parties to a mortgage originally intended to secure a particular debt may extend the security to the payment of a different debt or future advances as far as their respective rights are concerned. *Taft* v. *Stoddard,* 142 Mass. 545 (8 N. E. 586); *Brown* v. *Gaffney,* 32 Ill. 251; *Huntington* v. *Kneeland,* 102 App. Div. 284 (92 N. Y. Supp. 944); *Kapalczynski* v. *Sitniski,* 91 N. J. Eq. 524 (111 Atl. 24); *Georgia National Bank* v. *Reese,* 156 Ga. 652 (119 S. E. 610); *Benton* v. *Kent,* 61 N. H. 124; *Walker* v. *Walker,* 17 S. C. 329; *Steele* v. *Bond,* 28 Minn. 267 (9 N. W. 772); *First National Bank* v. *Marlowe,* 71 Mont. 461 (230 Pac. 374); *Burke Land & Livestock Co.* v. *Wells, Fargo & Co.,* 7 Idaho, 42 (60 Pac. 87).

There is some conflict in the testimony, but we believe that the trial judge reached the correct conclusion. The decree for defendant is affirmed, with costs.

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

DUNN *v.* MEYER.

1. DRAINS—HIGHWAYS AND STREETS—STATUTES.

Proper method of determining necessity of drain whose purpose appears to be to drain land and not highways is proceeding by drain commissioner rather than by highway commissioner (1 Comp. Laws 1929, § 4951).

2. SAME—INJUNCTION.
Court may interfere when highway commissioner acts beyond his powers in constructing drain to drain land rather than highway.

3. SAME—HIGHWAYS AND STREETS.
Highway commissioner has power to construct drain through lands adjacent to highway only in event that principal purpose and effect of drain is drainage of highway (1 Comp. Laws 1929, §§ 4949–4951).

4. SAME—INJUNCTION.
Construction by highway commissioner of drain whose principal object was drainage of private lands rather than highway was properly enjoined by court below (1 Comp. Laws 1929, §§ 4949–4951).

Appeal from Bay; Toms (Robert M.), J., presiding. Submitted January 20, 1931. (Docket No. 40, Calendar No. 35,385.) Decided February 27, 1931.

Bill by William P. Dunn and others against Theodore Meyer, Hampton township highway commissioner, and others to enjoin the construction of a drain alleged to benefit certain highways. Decree for plaintiffs. Defendants appeal. Affirmed.

Gilbert W. Hand, for plaintiffs.

Kinnane & Leibrand, for defendants.

BUTZEL, C. J. Plaintiffs are owners of farm lands in sections 20, 28, and 29, Hampton township, in Bay county. Their lands are traversed by or are situated close to the old and abandoned roadbed of the Detroit, Bay City & Western Railway Company. It is located a quarter of a mile south of and parallel to Center avenue, a State trunk line, leading to Bay City, approximately three miles distant from the farm lands involved in this litigation. Center

avenue lies on the north line of sections 28 and 29, Ridge road lies on the east and west quarter line, a half a mile south of Center avenue. On the west side of section 29 is the Knight road, and on the east, adjacent to section 28, is the Merrill road. Midway between and parallel to them is another road which we shall refer to as the additional North and South road.

Center avenue is provided with a tile drain on each side. Normally all the water flows east into the Merrill ditch where it turns north, but these tiles are so small that after a heavy rain the water backs up and flows over on the farms to the south of the road. Ridge road is drained by a ditch on its south side. The water flows into the Merrill ditch and nearly all of it is turned north, because of the small opening to the east. In the past this has caused the Merrill ditch to overflow after a hard rain, but danger from this source was largely overcome when the Merrill ditch was cleaned out in 1929. The additional north and south quarter line road in section 29 drains into small ditches which normally empty into the Center avenue drain. In times of high water, however, the water may not be drained off, and this road thus becomes flooded. Neither the map nor the testimony in the record would indicate that this north and south road is an important one. The drainage of Center avenue, the main trunk highway, seems to be stressed as the reason for the proceedings that are the subject of the present litigation, but the need of more drainage for Center avenue as a highway is not shown. There is water on some of the lands south of Center avenue. Prior to the action by the highway commissioner herein complained of, proceedings were brought by the drain commissioner to construct a

drain through the strip of land formerly belonging to the Detroit, Bay City & Western Railway and abandoned for railroad purposes. The record fails to show how or why these proceedings came to naught. It was a proper method of determining the necessity of a drain whose purpose appears to be to drain lands and not highways. It would have given all parties interested an opportunity to be heard and be compensated for such damages, if any, as they might be entitled to were such drain found necessary.

At the request of certain property owners, some of whose interests are opposed to plaintiffs' and whose lands abut Center avenue and also the old railroad roadbed, or both of them, the highway commissioner recommended to the township board of Hampton township that a drainage ditch ten feet in width at the top and four feet in depth be dug for a distance of two miles, through sections 28 and 29, along the strip of land formerly belonging to the Detroit, Bay City & Western Railway. This strip of land was purchased by property owners who are opposed to plaintiffs' interests. Shortly after this suit was begun, they donated and deeded the strip of land to the township. It is claimed that they thus showed that they wanted the ditch in order to drain their lands and not for highway purposes. The board authorized the highway commissioner to construct the drain. Thereupon plaintiffs brought this suit against the commissioner, the clerk, and the supervisor to restrain the construction of this drain. They charge in their bill of complaint that the drain is solely in the interest of individuals favored by the officers and not for highway purposes, and that it would result in great and irreparable injury to

the plaintiffs. A permanent injunction was granted by the trial judge.

Defendants contend that the court is without power to pass on the manner in which the highway commissioner exercised the discretion vested in him. It, however, by no means follows that a court should not interfere when such officer is acting beyond his powers. Defendants are proceeding under sections 4949, 4950, and 4951 of the Compiled Laws of 1929. Section 4951 provides:

"Nothing in the provisions of the preceding sections shall be construed as giving to highway commissioners power to lay out and construct drains having any other purpose than the drainage of highways."

Giving to that section its natural meaning, we conclude that a highway commissioner has power to construct a drain through lands adjacent to the highway only in the event that the principal purpose and effect of the drain is the drainage of the highway. If it is apparent that the object of the proposed ditch is to drain the lands of individuals and not the roads, the highway commissioner is without authority to construct it. We do not discuss whether the lands the proposed drain was to traverse were adjacent to the highway as prescribed by statute.

There is considerable testimony in the record as to the effect the proposed drain would have if built. It was said that the Knight road and the Merrill road would both be benefited; but since neither ditch would be connected with the proposed ditch, it is difficult to see how more than a negligible amount of water would be drawn off. Center avenue, the main highway to be drained, is a quarter of a mile to the north and the natural slope is opposed to

water flowing towards the proposed ditch. It is claimed that enlarging the present drains along Center avenue would largely stop the flooding of the lands of those who are urging the building of the drain. Ridge road, likewise a quarter of a mile away to the south, has a poor flow to the east in section 28, where it is most in need of drainage, but it is very doubtful whether drainage through the proposed ditch would be effective. A careful examination of the record leads us to the conclusion that the principal object of this ditch is the drainage of private lands. The trial judge so found in rendering a decree for plaintiffs.

The decree is affirmed, with costs.

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

HOME DEVELOPMENT CO. *v.* OMELEANCHIK.

1. COVENANTS—BUILDING RESTRICTIONS—WAIVER.
   Property owner does not necessarily waive right to insist on strict enforcement of building restrictions in particular district by failure to insist on observance thereof in other parts of same subdivision.

2. SAME—RESIDENTIAL PURPOSES.
   Purpose of building restrictions in certain deeds and contracts, *held*, to be to restrict subdivision to residential purposes.

3. SAME—DISREGARDING RESTRICTIONS.
   Ordinarily grantee may not disregard plain meaning of restrictions by erecting building for business purposes on rear of lot, even though it abuts on side street.

4. INJUNCTION—PARTIES—JOINING ADDITIONAL PARTIES.
Under 3 Comp. Laws 1929, § 14018, joinder of home owners as additional parties plaintiff, after proofs were all in, was properly permitted, in suit to enjoin violation of building restrictions, where defendant suffered no disadvantage therefrom except technical one.

5. SAME—MODIFYING DECREE—BUILDING RESTRICTIONS.
Decree enjoining use of building for store purposes and ordering its removal because such use violates building restrictions is modified, on appeal, and permission given to convert it into private garage, which defendants claim they intend to do, within limited time.

Appeal from Wayne; Smith (Guy E.), J., presiding. Submitted January 7, 1931. (Docket No. 44, Calendar No. 35,341.) Decided February 27, 1931.

Bill by Home Development Company, a Michigan corporation, and others against Samuel Omeleanchik and another to enjoin violation of building restrictions. Decree for plaintiffs. Defendants appeal. Modified and affirmed.

Monaghan, Crowley, Reilley & Kellogg, for plaintiffs.

Wm. Henry Gallagher (*Francis Fitzgerald,* of counsel), for defendants.

BUTZEL, C. J. Plaintiff Home Development Company platted "Judson Bradway's Six Mile Road Subdivision of Part of Fractional Section 7, Town 1 South, Range 12 East, in the city of Detroit, Wayne county, Michigan," consisting of 304 lots. It sold and conveyed these lots to various parties, and inserted in the deeds or contracts of sale the following building restrictions:

"Character and Value of Buildings: Nothing but a single private dwelling-house, a double house or

duplex shall be constructed on Joseph Campau parkway or on Irving boulevard. No building shall be constructed with flat roof. All single dwellings on Joseph Campau parkway or in Irving boulevard, between Palmer boulevard and Erwin avenue shall cost not less than $2,500; double house $3,000; and duplex, $2,700. Between Maderia avenue and Erwin avenue single dwellings not less than $2,000; double, $2,700; duplex $2,500; and between Maderia avenue and Carson street, single houses to cost not less than $1,800 and double, $2,500 and duplexes, $2,500.

"Building Line: The building line for all lots fronting on Joseph Campau parkway or on Irving boulevard, shall be twenty feet from the front or on street line. Projections forming a part of the residence shall be considered as a part of the residence and must be set within the building line. Open porches and steps are not to be construed as part of a residence.

"Grade: The grade line of all residence buildings shall be substantially not more or less than one-half inch to each foot above the established sidewalk grade opposite said premises unless by mutual consent in writing and recorded of all the property owners on one side of any block should change the same.

"Third: This deed is given and accepted by the parties hereto in consideration of mutual agreements and waivers heretofore had between them, with a covenant on the part of the party of the second party, her heirs, representatives, assigns will never sell, assign, transfer, convey or lease all or any part thereof to be occupied by any person or persons other than those of the Caucasian race."

The name of Joseph Campau parkway was subsequently changed to Joseph Campau avenue, that of Irving boulevard to Anglin avenue, that of Erwin avenue to Stender avenue, and that of Maderia

avenue to Minnesota avenue. Joseph Campau avenue and Anglin avenue, running north and south, are the two main streets of the subdivision and all of the lots front on one or the other of them, except that 28 lots face Palmer boulevard on the southerly side of the subdivision. One hundred forty-three of the lots of the subdivision face either the east or west side of Anglin avenue. Two side streets, Minnesota avenue and Stender avenue, run through the subdivision. Defendants are the owners of lot 47, located on the southwest corner of Anglin avenue and Stender avenue. Anglin avenue has been built up with substantial and attractive frame houses. All of them conform with the restrictions. Joseph Campau avenue is an extension of an important thoroughfare, the character of which has changed in many sections from a residence to a business street. The part embraced in the subdivision was widened after the plat of the subdivision was recorded. There have been four deviations from the restrictions by owners of lots fronting on Joseph Campau avenue in the subdivision.

Defendants, who own an attractive home, which conforms with the restrictions, began the erection of a one-story store building in the rear of their house on their corner lot so that the store fronts on Stender avenue. The plaintiffs thereupon filed a bill to restrain defendants from building a store building and using the lot for business purposes, and further asking that the building be removed. A question is also raised as to whether defendants were not guilty of contempt of court in continuing to construct the store building after being served with a preliminary injunction forbidding the erection of such a structure. The trial judge did not

pass on the question of contempt, but stated that formal charges might be filed. As this has not yet been done, the question of contempt is not before us. The trial judge rendered a decree in favor of plaintiffs, enjoined the use of the property for business purposes, and ordered the removal of the store building that had been erected. Defendants appeal.

Defendants claim the restrictions on Anglin avenue were waived because they were broken on Joseph Campau avenue. An owner does not necessarily waive the right to insist on the strict enforcement of restrictions in a particular district by his failure to insist upon their observance in some other blocks or streets of the same subdivision. *Farley* v. *Finn,* 226 Mich. 205 and 209, and the many cases therein cited.

Defendants further claim that restrictions must be strictly construed against the grantor, and, inasmuch as nothing was said in the restrictions in regard to the side streets, the defendants had a right to build a store building on a side street. The plat shows that all of the lots, except those on Palmer boulevard, front on Joseph Campau or Anglin avenues, although each corner lot abuts also on the side street. A reading of the restrictions leaves no doubt but that their purpose was to restrict the subdivision to residential purposes. Ordinarily defendants cannot disregard the plain meaning of the restrictions by erecting a building for business purposes on the rear of their lot even though such part of the lot abuts on a side street. In *Zoller* v. *Goldberg,* 183 Mich. 197, where the question of the use of the rear part of the lot for business purposes arose, it was held that the "clear intention of the parties was to prevent the erection of any building on the lot to be used for business purposes."

Defendants further claim that it was error for the court to permit the addition of a number of plaintiffs after the proofs were all in. Complaint is made that plaintiff corporation had lost all interest in the property because it had disposed of all of the lots although some of the lots were still being sold on contract and title retained by plaintiff. The owners of homes on Anglin avenue, interested in upholding the restrictions, were permitted, over defendants' objections, to join in the case as parties plaintiff after the testimony was in, so that any objection to plaintiff's having lost interest by having sold out the subdivision need not be considered. These plaintiffs appeared as witnesses in the case and defendants do not show that they were put to any disadvantage except a technical one by the adding of parties plaintiff. It was proper to permit the joinder of additional parties as plaintiffs. 3 Comp. Laws 1915, § 12361 (3 Comp. Laws 1929, § 14018).

The only question about which there may be some doubt is whether the court should have ordered the demolition of the entire store building. A glance at the photographic exhibits plainly shows that the building was not designed for a garage. In front it has two plate glass windows with a glassed-in recess midway between them, leading to the entrance door with a glass window instead of a panel as is customary in a store building. Defendants claim that it was their purpose when they erected the building to convert it into a garage if it should be judicially determined that the restrictions prohibited a store building being erected on the property.

It is further claimed that any violation of the injunction was unintentional and it was only for the purpose of protecting the building material on the property, and that objections to doing this had been

withdrawn. This is a matter for the court to determine if proceedings are brought for contempt.

The defendants may have 60 days from the time of the filing of this opinion in which either to remove the store building or convert it into a private garage without any store front whatsoever. Otherwise the decree of the lower court is affirmed. Plaintiffs will also recover costs notwithstanding the slight modification in the decree.

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

DETROIT FIDELITY & SURETY CO. *v.* CONTINENTAL BANK.

1. BANKS AND BANKING—PRIORITY OF LIEN—UNIFORM STOCK TRANSFER ACT.

   Uniform stock transfer act (2 Comp. Laws 1929, §§ 9520–9544), not having been adopted by two-thirds vote of members-elect, as required by Constitution (article 12, § 9) relating to banking laws, did not affect bank's priority of lien on its stock standing in debtor's name (2 Comp. Laws 1915, § 7975).

2. SAME—WAIVER.

   Bank president's letter to third party recommending pledgor of bank stock, which was communicated to pledgee, did not waive bank's prior lien on stock under 2 Comp. Laws 1915, § 7975, especially where bank had no notice that stock was pledged.

3. SAME—PLEDGES—PRIORITY OF LIEN.

   Under 2 Comp. Laws 1915, § 7975, bank making loans to stockholder without notice that stock was pledged had prior lien over pledgee.

Appeal from Wayne; Pugsley (Earl C.), J., presiding. Submitted January 16, 1931. (Docket No. 93, Calendar No. 35,437.) Decided February 27, 1931. Rehearing denied June 1, 1931.

Bill by Detroit Fidelity & Surety Company, a Michigan corporation, against Continental Bank, a Michigan banking corporation, and others to enforce a lien on bank stock held by plaintiff as security. Bill dismissed as to defendant Continental Bank. Plaintiff appeals. Affirmed.

Monaghan, Crowley, Reilley & Kellogg, for plaintiff.

Anthony Maiullo, for defendant Continental Bank.

BUTZEL, C. J. During the year 1923 and thereafter, plaintiff became surety on a number of bonds and notes for defendants Rosenthal, and was obliged to pay a large sum in discharge of its liability thus created. This liability has not been discharged by defendants Rosenthal. In order to indemnify plaintiff against loss on the bonds they pledged to it certain securities, including 10 shares of stock of defendant E. M. Rosenthal, and 125 shares of stock of David Rosenthal in the Continental Bank, the main defendant herein. Just prior to the time plaintiff first became surety on these bonds, Walter Toepel, president of defendant Continental Bank wrote a letter to a representative of the National Surety Company in which Toepel speaks with lavish praise of his 45 years' business and social relationship with David Rosenthal and recommends him for his integrity, honesty, ability, and responsibility. He states that the bank loaned him money from time to time

which he has always paid in accordance with previous arrangements; that he was a valuable customer of the bank and the owner of 100 shares of its stock standing in his own name. The information contained in this letter was communicated to plaintiff by the National Surety Company. No notice was given to the bank by plaintiff of the pledge of this bank stock until some time in the year 1928, five years after the pledge had been made. The bank has been in liquidation for some time, and liquidating dividends aggregating 35 per cent. have thus far been paid to stockholders, but withheld on the 135 shares in question, awaiting the outcome of this litigation. Plaintiff asserts a prior lien on the 135 shares, while the defendant bank claims that it has a right to apply the liquidating dividends from this stock on the very large indebtedness due it from the defendants Rosenthal who have been adjudged bankrupts. The bank claims its priority under 2 Comp. Laws 1915, § 7975 (see 3 Comp. Laws 1929, § 11906), affecting banking corporations. This particular section of the banking law, so far as material here, remains the same as it was when enacted in 1887, and provides as follows:

"The shares of stock of such bank shall be deemed personal property, and shall be transferred on the books of the bank in such manner as the by-laws thereof may direct, but no transfer of stock shall be valid against a bank so long as the registered holder thereof shall be liable as the principal debtor, surety or otherwise to the bank for any debt which shall be due and unpaid, nor in such case shall any dividend, interest or profits be paid on such stock, so long as such liabilities continue, but all such dividends, interest or profits shall be retained by the bank and applied to the discharge of such liabilities; and no stock shall be transferred on the books of

any bank without the consent of the board of directors, where the registered holder thereof is in debt to the bank for any matured and unpaid obligations."

Plaintiff, however, bases its right to priority because the stock certificates of defendant bank did not contain a statement of the right to the retention of lien as provided by the uniform stock transfer act (2 Comp. Laws 1929, §§ 9520–9544). Section 24 of this act (3 Comp. Laws 1915, § 11943 [2 Comp. Laws 1929, § 9543]) provides that all acts or parts of acts inconsistent with it are repealed. Its purpose is to make uniform the laws of transfer of shares of stock in the corporation. Section 15 of this act (3 Comp. Laws 1915, § 11934, as amended by Act No. 10, Pub. Acts 1925 [2 Comp. Laws 1929, § 9534]) reads as follows:

"(There shall be no lien or restriction unless indicated on certificate.) There shall be no lien in favor of such corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate."

The main question in the instant case is whether this last-quoted section modifies or amends the section quoted from the general banking law.

The case of *United States Gypsum Co.* v. *Houston,* 239 Mich. 249, cited by plaintiff, does not refer to bank stock, and is, therefore, not applicable.

Section 9 of article 12 of the Constitution of this State provides as follows:

"No general law providing for the incorporation of * * * corporations for banking purposes, or regulating the business thereof, shall be adopted,

amended or repealed except by a vote of two-thirds of the members elected to each house of the legislature."

The legislative history of the uniform stock transfer act shows that it was not passed by a two-thirds vote of both the members of the house and senate. Only 56 out of 100 members of the house voted for it. It is claimed that one of the effects of section 11934, *supra,* was to amend and change the section of the general banking act hereinbefore quoted. Inasmuch as under the constitutional provision this can be done only by a two-thirds vote of the members of each house of the legislature, the uniform stock transfer act did not amend or repeal directly or by implication the section of the banking law hereinbefore quoted. For this reason, the bank has a first lien on the stock and the liquidating dividends for the indebtedness due it from defendants Rosenthal.

Plaintiff waited until the year 1928 before it first notified the bank that it held the stock as security. The prior lien of the bank on the stock was not waived by the letter written by Toepel to the National Surety Company, nor is the bank estopped thereby from asserting its lien. The letter was not written to the plaintiff. While it is not free from ambiguity, the record shows that on August 20, 1924, David Rosenthal had paid up his direct loans from the bank, and that, at the time the bank made subsequent loans to him, it became entitled to a lien under the general banking law, for it had no notice whatsoever that plaintiff claimed a lien on the stock.

Defendant bank did not lose its right to a prior lien. The decree of the trial court in favor of the defendants and appellees is affirmed, with costs.

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

ERDMAN *v.* GREAT NORTHERN LIFE INSURANCE CO.

1. INSURANCE—NOTICE—WAIVER.
   Where, in furnishing blanks for proof of claim, insurer stated it reserved all legal defenses, it did not thereby, or later by receiving proof of claim, waive legal defense that insured had not complied with terms of policy, of which it had no notice.

2. SAME—UNAMBIGUOUS POLICY MAY NOT BE EXTENDED BY CONSTRUCTION.
   Policy requiring insured to be under care of licensed physician or surgeon, being plain and unambiguous, may not be extended by construction to include treatment by chiropractor as within terms of policy.

3. PHYSICIANS AND SURGEONS—CHIROPRACTORS.
   Chiropractor is not licensed physician or surgeon, nor is he entitled to use title of "doctor" (2 Comp. Laws 1929, §§ 6739, 6792), although he may practice medicine.

4. SAME—CONSTITUTIONAL LAW—DISCRIMINATION.
   That 2 Comp. Laws 1929, § 6739, provides for examinations in certain subjects for chiropractors and in wider range of subjects for doctors, physicians, and surgeons is not discrimination; persons in respective classes being treated alike.

Case-made from Mecosta; Pugsley (Earl C.), J. Submitted January 22, 1931. (Docket No. 91, Calendar No. 35,434.) Decided February 27, 1931.

Assumpsit by William W. Erdman against the Great Northern Life Insurance Company, a Wisconsin corporation, to recover disability indemnity under a life and health insurance policy. Judgment on verdict directed for defendant. Plaintiff brings case-made. Affirmed.

Fred R. Everett, for plaintiff.

Application of statutes regulating practice of medicine by treatment known as chiropractic, see annotation in 33 L. R. A. (N. S.) 179; L. R. A. 1917C, 823; 37 A. L. R. 681.

John J. Temple and *Worcester & Worcester*, for defendant.

BUTZEL, C. J. Plaintiff, William W. Erdman, took out a life and health insurance policy with the Great Northern Life Insurance Company, a Wisconsin corporation, defendant herein. It provided for an indemnity of $250 a month for the period during which insured was totally disabled by reason of bodily disease, subject, however, to certain printed conditions. Clause (b) of the policy affects the issue in this case and is as follows:

"(b) The health insurance under this policy shall not cover disease contracted, nor sickness nor disability sustained, in any part of the world except that part of the United States and Canada in North America, lying between the tropic of cancer and the fifty-fifth degree of north latitude; nor shall it cover disability from disease contracted while engaged in military or naval service; nor shall it cover disability for any period during which the insured is not under the professional care and regular attendance of a licensed physician or surgeon other than the insured; nor shall it cover disability unless the cause of the disease be contracted and the disability begins while the insurance against disability by disease is in force."

Plaintiff is a chiropractor at Big Rapids, Michigan, and practices a system of treatment of human ailments or diseases without the use of drugs or medicines. He claims that during the fall and early winter of 1929 he became afflicted with a general nervous breakdown. He thereupon consulted Clyde I. Green, another chiropractor, who advised him that he needed a complete rest and change. Thereupon plaintiff went to Texas and remained

there until the first day of February, 1930. Upon his return, he continued to practice his profession. While he was away, he neither consulted Green nor any one else for his ailments. During this period Green became seriously sick and was confined to a hospital for many weeks.

Plaintiff filed a claim against defendant under the policy for the period during which he was in the south. Defendant claims that clause (b) precludes plaintiff's recovery because during the period for which disability is claimed plaintiff was not under the professional care and regular attendance of a licensed physician or surgeon or anyone, and that a chiropractor is not a licensed physician or surgeon as provided for by the policy. Plaintiff insists that his ailment was such as not to require medical services during the time he was away. He further claims that a treatment by a chiropractor complies with the intent and meaning of clause (b). The trial court, upon the conclusion of plaintiff's testimony, directed a judgment in favor of defendant.

Plaintiff asserts that the furnishing of blanks for proof of claim and their receipt by defendant after having been filled in by plaintiff constitute a waiver of the defenses claimed. Defendant, in furnishing the blanks, specifically stated that it reserved all legal defenses. There is no showing whatsoever that it knew that plaintiff had not complied with the terms of the policy. On the contrary, the plaintiff's proof of claim is misleading in describing the chiropractor, who attended plaintiff, as a doctor, a title to which he has no legal right.

It is further claimed that as a policy must be construed most strongly against the insurer who wrote it, a fair interpretation of clause (b) includes treat-

ment by a chiropractor. The plain meaning of the words does not permit this construction.

The law (sub-section 3 of section 6726, 2 Comp. Laws 1915 [2 Comp. Laws 1929, § 6739]) under which both plaintiff and Green were licensed to practice chiropractic, states as follows:

"A practitioner under this subdivision shall not be permitted to use in any form the title of 'doctor' or 'professor' or any of their abbreviations, or any other sign or appellation to his or her name which would in any way designate him or her as a physician or surgeon qualified under the provisions of section three, subdivisions one and two of this act, or in violation of the provisions of this act."

While the meaning of this section is unambiguous and plain, the legislature subsequently in a different act again referred to it, and in section 12, Act No. 407, Pub. Acts 1927 (2 Comp. Laws 1929, § 6792), provided as follows:

"Interpretation of terms used in this act: Whereever in this act the terms 'physicians' and 'surgeons' appear, they shall be interpreted as meaning such persons as are licensed to full and unlimited privileges to practice medicine and surgery as provided for in act number two hundred thirty-seven of the public acts of eighteen hundred ninety-nine, and acts amendatory thereto, and shall not refer to persons licensed to practice a system of treatment of human ailments or diseases as provided for in section three, subdivision three, act number two hundred thirty-seven, of the public acts of eighteen hundred ninety-nine, or acts amendatory thereto."

If there were any doubts in regard to the plain meaning of the terms "licensed physician or surgeon," they are dispelled by these statutory provisions.

A chiropractor may practice medicine. *Locke* v. *Ionia Circuit Judge,* 184 Mich. 535; *Janssen* v. *Mulder,* 232 Mich. 183; *People* v. *Lewis,* 233 Mich. 240 (42 A. L. R. 1337). In so doing, however, he does not become a licensed doctor, physician, or surgeon. 2 Comp. Laws 1929, § 6739, provides for examinations in certain subjects for those who wish to become chiropractors and in a wider range of subjects for those desiring to become doctors, physicians, or surgeons. Persons in the respective classes are treated the same as others in the same class. There is no discrimination.

Other errors claimed are raised for the first time in this court or have been answered in the discussion of the case or have no merit. The trial judge came to the correct conclusion. The judgment in favor of defendant is affirmed, with costs.

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

PEOPLE *v.* ABERNATHY.

1. CRIMINAL LAW—SUFFICIENCY OF EVIDENCE.
   Question of sufficiency of evidence is for jury unless there is no evidence at all on material point.

2. HOMICIDE—CIRCUMSTANTIAL EVIDENCE.
   In prosecution for murder, even where evidence is all circumstantial, if it is such as tends to show guilt of defendant, it should be submitted to jury.

3. SAME.

In prosecution for murder, evidence was sufficient to justify submitting case to jury, although it was circumstantial.

Error to Cheboygan; Sprague (Victor D.), J. Submitted January 15, 1931. (Docket No. 145, Calendar No. 34,998.) Decided February 27, 1931.

Charles Abernathy was convicted of murder in the first degree. Affirmed.

Henry E. Naegely and *Lisle Shannahan,* for appellant.

Paul W. Voorhies, Attorney General, and *Ward I. Waller,* Prosecuting Attorney, for the people.

BUTZEL, C. J. Charles Abernathy, defendant, was found guilty of murder in the first degree, and sentenced to the State's prison for life. He and John Koch, the murdered man, lived in Cheboygan, Michigan. They had been friends for years. Both worked along the water front and as a side occupation were engaged together in the manufacture and sale of moonshine whisky. They lived in the same block, there being an alley between their homes. Their families associated together, and after the death of defendant's wife, the relation between defendant and Koch's wife became very intimate. In January, 1929, Koch and defendant had a serious quarrel at the latter's home. The police were called in and Koch was locked up for the time being in order to avoid serious trouble.

Defendant kept meeting Mrs. Koch clandestinely for immoral purposes, and on the 26th day of September, 1929, they met at a place of assignation, at which time, according to her testimony, Mrs. Koch

told defendant that their relations would have to terminate; that it was the last time she would meet him; that trouble with her husband was threatened and that she was being talked about; that it might result in her children being taken away from her and that she and her husband and family were shortly moving to Wisconsin; that defendant could not stop her from going, and that they were leaving as soon as the job on which Koch was working was completed. The testimony of Mrs. Koch further shows that defendant thereupon told her that if she did go, she would be sorry; that Mrs. Koch told him that he could not stop her as she was Koch's wife, and that defendant thereupon said: "I'll show you." Defendant denied that this conversation took place.

Defendant for 17 years had worked at the Olds dock. On September 27, 1929, the morning following this alleged conversation, he went to work shortly before 7:00 a. m. A few minutes later Koch reached the Olds dock on his way to work. A loud shot was heard, but no one saw it fired. The testimony shows that Koch was shot from an elevation as he was passing along a covered coal shed of the Olds dock. One of the witnesses for the people, Edward Davis, had been walking ahead of Koch. At the sound of the shot, followed by a loud shout, he turned around and saw Koch running toward him holding his hand to his right breast. Koch said to the witness: "Ted, help me. Charley shot me. I am going to die." He immediately became unconscious. Davis laid him down and started towards the waterworks to phone for a doctor. On his way he met two other acquaintances who were driving a truck; they hurried to where Koch was lying and took him immediately to a doctor's office, where he died.

A load of shot from a shotgun shell had entered his body and punctured the heart. The doctor testified that the shot must have been fired from a distance of from 30 to 40 feet and from an elevation of 10 to 14 feet. Koch's lunch box was found near where it is supposed he was shot. Nearby wads from a Peters 12-gauge shotgun shell were also found. They were picked up shortly after the murder occurred and found to be dry, although the testimony shows that everything on the ground was damp, owing to the heavy dew early in the morning at that time of the year. It was shown that defendant's son owned and kept at defendant's home a shotgun which a Peters 12-gauge shell would fit. It was not seen after the murder and no explanation given for its disappearance. Peters 12-gauge shotgun shells were found in defendant's home shortly after the murder.

It was the theory of the prosecution that defendant, upon arriving at his place of work after attending to his immediate duties, went to the west compartment of the coal shed and climbed on top of the high coal pile inside the shed. This would account for the elevation from which the shot was fired. Near the top of the wall of the coal shed there was an opening which had been boarded up and which defendant was familiar with. The boards were placed perpendicularly. One board located at the north side of this opening was not secure. It was nailed at the top but loose at the bottom so that it could be swung in. This board was about 6 inches wide, so that its removal would leave a 6-inch opening. Immediately outside the opening, however, was a coal chute which obstructed the view straight in front of the opening, but not to the side of it. It would have been possible for one to aim at the spot

some 25 feet away where it is supposed Koch was shot. The range of vision in that direction is exceedingly small, however, being about an inch and a half wide, and it is very doubtful whether a person from the outside could identify anyone looking through the opening. There is no testimony that Koch saw defendant except what may be inferred from Koch's dying declaration. In order to reach the compartment from which the shot evidently was fired, it would be necessary for defendant to enter from the outside, as there were no doors between the compartments. If the prosecution's theory is correct, Koch might have seen defendant outside of the building just prior to the murder.

Defendant testified that his duties were such that he was kept busy from the time he came to work until after the murder. There is testimony, however, showing that there was ample time in which he could have committed the crime and returned to his work. A fellow-workman testified that he met defendant about seven o'clock at the office, that they walked together to the tool shed where defendant unlocked the door; that the latter then left to attend to other duties; that it was 10 or 15 minutes later when the witness heard a loud shot, and that it was some ten minutes still later before defendant returned. Defendant testified that he was busy with other duties all this time.

The sole assignment of error claimed in the case is that the court erred in ruling that the evidence relied upon was sufficient to submit the case to the jury. The question of the sufficiency of the evidence is one for the jury unless there is no evidence at all upon a material point. *People* v. *Eaton,* 59 Mich. 559. See, also, *People* v. *Lay,* 193 Mich. 17 (L. R. A. 1917B, 608). Even where evidence is all circum-

stantial, if it is such as tends to show the guilt of the defendant, it should be submitted to a jury. *Miller* v. *Commonwealth,* 182 Ky. 438 (206 S. W. 630); *State* v. *Rush,* 129 S. C. 43 (123 S. E. 765); *United States* v. *Green,* 220 Fed. 973; *Copeland* v. *State,* 23 Ala. App. 91 (121 South. 445).

In the instant case there was absolute proof that Koch was murdered near where defendant was working. There is proof of the *corpus delicti,* and the dying declaration of the murdered man, a motive, and so many other circumstances that it became proper for the trial judge to submit the case to the jury.

The judgment of conviction is affirmed.

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

ALBAUGH *v.* ABBOTT.

1. NUISANCE—GARBAGE.
   Garbage is nuisance *per se.*

2. SAME—PIGGERY.
   In suit to abate nuisance created by hauling and feeding garbage to pigs, decree in favor of plaintiffs, *held,* justified under evidence.

On right to enjoin piggery as nuisance, see annotation in 50 A. L. R. 1017.

3. SAME—PARTIES—JOINDER OF DEFENDANTS.
Several defendants were properly joined in suit to abate nuisance, where they each contributed thereto, although they operated separate plants.

4. SAME—JOINDER OF PLAINTIFFS.
Several plaintiffs may be joined in one suit to abate nuisance when they are all injured in similar manner and are interested in same sort of relief.

5. SAME—HUSBAND AND WIFE—NECESSARY PARTIES.
In suit to abate nuisance created by hauling and feeding garbage to pigs, one who ran piggery for defendant on percentage basis, and defendant's wife, who owned property with husband by entireties but was not interested in piggery, were not necessary parties defendant.

Appeal from Calhoun; Hatch (Blaine W.), J. Submitted January 9, 1931. (Docket No. 72, Calendar No. 34,794.) Decided February 27, 1931.

Bill by Albert Albaugh and others against Floyd Abbott and others to abate a nuisance resulting from the collection of garbage and feeding it to hogs. Decree for plaintiffs. Defendants appeal. Affirmed.

Elmer N. Peters and *John A. Mustard,* for plaintiffs.

John A. Wagner, for defendants Palmer, Stiles, Scully, and Gaines.

George A. Winkler, for defendant Abbott.

BUTZEL, C. J. Plaintiffs Albaugh *et al.* owned and occupied farm houses in Emmet township, Calhoun county, Michigan, on or near the Beadle Lake road, a main thoroughfare. Defendants Abbott, Palmer, and Stiles also owned lands in the same vicinity. The latter haul garbage and refuse from the city of

Battle Creek, about two and one-half miles away, to their farms, where they conduct or own piggeries. Defendants Scully and Gaines are the owners of the Battle Creek Garbage Company, which hauls garbage for defendants Palmer and Stiles. Defendants Mason and Brancato are no longer interested in piggeries in this locality and a consent decree has been entered against them.

Battle Creek, one of the largest municipalities in southern Michigan, has no garbage disposal plant. Over 80 per cent. of its garbage is collected and transported by defendants' trucks to the piggeries maintained by them on the aforementioned lands. The farms of the parties consist largely of light soil, but some of the land of plaintiffs is desirable and suitable for farming. Owing to the growth of Battle Creek, a few new houses have been erected in the vicinity of the homes of some of the plaintiffs. The lands used by the defendants for the piggeries are all within a radius of a quarter of a mile from the home of plaintiff Peters, and almost all of the homes of the plaintiffs are within a radius of one-half mile from that point.

The Palmer-Stiles, Abbott and Palmer (Irish) piggeries are respectively about 70, 35, and 70 rods from plaintiff Peters' home, but further from the lands of the other plaintiffs. Inasmuch as the obnoxious odors become more pronounced when the wind blows in the direction of plaintiff Peters' home, he was able to absolutely identify the odors emanating from the respective piggeries of each of the defendants. He testified that each one of them contributed to the creation of a most intolerable nuisance.

During the summer, 25 tons of refuse are hauled daily to the piggeries or dumps of defendants

Palmer and Stiles, while in the winter time, owing to the collection of ashes, twice this amount is taken by them. They collect the garbage of some 4,000 customers in the summer and 2,500 in the winter. The Abbott dump daily collects 15 loads of refuse and serves about 3,000 customers. Defendants claim that the amount of garbage consists only of 10 per cent. of the amount of refuse collected in the summer and is less in the wintertime. The dump owned by defendant Palmer, but conducted by a party named Irish, daily receives two tons of garbage. During the summer, and particularly during the fruit season, the amount of garbage becomes larger. Some of the defendants claim that the garbage is in many instances covered by other refuse when brought to their piggeries. The number of hogs that each piggery maintains is important. At the time of the trial, between 150 and 250 hogs were kept at the Palmer (Irish) dump, 350 at the Abbott dump, and 400 at the Palmer-Stiles dump.

Plaintiffs filed a bill of complaint alleging that defendants were creating a nuisance through the collecting and hauling of garbage and maintaining the piggeries. A decree was granted as prayed for in the bill, except that defendants were given a reasonable time in which to close their piggeries, or, if they desired, remove them to some other locality.

Defendants on appeal claim that the testimony does not justify the decree. Plaintiffs showed that the awful stench arising from the piggeries was such a nuisance and abomination that it destroyed the peace and comfort of their homes, and asserted that they were unable to withstand it any longer. Plaintiff Peters, in fact, showed that he and his family were forced to abandon their home on account of the nuisance; that they moved over to an oil station

owned by him. It was further shown that visitors refused to come to the homes of plaintiffs, that people drove past the piggeries as rapidly as possible, that windows and doors had to be kept closed during the heat of the summer, and that both the buildings and the land surrounding them were covered with flies. The condition of putrefaction and corruption of the piggeries, as described by some of the witnesses for plaintiffs, is revolting and disgusting. Some of the defendants' witnesses testified that the conditions were not bad. However, many of them admitted that the atmosphere was very bad and that the nature of hogs and decaying garbage is such that foul odors must arise and permeate the air. Garbage is a nuisance *per se*. *Trowbridge* v. *City of Lansing,* 237 Mich. 402 (50 A. L. R. 1014). Some of the defendants claim that they use the ashes and other solid rubbish to fill in lowlands and thus cover the garbage with other waste material. The fact remains that the purpose of the piggeries was to fatten hogs and this is not accomplished by burying the garbage. Over 80 witnesses testified in the case; the record is a very long one. The trial judge not only heard the witnesses but also visited the piggeries at the beginning of the hearing of the case.

Notwithstanding the fact that many witnesses testified for the defendants, a careful reading of the record convinces us that the correct conclusion was reached by the trial court, and that the decree in favor of plaintiffs should not be disturbed.

Defendants claim that they should not have been joined as defendants in one action. It was proper to join them, where, as it was shown, each one contributed to the nuisance. Had they not been joined each might have blamed the other for being the cause of the conditions described. They all contributed

together towards causing the nuisance, and each one was severally guilty of the charges in the bill of complaint. A number of plaintiffs may be joined in one action when they are all injured in a similar manner and are interested in the same sort of relief, and a number of defendants may likewise be joined in one action when they all contributed to the creating of a nuisance. A multiplicity of suits can thus be readily avoided. *Stodder* v. *Rosen Talking Machine Co.,* 241 Mass. 245 (135 N. E. 251, 22 A. L. R. 1197); *Rowbotham* v. *Jones,* 47 N. J. Eq. 337 (20 Atl. 731, 19 L. R. A. 663); *Warren* v. *Parkhurst,* 186 N. Y. 45 (78 N. E. 579, 6 L. R. A. [N. S.] 1149, 9 Ann. Cas. 512); *Lockwood Co.* v. *Lawrence,* 77 Me. 297 (52 Ann. Rep. 763); *Draper* v. *Brown,* 115 Wis. 361 (91 N. W. 1001); *Norton* v. *Colusa Parrott Mining & Smelting Co.* (C. C. A.), 167 Fed. 202; *King* v. *American Rock Crusher,* 119 Kan. 618 (240 Pac. 394).

Further complaint is made that neither Mrs. Palmer nor Irish were made party defendants. Irish ran the piggery for Palmer on a percentage basis. Mrs. Palmer owned the property with Palmer by the entireties but was not engaged in the piggery business. It was not necessary to join them as defendants.

The decree of the lower court is affirmed, with costs, but defendants are given until June 1, 1931, in which to carry out the terms of the decree. Some complaint is made that the terms of the decree are so severe as to prevent defendants from even keeping pigs on their farms. We do not read the decree that way. It restrains defendants from collecting and hauling garbage to their respective lands and maintaining piggeries. They may continue to raise pigs by furnishing feed for them in the usual method em-

ployed by farmers, but they may not haul garbage to their farms, nor use the lands as garbage disposal plants, nor in a manner so as to become a nuisance to plaintiffs.

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

ROGERS *v.* LAWRENCE.

DAANE *v.* SAME.

ELECTIONS—STATE CONVENTION—RECANVASS OF VOTES—MANDAMUS.

Where, at State convention, there were two candidates for elective office, and, after ballot was taken, chairman announced name of nominee, and convention adjourned, Supreme Court may not recanvass vote taken and direct that other candidate's name be certified as nominee on ground that after convention adjourned it was discovered that he had majority of votes, in absence of fraud, oppression, or reconsideration by convention.

Separate petitions for mandamus by A. J. Rogers and Gilbert L. Daane to compel Howard C. Lawrence and James G. Frey, respectively chairman and secretary of the Republican State Central Committee, and Frank D. Fitzgerald, Secretary of State, to certify his name as nominee for an elective office. Submitted March 10, 1931. (Calendar No. 35,650.) Writ granted March 11, 1931, to plaintiff Daane.

Pulver & Bush (*Joseph T. Riley,* of counsel), for plaintiff Rogers.

Edward N. Barnard and *Dunham, Cholette & Allaben,* for plaintiff Daane.

George E. Nichols, for defendant Lawrence.

Kenneth M. Stevens, for defendant Frey.

Present: BUTZEL, C. J., and WIEST, SHARPE, MCDONALD, and FEAD, JJ.

PER CURIAM. Gilbert L. Daane and A. J. Rogers were rival candidates for nomination as a member of the State board of agriculture at the Republican State convention, held in the city of Kalamazoo, on March 6, 1931. Their names were presented, a ballot taken, and the chairman of the convention announced that Gilbert L. Daane had been nominated.

It is claimed that Mr. Rogers had a majority of the votes cast, and this was discovered after the convention adjourned. We are asked by Mr. Rogers to direct the chairman and secretary of the State central committee to certify his name as the nominee; and we are also asked by Mr. Daane to direct certification of his name as the nominee.

We are of opinion that, in the absence of fraud or oppression or a reconsideration by the convention, we may not recanvass the vote taken, and the announcement of the chairman controls, and the chairman and secretary of the State central committee should certify the nominee announced by the chairman of the convention.

CITY COMMISSION OF JACKSON *v.* HIRSCHMAN.

1. MUNICIPAL CORPORATIONS—HOME-RULE ACT—MANDATORY PROVISIONS.
   Provisions of home-rule act (1 Comp. Laws 1929, § 2230) that charter shall provide for annual appropriations and tax levies for municipal purposes are mandatory.

2. SAME—POWER TO CHANGE FISCAL YEAR.
   Under home-rule act (1 Comp. Laws 1929, § 2228 *et seq.*) city has implied power to change fiscal year.

3. SAME—CONSTRUCTION OF STATUTE.
   Considering purpose of home-rule act, it should be construed liberally and in home-rule spirit.

4. SAME—AMENDMENT TO CHARTER—CHANGING FISCAL YEAR—ANNUAL APPROPRIATIONS.
   Amendment to city charter setting fiscal year ahead six months, and providing for temporary tax levy for six months period to provide funds for payment of city expenditures for said period, is not in violation of home-rule act providing for annual appropriations.

5. SAME—ELECTIONS—IRREGULARITIES—AMENDMENT TO CHARTER.
   Irregularities in election for amendment of city charter are not fatal to validity thereof, in absence of showing that any elector was misled or hindered in voting by reason thereof.

Appeal from Jackson; Miller (Guy A.), J., presiding. Submitted February 24, 1931. (Calendar No. 35,573.) Decided March 11, 1931.

Mandamus by City Commission of the City of Jackson to compel Harry A. Hirschman, city treasurer, and Clifton H. Vedder, city clerk, to borrow funds pursuant to directions by the plaintiff. Herbert E. Trumbull and others, taxpayers, intervene

as defendants. From an order granting the relief prayed, defendants appeal. Affirmed.

Benjamin Kleinstiver, for plaintiff.

Bisbee, McKone, Wilson & King, for defendants.

Frank L. Blackman, for intervening defendants.

