MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JULY 2, 1962 to OCTOBER 1, 1962

HIRAM C. BOND
STATE REPORTER

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1963

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SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
LELAND W. CARR, LANSING, ...	Dec. 31, 1963

ASSOCIATE JUSTICES.

JOHN R. DETHMERS, HOLLAND, ...	Dec. 31, 1969
HARRY F. KELLY, DETROIT, ...	Dec. 31, 1969
EUGENE F. BLACK, PORT HURON, ...	Dec. 31, 1963
THOMAS M. KAVANAGH, CARSON CITY, . .	Dec. 31, 1965
THEODORE SOURIS, GROSSE POINTE PARK, .	Dec. 31, 1967
OTIS M. SMITH, FLINT.	
PAUL L. ADAMS, SAULT STE. MARIE.	

CLERK—DONALD F. WINTERS, OKEMOS.

CRIER—CLYDE E. SPRAGUE, LANSING.

ATTORNEY GENERAL—FRANK J. KELLEY, ALPENA.

SOLICITOR GENERAL—EUGENE KRASICKY, HAMTRAMCK.

CIRCUIT JUDGES.

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2. PHILIP A. HADSELL, NILES.
   KARL F. ZICK, SODUS.
3. VICTOR J. BAUM, DETROIT.
   THEODORE R. BOHN, DETROIT.
   GEORGE E. BOWLES, PLYMOUTH.
   JAMES N. CANHAM, DETROIT.
   MILES N. CULEHAN, GROSSE POINTE.
   NEAL FITZGERALD, DETROIT.
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   LILA M. NEUENFELT, DEARBORN.
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   JOSEPH G. RASHID, DETROIT.
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   JOHN M. WISE, DETROIT.
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   JOHN SIMPSON, JACKSON.
5. ARCHIE D. McDONALD, HASTINGS.
6. CLARK J. ADAMS, PONTIAC.
   WILLIAM JOHN BEER, BERKLEY.
   STANTON G. DONDERO, ROYAL OAK.
   H. RUSSEL HOLLAND, PONTIAC.
   FREDERICK C. ZIEM, PONTIAC.
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8. LEO BEBEAU, BELDING.
9. RAYMOND W. FOX, KALAMAZOO.
   LUCIEN F. SWEET, KALAMAZOO.
10. FRED J. BORCHARD, SAGINAW.
    EUGENE SNOW HUFF, SAGINAW.
    JAMES E. O'NEILL, SAGINAW.
11. GEORGE S. BALDWIN, MUNISING.
12. LEO J. BRENNAN, L'ANSE.
13. CHARLES L. BROWN, TRAVERSE CITY.

[1] Appointed July 18, 1962, qualified July 23, 1962.

14. HENRY L. BEERS, Muskegon.
NOEL P. FOX, Muskegon.[1]
JOHN H. PIERCEY, Muskegon Heights.[2]
15. MARK S. ANDREWS, Coldwater.
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28. WILLIAM R. PETERSON, Cadillac.
29. PAUL R. CASH, Alma.
30. LOUIS E. COASH, Lansing.
SAM STREET HUGHES, Lansing.
MARVIN J. SALMON, Lansing.
31. EDWARD T. KANE, Port Huron.
HALFORD I. STREETER, Port Huron.
32. ROBERT R. WRIGHT, Ironwood.
33. EDWARD H. FENLON, Petoskey.
34. DENNIS J. O'KEEFE, Standish.
35. MICHAEL CARLAND, Owosso.
36. DAVID ANDERSON, Jr., Paw Paw.
37. CREIGHTON R. COLEMAN, Battle Creek.
ALFONSO A. MAGNOTTA, Albion.
38. WILLIAM J. WEIPERT, Jr., Monroe.
39. REX B. MARTIN, Adrian.
40. TIMOTHY C. QUINN, Caro.
41. ERNEST W. BROWN, Iron Mountain.

MUNICIPAL JUDGES.

Recorder's Court of Detroit.

ELVIN L. DAVENPORT.	JOHN P. O'HARA.
JOSEPH A. GILLIS.	JOHN A. RICCA.
GERALD W. GROAT.	JOHN P. SCALLEN.
ARTHUR J. KOSCINSKI.	FRANK G. SCHEMANSKE.
PAUL E. KRAUSE.	W. McKAY SKILLMAN.

Traffic and Ordinance Division: GEORGE T. MURPHY.
JOHN D. WATTS.

Superior Court of Grand Rapids, CLAUDE Vander PLOEG.

[1] Resigned August 8, 1962.
[2] Appointed August 8, 1962; qualified August 9, 1962.

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COURT RULES AMENDMENTS

Effective immediately the Court Rules were amended and Rule 71B was added July 2, 1962, as follows:

Rule 70. SUPREME COURT DOCKET.

Sec. 1. After the record has been sent to the Supreme Court by the clerk of the court or tribunal from which the appeal is taken, either party may notice the cause for hearing. Said notice shall be filed in the Supreme Court and served on the other parties to the appeal at least 30 days before the first day of the session at which the argument is desired, and proof of service thereof shall be promptly filed. No such notice shall be given unless both parties have filed their briefs and appendices except that appellant may give such notice upon the expiration of the time for the filing of appellee's brief.

No cause shall be so placed on the session docket until such notice has been given. The priority of causes on the session docket as first made shall be in accordance with the dates of filing said notices with the clerk.

The Court may, upon its own motion, dismiss any appeal or proceeding which has not been expeditiously noticed for hearing.

Sec. 2. All cases brought up by claim of appeal are termed docket cases and to be heard at any session must be placed on the session docket for that

session. Appeals to review interlocutory orders, original proceedings and appeals ordered by the Court to be heard as motions, shall be noticed as motions to be heard on a Tuesday and placed on the motion docket and, except as otherwise provided, the rules applicable to the filing of briefs and appendices in appeals as of right shall apply. The notice shall be filed with the clerk together with proof of service on all other parties to the cause at least 5 days before the day noticed for hearing. Where leave to appeal is granted on condition that the appeal shall be presented as a motion, the cause shall not be noticed for hearing on the merits until both parties have filed their briefs and appendices, except that appellant may give such notice upon the expiration of the time for the filing of appellee's brief. The time and manner for filing of briefs and appendices, taking of proofs, oral arguments, or taking any other steps in original proceedings in the Supreme Court, shall be under the control of the Supreme Court, upon order entered after notice to all parties. In original proceedings in the Supreme Court, the record shall consist of the original documents on file in the cause and the rules as to printing of briefs and appendices shall apply as near as may be feasible, except that in habeas corpus proceedings, neither the briefs nor appendices need be printed.

Sec. 3. Ten days before the first day of the session cases will be placed on the session docket and the order in which they are to be heard will be arranged. Conformable with that arrangement, or rearrangement as provided in section 4 of this rule, cases will be placed on call the day before they are to be heard, except that Tuesday's cases, after the first day of the term, will be placed on call on the preceding Friday.

Sec. 4. Upon filing stipulation with the clerk not later than the eleventh day before the first day of the

session, cases may be placed lower down on the session docket and grouped to suit the convenience of counsel, continued over session or placed at foot of call. After such rearrangement of causes by the clerk, no further changes may be made by counsel except as in Rule 71, § 1. Notice of motions for continuance, to be heard on the first day of the session, or any subsequent day thereto, shall be given at least 48 hours previous thereto.

Rule 70B. APPEALS IN WHICH NO PROGRESS HAS BEEN MADE.

All appeals which have not been noticed for hearing within 18 months after the copy of the claim of appeal has been filed in the Supreme Court (or after the record has been filed in the Supreme Court in the case of appeals taken under the rules in effect prior to January 2, 1957), excluding any extension of time or continuances which have been granted by the Supreme Court, matters in which applications for leave to appeal have been granted, matters where stays, extensions of time to appeal or complete appeals were granted and no further action in any of these instances has been reported to this Court, and in original actions arising in this Court in which orders to show cause or writs have been issued and no return made or return having been made and no further action has been taken for 18 months, shall be designated as "appeals in which no progress has been made."

In all appeals so designated, the clerk shall mail to each party, or his attorney, notice that unless cause is shown to the contrary the appeal will be dismissed and shall file due proof of such notice. Thereafter, the clerk shall place at the head of each session docket all appeals in which notice of no progress has been mailed at least 30 days prior to the

first day of that session. On the first day of each session, each appeal appearing on the docket as an appeal in which no progress has been made shall be dismissed unless cause is shown to the contrary.

Rule 71. CALL AND ARGUMENT OF CASES IN SUPREME COURT.

Sec. 1. The Court, on the first day of each session, after motions are disposed of, will commence calling the cases for argument in the order as they stand on the session docket as rearranged, and proceed from day to day during the session in the same order. No oral argument of session docket cases will be permitted, except on order of the Court, unless counsel shall advise the clerk, in writing, of his desire to so argue orally at least 15 days before the first day of the session, and if neither party shall be entitled and ready to proceed in the argument the cause will be listed as submitted on briefs. No cause shall be withdrawn after being placed on the call, except to continue the same, and a continuance may be allowed only upon stipulation being filed based upon a sufficient showing of the death or illness of counsel.

Sec. 2. In the argument of session docket cases 2 counsel may be heard on a side. The time allowed for argument shall be 1/2 hour on a side. Where but 1 side is represented only 15 minutes will be allowed. The time for argument may be extended by the Court upon motion made at least 15 days prior to commencement of the session.

No oral argument shall be had in original proceedings or in appeals ordered heard as motions unless by special permission of the Court first obtained, and unless the Court is in session on the day for which the case is noticed for hearing. When oral arguments are permitted, they shall be limited to 15

minutes on each side, without reply, unless further time is granted by the Court before argument begins.

Rule 71B. SESSIONS OF COURT FOR HEARING OF CASES.

There shall be 9 regular sessions of the Court each year, to be held during its 4 constitutionally specified terms, for the hearing of cases which are ready for argument as provided by Court Rule. Each session shall commence on the first Tuesday after the first Monday during the months of October through June and shall continue for such number of days as may be necessary to conclude the hearing of cases scheduled for argument. In addition to such regular sessions of the Court, the Court shall order such special sessions as in its judgment may be required.

DETHMERS, J., dissenting.

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JUNE TERM, 1962.*

LINDSAY *v.* LIPSON.

1. WITNESSES—PHYSICIANS AND SURGEONS—PRIVILEGED COMMUNICATIONS—EXAMINATION OF PLAINTIFF FOR ATTORNEY.

   The language of the statute setting forth the privilege from disclosure attending the relation of physician and patient may not be extended beyond its plain terms, hence, that statutory privilege is not applicable to the relation between physician who did not attend plaintiff for the purpose of treating her or for the purpose of contemplated surgery, but to obtain information for the benefit of the attorney at whose request the examination was made (CL 1948, § 617.62).

2. SAME—ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATION.

   The common-law rule as to privileged communications between attorney and client is given somewhat liberal interpretation.

3. SAME—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

   Information obtained by physician from plaintiff woman, injured at defendant's store when head of cabbage was tossed by an employee of defendant in the direction of another employee, upon an examination made at the request of her attorney to enable him to prepare pleadings properly and to try the cases she and her husband intended to institute, was a privileged communication not subject to disclosure over plaintiffs' objection since it was consistent with the privilege attending the relation of attorney and client.

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* Continued from Volume 366.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 4] 58 Am Jur, Witnesses § 418.
Physician-patient privilege as affected by contention that purpose was examination and not treatment. 107 ALR 1495.
[2, 4] 58 Am Jur, Witnesses § 464.

4. SAME—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

Information conveyed by a client to attorney, either directly, or through the client's or attorney's agent, including physicians who are requested to examine the client preparatory to trial and not for treatment or performance of surgery, is privileged from disclosure under the common-law rule as to privileged communications between attorney and client.

Appeal from Wayne; McCree, Jr. (Wade H.), J. Submitted April 12, 1962. (Docket Nos. 31, 32, Calendar Nos. 49,284, 49,285.) Decided July 2, 1962.

Case by Madelon Lindsay against Philip Lipson and Rose Lipson, doing business as Lipson Super Market, for personal injuries sustained while a store customer. Derivative suit by John Lindsay for medical expense. Cases consolidated for trial and on appeal. Verdict and judgments for plaintiffs. Defendants appeal. Affirmed.

Theodore R. Robbins, for plaintiffs.

Alexander, Buchanan & Conklin (*Perry J. Seavitt,* of counsel), for defendants.

CARR, C. J. On August 26, 1958, at about 7:30 in the evening the plaintiffs in these cases entered the store of the defendants at the intersection of James Couzens and Meyers road in the city of Detroit for the purpose of making purchases therein. While waiting to check out, an employee of defendants threw or tossed a head of cabbage weighing between 3 and 5 pounds in the direction of another employee. The precise purpose of such action is not material in the instant case. The cabbage struck Mrs. Lindsay on the head, knocking her to the floor and causing her to become unconscious for several minutes. It is the claim of the plaintiffs that the blow resulted in serious injuries. Mrs. Lindsay insti-

tuted an action at law to recover damages for pain and suffering and for loss of income during the time that she was incapacitated, as it is claimed, because of her injuries. Her husband also sued to recover for expenses incurred by him because of the injuries sustained by Mrs. Lindsay, and for loss of her services in the home. The cases were tried before a jury which returned a verdict of $10,500 in favor of Mrs. Lindsay and $4,500 in favor of the other plaintiff. Judgments were entered in accordance with the verdicts.

Prior to the institution of the actions for damages the attorney for the plaintiffs referred Mrs. Lindsay to Dr. John G. Slevin for the purpose of an examination and a report thereon. There was no instruction or request for treatment or for advice with reference thereto. The doctor was merely requested to make his examination, with a diagnosis from his findings, and submit a written report to counsel to assist the latter in preparing the pleadings in the contemplated litigation and, inferentially, in presenting the causes of action of his clients on the trials thereof.

The cases brought by Mr. and Mrs. Lindsay were consolidated for trial before a jury. Counsel for defendants subpoenaed Dr. Slevin as a witness in their behalf, claiming the right to examine him with reference to his findings, and presumably his report to counsel for plaintiffs. Objection was made on behalf of plaintiffs, it being asserted that the findings of the physician under the circumstances, and in view of the purpose of the examination, should be excluded as a privileged communication between physician and patient, or as such between attorney and client. The trial judge sustained the objection. Dr. Slevin was, however, permitted to testify as an expert witness and to answer certain hypothetical questions not connected in any way

with the examination that he had made of Mrs. Lindsay and the report to her counsel. Defendants have appealed from the judgments entered, asserting that the trial court was in error in holding that the results of the examination made by Dr. Slevin were privileged for either of the reasons urged in support of the objection by plaintiffs' counsel.

Counsel for appellants state the questions involved on this appeal as follows:

"1. Did the trial court err in ruling that the testimony of an examining physician as to his findings on examination of the plaintiff prior to the institution of these actions for the purpose of assisting plaintiffs' counsel in the preparation and evaluation of the case should be excluded as a privileged communication between physician and patient?

"2. Did the trial court err in ruling that the testimony of an examining physician as to his findings on examination of the plaintiff prior to the institution of these actions for the purpose of assisting plaintiffs' counsel in the preparation and evaluation of the case should be excluded as a privileged communication between attorney and client?"

The privilege attending the relation of physician and patient is set forth in CL 1948, § 617.62 (Stat Ann § 27.911), which reads as follows:

"No person duly authorized to practice medicine or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, however, That in case such patient shall bring an action against any defendant to recover for any personal injuries, or for any malpractice, if such plaintiff shall produce any physician as a witness in his own behalf, who has treated him for such injury, or for any disease

or condition, with reference to which such malpractice is alleged, he shall be deemed to have waived the privilege hereinbefore provided for, as to any or all other physicians, who may have treated him for such injuries, disease or condition: Provided further, That after the decease of such patient, in a contest upon the question of admitting the will of such patient to probate, the heirs at law of such patient, whether proponents or contestants of his will, shall be deemed to be personal representatives of such deceased patient for the purpose of waiving the privilege hereinbefore created."

The language of the statute may not be extended beyond its plain terms. In the instant case the physician did not attend Mrs. Lindsay for the purpose of treating her or advising as to treatment. The information that he obtained was designed for the benefit of the attorney at whose request the examination was made. It obviously was not contemplated that Dr. Slevin should perform any act as a surgeon or that he should in any respect assume the role of a physician called to treat a patient or prescribe therefor. The conceded facts in the instant case indicate conclusively that the statutory privilege is not applicable.

This brings us to the query whether under the situation presented the common-law rule as to privileged communications between attorney and client applies here. This Court has in prior decisions been inclined for obvious reasons to give a somewhat liberal interpretation to said rule. *People* v. *Pratt,* 133 Mich 125 (67 LRA 923), and decisions there cited. Doubtless such interpretation is essential to a proper protection of the rights of the client. Had Mrs. Lindsay possessed the requisite training and skill to make an accurate appraisal of her physical condition and to draw reasonable conclusions therefrom as to probable future developments

any communication by her to her attorney of such appraisal and diagnosis would without question have been privileged and she could not have been examined as a witness with reference thereto. To accomplish the desired result the attorney representing her deemed it necessary to employ a medical expert to act for him and his client and to convey to him on behalf of his client the information that he needed in order to properly prepare his pleadings and to try the cases that the parties intended to institute. We think such procedure was within the scope of the privilege attending the relation of attorney and client. It does not appear that the question here involved has heretofore been passed on by this Court. *Watson* v. *Detroit Free Press,* 248 Mich 237, and *Eicholtz* v. *Grunewald,* 313 Mich 666, are distinguishable on the basis of the facts involved. We think the conclusion indicated is, however, consistent with the general purpose of the privilege attending the relation of attorney and client.

In the State of California the privilege arising from the relation of physician and patient is declared by statute, comparable in form and substance to the Michigan rule above quoted. The privilege attending the relation of attorney and client is likewise dependent on statutory provisions, but it appears that the rule as so declared is analogous to the common-law rule recognized in Michigan. In *City and County of San Francisco* v. *Superior Court of the City and County of San Francisco,* 37 Cal 2d 227 (231 P2d 26, 25 ALR2d 1418), consideration was given to both privileges. There, as in the case at bar, a physician made an examination of an injured person at the request of the latter's attorney in connection with the preparation of a contemplated action for damages. There, as here, the physician was not authorized to administer treatment, or pre-

scribe such, his examination being wholly limited to the obtaining of information for the attorney at whose request such examination was made. It was held that the statutory physician-patient privilege did not apply but that the attorney-client privilege precluded the examination of the physician, as a witness on the trial of the case, with reference to his findings and diagnosis made for the purposes indicated. An attempt to compel the physician to testify was denied. In commenting on the situation presented, it was said, in part (pp 236, 237):

"Had Hession [the client] himself described his condition to his attorneys there could be no doubt that the communication would be privileged and that neither the attorney nor Hession could be compelled to reveal it, even though a client is not listed in section 1881 (2) among those who cannot be examined. (Citing cases.) It is no less the client's communication to the attorney when it is given by the client to an agent for transmission to the attorney, and it is immaterial whether the agent is the agent of the attorney, the client, or both. 'The client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege.

" 'This of course includes communications through an *interpreter,* and also communications *through a messenger* or any other *agent of transmission,* as well as communications *originating with the client's agent* and made to the attorney. It follows, too, that the communications of the *attorney's agent* to the attorney are within the privilege, because the attorney's agent is also the client's subagent and is acting as such for the client.' (Citing cases.) Thus, when communication by a client to his attorney

regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed."

The above case was referred to by this Court in *In re Dalton Estate,* 346 Mich 613, 621, the holding not being questioned. We are in accord with the reasoning of the California court and under the facts in the case at bar we conclude that the attorney-client privilege is applicable, and that the trial judge was correct in so holding.

Judgments affirmed, with costs to appellees.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

LIBERTY MUTUAL INSURANCE COMPANY *v.* CITY OF BAY CITY.

1. NEGLIGENCE—NONJURY CASE—FRACTURED BOTTOM PLATE OF WATER METER—EVIDENCE.

   The finding of trial court in a nonjury case that leakage of water in a business building, due to fracture of a rusty cast iron plate attached to bottom of water meter with 4 bolts on 1 of which a washer was missing, was not the type of an accident that commonly does not happen except in con-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 38 Am Jur, Negligence § 57.

[2] 38 Am Jur, Negligence § 326.

Admissibility of opinion evidence as to the cause of an accident or occurrence. 38 ALR2d 13.

sequence of negligence *held,* not against the clear preponderance of the evidence under record showing there was a question of fact presented.

2. SAME—NONJURY CASE—WATER METER—PROXIMATE CAUSE—EVIDENCE—EXPERTS.

The trial court in nonjury action for damage due to leakage of water properly considered testimony by defendant's expert witnesses as to possible causes of fracture of plate attached to bottom of water meter, other than rustiness and insufficient or improper attachment to the meter, for while defendant did not have burden of proving what caused the break, it could present testimony of water hammer or hammer lock to refute plaintiff's theory of cause.

Appeal from Bay; Smith (Richard G.), J. Submitted January 12, 1962. (Docket No. 8, Calendar No. 48,884.) Decided July 2, 1962.

Case by Liberty Mutual Insurance Company, a foreign corporation, subrogee, and Kanes Credit Clothing Company, Inc., a Michigan corporation, against the City of Bay City, a municipal corporation, for damages occasioned by flooding due to broken water meter. Judgment for defendant. Plaintiffs appeal. Affirmed.

Reginald S. Johnson, for plaintiffs.

John X. Theiler, for defendant.

DETHMERS, J. Plaintiff insurance company was the subrogee of plaintiff clothing company, which was lessee of a business building in defendant city. Plaintiffs sued for damages resulting from flooding the basement of the building caused by leakage from defendant's broken water meter. Plaintiffs alleged and defendant denied that it was negligent in the installation, inspection, and maintenance of the meter. The case was tried to the judge without a

jury. From judgment of no cause for action, plaintiffs appeal to this Court.

The first question presented is whether the judgment is against the clear preponderance of the evidence. That question goes to whether the condition of the meter was such that defendant should have known that it might break and flood the basement.

The evidence disclosed that the housing of the meter was constructed of bronze, with a bottom plate, referred to as the frost bottom, made of cast iron so that it, rather than some other part of the meter, would break if the meter were to be affected by frost. That plate was attached to the meter with 3 steel bolts and 1 brass bolt and nuts. The plate was rusty as were some of the bolts, and a washer was missing from 1 of the bolts. A fracture developed in the plate, near that bolt, from which the leaking occured.

City employees read the meter 4 times a year. There was testimony that it was their duty, when reading a meter, to inspect it and report unusually rusty or defective conditions and that they had not reported any such condition here. Some opinion evidence was given that excessive rusting and absence of a washer could permit breaking of the bottom plate. On this plaintiffs predicated their claim of defendant's negligence. There was, however, also testimony that the rustiness of the plate and bolts was not so bad as to have warranted reporting, or such as to give occasion for concern or for replacing the meter. A fact issue of negligence, thus, was presented.

Expert witnesses for defendant testified that the fracture in the bottom plate could be caused by freezing, by water hammer or hammer lock, or by tampering.

At the conclusion of proofs and when the court announced its decision, there was colloquy between court and counsel, in which the subject of *res ipsa loquitur* was discussed and the doctrine was urged upon the court by plaintiffs' counsel as applicable here. The court quoted from *Weisenberg* v. *Village of Beulah,* 352 Mich 172, 182, the quotation therein from Holmes, as follows:

"*Res ipsa loquitur,*—which is merely a short way of saying that, so far as the court can see, the jury from their experience as men of the world may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case."

The trial court concluded that in the instant case plaintiffs had not established negligence on defendant's part as a proximate cause of the damage and, insofar as *res ipsa loquitur* is concerned, said, in effect, that the proofs did not present a situation in which a jury would "be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence." On the contrary, the court referred to the testimony in the case that not any of the witnesses had ever experienced a break in the bottom plate of a meter resulting from rust, and concluded, accordingly, that that would be uncommon. There was considerable testimony, however, that the appearance of rust on the plate and bolts was not excessive nor such as to indicate that a break might result, and that, upon examination, it did not appear that the plate had been thinned or weakened by rust. The court stated that, on the other hand, the testimony

showed that hammer lock or water hammer would be common where there are quick acting valves that suddenly stop the flow of water and build up pressure behind it. The court then observed that this was a hotel building in which there were a number of urinals in which the water turned on and off, intermittently, which, according to the mentioned testimony, commonly could cause hammer lock.

While there was testimony from which negligence on defendant's part might have been inferred, rebuttal thereof was offered, and other possible causes for the plate fracture were presented. The trial court found that the break in the plate was not shown by plaintiffs to have resulted from defendant's alleged failure to detect its rusty condition or, for that matter, after the court's inspection of the meter and plate, from rusting at all. Whether we would have made the same finding is not the question. On the record before us we cannot say that that finding was against the clear preponderance of the evidence.

Plaintiffs also assign as error the court's consideration of the testimony of defendant's expert witnesses concerning possible causes of the break other than the one urged by plaintiff. Specifically, plaintiff contends that the court should have ignored their testimony about water hammer as a possible cause of a break because there was no testimony that water hammer had occurred at this location. The above noted testimony afforded a basis for the court's consideration of this possibility. The burden did not rest on defendant to prove what caused the break nor to establish the occurrence of water hammer. The testimony was entitled to be received and considered, however, on the question of whether the accident was of a particular kind that commonly does not happen except in consequence of negligence. It had probative value and

was admissible in refutation of that theory or possible line of thinking.

Finally, plaintiffs complain that the court erred in not applying in this case "negligence based on circumstantial evidence." The evidence referred to was that about the rusty condition of the plate and bolts and the missing washer. This brings us right back to the clear preponderance question. The evidence referred to by plaintiffs was entitled to and received the trial court's consideration. He concluded that plaintiffs had failed to establish that this was an actual or proximate cause of the break and that the evidence disclosed that it could have been caused by factors not entailing any negligence on defendant's part. That finding was not against the clear preponderance of the evidence.

Affirmed, with costs to defendant.

CARR, C. J., and KELLY, BLACK, KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., concurred.

SOURIS, J., did not sit.

MERRILL *v.* SHUMWAY.

1. TRIAL—TRANSFER FROM NONJURY TO JURY CALENDAR—DISCRETION OF COURT.

   The transfer of a cause from the nonjury calendar to the jury calendar of the trial court after the expiration of 15 days after the cause was at issue without demand for a jury trial having been made is a matter for discretion of the trial court (Court Rule No 33, § 3 [1945]).

2. SAME—TRANSFER OF CAUSE FROM NONJURY TO JURY CALENDAR—DISCRETION OF COURT.

   Trial court's denial of motion to transfer cause, arising from automobile accident at intersection, from nonjury calendar to jury calendar, filed more than 5 months after the cause was at issue, *held,* not an abuse of discretion, where trial court stated in denial of motion to transfer that the case could and would be heard much sooner and more expeditiously if left on the nonjury calendar (Court Rule No 33 [1945]).

3. APPEAL AND ERROR—NONJURY CASES—QUESTION FOR TRIER OF FACTS—EVIDENCE.

   The Supreme Court does not review a nonjury case *de novo* nor substitute its judgment for that of the trial court as to what the facts are as established by the proofs, the Supreme Court's determination in such respect being limited solely to whether the trial court's finding of facts is against the clear preponderance of the evidence.

4. AUTOMOBILES—NONJURY CASE—INTERSECTION ACCIDENT—NEGLIGENCE—FINDING OF COURT—EVIDENCE.

   Finding of trial court in nonjury case that southbound defendant motorist on his right-hand side of 2-lane through highway,

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial §§ 5–7.
[3] 3 Am Jur, Appeal and Error § 817.
[4] 53 Am Jur, Trial § 1131 *et seq.*

driving at a lawful speed, was not guilty of negligence as he drove into right side of westbound car in which plaintiff was a guest passenger, where latter car had not stopped as required before entering the through highway, was on right-hand side of its highway, and view of it was obstructed by a high, earthen bank immediately northeast of the intersection *held,* not against the clear preponderance of the evidence, there being insufficient time, after car in which plaintiff was riding came into view and failed to stop as required, for defendant to do anything to avoid the accident (CLS 1956, § 257.651).

Appeal from Jackson; Dalton (John C.), J. Submitted January 12, 1962. (Docket No. 89, Calendar No. 49,316.) Decided July 2, 1962.

Case by Virginia Merrill against Forest T. Shumway for personal injuries sustained in automobile collision on November 21, 1957. Judgment for defendant. Plaintiff appeals. Affirmed.

Felix F. Best, for plaintiff.

McKone, Badgley, Domke & Kline (*Maxwell F. Badgley,* of counsel), for defendant.

DETHMERS, J. Plaintiff sued for damages resulting from injuries sustained in an intersection automobile accident. She was a guest passenger in an automobile being driven by her father. It collided with another automobile which was owned and being driven by defendant. Plaintiff appeals from judgment of no cause for action entered by the trial judge, as trier of the facts, on its finding of no negligence on defendant's part which was a proximate cause of the accident.

The first question plaintiff raises on appeal is whether it was error for the court to deny plaintiff's motion to transfer the case from the nonjury to the jury calendar. That motion was filed more

than 5 months after the cause was at issue. No previous demand for trial by jury had been filed. Michigan Court Rule No 33 (1945), requires that a demand for jury trial, to be made in writing, shall be filed not later than 15 days after the cause is first at issue. Plaintiff says the failure to make timely demand for jury trial was due to "inadvertence of plaintiff's counsel". Court Rule No 33, § 3, makes the transfer here sought discretionary with the trial court. The court stated as its reason for denying the motion for transfer that the case could and would be heard much sooner and more expeditiously if left on the nonjury calendar. For cases in which denial of a belated demand for trial by jury has been held not an abuse of discretion nor grounds for reversal, see: *Zoski* v. *Gaines,* 271 Mich 1; *Basmajian* v. *City of Detroit,* 256 Mich 539; *Richey* v. *Monroe County Board of Education,* 346 Mich 156. No abuse of discretion is shown here in denying the motion.

The next question involved as stated in plaintiff's brief is: "Was defendant Shumway guilty of negligence which was a proximate cause of the accident?" Her brief presents no argument that the trial court's finding, as a matter of fact, in the negative, is against the clear preponderance of the evidence, but merely that a chronological analysis of the facts "leads one to the conclusion that the defendant was guilty of negligence which was the proximate cause of the accident." It is not the function of this Court, in an appeal from a trial court's decision on the facts in a nonjury law action, to hear the matter *de novo* and substitute our judgment for that of the trial court as to what the facts are as established by the proofs. Our determination in that regard is limited solely to whether the trial court's finding of facts is against the clear preponderance of the evidence. *Noyce* v. *Ross,* 360 Mich 668; *Lynes* v.

J. R. Heineman & Sons, Inc., 363 Mich 276; *Houghton* v. *Roberts*, 357 Mich 223; *Gocha* v. *Fetterolf*, 363 Mich 344. As noted, plaintiff does not say, and we do not conclude, that the trial court's finding, as a matter of fact, that defendant had not been shown to be guilty of negligence which was a proximate cause of the accident is against the clear preponderance of the evidence. For that conclusion, the following recital of facts suffices:

Defendant was traveling south on his right-hand side of a 2-lane, through highway, at a speed not in excess of the lawful limit, at about the hour of 11 a.m. Plaintiff's driver, approaching that through highway from the east, was driving his automobile westerly on his right-hand side of an intersecting, 2-lane highway at from 20 to 25 miles per hour. He was required, as disclosed by stop sign, to stop before entering the intersection. Some distance back, when he applied his brakes, he had noticed that his car began to slip, so he decided to disregard the stop sign. He drove into the intersection without stopping. Defendant testified that the view between the 2 cars was obstructed by a high, earthen bank immediately northeast of the intersection, so that he did not see the car in which plaintiff rode until it was about to enter the intersection and defendant was then about 75 feet from the intersection, traveling at about 45 to 50 miles per hour; that as defendant then became aware that the other car was not going to stop as required by law,* it was too late for defendant to do anything to avert an accident. The front of defendant's car then struck the right center of the other car.

The trial court held, in effect, that defendant could not have seen the other car much earlier than he did and that, even had he seen it at the first possible

* See PA 1949, No 300, § 651 (CLS 1956, § 257.651, Stat Ann 1952 Rev § 9.2351).—REPORTER.

moment after it emerged from behind the bank, he had a right to assume its driver would heed the stop sign and come to a stop and that when first it could or should have become apparent to defendant that the other car was not going to stop, sufficient time no longer remained for defendant to do anything to avoid the accident.

On such finding of facts, amply supported by the record, we cannot say that the court's further finding that defendant had not been shown to have been guilty of negligence which was a proximate cause of the accident is against the clear preponderance of the evidence. For rights and privileges of favored driver on through highway, see: *McGuire* v. *Rabaut*, 354 Mich 230; *Churukian* v. *LaGest*, 357 Mich 173.

Affirmed. Costs to defendant.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

CLARKSON *v.* LUFKIN RULE COMPANY.

1. WORKMEN'S COMPENSATION—SANDER—AGGRAVATION OF PRE-EXISTING SILICOTIC CONDITION—EVIDENCE.

   Workmen's compensation appeal board's finding that plaintiff was entitled to workmen's compensation because of disability is affirmed, where there is competent evidence to support the finding, it being shown that dust and sand from sanding machine at which he worked could have contributed to and aggravated a pre-existing silicotic condition and medical testimony was that he had extensive pulmonary fibrosis, emphysema, and silicosis.

2. SAME—AGGRAVATION OF NONCOMPENSABLE DISABILITY—SILICOSIS.

   Provision of workmen's compensation act permitting reduction of award for occupational disease where noncompensable disability or death from any other cause is aggravated, prolonged, accelerated, or in any wise contributed to by an occupational disease *held,* inapplicable, where plaintiff's previous silicotic condition, noncompensable because antedating the occupational disease amendment to the workmen's compensation act, was aggravated by an occupational exposure to sander dust (CL 1948, § 417.8).

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation §§ 247, 252, 278.
Workmen's compensation; injury or death to which pre-existing physical condition of employee contributed. 19 ALR 95, 28 ALR 204, 60 ALR 1299.

[2] 58 Am Jur, Workmen's Compensation §§ 247, 252, 278, 501.
Workmen's compensation; injury or death to which pre-existing physical condition of employee contributed. 19 ALR 95, 28 ALR 204, 60 ALR 1299.
Conditions of bodily organs due to particles of dust or other material incident to work as compensable within workmen's compensation act not covering occupational diseases. 62 ALR 1460, 97 ALR 1412.

[3] 58 Am Jur, Workmen's Compensation § 527.

3. SAME—SILICOSIS—LIMITATION ON AWARD—ERROR RAISED FOR FIRST TIME IN SUPREME COURT.

Claim of error on part of hearing referee in awarding plaintiff workmen's compensation "until further order of the department" without providing for the $10,500 limitation in statute pertinent to silicosis and other dust diseases, which claim was not mentioned in application for review by workmen's compensation appeal board nor urged upon the board, came too late when raised for first time in Supreme Court (CLS 1956, § 417.4).

Appeal from Workmen's Compensation Appeal Board. Submitted April 3, 1962. (Docket No. 4, Calendar No. 49,390.) Decided July 2, 1962.

John Clarkson presented his claim against the Lufkin Rule Company for compensation because of occupational silicosis. Award to plaintiff. Defendant appeals. Affirmed.

John P. Murphy, Jr., for plaintiff.

Lacey & Jones (*Robert B. Lacey,* of counsel), for defendant.

DETHMERS, J. Plaintiff worked for defendant for 35 years, until he reached age 65. Defendant company made wooden rulers capped at the end by brass through which rivets were driven. Plaintiff's duties included holding the ends of such rivets against a belt sander to grind them down. Dust and sand from the sander got into his face and up his nose and made him cough and his sputum became a dirty gray. About 5 years before stopping work for defendant company his breath began to be short. He finally stopped working on the job for defendant because he became weak and tired and for reasons of health. Medical testimony was that he had extensive pulmonary fibrosis, emphysema, and silicosis.

Defendant showed that for some years before the 35-year period plaintiff had worked for it he had worked in coal mines; that the sanding belts in its plant have no sand on them, are made of aluminum oxide and no free silicon dioxide is used in manufacturing them; that there was a suction machine and vacuum hood over the sander pulling sawdust away from the operator of the machine; that a district engineer of the Michigan department of health had found that defendant's premises presented no potential health hazard; that silicosis is progressive, so that, once incurred, it keeps developing even after exposure to silica ceases. On this basis, defendant contends that plaintiff's silicosis was incurred in coal mining, that there are no proofs that silica exposure or other conditions existed in defendant's employment which were factors, and that, hence, his disability was not shown to be attributable to employment with defendant.

For plaintiff, however, there was medical testimony that dust from the sanding machine, even if free from silica, could have contributed to and aggravated a pre-existing silicotic condition.

Under such record, we cannot say that the appeal board's finding of facts entitling plaintiff to compensation is without support of competent evidence.

Defendant claims error in the appeal board's failure to apply the following language of CL 1948, § 417.8 (Stat Ann 1960 Rev § 17.227):

"or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated, or in any wise contributed to by an occupational disease, the compensation payable shall be such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as a causative factor, bearing to all the causes of such disability or death,

such reduction in compensation to be effected by reducing the number of weekly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interests of the claimant or claimants."

As plaintiff properly points out, defendant does not distinguish between aggravation of the original silicosis, noncompensable because antedating the statute, which plaintiff may have acquired in mining, by an occupational disease, as provided for in the quoted language of the statute, and aggravation thereof by an occupational exposure (sander dust), as occurred in this case. Accordingly, we agree with plaintiff that the quoted language has no application here. The appeal board did not err in this connection.

The hearing referee awarded plaintiff compensation "until further order of the department" without providing for the $10,500 limitation contained in CLS 1956, § 417.4 (Stat Ann 1960 Rev § 17.223). In its application for review of claim to the appeal board defendant made no mention of this point nor did it urge it upon the board. Under such circumstances, it comes too late when raised for the first time here. *DeWitt* v. *Grand Rapids Fuel Company,* 346 Mich 209; *McLean* v. *Eaton Manfg. Company,* 286 Mich 285.

Affirmed. Costs to plaintiff.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

CARLTON *v.* PARKER DAIRY COMPANY.

NEGLIGENCE—PLEADING—MINORS—STATUS OF PLAINTIFF—INJURY BY VENETIAN BLIND.

Declaration in action by guardian of minor who was injured when defendant's Venetian blind fell and struck her face and head *held*, not to have stated a cause of action, where it failed to aver whether she was a trespasser, invitee, licensee, or employee, stated only conclusions that she was lawfully upon the premises, that she had a right to attempt to raise the blind, and that defendant had a duty to keep the blind safe for her use.

Appeal from Saginaw; O'Neill (James E.), J. Submitted January 12, 1962. (Docket No. 85, Calendar No. 48,791.) Decided July 2, 1962.

Case by Diana Carlton, a minor, by Paul E. Carlton, her guardian, against Parker Dairy Company, a Michigan corporation, for personal injuries sustained when struck by falling Venetian blind. Cause dismissed on motion. Plaintiff appeals. Affirmed.

Joseph J. Trogan, for plaintiff.

Stanton, Taylor & McGraw (*John W. McGraw,* of counsel), for defendant.

DETHMERS, J. Plaintiff, a minor, by her guardian, sued defendant company for damages resulting

REFERENCES FOR POINTS IN HEADNOTES

38 Am Jur, Negligence § 273.

from injuries sustained when she attempted to raise a metal Venetian blind on defendant's premises and it fell, striking her face and head.

Plaintiff's declaration alleged that when the accident occurred she was lawfully upon defendant's premises, that she had a right to attempt to raise the blind, that it was defendant's duty to keep the blind in a reasonably safe condition so that it could be used safely by her, and that defendant negligently, recklessly and wilfully, in disregard of its duty to her, kept the blind in an unsafe condition so that it fell and injured her, without fault on her part.

Plaintiff's declaration alleged no facts about her status upon the premises or the relationship then existing between her and defendant, nor why or in what capacity she was there, nor about the nature of her alleged right to attempt to raise the blind. Its stated conclusions that she was lawfully upon the premises, that she had a right to attempt to raise the blind and that defendant owed her a duty to keep the blind safe for her use, are supported by no allegations of facts whatsoever. Whether she was there as a trespasser, an invitee, a licensee or an employee cannot be gathered from anything in the declaration.

Plaintiff's declaration, in consequence, stated no cause of action and, on defendant's motion, was properly dismissed. Plaintiff appeals.

Defendant's motion to dismiss and the court's dismissal were based, however, on a different ground, namely, lack of jurisdiction in the court and exclusiveness of remedy under the workmen's compensation act. The motion and supporting affidavits stated that plaintiff had represented herself to be 16 years of age and secured employment with defendant, to work on the premises in question, some time before the accident and that she was engaged in that employment when the blind fell.

Plaintiff did not file an answer to the motion or counteraffidavits. It appears, however, that, on oral argument of the motion, it was the contention of plaintiff's attorney that no work permit had been secured and filed with defendant for plaintiff, that her employment was, accordingly, unlawful and, therefore, the relationship of employer and employee never came into existence, thus leaving plaintiff free to sue defendant at common law. For that line of reasoning, plaintiff offers us no authority and we find none.

The Michigan workmen's compensation act and decisions are to the contrary. CLS 1956, § 411.7 (Stat Ann 1960 Rev § 17.147), provides, in part:

"The term 'employee' as used in this act shall be construed to mean: * * *

"Every person in the service of another, under any contract of hire, express or implied, * * * including minors, who, for the purpose of this act, shall be considered the same and have the same power to contract as adult employes: Provided, That any minor under 18 years of age 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."

CL 1948, § 411.2 (Stat Ann 1960 Rev § 17.142), reads, in part:

"On and after the effective date of this section, every employer, public and private, and every employee * * * shall be subject to the provisions of this act and shall be bound thereby."

In *Field* v. *Jack & Jill Ranch,* 343 Mich 273, 280, this Court said:

"It will be noted that the compensation act itself does not define illegal employment. For that we

turn to the Hittle juvenile employment act (PA 1947, No 157 [CL 1948, § 409.1 *et seq.* (Stat Ann 1950 Rev § 17.701 *et seq.*)]),which regulates the employment of minors in this State. It is provided in section 3 thereof (CL 1948, § 409.3 [Stat Ann 1950 Rev § 17.703]) that a work permit must be obtained for the employment of any minor under the age of 18 years."

This Court then held in the *Field Case* that the 16-year-old plaintiff, who had been engaged by a dude ranch under a work permit for washing pots and pans and who was injured while wrangling on horseback, was, by reason of the lack of permit therefor, engaged in illegal employment when injured and, therefore, entitled, under the above statutory provision, to double compensation. See, also, for case of work by 16-year-old boy without requisite work permit and application of the act and its double compensation feature by this Court, *Crilly* v. *Ballou,* 353 Mich 303. In *Holloway* v. *Ideal Seating Company,* 313 Mich 267, this Court, after quoting the compensation act definition of the term "employee" as above quoted from CL 1948, § 411.7 (Stat Ann 1960 Rev § 17.147), to include minors, went on to say (p 275):

"The above section grants to minors the same power to contract as adult employees, for the purposes of this act, and subjects them, whether legally or illegally employed, to its provisions the same as adults. *Thomas* v. *Morton Salt Co.,* 253 Mich 613; s. c. reaffirmed, 258 Mich 231; *Jesiek* v. *Banfield,* 286 Mich 440."

The above establish that a minor in illegal employment is not at all one outside the employment relationship and the scope of the workmen's compensation act, but, on the contrary, is one within the protection and exclusive coverage of the act and

sometimes entitled to double compensation thereunder.

Plaintiff and defendant were, therefore, subject to the compensation act, and the conditions of liability under that act existed. As to them, it is stated in CL 1948, § 411.4 (Stat Ann 1960 Rev § 17.144), that:

"Where the conditions of liability under this act exist, the right to the recovery of compensation benefits, as herein provided, shall be the exclusive remedy against the employer."

In *Totten* v. *Detroit Aluminum & Brass Corporation,* 344 Mich 414, 418, this Court quoted with approval from *Munson* v. *Christie,* 270 Mich 94, 98, the following:

" 'It appears from the title the act is one providing that as against the employer the injured employee and his dependents have no rights and can enforce no liability except those provided in the act. We need not read beyond the title of the act to find this intent and purpose of the legislature clearly expressed."

In *Dershowitz* v. *Ford Motor Company,* 327 Mich 386, plaintiff brought an action at law against his employer for damages resulting from injuries sustained on defendant's premises. In holding his remedy to be exclusively under the workmen's compensation act, we said (p 389):

"To state a cause of action plaintiff's declaration needed to allege facts showing that at the time the injury occurred he was not doing anything connected with his employment and that there was no causal connection between the latter and his injury."

Plaintiff's redress rests entirely within the compensation act. The order dismissing the cause is affirmed, with costs to defendant.

CARR, C. J., and KELLY, J., concurred with DETHMERS, J.

BLACK, J. (*concurring*). I agree, for reasons given in the first 4 paragraphs of the opinion submitted by Mr. Justice DETHMERS, that plaintiff's declaration fails to state a cause and was therefore properly dismissed. On such ground I concur in affirmance.

KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred with BLACK, J.

ALDERTON *v.* CITY OF SAGINAW.

1. MUNICIPAL CORPORATIONS—ZONING ORDINANCES—POLICE POWER.
   A municipal zoning ordinance, to be valid, must bear a direct and substantial relation to the objectives of police power, the preservation of the public health, safety, morals, and general welfare of the community as a whole.

2. SAME—ZONING ORDINANCE—BURDEN OF PROVING INVALIDITY.
   The party attacking a municipal zoning ordinance has the burden of establishing affirmatively that the ordinance has no real or substantial relation to public health, morals, safety, or general welfare.

3. SAME—ZONING ORDINANCE—PRESUMPTIONS.
   A municipal zoning ordinance is presumed valid.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Zoning § 26.
[2, 3, 5] 58 Am Jur, Zoning § 16.
[4] 58 Am Jur, Zoning § 14.
[6] 58 Am Jur, Zoning §§ 140–142.
[7] 3 Am Jur, Appeal and Error § 896.

4. SAME—DETERMINATION OF VALIDITY OF ZONING ORDINANCE.
   The validity of each municipal zoning ordinance must be determined on its own facts and circumstances.

5. SAME—ZONING ORDINANCE—APPLICATION TO PARTICULAR TRACT.
   More than a debatable question must be presented as to the validity of a municipal zoning ordinance before a court may find invalid action by legislative body which adopted the zoning ordinance and hold the ordinance invalid so far as it applies to particular tract involved.

6. SAME—ZONING ORDINANCE—RESIDENTIAL USE—VALUE.
   Determination as to the validity of a municipal zoning ordinance restricting use of property to residential purposes, requires that consideration be given to the character of the district, its peculiar suitability for particular uses, the conservation of property values and character of building and population development, unsuitability and lack of market for residential purposes and whether it will become "dead land" or nonincome-producing land without residential value.

7. SAME—ZONING ORDINANCE—FINDINGS OF COURT—EVIDENCE.
   The Supreme Court gives weight and careful consideration to the findings of the lower court who heard the testimony, saw the exhibits, and, in most instances, was familiar with the area involved in disputed application of a municipal zoning ordinance.

8. SAME—ZONING ORDINANCE—RESIDENCE USE IN COMMERCIAL AREA —TRAFFIC—VALUE.
   Conclusion of trial court that recently adopted municipal zoning ordinance, restricting use of 3 blocks midway of 27-block portion of only through arterial highway in that part of city to multiple family residential use, accessory uses, and listed waiver uses, such as office and professional buildings, was invalid as applied to such area *held*, proper under record showing the area was commercial not only in the adjacent portions but within the 3-block area itself, no new residences were being constructed, that such residences as were there were 50 years old, or more, that traffic will not be substantially reduced, and value as commercial area is considerably more than as residential.

9. COSTS—PUBLIC QUESTION—ZONING ORDINANCE—RESIDENCES.
   No costs are allowed in suit to declare invalid a municipal zoning ordinance as applied to 3-block area midway on 27-block portion of a through arterial highway in defendant city whereby use was limited to residential purposes, a public question being involved.

Appeal from Saginaw; O'Neill (James E.), J. Submitted April 5, 1962. (Docket No. 23, Calendar No. 48,833.) Decided July 2, 1962.

Bill by Emery R. Alderton and others against the City of Saginaw, a municipal corporation, to enjoin enforcement of zoning ordinance as it applies to their properties. Decree for plaintiffs. Defendant appeals. Affirmed.

William A. Boos, Jr. and *Hamed W. Suffety,* for plaintiffs.

W. Vincent Nash, City Attorney, and *Jack E. Kerr,* Assistant City Attorney, for defendant.

KELLY, J. This case involves a zoning ordinance as applied to 3 blocks of Genesee avenue, in the city of Saginaw, to-wit: R–3 classification, limiting use to multiple family residential uses, accessory uses, and listed waiver uses, such as office and professional buildings. The circuit judge entered a decree restraining defendant city from enforcing the provisions of the zoning code as it applies to plaintiffs' properties and, further, prohibiting defendant from more highly restricting the use of the properties in question than that property which is classified as B–2 (business classification) elsewhere in the city of Saginaw. Defendant city appeals.

The Saginaw river bisects the city of Saginaw in a generally northerly and southerly direction and divides the city into eastern and western parts. The street in question, East Genesee, is the major street in the eastern part and it is the only through arterial highway running from southeast to northwest.