MCDONALD, J. This is an appeal from a circuit court judgment in mandamus. The question in issue arises out of the refusal of the city clerk and the city treasurer of Jackson, Michigan, to negotiate a loan as directed by the city commission. The loan is authorized by recent amendments to the city charter. The purpose of the amendments was to change the fiscal year of the city of Jackson from January 1st to July 1st. In the accomplishment of this purpose, it was necessary to provide funds for the payment of city expenditures for the six months period between January and July, that is, from the last day of the old fiscal year to the first day of the new fiscal year. Consequently, the amendments provided for a six months budget, a six months appropriation and a six months tax levy. It is this provision that gives rise to the present controversy. The defendants contend that, inasmuch as the home-rule act (1 Comp. Laws 1929, § 2228 *et seq.*) only provides for "annually laying and collecting taxes" and for "an annual appropriation of money for municipal purposes" (§ 2230), the city has no power to provide for a six months appropriation and levy.

The determination of this question requires a construction of the home-rule act, for, if the city has power to make a six months appropriation and tax levy, it is because the power is conferred expressly or impliedly by that act.

The applicable portion of the act will be found in 1 Comp. Laws 1915, § 3306 (amended by Act No. 126, Pub. Acts 1929), being section 2230, 1 Comp. Laws 1929. It provides in part as follows:

"SEC. 3. Each city charter shall provide: * * *

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

"(h) For an annual appropriation of money for municipal purposes."

These provisions are mandatory, and if the charter amendments had sought to change the policy of annual appropriations and tax levies to periods of six months, it clearly would have been within the inhibition of the act. But no such change was attempted. The amendments make provision for a continuance of annual appropriations and levies. The only change made is for a temporary levy to bridge over the gap created by setting the fiscal year ahead six months. This was necessary in order to put into effect the change in the fiscal year. A reading of the home-rule act shows that it is rather comprehensive in its provisions as to what the city may or may not incorporate in its charter, but it leaves many things to be implied from the power conferred. One of these implied powers is the power to change the fiscal year. In changing the fiscal year by setting it ahead six months, there is necessarily created a six months interval in which the city would be without funds to carry on its municipal business. Of what use would be the power to change the fiscal year if there did not go with it the power to do whatever was essential to put the change into effect? It surely was not the intention of the legislature to

confer power and withhold the means of exercising it. The purpose of the legislative enactment was to give the city a large measure of home rule. It relates to matters strictly municipal. Considering its purpose, it should be construed liberally and in a home-rule spirit. The change of its fiscal year is conceded to be very desirable and of great benefit to the city of Jackson. The tax levy for the six months period will not increase the amount of taxes beyond what it would be if they were included in the annual appropriation and levy. It is a necessity for the city and imposes no additional burden on the taxpayers. In *Bowler* v. *Nagel,* 228 Mich. 434 (37 A. L. R. 1154), this court said:

> " 'When action is taken by a State or one of its municipal subdivisions, manifestly in the interest of its people as a whole, and the rights of individuals are not abridged thereby, and such action is not within the inhibition of some constitutional or statutory provision, it should be upheld as a valid exercise of authority, though lacking in any positive grant of power to support it.'

"The power must, of course, be found in the legislative enactment. It need not, however, be delegated in express words. *City of Kalamazoo* v. *Kalamazoo Circuit Judge,* 200 Mich. 146. It is sufficient if it be 'necessarily or fairly implied in or incident to the powers expressly granted' or 'essential to the accomplishment of the declared objects and purposes,' as set forth in the enactment. 1 Dillon on Municipal Corporations (5th Ed.), § 237."

In the instant case, the sole purpose of the charter amendments was to change the fiscal year. The city had power to make the change and incident thereto was the power to do what was necessary and essential to its accomplishment. The necessity to levy taxes to tide the city over to the new fiscal year is obvious. It was purely municipal business within

the scope of local self-government. The circuit judge correctly held that it did not invalidate the amendments.

Further objections affecting the validity of the charter amendments are that they were not lawfully submitted to the electors. These objections go to the form of submission, advertisement, posting of notices, and conduct of the election. We have carefully considered all of them and are not convinced that they have sufficient merit to require discussion. There were irregularities, but the important fact is that there is no claim or showing that any elector was misled or hindered in his voting by reason of such irregularities. The record shows that for months immediately preceding the election the amendments were given the widest publicity and every opportunity afforded the voter to intelligently and freely express himself at the polls. We find no irregularity fatal to the validity of the amendments.

The judgment of the circuit court is affirmed, without costs.

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

APRIL TERM, 1931.

HANSON *v.* MICHIGAN STATE BOARD OF REGISTRATION IN MEDICINE.

1. PHYSICIANS AND SURGEONS—REVOCATION OF LICENSE—CERTIORARI —QUESTIONS REVIEWABLE.
   On certiorari to review revocation of physician's license by State board of registration in medicine, board's finding of facts based on competent evidence is binding on court.

2. SAME—POLICE POWER—JUDICIAL POWER.
   Revoking physician's license by board was exercise of police power, and not strictly exercise of judicial power (2 Comp. Laws 1915, § 6726).

3. SAME—PROOF BY DEPOSITION PERMISSIBLE.
   In revoking physician's license, board is not required to proceed in strict accordance with rules applicable to judicial tribunals, so that, unless otherwise provided by statute, requisite proof may be by deposition or affidavit.

4. SAME—COMPULSORY PROCESS NOT INDISPENSABLE.
   In proceedings to revoke physician's license, right to compulsory process is not indispensable.

5. SAME—LICENSE MAY NOT BE REVOKED ARBITRARILY.
   Generally, action of board in revoking physician's license must not be arbitrary, but must be for cause only, and based on specific charges made and evidence submitted.

6. SAME—RIGHTS MAY BE WAIVED.
   In proceedings to revoke license, physician has right, unless waived, to notice, hearing, reasonably definite statement of charge, cross-examination of witnesses, to produce witnesses, and fair consideration and determination of evidence.

Validity of statute providing for revocation of license of physician or surgeon, see annotation in 5 A. L. R. 94.

7. SAME—HEARING LEGAL.

In proceedings to revoke license, physician *held*, to have had such hearing as he was entitled to in law.

8. SAME—EVIDENCE—SWORN STATEMENTS ADMISSIBLE IN ABSENCE OF OBJECTION—CROSS-EXAMINATION.

In proceedings to revoke physician's license, sworn statements of witnesses are competent to establish charge, in absence of objection thereto or demand for cross-examination.

9. SAME—ACQUIESCING IN PROCEEDINGS WAIVED RIGHTS.

In proceedings to revoke license, physician waived rights by failure to assert them, and by acquiescing in proceedings taken.

10. SAME—PREVIOUS CONVICTION NOT NECESSARY TO REVOCATION OF LICENSE.

That physician had not first been convicted in criminal court is no bar to proceedings by board to revoke his license.

11. SAME—STATUTES—PRESUMPTIONS.

That subdivision of statute relating to revocation of physician's license does not expressly provide for notice, as does another subdivision, is of no consequence, since notice and fair hearing is implied as indispensable part of enactment (2 Comp. Laws 1915, § 6726, subds. 6, 7).

12. SAME—COMPOSITION OF BOARD—DE FACTO BOARD—QUORUM.

That medical registration board of ten members, revoking physician's license, contained seven members from regular school of medicine instead of five as provided by statute, would not render its action void, since it is *de facto* board, and especially where its action was unanimous, and vote of seven was sufficient (2 Comp. Laws 1915, § 6724).

WIEST, MCDONALD, and POTTER, JJ., dissenting.

Certiorari by Joseph H. Hanson to Michigan State Board of Registration in Medicine to review its action in revoking his license to practice medicine and surgery. Submitted December 26, 1930. (Calendar No. 35,398.) Decided January 23, 1931. Rehearing denied April 7, 1931.

Kenneth M. Stevens, for plaintiff.

Wilber M. Brucker, Attorney General, and *Joseph A. Gillis,* Assistant Attorney General, for defendant.

NORTH, J. This is certiorari to review the action of the Michigan State board of registration in medicine in revoking plaintiff's license to practice medicine and surgery. Complaint is made that:

1. Proper notice of the exact charges preferred was not given to plaintiff.

2. The board's action was not based upon sufficient and proper evidentiary facts.

3. The hearing was unfair, arbitrary, and not in accordance with the fundamental rules of evidence.

4. The board as constituted does not conform to statutory requirements, and therefore is without power to act.

Section 6726, 2 Comp. Laws 1915 (2 Comp. Laws 1929, § 6739), vests in the board of registration the power "to refuse to * * * continue" the license of any physician to practice who is guilty of "grossly unprofessional * * * conduct" which is declared by the statute to include within its meaning (among other unprofessional acts enumerated): "The obtaining of any fee on the assurance that an incurable disease can be permanently cured." This record discloses that numerous complaints of alleged unprofessional conduct on the part of plaintiff had come to the attention of the medical registration board. These complaints for the most part were contained in letters and embodied much that was of a hearsay character. An investigation by the board led to interviews between some of its members and plaintiff, and at least on one such occasion plaintiff's attorney was also present. Thereafter notice that charges of unprofessional conduct had been made against him was served upon plaintiff.

At the time and place designated in the notice plaintiff and his attorney appeared. A hearing was

had before the full membership of the board. The originals of four complaints were shown to plaintiff and his attorney. Only that of Anthony Klette was under oath, and as no testimony seems to have been taken in support of the other complaints, that of Klette alone merits consideration. In an affidavit dated January 20, 1930, Mr. Anthony Klette of Detroit charged that his son had been afflicted with *dementia præcox* for four or five years, and that upon taking him to Dr. Hanson the latter told the affiant "that he would bring him (the son) back to a perfect mental state and that he proposed to do this by the administration of serum and certain liquid medicines, and he agreed to do this for a total payment of $500." Two hundred and fifty dollars was paid down, the balance to be paid at a future date. The affidavit further recites: "For this amount of money he assured me that my son would be completely cured."

At the hearing, evidently for the purpose of advising plaintiff and his counsel of the specific complaints made against the doctor, there was read the "report of the committee on registration and standards," which committee is composed of five members of the board. Touching the complaint under consideration, this report contains the following:

"(1) Complaint filed by Mr. A. Klette, 5893 Hazlett avenue, Detroit, stating that Dr. Hanson promised to cure his son of *dementia præcox* for the sum of $500. This amount to be paid $250 down, and the balance later. After 20 months treatment the boy was unimproved. After this complaint was filed, Dr. Hanson returned the $250 to Mr. Klette."

The doctor's attorney made a statement to the board at this hearing, which included the following:

"I went to see Dr. Warnshuis (secretary of the board) and asked him about what the charges were. I supposed they were written charges, but I understand there are no written charges and Dr. Warnshuis told me of the complaints that were said to have been made and I have taken this up with my client and we are here prepared to meet those. I would be very glad to know what it is we have to meet, and glad to do all I can to help you gentlemen. * * * I will be very glad, if you gentlemen care to hear him (Dr. Hanson), to find out from him the details of these different cases. I think that is reasonable. So, if you will just take a seat here, if there will be no objection gentlemen."

Of the specific charge we are reviewing, Dr. Hanson voluntarily testifying as a witness in his own behalf stated:

"Dr. Warnshuis, and, I believe, Dr. McLaughlin, were both there at the time I was called to your (plaintiff's attorney) office, and you asked me whether I had treated a man (by) the name of Klette and I told you yes, and you asked me what the man had, and I told you *dementia præcox,* and you asked me whether the condition was curable, and I said absolutely no, under no condition; *dementia præcox* is not curable."

As noted above, after complaint was made, Dr. Hanson returned the $250 paid him by Mr. Klette. This was done with the understanding that the parties concerned would not make complaint against the doctor. No other witnesses testified relative to the merits of the Klette complaint. The return of the board to this court, which is not traversed, em-

bodies from its record of this hearing the following:

"Accused appeared in person and with his attorney, and was given ample opportunity to present to the board such statements, evidence and witnesses as to why he was not guilty of violations as charged. * * *

"Upon termination of the open hearing, the board went into executive session. After careful weighing and reviewing the evidence presented, the finding of the board of registration in medicine was that Dr. Hanson had been guilty of grossly unprofessional and dishonest conduct, obtaining fees on the assurance that an incurable disease could be permanently cured, making grossly improbable statements, and violating the various provisions of subsection 6 of section 3, of the medical practice act (2 Comp. Laws 1929, § 6739)."

By the unanimous action of the full board Dr. Hanson's license to practice was thereupon revoked. About four months later petitioner changed counsel and a petition in behalf of the doctor was filed with the board seeking rescission of its order revoking the doctor's license. This petition was considered and denied by the unanimous action of the board.

In reviewing by certiorari, the board's finding of facts based on competent evidence is binding upon the court. In revoking plaintiff's license the board's action was an exercise of police power and not, at least in a strict sense, the exercise of judicial power. *Kennedy* v. *State Board,* 145 Mich. 241, 245 (9 Ann. Cas. 125). The board was not required to proceed in strict accordance with rules applicable to judicial tribunals. In a proceeding of this character, unless otherwise provided by statute, the requisite proof may be by deposition (*State, ex rel. Hurwitz,* v. *North,* 304 Mo. 607 [264 S. W. 678]), or by affidavit

(*Mathews* v. *Hedlund,* 82 Neb. 825 [119 N. W. 17]). The right to compulsory process is not indispensable. *State, ex rel. McAnally,* v. *Goodier,* 195 Mo. 551 (93 S. W. 928). What is required of officers and boards in the exercise of powers of removal or revocation, such as are under consideration, is considered in numerous adjudicated cases. We cite only the following: *Dullam* v. *Willson,* 53 Mich. 392 (51 Am. Rep. 128); *Munk* v. *Frink,* 81 Neb. 631 (116 N. W. 525, 17 L. R. A. [N. S.] 439); *State, ex rel. McAnally,* v. *Goodier, supra.*

"In general the action of a board or officer in revoking a license must not be arbitrary. It must be for cause, only, and based on specific charges made and evidence submitted." 17 R. C. L. p. 555.

Unless the right is waived, the person charged is at least entitled to:

(1) Notice of a time and place of hearing.
(2) A hearing before a properly authorized body.
(3) A reasonably definite statement of the charge or charges preferred against the accused.
(4) The right to cross-examine the witnesses who testify against him.
(5) The right to produce witnesses in his own behalf.
(6) A full consideration and a fair determination according to the evidence of the controversy by the body before whom the hearing is had.

Tested by the applicable rules, we conclude that plaintiff herein had such a hearing before the board of registration in medicine as he was entitled to in law. He was given the required notice, he appeared with his counsel, and was informed of the charges made against him and embodied in the records of the board. His counsel announced: "We are here

prepared to meet'' the charges made. Mr. Klette's affidavit in support of the charge was before the board and was submitted to the accused and his attorney. The accused voluntarily testified in his own behalf. No request was made by him or by his attorney for an opportunity to produce or that the board should call other witnesses who had knowledge of the charge preferred. Nor was there a request to cross-examine Mr. Klette, whose affidavit in support of the charge was before the board. As noted, the board deliberated and found Dr. Hanson guilty of the charge, *i. e.*, ''obtaining fees on the assurance that an incurable disease could be permanently cured.'' Klette's affidavit together with the doctor's admissions sustained the finding. There was no demand that Klette be produced for cross-examination. Where there is no demand for cross-examination and no objection made, the sworn statements of witnesses are competent to establish the charge. *Mathews* v. *Hedlund, supra*; *Traer* v. *State Board of Medical Examiners,* 106 Iowa, 559 (76 N. W. 833). Except as exercised, defendant's rights were waived by his failure to assert them and by acquiescing in the proceeding taken. The record discloses nothing that would justify us in disturbing the board's determination.

Appellant's contention that the board had no power to hear charges and revoke the doctor's license to practice until he had first been convicted in a court of criminal jurisdiction is without merit. The statute is not reasonably subject to such construction. Nor is it of consequence that the sixth subdivision of section 3 of the act (2 Comp. Laws 1915, § 6726 [2 Comp. Laws 1929, § 6739]) does not expressly provide for giving notice of the hearing to the one charged, as does the seventh sub-

division. It may be noted that prior to the amendment by Act No. 368, Pub. Acts 1913, the provisions of these two subdivisions were embodied in one. If the provision for "a fair hearing" were entirely omitted from the above subdivision, it would still be implied and considered as an indispensable part of the enactment. As stated by Justice CHAMPLIN in *Dullam* v. *Willson, supra*:

"It is to be understood as required that the tribunal, to which is committed the duty of inquiring and determining, shall give opportunity to the subject to be heard in support of his innocence or his capacity."

The remaining question is presented by appellant's contention that the defendant board is without power to act because its membership does not conform to the statutory requirement (2 Comp. Laws 1915, § 6724 [2 Comp. Laws 1929, § 6737]), which specifies that this board of ten members shall be composed of not more than five persons from the regular school of medicine, not more than two from the homeopathic, not more than two from the eclectic, and not more than one from the physio-medical school. The board is composed of seven members of the so-called regular school, two of the homeopathic, one of the eclectic; but none from the physio-medical. Plaintiff is of the regular school. We think the board must be held to be a *de facto* board, and in any event since the action taken in the instant case was unanimous, and the statute (2 Comp. Laws 1915, § 6724 [2 Comp. Laws 1929, § 6737]) provides that the business of the board "shall be transacted by and receive the concurring vote of at least seven members," appellant's contention cannot be sustained.

The relief sought by plaintiff is denied, and his petition dismissed, with costs to defendant.

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

POTTER, J. (*dissenting*). Plaintiff and appellant, claiming his license to practice medicine was irregularly and illegally revoked, brings certiorari against the Michigan State board of registration in medicine, to review its action in so revoking it. He claims respondent board is illegally constituted; that no specific charges were made against him, nor served upon him, and no legal evidence was introduced against him, and the proceedings for revoking his license were irregular, illegal, and void. The respondents return that petitioner and his attorney were given ample opportunity to present to the board such statements, evidence, and witnesses as to why he was not guilty of the violations as charged, and it claims this was sufficient. When petitioner was licensed to practice medicine, there was conferred upon him something akin to a franchise, which was valuable, and in the nature of property, which could not be taken from him without due process of law.

In *Mathews* v. *Hedlund,* 82 Neb. 825, 830 (119 N. W. 17) it is said:

"It is urged that one cannot have a property right in a license to practice medicine; that it is within the police power to name the conditions upon which such a permit shall issue and may be enjoyed, and that the holder thereof takes the privilege with the condition annexed that his license may be revoked at any time by the power that gave it. There is much force in the argument, and many authorities may be cited to sustain it, but we are of opinion that after a license has been issued the right

thereunder to practice medicine is a valuable right, and one that may not be taken away without good cause; that, if such license is canceled by a board of health, it must be upon proper charges, with opportunity to appear and defend by the introducing of evidence and the cross-examination of those witnesses who testify against the physician at the hearing. *Munk* v. *Frink,* 75 Neb. 172 (106 N. W. 425); *Hewitt* v. *State Board of Medical Examiners,* 148 Cal. 590 (84 Pac. 39, 3 L. R. A. [N. S.] 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750); *Smith* v. *State Board of Medical Examiners,* 140 Iowa, 66 (117 N. W. 1116). The hearing in the instant case did not involve the determination of the learning or professional skill of the defendant, but whether he had performed a criminal operation upon the person of a patient. Under the circumstances of this case the revocation of defendant's license, as reasoned by Mr. Commissioner Ames in *Munk* v. *Frink, supra,* was analogous to a forfeiture, and involved the exercise of judicial or *quasi*-judicial power, within the meaning of section 580 of the code. *Board of Aldermen* v. *Darrow,* 13 Colo. 460 (22 Pac. 784, 16 Am. St. Rep. 215); *State, ex rel. Hart,* v. *Common Council of City of Duluth,* 53 Minn. 238 (55 N. W. 118, 39 Am. St. Rep. 595); *People, ex rel. Kasschau,* v. *Board of Police Commissioners,* 155 N. Y. 40 (49 N. E. 257); *People, ex rel. Smith,* v. *Hoffman,* 166 N. Y. 462 (60 N. E. 187, 54 L. R. A. 597); *College of Physicians & Surgeons* v. *Guilbert,* 100 Iowa, 213 (69 N. W. 453)."

In *Dullam* v. *Willson,* 53 Mich. 392 (51 Am. Rep. 128), the question of the governor's right to remove officers under the constitutional authority conferred upon him, by amendment of the Constitution of 1850, was involved. It is said:

"He is not authorized to exercise the power at his pleasure or caprice. It is only when the causes

named exist that the power conferred can be exercised. It follows as a necessary consequence that the fact must be determined before the removal can be made. It is also clear that the fact must be determined by some tribunal invested with judicial power, for a determination whether specified causes exist is the exercise of judicial functions. Judicial determination of facts must rest upon and be preceded by notice, proof and hearing."

This case has been followed by subsequent decisions of the court. Not only was the petitioner entitled to a specific statement of the charges made against him, but such charges must have been supported by evidence. No evidence was introduced against him. The burden was upon respondent to introduce evidence to show petitioner was not entitled to practice. An order revoking his license cannot legally be based upon hearsay, rumor, the *ex parte* affidavits of disgruntled patients, nor can it be made to gratify jealousy, humor, or caprice. Petitioner was not given the opportunity to cross-examine witnesses against him.

"The benefit of cross-examination is an essential condition to the reception of direct testimony." *Heath* v. *Waters,* 40 Mich. 457.

The testimony of any witness which the petitioner did not have a right to cross-examine was not evidence but a mere *ex parte* statement. The rule is thus stated in 48 C. J. p. 1103:

"In a proceeding before a board to revoke a license or certificate of a physician or dentist, the holder of the license or certificate must be given an opportunity to introduce evidence and cross-examine the witnesses who testify against him; and a statute governing the proceedings is unconstitutional as denying due process of law where it does

not make any provision whereby the attendance of witnesses can be required or their testimony procured."

Both the State and the United States Constitutions provide that no one may be deprived of life, liberty, or property without due process of law. In this case, no written complaint was filed against the petitioner; no specific charges were made against him; he was not furnished with the copy of the charges which he was to answer; no opportunity for filing a written answer to a verified complaint was given him; no testimony was introduced against him; he was not given the right to cross-examine the witnesses against him. The procedure was irregular, illegal, and void. Plaintiff is entitled to the relief prayed.

WIEST and MCDONALD, JJ., concurred with POTTER, J.

THOMAS *v.* MORTON SALT CO.

1. INFANTS—ABROGATION OF DISABILITY TO CONTRACT.
   Legislature may abrogate disability of infants to contract.

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INFANTS.
   Employed minors between ages of 16 and 18 years, whether legally or illegally employed, are within terms of workmen's compensation act (Act No. 162, Pub. Acts 1927), unless, in accordance with its terms, they elect otherwise.

Applicability and effect of workmen's compensation act in case of injury to minors, see annotation in 14 A. L. R. 818; 33 A. L. R. 337; 49 A. L. R. 1435; 60 A. L. R. 847.

3. SAME—CONTRACTS—ILLEGAL EMPLOYMENT OF MINORS—CHILD LABOR LAWS.

Act No. 162, Pub. Acts 1927, subjecting employed minors between ages of 16 and 18 years, whether legally or illegally employed, to provisions of workmen's compensation act, abrogates to certain extent judicial rule that contract of employment made in violation of child labor laws carrying criminal penalties is void.

4. SAME—CONSTITUTIONAL LAW—ESTOPPEL.

Employed minor between 16 and 18 years of age, whether legally or illegally employed, who elects to accept benefits of workmen's compensation act (Act No. 162, Pub. Acts 1927), is estopped to deny its constitutionality.

McDONALD, J., dissenting.

Error to St. Clair; George (Fred W.), J. Submitted June 5, 1930. (Docket No. 45, Calendar No. 35,042.) Decided April 7, 1931.

Case by Howard Thomas, administrator of the estate of Harold J. Pringle, a deceased minor 17 years of age, against Morton Salt Company, for personal injuries resulting in the death of plaintiff's decedent while in defendant's employ. Judgment for plaintiff. Defendant brings error. Reversed.

Stewart & Black, for plaintiff.

Cady & Pepper, for defendant.

McDONALD, J. (*dissenting*). This action was brought to recover damages for injuries resulting in the death of Harold James Pringle, alleged to have been caused by the negligence of the defendant.

At the time of the accident, Harold James Pringle was a minor. The plaintiff claims he was between 17 and 18 years of age. He was employed by the

defendant as an electrician's helper in its Marysville plant. His duties consisted of oiling and greasing electric motors situated in various parts of the plant, some of which were suspended over large steel vats. In these vats there was constantly maintained about 21 inches of boiling hot brine. The electric motors were made accessible to the workmen by a ladder at the side of each vat from which they could climb onto a wooden platform extending across and above the roof. On February 21, 1929, at about three o'clock in the afternoon, Harold Pringle climbed up onto one of these platforms to grease and oil a motor. The platform gave way and he fell into the hot brine below. He crawled out and walked about 50 feet before he was discovered by another workman. He was rushed to the hospital, where he died at ten o'clock that night. His parents filed a claim for compensation with the department of labor and industry. A day for hearing was set before a deputy commissioner. In the meantime they retained counsel, who unsuccessfully sought to discontinue the proceedings. The deputy commissioner rendered an award in favor of the claimants. An appeal was taken, a formal motion to discontinue was denied by the commissioner, and an order was entered affirming the award of the deputy. The award is now in this court for review. On August 12, 1929, this common-law action was commenced. The trial resulted in a verdict for the plaintiff for $25,000. In refusing a motion for a new trial, the court required the plaintiff to file a remittitur of $5,000. Judgment was entered for $20,000. The defendant has brought error.

The principal question involved relates to the jurisdiction of the court to determine the plaintiff's rights in a common-law action. It is the defendant's

theory that the case lies within the provisions of the workmen's compensation law, as amended in Act No. 162, Pub. Acts 1927 (see 2 Comp. Laws 1929, § 8413), and therefore the plaintiff is barred from a common-law action. It is the plaintiff's claim that the amendment of 1927 does not apply to cases of illegal employment such as this, and, if it does, it is unconstitutional for reasons which we shall presently discuss.

The first question to be considered is whether the 1927 amendment to the workmen's compensation act applies to cases where the accidental injury is to a minor between the ages of 16 and 18 who is unlawfully employed. The applicable parts of the amendment read as follows:

"SEC. 7. The term 'employee' as used in this act shall be construed to mean: * * *

"2. Every person in the service of another, under any contract of hire, express or implied, including aliens, including working members of partnerships, receiving wages irrespective of profits from such, and also including minors, who, for the purpose of this act, shall be considered the same and have the same power to contract as adult employees: *Provided,* that any minor between the ages of sixteen and eighteen years whose employment at the time of injury shall be shown to be illegal shall, in the absence of fraudulent use of permits, or certificates of age, in which case only single compensation shall be paid, receive compensation double that provided elsewhere in this act."

Before this amendment, all minors illegally employed were excepted from the compensation act. The statute then in force in defining the term "employee" said:

"And also including minors who are legally permitted to work under the laws of the State."

This language is omitted from the amendment, which fact, together with the statement in the proviso, shows the legislature intended to adopt a new policy with respect to the employment of minors and to bring all, including those illegally employed, within the operation of the compensation law.

But we are of the opinion that in bringing all illegally employed minors within the law, separating them into two classes and awarding twice as much compensation to one class as to the other, the legislature has established an illegal classification both as to employers and to minors in contravention of the equal protection clause of the Constitution.

The constitutional test is stated in *Mackin* v. *Detroit-Timkin Axle Co.*, 187 Mich. 8, as follows:

"It is within the power of the legislature to classify both employers and employees, if the classification is not fanciful or arbitrary and for reasons of public policy, is based upon substantial distinctions, is germane to the object sought to be accomplished by the act, not limited to existing conditions only, and applies impartially and equally to each member of the class."

Applying this test to the act in question, it will readily appear that the classification is unreasonable and arbitrary, that it is based upon no substantial distinctions and does not apply impartially and equally to each member of the class. What good reason is there for giving illegally employed minors under 16 years of age only half as much compensation as those illegally employed minors who are between 16 and 18? Why should an employer who illegally employs minors over 16 years of age be required to pay double compensation while those who employ minors under 16 pay single compensation? If employers are to be penalized for

illegally employing minors, it would seem more in harmony with reason and justice to impose the penalty on those who employ the younger class. Clearly the classification gives privileges and immunities to some which it denies to others of the same class. It violates the constitutional guaranty as to equal protection of the laws and is therefore invalid. The trial court was right in so holding.

But it is claimed that, as the minor in this case elected to come under the compensation act, his administrator is estopped from denying its validity. In *Cooley* v. *Boice Bros.*, 245 Mich. 325, we held that, having accepted the benefits of the act by electing to be bound by its provisions, the employer was estopped from questioning its constitutionality. Of course, the same rule applies to employees. The question is whether it should be applied in this case.

The amendment does not repeal or modify the child labor law. In that law is expressed the public policy of the State in regard to the employment of minors. It prohibits, under penalty, their employment except in compliance with certain conditions. These conditions were not complied with by the defendant in employing Harold Pringle. The contract was more than illegal. It was a complete nullity. It was prohibited under penalty by statute and therefore was utterly void. It was incapable of being confirmed or ratified and no estoppel could arise against the minor for acting or failing to act under it.

"It is a well-settled principle of law that all contracts which are founded on an act prohibited by a statute under a penalty are void, although not expressly declared to be so." *In re Reidy's Estate,* 164 Mich. 167.

See, also, *Cashin* v. *Pliter,* 168 Mich. 386 (Ann. Cas. 1913C, 697).

"Such a contract has no existence whatever. It has no legal entity for any purpose, and neither action nor inaction of a party to it can validate it; and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity. The authorities are uniformly agreed on this principle." 6 R. C. L. p. 819.

The legislature cannot create a master and servant relation out of a void contract. It has not attempted to do so by this amendment. The most that can be said is that it allows a minor to contract and become an employee within the meaning of the act though his employment is illegal. But as we have already pointed out, there is a wide difference between an illegal contract and a void contract. A void contract is no contract at all. It does not exist. It cannot be rescinded because there is nothing to rescind. It cannot be enforced because there is nothing to enforce. There can be no election under it. For these reasons, the decedent's administrator is not estopped from attacking the constitutionality of the amendment.

In another assignment, error is claimed because of the refusal of the court to submit the question of contributory negligence to the jury.

There were no eyewitnesses to the accident. The plaintiff put in evidence all of the facts and circumstances attending the injury which did not show any contributory negligence on the part of the decedent. There was no other testimony from which an inference of contributory negligence could be drawn. In view of this complete lack of evidence, the court was right in refusing to submit the question to the jury. *Teipel* v. *Hilsendegen,* 44 Mich. 461.

In a motion for a new trial it was urged that the verdict was excessive. The court reduced it to $20,000 and entered a judgment for that amount.

We are not inclined to disturb his conclusion. It is true the jury awarded large damages but the sum awarded is reasonably within the evidence as to pain and suffering and the loss of earnings. The decedent lived for seven hours after the injury. During all of that time he suffered the most excruciating pain. He was an industrious young man and at the time of his death had an earning capacity of $24 a week. His life expectancy was 43 years. The trial court said:

"Using these figures and the established rule relating to determination of present value of sums payable in the future, a computation of a sum in excess of $14,000 might reasonably be arrived at, representing the present value of the decedent's prospective earnings after he would have attained his majority."

If the amount of the verdict for pain and suffering and for loss of earnings is within reason, in view of the evidence, this court should not call it excessive. In this case, uninfluenced by any other consideration than that of the evidence, the jury could have computed the damages at the amount of $20,000. Such an amount is not excessive.

Other questions presented by the record require no discussion. The case was well tried. In a very clear charge, the court correctly submitted the issues to the jury. The defendant has no just cause for complaint.

The judgment should be affirmed, with costs to the plaintiff.

POTTER, J. Plaintiff brought suit to recover damages for the death of Harold J. Pringle, recovered judgment in a substantial amount, and defendant brings error. If Act No. 127, Pub. Acts 1927 (see

2 Comp. Laws 1929, § 8413), is constitutional, plaintiff cannot recover, but the remedy for the injury and death of decedent, if any, is under the workmen's compensation law. Decedent was, at the time of the injury which resulted in his death, between the ages of 16 and 18 years.

The accident involved occurred February 21, 1929. It is claimed Act No. 162, Pub. Acts 1927, is unconstitutional, in so far as it applies to minors between the ages of 16 and 18 years, illegally employed, and the trial court so held. The injured employee died before a claim was filed for compensation and before suit brought. It will not be controverted that, at common law, any right of action which an injured employee might have against his employer, for the latter's negligent injury of the employee, died with the party injured. To remedy this condition, the so-called survival act (3 Comp. Laws 1929, § 14040 *et seq.*) was passed, under which the right of action which the deceased employee may have had, in his lifetime, against his employer, survived the employee's death and passed to his personal representative, as an asset to be recovered for the benefit of the estate of deceased. A sentiment was generated that, no death act being in force, when an employer saw that injury to an employee was inevitable, he preferred his instant death to his severe injury—that lives of employees were needlessly sacrificed—because it was cheaper for the employer, and, as a result, the death act (3 Comp. Laws 1929, §§ 14061, 14062) was passed, which provided a new and distinctly different cause of action, which did not exist at common law, the proceeds of which were not assets of his estate, and did not pass by the death of the person killed to his personal representative. It will not be claimed it was not competent

for the legislature to abolish the survival act, the death act, the common-law liability of the employer for the negligent injury of an employee, and the right of action given to survivors under the death act, and substitute in the place thereof the certainty of compensation for injury, regardless of the negligence of the employer, the contributory negligence of the employee, assumed risk, or the negligence of fellow servants. This was done by the workmen's compensation act (2 Comp. Laws 1929, § 8407 *et seq.*) which has been declared to be a constitutional exercise of the police power.

When 2 Comp. Laws 1915, § 5429, was in force, the employer was guilty of negligence, as a matter of law, in illegally employing a minor, and was deprived of the defenses of negligence of fellow servants and assumption of risk. *Gee* v. *Brunt,* 214 Mich. 679; *Grand Rapids Trust Co.* v. *Petersen Beverage Co.,* 219 Mich. 208; *Szelag* v. *Jordan,* 223 Mich. 672; *Gwitt* v. *Foss,* 230 Mich. 8; *Kucinski* v. *City Laundry & Cleaning Works,* 242 Mich. 352.

Act No. 162, Pub. Acts 1927 (see 2 Comp. Laws 1929, § 8413), in force when the accident here involved occurred, provides:

"That any minor between the ages of sixteen and eighteen years whose employment at the time of injury shall be shown to be illegal shall, in the absence of fraudulent use of permits or certificates of age, in which case only single compensation shall be paid, receive compensation double that provided elsewhere in this act."

The position taken by plaintiff, as I understand it, is based upon the operation of the statute, which provides:

a. As to minors under 16 years of age, illegally employed, the employer is guilty of negligence as a

matter of law, and is deprived of the defenses of assumed risk and of negligence of fellow servants, and may be held liable in a common-law action for all the damages resulting from the injury;

b. That as to persons between the ages of 16 and 18 years, illegally employed, the statute holds the employer liable thereunder for single compensation only if he acted in good faith, in reliance upon a certificate of employment or of age, which, though false in fact, was fraudulently used by the person employed, to induce the employment; and

c. That where the person illegally employed is between the ages of 16 and 18 years, and without contributory fraud upon his part, the employee is held entitled to double compensation;—

and it is contended this classification is unreasonable, arbitrary, based upon no substantial distinction, and does not apply impartially and equally to age or class.

There is no question but the statute, as to persons over 18 years of age and as to minors under 16 years of age, is valid. The question is whether it is invalid as applicable to minors between 16 and 18 years of age. It is competent for the legislature to enact legislation applicable to particular classes of persons employed, so long as the classification has some basis in reason, and the law is equally applicable to all persons of each particular class. It is immaterial whether the court agrees with the basis of classification or not; so long as it is based upon reason, it is a subject for legislative consideration and determination. Is there any basis in reason which may have prompted legislative action, upon which the classification of persons, between 16 and 18 years of age, may rest?

By 2 Comp. Laws 1915, § 5331 (see 2 Comp. Laws 1929, § 8425), the employment of children between 14 and 16 years of age in manufacturing establishments was prohibited, unless a permit was issued, delivered to the employer and placed on file in its business office; and "every employer complying with the provisions of this section shall be at liberty to employ the person so presenting the permit hereinbefore referred to, and is justified in considering and treating such person as of the age shown in such permit and shall not be liable, if it transpire that such person is under the age represented in such permit, to any greater extent than such employer would be liable if such person were of the age represented." This provision was substantially reenacted by Act No. 280, Pub. Acts 1917. By Act No. 206, Pub. Acts 1923, the age limit was raised to 17 years, and by Act No. 312, Pub. Acts 1925, the age limit was raised to 18 years, all with the same provision as to the employer's liability as contained in 2 Comp. Laws 1915, § 5331.

Act No. 162, Pub. Acts 1927, brought the workmen's compensation law into harmony with the statute of 1925 regulating the employment of children. The legislature had a right to consider the size, age, and probable discretion of the minor, the ease with which he might perpetrate fraud upon the employer, inducing his employment, and to provide that if injured or killed, if he had fraudulently induced his own illegal employment, the same compensation should accrue as if he were legally employed. The employer, acting in good faith, ought not to be penalized. On the other hand, it could well consider that the statute prohibited the employment of minors between 16 and 18 years of age without a permit, and hold the employer liable for

double compensation, in case such minor was wrongfully employed, without such permit. Double compensation might be considered in the nature of a penalty imposed for an intentional, careless, or negligent violation of law, cast, by the statute, in case of death of the minor employee, upon his dependents.

Act No. 162, Pub. Acts 1927, covers—

"Every person in the service of another, * * * including minors, who, for the purpose of this act, shall be considered the same and have the same power to contract as adult employees."

It is a complete answer to plaintiff's assault upon the validity of the statute that, by accepting its benefits, he is estopped to deny the validity of the act. *American Life Ins. Co.* v. *Balmer,* 238 Mich. 580; *Cooley* v. *Boice Bros.,* 245 Mich. 325; *Booth Fisheries Co.* v. *Industrial Commission,* 271 U. S. 208 (46 Sup. Ct. 491).

The statute is constitutional, the judgment reversed, and the case remanded for disposition under the workmen's compensation law.

FEAD, J. I concur in reversal without a new trial. The legislature may abrogate the disability of infants to contract. Act No. 162, Pub. Acts 1927 (see 2 Comp. Laws 1929, § 8413), grants minors "the same power to contract as adult employees" for the purposes of the workmen's compensation law, and subjects them, whether legally or illegally employed, to its operation, unless, in accordance with its terms, they elect otherwise. To this extent it abrogates the judicial rule that a contract of employment made in violation of child labor laws carrying criminal penalties is void. The minor employee is under the same estoppel as the employer to deny constitutionality.

To avoid misunderstanding, attention is called to the fact that the minor at bar was over 16 years of age and the effect of Act No. 162 upon minors under that age is not in issue nor passed upon.

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

LA PLANTE *v.* CHEVROLET MOTOR CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSABLE ACCIDENT.

Compensation under workmen's compensation act was properly denied to wife of deceased employee whose death was caused by fall from stairway he was ascending to toilet while ill, in absence of any evidence as to what caused his fall; there being no evidence tending to show causal connection between his employment and his death.

Certiorari to Department of Labor and Industry. Submitted January 7, 1931. (Docket No. 50, Calendar No. 35,153.) Decided April 7, 1931.

Myrtle M. La Plante presented her claim for compensation against Chevrolet Motor Company, Division of General Motors Corporation, for the accidental death of her husband, William Joseph La Plante, while in defendant's employ. Plaintiff re-

On the question as to whether cerebral hemorrhage is an accident within the meaning of workmen's compensation act, see annotation in 7 A. L. R. 1614; 13 A. L. R. 438.

views denial of compensation by certiorari. Affirmed.

David E. Roberts, for plaintiff.

J. G. Stevenson, for defendant.

McDonald, J. This is certiorari from an award of the department of labor and industry. The only question involved is whether decedent suffered an accidental injury arising out of and in the course of his employment.

The decedent, William La Plante, was employed by the defendant as a steamfitter. He worked nights. His death occurred at about two o'clock in the morning of January 7, 1930, and was caused by concussion of the brain, the result of a fall from the steps of a stairway to the cement floor below. The question is, what caused him to fall? The commission denied compensation on the theory that there was no evidence to show a causal connection between his employment and his death.

The facts on which the commission based its conclusion are substantially as follows: Before he left home on the evening in question, the decedent ate a hearty dinner of cabbage and sausage. He ate again at about 11 o'clock at the factory. He had complained of not feeling well. He said he had a pain in his stomach which would not go away. About 12 o'clock he went to the first aid department and was given a dose of sodium phosphate. About two o'clock he started up a stairway which led to a toilet. When on the third step, he was seen to fall or roll onto the step and then to the floor. He died immediately. The doctor who performed the autopsy said he found some inflammation of the aorta,

but that death was caused by cerebral hemorrhage due to concussion of the brain.

There is no evidence that he slipped or stumbled, and if it be found that some mishap or accident caused the fall, it must be by inference from the circumstances shown in the evidence above stated. No such inference is possible. The evidence is more consistent with the theory of the commission that he may have become dizzy or something of a physical nature caused him to fall. At any rate, there is no direct evidence as to what caused the fall, and no circumstances from which might be inferred any fortuitous or accidental happening.

The award denying compensation is affirmed.

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

HAYES *v.* BOUTELL.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING OF DEPARTMENT CONCLUSIVE IF SUPPORTED BY EVIDENCE.

   On certiorari to review award under workmen's compensation act, Supreme Court may not reverse finding of department of labor and industry as contrary to great weight of evidence if finding is supported by competent evidence, although it might have reached different conclusion under conflicting testimony.

2. SAME—CAUSE OF DEATH.

   Finding of department of labor and industry that employee's injuries received in course of his employment caused his death two years later from ruptured aneurism of aorta, may not be reversed as contrary to great weight of evidence, where supported by testimony, although there was impressive testimony to the contrary.

3. SAME—LIMITATION OF ACTION.

Claim under workmen's compensation act for death of employee from ruptured aneurism of aorta caused two years before by injuries received in course of his employment is barred under 2 Comp. Laws 1929, § 8431, where decedent, after his injury, for which he received compensation, returned to his former employment and continued therein for over two years, and until his sudden death, without claim of disability, or of disability in fact, and without continuing compensation.

Certiorari to Department of Labor and Industry. Submitted January 16, 1931. (Docket No. 55, Calendar No. 35,301.) Decided April 7, 1931.

Esther Hayes and another presented their claim against F. J. Boutell, employer, and New York Indemnity Company, a New York corporation, insurer, for compensation as dependents of Rutherford B. Hayes for his death while in defendant's employ. Award of compensation is reviewed by certiorari by defendants. Reversed.

Hendryx & Mosier, for plaintiffs.

Butzel, Levin & Winston (*Chris M. Youngjohn,* of counsel), for defendants.

WIEST, J. August 12, 1925, Rutherford B. Hayes, an employee of defendant F. J. Boutell, was struck by an automobile, and the artery in his right ankle was cut, and his right calf, knee, and hip bruised. Weekly compensation was by approved agreement. April 24, 1926, Mr. Hayes was able to and did resume and perform his former work and so continued until May 13, 1928, when he was found dead in a bathroom of his boarding house. An autopsy disclosed that his death was caused by a ruptured aneurism of the aorta. October 13, 1928, Esther

Hayes, his widow, filed claim for an award as a dependent and alleged that the injuries to the deceased in August, 1925, produced the ruptured aneurism in May, 1928. Defendants filed a denial of dependency and of causal connection between the injuries and death, gave notice of failure to make claim in season, and invoked the statute of limitations. Testimony was taken before a deputy commissioner, and plaintiff was denied an award. Upon review, under appeal by both parties, the commission awarded compensation to plaintiff and her minor child as dependents. Defendants review by certiorari.

There was opinion testimony by medical witnesses in support of the finding of the commission that the mentioned injuries caused the aneurism of the aorta two years later. In such case we may not substitute our judgment for that of the commission, although we are impressed by the testimony of another medical witness, of long practice and practical knowledge of aneurisms, that no such causal connection, as here claimed, between the injuries and the aneurism has ever been known and is absolutely impossible. The responsibility for finding facts is with the commission and we may not reverse on the ground that a finding is contrary to the great weight of evidence.

The claim for compensation in this case is barred by the statute. 2 Comp. Laws 1929, § 8431. Mr. Hayes resumed his former employment in April, 1926, and continued therein until his sudden death on May 13, 1928, without claim of disability, or of disability in fact, and without continuing compensation.

This case is on all fours with *Millaley* v. *City of Grand Rapids,* 231 Mich. 10, and, unless that case

is overruled, the award in this case cannot stand. In subsequent cases, under facts showing timely initial claim, award, and continued disability, we pointed out the inapplicability of the *Millaley Case* (*Hovey* v. *General Construction Co.*, 242 Mich. 84; *Greene* v. *City of Ann Arbor*, 242 Mich. 452; *Gallup* v. *Western Board & Paper Co.*, 252 Mich. 68), but we have not overruled our holding therein, and, under like facts, the *Millaley Case* is decisive. The opinion by the commission did not touch this point, and counsel for plaintiffs insist that the point was not urged before the commission. Counsel for defendants strenuously insist that the point was not only pleaded but was presented in argument before the commission. We are governed by the record, and find that the statute of limitations was pleaded, and, in the absence of some showing of waiver, we must assume that the point made was presented.

The award is vacated, with costs to defendants.

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

KAVANAUGH *v.* BAIRD.

NAVIGABLE WATERS—GREAT LAKES—RELICTED LAND.

This case is controlled by *Hilt* v. *Weber*, 252 Mich. 198, requiring reversal of former decision in 241 Mich. 240, and entry of decree quieting title in plaintiff to land between meander line and waters of Saginaw Bay.

Appeal from Bay; Houghton (Samuel G.), J. Submitted June 15, 1927. (Docket No. 81, Calendar No. 33,104.) Resubmitted December 1, 1927. Decided January 3, 1928. Submitted on rehearing on court's motion January 23, 1931. Decided April 7, 1931.

Bill by William P. Kavanaugh against John Baird, director of conservation of the State of Michigan, to quiet title to land. From a decree dismissing the bill, plaintiff appeals. Reversed on rehearing.

ON REHEARING.

PER CURIAM. The opinion of the court in this case was handed down January 3, 1928, reported in 241 Mich. 240; but no decree was entered. Following the decision in *Hilt* v. *Weber,* 252 Mich. 198 (71 A. L. R. 1238), this court of its own motion ordered a rehearing herein. The facts and issues are so fully presented in the original opinion that there is no occasion for detailing them again. The decision as originally rendered in the *Kavanaugh Case* was overruled by the *Hilt Case.* In the orderly administration of justice this necessitates the court now holding that the plaintiff herein is entitled to a decree quieting the title in him to the relicted land involved as prayed in his bill of complaint. A decree may be taken accordingly, but without costs.

STAUB *v.* TRIPP.

1. COVENANTS—BREACH—JUDGMENT.

Former decision of instant case in 248 Mich. 45, is overruled by *Hilt* v. *Weber*, 252 Mich. 198; controlling question therein having been presented on former hearing.

2. JUDGMENT—SATISFACTION.

Where, subsequent to decision of Supreme Court affirming judgment against appellants and remanding case to circuit court, appellants delivered draft to court clerk in satisfaction of judgment and costs with instructions to deliver to appellee when he filed satisfaction of judgment, but his attorney refused to accept draft, claiming that it was insufficient in amount, whereupon its return was demanded, payment stopped, and appellants' motion for rehearing granted, there was no satisfaction of judgment.

Error to Van Buren; Warner (Glenn E.), J. Submitted June 18, 1929. (Docket No. 110, Calendar No. 34,381.) Decided September 4, 1929. Rehearing denied December 3, 1929, and reconsidered. Resubmitted January 23, 1931. Decided April 7, 1931.

Assumpsit by Casper Staub, Jr., against Burrell Tripp and another for breach of covenant of title. Judgment for plaintiff. Defendants bring error. Reversed on rehearing and new trial ordered.

W. G. Bessey (*A. M. Cummins,* of counsel), for plaintiff.

I. C. Montague, for defendants.

ON REHEARING.

NORTH, J. The original opinion herein is reported in 248 Mich. 45; and is in accord with the earlier decisions in the so-called *Kavanaugh Cases.* See *Kavanaugh* v. *Rabior,* 222 Mich. 68, and *Kava-*

naugh v. *Baird,* 241 Mich. 240. These decisions have now been overruled by *Hilt* v. *Weber,* 252 Mich. 198 (71 A. L. R. 1238); and consistent administration of justice clearly necessitates a reversal of our former decision herein unless such action is foreclosed for reasons presented on this rehearing by appellee.

It is first urged by appellee that the controlling question in the *Hilt Case* was not presented in the instant case; that appellants did not claim there was not a lack of title to the lands purchased from them by appellee, and that therefore there was no breach of the covenant of title. While, in the face of the *Kavanaugh* decisions, appellants did not stress a claim of title to lands lying on the lake side of the meander line, reference to our former decision herein discloses that it was wholly based on that theory and express reference was made to the holding in *Kavanaugh* v. *Baird, supra.* And appellants did assert as their defense that there was no breach of their covenant of title. If, as we now hold, their title extended beyond the meander line to the water's edge there was in fact no failure of title and the asserted defense was good. A holding to the contrary, in view of our decision in *Hilt* v. *Weber, supra,* would result in a total failure of justice in the instant case. Even when considered from the more technical standpoint of whether the question was properly saved for review by this court, the record discloses that the trial judge specifically found:

"Riparian owners along the great lakes own only to the meander line and title between the meander line and the present water is held in trust by the State for its citizens. *Kavanaugh* v. *Rabior,* 222 Mich. 68; *Kavanaugh* v. *Baird,* 241 Mich. 240. * * * The covenant of seizin has been broken and plaintiff is entitled to recover."

And appellants' 17th assignment of error is that the trial court erred: "In finding that the covenant of seizin had been broken." The question was thus clearly presented in this court by the record.

A further objection by appellee to relief being granted upon rehearing is that the judgment affirmed by our former decision has already been satisfied. From affidavits filed incident to this rehearing it appears that, subsequent to the affirmance and remanding of this case to the circuit court, appellants delivered to the clerk of that court a draft for $6,430.25 with instructions to deliver the same to appellee when the latter filed a satisfaction of judgment. Appellee's attorney refused to accept the draft as satisfaction of the judgment and costs, claiming that it was insufficient in amount. Thereupon appellants' attorney demanded of the clerk a return of the draft, stopped payment thereon, and filed a motion in this court for a reconsideration of the order by which his application for rehearing had been denied. This rehearing was subsequently granted. In view of these facts, appellants are right in their contention that there has not been a satisfaction of the judgment heretofore rendered in this cause.

As noted above, in view of our holding in *Hilt* v. *Weber, supra,* it conclusively appears from the record in this case that there was no breach of the covenant of title to the premises conveyed by appellants to appellee and therefore the judgment of the lower court is reversed, the case remanded, and a new trial ordered. Under the circumstances, no costs will be awarded in this court.

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

PAEPCKE *v.* PAINE.

1. NEGOTIABLE INSTRUMENTS—BILLS AND NOTES—BONDS—CONFLICT OF LAWS.

   Whether certain bonds are negotiable should be determined by law of State where they are issued and made payable.

2. SAME—PRESUMPTION THAT BONDS ISSUED WITH KNOWLEDGE OF APPLICABLE LAW.

   Corporation bonds issued and made payable in New York must be assumed to have been issued with full knowledge of usage of courts of that State to attach to them attributes of commercial paper, and with manifest design that they should be so circulated.

3. SAME—INSTRUMENT DETERMINES ITS CHARACTER IN RESPECT TO NEGOTIABILITY.

   Instrument itself determines its character in respect to negotiability, so that, to be negotiable, it must conform to requirements of negotiable instruments law.

4. SAME—NEGOTIABLE BONDS GOVERNED BY NEGOTIABLE INSTRUMENTS LAW.

   Bond and trust agreement securing its payment do not constitute single contract, but they are separate instruments executed for different purposes and not of same nature, so that bond, if negotiable in form, is governed by law applicable to negotiable instruments, and holder may abandon security and enforce payment of bond according to its terms.

5. SAME—TRUST AGREEMENTS AS AFFECTING NEGOTIABILITY OF BONDS SECURED THEREBY.

   Trust agreement securing payment of bond, unless referred to in way to incorporate its provisions into bond, is but incident thereto, and is to be regarded as security only, and does not affect negotiability of bond.

6. SAME—NEGOTIABILITY NOT DESTROYED BECAUSE INSTRUMENT ACCOMPANIED BY STATEMENT OF TRANSACTION.

   Under negotiable instruments law, an instrument containing an unconditional promise or order to pay sum certain in money is negotiable, and such provision is not affected though coupled with statement of transaction which gives rise to the instrument, but if it contains special stipulations, and payment is subject to contingencies not within control of holder, it is

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Private corporation bonds as negotiable within the meaning of negotiable instruments act, see annotation in 31 A. L. R. 1390.

deprived of its negotiable character and becomes exposed to existing defenses as though still held by original party thereto.

7. SAME—ESSENTIAL ELEMENTS OF NEGOTIABILITY.
Essential elements of negotiability are certainty in sum to be paid and in time of payment.

8. SAME—RIGHT TO SUE IN OWN NAME NOT ESSENTIAL TO NEGOTIABILITY.
Although New York negotiable instruments law (article 6, § 90) provides that holder of negotiable instrument may sue thereon in own name, it does not prescribe such right as necessary element of negotiability.

9. SAME—PROVISION THAT ACTION TO ENFORCE COLLECTION BE BROUGHT BY TRUSTEE DOES NOT DESTROY NEGOTIABILITY.
That trust agreement securing payment of bonds provides that in case of default trustee shall represent bondholders in action brought to enforce collection does not destroy their negotiability.

10. SAME—ACCELERATION DOES NOT DESTROY NEGOTIABILITY.
Possibility of acceleration of date when bonds are due if there is default under mortgage does not make them nonnegotiable.

11. SAME—STOLEN BONDS—DIRECTED VERDICT.
In action against good-faith purchasers of negotiable bonds which had been stolen from plaintiff, verdict should have been directed in favor of defendants.

Error to Wayne; Hunt (Ormond F.), J. Submitted October 29, 1930. (Docket No. 102, Calendar No. 35,212.) Decided April 7, 1931. Rehearing denied June 25, 1931.

Replevin by Elizabeth H. Paepcke against William A. Paine and others, a copartnership doing business as Paine, Webster & Company, to recover certain corporate debentures. Judgment for plaintiff. Defendants bring error. Reversed.

Miller, Canfield, Paddock & Stone, for plaintiff.

George E. Brand, for defendants.

Shearman & Sterling (*Philip A. Carroll,* of counsel), *E. B. Howarth, Bulkley, Ledyard, Mills &*

Dickinson (*Charles H. L'Hommedieu* and *William B. Cudlip*, of counsel), *Fisher, Boyden, Bell, Boyd & Marshall*, and *Beaumont, Smith & Harris* (*Don M. Dixon*, of counsel), *amici curiæ*.

SHARPE, J. Plaintiff brought replevin to recover from defendants, a firm of brokers, certain corporate debentures, hereafter spoken of as bonds, which had been stolen from her, but which had been acquired by defendants in good faith, for value and without notice. Trial was had before the court without a jury. An agreed statement of facts was filed. It is conceded that, if the bonds are negotiable instruments, defendants have title thereto. The court found as a matter of law that they were not, and entered a judgment for the plaintiff, of which defendants seek review by writ of error.

It seems to be further conceded that, in decision of the question presented, we should apply the law of the State of New York, where the bonds were issued and are made payable. This is in accord with the holding of this court. *Fidelity & Deposit Co.* v. *Andrews*, 244 Mich. 159; *City Bank & Trust Co.* v. *Atwood*, 197 Mich. 116.

The applicable provisions of the negotiable instruments law of that State (Cahill's Consolidated Laws of New York, 1930, Chap. 39, Art. 3)[1] appear

[1] Art. 3, § 20. "An instrument to be negotiable must conform to the following requirements:

"1. It must be in writing and signed by the maker or drawer;

"2. Must contain an unconditional promise or order to pay a sum certain in money;

"3. Must be payable on demand, or at a fixed or determinable future time;

"4. Must be payable to order or to bearer; and

"5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

Art. 3, § 22. "An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with:

in the margin. While this act does not in express terms refer to bonds of corporations, the court of appeals of that State in an early day (*Brainerd* v. *Railroad Co.*, 25 N. Y. 496) and courts generally since that time have attached to them the attributes of commercial paper. (See note, 31 A. L. R. 1390.) It must be assumed that the bonds here in question were issued with full knowledge of the prevailing usage, and with the manifest design that they should be so circulated.

The instrument itself determines its character. It must, of course, conform to the requirements of the negotiable instruments law. But the statute deals with its form—with what an inspection of its face discloses.

"If in the bond or note anything appears requiring reference to another document to determine whether in fact the unconditional promise to pay a fixed sum at a future date is modified or subject to some contingency, then the promise is no longer unconditional. What that document may provide is immaterial. Reference to the paper itself said to be negotiable determines its character. (*Old Colony Trust Co.* v. *Stumpel*, 247 N. Y. 538 [161 N. E. 173].)" *Enoch* v. *Brandon*, 249 N. Y. 263, 267 (164 N. E. 45).

"In the instant case the question as to whether the note in question is negotiable or not must be

"1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

"2. A statement of the transaction which gives rise to the instrument.

"But an order or promise to pay out of a particular fund is not unconditional."

Art. 3, § 23. "An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable:

"1. At a fixed period after date or sight; or

determined by an examination of the note itself. (See *Continental Guaranty Corp.* v. *People's Bus Line,* 31 Del. 595 [117 Atl. 275]; *International Finance Co.* v. *Northwestern Drug Co.,* 282 Fed. 920.) As stated in the last-mentioned case, a departure from this rule would throw the whole law of commercial paper into confusion." *National Bond & Inv. Co.* v. *Lanners,* 253 Ill. App. 262, 270.

There is, however, authority to the contrary. See, *Hubbard* v. *Wallace Co.,* 201 Iowa, 1143 (208 N. W. 730, 45 A. L. R. 1065, and the copious note appended thereto in the latter).

Much of the difficulty in decision is due to the application of the rule that two or more instruments, executed by the same parties at the same time and referring to each other, must be read together as constituting but a single contract between the parties. But a note and a mortgage securing its payment do not constitute a single contract. They are separate instruments, executed for different purposes and not of the same nature. The note, if it be negotiable in form, is governed by the law applicable to negotiable instruments, and the mortgage by the law of real property. The holder of such a

"2. On or before a fixed or determinable future time specified therein; or

"3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

"An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

Art. 3, § 24. "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

"1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

"2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

"3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

note may abandon his security, and seek to enforce payment of it according to its terms as written. The question of its negotiability will be determined by the law relating thereto. If they be construed together as but one instrument, the note loses its character as such, and recovery must be had upon the contract as evidenced by both instruments. What has been said relative to a note and mortgage applies with equal force to a bond, negotiable in form, and the trust agreement securing its payment.

The better rule, as we view it, is that announced in the New York and Illinois cases above referred to and the cases cited in support thereof. The form of the note or bond may alone be considered in determining its negotiability. The mortgage or trust agreement, unless referred to in a way to incorporate its provisions into the note or bond, is but an incident thereto, and is to be regarded as a security only. If the note or bond contains "an unconditional promise or order to pay a sum certain in money" at "a fixed or determinable future time" and is "complete and regular upon its face," it may be enforced according to its terms.

"4. Gives the holder an election to require something to be done in lieu of payment of money.

"But nothing in this section shall validate any provision or stipulation otherwise illegal."

Art. 3, § 28. "The instrument is payable to bearer:

"1. When it is expressed to be so payable; or * * *."

Art. 6, § 90. "The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument."

Art. 6, § 91. "A holder in due course is a holder who has taken the instrument under the following conditions:

"1. That it is complete and regular upon its face;

"2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"3. That he took it in good faith and for value;

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The bonds in question are undertakings on the part of the Container Corporation of America to pay to the bearer, or, if registered, to the registered owner thereof, on June 15, 1936, the sum of $1,000, and interest, payable semi-annually at the office of the trustee in the city of New York. Each of them recites that it is one of a duly authorized issue of $1,000,000—

"all issued under a certain trust agreement, dated as of June 15, 1926, executed by the company to the National City Bank of New York, as trustee, to which trust agreement reference is hereby made for a statement of the terms under which the said debentures are issued and the rights and obligations of the company, of the trustee and of the respective holders of the said debentures under the said trust agreement. To the extent provided in the said trust agreement, all rights of action upon this debenture are vested in the trustee."

Under the statute an instrument to be negotiable "must contain an unconditional promise or order to pay a sum certain in money," but such provision is not affected "though coupled with * * * a statement of the transaction which gives rise to the instrument."

"But when such instruments contain special stipulations, and their payment is subject to contingencies not within the control of their holders, they are, by the established rules, deprived of the character of negotiable instruments, and become exposed to any defense existing thereto as though still held by the original parties to the instrument." 3 R. C. L. p. 845.

"It may be stated as the general rule that wherever a bill of exchange or promissory note contains a reference to some extrinsic contract in such

a way as to make it subject to the terms of that contract, as distinguished from a reference importing merely that the extrinsic agreement was the origin of the transaction, or constitutes the consideration of the bill or note, the negotiability of the paper is destroyed." 3 R. C. L. p. 883.

Negotiable paper is frequently used as a substitute for money, and the essential elements of negotiability are the certainty in the sum to be paid and in the time of payment. If the instrument on its face contains language creating uncertainty in either of these respects, it fails to meet the statutory requirements.

The reference in the bond above quoted does not assume to in any way affect the unconditional promise to pay. A purchaser is referred to the trust agreement for a statement of the rights and obligations of the company, the trustee, and the holders of the bonds "under the said trust agreement." It in no way refers to or qualifies the unconditional promise of the company to pay the bond at maturity theretofore clearly expressed. The reference gives notice to the bondholder that he may examine the trust agreement to ascertain the nature and kind of the security pledged to insure payment and the procedure provided for to enforce the same, should he care to do so before making purchase thereof. But it in no way imposes that duty upon him in order to determine the status of the bond as a negotiable instrument. In *Enoch* v. *Brandon, supra* (p. 268), in discussing the reference, the court said:

"We hold that here there is no modification of the promise to pay, made in explicit terms. The provisions all have to do with the trust mortgage. They refer to the rights conferred by it upon the bondholders and limit and explain those rights.

They are so linked together as to indicate that the obligor was speaking solely of the security. A purchaser scanning the bonds would have the same thought."

See, also, *Hibbs* v. *Brown,* 190 N. Y. 167 (82 N. E. 1108).

There is a clear distinction between this reference and that contained in *Allan* v. *Moline Plow Co.* (C. C. A.), 14 Fed. (2d) 912, and *Crosthwaite* v. *Moline Plow Co.,* 298 Fed. 466, relied on by plaintiff, where there was reference to a trust agreement "for a description of the terms under which the said notes are issued, and of the rights and obligations of the company and the trustee *with respect thereto.*" Under this reference the trust instrument must be examined to determine the rights and obligations of the company *under the notes;* in that before us it applies only to the rights and obligations under the trust agreement.

Stress is laid upon the last sentence in the above quotation, reading as follows:

"To the extent provided in the said trust agreement, all rights of action upon this debenture are vested in the trustee."

Inclination would lead us, as it apparently did the trial court, to examine the trust agreement in order to ascertain the extent to which, under this provision, the rights of action are vested in the trustee. But, under the rule above stated that the bond itself must determine its character, we may not do so. The effect of the provision must be determined from the language used. It can have no application except in case of default, as no right of action can accrue until that time. The provision is in the nature of an agreement among the bondholders that the

trustee shall represent all of them in any action which may be brought to enforce collection.

The statute provides:

"The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument." (Art. 6, § 90.)

It does not prescribe the right of a holder to sue in his own name as a necessary element of negotiability.

This provision in the bond contains no intimation that the promise to pay, or the time of payment, is affected thereby. Under it the right to bring action to enforce the promise is "to the extent provided in the said trust agreement," vested in the trustee. The trust agreement is in the nature of a security for the payment of the debt. It is primarily for the benefit and advantage of the bondholders, and may contain provisions for collateral security; provide for a sinking fund; give rights to convert bonds or debentures into stock of the company; restrict the right of the company to merge with another, and otherwise provide for the mutual and respective interests of the parties, collateral to the promises and agreements in the bond.

An individual owner of a bond could ill afford to bear the expense incident to the enforcement of the obligation in case of default. A provision such as here considered must be treated as one for his benefit, and to insure an orderly method of procedure for collection, thus avoiding the necessity of a multiplicity of separate actions. A purchaser of one of these bonds takes with notice that he thereby makes the trustee his agent to act for him in case of default. But it will not be assumed that the

trustee so acting is limited by this reference from discharging the duty he owes to the bondholders to at all times protect their interests.

"A general provision limiting the right of a trustee to foreclose would evidently be void." 4 Thompson on Corporations (3d Ed.), § 2689.

In a note in 16 L. R. A. (N. S.) 1014, it is said:

"If the trustees improperly refuse to commence proceedings for the protection of the rights of the bondholders, such refusal does not leave the latter without remedy; they may, upon such refusal, commence in their own names proceedings for the protection of their rights."

Many authorities are cited in support of this statement.

The bonds also contain a provision that—

"In case any default shall occur as set forth in the said trust agreement, the principal of all the debentures issued and outstanding thereunder may be declared, and shall thereupon become, due and payable before maturity in the manner and with the effect therein provided."

In *Enoch* v. *Brandon, supra,* the court said in regard to such a provision:

"There is the possibility of the acceleration of the date when the bonds are due if there is default under the mortgage. Such a possibility does not make them nonnegotiable."

See, also, *McCornick & Co.* v. *Gem State O. & P. Co.,* 38 Idaho, 470 (222 Pac. 286, 34 A. L. R. 867), where the late cases are collected and commented upon, and, also, 3 R. C. L. p. 909.

It follows from what has been said that, in our opinion, the bonds in question are negotiable instruments and the defendants had title thereto.

The judgment is reversed, with costs, and the case remanded, with direction to enter a judgment for the defendants.

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

MOTYKA *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

MIECZNIK *v.* SAME.

KULESZA *v.* SAME.

1. APPEAL AND ERROR—DIRECTED VERDICT.
   In reviewing judgment *non obstante veredicto* for defendant, evidence must be viewed in light most favorable to plaintiffs.

2. RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—PROTECTED CROSSING.
   Where pedestrians were killed by train on crossing protected by watchman, other considerations respecting their contributory negligence must obtain than at ordinary crossing.

3. SAME—CONTRIBUTORY NEGLIGENCE.
   Since pedestrians killed by railroad train on crossing protected by watchman were only bound to exercise care and caution which an ordinarily prudent person would have exercised in

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As to duty of railroad company to maintain flagman at crossing, see annotation in 16 A. L. R. 1273.

Care required of traveler going on crossing when gates are open, see annotation in 4 L. R. A. (N. S.) 521; L. R. A. 1916E, 821.

same or similar circumstances, on question of their contributory negligence regard must be had for circumstances of particular occasion.

4. SAME—PEDESTRIAN MAY PLACE SOME RELIANCE ON CROSSING WATCHMAN.

While pedestrian may not rely wholly on flagman, gates, or bell at railroad crossing, but must take precaution for his own safety, he may place some reliance on such protection.

5. SAME—ABSENCE OF WATCHMAN—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether absence of watchman from protected railroad crossing and lack of signal from him might indicate to reasonably prudent person that crossing was clear for safe passage—whether conduct of watchman was invitation to proceed—*held*, under circumstances of particular case, question for jury.

6. SAME—PROTECTED CROSSING—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.

Pedestrians killed at railroad crossing protected by watchman were not guilty of contributory negligence as matter of law, where evidence shows that, when they started to cross, street was clear and watchman was not in view to give warning, although they failed to look in direction from which train was coming, and, had they looked, accident might have been avoided.

BUTZEL, C. J., and WIEST and NORTH, JJ., dissenting.

Error to Wayne; Brennan (Vincent M.), J. Submitted January 6, 1931. (Docket Nos. 3, 4, 5, Calendar Nos. 35,082, 35,083, 35,084.) Decided April 7, 1931. Rehearing granted June 1, 1931.

Separate actions of case by Thomas Motyka, administrator of the estate of John Motyka, deceased, Mary Miecznik, administratrix of the estate of Casimir Krzewinski, deceased, and Maryanna Kulesza, administratrix of the estate of Stanislaw Kulesza, deceased, against the Detroit, Grand Haven & Milwaukee Railway Company, a Michigan

corporation, and another for personal injuries received in the same accident at a railroad crossing and resulting in the death of plaintiffs' decedents were tried jointly.

Judgments for defendants *non obstante veredicto*. Plaintiffs bring error. Reversed, and judgments ordered entered on verdicts.

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

Frederic T. Harward and *Frederick V. Slocum*, for defendants.

CLARK, J. In each of these three consolidated cases, plaintiff's decedent was a boy about 18 years of age. On March 17, 1924, near eight o'clock in the morning of a clear day, the three boys, walking abreast on Harper avenue in Detroit and passing on the crossing of defendant's railway tracks with Harper avenue, were run over by a backing locomotive. One boy was killed instantly; one survived several hours; and the other, it was found, also survived for a short time.

In one case there was recovery under the death act, and in the other cases, it appears, under the survival act. Each of the three verdicts is a substantial sum. On decision of a reserved motion to direct verdicts, the trial judge ordered judgments for defendant. The plaintiffs bring error.

Judgments on the verdicts were denied on the ground of contributory negligence of the boys. The error assigned is on the order of judgments for defendant. Defendant assigns no error.

There is evidence of negligence of defendant, and this calls for no discussion.

Were the boys guilty of contributory negligence as a matter of law?

Pertinent facts are thus well stated by the trial judge:

"Harper avenue runs east and west; defendant's right of way runs north and south. There are four railway tracks which cross Harper avenue. The westerly track is known as siding 11. The other tracks in order, proceeding easterly, are known as the inbound main track, the outbound main track and the long siding. Several hundred feet north of Harper avenue the main tracks curve to the west. West of siding 11, and north of Harper avenue, and running parallel to the other four tracks, there are also two stub tracks which end at the sidewalk just north of Harper avenue. According to plaintiffs' witness, railway boxcars were standing upon these stub tracks, and also upon siding 11, north of the northerly sidewalk of Harper avenue, and within a foot or two of the same, obstructing the view, north, of the inbound main track, plaintiffs' principal witness testified also that there was a locomotive operating on siding 11 just south of Harper avenue, and that its bell was ringing just preceding the accident. All witnesses agree that immediately preceding the accident, a locomotive, with bell ringing, and train of cars proceeded north on the outbound main track, crossing the intersection a moment or two before the accident. The accident occurred during the daylight hours.

"As stated, the three decedents were walking easterly upon the sidewalk upon the north side of Harper avenue across the railway tracks. They proceeded to the center of siding 11 where they stopped and looked south. At that point the train going north on the outbound main track went by.

The three decedents, walking together, then started across the inbound main track. A few feet behind them was Alfred Wolinski, plaintiffs' principal witness, who saw the accident and described its happening. He testified that the three lads, after stopping in the center of siding 11 and looking south, proceeded to cross the next track (the inbound main), without looking north, and that they were struck and killed by a locomotive and tender coming from the north and running backwards in a southerly direction on the inbound main track. Wolinski also testified that the watchman or flagman required to be in attendance by virtue of an order of the Michigan railroad commission was not in evidence at the crossing just prior to the accident."

The protection of the crossing was by order of the Michigan railroad commission, made January 19, 1916, that a watchman be stationed by defendant at the crossing 24 hours of each and every day to warn the public of approaching engines and trains. There was a watchman's shanty at the crossing.

Plaintiffs' principal witness testified that at the moment in question his vision was clear and unobstructed, he could "see on Harper avenue across the tracks," and that he saw no watchman or flagman. He started across just behind the boys and barely escaped being killed. He gave further testimony, over objection, the competency of which is not here questioned, that, immediately after the accident, the watchman made statements from which it might be inferred that he was not on the crossing at the moment in question.

So there is some evidence that the watchman was not at the moment on the crossing. There is evidence that he was there just before the accident and soon thereafter. On the question before us,

the decision of the reserved motion of defendant to direct, evidence must be viewed in the light most favorable to plaintiffs.

There was a small but sufficient safety zone from which the boys, had they looked to the north, could have seen the backing locomotive approaching on the inbound main and thus avoided injury. This fact, if this were an ordinary crossing case, might require affirmance of a holding of contributory negligence, but this was a protected crossing, and other considerations respecting negligence must obtain.

It is settled law that it was upon the boys to exercise the care and caution which an ordinarily prudent person would have exercised in the same or similar circumstances, and from this it follows that regard must be had for the circumstances of the particular occasion. 45 C. J. p. 951.

The evidence here reviewed is that, when the boys, after stopping to look, started across the tracks, the street was clear and the watchman stationed there was not out to warn of the approach of the locomotive.

Granting that one may not rely wholly on flagman, gates, or bell, but must take precaution for his own safety, he may place some reliance on such protection afforded at a crossing. We think it was for the jury to say whether the absence of the watchman and the lack of any signal from him might indicate to a reasonably prudent person that the crossing was clear for safe passage, whether the conduct of the watchman was an invitation to proceed. This view has obtained in case of a pedestrian (*Amedeo* v. *Railway Co.*, 215 Mich. 37), as in other cases.

See *Day* v. *Railway Co.*, 252 Mich. 589; *Tobias* v. *Railway Co.*, 103 Mich. 330; *Hudson* v. *Railway Co.*,

227 Mich. 1 (23 N. C. C. A. 682); *Richmond* v. *Railway Co.*, 87 Mich. 374; *Crawford* v. *Railway Co.*, 207 Mich. 159; note 53 A. L. R. 973; note 23 N. C. C. A. 682; note 16 N. C. C. A. 110, 112.

Under the circumstances of the case, it ought not to be held as a matter of law that the boys were negligent in not looking more carefully before attempting to cross. The trial judge was right in submitting to the jury the question of contributory negligence.

Judgments reversed. Costs to appellants.

Causes remanded for judgments on the verdicts.

MCDONALD, POTTER, SHARPE, and FEAD, JJ., concurred with CLARK, J.

WIEST, J. (*dissenting*). I cannot concur in the opinion of Mr. Justice CLARK. Under the evidence introduced by plaintiffs the young men were guilty of contributory negligence, and the judgments, notwithstanding the verdicts, should be affirmed.

An eyewitness, and the only person who saw the accident and who was walking immediately behind the young men, was called by plaintiffs and testified that, before the young men stepped on the track, they did not look in the direction of the oncoming cars. Opportunity to have observed the approaching cars in time to keep off the track was open to them, and the absence of the crossing flagman, whether noticed by them or not, did not relieve them from the duty of exercising the ordinary precaution of looking before stepping into a place which was a warning, in and of itself, of possible danger. It has long been held that a railroad track warns of danger, and ordinary care requires one about to cross to, at least, take a look. The evidence dis-

closes no circumstances so diverting the attention of the young men as to excuse them from not looking for the approach of the train. A switch engine was upon another track but not approaching the crossing.

What was said by this court in *Gardner* v. *Railroad Co.*, 97 Mich. 240, is applicable here:

"If the plaintiff's attention was diverted by the switch engine, as he claims, it is no excuse for not looking for the approach of a train. He was to pass a dangerous point. He knew there was danger there. He was bound to exercise that degree of care that the situation and surroundings demanded of a prudent and careful person. If the switch engine was making a noise by its bell and by letting off steam, it, at least, was not an obstruction to his view to the east, and it is not so claimed. If he had looked eastward, he would have seen the train before he stepped upon the track. The ringing of the bell and the blowing off of steam from the switch engine did not relieve him from the duty of looking in the other direction. One look eastward, and one less step taken, and he would not have been upon the track. Upon any theory of the case, it was the duty of the court to direct the verdict in favor of the defendant."

I do not find the cases cited by my Brother decisive of the question here involved. Such cases either recognize or are not in conflict with the rule of care laid down in the cases I shall cite.

The circuit court relied, and rightly so, upon our holding in *Tree* v. *Railway Co.*, 238 Mich. 658. In that case the crossing watchman was absent, and we held that plaintiff, a truck driver, assumed the duty of crossing under his own supervision and was guilty of want of care barring recovery in not looking before driving upon the track. That case and

this are alike in principle of law, for the rule of care is the same for drivers of vehicles and for pedestrians.

In *Aiken* v. *Railroad Co.,* 130 Pa. 380 (18 Atl. 619, 17 Am. St. Rep. 775), a case very much like the one at bar, the trial judge instructed the jury:

" 'Ordinarily, the rule of law is * * * that a man before crossing a railroad track must stop, look, and listen. * * * I think that it is usually applied, however, to parties who are driving, and not to parties walking. It is after all not a rule of law, but a rule of evidence only, and therefore the duty of stopping is always a question for the jury.' "

Of this the supreme court said:

"This was clear error. The rule as to stopping applies equally to persons walking as to persons driving. There is no distinction, in the nature of things, except of degree as to danger, and none is recognized in the cases. * * * It is not a rule of evidence, but a rule of law, peremptory, absolute and unbending; and the jury can never be permitted to ignore it, to evade it, or to pare it away by distinctions and exceptions. That failure to stop is not merely evidence of negligence, but negligence *per se,* has been said so often, from *North Pennsylvania R. Co.* v. *Heileman,* 49 Pa. 60 (88 Am. Dec. 482), to *Greenwood* v. *Railroad Co.,* 124 Pa. 572 (17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614), that to cite the cases would be wearisome."

In *Tomes* v. *Railroad Co.,* 240 Mich. 133, a 14-year old school girl, at a railroad crossing, did not look and was struck by a train. Held there could be no recovery under the rule of law, *which is more than a mere rule of evidence.*

The following rule stated in *Phillips* v. *Railway Co.,* 111 Mich. 274 (66 Am. St. Rep. 392), has never

been departed from in this jurisdiction. It was there said:

"A person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing as well as of sight, * * * to ascertain, before attempting to cross, whether a train is in dangerous proximity; and if he neglects to do this, but ventures blindly upon the track, without any effort to ascertain whether a train is approaching, it must be at his own risk."

In *Guntermann* v. *Railroad Co.*, 168 Mich. 37, it was stated:

"There is no testimony that upon approaching the track plaintiff's decedent stopped, looked, and listened for the approaching train."

Held, negligence precluding recovery, and the verdict should have been directed for defendant under twelve Michigan cases cited.

If the young men knew that a flagman was stationed at the crossing and noted his absence, or that he was not flagging, then they were in no wise released from looking before crossing the track. The rule on this is stated with reference to gates, in *Koch* v. *Railway Co.*, 148 Cal. 677 (84 Pac. 176, 4 L. R. A. [N. S.] 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795):

"Nor is it the law that when a railroad company adopts safety gates or any other appliance for the protection of the public the public is thereby absolved from all duty of taking care of itself. A person is still required to exercise due and ordinary care, and while the *quantum* of care which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates themselves are not an assurance and a war-

ranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions."

There is no evidence that the young men knew of a flagman at this crossing or looked to a flagman for guidance. Even if the young men relied upon the absence of the flagman as indicative of safety in crossing there can be no recovery. Something more than that they so relied must be shown; for the absence of the flagman did not excuse them from looking and listening and taking thought for their own safety. *Ellis* v. *Railroad Co.,* 169 Mass. 600 (48 N. E. 839).

3 Elliott on Railroads (3d Ed.), § 1651, states:

"Nor does the absence of a flagman in any event absolve the traveler from the exercise of care."

In the case at bar there is no claim that the flagman signaled the young men to cross, for the claim is that the flagman was absent from his post and gave no signal.

In *Tiffin* v. *Railway Co.,* 78 Ark. 55 (93 S. W. 564), it was stated:

"Learned counsel insists that deceased might have been lulled into a feeling of security by the fact that a flagman was usually stationed at the crossing to warn travelers of approaching trains, and that under those circumstances it should have been left to the jury to say whether or not ordinary care required him to use his senses in discovering the approach of the train. We do not think so. It might have been different if he and the flagman had been standing in plain view of each other, so that he could reasonably expect warning from the latter of an approaching train. He could then have assumed that no train approached because no warn-

ing was given. But such is not the state of the case. He and the flagman were not in view of each other, and he was not misled by the inaction of the latter. He was about to occupy a position fraught with unusual danger, and it was his imperative duty to make use of his senses to discover the peril and avoid it."

In *Hodgin* v. *Railway Co.*, 143 N. C. 93 (55 S. E. 413, 10 Ann. Cas. 417), the railroad had maintained a flagman to plaintiff's knowledge, and when plaintiff got near the railroad crossing he looked for the flagman but did not see him. In reply to the contention that, having looked for the usual watchman and seeing none, he had a right to cross the track and was absolved from the usual duty of looking and listening, the court said:

"The traveler who sees the watchman in his place has the right to rely on him for protection, but when he discovers that the watchman is absent from his post of duty, he is put on his guard at once, and must exercise ordinary care to protect himself from injury. He should himself then look and listen for passing trains. It is true the watchman is guilty of negligence when he deserts his post, but when this negligence was discovered by plaintiff it made it all the more incumbent upon him to look and listen for his own protection, for he had ample time to do so."

See, also, *Smith* v. *Railroad Co.*, 141 Ind. 92 (40 N. E. 270); *Berry* v. *Railroad Co.*, 48 N. J. Law, 141 (4 Atl. 303).

Plaintiffs' sole testimony was that in broad daylight the three young men, side by side, without looking, walked onto the railroad track, immediately in front of a train, which they would have seen and avoided had they made the most casual observation,

and yet the jury awarded damages aggregating $51,000. It may be conceded that defendant was guilty of negligence in all particulars claimed. It is established by plaintiffs' proofs that the young men were also guilty of negligence *per se*. The verdict was contrary to the undisputed evidence, and the circuit judge could do no less than enter judgment for defendant.

Judgment should be affirmed, with costs to defendant.

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

RICHARDSON *v.* LAMB.

1. SPECIFIC PERFORMANCE—TENDER OF PERFORMANCE BY PLAINTIFF NECESSARY.
   Tender of performance by purchaser is necessary to entitle him to maintain suit for specific performance of contract to sell shares of corporate stock.

2. SAME—DEPOSIT OF MONEY IN BANK INSUFFICIENT TENDER.
   Deposit of money in bank by purchaser of shares of corporate stock, with instructions to seller to deliver stock to bank and receive certified check was insufficient tender to entitle purchaser to maintain suit for specific performance of contract to sell.

3. SAME—TENDER OF WHOLE AMOUNT NECESSARY.
   To entitle purchaser to maintain suit for specific performance of contract to sell shares of corporate stock, he must tender seller whole amount to be paid therefor, and anything short of this is insufficient.

Specific performance of contract for the sale of stock in corporation, see annotation in 50 L. R. A. 501; 31 L. R. A. (N. S.) 491; 51 L. R. A. (N. S.) 785.

On the question as to whether tender of certified check constitutes payment, see annotation in 23 A. L. R. 1284; 51 A. L. R. 395.

4. SAME—EXERCISE OF OPTION TO TWO PERSONS.

Exercise of option to two persons to purchase "equally" and "in equal proportions" 4,000 shares of corporate stock does not require concert of action by both optionees, but one might exercise option for equal proportion, 2,000 shares.

5. SAME—PERSONAL PROPERTY—EXCEPTIONAL CIRCUMSTANCES.

Generally, specific performance is not decreed where subject-matter of contract is personal property, unless there are exceptional circumstances.

6. SAME—SHARES OF CORPORATE STOCK.

Specific performance of contract to sell shares of corporate stock was properly decreed in suit by purchaser, where court of law could not afford him adequate relief, in that stock is not listed, is not procurable in market, and is difficult to obtain, and especially where evidence shows that purchaser, after buying nearly one-fourth of capital stock, had moved to city where corporation is located, had devoted his best efforts to corporation, and that his purpose in seeking to acquire stock in question was to protect investment already made.

Appeal from Lenawee; Rathbun (G. Arthur), J. Submitted January 21, 1931. (Docket No. 98, Calendar No. 35,419.) Decided April 7, 1931. Rehearing denied June 1, 1931.

Bill by A. Howard Richardson against Herbert W. Lamb and others for specific performance of a contract to sell shares of corporate stock. Decree for plaintiff. Defendants appeal. Reversed, and bill dismissed.

James H. Baker (*George W. Bean,* of counsel), for plaintiff.

Baldwin & Alexander and *Mark L. Rowley,* for defendants.

CLARK, J. The bill was filed for specific performance of an alleged agreement to sell shares of capital stock of Fireside Industries, Inc., of Adrian,

Michigan. Plaintiff had decree. Defendants have appealed.

Defendants as first parties and Edwin A. Peterson as second party and plaintiff, A. Howard Richardson, as third party, in April, 1927, entered into a written contract, one paragraph of which is here important:

"The parties of the first part, in consideration of the purchase of the stock herein agreed to be purchased from them, do hereby give and grant to the parties of the second and third part, equally, an option to purchase in equal proportions 4,000 shares of the Class 'B' stock held by the parties of the first part in the said Fireside Industries, Inc., at any time hereafter, so long as said parties of the first part shall continue as stockholders, at a price of $3 per share, such option to be exercised by notice in writing to the parties of the first part that the said parties of the second and third part desire to avail themselves of the said option, payment to be made thereof within 10 days after the date of the notice given to the said parties of the first part of the exercise of said option."

On December 28, 1929, Richardson mailed to each of the defendants the following letter:

"Dear Sir:

"In accordance with the contract made and executed between yourself" (and other defendants) "parties of the first part and Edwin A. Peterson, party of the second part and A. Howard Richardson, party of the third part under date of April 27, 1929, and in accordance with paragraph 11 thereof;

"I, the undersigned A. Howard Richardson, do respectfully serve notice upon you in accordance with said contract and paragraph aforementioned to deliver to me at the Adrian State Savings Bank, between the hours of nine a. m. and three p. m. of January 8, 1929, 666⅔ shares of capital stock class

B of the Fireside Industries, Incorporated, a Michigan corporation, at which time you will receive my certified check in the sum of $1,999.33, which is three dollars per share per said agreement.

"Trusting that you will act promptly in the matter and wishing you a Happy New Year,

"I am,

"Respectfully yours."

Richardson had an arrangement with the bank by which it appears defendants would have been paid in accordance with the letter, had they there presented the certificates of stock. There was no other tender or acceptance on the offer first above quoted. Defendants did nothing. This bill followed.

Tender of performance by plaintiff was necessary to enable him to enforce the right. 38 Cyc. p. 132. The option does not provide for payment at the bank, and deposit there is therefore not good tender. 38 Cyc. p. 151. It was upon plaintiff to tender to defendants the whole amount to be paid to them. Anything short of this is insufficient. To each defendant plaintiff proposed to pay 67 cents less than the sum required, as appears by the letter. Although the deficiency is small, the court may not ignore it. *Boyden* v. *Moore,* 5 Mass. 365; *Wright* v. *Behrens,* 39 N. J. Law, 413; 38 Cyc. p. 137. This necessitates reversal, but, in prospect of further controversy, other matters should be discussed.

The option is that Richardson and Peterson might purchase "equally" and "in equal proportions" 4,000 shares of stock. The trial court rightly held, in interpreting the option, that exercise thereof did not require concert of action by both Richardson and Peterson, but that Richardson alone might exercise the option for his equal proportion, 2,000 shares.

The general rule is that specific performance is not decreed where the subject-matter of the contract is personal property. The trial court held this an exceptional case, in which a court of law could not afford adequate compensation for breach, for the reason the stock was not listed, not procurable in the market, and was difficult to obtain. Also, the evidence is that plaintiff, after buying nearly one-fourth of the capital stock, had moved to Adrian and made his home there and had devoted his best efforts to the company, and that his purpose in seeking to acquire the shares was to protect the investment already made. On this record, the holding of the trial judge that this case presented exceptional circumstances permitting specific performance will not be disturbed. *Cole* v. *Cole Realty Co.*, 169 Mich. 347; *Toles* v. *Duplex Power Car Co.*, 202 Mich. 224; 36 Cyc. p. 560.

Reversed, and bill dismissed. Costs to appellants.

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

REPUBLIC AUTOMOBILE INSURANCE CO. *v.* MAEDEL.

1. COURTS—JURISDICTION—WHEN FORMER SUIT PENDING MAY BE PLEADED IN BAR.

   Defense of former suit pending in another jurisdiction is availing only when, if first suit had been decided, it could be pleaded in bar as former adjudication.

Prior action in which claim might have been asserted by counterclaim, set-off, or cross-petition, as barring or abating subsequent independent action thereon, see annotation in 8 A. L. R. 694.

2. SAME.

Action by insurance company as assignee of claim for damages arising from automobile accident is not barred by pending suit in another jurisdiction by defendant against assignor for damages arising from same accident, because judgment of no cause of action in pending suit could not be pleaded in bar in instant suit as former adjudication.

3. SAME—JURISDICTION—APPEARANCE—WAIVER.

Defendant waived right to challenge jurisdiction of his person by entry of general appearance.

Error to Genesee; Parker (James S.), J. Submitted January 15, 1931. (Docket No. 157, Calendar No. 35,445.) Decided April 7, 1931.

Case by Republic Automobile Insurance Company, as assignee of Ivan Lambert, against Edward Maedel, to recover damages arising out of an automobile accident. From an order of dismissal, plaintiff brings error. Reversed.

Neithercut & Neithercut (*Richard C. Fruit,* of counsel), for plaintiff.

Alex. B. Simonson, for defendant.

CLARK, J. The automobiles of Edward Maedel and Ivan Lambert collided on a highway in Sanilac county. Lambert's insurer, Republic Automobile Insurance Company, plaintiff here, settled with him and took assignment of his rights, if any, to recover against Maedel. Maedel commenced a tort action against Lambert in the Sanilac circuit court to recover damages arising out of the collision, averred to be due to Lambert's negligence. This suit is pending. Later, plaintiff, assignee of Lambert, commenced this tort action against Maedel in the Genesee circuit court to recover damages of the

same accident, averred to be due to Maedel's negligence. Defendant Maedel entered general appearance, and pleaded the general issue, and later amended his plea by setting up thereunder matter in challenge of jurisdiction of the cause on the ground of former suit pending, and on the ground, too, of lack of jurisdiction of his person because of residence.

An order was made dismissing the case because of former suit pending. Plaintiff brings error. If defendant is right in either of his reasons advanced for dismissal, the order must be affirmed.

The defense of former suit pending is availing when—"if the first suit had been decided, it could be pleaded in bar as a former adjudication." 7 R. C. L. p. 1069. A verdict of no cause of action, and judgment thereon, in the former suit would not be a bar to the second suit. The statute, Comp. Laws Supp. 1922, § 12477 (1) (3 Comp. Laws 1929, § 14142), permitted, but did not require, plaintiff or Lambert, its assignor, to file cross-declaration in the cause in the Sanilac circuit. Plaintiff might bring its separate suit, as it did. The defense of former suit pending is not sustained. *Seager* v. *Foster,* 185 Iowa, 32 (169 N. W. 681, 8 A. L. R. 690, and note, 694). Defendant waived right to challenge jurisdiction of his person by entry of general appearance. 1 Green's Michigan Practice (3d Ed.), p. 378; *Morgan* v. *Hoey,* 209 Mich. 655.

Reversed. Costs to appellant.

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

WAYNE COLORPLATE CO. *v.* WAYNE CIRCUIT JUDGE.

INJUNCTION—STAY OF PROCEEDINGS—BONDS—PARTIES.

One not party to proceedings at law is not entitled to preliminary injunction enjoining sale of goods and chattels levied upon by officer without filing bond required by statute (3 Comp. Laws 1929, § 14352 *et seq.*), even though bill for injunction showed undoubted equities.

Mandamus by Wayne Colorplate Company, a Michigan corporation, to compel Vincent M. Brennan, Wayne circuit judge, to dissolve an injunction. Submitted February 10, 1931. (Calendar No. 35,448.) Writ granted April 7, 1931. Rehearing denied June 1, 1931.

Lawrence J. DeFerie, for plaintiff.

James Gibbons, for defendant.