The present zoning code was adopted in October, 1958. Immediately north of the 3-block area in question the property is classified as either B–2 or

B–3 for a distance of 13 blocks. This allows general shopping and merchandizing on both sides of the through street for these 13 blocks. Immediately south of the 3-block area is a drive-in, and to the south we find a similar situation on both sides of Genesee, namely, for 11 blocks it is zoned B–1, B–2, M–1 or M–2, which permits business and manufacturing use.

At first glance the 3 blocks in question appear to be residential, but within these 3 blocks, on both sides of Genesee, we find the following businesses or offices: Fur sales, repair, and storage; vacuum cleaner sales; insurance office; 3 doctors' offices; real-estate firm; dentist; chiropractor; Temple Beth El; television service; dry cleaner pickup station; and 2 grocery stores.

It is apparent that there has been created a zoning formula for this 3-block area that plaintiffs properly described to this Court as a "3-block oasis."

It is the contention of the city that the trial court erred in decreeing that henceforth both sides of Genesee within this 3-block area, which is now zoned R–3, will not be zoned with a higher restriction than B–2.

The city, endeavoring to prove that the circuit judge was wrong in so determining and attempting to justify this unusual zoning, states that if the trial court's decree would become operative the traffic on Genesee street within this 3-block area would increase due to the fact that there could, and probably would, be various business places constructed within the area.

It is difficult to understand the city's position in this regard when the proofs show that within the last 2 or 3 years the city allowed the lots immediately south of this 3-block area to be used for the construction of a quarter of a million dollar drive-in,

which, it is admitted (and is apparent) has greatly increased the traffic in this area.

The residences presently in the area are old, and no testimony was given as to when the last residence was erected, but apparently it has been some time since there has been new residential construction.

In the "findings of the court" we find the following statement:

"It seems to me that this is an unreasonable restriction on the people who live in this small area because they are being squeezed and being squeezed and being squeezed, and the question this court has to decide is when does that squeezing become unreasonable, and it seems to me that that point has been reached, because of the nature of this locality, you have a traffic problem there which you can't eliminate."

Appellant does not deny that it is a rather late day to apply this zoning restriction to these 3 blocks, but states that this should not prevent the city from holding the line now.

The record discloses that 2 real-estate appraisers testified; that the appraiser called by plaintiffs testified there was no marketable value for plaintiffs' property under the existing code. The other appraiser, called by the city, admitted that under the existing code the use would be limited to waiver uses, such as professional buildings.

Appellees call attention to the fact that most of the plaintiffs are not speculators and are not "Johnnys come lately" as they have, with the exception of plaintiffs Vernon W. Dingman, Jr. and Dorine Dingman, owned their properties for years, and call this Court's attention to the fact that plaintiffs Alderton, who have owned their property for over 10 years, buying it for $10,500, have been endeavoring to sell and the best offer obtained was

$8,500, which was accepted but then rejected before sale was consummated after purchaser, a dentist and his wife, looked over the neighborhood; that another plaintiff had invested $20,000 in remodeling property he had hoped to be able to occupy under the present zoning for multiple family residential use and, while he was able to so rent it in the 2 or 3 years following World War II when property was scarce in Saginaw, since that time he has not been able to obtain enough money to keep it repaired and pay taxes. Plaintiffs Vernon W. Dingman, Jr., and Dorine Dingman purchased their property in 1959, at 1422 East Genesee, intending to open a school of cosmetology, but were turned down by the zoning board for a waiver use.

We have held that a zoning ordinance to be valid must bear a direct and substantial relation to the objectives of police power, the preservation of the public health, safety, morals, and general welfare, of the community as a whole (*Long* v. *City of Highland Park,* 329 Mich 146); that the attacking party has the burden of establishing affirmatively that the ordinance has no real or substantial relation to public health, morals, safety, or general welfare and that the ordinance is presumed valid (*Austin* v. *Older,* 283 Mich 667); that each case must be determined on its own facts and circumstances (*Moreland* v. *Armstrong,* 297 Mich 32), and that in order for the courts to find action of the legislative body invalid, more than a debatable question is required (*Brae Burn, Inc.,* v. *Bloomfield Hills,* 350 Mich 425).

The debatable question rule as presented in *Brae Burn, supra,* does not mean such question exists merely because there is a difference of opinion between the zoning authority and the property owner in regard to the validity of the ordinance. If this were the case, no ordinance could ever be successfully attacked.

In determining validity of an ordinance we give consideration to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development (*Grand Trunk W. R. Co.* v. *City of Detroit,* 326 Mich 387); unsuitability for residential purposes (*Ritenour* v. *Township of Dearborn,* 326 Mich 242); lack of market for such purpose (*Long* v. *City of Highland Park, supra*), and whether the land will become "dead land" or nonincome-producing land without residential value (*Janesick* v. *City of Detroit,* 337 Mich 549).

In zoning appeals we give weight and careful consideration to the findings of the lower court who heard the testimony, saw the exhibits and, in most instances, is familiar with the area in dispute. In the case at bar, the lower court having heard the testimony and viewed the exhibits concluded the ordinance was invalid. This conclusion is amply supported by the following: (1) The character of the area was commercial as indicated by the properties immediately to the north and south and by the numerous commercial type operations in the very area zoned; (2) There was no evidence of any new residential construction and the present residences are 50 years old, or more; (3) The best the property could be moved for, even by the testimony of defendant's own expert witnesses, was for waiver uses which were commercial in nature; (4) Defendant's claim that traffic will be substantially reduced is not supported by the general character of the area, particularly the property along Genesee immediately to the north and south of the zoned area; (5) The value of the property as commercial is considerably more than as residential. While this in itself is not a controlling factor, we will give it consideration (*Janesick* v. *City of Detroit, supra*).

The decree of the lower court is affirmed. No costs, a public question being involved.

CARR, C. J., and DETHMERS, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

REETZ v. RIGG.

1. TRIAL—SPECIAL QUESTIONS—APPROVAL AND SUBMISSION BY COURT.
   A special question that is timely presented to the court and approved by it as to form and substance for submission to the jury is adopted by the court and submitted to the jury as an interrogatory of the court, not of counsel, and in such regard the duty of the court is no different than if the question had been drafted and redrafted by the court (CL 1948, § 618.39).

2. SAME—SPECIAL QUESTIONS—SUBMISSION BY TRIAL COURT.
   The trial judge has inherent power to draft and submit special questions to the jury regardless of request by counsel (CL 1948, § 618.39).

3. SAME—SPECIAL QUESTIONS—SUBMISSION BY TRIAL COURT.
   The submission of special questions to the jury, when requested, is required by statute, but such statutory command does not forbid the court, in the exercise of its inherent power, from submitting on its own motion special questions which will aid in reaching a proper verdict, its right in such respect being coextensive with its power to give instructions generally (CL 1948, § 618.39).

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 1075.
[2, 3] 53 Am Jur, Trial §§ 1065, 1068.
[4] 53 Am Jur, Trial § 1063.
[6] 3 Am Jur, Appeal and Error § 872.
[7] 3 Am Jur, Appeal and Error § 246.

4. SAME—PURPOSE OF SPECIAL QUESTIONS.

The specific object of special questions is that of ascertainment by the court, whether the jury has properly applied the law as given by the court to the jury's findings of fact (CL 1948, § 618.39).

5. SAME—SPECIAL QUESTIONS.

It is improper to submit special questions or requested instructions as having emanated other than from the court (CL 1948, § 618.39).

6. APPEAL AND ERROR—ERROR IN SUBMISSION OF SPECIAL QUESTIONS—SAVING QUESTION FOR REVIEW.

It was too late, from and after rendition of the jury's verdict, to question procedure taken whereby the fact that a special question which had been presented by the defendants was stated to the jury as having been presented by them, although such designation of origin was improper, where counsel for neither party saved the question for review, the importance of errors of such nature, and their consequent effect as being either reversible or harmless, being judged in part by the attitude of counsel toward them when time yet remains to set things right in the jury room (CL 1948, § 618.39).

7. SAME—QUESTIONS REVIEWABLE—SAVING QUESTIONS FOR REVIEW.

The Supreme Court is a court of review in law cases, not of retrial, and considers duly raised and saved questions only.

Appeal from Bay; Smith (Richard G.), J. Submitted April 3, 1962. (Docket No. 7, Calendar No. 48,762.) Decided July 2, 1962.

Case by Milo Reetz against Alvin E. Rigg and Jerry W. Rigg for personal injuries sustained in automobile collision on March 9, 1956. Verdict and judgment for defendants. Plaintiff appeals. Affirmed.

Roy De Gesero, for plaintiff.

Heilman & Purcell, for defendants.

BLACK, J. This is an intersectional collision case, tried to court and jury in the Bay circuit. The jury

returned a verdict for defendants. Judgment on the verdict having entered, plaintiff moved for retrial, alleging—with other questions—erroneous submission to the jury of certain special questions defendants had proffered under the statute (CL 1948, § 618.39 [Stat Ann § 27.1019]). The motion was denied. Plaintiff appeals.

The crash intersection and approaching roadways were covered with ice. The 2 drivers approached from opposite directions. Plaintiff's pleaded and tried theory was that the defendant driver caused defendants' car to skid into his car as he, plaintiff, was attempting to make a lawful left turn in the intersection. Defendants, denying negligence on the part of their driver, pleaded contributory negligence consisting of effort by plaintiff to "cut the corner" in front of defendants' car without signalling intention of making such turn. Plaintiff, replying, insisted that the defendant driver was guilty of "gross negligence."

With its general verdict for defendants the jury reported answers to 4 special questions as follows:

"Was the negligence of defendant Jerry W. Rigg a proximate cause of the collision?

"Answer: Yes.

"Was the negligence of plaintiff Milo Reetz a proximate cause of the collision?

"Answer: Yes.

"Was the defendant Jerry W. Rigg guilty of gross negligence which was a proximate cause of the collision?

"Answer: No.

"Was the Reetz vehicle entirely out of the intersection at Frank and Community street at the time of collision?

"Answer: No."*

* We do not, by silence, indicate approval of the mixed (law and fact) form of the first 3 of these questions. See *May* v. *Goulding*, 365 Mich 143; followed in *McClelland* v. *Scholz*, 366 Mich 423.

Defendants, having proposed the above special questions, labeled one as "Defendant's special question." It was delivered in that form to the jury for answer. Also, and in the course of his charge, the trial judge informed the jury that some of the special questions had been presented by defendants. Near the end of the charge the following discussion took place in the presence of the jury:

"*The Court:* Now, there are 2 possible verdicts which you may render in this case. Number 1, you may find damages in favor of the plaintiff, in the sum of so many dollars; number 2, you may find judgment in no cause of action.—Anything further, gentlemen?

"*Mr. De Gesero* [plaintiff's counsel]: Your Honor, just a moment.*

"*The Court:* Now, I have indicated to you that the special questions were presented by particular parties. That should make no difference to you, who presents the special questions, you are to answer them fairly and honestly. All right. Anything further?

"*Mr. De Gesero:* I have nothing further, your Honor.

"*The Court:* Mr. Heilman?

"*Mr. Heilman:* I have nothing further."

The following was said later, at conclusion of the court's charge:

"*The Court*: I want to put on the record before we adjourn the following statement. I indicated to the jury that 1 of the questions was defendant's special question. Now, the court does not know whether that was the proper thing to do. However, I have called to the attention of both parties that the question as it was given to me had the title on it 'defendant's special question.' So, I fail to see how that in

* The record is silent, here, with respect to what if anything was said to the court by counsel for one or all parties prior to the court's subsequent utterances as quoted.

any way could be error. However, I did want to place it in the record, because Mr. Heilman did raise that objection that it should be placed in the record."

On motion for new trial plaintiff pointed vainly to the form and manner of submission of the special questions. Referring to the fourth quoted above, his counsel said and says now that the label is "contrary to the practice and rule"; that the question indicated its source and that he was thereby denied "a fair and impartial trial." The point calls for some comment upon and exposition of the respective functions of court, counsel, and jury when the cited statute is called duly into play.

When a special question is timely submitted to the court, and the court has approved it as to form and substance for submission, the question is adopted by the court and is submitted to the jury as an interrogatory of the court; not of counsel. In such regard the duty of the court is no different than if the question had been drafted or redrafted by the court.* The specific object is that of ascertainment, by the court, whether the jury has properly applied the law as given by the court to the jury's findings of fact (*Beecher* v. *Galvin,* 71 Mich 391; *International Wrecking & Transportation Company* v. *McMorran,* 73 Mich 467; *Holman* v. *Cole,* 242 Mich 402; and see cases cited in *Richards* v. *Birmingham School District,* 348 Mich 490, 496). The situation is no whit different than that which obtains when the trial judge approves requested jury instructions. In the latter

* That the trial judge has inherent power to draft and submit, regardless of request by counsel, was settled in *Vukich* v. *City of Detroit,* 318 Mich 515. On that occasion the following was taken from American Jurisprudence and adopted (p 521):

"Although the submission of special questions, when requested, is required by statute, the court is not thereby forbidden, in the exercise of its inherent power, from submitting on its own motion special questions which will aid in reaching a proper verdict, its right in this respect being coextensive with its power to give instructions generally." 53 Am Jur, Trial, § 1065, p 738.

instance the requested and approved instructions are adopted by the court and become a part of the court's charge. In the other the requested and approved special question is adopted by the court and is submitted by the court. The interrogator is the judge; not the movant lawyer or party. Such is the proper instructional posture of the question when it goes before the jury and is considered by the jury.

It is improper, then, to submit special questions or requested instructions as having emanated other than from the court. What was said unanimously in *Newton* v. *Consolidated Construction Co.*, 184 Mich 63, 75, 76, comes to mind as explanatory of that which we lay now before the profession and our trial judges:

"It is an exasperating thing, one which most trial lawyers have at some time had occasion to complain about, to have the trial judge say to the jury, 'I am requested to charge you,' proceed to read a request, and end by so qualifying or amending it, with or without argument, that its force as a declaration of the applicable law is weakened or wholly lost. The jury will usually understand by whom the request is preferred, and if several requests preferred by the same party suffer this fate, especially if they are contrasted with an unqualified, connected statement of rules favorable to the other party, dissatisfaction with an adverse verdict is to be expected."

Considering what took place during the trial we find no reversible error. When, during the course of jury instruction, plaintiff's counsel asked and received the relevant ear of the court, he was obligated to act with respect to the present specification of error on penalty of holding his peace from and after rendition of verdict. He could have moved for mistrial, or for withdrawal by the court of the labeled special question. He should in any case have objected to the form of the question when it was submitted

to the court pursuant to the time requirements of section 6 of Court Rule No 37 (1945). Finally, he should not have announced himself as having "nothing further" when Judge Smith inquired of counsel, as he did, after having made what to the judge was corrective instruction. It is not difficult at all, when such questions arise in the presence of the jury, to simply say in response to the court's question that a motion will be made at chambers immediately after the jury retires or, if the time element is opportune, upon suggested temporary retirement of the jury. As noted in *Gilson* v. *Bronkhorst,* 353 Mich 148, 160n, "We judge the importance of errors of such nature, and their consequent effect as being either reversible or harmless, in part by the attitude of counsel toward same when time yet remains to set things right in the jury room."

It was too late, from and after rendition of the jury's verdict, to question the procedure taken. See COOLEY, J., writing for the Court in *DuPont* v. *Starring,* 42 Mich 492, 495 (followed in *Baker* v. *Saginaw City Lines Inc.,* 366 Mich 180, 185), and the like ruling made in *Richards* v. *Birmingham School District, supra,* at page 498. This is no more than familiar application of a familiar tenet which distinguishes the appellate process. The Supreme Court of Michigan is a court of review in law cases; not of retrial. We consider duly raised and saved questions only. The rule, "No objection—no ruling—no error presented" (taken from *Gubas* v. *Bucsko,* 219 Mich 553, 556, and repeated in *Herbert* v. *Durgis,* 276 Mich 158, 166), is fundamental. We adhere to it lest litigation become endless.

No other question requires discussion. Judgment affirmed. Costs to defendants.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

SHAFKIND *v.* KROLL.

1. AUTOMOBILES—NEGLIGENCE—BICYCLES.

Whether or not westbound defendant motorist at dusk in December was causally negligent, as charged by plaintiffs, in striking 10-year-old northbound bicyclist on westerly side of intersection when he was several feet north of the centerline *held*, properly left to jury.

2. SAME—BICYCLIST—DISCOVERED NEGLIGENCE.

The discovered negligence rule was not applicable to westbound motorist on north side of street at dusk in December in colliding with 10-year-old bicyclist who was several feet north of centerline on westerly side of intersection, where his causally negligent conduct continued until time of impact.

Appeal from Wayne; Rashid (Joseph G.), J. Submitted April 12, 1962. (Docket Nos. 15, 16, Calendar Nos. 49,380, 49,381.) Decided July 2, 1962.

Case by Albert Shafkind, a minor, by his next friend, Nathan Shafkind, against Freda Kroll for personal injuries sustained when struck by automobile while riding bicycle. Derivative suit by Nathan Shafkind. Cases consolidated for trial and appeal. Verdict and judgments for defendant. Plaintiffs appeal. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5A Am Jur, Automobiles and Highway Traffic § 1040.
Reciprocal duties of automobile driver and bicyclist. 172 ALR 736.
[2] 5A Am Jur, Automobiles and Highway Traffic § 693 *et seq.*
Last clear chance doctrine. 171 ALR 365.

Albert Lopatin, for plaintiffs.

Erickson, Dyll, Marentay & Slocum (*Milo M. Rouse,* of counsel), for defendant.

BLACK, J. The sole question is whether, in these consolidated jury-tried traffic accident cases, the trial judge should have granted plaintiffs' timely request for instruction that the defendant motorist could, depending of course on jury view of the presented facts, be held liable for what we call subsequent or discovered negligence. See—in Prosser on Torts (2d ed), § 52, p 291—discussion of what, since *Davies* v. *Mann,* 10 M & W 546 (152 Eng Rep 588, 19 Eng Rul Cas 190), has been known as the "jackass doctrine."* The jury returned a general verdict for defendant. Judgments for defendant thereupon entered. Plaintiffs appeal.

Plaintiff Albert Shafkind, then aged 10, received from his parents a used bicycle earlier in the day of presently scrutinized events. On account of maladjustment or want of repair the operating mechanism thereof was indirectly responsible for that which occurred at dusk or shortly after on December 21, 1957.

East-west Curtis and north-south Roselawn intersect, in Detroit, near the Bagley school in a so-called residential area. Roselawn, from curb to curb, is 28 feet wide south of Curtis and 30 feet wide north of Curtis. Curtis is 36 feet wide between curbs. The defendant motorist approached and entered the intersection from the east on the proper side of Curtis

* Referring to "the celebrated case of *Davies* v. *Mann,*" the text-writer of American Jurisprudence says "The decision was merely to the effect that the negligence of the plaintiff in leaving his donkey on the highway so fettered as to prevent it from getting out of the way of carriages did not preclude recovery against the defendant who had negligently driven his carriage against the animal." 38 Am Jur, Negligence, § 216, p 902.

and, although her headlamps were lighted properly, failed to see Albert or Albert's bicycle until actual collision of her car with them. She was driving according to some of the witnesses at a rate of speed higher than the posted limit. It is manifest that the issue whether she was or was not causally negligent, as charged by plaintiffs, became one for jury determination.

Some time prior to defendant's approach Albert undertook to cross Curtis, from south to north on the westerly side of Roselawn. He was having trouble with the propulsion chain "skipping" or "slipping" and, apparently on that account, started to cross Curtis from the south curb by "straddling" the bicycle or, as described by him, "walking it." Walking the bicycle in such manner he arrived at or just short of the center line of Curtis. There, his pant leg having become entangled either with the chain or the pedal, Albert stopped for some 30 to 40 seconds (or possibly a minute as 1 witness estimated) in order to free his leg and clothing preparatory to riding the bicycle.

While Albert was stopped 4 disinterested witnesses, approaching in an automobile from the west on Curtis, saw his trouble and brought their car to a stop, on the south side of Curtis, abreast and just short of Albert's position. Their car remained in such position until Albert was ready to proceed, at which time the car was started forward and to the east on Curtis. Albert thereupon undertook to continue north across the northerly portion of Curtis. He did not see defendant's car approaching at any time. As he started Albert was riding the bicycle. He continued riding it until impact. How far he progressed is disputed as well as uncertain. An officer estimated that the point of impact was "approximately 3 or 4 feet to the north of the centerline." Whatever the distance, Albert was struck while rid-

ing, as indicated, by the left front portion of defendant's westbound car. He was seriously injured.

The stated question must be answered in the negative. Whether the defendant motorist was causally negligent and, if so, whether Albert was contributorily negligent, were typical questions which the trial judge submitted to the jury according to standard instructions. It is quite true that Albert was not causally negligent prior to the time he started to ride northerly from the center—or near center—of the pavement. From that time on, however, his conduct was such that, if it constituted negligence, the causative effect thereof continued right up to the time of impact.

The fact is that the plaintiff rider and the defendant motorist, each blindly, pursued and continued to pursue what men of the sea call "a collision course." There was, in such circumstances, no room for jury consideration of the discovered negligence rule. In sum, there is no proof or fair inference from proof that there was sufficient time and sufficient distance allotted for preventive action by defendant after Albert started to ride forward toward the north curb.

See *Duffy* v. *Enright Topham Co.,* 282 Mich 662 (3 NCCA NS 123); *Ertzbischoff* v. *Smith,* 286 Mich 306; *Davidson* v. *City of Detroit,* 307 Mich 420; *St. John* v. *Nichols,* 331 Mich 148; *Schmid* v. *Morehead,* 333 Mich 611; and *Dunn* v. *City of Detroit,* 349 Mich 228, for full exposition of our consistent rule that the doctrine of discovered negligence cannot be considered or applied in the absence of proof showing or tending to show that the plaintiff's negligence had put him in a position of peril; that such negligence thereafter ceased to operate as an efficient cause of the pleaded injury; that the defendant could and should have discovered the plaintiff's peril in time to avoid such injury by the employment of safe

means at ready hand, and that the defendant failed to so discover and act as would a person exercising due care under like circumstances.

Judgments affirmed, with costs to defendant.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

BARNEBEE *v.* SPENCE BROTHERS.

1. APPEAL AND ERROR—JUDGMENT NOTWITHSTANDING VERDICT—EVIDENCE.

   The testimonial record is viewed in the light most favorable to the plaintiff on his appeal from order granting defendant's motion for a judgment notwithstanding the verdict.

2. NEGLIGENCE—QUESTION FOR COURT.

   The question of negligence is one of law for the court where the facts are such that all reasonable men must draw the same conclusion from them.

3. SAME—UNSECURED EXTENSION LADDER—WINDS.

   Whether or not general contractor was negligent in permitting a 32′ extension ladder to remain upright and yet untied to scaffolding during day it was not being used and on which there were unusually gusty winds was properly left for consideration of jury.

4. SAME—PROXIMATE CAUSE—INTERVENING CAUSE—QUESTION FOR JURY.

   Whether or not the action of fellow employees of subcontractor, by whom plaintiff was employed, in moving lower end of 32′

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error §§ 937, 953.
[2, 3] 38 Am Jur, Negligence § 344 *et seq.*
[4, 5] 38 Am Jur, Negligence §§ 351, 352.

extension ladder that was not secured at the top, a foot or more toward the structure against which it was leaning and some 5 feet west of its former position on the ground was an intervening cause which absolved defendant general contractor from liability for negligence in permitting it to remain in its position on an unusually gusty, windy day until it fell and injured plaintiff in midafternoon was a matter for jury's determination.

5. SAME—PROXIMATE CAUSE—QUESTION FOR JURY.

Proximate cause, including the operation of intervening forces, is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.

Appeal from Genesee; McGregor (Louis D.), J. Submitted April 10, 1962. (Docket No. 52, Calendar No. 49,488.) Decided July 2, 1962.

Case by Gerald Barnebee against Spence Brothers, a Michigan corporation, for personal injuries sustained on construction job. Judgment for defendant *non obstante veredicto*. Plaintiff appeals. Reversed and remanded for entry of judgment on verdict.

Herbert W. Devine and *Philip Elliott*, for plaintiff.

Ransom & Fazenbaker (*Marvin W. Ransom* and *Robert B. Norgren*, of counsel), for defendant.

BLACK, J. This common-law negligence case was tried to court and jury in the Genesee circuit. Defendant moved in due time for a directed verdict in its favor. The motion was denied and reserved and the case was given to the jury. The jury returned a verdict for plaintiff and assessed damages in the sum of $39,000.* On motion the trial judge set the verdict

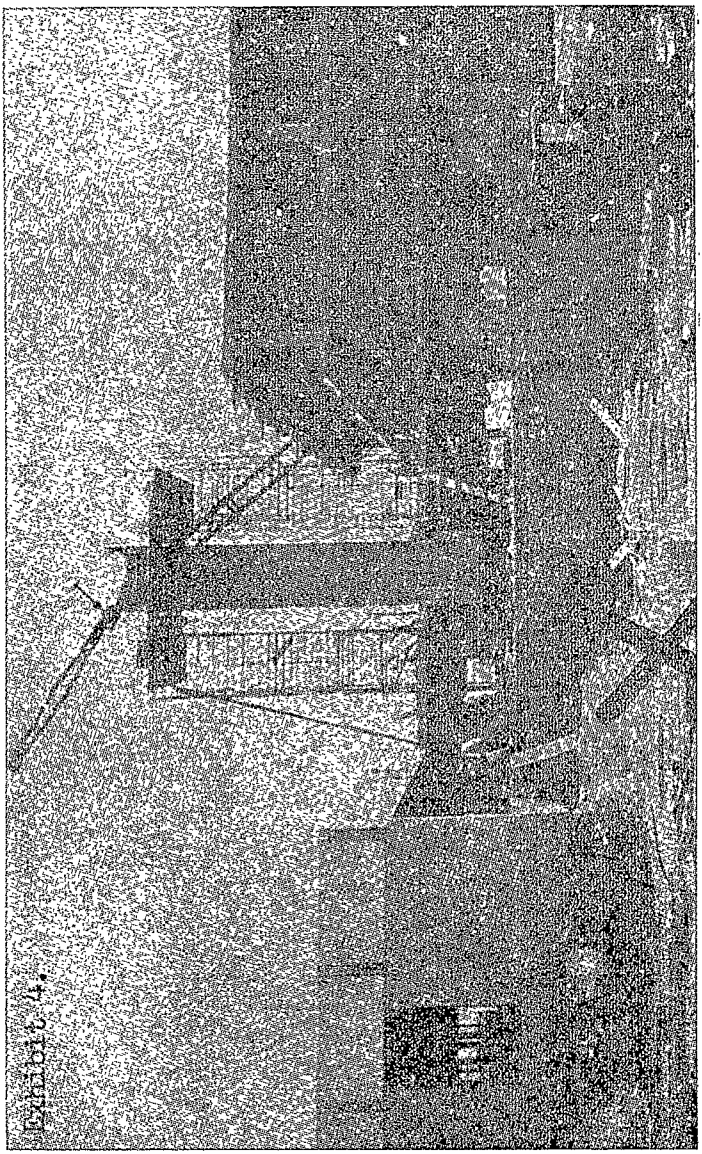
* The amount of the verdict includes some $2,300 of medical and hospital bills; also the amount of compensation paid plaintiff, to the time of trial, by his employer's insurer. See section 15 of part 3 of the workmen's compensation law (CLS 1956, § 413.15 [Stat Ann 1960 Rev § 17.189]).

aside and entered judgment for defendant. Plaintiff appeals.

We examine the case, of course, upon view of the testimonial record in that light which is most favorable to the plaintiff. Defendant, by its presently tested motion for judgment notwithstanding the jury's verdict, has for the purposes of such motion stipulated all that the plaintiff may rightfully claim from the adduced proof. *Detroit & Milwaukee R. Co.* v. *Van Steinburg,* 17 Mich 99, 118.

September 25, 1959, defendant as general contractor was engaged in construction of a new osteopathic hospital in Flint. Defendant's employees as well as the employees of several subcontractors were working, more or less in relative proximity, upon various phases of such construction. Plaintiff was working as an employee of one of the subcontractors, called "Reinforced Steel" in the record. Utilizing for the purpose a crane with extended boom, Reinforced Steel was lifting slabs of specially finished heavy siding from the ground to elevated positions for attachment to the buildings then being erected. Plaintiff, assisting the crane operator, was working on and about a low concrete platform when defendant's 32-foot extension ladder fell upon him. The position of the ladder, prior to its fall, and plaintiff's relevant claim of actionable negligence, will now appear.

By the helpful coincidence of "progress photography" a photo of the construction job and of the portentous scene of plaintiff's injury was taken during the morning, but a few hours prior to the time of such injury. The photographer was facing east toward the portrayed and partially constructed brick chimney, the steel scaffolding surrounding the chimney, and the defendant's said ladder leaning against the topmost part of such scaffolding. The photograph, exhibit 4, appears in the margin.


Exhibit 4.

As already indicated, the ladder belonged to defendant and was used by it on the job. There was testimony from which the jury legitimately may have inferred that defendant should have secured the ladder, by tying the top to the scaffolding, before leaving it in the pictured position;* that there was no necessity for leaving the ladder in such position —secured or unsecured—during the day of plaintiff's injury since defendant's bricklayers, for whose use it was provided, were not due to work on the chimney during such day; that defendant knew there was an unusually gusty wind throughout the work day prior to such injury; that it, in the meantime, made no effort to secure the ladder or remove it; that defendant's superintendent discovered, between 12 and 1 o'clock on such day and approximately 2 hours before plaintiff was hurt, that the ladder had been moved to some extent (variantly estimated by several witnesses) from its pictured position to "more perpendicular than it had been," and also a few feet farther east; that the foreman did not at that time check the ladder to see if it had been tied to the scaffolding or otherwise secured and, in general, that defendant owed a duty in such circumstances to protect persons rightfully in the vicinity from the possibility or probability that the ladder might topple over or be blown over upon 1 or more of them.

The question of intervening cause aside for the moment, there can be no question as to plaintiff's right to have the jury decide the question of defendant's liability. The subject has been so thoroughly covered in recent decisions as to eliminate need for citation and discussion beyond reaffirmation of our test; that it is only where the facts are such that *all* reasonable men must draw the same conclusion from

* The ladder was in the pictured position when defendant's superintendent came on the job at 7:30 o'clock in the morning.

them that the question of negligence is ever considered as one of law for the court. The phrase is taken from *Grand Trunk R. Co.* v. *Ives,* 144 US 408, 417 (12 S Ct 679, 36 L ed 485), citing our *Van Steinburg Case, supra,* and from the Michigan authorities gathered in *Kaminski* v. *Grand Trunk W. R. Co.,* 347 Mich 417, and *Normand* v. *Thomas Theatre Corporation,* 349 Mich 50. Indeed, this plaintiff's adduced evidence of causal negligence is stronger than that which was made to appear in the strikingly similar cases of *Haxer* v. *Griessel,* 162 Mich 310, and *Bacon* v. *Candler,* 181 Mich 372, in each of which the question of negligence, as charged against the respective defendants, was held proper for jury determination.

The real question for review is whether the disclosed act of 2 employees of Reinforced Steel, in moving the lower end of the unsecured ladder from its pictured position a foot or more in toward the scaffolding, and the entire ladder some 5 feet laterally toward the pictured 1-story building, and then leaving the ladder otherwise in its pictured and unsecured position,* constituted a superseding cause which insulated defendant from liability to plaintiff as a matter of law. With respect to such question defendant definitely errs, much as did the similarly charged defendants in *Parks* v. *Starks,* 342 Mich 443; *Berry* v. *Visser,* 354 Mich 38; and *Comstock* v. *General Motors Corporation,* 358 Mich 163 (78 ALR2d 449). Testing the foregoing facts and inferences by rules adopted in *Parks, Berry,* and *Comstock,* we can only say that the issue of causal connection, between the acts and omissions of defendant and plaintiff's sustained injuries, was "for the jury upon all the facts" (quotation from Cooley on Torts [2d ed], p 81).

* This was done by the 2 employees about 11 o'clock in the forenoon, after the picture was taken and before plaintiff was injured, to facilitate work on the platforms in the vicinity of the ladder.

On required favorable view it may be inferred that defendant should have foreseen what could or might happen to the unsecured ladder that windy day, even though it be left untouched by anyone. This Court, unlike the jury, accordingly has no right to find or affirm that what was done by the mentioned act of the 2 employees constituted an intervening cause. The superintendent's timely discovery of such act, and his own failure to act with respect to such discovery, forecloses all such thought and simply cements our conclusion that the rules adopted in the quoted cases do apply to this falling ladder case.

Prosser concludes his chapter on proximate cause this way (Prosser on Torts [2d ed], § 50 "Functions of Court and Jury", p 282):

"In any case where there might be reasonable difference of opinion as to the foreseeability of a particular risk, the reasonableness of the defendant's conduct with respect to it, or the normal character of an intervening cause, the question is for the jury, subject of course to suitable instructions from the court as to the legal conclusion to be drawn as the issue is determined either way. By far the greater number of the cases which have arisen have been of this description; and to this extent it may properly be said that 'proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.' "

We adopt such conclusion as consistent in every respect with our own cases and accordingly direct that the judgment of the circuit court be reversed and that the cause be remanded to that court for entry of judgment upon the jury's verdict. Costs to plaintiff.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

KETCHEL *v.* KETCHEL.

1. EASEMENTS—IMPLIED GRANT—PRESCRIPTIVE USE—WAY OF NECESSITY—PERMISSIVE USE.

   Trial court's finding that plaintiffs had acquired no easement by prescriptive use of private way during 32-year period since division of farm on easterly side of lake between 2 brothers to whom their mother had conveyed it shortly prior thereto *held*, proper under evidence presented, where although the way was visible and had been used before severance of the estates, it was not reserved, it does not appear to have been a way of necessity, in view of use made of farm lane to westerly end of the property, and the use which has been made of the claimed way was permissive.

2. SAME—IMPLIED GRANT—VISIBLE DEPENDENCY.

   The law will not imply a grant of serviency by the severing grantor if there is no visible dependency at the time of severance.

3. SAME—IMPLIED GRANT—BURDEN OF PROOF—EVIDENCE.

   A party who claims that grant of an easement may be implied, upon severance, has the burden of proving the factor of visible dependency by preponderant proof.

4. SAME—VISIBLE DEPENDENCY OF ACCESS—SEVERANCE OF ESTATE.

   A way constitutes an easement appurtenant to the estate granted and passes to the grantee as accessorial to the beneficial use

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 17A Am Jur, Easements §§ 56, 57.
Roadway or pathway used at time of severance of tract as visible or apparent easement. 164 ALR 1001, 1007.
[3] 17A Am Jur, Easements § 65.
[4] 17A Am Jur, Easements § 41.

and enjoyment of the granted premises, where the owner of the entire estate had made the granted part of it visibly dependent for the means of access upon the other through the use of the way.

Appeal from Kent; Hoffius (Stuart), J. Submitted June 7, 1962. (Docket No. 25, Calendar No. 49,236.) Decided July 2, 1962.

Bill by James Stanley Ketchel, Elsie Ketchel, Harry J. Mulder, and others against Violet Ketchel and Arthur Ketchel, Sr., to affirm a private way over defendants' land and to enjoin interference therewith. Bill dismissed. Plaintiffs appeal. Affirmed.

Roach, Smolenski & Twohey (*Edward L. Twohey,* of counsel), for plaintiffs.

Milanowski & Milanowski (*John P. Milanowski,* of counsel), for defendants.

BLACK, J. What is known in the record as the Ketchel farm, extending at the time some 3,000 feet east from the easterly shore of Kent county's Little Pine Island lake to a north-south public highway, was divided in 1928 by the common tenants thereof, brothers Leon Ketchel and Arthur Ketchel. The division was accomplished by written agreement of the parties and execution and delivery, one to the other, of quitclaim deeds. Leon received what may roughly be called the north half of the farm, with Arthur receiving the south half.

The agreement called for a survey of the farm as a basis for conveyance. It was executed July 23, 1927. A satisfactory survey was thereafter made and, March 31, 1928, the mentioned deeds were delivered and recorded. Both deeds were unconditional in form. Neither made reference to or suggested

reservation or grant of a way across either of the 2 parcels. Neither did the agreement for such division.*

Plaintiffs, claiming through since deceased Leon, filed this bill for an injunction and judicial determination that they are possessed of an implied easement appurtenant, to the estate granted Leon, over the westerly portion of the estate granted Arthur, for northerly and southerly ingress and egress between the westerly or lake front portion of Leon's parcel and a public highway known as Pine Island drive. They rely particularly upon rules appearing in *Kamm* v. *Bygrave,* 356 Mich 189; *Rannels* v. *Marx,* 357 Mich 453; and *Harrison* v. *Heald,* 360 Mich 203 and, in addition, claim acquisition of such easement by user.

* The agreement was prepared agreeably by competent counsel. It reads, exclusive of preliminary and concluding declarations, as follows:

"The parties hereto have recently received a deed of conveyance from their mother, Julia Ketchel, transferring to them all of the real estate now owned by her in Plainfield township, Kent county, Michigan. It is their desire after said property shall have been properly surveyed and staked in order to divide it as hereinafter expressed, to exchange conveyances between themselves so that each will hold a portion of said property in his own name. They have, therefore, agreed as follows:

"1. The deed from Julia Ketchel to the parties hereto has been taken subject to this agreement and is made a part hereof so that if necessary, the deeds to be hereafter exchanged may be executed the same as purchase price mortgage, that is, without the wife of the parties hereto signing.

"2. The parties hereto agree that their attorneys, Messrs. Dunham & Cholette, shall make immediate arrangements with Theodore Williams, county surveyor, to survey the property and mark it out as hereinafter set forth.

"3. The island located in Pine Island lake in said township of Plainfield, is to remain the joint property of the parties hereto, unless at some time in the future one should agree to sell to the other.

"4. The balance of the property shall be surveyed so that it may be divided equally between them, that is, so that each shall have an equal number of acres and each shall have an equal amount of lake frontage, the property to be divided, however, so that Arthur A. Ketchel shall receive the south portion of the farm and the pavilion, so-called, located upon the shore of Pine Island lake.

"5. As soon as said survey shall have been completed, the deeds shall be prepared as hereinbefore indicated and shall be immediately executed and exchanged by said parties."

The way plaintiffs would use of decreed right is private. It extends northwesterly across the lake front end of Arthur's parcel from—and is part of—a way which leads from the south toward the Ketchel farm. Its principal use is that of access by motor car to and from a pavilion on Arthur's parcel where defendants conduct a resort business. The pavilion is on the lake shore, near the northerly boundary of said parcel. Such boundary is, of course, the dividing line between the 2 mentioned parcels. Plaintiffs claim such way extended, at time of severance, entirely across Arthur's parcel and on in a northwesterly direction over their parcel to certain lake-fronted cottages which had been built thereon. They contend, in addition to their allegation of implied grant, that they have acquired such easement right "on prescriptive use for upwards of 32 years" (since 1928).

The chancellor ruled, properly as we conceive, that all disclosed use of the questioned way, since 1928 by Leon and others claiming under him, was permissive in fact. It was held accordingly that no easement by prescription should be decreed. Judge Hoffius turned then to the cited cases and distinguished them as follows:

"In the case at bar there is no doubt that the way to plaintiffs' property was apparent and visible to the parties at the time of their division. There is some doubt, however, that this particular road was 'necessary to convenient use of the property' at that time. It is true that it was in existence, but the farm lane was also in existence and was probably the better used means of access at the time of the division of the property.

"The important consideration in this case, however, is the fact that we have 3 of the original 4 parties to the division of the land in 1928, in court before us. If this court were to spell a different agree-

ment than the parties executed it would be working a great injustice on defendants. Their failure to start litigation, and their failure to create quarrels with plaintiffs' tenants, cannot be used to plaintiffs' advantage in this litigation. Accordingly, an easement across defendants' premises will not be granted by this court."

We agree. Plaintiffs would extend, quite unduly, the rule of *Kamm, Rannels,* and *Harrison* by disregarding the first premisory requisite thereof. Among other things it must be shown, in order that such rule come to effective play, that the severing owner has, prior to or at time of severance, made the conveyed parcel "visibly dependent for the means of access" upon the parcel retained by him (quotation from *Bean* v. *Bean,* 163 Mich 379, 397, citing *National Exchange Bank* v. *Cunningham,* 46 Ohio St 575 [22 NE 924] and followed in *Kamm*). If there is no visible dependency at the time of severance, then it is not reasonably necessary—"for the fair enjoyment" of the conveyed parcel—that the law imply a grant of serviency by the severing grantor.

Here, by severance, Leon received title in fee to a parcel 660 feet (plus) wide which extended all the way from Little Pine Island lake on the west to the public highway on the east. Thus no "visible dependency" was affirmatively shown. To be explicit, it is not disclosed that, on account of condition of the terrain thereof or otherwise, Leon could not have made his entire tract accessible to the highway which bounded same on the east. And if the then available "farm lane" mentioned by Judge Hoffius did not traverse from east to west *all* of the parcel awarded Leon (the fact is left in doubt save only as to heatedly disputatious representations of counsel), such lane concededly did extend easterly from the lake over much of that parcel. This simply suggests that

one who would rely upon the rule that grant of an easement may be implied, upon severance, had best prove the factor of visible dependency by preponderant proof. The chancellor was left in doubt, by plaintiffs, on that score. So are we.

The rule we apply was, as noted in *Kamm,* taken from *Bean* v. *Bean, supra.* It is that "When the owner of an entire estate makes one part of it visibly dependent for the means of access upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises" (p 397). Perhaps, in view of Professor Aigler's justified or unjustified criticism of *Kamm, Rannels,* and *Harrison* (59 Mich L Rev 432–437), we might advisedly and for the sake of desirable accord dub this a rule of "strict necessity." Yet on second thought it would seem that "visibly dependent" is just as strong as "strict necessity"; also that it pertinently means quite as much. When one parcel of property is, by act of the grantor, made "visibly dependent for the means of access" on what that grantor retains, it would seem that a case of "strict necessity" has been made. Be that as it may, no such case appears from this record.

Affirmed. Costs to defendants.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

ARNOLD *v.* JARVIS.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE—CONVICTION—FRAUD.

   Trial judge properly found plaintiff had made no case for false arrest and malicious prosecution by defendant police officers, where it appears that at trial by a recorder's court judge, sitting as a magistrate, on charge of drunkenness in a public place, there was presented evidence upon which he was convicted, although on appeal, taken by way of a motion for a new trial and tried by another recorder's court judge plaintiff herein was discharged, there being no evidence that the conviction which had been obtained was secured by fraud or unfair means, hence, it was conclusive evidence of probable cause.

2. SAME—PROBABLE CAUSE—EVIDENCE.

   The fact that one judge had found plaintiff guilty as charged and that another judge, on retrial, had found him not guilty, made no jury question of whether there was or was not probable cause for plaintiff's arrest and prosecution.

3. SAME—PROBABLE CAUSE—FRAUD.

   The fraud or perjury necessary to be alleged and proved in order to prevent a conviction from being evidence of probable cause in civil action for false arrest and malicious prosecution must be extrinsic, or collateral fraud or perjury.

4. COSTS—ASSAULT AND BATTERY—FALSE ARREST—MALICIOUS PROSECUTION.

   No costs are allowed on affirmance of judgment against defendant police officers for assault and battery, where plaintiff had

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 34 Am Jur, Malicious Prosecution § 55.
Acquittal, discharge, or discontinuance of criminal case as evidence of want of probable cause in malicious prosecution action. 59 ALR2d 1413.
[3] 34 Am Jur, Malicious Prosecution § 56.
[4] 14 Am Jur, Costs § 92.

appealed from such judgment because of trial court's elimination from jury's consideration of counts alleging false arrest and malicious prosecution.

Appeal from Wayne; Wise (John M.), J. Submitted April 11, 1962. (Docket No. 61, Calendar No. 48,873.) Decided July 2, 1962.

Case by Leroy Arnold against Ray Jarvis, John Oatey, and Thomas McGrath for false arrest, malicious prosecution, and assault and battery. Directed verdict for defendants on first 2 counts. Verdict and judgment for plaintiff for assault and battery. Plaintiff appeals. Affirmed.

Kelman, Loria, Downing & Craig (*Roger E. Craig,* of counsel), for plaintiff.

Robert Reese, Corporation Counsel, *William P. Doran* and *Robert D. McClear,* Assistant Corporation Counsel, for defendants.

BLACK, J. Plaintiff, suing the defendant police officers, charged in separate counts assault and battery, false arrest, and malicious prosecution. The trial judge instructed the jury to find against plaintiff with respect to the counts alleging false arrest and malicious prosecution. The tried issue of assault and battery was submitted to the jury and resulted in a verdict for plaintiff, against all defendants, in the sum of $137. He appeals from judgment entered upon such verdict, alleging that elimination of the above counts from jury consideration constituted reversible error.

Having concluded that 6 or 7 men were "loitering" and "drinking," near and around a barber shop in the vicinity of Joy and Savery in Detroit, the defendant officers ordered the group to disperse and "go

home." Some complied. Plaintiff and one other did not. The ensuing conduct of plaintiff and that of the officers is disputed. Two of the officers testified that plaintiff was belligerent and unsteady on his feet, and that he was "flailing his arms" in vain effort to hit defendant Jarvis. Plaintiff denied all such testimony. His testified version was that, when Jarvis asked him for identification, he sought to comply and that Jarvis without reason or provocation knocked him down. There was, in addition to the above, evidence for and against the issue whether plaintiff was intoxicated at the time or appeared reasonably to be so.

Plaintiff was arrested and taken to Receiving hospital for first aid, following which he was jailed. The next morning, charged with drunkenness in a public place, plaintiff was arraigned and tried before Recorder's Judge Ricca. He was convicted and given a suspended sentence. Thereafter, on granted motion for new trial, plaintiff was tried before Recorder's Judge Gillis.* Judge Gillis, comparing Officer Jarvis' testimony on the first trial with that which was given by Jarvis on the second trial, concluded that there was an absence of credible proof sufficient to sustain the people's charge and that the defendant (plaintiff here) should be discharged. It was so adjudged by Judge Gillis.

Such compared testimony appears in the appendix as follows:

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* Circuit Judge Wise, presiding at trial of the instant case, described the procedure which led up to the plaintiff's retrial this way:

"The procedure in recorder's court is such that those hearing early sessions cases, or misdemeanors in early sessions, are heard by the judge sitting as a magistrate, and an appeal is taken in the nature of a motion for a new trial, which is made in writing, based upon the record before the magistrate by the then presiding judge for that month in recorder's court.

"Upon granting a motion for a new trial, which is in the nature of an appeal, the cause is assigned to another recorder's court judge other than the one originally trying the cause, sitting as a magistrate, and a trial *de novo* is had before the recorder's judge."

Testimony of Officer Jarvis, given before Judge Ricca July 8, 1958:

"*The Officer* [*Jarvis*]: Your Honor, at approximately 10:25, July 7th, in the city of Detroit, on Joy road, east of Savery, we observed a group of men standing and loitering in the doorway of a business place drinking. We asked them to move and they all moved except the 2 that were here. When we got out to get some identification from them to move along, they started giving us trouble and fighting with us.

"*The Court:* Well, he is charged with drunk. Was he drunk?

"*The Officer:* Yes, your Honor.

"*The Court:* What about this, Leroy?

"*The Defendant:* Your Honor, I was leaving the barber shop, getting a haircut, and waiting for my friend to lock up the barber shop. This officer came up and they asked me to stand up and I stood up. He knocked me down, that was all."

Testimony of Officer Jarvis, given before Judge Gillis August 1, 1958:

"*The Court:* When did you discover he was drunk? (Addressed to Patrolman Jarvis.)

"*Patrolman Jarvis:* When he stood up, your Honor.

"*The Court:* But you didn't see any drinking?

"*Patrolman Jarvis:* No, I didn't see any drinking.

"*The Court:* Why did you testify before at the first trial that they were drinking, that they were all drinking?

"*Patrolman Jarvis:* If I said they were drinking, that isn't what I meant. What I mean is that they had been drinking."

The decisive question depends for determination upon the correct application, in the specific context of this case, of a generally accepted rule (1 Cooley on Torts [4th ed], § 118, p 397):

"A conviction of the accused is conclusive evidence of probable cause, unless it was obtained by fraud or unfair means, which may be shown in rebuttal; and this is true though afterwards, on appeal, the conviction is set aside or the accused acquitted."*

Judge Wise, having considered the stated question and having found no ground for decision or jury finding that Officer Jarvis' original testimony was perjured or that it or any part thereof constituted "fraud or unfair means," applied the foregoing rule. He held, properly as we conceive, that plaintiff had made no case under the mentioned counts for false arrest and malicious prosecution.

There was proof sufficient to justify plaintiff's conviction as well as acquittal on the occasion of both criminal trials. The fact that one judge found plaintiff guilty as charged and that another, on retrial, found him not guilty, of itself, made no jury question whether there was or was not probable cause for plaintiff's arrest and prosecution. See the similar case of *Haygood* v. *Boothby Realty Co.*, 272 Ala 95, 101 (128 So2d 497, 503), and this treatment therein of our question, with which we fully agree:

"This brings us to the pivotal question in the case. Was the judgment rendered in the municipal court procured by 'fraud, perjury or other improper means'? We do not think so. Apparently the allegations of replication 2 as amended are based on the alleged untruthfulness of the testimony of James H. Roberts, vice-president of Boothby Realty Company, a corporation. In the municipal court his testimony was given credibility. On the trial *de novo* in the circuit court his testimony was apparently not

* See *Doak* v. *Springstead*, 284 Mich 459, citing earlier Michigan cases and quoting Cooley's foregoing rule with approval. See, also, annotation, "Judgment in prior civil proceedings adverse to instant plaintiff in malicious prosecution as evidence of probable cause." 58 ALR2d 1422; also collection of cases under section 6 of such annotation (pp 1433, 1434) subheaded "Effect of fraud, perjury, or other improper means in obtaining prior judgment."

believed. But the credibility of his testimony was a matter which was presented and considered in the trial of those cases. It was a matter intrinsic to those trials.