CLARK, J. Wayne Colorplate Company, a corporation, recovered judgment against Bruce H. Wark and others in the Wayne circuit court. The sheriff levied upon certain goods and chattels as belonging to said judgment debtor. Thereupon Annanora E. Wark, claiming to own most of the goods and chattels, filed bill against the judgment creditor, the sheriff, and others to enjoin the proceedings at law. Temporary injunction was issued. Plaintiff here, judgment creditor, moved to dissolve the injunction on the ground that no bond had been filed, as required by statute, 3 Comp. Laws 1915, § 12664 *et seq.* (3 Comp. Laws 1929, § 14352 *et seq.*). The motion was denied.

Plaintiff seeks relief on mandamus requiring the trial court to set aside the order of denial unless Annanora E. Wark shall file, or cause to be filed, within a reasonable time a bond in compliance with the statute.

It is urged that, as Annanora E. Wark was not a party to the proceeding at law, the statute does not apply to her. This is answered by *Boinay* v. *Coats,* 17 Mich. 411, 415:

"The injunction granted was a preliminary injunction to stay proceedings at law. It was urged that the rule and statutes imposing conditions on such injunctions only apply where the injunction is obtained by one party to a suit at law against the other. But we can see no force in this claim. A party who has a judgment has a right to enforce it, and it is just as serious an injury to him to have it stayed by one person as by another. In most cases, no one but a party would have any occasion for equitable relief, but, where there is such occasion, the effect of the stay is not changed by the character of the person suing it out; and there is no reason for allowing a third person to obstruct process on any easier terms than a party."

In *Hinkle* v. *Baldwin,* 93 Mich. 422, in facts somewhat like those in the case at bar, the *Boinay Case* was cited with approval, and a plaintiff, not a party to the proceedings at law, was held not to be entitled to preliminary injunction, even though his bill showed undoubted equities, without filing the bond required by statute.

It follows that the writ will issue, if necessary. Costs to plaintiff against Annanora E. Wark.

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

ANDERSON *v.* FRISCHKORN REAL ESTATE CO.

1. CONTRACTS—RESCISSION—FRAUD IN SALE OF CORPORATE STOCK—TENDER.

   In order to maintain action for money paid for shares of corporate stock on theory that contract had been rescinded for fraud, it was upon plaintiff before suit to restore, or offer to restore, whatever of value he had received, but if what he received had no value failure to restore it worked no prejudice.

2. SAME—"VALUE" AND "MARKET VALUE" USED INTERCHANGEABLY.

   Showing that shares of corporate stock had no market value was properly accepted by trial judge as showing that they had no value; "value" and "market value" being commonly used interchangeably as equivalents of actual value.

3. SAME—RESCISSION—TENDER.

   Where corporate stock had no market value at time of bringing action for its fraudulent sale on theory of rescission, there was nothing of value to return, and bringing action was sufficient rescission.

4. NEW TRIAL—MATERIAL WITNESS—ABSENT WITNESS.

   Motion for new trial on ground that defendant's agent in transaction involved was necessary and material witness was properly denied, where fact that he could not be found at time of trial was known to defendant, but no application for delay or continuance because thereof was made or any intimation given that his testimony was desired.

5. FRAUD—VIGILANCE IN DISCOVERING FRAUD NOT REQUIRED.

   Person defrauded is not required to be vigilant in discovering fraud.

6. SAME—WAIVER.

   That plaintiff knew, when he signed renewal notes for purchase price of corporate stock, that at least two representations made to him were false did not waive the fraud as matter of law, where he did not learn of falsity of other material representations until shortly before suit.

7. SAME—TRIAL—EXCESSIVE VERDICT.

Testimony by plaintiff attaching fraud to earlier as well as later subscription for corporate stock justified trial court in submitting both transactions to jury, notwithstanding letter by plaintiff's counsel seeming to indicate that no fraud was claimed in earlier transaction.

Error to Menominee; Bell (Frank A.), J. Submitted February 13, 1931. (Docket No. 119, Calendar No. 35,439.) Decided April 7, 1931.

Case by Carl A. Anderson against Frischkorn Real Estate Company, a Michigan corporation, for money paid for corporate stock upon fraudulent representations. Judgment for plaintiff. Defendant brings error. Affirmed.

Meredith P. Sawyer and *George Barstow,* for plaintiff.

Monaghan, Crowley, Reilley & Kellogg, for defendant.

CLARK, J. The declaration avers rescission of subscriptions to purchase shares of capital stock of defendant, and is for recovery back of the money paid. Plaintiff had verdict and judgment. Defendant brings error.

No witnesses were called by defendant. There is evidence that subscriptions were induced by fraud of an agent of defendant. Certificates for the shares were made, and have been held by defendant as collateral to plaintiff's purchase money notes. The record is that, at the time of bringing this suit, the stock had no market value.

1. *Rescission.* It was upon plaintiff before suit to restore, or offer to restore, whatever of value he had received, that he might thus by his own act have

legal right and title to the money in the hands of defendant and thus have right to recover at law on the theory that the contract had been rescinded. *Witte* v. *Hobolth,* 224 Mich. 286. Plaintiff had nothing to restore except such interest or right as he may have had in the shares, certificates for which were held by defendant, as stated. *Stowe* v. *Mather,* 247 Mich. 329. Counsel for plaintiff argue that in these circumstances, defendant then having the certificates, an offer to restore them was not necessary, citing 14 C. J. pp. 597, 598, and cases there cited. And they urge, too, that, as the stock was without value, an offer before suit to restore the certificates was not required, and it is this question we consider.

It was upon plaintiff before suit, as stated, to restore, or offer to restore, whatever "of value" he had received. If he had received something of no value, his failure to restore it worked no prejudice. Counsel for defendant contend the record is not conclusive that the stock had no market value, because there is some evidence of the company's having or owning some property, but such evidence, without a further showing of some substantial excess of assets over liabilities to creditors, has no tendency to impair the direct and positive evidence that the stock had no market value. It is also urged "no market value" is not equivalent to "no value." The words market value must be taken in the sense used. *Missouri, etc., R. Co.* v. *Crews,* 54 Tex. Civ. App. 548 (120 S. W. 1110). The words value and market value are commonly used interchangeably as equivalents of actual value. *Southern Traction Co.* v. *Hulbert* (Tex.), 177 S. W. 551; 38 C. J. p. 1266. The trial judge rightly accepted the record as showing that the stock at the time of bringing suit was

of no value. And, in this regard, we are in accord with his conclusion:

"The testimony is undisputed that at the time the suit was brought and for some time prior thereto, the stock had no market value. It is the common experience, of that part of mankind which deals in stocks, that 'no market value' means 'nothing of value'; and that the hope that the stock which has no market value will be worth something some day does not remove it from the no value class today. If this can be accepted as a legal conclusion, and I think it can, then there was nothing to return and the bringing of the suit was a sufficient disaffirmance of the contract. *Pangborn* v. *Ruemenapp,* 74 Mich. 572, cited with approval in *Joslin* v. *Noret,* 224 Mich. 240, 245."

2. *Motion for New Trial.* This question relates to having the testimony of defendant's agent Early, who sold the stock to plaintiff. We approve the disposition of the matter by the trial judge, who states the reason urged:

"That defendant, after diligent search, was unable to locate the witness Early so as to take his testimony or produce him at the trial as a witness, and that his whereabouts are now known and he can now be produced as a witness, and that, as appears from his affidavit attached to the motion, he will deny all the charges made against him by plaintiff, thus making a different result probable,"

and the decision:

"The witness Early was not produced and the affidavits show that with the effort made the defendant could not locate him. This effort consisted, according to the showing made, of writing three or four letters to persons who might know his address because they had known him when he was in Detroit,

some of which were never answered and the rest of which gave no information. No subpœna was put into the hands of officers nor is there any showing that the effort to locate the witness was any more zealous.

"The fact that the witness could not be found was known to defendant at all times after the suit was commenced until it was tried and there was no application for delay or continuance because of it nor any intimation at the trial that the testimony was desired.

"The case was tried on the legal defense * * *. It is true that the plaintiff's claims were denied by the defendant, but there was no effort to meet them on the facts nor any showing that the witness who knew the facts was desired as a witness.

"To grant a new trial now on the theory that Mr. Early was a necessary and material witness would be to reward the defendant for its own laches and permit it to come in and try its case on a new and different theory from that on which it stood at the time of the trial."

3. *Waiver.* The plaintiff was not required to be vigilant in discovering the fraud. The record shows many false and material representations made to plaintiff by defendant's agent. There is evidence, perhaps undisputed, that at least two of the representations were known by plaintiff to be false when he signed renewal notes. If this were all there was of the case, plaintiff might, perhaps, be held to have waived right to rescind. But there is evidence that with respect to other material representations plaintiff did not learn of their falsity and of the fraud until shortly before suit, and until after he had retained counsel. There was delay by correspondence and attempted negotiations for compromise. The trial judge, on this record, could not find waiver as a matter of law. He gave defendant

as favorable treatment as it was entitled to when he submitted the question to the jury in a charge, in which, it may be noted, no error is claimed.

4. *Excessive Verdict.* Defendant contends that the verdict is excessive as including amount paid on first subscription for the reason that there is no evidence of fraud as to such subscription for stock, and stresses language relative thereto in a letter by plaintiff's counsel. Plaintiff's testimony, however, does not support such construction of the letter of his counsel, but attaches the fraud to the earlier and as well the later subscription. There was nothing for the trial judge to do but to submit the matter to the jury, as he did.

The assignments urged here present no reversible error.

Affirmed.

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

BEIER *v.* PACHOLKA.

1. JUSTICES OF PEACE—JURISDICTION—ADJOURNMENT.
   Where cause in justice's court was adjourned by stipulation to certain date, justice was without jurisdiction to render judgment therein before adjourned day.

2. SAME—TRANSCRIPT OF JUDGMENT.
   Transcript of judgment in justice's court must affirmatively show jurisdiction.

3. SAME—EXECUTION BASED ON VOID JUDGMENT.

Where transcript of judgment in justice's court showed on its face that justice was without jurisdiction to render judgment, execution based thereon and all subsequent proceedings thereunder are void.

Error to Wayne; Richter (Theodore J.), J. Submitted January 21, 1931. (Docket No. 90, Calendar No. 35,435.) Decided April 7, 1931.

Ejectment by Robert Beier against Cora W. Pacholka or Broadwell and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Frederick E. McCain, for plaintiff.

Retan & Zeleznik, for defendant Cora W. Pacholka or Broadwell.

Patrick H. O'Brien, for defendant Truemner.

Lucking, VanAuken & Sprague, for defendant Allie M. Broadwell.

McDONALD, J. This is a suit in ejectment. The plaintiff claims title through sheriff's deed. Defendant Cora W. Pacholka claims title by warranty deed from Louis O. Broadwell, the original owner. She is in possession. Defendant Virginia Truemner claims title as sole heir of Louis O. Broadwell, deceased. The defendant Allie M. Broadwell claims a lien on the property given in decree for divorce.

Ernest B. Joslin purchased the land in question at a sale on an execution issued out of the circuit court for Wayne county. He deeded it to John G. Starling who deeded it to the plaintiff, Robert Beier. The execution was based on the transcript of a justice's court judgment. The transcript shows on its face that in justice's court on March 14, 1924,

by stipulation the cause was adjourned to March 28, 1924; that on March 18th, ten days before the adjourned day, the plaintiff appeared in court and took judgment in the absence of the defendant.

The justice had no jurisdiction to render judgment on March 18th. The transcript shows a void judgment. All proceedings based thereon are void. The transcript must affirmatively show jurisdiction. *Wedel* v. *Green,* 70 Mich. 642.

In the instant case, the transcript shows a judgment on which no valid execution could issue. All of the proceedings through which plaintiff traces his title were void. He has no title and right of possession to the property in question. It is not necessary to consider other alleged defects in the transcript or to determine the relative rights of the various defendants.

The judgment of the circuit court is affirmed, with costs to the defendants.

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

PACIFIC FRUIT & PRODUCE CO. *v.* FISHMAN.

SALES—REFUSAL TO ACCEPT—QUALITY.

Where defendants purchased carload of pears described by seller as "dark green to light yellow ground color," they were not justified in refusing to accept them as not of quality ordered because they were not light green in color.

Error to Wayne; Richter (Theodore J.), J. Submitted January 7, 1931. (Docket No. 32, Calendar No. 35,123.) Decided April 7, 1931.

Assumpsit by Pacific Fruit & Produce Company, a foreign corporation, against Jacob Fishman and David I. Brown, copartners, as Fishman & Brown, for loss on carload of pears rejected by defendants. Judgment for defendants. Plaintiff brings error. Reversed.

Frederick S. Baker (*Patterson & Patterson,* of counsel), for plaintiff.

Marvin B. Gingold (*Max D. Schuster,* of counsel), for defendants.

MCDONALD, J. This suit was brought to recover damages for loss sustained because of defendants' refusal to accept a carload of pears shipped to them by the plaintiff, a dealer in fruit and produce at Seattle, Washington. The car in question was sold f.o.b. shipping point by C. J. Yokom & Company, fruit brokers of Detroit, Michigan. When it reached the defendants they inspected the fruit and refused acceptance on the ground that it was not as ordered. To minimize its damages, the plaintiff diverted the car to Philadelphia, the nearest favorable market, and sold the contents at a loss which it seeks to recover of the defendants in this action. The trial court determined that the fruit was not of the quality ordered, and entered judgment in favor of the defendants. The plaintiff has appealed.

The question is whether the shipment corresponded with the pears defendants contracted to purchase.

These pears were bought while the car was in transit. A description of its contents was bulletined. The defendants bought from that bulletin. They bought the kind of pears described therein. They bought Anjou pears, C. grade, of "dark green to light yellow ground color." They were rejected by the defendants because of their color, which, they say, rendered them unsaleable. Defendant Brown testified:

"They were a rusty color, a ground color and the color of the pears was not what I bought. I know Anjou pears and their color is a light green and these pears in that carload were not light green. * * *

"*Q.* The only thing that you did not like was the brownish color of those pears?

"*A.* Which makes them unsaleable. * * *

"*Q.* Did you state at that time that the only objection you had to this car of pears or the pears in the car was that the pears which you examined were more or less brownish in color?

"*A.* I said a ground color. I mean the color of this linoleum. I do understand the meaning of the word ground; it does not mean earth in this case; no, not in this case. I say they were of ground color."

Other witnesses for the defense testified to the same color. Their testimony showed that these pears were 60 per cent. off color from bright green.

There would be real merit to this defense if defendants had contracted to buy light green pears. They did not do so. They bought from the bulletin which described the pears as "dark green to light yellow ground color." The same description as to color is in the written confirmation of the order signed by Mr. Brown for defendants. Certainly they knew the pears they were buying were not light

green. There is a dispute in the testimony as to the color of Anjou pears, grade C. We do not regard that as important, because the color of this carload of grade C. pears was definitely stated in the offer of sale which defendants accepted. As we read the testimony, it clearly shows that the pears which the defendants rejected corresponded in color with those which they contracted to purchase. On this record the plaintiff is entitled to recover its loss.

The judgment is reversed and a new trial granted. The plaintiff will have costs.

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

BRYLL *v.* KARCHMARZ.

JUDGMENT—EQUITY—NEGLECT OF ATTORNEY.

Relief from judgment may not be granted in equity on ground that plaintiff, without fault on her part, lost her right to review because of gross negligence of her attorney to whom she had intrusted appeal, notwithstanding allegations of errors and irregularities in judgment which might have been sufficient to release her had it been reviewed.

Appeal from Wayne; Campbell (Allan), J. Submitted January 20, 1931. (Docket No. 105, Calendar No. 35,246.) Decided April 7, 1931.

Bill by Jessie Bryll against John Karchmarz and others to enjoin enforcement of a judgment. Bill dismissed. Plaintiff appeals. Affirmed.

John L. Crandell, for plaintiff.

Edmund E. Shepherd, for defendant.

McDONALD, J. The purpose of this suit is to enjoin the enforcement of a circuit court judgment entered in favor of defendants John and Anna Karchmarz against plaintiff, Jessie Bryll, and Peter Bryll, her husband. When the bill was filed, a temporary injunction was issued. On motion of defendants, the injunction was dissolved and the bill dismissed. The plaintiff has appealed.

The bill does not charge fraud, but alleges various errors and irregularities, which, if reviewed by this court, undoubtedly would have released plaintiff from the judgment. But she lost her right to review because of the gross negligence of her attorney to whom she had intrusted the appeal. It is her contention that, though she had an adequate remedy at law by error to this court, she lost it through the negligence of her attorney and without fault on her part, and therefore equity ought to grant the relief which she would have obtained if her appeal had been properly prosecuted.

"Relief from a judgment will not be granted in equity on the ground that the attorneys * * * failed to prepare and present a bill of exceptions or to do other formal acts necessary to prepare the case for trial in a reviewing court although in consequence the right of appeal was lost." 15 R. C. L. § 209, p. 757.

"Relief will in no case be granted where the loss of the remedy at law was due to the party's own negligence or fault or that of his counsel." 34 C. J. p. 438, § 687, and cases cited under note 61.

See *Weisman* v. *Newton Beef Co.,* 154 Mich. 511.

The plaintiff's bill does not state a case for equitable relief. It was properly dismissed.

The decree is affirmed, with costs to the defendants.

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

REINDEL *v.* REINDEL.

1. LIMITATION OF ACTIONS—PARTNERSHIP—ACCOUNTING.
   While statute of limitations is applicable to partnership accounts, as general rule it does not begin to run until dissolution or until there has been settlement or accounting of partnership dealings.

2. SAME—ACCOUNTING BY INDIVIDUAL PARTNER.
   Where one partner on his own account used part of building leased by partnership, also using same clerical force, telephones, elevators, etc., as partnership, part of expense of which he paid, and it was understood that adjustment in respect to rent would be determined by accounting, statute of limitations did not run against partnership's claim for rent.

3. PARTNERSHIP—ACCOUNTING—APPEAL AND ERROR.
   In partnership's suit against individual partner for accounting for his share of rent of building, part of which he used on his own account, decree holding him liable for 25 per cent. of rent is reduced, on appeal, to 21 per cent., as being more nearly correct under evidence.

Appeal from Wayne; Dingeman (Harry J.), J. Submitted January 22, 1931. (Docket No. 129, Calendar No. 35,454.) Decided April 7, 1931.

Bill by Herman C. Reindel against George J. Reindel for an accounting of partnership funds and for dissolution. Decree for plaintiff. Defendant appeals. Modified and affirmed.

Robert M. Brownson (*Kenneth Murray,* of counsel), for plaintiff.

Sempliner, Dewey, Stanton & Bushnell, for defendant.

MCDONALD, J. This is a suit for an accounting and the dissolution of a partnership business conducted by the parties under the firm name of George J. Reindel & Company. The partnership was formed in 1896 for the purpose of dealing in office furniture at retail. In connection with this business, the defendant engaged in buying and selling household furniture on his own account, but under the name of George J. Reindel & Brother. The partnership leased the building and paid the rent for the premises. The defendant with his household furniture business occupied some of the space, and the dispute in the case grows out of his refusal to pay rent to the partnership. He claims it was agreed that, in lieu of rent, he was to furnish and pay the bookkeeper and a salesman. This claim the plaintiff denies. On the hearing, it was also urged in defense that the action for rent has become barred by the statute of limitations and laches. The trial court held against this contention, and in his determination of the facts found defendant liable for rent and certain other expenses incurred by the parties in their joint use of the premises. He made an accounting and entered a decree from which the defendant has appealed.

What was the agreement, if any, in regard to the payment of rent to the partnership by defendant for the space used by him in his individual business?

The evidence does not show an express agreement. The most that is shown is that both parties understood the defendant would pay rent. From the beginning it was his practice to pay certain expenditures of the partnership business. After they moved into the Malcomson building, in 1911, this practice became a source of contention between them which they were never able to adjust. They took it up with their attorney, Mr. Mulford. He was a witness on the trial. He testified that in numerous discussions in his office neither of them claimed an actual agreement. The plaintiff insisted that there should be some understanding about the rent. The defendant was satisfied with matters as they stood. He said he was paying some expenditures for the partnership and he considered that sufficient to offset his proportion of the rent. Mr. Mulford's testimony supports the plaintiff, in his claim that they never reached an agreement. They were brothers and continued the business in a friendly way without any more definite understanding. The circuit judge took a sensible view of the situation, and held that defendant should account for and pay reasonable rent for the joint use of the partnership property and be credited with any money he had expended in its behalf unless the accounts were barred by laches or the statute of limitations.

It is agreed that the statute of limitations is applicable to partnership accounts, but, as a general rule, does not begin to run until dissolution or until there has been a settlement or an accounting of the partnership dealings. But the defendant insists that this claim is not a partnership account; that it

is not the subject of an accounting between partners; that a suit at law would lie against the defendant at any time during the existence of the partnership; and, not having availed itself of that remedy, the partnership is now barred by the statute from recovering on any claims accruing more than six years prior to the commencement of this suit. With this contention we cannot agree. In their operation these two businesses were very closely related. They used the same clerical force. They occupied the same office, used in common the telephones, elevators, stairways, store rooms, and shipping rooms. Light, heat, postage, etc., were furnished by the partnership and shared by defendant. Just what proportion of the rent and the other expenses each should pay was never determined. It was a matter for an accounting and was so treated by the partners. The plaintiff testified that defendant:

"Assured me it was a matter of record, the books would show it and we would have an accounting and get it straightened out."

It is quite clear that the differences between these parties which continued up to the time of suit presented a subject for an accounting and that neither the statute of limitations nor the doctrine of laches has any application. The court correctly so held.

In making the accounting, the court covered the business for the period beginning January 1, 1911, and ending November 18, 1925. He apportioned and charged each party rent on the basis of the floor space used. As to the other expenses, he apportioned them according to the relative sales volume of the two businesses. The only dispute here relates to the apportionment for rent. During the period covered by the accounting, the parties oc-

cupied two places of business, the Malcomson building from March 1, 1911, until April 1, 1923, and the Shelby street building from April 1, 1923, until November 18, 1925. It seems to be conceded that for the space used by defendant in the Shelby street building, he was properly charged 25% of the rent. The same proportion was charged against him for the space used in the Malcomson building. In our view of the evidence this charge was too high. We are not impressed with the accuracy of the estimates of the one witness who testified for the plaintiff on this question. The testimony of the witnesses for the defendant shows a more careful and intelligent attempt to arrive at a fair distribution of the rent. They figured from a correct basis and consequently reached a more reasonable and dependable conclusion. We are inclined to accept their estimate, which charges defendant with 21% of the rent of the Malcomson building. With this modification, the decree of the circuit court is affirmed. A decree will be entered in accordance with this opinion. No costs are allowed.

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

McAFEE v. BANKERS TRUST CO.

1. RECEIVERS—LEAVE OF COURT NOT NECESSARY IN ACTION AGAINST RECEIVER FOR PERSONAL TORT.

   Rule that receiver may not be sued without leave of court is not usually applied to actions which do not affect custody and control of receivership property, and therefore it does not apply to action brought against receiver individually for his personal tort.

2. SAME.

   Where receiver is personally at fault in wrongfully taking possession of property belonging to and in possession of third party, his receivership is no protection to him, and in such case leave of court to bring action against him personally is not necessary.

3. SAME—AUTHORITY OF RECEIVER.

   Receiver appointed for corporation has only authority to take possession of property belonging to said corporation.

4. SAME—NO AUTHORITY TO USE FORCE.

   Receiver is under no obligation to attempt to take property out of possession of third party by force, but proper course is to apply to appointing court for instructions.

5. SAME—LEAVE OF COURT.

   Action against receiver personally on theory that he was guilty of personal tort in wrongfully taking possession of plaintiffs' property and disposing of it may be maintained without leave of appointing court.

6. CONTRACTS—DIVISIBILITY—PERFORMANCE—TITLE.

   Where contract for drilling oil wells provided that, on delivery of steel casing for each well, payment was to be made therefor to contractor by owner, contract was divisible, and, on payment therefor, title passed to owner without further performance of contract.

Error to Muskegon; Vanderwerp (John), J. Submitted January 14, 1931. (Docket No. 115, Calendar No. 35,275.) Decided April 7, 1931.

On the rule as to right to bring action against receiver without consent of court, see annotation in 39 A. L. R. 8.

Case by Don G. McAfee and another against Bankers Trust Company of Muskegon and another for conversion of a quantity of steel casing. Judgment for defendants. Plaintiffs bring error. Reversed.

McAllister & McAllister (*Alexis J. Rogoski*, of counsel), for plaintiffs.

Cross, Foote & Sessions, for defendants.

MCDONALD, J. This action was brought to recover the value of a quantity of steel casing used in the drilling of oil wells. The plaintiffs claim that it was unlawfully converted by the defendant. The steel had come into plaintiffs' possession by virtue of a contract with F. M. Gray, Jr., Inc., employed by them to drill a well at Muskegon. Subsequently, the defendant was appointed receiver for the Gray corporation. It took the steel from the possession of the plaintiffs and disposed of it. The plaintiffs then brought this suit. At the trial, on motion of the defendant, the court directed a verdict in its favor on two grounds; first, because the defendant took possession of the property in question in its official capacity as receiver and therefore this suit, which was begun without leave of the appointing court, could not be maintained; and second, because the undisputed evidence showed the property did not belong to the plaintiffs. On error assigned, the plaintiffs claim the trial court was wrong on both grounds and that therefore the judgment should be reversed.

1. Was it necessary for the plaintiffs to obtain leave of the court before beginning suit?

There is no question as to the general rule that a receiver cannot be sued without leave of the court

that appointed him; but this rule is not usually applied to actions which do not affect the custody and control of receivership property. It does not apply to a suit brought against a receiver individually for his personal tort. It is the duty of the court to protect him against interference with his possession of property belonging to the estate, but, where he is personally at fault in wrongfully taking possession of property belonging to and in possession of a third party, his receivership is no protection to him. He is personally responsible, and, in such case, leave to sue is not necessary. In *Gutsch* v. *McIlhargey,* 69 Mich. 377, the defendants were sued individually in an action of replevin. Bacon was a receiver and McIlhargey was an officer. The court said:

"Objection was also made that Bacon could not, as receiver, be liable in replevin, or for a tort. This is not so. A receiver may frequently, under color of office, get possession of property which does not belong to him, and his official character ought not to be a defense to his tortious action or deprive parties of their rights."

In *Kenney* v. *Ranney,* 96 Mich. 617, the defendant was receiver of mortgaged property. He wrongfully took possession of and sold property belonging to the plaintiff, who sued him individually in trover. The court said:

"Defendant's counsel contend that his receivership protects him from an action, without leave of court first obtained; but this appears to be in conflict with the case of *Gutsch* v. *McIlhargey,* 69 Mich. 377, where it was held that an officer of court obtains no immunity from liability for a tort by reason of his office."

These cases are readily distinguishable from *People, ex rel. Tremper,* v. *Brooks,* 40 Mich. 333 (29 Am. Rep. 534), and other cases cited by the defendant in support of its contention that the plaintiffs cannot maintain this suit against the receiver without leave of the appointing court. In all of those cases the action affects the custody and control of funds and property in the hands of the receiver belonging to his estate. The courts will not permit interference with the receiver's possession of such property. But that is not the purpose or effect of the suit in the instant case. Here the action is against the receiver individually for conversion in taking possession of and selling property belonging to the plaintiffs. It does not affect the custody and control of receivership property. As receiver, the only authority given to the defendant was to possess itself of property belonging to the Gray corporation. It found the property in question in the possession of third parties who claimed to own it and who forbade interference with their possession. Nevertheless, the defendant invaded their premises, forcibly took possession of the property, and sold it. A better and safer way would have been for the receiver to have applied to the appointing court for instructions. If that course had been followed, undoubtedly the court would have advised proceeding in a legal way to try out the plaintiffs' ownership. In 1 Clark on Receivers (2d Ed.), § 397, it is said:

"A receiver is under no obligation to attempt to take property out of the possession of a third party or even out of the possession of the defendant himself by force."

Under the plaintiffs' theory, this is not a suit against a receiver officially. It is an action based

on defendant's personal tort in wrongfully taking possession of their property and disposing of it. Such an action may be maintained without leave of the appointing court.

2. Was the trial court in error in directing a verdict in favor of the defendant on the ground that the undisputed evidence showed the plaintiffs did not own the steel casing?

The plaintiffs entered into a written contract with the Gray corporation to drill wells for them in the oil fields at Muskegon. The Gray corporation was to furnish the materials and do the work for a specified sum. Payments were to be made by the plaintiffs as follows:

"Upon presentation of bill of lading or delivery ticket covering casing for each well, $2,000 shall be paid.

"When well has been spudded in, $750 shall be paid.

"When 10" casing has been landed, $1,000 shall be paid.

"When 8" casing has been set, $500 shall be paid.

"When 6⅝" casing has been set, $1,000 shall be paid.

"When well or wells are completed, the balance due on each well shall be paid. All bills for day work shall be paid in full every two weeks."

It is the plaintiffs' claim that, by the terms of this contract, when the casing was delivered and paid for, it became their property. It is the defendant's claim that it did not become theirs until the contract was completed or until the casing was put in the ground.

By the terms of the contract, payments were apportioned. The payment of the $2,000 was not made to depend on the completion of the contract. The

steel was to be paid for on delivery. It was a divisible contract.

"A contract may be divisible if separate payment was, by the contract, to be made for several things, even though they were to be used together as parts of a completed whole." Williston on Contracts, § 862, p. 1650.

"A divisible contract, using that term properly, is always one contract and not several contracts. It differs in one respect only from other contracts—namely, that on performance on one side of each of its several divisions, the other party becomes indebted for the agreed price of the division." Williston on Contracts, § 861, p. 1649.

"The essential feature of such a contract is that a portion of the price is by the terms of the agreement set off against a portion of the performance and made payable for that portion, so that when part of the performance has been rendered a debt for that part immediately arises." Williston on Contracts, § 861, p. 1647.

The contract in question has all the essentials of a divisible contract. It sets off portions of the price against portions of the performance and requires immediate payment on each portion when performed; "so that when part of the performance has been rendered a debt for that part immediately arises." According to the contract, a portion of the performance was furnishing and delivering steel casing at the well by the Gray corporation. Set off against this was $2,000, a portion of the total price made due and payable immediately. When the steel was delivered, the Gray corporation could have enforced payment of the $2,000 without waiting for the completion of the contract or without further performing any other portion thereof. In

other words, by agreement of the parties, $2,000 of the contract price was apportioned for the payment of the steel when delivered. It was delivered. The $2,000 was paid and title to the steel passed to the plaintiffs.

The court erred in directing a verdict for the defendant. The judgment is reversed, and a new trial granted. Costs go to the plaintiffs.

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

WOLF v. COHEN.

1. Appearance—General Appeal Amounts to General Appearance—Circuit Court Commissioners.

   General appeal to circuit court from judgment in summary proceedings before circuit court commissioner was in effect general appearance and conferred jurisdiction on said court.

2. Justices of Peace—Circuit Court Commissioners—Appeals.

   Statute providing for appeals from justice's court governs appeals from circuit court commissioner (3 Comp. Laws 1929, § 14987).

3. Same—Special Appeals—Objections to Jurisdiction Must be Set Forth.

   In special appeal from judgment in justice's court, objections to jurisdiction must be specifically set forth in affidavit (3 Comp. Laws 1929, § 16224); if stated too generally they will not be considered by appellate court.

4. CIRCUIT COURT COMMISSIONERS—APPEALS—OBJECTIONS TO JURISDICTION MUST BE STATED.

Where, on special appeal from judgment in summary proceedings before circuit court commissioner, affidavit on which appeal was based did not allege errors in proceedings before commissioner, but was general, relating only to judgment on merits and stating no objections to jurisdiction, there was nothing before appellate court except retrial of case on its merits (3 Comp. Laws 1929, §§ 14987, 16224).

Error to Oakland; Doty (Frank L.), J. Submitted January 14, 1931. (Docket No. 139, Calendar No. 34,968.) Decided April 7, 1931.

Summary proceedings by Ernest P. Wolf and another against Maurice Cohen to recover possession of land. Circuit court commissioner rendered judgment for plaintiffs. Defendant appealed to circuit court. Judgment affirmed. Defendant brings error. Affirmed.

David C. Pence, for plaintiffs.

Benjamin B. Gordon, for defendant.

MCDONALD, J. The defendant has brought error to review a circuit court judgment in an action of summary proceedings for the restitution of certain premises.

The only question involved is the jurisdiction of the court. There was no personal service of the summons issued by the circuit court commissioner. Where personal service is not obtained, Act No. 257, Pub. Acts 1925 (3 Comp. Laws 1929, § 14978), provides for the publication of an order for appearance and the mailing of a copy thereof by registered mail to the defendant's last known place of residence. It also provides for proof of mailing by affidavit to which shall be attached a return receipt

if one has been received. In this case no receipt was attached to the affidavit, and it is not stated that one was received. Because of this defect in the affidavit, the defendant appeared specially before the circuit court commissioner and moved to dismiss for lack of jurisdiction. The motion was denied and from the judgment entered the defendant took a general and special appeal to the circuit court. There the motion was renewed and denied. No defense to the merits was offered, and judgment was entered for the plaintiffs.

The general appeal to the circuit court was in effect a general appearance and conferred jurisdiction. *Lapham* v. *Tarabusi,* 247 Mich. 380.

The statute providing for appeals from the justice's court governs appeals from a circuit court commissioner. 3 Comp. Laws 1915, § 13252 (3 Comp. Laws 1929, § 14987).

In a special appeal from the judgment of a justice's court, objections to jurisdiction must be specifically set forth in the affidavit. If stated too generally, they will not be considered by the appellate court; *Osborne* v. *Osborne,* 156 Mich. 413; 3 Comp. Laws 1915, § 14402 (3 Comp. Laws 1929, § 16224).

In the instant case, the affidavit on which the special appeal is based does not allege any errors in the proceedings before the commissioner. It is general and relates only to the judgment on the merits. No objections to the jurisdiction were stated. There was nothing before the appellate court except a retrial of the case on its merits.

The judgment is affirmed, with costs to the plaintiffs.

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

PEOPLES SAVINGS BANK *v.* GEISTERT.

VAN RAALTE *v.* SAME.

1. RECEIVERS—VENDOR AND PURCHASER—ASSIGNMENT BY QUITCLAIM—AGREEMENT TO PAY VOID WHERE ASSIGNEE UNDER NO OBLIGATION TO PAY.

   In authorizing sale by receiver of insolvent's interest in land contracts acquired from vendee by quitclaim deed without any assumption of vendee's contract obligations, court had no power to require purchaser from receiver to agree to pay said contracts, and therefore his agreement to pay vendors was *nudum pactum*.

2. VENDOR AND PURCHASER—ASSIGNMENT OF VENDEE'S INTEREST BY QUITCLAIM—PRIVITY OF OBLIGATION.

   Privity of obligation between vendors and vendee in land contracts did not carry over to assignee of vendee by naked quitclaim deed, nor did liability for deficiency upon foreclosure.

3. SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—LIABILITY OF VENDEE'S ASSIGNEE.

   Where insolvent's interest in certain land contracts was acquired from vendee by quitclaim deed without any assumption of vendee's contract obligation, vendors may not specifically enforce said contracts against purchaser from insolvent's receiver, notwithstanding purchaser in his offer to purchase, agreed to pay contract; there being no privity of contract between him and vendors, and his agreement to pay being *nudum pactum*.

Appeals from Ottawa; Miles (Fred T.), J. Submitted January 21, 1931. (Docket Nos. 58, 59, Calendar Nos. 35,238, 35,239.) Decided April 7, 1931. Rehearing denied June 1, 1931.

Separate bills by Peoples Savings Bank, administrator of the estates of Patrick and Bella McCarthy, and Abbie Van Raalte against Lewis A. Geistert, assignee of Grand Rapids Trust Company, as receiver of the Sunset Terrace Resort Company,

insolvent, and others for specific performance of land contracts. Decrees for plaintiffs. Defendant Geistert appeals. Reversed.

Leo C. Lillie, for plaintiffs.

Dunham, Cholette & Allaben (*Knappen, Uhl, Bryant & Snow,* of counsel), for defendant Geistert.

POTTER, J. Fred Z. Pantlind, as trustee, bought the lands involved herein on several land contracts. The contracts contained a covenant against assignment without the written consent of the vendors indorsed thereon. No indorsement of vendor's consent to their assignment was made on any of the contracts. Pantlind, as trustee, transferred his vendee's interest in the land and contracts by quit-claim deed to the Sunset Terrace Resort Company, a corporation. The articles of association of the Sunset Terrace Resort Company state it is assignee of the vendee's interest of Pantlind, trustee, in the land contracts. The Sunset Terrace Resort Company became insolvent. The Grand Rapids Trust Company was appointed receiver for it by the circuit court of Kent county, in chancery, and the property and assets of the corporation were offered for sale by the receiver and sold at receiver's sale. Defendant Geistert made an offer in writing for the assets and property of the Sunset Terrace Resort Company which contained the following:

"This offer will be sufficient to pay in full all claims now allowed, except claims arising upon land contracts, mortgages, taxes and other liens upon real estate, which I will assume and will pay or make such settlement as may be possible after receiving proper conveyances or assignments from the receiver."

Geistert's offer was accepted, an appropriate order entered by the court in the receivership proceedings, the sale made, approved, and confirmed by order of the court. Plaintiffs seek specific performance of the land contracts and the right to a decree for deficiency against defendant Geistert. From a decree for plaintiffs, defendant Geistert appeals.

(1) Are plaintiffs entitled to specific performance and a decree for deficiency against defendant Geistert?

"The principle which is material to be considered in the present case is, that the court gives specific performance instead of damages only when it can by that means do more perfect and complete justice." *Wilson* v. *Railway Co.*, L. R. 9 Ch. (Eng.) 279.

"It is strictly an ancillary and supplementary remedy, and is confined to those classes of agreements for whose breach the mere payment of pecuniary damages is acknowledged to be either impracticable or inadequate." Pomeroy, Specific Performance (3d Ed.), § 4. See, also, *McCall* v. *Atchley,* 256 Mo. 39 (164 S. W. 593).

"The only thing due to the vendor is his money, and this is due as an ordinary money debt, which it is the object of the suit to collect. * * * While at law the title remains in the vendor, yet in equity the contract conveys it to the vendee, and the only principle which allows the vendor to sue for his money, and at the same time seek security against the land, is the one which recognizes the analogy to a vendor's lien. * * * A bill by a vendor is always to get his money, and the lien on the land is only a means of collecting it in whole or in part." *Fitzhugh* v. *Maxwell,* 34 Mich. 138.

"It is in the nature of a bill of foreclosure, and when the rights under the contract are determined, the court will have full power to provide for the

protection of all equities, and to order a sale for the satisfaction of moneys due, if necessary." *Day* v. *Cole,* 56 Mich. 294.

"It is well settled that specific performance is granted in favor of the vendor of land as freely as in favor of the vendee, though the relief actually obtained by him is the recovery of money, the purchase price." *Pearson* v. *Gardner,* 202 Mich. 360 (L. R. A. 1918 F, 384).

(2) It is fundamental that the contract between the parties must be mutual and the rights thereunder reciprocal in order to entitle either to specific performance.

"The contract or agreement sought to be enforced, must be mutual, and the tie reciprocal, or a court of equity will not enforce a performance." *McMurtrie* v. *Bennette,* Harr. Ch. 124.

"It is a general rule that a court of equity will not decree a specific performance where the remedy is not mutual, or one party only is bound by the agreement." *Hawley* v. *Sheldon,* Harr. Ch. 420.

Where there is no mutuality of obligation or no mutuality of remedy, a specific performance will be refused. *Gillette* v. *Metzgar Register Co.,* 243 Mich. 48; *Gannon* v. *Stansfield,* 216 Mich. 440.

"That as a requisite to specific performance there must be mutuality of obligation and of remedy has been made in innumerable cases and is accepted by the textbooks as a cardinal principle." 36 Cyc. p. 621.

(3) The assignment of a land contract is a mere release of interest. The vendor may not compel specific performance by the assignee of the vendee.

"When an agreement has been assigned, the vendor cannot compel the assignee to perform,

there being no contract between them. * * * In such case the vendor must enforce the contract against the original vendee." Waterman, Specific Performance, § 68.

The assignee of the vendee is not a proper party to a bill for specific performance. *Anonymous* v. *Walford,* 4 Russ. 372 (38 Eng. Rep. Repr. 845); *Corbus* v. *Teed,* 69 Ill. 205; Waterman, Specific Performance, § 59.

"The vendor cannot have specific performance against his vendee's assignee, although he has paid part of the consideration; it is optional with the assignee whether or not to complete the contract." 36 Cyc. p. 760.

"The purchaser of the vendee's interest at a judicial sale on a decree against the vendee may sue in his own name, and this principle would include the assignee in bankruptcy or insolvency, if the contract is itself assignable. While the assignee of the vendee may thus sue the vendor to enforce a specific performance, the vendor cannot, upon a mere assignment, maintain a suit against the assignee; his remedy is against the original vendee alone, unless in the change of parties the whole transaction amounts to a novation." Pomeroy, Specific Performance (3d Ed.), § 487.

In *Corbus* v. *Teed, supra,* the vendee sued his assignee to compel him to perform. It was said:

"Complainant could not compel him to perform. Should he file a bill for such purpose the answer would be that he had made no contract with complainant. Hastings by the assignment had a right to pay the money and demand a deed. In such case a court of equity would, undoubtedly, compel a conveyance, if the transaction was *bona fide.* The offer of the deed to Corbus was according to the contract."

(4) There was no agreement by the Sunset Terrace Resort Company in writing or otherwise, to pay the amount due or to grow due on the land contracts. Geistert as purchaser at receiver's sale, could acquire no other or greater interest than that possessed by the receiver, which in turn had no other interest than that of the Sunset Terrace Resort Company. Reliance by plaintiff to sustain its proposed decree for deficiency against defendant Geistert is based upon the language of his bid above quoted, accepted by the trustee of the sale, its approval by the court, the sale made, and the order of confirmation entered.

(5) There is no doubt but the purchaser of mortgaged lands who assumes and agrees in writing to pay the mortgage may be held by a personal decree for any deficiency which may result from the sale of the premises. *Crawford* v. *Edwards,* 33 Mich. 354; *Miller* v. *Thompson,* 34 Mich. 10; *Taylor* v. *Whitmore,* 35 Mich. 97; *Higman* v. *Stewart,* 38 Mich. 513; *Winans* v. *Wilkie,* 41 Mich. 264; *Booth* v. *Conn. Mutual Life Ins. Co.,* 43 Mich. 299; *Gage* v. *Jenkinson,* 58 Mich. 169; *Shelden* v. *Warner's Estate,* 59 Mich. 444; *Winsor* v. *Ludington,* 77 Mich. 215; *Corning* v. *Burton,* 102 Mich. 86; *Union Trust Co.* v. *Detroit Motor Co.,* 117 Mich. 631.

This liability did not exist at common law but is based upon the statute, 3 Comp. Laws 1929, § 14368, which provides:

"If the mortgaged debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the plaintiff may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied, after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases."

It has been repeatedly held by the court that this statute is the sole basis of the right to a decree for a deficiency against a purchaser of mortgaged premises who assumes and agrees to pay the mortgage. *Booth* v. *Conn. Mutual Life Ins. Co., supra; Gage* v. *Jenkinson, supra; Winsor* v. *Ludington, supra; Corning* v. *Burton, supra.*

In *Gage* v. *Jenkinson, supra,* it is said:

"The practice in this class of cases of allowing a personal decree against even the mortgagor himself comes from no original equitable jurisdiction, but springs from quite recent statutory authority."

In *Winsor* v. *Ludington, supra,* it is said:

"The power to make a personal decree against the makers of a mortgage upon real estate, or against others interested in its payment, upon a foreclosure in chancery, comes entirely from the statute."

In *Corning* v. *Burton, supra,* it is said:

"A personal decree may be rendered in a foreclosure case against a grantee of the mortgagor, who has accepted a deed stating that it is subject to the mortgage, which the grantee assumes and agrees to pay. It is settled by repeated decisions in this State and in New York, from which State we borrowed the statute (2 How. Stat., § 6704) which authorizes it."

This rule has no application to land contracts or the assignees thereof.

(6) The assignee of the vendee under land contract at common law was not liable for a deficiency though there was an agreement in writing between the vendee and his assignee that the latter assumed and agreed to pay the amount due and to grow due upon the contract for the reason there was no

privity of contract between the assignee of the vendee and the vendors. *Pipp* v. *Reynolds,* 20 Mich. 88; *Turner* v. *McCarty,* 22 Mich. 265; *Halsted* v. *Francis,* 31 Mich. 113; *Osborn* v. *Osborn,* 36 Mich. 48; *Hicks* v. *McGarry,* 38 Mich. 667; *Hunt* v. *Strew,* 39 Mich. 368; *Wood* v. *Truax,* 39 Mich. 628; *Hidden* v. *Chappel,* 48 Mich. 527; *Necker* v. *Harvey,* 49 Mich. 517; *Monaghan* v. *Agricultural Fire Ins. Co.,* 53 Mich. 238; *Edwards* v. *Clement,* 81 Mich. 513; *Wheeler* v. *Stewart,* 94 Mich. 445; *Linneman* v. *Moross Estate,* 98 Mich. 178 (39 Am. St. Rep. 528); *Chase* v. *Warner,* 106 Mich. 695; *K. O. M. M.* v. *Sharp,* 163 Mich. 449 (33 L. R. A. [N. S.] 780); *Clay Lumber Co.* v. *Hart's Branch Coal Co.,* 174 Mich. 613; *Edwards* v. *Thoman,* 187 Mich. 361.

In 13 C. J. p. 703, it is said:

"In England it is held, subject to the exceptions hereafter stated, that, where two persons make a contract in which one of them promises to confer benefits on a third person, the latter cannot sue on the contract, at law or in equity, for the money or other benefit which it is promised that he shall receive. The same doctrine, with some difference as to the exceptions, has been held, in the absence of a statute, in some of the United States, * * * The reason is that it is held essential that the consideration shall move from plaintiff; there must be privity between the parties in order to support an action on the contract."