"We take the view that the fraud or perjury necessary to be alleged in order to prevent the judgment in the municipal court from being evidence of probable cause must be extrinsic or, as it is sometimes called, collateral fraud or perjury. *Tarantino* v. *Griebel,* 9 Wis2d 37 (100 NW2d 350); *Dunlap* v. *Glidden,* 31 Me 435 (52 Am Dec 625). In other words, the fraud or perjury alleged was actually presented and considered in the municipal court. It does not go to the manner in which that judgment was procured. As authority for the statement that extrinsic or collateral fraud is the same thing, see *Dockery* v. *Central Arizona Light & Power Co.,* 45 Ariz 434 (45 P2d 656). We have been cited to no authority that the alleged perjury in the trial of the case is evidence to rebut the sufficiency of the judgment as probable cause."

Judgment affirmed. No costs.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

AUDITOR GENERAL *v.* KLENK.

1. TAXATION—SALE FOR NONPAYMENT—ASSESSMENT IN WRONG COUNTY.

   A court of equity has complete and plenary jurisdiction to consider and determine objections of owners of property to sale of their property for nonpayment of taxes on ground of invalid assessment by officers of the wrong county (CL 1948 and CLS 1956, §§ 211.60, 211.67, 606.4).

2. SAME—SALE FOR NONPAYMENT—AUDITOR GENERAL.

   The auditor general, as an officer of the State, enjoys no position superior to that of any other suitor in chancery when he comes into the circuit court of each county with the annual petition for sale of land for nonpayment of taxes (CLS 1956, § 211.61).

3. SAME—SALE FOR NONPAYMENT—OBJECTION TO ASSESSMENT.

   The auditor general, as petitioner for sale of lands for nonpayment of taxes must do equity, if he is to have equity in such a proceeding, hence, a property owner who raises an objection to the assessment as being void for some recognized reason, and the auditor general is unable to meet the objector's pleading and proof, and the objector's own conduct is not inequitable, is entitled to an adjudication of invalid assessment with stated reason for such adjudication (CLS 1956, § 211.61).

4. SAME—ASSESSMENT—IDENTITY OF ASSESSORS.

   The determination of whether an assessment for taxes is proper includes a determination of the identity of the proper officers charged with the duty of making the assessment and the county in which they function (CL 1948 and CLS 1956, § 211.1 *et seq.*).

5. COSTS—ASSESSMENT.

   No costs are allowed in suit to sell lands for nonpayment of taxes on appeal from order granting petitioner's motion to strike objections interposed that land was in county other than county

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REFERENCES FOR POINTS IN HEADNOTES

[1] 51 Am Jur, Taxation §§ 772, 1161.
[4] 51 Am Jur, Taxation § 662.

where taxes were assessed (CL 1948 and CLS 1956, § 211.1 *et seq.*).

Appeal from Macomb; Kane (Edward T.), J., presiding. Submitted April 5, 1962. (Docket No. 24, Calendar No. 49,224.) Decided July 2, 1962.

In the matter of the petition of Otis M. Smith, Auditor General, for the sale of certain lands for taxes, William C. Klenk and Margaret T. Klenk, with Joseph A. Cassese subsequently intervening, filed objections to the inclusion of their properties claiming improper assessment and taxation within Macomb county. Various municipal and governmental bodies intervened and joined in motion to strike portion of objections. Motion granted. Defendants appeal. Reversed and remanded.

Frank J. Kelley, Attorney General, *Eugene Krasicky,* Solicitor General, *Nicholas V. Olds* and *Warren R. Snyder,* Assistant Attorneys General, for plaintiff Auditor General.

John H. Yoe, for intervening plaintiff South Lake School District.

John H. Yoe and *Robert M. Fraser,* for intervening plaintiff City of St. Clair Shores.

Julius L. Berns, for intervening plaintiff City of Grosse Pointe Woods.

Alfred A. Blomberg, Ray W. McPeters and *George N. Parris,* Prosecuting Attorney, for intervening plaintiff County of Macomb.

Daniel P. Cassidy and *John T. Lungerhausen,* for defendants Klenk.

Frederick D. Jasmer, for defendant Cassese.

PER CURIAM. The meritorious question appellants would have determined is whether, as contended by them, the "base line" dividing Macomb and Wayne counties, along which line east-west Eight Mile road extends until that road intersects southeastward veering Vernier road, continues such division straight east to Lake St. Clair from the intersection. The appellee public authorities, with support of the attorney general, contend that the division effected by such base line ends at the intersection and proceeds thence a degree or so southeastward from extended base line to the lake. The question arose when the appellant landowners filed objections to the auditor general's petition for 1960 sale, as tax delinquent, of certain Macomb county properties, theirs having been included therein.

We are concerned only with a question of jurisdiction, raised by motion of appellees to strike appellants' said objections. It is contended by appellees "that the fixing of boundaries of municipal corporations is a legislative function" (citing *Village of Elberta* v. *City of Frankfort,* 347 Mich 173, and cases therein considered), and that the court in a proceeding instituted under sections 60 through 67 of the general property tax law (CL 1948 and CLS 1956, §§ 211.60–211.67 [Stat Ann 1960 Rev §§ 7.104–7.112]) is without jurisdiction to hear and determine such a question.

When the issue made by appellants' said objections was originally considered, Judge Noe presiding, a special order was entered (August 8, 1960). The order proceeds:

"Now, therefore, this court does hereby order, adjudge and decree that the taxes so assessed against the several descriptions [appellants' parcels] hereinbefore mentioned are illegal and void for the reason that they are vague, inaccurate, indefinite and misleading and the said auditor general is hereby

directed to reject such taxes and to cause the same to be reassessed on corrected descriptions to be determined by the court to which this cause will be referred as hereinafter provided; and

"It further appearing that there is a grave question as to whether the aforementioned parcels and the following parcels set forth in subparagraphs of the objections of said William C. Klenk and Margaret T. Klenk, his wife, to-wit: (here follows the legal description of appellants' parcels) are located wholly or in part within the said county of Macomb and the said city of St. Clair Shores, and therefore subject to assessment and taxation by said municipalities which question should be determined pursuant to the applicable statutes of the State of Michigan by a judge other than a judge elected to serve as such in the said counties of Wayne or Macomb.

"Now, therefore, it is ordered that said questions should be determined by the taking of testimony relative thereto by a circuit judge elected and serving as such in a county of this State other than Wayne or Macomb, said judge and circuit to be selected by the Supreme Court of this State on recommendation of the court administrator of this State."

Appellees' said motion to strike subsequently came to hearing before Judge Kane, presiding in the Macomb circuit. Judge Kane granted the motion to strike and entered an order (February 17, 1961) reciting as follows:

"It is hereby ordered and adjudged that the court is required to accept and recognize the present location of the boundary line as used by the taxing authorities of Wayne and Macomb counties and the various governmental units and that this court is without jurisdiction to adjudicate and determine the legally established boundary line between the counties of Macomb and Wayne in this proceeding and that the motion of the respective municipalities and

units of government to strike the objections pertaining thereto is hereby granted.

"It is further ordered and adjudged that that portion of the order of the Honorable Alton H. Noe heretofore entered herein on August 8, 1960, finding the descriptions of parcels A, C, D, H, and I, to be vague, inaccurate, indefinite and misleading, and the taxes so assessed to be illegal and void, is to remain in full force and effect, anything herein to the contrary notwithstanding, subject to proper reassessment as provided by statute."

The present appeal followed.

The jurisdiction is upheld upon direct authority of *Auditor General* v. *Gillingham Fishing Co.,* 293 Mich 642; likewise upon the well-settled rule that the jurisdiction of equity, to which the auditor general must appeal for aid in the doing of his annual statutory task, is complete and plenary by force of venerable statute save only as specially restricted or limited (CL 1948, § 606.4 [Stat Ann 1959 Cum Supp § 27.545]).* There being no such restriction or limitation, and this Court having previously referred to said sections 60 through 67 as having clothed "the court of chancery with general jurisdiction over these [tax sale] proceedings." (*Hooker* v. *Bond,* 118 Mich 255, 257), it is held that appellants are entitled to a hearing—by the court with which their objections have been lodged—and to prove, if they can, that their said parcels have been assessed invalidly by officers of the wrong county.

We of course express no opinion of the merits. Appellants may, upon hearing, be denied relief for laches or on account of some other provable defense equity recognizes and upholds. It may be that the

* The cited statute provides generally that the powers and jurisdiction of the circuit courts and circuit judges in chancery shall be coextensive with the powers and jurisdiction of the English courts in chancery, as of March 1, 1847, subject to such exceptions and limitations as may be prescribed by our Constitution and laws.

"consequences"—deplored by appellees in their brief —of a decree that appellants' property belongs in Wayne rather than Macomb will for some yet unconsidered reason deter the hearing chancellor from decreeing as appellants would have the court decree. No one of these questions, however, is before us. The question of jurisdiction is, and that we determine affirmatively.

When the auditor general comes into the circuit court of each county with the annual petition required by said section 61 (CLS 1956, § 211.61 [Stat Ann 1960 Rev § 7.105]), he, as an officer of the State, enjoys no position superior to that of any other suitor in chancery.* The only exception is that which may be supplied by express statute, and there is no such presently relevant statute. He asks the aid of equity based on law, and he then and there "makes an application to the court to exercise judicial power" (quotation from *Thompson* v. *Auditor General,* 261 Mich 624, 650, 651). He must do equity if he is to have equity in such a proceeding. When and if an objector pleads and proves that the allegedly delinquent assessment of his included parcel or parcels was void for some recognized reason, and the auditor general is unable to meet such proof, then the objector, if his own conduct is not inequitable, is entitled to an adjudication of invalid assessment with stated reason for such adjudication.

It has been suggested that the concluding portion of Judge Kane's order provides appellants adequate and fully protective relief. That indeed may turn out ultimately to be so. Yet the subject of "proper reassessment as provided by statute" seemingly cannot be settled without a determination of the stated meritorious question. If reassessment is to be made, it would appear necessary that determination be

* For amplification of this principle, see *Hunt* v. *State Highway Commissioner,* 350 Mich 309, 320, 321.

made of identity of the proper officers charged with the duty of such reassessment and levy. Such officers are elected and function responsibly in one county or the other.

Reversed and remanded for hearing as indicated. No costs.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and SOURIS, JJ., concurred.

OTIS M. SMITH and ADAMS, JJ., did not sit.

BAUER *v.* TOWNSHIP OF REDFORD.

1. JUDGMENT—INJUNCTION—TOWNSHIP ZONING ORDINANCE—ORNAMENTAL IRON SALES BUSINESS.

   Consent decree whereby plaintiffs were permitted to continue nonconforming use under defendant township zoning ordinance of their ornamental iron sales business but not to use the premises for manufacturing, fabricating, or other uses not permitted by the ordinance *held,* unambiguous and in avoiding outright litigatory loss in first suit to enjoin enforcement of the ordinance adjudicated the rights of both parties with respect to both first and second suits brought for the same purpose in that plaintiffs were prohibited from continuing incidental shopwork, such as welding, fabricating, cutting, and grinding.

2. COSTS—INJUNCTION—TOWNSHIP ZONING ORDINANCE—ORNAMENTAL IRON SALES BUSINESS.

   No costs are allowed in 2 suits to enjoin enforcement of township zoning ordinance as to conduct of ornamental iron sales business.

REFERENCES FOR POINTS IN HEADNOTES

[1] 28 Am Jur, Injunctions §§ 293, 320.
[2] 28 Am Jur, Injunctions § 299.

Appeal from Wayne; Bohn (Theodore R.), J. Submitted on rehearing April 12, 1962. (Docket No. 71 on rehearing, original Docket No. 14 of October, 1959, Calendar No. 47,748.) Appeal from Wayne; Wise (John M.), J. Submitted April 12, 1962. (Docket No. 71, continued from original Docket No. 73 of October, 1961.) Decided July 2, 1962.

Bill by Norman C. Bauer and Elsie Bauer against the Township of Redford and certain of its officials to enjoin enforcement of zoning ordinance. Consent decree entered on first appeal. Similar bill to enjoin prosecution of certain acts claimed permissible under consent decree. Temporary injunction dismissed. Plaintiffs appeal, seeking favorable interpretation or setting aside of consent decree. Consent decree confirmed. Denial of injunctive relief affirmed.

Dale D. Libby and *Herbert H. Schoenberg,* for plaintiffs.

Kasoff & Young, for defendants.

PER CURIAM. Impelled by urgent and successive representations of plaintiffs Bauer that the consent decree of December 11, 1959, which decree seemingly concluded the litigation brought here and presented under the title Bauer *v.* Township of Redford (Calendar No. 47,748; Docket No. 14, October term, 1959), was uncertain, ambiguous, and productive of undue litigation, we ordered (November 30, 1961) that such presented cause be reheard. See *Bauer* v. *Township of Redford,* 364 Mich 547. The same order provided that decision of what we shall call the second Bauer Case (Calendar No. 48,839), which second case was initially submitted October 13, 1961, be "postponed pending further action in the original case." Rehearing of the first case, and hearing of the second case,

was had upon consolidated submission April 12, 1962. Since the 2 cases are interrelated, we determine them together.

The consent decree of 1959, entered by the Chief Justice upon unqualified stipulation of the parties, provided in critical sum that plaintiffs' attack upon the involved township zoning ordinance be settled and concluded by permitting plaintiffs "to operate an ornamental iron sales business" upon and as a part of their described residence property. The decree provided further:

"It is further ordered, adjudged and decreed that the right of operation of such sales shall be conclusive with the plaintiffs and appellants, Norman C. Bauer and Elsie Bauer, his wife, and in the event the said plaintiffs vacate the premises herein described at any time in the future, the premises shall then become subject to such use as may be permitted under the zoning ordinance of the township of Redford.

"It is further ordered, adjudged and decreed that the plaintiffs herein, their agents, servants and employees, shall not conduct upon or use said premises for any manufacturing, fabricating or other uses which are not permitted by the Redford township zoning ordinance, excepting therefrom an ornamental iron sales business."

Plaintiffs subsequently sought to resume what Judge Wise, in the second case, found was something more than an ornamental iron sales business. The township authorities thereupon summoned plaintiffs to appear before a township justice to answer for alleged violation of said zoning ordinance. The alleged violation, later found judicially, was that plaintiffs had been and were guilty of "permitting welding and fabricating on [said] premises." Plaintiffs thereupon instituted the second suit, seeking to enjoin the township authorities "from enforc-

ing said zoning ordinance as against plaintiffs' property."

Judge Wise, hearing the second suit, concluded that the consent decree was "clear" and "unambiguous" and that it prevented on plaintiffs' said premises the welding, fabricating, cutting and grinding of steel. From his order denying—after due hearing—the injunctive relief sought by plaintiffs in such second suit, an appeal to this Court was perfected on leave granted.

We find, upon examination thereof in conjunction with the original and present appendices and briefs, that the consent decree is not ambiguous or doubtful as claimed, and that Judge Wise correctly concluded that it permitted, on plaintiffs' said premises, continuation only of an ornamental iron sales business, meanwhile denying continuation of what plaintiffs call "incidental shopwork." The township voluntarily gave up an asserted right when the consent decree was entered. Such asserted right was that of prohibition, by ordinance, of the conduct of *any* ordinance-defined business on plaintiffs' premises. Plaintiffs also and by like token gave up an asserted right, that of continued conduct on their premises of the combined business of fabricating and selling ornamental iron. Too, both parties gained something by the decree, that is, avoidance of outright litigatory loss.

If, as it has manifestly turned out, plaintiffs' "ornamental iron sales business cannot be operated without incidental shopwork, such as welding, fabricating, cutting and grinding,"* the consent decree nevertheless effects the same relevant result as if Judge Bohn's decree in the first case, by which plaintiffs' original bill attacking the zoning ordinance was dismissed, had come to formal affirmance. The con-

* The words are those of plaintiffs' counsel.

sent decree is equally as strong and unyielding, and we can do naught but uphold it as an effective agreement of the parties which, attested as it is by judicial approval, adjudicates the rights of the parties with respect to the subject matter of both suits.

What has been said disposes of the second case. No ground for disagreement with the order of Judge Wise, by which the prayer of plaintiffs' second bill was denied, has been shown.

The consent decree of December 11, 1959 is confirmed as an adjudication of the rights of the parties according to its tenor. The appealed order in the second case is affirmed. No costs are awarded in either case.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH and ADAMS, JJ., concurred.

KENNY *v.* VILLAGE OF NOVI.

1. APPEAL AND ERROR—CHANCERY CASES—RECORD.
   The testimonial record of a chancery case that is appealed to the Supreme Court should be in such comprehensive shape as to permit decision on review, *de novo*, of all issues necessary to effectuation of complete and final grant or denial of relief as the nature of the fully assembled case may require.

2. SAME—REMAND FOR FINAL DETERMINATION.
   Suit attacking certain village regulations is ordered remanded to trial court with jurisdiction to permit final determination by

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REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error §§ 570, 814.
[2] 3 Am Jur, Appeal and Error §§ 1210, 1211.

the trial court in the matter so that such court may, with additional testimony or stipulated additional facts, consider and determine presented issues as possibly affected by post-appeal events and recertification to the Supreme Court for submission and determination of such questions as may then be made to appear.

Appeal from Oakland; Holland (H. Russel), J. Submitted June 13, 1962. (Docket No. 46, Calendar No. 48,744.) Decided July 2, 1962.

Bill by Daniel Kenny, Sylvia Kenny, Leo G. Russell, Margaret Russell, and Wayne Disposal, Inc., a Michigan corporation, against the Village of Novi, a municipal corporation, to invalidate regulatory ordinance or, in alternative, to secure for corporate plaintiff a license to operate sanitary landfill. Decree for plaintiffs. Subsequent intervention by various property owners and Novi Protective Association. On rehearing amended decree entered without provision for retention of jurisdiction. Plaintiffs appeal. Defendant and intervenors cross-appeal. Remanded under court rule for further proceedings.

Wechsler & Starr (*I. R. Starr,* of counsel), for plaintiffs.

Bond & Dillon, for defendant.

Lampert, Fried & Kanner, for intervening defendants.

PER CURIAM. Relying upon the general rule of *Culy* v. *Upham,* 135 Mich 131, 135 (106 Am St Rep 388),* we said recently (*Crocker* v. *Crocker,* 362 Mich 6, 8):

* "As a general rule, suits at chancery should be so tried in the lower court that, when they are appealed, this Court may finally dispose of the issue raised by the pleadings."

"When chancery cases are brought to this Court, the testimonial record should be in such comprehensive shape as to permit decision here, *de novo,* of all issues necessary to effectuation of equity's ultimate purpose, that of complete and final grant or denial of relief as the nature of the fully assembled case may require."

In this briefed and submitted chancery case, wherein plaintiffs attack certain ordained regulations of the defendant village, it is disclosed that the chancellor, following due hearing, entered a decree granting plaintiffs relief as prayed under and in accordance with specific defendant-protective requirements and declared retention of jurisdiction for the purpose of enforcing such requirements. The decree was entered, we assume, mindful of the procedural precepts which, some 4 years ago, were recommended for like cases in *Certain-teed Products Corp.* v. *Paris Township,* 351 Mich 434, 466–473.

The decree was entered November 18, 1959. Following intervention and application for rehearing an "amended" decree was entered (March 28, 1960) providing that the council of the defendant village "should proceed to consider and act upon the plaintiffs' application for license in like manner as though the village board of appeals had approved the application [of the plaintiff corporation] for a permit." Further, and in the same decree, the following informative reference appears:

"That for the purpose of indicating the intent of the court, or explanatory hereof, reference is hereby made to the court's opinion filed herein dated November 9, 1959, and as amended on March 11, 1960."*

The council, following entry of the amended decree, denied plaintiffs' previously denied applica-

* The opinion of November 9, 1959, was the opinion upon which the first decree was entered. The opinion of March 11, 1960, was the opinion which authorized the second or "amended" decree.

tion for permit. Such denial did not take place, however, until jurisdiction of the cause had passed to this Court by plaintiffs' claim of appeal, filed April 13, 1960, from the amended decree.

We find, foregoing matters considered, that the chancellor has not as yet determined the issuable validity of the council's final denial to plaintiffs of permit as applied for and that the cause should in consequence be continued and remanded for further proceedings pursuant to Court Rule No 72, § 1 (1945). He noted, when plaintiffs applied to him for relief from the council's post-appeal denial of their application, that jurisdiction had passed on.

The original record with jurisdiction of the cause is returned to the circuit court in order that the chancellor may, upon additional testimony or stipulated additional facts, consider and determine the presented issues as possibly affected by post-appeal events. Upon such remand the chancellor will consider the original and supplemented record and thereupon will cause to be entered a new decree which, with or without declared retention of jurisdiction, will adequately fulfill the indicated requirements of this order. Thereupon the complete record may be recertified to this Court for submission and determination of such questions as may then be made to appear. Whether the preparation and printing of supplemental appendices and briefs becomes necessary may be determined on motion following such certification.

CARR, C. J. and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

LOCAL NO. 1644, AFSC&ME, AFL-CIO, *v.*
OAKWOOD HOSPITAL CORPORATION.

1. LABOR RELATIONS—COLLECTIVE BARGAINING—HOSPITALS.
   A hospital, as an employer, has a duty to bargain collectively with representatives of the employees under the labor mediation act (PA 1939, No 176, as amended by PA 1949, No 230).

2. CONSTITUTIONAL LAW—POLICE POWER—CLASSIFICATION.
   A legislative body may properly resort to classification under the police power.

3. LABOR RELATIONS — HOSPITALS — PUBLIC UTILITIES — COLLECTIVE BARGAINING—STRIKES—PUBLIC INTEREST.
   The classification of hospitals and public utilities under the labor mediation act, separately from other employers, and compelling such 2 classes to engage in collective bargaining in good faith with representatives of their employees, and prohibiting latter from striking, is in harmony with the general purpose of the act to promote industrial peace and to insure continued operation which is in the public interest (PA 1939, No 176, as amended by PA 1949, No 230).

4. SAME—ELECTIONS—COSTS—EQUALLY DIVIDED COURT.
   Provision of decree in suit to compel defendant hospital to engage in collective bargaining with plaintiff local union, that defendant pay costs of holding election to determine whether plaintiff union represented a majority of defendant's employees, which election had been conducted under the direction of the court is affirmed by a court equally divided as to whether the defendant should pay all or only 1/2 of such cost (PA 1939, No 176, as amended by PA 1949, No 230).

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 31 Am Jur, Labor § 359.
Nonprofit charitable institutions as within operation of labor statutes. 26 ALR2d 1020.
[2] 12 Am Jur, Constitutional Law § 476.

Appeal from Wayne; Gilmore (Horace W.), J. Submitted January 3, 1962. (Docket No. 20, Calendar No. 49,283.) Decided July 2, 1962.

Bill by Local No. 1644, American Federation of State, County and Municipal Employees, AFL–CIO, Public Employees Council No. 77, AFSC&ME, AFL–CIO, and Juliann Havrilak against Oakwood Hospital Corporation, a Michigan nonprofit corporation, to compel it to engage in collective bargaining and for other incidental relief. The Attorney General intervenes for sole purpose of defending constitutionality of labor mediation act. Decree for plaintiffs. Defendant appeals. Affirmed, the court being equally divided as to matter of modification as to costs of election.

Zwerdling, Zwerdling & Klimist (*A. L. Zwerdling* and *Maurice Kelman,* of counsel), for plaintiffs.

McClintock, Fulton, Donovan & Waterman (*Stanley H. Fulton* and *Nancy Jean Van Lopik,* of counsel), for defendant.

Frank J. Kelley, Attorney General, *Joseph B. Bilitzke,* Solicitor General, and *Maurice M. Moule,* Assistant Attorney General, for intervenor.

KAVANAGH, J. This is an action in chancery by plaintiffs, Local No. 1644, American Federation of State, County and Municipal Employees, AFL–CIO, Public Employees Council No. 77, AFSC&ME, AFL–CIO, and Juliann Havrilak, an employee of defendant, to compel defendant hospital to engage in collective bargaining with plaintiffs, as provided under the Michigan labor mediation act, as

amended.* Defendant Oakwood Hospital Corporation is a Michigan nonprofit corporation located in the city of Dearborn.

In February, 1959, plaintiff Local No. 1644 initiated requests for collective bargaining, and defendant hospital refused. Plaintiff subsequently, in April, 1959, requested the Michigan labor mediation board to intervene under the provisions of the act. Both parties were represented at a meeting with Mr. Quillico, the board's mediator, on May 20, 1959. At that time, according to the testimony, the union submitted employee authorization cards to the mediator. The mediator cross-checked these against the hospital's records, making a determination that the union had cards for 37 out of the 45 employees in the housekeeping department of the hospital.

Thereafter, the union filed additional authorization cards for nurses aides, orderlies, and employees in the dietary department of the hospital, and a subsequent procedure before the same mediator produced a determination that the union had authorization cards for 78 out of the 144 employees in these departments.

The union representatives also indicated they secured additional authorization cards from employees in the laundry, maintenance, and miscellaneous categories which had not yet been formally presented to the mediation board.

The union's position is, that while they commenced organization with the housekeeping employees of the hospital, and have since proceeded to organize some other departments of the hospital, it is their intention to organize as a single collective bargaining unit all of the unskilled, nonclerical employees of the Oakwood Hospital.

* PA 1939, No 176, as amended (CL 1948 and CLS 1956, § 423.1 *et seq.* [Stat Ann 1960 Rev § 17.454(1) *et seq.*]).

The hospital's position is that there is no legal duty or obligation on its part to recognize or talk to or bargain with the union. The extension of the hospital's position is that so long as it refuses to recognize the union, it has no duty to bargain collectively with regard to wages, fringe payments, seniority rights, or union recognition, which have been made issues in this labor dispute.

The issues between the parties could not be settled by the board's mediator, and on June 2, 1959, the dispute was certified to the governor, who appointed a special commission in accordance with sections 13a and 13b of the act,* to conduct hearings and issue findings and recommendations.

Subsequently, a similar dispute between the same parties, existing in other departments of the hospital, was referred by the governor on July 29, 1959, to the same special commission.

The special commission made the following recommendations:

"1. That this matter be referred back to the labor mediation board, and that that board determine that the appropriate bargaining unit for the Oakwood hospital consist of all employees except managerial, office, supervisory, executive, professional, and skilled trades employees, as more fully described above.

"2. That the labor mediation board conduct an appropriate election within the bargaining unit as so determined.

"3. That the hospital be advised of its obligation under the act to bargain collectively at all times with the union representing its employees under section 13a, subd (3)(a), and of the injunctive relief provisions of section 22 of the act,† which the legis-

* CLS 1956, §§ 423.13a, 423.13b (Stat Ann 1960 Rev §§ 17.454 [14.2], 17.454[14.3]).—REPORTER.

† CLS 1956, § 432.22 (Stat Ann 1960 Rev § 17.454[23]).—REPORTER.

lature provided to insure fulfillment of this obligation.

"4. That the parties hereto be reminded that the legislature has declared as the public policy of this State, 'that the best interests of the people of the State are served by the prevention or the prompt settlement of labor disputes.'"

The following additional recommendations were made:

"A. That the election to be conducted within the bargaining unit above described be held solely on the question of representation of the Oakwood hospital employees by this union.

"B. That if a majority of the employees in the unit described vote for representation by this union, and the hospital has not commenced collective bargaining with it within 10 days following the election, the board initiate action before the appropriate circuit court in equity to enforce the provisions of section 13a, subd (3)(a) of the act as provided for in section 22 of the act."

Attempts to further mediate this dispute between the parties were unsuccessful. The board, upon petition by the plaintiffs for an election on the question of representation, held hearings, and on October 12, 1959, issued an order directing a statutory strike election in a designated unit found by the board to be appropriate on the following question:

"Do you wish to go on strike because of the refusal of the Oakwood Hospital to recognize Local No. 1644 of the American Federation of State, County, and Municipal Employees, AFL–CIO as your bargaining representative in matters of wages, hours and working conditions?"

The election was held on October 21, 1959, and of the approximately 206 eligible voters, 135 voted "yes"; 51 voted "no"; 4 were challenged; 14 did not vote; and there were 2 spoiled ballots.

The board found the election results entitled the employees in the bargaining unit to take strike action under the provisions of the labor mediation act.

The union again made efforts to engage in collective bargaining negotiations with the hospital, and defendant again refused.

Thereafter, plaintiffs instituted this action, on January 20, 1960, to compel defendant to bargain collectively at all times in good faith with Local No. 1644. Plaintiffs sought a temporary mandatory injunction at a hearing on February 5, 1960. Defendant objected, contending such injunction should not issue unless a situation existed where great harm would result to plaintiffs and no injury to defendant. At the hearing plaintiffs offered, and defendant refused, to submit to a representation election to be conducted either by the labor mediation board or the court.

The circuit court held plaintiffs were entitled to a temporary injunction restraining defendant hospital from refusing to bargain in good faith with Local No. 1644 pending the hearing on the merits.

Defendant filed application for leave to appeal from the entry of the order. Leave was denied on March 29, 1960.

The cause came on for trial on the merits on December 6, 1960. Defendant once again refused to consent to a representation election among the employees of the bargaining unit. Plaintiffs then asked the court to conduct a secret ballot election under the court's supervision for its own advice, guidance and information.

After argument, the court entered an order for such election and appointed Mr. Edward P. Frohlich, a member of the State Bar of Michigan, to conduct the election. Leave to appeal from this order was sought by defendant and denied by this Court.

The election was held on February 2, 1961, on the following question:

"Do you wish to be represented for purpose of collective bargaining by Local No. 1644, American Federation of State, County and Municipal Employees, AFL–CIO?"

Mr. Frohlich filed his report on February 3, 1961, and trial was resumed and concluded on February 28, 1961. Mr. Frohlich testified, and certified the results of the election as follows: Yes, 150; no, 49; spoiled ballots, none; challenged voters, 7; total 206.

A final decree was entered by the trial court on April 17, 1961, restraining defendant hospital from refusing to bargain collectively in good faith with Local No. 1644, and ordering defendant to pay Edward P. Frohlich the sum of $655 for services and fees in his capacity as election supervisor.

From this decree the defendant appeals to this Court raising the following questions:

1. Does section 13a, subd (3)(a) or any provision of the Michigan labor mediation act impose upon a hospital employer a duty to bargain collectively with a labor organization where there has never been any recognition of the labor organization by the hospital employer?

2. Is plaintiff Local No. 1644 a "labor organization" within the meaning of the term as defined in the act?

3. Does the Michigan labor mediation act embrace more than one object in its title, contrary to section 21, article 5, of the Michigan Constitution of 1908?

4. Does the Michigan labor mediation act violate the equal protection clauses of the Fourteenth Amendment to the United States Constitution and section 1, article 2, of the Michigan Constitution of 1908?

5. Is section 13a, subd (3)(a) of the act so vague, indefinite and arbitrary as to render it violative of the Fourteenth Amendment to the United States Constitution and section 16, article 2, of the Michigan Constitution of 1908?

6. Was the trial court correct in taxing the election costs against the defendant?

With reference to the first question, the defendant argues that under the Michigan labor mediation act "collective bargaining" is not defined and the act contains no means of determining representatives except under section 9c* in case of a jurisdictional dispute. Defendant then asserts the union is not a party to this dispute since the defendant has never recognized the union as representing the hospital employees.

This Court has held that, under section 8† of the act, employees have the statutory right to organize for the purpose of bargaining with their employer through representatives of their own free choice, and that such right is not conditioned upon the employer's recognition of the representative. *Service Drivers & Car Washers* v. *Labor Mediation Board,* 342 Mich 295. Recognition by the employer has nothing to do with the determination under the Michigan labor mediation act as to whether or not the employer shall bargain collectively.

In the instant case the union presented employee authorization cards to the mediator in sufficient numbers to indicate the union was the choice of the employees to represent them. Once a proper showing has been made that the employees, through application, have selected a union to represent them, the fact of nonrecognition by the employer will not prevent the board from proceeding to hold an elec-

* CLS 1956, § 423.9c (Stat Ann 1960 Rev § 17.454[10.2]).—REPORTER.

† CL 1948, § 423.8 (Stat Ann 1960 Rev § 17.454[8]).—REPORTER.

tion to determine whether the union should be their representative before the labor mediation board. In the *Car Washers Case, supra,* this Court held that section 9a of the act provides for such a determination where the plaintiffs have made a prima facie showing that they were employees and members of the union.

Defendant hospital contends the trial judge was in error in holding that section 13a, subd (3)(a) of the act imposed upon defendant a duty to bargain with the union. Defendant attempts by semantic gymnastics to interpret words, phrases, and clauses of the act to show that the language is not broad enough to apply to recognition disputes involving wages, hours, and conditions of employment. We find no such restrictive meaning. This Court in *Service Drivers & Car Washers* v. *Labor Mediation Board, supra,* and in *General Teamsters Union, Local No. 406,* v. *Uptown Cleaners & Hatters, Inc.,* 356 Mich 204, held the employer has a duty to bargain collectively with the representatives of the employees where a prima facie showing of authorization has been made. Even the dissenting opinion in the *Teamsters Case, supra,* recognizes this duty. See that portion of such dissent on page 239 reading:

"It may be noted, also, in connection with the legislative history of the mediation act that the legislature, while refusing to accept an amendment to the mediation act requiring all employers to bargain collectively with the representatives of their employees, undertook, in section 13a of PA 1949, No 230 (CLS 1956, § 423.13a [Stat Ann 1950 Rev § 17.454(14.2)]) to impose such obligation in labor disputes involving hospital or public utility employees. For reasons not material, based on the procedure specified in the handling of such disputes, these amendments relating to disputes of the character indicated were held invalid in *Local 170, Trans-*

port Workers Union of America v. *Genesee Circuit Judge,* 322 Mich 332. However, the provision enacted with reference to collective bargaining in the special classes of cases mentioned must be taken to indicate that the legislature did not consider that any general obligation as to collective bargaining by employers was contemplated by the act. Any such general provision would of course have rendered it unnecessary to incorporate the special requirement as to hospital and public utilities." (Emphasis supplied.)

Under the plain language of section 13a, subd (3)(a) of the labor mediation act, a hospital employer has an express duty to bargain collectively at all times. The majority opinion in *General Teamsters Union, Local No. 406,* v. *Uptown Cleaners & Hatters, Inc., supra,* is direct authority for holding that the act in general imposes an implied duty upon all employers to bargain collectively with their employees or their representatives.

No error was committed by the labor mediation board in conducting a representation election on the issue of wages, hours, and conditions where there was a prima facie showing of a majority employee intention to be represented by the union.

The defendant challenged plaintiff union's status as the collective bargaining representative for the hospital employees, alleging plaintiff local was not a "labor organization" within the statutory definition of the term.

Defendant's exhibit 15 is the constitution of the American Federation of State, County and Municipal Employees, AFL–CIO. Article 2 thereof provides that one of its objectives is "to promote the organization of workers generally and of public employees in particular."

Plaintiffs' exhibit 7 is the charter granted by the parent organization to Oakwood Hospital Em-

ployees, Dearborn, Michigan, Local No. 1644. It provides in part:

"The union being duly formed is empowered and authorized to initiate into its membership any person or persons within its jurisdiction in accordance with the constitution of the American Federation of State, County, and Municipal Employees, and as hereafter revised and amended. That jurisdiction shall be as follows: Employees of Oakwood Hospital in Dearborn, Michigan, who are within the jurisdiction of the AFSC&ME.

"Provided, however, that the international executive board shall have power for good cause and after notice and hearing, to enlarge or restrict such jurisdiction."

Defendant's contention is that plaintiff Local No. 1644 exists solely for the purpose of dealing with public or governmental employers. Defendant hospital is not a public or governmental employer. Therefore, defendant argues that Local No. 1644 is not a labor organization as defined in section 2, subd (g) of the act* and has no standing to seek the relief prayed.

In view of the above exhibits, we believe the trial judge was correct in holding that Local No. 1644 came within the definition of a labor organization as set forth in the act.

Defendant argues the labor mediation act is unconstitutional because it violates the equal protection clauses of the Federal and State Constitutions.† The general principles relating to equal protection of the law under our State and Federal Constitutions have long recognized the rule that the legislative body is not precluded from resorting to classification under the police power if the classification is reasonable, not arbitrary, rests on some valid

* CL 1948, § 423.2 (Stat Ann 1960 Rev § 17.454[2]).—REPORTER.
† US Const, Am 14; Mich Const (1908), art 2, § 1.—REPORTER.

distinction, and has a fair and substantial relation to the object of the legislation so that all persons within the class shall be treated alike.

Defendant hospital argues that—since the act purports to cover the entire field of labor relations —hospitals and public utilities may not be singled out because "the relative consequences of industrial strife are no basis for a discrimination in treatment in an act whose broad and common purpose is to promote industrial peace." This argument has no real merit, since the provisions of the act with reference to hospitals and public utilities obviously indicate the health and welfare of the public is necessarily contingent on their continued operation unaffected by strikes and discord. Such a distinction has a direct and substantial relation to the purpose of the act—"to promote industrial peace"—and the well-being of society necessarily permits a classification of this kind. To single out hospitals and public utilities was for the purpose of making sure they continued to operate to protect the health of the public generally without industrial strife. A long line of decisions of the Michigan and United States Supreme Courts support the rule that the legislative body may classify as long as the classification is not unreasonable, arbitrary, or capricious. The classification of hospitals and public utilities could not be held to be unreasonable, arbitrary, or capricious.

Defendant hospital further argues that section 13a, subd (3)(a), is void in that it is "vague, indefinite, and arbitrary." No such interpretation could be placed upon the clear language of this section, which reads in part:

"The parties to a hospital or public utility dispute shall be obligated under this act to bargain collectively at all times."

There is nothing vague, indefinite, or arbitrary about this language. Its meaning is clear. The duty imposed upon defendant hospital in this case was simply this—to bargain collectively at all times.

Defendant hospital raises the question of whether the title to the act embraces more than 1 object, contrary to section 21 of article 5 of the Michigan Constitution of 1908. Numerous cases have held that the "object" of a statute is the general purpose or aim of the enactment. The legislature may empower a body created by it to do everything requisite, necessary, or expedient to carry out the principal objective to be attained. Legislation, if it has a primary object, is not invalid because it embraces more than 1 means of attaining its primary object. *In re Brewster Street Housing Site,* 291 Mich 313.

It is apparent the act has a single general object —the regulation of labor disputes within the State. It, therefore, meets the provisions of section 21 of article 5 of the State Constitution.

Lastly, the defendant contends it should not have borne the expenses of the election supervisor appointed by the trial court. The court was faced with the determination of a fact question as to whether plaintiff union represented a majority of the workers of defendant hospital. It was agreed by both counsel that one way of arriving at the facts would be to subpoena all 250 employees and ask if they were members of the union. The chancellor decided such a procedure would be a cumbersome, expensive, and long-drawn-out affair and would constitute an unnecessary burden on the court, the defendant, and the plaintiffs. The alternative was to conduct an election under the supervision of the court. The case was adjourned until such an election could be held.

Under the above circumstances, we do not believe the court exceeded its power as chancellor by holding the election.

The court made inquiry of the parties whether the referee costs should be apportioned prior to the election or await final decree. Plaintiffs' counsel indicated they would prefer the expense await final disposition of the case. Defendant's counsel commented, "We would not undertake voluntarily to pay any of the costs, I will say that much."

CL 1948, § 647.6 (Stat Ann 1943 Rev § 27.2524), provides:

"In all other cases where no special provision shall be made by law, the costs of all suits and proceedings in chancery shall be paid by such party as the court shall direct."

This litigation, including the election, was caused by defendant hospital's arbitrary and unreasonable refusal to bargain collectively. We believe the assessment of the costs was within the discretion of the trial judge and under the circumstances we do not believe he abused that discretion. See *Boyce* v. *Wendt,* 305 Mich 254.

The decree of the trial court is affirmed. Plaintiffs shall have costs.

BLACK and OTIS M. SMITH, JJ., concurred with KAVANAGH, J.

CARR, C. J. This case involves the validity of certain provisions of the State labor mediation act in its present form. Plaintiffs brought suit in equity to compel defendant hospital to enter into collective bargaining with them with reference to certain labor disputes. Plaintiffs had decree in the trial court granting the relief sought and defendant hospital has appealed, raising questions of validity of provisions of the act as amended based on claims of

alleged arbitrary procedure and violation of constitutional guaranties.

In *Local 170, Transport Workers Union of America,* v. *Genesee Circuit Judge,* 322 Mich 332, this Court held invalid provisions of PA 1947, No 318, amending the mediation act in such manner as to provide for compulsory arbitration of labor-management disputes between public utilities, municipally-owned utilities, and hospitals, by an appointive board of which a circuit judge of the State was required to be member and chairman. The act of 1947 was held unconstitutional in the majority opinion of this Court solely on the ground that the attempt to confer administrative powers upon a circuit judge was inseparably involved in the amendatory act, rendering it invalid on the theory that the act was meaningless without the appointment of the arbitration board for which provision was made. It may be noted that the act of 1947 was questioned on other grounds involving constitutional provisions. However, the opinion of the majority of the Court, being based *solely* and expressly on the requirement that a circuit judge should be a member of the arbitration board, would appear to be an implied rejection of the other grounds of attack.

Following the decision referred to, the legislature by PA 1949, No 230, again amended the mediation act by including in the title thereof a provision stating that it covered methods for the settlement of hospital and public utility labor disputes, and by substantially re-enacting, with certain changes and extensions, the sections added by PA 1947, No 318, which had been held invalid in the case above cited. Section 13 of the act as so amended (CLS 1956, § 423.13 [Stat Ann 1960 Rev § 17.454(14)]) specifically provided that sections 13a to 13g, inclusive, should be applicable only to public utility employers and employees, hospital employers and employees,

and to labor organizations representing or seeking to represent such employees. In section 13a, subd (3)(a), was incorporated a provision reading as follows:

"The parties to a hospital or public utility dispute shall be obligated under this act to bargain collectively at all times."

As pointed out in the dissenting opinion in *General Teamsters Union, Local No. 406,* v. *Uptown Cleaners & Hatters, Inc.,* 356 Mich 204, 239, the inclusion in the amended act of specific provisions with reference to collective bargaining clearly indicated that the legislature did not consider that such duty was imposed on employers generally. Otherwise the specific reference to utilities and hospitals would have been wholly unnecessary. However, we are not concerned in the instant case with the question as to the duty of all employers, regardless of the nature of the business involved, to bargain collectively in the event of a labor dispute with employees.

Defendant hospital is clearly subject to the specific provision above quoted from section 13a as contained in the amendatory act of 1949, unless such provision is invalid on 1 or more of the grounds urged by appellant. In part, such objections are analogous to those advanced in *Local 170, Transport Workers Union of America,* v. *Genesee Circuit Judge, supra,* and, as above pointed out, apparently rejected in the majority opinion of this Court. Without going into the questions raised in detail, we are not persuaded that the legislature exceeded its authority in the enactment of PA 1949, No 230. The power of a legislative body to classify for purposes of regulation under the general police power is commonly recognized. Dealing with public utilities and hospitals clearly involved considerations not present as a rule in disputes between employers and em-

ployees in commercial and industrial enterprises. The public interest is involved and the legislature obviously deemed it expedient to protect the welfare of the people of the State generally by obviating, if possible, cessation of operations of public utilities and of hospitals devoted to the care of the sick and injured. Bearing in mind the object to be attained, we do not think it can be said that the means adopted by legislative action are arbitrary or unreasonable to such an extent as to violate constitutional guaranties. We conclude that the State mediation act, as amended by PA 1949, No 230, is not invalid.

In circuit court the question arose whether the unions represented a majority of defendant's employees. To determine that issue the trial judge, with the approval of the plaintiffs but against the objections of the defendant, proceeded to conduct an election by said employees, appointing a referee to take immediate charge of the proceeding. Subsequently the referee's compensation and expenses, amounting to $655, were charged by the decree entered in the case against the defendant hospital. The record clearly indicates that plaintiffs strongly favored the action taken, and it obviously was to the advantage of both parties to the case, as well as for the assistance of the court, to have the question at issue definitely settled in advance of further proceedings. Under the circumstances we think that the sum found to be due to the referee should have been divided equally, each party being required to pay 1/2 thereof.

The decree entered by the trial court should be amended accordingly, and otherwise affirmed. Plaintiffs are entitled to costs on this appeal.

DETHMERS and KELLY, JJ., concurred with CARR, C. J.

SOURIS and ADAMS, JJ., did not sit.

SAKORRAPHOS *v.* EASTMAN KODAK STORES, INC.

1. AUTOMOBILES — NEGLIGENCE — PEDESTRIAN'S RIGHT-OF-WAY — INSTRUCTIONS—VIOLATION OF STATUTES—VIOLATION OF ORDINANCE.

   Failure of trial court to instruct jury that northbound right-turning motorist was guilty of negligence *per se* in failing to accord right-of-way to northbound plaintiff pedestrian on east crosswalk even though plaintiff's counsel had failed to make a request so to charge, based on State statute making such a failure by a motorist negligence *per se*, although he had made a request based on applicable local ordinance which differed in that its violation was merely evidence of negligence and not negligence *per se* and such request had been given *held*, reversible error, since plaintiff's proofs depended in very large part upon application of the statute to support his claim that defendant's driver was negligent (CLS 1956, § 257.612).

2. TRIAL — INSTRUCTIONS — PLEADING — EVIDENCE — REQUEST TO CHARGE.

   It is the duty of the court to present to the jury the substantial issues in the cause raised by the pleadings and supported by evidence governing the rights of the parties, whether or not any specific instructions are requested by counsel (Court Rule No 37, § 9 [1945]).

3. SAME—INSTRUCTIONS—REQUEST TO CHARGE.

   Counsel who desire additional or more specific instructions upon any particular point, after the court instructs the jury on the basic elements of the case, must frame a special request to the court to charge as desired or be deemed satisfied with instructions as given, and an exception based upon the want of sufficiency on particular points of law cannot be assigned as error (Court Rule No 37, § 9 [1945]).

DETHMERS, KELLY, and BLACK, JJ., dissenting.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5A Am Jur, Automobiles and Highway Traffic §§ 231, 1094, 1095.
[2] 53 Am Jur, Trial § 510.
[3] 53 Am Jur, Trial § 513.

Appeal from Wayne; Gilmore (Horace W.), J. Submitted October 23, 1961. (Docket No. 103, Calendar No. 48,601.) Decided July 2, 1962. Rehearing denied September 7, 1962.

Case by Stilos Sakorraphos against Eastman Kodak Stores, Inc., a Michigan corporation, for personal injuries sustained in automobile-pedestrian accident at crosswalk on November 21, 1956. Verdict and judgment for defendant. Plaintiff appeals. Reversed and remanded for new trial.

Cassese, Batchelder, Jasmer & Evanski (*Frederick D. Jasmer,* of counsel), for plaintiff.

Vandeveer, Haggerty, Doelle, Garzia, Tonkin & Kerr (*Edward P. Echlin,* of counsel on application for rehearing), for defendant.

SOURIS, J. In the trial of this case, the jury was instructed that there was a city ordinance which required drivers of vehicles turning right on a green traffic signal to yield the right-of-way to pedestrians lawfully in a crosswalk and that violation of the ordinance is evidence of negligence, but not negligence *per se.* The circuit judge did not instruct the jury that there was a comparable statute (CLS 1956, § 257.612 [Stat Ann 1960 Rev § 9.2312]), violation of which would be negligence *per se.* Following denial of his motion for new trial, after jury verdict for defendant, plaintiff appeals, claiming failure of the court to instruct the jury on the applicable statute constitutes reversible error. Other errors are assigned, but will not be discussed in view of the disposition we must make of this appeal.

Plaintiff testified he was walking north on Woodward avenue in Detroit and stopped on the curb at Cadillac Square in obedience to a red traffic light. When the traffic light turned green, he said he looked to the left and to the right and, seeing that the way

was clear, proceeded into the marked crosswalk. He had taken only 3 or 4 steps into the crosswalk when defendant's car, making a right turn off Woodward onto Cadillac Square, struck plaintiff, causing him injuries. Based upon these facts, plaintiff claimed below, and claims here, that he had the right-of-way in the crosswalk and defendant's driver was obliged, by the statute as well as the ordinance, to yield him that right-of-way, failure to do which constituted negligence *per se* on the part of defendant.

It was defendant's theory, supported at least by inference from the evidence presented, that plaintiff did not enter the crosswalk until its car had proceeded substantially through it in making its turn and that plaintiff ran into the right side of the car, just in front of the rear fender, because of his own negligent failure to observe what was there to be seen.

Quite clearly there was an issue of fact to be resolved by the jury, but its resolution fairly to both parties required the jury to be instructed upon the statute cited and the legal consequences in the event the jury found it to have been violated. Failure to instruct the jury on this aspect of the case, we conclude, was prejudicial to plaintiff's rights and requires our reversal and remand for a new trial.

It should be noted that plaintiff's counsel failed to request an instruction on the statute although he did submit a request for instruction on the applicable ordinance, which was given in substance, and although the statute was relied upon in plaintiff's declaration. At the hearing on the motion for new trial, Judge Gilmore correctly observed that he should have instructed the jury on the statute even in the absence of request to do so,* but he concluded the error was not so prejudicial to plaintiff that a

* See *Barton* v. *Gray*, 57 Mich 622, 631, 632; *Huffman* v. *First Baptist Church of Flushing*, 355 Mich 437, 445–447; *Hicks* v. *B & B Distributors, Inc.*, 353 Mich 488, 491, 492; and *Martiniano* v. *Booth*, 359 Mich 680, 688.

new trial was required. We disagree. Plaintiff's proofs depended in very large part upon application of the statute to support his claim that defendant's driver was negligent. Absent an instruction on the statute, and on the legal effect of its violation, plaintiff's case was seriously weakened and a new trial is required to correct the error.

It is the duty of the court to present to the jury the substantial issues in the cause raised by the pleadings and supported by evidence governing the rights of the parties, whether or not any specific instructions are requested by counsel. This duty was not performed by the trial judge in this cause. He did not instruct the jury that if it found defendant had violated the statutory provisions pleaded by the plaintiff, such statutory violations would constitute negligence *per se*. *Barton* v. *Gray,* 57 Mich 622; *Martiniano* v. *Booth,* 359 Mich 680, 688. Absent an instruction on the statutes and their legal effect, plaintiff's cause was seriously weakened. If, after the court instructs the jury on the basic elements of the case, counsel desires additional or more specific instructions upon any particular point, it is his duty to frame a special request to the court to charge as desired. Omitting or neglecting to do so, he will be deemed to be satisfied with the instructions as given, and an exception based upon the want of sufficiency on particular points of law cannot be assigned as error.

The failure to properly charge in the instant case is not the type of error contemplated by Court Rule No 37, § 9 (1945).* See *Martiniano* v. *Booth, supra,* and cases therein cited.

* "The court shall instruct the jury as to the law applicable to the case whenever a verdict is to be rendered, and in his charge may make such comment on the evidence, the testimony and the character of the witnesses as in his opinion the interests of justice may require. The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested."

Reversed and remanded for new trial. Costs to plaintiff.

CARR, C. J., and KAVANAGH and OTIS M. SMITH, JJ., concurred with SOURIS, J.

BLACK, J. (*dissenting*). As in *Martiniano* v. *Booth,* 359 Mich 680, we divide again respecting the meaningful purpose of the last sentence of section 9 of Court Rule No 37 (1945). By oversight or tactical design, we know not which, this unsuccessful plaintiff in negligence omitted timely request that the trial judge charge the jury with respect to 1 of the points of law made by his declaration and disputed proof. Appealing, he would have us hold that the judge erred reversibly by omission of charge to such point.

I cannot agree with any like appellant who, for aught we know, has calculated and placed his bet for a winning verdict on a general charge, admittedly proper, rather than the same charge hopped up by a specific addition he could but did not ask for. The error, if any, was that of his counsel—not of the trial judge. The judge's charge otherwise, viewed as a whole, presented generally and fairly "the substantial issues in the cause" (quotation from *Barton* v. *Gray,* 57 Mich 622, 631, 632; quoted more fully in *Martiniano,* pp 688, 689) and that is all counsel may ask in the absence of a request or requests framed in terms of greater detail. To make it plain, a trial judge is not obliged to guess what counsel may want included with general and otherwise proper jury instructions when counsel fail to advise him duly of their wishes.

There is one field of law, the adjective or procedural, in which appellate courts can and should write with pinpointed precision and ever-desirable certainty. In the context of today's issue we have

repeatedly done so, by dovetailing decisions and a 32-year-old court rule, and it is necessary only to record again that the relevant portion of section 9 of 1931 Court Rule No 37 means just what it says. The section (as it appears by the revision of 1945):

"The court shall instruct the jury as to the law applicable to the case whenever a verdict is to be rendered, and in his charge may make such comment on the evidence, the testimony and the character of the witnesses as in his opinion the interests of justice may require. *The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested.*"

Veterans of the bar will recall, when the so-called Sunderland rules of 1931 were publicly debated and considered prior to their adoption, that the emphasized final sentence of quoted section 9 was fully and advisedly understood as reflecting, in form of rule, the previously consistent rulings of this Court, that is to say, one who takes his chances with such requested instructions as he may choose to proffer cannot "lie in wait" and then, if the jury decide against him, assert as judicial error his own omission. One need but recall the bellwether of these cases (*Kinney* v. *Folkerts,* 84 Mich 616), quoted in *Hartwig* v. *Kell,* 199 Mich 603, 611, 612 as follows:

"If more full or specific instructions upon any particular point was desired, it was the duty of the defendant to frame and present a special request covering the point. 'Omitting or neglecting to do so, he will be deemed satisfied with the sufficiency of the instructions as given, and an exception based upon the want of sufficiency cannot be assigned as error.' *Walters* v. *Detroit United Railway,* 183 Mich 549 (Ann Cas 1916B, 382); *Barton* v. *Gray,* 57 Mich 622; *Barnett* v. *Farmers' Mutual Fire Insurance Co.,* 115 Mich 247; *Spray* v. *Ayotte,* 161 Mich 593; *Lewis*

v. *Detroit Vitrified Brick Co.*, 164 Mich 489. 'Parties cannot remain silent, and thereby lie in wait to ground error, after the trial is over, upon a neglect of the court to instruct the jury as to something which was not called to its attention on the trial, especially in civil cases.' *Kinney* v. *Folkerts*, 84 Mich 616, 625; *Hewitt* v. *East Jordan Lumber Co.*, 136 Mich 110."

The rule of *Kinney* v. *Folkerts* was consistently followed up to the time of its echo by explicit court rule. See *Grove* v. *Youell*, 110 Mich 285, 291 (33 LRA 297); *Hewitt* v. *East Jordan Lumber Co.*, 136 Mich 110, 112; *Stuart* v. *Holt*, 166 Mich 549; *Hartwig* v. *Kell, supra; Tishhouse* v. *Schoenberg*, 234 Mich 271, 272. That rule, fortified now by said section 9, controls and dictates ruling that omission of counsel to request and omission of Judge Gilmore to instruct, upon plaintiff's claim that defendant was negligent *per se*, under CLS 1956, § 257.612 (Stat Ann 1960 Rev § 9.2312), does not constitute reversible error. As said in *Record Publishing Co.* v. *Merwin*, 115 Mich 10, 11:

"The other errors assigned upon the charge are directed to the failure to give certain instructions which it did not occur to counsel to suggest until after verdict. It is not too much to ask in civil cases that counsel shall ask for such instructions as shall protect their clients."

When it is the will of this Court that an errant appellant shall—in the total absence of valid specification of error—receive our benign grant of new trial, let us say what we mean and record what we do, that is to say, let us declare and then exercise our inherently independent power to "order a new trial whenever it [this Court] deems that the ends of justice so require." See, with respect to such power and its exercise in favor of another appellant

whose potential assignment of error had been waived, *St. John* v. *Nichols,* 331 Mich 148, 158 (followed in *Weller* v. *Mancha,* 353 Mich 189, 195, and *Bahr* v. *Miller Brothers Creamery,* 365 Mich 415, 428). And let us take pertinent note that our trial judges, especially those of the third circuit, have enough assembly-line trouble already without compelling them to pick the strategic brains of counsel for possible omission of instruction "on *any* point of law."

Here there is no occasion for any such extraordinary judicial gratuity. The appellant plaintiff's case was dangerously close (as the trial judge noted on several occasions) to the frontier of an instructed verdict, and it was only on account of our enduring rule that "*all* reasonable men" must agree (see collection of cases in *Normand* v. *Thomas Theatre Corp.,* 349 Mich 50, 56, 57) that he received due trial to a jury. The trial judge's charge, considered as a whole, presented fairly and generally the law applicable to the case and no criticism thereof arose until the cards of the verdict turned up in favor of the defendant. We should adhere, then, to the standard rule that law cases are rightfully affirmed when the record discloses an absence of reversible error.

Having considered appellant's remaining specifications of error, and discovering nothing of reversible nature, I vote to affirm with costs to defendant.

DETHMERS and KELLY, JJ., concurred with BLACK, J.

ADAMS, J., took no part in the decision of this case.

DETROIT EDISON COMPANY *v.* CORPORATION & SECURITIES COMMISSION.

1. TAXATION—ELECTRIC UTILITY COMPANY—PUBLIC SERVICE COMMISSION—ACCOUNTING.

   The corporation and securities commission must abide by the accounting and tax-calculating procedures an electric utility company has followed under orders of the public service commission, where the latter commission has been vested by statute with authority to regulate such utility and to prescribe its uniform methods of keeping accounts (CL 1948 and CLS 1956, § 460.1 *et seq.*).

2. SAME—SURPLUS—ELECTRIC UTILITY COMPANY—ANNUAL PRIVILEGE FEE—RESERVE FOR DEFERRED FEDERAL INCOME TAXES.

   Surplus of an electric utility corporation for purposes of determining the annual franchise fee to be paid by the corporation, is governed by pertinent accounting procedures prescribed by the public service commission pursuant to statutory authority conferred upon it and observed by the corporation, hence, reserve for deferred Federal income taxes, established to meet possibility of higher income taxes when accelerated depreciation benefits as to certain property were exhausted, was not to be included as surplus in computing the corporation's annual privilege fee (CLS 1956, § 450.304; CL 1948 and CLS 1956, § 460.1 *et seq.*).

CARR, C. J., and SOURIS, J., dissenting.

Appeal from Court of Claims; Quinn (Timothy C.), J., presiding. Submitted January 9, 1962. (Docket No. 49, Calendar No. 49,272.) Decided July 2, 1962. Rehearing denied September 7, 1962. Motion of Public Service Commission to participate in rehearing as *amicus curiae* denied September 7, 1962.

Detroit Edison Company, a New York corporation, filed its claim against State of Michigan and

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 51 Am Jur, Taxation § 817 *et seq.*

Michigan Corporation and Securities Commission for refund of payment, made under protest, of additional sums following redetermination of its annual franchise fee. Judgment for plaintiff. Defendants appeal. Affirmed.

Fischer, Sprague, Franklin & Ford (*Harvey A. Fischer, Gerald C. Simon,* and *George F. deClaire,* of counsel), for plaintiff.

Frank J. Kelley, Attorney General, *Joseph B. Bilitzke,* Solicitor General, *T. Carl Holbrook* and *William D. Dexter,* Assistant Attorneys General, for defendants.

Frank J. Kelley, Attorney General, *Eugene Krasicky,* Solicitor General, and *Benjamin F. Gibson* and *Hugh B. Anderson,* Assistant Attorneys General, for Michigan Public Service Commission to participate in rehearing as *amicus curiae.*

SOURIS, J. (*dissenting*). In *Detroit Edison Co.* v. *Corporation & Securities Commission,* 361 Mich 150, only 2 members of this Court* reached and decided the substantive issues raised in that case and again raised in this one. The principal issue is whether an item appearing on plaintiff's balance sheet as a liability under the caption "reserve for deferred Federal income taxes" should be treated as "surplus" for franchise fee purposes under PA 1921, No 85, § 4, as amended by PA 1954, No. 144.† The franchise fee involved in the earlier cited case was for the year 1956; involved here is the fee for 1958. The procedural issue on which the prior case was decided by our majority is not involved in this appeal from the

* Justices EDWARDS and TALBOT SMITH, both of whom have since resigned.

† For statute then in force see CLS 1956, § 450.304 (Stat Ann 1959 Cum Supp § 21.205).—REPORTER.

court of claims. In all other material respects the facts and the issues are the same.

In the prior case, beginning at p 162, Mr. Justice EDWARDS considered and succinctly resolved the substantive issues presented once again in this appeal. Absent the procedural issue which previously divided the members of this Court, we are able now to agree with his reasoning and his conclusions.

Accordingly, the judgment below should be reversed and this cause be remanded for entry of a judgment in accordance herewith. No costs should be taxed, matters of statutory construction being involved.

CARR, C. J., concurred with SOURIS, J.

BLACK, J. The ultimately meritorious question which, in *Detroit Edison Co.* v. *Corporations & Securities Commission,* 361 Mich 150, was left undecided,* faces us again. It is the subject of 2 recorded and hopelessly oppugnant judicial opinions. Neither opinion is necessarily controlling. One was prepared by former Justice EDWARDS, writing then for a minority of 2. It appears in the cited case starting on page 158 of the volume. The other was handed down by Judge Quinn, of the 40th judicial circuit. The presently scrutinized judgment was entered on strength of the latter opinion.

It is proposed now, by Justice SOURIS, that we adopt the EDWARDS opinion. That opinion concludes that the attorney general's submitted view of the term "surplus" (refer to CLS 1956, § 450.304 [Stat Ann 1959 Cum Supp § 21.205]) should be adopted and applied in reversal of Judge Quinn's judgment. On the other hand, convinced that Judge Quinn's

* It was held that the disputed amount of Detroit Edison's 1956 privilege fee had been determined by an illegally assembled appeal board and the case was remanded accordingly.

view of decisive and pretrial-agreed issue 4–(a) is unanswerably sound, I would hold that the defendant corporation and securities commission was and is—for the relevant purposes of the act in which said section 450.304 appears—legally bound to abide the accounting and tax-calculating procedures plaintiff has followed and that said commission had and has no right to determine or redetermine the amount of plaintiff's annually payable privilege fees contrary to such procedures. Judge Quinn ruled, and I agree:

"Now, first of all, with respect to issue (a) under paragraph 4 of the pretrial statement, which is stated as follows:

"'Is the corporation and securities commission bound by the accounting procedures set up by the Michigan public service commission with respect to utilities in determining the annual franchise fee?'

"The public service commission is a body set up by statute to control and regulate public utilities with an idea of protecting the stockholders and the utilities as well as the consumer public. They set the rates, and so forth. By statute and regulation, which is R–460.600 in the administrative code [1954], they prescribe in great detail the system of accounts that the utilities like the Detroit Edison must keep, and exhibits E and F in this record indicate 2 rulings by the public service commission that an item similar to the item involved in this litigation shall not be carried on the books of the company as surplus, and to this court it is incongruous that that order of the public service commission would not be binding on another branch of the State for another purpose, and it is the opinion of this court that the 2 orders, shown in exhibits E and F,* of the public service commission are binding on the corporation and securities commission so far as the classification of the item involved in this litigation is concerned."

Now for what would seem to be controlling facts;

* Exhibits E and F are the presently mentioned orders of 1951 and 1954.

facts made by unequivocal statutes granting broad and exclusive powers—to the public service commission—of long since exercised superintendence over the electric utilities of Michigan and the accounting procedures thereof. It was and is provided, by original and present section 6 of the public service commission act of 1939, as amended (CL 1948 and CLS 1956, § 460.1 *et seq.*, [Stat Ann 1959 Cum Supp § 22.13(1) *et seq.*]):

"Sec. 6. The Michigan public service commission is hereby vested with complete power and jurisdiction to regulate all public utilities in the State except any municipally owned utility and except as otherwise restricted by law. It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation, or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies, whether private, corporate or cooperative, gas companies, telephone, telegraph, oil, gas, and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies."*

The foregoing grant of superintendence has remained complemented by a separate grant—to the public service commission—of power to "prescribe uniform methods of keeping accounts to be observed by all * * * corporations engaged in such business of transmitting and supplying electricity." (Quotation from CL 1948, § 460.556 [Stat Ann § 22.156].) The precise as well as exclusive extent to which these powers have been exercised fully appear upon examination of the "Uniform system of ac-

* By PA 1960, No 44, the quoted portion of section 6 was amended solely to include the word "water," after the words "gas companies."

counts for electric utilities," which system the public service commission has promulgated and enforced pursuant to such statutory power. See the Michigan administrative code of 1954, pages 5954–6074.

From the above let us turn to the fact of affirmative action, taken duly by the public service commission with respect to plaintiff's presently questioned accounting procedures. August 8, 1951, under the heading "Order authorizing certain accounting entries," the commission issued an order authorizing and directing plaintiff Detroit Edison:

"(a) To charge to 'Provision for deferred Federal income taxes' as a separate subaccount under account 507–Taxes, and to credit to 'Reserve for deferred Federal income taxes' as a separate subaccount under account 258.2—Miscellaneous reserves, an amount or amounts in total for each year equal to the reduction in Federal income taxes arising out of special amortization, as provided in section 124A of the internal revenue code, rather than normal income tax depreciation of the cost of such facilities."*

November 5, 1954, under the heading "Accounting order," the commission issued another order authorizing and directing plaintiff Detroit Edison, "with respect to the Federal income tax results of any allowances for accelerated depreciation (or amortization) of properties which it may elect to take under section 167, subd (b) (3) of the internal revenue code of 1954, to account therefor in the following

* The orders proper (excluding the prefatory premises thereof) of August 8, 1951 and November 5, 1954 are included as appendices "A" and "B" at end of this opinion. It is significant that the public service commission, in each instance, retained jurisdiction "in the matter here contained" and reserved the right to issue such further order or orders "as the circumstances may require."

The question naturally arises: Which of these currently conflicting determinations by 2 commissions (CSC and PSC) should this beset plaintiff recognize? In view of foregoing statutes the answer must be "PSC," at least until the latter decides, if it does decide, to order conformably with the determination of CSC.

manner" (exactly as it has done to the total dissatisfaction of the defendant commission and the attorney general).

Excepting as the latter may modify the former both orders remain in effect. We are advised that such orders do but reflect like orders issued over the years to other like utilities. Plaintiff has faithfully conformed with both. Notwithstanding all this, the defendant commission has assumed to rule that plaintiff may not employ the accounting procedures so authorized and ordered, at least for the purpose of calculating and determining the latter's annually payable corporate privilege fee. Thus we behold an unseemly collision of "determination" and "redetermination" by one agency of the State with contrary "orders" made by another. Yes, as Judge Quinn observed, this is quite "incongruous." Indeed, it is legally intolerable once the statutorily plenary supremacy of public service commission control, over Michigan electric service utilities, is fairly considered. Any other holding would sanction, judicially, the administrative whipsawing of any selected utility taxpayer by 2 agencies of one government, one ordering that it proceed as the other penalizes it for doing so.

If the plaintiff utility is to be governed, taxwise, by accounting rules other than those already prescribed by the public service commission, such other rules under present law will have to come into being by order of the same commission; the commission which, incidentally, is now carrying on a series of public hearings designed to provide aid in deciding whether it should or should not retain such previously ordered accounting procedures.*

* These hearings were instituted by special order of the public service commission dated March 22, 1962, headed "Order directing investigation and notice of hearing." They have, at the time of present writing, received widely publicized treatment in the daily press.

In the mentioned EDWARDS opinion it is said (without discussion of or reference to foregoing statutes) that "We are not concerned with whether or not this [Detroit Edison's presently questioned accounting procedure] is a sound accounting practice or good business, or even whether or not it is a procedure required by orders of the public service commission." (p 163 of report, 361 Mich.)

For reasons given above I respectfully disagree, now as before. We *are* concerned, in avoidance of internecive administrative warfare if for no other reason, with the validity and integrity of foregoing orders of the public service commission. I would uphold their controlling worth, thereby upholding that commission's superior and exclusive power to superintend public utilities as in the quoted statutes provided. This means that Judge Quinn, upon the stipulated record of facts, could do naught but enter judgment for this plaintiff.

The judgment of the court of claims should be affirmed.

KELLY, J., concurred with BLACK, J.

DETHMERS, J., concurred in result.

KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., did not sit.

APPENDIX "A"

Order (proper) of public service commission dated August 8, 1951

"Now therefore, by virtue of the authority vested in this commission by law, the commission orders and directs as follows:

The commission's said order refers to existing orders "for special accounting authority relating to the use of liberalized depreciation" and defines them this way: "In general, these orders have approved the charging of the so-called income tax deferral to a subaccount under the 'Taxes' account, with a concurrent credit to an account designated 'Reserve for deferred Federal income taxes.'"

"1. The Detroit Edison Company is hereby directed and instructed with respect to the Federal income tax results of any allowances for amortization of emergency facilities which it may elect to take under section 124A of the internal revenue code, to account therefor in the following manner:

"(a) To charge to 'Provision for deferred Federal income taxes' as a separate subaccount under account 507—Taxes, and to credit to 'Reserve for deferred Federal income taxes' as a separate subaccount under account 258.2—Miscellaneous reserves, an amount or amounts in total for each year equal to the reduction in Federal income taxes arising out of special amortization, as provided in section 124A of the internal revenue code, rather than normal income tax depreciation of the cost of such facilities.

"(b) After such amortization under each necessity certificate is completed or is discontinued by the company and thereafter during the life of such property or until the earlier exhaustion of the portion of the reserve for deferred Federal income taxes related to such property,

"(1) to charge to 'Reserve for Federal income taxes' and to credit to 'Portion of current Federal income taxes deferred in prior years', (a separate subaccount under account 507—Taxes) an amount, or amounts, in total for each year for each necessity certificate, equal to the increase in the Federal income taxes payable for that year due to the fact that normal depreciation cannot be deducted because of previous amortization of the property under such necessity certificates, and

"(2) to charge to 'Reserve for deferred Federal income taxes' and to credit to 'Portion of current Federal income taxes deferred in prior years', an amount, or amounts, equal to any balance in said reserve at December 31 of each year for plant re-

tired during said year which had been amortized under such necessity certificate.

"(c) Within 60 days after the end of the first year in which amortization under each necessity certificate is taken and within 60 days after the end of each year thereafter during the life of the property included in said necessity certificates, The Detroit Edison Company shall by statement duly verified, report to this commission with respect to each necessity certificate, the amount of plant costs amortized, the resulting reduction in Federal income taxes, the entries made in accordance with this order, the cost of plant retired which was included in such necessity certificate, and any other pertinent data or calculations concerning the accumulation or disposition of the 'Reserve for deferred Federal income taxes' which the commission may request.

"(d) To provide in its books of account for retirement of the properties covered by the necessity certificates by appropriations to retirement (depreciation) reserve in amounts consistent with its practice for like property not covered by necessity certificates.

"The commission retains jurisdiction of the matters herein contained and reserves the right to issue such further order, or orders, as the circumstances may require."

APPENDIX "B"

Order (proper) of public service commission dated November 5, 1954

"Now, therefore, by virtue of the authority vested in this commission by law, the commission orders and directs as follows:

"1. The Detroit Edison Company is hereby authorized and directed, with respect to the Federal income tax results of any allowances for acceler-

ated depreciation (or amortization) of properties which it may elect to take under section 167, subd (b) (3) of the internal revenue code of 1954, to account therefor in the following manner:

"a. During the period when the annual allowances for depreciation of properties under section 167, subd (b) (3) are more than what would be the allowances for normal income tax depreciation of such properties under said section 167, subd (b) (1), to charge to 'Provision for deferred Federal income taxes arising out of section 167, I.R.C.' as a separate subaccount under account 507—Taxes, and to credit to 'Reserve for deferred Federal income taxes—section 167, I.R.C.' as a separate subaccount under account 258.2—Miscellaneous reserves, an amount for each year equal to the reduction in Federal income taxes payable for that year due to the fact that allowances for accelerated depreciation (or amortization) of properties pursuant to said section 167, subd (b) (3) are in excess of what would be allowable for normal income tax depreciation under section 167, subd (b) (1) of the internal revenue code of 1954.

"b. During the period when the allowances for depreciation of properties under said section 167, subd (b) (3) are less than what would be allowable for normal income tax depreciation, to charge to 'Reserve for deferred Federal income taxes—section 167, I.R.C.' and to credit to 'Portion of current Federal income taxes deferred in prior years' as a separate subaccount under account 507—Taxes, an amount for each year equal to the increase in Federal income taxes payable for that year due to the fact that allowances for accelerated depreciation (or amortization) of properties under section 167, subd (b) (3) for that year are less than the amount that would be allowable for normal depreciation under said section 167, subd (b) (1).

"2. Within 60 days after the end of the first year in which allowances for accelerated depreciation (or amortization) under said section 167, subd (b) (3) are taken, and within 60 days after the end of each year thereafter during which allowances for such depreciation under said section are taken, The Detroit Edison Company, by statement duly verified, shall report to this commission the amount of property costs with respect to which accelerated depreciation (or amortization) has been allowed for Federal income tax purposes under said section 167, subd (b) (3), the resulting decrease or increase in Federal income taxes, the entries made in accordance with this order and any other pertinent data or calculations concerning the accumulation or disposition of 'Reserve for deferred Federal income taxes —section 167, I.R.C.' which the commission may request.

"3. To provide in its books of account for retirement of its properties including those with respect to which it has elected to compute accelerated depreciation allowances under said section 167, subd (b) (3), by appropriations to account 250—Depreciation reserve, without giving effect to the amounts allowable for Federal income tax purposes.

"The commission retains jurisdiction in the matter here contained and reserves the right to issue such order or orders as the circumstances may require."

PEOPLE *v.* McCAGER.

1. HABEAS CORPUS—NATURE OF WRIT.

   The ancient writ of habeas corpus, a restraint upon governmental despotism, has been inherited full grown as it was known in England in 1789.

2. SAME—PURPOSE OF WRIT.

   Habeas corpus is a civil proceeding the main purpose of which is to cause the release of persons illegally confined, to inquire into the authority of law by which a person is deprived of his liberty (CL 1948, § 637.1 *et seq.*).

3. SAME—CIVIL PROCEEDING.

   Application for the writ of habeas corpus is not made in the criminal proceedings but in new and independent civil action instituted to enforce a civil right, the right to personal liberty (CL 1948, § 637.1 *et seq.*).

4. SAME—DISCHARGE.

   The effect of a successful application for a writ of habeas corpus is to obtain discharge of applicant from custody even though he be held under criminal process, as the writ of habeas corpus is of paramount authority over all other writs (CL 1948, § 637.1 *et seq.*).

5. SAME—CUSTODY OF PRISONER.

   The authority under which an original commitment of an applicant for habeas took place is superseded upon the return of the writ and production of the body of the party suing it out, the safe-keeping of the prisoner being entirely under the con-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 25 Am Jur, Habeas Corpus § 3.
[2, 3] 25 Am Jur, Habeas Corpus §§ 11, 12.
[4] 25 Am Jur, Habeas Corpus § 157.
[5, 6] 25 Am Jur, Habeas Corpus § 148.
[7] 3 Am Jur, Appeal and Error § 812.
[9] 20 Am Jur, Evidence § 533.

trol and direction of the court to which the return is made, and he may be brought before the court from time to time until it is determined whether he shall be discharged or absolutely remanded (CL 1948, § 637.1 *et seq.*).

6. SAME—CUSTODY FOLLOWING ISSUANCE OF WRIT.

Defendant's liberty was the exclusive responsibility of the judge who issued writ of habeas corpus after defendant was produced in court on the day following his arrest, in response to the writ of habeas corpus and until final hearing thereon, irrespective of the nature of his detention before he was first produced in court in response to the writ (CL 1948, § 637.1 *et seq.*).

7. CRIMINAL LAW—HABEAS CORPUS—MOTION TO QUASH INFORMATION—QUESTIONS REVIEWABLE.

No opinion on the propriety of the 2 adjournments of the hearing on writ of habeas corpus is expressed on granted leave to appeal from order denying motion to quash information charging defendant with first-degree murder, where the habeas corpus proceedings are not before the Supreme Court for review (CL 1948, § 637.1 *et seq.*; Court Rule No 60, § 1 [b] [1945]).

8. SAME—MOTION TO QUASH INFORMATION—CONFESSION—HABEAS CORPUS.

Motion to quash information, charging defendant with first-degree murder, based upon his alleged illegal detention at time his confession was obtained, was properly denied, where at such time he was being detained at the direction of the judge who had issued a writ of habeas corpus pending his determination thereof (CL 1948, § 637.1 *et seq.*).

9. SAME—ADMISSIBILITY OF CONFESSION.

Questions as to the admissibility of an alleged confession to first-degree murder, after affirmance of order denying motion to quash information, are to be resolved by trial judge if the confession was otherwise inadmissible than because obtained while he was being detained pursuant to direction of judge who had issued writ of habeas corpus pending such judge's final determination thereof, or, if questions of fact must be resolved, by jury under proper instruction of the trial judge (CL 1948, § 637.1 *et seq.*).

Appeal from Recorder's Court of Detroit; O'Hara (John P.), J. Submitted January 11, 1962. (Docket No. 83, Calendar No. 49,121.) Decided July 2, 1962.

Edward McCager, charged with murder, appeals from denial of motion to quash information. Affirmed.

Frank J. Kelley, Attorney General, *Joseph B. Bilitzke,* Solicitor General, *Samuel H. Olsen,* Prosecuting Attorney, *Samuel J. Torina, Angelo A. Pentolino,* and *Dominick R. Carnovale,* Assistant Prosecuting Attorneys, for the people.

Henry Heading, for defendant.

SOURIS, J. By this appeal on leave granted we review denial of defendant's motion to quash an information charging murder in the first degree, defendant's claim being that his confession, solely upon which the information was based, was inadmissible in evidence against him. Neither at the preliminary examination, nor at the hearings on defendant's motion to quash, was there offered any evidence that his confession was involuntarily extracted from him by physical or psychological brutality. Instead, defendant relies upon the claim that his detention for 4 days after arrest without a warrant and prior to arraignment was for the manifest purpose of affording the police an opportunity to extract from him the confession which he ultimately made and, therefore, that the confession was inadmissible as a matter of law within our ruling in *People* v. *Hamilton,* 359 Mich 410, because extracted from him during a period of unlawful detention.

Two years ago, in *People* v. *Hamilton, supra,* at p 417, this Court unanimously held that "an unnecessary and so unlawful delay of compliance with

either of said sections 13 and 26,[*] when done for prolonged interrogatory purposes and without proven justification of the delay, renders involuntary and so inadmissible whatever confessional admissions the detained person may have made while so unlawfully detained."

Thus Michigan became the first State to adopt the exclusionary principle announced in *McNabb* v. *United States,* 318 US 332 (63 S Ct 608, 87 L ed 819), which the Federal courts are required to follow. See *Culombe* v. *Connecticut,* 367 US 568, 600 (81 S Ct 1860, 1878, 6 L ed 2d 1037, 1056), footnote 53 of Mr. Justice Frankfurter's opinion; 7 Wayne L Rev 51, 60; and *People* v. *Lundberg,* 364 Mich 596, 604.

Our decision in *Hamilton,* adopting the exclusionary principle of *McNabb,* was planted not alone on the statutory requirements cited, but also upon Michigan's own constitutional guarantee of due process. Const 1908, art 2, § 16. By guarding against "actual or inferential judicial sanction of procedures which are violative either of section 13 or section 26," we also sought to assure an accused "the process that is due him," p 419.

This appeal comes to us before trial by motion designed either to avoid trial entirely or to insure that, if a trial is held, defendant will not be put in jeopardy of conviction of first-degree murder by the use of a confession alleged by him to be inadmissible in evidence. Normally, when confessions are claimed to be inadmissible because obtained

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* CL 1948, §§ 764.13 and 764.26 (Stat Ann 1954 Rev §§ 28.872 and 28.885). Section 13, at the time of *Hamilton* and at the time of the events in this case of McCager, read:

"A peace officer who has arrested a person without a warrant must without unnecessary delay, take the person arrested before the most convenient magistrate of the county in which the offense was committed, and must make before the magistrate a complaint, stating the offense for which the person was arrested."

Section 13 was subsequently repealed by PA 1961, No 44, effective May 20, 1961.

against the confessor's will by force, or threat of force, actual or more subtle, there are present disputed factual issues appropriately left for jury determination at the time of trial. *People* v. *Barker,* 60 Mich 277 (1 Am St Rep 501); *People* v. *Owen,* 154 Mich 571 (21 LRA NS 520); *People* v. *Prestidge,* 182 Mich 80; *People* v. *Biossat,* 206 Mich 334; *People* v. *Foster,* 211 Mich 486; *People* v. *Podolski,* 332 Mich 508, and opinion for affirmance in *People* v. *Roberts,* 364 Mich 60, 61. What we have here, however, is a confession claimed to be made inadmissible not by physically or psychologically oppressive tactics by which it was involuntarily extracted from defendant, but rather, solely by reason of defendant's allegedly unlawful detention during which he confessed.

On the day following defendant's arrest, an attorney apparently hired in his behalf caused to be issued a writ of habeas corpus, in obedience to which the police produced defendant before Judge John A. Ricca, one of the judges of the recorder's court for the city of Detroit. The record discloses that at the police officers' request, Judge Ricca adjourned the hearing until the following morning, a Saturday, to give the police additional time to conduct their investigation concerning a conflict between defendant's denial that he had been in the vicinity at the time of the crime and other information possessed by the police which we are told indicated that he had been there the night before the morning of the murder. On Saturday, the adjourned hearing on the writ was again adjourned an additional 48 hours until the following Monday morning. This adjournment resulted, we are told, because the police officers informed the judge that defendant had named another person in whose company he was when he last saw the victim and that the police had not had

an opportunity to question that person, although he had been arrested.

Many of our constitutional guardians of liberty were conceived at our country's birth out of a felt need of our forebears for new restraints upon governmental despotism. The ancient writ of habeas corpus, however, was so fundamental to their notions of an ordered society that it was inherited full grown as it was known in England in 1789. *Stidham* v. *Swope,* 82 F Supp 931. Alexander Hamilton ranks it together with the prohibition of *ex post facto* laws in our Federal Constitution as the greatest securities against the "most formidable instruments of tyranny". The Federalist Papers, No 84.

Habeas corpus is a civil proceeding the main purpose of which is to cause the release of persons illegally confined, to inquire into the authority of law by which a person is deprived of his liberty. CL 1948, § 637.1 *et seq.* (Stat Ann § 27.2244 *et seq.*), and *Goetz* v. *Black,* 256 Mich 564 (84 ALR 802). Application for the writ of habeas corpus is not made in the criminal proceedings; it is made in a new and independent civil action instituted to enforce a civil right, the right to liberty.

"The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ

of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offence; but if he succeeds he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime." *Ex parte Tom Tong,* 108 US 556, 559, 560 (2 S Ct 871, 27 L ed 826).

The place of the writ of habeas corpus in the arsenal of free men dedicated to the preservation of their liberties is guaranteed, "unless when in cases of rebellion or invasion the public safety may require" its suspension. United States Constitution, art 1, § 9, and Const 1908, art 2, § 11. Its power is supreme; it is of paramount authority over all other writs. 39 CJS, Habeas Corpus, § 87, citing *People, ex rel. Wayman,* v. *Zimmer* (1911), 252 Ill 9 (96 NE 529), and *Ex parte Dodd* (1952), 72 Idaho 351 (241 P2d 359).

At the common law, upon return to a writ of habeas corpus custody of the prisoner thereafter passed to the judge who issued the writ. In 1871, in *Barth* v. *Clise,* 79 US 400 (20 L ed 393), the United States supreme court said (p 402):

"By the common law, upon the return of a writ of habeas corpus and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safe-keeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment, but under the authority of the writ of habeas corpus. Pending the hearing he may be bailed *de die in diem,* or be re-

manded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court. He may be brought before the court from time to time by its order until it is determined whether he shall be discharged or absolutely remanded. *King* v. *Bethel,* 5 Mod 19 (87 Eng Rep 494); Bacon Abridgment, Habeas Corpus, B13; *Anonymus,* 1 Vent 330 (86 Eng Rep 213); *Sir Robert Peyton's Case,* 1 Vent 346 (86 Eng Rep 223); Hurd, Habeas Corpus 324."

Hurd, Habeas Corpus (2d ed), p 319, the same passage cited in *Barth, supra,* put it this way:

"Pending the examination or hearing, the prisoner, in all cases on the return of the writ, is detained, not on the original warrant, but under the authority of the writ of habeas corpus. He may be bailed on the return *de die in diem,* or be remanded to the same jail whence he came, or to any other place of safekeeping under the control of the court or officer issuing the writ, and by its order brought up from time to time till the court or officer determines whether it is proper to discharge or remand him absolutely.

"The King's Bench may, pending the hearing, remand to the same prison or to their own, the Marshalsea. The efficacy of the original commitment is superseded by this writ while the proceedings under it are pending, and the safekeeping of the prisoner is entirely under the authority and direction of the court issuing it, or to which the return is made.

"In several of the States it is provided by statute that the court may make such order for the safekeeping of the prisoner, pending the hearing, as they may judge expedient."

See, also, *Stallings* v. *Splain* (1919), 253 US 339 (40 S Ct 537, 64 L ed 940), and 25 Am Jur, Habeas Corpus, § 148.

In this State, CL 1948, § 637.33 (Stat Ann § 27-.2276), provides:

"Until judgment be given upon the return, the court or officer before whom such party shall be brought, may either commit such party to the custody of the sheriff of the county in which such court or officer shall be, or place him in such care, or under such custody, as his age and other circumstances may require."

With reference to an almost identical Wisconsin statute, the United States supreme court in *Barth* v. *Clise, supra,* said it was in accordance with the common law and that (p 403):

"The entire responsibility for the safekeeping of the prisoner under this statute rests upon the officer before whom the prisoner is brought pursuant to the writ."

From the foregoing, we conclude that once McCager was produced in court on the day following his arrest in response to the writ of habeas corpus and until final hearing on the writ, McCager's liberty was the exclusive responsibility of the judge who issued it. The legality of McCager's detention in the interim depended not upon the facts claimed to have justified his original commitment (determination of the legal sufficiency of which was the purpose of the writ) but, rather, upon the superior authority of the habeas corpus. Whatever the nature of his detention before he was first produced in court in response to the writ, thereafter and at the time of his confession, McCager's detention was, in the words of *Barth* v. *Clise, supra,* "under the authority of the writ of habeas corpus."

We do not here review the proceedings on the writ. Our appellate jurisdiction for that purpose has not been invoked by application under Court Rule No 60, § 1(b) (1945). See *In re Brock,* 144

Mich 42. The record of the habeas corpus proceeding is not before us. Accordingly, we express no opinion on the subject of the propriety of the 2 adjournments of the hearing on the writ.

For the purpose of this appeal from denial of defendant's motion to quash the information, based upon the claimed inadmissibility of defendant's confession on the ground that it was obtained during a period of illegal detention, we hold that his detention at the time the confession was made was not unlawful and, therefore, defendant's motion to quash the information was properly denied.

There remains only to say that if, in the course of trial, it is determined judicially that the defendant's alleged confession was otherwise inadmissible, admission thereof in evidence will be denied by the trial judge or, if questions of disputed fact must be resolved, by the jury under proper instruction by the trial judge according to the procedural rules to which this Court has adhered since *People* v. *Barker, supra,* was decided.

Affirmed.

CARR, C. J., and KELLY, KAVANAGH, and OTIS M. SMITH, JJ., concurred with SOURIS, J.

BLACK, J. (*concurring*). I agree fully with Mr. Justice SOURIS, yet would add a few sentiments concerning a recurrently misunderstood procedural aspect of this and like cases.

As in *People* v. *Roberts,* 364 Mich 60, 65, a question of admissibility of evidence is primarily before us. In *Roberts* 4 present members of the Court (Justices DETHMERS, CARR, KELLY, and BLACK) stressed the procedural point in these words (p 61):

"Defendant cites *People* v. *Barker,* 60 Mich 277 (1 Am St Rep 501), and *People* v. *Prestidge,* 182

Mich 80, for the proposition that the question whether a confession was voluntary is for the court, if the matter is clear and the testimony on the subject is undisputed, but if there is ground for doubt, the court may leave it to the jury to determine whether the confession should be considered. This is their holding. In both cases cited, however, the trial had been had, resulting in convictions. Here there has been no trial. When it is had there will be time enough for the trial court, as the question arises, to determine, on the state of the record then before it or on such further testimony on the subject as may then be adduced, whether the voluntariness of the confession should then be decided by the court or left for jury determination. From the court's ruling at such time, opportunity for application for leave to appeal will still be available."

If in the course of trial it is determined judicially that the alleged confession of this apparently intelligent adult defendant was involuntary within rules considered in *People* v. *Hamilton,* 359 Mich 410, admission thereof in evidence will be denied by the trial judge. If the adduced proof leaves the question in doubt, the jury will be instructed to determine the question of voluntariness and so the question of admissibility. Then and only then, as firmly suggested in *Roberts,* may such crucial questions be settled properly in conformity with current Michigan practice.

There may, of course, be circumstances under which it is proper to determine such a question upon pretrial motion to quash and discharge.* But no

* Such as a flat statement by the prosecutor that no proof of voluntariness—over and above that which is before the court on such motion—will be offered at trial; or a similar admission or declaration by the prosecutor that the court ultimately would have to deny admission of the questioned confession; or where the prosecutor offers no proof, weak or otherwise, countering the defendant's amply persuasive showing of unlawful detention and unlawful interrogation resulting in such a confession.

such circumstances are present in this case. Here it appears beyond question that an able-bodied male brutally murdered one Mary Cooper. And the record leaves one in doubt whether the defendant was *unlawfully* detained or *unlawfully* interrogated prior to or when, as testified by Officer Clark, he confessed as related here. In short, the record so far discloses no "totality of circumstances" upon which it may be said that the defendant's confession was involuntary as a matter of law; or that it was extracted or obtained, again as a matter of law, by unlawful means.

When the question of admissibility of an offered confession came first to the considered attention of this Court (*People* v. *Barker,* 60 Mich 277, 294–300 [1 Am St Rep 501]), procedural rules of tried value were adopted. We refer the profession thereto, noting from *Barker* and the *Roberts*-cited case of *Prestidge;* likewise *People* v. *Owen,* 154 Mich 571 (21 LRA NS 520); *People* v. *Biossat,* 206 Mich 334; *People* v. *Foster,* 211 Mich 486; and *People* v. *Podolski,* 332 Mich 508 (all following *Barker*); that determination of the question of admissibility was made during the course of trial of the accused, at which time all then available foundation testimony the people had assembled was before the Court.* That, as we conceive, is the right occasion for determination that this defendant did or did not voluntarily and so validly confess.

Courts are bound to guard and carefully defend the constitutional rights of persons charged with crime. They are bound by like obligation to protect society from the ravages of crime and to refrain from undue hampering of the presumptively valid

* In *Hamilton,* too, the question was decided upon offer, objection, and ruling during the course of trial. So it was when the McNabbs were tried. See *McNabb* v. *United States,* 318 US 332, 346 (63 S Ct 608, 87 L ed 819). *McNabb,* of course, is the judicial father of *Hamilton.*

(see *Barker*) efforts of police officers to perform duties which are quite as difficult as those of judges. In this jurisdiction it is believed that such dual obligation is acquitted best by insistence generally that questions of admissibility of evidence arising in criminal cases be settled during trial rather than by the device of motion prior to trial. Furthermore, such is the tendency of modern rulings made by the Federal courts. See *DiBella* v. *United States* (March 19, 1962), 369 US 121 (82 S Ct 654, 7 L ed 2d 614).

I concur in affirmance.

DETHMERS, J., concurred with BLACK, J.

ADAMS, J., did not sit.

KAARTO *v.* CALUMET & HECLA, INC.

1. WORKMEN'S COMPENSATION — EARNING CAPACITY — COMPENSABLE INJURY.

An injury is not compensable under the Michigan workmen's compensation act unless it impairs the employee's earning capacity in the employment in which he was working at the time of injury (CL 1948, § 412.11).

2. SAME—MINERS—SKILLED EMPLOYMENT—COMMON LABOR.

Miner who was burned by mine explosion that did not impair his earning capacity as a skilled employee but did limit him in the performance of common labor, presently the only employment available in his community, *held*, not entitled to work-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Workmen's Compensation §§ 284, 285.
[3] 58 Am Jur, Workmen's Compensation § 543.

men's compensation, since his earning capacity in the employment at which he was working at the time of injury has not been impaired (CL 1948, § 412.11).

3. SAME—COSTS.

No costs are allowed in proceeding to recover workmen's compensation by miner whose injury impaired his earning capacity at common labor but not in the skilled employment at which he was working at the time of injury (CL 1948, § 412.1).

Appeal from Workmen's Compensation Appeal Board. Submitted February 5, 1962. (Docket No. 92, Calendar No. 49,293.) Decided July 2, 1962. Rehearing denied September 7, 1962.

Emil Kaarto filed his claim against Calumet & Hecla, Inc., for compensation because of injuries resulting from explosion. Award to plaintiff. Defendant appeals. Reversed.

Leo Elmer Maki, for plaintiff.

McLean & Olds (*Charles B. Olds,* of counsel), for defendant.

SOURIS, J. Plaintiff was burned on the hands and face as a result of an explosion in defendant's mine, where he was engaged in what both parties describe as skilled employment. Workmen's compensation benefits were paid to him voluntarily by defendant for a period of about 7 months while he recuperated from his injuries. Upon recovery, plaintiff returned to the mine and resumed his former duties, performing them satisfactorily and without significant discomfort. At the end of 14 months, defendant's mine was shut down for economic reasons and all its employees, including plaintiff, were laid off.

Apparently regular mining employment is no longer available in the locality of plaintiff's residence, although he has worked on a few occasions at an adventure-type mine. Plaintiff concedes that

his injuries do not impair his ability to perform his former mine employment and he says that he would return to such employment were it available to him. The only work available to plaintiff now is common labor, but plaintiff claims that his injuries limit him in performing such labor and, on that account, seeks workmen's compensation benefits.

It appears from the record that a residual effect of the burns on plaintiff's hands and face is that they are susceptible to extremes of temperature. Because of pain resulting from exposure to such extreme hot or cold temperatures, plaintiff cannot work where he would be subjected to such conditions. The mining work plaintiff did was in fairly uniform median temperatures and he had no difficulty performing his duties in the mine during the 14 months he worked following his injury and prior to his layoff. However, after only 1 day as a member of a county road commission crew performing common labor in the sunshine, plaintiff's hands and face became swollen and painful. Similar discomfort occurred when he tried cutting wood in the winter.

The appeal board awarded plaintiff benefits on the theory that he has suffered "serious disability in the field of common labor as the result of his injury." On leave granted, defendant appeals, claiming that under our workmen's compensation law plaintiff may not claim benefits because his injuries do not disable him from earning wages at the employment in which he was working at the time of the injuries. Without conceding that the evidence supports the appeal board's finding that plaintiff is disabled from performing common labor, defendant claims that even if true such disability is not compensable under our law because the test of compensability for an injured skilled worker is limited to a determination of his capacity to earn wages in his skilled employment.

Unlike other States, and perhaps unique to Michigan,* an injury is not compensable under our statute unless it impairs the employee's "earning capacity in the employment in which he was working at the time of the injury." CL 1948, § 412.11 (Stat Ann 1960 Rev § 17.161). See *Levanen* v. *Seneca Copper Corp.*, 227 Mich 592.

The statutory language quoted has led to absurd results. For instance, in *Hirschkorn* v. *Fiege Desk Co.*, 184 Mich 239, plaintiff's vision was substantially impaired as a result of an industrial injury, but he was thereafter able to perform his old duties satisfactorily and at the same wages. As is the claim in the case at bar, the injury undoubtedly impaired the injured worker's earning capacity in some employment, but it did not impair his earning capacity in the employment in which he was engaged at the time of injury and, therefore, an award of compensation had to be reversed.

In *Geis* v. *Packard Motor Car Co.*, 214 Mich 646, on the other hand, plaintiff's injury there prevented him from performing the skilled employment in which he was engaged at the time of injury, but he was able to work, and did work, at somewhat related employment at higher wages. The statutory language quoted above compelled a finding of compensable disability and, since the case arose prior to the act's amendment by PA 1927, No 376, which provided for offsetting wage-earning capacity "in the same or another employment" from benefits awarded, the award of compensation was affirmed.

In the case at bar, the evidence is sufficient to support the appeal board's finding that this skilled worker's injuries impaired his wage-earning capacity *as a common laborer*. It is also clear from the record that there is no longer available regular em-

* See 2 Larson's Workmen's Compensation Law, § 57.22.

ployment requiring plaintiff's skills and plaintiff is thereby limited to employment as a common laborer, in which labor his wage-earning capacity has been impaired by industrial injury. Had plaintiff been engaged in common labor at the time of injury, he would be entitled to compensation benefits because his injuries prevent him from doing some common labor. *Miller* v. *S. Fair & Sons,* 206 Mich 360; *Smith* v. *I. Stephenson Co.,* 212 Mich 154; and *Wieland* v. *Dow Chemical Co.,* 334 Mich 427. However, because he would be able to perform his skilled mining work but for the economic conditions which closed the mine, he is barred by the statute from receiving compensation for his impaired earning capacity as a common laborer.

Were there a way properly to affirm what the appeal board sought here to accomplish, we would affirm. The statutory language, however, bars the way to substantial justice for this plaintiff. We repeat what this Court said 47 years ago, in January of 1915, in *Hirschkorn* v. *Fiege Desk Co., supra,* at p 242:

"The award made by the board was a very equitable one, and is one which we would prefer to sustain, if we could do so without attempting to amend the law by judicial construction. It appears to be, however, an exigency which the law has not provided for. We think the relief in such cases lies with the legislature, rather than with the courts."

Reversed. No costs.

KELLY, BLACK, KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., concurred with SOURIS, J.

CARR, C. J., and DETHMERS, J., concurred in result.

In re MUXLOW ESTATE.

APPEAL OF BRYCE.

1. HUSBAND AND WIFE—ANTENUPTIAL CONTRACTS—STATUTES.
   Antenuptial agreements are expressly authorized by statute in this State (CL 1948, § 557.5).

2. SAME—ANTENUPTIAL CONTRACTS—PUBLIC POLICY.
   Generally, an antenuptial contract which provides for, facilitates, or tends to induce a separation or divorce of the parties after marriage, is contrary to public policy, and is, therefore, void (CL 1948, § 557.5).