This court, in *K. O. M. M.* v. *Sharp, supra,* said:

"It is the general rule in England that a third person cannot become entitled by the contract itself to demand the performance of any duty under the contract. Pollock, Principles of Contract (7th Ed.), p. 199. The rule, contracts creating trusts aside, is the same whether such enforcement is attempted at law or in equity. *Ibid.,* p. 213. In this State the

English rule has been followed when the attempted enforcement of the contract by a third person was at law. *Pipp* v. *Reynolds,* 20 Mich. 88; *Turner* v. *McCarty,* 22 Mich. 265; *Hicks* v. *McGarry,* 38 Mich. 667; *Hunt* v. *Strew,* 39 Mich. 368; *Hidden* v. *Chappel,* 48 Mich. 527; *Edwards* v. *Clement,* 81 Mich. 513; *Linneman* v. *Moross Estate,* 98 Mich. 178 (39 Am. St. Rep. 528)."

In *Pipp* v. *Reynolds, supra,* the court, by Justice GRAVES, said of a contract sued upon:

"The plaintiffs who sue upon it are not shown to have been connected with the consideration or promise, or to have been privy to the transaction."

In *Turner* v. *McCarty, supra,* plaintiff sued on a written contract between others by which he was to be paid. It was said:

"There was no contract relation between the parties to this suit. Turner was only bound to his assignor."

In *Osborn* v. *Osborn, supra,* the court, commenting on *Pipp* v. *Reynolds, supra,* and *Turner* v. *McCarty, supra,* and *Halsted* v. *Francis, supra,* said:

"In each of those cases the plaintiff counted on a promise made to a third person and not to himself."

In *Hicks* v. *McGarry, supra,* it is said:

"We have held in *Pipp* v. *Reynolds,* 20 Mich. 88 and *Turner* v. *McCarty,* 22 Mich. 265, that no action at law will lie by a third person against a promisor who has promised to pay an obligation from a debtor of such person, but who has had no dealings with the creditor."

Hunt v. *Strew, supra,* holds that a promise to pay a debt to a third person "is only good as between parties to the arrangement."

In *Necker* v. *Harvey, supra,* it is held that "a third person cannot sue for damages growing out of a mere breach of a contract between others." (Syllabus.)

In *Edwards* v. *Clement, supra,* it was held that though one person contracted with another to pay a third, such third person could not sue upon the contract because not a party to it; there is as to him no privity of contract.

In *Wheeler* v. *Stewart, supra,* it is said:

"This case comes within the general rule that a promise made by one person to another for the benefit of a third person, a stranger to the consideration, will not support an action by the latter."

In *Linneman* v. *Moross Estate, supra,* the court, citing many of the cases above, adhered to "the rule that a promise made by one person to another for the benefit of a third—a stranger to the consideration—will not support an action by the latter."

In *Clay Lumber Co.* v. *Hart's Branch Coal Co., supra,* the court cited with approval the rule of *K. O. M. M.* v. *Sharp, supra.*

In *Edwards* v. *Thoman, supra,* the court expressly approved the rule as stated in *Wheeler* v. *Stewart, Linneman* v. *Moross Estate,* and the other cases cited above, citing also *Randall* v. *Railway,* 134 Mich. 493.

This court for more than half a century recognized and adhered to the rule as stated in *K. O. M. M.* v. *Sharp, supra,* stated in 13 C. J. p. 703, and sustained by a great number of cases besides those cited above.

(7) It is a maxim which needs no citation of authority that equity follows the law.

"Equity cannot create contracts any more than other courts." *Wood* v. *Truax, supra,*

"It is not the province of the court to alter a contract by construction or to make a new contract for the parties." 13 C. J. p. 525.

"Neither has equity any power to make contracts for the parties which they have not made for themselves." 21 C. J. pp. 153, 154.

"Courts are not called upon when construing contracts, to abrogate or make them for the parties, but when required, to ascertain their provisions and enforce them." *Thayer* v. *Augustine,* 55 Mich. 187 (54 Am. Rep. 361).

Equitable reasons cannot control "against any well-settled rule of law." *McCurdy* v. *County of Shiawassee,* 154 Mich. 550.

If defendant Geistert is not liable at law, because of his bid, he is not liable in equity. This is the rule in Connecticut, Delaware, Georgia, Massachusetts, New Hampshire, Virginia, and Wyoming, as well as in Michigan. 13 C. J. p. 703, 6 R. C. L. § 271, pp. 882–885. No clearer statement of the rule has ever been made than that by Mr. Justice OSTRANDER for the court in *K. O. M. M.* v. *Sharp, supra,* when, citing Pollock on Contracts (7th Ed.), p. 213, he said:

"The rule, contracts creating trusts aside, is the same whether such enforcement is attempted at law or in equity."

The foreclosure of mortgages is a statutory proceeding, *Janower* v. *Sibley Lbr. Co.,* 245 Mich. 571, and the statutory rules governing them are not subject to application to other cases to which the rules have not been extended. Courts of equity find their

basis in the Constitution. They cannot enlarge or impair the obligation of contracts.

(8) In case of novation, a new contract between the creditor or vendor and the third person is substituted in place of the original contract. *Clay Lbr. Co.* v. *Hart's Branch Coal Co., supra.*

"Where a debtor and his creditor and a third person enter into an agreement by which the third person is to pay the debt to the creditor and the debtor is released there is a novation, and the creditor may sue the third person. In such a case, however, there is a contract between the creditor and the third person. If the promise is made by the third person to the debtor and the creditor is not a party thereto he cannot sue, unless the circumstances bring the case within an exception to the general rule." 13 C. J. p. 705.

(9) Though there may be analogies between the rights of a vendor and vendee, and a mortgagor and mortgagee, these relations are separate and distinct. The mortgagor holds the legal title of real estate mortgaged; the vendor holds the legal title of real estate sold. The one is subject to a mortgage given to the mortgagee. The other is subject to a contract given to the vendee. On the performance of the terms of a mortgage, the mortgagor's legal title remains unincumbered. On the performance of the terms of a land contract by the vendee he is entitled to a conveyance. The right to a conveyance in one case arises from breach of contract; the right to conveyance in the other case arises from performance of the contract. The vendor holds the legal title and on foreclosure cuts off the right of vendee to acquire the legal title. In mortgage foreclosure the mortgagee may acquire legal title only by foreclosure and sale of property, payment of the

purchase price, and expiration of the equity of redemption.

(10) The right to take judgment for deficiency against the purchaser of mortgaged premises who promises and agrees to pay the mortgage arises solely from statute, which is in derogation of the common law, is to be strictly construed and not extended by implication or construction to cases not clearly falling within its terms.

By 3 Comp. Laws 1929, § 14018, it is provided:

"In all equitable actions, all persons having an interest in the subject of the action and in obtaining the relief demanded, may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant."

This statute was borrowed from Federal Equity Rule No. 37, and was before the court in *Preston* v. *Preston,* 205 Mich. 646, and *Preston* v. *Preston,* 207 Mich. 681. These cases hold this statute changed the rule established by the prior decisions of the court, so as to permit any party having an interest in the subject-matter of the action or the relief sought to become parties plaintiff.

This is an example of the rule that hard cases make poor law. If this is to stand, the profession should know that the cases mentioned in paragraph numbered (6) above are overruled and the common-law rule, matured by the wisdom of ages, is abrogated.

The language quoted in *Preston* v. *Preston,* 207 Mich. 681, from *Palmer* v. *Bray,* 136 Mich. 85, to

justify the holding, was *dictum.* The mortgagees, who did not furnish the consideration, were expressly named in the mortgage foreclosed. "They were not therefore strangers to the contract" but parties to it. The court, upon the authority of *Corning* v. *Burton, supra,* said:

"It has been repeatedly held by this court that in a suit in equity a person for whose benefit a promise is made may enforce it in his own name."

No case was cited except *Corning* v. *Burton,* to support this statement, and that case, as above pointed out, was clearly and unequivocably based upon the statute (2 How. Stat. § 6704, now 3 Comp. Laws 1929, § 14368). Moreover, Federal Equity Rule No. 37 has to do with intervention, which the Michigan legislature sought to cover in 3 Comp. Laws, 1929, §§ 14018, 14019.

(11) In *Preston* v. *Preston,* 207 Mich. 681, it was held that because the contract was made in the presence of the blind girl and for her benefit, she was a party to the contract. The court said:

"We are of opinion that the plaintiff was, under these circumstances, a party to the contract."

That one is present when a contract is made does not make him a party to it. This case makes no pretense of holding third persons not parties to a contract may maintain an action thereon. It reaffirms the doctrine that only parties to a contract may sue upon it.

Clark Memorial Masonic Ass'n v. *Colman's Estate,* 222 Mich. 599, relies upon the *Preston Case* as controlling. The *Colman Case* is sustainable under the principles established in *Allen* v. *Duffie,* 43 Mich. 1 (38 Am. Rep. 159). There was no thought of the *Preston Case* overruling the *Maccabee Case* (*K. O. M. M.* v. *Sharp, supra*). The court, in *Hines*

v. *Hines,* 212 Mich. 50, expressly approved the holding in *K. O. M. M.* v. *Sharp, supra.*

Claxton v. *Margolis,* 248 Mich. 199, recognized:

"The general rule is that there must be privity of contract between the parties thereto and that no action can be brought upon a contract except by a party to it."

But the court held there was a memorandum in writing, signed by the party to be charged, sufficient to take the case out of the statute.

It is well settled,

a. that contracts to make a will,

b. contracts to reimburse another in property for services rendered,

c. contracts to make one an heir or to treat them as such—

fall within the general exception of contracts creating or resulting in trusts noted by the court in *K. O. M. M.* v. *Sharp, supra.* The theory of recovery in these cases is that it is inequitable for the promisor to receive and retain the consideration moving to him from the promisee or from the person who paid the consideration or performed the contract without having paid the consideration or performed the contract on his part to be paid or performed. In equity, such contracts, where there has been performance by the beneficiary, are enforced, at his instance, on the principle that the promisor having by means of the promise procured the payment of the consideration and the benefit of the performance of the contract to himself, is guilty of fraud in keeping the consideration paid and the benefits of performance received, and repudiating the binding force of the contract by which he procured them and keeping the consideration which moved to him; and equity will treat the promisor and those in privity with him as trustees of the party for whose benefit

the contract was made and specifically enforce the contract against the promisor or those in privity with him, or if the specific property or thing promised has been alienated beyond reach or recall by the promisor, the law will imply a promise to compensate the beneficiary of the contract for its breach and award him damages. The statement in *Smith* v. *Thompson,* 250 Mich. 302, that "The *Maccabee Case* should no longer be held to be a correct exposition of the law of this State relating to such contracts" is *dictum.* The rule of *Smith* v. *Thompson* is not inconsistent with that of *K. O. M. M.* v. *Sharp,* above stated.

Besides the comment of text-writers, the questions involved have been discussed in periodical law literature: Considerations Moving from Third Persons. 9 Harvard Law Review, 233. The Right of a Stranger to Maintain an Action upon a Contract. 11 Central Law Journal, 161. Contracts for the Benefit of Third Persons. 27 Yale Law Journal, 1008. Promises to One of Performance to Another. 24 Case and Comment, 134. The Right of a Third Person to Sue upon a Contract Made for his Benefit. 8 Harvard Law Review, 93. Contracts for the Benefit of a Third Person in the Civil Law. 16 Harvard Law Review, 43. Contract Beneficiaries. 32 Yale Law Journal, 790. History of the Beneficiary's Action in Assumpsit. 3 Select Essays, Anglo-American Legal History, 339.

The abstract question of what the law ought to be is not here, but the concrete question of what the law of this State may be is here for decision.

(a) It has been settled in this State by repeated decisions of the court that at common law specific performance of parol contracts to convey land would be granted if there had been payment of consideration and such performance or part perform-

ance as to take the case out of the operation of the statute of frauds. *Twiss* v. *George,* 33 Mich. 253; *Lamb* v. *Hinman,* 46 Mich. 112; *Putnam* v. *Tinkler,* 83 Mich. 628; *Ruch* v. *Ruch,* 159 Mich. 231; *Hogan* v. *Hogan,* 187 Mich. 278, and cases cited.

(b) It is likewise well settled at common law that contracts to leave property by will may be specifically enforced. Waterman, Specific Performance, § 41, and cases cited; cases cited in note to Pomeroy's Specific Performance (3d Ed.), § 191.

(c) It is well-settled in this State that contracts to leave property by will, if supported by a sufficient consideration and otherwise unobjectionable, are valid and may be specifically enforced. *Faxton* v. *Faxon,* 28 Mich. 159; *Sword* v. *Keith,* 31 Mich. 247; *Mundy* v. *Foster,* 31 Mich. 313; *De Moss* v. *Robinson,* 46 Mich. 62 (41 Am. Rep. 144); *Carmichael* v. *Carmichael,* 72 Mich. 76 (1 L. R. A. 596, 16 Am. St. Rep. 528); *Bassett* v. *American Baptist Pub. Soc.,* 215 Mich. 126 (15 A. L. R. 213); *Jones* v. *Ireland,* 225 Mich. 467; *Smith* v. *Thompson, supra; Jolls* v. *Burgess,* 252 Mich. 437; and

(d) Contracts to make one an heir or to treat him as such are valid and enforceable at common law and have been recognized and enforced in this State. *Wright* v. *Wright,* 99 Mich. 170 (23 L. R. A. 196); *Bassett* v. *American Baptist Pub. Soc., supra;* 36 Cyc. p. 674, and cases cited.

None of these cases militate against the rule as above stated, which is sustained by the great weight of authority, not only in this State but elsewhere. 40 Cyc. pp. 1063–1073 and cases cited.

(12) Notwithstanding *United Fuel & Supply Co.* v. *Sibley Lbr. Co.,* 222 Mich. 401; *Anderson* v. *Thompson,* 225 Mich. 155; *Tapert* v. *Schultz,* 252 Mich. 39, and *Barnard* v. *Huff,* 252 Mich. 258, in the decision of some of which I concurred, subsequent

investigation has satisfied me they are illogical and unsound. If they are to stand—

(a) Section 14368, 3 Comp. Laws 1929, enacted to create an exception in case of mortgage foreclosures to the general rule of contracts, is rendered absurd. The exception created has become the general rule.

(b) Section 14018, 3 Comp. Laws 1929, cited in *Preston* v. *Preston,* 205 Mich. 646, and *Preston* v. *Preston,* 207 Mich. 681, destroys the doctrine of intervention, its basis, and makes all persons who might be permitted to intervene, parties.

(c) To extend 3 Comp. Laws 1929, § 14368 by implication and construction to cases to which by its terms it has no application, reverses a settled principle of statutory construction as applied to enactments in derogation of the common law; and

(d) The vendor's rights under a land contract instead of being analogous to a vendor's lien (*Fitzhugh* v. *Maxwell,* 34 Mich. 138), which arises in favor of a vendor who has sold and conveyed by deed to the vendee, for the purchase money (*Dunton* v. *Outhouse,* 64 Mich. 419), are said to be analogous to those of a mortgagee, where the legal title is in the mortgagor, where the mortgagee has neither legal or equitable title, and may never have had, but holds but a mere mortgage lien.

(e) To reverse a rule fixed and established for centuries, based upon sound reason, logic, and experience, by judicial fiat is to invade the province of the legislature, a co-ordinate department of government.

If this court is wrong, it should get right.

Here, the assignee of the vendee did not assume and agree to pay. Defendant Geistert's liability, if it exists, must be based upon the language of his bid for the property at receiver's sale, by which he acquired only such title, rights, and liabilities as

the receiver had. The receiver had only such title, rights, and liabilities as the Sunset Terrace Resort Company had. The Sunset Terrace Resort Company was not liable for deficiency to vendors on foreclosure. There was no mutuality of contract between the receiver of the Sunset Terrace Resort Company and Geistert, no privity of contract between vendors and Geistert, no right to a decree against him for deficiency at common law, and no statute applicable to land contracts changing the common-law rule. Decree reversed. No costs.

WIEST, J. (*concurring in part*). I concur in dismissing the bill, but not for the reasons stated by Mr. Justice POTTER.

The receiver of the Sunset Terrace Resort Company sold to defendant Geistert the interest of that company in certain land contracts, acquired by way of quitclaim deed from the vendee therein. There never was any assumption by the Sunset Terrace Resort Company of the contract obligations of the vendee in the land contracts. In authorizing sale by the receiver, the court had no power to require the purchaser from the receiver to agree to pay the contracts, and defendant's agreement to pay the vendors was *nudum pactum*. Privity of obligation between the vendors and vendee in the land contracts did not carry over to the assignee of the vendee by the naked quitclaim deed, nor did liability for deficiency upon foreclosure. The receiver of such assignee was not concerned with anything beyond the mere pecuniary interest of the Sunset Terrace Resort Company in the land contracts. Defendant Geistert cannot be held to pay the contracts.

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

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ABANDONMENT—See MUNICIPAL CORPORATIONS (1).

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ACQUIESCENCE—See BOUNDARIES; PHYSICIANS AND SURGEONS (11).

ACTION.

1. Right to use cumulative remedies does not permit or enable one to resort to inconsistent remedies, nor does it obviate defense of waiver or estoppel. *Webb* v. *Knauss*, 198.

2. Where controversy existed between city and certain taxpayers as to validity of bonds issued by city to relieve distress and suffering due to unemployment of inhabitants, and issues of fact were presented, evidence taken, and points of law raised in circuit court, Act No. 36, Pub. Acts 1929, authorizing courts of record to make binding declaration of rights, was applicable. *City of Muskegon Heights* v. *Danigelis*, 260.

See CONSTITUTIONAL LAW (5); CORPORATIONS (6); JUDGMENT (9); RECEIVERS (1, 2, 5).

ADJOURNMENT—See JUSTICES OF PEACE (1).

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AORTA—See MASTER AND SERVANT (18, 19).

APPEAL AND ERROR.

1. In action for personal injury, court's failure to define contributory negligence, and instruction, in effect, that plaintiff's negligence would not be contributory negligence unless it was sole proximate cause of injury was reversible error. *Rockwell* v. *Grand Trunk Western R. Co.*, 145.
2. Question of trial court's authority to grant new trial, not passed on in circuit court, is not properly before Supreme Court. *Watson-Higgins Milling Co.* v. *Gracezyk*, 175.
3. In reviewing judgment on directed verdict against plaintiff, every reasonable inference tending to support plaintiff's claim should be drawn. *Croff* v. *DeVries*, 180.
4. Error in admitting testimony as to remark of eyewitness to automobile accident that driver was on wrong side of street was harmless, where driver himself had testified that he was on wrong side. *Dreyfus* v. *Daronco*, 235.
5. In action for purchase price of carload of grapes claimed by plaintiff to have been diverted to another dealer on account of

APPEAL AND ERROR—Continued.

defendant, finding of trial court on question of fact, where supported by evidence, may not be disturbed by appellate court. *Earl Fruit Co.* v. *Herndon Fruit Co.*, 329.

6. Error in admission of hearsay testimony may not be considered by Supreme Court, where it was received without objection. *Davis* v. *Cohen*, 330.

7. Where case was not settled and signed by trial judge or any one else, in accordance with Circuit Court Rule No. 66, there is nothing before Supreme Court to consider. *Kuschinski* v. *Cohn*, 378.

8. Where evidence presented question of fact for jury, its determination is binding on appellate court. *Hillman Township Board* v. *Empire Mutual Fire Ins. Co.*, 394.

9. In reviewing directed verdict in favor of defendants, testimony must be viewed in light most strongly tending to support plaintiff's claim. *DeLockerby* v. *D'Archangelo*, 420.

10. While on appeal in equity case due weight should be given to advantage which trial judge had in seeing and hearing witnesses, Supreme Court is not thereby relieved from duty of exercising its own judgment in passing on weight of evidence. *Shultz* v. *McCarty*, 445.

11. Error in admission of hearsay testimony by defendant's employee that defendant had instructed him not to allow rear of premises to be used for toilet purposes was not prejudicial, where court instructed jury that employee was in actual charge of building, and if he directed plaintiff to go to rear it would not make any difference whether he had actual authority from defendant or not. *Domzalski* v. *Ver Hoven*, 497.

12. Where, in action for personal injuries, questions of fact were properly submitted to jury, verdict in favor of defendant should not be disturbed, on review, without justification therefor. *Id.*

13. Classifying finding of law as one of fact by trial judge will not disturb result, notwithstanding wrong classification. *Bank of Commerce* v. *Ternes Coal & Lumber Co.*, 548.

14. Where delay in perfecting appeal was caused by failure of court stenographer to furnish transcript of testimony within extension period, refusal of court to grant further extension because motion therefor was not made prior to final day of extension was abuse of discretion. *Martin* v. *Washtenaw Circuit Judge*, 554.

15. In reviewing judgment *non obstante veredicto* for defendant, evidence must be viewed in light most favorable to plaintiffs. *Motyka* v. *Detroit, Grand Haven & Milwaukee R. Co.*, 647.

See APPEARANCE (2); ASSIGNMENTS (2); CIRCUIT COURT COMMISSIONERS; CRIMINAL LAW (7, 8, 15, 21, 24, 26, 34); DIVORCE (3); JUSTICES OF PEACE (4, 5); MUNICIPAL CORPORATIONS (19); PARTITION; PARTNERSHIP (6); SALES (8); STIPULATIONS.

APPEARANCE.

1. By entering general appearance and filing plea of general issue, defendant waived any defect or irregularity in service made upon him (3 Comp. Laws 1915, § 12430). *Croff* v. *DeVries*, 180.

2. General appeal to circuit court from judgment in summary proceedings before circuit court commissioner was in effect general appearance and conferred jurisdiction on said court. *Wolf* v. *Cohen*, 691.

See COURTS (4); DIVORCE (4).

APPLICATION—See PAYMENT (2).

ARBITRARY ACTION—See PHYSICIANS AND SURGEONS (7).

ARCHITECTS—See CONTRACTS (4); DAMAGES.

ARGUMENT OF COUNSEL—See CRIMINAL LAW (24).

ASSAULT AND BATTERY.

In action for assault and battery, where plaintiff's character as law-abiding citizen was not in issue under pleadings, admission of testimony that his reputation was bad was reversible error. *Bennett* v. *Kowenstrat*, 116.

See RAPE (2).

ASSESSMENT—See TAXATION (1).

ASSIGNMENTS.

1. Notice of assignment of account sufficient to direct purchaser's attention to prior rights or equities of third persons and to enable him to ascertain their nature by inquiry is sufficient. *Bank of Commerce* v. *Ternes Coal & Lumber Co.*, 548.

2. In assignee's action on account for carload of lumber shipped to defendant, where there was ample testimony to show that it received notice of assignment before making payment to assignor, finding of trial judge in accordance therewith is not disturbed, on review. *Id.*

See EXECUTORS AND ADMINISTRATORS (8); LANDLORD AND TENANT (1, 2); MORTGAGES (3, 4); PRINCIPAL AND AGENT (1, 2); RECEIVERS (6); SPECIFIC PERFORMANCE (11); VENDOR AND PURCHASER (6, 13).

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ATTORNEY AND CLIENT.

Order of court below impressing lien on judgment for attorney's services for amount claimed is affirmed, on review. *Shank* v. *Lippman*, 451.

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AUTHORITY TO CONTINUE INTESTATE'S BUSINESS—See EXECUTORS AND ADMINISTRATORS (4–6).

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BAIL.

1. Obligation of sureties on bail bond of accused required them to have him in court until his case was finally determined by imposition of sentence, but it terminated when sentence was imposed. *People* v. *Brow*, 140.
2. Court has no authority to continue in force bail bond of accused beyond imposition of sentence without consent of sureties. *Id.*
3. Sureties on bail bond of accused, who were not in court when bond was ordered continued after imposition of sentence, and who did not consent thereto, were not bound by order of continuance. *Id.* 141.

BAILMENTS—See INNKEEPERS.

BANKS AND BANKING.

1. Uniform stock transfer act (2 Comp. Laws 1929, §§ 9520–9544), not having been adopted by two-thirds vote of members-elect, as required by Constitution (article 12, § 9) relating to banking laws, did not affect bank's priority of lien on its stock standing in debtor's name (2 Comp. Laws 1915, § 7975). *Detroit Fidelity & Surety Co.* v. *Continental Bank*, 574.
2. Bank president's letter to third party recommending pledgor of bank stock, which was communicated to pledgee, did not waive bank's prior lien on stock under 2 Comp. Laws 1915, § 7975, especially where bank had no notice that stock was pledged. *Id.*
3. Under 2 Comp. Laws 1915, § 7975, bank making loans to stockholder without notice that stock was pledged had prior lien over pledgee. *Id.*

BELL—See RAILROADS (3).

BENEFICIARY—See TRUSTS (1, 6); WITNESSES.

BILL OF EXCEPTIONS—See EXCEPTIONS, BILL OF.

BILLS AND NOTES.

1. In action on mortgage notes given incident to purchase of Florida real estate, defense of fraud is not established where there was no proof of misrepresentation as to material existing fact upon which defendants relied, and no evidence of seller's bad faith in making statements of values or in declarations of promissory character. *City Investment Co.* v. *Weatherwax*, 166.

BILLS AND NOTES—Continued.

2. In action on mortgage notes given incident to purchase of Florida real estate, defense of lack of consideration, *held*, under circumstances, not tenable. *Id.*

See CONTRACTS (5); FRAUD (4); LICENSES (3, 4); NEGOTIABLE INSTRUMENTS (1–4); PRINCIPAL AND AGENT (2); USURY (2); VENDOR AND PURCHASER (1).

BLUE SKY LAW—See LICENSES (1, 4).

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BOOKS OF ACCOUNT—See EVIDENCE (2, 3).

BOULEVARD PAVING—See MUNICIPAL CORPORATIONS (35).

BOUNDARIES.

1. To establish boundary line by acquiescence, there must exist doubt or dispute as to where line is, and resolving of doubt or composing difference by agreement upon line. *George* v. *Daniels*, 293.
2. Where doubt existed as to location of boundary line, but no showing was made that said doubt had been composed by agreement, tacit or otherwise, boundary by acquiescence has not been established. *Id.*

BREACH OF CONDITION—See INSURANCE (6–8).

BREACH OF CONTRACT—See CONTRACTS (6–8, 10–12); DAMAGES; SALES (2).

BREACH OF COVENANT—See COVENANTS (4).

BREACH OF DUTY—See PROCESS (10, 11).

BREACH OF WARRANTY—See SALES (5–7).

BRICK—See SALES (12).

BROKERS.

1. Execution of lease by landlord to lessees of doubtful financial ability, on broker's assurance that they were financially able to perform, afforded sufficient consideration for broker's agreement to wait for part of his commission until lessees demonstrated ability to perform. *Shiffman* v. *Turner*, 73.
2. Broker is entitled to commission only when he produces person willing, ready, and able to perform. *Id.*

BROKERS—Continued.

3. Broker is not entitled to commission for procuring tenants who executed 20-year lease but were unable to pay taxes agreed, unable to pay first month's rent, and never went into possession, since they were not able to perform. *Id.*
4. Where owner did not list property with broker, did not employ him to sell it, and had no knowledge of his efforts to sell it, false representations made by him to prospective purchaser were not made as owner's agent, and owner is not liable therefor, although sale was afterward made by broker acting for both parties. *Polly* v. *Charoulis*, 363.
5. Admission by owner that broker was his agent in selling property may not be taken as admission that broker was agent in making false representations of which owner had no knowledge before broker actually became agent. *Id.* 364.
6. Where, in exchange of real estate, broker represented to his principal that property he was receiving was worth $7,000, when in fact it was worth only $3,000, broker is liable in action for damages unless jury find from evidence that he acted in good faith and honestly believed representations to be true. *DeLockerby* v. *D'Archangelo*, 420.

See EXCHANGE OF PROPERTY (6).

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"CALAMITY"—See MUNICIPAL CORPORATIONS (18).

CANCELLATION OF INSTRUMENTS.

1. In suit for cancellation of deed to nephew and niece, conclusion of court below that there was no fraud and that grantor was of sound mind when deed was executed, *held*, justified by record. *Ball* v. *Reilly*, 187.
2. Carelessness or inadvertence on part of one executing written instrument does not justify courts in decreeing its nullification in whole or in part. *Pittsburgh Plate Glass Co.* v. *Art Centre Apartments*, 501.
3. Suit by children to set aside transfer of real property by their mother, creating estate by entireties in herself and husband, was properly dismissed where testimony of disinterested witnesses is convincing that at time of execution of deed mother was mentally competent. *Plant* v. *Langdon*, 513.

See DEEDS (2); LICENSES (1, 2); VENDOR AND PURCHASER (12).

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CERTIORARI.

On certiorari to review denial of writ of mandamus, finding of fact by court below, supported by evidence, may not be reviewed. *Steele* v. *Sexton*, 32.

See MASTER AND SERVANT (9, 17); PHYSICIANS AND SURGEONS (3).

CHAMPERTY AND MAINTENANCE.

Defense of champerty does not exist in Michigan, except as specified in 3 Comp. Laws 1929, § 13600. *National Adjusting Ass'n* v. *Dallavo*, 239.

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CHILD LABOR LAWS—See MASTER AND SERVANT (14).

CHIROPRACTORS—See INSURANCE (18); PHYSICIANS AND SURGEONS (1, 2).

CIRCUIT COURT COMMISSIONERS.

Where, on special appeal from judgment in summary proceedings before circuit court commissioner, affidavit on which appeal was based did not allege errors in proceedings before commissioner, but was general, relating only to judgment on merits and stating no objections to jurisdiction, there was nothing before appellate court except retrial of case on its merits (3 Comp. Laws 1929, §§ 14987, 16224). *Wolf* v. *Cohen*, 692.

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COLLATERAL MATTERS—See CRIMINAL LAW (17).

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CONDEMNATION PROCEEDINGS—See EMINENT DOMAIN; MANDAMUS (1); PLEADING (1).

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CONFLICT OF LAWS.

In recognizing and enforcing laws of foreign State, courts are disinclined to overrule positive laws of forum, and such foreign laws will never be given effect when they contravene fixed policy of law of forum, whether such policy is found in statutory enactments or not. *Mount Ida School for Girls* v. *Rood*, 483.

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CONSTITUTIONAL LAW.

1. Withholding credits from high school pupil violating general school law prohibiting membership in high school fraternities, sororities, etc., by high school pupils is not cruel and unusual punishment within meaning of Constitution. *Steele* v. *Sexton*, 33.

CONSTITUTIONAL LAW—Continued.

2. Withholding credits from high school pupil violating general school law prohibiting membership in high school fraternities, sororities, etc., by high school pupils does not violate "due process" clause of Fourteenth Amendment to Federal Constitution, nor is pupil thereby denied equal protection of law. *Id.*

3. Provision of general school law prohibiting membership in high school fraternities, sororities, etc., by high school pupils is not class legislation within inhibition of Constitution. *Id.*

4. Statute may not be declared unconstitutional merely because court may deem it unjust or unwise, nor unless it is in violation of applicable constitutional restrictions. *Naudzius* v. *Lahr*, 216.

5. Right of action for tort to happen in future is not property, and may be abrogated by legislature. *Id.*

6. Equality of rights protected by Michigan Constitution is same as that preserved by Fourteenth Amendment to Federal Constitution. *Id.* 217.

7. Motor car presents social, financial, and governmental problems which justify the legislature in reasonably classifying it apart from other vehicles in enactment of laws. *Id.*

8. Classification need not be made to operate with mathematical nicety, and is not invalid because in practice it results in some inequality. *Id.*

See HOMESTEADS (2); MASTER AND SERVANT (15); MOTOR VEHICLES (2, 3); MUNICIPAL CORPORATIONS (2); PHYSICIANS AND SURGEONS (2); RAPE (4); STATUTES (1–5); TAXATION (2); WEAPONS (1, 2, 4).

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CONSTRUCTIVE TRUST—See EXECUTORS AND ADMINISTRATORS (1); TRUSTS (1–4).

CONTAGIOUS ABORTION—See SALES (5).

CONTEMPT.

Husband appearing in divorce suit by attorney and having actual notice of decree against him for support of child was properly adjudged guilty of contempt, where he wilfully disobeyed said order, notwithstanding irregularity consisting of want of notice to him of settlement and signing decree (3 Comp. Laws 1929, §§ 12773, 12775). *Curtis* v. *Curtis*, 312.

CONTINGENT REMAINDERS—See WILLS (5, 7–9, 12).

CONTINUANCE—See NEW TRIAL (2).

CONTINUING BOND—See BAIL (2, 3).

CONTRACT INTEREST—See HOMESTEADS (1).

CONTRACTOR—See PAYMENT (1).

CONTRACTS.

1. Material departure from terms of offer invalidates offer as made and results in counter proposition, which, unless accepted, cannot be enforced. *Carrollton Acceptance Co.* v. *Ruggles Motor Truck Co.*, 1.
2. Furnishing material to improve owners' property in response to their written order therefor was sufficient consideration to uphold their implied promise to pay therefor. *Milligan* v. *Kappaport*, 120.
3. Failure of contractor to pay for material ordered by owners would not release them from their obligation to pay. *Id.*
4. In action for breach of oral contract to prepare plans and specifications and erect building, finding that contract as claimed by plaintiff was made, *held*, not against great weight of evidence. *Davey* v. *Sanders*, 137.
5. Promissory note given by borrower to loan association licensed under Act No. 317, Pub. Acts 1921, to take place of usurious notes, is best evidence of transaction, and, in absence of showing to contrary, court will assume that it was voluntarily signed. *Michigan Loan Ass'n* v. *Cahill*, 358.
6. In Michigan, it is rule of law, and rule of procedure or remedy, that party to executory contract may always stop performance by other party and refuse further to perform on his part, and thereafter he is liable only for damages for breach of contract. *Mount Ida School for Girls* v. *Rood*, 482.
7. Contract price is recoverable only on theory of performance, and never on theory of inability to perform, so that, although defendant prevented performance by breaching contract, he is not liable for contract price, but only for damages. *Id.*
8. That parties contemplated performance of contract in foreign State does not affect rule that remedy in this State for breach of executory contract is limited to damages for breach. *Id.*
9. Father's promise to pay certain amount for his daughter's board and tuition at boarding school for school year is consideration for school's undertaking, and does not constitute independent contract. *Id.*
10. In action by boarding school for father's breach of executory contract to pay certain amount for daughter's board and tuition for school year, where daughter attended school only part of year, plaintiff has burden of proving amount of damages; that contract was indivisible in that it provided for both board and tuition, rendering it difficult to determine damages, would not change rule and render defendant liable for entire amount. *Id.*

CONTRACTS—Continued.

11. Plaintiff suing for breach of executory contract has burden of establishing not only right to recover but also extent of recovery. *Id.*

12. Where, in action for breach of executory contract, plaintiff offered no proof of damages resulting from breach, judgment was properly entered for defendant. *Id.* 483.

13. In order to maintain action for money paid for shares of corporate stock on theory that contract had been rescinded for fraud, it was upon plaintiff before suit to restore, or offer to restore, whatever of value he had received, but if what he received had no value failure to restore it worked no prejudice. *Anderson* v. *Frischkorn Real Estate Co.*, 668.

14. Showing that shares of corporate stock had no market value was properly accepted by trial judge as showing that they had no value; "value" and "market value" being commonly used interchangeably as equivalents of actual value. *Id.*

15. Where corporate stock had no market value at time of bringing action for its fraudulent sale on theory of rescission, there was nothing of value to return, and bringing action was sufficient rescission. *Id.*

16. Where contract for drilling oil wells provided that, on delivery of steel casing for each well, payment was to be made therefor to contractor by owner, contract was divisible, and, on payment therefor, title passed to owner without further performance of contract. *McAfee* v. *Bankers Trust Co.*, 685.

See BROKERS (1); ESTOPPEL; EXCHANGE OF PROPERTY (2); EXECUTORS AND ADMINISTRATORS (3); INFANTS (1, 3); JUDGMENT (3); LANDLORD AND TENANT (3); LOGS AND LOGGING; MASTER AND SERVANT (14); MECHANICS' LIENS (2); MOTOR VEHICLES (2); MUNICIPAL CORPORATIONS (12, 13, 26, 27); PRINCIPAL AND SURETY (2, 4–7); SALES (1, 2); USURY (1); WILLS (13).

CONTRIBUTORY NEGLIGENCE—See APPEAL AND ERROR (1); MOTOR VEHICLES (7); NEGLIGENCE (2–6); RAILROADS.

CONVEYANCES—See HOMESTEADS (2).

CORPORATIONS.

1. Officers and directors of corporation have its affairs committed to their charge upon trust and confidence that they will be cared for and managed for common benefit of all stockholders. *Thompson* v. *Walker*, 126.

2. It is of essence of trust committed to officers and directors of corporation that it be so managed as to produce to each stockholder best possible return for his investment. *Id.*

3. When real purpose of forming corporation is to use it for illegal purpose, fact of incorporation will not avail promoters as defense in action against them to recover money obtained by such methods. *Id.*

CORPORATIONS—Continued.

4. Promoters of corporation are not entitled to secret profits. *Id.* 127.
5. Where one man or family controls corporation, it is especially true that it must be managed in utmost good faith as to minority stockholders. *Id.*
6. Foreign corporation may bring action without first qualifying to do business in State under 2 Comp. Laws 1929, § 10118, in order to assert its rights arising out of isolated transaction conducted in State by agent. *National Adjusting Ass'n* v. *Dallavo*, 239.
7. Under Act No. 84, Pub. Acts 1921, giving to corporations right of consolidation by three-fourths vote of capital stock (part 1, chap. 3, § 2), and providing that corporations whose act of incorporation is repealed shall be subject to provisions of said act (part 5, chap. 3, § 2), corporation organized previous to enactment of said statute has right of consolidation. *Kirby* v. *Saginaw Hotels Co.*, 308.
8. Conferring on corporations organized under other statutes which are repealed the right to consolidate takes nothing from corporate powers, rights, privileges, and immunities theretofore enjoyed and reserved to them under the statute (Act No. 84, Pub. Acts 1921, part 5, chap. 3, § 2). *Id.*
9. Stockholder acquiring corporate stock after legislature had conferred on corporation right to consolidate may not complain that consolidation with another corporation was not by unanimous vote of stockholders, where statute was complied with. *Id.* 309.

See CONTRACTS (13–15); FRAUD (1, 2); LICENSES (4); RECEIVERS (3); USURY (1).

CORPUS DELICTI—See HOMICIDE (1).

COSTS—See CRIMINAL LAW (35, 36).

COUNTY CLERK—See MUNICIPAL CORPORATIONS (23).

COUNTY OFFICERS—See MUNICIPAL CORPORATIONS (23).

COUNTY TREASURER—See PUBLIC OFFICERS (1).

COURT OFFICER—See COURTS (1).

COURTS.

1. Official circuit court stenographer is officer of court as far as furnishing transcript of testimony is concerned. *Martin* v. *Washtenaw Circuit Judge*, 554.
2. Defense of former suit pending in another jurisdiction is availing only when, if first suit had been decided, it could be pleaded in bar as former adjudication. *Republic Automobile Ins. Co.* v. *Maedel*, 663.

COURTS—Continued.

3. Action by insurance company as assignee of claim for damages arising from automobile accident is not barred by pending suit in another jurisdiction by defendant against assignor for damages arising from same accident, because judgment of no cause of action in pending suit could not be pleaded in bar in instant suit as former adjudication. *Id.* 664.
4. Defendant waived right to challenge jurisdiction of his person by entry of general appearance. *Id.*

See CONFLICT OF LAWS; CRIMINAL LAW (5).

COVENANTS.

1. Property owner does not necessarily waive right to insist on strict enforcement of building restrictions in particular district by failure to insist on observance thereof in other parts of same subdivision. *Home Development Co.* v. *Omeleanchik*, 568.
2. Purpose of building restrictions in certain deeds and contracts, *held*, to be to restrict subdivision to residential purposes. *Id.*
3. Ordinarily grantee may not disregard plain meaning of restrictions by erecting building for business purposes on rear of lot, even though it abuts on side street. *Id.*
4. Former decision of instant case in 248 Mich. 45, is overruled by *Hilt* v. *Weber*, 252 Mich. 198; controlling question therein having been presented on former hearing. *Staub* v. *Tripp*, 633.

CREDIBILITY OF WITNESSES—See CRIMINAL LAW (20).

CRIMINAL CODE—See CRIMINAL LAW (28, 29).

CRIMINAL LAW.

1. In trial for robbery armed, verdict of guilty cannot be said to be against great weight of evidence, because defense of *alibi* was supported by evidence. *People* v. *Wudarski*, 83.
2. Instruction that *alibi* is defense difficult to disprove was not erroneous, notwithstanding notice in writing of intention to claim such defense is required by statute (section 20, chap. 8, Act No. 175, Pub. Acts 1927, as amended by Act No. 24, Pub. Acts 1929). *Id.*
3. In criminal case, jury may be instructed to take into consideration, in weighing testimony given by accused, interest he has in result. *Id.* 84.
4. Under section 29, chap. 8, Act No. 175, Pub. Acts 1927, judge in charge to jury in criminal case may make such comment on evidence, testimony, and character of witnesses as in judge's opinion interest of justice may require, but he should make it clear that he is merely stating his opinion, and not directing jury to be guided by it. *Id.*

CRIMINAL LAW—Continued.

5. Instruction in criminal case calling jury's attention to accused's previous record, and stating that judge would be reluctant to believe accused's testimony as against that of officers was not erroneous where judge further stated that he was only expressing his opinion, and that jury had duty of determining disputed issues of fact (section 29, chap. 8, Act No. 175, Pub. Acts 1927). *Id.*
6. In absence of motion for new trial, Supreme Court may not pass upon question of whether verdict is against great weight of evidence. *People* v. *Jagosz*, 290.
7. Suggestive and leading questions by prosecuting attorney, in prosecution for rape, where not objected to, disclose no error. *Id.*
8. Delay of 63 days after conviction of rape in imposing sentence does not constitute error, in absence of showing of cause therefor. *Id.*
9. That statutory rape was committed in back seat of automobile by another would not render owner and driver of car guilty of said offense, as accessory, in absence of showing by prosecution that he had knowledge that said offense was to be committed; mere knowledge of what was happening when offense was being committed being insufficient to render him guilty (Act No. 175, Pub. Acts 1927, chap. 7, § 39). *People* v. *Burrel*, 321.
10. People are under no obligation to produce unknown witnesses. *People* v. *Todaro*, 367.
11. There was no error in indorsing as witness on information during trial name of one of the officers making arrest (Act No. 175, Pub. Acts 1927, chap. 7, § 40). *Id.*
12. There was no error in trial court's comments on evidence, where jury were informed that they were advisory merely, that jury were sole judges of facts, and that they had full power to use their own judgment as to facts and testimony without necessarily following anything trial judge might say. *Id.* 368.
13. In prosecution for robbery armed, testimony by officer arresting defendant that some one in room where robbery occurred remarked, referring to defendant as one of the robbers, "That is one of them," was admissible if made by one of the robbers or one of the robbed. *Id.*
14. Statements made in presence or hearing of party to be affected thereby under circumstances from which his acquiescence in their truth may be fairly inferred, though not expressed, are admissible in evidence and entitled to consideration by jury in accordance with what they find to be facts. *Id.*
15. Voluntary and irresponsive answer to proper question does not ordinarily constitute error. *Id.*
16. Where no request to charge was made in relation to irresponsive answer to proper question, case is not reversed there-

CRIMINAL LAW—Continued.

for; especially where it does not affirmatively appear that miscarriage of justice resulted therefrom (3 Comp. Laws 1929, § 17354). *Id.*

17. Right of cross-examination in relation to collateral matters rests in discretion of trial court. *People* v. *Marcus*, 410.

18. Where, in prosecution for robbery armed, complaining witness did not know names or whereabouts of certain persons who witnessed holdup, and investigation by police disclosed that they had left State, failure of trial court to instruct jury, as requested, that it was duty of prosecution to produce all *res gestæ* witnesses was not error. *Id.*

19. In prosecution for robbery armed, where defense was *alibi*, trial court was not in error in instructing jury that *alibi* is defense easy to prove and hard to disprove, and therefore they should be careful and cautious in examining evidence in regard thereto; especially where further instruction was given that if defense of *alibi* raised reasonable doubt of defendant's guilt he should be acquitted. *Id.*

20. Testimony by police officer relating to conversation between him and certain of defendant's *alibi* witnesses, *held*, properly received for its bearing on their credibility. *Id.* 411.

21. Defendant may not complain of introduction by prosecution of letter claimed to have been sent to defendant under another name, where defendant's counsel asked to have it introduced. *Id.*

22. Testimony brought out on legitimate cross-examination of codefendant, tending to show commission of another offense, was not prejudicial to defendant, where it did not concern him but related to codefendant, who was acquitted. *Id.*

23. Where defendant had an office, desk, chairs, hat tree, and some blank envelopes and paper, but had no stock of goods, and, although he claimed to have a partner, did not know his address, there was no error in asking him if the office was maintained as a blind. *Id.*

24. Complaint that argument of prosecutor was inflammatory may not be considered by Supreme Court, where argument is not in record. *Id.*

25. Where there was ample evidence of defendant's guilt, determination of facts was for jury, and verdict of guilty may not be said to be against great weight of evidence. *Id.*

26. That codefendant was acquitted may not be considered as bearing on guilt or innocence of defendant, where there was testimony relating to codefendant which had no bearing on guilt or innocence of defendant. *Id.*

27. Where there was no error in charge of court on presumption of innocence, reasonable doubt, character, *alibi*, and defendant's testimony, there is no merit in defendant's claim that verdict of guilty is not in accordance with doctrine of reasonable doubt. *Id.*

CRIMINAL LAW—Continued.

28. Generally, prosecution may not prove commission of another and distinct offense against another party, though of same kind with that charged, for purpose of rendering it more probable in minds of jury that defendant committed offense charged, unless it is admissible under criminal code (3 Comp. Laws 1929, § 17320). *People* v. *Dean*, 434.

29. In prosecution for committing act of gross indecency with boy in violation of 3 Comp. Laws 1929, § 16851, defendant's "motive, intent, the absence of, mistake or accident on his part" was not involved, nor may it be said that in committing said offense he was acting in conformity with any "scheme" or "plan" theretofore formulated by him, and therefore testimony of other similar offenses committed with other persons previous to commission of offense charged was not admissible under criminal code (3 Comp. Laws 1929, § 17320). *Id.*

30. In prosecution for committing act of gross indecency with boy in violation of 3 Comp. Laws 1929, § 16851, admission of testimony of other similar offenses committed with other boys previous to commission of offense charged was reversible error. *Id.*

31. Showing made by prosecutor that he was unable to produce some of the *res gestæ* witnesses, *held*, to justify submission to jury question of whether their absence was satisfactorily explained. *People* v. *Gibson*, 476.