3. SAME—ANTENUPTIAL CONTRACT—SUPPORT OF WIFE.
   An antenuptial agreement may not legally limit the husband's obligation to support his wife to the sum of $100 per year (CL 1948, § 557.5).

4. SAME—CONSTRUCTION OF ANTENUPTIAL CONTRACTS—PUBLIC POLICY.
   Antenuptial agreement which did not effectively bar either party from claiming an interest in the property of the other had their marital relation terminated prior to the death of one of the parties, nor effectively limit husband's obligation to support wife, may not be said to make separation or divorce more attractive to either party, hence, was not void as against public policy (CL 1948, § 557.5).

Appeal from Lapeer; Quinn (Timothy C.), J. Submitted April 3, 1962. (Docket No. 8, Calendar No. 49,290.) Decided July 2, 1962.

REFERENCES FOR POINTS IN HEADNOTES

[1] 26 Am Jur, Husband and Wife § 275 *et seq.*
[2] 17 Am Jur, Divorce and Separation § 16.
Validity of argument facilitating or contemplating divorce or separation. 70 ALR 826.
[3] 26 Am Jur, Husband and Wife § 290.

In the matter of the estate of Fred R. Muxlow, deceased, determination made in probate and circuit courts that antenuptial agreement was valid, barring widow, Minerva Muxlow, from inheritance. Cecil Earl Bryce, administrator of the widow's estate, appeals. Affirmed.

Robert L. Taylor, for Fred R. Muxlow estate.

Atkins & Drillock, for Minerva Muxlow estate.

SOURIS, J. Minerva Muxlow and Fred Muxlow were married in November of 1935. In February of 1937 they separated, but were never divorced. Fred Muxlow died in 1958 and Minerva died the following year. At issue in this appeal is an antenuptial agreement entered into by Minerva and Fred Muxlow a few days before their marriage. Its invalidity is urged by the administrator of Minerva's estate, appellant herein, solely on the ground that it limited Fred Muxlow's financial obligations to Minerva upon termination of the marital relation, was entered into in contemplation of a future separation and was, therefore, void because against public policy.

The probate court upheld the validity of the agreement, thereby barring Minerva's administrator from claiming any interest in Fred's estate. On appeal to the circuit court for Lapeer county, Judge Quinn likewise affirmed the validity of the agreement.

Antenuptial agreements are expressly authorized by statute in this State. CL 1948, § 557.5 (Stat Ann 1957 Rev § 26.164), and *In re Irwin's Estate,* 335 Mich 143, 147. The general rule is that an "antenuptial contract which provides for, facilitates, or tends to induce a separation or divorce of the parties after marriage, is contrary to public policy, and is therefore void." 70 ALR 826, 827, and cases therein annotated. See, also, *Scherba* v. *Scherba,* 340 Mich

228, 231. The antenuptial agreement involved in this appeal, excepting only the acknowledgment, is as follows:

"ANTENUPTIAL AGREEMENT.

"This indenture, made this 7th day of November, 1935, by and between Fred R. Muxlow of Marlette, Michigan, party of the first part, and Minerva G. Bryce of Brown City, Michigan, party of the second part, witnesseth:

"That whereas, a marriage has been agreed upon and is intended to be duly had and solemnized between the said parties, and whereas, both of said parties are possessed of certain real and personal properties and it is the desire of said parties that neither of them, upon the death of the other or upon the termination of the marital relation of said parties, shall claim or have any interest or title in the property of the other,

"Therefore, in consideration of the mutual agreement of said parties and the consideration hereinafter named, it is hereby mutually agreed by and between said parties, for themselves, their heirs, administrators, executors and assigns that each of them shall release and relinquish and do hereby release and relinquish to the other any and all claims of any kind and nature in and to the property, both real and personal, of the other party which includes any claim of dower or curtesy and any right or claim which might accrue to them upon the death of the other by virtue of any law of the United States or of this State, and includes any claim against any property now held by said parties or which they may hereafter acquire. The said parties further agree that either will, at the request of the other, at any time execute such deeds, instruments or conveyances as may be necessary for the transfer of property or may otherwise be required to carry out the full intent and purpose of this agreement.

"Further, it is agreed that first party shall pay to second party the sum of $100 per year, beginning

1 year after marriage and payable each year thereafter so long as both of said parties live but upon the death of either party or in the event that said parties cease to live and cohabit together as husband and wife, then said yearly payments shall cease.

"In witness whereof, the parties hereto have set their hands and seals the day and year first above written.

/s/ FRED R. MUXLOW (L.S.)
/s/ MINERVA G. BRYCE (L.S.)

"Witnessed by
/s/ GLEN SMITH
/s/ GLENN POWELL"

The second and the fourth paragraphs of the foregoing agreement are the ones relied upon by appellant to establish the claim that it was entered into in contemplation of a future separation. The second paragraph, it is true, recites that the intention of the parties was to provide for disclaimer by each of any interest in the property of the other upon termination of the marital relation as well as upon death. Of controlling significance, however, is the fact that notwithstanding the express desire of the parties, the agreement contains mutual disclaimers effective only upon death. Whatever may be said concerning the desire and motives of the parties at the time of execution of the agreement, the fact remains there is no language in the agreement which effectively barred either party from claiming an interest in the property of the other had their marital relation terminated prior to the death of one of the parties.

Appellant also contends that the fourth paragraph of the agreement quoted above absolutely limits Fred Muxlow's obligation to support and maintain his wife. Appellant claims the fact of the matter is, as disclosed by receipts duly signed by Minerva Muxlow, that Fred paid her $100 in satisfaction of his obligation under the fourth paragraph of the agree-

ment for the period of their marriage from its inception in November of 1935 to November, 1936 and the further sum of $27 for the three-month period from November, 1936 to February 18, 1937, the date of separation of the parties. Thereafter, apparently, the parties lived apart, although remaining married, without further contributions made by Fred to Minerva. As we read the fourth paragraph of the agreement, it requires Fred Muxlow to pay his wife each year during their marriage, until death or cessation of the relationship of husband and wife, the sum of $100. For what purpose this payment was to be made, the agreement is silent; but it is certain that the agreement itself did not purport to limit the husband's obligation to support his wife to the sum of $100, nor could it legally have done so.

Nothing in the agreement can be said to make separation or divorce more attractive to either party, notwithstanding the apparent interpretation given to the agreement by the parties themselves following their separation. See annotation 57 ALR2d 942. Had one of the parties to the agreement sought divorce, the chancellor would not have been bound by anything in the agreement in dividing the property of the parties or in awarding alimony and other rights, if in his judgment the equities so required.

Accordingly, since it cannot be held that any effective provision of this agreement provided for, facilitated, or tended to induce a separation or divorce, the agreement was not against public policy, and the judgment of the circuit court affirming its validity is, therefore, affirmed. Costs may be taxed in favor of appellee.

CARR, C. J., and KELLY, BLACK, KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., concurred with SOURIS, J.

DETHMERS, J., concurred in result.

MOONEY *v.* HILL.

DEATH—VOLUNTARY CONTRIBUTIONS BY ADULT SON—PARENTS AS NEXT OF KIN—DAMAGES.

The assumption of an obligation to make part of the monthly mortgage payments on the home of parents of 24-year-old son and his other contributions toward the home and for family use, even though voluntary, was sufficient to place his parents in the class of next of kin suffering pecuniary loss recoverable under the death act (CL 1948, §§ 691.581, 691.582).

Appeal from Saginaw; O'Neill (James E.), J. Submitted April 4, 1962. (Docket No. 18, Calendar No. 49,189.) Decided July 2, 1962.

Case by Steven A. Mooney, administrator of the estate of Thomas Mooney, deceased, for damages under the death act. Verdict and judgment for plaintiff. From an order granting new trial unless remittitur filed, plaintiff appeals. Reversed and remanded for entry of judgment on verdict.

Doozan, Scorsone & Trogan, for plaintiff.

SOURIS, J. The question presented by this appeal is whether the surviving parents of an adult unmarried male child, who voluntarily contributed to their support, may recover damages for their loss of such

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REFERENCES FOR POINTS IN HEADNOTE

16 Am Jur, Death § 218.

Pecuniary value of services rendered by deceased without legal obligation as element of damages for his death. 53 ALR 1103.

support in an action under the wrongful death act.* *Rytkonen* v. *City of Wakefield,* 364 Mich 86, decided by this Court subsequent to the entry of the order below from which this appeal is taken, considered, and decided the same question and governs our disposition of this case.

Thomas Mooney was killed in an automobile accident. He was 24 years of age at death and was survived by both parents and 4 brothers and sisters. Appellant, administrator of his estate, sought damages for loss of decedent's support to his parents and the jury was instructed that if it found in plaintiff's favor, it could award damages for such loss of support as well as for other damages proved. A verdict for $8,500 was returned by the jury.

On defendant's subsequent motion for new trial, the trial judge ordered appellant to remit all of the jury verdict except $1,155.44, the exact amount of the burial expense, as a condition of denial of the motion. Upon appellant's refusal to accept the order of remittitur, defendant's motion for new trial was granted and this appeal was thereupon taken upon leave granted.

Decedent's mother had incurred substantial medical expenses over a period of several years prior to his death to pay which his parents' home had been mortgaged. Decedent at the time of his death was paying 1/2 the monthly mortgage payment as well as other expenses of the household. He paid $37.81 each month toward the cost of siding put on the home at a total cost of $2,000; he purchased furniture, household equipment, and clothes for the younger children, and otherwise regularly contributed money and services to his parents. At his death, his father was 55 years old, earning $1.53 an hour, and his mother was 45, then employed as a nurses' aid at

* CL 1948, §§ 691.581, 691.582 (Stat Ann 1959 Cum Supp §§ 27.711, 27.712).

about $35 per week. While in military service several years before his death, decedent voluntarily sent his parents for their own use $50 or $60 each month.

The record discloses that decedent, over a period of several years prior to his death, had contributed substantially to the support of his parents and his younger brothers and sisters. As in *Rytkonen* v. *City of Wakefield, supra,* p 95, "The assumption of the obligation, even though voluntary and not compelled for whatever reason, was sufficient to place [his parents] in the class of next of kin suffering pecuniary loss recoverable under the death act."

Reversed and remanded for entry of judgment in accordance with the jury's verdict. Costs to plaintiff.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., concurred.

WILLIS *v.* MICHIGAN STANDARD ALLOY CASTING.

1. WORKMEN'S COMPENSATION—RES JUDICATA.
   The doctrine of *res judicata* applies to workmen's compensation claims before the workmen's compensation department.

2. SAME—INTEREST ON AWARD—LAPSE OF APPEAL PERIOD.
   Claim for interest on all benefits awarded to plaintiff which were

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REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation § 493.
Res judicata as regards decisions or awards under workmen's compensation acts. 122 ALR 550.
[2] 30 Am Jur, Interest § 10.
[4] 58 Am Jur, Workmen's Compensation § 543.

paid after their due date was improperly allowed by workmen's compensation department and its appeal board, where made after expiration of period for appeal from affirmance of the award by the appeal board.

3. SAME—INTEREST ON AWARD—PROSPECTIVE OPERATION OF DECISION.
Interest on an award of workmen's compensation on which period for taking an appeal had expired before decision of Supreme Court allowing interest on such awards prospectively was not a case pending before the department.

4. SAME—INTEREST ON AWARD—COSTS.
No costs are allowed on reversal of award of workmen's compensation appeal board improperly allowing interest on delayed payment of workmen's compensation.

Appeal from Workmen's Compensation Appeal Board. Submitted April 6, 1962. (Docket No. 36, Calendar No. 49,433.) Decided July 2, 1962.

Dorothy Willis, widow of Eugene Willis filed her claim for compensation against Michigan Standard Alloy Casting, employer, and Michigan Mutual Liability Company, insurer, because of death of husband from silicosis. Award to plaintiff. Subsequent claim filed for interest on accumulated back payments. From an order directing payment of interest, defendant appeals. Reversed.

Kelman, Loria, Downing & Craig (*Jerome W. Kelman,* of counsel), for plaintiff.

LeVasseur, Werner & Mitseff (*Norman J. LeVasseur,* of counsel), for defendants.

SOURIS, J. The appeal board of the workmen's compensation department affirmed an award of benefits to plaintiff in March of 1959. In July of the same year, she filed an application for hearing and adjustment of claim for interest upon all benefits awarded

to her paid after their due dates. Our decision in *Wilson* v. *Doehler-Jarvis,* 358 Mich 510, by which we first determined that such interest is recoverable, was made in the following January of 1960, and in the opinion announcing that decision a majority of this Court said, at p 517, "This decision shall not, however, be regarded as retroactive." One month after our decision in *Wilson* v. *Doehler-Jarvis,* a workmen's compensation department referee passed upon plaintiff's application and claim pending at the time of our decision in *Wilson* and awarded plaintiff the interest she claimed. The award was subsequently affirmed by the appeal board and we granted leave to defendants to file this appeal.

Defendants contend that plaintiff should not have been awarded interest on an award after it was made and after the appeal period had expired. It is their claim that the original award was *res judicata* of all claims that could have been made in the original proceedings whether or not they were in fact presented and considered.

We have previously held, in *Besonen* v. *Campbell,* 243 Mich 209; *Valisano* v. *Chicago & Northwestern R. Co.,* 247 Mich 301; and in cases cited in the dissenting opinion in *Hayward* v. *Kalamazoo Stove Co.,* 290 Mich 610, at p 649, that the doctrine of *res judicata* applies to workmen's compensation claims before the department. Defendants objected, for this reason, to the proceedings before the referee and the appeal board for the determination of plaintiff's interest claim. Their objection was valid and should have barred further proceedings after expiration of the period for appeal from affirmance of the award in March of 1959 by the appeal board. Accordingly, it cannot be said that the award of interest in plaintiff's favor 1 month after our decision in *Wilson* v.

Doehler-Jarvis, supra, was made in a case then pending before the department.

Reversed. No costs.

BLACK, KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., concurred with SOURIS, J.

CARR, C. J., and DETHMERS and KELLY, JJ., concurred in result.

In re WILSON ESTATE.

STURGES *v.* BROWN.

1. WILLS—CONSTRUCTION—AMBIGUITY—EXTRINSIC EVIDENCE.
   Extraneous facts and circumstances, not discernible from testamentary instrument itself, may be examined when the language used in it is not clear and unambiguous, but when the language is clear and free from ambiguity, resort may not be had to extrinsic evidence.

2. SAME—CONSTRUCTION—RESIDUARY CLAUSE.
   Provision of will that "all the rest, residue and remainder of my property, both real and personal, wherever situated, which I own and all property over which at the time of my death I shall have any power of appointment, general or special, including [listed tangible personalty], I give, devise and bequeath to my sister. * * * Upon the death of my sister * * * it is my desire that this property be divided equally between my brothers then living" *held,* unambiguous, and to have granted the sister a fee interest in the residue and expressed a desire, or a wish, that whatever remained be divided among the surviving brothers.

REFERENCES FOR POINTS IN HEADNOTES

[1] 57 Am Jur, Wills § 1040 *et seq.*
Admissibility of extrinsic evidence to aid interpretation of will. 94 ALR 26.
[2] 57 Am Jur, Wills § 1180.
[3] 57 Am Jur, Wills § 1046.

3. SAME—CONSTRUCTION—ERROR OF EXPRESSION.

Probate and circuit judges who heard respective claims of parties as to proper construction to be given residuary clause of will properly declined to consider evidence that tended to indicate that someone in the office of the attorney who drafted the codicil affecting residuary clause had committed an error of expression, where there is no ambiguity in the will.

Appeal from Ionia; Davis (Morris K.), J. Submitted April 10, 1962. (Docket No. 46, Calendar No. 49,481.) Decided July 2, 1962.

In the matter of the estate of Nelle M. Wilson, deceased, petition was made by J. B. Sturges and Vernon Sturges for construction of will in which M. Hazel Brown was executor and beneficiary under residuary clause. Determination in probate and circuit courts that M. Hazel Brown took in fee simple as to realty and absolute title to personalty. Petitioners appeal. Affirmed.

Newman, Jones & Mackay (*William L. Mackay* and *Donald A. Jones,* of counsel), for plaintiffs Sturges.

Richard S. Wagner (*Douglas R. Welch,* of counsel), for defendant Brown.

SOURIS, J. Appellants ask that we interpret a will in a manner favorable to them by reference to facts and circumstances relating to the execution of a codicil to the will. We examine such "extraneous" facts and circumstances not discernable from the testamentary instrument itself when the language used is not clear and unambiguous. *In re McLennan's Estate,* 179 Mich 595, 601. However, *McLennan* also tells us that we may not inquire into such surrounding facts and circumstances when the language of the instrument is clear and unambiguous. The will of Nelle Wilson contains the following provision:

"All of the rest, residue and remainder of my property, both real and personal, wherever situated, which I own and all property over which at the time of my death I shall have any power of appointment, general or special, including my automobile, wearing apparel, furs, watches, diamond rings and all other jewelry, set of sterling silver table service, vases and figurines, I give, devise and bequeath to my sister, M. Hazel Brown, of Belding, Michigan. Upon the death of my sister, M. Hazel Brown, it is my desire that this property be divided equally between my brothers then living."

The probate and circuit judges who heard this matter below both concluded that by such language testatrix granted her sister a fee interest in the residue and expressed a desire, or a wish, that whatever remained upon the sister's death be divided among the surviving brothers. Both judges rejected appellants' interpretation of the language by which the sister's interest was limited to a life estate with a contingent remainder over to the surviving brothers. We agree with the conclusions reached below. We find no ambiguity in this language or in any other part of the will. Absent ambiguity we cannot examine the "surrounding facts and circumstances", however persuasive, of testatrix's contrary intent, to defeat what is stated so clearly in the will of the testatrix. For this reason we believe both the probate judge and the circuit judge who heard this matter below were right in declining to consider evidence that tended to indicate that someone in the office of the attorney who drafted the codicil committed an error in expression.

Affirmed. Costs to appellee.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., concurred.

FORTNER *v.* CONNELL.

1. BROKERS—COMMISSIONS—RESCISSION BY PURCHASER AND SELLER.
   It was reversible error in nonjury case to award judgment to plaintiff after excluding evidence of events subsequent to time of execution of preliminary agreement to purchase land in action to recover real-estate commission based on defendant seller's letter setting forth his express agreement to pay plaintiff the commission "upon the date of consummation of the deal," where preliminary agreement executed on the same day as the letter, provided for consummation of the sale by payment of $75,000 down and the execution of a land contract, on specified terms, within 30 days after delivery of an abstract of title or title policy showing seller to have marketable title; seller had refused payment of commission because deal had not been consummated; and record fails to disclose whether or not the deal had been consummated before rescission 2 months after purchasers had taken possession.

2. SAME—COMMISSIONS—CONDITION PRECEDENT.
   The real-estate broker will not be denied his commission where a condition precedent to payment of the commission fails to occur because of the seller's inaction.

3. SAME—CONSUMMATION OF DEAL—EVIDENCE.
   The exclusion of evidence that down payment on purchase price called for by the preliminary agreement to purchase land had not been made, and evidence of the seller's efforts to complete the sale *held*, reversible error in nonjury case for broker's commission; the execution of the preliminary agreement setting forth how consummation was to be effected not being sufficient to satisfy condition precedent to right to commission specifically contingent upon "consummation of the deal."

REFERENCES FOR POINTS IN HEADNOTES

[1] 8 Am Jur, Brokers § 181.
[2] 8 Am Jur, Brokers § 184.

4. SAME—COMMISSIONS—CONSUMMATION OF DEAL.

Judgment for plaintiff for commission on sale of property of defendant's decedent under contract for payment of commission "upon the date of consummation of the deal," *held*, error, where defendant seller's evidence bearing upon the issue of who was responsible for failure of consummation was excluded.

Appeal from Oakland; Holland (H. Russel), J. Submitted April 12, 1962. (Docket No. 63, Calendar No. 49,467.) Decided July 2, 1962.

Assumpsit by Eugene R. Fortner against Richard A. Connell, Jr., continued in the name of Mary S. Connell, administratrix, for real-estate dealer's commission. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

Murray & Murray (*Henry C. Murray,* of counsel), for plaintiff.

Colombo, Colombo, Colombo & Vermeulen, for defendant.

SOURIS, J. This is a suit for a $5,000 real-estate commission based upon a letter to plaintiff from defendant's decedent, Richard Connell, Jr., in which Connell set forth his agreement to pay plaintiff the commission "upon the date of consummation of the deal." The deal referred to in the letter was contained in a preliminary agreement of purchase executed by Connell and the prospective purchasers on the same day in January of 1957 on which plaintiff was given the letter by Connell. That preliminary agreement of purchase provided for consummation of the sale by payment of $75,000 down and the execution of a land contract, on specified terms, within 30 days after delivery of an abstract of title or title policy showing seller to have marketable title.

From the record it appears that the prospective purchasers took possession of the property in April, that in June they and Connell rescinded the deal by execution of a written "mutual release," and that Connell refused payment of the commission to plaintiff on the ground that the deal had not been consummated. At trial, defendant was not allowed by the judge, who tried the case without a jury, to introduce evidence that the down payment on the purchase price called for by the preliminary agreement had not been paid, nor was defendant allowed to introduce evidence of Connell's efforts to complete the sale. Apparently, as appears from the trial judge's written opinion awarding plaintiff his judgment, the trial judge concluded that plaintiff became entitled to his commission upon execution by the prospective purchasers and seller of the preliminary agreement in January and that no evidence of events subsequent thereto could be admitted to vary the legal effect attributed to it.

It was error to exclude evidence such as defendant sought to introduce. Plaintiff's right to be paid a commission in accordance with the terms of his agreement with Connell was expressly conditioned upon "consummation of the deal." Unlike the recent case of *Cunningham* v. *Garber,* 361 Mich 90, because of the exclusion of evidence offered, we cannot say from this record that failure of consummation of the deal was or was not the fault of Connell.* Nor, for the same reason, can we even say with any certainty, on the basis of this record, that the deal was or was not in fact consummated in accordance with the preliminary agreement. The mutual release, admitted in evidence, does not disclose at what point

* We have held that where a condition precedent to payment of a real-estate broker's commission fails to occur because of the seller's action or inaction, the broker will not be denied his commission. *Greenberg* v. *Sakwinski,* 211 Mich 498, and *Hayes* v. *Beyer,* 284 Mich 60.

in the transaction, or for what reason, the deal was rescinded.

This suit does not involve a broker's listing agreement by which a commission is payable upon the broker's merely providing a purchaser ready, willing, and able to buy on the seller's terms. Nor does it involve an agreement by which payment of the commission is conditioned upon a future event within the control of the broker such as was involved in *Tyson* v. *Herrle,* 354 Mich 298. It does involve, however, an express condition that the deal be consummated as stated in the preliminary agreement, and that required a down payment by the purchasers of $75,000 and their execution of a land contract on specified terms. Whether that condition was performed and, if not, whether its failure of performance was due to any fault of Connell or of plaintiff, goes to the heart of plaintiff's case and defendant's defense. In the absence of specific provision for forfeiture by either party to the preliminary agreement by which the obligations of the parties are limited, as was involved in *Kolodziejczak* v. *Bak,* 220 Mich 274, it was relevant and material to the issues here involved to determine whether Connell or plaintiff was responsible for failure to consummate the deal.

Reversed and remanded for new trial. Costs to appellant.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., concurred.

LANDOWNERS OF SEXTON-KILFOIL DRAINAGE DISTRICT *v.* WAYNE COUNTY DRAIN COMMISSIONER.

1. EQUITY—AMENDMENT—NONSUIT.

Visiting judge to whom injunction suit had been assigned for adjudication properly denied relief to plaintiffs who had theretofore been denied adjournment by presiding judge of circuit where cause was set for trial, in order to make further amendment, which denial had been followed by denial of permission to submit to a nonsuit.

2. PARTIES—INTERVENORS—INACTION.

Whether or not appellants, alleged landowners in drainage district in which proceedings were pending to clean out, relocate, widen, deepen, straighten, and extend the drain, had sought and obtained the right to intervene in suit to enjoin the carrying out of the contemplated project, actually acquired the status of intervenors *held*, questionable, where subsequent action consisted in having attorney present, but apparently inactive, at pretrial conference and at hearings, until motion to dismiss bill of complaint had been granted, in view of their inaction and failure actively to participate in the proceedings, since they had consented that their intervention should be in subordination to, and in recognition of, the propriety of the main proceedings (CLS 1956, § 280.1 *et seq.*, as amended; CL 1948, § 612.11).

3. SAME—RIGHTS OF INTERVENORS.

Intervenors who come into an action in subordination to the main proceedings may not broaden the issues which were litigated between the principal parties (CL 1948, § 612.11).

REFERENCES FOR POINTS IN HEADNOTES

[1] 28 Am Jur, Injunctions § 276.
[2] 39 Am Jur, Parties § 55 *et seq.*
[3] 39 Am Jur, Parties § 79.
[4] 39 Am Jur, Parties §§ 79, 80.

4. SAME—INJUNCTION—INTERVENORS—DISMISSAL OF BILL.

Appellants who came into suit to enjoin a drainage project upon their acceptance of permission to intervene as parties plaintiff were wholly subordinate to the prerogative of the original plaintiffs to direct and control the course of the litigation, hence, where the bill filed by the original plaintiffs was dismissed without a hearing on the merits, there is nothing left for the appellants to adopt or rely upon were they to have a hearing as sought (CL 1948, § 612.11).

Appeal from Wayne; Bach (Arthur M.), J., presiding. Submitted June 7, 1962. (Docket No. 22, Calendar No. 49,374.) Decided July 18, 1962.

Bill by Landowners of the Sexton-Kilfoil Drainage District, a Michigan nonprofit corporation, against Henry V. Herrick, Wayne County Drain Commissioner, to enjoin work on county drain. Leonard H. Moore, James M. Moore, and Henry Buck intervened as parties plaintiff. Plaintiffs' motion to amend denied, and bill dismissed. Intervenors' motion for rehearing denied. Intervenors appeal. Affirmed.

B. B. Moshier, for intervening plaintiffs.

Samuel H. Olsen, Prosecuting Attorney, *Aloysius J. Suchy, David E. Flayer,* and *William F. Bledsoe,* Assistant Prosecuting Attorneys (*Miller, Canfield, Paddock & Stone, Stratton S. Brown,* and *Chester C. Pierce,* Wayne County Drain Commission Legal Advisor, of counsel), for defendant.

CARR, C. J. The Sexton-Kilfoil drain was constructed in Wayne county several years past. In June, 1957, a petition was presented to the defendant drain commissioner seeking the cleaning out, relocating, widening, deepening, straightening, and extending of said drain, which lies in the townships of

Ecorse, Romulus, and Taylor, and the cities of Wyandotte, Lincoln Park, Ecorse, and Allen Park. Said petition was filed under the drain code of 1956.* The defendant took action under the statute and petitioned the probate court of the county for the appointment of commissioners to function in accordance with the statutory requirements. Subsequent proceedings were taken, as prescribed by the governing statute, prior to the institution of the present litigation.

Plaintiffs, describing themselves as owners of land in the Sexton-Kilfoil drainage district subject to assessment in connection with the pending proceeding, filed suit in the circuit court of Wayne county under date of July 13, 1960, for the purpose of obtaining injunctive relief to prevent the carrying out of the contemplated project. An amended bill of complaint was filed July 21st following, and on August 9th plaintiffs' claims were set forth in their second amended bill of complaint. A third amended bill of complaint was filed December 7, 1960, alleging that section 191† of the drain code was unconstitutional for certain reasons, that the special commissioners appointed failed to act in compliance with the statute, that the petition on which the drain commissioner acted did not confer jurisdiction on him because not properly signed by qualified persons, and that there were also other irregularities and defects in the proceeding.

To such pleading defendant filed answer denying the material claims of plaintiffs and asserting in substance that the proceeding had been conducted strictly in accordance with the statute. It was

* PA 1956, No 40, as amended (CLS 1956, § 280.1 *et seq.*, as amended [Stat Ann 1960 Rev and Stat Ann 1961 Cum Supp § 11.1001 *et seq.*]).

† CLS 1956, § 280.191, as amended by PA 1957, No 119 (Stat Ann 1957 Cum Supp § 11.1191).

denied that plaintiffs were entitled to the relief sought or to any equitable relief. Subsequent to the filing of plaintiffs' amended bill of complaint a petition for leave to intervene was presented to the court by the 3 appellants herein, setting forth that they owned property in the Sexton-Kilfoil drainage district assessed for work to be done in connection with the project contemplated by the petition presented to the defendant commissioner. They further alleged that they desired to join as party plaintiffs in the cause and to litigate the question involved as to their properties. They formally consented that intervention on their part should be "in subordination of, and in recognition of the propriety of the main proceedings."

Said petition was granted by order filed August 15, 1960, defendant through his counsel consenting thereto, and the original plaintiffs and the defendant were directed to furnish copies of all pleadings to the attorney for appellants. The order allowing intervention contained no provision requiring that the parties seeking such order should file a pleading or pleadings, and appellants did not do so. So far as this record is concerned, they apparently took no part in the proceedings other than to appear by their attorney, nor did they join with the original plaintiffs in the third amended bill (above referred to) filed in December, 1960.

A pretrial hearing was held on April 7, 1961, in accordance with the court rule (Michigan Court Rule No 35 [1945]*). At such hearing the attorney representing appellants appeared but the statement made by the circuit judge conducting the proceeding does not indicate that any claims on behalf of these appellants were submitted in the course of the hearing or otherwise called to the attention of

* See additions and revisions, 334 Mich xl, 352 Mich xv.—REPORTER.

the judge. The statement set forth at some length the claims of the original plaintiffs and, likewise, the position of the defendant. As suggested, it does not appear that any showing was made as to the specific claims, if such there were, that appellants desired to advance on the trial of the cause.

The case was set for trial on June 5, 1961, being assigned for hearing to Judge Arthur M. Bach. At that time counsel representing the parties who filed the third amended bill of complaint sought an adjournment to permit a further amendment to the bill. It may be noted that the pretrial statement sets forth the conclusion of the circuit judge presiding that: "The pleadings seem to be in order." Apparently there was no indication at the time that further amendment of the bill of complaint was desired. The request for adjournment for the purpose indicated was referred by Judge Bach to the presiding judge of the Wayne circuit court, by whom the request was denied. A further request was then made that plaintiffs be allowed to submit to a nonsuit. The presiding judge also denied that request on the ground that the court could not properly grant it without stipulation. Thereupon counsel for the parties returned to Judge Bach who quite properly declined to consider granting the relief that the presiding judge had denied. Counsel for the plaintiffs then indicated that they were not prepared to proceed to trial, and that they would stand on their motion for a nonsuit. Thereupon the judge stated from the bench that he had no alternative other than to grant a motion to dismiss the case with prejudice.

It appears that counsel representing the present appellants was in court at the outset of the proceedings on June 5, 1961, but apparently took no part therein. Before their termination he absented himself for the purpose of trying a case set for hear-

ing in another courtroom. On his return he discovered what had occurred. On behalf of his clients he filed objections to the entering of the proposed decree which objections were overruled, and a decree was entered dismissing the third amended bill of complaint with prejudice. A subsequent motion by appellants for a rehearing was denied. The appeal to this Court followed.

In substance it is the claim of appellants as set forth in the brief of their counsel that the trial court was in error in not affording them an opportunity for a hearing on the merits of the cause. It is a matter of inference that their position is that, the case having been dismissed as to the original plaintiffs who filed the third amended bill of complaint, appellants nonetheless should have been permitted to go to trial thereon and to raise such questions set forth in the pleading as they desired. They ask by way of relief that this Court remand the case with directions to allow them such hearing.

As before pointed out, appellants filed no pleading of any kind or character setting forth the claims that they desired to interpose in their own behalf in the litigation, nor did they indicate in any way that they accepted the bill of complaint filed prior to the order allowing intervention as a formal statement of a cause of action on their part. Since the other parties were required to serve pleadings on their attorney, presumably they were advised with reference to the third amended bill of complaint which, as stated, was filed in December, 1960. No claim is made that they sought to join as party plaintiffs in that pleading, or that in any way they expressed their acceptance of it for the purposes of the case. It may be inferred that they expected that the original plaintiffs would proceed with the litigation, but there is nothing in the record before us to indicate that they intended, or were prepared,

to actively participate in the trial. In short, their activity in the litigation was limited to an order permitting them to intervene, the permission granted by which they did not pursue.

The statutory provision providing for intervention in a case pending in court is set forth in CL 1948, § 612.11 (Stat Ann § 27.663), as follows:

"In an action either at law, or in equity, anyone claiming an interest in the litigation may, at any time, be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The interpretation of the language quoted was involved in *Zerfas* v. *Eaton County Drain Commissioner,* 326 Mich 657, 665, in which it was recognized that the trial court has a "measure of discretion" with reference to the granting of such application. In effect, the trial judge in the case at bar was asked to permit appellants to adopt the bill of complaint that had previously been filed by the original plaintiffs after it had been dismissed as to said plaintiffs. Under the peculiar situation involved in the case at bar it may be questioned whether appellants, because of their inaction, actually acquired the status of intervenors.

In *Spanich* v. *City of Livonia,* 355 Mich 252, the suit was brought by plaintiff to enjoin the enforcement of a zoning ordinance as to his property. Other property owners intervened as parties defendant. Plaintiff had decree which this Court affirmed, approving and adopting the opinion of the trial judge. In the course of such opinion the matter indicated by the following quotation therefrom was considered (pp 264, 265):

" 'One other matter may be dealt with briefly. The principal defendant, the city, pleaded "laches"

as a defense. However, it transpired that the city made no effort at the trial to prove the elements of such a defense. The intervening defendants, a group of homeowners in the neighborhood, attempted to pick up and utilize this defense. It is the position of the court that laches is a defense not available to the principal defendant, legally or factually, even if it had not been abandoned so far as proofs are concerned. Having vanished from the case, so far as the principals were concerned, it follows that it may not be invoked by the intervenors, under the rule of law established by the statute (CL 1948, § 612.11 [Stat Ann § 27.663]), that they must come into the action "in subordination to * * * the main proceeding." They may not broaden the issues which were litigated between the principal parties.' "

In accord with such holding the conclusion follows in the instant case that the bill of complaint as filed by the original plaintiffs having been dismissed it was no longer in the case and, in consequence, under no theory were the appellants entitled to adopt it or to rely thereon. With such pleading absent from the picture there would be nothing before the trial court in the event of a remand thereto. In any event the rights of appellants, assuming that they in some way accepted the permission to intervene, were wholly subordinate to the prerogative of the original plaintiffs to direct and control the course of the litigation.

Appellants cite and rely on *Weatherby* v. *Kent Circuit Judge,* 194 Mich 46. That case resulted from an action against a surety company on the bond of a saloonkeeper, based on alleged unlawful sale of liquor to plaintiff's husband. The saloonkeeper was not made a party defendant in the case but he sought and was granted leave to intervene on the basis of an agreement that he had made to indemnify the surety against loss. The plaintiff,

by mandamus, sought to compel the setting aside of the order allowing intervention. It was held that the saloonkeeper had such an interest in the litigation as to justify the granting of permission to intervene. The Court referred to the general rule that the intervention was in recognition of and subordinate to the main proceeding. It was held also that mandamus was not a proper remedy. We do not think that the decision has any particular bearing on the issue involved in the case now before us, and like comment may be made with reference to *Stratford Arms Hotel Co.* v. *General Casualty & Surety Co.*, 249 Mich 518, and *Smith* v. *Township of Norton*, 319 Mich 365, relied on by counsel for appellants.

In *Skurski* v. *Gurski*, 329 Mich 474, also cited by counsel for appellants, the action was brought by the plaintiff to reform a deed, given to her husband as grantee, in such manner as to include her name therein. The husband was deceased at the time the suit was brought. A son of the parties was granted leave to intervene. On appeal the propriety of such action was recognized, it being pointed out that he was a necessary party defendant. In discussing the situation it was said (pp 477, 478):

"As an heir at law of his father, he was interested in the latter's estate and his rights were directly affected by any attempt to strip that estate of any of its assets. Even though it be said that the decree sought by plaintiff against the Gurskis would not have been binding on defendant Wozniak if he had not become a party, nonetheless, such decree would have had the effect of clouding the title to real estate in which he claimed an interest. Under the circumstances, no court would have been justified in permitting the case to go to decree for plaintiff with only nominal parties defendant, while the children, as the real parties in interest, were not made parties to the suit. What the trial court did, however, was

to permit defendant Wozniak to intervene to the extent of being bound by the decree but not to the extent of being allowed to contest plaintiff's claims of right thereto.

"The difficulty in this case arose from a misconception of the rights and status of one intervening as a party defendant. While an intervenor may not, under the statute, challenge the propriety of the proceeding in which he intervenes, nonetheless, when, as here, he is a real party in interest and a necessary party defendant, upon his intervention as a party defendant, he becomes invested with the rights of a defendant to contest plaintiff's claimed right to recovery or redress."

The case was dismissed on the ground that plaintiff had not introduced sufficient competent proof to sustain her right to the relief sought. Accordingly a decree was entered dismissing the bill of complaint with costs to the intervening defendant. It appears that in the case the intervenor actually assumed the burden of the defense, the original defendants having been defaulted. Apparently they had no interest in the premises at the time the suit was brought. The factual situation in the instant case is such as to render the decision cited inapplicable.

Without discussing the matter in further detail, we conclude that the trial court was not in error in dismissing the third amended bill of complaint filed by the original plaintiffs and in denying appellants' petition for a rehearing. Defendant may have costs.

DETHMERS, KELLY, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred with CARR, C. J.

BLACK, J., concurred in result.

INTERNATIONAL SALT COMPANY *v.* WAYNE COUNTY DRAIN COMMISSIONER.

1. DRAINS—NOTICES—HEARING ON REVIEW OF APPORTIONMENT—DUE PROCESS.

   Statute providing for the giving of notice to persons whose names and addresses appear upon the last city or township tax assessment roll as owning land within special assessment district, of public meeting for review of apportionment of benefits is a proper and permissible means of according due process, where it was in addition to publication of the notice in a newspaper and posting in 5 conspicuous and public places in each city, village, and township where the district is located (US Const, Am 14; Mich Const 1908, art 2, § 16; PA 1956, No 40, § 154, as amended by PA 1957, No 61).

2. CONSTITUTIONAL LAW—DUE PROCESS—NOTICE.

   An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections (US Const, Am 14; Mich Const 1908, art 2, § 16).

3. EVIDENCE—JUDICIAL NOTICE—MAILS.

   The mails today are recognized as an efficient and inexpensive means of communication.

REFERENCES FOR POINTS IN HEADNOTES

[1] 48 Am Jur, Special or Local Assessments §§ 171–173.
17A Am Jur, Drains and Sewers §§ 74, 75.
[2] 12 Am Jur, Constitutional Law § 598.
[3] 39 Am Jur, Notice and Notices § 28.
20 Am Jur, Evidence § 108.
[4, 5, 6, 7] 48 Am Jur, Special or Local Assessments §§ 171–173.
39 Am Jur, Notice and Notices § 28.
17A Am Jur, Drains and Sewers §§ 74, 75.
[8] 17A Am Jur, Drains and Sewers § 46.

4. DRAINS—NOTICE—HEARING FOR REVIEW OF APPORTIONMENT OF BENEFITS—MAILING—PUBLICATION—POSTING.

The sending of notice by first class mail of public meeting for review of apportionment of benefits in a drain proceeding to landowners whose names appeared on city or township tax assessment rolls is a method reasonably calculated to apprise each taxpayer to whom the notice is sent of his rights and liabilities although service by publication in newspapers, or by posting, is not sufficient alone, as a matter of law, to afford reasonable notice (PA 1956, No 40, § 154, as amended by PA 1957, No 61).

5. SAME—NOTICE—MAILING—JURISDICTION.

Provision of drain code that failure to send notice by mail of public hearing on review of apportionment of benefits, if such notice shall have been published and posted, should not constitute a jurisdictional defect invalidating the tax, must be disregarded in order to hold statute valid that provides for the giving of such notice to property owners within the special assessment district by first class mail (US Const, Am 14; Mich Const 1908, art 2, § 16; PA 1956, No 40, § 154, as amended by PA 1957, No 61).

6. SAME—MAILING—PRESUMPTIONS—EVIDENCE.

The presumption of the regularity of the official action of the drain commissioner in mailing his notice of public meeting for review of apportionment of benefits cannot be given the conclusive effect as sought to be provided by statute, but must yield to a showing as to the actual facts in order to constitute due process of law (US Const, Am 14; Mich Const 1908, art 2, § 16; PA 1956, No 40, § 154, as amended by PA 1957, No 61).

7. SAME—NOTICE—HEARING FOR REVIEW OF APPORTIONMENT OF BENEFITS.

Plaintiff property owner in drain district to whom it is not shown that there had been mailed a notice of hearing for review of apportionment of benefits by first class mail *held,* entitled to a hearing relating to the assessment against its property, under evidence presented (US Const, Am 14; Mich Const 1908, art 2, § 16; PA 1956, No 40, § 154, as amended by PA 1957, No 61).

8. COSTS—DRAINS—NOTICE—HEARING FOR REVIEW OF APPORTIONMENT OF BENEFITS.

No costs are allowed in suit to set aside drain tax assessment against plaintiff's property because of failure to receive notice of hearing on review of apportionment of benefits, in view of the nature of the question involved (US Const, Am 14; Mich

Const 1908, art 2, § 16; PA 1956, No 40, § 154, as amended by PA 1957, No 61).

BLACK, KAVANAGH, and SOURIS, JJ., dissenting.

Appeal from Wayne; Fitzgerald (Neal E.), J. Submitted June 14, 1962. (Docket No. 59, Calendar No. 49,553.) Decided July 18, 1962.

Bill by International Salt Company, a New Jersey corporation, against Henry V. Herrick, Wayne County Drain Commissioner, to set aside drain tax assessment against its property or to secure equitable relief in connection therewith. Bill dismissed. Plaintiff appeals. Attorney General intervenes in public interest. Modified and remanded to afford plaintiff hearing.

Alexander P. Leete, for plaintiff.

Samuel H. Olsen, Prosecuting Attorney, *Aloysius J. Suchy, David E. Flayer* and *William F. Bledsoe,* Assistant Prosecuting Attorneys, for defendant.

Frank J. Kelley, Attorney General, and *Eugene Krasicky,* Solicitor General, for intervenor.

CARR, C. J. This case involves the validity of an assessment levied in proceedings under the Michigan drain code of 1956* for the cleaning out, relocating, widening, deepening, straightening, and extending of a Wayne county drain. Said drain, known as the Sexton-Kilfoil drain, and the drainage district embracing property assessed for the construction thereof, was established, as the record indicates, "many years ago." It lies in the townships of

* PA 1956, No 40, as amended (CLS 1956, § 280.1 *et seq.*, as amended [Stat Ann 1960 Rev and Stat Ann 1961 Cum Supp § 11.1001 *et seq.*]).

Romulus, Ecorse, and Taylor, and the cities of Lincoln Park, Allen Park, Wyandotte, and Ecorse.

Following the filing of a petition for the cleaning out and extending of the drain the defendant commissioner proceeded pursuant to the drain law, and endeavored to comply with the requirements thereof. Following the final order of determination and the apportionment of benefits, he fixed the 1st of June, 1960, as the time for receiving bids for the doing of the work and for a review of the apportionment of benefits. The procedure with reference to the giving of notice of a hearing of such character is set forth in section 154 of the drain code, CLS 1956, § 280.154, as last amended by PA 1957, No 61 (Stat Ann 1960 Rev § 11.1154). Insofar as material in the instant controversy said section reads as follows:

"The commissioner shall give notice for the receiving of bids for the construction of such drain and also for the holding of a public meeting, at which a review will be had of the apportionment of benefits made as aforesaid. Such notice shall specify the time and place of receiving bids, and the time and place of the meeting for review of apportionment, which shall be not less than 5 nor more than 30 days after the date set for receiving bids. Such notice shall be given by publication at least 2 insertions in some newspaper published and of general circulation in the county if there is one, the first publication to be at least 10 days before the date set for receiving bids, and by posting in 5 conspicuous and public places in each city, village and township where the district is located, within the limits of said district, at least 10 days before the date set for receiving bids. The drain commissioner also shall send notice by first class mail of the time and place of such meeting, at least 10 days before the date thereof, to each person whose name appears upon the last city or township tax assessment roll as owning land within the special assess-

ment district, at the address shown on such roll, and if no address appears thereon, then no notice need be mailed to such person. The drain commissioner shall make an affidavit of such mailing and shall recite therein that the persons to whom such notice was mailed, constitute all of the persons whose names and addresses appear upon such tax rolls as owning land within the particular special assessment district, and such affidavit shall be conclusive proof that notice was mailed to each person to whom notice is required to be mailed by the terms of this section. The failure to send or receive any such notice by mail shall not constitute a jurisdictional defect invalidating a drain proceeding and/or tax, if notice shall have been given by publication and posting as provided in this section."

Plaintiff herein is the owner of 69.791 acres of land in Romulus township, against which an assessment for the contemplated project was made in the sum of $11,495. Of such parcel 58.64 acres were included in the original assessment district. It is a matter of inference from the record that the assessment here involved was based on the theory of additional benefits to the property previously assessed. Plaintiff instituted the present suit under date of September 1, 1960. It alleged in its bill of complaint that its name appeared on the Romulus township tax assessment roll as owner of the land in question and that its address was given as 12841 Sanders avenue, Detroit, the principal office of plaintiff within this State.

Plaintiff alleged further that it received no notice from defendant, or otherwise, of the review of the apportionment of benefits on June 1, 1960, that it observed no published or posted notice of such hearing, and that it learned for the first time on August 4, 1960, that its land had been included in the Sexton-Kilfoil assessment district. Plaintiff's pleading further alleged that the project did not in

any way benefit its property, and that for such reason the tax was improperly assessed. Relief was sought on the ground that the assessment of the tax without notice constituted a violation of article 2, § 16, of the Michigan Constitution (1908) and of section 1 of the Fourteenth Amendment of the Constitution of the United States. Plaintiff asked that the assessment against its property be set aside or that it be granted, in the alternative, suitable equitable relief. On behalf of defendant answer was filed asserting in substance that he had proceeded in accordance with the drain code, that due notice of the hearing on the apportionment of benefits was mailed to plaintiff, that such notice was duly published and posted as required by the statute, and that plaintiff was not entitled to the equitable relief sought.

Following hearing in circuit court the trial judge upheld in all respects the validity of pertinent provisions of the drain code. With reference to factual issues he determined that plaintiff did not receive notice of the hearing on apportionment of benefits, and that the proofs did not show the actual mailing of a notice to plaintiff at its proper address. He concluded, however, that as far as possible the requirements of the statute had been followed by the drain commissioner. The trial judge declined to consider the question whether the property of plaintiff would be benefited by the project, suggesting that in order to present such question plaintiff should pay the assessment under protest and bring appropriate action to recover. No appeal has been taken from such ruling. In accordance with the opinion rendered a decree was entered dismissing the bill of complaint. From such decree, plaintiff has appealed.

Counsel for the respective parties are not altogether in accord as to the questions involved. Coun-

sel for appellant states the issues before us as follows:

"1. Did plaintiff have notice by first class mail, as required by section 154 of the drain code of 1956, as amended, of the public meeting at which a review will be had for the apportionment of benefits, to determine a special drain tax assessed against plaintiff's property?

"2. In the absence of notice by mail, did the publication and posting of such notice, in accordance with the provisions of section 154 of the drain code of 1956, as amended, meet the requirements of due process under the Michigan Constitution and article 14 of the amendments to the Constitution of the United States of America?"

Counsel for defendant state what they consider the question involved is in the following language:

"Do the provisions of section 154 of the drain code, (CLS 1956, § 280.154, as amended, Stat Ann 1960 Rev § 11.1154), relating to notice to landowners of the date for receiving bids for the construction of a drain and for the holding of a public meeting for review of apportionment of benefits, meet the requirements of the 'due process clause' of the Fourteenth Amendment of the Constitution of the United States, and article 2, § 16 of the Michigan Constitution?"

It is, we think, apparent that constitutional issues were considered in circuit court. We note that in their briefs counsel representing the respective parties stress certain decisions of the United States supreme court relating to due process of law in the giving of notice to interested parties of proceedings affecting property rights and interests. Directly involved are the provisions of section 154 of the drain code, above quoted, with reference to the conclusive nature of the affidavit of mailing required to be made by the drain commissioner, and the effect

of failure to send notice by mail as required by prior specific provisions of the section.

The legislature in the enactment of the drain code and of amendments thereto clearly imposed the requirement that in a situation of the character here involved notice should be mailed to each property owner whose name appeared on the assessment roll together with his address. In addition thereto publication in newspapers, and by posting, was required. In a case of this character we think that statutory provision for resort to the mails is proper and permissible as constituting due process. The supreme court of the United States commented on such method of service in *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 US 306 (70 S Ct 652, 94 L ed 865). Involved there was the sufficiency of notice to beneficiaries under judicial settlement of accounts by the trustee of a common trust fund established under the banking laws of the State of New York. The number of persons entitled to service was, as in the case at bar, numerous. In discussing the question at issue the basic principle applicable was stated as follows (p 314):

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer,* 311 US 457 (61 S Ct 339, 85 L ed 278, 132 ALR 1357); *Grannis* v. *Ordean,* 234 US 385 (34 S Ct 779, 58 L ed 1363); *Priest* v. *Las Vegas,* 232 US 604 (34 S Ct 443, 58 L ed 751); *Roller* v. *Holly,* 176 US 398 (20 S Ct 410, 44 L ed 520)."

In holding that statutory notice by publication was not sufficient, it was further said (pp 315, 319):

"But when notice is a person's due, process which is a mere gesture is not due process. The means

employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *Hess* v. *Pawloski,* 274 US 352 (47 S Ct 632, 71 L ed 1091), with *Wuchter* v. *Pizzutti,* 276 US 13 (48 S Ct 259, 72 L ed 446, 57 ALR 1230), or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes. * * *

"The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan."

The *Mullane Case* was followed in *Walker* v. *City of Hutchinson,* 352 US 112 (77 S Ct 200, 1 L ed 2d 178), which was an action to condemn the property of the appellant. No notice was given him of the proceeding other than by publication. He sought relief in equity on the ground that such publication, while authorized by the State statute, was not sufficient to satisfy the Fourteenth Amendment requirement as to due process. Commenting on the *Mullane* decision, it was said (pp 115, 116):

"That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and ad-

versely affect their legally protected interests. We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.

"Measured by the principles stated in the *Mullane* case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value."

It is conceded in the instant case that in excess of 10,000 notices were sent out to parties owning property assessed for benefits. We think the language used in the controlling decisions of the United States supreme court justify the conclusion that under such circumstances sending notice by mail is a method *reasonably* calculated to apprise each taxpayer to whom the notice is sent of his rights and liabilities. It is equally clear that service by publication in newspapers, and by posting, is not sufficient as a matter of law to afford reasonable notice. Such was our conclusion in *Ridenour* v. *County of Bay*, 366 Mich 225. See, also, *Wisconsin Electric Power Company* v. *City of Milwaukee*, 275 Wis 121 (81 NW2d 298).

The provision of the statute that the failure to send the notice by mail shall not constitute a jurisdictional defect invalidating a tax, if notice shall have been published and posted, is obviously at variance with the requirements of the statute directing the mailing of notice to each taxpayer entitled thereto, and is clearly repugnant to the holdings in the above cited cases. A situation that the legislature presumably did not intend might well result if the mandatory provisions of the statute with reference to the giving of notice by mail may be disregarded. For like reasons the conclusive effect sought to be given to the affidavit of the drain commissioner cannot be sustained. The presumption of the regularity of official action must yield, in order to constitute due process of law, to a showing as to the actual facts. As indicated, however, with the exception of these 2 provisions, we sustain the constitutionality of section 154 of the drain code on the ground that if the conditions therein prescribed are complied with due process of law is had in a situation of the character now before us.

This brings us to the question whether on the record a finding is justified that a notice of the hearing to be held on June 1, 1960, was actually mailed to the plaintiff. Due process of law requires such mailing to be made. The attorney general of the State, who has intervened in the case, makes the following statement in his brief, with which statement we are wholly in accord:

"Due process of law demands that there be a mailing. This is a reasonable method calculated to give notice of the hearing in question. It is only meaningful if the act of mailing is performed."

It was admitted on the hearing of this case in circuit court that there was no one who could say that a notice was actually mailed to plaintiff. The

defendant, who made the statutory affidavit that the notices had been mailed, conceded that he mailed none of the notices himself, nor did he know who actually did mail them. The procedure followed in this connection appears from the testimony and is summarized by counsel for appellant in an uncontroverted statement in his brief as follows:

"When the drain commissioner is required under any of the statutory provisions, to send a notice to taxpayers of any given drainage district, he calls upon the services of the Wayne county bureau of taxation. The boundaries of an established drainage district such as the Sexton-Kilfoil drainage district are on record with the bureau of taxation. The bureau has the names that appear on the general tax rolls. The bureau ascertains the names of taxpayers within the district. Someone in the drain commissioner's office orders the bureau of taxation to prepare 3 lists of such taxpayers and envelopes. The envelopes are to mail the notices to property owners, whatever the notice may be. Someone from the drain commissioner's office picks up the envelopes in cartons. There were over 10,000 envelopes in the Sexton-Kilfoil drain. Depending on the size of the drain, certain employees are assigned to 'stuffing the envelopes.' The envelope is opened up. The notice is inserted. Then the lid is folded back over and placed back in the same cartons so far as possible. A designated employee may receive so many cartons or so many envelopes, which they fill with the notice that is required to be mailed and they are delivered to the mailing department in the City-County building and the mailing department sends them out.

"Each parcel of property bears a code number for general tax purposes. The code number of plaintiff's property was 15Y in Romulus. The list prepared by the bureau of taxation for purposes of sending out notice of the day of review included

International Salt Co., 12841 Sanders avenue, Detroit, Michigan.

"A notice, a copy of which is in pocket of back cover of appellant's appendix (plaintiff's exhibit 1), was placed in each envelope that was sent out to a property owner in the Sexton-Kilfoil drainage district. The defendant did not personally mail to plaintiff any notice that a public meeting would be held by him on June 1, 1960, to review the apportionment of benefits to plaintiff's land. Defendant does not know which employee of his office sent out a letter, containing such notice, to plaintiff. Defendant's attorney admitted he did not know of any definite person who mailed any envelope to plaintiff."

It does not appear that the envelopes after being addressed and the printed notice inserted therein were checked against the list furnished by the bureau of taxation, or by any other method. It appears from the notice that the descriptions of assessed properties were set forth with reference to the townships or cities in which they were situated. Conceivably the notices intended for property owners in the various townships and cities might have been separately handled, checked and mailed by employees who would by such method of procedure have been in position to testify with reference to such checking and mailing. Quite possibly some more practical plan might have been worked out by those familiar with handling notices of the character here involved in order that, in the event of litigation on the point, proof of actual mailing might be available. We realize, of course, that any detailed method of handling the notices where the number to be sent is large involves additional care and labor. However, it seems essential in order to establish that constitutional requirements as to due process of law have been observed that some method to accomplish the result suggested should be worked

out by those to whom the task of preparing and mailing the notices in a case of this character is committed.

In the instant case there is, as before indicated, an absence of proof that any notice was actually mailed to plaintiff. However, mailing was essential to due process of law and to the procedure prescribed by the legislature. Under the circumstances we think that plaintiff is entitled to equitable relief and to that end we remand the case with directions that within 30 days after such remand defendant drain commissioner afford to plaintiff the right to a hearing relating to the assessment against plaintiff's property. In view of the nature of the controversy no costs are allowed.

DETHMERS, KELLY, OTIS M. SMITH, and ADAMS, JJ., concurred with CARR, C. J.

BLACK, J. (*dissenting*). The appealed decree reads in full as follows:

"This cause having come on for a trial on the merits, and having been heard upon the pleadings filed and the proofs made therein, and having been argued by counsel for the respective parties, and the court having found that the statute, PA 1956, No 40, § 154, as amended by PA 1957, No 61 (CLS 1956, § 280.154, as amended [Stat Ann 1960 Rev § 11.1154]), required defendant drain commissioner to give notice to property owners in the Sexton-Kilfoil drainage district, including plaintiff, of the day of meeting of the board of review for review of apportionment of benefits, by first class mail, by publication in a newspaper of general circulation in the community involved, and by posting in at least 5 conspicuous places in such drainage district; and having further found that the said provisions of the statute and the further provision thereof to the effect that the failure to send or to receive such notice by mail

does not constitute a jurisdictional defect nor invalidate such drain proceedings and/or tax, is a proper exercise of legislative power and is constitutional; and having found that the defendant did in fact comply with such statute in the course of the Sexton-Kilfoil drain proceedings; and the court further finding that although plaintiff did not actually receive such notice by mail, nonetheless it is deemed to have received proper notice within the purview of the statute in such case made and provided; and the court having found that the Sexton-Kilfoil drain proceedings were jurisdictionally intact and the plaintiff being deemed to have had proper notice of such proceedings, it may not maintain an action in chancery seeking review thereof; and the court being otherwise fully advised and informed in the premises and having rendered its opinion on the matters involved herein, to which opinion reference may be made for more particularity and shall be considered a part of this decree,

"Now, therefore, it is ordered, adjudged and decreed, that the bill of complaint filed in this cause be, and the same is hereby dismissed, without costs to either party."

Plaintiff has properly invoked the aid of equity to obtain the process which, in the course of these statutory proceedings, was due it by admonition of the Fourteenth Amendment. That admonition is as much a part of the drain code as if written therein for, as said in both reports of *Blythe* v. *Hinckley* (173 US 501, 508 [19 S Ct 497, 43 L ed 783]; 180 US 333, 338 [21 S Ct 390, 45 L ed 557]), "the Constitution, laws and treaties of the United States are as much a part of the laws of every State as its own local laws and constitution." I construe and apply the code accordingly and, guided by the *Mullane* (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 US 306 [70 S Ct 652, 94 L ed 865]) and *Walker* (*Walker* v. *City of Hutchinson,* 352 US 112

[77 S Ct 200, 1 L ed 2d 178]) *Cases,* hold that this plaintiff has been denied due process as charged in its bill and is therefore entitled to plenary relief from the consequences of notice withheld when adequate notice could and should have been given.

Now I have always supposed that when equity has accepted jurisdiction—of person and subject matter—for any good reason known to her exalted jurisprudence, the chancellor should and does retain jurisdiction to accomplish equity's benign and final purpose; that of providing complete relief in one suit with due determination of the rights and duties of the parties growing out of or connected with the pleaded subject matter. Our latest expression in such regard appears in *Jeffery* v. *Lathrup,* 363 Mich 15, 22.* There is no disclosed reason why we should relegate plaintiff to another administrative hearing and litigation stemming inevitably therefrom.

I would reverse and remand with direction to proceed with hearing and determination of plaintiff's allegation that the project provides no benefit for its property. Plaintiff should, of course, have costs.

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* *Jeffery* refers authoritatively to the collection of principles and citations appearing in *Second Michigan Cooperative Housing Association* v. *First Michigan Cooperative Housing Association,* 358 Mich 252, 256, 257. Having first quoted Pomeroy's enduringly pertinent precepts, our unanimous Court therein reaffirmed allegiance to what was said in *Whipple* v. *Farrar,* 3 Mich 436, 446 (64 Am Dec 99):

"But it has often been held, and in New York and some of the other States, it is regarded as a settled rule, that where a court of chancery has gained jurisdiction of a cause for any purpose of relief, it will retain it, for the purpose of giving full relief. 1 Story Equity Jurisprudence, § 71, note 2, and cases there cited; *Bradley* v. *Bosley,* 1 Barb Ch (NY) 125, 151; see, also, 2 Harris Ch 286.

"This is a rule of such practical utility in promoting the ends of justice—preventing unnecessary suits, saving expense, and avoiding delay, as commends itself strongly to our approbation, and the case under consideration is one where it may well be applied."

This case of International Salt Co. *v.* Wayne County Drain Commissioner is another case where it—the stated rule of retention of jurisdiction—"may well be applied."

There is no occasion, now, for determination of the question whether, under the statute, proven mailing of a notice constitutes due process. Suppose the notice is mailed but not received by the addressee, through no fault of his own. Is he then precluded from challenging validity of the special assessment of his property? I would carefully refrain from hinting an answer to such question until a specific case requiring an answer either way is before us.

KAVANAGH and SOURIS, JJ., concurred with BLACK, J.

SCHOLLE *v.* SECRETARY OF STATE.

ON REMAND.

1. CONSTITUTIONAL LAW—STATE SENATORS—EQUAL PROTECTION.
   Provisions of State Constitution presently setting forth districts for election of State senators *held*, invalid prospectively as a denial of equal protection of law under the Constitution of the United States for lack of a rational basis for the invidiously discriminating apportionment made (US Const, Am 14; Mich Const 1908, art 5, §§ 2, 4, as amended in 1952).

2. SAME—SENATORIAL DISTRICTS—DISPARITY OF POPULATION.
   Provisions of the Constitution of Michigan relative to arrangement of senatorial districts, as such provisions stood before

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 18 Am Jur, Elections § 16 *et seq.*
[3, 4, 6] 43 Am Jur, Public Officers § 470 *et seq.*
49 Am Jur, State Territories and Dependencies § 34.
18 Am Jur, Elections § 16 *et seq.*
[5] 49 Am Jur, State, Territories and Dependencies §§ 34, 54.
[7, 8] 18 Am Jur, Elections §§ 99–101.
[9] 14 Am Jur, Costs § 91.
18 Am Jur, Elections § 321.

adoption of amendments hereby declared invalid, prohibit an arrangement of such districts which would result in some districts having more than twice the population of others, per BLACK, KAVANAGH, SOURIS, and OTIS M. SMITH, JJ., such disparity of population being also offensive to the equal protection clauses of the State and Federal Constitutions, per BLACK and KAVANAGH, JJ. (US Const, Am 14; Mich Const 1908, art 2, § 1; art 5, §§ 2, 4, as amended in 1952).

3. SAME—APPORTIONMENT OF SENATORIAL DISTRICTS.

Legislation relative to apportionment of senatorial districts in accordance with the State Constitution as it stood before adoption of amendments hereby declared invalid, as construed to prohibit any district from having more than twice the population of any other district, may properly be enacted by a legislature which includes a *de facto* senate whose existence is continued for all valid purposes for balance of current term, but not thereafter (Const 1908, art 5, §§ 2, 4, as amended in 1952).*

4. OFFICERS—DE FACTO SENATORS.

Senators in the presently constituted State senate, although elected under provisions of the State Constitution that are invalid by reason of being a denial of equal protection of laws under the Constitution of the United States, are continued for the balance of their current term, but not thereafter, as *de facto* officers for all valid purposes (US Const, Am 14; Mich Const 1908, art 5, §§ 2, 4, as amended in 1952).*

5. ELECTIONS—STATE SENATORS.

The secretary of State, as chief election officer of the State, may not presently permit the election of State senators in the absence of valid legislation or constitutional provision authorizing him to do so.*

6. OFFICERS—DE FACTO SENATE.

The acts of the senate, created under an untouched provision of the Constitution, while continuing to function after constitutional provisions apportioning the senatorial districts are declared void as a denial of equal protection of law under the Fourteenth Amendment of the Constitution of the United States, are upheld as the acts of a *de facto* body (US Const, Am 14; Mich Const 1908, art 5, § 1; §§ 2, 4, as amended in 1952).*

* See final paragraph of page 179 as to stay granted by a justice of the supreme court of the United States.—REPORTER.

7. ELECTIONS—STATE SENATORS—STATUTES—COURT ORDER.
The secretary of State is ordered to apply to the Supreme Court, in the event valid legislation is not adopted for holding of primaries and election of State senators within 33-day period allowed therefor, for instructions and orders enabling him to call and conduct a special State-wide primary election of candidates 62 days hence, and conduct a State-wide election of number of senators allowed by Constitution prior to adoption of invalid amendment (Const 1908, art 5, §§ 2, 4, as amended in 1952).*

8. SAME—STATE SENATORS—JURISDICTION OF SUPREME COURT.
The Supreme Court retains jurisdiction of proceeding wherein election of State senators in conformity to provisions of State Constitution as they stood prior to adoption of invalid amendments thereto is accomplished and complete disposition of the matter is adequately provided (US Const, Am 14; Mich Const 1908, art 5, §§ 2, 4, as amended in 1952).

9. COSTS—PUBLIC QUESTION—ELECTION OF STATE SENATORS.
No costs are allowed in proceeding involving the election of State senators, a public question being involved (US Const, Am 14; Mich Const 1908, art 5, §§ 2, 4, as amended in 1952).

CARR, C. J., and DETHMERS and KELLY, JJ., dissenting.

Original petition for mandamus by August Scholle, in his own behalf as a citizen and elector in the twelfth Michigan senatorial district, and in a representative capacity as president of the Michigan State Council, AFL-CIO, against James M. Hare, Secretary of State, to command latter in the first instance, not to issue 1960 election notices or perform acts requisite to election of State senators under the present senatorial districting, praying that amendments to article 5, §§ 2 and 4, of the Constitution be declared invalid as violative of provisions of the Constitution of the United States, praying that said sections in respect to senate apportionment or districting be declared unamended, that the Court declare that no apportionment or

* See final paragraph of page 179 as to stay granted by a justice of the supreme court of the United States.—REPORTER.

districting act is extant, and further praying that the writ command defendant to declare and conduct senatorial elections on an at-large basis until an apportionment or districting act can be passed, and further praying that the Court retain jurisdiction pending reapportionment.

Frank D. Beadle, senator from the thirty-fourth district, and Albert K. Blashfield, a constituent of the thirty-third senatorial district, on their motion, joined as parties defendant. John W. Cummiskey, a constituent of the sixteenth senatorial district, John W. Fitzgerald, senator from the fifteenth district, and Paul C. Younger, senator from the fourteenth district, on their motion to be joined as parties defendant, permitted to intervene.

Prior judgment of Supreme Court of Michigan (360 Mich 1) dismissing petition vacated upon appeal to supreme court of the United States.

Submitted on remand July 2, 1962. (Docket No. 63, Calendar No. 48,580.) Writ of mandamus granted July 18, 1962. Amendments to Constitution 1908, art 5, §§ 2 and 4, declared violative of Fourteenth Amendment to Constitution of the United States and therefore invalid. Reference made to governor and legislature for reapportionment under previously existing constitutional provisions, the presently constituted senate being adjudged to be a continuing *de facto* body. Jurisdiction retained pending transition. Directions given as to conduct of elections for State senators.

On July 27, 1962, an order was issued by a justice of the supreme court of the United States to stay the senatorial redistricting order of the Supreme Court of Michigan pending the timely filing of a petition for writ of certiorari and a further stay pending the final disposal of the petition. Application for certiorari filed in the supreme court of the United States October 15, 1962.

Rothe, Marston, Mazey, Sachs & O'Connell (*Theodore Sachs,* of counsel), for plaintiff.

Frank J. Kelley, Attorney General, and *Eugene Krasicky,* Solicitor General, for defendant, concluding certain provisions violative of Federal Constitution and suggesting remedial measures.

Edmund E. Shepherd, for intervening defendants and intervenors.

Amicus Curiae: Creighton R. Coleman, in propria persona.

ON REMAND

KAVANAGH, J. As we approach determination of the merits, following vacation by the supreme court (*Scholle* v. *Secretary of State,* 369 US 429 [82 S Ct 910, 8 L ed 2d 1]), of the judgment entered here June 6, 1960 (360 Mich 1), each unmanageable member of the Court faces an arrogant and amply headlined threat of impeachment "if the senate districts are declared illegal."[1] This threat should neither hasten nor slow the judicial process.[2] It does call into play Marshall's grim words (quoted in *O'Donoghue* v. *United States,* 289 US 516, 532 [53 S Ct 740, 77 L ed 1356]):

"The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he (the judge)

[1] Detroit Free Press, metropolitan edition, Friday, June 29, 1962, front page article, under headline "Threaten to Impeach Top Court."

[2] Today's effort to intimidate the Court finds its historic counterpart when, in Marshall's time, a "scethingly hostile" congress "closed down the supreme court for a year." That challenge of judicial independence, and the way it was handled ultimately by the Marshall court, is chronicled in Rodell's "Nine Men," pp 85–90 (Random House, New York 1955).

should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? * * * I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary."

Only an ignorant, a corrupt, or a dependent judge would cringe and pause before any such formidable threat. We choose instead to consider and execute the duty which has been cast here by the supremacy clause and the oath *all* judicial officers of Michigan have taken.

If the laws of Michigan, brought now to question again, do offend the right of thousands upon thousands of Michigan citizens to federally guaranteed equal protection, and the writer did so find more than 2 years ago, then this Court, loyal to its oath, should say so now; now that jurisdiction to say so has been specifically confirmed by the United States supreme court. Failing in such regard, another biennially extended election of members of the upper house will have come and gone under patently unconstitutional law; law so invidiously discriminatory that but feeble effort is and can be made to sustain it as against the current surge of national authority which, almost daily, arrives from a steadily increasing number of the States. Indeed, the position of these intervening defendants seems only to be that a little equality goes a long way and that too much equality goes too far.

The Supreme Court of Michigan did not ask for submission of this issue and its now unavoidable determination. Some of the veterans of the legislature, along with their predecessors, failed regularly to execute the constitutional oath each had taken to redistrict and reapportion under original section 4 of the fifth article of the Michigan Con-

stitution (1908). They and they alone are responsible for justiciable presentation and consideration of the issue before this Court. Had they faithfully and decennially executed said section 4 the powers of this Court, and those of the United States supreme court, never could have been invoked; nor would those powers now be called to action. So much for any suggestion that the courts of this country are invading without warrant the processes and powers of a separate branch of government. What the courts do is no invasion; it is no more and no less than performance of their duty to guard vigilantly government by constitutional law.

Is it not true that this Court of last resort of a State, when it is called upon to determine the merits of a duly presented and manifestly decisive Federal question, sits for the required time as an inferior court of the United States? And is it not true that, for solution of the presented question, we are obliged to hold that the Constitution of the United States is controlling where, as found here, one of its provisions stands in conflict with provisions of a State Constitution? For answer see *Testa* v. *Katt,* 330 US 386, 390, 391 (67 S Ct 810, 91 L ed 967, 172 ALR 225), wherein *Claflin* v. *Houseman,* 93 US 130 (23 L ed 833),[3] was unanimously characterized as follows:

"The opinion of a unanimous court in that case was strongly buttressed by historic references and

[3] This passage, taken from the *Claflin Case,* exposes the rule fully (p 137):

"The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The 2 together form 1 system of jurisprudence, which constitutes the law of the land for the State; and the courts of the 2 jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

persuasive reasoning. It repudiated the assumption that Federal laws can be considered by the States as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon States, courts, and the people, 'any thing in the Constitution or laws of any State to the contrary notwithstanding.' It asserted that the obligation of States to enforce these Federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide."

Lest someone might suggest that we are not speaking in this context of State constitutional provisions and State statutes alike, we would refer them to the rule of *Standard Computing Scale Co.* v. *Farrell,* 249 US 571, 577 (39 S Ct 380, 63 L ed 780):

"For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the State is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission. *Great Northern R. Co.* v. *Minnesota,* 238 US 340 (35 S Ct 753, 59 L ed 1337); *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 US 278, 286–288 (33 S Ct 312, 57 L ed 510); *State of Washington, ex rel. Oregon Railroad & Navigation Co.,* v. *Fairchild,* 224 US 510 (32 S Ct 535, 56 L ed 863); *Grand Trunk Western R. Co.* v. *Railroad Commission of Indiana,* 221 US 400, 403 (31 S Ct 537, 55 L ed 786)."

The decision of the supreme court, reversing our majority decision and remanding the case for further consideration in the light of *Baker* v. *Carr,* 369 US 186 (82 S Ct 691, 7 L ed 2d 663), was handed down April 23, 1962. Accordingly, and at the be-

ginning of the present term, the following order for resubmission was entered (June 5, 1962):

"In this cause a motion is filed by plaintiff for summary judgment or in the alternative to advance the cause for prompt hearing, and answers thereto having been filed by defendant and by intervening defendants, and due consideration thereof having been had by the Court, it is now ordered that the case be and the same hereby is ordered submitted for rehearing on July 2, 1962 at 10 o'clock in the forenoon of that date, such rehearing to be on present appendices and briefs as filed with our clerk augmented by the United States supreme court's opinion of April 23, 1962 in this cause,[4] and by such additional briefs as counsel may be advised to file on or before the oral arguments scheduled above."

In pursuance of such order the case was fully resubmitted. No further proof or pleading was offered. Neither was request made for submission of further proofs. Thus the case is before us on a record made more than 2 years ago; a record each then member[5] of the Court must have studied with painstaking care prior to consideration and review of the exhaustive opinions which appear between pages 1 through 125 of the 360th Michigan Report. It is false, then, to say that meager time has been allotted for proper consideration of the merits of this all important case. Doubtless no case submitted to this Court in modern times is known so well to the members who would protest that our determination of the merits should be delayed the more that they may study it the more; pointedly until that determination comes too late for legislative reapportionment of the senate and senatorial

[4] *Scholle* v. *Secretary of State,* 369 US 429 (82 S Ct 910, 8 L ed 2d 1).—REPORTER.

[5] Justice OTIS M. SMITH is the only presently participating Justice not then a member of the Court.

elections this year; likewise too late for direly pertinent advices the presently assembled constitutional convention should receive and heed before it, as imminently provided, passes for all time into the pages of history. By Magna Carta's fortieth grant, "To none will we sell, to none will we deny, or delay, right or justice."

Now that 2 years have intervened since the decision of this Court in the case of *Scholle* v. *Secretary of State,* 360 Mich 1, we ask ourselves: Are there any intervening facts, judicially noticeable or otherwise, that would change the former finding that the present senatorial districts of Michigan lack a rational, reasonable, uniform, or even ascertainable nondiscriminatory legislative purpose?

None has been suggested, and we find none. A comparison of the population growth using the 1950 and 1960 Federal censuses indicates that the disparities are growing with the population increase at an average of approximately 150,000 persons per year.

The absence of any semblance of design or plan in the present senatorial districts was recently acknowledged by D. Hale Brake, a Michigan lawyer and former State treasurer from 1943 through 1954, now a constitutional convention delegate, in an article entitled, "The Old and the New Constitutions—a Comparison and Appraisal" dated May 16, 1962, signed by Mr. Brake, Director, Education Division, Michigan Association of Supervisors, 319 W. Lenawee, Lansing 33, Michigan, and sent to the members of the association. Mr. Brake concluded with appropriate accuracy:

"Our present senate, of course, does not follow any plan. It is simply an arbitrary freezing in of various districts."

Having duly considered the additional briefs submitted, the oral arguments made by the parties and for the reasons set forth in detail in my opinion recorded in *Scholle* v. *Secretary of State,* 360 Mich 1, we hold plaintiff has been and is being deprived of the equal protection of the laws within the meaning of the Fourteenth Amendment to the United States Constitution, by the provisions of article 5 of the Michigan Constitution of 1908, as amended in 1952, by which plaintiff's vote for the office of State senator is invidiously unequal to the votes cast for State senator by other citizens of the State, the classification of citizens in the senatorial districts being arbitrary, discriminatory, and without reasonable or just relation or relevance to the electoral process. Sections 2 and 4 of article 5 of the Michigan Constitution of 1908, as amended in 1952, are therefore declared a violation of the Fourteenth Amendment of the United States Constitution and are void.

We turn then to a consideration of the provisions of article 5, sections 2 and 4 of the 1908 Constitution without the 1952 amendment,[6] to test the present senate apportionment in the light of adjudicated cases of the Michigan Supreme Court and the application thereto of the Fourteenth Amendment. We

[6] Sections 2 and 4 of article 5 of the Michigan Constitution (1908) without the 1952 amendment read as follows:

"Sec. 2. The senate shall consist of 32 members. Senators shall be elected for 2 years and by single districts. Such districts shall be numbered from 1 to 32, inclusive, each of which shall choose 1 senator. No county shall be divided in the formation of senatorial districts, unless such county shall be equitably entitled to 2 or more senators."

"Sec. 4. At the session in 1913, and each tenth year thereafter, the legislature shall by law rearrange the senatorial districts and apportion anew the representatives among the counties and districts according to the number of inhabitants, using as the basis for such apportionment the last preceding United States census of this State. Each apportionment so made, and the division of any county into representative districts by its board of supervisors, made thereunder, shall not be altered until the tenth year thereafter."

find our Court in *Giddings* v. *Secretary of State,* 93 Mich 1 (16 LRA 402), considering a similar action by citizens to declare statutory rearranging of the senate districts unconstitutional and void, where Justice GRANT, speaking for the Court, said (p 7):

"It was never contemplated that 1 elector should possess 2 or 3 times more influence, in the person of a representative or senator, than another elector in another district. Each, insofar as it is practicable, is, under the Constitution, possessed of equal power and influence. Equality in such matters lies at the basis of our free government. It is guaranteed, not only by the Constitution, but by the ordinance of 1787, organizing the territory out of which the State of Michigan was carved."

Justice GRANT went on to say (p 8):

"It (the Constitution) requires the exercise on the part of the legislature of an honest and fair discretion in apportioning the districts so as to preserve, as nearly as may be, the equality of representation."

Justice MCGRATH in a concurring opinion in *Giddings* said (p 13):

"The purpose of the constitutional enactment is to secure as nearly as possible equality of representation. Any apportionment which defeats that purpose is vicious, contrary not only to the letter of the Constitution, but to the spirit of our institutions, and subversive of popular government. Power secured or perpetuated by unconstitutional methods is power usurped, and usurpation of power is a menace to free institutions."

The Court stated its conclusions as follows (p 9):

"1. The petition is properly brought into this Court by the relator.

"2. The Court has jurisdiction in the matter.

"3. The apportionment acts of 1891 [No 175] and 1885 [No 183] are unconstitutional and void.

"4. The writ of mandamus must issue, restraining the respondent from issuing the notice of election under the act of 1891, and directing him to issue the notice under the apportionment act of 1881, unless the executive of the State shall call a special session of the legislature to make a new apportionment before the time expires for giving such notice."

Fourteen years later, in the June term of 1906, this Court again had before it similar reapportionment acts according to which certain senatorial districts had more than double the population of others. The Court again ruled in accordance with *Giddings,* that such a disparity between districts made the acts unconstitutional. See *Williams* v. *Secretary of State,* 145 Mich 447.

It is to be noted that Justices Douglas, Black, and Murphy, dissenting in *MacDougall* v. *Green,* 335 US 281, 288 (69 S Ct 1, 93 L ed 3), stated:

"None would deny that a State law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees."

We would conclude, then, under the rule of *Williams* and *Giddings* as applied by our own Court, that any law of our State giving some citizens more than twice the votes of other citizens[7] in either the primary or general election would lack constitutional equality so as to void that law. Here, then, written in *Williams* and 48 years later by dissenting justices in the *MacDougall Case,* is a maximal standard by which the legislature and the constitutional convention may receive fair guidance. When a legislative apportionment provides districts having more than double the population of others, the

[7] Ratio of representation under present senatorial apportionment: 1950 census approximately 7 to 1; 1960 census approximately 12 to 1.

constitutional range of discretion is violated. This is not to say that less than such 2 to 1 ratio is constitutionally good. It is to say only that peril ends and disaster occurs when that line is crossed.

We regard Michigan as fortunate for, unlike other States, we have in the *Williams* and *Giddings Cases* judicial interpretation in applying the identical constitutional phrases to which the legislative destiny of Michigan is now returned. We hope the legislature will act promptly to fill the void, and that its prompt action will eliminate need for a State-wide at-large primary and general election of State senators.

The *Williams Case,* the doctrine of which we now affirm, marks the outermost boundary of that constitutional discretion which, in 1908, the people awarded to the legislature in the name of local as well as national equal protection. Equal protection, in the context of this case, does not mean arithmetical equality. Section 2's restriction against division of a county and the stated exception to such restriction, alone would prevent such arithmetical equality. It does mean that equality which fairly approximates, by the standards of reasonable minds exercising fair discretion, that which should have been done decennially between 1908 and 1952 and must now be done to ensure that reasonably uniform right of governmental representation which came to life by impact of the Declaration of Independence. It means, too, that when any apportionment plan provides some elective districts having more than double the population of others, that plan cannot be sustained. And so we hold in final summation that the Fourteenth Amendment and our own corresponding

pledge of the protection of equal laws (art 2, § 1)[8] do require that the senatorial districts of Michigan be so arranged as to be consistent with the foregoing maximum 2-to-1 ratio.

That is enough for decision of the present case. We may add, however, that other programs creating elective districts, whether on an area versus population basis, or gerrymandered as to shape or want of contiguity, or planned for purposes of invidious discrimination or iniquitous advantage, may some day be presented to this Court for test against the national and State equality clauses, but we do not pass on them at the present time. There could be no question, however, that they would have to meet the foregoing test set forth in the *Williams* and *Giddings Cases* and in *MacDougall* v. *Green, supra.* Perhaps they would be required to do more, but certainly not less.

Due consideration having been given to the foregoing conclusions and findings, and the Court being fully advised, it is now and here adjudged and ordered as follows:

(1) That present sections 2 and 4 of article 5 of the Constitution of Michigan (1908), referring specifically to those sections as ratified at the general election held November 4, 1952, do as charged by plaintiff offend and therefore do fall before the equality clause of the Fourteenth Amendment of the Constitution of the United States. Said sections 2 and 4 are consequently adjudged invalid, prospectively from and after the date hereof.

(2) That no legislation exists in Michigan, effected either by statute or constitutional provision, un-

[8] "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." (Quotation from *Naudzius* v. *Lahr,* 253 Mich 216, 222 [74 ALR 1189, 30 NCCA 179]; followed in *Cook Coffee Co.* v. *Village of Flushing,* 267 Mich 131.)

der or by which candidates for the office of State senator may validly be elected for the biennial term commencing January 1, 1963.

(3) That the primary election of candidates for the office of State senator, scheduled now in the hitherto constituted 34 senatorial districts of Michigan, for conduct on August 7, 1962, be and the same is restrained and enjoined by force of this Court's writ of mandamus, which writ shall issue forthwith to the defendant secretary of State. The defendant secretary, as chief election officer of the State and supervisor of all local election officers in the performance of their duties,[9] will by timely regulation and instruction do and perform such acts as will ensure State-wide observance of the restraint directed by said writ.

(4) For the purpose of ensuring validity of all legislation which, being otherwise valid, may have been enacted into statute by the legislature prior to the date of this judgment; and for the further purpose of ensuring validity of legislation and joint resolutions (for submission of any proposed constitutional amendment) as may hereafter be enacted into statute or adopted by the legislature during the remainder of the year 1962; and for the further purpose of providing means for the enactment of valid new legislation during the present legislative session, comporting with original sections 2 and 4 of said article 5, and for the further purpose of providing means by which this judgment may receive prompt performance and due execution, it is adjudged that the presently constituted senate shall, from this date and until December 31, 1962, but not thereafter, function as a *de facto* body and that the

[9] Pertinent sections of the Michigan election law as amended (CLS 1956, § 168.21, and CLS 1956, § 168.31, as amended by PA 1957, No 249 [Stat Ann 1956 Rev § 6.1021 and Stat Ann 1961 Cum Supp § 6.1031]).

members of the senate elected as such for the current term shall, from this date and until December 31, 1962, but not thereafter, function as *de facto* officers for all valid purposes. Reference is pertinently made to the general rule that where the law creating a public office is declared void the acts of an officer continuing to function thereunder will, until he is legally succeeded, be upheld as the acts of a *de facto* officer. See *People* v. *Buckley,* 302 Mich 12; *People* v. *Russell,* 347 Mich 193; *Greyhound Corp.* v. *Public Service Commission,* 360 Mich 578.[10]

(5) That the governor and legislature be advised, respectfully by the judicial department, that legislation is urgently required under and in pursuance of original sections 2 and 4 of said article 5, by which 32 senatorial districts of Michigan are arranged according to the number of inhabitants of the State as shown by the most recent United States census of Michigan, and under and in pursuance of which candidates for the office of senator in each of such newly arranged districts may be nominated and elected for the coming biennial term.

(6) In event valid legislation, recommended aforesaid, is not enacted with necessary immediate effect on or before August 20, 1962, the defendant secretary will apply forthwith to this Court for such instructions and orders as will enable him to call and conduct a special State-wide primary election of candidates for the office of State senator on September 11, 1962, and as will enable him to call and conduct a State-wide election on November 6, 1962, of the necessary number of State senators, 32 in all, for such coming biennial term.

(7) That jurisdiction of this cause be and is retained indefinitely, pending further order or orders, until the transition from invalid sections 2 and 4

[10] That part of the opinion of the *Greyhound Case* which dealt with the status of *de facto* officers was unanimous.

of said article 5, to original sections 2 and 4 of said article 5, is fully accomplished and complete disposition of the involved subject matter is adequately provided.

If necessary, additional appropriate writs will issue by the presently seated Court for due enforcement of the foregoing judgment.

No costs, a public question being involved.

BLACK, J., concurred with KAVANAGH, J.

CARR, C. J. (*dissenting*). This case involves an attack by plaintiff on the validity of article 5, § 2, of the State Constitution (1908), as amended by vote of the people at the November election in 1952. Said section relates specifically to the State senate and the election of the members thereof by single districts. The amendment was proposed and submitted to popular vote on the basis of petitions filed by qualified and registered electors of the State as provided in article 17, § 2, of the State Constitution as amended at the general election of April 7, 1941. At the 1952 election there was also submitted a proposed amendment requiring that the members of both houses of the legislature be selected on the basis of a legislative apportionment in accordance with population. The latter amendment was defeated while the adoption of the amendment here in question was carried by a substantial vote.

The amendment now attacked was submitted on the ballot as "Proposal No 3", its purpose being declared to be "to establish senatorial districts and provide for decennial reapportionment of representatives." (PA 1953, p 438.) Considering the amendment in its entirety as relating to the election of the members of the bicameral legislature, it was obviously the intention of the people that members of the house of representatives should be selected from dis-

tricts which shall contain "as nearly as may be an equal number of inhabitants." Insofar as the senate was concerned the people undertook by the amendment to divide the State into 34 districts, from each of which a member of the senate should be elected. Said districts were specifically set forth in article 5, § 2. Senatorial districts as previously existing were materially changed, and the number increased from 32 to 34. That the factor of population was not overlooked is indicated by the provision of said section that senatorial districts within a county shall contain, as nearly as may be, an equal number of inhabitants. Unquestionably the basic plan of the people as set forth in the amendment was to divide the State into designated districts, the geographic division being adopted as stated. The provision in the Federal Constitution for 2 senators from each State may have served to suggest such method.

It must be assumed, and it clearly appears, that the people in making these provisions for selection of members of the house and senate sought a general plan for the legislative department of the State government that would best serve the State as a whole. While population is the controlling factor as far as representatives are concerned, it was obviously deemed that the rights of the people living in different sections of the State would be best protected by the adoption of a geographical basis, in part, of apportionment as to the senate. It is, of course, apparent that if the members of both houses are selected on a strictly population basis the urban industrial centers, having the largest number of inhabitants, would be enabled to dominate the legislative department of the State government. It was this kind of a situation that the framers of the amendment now in question here, and the people adopting it, had in mind at the time. The question now presented is, was such plan irrational? Must it be said that it consti-

tutes an "invidious" attempt to deprive any section of the State, or any portion of its inhabitants, of their just rights under the fundamental laws of the State and of the Nation?

In attacking article 5, § 2, of the Constitution, as amended, plaintiff insists that it violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution. In his petition for a writ of mandamus to prevent the secretary of State, defendant herein, from issuing election notices for State senators to be chosen at the 1960 general November election the claim is advanced that senatorial districts must be established on the basis of population. Obviously it is the claim that in electing members of a bicameral legislature population must be the sole criterion to be followed, and that any plan involving an attempt to protect the interests of the less densely populated sections of the State is invalid because not affording equal protection to residents in heavily populated urban centers. We are not in accord with such theory.

The case was instituted in this Court by petition for a writ of mandamus against the secretary of State requiring that official to refrain from acting under the Michigan election law with reference to the election of State senators. Said petition does not specifically allege wherein plaintiff or others whom he claims to represent have actually been prejudiced as a result of State senators being chosen in Michigan at the last 4 general November elections in accordance with the amendment of 1952. There is no showing that as a result of such method of senatorial selection improper legislation has been enacted to the prejudice of plaintiff or of others. In view of the record of the Michigan legislature there would seem to be no basis for any possible argument that the State of Michigan has suffered, or that any segment of its population has been prejudiced. The realistic

situation presented is that no section of the State has suffered from legislative discrimination. There is no showing that either house of our legislature has failed to discharge its responsibilities to the public generally, or that the basic principle of equal protection of the laws has been violated because of the plan adopted by the people acting in their sovereign capacity at the 1952 election.

When the controversy first came before this Court in 1960 a majority of the justices concluded that under prior decisions of the United States supreme court, including *Colegrove* v. *Green,* 328 US 549 (66 S Ct 1198, 90 L ed 1432), and other decisions of like import cited by Mr. Justice EDWARDS in his opinion, the nature of the issue did not bring it within the scope of the jurisdiction of this Court, and that such issue was not a justiciable one. Accordingly, plaintiff's petition was denied (360 Mich 1), and his subsequent application for rehearing was also denied. Thereupon plaintiff sought to appeal to the supreme court of the United States.

Thereafter the case of *Baker* v. *Carr,* 369 US 186 (82 S Ct 691, 7 L ed 2d 663), was submitted to the Supreme Court for determination. The case was an appeal from the decision of a Federal district court rejecting an attack on legislative apportionment statutes of Tennessee. In that case the State constitution required reapportionment at regular intervals, but the legislature had not taken action since 1901. In other words, there was no compliance by the State legislature with the mandate of constitutional provisions by which it was bound. The supreme court, Justices Frankfurter and Harlan dissenting, concluded that a justiciable question was involved and remanded for further consideration of the controversy on its merits. In taking such action attention was called (p 193) to the fact that the fundamental law of Tennessee did not provide for the ex-

ercise of the power of the initiative or the referendum on the part of the electors of the State. It was suggested that under said circumstances no remedy was available other than by appeal to the court. Obviously such is not the situation in Michigan. Here the power to initiate, by petition, legislation and constitutional amendments (as well as the referendum) is reserved to the people by the express language of our Constitution.

Following the action taken in the Tennessee case the supreme court of the United States remanded the present controversy to this Court, directing by mandate received under date of May 29, 1962, that we give the case further consideration in the light of *Baker* v. *Carr*. We do not understand from the opinions filed by members of the court of last resort of the Nation that any question was determined other than that the controversy is justiciable. In consequence, we are now confronted by the question whether it must be said that the plan adopted in 1952 by the people of this State with reference to the selection of members of its bicameral legislature offends the equal protection clause of the Fourteenth Amendment.

In *MacDougall* v. *Green*, 335 US 281 (69 S Ct 1, 93 L ed 3), the court refused to hold invalid an Illinois statute relating to the nomination of candidates for a new political party, it being contended, as in the case before us, that the Fourteenth Amendment was violated. Commenting on the issue involved and the arguments advanced, it was said (pp 283, 284):

"To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this court, applying such broad consti-

tutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States. *Colegrove* v. *Green,* 328 US 549 (66 S Ct 1198, 90 L ed 1432), and *Colegrove* v. *Barrett,* 330 US 804 (67 S Ct 973, 91 L ed 1262)."

We note that in the opinion of Mr. Justice Stewart, who concurred in the holding of the majority in *Baker* v. *Carr, supra,* reference was made to the above quoted case, it being said that (pp 265, 266):

"In *MacDougall* v. *Green,* 335 US 281 (69 S Ct 1, 93 L ed 3), the court held that the equal protection clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.' 335 US, at 284. In case after case arising under the equal protection clause the court has said what it said again only last term—that 'the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.' *McGowan* v. *Maryland,* 366 US 420, 425 (81 S Ct 1101, 1153, 1218, 6 L ed 2d 393). In case after case arising under that clause we have also said that 'the burden of establishing the unconstitutionality of a statute rests on him who assails it.' *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 US 580, 584 (55 S Ct 538, 79 L ed 1070).

"Today's decision does not turn its back on these settled precedents. I repeat, the court today decides only: (1) that the district court possessed jurisdiction of the subject matter; (2) that the complaint

presents a justiciable controversy; (3) that the appellants have standing."

Reference to the *MacDougall Case* was also made in the opinions of other justices. We have before us, therefore, the question hereinbefore stated, that is, whether the plan adopted by the people in the 1952 amendment to the Constitution is irrational and discriminatory to a degree requiring its expunging from the fundamental law of this State on the ground that it violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Applying the principle announced in *MacDougall* v. *Green, supra,* we submit that such question must be answered in the negative. Such plan was adopted in the light of circumstances prevailing in the State of Michigan, with reference to varied conditions existing in different parts of the State, and for the proper purpose of protecting the rights of the people in the more sparsely settled sections. It was not intended to perpetrate an undue hardship or an injustice on any part of our population, *nor has it operated to do so.* The burden of proof to establish that a provision of the fundamental law of the State is invalid rests on the plaintiff, and that burden has not been sustained. The 1952 amendment now in question was not challenged immediately following its adoption, nor has any attempt been made to change it by the orderly process of amendment to the Constitution by resort to the same method of procedure that brought about the submission and adoption of said amendment.

If a majority of the members of this Court grant the relief sought in plaintiff's petition and hold invalid the 1952 amendment to article 5, § 2, of our Constitution, an unfortunate situation will result. It must be borne in mind that the attack here is not on the right of the present members of the State senate

to hold their offices but, rather, goes to the right of existence of those offices themselves as established under the amendment. The people by their action in 1952 created additional senatorial districts, and the new districts created were not in many instances identical with those fixed under the prior apportionment statute. If the amendment is adjudged invalid, the senatorial districts created thereby become nonexistent, and for obvious reasons the members of the Senate elected from said districts cannot be deemed *de facto* officers for any purpose. There cannot be a *de facto* officer unless there is a *de jure* office. The law in this respect was rather succinctly stated as follows in the opinion of the supreme court of the United States in *Norton* v. *Shelby County,* 118 US 425, 441, 442 (6 S Ct 1121, 30 L ed 178):

"The doctrine which gives validity to acts of officers *de facto,* whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that

such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

In accord with the holding above quoted are: *Carleton* v. *People,* 10 Mich 250; *People* v. *Payment,* 109 Mich 553; *Kidd* v. *McCanless,* 200 Tenn 273 (292 SW 2d 40).[1] If this Court enters judgment in accordance with plaintiff's demand that article 5, § 2, of the State Constitution is and has been from its inception a nullity, then the State of Michigan will necessarily be left without a State senate and, hence, without a legislature that can function under the Constitution. Striking from the fundamental law of Michigan the provision for designated senatorial districts will obviously terminate the existence of such districts. This Court is without power to give to those previously elected therefrom the status of *de facto* incumbents of offices that no longer exist.

It is interesting to note that the district court of the United States for the middle district of Tennessee, to which the supreme court remanded *Baker* v. *Carr* for further consideration, came to the conclusion (206 F Supp 341) that the apportionment acts passed by the legislature of Tennessee were invalid, but declined to enter a judgment in accordance with

[1] Appeal dismissed, 352 US 920 (77 S Ct 223, 1 L ed 2d 157).—REPORTER.

its opinion. The court decided to withhold final action on the issues presented, including any declarations of invalidity or the issue of injunctive process, in order to permit the selection of a State legislature, under the alleged invalid statutes, to act at its 1963 session, the members of such legislature to be elected during the current year. It was pointed out that such method of procedure would obviate the possibility of the State being left without a legislative body, under the holding in *Kidd* v. *McCanless, supra,* as the result of a judgment of invalidity. The court obviously realized the situation that would be presented in the event of a judgment entered without affording a reasonable opportunity for the State legislature to act.

It was apparently recognized also that the 1962 legislature, which had enacted apportionment statutes during the pendency of the litigation and considered therein pursuant to stipulation of the parties, but which the Court deemed invalid, could scarcely be expected to enact a statute that would be sustained. For such reason it was deemed to be a realistic solution of the problem to withhold entry of judgment, allowing a new legislature to be elected and giving it a reasonable opportunity to adopt proper statutes that would not offend against constitutional provisions. Commenting on the procedure to be observed, it was said in part (p 350):

"This will permit the election of a State legislature under the 1962 statutes with full authority and power to discharge validly and legally the legislative functions of the State. It will enable the general assembly to act with the express sanction of the court to effect the necessary remedial measures and consequently in 'good faith' as far as its authority is concerned. Under such conditions the restrictive view of the *de facto* rule announced in *Kidd* v. *McCanless* will not apply. If it should be argued that

this is a somewhat technical method to circumvent the ruling in that case, the answer is threefold: First, *Kidd* v. *McCanless* itself represents a rather technical effort by a court to avoid entering an area which courts then generally regarded as involving political and nonjusticiable issues, a view now undercut by the supreme court's decision in this case. Second. This remedial method has the advantage of avoiding a far more drastic form of relief which could conceivably entail a direct intrusion into State affairs. Third. It is justifiable on the basis of the wide latitude of discretion resting in the court in devising remedies in cases of this type.

"Accordingly, an order will be entered reserving final judgment herein on all issues until the 1963 general assembly constituted and elected under the 1962 statutes has had an opportunity at its regular 1963 session to act on the matter of legislative apportionment, but not later than June 3, 1963. After that date, or after the date of adjournment of the general assembly if occurring prior to June 3, 1963, the case may be reopened upon application of any party or upon the court's own motion. However, notwithstanding such time limits for reopening, full jurisdiction is retained, and the order will provide that if necessary or proper for any reason, the action may be reopened at any time hereafter, either upon the court's own motion or upon the application of any party."

Obviously the course pursued by the Federal district court in Tennessee is adapted to the prevention of a chaotic condition in the State government, and to obviate also the adoption of some method of apportionment by the Court that might be subject to question as to the requisite authority therefor. What was said by the Federal district court in determining the appropriate procedure in *Baker* v. *Carr* is, in large measure, applicable in the controversy before us. In view of the situation existing in Michigan, it clearly appears that a like course is

imperative here, if a majority of this Court finally concludes that article 5, § 2, of our present Constitution is invalid.

In the judgment proposed by Mr. Justice KAVANAGH immediate action is obviously contemplated. If the proposed order is entered as the judgment of a majority of the members of this Court participating in the case the obvious result would be a chaotic condition entailing the exercise of doubtful powers of this Court, interfering with the election laws of the State, and, likewise, interrupting the orderly course of legislative proceedings.