32. One who undertakes to drive motor vehicle on highway while physically weary and sleepy from his own voluntary acts is guilty of negligence within meaning of negligent homicide statute (3 Comp. Laws 1929, §§ 16743–16745). *People* v. *Robinson*, 507.

33. In prosecution for negligent homicide under 3 Comp. Laws 1929, §§ 16743–16745, based on death from collision of passenger in defendant's automobile, request to charge that defendant should not be found guilty if collision occurred while he was asleep due to fatigue and weariness, was properly rejected. *Id.*

34. Where defendant's own testimony shows that in his conviction of negligent homicide there was no miscarriage of justice, assignments of error relating to admission and rejection of testimony and to charge of court, *held*, not prejudicial, although they have some merit and under other circumstances might require reversal. *Id.*

35. Costs imposed as condition of probation under criminal code (3 Comp. Laws 1929, § 17373) are not governed by rules for taxation of costs imposed as part of sentence, but they may be summarily fixed at amount sufficient to reimburse county for all expenses incurred in connection with apprehension, examination, trial, and probationary oversight of probationer. *Id.* 508.

CRIMINAL LAW—Continued.

36. Costs of $200 imposed as condition of defendant's probation under criminal code (3 Comp. Laws 1929, § 17373) after conviction of negligent homicide (sections 16743–16745) are not excessive. *Id.*

37. Probation is substitute for imprisonment; being conditional suspension of sentence. *Id.*

38. Conditions of probation may be altered or amended at court's discretion. *Id.*

39. Where convicted person is placed on probation, imprisonment may not be imposed until probation is revoked or terminated. *Id.*

40. Charge of habitual offender under 3 Comp. Laws 1929, § 17341, includes both identity of person alleged to have committed other felonies and fact of prior convictions. *People* v. *Brown,* 537.

41. Acknowledgment by defendant that he was person charged with fourth felony in supplemental information under 3 Comp. Laws 1929, § 17341, was insufficient plea of guilty to warrant conviction, where record does not show compliance with statutory duty of court to inform defendant of his rights nor plea of guilty to charge. *Id.*

42. Question of sufficiency of evidence is for jury unless there is no evidence at all on material point. *People* v. *Abernathy,* 583.

See CONSTITUTIONAL LAW (1); RAPE (3, 4).

CROSS-EXAMINATION—See CRIMINAL LAW (17, 22, 23); PHYSICIANS AND SURGEONS (8, 10).

CROSSING ACCIDENT—See MOTOR VEHICLES (12–14); RAILROADS.

CRUEL AND UNUSUAL PUNISHMENT—See CONSTITUTIONAL LAW (1); RAPE (4).

CUMULATIVE REMEDIES—See ACTION (1).

CUSTOMS AND USAGES—See INSURANCE (12).

CUT TIMBER—See LOGS AND LOGGING (2, 3).

DAMAGES.

1. Defendant's requested instruction, in action for breach of oral contract, that, if jury found contract to prepare plans and specifications and erect building was made, as claimed by plaintiff, verdict must be for nominal damages only, was properly refused, where there was evidence that value of plaintiff's services in preparing plans and specifications and his expenses in connection therewith amounted to substantial sum. *Davey* v. *Sanders,* 137.

DAMAGES—Continued.

2. Where, in action by architect for breach of contract to prepare plans and specifications and erect building for certain price, he would have been entitled to recover for value of services already performed and also for prospective profits, verdict for value of services alone cannot be said to be excessive. *Id.*

See BROKERS (6); CONTRACTS (6–8, 10–12); EXEMPTIONS (4); INJUNCTION (2); JUDGMENT (14); MOTOR VEHICLES (16); MUNICIPAL CORPORATIONS (24, 28); PRINCIPAL AND SURETY (5–9); SALES (2, 6, 7); STIPULATIONS.

DEBTOR'S STOCK—See BANKS AND BANKING.

DECLARATION—See PLEADING (3).

DECLARATORY JUDGMENTS—See ACTION (2).

DEDICATION.

1. One in possession of strip of land under quitclaim deed is entitled to enjoin repeated trespass by one claiming right to use it as road or street, in absence of evidence that claimed offer of dedication had ever been accepted by proper public authorities or that it had been kept in repair or taken in charge by them. *Ribble* v. *Burnham*, 338.

2. Acceptance of dedication of road or street must be by highway commissioner, township board, or other proper municipal highway authorities; tax assessor having no authority to accept dedication, assessment for taxes is unimportant. *Id.*

See EMINENT DOMAIN (3); HIGHWAYS AND STREETS (3); MUNICIPAL CORPORATIONS (1).

DEDUCTIONS FROM ASSESSMENTS—See MANDAMUS (3); TAXATION (1).

DEEDS.

1. Where grantors' acknowledgment was taken by notary three days after date of deed and after they had examined it, their claim that their signatures were obtained by trick amounting to forgery, is untenable, although grantee was guilty of fraud in the transaction. *Marshall* v. *DeMagnassun*, 56.

2. Where grantors knew that they were signing deed, they are not entitled to have it set aside as constructive forgery, as against good-faith purchasers from grantee, although latter was guilty of fraud. *Id.*

See CANCELLATION OF INSTRUMENTS (1, 3); JUDGMENT (3); TRUSTS (4).

DE FACTO BOARD—See PHYSICIANS AND SURGEONS (14).

DEFAULT—See JUDGMENT (4).

DEFENSE—See ACTION (1); VENDOR AND PURCHASER (3).

DEMAND—See INNKEEPERS (2, 3).

DEPOSIT—See SPECIFIC PERFORMANCE (6).

DEPOSITIONS—See PHYSICIANS AND SURGEONS (5).

DESCENT AND DISTRIBUTION—See WILLS (5, 7).

DESERTION—See DIVORCE (6, 7).

DETROIT CHARTER—See MANDAMUS (3, 4); MUNICIPAL CORPORATIONS (3, 32, 35).

DIRECTED VERDICT—See APPEAL AND ERROR (3, 9, 15); CONTRACTS (12); FORCIBLE ENTRY AND DETAINER (2); MASTER AND SERVANT (6); NEGOTIABLE INSTRUMENTS (11); RAILROADS (4, 5).

DIRECTORS—See CORPORATIONS (1, 2).

DISABILITY—See INFANTS (1, 3); INSURANCE (4).

DISABILITY INSURANCE—See INSURANCE (14–16).

DISCHARGE—See BAIL (1).

DISCHARGE OF PARTNER—See PARTNERSHIP (4, 5).

DISCOVERY OF FRAUD—See FRAUD (3).

DISCRETION OF COURT—See CRIMINAL LAW (17); JUDGMENT (6); RAPE (4); TRUSTS (7, 9); VENUE (2).

DISCRIMINATION—See PHYSICIANS AND SURGEONS (2); TAXATION (2).

DISMISSAL AND NONSUIT—See JUDGMENT (2); PLEADING (1).

DISSOLUTION—See LIMITATION OF ACTIONS (2); PARTNERSHIP (2, 3).

DIVISIBILITY—See CONTRACTS (16).

DIVISION OF PROPERTY—See DIVORCE (5); MUNICIPAL CORPORATIONS (20–22).

DIVORCE.

1. Decree of divorce awarding to wife household furniture and $3,000 equity in home owned by entireties, which is practically all of husband's property, is modified, on appeal, and home ordered sold and proceeds divided equally between them after expenses, taxes, and interest on mortgage are paid; wife to have household goods, and husband released from temporary alimony. *Parsons* v. *Parsons,* 288.

2. If irregularity in filing second decree in divorce suit after enrollment of first decree avoided second one, it leaves first decree unaffected. *Curtis* v. *Curtis,* 312.

3. Denial of defendant's motion to strike second decree in divorce suit from record is immaterial, where it would have availed him nothing had his motion been granted. *Id.*

DIVORCE—Continued.

4. Defendant husband appearing by attorney in divorce suit is entitled to notice of all subsequent proceedings. *Id.*
5. Divorce decree to wife awarding her $11,992.10, and husband $6,196.04 of joint property is affirmed, on appeal by wife, where record shows that although she inherited about $4,000, the rest is the result of their joint efforts, and she has in her own name, in addition to award by court, money and property of value of $7,659.25, making her total holdings $19,651.35, as against husband's $6,196.04. *Howcroft* v. *Howcroft,* 385.
6. To entitle husband to decree of divorce on ground of desertion, he must establish by competent proof cessation of cohabitation, abandonment by wife without fault on his part, and that separation was against his will and desire. *Miller* v. *Miller,* 463.
7. Where finding of trial court that wife did not desert husband but that they separated pursuant to agreement is sustained by record, husband's suit for divorce on ground of desertion was properly dismissed. *Id.*

See CONTEMPT.

DOUBLE LIABILITY—See JUDGMENT (9).

DOUBLE TAXATION—See TAXATION (2).

DOWER—See HUSBAND AND WIFE (3).

DRAINS.

1. Proper method of determining necessity of drain whose purpose appears to be to drain land and not highways is proceeding by drain commissioner rather than by highway commissioner (1 Comp. Laws 1929, § 4951). *Dunn* v. *Meyer,* 563.
2. Court may interfere when highway commissioner acts beyond his powers in constructing drain to drain land rather than highway. *Id.* 564.
3. Highway commissioner has power to construct drain through lands adjacent to highway only in event that principal purpose and effect of drain is drainage of highway (1 Comp. Laws 1929, §§ 4949–4951). *Id.*
4. Construction by highway commissioner of drain whose principal object was drainage of private lands rather than highway was properly enjoined by court below (1 Comp. Laws 1929, §§ 4949–4951). *Id.*

DUE PROCESS—See CONSTITUTIONAL LAW (2).

DUTY TO LOOK—See NEGLIGENCE (6).

ELECTION—See MANDAMUS (7); MASTER AND SERVANT (13, 15).

ELECTIONS.

Where, at State convention, there were two candidates for elective office, and, after ballot was taken, chairman announced name of nominee, and convention adjourned, Supreme Court may not recanvass vote taken and direct that other candidate's name be certified as nominee on ground that after convention adjourned it was discovered that he had majority of votes, in absence of fraud, oppression, or reconsideration by convention. *Rogers* v. *Lawrence*, 594.

See MUNICIPAL CORPORATIONS (14–17, 40); SCHOOLS AND SCHOOL DISTRICTS (3).

"EMERGENCY"—See MUNICIPAL CORPORATIONS (18).

EMINENT DOMAIN.

1. In proceedings to condemn land to widen city street, question of necessity must be determined by jury. *City of Detroit* v. *Judge of Recorder's Court of Detroit*, 6.
2. Condemnation for public purpose of land already used for public purpose must be authorized by legislature, if proposed use materially interferes with present use. *Id.*
3. Rights of owners of reversion and abutting owners in strip of land in middle of street reserved by dedicators for ornamental purposes constitute private property, which must be acquired by city before strip may be used for street purposes. *Id.*
4. Proceedings by city of Detroit to condemn ornamental strip of land in middle of street for purpose of widening street were properly brought under Act No. 149, Pub. Acts 1911, § 2, where owners of reversion and abutting property owners had property rights in said strip. *Id.* 7.
5. It was unnecessary to first attempt to purchase reversionary interest and rights of abutting property owners in strip of land in middle of street reserved for ornamental purpose before beginning proceedings to condemn said strip for purpose of widening street. *Id.*

See MANDAMUS (1); MUNICIPAL CORPORATIONS (3).

EMPLOYMENT INSURANCE—See INSURANCE (10, 11).

ENROLLMENT OF DECREE—See DIVORCE (2).

EQUAL PROTECTION OF LAW—See CONSTITUTIONAL LAW (2).

EQUITY.

Decree providing that grantee account to grantor's estate for rents collected during lifetime of grantor, who retained life estate, did not provide for accounting of money received from "miscellaneous sources." *Ball* v. *Reilly*, 187.

See APPEAL AND ERROR (10); EXECUTORS AND ADMINISTRATORS (2); JUDGMENT (17); SALES (11); VENDOR AND PURCHASER (8).

ESSENTIAL ELEMENTS OF NEGOTIABILITY—See NEGOTIABLE INSTRUMENTS (7).

ESTATE CONVEYED—See WILLS (2).

ESTATES.

1. There can exist but one estate in fee simple to a particular parcel of land. *In re McBride's Estate,* 306.
2. If quitclaim of life estate to fee owner and wife passed estate to them independent of fee, it ended with death of life tenant. *Id.*

See HUSBAND AND WIFE (4).

ESTATES BY ENTIRETIES—See CANCELLATION OF INSTRUMENTS (3); MORTGAGES (5).

ESTATES IN COMMON—See WILLS (2).

ESTOPPEL.

One may not repudiate contract and claim under it at same time. *Webb* v. *Knauss,* 198.

See ACTION (1); LANDLORD AND TENANT (1); MASTER AND SERVANT (15); MECHANICS' LIENS (5); MORTGAGES (5); PLEADING (2); PRINCIPAL AND AGENT (3); SPECIFIC PERFORMANCE (2); TRUSTS (8); WILLS (15).

EVIDENCE.

1. It is common knowledge that coal cannot be handled without discharging dust. *McMorran* v. *Cleveland-Cliffs Iron Co.,* 65.
2. Where books of account, papers, or other documents submitted to jury are too voluminous to admit of separate presentation, abstracts, conclusions, or summaries may be submitted together with originals, even though prepared in advance. *Thompson* v. *Walker,* 126.
3. Auditor may not testify, from examination of books, in advance, what they would show if introduced, but books must be introduced in evidence and he may testify to what they show. *Id.*
4. Buyer's written confirmation of terms of purchase of carload of rye and seller's written invoice conforming therewith constituted final agreement which could not be changed by proof of prior parol agreement. *Watson-Higgins Milling Co.* v. *Graczyk,* 175.
5. Under Circuit Court Rule No. 23, § 6, statement of fact set forth in notice added to plea is treated as admission by defendant and need not be proved by plaintiff. *Id.*
6. Testimony as to remark of eyewitness to automobile accident that driver was on wrong side of street was inadmissible. *Dreyfus* v. *Daronco,* 235.
7. Generally, ambiguous written expressions are subject to explanation by oral testimony. *Cook* v. *Schwemler,* 458.

EVIDENCE—Continued.

8. In action for injuries received by fall into open stairway leading to basement at rear of defendant's garage when plaintiff went there in nighttime for toilet purposes on claimed direction of defendant's employee, which he denied, his testimony that defendant had instructed him not to allow rear of premises to be used for toilet purposes was inadmissible as hearsay. *Domzalski* v. *Ver Hoven,* 497.

9. Where waiver executed by materialman providing for waiver of liens for materials furnished "at any time heretofore" bore two dates, it was ambiguous, and parol evidence was admissible to show intent of parties as to date it became effective. *Pittsburgh Plate Glass Co.* v. *Art Centre Apartments,* 501.

10. Danger of driving automobile on highway by one not in possession of his faculties is matter of common knowledge. *People* v. *Robinson,* 507.

See APPEAL AND ERROR (5, 6, 11, 15); ASSAULT AND BATTERY; BILLS AND NOTES (1); CONTRACTS (5); CRIMINAL LAW (1, 6, 13, 14, 20, 22, 25, 28–30, 42); HOMICIDE (2, 3); HUSBAND AND WIFE (7, 8); INSURANCE (12); JUDGMENT (1); MASTER AND SERVANT (17, 18); NEW TRIAL (1); NUISANCE (9); PARTNERSHIP (6); PHYSICIANS AND SURGEONS (3, 5, 8, 10); REFORMATION OF INSTRUMENTS (2); WILLS (16–18).

EXCEPTIONAL CIRCUMSTANCES—See SPECIFIC PERFORMANCE (9, 10).

EXCEPTIONS—See INSURANCE (3); STATUTES (9).

EXCEPTIONS, BILL OF.

Motion to amend findings of court under Circuit Court Rule No. 45, in case tried without jury, should be treated as motion for new trial under 3 Comp. Laws 1915, § 12634, and time for settling bill of exceptions governed thereby. *Timmerman* v. *Bultman,* 99; *Schroetenboer* v. *Bultman,* 108; *Nienhuis* v. *Bultman,* 109.

EXCESSIVE COSTS—See CRIMINAL LAW (36).

EXCESSIVE SPEED—See MOTOR VEHICLES (13).

EXCESSIVE VERDICT—See DAMAGES (2); FRAUD (5).

EXCHANGE OF PROPERTY.

1. In suit for rescission of contract for exchange of property, holding of court below that fraud was established, *held,* justified by record. *Mezak* v. *Fox,* 326.

2. Where plaintiffs in suit for rescission by court of contract for exchange of property on ground of fraud made full tender in their bill, no other tender was necessary. *Id.*

3. Claim by defendants that plaintiffs in suit for rescission are guilty of laches because they retained possession of property received after starting suit and making tender is without

EXCHANGE OF PROPERTY—Continued.

merit, since it was upon them to stand to their tender, save property, and restore what of value they had received in case they prevailed. *Id.* 327.

4. In decreeing rescission of contract for exchange of property for fraud and to restore *status quo*, court properly took account of disbursements, benefits, and the like, as between parties. *Id.*
5. Rule that statement by owner, made during negotiations for exchange of property, that it was worth sum in excess of its real value does not amount to fraud, applies only to statements made by parties themselves, and not to one made by third person acting on behalf of party claiming to have been defrauded. *DeLockerby* v. *D'Archangelo,* 420.
6. Broker acting as agent in exchange of real estate is charged with duty of protecting principal's interests, and he must act in good faith in representing value of respective properties. *Id.*
7. Owner of property, who deeded it to plaintiff and received in exchange therefor property from third party who received plaintiff's property, is not liable in action for fraud in misrepresenting value of his property, in absence of showing that he had ever seen plaintiff's property or had any knowledge of its value. *Id.*
8. That plaintiffs, in exchange of properties, made unfortunate investment, would not entitle them to equitable relief of rescission, unless they were defrauded. *Shultz* v. *McCarty,* 445.
9. Where defendant's books showed that, for several months previous to its sale, theater was being operated at profit represented, said representation may not be found to be false because previous to that time it had been operated at loss. *Id.*
10. Where plaintiff was experienced in valuing properties, looked over property he was to receive several times, and was not deceived by price represented as its value, he is not entitled to rescind contract for exchange on ground of fraud, although price was boosted somewhat for trading purposes; price fixed on his property being of same kind. *Id.* 446.

EXECUTION—See JUSTICES OF PEACE (3).

EXECUTORS AND ADMINISTRATORS.

1. Where court decree constituted fund constructive trust in hands of husband and wife, estate of deceased wife was not necessary party to suit against husband to enforce trust. *Pierce* v. *Smith,* 45.
2. That aged aunt turned over rental checks to nephew, who looked after her business, and that he deposited some of them in his account in bank, is insufficient in itself to warrant charging his estate with amount thereof, especially where both are now deceased, and their relationship was intimate, almost that of parent and child. *Ball* v. *Reilly,* 187.

EXECUTORS AND ADMINISTRATORS—Continued.

3. Decree providing that estates of nephew and niece account to estate of deceased aunt for rentals collected, *held*, not justified, in absence of evidence showing enforceable agreement that rents should be paid to aunt, and especially in view of fact that she had previously quitclaimed to them all her interest in leased property. *Id.*

4. Except by order of court, direction in will, or by consent of all parties interested, administrator has no authority to continue business which was being conducted by intestate when he died. *Marshall Field & Co.* v. *Himelstein*, 355.

5. Administrator continuing intestate's business without authority has no power to bind estate. *Id.*

6. Where administrator continues intestate's business without authority, justice's court has jurisdiction in action against him personally for merchandise bought in connection with said business, notwithstanding 3 Comp. Laws 1929, § 15982, providing that no justice of peace shall have cognizance of actions against executors or administrators as such, since in contracting said debt he was acting as individual and not in representative capacity. *Id.*

7. Neither foreign executor nor his assignee may maintain proceeding in this State to foreclose real estate mortgage belonging to decedent, but proceeding must be brought by administrator appointed in this State. *Weaver* v. *Shevitz*, 535.

8. Administrator appointed under ancillary probate in this State was real party in interest in proceedings to foreclose mortgage belonging to decedent, even if distribution agreement and order of probate court in foreign State amounted to assignment. *Id.*

See WILLS (13, 15).

EXECUTORY DEVISE—See WILLS (7).

EXEMPTIONS.

1. Statute exempting household goods should be liberally construed in favor of householder. *Slumpff* v. *McGuire & Hansen*, 473.

2. That household article is not only item of furniture or utility but is also ornamental in character and of value somewhat in excess of bare necessity of its character, does not place it beyond scope of exemption statute. *Id.*

3. Floor rugs, although more expensive than those in common use, are household goods of such character that judgment debtor is entitled to select exemption therefrom under statute (3 Comp. Laws 1915, § 12858, subd. 7). *Id.*

4. Where levy and sale of household goods occurred while 3 Comp. Laws 1915, § 12858, subd. 7, was in force, householder's exemption was limited to $250, and therefore in action for damages for wrongful levy his damages are limited to said amount, although at time of trial statute had been amended increasing exemption to $500 (3 Comp. Laws 1929, § 14578). *Id.*

EXERCISE OF OPTION TO TWO PERSONS—See SPECIFIC PERFORMANCE (8).

EXPLANATION—See HUSBAND AND WIFE (8).

EXTENSION OF LEASE—See SPECIFIC PERFORMANCE (1, 2).

EXTENSION OF TIME—See APPEAL AND ERROR (14); EXCEPTIONS, BILL OF; PRINCIPAL AND SURETY (8).

EYEWITNESSES—See APPEAL AND ERROR (4); EVIDENCE (6).

FALSE REPRESENTATIONS—See VENDOR AND PURCHASER (1).

FEDERAL CONSTITUTION—See CONSTITUTIONAL LAW (6).

FEES—See MUNICIPAL CORPORATIONS (23).

FEE SIMPLE—See ESTATES; HUSBAND AND WIFE (4).

FIDUCIARY RELATION—See TRUSTS (5).

FINDING OF COURT—See ASSIGNMENTS (2).

FINDING OF FACT—See APPEAL AND ERROR (5, 13); CERTIORARI; MASTER AND SERVANT (8–10, 12, 17, 18); PARTNERSHIP (3); PHYSICIANS AND SURGEONS (3).

FINDING OF LAW—See APPEAL AND ERROR (13).

FIRE INSURANCE—See INSURANCE (5, 7, 8).

FISCAL YEAR—See MUNICIPAL CORPORATIONS (37, 39).

FORCE—See FORCIBLE ENTRY AND DETAINER; RECEIVERS (4).

FORCIBLE ENTRY AND DETAINER.

1. In order to maintain action for forcible entry and detainer, entry or detainer must have been riotous, or personal violence must have been used or threatened, or conduct of defendant must have been such as to inspire terror or alarm. *Christian* v. *Amster*, 400.
2. In action for forcible entry and detainer, where there was no evidence that any force or violence was offered, verdict should have been directed in favor of defendant. *Id.*

FORECLOSURE—See EXECUTORS AND ADMINISTRATORS (7); MORTGAGES (5, 6).

FOREIGN CORPORATIONS—See CORPORATIONS (6); PROCESS (2, 3).

FORFEITURE—See LANDLORD AND TENANT (1, 2); VENDOR AND PURCHASER (6).

FORGERY—See DEEDS.

FOURTH FELONY—See CRIMINAL LAW (41).

FRAUD.

1. In action against promoters of corporation for fraud in sale of its stock, corporation was not necessary party. *Thompson* v. *Walker*, 127.
2. Controlling stockholders, directors, officers, and promoters of corporation owed duty to act in utmost good faith to see that statements made by them to prospective stockholders were true, and it is no defense, in action thereon, that they believed the statements, when made, to be true, or that they acted in good faith, if in fact statements were false. *Id.*
3. Person defrauded is not required to be vigilant in discovering fraud. *Anderson* v. *Frischkorn Real Estate Co.*, 668.
4. That plaintiff knew, when he signed renewal notes for purchase price of corporate stock, that at least two representations made to him were false did not waive the fraud as matter of law, where he did not learn of falsity of other material representations until shortly before suit. *Id.*
5. Testimony by plaintiff attaching fraud to earlier as well as later subscription for corporate stock justified trial court in submitting both transactions to jury, notwithstanding letter by plaintiff's counsel seeming to indicate that no fraud was claimed in earlier transaction. *Id.* 669.

See BILLS AND NOTES (1); BROKERS (4–6); CANCELLATION OF INSTRUMENTS (1); CONTRACTS (13); CORPORATIONS (3); DEEDS; ELECTIONS; EXCHANGE OF PROPERTY (1, 5–10); INSURANCE (1); LICENSES (1, 2); LIMITATION OF ACTIONS (1); MOTOR VEHICLES (16); MUNICIPAL CORPORATIONS (7); PRINCIPAL AND AGENT (4); SALES (9–11); STATUTES (8); TRUSTS (4); VENDOR AND PURCHASER (1, 4, 7, 10, 12).

FRAUDS, STATUTE OF.

Sale of parts for trucks manufactured especially for buyer and not suitable for sale to others in regular course of business falls within exception to statute of frauds (3 Comp. Laws 1915, § 11835, subd. 2). *Carrollton Acceptance Co.* v. *Ruggles Motor Truck Co.*, 1.

See SPECIFIC PERFORMANCE (1).

FRAUDULENT CONVEYANCES.

Transfer to daughter by father, who was in failing financial circumstances, of all of his property in consideration of his support and maintenance, was properly adjudged to have been in fraud of creditors, where father remained in possession, collected rents, and retained proceeds, and no support was furnished by daughter; especially where father's testimony shows actual intent to defraud. *Grand Haven State Bank* v. *Church*, 347.

FUEL DOCK—See NUISANCE (1–7).

FUTURE ADVANCES—See MORTGAGES (8, 9).

FUTURE TORT ACTION—See CONSTITUTIONAL LAW (5).

GARAGE—See INJUNCTION (6).

GARBAGE—See NUISANCE (8, 9, 12).

GARNISHMENT.

Writ of garnishment against debtor, issued after appointment of receiver without permission of court, fastened no lien and worked no preference. *O'Connor* v. *Vander Veen*, 77.

See JUDGMENT (8, 9).

GATES—See RAILROADS (3).

GENERAL APPEAL—See APPEARANCE (2).

GENERAL APPEARANCE—See APPEARANCE (2).

GOOD FAITH—See BROKERS (6); CORPORATIONS (5); EXCHANGE OF PROPERTY (6); FRAUD (2); JUDGMENT (10); TRUSTS (4).

GOOD FAITH PURCHASERS—See NEGOTIABLE INSTRUMENTS (11).

GOVERNMENTAL FUNCTION—See MUNICIPAL CORPORATIONS (24–26, 28).

GRADED SCHOOL DISTRICT—See SCHOOLS AND SCHOOL DISTRICTS (2, 3).

GRAPES—See APPEAL AND ERROR (5); SALES (8).

GRATUITOUS PASSENGERS—See MOTOR VEHICLES (3).

GRATUITOUS SURETIES—See PRINCIPAL AND SURETY (3, 4).

GREAT LAKES—See NAVIGABLE WATERS.

GREAT WEIGHT OF EVIDENCE—See CRIMINAL LAW (25); MASTER AND SERVANT (17, 18).

GROSS INDECENCY—See CRIMINAL LAW (29, 30).

GROSS NEGLIGENCE—See MOTOR VEHICLES (5, 6); PLEADING (3–5); STATUTES (6).

GUESTS—See INNKEEPERS (2, 3); MOTOR VEHICLES (2, 3, 5); PLEADING (5); STATUTES (5, 6).

HABITUAL OFFENDER STATUTE—See CRIMINAL LAW (40, 41).

HARMLESS ERROR—See APPEAL AND ERROR (4, 11).

HEARING—See PHYSICIANS AND SURGEONS (8, 9, 13).

HEARSAY—See APPEAL AND ERROR (6, 11); CRIMINAL LAW (13); EVIDENCE (6, 8).

HIGH SCHOOL FRATERNITIES—See CONSTITUTIONAL LAW (2, 3); MANDAMUS (2); SCHOOLS AND SCHOOL DISTRICTS (1); STATUTES (1).

HIGHWAYS AND STREETS.

1. Extent to which road is used does not govern in determining whether it exists by user, but it is sufficient if it was used as much as business of surrounding population required. *Village of Riverview* v. *A. G. Liggett & Sons Co.*, 23.
2. In suit to enjoin obstruction of highway, evidence *held*, sufficient to establish highway by user, under 1 Comp. Laws 1915, § 4307. *Id.* 24.
3. Mere fact that public uses way will not make it public way; but there must be more, such as keeping in repair or adoption by public authorities. *Ribble* v. *Burnham*, 338.

See DEDICATION; DRAINS; EMINENT DOMAIN (4); JUDGMENT (1); MUNICIPAL CORPORATIONS (1–11, 19, 26, 27).

HOLLAND CHARTER—See MUNICIPAL CORPORATIONS (4).

HOME-RULE ACT—See MUNICIPAL CORPORATIONS (36–39).

HOMESTEADS.

1. Homestead right attaches to house and lot being purchased on contract, where purchaser is living there with his family. *Ter Keurst* v. *Zinkewicz*, 383.
2. Under Constitution (article 14, § 2), alienation of homestead by owner, if married, is void without signature of wife. *Id.*

See SPECIFIC PERFORMANCE (3).

HOMICIDE.

1. In prosecution for negligent homicide under 3 Comp. Laws 1929, §§ 16743–16745, evidence that defendant was driving automobile while under influence of intoxicating liquor at time of homicide, as charged, *held*, sufficient to sustain conviction of involuntary manslaughter. *People* v. *Gibson*, 476.
2. In prosecution for murder, even where evidence is all circumstantial, if it is such as tends to show guilt of defendant, it should be submitted to jury. *People* v. *Abernathy*, 583.
3. In prosecution for murder, evidence was sufficient to justify submitting case to jury, although it was circumstantial. *Id.* 584.

HORN—See MOTOR VEHICLES (9).

HOTEL—See MORTGAGES (6).

HOUSEHOLD GOODS—See EXEMPTIONS.

HUSBAND AND WIFE.

1. Life estate granted husband and wife by entireties accords all usufructs to husband, and therefore wife takes nothing. *Willis* v. *Willis' Estate*, 296.
2. Life estate granted husband and wife is by entireties if it does not end until death of survivor, but if life estate ends at death of either tenant there exists no estate by entireties, because without right of survivorship there exists no estate by entireties. *Id.*

HUSBAND AND WIFE—Continued.

3. That wife having inchoate dower right in husband's land joined with him in executing land contract thereon, would give her no right to payments either before or after husband's death. *In re McBride's Estate,* 305.
4. Quitclaim of life estate to fee owner and wife did not modify fee, but it either merged life estate in fee, or, at most, carried use and occupation of premises to husband and wife during lifetime of life tenant; fee remaining in husband. *Id.*
5. Husband is entitled to all benefits of life estate held by him and his wife by entireties. *Id.* 306.
6. Where fee owner and wife executed contract for sale of land to which he and his wife had life estate during lifetime of life tenant, and life tenant died before husband, all sums due under contract passed to administrator of husband's estate as personalty. *Id.*
7. In action for alienation of wife's affections, where count charging adultery was withdrawn by plaintiff, rulings of court as to admissibility of evidence, *held,* not prejudicial error, although court may have been overcautious in desiring to eliminate testimony from which inference of adultery might be drawn. *Cook* v. *Schwemler,* 458.
8. Where, in action for alienation of wife's affections, letter from defendant to plaintiff's wife was introduced in evidence, defendant was properly allowed to explain that statement therein that he could write a lot of stuff did not mean mushy stuff. *Id.*

See ESTATES (2); HOMESTEADS (2); NUISANCE (12); SPECIFIC PERFORMANCE (3); WILLS (15).

ILLEGAL EMPLOYMENT OF MINORS—See MASTER AND SERVANT (13–15).

IMMEDIATE EFFECT—See STATUTES (3, 4).

IMPLIED CONTRACT—See JOINT ADVENTURES.

IMPLIED PROMISE TO PAY—See CONTRACTS (2).

IMPLIED WARRANTY—See SALES (4, 12).

IMPRISONMENT—See CRIMINAL LAW (39).

IMPROVEMENTS—See SPECIFIC PERFORMANCE (1, 4).

INCIDENTAL INCOME—See MUNICIPAL CORPORATIONS (28).

INCOME—See TRUSTS (1).

INCONSISTENT CLAIMS—See ESTOPPEL.

INCONSISTENT REMEDIES—See ACTIONS (1); LANDLORD AND TENANT (1, 2).

INCONTESTABLE CLAUSE—See INSURANCE (2, 3); STATUTES (8, 9).

INDEPENDENT CONTRACT—See CONTRACTS (9).

INDORSING NAMES OF WITNESSES—See CRIMINAL LAW (11).

INFANTS.

1. Legislature may remove disability of minor to contract. *Naudzius* v. *Lahr*, 217.
2. While infant is something of ward of State, it is by trust voluntarily assumed and declared by State. *Id.*
3. Legislature may abrogate disability of infants to contract. *Thomas* v. *Morton Salt Co.*, 613.

See MASTER AND SERVANT (13–15); MOTOR VEHICLES (2).

INFERENCES—See APPEAL AND ERROR (3).

INFRINGEMENT—See PATENTS.

INJUNCTION.

1. Decree enjoining infringement of patent should be definite and certain in its terms, so that defendants may know what they are restrained from doing. *Hamilton Manfg. Co.* v. *Poll*, 324.
2. Where further proceedings under judgment for possession of premises were enjoined on filing of bond (3 Comp. Laws 1915, § 12667) for damages, and injunction was later dismissed, circuit court had authority to determine damages without reference to circuit court commissioner (section 12668). *Morris* v. *Barker*, 334.
3. One in actual possession of land, claiming title, may maintain suit to enjoin repeated trespass. *Ribble* v. *Burnham*, 338.
4. Constable designated in præcipe to serve process has special, personal, and financial interest in performance by court clerk of his legal duty to deliver such process to him for service, and therefore he is proper party to maintain suit to enjoin judge and clerk from interfering with exercise of his office and perquisites thereof by refusing to deliver to him such process. *Brand* v. *Teagan*, 531.
5. Under 3 Comp. Laws 1929, § 14018, joinder of home owners as additional parties plaintiff, after proofs were all in, was properly permitted, in suit to enjoin violation of building restrictions, where defendant suffered no disadvantage therefrom except technical one. *Home Development Co.* v. *Omeleanchik*, 569.
6. Decree enjoining use of building for store purposes and ordering its removal because such use violates building restrictions is modified, on appeal, and permission given to convert it into private garage, which defendants claim they intend to do, within limited time. *Id.*
7. One not party to proceedings at law is not entitled to preliminary injunction enjoining sale of goods and chattels levied upon by officer without filing bond required by statute (3 Comp.

INJUNCTION—Continued.

Laws 1929, § 14352 *et seq.*), even though bill for injunction showed undoubted equities. *Wayne Colorplate Co.* v. *Wayne Circuit Judge*, 666.

See DEDICATION (1); DRAINS (2, 4); HIGHWAYS AND STREETS (2); NUISANCE (3, 5–7, 10–12); PATENTS; PRINCIPAL AND SURETY (9).

INNKEEPERS.

1. Statute limiting liability of innkeeper (2 Comp. Laws 1929, § 8803) is in derogation of common law, and must be strictly construed. *Davis* v. *Cohen*, 330.
2. Formal demand by guest for return of property left with innkeeper was waived by his statement to guest's husband, in response to inquiry, in effect, that he could not and would not comply with demand for its return. *Id.* 331.
3. In action by guest under 2 Comp. Laws 1929, § 8804, for value of property left with innkeeper, *prima facie* case was made by showing that property was left in innkeeper's possession and refusal or neglect to return on demand, and it was upon defendant to go forward with evidence and show that loss was not caused by theft or negligence of himself or any of his servants. *Id.*
4. In said action, mere statement in plaintiff's proof that loss was due to robbery does not exonerate defendant, and his failure to prove that robbery was not committed by him or any of his servants entitled plaintiff to recover. *Id.*

INSANE PERSONS—See VENDOR AND PURCHASER (11).

INSTRUCTIONS—See APPEAL AND ERROR (1); CRIMINAL LAW (2, 3, 5, 12, 18, 19, 33); DAMAGES (1); INSURANCE (8); RAPE (1–3).

INSURANCE.

1. In action on benefit certificate, claim that it was obtained by misrepresentation as to material facts is good defense, if proved. *Schempf* v. *New Era Life Ass'n*, 153.
2. Claim by insurer that life insurance policy is against public policy and therefore void is contest required by Comp. Laws Supp. 1922, § 9100(147) to be made within designated period, and may not be urged thereafter. *Bogacki* v. *Great-West Life Assur. Co.*, 254.
3. After lapse of two years, contest of life insurance policy is limited to exceptions stated in statute (Comp. Laws Supp. 1922, § 9100 [147]). *Id.*
4. Where injury to insured resulted in amputation of right arm above elbow, it was not loss of hand within meaning of accident policy defining such loss as severance at or above wrist joint, but was loss of arm for which no indemnity was provided, and therefore insured is entitled to indemnity provided for total disability rather than that provided for specific loss

INSURANCE—Continued.

of hand; that insured was totally disabled from carrying on business he was formerly engaged in not being disputed. *Nelson* v. *Great Northern Life Ins. Co.*, 351.

5. Use of insured building as public hall was within terms of insurance policies describing it, among other things, as hall. *Hillman Township Board* v. *Empire Mutual Fire Ins. Co.*, 394.

6. Rights of insured and insurer which became fixed while Act No. 264, Pub. Acts 1921, was in force, are not affected by its repeal. *Id.*

7. In action on fire insurance policies, where insurer claims breach of condition, it has duty of showing that there was causal relation between breach and loss (Act No. 264, Pub. Acts 1921). *Id.*

8. In action on fire insurance policies on town hall, where insurer claimed breach of condition in that building was used as public hall, charge of court in reference thereto, *held*, warranted under the circumstances; insurer's agent having had full knowledge of use and character of building, which was not misdescribed in policies. *Id.*

9. Where insured obtained from local secretary of mutual benefit association blank application for change of beneficiary, and later returned it to secretary and her husband, stating that she had signed it, and they both signed as witnesses thereto, if signature was not that of insured her action constituted adoption of it as her own, and gave it same force and effect as if written by her own hand. *Ancient Order of Gleaners* v. *Zeluff*, 426.

10. Exceptions to policy insuring railroad employee against loss of job except in case of his "wilfully inviting his own discharge" operates only when insured intentionally gives occasion for his discharge; "wilful" meaning "intentional;" and "inviting" meaning, among others, "to tempt; to give occasion for or opening to." *McKimmy* v. *Conductors Protective Assur. Co.*, 521.

11. That railroad employee brought action for personal injuries against his employer without first presenting his claim to its claim department did not establish that he was "wilfully inviting his own discharge" within exception to policy insuring him against loss of his job, in absence of showing that he knew or intended that his failure to seek compromise of his claim would result, or be likely to result, in his dismissal. *Id.* 522.

12. Where exception in policy insuring railroad employee against loss of job applies only to his own acts, knowledge of custom which would imperil his job must be brought home to him before testimony of said custom would be admissible in action by him on policy. *Id.*

13. In action on insurance policy which is not ambiguous, there is no occasion for application of rule that it will be construed most strongly against insurer. *Brod* v. *Detroit Life Ins. Co.*, 545.

INSURANCE—Continued.

14. Where disability insurance policy by its terms is not straight disability contract, but requires that disability to be compensable shall be both total and permanent, both elements must coexist. *Id.*

15. Temporary total disability, followed by only partial disability, is not within benefits of policy requiring disability to be both total and permanent to be compensable. *Id.*

16. Although insured was totally disabled for year he is not entitled to benefits under disability policy requiring proof that disability is total and will presumably be for life, in absence of showing of probable duration of total disability or that such showing had been made in his proof of claim. *Id.*

17. Where, in furnishing blanks for proof of claim, insurer stated it reserved all legal defenses, it did not thereby, or later by receiving proof of claim, waive legal defense that insured had not complied with terms of policy, of which it had no notice. *Erdman* v. *Great Northern Life Ins. Co.*, 579.

18. Policy requiring insured to be under care of licensed physician or surgeon, being plain and unambiguous, may not be extended by construction to include treatment by chiropractor as within terms of policy. *Id.*

See COURTS (3); LANDLORD AND TENANT (1); STATUTES (8, 9).

INTENT—See EVIDENCE (9); FRAUDULENT CONVEYANCES; LICENSES (3); PROCESS (2); STATUTES (7); WILLS (1, 2, 8).

"INTENTIONAL"—See INSURANCE (10, 11).

INTEREST—See LANDLORD AND TENANT (4, 5); USURY (2).

INTESTATE ESTATE—See WILLS (11, 12).

INTOXICATING LIQUORS—See HOMICIDE (1).

"INVITING"—See INSURANCE (10).

INVOLUNTARY MANSLAUGHTER—See HOMICIDE (1).

INVOLUNTARY PAYMENT—See MUNICIPAL CORPORATIONS (29-34).

IRREGULARITIES—See MUNICIPAL CORPORATIONS (40).

IRRESPONSIVE ANSWER—See CRIMINAL LAW (15, 16).

ISOLATED TRANSACTION—See CORPORATIONS (6).

JOINDER OF PARTIES—See INJUNCTION (5); NUISANCE (10–12).

JOINT ADVENTURES.

Under common law, persons engaged in joint adventure relating to single transaction were regarded as partners, and, as general rule, were held not entitled to compensation for services rendered beyond share of profits received, with the exception that, in case one partner performed unusual services in behalf of partners at their request, law implied agreement to compensate him therefor. *Johnson* v. *Ironside*, 428.

See TRUSTS (8, 9).

JOINT TENANCY—See WILLS (2).

JUDGMENT.

1. Decree in former suit that road exists by user has some evidentiary value in present suit involving same road, although not binding because between different parties. *Village of Riverview* v. *A. G. Liggett & Sons Co.*, 24.

2. *Res adjudicata* may not be raised by motion to dismiss, because motion is heard upon allegations in bill, but where bill by reference incorporates former adjudications, then *res adjudicata* based thereon may be urged by motion to dismiss. *Bocinski* v. *Krzeminski*, 48.

3. Unappealed judgment of restitution in summary proceeding to recover possession under forfeiture of land contract is *res adjudicata* in suit to have deed and contract back decreed to constitute mortgage. *Id.*

4. Under Circuit Court Rule No. 32, § 4, showing of defendants' defense in action at law by affidavit of merits as prescribed by Circuit Court Rule No. 34, is condition precedent to right to have default and judgment based thereon set aside. *Feierabend* v. *Manistee Circuit Judge*, 115.

5. Affidavits of merits in opposition to motion for summary judgment do not comply with Circuit Court Rule No. 34, where affiants are not competent to testify to statements contained therein. *Schempf* v. *New Era Life Ass'n*, 152.

6. On hearing of motion for summary judgment, court may, in its discretion, require production of witnesses for oral examination in open court. *Id.* 153.

7. Refusal of court to take testimony offered for purpose of supplying insufficiencies of affidavits of merits in opposition to motion for summary judgment was abuse of discretion, where witnesses were then in courtroom. *Id.*

8. Affidavit of merits showing that defendant had been garnisheed in independent action brought against plaintiff was insufficient to prevent entry of summary judgment under 3 Comp. Laws 1915, § 12581, and Circuit Court Rule No. 34, as amended. *Jackson Reinforced Concrete Pipe Co.* v. *Central Contracting & Engineering Co.*, 157.

9. Entry of summary judgment against defendant after it had been garnisheed in independent action against plaintiff would not subject defendant to double liability, since it could apply for stay of execution and thus protect its rights. *Id.*

10. Statutory test in determining whether motion for summary judgment should be denied is good faith and merits of defense as disclosed by showing made. *Id.*

11. Decision of Supreme Court that superintendent of public instruction was not legally entitled to additional salary for services as director of vocational education (Act No. 149, Pub. Acts 1919), or as director of vocational rehabilitation (Act No. 211, Pub. Acts 1921), is controlling in action against him by State to recover money so illegally paid to him. *State of Michigan* v. *Johnson*, 317.

JUDGMENT—Continued.

12. Decree is open to collateral attack if void. *Morris* v. *Barker*, 334.

13. Recitals in decree which are outside issue presented may be rejected as surplusage without voiding decree. *Id.*

14. That decree for damages is excessive because of erroneous computation would not render it void but only voidable, and therefore it would not be open to collateral attack on said ground. *Id.*

15. Plaintiff's motion for summary judgment should have been granted where it appears that averments in defendant's affidavit of merits, even if true, would not constitute defense to plaintiff's cause of action. *Jones* v. *Wayne Circuit Judge*, 515.

16. Where, subsequent to decision of Supreme Court affirming judgment against appellants and remanding case to circuit court, appellants delivered draft to court clerk in satisfaction of judgment and costs with instructions to deliver to appellee when he filed satisfaction of judgment, but his attorney refused to accept draft, claiming that it was insufficient in amount, whereupon its return was demanded, payment stopped, and appellants' motion for rehearing granted, there was no satisfaction of judgment. *Staub* v. *Tripp*, 633.

17. Relief from judgment may not be granted in equity on ground that plaintiff, without fault on her part, lost her right to review because of gross negligence of her attorney to whom she had intrusted appeal, notwithstanding allegations of errors and irregularities in judgment which might have been sufficient to release her had it been reviewed. *Brylł* v. *Karchmarz*, 678.

See CONTEMPT; COURTS (2, 3); COVENANTS (4); DIVORCE (2, 3); EQUITY; EXCHANGE OF PROPERTY (4); INJUNCTION (1); PRINCIPAL AND SURETY (9); VENDOR AND PURCHASER (2).

JUDICIAL NOTICE—See EVIDENCE (1, 10).

JUDICIAL POWER—See PHYSICIANS AND SURGEONS (4).