The procedure adopted by the Federal district court in *Baker* v. *Carr* found support in prior decisions cited therein. In *McGraw* v. *Donovan* (DC Minn, July 10, 1958), 163 F Supp 184, the Federal district court of Minnesota, third division, was asked to hold invalid a statute enacted by the Minnesota legislature in 1913 establishing legislative districts throughout the State. It was asserted that the act was in violation of the State constitution. There, as in the case at bar, it was urged that the equal protection clause of the Fourteenth Amendment to the Federal Constitution was also violated. The court deferred decision on the issues presented to it in order to give the 1959 legislature, the members of which were to be elected on November 4, 1958, an opportunity to take action. The following comment in the opinion indicates the reason for such deferment (p 188):

"It seems to us that if there is to be a judicial disruption of the present legislative apportionment or of the method or machinery for electing members of the State legislature, it should not take place unless and until it can be shown that the legislature meeting in January, 1959, has advisedly and deliberately failed and refused to perform its constitutional duty to redistrict the State."

The supreme court of New Jersey in *Asbury Park Press, Inc.,* v. *Woolley,* 33 NJ 1 (161 A2d 705), likewise withheld determination of the questions raised in a case challenging a reapportionment act, adopted by the legislature of the State, in order to afford a reasonable opportunity for legislative action. The case was cited by the supreme court of Colorado in its recent decision (rendered July 6, 1962) in the case of *Stein* v. *General Assembly of the State of Colorado,* 150 Colo — (374 P2d 66). After discussion of the practical problems involving legislative reapportionment of senators and representatives, the court, referring specifically to the decision of the supreme court of New Jersey, declined to intervene until the next general assembly of the State, the members of which will be chosen at the November election in 1962, has a reasonable opportunity to consider the issues raised with reference to reapportionment. The attitude of the court is indicated by the following excerpt from its opinion:

"We believe there should be no judicial intrusion into the legislative and executive affairs of the State, and we should be ever mindful of the necessity of preserving the integrity and independence of the coordinate branches of government. We should, therefore, exercise an appropriate degree of restraint to see if they will carry out their duties. Only if both they and the people fail to act will it become a judicial function to step into the void.

"It has been called to our attention that in Tennessee on June 22, 1962 (USDC No 2724 Nashville Div, 206 F Supp 341) a 3-judge Federal court acting pursuant to the mandate of *Baker* v. *Carr, supra* (the landmark case from which flows all current reapportionment litigation) decided to retain jurisdiction to give the Tennessee legislature 'an opportunity at its 1963 session to enact a fair and valid reapportionment'. As authority for so doing the court cited similar procedures in *McGraw* v. *Donovan* (DC Minn,

1958), *supra, Toombs* v. *Fortson* (ND Ga, May 25, 1962), 205 F Supp 248 (involving the legislature of Georgia); and the recent Alabama case of *Sims* v. *Frink* (DC Ala), 205 F Supp 245."

It is somewhat significant that the Colorado court in its opinion discussed at some length the suggested procedure involving the election of members of the legislature at large, and in doing so pointed out practical objections to such course. It will be noted also that the decisions of State and Federal courts emphasize the necessity for deliberate action in dealing with legislative enactments claimed to be in violation of constitutional provisions. The situation in the controversy before us is far more complicated in that the attack is made on an amendment to the State Constitution, initiated by petition and adopted by the people of the State. If the section providing for senatorial districts and the election of senators therefrom is stricken from the Constitution obviously extremely grave questions will thereby be raised. It must be said also that there is no emergency or threatened crisis rendering hasty action imperative. No reason has been or can be assigned for the contemplated refusal to adopt the realistic method of procedure suggested by the decisions of other courts, above cited.

Attention has been directed to the situation that will be created if this Court enters immediately a judgment, as proposed by Mr. Justice KAVANAGH in his opinion, striking from the Constitution the apportionment of senatorial districts within the State. As before pointed out, the amendment of 1952 increased the number of senators from 32 to 34 and materially changed the limits of districts. In the 4 elections that have followed since the adoption of that amendment senators have been chosen from the districts as so specified, including, of course, the members of the present senate. No possible claim can be made that

they represent districts created by act of the legislature in accordance with the original provisions of the Constitution of 1908. If the existing districts are abolished, a result necessarily following expunging article 5, § 2, from the fundamental law of the State, the conclusion cannot be avoided that the offices the present senators were chosen to fill will no longer exist.

The proposed judgment set forth in Mr. Justice KAVANAGH's opinion provides for the issuance of an injunction against the defendant secretary of State to restrain the primary election of candidates for the office of State senator, which election is now set under the general law of the State for August 7, 1962. Such an injunction will clearly rest on the theory, if the proposed judgment is entered, that the office of State senator as now existing is abolished. However, the proposed judgment would continue in office the present members of the senate until December 31, 1962, and the senate would be permitted to function as a *de facto* body. It thus appears that the members of the *de facto* senate will, under the proposed judgment, be acting not by virtue of their election by the people of the various senatorial districts created under the amendment of 1952 but by fiat of the majority of the members of this Court participating in the decision of the case. The query naturally suggests itself as to the authority of this Court to thus create one of the houses of the State legislature. The proposed judgment entry is not consistent with any possible theory that an incumbent of an office existing under a law adjudged to be invalid may continue to function on the ground that he may be regarded as a *de facto* official. The general rule of law unquestionably is that there can be no *de facto* officer unless there is a *de jure* office.

The decision of the supreme court of the United States in *Norton* v. *Shelby County,* 118 US 425 (6

S Ct 1121, 30 L ed 178), above cited, declares the general rule of law on the issue with reference to the status of a prior incumbent of an office previously existing under a statute adjudged unconstitutional. Decisions involving the status of one assuming to perform the duties of an existing office obviously are not in point. Mr. Justice SOURIS directs attention to *Attorney General, ex rel. Dingeman,* v. *Lacy,* 180 Mich 329, in support of the claim that an adjudication that an act creating a particular office is invalid does not prevent the incumbent from continuing to act with a *de facto* status. The Court did not so hold in that decision. Involved was an act of the State legislature undertaking to create a domestic relations court in counties having a population of more than 250,000. It applied to Wayne county only and was adjudged invalid because in conflict with article 5, § 30, of the State Constitution (1908) forbidding local acts if a general act can be made applicable and further requiring the approval of all local acts by electors of the district to be affected. It was also held that the provisions of the State Constitution relating to the jurisdiction of circuit and probate courts were violated. The purpose of the act was to relieve the circuit court of Wayne county of a portion of its burden. The domestic relations court had functioned for some time prior to adjudication, and the Court declined to hold invalid *prior* judicial acts within the scope of the circuit court jurisdiction. The gist of the decision in this respect is indicated (p 342) in the following statement:

"Inasmuch as respondent, under the authority of a legislative enactment, assumed to exercise a portion of the jurisdiction of the circuit court, which is a constitutional court, we are of opinion that such of his judicial acts as are within the jurisdiction of the circuit court should be considered as those of a *de*

facto judge, not open to question upon jurisdictional grounds."

It will be noted that only acts that might have been performed by a circuit judge were declared to be valid. Furthermore, the Court did not hold that the defendant judge was entitled to *continue* to act on the theory of a *de facto* status. When the judgment was entered declaring nonexistent the office that the defendant had held his functions ceased. He was a *de facto* judge as to prior acts only. The case is not authority for any possible claim that if judgment enters invalidating the section of the Constitution under which the present senators were chosen such members may continue to act for the purpose of creating a *de facto* senate. Such a claim has no basis in either law or logic.

We have called attention to certain aspects of the proposed judgment as set forth in Mr. Justice KAVANAGH'S opinion for the purpose, among others, of emphasizing the serious nature of the problem with which we are confronted. Judicial interference, as emphasized in decisions above cited, in controversies of the nature here involved, should if possible be avoided. Careful consideration and action are imperative. It must be borne in mind that we are dealing with an attempt to strike from our Constitution provisions that have been placed there by the people of the State in whom all political power is inherent. Bearing in mind the origin of the amendment of 1952, is there any basis for a suggestion that there was any purpose of "invidious discrimination" involved?

As hereinbefore stated, the purpose of the people in the adoption of the amendment in question was the formulation of a definite plan deemed proper for the protection of the people of the State and of all sections of the State. The fundamental law of the State,

like that of the nation, involves a series of checks and balances essential in all representative government. The underlying purpose and plan of the amendment must be determined by reference to all of the provisions thereof. Provision was made that members of the house of representatives, 110 in number, should be selected from districts established on the basis of population. Such provision insured that the more populous sections of the State should not be discriminated against by unfair legislation, nor is there any claim that such has occurred. Protection from such discrimination was assured to plaintiff and others in like situation. On the other hand it was recognized that the more thinly populated sections of the State should not be overlooked. It has been repeatedly declared, and is not denied in this case, that in the interests of the general welfare the situation with respect to all parts of the State in any plan for the election of members of the legislature should be given due consideration.

Mr. Justice SOURIS asserts that the present senatorial districts were established without any conceivable or rational basis. We disagree. How could such a plan be formulated other than by consideration of geographic divisions? The people of Michigan in adopting the amendment recognized the situation existing in different sections of the State, recognized the necessity for protecting all sections and all people against possible injustice, recognized the necessity for a definite plan that would accomplish that purpose, and acted accordingly. A bicameral legislature renders feasible such a plan. Plaintiff's objections to it are predicated in the final analysis on the desire to create a situation by virtue of which the legislature of the State may be controlled by numbers. The argument is that no apportionment act is valid unless resting on the population basis. It must be conceded, and it cannot be

denied, that population alone is not the controlling factor. To effect a desired and proper result there may be departure therefrom, a situation that obtains in government, national, State, and local. The underlying purpose sought to be obtained through the relief sought by plaintiff in this case is the obtaining of power on the basis of numbers. May the equal protection clause of the Fourteenth Amendment be successfully invoked to accomplish that purpose? We think not. Such was not the intent of the people of this country in the adoption of that amendment to the fundamental law of the nation.

There is no question here involved as to any violation of the Constitution of the State of Michigan. Justices KAVANAGH and SOURIS have cited *Giddings* v. *Secretary of State,* 93 Mich 1 (16 LRA 402); and *Williams* v. *Secretary of State,* 145 Mich 447. Each of said cases involved a statute, enacted by the legislature, found to be in conflict with the State Constitution. In neither case was any question raised as to the denial of the equal protection of the law.

In remanding the case to this Court for consideration and decision it is clear that the supreme court of the United States did not pass on the merits of the justiciable issue found to be present. The various opinions filed in *Baker* v. *Carr* may not be so construed. It is crystal clear that the purpose of the remand was to enable this Court to pass on the question whether plaintiff has made out a case entitling him to the relief sought. The burden of proving such right is, of course, on plaintiff. Such burden has not been borne. The people of Michigan may not be adjudged guilty of denying to plaintiff the equal protection of the laws.

For the reasons stated the validity of the provision of the Michigan Constitution assailed by plaintiff should be sustained and the petition for writ of mandamus should be dismissed.

DETHMERS and KELLY, JJ., concurred with CARR, C. J.

DETHMERS, J. (*dissenting*). I concur with what Mr. Chief Justice CARR has written and would add somewhat thereto.

An equal protection of the laws problem is not presented. Complaint is made of apportionment of senators on a basis such that the senator elected from plaintiff's district represents more electors than do senators from other districts. It is said that plaintiff's vote is thus debased or diluted. Plaintiff can vote for one candidate for senator and one senator represents his district. The same is true of every voting elector in the State, regardless of the population of his district. The rights of each elector in Michigan are, in that respect, no more nor less than plaintiff's, whatever the number of voters residing or voting with such elector in his district. If half the people in plaintiff's district were to move from it overnight, would plaintiff's rights in the respect here considered be doubled, or, if the direction of the move were reversed and the population of his district doubled, would his mentioned rights thereby be halved, and his vote debased or diluted accordingly? Would the degree or extent of his protection of the laws thereby be altered? He would still have 1 vote for senator and 1 senator representing his district. That is all he would have if he dwelt in a district less populous. Insofar, then, as the right of exercise of the franchise is concerned, there is no discrimination, no inequality, no vote debasement, no denial of the equal protection of the laws. So much for plaintiff's right to vote for and to have his district represented by 1 senator.

Even a dissenting opinion may, now and then, give rise to an interesting question or thought worthy of pursuit. Can it be, to paraphrase Mr. Justice

Frankfurter in *Baker* v. *Carr,* 369 US 186 (82 S Ct 691, 7 L ed 2d 663), that plaintiff's real or underlying complaint is that present apportionment of the senate deprives him of what he conceives to be his "proportionate share of political influence"? Concerning this, Justice Frankfurter went on to write (p 299): "This, of course, is the practical effect of any allocation of power within the institutions of government." To put the question another way, is it contended that if plaintiff's district were cut in two, with 1 senator apportioned to each half, this would serve to enhance his protection of the laws? He still could vote for but 1 senator, and but 1 would represent his district. Assuming, however, that an elector might say with accuracy that senate reapportionment on a strictly population basis, as distinguished from that now required by State Constitution, would result in transforming the present senate minority of adherents to his political faith and party into a senate majority, would it be denial of the Fourteenth Amendment equal protection of the laws to deny that elector such senate transformation? To pose the question is to highlight the ludicrousness of an affirmative answer. But if the mentioned senate transformation were accomplished by the proposed reapportionment, what, then, of the equal protection of the laws for electors of the opposite political faith or party? It is no answer for one to say that those of my political party are entitled to more protection of the laws because we are in the majority. It was precisely that which the Fourteenth Amendment protection of minorities was designed to prevent. It is obvious, then, that an equal protection of the laws question is not involved in this contemplation. In a republican form of government, guaranteed to every State by the Federal Constitution,[1] it is in the nature of things that with

[1] See US Const, art 4, § 4.—REPORTER.

2 major parties occupying the field, exclusively, unless their strength be equal, one must, for the nonce, be the majority and the other the minority party in legislative halls. No constitutional rights of party members or other groups are thereby infringed upon nor are they thus denied the equal protection of the laws.

Or is the essence of plaintiff's complaint that the alleged malapportionment of the senate has worked for him, and others in Michigan similarly situated, a denial of the equal protection of the laws in that resultant legislative enactments have conferred lesser benefits or imposed greater burdens on them than upon others resident in less populous senatorial districts? This, at least, would present something in the nature of an equal protection of the laws question. Plaintiff's petition does not so allege nor is there aught in the record to show or establish it. The burden of proof in that respect rests on plaintiff. It has neither been undertaken nor sustained.

In *Brown* v. *Board of Education of Topeka,* 347 US 483 (74 S Ct 686, 98 L ed 873, 38 ALR2d 1180), the supreme court of the United States held that the equal protection clause of the Fourteenth Amendment prohibits States from maintaining racially segregated schools. On that same day it decided *Bolling* v. *Sharpe,* 347 US 497 (74 S Ct 693, 98 L ed 884), holding that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment. It was the court's view that action which would violate the equal protection clause of the Fourteenth Amendment when perpetrated by a State could scarcely be squared with requirements of the Fifth Amendment's due process clause as relates to action by the Federal government. While the court did say that "equal protection of the laws" and "due process of law" are not always interchangeable phrases, it,

nevertheless, discerned such close relationship between the 2 concepts and similarity in effect and consequences as to cause the 2 to compel the same result with respect to the 2 like factual situations in the 2 noted cases. Cited as authority therefor was *Hurd* v. *Hodge,* 334 US 24 (68 S Ct 847, 92 L ed 1187). Can it be assumed, then, with the due process clause of the Fifth Amendment to the Constitution of the United States, relating to the Federal government, apparently seeming to the founding fathers to be left unoffended by the express provision of article 1, § 3, of that same Constitution for selection of 2 senators from each State, that, at a time when the United States senate continued, as now, to be so composed, it was intended by the adoption of the related equal protection clause of the Fourteenth Amendment, applicable to State governments, to thereby prohibit apportionment to the State senates on a similar basis, not keyed strictly to the population levels of the several senatorial districts? Sound reasoning forbids such conclusion. To give the Fourteenth Amendment such effect today is to recognize some subsequent amendment thereof accomplished by means other than those prescribed by the Constitution itself for its amendment.

That the United States supreme court has not deemed such to be the meaning and intent of the equal protection clause is evident enough from its unanimous opinion and decision in *Minor* v. *Happersett,* 21 Wall (88 US) 162 (22 L ed 627). There, the court held that the rights or privileges of suffrage were not within the meaning of the equal protection clause, pointing out (p 175) that, if they were guaranteed thereby, there would have been no occasion for adoption of the Fifteenth Amendment providing that the rights of citizens of the United States to vote shall not be abridged. The same may be said of the Nineteenth Amendment, providing for women's

suffrage. The fact of the adoption of these latter amendments reveals the national thinking that the Fourteenth had no such purpose or effect. See, also, the many Federal decisions cited in Mr. Justice EDWARDS' opinion in 1960, when this case made its previous appearance before us, to the effect that the apportionment here under attack is not violative of the Fourteenth Amendment. That it is and always has been part and parcel of the plan for republican government in vogue not only in the government of the United States, but in most of the States, may also be observed from the facts and statistics and recital of the history of the subject set forth in that opinion. This is indicative of the national concept, throughout the decades, of republican government and the absence of involvements under the equal protection clause and of the concurrence therein of the United States supreme court. *Baker* v. *Carr, supra,* and *Scholle* v. *Secretary of State,* 369 US 429 (82 S Ct 910, 8 L ed 2d 1), are not holdings to the contrary on the merits. The mandate to this Court in *Scholle* was simply to reconsider this case in the light of *Baker* v. *Carr, supra.* In the latter, the court was careful to point out that it was not passing on the merits, but only on questions of jurisdiction, justiciability, and standing of appellants as proper parties. (See opinions of Justices Brennan, Douglas, and Stewart.) In fact, particular reference is made in Justice Stewart's opinion to *MacDougall* v. *Green,* 335 US 281 (69 S Ct 1, 93 L ed 3), relied upon and quoted by Mr. Chief Justice CARR herein, and, as noted by him, Mr. Justice Stewart wrote (p 266) that the court's decision in *Baker* v. *Carr* does not turn its back on *MacDougall* and like settled precedents. That must inescapably include the statement in *MacDougall* to the effect that political power is not a function exclusively of numbers and that the court would not deny to a State the power to

assure a proper diffusion of political initiative as between its thinly populated areas and those having concentrated masses, inasmuch as the latter carry a political weight at the polls not available to the former.

Mention is made of *Giddings* v. *Secretary of State,* 93 Mich 1 (16 LRA 402), and *Williams* v. *Secretary of State,* 145 Mich 447. They held invalid apportionments made which were not in conformity with the requirements of the State Constitution in effect at that time for apportionment on a population basis. They are not determinative of the question of the validity of the relevant provision of the State Constitution now in effect.

When the framers of the Constitution of the United States provided for what they deemed to be a republican form of government, and guaranteed it equally to the States, they attempted no innovation with respect to formation of a congress composed of a house of representatives, to be elected approximately according to population, and a senate, consisting of members selected on a different basis, namely, 2 from each State regardless of the respective geographical sizes or populations of the States. They were following the pattern for legislative apportionment already in effect in the States, as it has been ever since in most of the States. That this was not through inadvertence but by design is evident enough from writings of the time when the Constitution was adopted and the course of action pursued since then throughout the country. The following excerpts from The Federalist are enlightening on the subject:

"It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove unfaith-

ful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of 2 distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. This is a precaution founded on such clear principles, and now so well understood in the United States, that it would be more than superfluous to enlarge on it. I will barely remark, that as the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the 2 bodies, it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government." Paper No 62.

Paper No 63 contains this statement:

"It may be suggested, that a people spread over an extensive region cannot, like the crowded inhabitants of a small district, be subject to the infection of violent passions, or to the danger of combining in pursuit of unjust measures. I am far from denying that this is a distinction of peculiar importance. I have, on the contrary, endeavored in a former paper to show, that it is one of the principal recommendations of a confederated republic."

In Paper No 51 the following is stated:

"It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. * * * Whilst all authority in it (Federal republic) will be derived from and dependent on the society, the society itself

will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."

The above was preceded by the following:

"But it is not possible to give each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit."

These writings are indicative of the spirit and purpose that occasioned the method of congressional and legislative apportionment then existing in States, adopted for the Federal government and followed throughout the United States from then until the present.

Checks and balances and a diffusion of governmental powers have been the genius of our system and the mainstay of the liberties of the people and our free institutions throughout our national history. Whether it be those inhering in a Federal system with a division between and assignment of powers to the central government over subjects of national concern and reservation to sovereign States of those of a State and local character, or in the separation of powers between the 3 branches of the government in both the National and the State governmental structures, or in the creation of a bicameral legislative branch, with each house a check on the other, our people have continued to recognize in them the bastions of our freedoms. These are irritants, of course, to those, impatient of what they

deem to be the delays of democratic processes, who seek the greater efficiency, speed and forceful action said to be characteristic of governments with unfettered powers. Not so for those who continue in their devotion as defenders of freedom.

These, it is evident, were the considerations which prompted the people of Michigan in 1952 to adopt by a majority of almost 300,000 the present constitutional amendment for senatorial apportionment and to reject, at the same election, by an almost half-million-vote majority, a proposed amendment to apportion both houses according to population. Did the people, in their efforts to preserve a system of checks and balances partly for the purpose of protecting the interests of minorities in sparsely populated areas against organized blocs in metropolitan areas, thus create a system of senatorial apportionment so unreasonable, irrational, and discriminating as to violate the spirit of the equal protection clause? I am persuaded that they did not. To quote from the conclusion of the brief of intervening defendants:

"Article 5 of our State Constitution, as amended in 1952, merely establishes a reasonable, rational, and permissible system of checks and balances in State government. It has been said that 'liberty means definitely limiting the power of the sovereign, whether that sovereign be a king or a majority,' and it is the genius of the American people that in formulating their Constitutions, they chose 'to guard against excesses' of such majority, and to exercise voluntary self restraint."

Interestingly enough, the present constitutional provision does not, as sometimes thought, provide for an apportionment and election of senators on merely an area basis. Area is a factor, but representation in the senate is very considerably weighted toward the population concept. It is not under rural control. Out of the total of 34 senators,

20 represent urban areas containing urban communities of 100,000 or more persons. Sixty-four per cent of the senators represent approximately 1/3 of the area—that is, the more populous area—of the State. The senate apportionment is manifestly a combination of the population and area considerations, with compromise and adjustment to insure a check and balance system for the protection of all sections of the State and, as well, of all people within it. The Constitution of the United States was and is a compromise. The Constitution of the State of Michigan is a compromise. The history of representative government in this country and elsewhere is a history of compromise. It is under despotism that the necessity for compromise ceases. Unlimited monarchs, dictators and other absolute rulers often have felt no need to bother with compromise. The same might be true under a system styled by Jefferson as an "elective despotism", where majority rule is unfettered by constitutional restraints. Not so here where constitutional guaranties and the checks and balances of governmental structures are expressly designed to protect minorities and individuals against unrestrained majorities.

When the object and purpose of combining both population and area factors into an apportionment formula are to afford the checks and balances so essential to continued freedom and protection of the different peoples and sections of the State, it is no valid criticism to say that neither population nor area equality or uniformity was accomplished, so long as that main object and purpose of checks and balances and preservation of rights of minorities and those in sparsely populated areas are subserved. Such is the result obtained in Michigan under the existing State constitutional provision.

The analogy of the Federal congress is dubbed inapt. Point is made that the Constitution of the United States was a compact between sovereign States which would not have agreed upon union without the compromise providing for equal representation in the senate for each State regardless of population or size, while, in contrast, local units of government in Michigan are creatures of the State which are not and never were sovereign entities whose consent was essential to formation of the State. This overlooks, incidentally, the subsequent admission to the Union, on the same senate apportionment basis, of 37 States which, with the exception of Texas, had not been equal sovereignties subscribing to a compact. Regardless of all that, however, and whatever may be the historic reasons and distinctions, in practical, everyday operation, the effects and consequences to the rights of people resulting from senate apportionment on a nonpopulation basis are the same whether it exists in the Federal or State government. Even though the Federal senate apportionment in disregard of population is constitutional because of the express provision for it in article 1, § 3, and the fact that the Fourteenth Amendment does not apply to the Federal government, it constitutes no more, but certainly no less, a denial of the equal protection of the laws to people than does such apportionment to a State senate. This Court, today, in effect, may announce that present apportionment to the United States senate works a constitutionally permissible denial of the equal protection of the laws to people. It is an announcement in which I do not join.

I concur with Mr. Chief Justice CARR'S opinion in its entirety and in his conclusion that plaintiff's petition should be dismissed.

CARR, C. J., and KELLY, J., concurred with DETHMERS, J.

KELLY, J. (*dissenting*). I not only concur with but completely indorse the opinions of Chief Justice CARR and Justice DETHMERS. Plaintiff states that this "may well be the most significant case ever to come before this Court," and with that thought I do not disagree and because of its importance and significance I am making the following addition to what has already been presented by Chief Justice CARR and Justice DETHMERS.

The former attorney general of Michigan (PAUL L. ADAMS, now Supreme Court Justice, who has disqualified himself because he was attorney general at the time of the original hearing) took an opposite position at the original hearing to the position taken by our present attorney general, Frank J. Kelley, at this rehearing, as is evidenced from Justice KAVANAGH'S 1960 opinion setting forth the following as the contention of the secretary of State and the attorney general (360 Mich, pp 11, 12):

"(2) Senatorial districting on a basis of area does not deny a republican form of government.

"(3) The equal protection of the laws provision of the Fourteenth Amendment to the United States Constitution is not violated, since—

"(a) There is no discrimination within a unit;

"(b) Area representation is proper and valid;

"(c) The Negro voting cases do not apply to the question; and

"(d) Constitutions of States seeking admission to the Union, and providing for legislative apportionment on some basis other than population, have been approved by congress and the president subsequent to the adoption of the Fourteenth Amendment to the United States Constitution.

"(4) The due process clause of the Fourteenth Amendment to the United States Constitution is not violated as—

"(a) Area representation does not violate the due process clause of the United States Constitution; and

"(b) Area representation conforms with our democratic traditions.

"(5) To forbid area representation would require the elimination of similar representative methods throughout our democratic system such as representation on—

"(a) The county board of supervisors;

"(b) City precincts; and

"(c) Other levels of area representation.

"(6) The relief prayed for by plaintiff cannot be granted for the following reasons:

"(a) If this Court declares the 1952 amendment to article 5 of the Michigan Constitution (1908) invalid, there will remain no legislative body either *de jure* or *de facto* with power to rearrange senatorial districts and reapportion the legislature; * * *

"(e) The plaintiff has an adequate remedy by seeking amendment of the State Constitution by vote of the electors."

I agree with the attorney general and secretary of State's position and with the development of the point by Chief Justice CARR, namely, that if this Court declare the amendment invalid, "then the State of Michigan will necessarily be left without a State senate and, hence, without a legislature that can function under the Constitution. Striking from the fundamental law of Michigan the provision for designated senatorial districts will obviously terminate the existence of such districts. This Court is without power to give to those previously elected therefrom the status of *de facto* incumbents of offices that no longer exist."

While Attorney General Kelley joins plaintiff and petitioner in his request that this Court declare that article 5, § 2, of the Michigan Constitution, violates the equal protection clause of the Fourteenth Amendment, he disagrees with plaintiff-petitioner as to the remedy or relief that should be granted.

Plaintiff-petitioner requests this Court as follows:

"We fervently pray for immediate relief, as above and earlier discussed—that a writ of mandamus issue, commanding the defendant not to issue 1962 election notices for State senators * * * pending an opportunity for enactment of timely, valid reapportionment legislation by the 1962 Michigan legislature, in failure of which the defendant further be directed to declare and conduct the 1962 elections for State senators on an at-large basis."

Attorney General Kelley, evidently realizing the injustice to the voters and the confusion that would result from granting petitioner's request, makes plain to this Court that he disagrees with petitioner by stating:

"The attorney general cannot subscribe to the request of petitioner that the August 1962 primary be enjoined for the reason that the legislature should be given sufficient time to reapportion the senate and to allow judicial review to be sought by an aggrieved party."

Endeavoring to sustain his contention that the majority opinion (360 Mich 1) did not decide "on the merits," plaintiff states: (1) "In short, that Justice EDWARDS did not express a majority judgment on the merits of this cause that the districts were valid under the tests of the Fourteenth Amendment"; and (2) "If Justice EDWARDS' remarks are now taken to have been on the merits, they obviously express erroneous conclusions."

I disagree with both of plaintiff's contentions and direct attention to the following from Justice EDWARDS' opinion (pp 92, 93, 96–98, 101, 103–106):

"The interpretation of the Fourteenth Amendment equal protection clause contended for herein would forbid any State from having a constitutional scheme for legislative representation in either house on any basis other than one which results in substantial voting equality.

"No matter what the future may bring in relation to this contention, it certainly was not the interpretation of the Fourteenth Amendment placed thereon by the States which ratified it. Nor is it that adopted by the United States congress subsequently in admitting States to the Union. Nor is it the interpretation current among the majority of the 50 States of the Union at present. * * *

"Of the 37 States in the Union in 1868, nine had constitutional provisions for election of representatives to at least 1 of the houses of their legislatures which based representation on constitutionally described legislative districts with constitutionally allocated representation without any pretense of guarantee of equality of popular representation. These States are Vermont, Rhode Island, Connecticut, New Hampshire, New Jersey, Delaware, Maryland, South Carolina, and Nevada.

"The resulting disproportion in popular representation was in some instances far greater than that complained of herein. In the instances of Vermont, Connecticut, and Rhode Island (all States which ratified the Fourteenth Amendment), representation in 1 house was based upon a political unit, with geographic boundaries, known as a town or city. * * *

"Without taking into account the major factor of disproportion occasioned by failure of legislatures to follow State constitutional commands to reapportion, or such relatively minor constitutional factors of disproportion as moiety clauses, it still appears that 20 of the 37 States constituting the Union at the

time of the adoption of the Fourteenth Amendment had in their own constitutions provisions which prevented at least 1 legislative house from being based upon the principle of equality of popular representation.

"Between 1868 and the present time, 13 additional States have entered the Union.

"As a prerequisite to such entry, the US Const, art 4, § 3, requires congressional approval. Historically, congress has required States applying for admission to submit their proposed constitution. See *Coyle* v. *Smith,* 221 US 559 (31 S Ct 688, 55 L ed 853). Typical of the form of approval is the statute by which the constitution of the proposed State of Hawaii was approved and Hawaii was admitted. * * *

"Of the 13 States whose constitutions were approved for admission, 8 such constitutions (for the States of Arizona, Alaska, Hawaii, Idaho, Montana, New Mexico, Oklahoma, Utah) contained provisions for election of at least 1 legislative house which fell into 1 of the 3 categories of disproportion discussed above. * * *

"The recent congressionally approved constitutions of the new States of Alaska and Hawaii contain State senatorial provisions which call for specific districts described largely on a geographic basis, with a resulting substantial inequality of popular representation. In Alaska, the newly elected State senator from the Anchorage-Palmer district represents 87,748 constituents, as compared with the senator from Barrow-Kobuk who represents only 5,705—a ratio of 15:1. * * *

"Thus a majority of the States of the Union in 1868, a majority of the States which joined the Union subsequently, and a majority of the States at the present time, had, or have, in their constitutions provisions as to 1 legislative house which have the effect of denying substantial equality of voting strength to some voters (generally in more populous

areas), as compared to other voters (generally in thinly populated areas).

"Many, if not most, of such provisions in other States are directly comparable in constitutional principle and resulting disproportion to the 1952 amendments to Michigan's Constitution.

"What the 1952 amendments did was to draw senatorial electoral districts based on geographic areas described in terms of counties, or groups of contiguous counties, or subdivisions of a single county. As we have seen, this has many parallels in the history of other States from the time of the adoption of the Fourteenth Amendment down to date. The system employed appears to be a variation of the 1-senator-per-county system which is common to many other States.

"We note the suggestion that the 1-senator-per-county system may be a constitutional classification where the variation is not. We reject this reasoning, however. The 1-senator-per-county system would in Michigan produce ratios of disproportion exceeding 1,000:1. We do not think the Fourteenth Amendment may be regarded as forbidding a variation from the 1-per-county system in the direction of popular representation.

"The real attack upon the classification of Michigan voters resulting from the 1952 senate amendments, however, is upon its purpose and its result. It seems clear to us that the general purpose of the disproportionate constitutional provisions which we have reviewed was, and is, to seek to give more thinly populated areas of a State a specific check upon the concentrated political power of the more populous areas. Considering that the amendment with which we deal in this case was adopted at an election wherein another amendment (Proposal No 2), designed to provide equality of popular representation in the Michigan senate, was defeated, it seems clear that this likewise was the purpose of the majority of Michigan voters in 1952.

"This Court does not determine the wisdom of the decisions made by the people of Michigan in adopting their Constitution. By its terms, all political power is inherent in them (Mich Const [1908], art 2, § 1), subject only, of course, to the United States Constitution.

"However distasteful to some of us the rationale of the majority of voters in 1952 may be as support for the classification of senatorial districts which resulted from the 1952 amendment, it clearly has been regarded to date as acceptable under the United States Constitution by the United States supreme court.

"The United States supreme court, in a case in which the classifications in a tax statute and ordinance were attacked as violative of the equal protection clause of the Fourteenth Amendment, established this test as to classification:

" 'Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. *Cf. Dominion Hotel, Inc.,* v. *Arizona,* 249 US 265 (39 S Ct 273, 63 L ed 597); *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 US 412 (57 S Ct 772, 81 L ed 1193, 112 ALR 293); *New York Rapid Transit Corp.* v. *City of New York,* 303 US 573 (58 S Ct 721, 82 L ed 1024); *Skinner* v. *Oklahoma, ex rel. Williamson,* 316 US 535 (62 S Ct 1110, 86 L ed 1655).' *Walters* v. *City of St. Louis,* 347 US 231, 237 (74 S Ct 505, 98 L ed 660).

"In *MacDougall,* 335 US 281 (69 S Ct 1, 93 L ed 3), the court said (p 284):

" 'It would be strange indeed, and doctrinaire, for this court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly

populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.'

"In the face of this history and this precedent, we find no way by which we can say that the classification we are concerned with herein is 'wholly arbitrary,' and hence repugnant to the Fourteenth Amendment of the United States Constitution as the United States supreme court has construed it to this date."

Plaintiff requests this Court to notify the legislature that unless it enacts "timely, valid reapportionment legislation" the 1962 elections for State senators will be conducted on an at-large basis.

Plaintiff asks this Court to issue a writ of mandamus "commanding the defendant not to issue 1962 election notices for State senators," evidently realizing that he is asking this Court to emasculate and render powerless the Michigan election laws, and more particularly CLS 1956, § 168.163, as amended by PA 1957, No 125 (Stat Ann 1961 Cum Supp § 6.1163), which provides:

"That the secretary of State and the various county clerks shall receive nominating petitions for filing in accordance with the provisions of this act up to 4 o'clock, eastern standard time, in the afternoon of the seventh Tuesday preceding the August primary."

Plaintiff is asking this Court to declare null and void the people's mandate as expressed in their Constitution that their senators be elected from senatorial districts.

Why this haste? Why this drastic action? Why ask this Court to not only declare null and void the present plan of apportionment adopted almost 10 years ago by the people of our State by the overwhelming majority of 294,000, but, also, to order

an election that will be contrary to the constitutional mandate? A plan that was directed in the same direction as now urged by plaintiff was defeated by over 490,000.

Repeated references have been made to *Baker* v. *Carr,* 369 US 186 (82 S Ct 691, 7 L ed 2d 663). Plaintiff asks the question whether Michigan can be distinguished from Tennessee, and states: "Justice Harlan, for example, would have distinguished *Scholle* from *Baker* on several counts."

I wholeheartedly agree with Justice Harlan because: (1) Plaintiff's claim concerns only one body of the legislature while the Tennessee claim was in regard to both; (2) Plaintiff attacks affirmative action of Michigan voters, while the Tennessee attack was on legislative inaction; (3) Michigan's apportionment conforms to the Michigan Constitution while Tennessee's legislation apportionment conflicts with the Tennessee constitution.

The Tennessee plaintiff had much greater reason to complain than our present Michigan plaintiff—and yet, the Federal judges in the Tennessee case of *Baker* v. *Carr* refused to do what plaintiff is asking this Court to do, as is ably set forth in Chief Justice CARR'S opinion.

Tennessee will hold an election under the Tennessee election laws in 1962, but plaintiff insists that that must not happen in Michigan. I do not agree with plaintiff's contention in this regard.

I concur with Chief Justice CARR and Justice DETHMERS' opinions in their entirety and with their conclusion that plaintiff's petition should be dismissed.

CARR, C. J., and DETHMERS, J., concurred with KELLY, J.

SOURIS, J. (*concurring*). The facts may be found in the dissenting opinion of Mr. Justice KAVANAGH, reported at 360 Mich 1, on the occasion of our first consideration of this case. The principal issue presented for our determination then and now is whether the 1952 amendments to sections 2 and 4 of article 5 of the Constitution of 1908 offend the equality clause of the Fourteenth Amendment to the United States Constitution. By the 1952 amendments Michigan's senatorial districts were territorially described, each district to be represented by a single senator, and with no provision for subsequent rearrangement of the designated districts. Plaintiff claims that the senatorial districts thus constitutionally established in 1952 were and are unconstitutionally discriminatory against him in violation of the equality clause of the Fourteenth Amendment for the reason that the arrangement of districts was palpably irrational and arbitrary, indeed that it was deliberately designed to accomplish the discriminatory result achieved, to-wit, constitutional permanence of pre-existing grossly disproportionate senatorial representation of residents of some areas, in one of which plaintiff resides, in favor of residents of other areas.

Our prior opinions having created some confusion on appeal to the United States supreme court (see opinions on remand in *Scholle* v. *Secretary of State,* 369 US 429 [82 S Ct 910, 8 L ed 2d 1]), a brief summary of them may be of some value. On our first consideration of this case, only 3 of the members[1] of this Court held, in dissent, that the 1952 constitutional amendments invidiously discriminated

[1] Two of the 8 Justices who participated in the first hearing of this case no longer are members of this Bench. One of them, Mr. Justice EDWARDS, wrote the controlling opinion and the other, Mr. Justice TALBOT SMITH, wrote one of the dissenting opinions.

against plaintiff and other residents of the State in violation of the equality clause and that the Court had the power and the duty to act. A fourth member of the Court agreed that there was unconstitutional discrimination, but he concluded that there was no judicial power to right that wrong. The remaining 4 Justices concluded that prior Federal cases[2] had considered similar claims of unconstitutional discrimination and rejected them, thereby compelling their holding that the senatorial district arrangement here involved was not repugnant to the Fourteenth Amendment as they conceived the United States supreme court to have construed it to that date. 360 Mich 106 and 124.[3] Five Justices of this Court having held either that the Court lacked the power to grant relief or that, under prior United States supreme court decisions, plaintiff was not entitled to relief, the petition for writ of mandamus was dismissed. Plaintiff appealed to the United States supreme court and now, on remand by man-

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2 *Colegrove* v. *Green,* 328 US 549 (66 S Ct 1198, 90 L ed 1432); *Cook* v. *Fortson,* 329 US 675 (67 S Ct 21, 91 L ed 596); *MacDougall* v. *Green,* 335 US 281 (69 S Ct 1, 93 L ed 3); *South* v. *Peters,* 339 US 276 (70 S Ct 641, 94 L ed 834); *Remmey* v. *Smith,* 342 US 916 (72 S Ct 368, 96 L ed 685); *Anderson* v. *Jordan,* 343 US 912 (72 S Ct 648, 96 L ed 1328); *Kidd* v. *McCanless,* 352 US 920 (77 S Ct 223, 1 L ed 2d 157); *Radford* v. *Gary* (WD Okla), 145 F Supp 541, affirmed 352 US 991 (77 S Ct 559, 1 L ed 2d 540); *Hartsfield* v. *Sloan,* 357 US 916 (78 S Ct 1363, 2 L ed 2d 1363); *Matthews* v. *Handley* (ND Ind), 179 F Supp 470, affirmed 361 US 127 (80 S Ct 256, 4 L ed 2d 180).

3 If there be confusion in Washington concerning our prior opinions, candor compels our admission that it exists as well in Lansing. Our Chief Justice says today that the prior controlling opinion, with which he specially concurred, held only that the Court lacked jurisdiction and the issue raised was not justiciable. See pp 196, 197, *supra.* Mr. Justice Harlan read that opinion as I do, saying that it "did not so much as mention questions pertaining to the 'jurisdiction' of the court, the 'standing' of the appellant, or the 'justiciability' of his claim." *Scholle* v. *Secretary of State,* 369 US 429, 432. He concluded, as do I, that the controlling opinion, and those who concurred in it, decided against plaintiff on the merits in accordance with their then current views of the United States supreme court's prior construction of the Fourteenth Amendment.

date of supreme authority, 369 US 429 (82 S Ct 910, 8 L ed 2d 1), we again consider, but this time in the light of *Baker* v. *Carr,* 369 US 186 (82 S Ct 691, 7 L ed 2d 663), plaintiff's claim that the 1952 amendments violate his Federal constitutional right to equal protection of the laws.

Whatever doubts remain in the wake of the majority opinion by Mr. Justice Brennan in *Baker* v. *Carr* (see concurring and dissenting opinions therein and subsequent Federal and State cases[4]), it seems certain to me that it authoritatively disposed of all of the grounds articulated by our majority in previously denying this plaintiff the relief he seeks. There can be no continuing doubt that the controversy presented is justiciable and that the Federal cases read by some of my Brothers to grant constitutional immunity to inequalities of suffrage such as is here involved, do not so hold. Nor can there be any doubt, in the light of language contained not only in Mr. Justice Brennan's opinion for the majority in *Baker* v. *Carr* but also in other opinions filed in that case, both concurring and dissenting, that the traditional standards for determining the existence of discrimination in violation of the equality clause applicable to other claims of invidious discrimination will be applied by the supreme

[4] *Caesar* v. *Williams* (April 3, 1962), 84 Idaho — (371 P2d 241); *Sims* v. *Frink* (DC Ala, April 14, 1962), 205 F Supp 245; *Scholle* v. *Secretary of State* (April 23, 1962), 369 US 429 (82 S Ct 910, 8 L ed 2d 1); *Maryland Commission* v. *Tawes* (April 25, 1962), 228 Md 412 (180 A2d 656); *Sanders* v. *Gray* (DC Ga, April 28, 1962), 203 F Supp 158, appeal granted June 18, 1962, *but* motion to advance denied, 370 US 921 (82 S Ct 1564, 8 L ed 2d 502); *Wisconsin* v. *Zimmerman* (Wis, May 23, 1962), 205 F Supp 673; *Maryland Commission* v. *Tawes* (May 24, 1962) Anne Arundel county circuit court, Maryland; *Toombs* v. *Fortson* (ND Ga, May 25, 1962), 205 F Supp 248; *W.M.C.A., Inc.,* v. *Simon* (June 11, 1962), 370 US 190 (appeal from NY DC SD, 202 F Supp 741) (82 S Ct 1234, 8 L ed 2d 430); *Moss* v. *Burkhart* (Okla, June 19, 1962), 207 F Supp 885; *Baker* v. *Carr* (MD Tenn, June 22, 1962), on remand from 369 US 186, 206 F Supp 341.

court in determining whether inequalities of suffrage such as plaintiff here asserts violate his rights to equal protection of the laws.

No Federal bar to relief now exists, if it ever did, assuming a majority of this Court finds, as I think we must, the existence of invidious discrimination against plaintiff. *Baker* v. *Carr, supra.* Nor does any State policy bar relief, for in this State the Court has been quick to strike down invidious discrimination in suffrage cases such as this where violations of our State Constitution have been proved. *Board of Supervisors of Houghton County* v. *Secretary of State,* 92 Mich 638 (16 LRA 432); *Giddings* v. *Secretary of State,* 93 Mich 1 (16 LRA 402); and *Williams* v. *Secretary of State,* 145 Mich 447. We must be at least as quick when contempt for supreme law permeates any aspect of our electoral process such as has been proved convincingly to be the case here.

Too much already has been written concerning the details of the 1952 amendments and their effect upon the rights of our citizens to equality in the chambers of the State's senate. For these details, reference must be made to the earlier dissenting opinions of Mr. Justice KAVANAGH and Mr. Justice TALBOT SMITH, 360 Mich 1–84. In both opinions the "well developed and familiar"[5] judicial standards under the equality clause were applied and were found violated by the 1952 amendments. In 1960 Justices KAVANAGH and SMITH sought, but did not find, any rational basis for the arrangement of senatorial districts made by the 1952 amendments. Nor could they conceive of any recognizable basis upon which the classification could be justified. Mr. Justice SMITH put it this way:

[5] *Baker* v. *Carr,* 369 US 186, at p 226.

"We have sought in vain to find some formula or formulae, even roughly approximate, competent to explain the groupings of counties and parts of counties into senatorial districts. It is impossible. The system, if such it is, defies explanation. Even the defendants in their briefs and appendices offer no more than the iteration and reiteration that this is representation by geographical area. But representation by geographical area, without more, is not enough. If it were, any gerrymander would be valid because the gerrymander always represents some geographical area, however grotesque." 360 Mich 1, at p 56.

However done, the result in 1960, based upon 1950 census figures, was grossly disproportionate representation in our State senate, the ratio of population of the smallest senatorial district to the largest being 1 to 6.5, and 2/3 of the members of the senate representing less than 1/2 the people in the State. Mr. Justice KAVANAGH concluded that the 1952 amendments were palpably arbitrary, discriminatory, and unreasonable. Mr. Justice TALBOT SMITH concluded:

"There is no recognizable unit employed in the classifications made. We have no more than an arbitrary division of the State into areas. At the best it is wholly capricious. At the worst, it is deliberate. In either event it is wholly indefensible." 360 Mich 1, at p 75.

Defendants' "iteration and reiteration that this is representation by geographical area" without specification of determinable basis therefor has given way on remand to intervenors' claim that the constitutional arrangement of senatorial districts "gives the more thinly-populated rural areas of the State a specific check upon the concentrated political power of densely-populated industrial urban centers." As a statement of result, none could quar-

rel with that. Based upon the 1960 census, the "specific check" of 1 thinly populated rural area upon the concentrated political power of a densely populated industrial urban center (in which plaintiff resides) is measured now by a ratio of population between the two of 1 to 12–1/2. That this is not an isolated example of disparity in senatorial representation is evident from the fact that 53% of the State's population is represented by only 10 of the 34 State senators, 29% of their number.

Whatever the result, the fact remains that neither the intervenors nor my Brothers who have written to dismiss plaintiff's petition has suggested *any* determinable basis for the classification here involved. Assuming *arguendo* the constitutional permissibility of the objective of the classification posited by the intervenors, that is not enough. There must also be some basis, rational, not arbitrary, for determining the classes; yet none has been even suggested.

The difficulty does not end at this point. In addition to a permissible objective of classification, and some rational, not arbitrary, basis therefor, I have always assumed that none would deny there were limits even then upon the discrimination between classes the equality clause would accommodate. Search as I have in the briefs and in the opinions urging dismissal, I find not even tacit recognition of the existence of such limitation, let alone its discussion.

In short, Mr. Justice KAVANAGH and Mr. Justice TALBOT SMITH, with whom I concurred, on original decision of this case before *Baker* v. *Carr* and its Federal and State progeny (see footnote 2), applied the "well developed and familiar" judicial standards of the equality clause to the facts of the case and found the 1952 amendments to §§ 2 and 4 of article 5 of Michigan's Constitution invidiously discrimina-

tory and void. But even after *Baker* v. *Carr* pointed the way to decision in this case on remand, briefs and opinions have been written which seem to deny the happening of judicial events since March 26, 1962. Indeed, in the teeth of the United States supreme court's remand of this case "for further consideration in the light of *Baker* v. *Carr*" (among the *holdings* in which is that plaintiffs' complaint stated a cause of action under the equality clause upon which they would be entitled to appropriate relief if the proofs sustain their allegations, allegations similar to those found here if the United States supreme court's statement of *Baker's Case* may be accepted as accurate),—in the teeth of such remand, 1 member of this Court begins his opinion by denial that there is presented here an equal protection of the laws problem.[6] The point is that meaningful application of the equality clause to the facts of this case requires discussion of the basis of the classification, its uniformity in application, its relevance to the objective of classification, and the limits of permissible discrimination. This the prior dissenting opinions did, and did well, even before *Baker* v. *Carr,* but no answers to their conclusions have yet been made or even attempted. That the standards applied in those dissents were the proper ones is clearly evident from the opinions in *Baker* v. *Carr.*

Mr. Justice Brennan established the standards for the majority of the court at 369 US 186, p 226:

"The question here is the consistency of State action with the Federal Constitution. * * * Nor

[6] Even after having earlier concurred in that portion of the prior controlling opinion that ends as follows:

"In the face of this history and this precedent, we find no way by which we can say that the classification we are concerned with herein is 'wholly arbitrary,' and hence repugnant to the Fourteenth Amendment of the United States Constitution as the United States supreme court has construed it to this date." 360 Mich 1, at p 106.

need the appellants, in order to succeed in this action, ask the court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the equal protection clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."

Mr. Justice Douglas, in his concurring opinion, at pp 244, 245, applied the "traditional test under the equal protection clause", citing *Skinner* v. *Oklahoma, ex rel. Williamson,* 316 US 535, 541 (62 S Ct 1110, 86 L ed 1655), and quoting from *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 US 483, 489 (75 S Ct 461, 99 L ed 563), to the effect that "the prohibition of the equal protection clause goes no further than the invidious discrimination."