JURISDICTION—See APPEARANCE (2); CIRCUIT COURT COMMISSIONERS; COURTS (2, 4); EXECUTORS AND ADMINISTRATORS (6); INJUNCTION (2); JUSTICES OF PEACE (1–3, 5); MUNICIPAL CORPORATIONS (13).

JURY—See EMINENT DOMAIN (1); VENUE (3).

JUSTICES OF PEACE.

1. Where cause in justice's court was adjourned by stipulation to certain date, justice was without jurisdiction to render judgment therein before adjourned day. *Beier* v. *Pacholka*, 673.

2. Transcript of judgment in justice's court must affirmatively show jurisdiction. *Id.*

JUSTICES OF PEACE—Continued.

3. Where transcript of judgment in justice's court showed on its face that justice was without jurisdiction to render judgment, execution based thereon and all subsequent proceedings thereunder are void. *Id.* 674.
4. Statute providing for appeals from justice's court governs appeals from circuit court commissioner (3 Comp. Laws 1929, § 14987). *Wolf* v. *Cohen*, 691.
5. In special appeal from judgment in justice's court, objections to jurisdiction must be specifically set forth in affidavit (3 Comp. Laws 1929, § 16224); if stated too generally they will not be considered by appellate court. *Id.*

See EXECUTORS AND ADMINISTRATORS (6); PROCESS (4).

LACHES—See EXCHANGE OF PROPERTY (3).

LAND CONTRACTS—See HUSBAND AND WIFE (3, 6); PRINCIPAL AND AGENT (1, 2); VENDOR AND PURCHASER (2–5, 7).

LANDLORD AND TENANT.

1. Lessor, by electing to proceed against all parties as tenants to enforce payment of taxes and insurance after serving notice of forfeiture of lease for unauthorized assignment, thereby waived forfeiture. *Webb* v. *Knauss*, 197.
2. Forfeiture declared by lessor for unauthorized assignment of lease may be waived by prosecuting to conclusion inconsistent remedy. *Id.*
3. Where lessee under terms of long-time lease deposited fund with lessor as security for faithful performance of lessee's agreements thereunder, duty of lessor to keep fund intact depends on contract. *Jones* v. *Wayne Circuit Judge*, 515.
4. Fair construction of terms of lease requiring lessor to pay interest on fund deposited with him by lessee as security for faithful performance of his agreements thereunder is that lessor is entitled to use of fund. *Id.*
5. Failure of lessor to keep intact fund deposited with him by lessee as security for faithful performance of lessee's agreements thereunder does not constitute ground for rescission of lease by lessee, where lessor is required to pay interest on said fund. *Id.*

See BROKERS (1, 3); SPECIFIC PERFORMANCE (1, 2).

LAPSED LEGACY—See WILLS (10, 11).

LEADING QUESTIONS—See CRIMINAL LAW (7).

LEAVE OF COURT—See RECEIVERS (1, 2, 5).

LESSER OFFENSES—See RAPE (3).

LICENSES.

1. Where customer's dealings with salesman licensed under blue sky law (Act No. 220, Pub. Acts 1923) took place after his discharge but before his license was canceled, his employer is liable for his fraudulent acts. *Timmerman* v. *Bultman*, 99; *Schroetenboer* v. *Bultman*, 108; *Nienhuis* v. *Bultman*, 109.
2. Stock dealer, to relieve himself from fraudulent acts of salesman after his discharge, must surrender to securities commission salesman's license for cancellation. *Id.*
3. Promissory note given by borrower to loan association licensed under Act No. 317, Pub. Acts 1921, for money borrowed with legal interest, is not void because of failure of association to deliver to borrower statement provided for in section 14 of said statute; no such intent being expressed in act. *Michigan Loan Ass'n* v. *Cahill*, 359.
4. Where corporate stock was sold in violation of blue sky law (2 Comp. Laws 1929, § 9769 *et seq.*), its delivery to purchaser constituted no consideration for notes given in payment therefor, and accommodation indorsers on said notes may not be held liable, where sale has been voided and stock tendered back. *Baltzer* v. *Rutt*, 389.

LIENS—See ATTORNEY AND CLIENT; CANCELLATION OF INSTRUMENTS (2); EVIDENCE (9); MECHANICS' LIENS (4, 5); MUNICIPAL CORPORATIONS (29–31); VENDOR AND PURCHASER (10).

LIFE ESTATES—See ESTATES (2); HUSBAND AND WIFE (1, 2, 4, 5); WILLS (15).

LIFE INSURANCE—See INSURANCE (2, 3); STATUTES (8, 9).

LIMITATION OF ACTIONS.

1. Law tolerates no fraud, yet frequently permits time to operate as bar to its assertion. *Bogacki* v. *Great-West Life Assur. Co.*, 254.
2. While statute of limitations is applicable to partnership accounts, as general rule it does not begin to run until dissolution or until there has been settlement or accounting of partnership dealings. *Reindel* v. *Reindel*, 680.
3. Where one partner on his own account used part of building leased by partnership, also using same clerical force, telephones, elevators, etc., as partnership, part of expense of which he paid, and it was understood that adjustment in respect to rent would be determined by accounting, statute of limitations did not run against partnership's claim for rent. *Id.*

See INSURANCE (2, 3); MASTER AND SERVANT (11, 19); STATUTES (8).

LOAN ASSOCIATIONS—See CONTRACTS (5); LICENSES (3); USURY (2).

LOGS AND LOGGING.

1. Contract for sale of all timber on certain land, *held*, to fix rule of action for parties thereto and law of case. *Case* v. *Harrah*, 524.
2. Contract for sale of all timber standing, lying, and being on certain described lands, with right to remove timber "so cut" on payment of agreed price per thousand feet, is construed to permit buyer to cut timber before paying therefor. *Id.*
3. Where contract for sale of timber provided that it should not be removed until paid for, that all timber not released should be security for purchase price, and that buyer would pay taxes on land until timber was removed, cut timber was included in security, and buyer was liable for taxes on land where timber was cut but not paid for or released. *Id.*

See WOODS AND FORESTS (2).

LOSS OF HAND—See INSURANCE (4).

LUMBER—See ASSIGNMENTS (2).

MACHINERY—See NUISANCE (6).

MANDAMUS.

1. Where, in reviewing order dismissing petition to condemn land to widen city street, only questions of law are raised, and mandamus is effective, mandamus is permitted, as against objection that it is not proper remedy. *City of Detroit* v. *Judge of Recorder's Court of Detroit*, 7.
2. Mandamus is proper remedy to test validity of action of school authorities in withholding credits from high school pupil violating general school law (chapter 33, pt. 2, Act No. 319, Pub. Acts 1927) prohibiting membership in high school fraternities, sororities, etc., by high school pupils. *Steele* v. *Sexton*, 32.
3. Mandamus will not issue to compel city of Detroit and its board of assessors to make deductions from tax roll after it has been confirmed and passed out of their control (Detroit Charter, tit. 6, chap. 2, §§ 5, 6). *First National Bank of Wyandotte* v. *Common Council of Detroit*, 89; *Equitable & Central Trust Co.* v. *Common Council of Detroit*, 97; *First National Bank of Wyandotte* v. *Board of State Tax Commissioners*, 98.
4. Provision of Detroit city charter (title 6, chap. 4, § 30) that council may provide by ordinance for refund of taxes illegally assessed or collected is not self-executing, and in absence of passage of such ordinance, refund may not be compelled by mandamus. *Id.*
5. Mandamus will not issue where it will be unavailing. *Id.* 90.
6. Citation of cases wherein availability of remedy by mandamus was not raised cannot have effect of making mandamus availing in case where question is raised and when it is in fact and law unavailing. *Id.*

MANDAMUS—Continued.

7. On mandamus to compel city clerk to call election for recall of mayor, allegation in answer to show cause that many signatures appear more than once was too indefinite to require plea thereto. *Karwick* v. *Grajewski,* 110.

See CERTIORARI; ELECTIONS.

MANDATORY PROVISIONS—See MUNICIPAL CORPORATIONS (36).

MARKET VALUE—See CONTRACTS (14, 15); SALES (2).

MARRIED WOMEN—See WILLS (13–15).

MASTER AND SERVANT.

1. If relation of master and servant was suspended while servant was temporarily assisting another, master would not be liable for servant's acts. *Rockwell* v. *Grand Trunk Western R. Co.,* 144.
2. Where master hires or lends servant to another for particular work and resigns control over servant while performing that work, he ceases to be servant of original master and becomes servant of one to whom he is hired or lent. *Id.*
3. Where servant is hired or lent to another, in determining whose servant he is, test is as to who has right to control him. *Id.*
4. Where railroad company, owning electric crane which it furnished to consignees to unload freight, paid operator, had right to discharge him, and consignee had no control over crane or operator except by way of signals to indicate direction of hoisting, operator was servant of railroad company, rendering it liable for his acts. *Id.*
5. Servant is one over whom master has control. *Croff* v. *De Vries,* 180.
6. In employee's action for injury to hand, based on employer's alleged negligence in failng to warn of danger in operating electrically driven meat grinder, judgment for defendant on directed verdict is affirmed by equally divided court. *Jarmoszko* v. *Myslywiec,* 204.
7. Nightwatchman employed by city to guard concrete mixer and other tools used in connection with improvement of street, who, while walking about in immediate vicinity of his employment, was struck by automobile and fatally injured, is presumed to have been in performance of his duties, in absence of testimony to contrary, entitling widow to award under workmen's compensation act. *Schlickenmayer* v. *City of Highland Park,* 265.
8. Employer petitioning to stop compensation payments to injured employee on ground that disability has ceased, has burden of establishing its claim. *Johnson* v. *Folwell-Ahlskog Co.,* 271.
9. On certiorari to review award of department of labor and industry, based on finding of partial disability, if testimony supports said findings, award must be affirmed. *Id.*

MASTER AND SERVANT—Continued.

10. Testimony that, while injured employee is able to do light work, and has mowed lawns and dusted furniture in store, he cannot labor full time and is unable to return to his former or like employment, justified finding of department that he is partially disabled. *Id.*

11. Where injured employee's actual disability did not develop within six months after accident, of which employer had notice, claim for compensation filed within three months after disability manifested itself to such extent that employee was compelled to quit work was filed within statutory period (2 Comp. Laws 1915, § 5445, as amended by Act No. 64, Pub. Acts 1919). *Hunt* v. *F. R. Patterson Construction Co.*, 273.

12. Where doctors disagreed as to cause of employee's death, and attending physician certified cause of death as cerebral apoplexy induced by alcoholism, but two doctors testified that in their opinion accidental injury resulting in amputation of left arm was contributing cause, question of cause of death was one of fact for department of labor and industry. *Leffler* v. *Morton Salt Co.*, 276.

13. Employed minors between ages of 16 and 18 years, whether legally or illegally employed, are within terms of workmen's compensation act (Act No. 162, Pub. Acts 1927), unless, in accordance with its terms, they elect otherwise. *Thomas* v. *Morton Salt Co.*, 613.

14. Act No. 162, Pub. Acts 1927, subjecting employed minors between ages of 16 and 18 years, whether legally or illegally employed, to provisions of workmen's compensation act, abrogates to certain extent judicial rule that contract of employment made in violation of child labor laws carrying criminal penalties is void. *Id.* 614.

15. Employed minor between 16 and 18 years of age, whether legally or illegally employed, who elects to accept benefits of workmen's compensation act (Act No. 162, Pub. Acts 1927), is estopped to deny its constitutionality. *Id.*

16. Compensation under workmen's compensation act was properly denied to wife of deceased employee whose death was caused by fall from stairway he was ascending to toilet while ill, in absence of any evidence as to what caused his fall; there being no evidence tending to show causal connection between his employment and his death. *La Plante* v. *Chevrolet Motor Co.*, 626.

17. On certiorari to review award under workmen's compensation act, Supreme Court may not reverse finding of department of labor and industry as contrary to great weight of evidence if finding is supported by competent evidence, although it might have reached different conclusion under conflicting testimony. *Hayes* v. *Boutell*, 628.

18. Finding of department of labor and industry that employee's injuries received in course of his employment caused his death two years later from ruptured aneurism of aorta, may not be

MASTER AND SERVANT—Continued.

reversed as contrary to great weight of evidence, where supported by testimony, although there was impressive testimony to the contrary. *Id.*

19. Claim under workmen's compensation act for death of employee from ruptured aneurism of aorta caused two years before by injuries received in course of his employment is barred under 2 Comp. Laws 1929, § 8431, where decedent, after his injury, for which he received compensation, returned to his former employment and continued therein for over two years, and until his sudden death, without claim of disability, or of disability in fact, and without continuing compensation. *Id.* 629.

See NEGLIGENCE (1).

MATERIAL CHANGE IN PAYMENT OF DEBT—See PARTNERSHIP (3, 4).

MATERIAL FACT—See INSURANCE (1).

MATERIALMEN—See MECHANICS' LIENS (2); MUNICIPAL CORPORATIONS (12, 13); PARTNERSHIP (1).

MATERIAL WITNESS—See NEW TRIAL (2).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See WITNESSES.

MEANDER LINE—See NAVIGABLE WATERS.

MEAT GRINDER—See MASTER AND SERVANT (6).

MECHANICS' LIENS.

1. Under 3 Comp. Laws 1915, § 14800, as amended by Act No. 304, Pub. Acts 1925, address of owner in statement of lien is not essential to validity thereof; form of statement being permissive and not mandatory. *Milligan* v. *Rappaport*, 120.
2. Furnishing material to contractor to improve owners' property in response to their written order to do so was sufficient contract to support lien therefor. *Id.*
3. Where, on execution by materialman of waiver of lien for materials furnished to subcontractor, latter was paid substantial sum, there was consideration for waiver, although materialman was paid nothing on account. *Pittsburgh Plate Glass Co.* v. *Art Centre Apartments*, 501.
4. Mechanic's lien once waived may not be revived in absence of express agreement binding upon those whose interests are adversely affected. *Id.*
5. Where materialman executed waiver of lien for material furnished or delivered "heretofore or at any time hereafter," its claim of lien for material furnished should have been denied. *Id.* 502.

See EVIDENCE (9).

MENTAL COMPETENCY—See CANCELLATION OF INSTRUMENTS (1, 3); WILLS (16–18).

MERGER—See HUSBAND AND WIFE (4).

MISCARRIAGE OF JUSTICE—See CRIMINAL LAW (16, 34).

MISTAKE—See REFORMATION OF INSTRUMENTS.

MORTGAGE NOTES—See BILLS AND NOTES.

MORTGAGES.

1. Purchase-money mortgage recorded on same day has priority over another mortgage given by purchaser before acquiring title to one furnishing money to make cash payment, although latter was first recorded. *Fecteau* v. *Fries,* 51.
2. Person furnishing money to make cash payment and taking mortgage therefor from purchaser before latter had title must be held to have knowledge of giving of purchase-money mortgage where represented at transaction when latter mortgage was given. *Id.*
3. Where two mortgages covering same property were acknowledged and recorded same day, record disclosing that one was given to mortgagor's grantor and was in nature of purchase-money mortgage was sufficient to put assignee of other mortgage on inquiry as to priority of mortgages. *Id.*
4. Assignee of mortgage has no greater rights than assignor. *Id.*
5. Where remaindermen joined with life tenant in mortgaging property, and, on foreclosure and expiration of redemption period, aided in conveying it to life tenant and wife, claim of remaindermen that said conveyance was mere redemption from mortgage foreclosure is without merit, since it created estate by entireties, which is inconsistent with and repugnant to any interest of remaindermen, and they are therefore estopped from complaining of result they aided to produce. *Bartholomew* v. *Salvation Army,* 280.
6. Where foreclosure of mortgage on hotel was in equity, and those interested had notice of sale and reasonable time in which to refinance, if possible, order confirming sale should not be set aside and resale ordered because of deficiency, in absence of guaranty that on resale property will bring more than on sale already had. *Detroit & Security Trust Co.* v. *Tuller Hotel Co.,* 415.
7. Failure to pay mortgage tax does not render mortgage void, but makes it unenforceable. *Riess* v. *Old Kent Bank,* 557.
8. Parties to mortgage originally intended to secure particular debt may extend security to different debt or future advances, as far as their respective rights are concerned, so long as third parties are not prejudiced. *Id.*
9. Where mortgage securing specific debt was also intended to cover future debts, land contracts given as additional security are properly held as security for additional loan, although not mentioned in note, and original loan has been paid in full. *Id.*

See EXECUTORS AND ADMINISTRATORS (7); JUDGMENT (3).

MOTION TO DISMISS—See JUDGMENT (2); MANDAMUS (1); PLEADING (1); PROCESS (1).

MOTOR VEHICLES.

1. Evidence of arrangement between finance company's agent and automobile purchaser that latter should drive car to garage and leave it there until he had made past-due payment did not establish that finance company took possession and that purchaser was its agent in driving car to garage, rendering it liable for his negligent act. *Croff* v. *DeVries*, 180.
2. Act No. 19, Pub. Acts 1929, amending Act No. 302, Pub. Acts 1915 (motor vehicle law), and abolishing right of action by guest for ordinary negligence of owner or operator, is not based on theory of contract, agency, or waiver, nor is there any constitutional objection rendering it inapplicable to minors. *Naudzius* v. *Lahr*, 217.
3. Act No. 19, Pub. Acts 1929, amending Act No. 302, Pub. Acts 1915 (motor vehicle law), and abolishing right of action by guest for ordinary negligence of owner or operator, is not unconstitutional as arbitrary class distinction between motor vehicles and those propelled by humans or animals, or as between gratuitous and paying passengers in same situation (Const. Mich. art. 2, § 16, Federal Constitution, 14th Amendment). *Id.*
4. One may be guilty of negligence who permits an incompetent person to drive an automobile, especially when owner remains in car and fails to protest against reckless driving. *Id.* 218.
5. Even if automobile owner's negligence in permitting incompetent brother to drive, resulting in injury to guest passenger, was gross negligence, it would not be actionable under Act No. 19, Pub. Acts 1929, if driver was guilty of no negligence or was guilty of only ordinary negligence, since defendant's prior gross negligence would not be proximate cause, not having had any effect on accident. *Id.* 219.
6. In action by guest against owner of automobile for negligence in allowing incompetent brother to drive, resulting in injury to plaintiff, declaration must properly charge defendant's fault both as gross negligence or wanton and wilful misconduct and as proximate cause of accident or charge driver with gross negligence or wanton and wilful misconduct causing injury, in order to recover under Act No. 19, Pub. Acts 1929. *Id.*
7. Whether pedestrian struck and injured by automobile traveling on wrong side of street was guilty of contributory negligence in failing to look in that direction before attempting to cross street, *held*, under circumstances, question for jury. *Dreyfus* v. *Daronco*, 235.
8. That approaching street car temporarily prevented automobile driver from crossing to proper side of street would not excuse his negligence in continuing on wrong side, resulting in injury to pedestrian, since it was his duty to stop and allow street car to pass. *Id.*

MOTOR VEHICLES—Continued.

9. Where there was evidence that automobile driver was on wrong side of street when he ran into and injured pedestrian, and that, although he saw pedestrian, he gave no warning of his approach, trial court properly refused to hold that there was no evidence of his negligence. *Id.*

10. In order to render owner of automobile liable for negligence of driver under Act No. 56, Pub. Acts 1927, § 29, it is not necessary that particular driver be known to owner and his consent to such driver be given; implied consent being sufficient. *Lidtka* v. *Wagner*, 379.

11. Whether owner of automobile was liable for personal injuries resulting from collision while car was being driven by prospective purchaser in another city, to which salesman had taken it, *held*, under evidence, question for jury, although owner had no knowledge of said prospective purchaser and did not assent to his driving (Act No. 56, Pub. Acts 1927, § 29). *Id.*

12. Automobile drivers approaching street intersection at right angles to each other are each required to use such care under circumstances as would be required of ordinarily prudent person to avoid collision; and each may assume that other will conduct himself as reasonably prudent driver would under like circumstances. *Swainston* v. *Kennedy*, 518.

13. Testimony that automobile driver approached street intersection at excessive speed, that he neglected to make proper observations, and that he failed to accord right of way to driver first entering intersection, *held*, sufficient to justify finding of jury that he was guilty of negligence. *Id.*

14. Whether automobile driver was guilty of contributory negligence in proceeding to cross intersection in front of approaching automobile 250 feet from intersection when he was only 40 feet from it was question for jury; that he did not look again before proceeding to cross being insufficient to establish his contributory negligence as matter of law. *Id.* 519.

15. Under 1 Comp. Laws 1929, § 4660, legal ownership of automobile may not be returned to seller without proper transfer of certificate of title. *Kelly* v. *Lofts*, 552.

16. In action by seller on note given for purchase price of automobile, purchaser, who had not rescinded contract by proper transfer of certificate of title, and who therefore still owns car, is entitled to recoup damages for seller's fraudulent representations. *Id.*

See APPEAL AND ERROR (4); CONSTITUTIONAL LAW (7); CRIMINAL LAW (9, 32, 33); EVIDENCE (6, 10); HOMICIDE (1); MASTER AND SERVANT (7); PLEADING (3, 5); SALES (9–11); STATUTES (5, 6).

MUNICIPAL CORPORATIONS.

1. Reservation by dedicators of plat of strip of land in middle of street for ornamental purposes, with right to abutting owners to vacate street if city failed to maintain strip in ornamental manner, did not of itself empower city to abandon it at will, but dedication must be presumed to be subject to city's right, under its charter (Act No. 326, Local Acts 1883, chap. 7, § 33, as amended by Act No. 544, Local Acts 1887), to abandon strip, and acceptance of plat and dedication did not constitute waiver of said right. *City of Detroit* v. *Judge of Recorder's Court of Detroit*, 6.
2. Under the Constitution (section 28, art. 8), right to control of streets, alleys, and public places is reserved to cities, villages, and townships. *Id.* 7.
3. Under charter of city of Detroit, adopted pursuant to so-called home-rule act, common council of said city has right to condemn private property for street purposes. *Id.*
4. Under its charter, city of Holland had power to vacate part of street. *Manufacturers Foundry Co.* v. *City of Holland*, 60.
5. That asserted purpose, inducing vacation of street, and acted on by city council, was made in good faith, forbids nullification by reason of subsequent events. *Id.*
6. Failure of city council to recite in record that it deemed vacation of part of street public improvement was not fatal to vacation if in fact it necessarily so found. *Id.*
7. Neither advisability nor purpose of vacating part of street is subject to review by court unless vacation was abuse of power or brought about by fraud. *Id.*
8. In suit against city to quiet title to part of street vacated by council and quitclaimed to plaintiff's grantor, city may not urge reversion to city's grantors, where they are not parties. *Id.* 61.
9. There is no merit in city's contention that vacation of part of street was without consideration, where property rights in another strip of land were acquired by abutting owner and opened as way in place of that vacated. *Id.*
10. Vacation of part of street to allow enlargement of manufacturing plant of abutting owner was matter of expediency and within power vested in city council. *Id.*
11. Where city council, in exercise of vested power, vacated part of street and quitclaimed it to abutting owner, later council, believing that mistake had been made, may not arbitrarily set aside said action at expense of abutting owner. *Id.*
12. Where company furnishing cement for city paving contract failed to give city notice as required by Act No. 384, Pub. Acts 1925, it could not look to sureties on contractor's bond given to protect materialmen. *O'Connor* v. *Vander Veen*, 77.
13. Where city, sureties, and materialman intervened or were impleaded in receivership proceedings against paving contractor, and evidence was offered on issue of materialman's

MUNICIPAL CORPORATIONS—Continued.

right to look to sureties on contractor's bond, court had jurisdiction to make adjudication denying such right on finding that materialman had failed to give statutory notice to city. *Id.*

14. Genuineness of signatures to recall petition may not be challenged except by matter appearing on face of petition, where there was showing by affidavit that signatures were genuine, as required by Act No. 44, Pub. Acts 1917. *Karwick* v. *Grajewski*, 110.

15. City clerk has no authority under statute to determine sufficiency of reasons stated for recall of mayor; that being question for courts on proper proceedings by interested elector. *Id.*

16. Duties of city clerk in regard to petition for recall of mayor are entirely ministerial, and in determining whether petition contains requisite number of signatures with residence, street number, ward, and voting precinct of signers, he must make canvass from petition itself, except that he may examine poll lists of city to determine number of electors voting for governor at last preceding election. *Id.*

17. Where petition for recall of mayor filed with city clerk contained sufficient number of signatures and on its face complied with statute (Act No. 44, Pub. Acts 1917) it was duty of clerk to call election. *Id.*

18. Distress of inhabitants of city due to widespread unemployment constitutes "calamity" within meaning of home-rule act, justifying city council in declaring emergency existed requiring issuance of bonds to relieve said distress under provisions of its charter and 1 Comp. Laws 1929, §§ 2231, 2241, subd. e. *City of Muskegon Heights* v. *Danigelis*, 260.

19. Where there was honest dispute as to advisability of vacating part of street to enlarge size of school playground by acquisition of certain lots across street, city council's action denying school board's petition to vacate may not be said to amount to abuse of discretion, and therefore is not reviewable by courts. *Board of Education of Fordson School District of City of Dearborn* v. *City of Dearborn*, 439.

20. In absence of express statutory provision, municipal corporation annexing territory of another municipality is not entitled to division and participation in latter's personal property. *City of Detroit* v. *Township of Redford*, 453.

21. Provision of home rule act (1 Comp. Laws 1929, § 2250) for division of real property where territory is annexed to another municipality, being plain and unambiguous, may not be extended by court by application of rules of construction to include personal property also, under provision of another statute (sections 2334–2344). *Id.*

22. Where territory from township was annexed to city under home-rule act (1 Comp. Laws 1929, § 2250), city was not entitled to division and participation in township's personal property. *Id.*

MUNICIPAL CORPORATIONS—Continued.

23. Under Act No. 480, Local Acts 1907, providing for payment of salaries to various officers of Washtenaw county, power conferred upon board of supervisors was limited to fixing salary in lieu of fees, and therefore board did not have power to grant county clerk salary of $2,100 per year and right to retain all fees collected in his office; Act No. 193, Pub. Acts 1921, not being applicable to said county. *Pray* v. *Ticknor,* 460.

24. At common law, governmental agency in performance of governmental function did not become liable in damages for its negligent performance. *Johnson* v. *Board of County Road Com'rs of Ontonagon Co.,* 465.

25. Statutes imposing liability on governmental agency for negligence in performance of governmental function are in derogation of common law, and therefore are strictly construed. *Id.*

26. Board of county road commissioners in removing snow from trunk line highway under agreement for maintenance entered into with State highway commissioner pursuant to 1 Comp. Laws 1929, §§ 4425, 4426, was acting as governmental agency in hands of State highway commissioner, and therefore is not liable for negligent operation of snowplow used in said work. *Id.*

27. In action against board of county road commissioners for negligent operation of snowplow on trunk line highway, plaintiff has burden of proving allegation in his declaration, which is essential to recovery, that defendant entered into contract with State highway commissioner to perform said work upon profitable consideration rather than as governmental agency. *Id.*

28. Municipal corporations and other governmental agencies when performing purely governmental function do not lose their immunity from liability for its negligent performance merely because they derive income therefrom, provided income is only incidental to main purpose of so functioning and aimed at covering cost of undertaking; but municipality may be held to respond in damages for negligent act of agent or employee incident to voluntary activity undertaken for its own profit and commercial in character. *Id.*

29. Assessment paid after levy becomes lien on property is paid involuntarily. *Blanchard* v. *City of Detroit,* 491.

30. Recovery of special assessments paid involuntarily is in no way affected by 1 Comp. Laws 1929, § 3444, requiring written protest as condition precedent to recovery of sums paid for general taxes. *Id.*

31. That special assessments were paid without protest does not render payment voluntary, where levy had become lien on property. *Id.*

MUNICIPAL CORPORATIONS—Continued.

32. Under Detroit city charter (title 6, chap. 4, § 30) and ordinance adopted in conformity therewith, taxes illegally assessed and involuntarily paid should be repaid to those from whom they have been wrongfully exacted by the city. *Id.*

33. If payment of tax is involuntary, in absence of statutory provision to contrary, it may be recovered, although there is no express statutory provision therefor. *Id.*

34. Where claim for refund of special assessments involuntarily paid was first made to city council and rejected, it could be asserted in courts; remedy by action of council not being exclusive. *Id.*

35. In suit to vacate special assessments for paving boulevard, which under Detroit charter should be paid from general fund, and for refund of installments already paid, decree was properly entered in favor of plaintiffs. *Id.*

36. Provisions of home-rule act (1 Comp. Laws 1929, § 2230) that charter shall provide for annual appropriations and tax levies for municipal purposes are mandatory. *City Commission of Jackson* v. *Hirschman*, 596.

37. Under home-rule act (1 Comp. Laws 1929, § 2228 *et seq.*) city has implied power to change fiscal year. *Id.*

38. Considering purpose of home-rule act, it should be construed liberally and in home-rule spirit. *Id.*

39. Amendment to city charter setting fiscal year ahead six months, and providing for temporary tax levy for six months period to provide funds for payment of city expenditures for said period, is not in violation of home-rule act providing for annual appropriations. *Id.*

40. Irregularities in election for amendment of city charter are not fatal to validity thereof, in absence of showing that any elector was misled or hindered in voting by reason thereof. *Id.*

See ACTION (2); DEDICATION (2); MANDAMUS (3, 4, 7).

MURDER—See HOMICIDE (2, 3).

MUTUAL MISTAKE—See REFORMATION OF INSTRUMENTS (1).

NATIONAL BANKS—See TAXATION.

NAVIGABLE WATERS.

This case is controlled by *Hilt* v. *Weber*, 252 Mich. 198, requiring reversal of former decision in 241 Mich. 240, and entry of decree quieting title in plaintiff to land between meander line and waters of Saginaw Bay. *Kavanaugh* v. *Baird*, 631.

NAVIGATION—See NUISANCE (5, 7).

NECESSARY PARTIES—See NUISANCE (12).

NECESSITY—See DRAINS (1); EMINENT DOMAIN (1); PLEADING (1).

NEGLECT OF ATTORNEY—See JUDGMENT (17).

NEGLIGENCE.

1. Where testimony was conflicting as to whether operator of electric crane owned by railroad company disregarded signals in unloading steel beams, resulting in injury to truckman, question of operator's negligence was for jury. *Rockwell* v. *Grand Trunk Western R. Co.*, 144.
2. Where testimony was conflicting as to whether truckman was warned of danger and disregarded it, resulting in his injury, question of his contributory negligence was for jury. *Id.*
3. Though plaintiff's negligence may not be proximate cause, it is contributory negligence if it contributes to cause. *Id.*
4. Contributory negligence is negligence of plaintiff which operates with negligence of defendant in producing injury; plaintiff's negligence combined with defendant's negligence being proximate cause of injury. *Id.* 145.
5. Contributory negligence of plaintiff necessarily implies negligence on part of defendant; theory being that defendant's negligence causes injury, and plaintiff's negligence contributes to it. *Id.*
6. Even if plaintiff was directed to go to rear of defendant's garage in nighttime for toilet purposes without warning him to look out for open stairway leading to basement, it was his duty to look in front of him and see where he was going, and to exercise ordinary care. *Domzalski* v. *Ver Hoven*, 497.

See CRIMINAL LAW (32); EVIDENCE (6, 8); MASTER AND SERVANT (1, 4, 6); MOTOR VEHICLES (1–14); MUNICIPAL CORPORATIONS (24–28); PLEADING (3–5); STATUTES (5, 6).

NEGLIGENT HOMICIDE—See CRIMINAL LAW (32–34).

NEGOTIABLE INSTRUMENTS.

1. Whether certain bonds are negotiable should be determined by law of State where they are issued and made payable. *Paepcke* v. *Paine*, 636.
2. Corporation bonds issued and made payable in New York must be assumed to have been issued with full knowledge of usage of courts of that State to attach to them attributes of commercial paper, and with manifest design that they should be so circulated. *Id.*
3. Instrument itself determines its character in respect to negotiability, so that, to be negotiable, it must conform to requirements of negotiable instruments law. *Id.*
4. Bond and trust agreement securing its payment do not constitute single contract, but they are separate instruments executed for different purposes and not of same nature, so that bond, if negotiable in form, is governed by law applicable to negotiable instruments, and holder may abandon security and enforce payment of bond according to its terms. *Id.*

NEGOTIABLE INSTRUMENTS—Continued.

5. Trust agreement securing payment of bond, unless referred to in way to incorporate its provisions into bond, is but incident thereto, and is to be regarded as security only, and does not affect negotiability of bond. *Id.*

6. Under negotiable instruments law, an instrument containing an unconditional promise or order to pay sum certain in money is negotiable, and such provision is not affected though coupled with statement of transaction which gives rise to the instrument, but if it contains special stipulations, and payment is subject to contingencies not within control of holder, it is deprived of its negotiable character and becomes exposed to existing defenses as though still held by original party thereto. *Id.*

7. Essential elements of negotiability are certainty in sum to be paid and in time of payment. *Id.* 637.

8. Although New York negotiable instruments law (article 6, § 90) provides that holder of negotiable instrument may sue thereon in own name, it does not prescribe such right as necessary element of negotiability. *Id.*

9. That trust agreement securing payment of bonds provides that in case of default trustee shall represent bondholders in action brought to enforce collection does not destroy their negotiability. *Id.*

10. Possibility of acceleration of date when bonds are due if there is default under mortgage does not make them non-negotiable. *Id.*

11. In action against good-faith purchasers of negotiable bonds which had been stolen from plaintiff, verdict should have been directed in favor of defendants. *Id.*

NEGOTIABLE INSTRUMENTS LAW—See NEGOTIABLE INSTRUMENTS (3, 4).

NEW TRIAL.

1. Motion for new trial on ground that verdict for defendant was against great weight of evidence was properly denied. *Cook* v. *Schwemler*, 458.

2. Motion for new trial on ground that defendant's agent in transaction involved was necessary and material witness was properly denied, where fact that he could not be found at time of trial was known to defendant, but no application for delay or continuance because thereof was made or any intimation given that his testimony was desired. *Anderson* v. *Frischkorn Real Estate Co.*, 668.

See APPEAL AND ERROR (2); CRIMINAL LAW (6); EXCEPTIONS, BILL OF.

NOISE—See NUISANCE (2, 3, 6).

NOTICE—See ASSIGNMENTS; BANKS AND BANKING (2, 3); BROKERS (4); CONTEMPT; DIVORCE (4); INSURANCE (8, 17); MORTGAGES (2, 3, 6); MUNICIPAL CORPORATIONS (12, 13); PARTNERSHIP (2); PHYSICIANS AND SURGEONS (8, 13); PRINCIPAL AND AGENT (4); SPECIFIC PERFORMANCE (2); VENUE (1).

NUISANCE.

1. Fuel dock for purpose of supplying vessels with coal is not nuisance *per se*. *McMorran* v. *Cleveland-Cliffs Iron Co.*, 65.
2. Whether fuel dock is nuisance *per accidens* depends on showing that dust, noise, and vibration are more than merely incident to proper and skilful operation, considering vicinage. *Id.*
3. Use of sledge hammer in dislodging clogged coal by hammering on steel chutes and bins in operating fuel dock was properly enjoined at instance of adjoining residents although district was not strictly residential. *Id.*
4. That vessels at fuel dock, because of their length, overlap adjoining waterfront, constitutes no nuisance. *Id.*
5. Smoke from smokestacks of boats at fuel dock is but incident of navigation and may not be enjoined by residents. *Id.*
6. Use of unloading machinery on vessel at fuel dock, if proper and managed with skill, may not be enjoined at instance of residents in vicinity, although noise therefrom interferes with their comfort and sleep. *Id.*
7. Vibration occasioned by vessels coming to fuel dock is but incident of navigation and beyond injunctive restraint. *Id.*
8. Garbage is nuisance *per se*. *Albaugh* v. *Abbott*, 588.
9. In suit to abate nuisance created by hauling and feeding garbage to pigs, decree in favor of plaintiffs, *held*, justified under evidence. *Id.*
10. Several defendants were properly joined in suit to abate nuisance, where they each contributed thereto, although they operated separate plants. *Id.* 589.
11. Several plaintiffs may be joined in one suit to abate nuisance when they are all injured in similar manner and are interested in same sort of relief. *Id.*
12. In suit to abate nuisance created by hauling and feeding garbage to pigs, one who ran piggery for defendant on percentage basis, and defendant's wife, who owned property with husband by entireties but was not interested in piggery, were not necessary parties defendant. *Id.*

NULLIFICATION—See MUNICIPAL CORPORATIONS (5).

OBSTRUCTING HIGHWAY—See HIGHWAYS AND STREETS (2).

OFFER—See CONTRACTS (1); SALES (3, 4).

OFFICERS—See CORPORATIONS (1, 2).

OIL AND GAS LEASE—See REFORMATION OF INSTRUMENTS (2).

OIL WELLS—See CONTRACTS (16).

OPEN ACCOUNT—See PARTNERSHIP (5); PAYMENT (2).

OPEN STAIRWAY—See EVIDENCE (8); NEGLIGENCE (6).

OPINION EVIDENCE—See MASTER AND SERVANT (12); WILLS (16).

OPINION OF COURT—See CRIMINAL LAW (4, 5).

OPPRESSION—See ELECTIONS.

OPTIONS—See SPECIFIC PERFORMANCE (1, 2, 8).

ORAL CONTRACT—See CONTRACTS (4); SPECIFIC PERFORMANCE (4).

ORAL EVIDENCE—See EVIDENCE (7); HUSBAND AND WIFE (8).

ORNAMENTAL HOUSEHOLD GOODS—See EXEMPTIONS (2).

OTHER OFFENSES—See CRIMINAL LAW (28–30).

OVERLAPPING WATERFRONT BY VESSELS—See NUISANCE (4).

OWNER'S ADDRESS—See MECHANICS' LIENS (1).

OWNERSHIP—See MOTOR VEHICLES (15).

PAID SURETIES—See PRINCIPAL AND SURETY (3, 5–8).

PARDONS AND PAROLES—See CRIMINAL LAW (35–39).

PARENT AND CHILD—See EXECUTORS AND ADMINISTRATORS (2).

PAROL EVIDENCE—See EVIDENCE (4, 9).

PARTIAL DISABILITY—See MASTER AND SERVANT (9, 10).

PARTIAL PERFORMANCE—See SPECIFIC PERFORMANCE (4).

PARTIES—See EXECUTORS AND ADMINISTRATORS (1, 7, 8); FRAUD (1); INJUNCTION (4, 5, 7); MUNICIPAL CORPORATIONS (8, 13); NUISANCE (10–12); VENDOR AND PURCHASER (6).

PARTITION.

Decree of court below modifying and affirming award of commissioners in partition proceedings is affirmed on appeal; question in dispute being one of fact. *Village of Spring Lake* v. *Thum*, 381.

PARTNERSHIP.

1. Seller of material ordered by partner for partnership had right to look to partnership for pay, although unaware of partnership relation at time material was furnished. *O'Connor* v. *Vander Veen*, 77.

PARTNERSHIP—Continued.

2. In suit against partners jointly and severally, evidence *held*, to support finding of trial court that plaintiffs were seasonably notified of dissolution of partnership and that obligations had been assumed by partner continuing business. *Wolverine Cigar Co.* v. *Knoppow*, 343.

3. Evidence *held*, to support finding of trial court that, after dissolution of partnership and assumption of obligations by partner continuing business, there was material change in nature and time of payment thereof. *Id.*

4. Under uniform partnership law (2 Comp. Laws 1929, § 9876, subd. 3), where there was material alteration in nature and time of payment of partnership obligation assumed by continuing partner on dissolution, partner who withdrew is discharged from liability. *Id.*

5. Where creditors of partnership, after dissolution and assumption of partnership debts by continuing partner, added new purchases to partnership debt, carrying it as open account, and credited payments, which were in excess of partnership debt, in reduction thereof, partnership debt was fully paid. *Id.*

6. In partnership's suit against individual partner for accounting for his share of rent of building, part of which he used on his own account, decree holding him liable for 25 per cent. of rent is reduced, on appeal, to 21 per cent., as being more nearly correct under evidence. *Reindel* v. *Reindel*, 680.

See JOINT ADVENTURES; LIMITATION OF ACTIONS (2, 3).

PATENTS.

Decree enjoining in general terms infringement by defendants of plaintiff's claims of patent is reversed, on appeal, where contest was narrowed on hearing to alleged infringement of automatic steering device on planting machine manufactured by plaintiff, on which it has patent. *Hamilton Manfg. Co.* v. *Poll*, 324.

See INJUNCTION (1).

PAYMENT.

1. Payment by contractor for material ordered by owners, although he was not party to contract therefor, would operate to discharge their obligation to pay. *Milligan* v. *Rappaport*, 120.

2. Payments made by debtor without direction as to application may be applied by creditors as they please, and where applied on open account, debits are discharged in order of time in which they occurred. *Wolverine Cigar Co.* v. *Knoppow*, 343.

See LOGS AND LOGGING (2); PARTNERSHIP (5); PRINCIPAL AND AGENT (2).

PAYMENTS ON LAND CONTRACT—See HUSBAND AND WIFE (3).

PEARS—See SALES (13).

PEDESTRIANS—See RAILROADS (1–3, 5).

PENDING SUIT—See COURTS (2, 3).

PERFECTING APPEAL—See APPEAL AND ERROR (14).

PERFORMANCE—See CONTRACTS (7, 8, 16); PRINCIPAL AND AGENT (2); SPECIFIC PERFORMANCE (5–11).

PERMANENT DISABILITY—See INSURANCE (14–16).

PERQUISITE OF OFFICE—See INJUNCTION (4); PROCESS (11).

PERSONAL INJURIES—See APPEAL AND ERROR (1, 12); EVIDENCE (8).

PERSONAL PROPERTY—See MUNICIPAL CORPORATIONS (20–22); SPECIFIC PERFORMANCE (9, 10).

PERSONAL TORT—See RECEIVERS (1, 2, 5).

PHYSICIANS AND SURGEONS.

1. Chiropractor is not licensed physician or surgeon, nor is he entitled to use title of "doctor" (2 Comp. Laws 1929, §§ 6739, 6792), although he may practice medicine. *Erdman* v. *Great Northern Life Ins. Co.*, 579.
2. That 2 Comp. Laws 1929, § 6739, provides for examinations in certain subjects for chiropractors and in wider range of subjects for doctors, physicians, and surgeons is not discrimination; persons in respective classes being treated alike. *Id.*
3. On certiorari to review revocation of physician's license by State board of registration in medicine, board's finding of facts based on competent evidence is binding on court. *Hamson* v. *Michigan State Board of Registration in Medicine*, 601.
4. Revoking physician's license by board was exercise of police power, and not strictly exercise of judicial power (2 Comp. Laws 1915, § 6726). *Id.*
5. In revoking physician's license, board is not required to proceed in strict accordance with rules applicable to judicial tribunals, so that, unless otherwise provided by statute, requisite proof may be by deposition or affidavit. *Id.*
6. In proceedings to revoke physician's license, right to compulsory process is not indispensable. *Id.*
7. Generally, action of board in revoking physician's license must not be arbitrary, but must be for cause only, and based on specific charges made and evidence submitted. *Id.*
8. In proceedings to revoke license, physician has right, unless waived, to notice, hearing, reasonably definite statement of charge, cross-examination of witnesses, to produce witnesses, and fair consideration and determination of evidence. *Id.*
9. In proceedings to revoke license, physician *held*, to have had such hearing as he was entitled to in law. *Id.* 602.

PHYSICIANS AND SURGEONS—Continued.

10. In proceedings to revoke physician's license, sworn statements of witnesses are competent to establish charge, in absence of objection thereto or demand for cross-examination. *Id.*

11. In proceedings to revoke license, physician waived rights by failure to assert them, and by acquiescing in proceedings taken. *Id.*

12. That physician had not first been convicted in criminal court is no bar to proceedings by board to revoke his license. *Id.*

13. That subdivision of statute relating to revocation of physician's license does not expressly provide for notice, as does another subdivision, is of no consequence, since notice and fair hearing is implied as indispensable part of enactment (2 Comp. Laws 1915, § 6726, subds. 6, 7). *Id.*

14. That medical registration board of ten members, revoking physician's license, contained seven members from regular school of medicine instead of five as provided by statute, would not render its action void, since it is *de facto* board, and especially where its action was unanimous, and vote of seven was sufficient (2 Comp. Laws 1915, § 6724). *Id.*

See INSURANCE (18).

PIGGERY—See NUISANCE (9, 12).

PLAN—See CRIMINAL LAW (29).

PLATS—See MUNICIPAL CORPORATIONS (1).

PLAYGROUNDS—See MUNICIPAL CORPORATIONS (19).

PLEA—See MANDAMUS (7).

PLEA IN BAR—See COURTS (2, 3).

PLEA OF GUILTY—See CRIMINAL LAW (41).

PLEADING.

1. In disposing of motion to quash petition for condemnation of land to widen city street, court must assume that facts set forth in petition are true and that necessity to condemn may be established. *City of Detroit* v. *Judge of Recorder's Court of Detroit,* 6.

2. Seller's plea in exact conformity as to price and quality of carload of rye with buyer's written acceptance and seller's written invoice estops seller from claiming inconsistent bargain on basis of minimum price. *Watson-Higgins Milling Co.* v. *Graczyk,* 175.

3. Declaration charging that defendant requested his brother, 17 years old, to drive motor car, knowing that brother was inexperienced, unskilful, and incompetent to drive; that brother drove at excessive rate of speed, and, by reason of inexperience, lack of skill, and incompetency, lost control of car, resulting in injury to plaintiff, does not charge more than ordinary negligence. *Naudzius* v. *Lahr,* 218.

PLEADING—Continued.

4. To constitute charge of gross negligence or wanton or wilful misconduct, facts lifting owner's faults above ordinary negligence must be set out. *Id.* 219.

5. In action by guest against owner of automobile, declaration charging negligence in allowing incompetent brother to drive and that he drove at excessive speed, charges no more than ordinary negligence, and plaintiff's right to recover is therefore barred by Act No. 19, Pub. Acts 1929. *Id.*

See APPEARANCE (1); ASSAULT AND BATTERY; EVIDENCE (5); MOTOR VEHICLES (6); MUNICIPAL CORPORATIONS (13).

PLEDGES—See BANKS AND BANKING (3).

POLICE POWER—See PHYSICIANS AND SURGEONS (4); WEAPONS.

POSSESSION—See EXCHANGE OF PROPERTY (3); INJUNCTION (3).

POWER TO BIND ESTATE—See EXECUTORS AND ADMINISTRATORS (5).

POWER TO CHANGE FISCAL YEAR—See MUNICIPAL CORPORATIONS (37).

PRACTICE OF MEDICINE—See PHYSICIANS AND SURGEONS (1).

PRESUMPTIONS—See CONTRACTS (5); CRIMINAL LAW (27); MASTER AND SERVANT (2, 7); NEGOTIABLE INSTRUMENTS (2); PHYSICIANS AND SURGEONS (13); PRINCIPAL AND SURETY (6); STATUTES (7).

PREVIOUS CONVICTION—See PHYSICIANS AND SURGEONS (12).

PRIMA FACIE CASE—See INNKEEPERS (3, 4).

PRINCIPAL AND AGENT.

1. In action for consideration for assignment of land contract to defendant and another, where defendant was not party to agreement, the only ratification necessary to be shown, to justify recovery, was that parties acting for defendant in transaction had power to bind her. *Aiken* v. *Peoples,* 161.

2. That consideration for assignment of the contract was to be in form of promissory note, which was never executed, and that defendant's ratification of transaction came after expiration of time for delivery of note, would not release her, since delivery of note would not have constituted payment but was mere evidence of the debt, and therefore it cannot be said that ratification came after time for performance had passed. *Id.*

3. Principal who for months confirmed agents' acts and led other parties to transaction to rely thereon may not later disavow agents' power and repudiate liability. *Id.*

4. Principal is not liable where agent makes false representations before becoming agent and without principal's knowledge or participation therein. *Polly* v. *Charouhis,* 363.

See BROKERS (5); CORPORATIONS (6); EXCHANGE OF PROPERTY (5, 6); LICENSES (1, 2); MOTOR VEHICLES (1, 2); SALES (8).

PRINCIPAL AND SURETY.

1. Where there is no question that bond was meant to cover particular note, variance of two days between date of note and date stated in bond is not of sufficient importance to affect surety's obligation. *Grinnell Realty Co.* v. *General Casualty & Surety Co.*, 16.
2. Surety company adopting its own wording in bonds is bound thereby. *Id.*
3. Where, in action on surety company's bond, both the nature of defendant's business and transaction in question show that it was not acting gratuitously, there is no merit in its claim that distinction in regard to liability of "paid" surety and that of "gratuitous" one should not apply. *Id.*
4. Under law merchant, liability of gratuitous surety will not be extended to contract varying in slightest degree from one for performance of which he became bound. *Id.*
5. Paid surety, in order to be released from obligation by some slight deviation from contract by obligee must show damage therefrom. *Id.*
6. There is no presumption that paid surety was harmed by slight deviation from contract by obligee, nor is suggestion of mere contingencies or possibilities sufficient to release surety. *Id.*
7. Paid surety is not relieved from obligation except where it is shown that there is material departure from contract which resulted in injury to surety. *Id.* 17.
8. Mere extension of time for payment does not discharge paid surety unless it can be shown that it suffered therefrom. *Id.*
9. In action against surety on injunction bond for damages assessed against principal by court, decree determining damages is not open to collateral attack, even if it is excessive by reason of erroneous computation (3 Comp. Laws 1915, § 12667). *Morris* v. *Barker*, 335.

See MUNICIPAL CORPORATIONS (12, 13).

PRIORITY—See ASSIGNMENTS (1); BANKS AND BANKING; MORTGAGES (1–3).

PRIVATE LANDS—See DRAINS (2–4).

PRIVATE PROPERTY—See EMINENT DOMAIN (3).

PRIVITY OF CONTRACT—See SPECIFIC PERFORMANCE (11).

PRIVITY OF OBLIGATION—See VENDOR AND PURCHASER (13).

PROBATION—See CRIMINAL LAW (35–39).

PROCESS.

1. Validity of service on defendant may be raised only by motion to dismiss (3 Comp. Laws 1915, § 12456). *Croff* v. *DeVries*, 180.
2. In action against foreign corporation, service of process on secretary of State, made outside of his office was not proper

PROCESS—Continued.

service, under 3 Comp. Laws 1929, §§ 14094, 14095, 14097; intent of statute (section 14097) being that service be made in official's office. *Huckle* v. *Mt. Forest Rabbitries*, 441.

3. Where service on foreign corporation was void, service on other defendants outside county, being dependent thereon, was also void (3 Comp. Laws 1929, § 14090). *Id.*
4. Right of litigant to select process server in justice's court is substantial one. *Brand* v. *Teagan*, 530.
5. Neither court nor officer thereof may control service of process except when authorized by statute. *Id.*
6. Where certain constable was designated by litigant in præcipe to serve process, diversion of process to other constables was not within lawful power of judge, clerk, or deputy clerks of common pleas court of Detroit instituted under 3 Comp. Laws 1929, § 16369 *et seq.* *Id.*
7. Although clerk of common pleas court of Detroit has broad discretion in adoption, continuance, and change of *modus operandi* of his office in serving process, there are essentials which must be included in any plan. *Id.*
8. On filing præcipe and receiving fees, clerk of common pleas court of Detroit has legal duty to issue process, which includes its delivery for service, and public has right to rely on plan of delivery adopted and customary in the office. *Id.*
9. Whether plan adopted for service of process in common pleas court of Detroit is for convenience of clerk or that of public, clerk may not have secret exception to it which deprives litigant of prompt delivery of process with opportunity for service by constable of his selection. *Id.*
10. Refusal of clerk of common pleas court of Detroit to deliver process to constable designated in præcipe for service, in accordance with plan of office, and failure to deliver it to litigant, constituted breach of clerk's legal duty to issue process. *Id.*
11. Refusal of judge and clerk of common pleas court of Detroit to deliver process to duly qualified constable designated in præcipe to serve same constituted interference with constable's right to exercise of his office and perquisites thereof. *Id.* 531.

See APPEARANCE (1); INJUNCTION (4); PHYSICIANS AND SURGEONS (6).

PRODUCTION OF WITNESSES—See PHYSICIANS AND SURGEONS (8).

PROFITABLE CONSIDERATION—See MUNICIPAL CORPORATIONS (27).

PROMISSORY REPRESENTATIONS—See SALES (10).

PROMOTERS—See CORPORATIONS (3, 4).

PROOF OF CLAIM—See INSURANCE (17).

PROPERTY RIGHTS—See CONSTITUTIONAL LAW (5).

PROSPECTIVE PROFITS—See DAMAGES (2).

PROTECTED CROSSING—See RAILROADS.

PROTEST—See MUNICIPAL CORPORATIONS (30, 31).

PROXIMATE CAUSE—See APPEAL AND ERROR (1); INSURANCE (7); MASTER AND SERVANT (16); MOTOR VEHICLES (5, 6); NEGLIGENCE (3, 4).

PUBLIC HALL—See INSURANCE (5, 8).

PUBLIC IMPROVEMENTS—See MUNICIPAL CORPORATIONS (6).

PUBLICITY—See VENUE (3).

PUBLIC LAND—See EMINENT DOMAIN (2).

PUBLIC OFFICERS.

1. Failure of superintendent of public instruction to make report to county treasurer of money received for purpose of defraying expenses of teachers' county institutes, as required by statute (2 Comp. Laws 1915, §§ 5974, 5977), does not render him liable therefor, in absence of showing of loss to county by reason thereof. *State of Michigan* v. *Johnson*, 317.
2. Superintendent of public instruction is liable for money received by him in his official capacity and deposited in his personal account, for which he has not satisfactorily accounted. *Id.*

See JUDGMENT (11).

PUBLIC POLICY—See INSURANCE (2).

PUBLIC SAFETY—See STATUTES (3, 4).

PURCHASE MONEY MORTGAGE—See MORTGAGES (1–3).

PURCHASE PRICE—See APPEAL AND ERROR (5); SALES (6); VENDOR AND PURCHASER (1).

QUALITY—See SALES (13).

QUESTION FOR JURY—See CRIMINAL LAW (42); FRAUD (5); HOMICIDE (2, 3); MOTOR VEHICLES (11); RAILROADS (4).

QUESTION FOR REVIEW—See APPEAL AND ERROR (2, 6, 7); CIRCUIT COURT COMMISSIONERS; CRIMINAL LAW (24); MUNICIPAL CORPORATIONS (7, 19); PHYSICIANS AND SURGEONS (3).

QUESTION OF FACT—See ACTION (2); APPEAL AND ERROR (5, 8, 12); CRIMINAL LAW (12, 25, 31); SALES (8); WILLS (17).

QUIETING TITLE—See MUNICIPAL CORPORATIONS (8).

QUITCLAIM DEED—See RECEIVERS (6); VENDOR AND PURCHASER (13).

QUORUM—See PHYSICIANS AND SURGEONS (14).

RAILROADS.

1. Where pedestrians were killed by train on crossing protected by watchman, other considerations respecting their contributory negligence must obtain than at ordinary crossing. *Motyka* v. *Detroit, Grand Haven & Milwaukee R. Co.*, 647.
2. Since pedestrians killed by railroad train on crossing protected by watchman were only bound to exercise care and caution which an ordinarily prudent person would have exercised in same or similar circumstances, on question of their contributory negligence regard must be had for circumstances of particular occasion. *Id.*
3. While pedestrian may not rely wholly on flagman, gates, or bell at railroad crossing, but must take precaution for his own safety, he may place some reliance on such protection. *Id.* 648.
4. Whether absence of watchman from protected railroad crossing and lack of signal from him might indicate to reasonably prudent person that crossing was clear for safe passage—whether conduct of watchman was invitation to proceed—*held*, under circumstances of particular case, question for jury. *Id.*
5. Pedestrians killed at railroad crossing protected by watchman were not guilty of contributory negligence as matter of law, where evidence shows that, when they started to cross, street was clear and watchman was not in view to give warning, although they failed to look in direction from which train was coming, and, had they looked, accident might have been avoided. *Id.*

See MASTER AND SERVANT (4); NEGLIGENCE (1).

RAPE.

1. Where, in prosecution for rape, trial judge fully defined essentials of rape consummated, it was not necessary to repeat elements of rape attempted. *People* v. *Jagosz*, 290.
2. In prosecution for rape, apt illustration of assault and battery by trial judge instead of definition thereof, was sufficient; if further instruction was desired, counsel should have made request therefor. *Id.*
3. Instruction in prosecution for rape which left it open to jury to acquit or find defendants guilty of rape or one of lesser offenses is not open to criticism that it led jury to believe that only one verdict, that of guilty, could be rendered. *Id.*
4. In view of fact that statute (3 Comp. Laws 1929, § 16727) provides imprisonment for life or any such period as court in its discretion shall direct for crime of rape, sentence of imprisonment from 12 to 30 years does not constitute cruel and unusual punishment. *Id.*

See CRIMINAL LAW (7–9).

RATIFICATION—See PRINCIPAL AND AGENT (1–3); VENDOR AND PURCHASER (12).

REAL PARTY IN INTEREST—See EXECUTORS AND ADMINISTRATORS (8).

REAR OF LOT—See COVENANTS (3).

REASONABLE DOUBT—See CRIMINAL LAW (27).

RECALL ELECTION—See MANDAMUS (7); MUNICIPAL CORPORATIONS (14–17).

RECANVASS OF VOTES—See ELECTIONS.

RECEIVERS.

1. Rule that receiver may not be sued without leave of court is not usually applied to actions which do not affect custody and control of receivership property, and therefore it does not apply to action brought against receiver individually for his personal tort. *McAfee* v. *Bankers Trust Co.*, 685.
2. Where receiver is personally at fault in wrongfully taking possession of property belonging to and in possession of third party, his receivership is no protection to him, and in such case leave of court to bring action against him personally is not necessary. *Id.*
3. Receiver appointed for corporation has only authority to take possession of property belonging to said corporation. *Id.*
4. Receiver is under no obligation to attempt to take property out of possession of third party by force, but proper course is to apply to appointing court for instructions. *Id.*
5. Action against receiver personally on theory that he was guilty of personal tort in wrongfully taking possession of plaintiffs' property and disposing of it may be maintained without leave of appointing court. *Id.*
6. In authorizing sale by receiver of insolvent's interest in land contracts acquired from vendee by quitclaim deed without any assumption of vendee's contract obligations, court had no power to require purchaser from receiver to agree to pay said contracts, and therefore his agreement to pay vendors was *nudum pactum*. *Peoples Savings Bank* v. *Geistert*, 694.

See GARNISHMENT; MUNICIPAL CORPORATIONS (13).

RECITALS—See JUDGMENT (13).

RECKLESS DRIVING—See MOTOR VEHICLES (4).

RECONSIDERATION BY CONVENTION—See ELECTIONS.

RECORD—See MUNICIPAL CORPORATIONS (6).

RECOUPMENT—See MOTOR VEHICLES (16).

REDEMPTION—See MORTGAGES (5); VENDOR AND PURCHASER (2).

REFORMATION OF INSTRUMENTS.

1. Written instruments entered into between competent parties should not be altered or reformed on theory of mistake unless mistake is mutual and evidence so clear as to establish right to relief beyond cavil. *Schuler* v. *Bucuss*, 479.

REFORMATION OF INSTRUMENTS—Continued.

2. In suit by vendor to reform land contract so that instead of conveying premises "free and clear of and from all liens and incumbrances" as called for, conveyance would be subject to pre-existing oil and gas lease, holding by trial court that plaintiff had failed to establish her right to relief, *held*, justified by record. *Id.*

REFUND—See MUNICIPAL CORPORATIONS (30, 32, 34, 35).

RELEASE—See CONTRACTS (3); LOGS AND LOGGING (3); PAYMENT (1); PRINCIPAL AND AGENT (2).

RELICTED LAND—See NAVIGABLE WATERS.

REMAINDER—See WILLS (4–9, 12).

REMAINDERMEN—See MORTGAGES (5); WILLS (4, 8, 9, 12).

REMEDY—See ACTION (1); CONFLICT OF LAWS; CONTRACTS (6, 8); MUNICIPAL CORPORATIONS (34).

REPEAL OF STATUTE—See INSURANCE (6).

REPRESENTATIONS BY THIRD PERSON—See EXCHANGE OF PROPERTY (5).

REPRESENTATIONS OF VALUE—See BROKERS (5); EXCHANGE OF PROPERTY (5–7, 10).

REPUTATION—See ASSAULT AND BATTERY.

REQUEST TO CHARGE—See CRIMINAL LAW (16); DAMAGES (1); RAPE (2).

RES ADJUDICATA—See JUDGMENT (2, 3, 11).

RESCISSION—See CONTRACTS (13, 15); EXCHANGE OF PROPERTY (1–4, 8, 10); LANDLORD AND TENANT (5); MOTOR VEHICLES (15, 16); SALES (6, 7, 9–11); VENDOR AND PURCHASER (4, 7, 8–10).

RES GESTÆ WITNESSES—See CRIMINAL LAW (18, 31).

RESIDENTIAL PURPOSES—See COVENANTS (2).

RESIDUARY ESTATES—See WILLS (10, 11).

REVERSION—See EMINENT DOMAIN (3–5); MUNICIPAL CORPORATIONS (1, 8).

REVIVAL—See MECHANICS' LIENS (4).

REVOCATION OF LICENSE—See PHYSICIANS AND SURGEONS (3–14).

RIGHT OF CONSOLIDATION—See CORPORATIONS (7–9).

RIGHT OF WAY—See MOTOR VEHICLES (13).

RIGHTS PROTECTED—See CONSTITUTIONAL LAW (6).

RIGHT TO BEAR ARMS—See WEAPONS.

RIGHT TO CONTROL—See MASTER AND SERVANT (2–5).

RIGHT TO SUE IN OWN NAME—See NEGOTIABLE INSTRUMENTS (8).

ROBBERY—See CRIMINAL LAW (19); INNKEEPERS (4).

RUGS—See EXEMPTIONS (3).

RUPTURED ANEURISM OF AORTA—See MASTER AND SERVANT (18, 19).

RYE—See EVIDENCE (4); PLEADING (2).

SAGINAW BAY—See NAVIGABLE WATERS.

SALARY—See MUNICIPAL CORPORATIONS (23).

SALARY ILLEGALLY PAID—See JUDGMENT (11).

SALES.

1. Where goods were shipped by seller with sight draft attached, contrary to buyer's order, and draft was not paid, title remained in seller, and therefore buyer is not liable for goods not delivered (3 Comp. Laws 1915, § 11851, subd. 1). *Carrollton Acceptance Co.* v. *Ruggles Motor Truck Co.*, 1.
2. Buyer's damages for seller's failure to deliver brass according to contract was difference between contract price and current price or market value at time and place of delivery. *Bunting Brass & Bronze Co.* v. *Liberman & Gittlen Metal Co.*, 118.
3. Where auction bill offering milch cows for sale contained no express statement that they were sound, there was no warranty of general condition or health. *Moeckel* v. *Diesenroth*, 284.
4. Where cattle offered for sale in auction bill were grouped according to purpose, seller is impliedly charged with notice that purchaser purchasing from group described as milch cows, with no other declared purpose, would buy for use as milch cows, with implied warranty by seller that they were reasonably fit for that purpose (2 Comp. Laws 1929, § 9454). *Id.*
5. Presence of contagious abortion in cow described by seller as milch cow and purchased for that purpose, which disease affects milk so that it is unfit for human use or disturbs ability of cow to freshen and continue production of milk, is breach of implied warranty that said cow is reasonably fit for its purpose as milch cow. *Id.*
6. Breach of warranty does not ordinarily entitle purchaser to abatement of whole purchase price in absence of rescission. *Id.*

SALES—Continued.

7. Breach of implied warranty that cows sold as milch cows were reasonably fit for that purpose did not entitle purchaser to damages in full, where there was testimony that they had some value for beef, in absence of rescission. *Id.* 285.

8. In action for purchase price of carload of grapes claimed to have been sold to defendant through broker, question of fact as to whether purchase was made from plaintiff or from broker personally, *held*, rightly decided in favor of plaintiff. *Earl Fruit Co.* v. *Herndon Fruit Co.*, 329.

9. Purchaser of automobile who within week knew of seller's false representations in connection with sale thereof, but thereafter made payments and continued to use car for about 90 days, waived right to rescind on ground of fraud. *Hughes* v. *Wm. F. V. Neumann & Sons*, 386.

10. Promise by seller of automobile to give purchaser enough law business to enable him to pay part of purchase price, being promissory in character, may not be made basis of rescission for fraud. *Id.* 387.

11. Where, in suit by purchaser for rescission of contract for purchase of automobile on ground of fraud, plaintiff's bill does not offer to place defendant *in statu quo*—does not offer to do equity—plaintiff is not entitled to rescind. *Id.*

12. Where buyer ordered stock brick of specific kind for veneer purposes, there was no implied warranty of its fitness for that purpose (2 Comp. Laws 1929, § 9454); fitness for purpose indicated being determined by buyer under circumstances. *Damman* v. *Mercier-Bryan-Larkins Brick Co.*, 392.

13. Where defendants purchased carload of pears described by seller as "dark green to light yellow ground color," they were not justified in refusing to accept them as not of quality ordered because they were not light green in color. *Pacific Fruit & Produce Co.* v. *Fishman*, 675.

See EVIDENCE (4); FRAUDS, STATUTE OF; MOTOR VEHICLES (15, 16).

SATISFACTION—See JUDGMENT (16).

SCHEME—See CRIMINAL LAW (29).

SCHOOLS AND SCHOOL DISTRICTS.

1. General school law (Act No. 319, Pub. Acts 1927, chap. 33, pt. 2) prohibiting membership in high school fraternities, sororities etc., by high school pupils is valid. *Steele* v. *Sexton*, 33.

2. Authority of graded school districts to issue bonds to erect schoolhouses is governed by chapter 12, pt. 2, Act No. 319, Pub. Acts 1927. *Heims* v. *School Dist. No. 6 of Davison Twp.*, 249.

SCHOOLS AND SCHOOL DISTRICTS—Continued.

3. Under Act No. 319, Pub. Acts 1927, part 2, chap. 12, assembled electors at special election of graded school district to authorize issuance of bonds to erect new schoolhouse had right to reject estimate of school board as to amount necessary to be raised and fix new amount to be voted on, and also had right to select one inspector of election, and denial of said rights by inspectors of election appointed by school board invalidated election. *Id.*

See CONSTITUTIONAL LAW (1–3); MANDAMUS (2); STATUTES (1).

SECOND DECREE—See DIVORCE (2, 3).

SECOND LOOK—See MOTOR VEHICLES (14).

SECRET EXCEPTIONS TO MODUS OPERANDI—See PROCESS (9).

SECRET PROFITS—See CORPORATIONS (4).

SECRET SOCIETIES—See CONSTITUTIONAL LAW (1–3); MANDAMUS (2); SCHOOLS AND SCHOOL DISTRICTS (1); STATUTES (1).

SECURITY—See LANDLORD AND TENANT (3–5); LOGS AND LOGGING (3); MORTGAGES (8, 9); NEGOTIABLE INSTRUMENTS (4, 5).

SENTENCE—See BAIL; CRIMINAL LAW (8, 37, 39); RAPE (4).

SEPARATION BY AGREEMENT—See DIVORCE (7).

SERVANT—See MASTER AND SERVANT (5).

SERVICE OF PROCESS—See PROCESS.

SERVICE ON SECRETARY OF STATE—See PROCESS (2).

SERVICE OUTSIDE COUNTY—See PROCESS (3).

SERVICES—See JOINT ADVENTURES; TRUSTS (7, 8); WILLS (13–15).

SETTLEMENT OF CASE—See APPEAL AND ERROR (7).

SHARES OF CORPORATE STOCK—See CONTRACTS (13–15); FRAUD (4, 5); SPECIFIC PERFORMANCE (5–8, 10).

SIGNATURES—See HOMESTEADS (2); INSURANCE (9); SPECIFIC PERFORMANCE (3).

SLEEPY DRIVERS—See CRIMINAL LAW (32, 33).

SMALL LOANS—See LICENSES (3); USURY (2).

SMOKE—See NUISANCE (5).

SNOWPLOW—See MUNICIPAL CORPORATIONS (26, 27).

SOUNDING HORN—See MOTOR VEHICLES (9).

SPECIAL ACT—See STATUTES (7).

SPECIAL APPEAL—See CIRCUIT COURT COMMISSIONERS; JUSTICES OF PEACE (5).

SPECIAL ASSESSMENTS—See MUNICIPAL CORPORATIONS (30, 31, 34, 35).

SPECIAL MOTION—See VENUE (1).

SPECIAL SERVICES—See JOINT ADVENTURES.

SPECIFIC PERFORMANCE.

1. Where lessee surrendered part of leased premises and expended substantial sum of money in improving leasehold premises in consideration of option for extension of lease, it is entitled to specific performance, although option prepared and signed by lessors was not signed by lessee. *King-Blair Co.* v. *Schloss,* 243.
2. Lessee's right to specific performance of option for extension of lease should not be defeated by its technical violation of lease, where it had continued during whole period without objection by lessors, who had notice thereof. *Id.*
3. Married man is not entitled to specific enforcement of contract for exchange of equities in land, where the equity he agreed to convey is homestead, and conveyance is not signed by wife. *Ter Keurst* v. *Zinkewicz,* 383.
4. Specific performance of oral contract to purchase land on condition that vendees improve property and pay taxes was properly decreed by court below, where vendees had partially performed by making improvements and paying taxes. *Oyler* v. *Fenner,* 417.
5. Tender of performance by purchaser is necessary to entitle him to maintain suit for specific performance of contract to sell shares of corporate stock. *Richardson* v. *Lamb,* 659.
6. Deposit of money in bank by purchaser of shares of corporate stock, with instructions to seller to deliver stock to bank and receive certified check was insufficient tender to entitle purchaser to maintain suit for specific performance of contract to sell. *Id.*
7. To entitle purchaser to maintain suit for specific performance of contract to sell shares of corporate stock, he must tender seller whole amount to be paid therefor, and anything short of this is insufficient. *Id.*
8. Exercise of option to two persons to purchase "equally" and "in equal proportions" 4,000 shares of corporate stock does not require concert of action by both optionees, but one might exercise option for equal proportion, 2,000 shares. *Id.* 660.
9. Generally, specific performance is not decreed where subject-matter of contract is personal property, unless there are exceptional circumstances. *Id.*
10. Specific performance of contract to sell shares of corporate stock was properly decreed in suit by purchaser, where court of law could not afford him adequate relief, in that stock is

SPECIFIC PERFORMANCE—Continued.

not listed, is not procurable in market, and is difficult to obtain, and especially where evidence shows that purchaser, after buying nearly one-fourth of capital stock, had moved to city where corporation is located, had devoted his best efforts to corporation, and that his purpose in seeking to acquire stock in question was to protect investment already made. *Id.*

11. Where insolvent's interest in certain land contracts was acquired from vendee by quitclaim deed without any assumption of vendee's contract obligation, vendors may not specifically enforce said contracts against purchaser from insolvent's receiver, notwithstanding purchaser in his offer to purchase, agreed to pay contract; there being no privity of contract between him and vendors, and his agreement to pay being *nudum pactum*. *People's Savings Bank* v. *Geistert*, 694.

SPECIFIC TAX—See TAXATION.

STAIRWAY—See EVIDENCE (8); NEGLIGENCE (6).

STANDING TIMBER—See WOODS AND FORESTS (1).

STARE DECISIS—See MANDAMUS (6).

STATE CONVENTION—See ELECTIONS.

STATEMENT OF CHARGE—See PHYSICIANS AND SURGEONS (8).

STATEMENT OF FACT—See EVIDENCE (5).

STATEMENT OF LIEN—See MECHANICS' LIENS (1).

STATEMENT OF TRANSACTION—See NEGOTIABLE INSTRUMENTS (6).

STATEMENTS MADE IN PRESENCE OF ACCUSED—See CRIMINAL LAW (14).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF; SPECIFIC PERFORMANCE (1, 4).

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

1. Subject-matter of chapter 33, pt. 2, Act No. 319, Pub. Acts 1927, prohibiting membership in high school fraternities, sororities, etc., by high school pupils is embraced in title of act, and therefore act is not unconstitutional. *Steele* v. *Sexton*, 32.
2. Whether statute will produce greater evils than those sought to be remedied goes to wisdom and not validity of law, and is for legislature and not court to consider. *Naudzius* v. *Lahr*, 217.
3. If subject of statute given immediate effect by legislature has real and substantial relation to public peace, health, or safety, all doubt should be resolved in favor of legislative judgment that it is "immediately necessary" within meaning of Constitution (article 5, § 21). *Id.* 218.

STATUTES—Continued.

4. Statute which tends to discourage collusion and fraud in litigation is obviously pertinent to public safety, and court may not say, beyond doubt, that it was not immediately necessary to that end (Const. Mich., art. 5, § 21). *Id.*
5. Title of motor vehicle law (Act No. 302, Pub. Acts 1915) being sufficient to cover provisions as to conditions and remedies of civil liability, Act No. 19, Pub. Acts 1929, amending said act and abolishing right of action by guest for ordinary negligence of owner or operator is not unconstitutional as embracing subject-matter not expressed in title (Const. Mich., art. 5, § 21). *Id.*
6. Objection that terms "gross negligence" and "wilful and wanton misconduct," as used in Act No. 19, Pub. Acts 1929, abolishing right of action by guest for ordinary negligence of owner or operator of motor car, are so uncertain as to render act inoperative is not tenable; said terms being familiar in legal nomenclature and having often been defined and discussed by courts. *Id.*
7. Special act including same matter as general act must be taken as intended to constitute exception thereto; intention of conflict not being presumed. *Heims* v. *School Dist. No. 6 of Davison Twp.*, 248.
8. Comp. Laws Supp. 1922, § 9100(147), providing that life insurance policy shall be incontestable after two years from its date, with certain exceptions, condones no fraud, but merely operates in nature of statute of limitations. *Bogacki* v. *Great-West Life Assur. Co.*, 253.
9. Construction of statute providing that life insurance policy shall be incontestable after two years from its date, with certain exceptions, falls within rule that inclusion of exception excludes everything else. *Id.* 254.
10. Where wording of statute is unambiguous, there is no room for construction. *City of Detroit* v. *Township of Redford*, 453.

See ACTION (2); BANKS AND BANKING; CHAMPERTY AND MAINTENANCE; CONSTITUTIONAL LAW (1–4, 7, 8); CORPORATIONS (6–9); DRAINS (1); EMINENT DOMAIN (2); EXECUTORS AND ADMINISTRATORS (6); EXEMPTIONS; HIGHWAYS AND STREETS (2); INJUNCTION (5, 7); INNKEEPERS (1, 3); INSURANCE (2, 3, 6, 7); LICENSES (3); MANDAMUS (2); MASTER AND SERVANT (13–15); MECHANICS' LIENS (1); MOTOR VEHICLES (2, 3, 5, 6); MUNICIPAL CORPORATIONS (12, 14, 20–23, 25, 26, 30, 33, 36); PARTNERSHIP (4); PHYSICIANS AND SURGEONS (13, 14); PLEADING (5); PROCESS (2, 3, 5); PUBLIC OFFICERS (1); SALES (12); SCHOOLS AND SCHOOL DISTRICTS; TAXATION; USURY (2); WILLS (2, 6); WITNESSES.

STATUTORY RAPE—See CRIMINAL LAW (9).

STAY OF EXECUTION—See JUDGMENT (9).

STAY OF PROCEEDINGS—See INJUNCTION (7).

STEERING DEVICE—See PATENTS.

STIPULATIONS.

Where counsel agreed in open court as to amount of verdict in case plaintiff should recover, verdict for amount agreed on cannot be said to be erroneous, in absence of proof of plaintiff's damages. *Thompson* v. *Walker*, 126.

See VENDOR AND PURCHASER (9).

STOCKS AND STOCKHOLDERS—See CORPORATIONS (1, 2, 5, 7–9); TAXATION (1).

STOLEN BONDS—See NEGOTIABLE INSTRUMENTS (11).

SUMMARIES OF VOLUMINOUS DOCUMENTS—See EVIDENCE (2).

SUMMARY JUDGMENT—See JUDGMENT (5–10, 15).

SUMMARY PROCEEDINGS—See APPEARANCE (2); CIRCUIT COURT COMMISSIONERS; JUDGMENT (3); VENDOR AND PURCHASER (3, 6).

SUPERINTENDENT OF PUBLIC INSTRUCTION—See PUBLIC OFFICERS.

SUPERVISORS, BOARD OF—See MUNICIPAL CORPORATIONS (23).

SUPPORT OF BENEFICIARY—See TRUSTS (1).

SUPPORT OF CHILD—See CONTEMPT.

SURETY—See BAIL; PRINCIPAL AND SURETY.

SURPLUSAGE—See JUDGMENT (13).

SURVIVORSHIP—See HUSBAND AND WIFE (2).

TAXATION.

1. Stockholder of national bank is entitled, in fixing assessed value of shares, to deduction of credits secured by lien on real property on which specific tax had been paid under Act No. 91, Pub. Acts 1911 (1 Comp. Laws 1915, § 4268 *et seq.*). *First National Bank of Wyandotte* v. *Common Council of Detroit*, 90; *Equitable & Central Trust Co.* v. *Common Council of Detroit*, 97; *First National Bank of Wyandotte* v. *Board of State Tax Commissioners*, 98.

2. Provision of Act No. 322, Pub. Acts 1929, for taxation of national bank stock without allowing deduction of credits secured by lien on real property on which specific tax had been paid is void as discriminating against national bank stock in violation of Federal statute (12 USCA, § 548), and is also void as double taxation under State Constitution (article 10, § 3). *Id.*

See DEDICATION (2); LANDLORD AND TENANT (1); MANDAMUS (3, 4); MORTGAGES (7); MUNICIPAL CORPORATIONS (29–35).

TAXES—See LOGS AND LOGGING (3); SPECIFIC PERFORMANCE (4).

TEACHERS' COUNTY INSTITUTES—See PUBLIC OFFICERS (1).

TENDER—See CONTRACTS (13, 15); EXCHANGE OF PROPERTY (2); SPECIFIC PERFORMANCE (5–7); VENDOR AND PURCHASER (12).

THIRD PARTIES—See MASTER AND SERVANT (1–4).

THREATS—See FORCIBLE ENTRY AND DETAINER (1).

TIMBER—See LOGS AND LOGGING; WOODS AND FORESTS.

TITLE—See CONTRACTS (16); MOTOR VEHICLES (15, 16); SALES (1); STATUTES (1, 5).

TITLE TO REALTY—See INJUNCTION (3).

TOILET—See APPEAL AND ERROR (11); EVIDENCE (8); NEGLIGENCE (6).

TORT—See CONSTITUTIONAL LAW (5).

TOTAL DISABILITY—See INSURANCE (14–16).

TRANSCRIPT OF JUDGMENT—See JUSTICES OF PEACE (2, 3).

TRANSFER—See MOTOR VEHICLES (15).

TRESPASS—See DEDICATION (1); INJUNCTION (3).

TRIAL—See APPEAL AND ERROR (1); CRIMINAL LAW (2–5, 12, 18, 19, 23, 33); DAMAGES (1); FRAUD (5); INSURANCE (8); RAPE (1–3).

TRICK—See DEEDS (1).

TRUNK LINE HIGHWAY—See MUNICIPAL CORPORATIONS (26).

TRUSTS.

1. Trustee *ex maleficio* of trust fund is not entitled to any part of corpus of fund for support of beneficiary who was entitled to one-half of income for that purpose, especially where he was allowed all of the income, and no application was ever made to court for further allowance. *Pierce* v. *Smith*, 45.
2. Where court decree adjudged certain funds to be constructive trust in hands of holders and ordered same to be turned over on execution of bond, existence of trust did not await giving of bond, and trust did not fail because bond was not given. *Id.*
3. Constructive trusts are sometimes declared by court of equity and impressed on funds in hands of one who should be decreed trustee *ex maleficio*. *Marshall* v. *Magnassun*, 56.
4. Purchaser of land may not be deemed trustee *ex maleficio*, establishing constructive trust, where he acted in good faith, although his grantor may have been guilty of fraud. *Id.*
5. One occupying position of trust and confidence may not act where duty is opposed to interest. *Thompson* v. *Walker*, 126.

TRUSTS—Continued.

6. Where trustee had power to transfer to beneficiary or to his children, or either of them, whole or any part of trust funds or property, trust funds did not belong to said children, but they belonged to trust estate with power in trustee to pay and transfer them to beneficiary or to his children or either of them. *Bartholomew* v. *Salvation Army*, 279.
7. In suit for accounting by trustees, where question of compensation for their services is not regulated by statute or otherwise, equity court should exercise just discretion and make or withhold allowance as particular circumstances require. *Johnson* v. *Ironside*, 428.
8. Where certain persons, engaged with others in joint adventure, acted as trustees, giving much of their time and performing valuable services for the others as well as themselves, equity court was warranted in holding them entitled to compensation therefor, in suit against them for accounting; and that they were mistaken as to their personal rights, as against the others, would not bar their right to compensation. *Id.*
9. Allowance of compensation for services to certain joint adventurers acting as trustees for all, *held*, within discretion of trial court, and not to be interfered with, on appeal, in absence of showing abuse of discretion. *Id.* 429.

See CORPORATIONS (1, 2, 5); EXECUTORS AND ADMINISTRATORS (1); INFANTS (2); JOINT ADVENTURES; NEGOTIABLE INSTRUMENTS (5, 9).

UNEMPLOYMENT RELIEF—See ACTION (2); MUNICIPAL CORPORATIONS (18).

UNIFORM STOCK TRANSFER ACT—See BANKS AND BANKING (1).

USE AND OCCUPATION—See HUSBAND AND WIFE (4).

USE OF BUILDING—See INSURANCE (5, 8).

USER—See HIGHWAYS AND STREETS; JUDGMENT (1).

USURY.

1. Usurious payment by corporation does not affect legality of transaction. *Grinnell Realty Co.* v. *General Casualty & Surety Co.*, 16.
2. Where notes containing usurious charges were surrendered by loan association licensed under Act No. 317, Pub. Acts 1921, and new note given by borrower for amount of money actually borrowed with legal interest, it is free from taint of usury, and therefore valid and enforceable. *Michigan Loan Ass'n* v. *Cahill*, 359.

See CONTRACTS (5).

VACATING STREET—See MUNICIPAL CORPORATIONS (4–11, 19).

VALUE—See CONTRACTS (14).

VARIANCE—See PRINCIPAL AND SURETY (1, 4–7).

VENDOR AND PURCHASER.

1. In action on note given as part of purchase price of lease of apartment house and furnishings, defense of fraud in misrepresenting character of tenants is not available, where false representations, if made, were not relied on by defendant, who knew all about apartment and character of neighborhood. *Shapero* v. *Gassel*, 28.
2. Bill to redeem from forfeiture of land contract may not be withheld until all methods of attack are litigated and adjudged futile. *Bocinski* v. *Krzeminski*, 48.
3. Modification of terms of payment under land contract, if made and performed by vendees, is defense in summary proceedings by vendor to obtain possession. *Pine Shores Realty Co.* v. *Parker*, 300.
4. If vendor, by accepting payments in accordance with terms stated by his attorney, ratified claimed modification of land contract and then repudiated modification, it constituted no fraud relating back to origin of contract, and therefore afforded no ground for rescission. *Id.*
5. If acceptance by vendees of offer by vendor's attorney modified time and terms of payment due under land contract, it called for unconditional performance by vendees. *Id.* 301.
6. Failure of vendor to give notice of forfeiture to vendees' assignee and to make assignee party defendant in summary proceedings may be urged on trial of case. *Id.*
7. Vendees' suit for rescission of land contract and recovery of money paid thereunder was properly dismissed, where bill confessed default in payments, and fraud was predicated upon breach of alleged modification of contract by vendor. *Id.*
8. Where facts pleaded and stipulated by parties lay foundation for exercise by court of equity of right to decree rescission of land contract, it was for court to determine terms and conditions under which rescission should be had. *Beacock* v. *Peoples Lumber Co.*, 403.
9. In suit by vendees to rescind land contract and recover payments made, vendor's claim that if rescission is decreed additional testimony should be taken to determine value of real estate given by vendees as part payment is without merit, where stipulation between parties fixes its value. *Id.*
10. Upon rescission of land contract on ground of fraud, vendees are entitled to lien for money found to be due to them. *Id.*
11. Contract to sell land executed by one later judicially declared insane was at most voidable. *Van Horn* v. *Herndon*, 408.
12. Suit by heirs of vendor to set aside land contract, voidable on ground of fraud, was properly dismissed, where plaintiffs were represented in probate court by able counsel, made no claim of fraud until more than five years after death of vendor, and in meantime had ratified contract by accepting from administrator of vendor's estate their share of payments received on contract, and made no tender of it back. *Id.*

VENDOR AND PURCHASER—Continued.

13. Privity of obligation between vendors and vendee in land contracts did not carry over to assignee of vendee by naked quit-claim deed, nor did liability for deficiency upon foreclosure. *Peoples Savings Bank* v. *Geistert*, 694.

See HOMESTEADS (1); HUSBAND AND WIFE (6); RECEIVERS (6); REFORMATION OF INSTRUMENTS (2); SPECIFIC PERFORMANCE (11).

VENUE.

1. Ordinarily, application for change of venue is special motion requiring four-day notice together with copies of affidavits upon which motion is based (Circuit Court Rule No. 38 [old rule], now Court Rule No. 34). *Hillman Township Board* v. *Empire Mutual Fire Ins. Co.*, 394.
2. Granting or refusing change of venue rests in sound judgment and discretion of trial court, and its action will not be disturbed, on review, in absence of showing of abuse of discretion. *Id.*
3. Denial of motion for change of venue in civil case, on ground that jurors had read newspaper articles discussing case, *held*, not abuse of discretion. *Id.*

VIBRATION FROM VESSEL—See NUISANCE (7).

VOIDABLE CONTRACT—See VENDOR AND PURCHASER (11).

VOID JUDGMENT—See JUSTICES OF PEACE (3).

WAIVER—See ACTION (1); APPEARANCE (1); BANKS AND BANKING (2); CANCELLATION OF INSTRUMENTS (2); COURTS (4); COVENANTS (1); EVIDENCE (9); FRAUD (4); INNKEEPERS (2); INSURANCE (17); LANDLORD AND TENANT (1, 2); MECHANICS' LIENS (3–5); MOTOR VEHICLES (2); MUNICIPAL CORPORATIONS (1); PHYSICIANS AND SURGEONS (8, 11); SALES (9).

WARD OF STATE—See INFANTS (2).

WARNING—See MASTER AND SERVANT (6); MOTOR VEHICLES (9); NEGLIGENCE (2); RAILROADS (5).

WARRANTY—See SALES (3–7, 12).

WASHTENAW COUNTY—See MUNICIPAL CORPORATIONS (23).

WATCHMAN—See RAILROADS.

WEAPONS.

1. State has police power to reasonably regulate right to bear arms (Const. art. 2, § 5). *People* v. *Brown*, 537.
2. Constitutional right to bear arms is not limited to militiamen nor military purposes, but extends to every person, including foreigners, right to possess revolver for legitimate defense of person and property, subject, however, to valid exercise of police power of State to regulate carrying of firearms. *Id.*

WEAPONS—Continued.

3. Police power of State to regulate bearing of arms is not restricted to establishment of conditions under which all sorts of weapons may be privately possessed, but it may take account of character and use of weapons and interdict those whose customary employment by individuals is to violate the law. *Id.*

4. 3 Comp. Laws 1929, §§ 16751, 16753, relative to manufacturing, selling, possessing, and carrying firearms or dangerous weapons is within reasonable and constitutional exercise of police power of State to curb crime, and does not infringe constitutional right of individuals to bear arms (Const. art. 2, § 5). *Id.*

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (10); CONTRACTS (4); CRIMINAL LAW (1, 6); NEW TRIAL (1); WILLS (18).

WIDOW—See MASTER AND SERVANT (7).

"WILFUL"—See INSURANCE (10).

WILFUL AND INTENTIONAL ACT—See INSURANCE (11).

WILLS.

1. In construing will, intent of testator should be ascertained from consideration of entire instrument. *Ball* v. *Reilly*, 186.

2. Rule as to ascertaining testator's intent from will in devising real estate to two or more persons is qualified by 3 Comp. Laws 1915, § 11562, providing that such devises shall be construed to create estates in common unless expressly declared to be in joint tenancy. *Id.*

3. Devise to three daughters with provision that if either married she was to receive $500 and property was to be held by last single daughter forever, was devise of one-third interest to each to be divested on marriage, and last single one should own property, so that, where none of them subsequently married, each owned undivided one-third interest, which, unless disposed of by will, descended to heirs. *Id.*

4. Where will provided that, after death of life tenant without issue, nephews and nieces named and described specifically should take remainder of estate in equal shares, they did not take as class. *In re Coots' Estate*, 208.

5. Where will gave contingent remainder to nephews and nieces named and described specifically, the estate of each was descendible, devisable, and alienable (3 Comp. Laws 1915, §§ 11531, 11553). *Id.*

6. Under 3 Comp. Laws 1915, §§ 11529, 11560, all future estates dependent upon precedent estates are classed as remainders, and are governed by same laws. *Id.*

7. Executory devise, being possibility coupled with interest, has same incidents of descendibility, devisability, and assignability as contingent remainder. *Id.*

WILLS—Continued.

8. Unless will bespeaks different intention, where remainder is contingent on life tenant's dying without issue or lineal heirs, no estate vests in remaindermen until happening of contingency. *Id.*

9. Where remainder was contingent on life tenant's dying without issue or lineal heirs, remaindermen who died before life tenant took no interest, and therefore their heirs, legatees, and assigns take nothing through them as remaindermen. *Id.*

10. Where legacy other than in residuary clause lapses or is void, it falls into residue. *Id.*

11. Lapsed legacy or devise of portion of residuary estate, where legatees or devisees take in common, does not inure to benefit of survivors, but becomes intestate estate. *Id.* 209.

12. Where remainder was contingent upon life tenant's dying without issue or lineal heirs, shares of remaindermen taking in common who died before life tenant became intestate property. *Id.*

13. Under contract to compensate by will married woman for her services, it was not necessary that testator inform her of provision made for her so that she be given opportunity to accept or reject same, because such opportunity was afforded when will was probated. *Willis* v. *Willis' Estate,* 296.

14. Married woman accepting provision for herself and husband in will for services is bound thereby unless will gave estate to husband and nothing to her. *Id.*

15. Where will devised life estate in common to husband and wife as compensation for wife's services to testator, her acceptance thereof is bar to claim against estate for said services, since she received valuable estate as compensation therefor. *Id.*

16. Where testator did not dictate will, but had written list of legacies not prepared by himself from which will was drawn, there was no such dictating of will by him requiring consecutive thought showing mental competency as to exclude opinion evidence that he was not mentally competent. *In re Slepski's Estate,* 340.

17. Conflicting testimony as to mental competency of testator at time will was made presented question of fact for jury. *Id.* 341.

18. Verdict that testator was incompetent to make will, *held,* not against great weight of evidence. *Id.*

WITNESSES.

In action by beneficiary on benefit certificate, insurance company's agents are precluded by Act No. 245, Pub. Acts 1881, from testifying to matters equally within knowledge of deceased; beneficiary being assign of deceased and protected by act. *Schempf* v. *New Era Life Ass'n,* 152.

See CRIMINAL LAW (3, 10, 11, 18, 20, 31); JUDGMENT (6, 7).

WOODS AND FORESTS.

1. Standing timber is real estate. *Case* v. *Harrah*, 524.
2. Timber cut from land is personal property. *Id.*

WORDS AND PHRASES—See CONTRACTS (14); INSURANCE (10); MASTER AND SERVANT (5); MUNICIPAL CORPORATIONS (18); STATUTES (6).

WORKMEN'S COMPENSATION ACT—See MASTER AND SERVANT (7–19).

WRONG CLASSIFICATION OF FINDING—See APPEAL AND ERROR (13).

WRONGFUL LEVY—See EXEMPTIONS (4).

WRONG SIDE OF ROAD—See APPEAL AND ERROR (4); MOTOR VEHICLES (8, 9).