Mr. Justice Clark, at p 253, likewise cited *Williamson* v. *Lee Optical of Oklahoma, Inc., supra,* as well as *McGowan* v. *Maryland,* 366 US 420, 426 (81 S Ct 1101, 6 L ed 2d 393), in recognizing that all inequities of suffrage may not constitute invidious discrimination "if any state of facts reasonably may be conceived to justify it." At p 260 of his opinion, Mr. Justice Clark stated that "there is no requirement that any plan have mathematical exactness in its application. Only where, as here, the total picture reveals incommensurables of both magnitude and frequency can it be said that there is present an invidious discrimination." Later, on the next page, he pointed out that "the majority appears to hold, at least *sub silentio,* that an invidious discrimination is present, but it remands to the 3-judge court for it to make what is certain to be that formal determination."

The whole tenor of Mr. Justice Stewart's concurring opinion is based upon the applicability, to ultimate factual decision in the case of *Baker* v. *Carr,* of the traditional equality clause tests. See particularly his reference to *MacDougall* v. *Green, supra; McGowan* v. *Maryland, supra;* and *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 US 580, 584 (55 S Ct 538, 79 L ed 1070), all of which are found at pp 265, 266, of Mr. Justice Stewart's concurring opinion.

Mr. Justice Harlan's opinion, relying upon *McGowan* v. *Maryland, supra,* and *Williamson* v. *Lee Optical of Oklahoma, Inc., supra,* also recognized the applicability of the traditional equality clause test, but concluded "that the State action complained of could have rested on some rational basis", p 338.

What we have, then, from *Baker* v. *Carr* is confirmation that the "well developed and familiar" judicial standards under the equality clause are to be applied in cases such as this to determine the existence or nonexistence of invidious discrimination. Mr. Justice KAVANAGH'S opinion on original hearing, 360 Mich 1, beginning at p 26, refers to many Federal and State court cases applying such standards to a variety of invidious discrimination claims. It is not necessary to repeat his references here; we can, however, take the law from them. The lesson those cases teach us is that the Fourteenth Amendment requires substantial equality between citizens except where there exist differences justifying the classification of citizens, in which event there must be equality within the classes. Quoting from *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 US 150, 155 (17 S Ct 255, 41 L ed 666), the United States supreme court in *Hartford Steam Boiler Insurance Co.* v. *Harrison,* 301 US 459, 462 (57 S Ct 838, 81 L ed 1223), said:

"*Mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.'"

As Mr. Justice TALBOT SMITH pointed out in his opinion on original hearing of this case, 360 Mich 1, at p 52, the classification must be rooted in reason, the distinctions made between classes must have "some relevance to the purpose for which the classification is made", quoting from *Walters* v. *City of St. Louis,* 347 US 231, 237 (74 S Ct 505, 98 L ed 660). See, also, *McGowan* v. *Maryland, supra,* 425.

There can be no doubt that application of these abstract principles to cases involving the electoral process will frequently present grave difficulties in their solution. There will be required close scrutiny of the object of classification into electoral districts, of the differences among our citizens based upon which their classification into electoral districts is sought to be justified, and of the relation between such asserted differences and the object of the classification.

Perhaps the most difficult problems will arise in attempting to determine what is the object of the classification and whether it is a legitimate objective within a permissible policy of the State. See *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 US 483 (75 S Ct 461, 99 L ed 563). Prudence requires that we remind ourselves that we are still speaking only of the requirements of the equality clause of the Fourteenth Amendment. We are not at this point (because the facts of our case do not require it) addressing ourselves to the constitutional guarantee to every State of a republican form of government. Article 4, § 4, United States Constitution. See *Baker* v. *Carr*: New Light on the Consti-

tutional Guarantee of Republican Government, Arthur Earl Bonfield, 50 Cal L Rev 245.

It seems hardly to be doubted that a State may have as a legitimate objective of classification, the effective representation of all its people in the legislative branch of government by legislators known, accessible, and responsive to their constituents' needs and that, so long as the districts in which the people are arranged have a reasonable and just relation to *that* purpose, the *minor* practical inequalities which *unavoidably* may result therefrom would not be violative of the rights guaranteed by the equality clause. No one has suggested, nor could anyone so suggest, that such was the purpose of the amendments. Even if we were to assume that was the purpose of the amendments, the wide disparity in the ratio of population between the most populous and the least populous districts (6.5 to 1 in 1952, over 12–1/2 to 1 today), a disparity neither minor nor unavoidable, would require our finding the amendments invidiously discriminatory in violation of the equality clause and, therefore, void.

As yet unresolved is the question whether a State may, as a matter of State policy, have as its objective in classifying its people into electoral districts, the dilution of the voting strength of some in favor of others. That, it would seem from the public controversy which followed announcement of the decision in *Baker* v. *Carr,* is the significant question. And that was precisely the objective of the 1952 amendments to our Constitution, an objective not difficult to perceive. See Mr. Justice KAVANAGH'S opinion at 360 Mich 1, 40, and Mr. Justice TALBOT SMITH'S at 360 Mich 1, 57. Whether or not the objective was permissible, a decision which need not be reached here although it is assumed to be permissible in the current opinions for dismissal, the arrangement of the districts was made without any

discernible or conceivable basis, let alone upon any rational basis, and for that reason cannot withstand plaintiff's constitutional attack.

Beyond the objective of affording to citizens effective representation in the legislature, it is difficult for me to conceive of any other legitimate State purpose for classification of citizens in their participation in the electoral process, a process inherently the equal right of each individual citizen. Perhaps there are such other legitimate objectives of classification which would constitutionally justify State denial of the citizen's right to a free and undiluted ballot, but if there are such, none has been suggested nor can any be imagined by me which would save the 1952 amendments from constitutional invalidity.

I agree with Mr. Justice KAVANAGH'S conclusion that today's declaration of invalidity of the 1952 amendments reinstates sections 2 and 4 of article 5 of the Constitution of 1908 as they existed prior to their attempted amendment. I also agree that the present senatorial districts cannot be sustained under the reinstated constitutional sections for the reason that their gross population disparities violate the reinstated requirement that they be arranged in accordance with population, as that requirement has been construed in *Giddings* v. *Secretary of State, supra,* and *Williams* v. *Secretary of State, supra.*

This brings me to the matter of relief. Mr. Justice KAVANAGH'S proposed judgment contemplates that the presently constituted senate may continue to function during the balance of the terms of its members, notwithstanding our declaration of invalidity of the constitutional provisions which arranged the districts within which its members were elected, on the theory that until succeeded by legally elected senators the present incumbents shall be entitled to

serve as *de facto* officers. He also contemplates that the incumbent senators properly may participate in the enactment of laws by means of which the judgment of this Court may be effectuated,—in other words, that the senate districts be rearranged in accordance with the provisions of reinstated sections 2 and 4 of article 5 of the Constitution of 1908 and means provided for the nomination and election of senators therefrom for the ensuing legislative term.

The Chief Justice, relying upon *Norton* v. *Shelby County,* 118 US 425 (6 S Ct 1121, 30 L ed 178), and citing *Carleton* v. *People,* 10 Mich 250; *People* v. *Payment,* 109 Mich 553; and *Kidd* v. *McCanless,* 200 Tenn 273 (292 SW2d 40), asserts that by our ruling that the 1952 amendments are void, "the senatorial districts created thereby become nonexistent" and, consequently, he concludes that the incumbents cannot act as *de facto* officers in the absence of *de jure* offices. Presumably, it would follow from his conclusion, there being no *de jure* nor *de facto* State senators following our judgment today, either that the full legislative power of the State resides exclusively in the house of representatives which may alone legally enact the necessary laws to effectuate the Court's judgment, or that the whole legislative process is suspended for lack of a validly existing senate. The prospect of an unicameral legislature, even for only the time it may take to establish new senatorial seats pursuant to the Constitution, presents a heady temptation for judicial experimentation. The other prospect, which one of my Brothers earlier[7] characterized as an "argument *in terrorem*", is not a practical possibility so long as this Court exercises responsibly its authority. I know of no constitutionally responsible court in the land which

[7] Mr. Justice BLACK, *Scholle* v. *Secretary of State,* 360 Mich 1, 120.

ever has, or would, countenance such a chaotic result,—and, certainly, there is no compelling reason for us to lead the way.

The *de facto* doctrine is another of our legal fictions by which the law manages somehow to preserve orderly governmental procedures when by some legal defect invalidating one's title to public office, his otherwise valid acts will be upheld by the courts. Otherwise, all who have business to transact with public officials would be compelled to ascertain their status as *de jure* officials at pain of invalidity of acts done under color of title to office. The doctrine has a salutary effect, thus broadly stated, but its obvious beneficial effect has been limited by some courts which have said that the doctrine does not apply where there is no *de jure* office. *Norton* v. *Shelby County, supra,* relied upon by the Chief Justice, is such a case but, like others so limiting the doctrine, it involved a situation where an office was attempted to be created, by act subsequently declared invalid, to perform duties constitutionally delegated to another office. Limitation of the doctrine in such cases settles what is fundamentally a dispute between 2 contenders for public power—one a *de jure* and the other a *de facto* officer. In the absence of such conflict, where the only question is whether validity is to be given to the acts of a *de facto* officer whose office is found to have been illegally created, there appears to be no reason in logic or law to so restrict or otherwise limit application of the legally convenient *de facto* doctrine.

In *Norton,* the officers whose rights to office were being challenged were asserting powers constitutionally delegated to the justices of the peace of the county. There were *de jure* officers performing such duties whereas here there is no such conflict between warring contestants for public office. The factual distinction, in my view, is significant. In *Norton,*

failure to find the usurpers to be *de facto* officers did not result in a failure of performance of any governmental office, let alone the legislative branch of government, as is the case here.

In the case now before us, it is not correct to say that the 1952 amendments which we here declare invalid created the senate, or the office of State senator, nor does the Chief Justice so say. He refers to the amendments as having created the senatorial districts and in this he is right. This distinction also is important in considering whether the refusal to apply the *de facto* doctrine in the *Norton* case has any applicability to our facts. Section 1 of article 5 of the Constitution of 1908, concerning the validity of which no challenge has been made, vests the legislative power of the State in a senate and house of representatives, subject to a reservation of some of such power to the people themselves. *That* is the valid constitutional provision which creates the senate, membership in which the incumbent senators claim to possess and the powers of which have been asserted continuously since 1953 under color of what was a presumptively valid constitutional arrangement of districts. I think no more is required to invoke the *de facto* doctrine to uphold the prior actions of the State senate and to afford it sufficient continuing status, at least until December 31, 1962, to preserve orderly government in this State and to provide a means by which the legislative branch of government can be organized next year as is required by our Constitution.

Lest it be thought what is here said is a novel departure from the law, reference should be made to the opinions in *Carleton* v. *People,* 10 Mich 250, cited by the Chief Justice as has been noted above. There, county officers were recognized as officers *de facto* who had been elected to fill offices which had not yet been legally created, the act creating such offices

having been passed by the legislature without giving it immediate effect so as to become law before the election. In *Attorney General, ex rel. Dingeman,* v. *Lacy,* 180 Mich 329, the acts of a domestic relation's court judge of Wayne county were upheld by a unanimous court as the acts of a *de facto* officer after the legislative act creating the court was declared unconstitutional, the circuit court having been granted by the Constitution the jurisdiction attempted to be granted by the legislature to its newly created domestic relations court. Reference should also be made to the cases cited in 43 Am Jur, Public Officers, § 475, from which it appears that *Norton* v. *Shelby County, supra,* is not by any means universally followed by the various State courts. I see absolutely no reason in logic to follow it in this case, nor does our law, legislative or common, require that we do so.

The problem with which we deal is too complex for simple solution. I have tried in this opinion to suggest some of the factors which may be judicially considered in determining compliance in such matters with the guarantees of equal protection provided by our own article 2 as well as the Fourteenth Amendment. Because the judicial problem is new, we must draw upon analogous situations in which such guarantees of equality have been applied. This can be, by the nature and magnitude of the problem, no more than a first effort at understanding it and recognizing its outer boundaries.

For reasons stated above, I join in Mr. Justice KAVANAGH's disposition of this case.

OTIS M. SMITH, J., concurred with SOURIS, J.

BLACK, J. (*concurring*). At present writing 5 opinions of this case, aggregating 76 typewritten

sheets, have been submitted for consideration of other members of the Court. Surely, borrowing now from Mr. Justice Clark (*Baker* v. *Carr*, 369 US 186, at p 251 [82 S Ct 691, 7 L ed 2d 663]), what we write bursts with too many words that go through so much and say so little. I would get back on the Federal track, the better to ascertain where we are, and where we should and so must go.

First: Palatable or not, it must be acknowledged by all that the Supreme Court of Michigan does not have the final word for the case before us. We sit now, exclusively as an inferior court, by direction of the United States supreme court, "in order that such proceedings may be had in the said cause, in conformity with the judgment of this [United States supreme] court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said appeal notwithstanding."[1] By such mandate we are told to determine the merits of a presented Federal question; not to decide whether we personally prefer—or do not prefer—the questioned amendments of our State's Constitution, and certainly not to determine whether the amount of the majority vote cast 10 years ago for such amendments is sufficient to overcome the Federal equality clause. No majority vote cast within a State, however overwhelming or even unanimous, can overcome such pre-eminent law. The reason:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." United States Constitution, Art 6 (2).

[1] Mandate of supreme court of the United States.—REPORTER.

Second: With triumvirate backs turned upon what proceeds apace—under *Baker* v. *Carr*—in many of the States, a tuneful triphony is sung for preservation of what my Brother DETHMERS repeatedly refers to as "republican government."[2] The song is not ended. Judging by past dissertations, the political melody will linger on until all voices are stilled by that final judgment of this case which, sooner or later, will be entered upon Federal precepts. "Intervention" by the Federal supreme court seems to irritate the more, *Baker* v. *Carr* and Justice KAVANAGH's opinion having applied fresh salt, as our former Chief Justice beholds what to him are the progressively lamentable doings of high court justices he has dubbed "judicial activists." (See U. S. News issue cited below, p 93.) Compare his stirring appeal today, for protection of "republican government" from the meddlement of activistic judicial officers, with what was said by him 3 years ago last December, in New York City:

"That there has been a trend toward centralization in Washington can scarcely be gainsaid. Challenged at mileposts along the way, it has advanced under the green light of judicial decisions. * * *

"These are part of the body of decisions giving rise to a concern that, by judicial construction, national powers are being too greatly and dangerously en-

[2] Mr. Justice Frankfurter, dissenting in *Baker* v. *Carr*, declared (p 324) what regrettably seems to be, that "Apportionment battles are overwhelmingly party or intraparty contests." By appended footnote the justice calls attention to "an instance of a court torn, in fact or fancy, over the political issues involved in reapportionment," citing *State, ex rel. Lashly*, v. *Becker*, 290 Mo 560 (235 SW 1017).

Intrigued, I have reviewed the case and discover among others this sobering confession (p 625):

"Shackled as we are with partisan bias and prejudice, it is humiliating to confess that even judges in our highest courts are unable to divorce law and politics. In emergencies, great and small, they have heard the Macedonian cry, and have not been disobedient to the call."

Yes, that Macedonian cry has been audible, all over Michigan, ever since this suit was instituted in 1959.

larged and State and local power correspondingly contracted. Of this trend, the conference of chief justices and many others have spoken with consternation. Great judicial self-restraint in this critical field of Federal-State relationships was enjoined upon the supreme court by the members of the conference. I concur."[3]

What indeed has contributed—in Michigan at least—to this trend toward "centralization" which, at Pasadena, is said to have caused so much "consternation"? Is it not, in fulsome part, due to the steady failure of many-times-elected executive officers of this and other similarly situated States (some being presently consternated Brethren seated here) to press upon legislators—as our Governor Groesbeck did with such force and effect in 1925—their sworn oath to rearrange and reapportion every 10 years? As said in Justice KAVANAGH's opinion, the issue before us never could have traced its way to the Potomac had the legislature of Michigan, during the decades of the 1940's and 1950's, performed faithfully according to constitutional oath. Let us, then, have done with criticism of that to which all of us, in greater or lesser degree of course, have contributed as governors, attorneys general, judges and citizens. Instead, let us turn to duty directed by the supremacy clause, the National equality clause, and our own fully concordant pledge of the protection of equal laws. And let us not report back to our superior court that we have just discovered a technical way to evade determination of the merits; such as saying that the questioned amendments cannot be judged void without destroying the law *de jure* which is creative of the office of State senator.

[3] U. S. News and World Report: "What a State Chief Justice Says About the Supreme Court," December 12, 1958, pp 88, 91, 92, address before the Congress of American Industry by "John R. Dethmers, Chief Justice, Supreme Court of Michigan."

As Justice SOURIS points out, the simple fact answer to Chief Justice CARR's "let's do nothing" motion is that original section 1 of article 5, the standing creator of the office of State senator, lives on as before unaffected by and unquestioned in this litigation. Furthermore, *Norton* v. *Shelby County,* 118 US 425 (6 S Ct 1121, 30 L ed 178), on which our Chief Justice presently relies, has since been confined most carefully in its proper area of fact by the United States supreme court. See *Shapleigh* v. *San Angelo,* 167 US 646, 658 (17 S Ct 957, 42 L ed 310), and *Tulare Irrigation District* v. *Shepard,* 185 US 1, 14 (22 S Ct 531, 46 L ed 773). *Shapleigh,* quoted in the margin,[4] is a fair example of such continued confinement, in the courts of the United States, of *Norton's* rule that where no law creates an office such an office cannot be occupied *de facto.*

Third: We are, I repeat, directed to consider and decide the merits of a Federal question the United States supreme court has sent back to us in the clothing of jurisdiction and justiciability. Is it not, then, exclusively due that we should look for judicial guidance to current Federal authority, and to such of our own cases as may accord therewith, rather than to the relevantly superseded scroll of the Federalists and other writings of the Colonial era? The Federalist Papers, ably conceived for times when all west of the Alleghanies was trackless and savage, were written more than 175 years ago by men who could not possibly have foreseen the Fourteenth

[4] "*Norton* v. *Shelby County,* 118 US 425, is not to the contrary. There certain persons who undertook to act as county commissioners were adjudged to be usurpers as against others who were lawful officers, and it was held that, as the acts of the legislature which created the board of commissioners was unconstitutional, there were no *de jure* offices, and, therefore, no *de jure* officers. But the general rule was recognized that 'where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions.' "

Amendment, the seeds from which the amendment grew, and its final mandate of equal protection. The equality clause of the Fourteenth Amendment is an order directed to each State. It has nothing to do with the political structure of the National government and, in the context of our current problem, is an understandable contradiction of that structure. The clause pointedly prohibits each State from denying "to any person within its jurisdiction the equal protection of the laws." It does, under direction of our superior, put upon us a new task, that of inquiring into the merits of plaintiff's claim of denial by Michigan of Fourteenth Amendment equality of voting rights; an inquiry 3 of us resolved affirmatively in *Scholle* v. *Secretary of State,* 360 Mich 1.

Nothing done within the borders of Michigan, whether by constitutional provision, statute, executive proclamation, ordinance, or administrative order, may impede the execution of that task. The supremacy clause so dictates. So do the authorities cited in Justice KAVANAGH's opinion, to which I would add *Bute* v. *Illinois,* 333 US 640 (68 S Ct 763, 92 L ed 986);[5] also the adjuration which, in 1899 and again in 1901, was declared and repeated in the 2 *Blythe Cases* (*Blythe* v. *Hinckley,* 173 US 501, 508 [19 S Ct 497, 43 L ed 783]; 180 US 333, 338 [21 S Ct 390, 45 L ed 557]).[6] Hence my disagreement with Justice DETHMERS' repetitious and apparently serious postulate that "An equal protection of the laws problem is not presented." That postulate I now

[5] "We recognize that the Fourteenth Amendment, as part of the supreme law of the land under article 6 of the original Constitution, supersedes 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'." (*Bute* v. *Illinois,* p 658.)

[6] "The State courts had concurrent jurisdiction with the circuit courts of the United States, to pass on the Federal questions thus intimated, for the Constitution, laws and treaties of the United States are as much a part of the laws of every State as its own local laws and constitution, and if the State courts erred in judgment it was mere error, and not to be corrected through the medium of bills such as those under consideration." (180 US 338.)

examine, admittedly with distrust as well as curiosity.

Justice DETHMERS simply cannot be right; at least in this case where our words are not final words. If an "equal protection of the laws problem is not presented," the supreme court of the United States would not have taken jurisdiction of this case and would not have sent it back for meritorious consideration in the light of another equal protection case, *Baker* v. *Carr*. When in the face of such mandate any State court judge says that the question we are directed to decide "is not presented," he surely defies higher authority. He should be challenged, with due vigor by others seated here, lest silence suggest tacit approval.

Fourth: As an understating Englishman would say, our problem is not without difficulty. No matter where we look and turn, the ominous storm of predicament gathers with warning of reprisals and conjured new reasons why this Court cannot move with affirmative firmness. To Dirksenize our judgment by telling the legislature that questioned sections 2 and 4 will be judged void, as soon as that body enacts validly under original sections 2 and 4, is to perpetuate an unconstitutional body for another 2 years (and doubtless more years depending on the outcome of 4 Supreme Court elections scheduled during the next 9 months). To delay judgment, and thus to knuckle before today's threat to obstruct Federal as well as State justice, is unthinkable. That threat, once there is an overt act, will menace the threateners only.[7] And to dismiss the case with

[7] "Whoever, by threats or force, wilfully prevents, obstructs, impedes, or interferes with, or wilfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both." Pub L 86-449, Title 1, § 101, May 6, 1960, 74 Stat 86 (18 USCA, 1961 Supp, § 1509).

prejudice means sure reversal; reversal for having ruled that a State constitutional provision is somehow of greater force than the Federal equality clause.

And the disunited Kellys provide no help; only more trouble. Attorney General Kelley would have us act, promptly in time for election day November 6th. Justice Kelly warns us act not at all, and even that with slow "haste." So a trouble is what man makes it, and when Kellys stir up its brew, the quaffing is man's own torment, and woe is his requiem too.

"'Here's to the Maine, and I'm sorry for Spain,'
Said Kelly and Burke and Shea. * * *

"'Wherever there's Kellys there's trouble,' said Burke.
"'Wherever fighting's the game,
Or a spice of danger in grown man's work,'
Said Kelly, 'you'll find my name.'"[8]

If what our majority does means "haste" to my veteran Brothers, so be it. They are the ones who cried "haste" when I formally moved—shortly after the opinions of *Scholle* v. *Secretary of State* were released April 23, 1962—that a date be set for resubmission during our June session, preferably June 11th (an available date which stayed available). That was not done, as the order quoted in Justice KAVANAGH'S opinion fully discloses, and there we find the real reason why this Court is in position where it may allot 33 days only for the enactment of that constitutional legislation original and now reinstated sections 2 and 4 do require.

Sometimes appellate judges must get down to work on one all-important case to outright exclusion of less important work. This is such a case.

[8] Joseph Ignatius Constantine Clarke, The Fighting Race.—REPORTER.

Whatever advices our effort will provide for the constitutional convention must be sent forth with dispatch. That assembled body is due for final adjournment 14 days hence, and its regular successor cannot be around until 1977. And we cannot legalize, even *de facto,* an unconstitutional body for any longer period of time than is fairly necessary to legislate and then elect.

Little more need be said about "haste." A liberal dose of activistic catharsis will do Michigan's judicial process no harm and, in this instance, may provide for our State a healthy new start. Some regard must be had in the course of judicial functioning for the comparative shortness of human life. And if as it seems Justices seated here must belong to one class or the other, I prefer "judicial activism" over "judicial obstructivism."

To conclude: The merits of this case presented no more difficulty 2 years ago than now. Jurisdiction to judge the merits did. Now that we have been loaned the Fourteenth Amendment "for employment in cases where the constitution or laws of a State create and insure gross inequality of voting power of citizens" (*Scholle* v. *Secretary of State,* 360 Mich at 120), I again, this time with justiciable authority, "agree fully with Mr. Justice KAVANAGH'S presentation of the case and especially with his conclusions upon the admitted as well as proven facts." (*Scholle* v. *Secretary of State, supra,* at 123.)

ADAMS, J., did not sit.

TAYLOR *v.* AUDITOR GENERAL.

1. COURTS—SUPERIOR COURT OF GRAND RAPIDS—INCREASE OF SALARY DURING TERM.

   The superior court of Grand Rapids, organized under a statute entitled "An act to provide for a municipal court in the city of Grand Rapids, to be called 'The superior court of Grand Rapids,'" is a municipal court, not a *circuit court*, within provision of the Constitution prohibiting increases in salary of any "public officer, except circuit judges" after election or appointment (Const 1908, art 16, § 3; CL 1948, § 727.1 *et seq.*, as amended).

2. SAME—SUPERIOR COURT OF GRAND RAPIDS—CIRCUIT COURTS—JURISDICTION.

   The establishment by the legislature of the superior court of Grand Rapids, thereby relieving the circuit court of the county within which it was located of a portion of its business, did not destroy or materially affect the jurisdiction conferred upon circuit court of that county or circuit courts elsewhere in the State (CL 1948, § 727.1 *et seq.*, as amended).

3. SAME—MUNICIPAL COURTS—STATUTES—CIRCUIT COURTS—CONSTITUTIONAL LAW.

   Municipal courts, such as the superior court of Grand Rapids, derive their powers from legislative action, whereas circuit courts are invested by the Constitution with powers of which they cannot be deprived by the legislature (Const 1908, art 7, §§ 8–12; CL 1948, § 727.1 *et seq.*, as amended).

4. JUDGES—SUPERIOR COURT OF GRAND RAPIDS—CIRCUIT JUDGES—INCREASE OF SALARY DURING TERM.

   The salary of the judge of the superior court of Grand Rapids may not be increased during his term of office, since he is neither legally nor factually a circuit judge within the exception to

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REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur, Courts § 17.
[2, 3] 14 Am Jur, Courts §§ 12, 13.
[4, 5] 30A Am Jur, Judges § 67 *et seq.*

the general prohibition in the Constitution against increase of salary of public officers after election or appointment (Const 1908, art 16, § 3; CL 1948, § 727.1 *et seq.*, as amended).

5. COURTS—PRECEDENTS—INCREASE OF SALARY DURING TERM OF OFFICE.

Precedents from other States where salaries of public officers were subject to increase by virtue of increase in population or assessed valuation of property do not support claim of right under statute to increase of salary for judge of superior court of Grand Rapids when circuit judges' salaries were increased, since such latter action is done by legislative action, and except for circuit judges, the Constitution specifically prohibits the increase of salaries of public officers after election or appointment (Const 1908, art 16, § 3; CL 1948 and CLS 1956, § 727.6).

6. APPEAL AND ERROR—QUESTIONS REVIEWABLE—SALARY OF JUDGE OF SUPERIOR COURT OF GRAND RAPIDS—STATUTE OF LIMITATIONS—FILING OF CLAIM.

A decision of the Supreme Court denying any relief to plaintiff, former judge of the superior court of Grand Rapids, for additional salary during 3 six-year terms of office, renders it unnecessary to discuss defendants' asserted defenses of statute of limitations and plaintiff's failure to observe provision of court of claims act with reference to time of notice of an intent to file a claim and the filing of such claim (CL 1948, §§ 691.111a, 691.117).

BLACK and KAVANAGH, JJ., dissenting.

Appeal from Court of Claims; Fox (Noel P.), J., presiding. Submitted January 3, 1962. (Docket No. 18, Calendar No. 49,178.) Decided September 7, 1962. Rehearing denied November 5, 1962. Certiorari denied by the supreme court of the United States February 18, 1963.

Claim by Thaddeus B. Taylor, former judge of the superior court of Grand Rapids, against State of Michigan, and Otis Smith, Auditor General, for additional salary. Judgment for plaintiff. Defendants appeal. Reversed and remanded for entry of judgment for defendants.

Thaddeus B. Taylor, in propria persona (*F. Roland Allaben,* of counsel).

Frank J. Kelley, Attorney General, *Joseph B. Bilitzke,* Solicitor General, and *Russell A. Searl,* Assistant Attorney General, for defendants.

CARR, C. J. The superior court of the city of Grand Rapids was created by, and organized pursuant to, PA 1875, No 49.[1] The Constitution of 1850 then in force and effect provided in article 6, § 1, thereof that:

"The judicial power is vested in one Supreme Court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities."

That the legislative action was taken pursuant to the permissive authority granted by the provision quoted of the then fundamental law of the State is apparent. The statute was entitled:

"An act to provide for a municipal court in the city of Grand Rapids, to be called 'the superior court of Grand Rapids.'"

The provisions of the act were in accord with the general purpose set forth in the title. Notice of the election of the judge of the court was required to be given in the manner prescribed by law with reference to city officers. One elected to the office, under the statute as amended in 1881, entered on the performance of his duties on the first Monday of May next succeeding his election. Pursuant to amendment the clerk has been, and now is, appointed by the judge of the court for a term of 2 years. It is further provided by the statute, as amended, that the judge shall

[1] See CL 1948 and CLS 1956, §§ 727.1–727.38 (Stat Ann and Stat Ann 1959 Cum Supp §§ 27.3611–27.3648).—REPORTER.

appoint a chief deputy clerk who shall also perform the duties of bailiff. Power of removal of said officers of the court is vested in the judge thereof. Other provisions of the statute clearly indicate the purpose of the legislature to establish a municipal court pursuant to the permissive authority granted with reference thereto by the State Constitution then in effect.

The plaintiff in the instant case served as judge of the superior court of Grand Rapids for a number of terms, retiring on May 4, 1959. Involved here is the question as to the amount of compensation that he was entitled to receive from the State during the last 3 of the 6-year terms served by him. The statute creating the court provided in section 6 thereof as originally enacted, and as subsequently amended, that:

"The judge of said superior court shall receive from the treasury of the State of Michigan the same annual salary as may be payable to circuit judges."

The statute also authorizes additional payments to be made by the city of Grand Rapids pursuant to action of the legislative body thereof.

The present action was instituted in the court of claims of the State, plaintiff seeking a declaratory judgment with reference to compensation that he asserted was owing to him but which State officials declined to pay. The petition was denied for reasons set forth in *Taylor* v. *Auditor General,* 360 Mich 146, and thereafter plaintiff's statement of claim was amended in such manner as to assert the right to a judgment for the aggregate of the alleged withheld payments. The amended claim, referring to the provision of section 6 of the act creating the superior court, above quoted, asserted that on the 10th of January, 1942, the annual salary of circuit judges, payable by the State, was fixed by legislative action

at $7,000, that plaintiff was entitled to a like salary but was paid at the rate of $6,000 per annum until the first of May, 1947, when a new term began. Likewise, during such new term the annual salary of circuit judges was fixed at $9,000 but that plaintiff continued to be paid at the rate of $7,000 until the expiration of his current term of office and his entry on a new term in May, 1953. In August, 1954, the salary of circuit judges was fixed at $12,500 but the officers of the State charged with the duty of paying plaintiff's salary refused to make payments to him at the increased rate during the continuance of his then term of office. Plaintiff asserted that during the aggregate period in question he should have received from the State of Michigan the sum of $28,978.46 over and above the salary payments made to him. He sought judgment for that amount, together with interest, claiming that the officers of the State whose acts he questioned improperly determined the salary that he was lawfully entitled to receive.

The State contested plaintiff's right to the additional payments claimed by him, asserting that under article 16, § 3, of the present Constitution of the State (1908) plaintiff's salary could not be increased during a current term of office. Said section reads as follows:

"Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employee or contractor after the service has been rendered or the contract entered into. Salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."

It was the contention of the defendants on the hearing of the matter in the trial court that plaintiff

was not a circuit judge within the meaning of said section of the Constitution, that he was not entitled to the benefit of the specific exception made in favor of such judges, and that the payments that he claimed should have been made to him were forbidden by the Constitution. It was further pleaded by way of affirmative defenses that the statute of limitations[2] barred all portions of plaintiff's claim asserted to have accrued prior to November 14, 1955; and that plaintiff, having failed to institute action or give notice of his intention to do so within a period of 1 year from the date his claimed cause of action accrued, as provided by section 11a[3] of the court of claims act, was barred as to the portion of his said claim accruing prior to November 14, 1957.

Following a hearing the trial judge rejected defendants' claims and entered judgment for plaintiff in the aggregate sum of $39,190.58 with interest thereon at the rate of 5% per annum from November 15, 1960. From the opinion filed it would appear that the trial judge accepted plaintiff's theory that because of the nature of the jurisdiction vested in the superior court plaintiff was, from both a practical and legal standpoint, a circuit judge within the meaning of article 16, § 3, of the present State Constitution (1908). Defendants have appealed from the judgment entered, asserting that the superior court of Grant Rapids is not a circuit court, that plaintiff during the period in question was not a circuit judge within the meaning of the term as used in the State Constitution, and that the statutory provision on which plaintiff relies that the State shall pay him the same salary as is paid to circuit judges cannot be given the force and effect of render-

[2] See CL 1948, § 691.117 (Stat Ann 1959 Cum Supp § 27.3548 [17]).—REPORTER.

[3] CL 1948, § 691.111a (Stat Ann 1959 Cum Supp § 27.3548 [11-1/2]).

ing inapplicable the specific prohibition of article 16, § 3.

As before suggested, there is nothing in the act creating the superior court of Grand Rapids or in subsequent amendments thereto, including PA 1877, No 147, indicating that the legislature of the State has at any time regarded said court as a circuit court. The title of the act of 1875 is significant in this regard, and that title has never been changed. There can be no question as to the provision of the Constitution of 1850 on which the legislature relied in providing for a municipal court in Grand Rapids. The status of said court was involved in several cases arising shortly after its organization, among which are *People, ex rel. Heath,* v. *Kent Circuit Judge,* 37 Mich 372; *People, ex rel. Allen,* v. *Kent Circuit Judge,* 37 Mich 474; *Grand Rapids, N. & L. S. R. Co.* v. *Gray,* 38 Mich 461. In the latter case the Court, after referring to article 6, § 1, of the Constitution of 1850, said (pp 464, 465):

"It is also clearly apparent that each circuit, as contemplated in and provided for by the Constitution, should include at least 1 county, and that at no time could there be more than 1 circuit court in a county or a circuit and a county court in the same county. It must however have been a matter considered by the members of the constitutional convention, engaged as they were, in the preparation of a judicial system permanent in its character, that a necessity might thereafter arise in some circuits, to relieve them from a part of their business; that in the growth and development of the State, cities would be springing up, in which, owing to the large manufacturing, mercantile and other business carried on and transacted therein, considerable litigation might be expected to arise, and that the circuit court of the county in which such city or cities were situate, would be inadequate to meet the growing demands made upon it in a prompt and satisfactory

manner, and that it might therefore at some time become necessary to establish 1 or more courts in particular cities to relieve the circuit of a portion of the business, and that with this object and purpose in view the clause in question authorizing the legislature to establish municipal courts in cities was inserted.

"There was not however, in my opinion, any intention, by the insertion of this clause, to destroy or materially change or affect the jurisdiction conferred upon the circuit courts, or any of them, or, that such municipal courts when established, should have a jurisdiction, territorially, in any class of cases, coextensive with the limits of the county, much less of the entire State. They were in my opinion intended for the benefit of and to meet the wants of the city in which they were established."

In *Dunham* v. *Tilma,* 191 Mich 688, the question arose as to whether the judge of the superior court of Grand Rapids was entitled to receive during his current term an increase in salary sought to be made by the common council of Grand Rapids. An action of mandamus was instituted against the comptroller of the city to compel him to recognize the increase. It is interesting to note that essentially the same question was raised on behalf of the plaintiff as in the instant case. Specifically it was claimed that the establishment of the superior court of Grand Rapids was not the creation of a new court "but merely a division and continuation of an already established court—the circuit court for the county of Kent—and a carving out therefrom, and a division of the jurisdiction thereof, on a territorial basis." This Court in a unanimous opinion written by Justice PERSON rejected the claim made, pointing out (p 691) that if it were well-founded the superior court without any grant from the legislature would possess all the powers vested by the Constitution in circuit courts. It was emphasized, however, citing *Nichols* v. *Judge*

of Superior Court, 130 Mich 187, that municipal courts derive their powers from legislative action and that without reference to the extent of such powers they still remain municipal courts. *People, ex rel. Covell,* v. *Treasurer of Kent County,* 36 Mich 332.

The opinion in *Dunham* v. *Tilma* further emphasized the fact that the superior court of Grand Rapids was professedly organized as a municipal court. It was pointed out that judges of circuit courts may fill vacancies in the office of county clerk or prosecuting attorney, and that the clerk of the county is the clerk of the circuit court for such county. No claim is or can be made that the judge of the superior court of Grand Rapids has any such power of appointment, or that the county clerk is the clerk thereof. *Dunham* v. *Tilma* was quoted and followed in *Mooney* v. *Unemployment Compensation Commission,* 336 Mich 344, in which it was held that a statutory provision granting a right of review by writ of certiorari from circuit court did not vest jurisdiction in the superior court of Grand Rapids, jurisdiction to the municipal court not having been specifically granted by the legislature.

While plaintiff herein was serving his last term as judge of superior court the legislature by PA 1954, No 155, increased the salary of circuit judges to $12,500 per annum. Relying on the same statutory provision that is invoked in the present case, plaintiff instituted mandamus proceedings in this Court to compel the auditor general to issue payroll vouchers increasing his salary to conform to that paid to judges of circuit courts. *Taylor* v. *Auditor General,* 342 Mich 265. The defense to the action was based on article 16, § 3, of the State Constitution (1908). In sustaining the defense it was said (p 269):

"The provision of the Constitution is clear. The legislature cannot fix plaintiff's salary by reference and thus circumvent the express constitutional inhibition against the increase of plaintiff's salary during term. He is not a circuit judge, does not come within the plainly worded exception to the constitutional inhibition, and his salary cannot be increased during term."

It would seem to be unnecessary to pursue further the discussion as to whether the superior court of Grand Rapids may be regarded as a circuit court and the judge thereof classified as a circuit judge within the meaning of article 16, § 3, of the State Constitution. The answer to the query does not lie in the similarity of powers, subject to exceptions and territorial restrictions, but basically rests on the fact that circuit courts are invested by the fundamental law of the State[4] with powers of which they cannot be deprived by legislative action, while the extent of jurisdiction of municipal courts is a matter subject to legislative control, under constitutional provisions pertaining to such functions and to the exercise of the legislative prerogative. As appears from the language of the act creating it, from amendments thereto, and from decisions of this Court relating to the matter, the superior court of Grand Rapids was created under the grant of authority to the legislature to establish municipal courts in cities. We cannot avoid the conclusion as expressed in prior decisions of this Court that the judge of the superior court of Grand Rapids may not be regarded as a circuit judge and as such within the exception set forth in the constitutional provision here involved. On the contrary, he is subject to the general inhibition of that provision and his salary may not be increased during his term of office on the theory that he is either legally or factually a circuit judge.

[4] See Const 1908, art 7, §§8–12.—REPORTER.

This brings us to a consideration of the question as to the practical effect of section 6 of the act of 1875 creating the superior court of Grand Rapids. That act provided, as does the amended statute,[5] that the judge of the superior court shall receive from the State of Michigan the same annual salary as may be payable to circuit judges. It is the claim of the plaintiff in substance, which claim the trial judge apparently accepted, that this provision of the statute constitutes the establishing of a formula pursuant to which compensation of the superior court judge is to be determined from time to time. Reliance is placed on decisions from other States involving statutes fixing compensation to be paid to certain public officials on the basis of population.

Typical of such decisions is *State, ex rel. Mack,* v. *Guckenberger,* 139 Ohio St 273 (39 NE2d 840, 139 ALR 728). Involved there was a State statute undertaking to fix additional compensation for a judge of a court of common pleas on the basis of 3 cents per capita for the first 50,000 population of the county of residence at the time of election or appointment, as ascertained by the Federal census. It was held that a change in population would entitle the incumbent of the office in question to an increase in salary during his term if it was established by the census that the population had increased to such an extent as to authorize it. A constitutional provision against increasing salaries during terms of office was held not applicable. Of like import are *Crowe* v. *Board of Commissioners of St. Joseph County,* 210 Ind 404 (3 NE2d 76); *State, ex rel. Harvey,* v. *Linville,* 318 Mo 698 (300 SW 1066); *Puterbaugh* v. *Wadham,* 162 Cal 611 (123 P 804). In the above cited decisions, however, it appears that no legislative action claimed as the basis for an increase in

[5] See PA 1875, No 49, § 6, and also CL 1948 and CLS 1956, § 727.6 (Stat Ann and Stat Ann 1959 Cum Supp § 27.3616).—REPORTER.

compensation during a current term of office was involved. In the case at bar the situation is otherwise. Each increase in the salary of circuit judges, from which plaintiff claims the right to benefit, was due directly to legislative action. We are not, in other words, dealing with a formula resting on the basis of a change in population, an increase or decrease in assessed valuation, or other analogous factor. If plaintiff is entitled to the various increases that he claims in this proceeding it is by virtue of the fact that the legislature spoke and that its action in so doing required the payment to him of increased compensation during his term of office. Such an increase would be as much due to legislative action as though stated in specific language.

Reliance is placed by plaintiff on the decision of the supreme court of Colorado in *Blakeley* v. *People, ex rel. Madden,* 104 Colo 206 (89 P2d 1015). That was a proceeding in mandamus to require the payment of additional salary to the judge of the juvenile court of the city and county of Denver. For some years a salary of $4,000 per annum had been paid. On June 7, 1937, there became effective an act of the legislature fixing the salary of district judges at $5,000 per annum. By prior act of 1923 payment to juvenile court judges of a salary not less than that received by district judges was directed. Relying on said act plaintiff in the case claimed that the increase of the salary of district court judges to $5,000 automatically increased his pay to the same amount during his current term. The defendants relied on a provision of the State Constitution directed against an increase or decrease in the salary of any public officer, after election or appointment, as fixed by legislative enactment. The constitutional provision in question was adopted in 1928. Commenting thereon (p 209) the majority opinion in the case deemed it reasonable to infer that the voters in adopting the

amendment believed "that authorized change in salaries of district judges, when made, would work immediate like result as to the salary of the judge of the juvenile court." It would appear therefore that the Colorado court, in upholding the claim of the plaintiff that he was entitled to the increase in salary, did so on the basis of an assumption that the people had adopted the constitutional provision after the statute had been adopted in 1923 in the belief, or on the theory, that the statute would control and that the prior existing status would continue. It is significant that 2 members of the court dissented, expressing their reasons for dissent in the following terse statement (p 215):

"I think the court's opinion sanctions not only amendment of the constitution by indirection and implication, but amendment by the legislature. My reason for that conclusion, to which I think no answer has been made, may be thus briefly stated: There is not a word in the constitution about a juvenile judge or his salary. Hence if he has any salary it must be provided solely by statute. During every minute that court has been in existence the constitution has forbidden the application of changes in salaries so fixed to persons then in office. This judge was in office when the statute was passed, hence he cannot take the increase during that term."

Whether the assumption on which the majority of the members of the Colorado court apparently relied was properly made does not require discussion. It is certain in the instant case that the interpretation of article 16, § 3, of the Michigan Constitution (1908) does not involve any such consideration. The Constitution of 1850 provided in section 20 of the schedule thereof that "it shall not be lawful hereafter for the legislature to increase or diminish the compensation of any officer during the term for which he is elected or appointed." This provision remained in

force until the effective date of the present Constitution, January 1, 1909. Up to that time it was not within the power of the legislature to increase the salaries of circuit judges, or the salary of the judge of the superior court of Grand Rapids, effective during current terms of office. If we assume, as the trial court suggests in his opinion, "PA 1875 No 49, § 6 was in the minds and intelligence of the delegates to the convention of 1908" the query naturally suggests itself why specific mention was not made in article 16, § 3, of the superior court judge. That was not done and there is no basis for any inference that an unexpressed inclusion was intended. The sole authority cited in support of plaintiff's position as to the effect to be given to section 6 of the act of 1875 is the holding of the majority of the Colorado court, which holding we decline to follow.

The conclusion reached on the principal questions at issue renders it unnecessary to consider the arguments of the defendants with reference to the statute of limitations and the failure to observe the requirements of the court of claims act with reference to the time of notice of an intent to file a claim and the filing of such claim.

The case is remanded to the trial court with directions to set aside the judgment entered and to render judgment in favor of the defendants.

DETHMERS, KELLY, and SOURIS, JJ., concurred with CARR, C. J.

BLACK, J. (*dissenting*).

"What can we know? or what can we
discern,
When error chokes the windows of the
mind?"

Sir John Davies, The Vanity of Human Learning (Nosce Teipsum), stanza 15.

Our unintentional yet grievous error, committed in 1955 against faithfully deserving Judge Thaddeus B. Taylor (*Taylor* v. *Auditor General,* 342 Mich 265), really does choke the windows of some minds here. There is no other rational way to account for the presently proposed opinion for reversal of this eminently rightful judgment of the court of claims.

Finally, after 7 years of admirable patience and dogged perseverance, Judge Taylor has forced us to consider and treat that pat authority and established principle (found particularly in *Blakeley* v. *People, ex rel. Madden,* 104 Colo 206 [89 P2d 1015]) he has righteously relied upon ever since filing—September 29, 1954—of his original petition for mandamus. After 3 entreaties by Judge Taylor (*Taylor* v. *Auditor General, supra,* decided April 14, 1955; *Taylor* v. *Auditor General,* 360 Mich 146, decided June 6, 1960, and now Taylor *v.* Auditor General) we will have forthrightly done something at least, that is to say, this Court will have faced up to the precedent *Blakeley* supplies for dovetail with our own similarly snubbed case of *People* v. *Reigel,* 120 Mich 78. I shall refer to such principle as that which is made when the constituted legislative body ordains that the amount of salary a to-be-elected-or-appointed public officer is to receive, in whole or in part during his term, shall be determined according to a readily ascertainable "fluctuating factor." (The expression is taken from presently quoted OAG 1951-1952, p 38, No 1269.)

At this point, farsing with due purpose, I insert a manifestly fair question: Were the presently considered *Blakeley, Guckenberger, Crowe,* and *Reigel Cases* examined *at all* by the Court when the first *Taylor Case* was considered and decided in 1955? Although cited and stressed on each occasion (*Taylor* 1955 and *Taylor* 1960),* *Blakeley* in particular was ignored by majority opinion signers, so far at least as the official opinions disclose. On both occasions the Court deigned no recognition or treatment of the easily understood aphorism that legislatures may and occasionally do, with constitutional propriety, provide for prospective and during-term escalation of the salaries of public officers by acting and enacting *prior to election for the official term in question.* And no regard (again as far as the official opinions disclose) seems to have been given that vital word "annual" which, prior to and throughout all of Judge Taylor's elective terms and continuous years of service (1932–1959), appeared in the *only statute which authorized payment to him of any salary whatever from Michigan's treasury.* A man cannot receive "the same annual salary" another receives unless he receives the same amount annually. And he assuredly does not receive the same amount annually when the other's received amount fluctuates regularly upward as his received amount remains stationary.

First: Present is a fact—a *controlling* fact—which makes for unerring decision of this case if we will but let it shine through the "windows" of the judicial mind. It is that the legislature has exclusively provided, continuously for more than 85 years, that the judge of the superior court of Grand Rapids "shall receive from the treasury of the State of Michigan the *same annual salary* as may be payable to circuit judges" (see section 6 of the act of 1875 and notes of

* Starting on page 15, Judge Taylor's 1955 brief devoted 6 full pages to discussion and quotation of then-scorned *Blakeley.*

amendments, CL 1948, § 727.6). The phrase reads now, in full (CLS 1956, § 727.6 [Stat Ann 1959 Cum Supp § 27.3616]):

"Sec. 6. The judge of said superior court shall receive from the treasury of the State of Michigan the same annual salary as may be payable to circuit judges, and payable in the same manner as are circuit judges."

If the legislature had constitutional power to enact such a statute, and the Chief Justice carefully refrains from denial of such power, then we have before us no more than a question of statutory interpretation, with respect to which the following is submitted. The Chief Justice says:

"If plaintiff is entitled to the various increases that he claims in this proceeding it is by virtue of the fact that the legislature spoke and that its action in so doing required the payment to him of increased compensation during his term of office."

Here we agree and square off. I say the legislature *did* speak, exactly as in *Blakeley* and for many more continuous years prior to all of Judge Taylor's term-tenures; that by its action of 1875 and the successive statutes authorizing increases of State-paid salaries for circuit judges the legislature *did* authorize and require the payment to Judge Taylor of the correspondingly increased compensation Judge Fox awarded him in the court below.*

Now let *Blakeley* speak. The facts are identical. All of the writing justices—not just the majority—held to the only permissible legislative intent, arising from said section 6 (including that word "annual"). What the 7-man court did differ upon, 4 to 2 with 1 justice not participating, was the constitu-

* Indeed, during all his years of tenure, no statute excepting said section 6 determined the *amount* of salary Judge Taylor should receive from the State treasury.

tional question arising from the same no-increase no-decrease provision which appears in the Constitutions of Colorado and Michigan. To make our record clear upon this point I quote here the entire *dissenting opinion* of Justices Burke and Bock, which *dissent* the Chief Justice, ignoring all extant authority including *Reigel, supra,* would have us adopt (p 215):*

"I dissent. I think the court's opinion sanctions not only amendment of the constitution by indirection and implication, but amendment by the legislature. My reason for that conclusion, to which I think no answer has been made, may be thus briefly stated: There is not a word in the constitution about a juvenile judge or his salary. Hence if he has any salary it must be provided solely by statute. During every minute that court has been in existence the constitution has forbidden the application of changes in salaries so fixed to persons then in office. This judge was in office when the statute was passed, hence he cannot take the increase during that term."

When *Blakeley* came to consideration, and for 11 years prior thereto, Colorado's constitution provided: "No law shall extend the term of any public officer, or increase or decrease his salary, after his election or appointment, as fixed by legislative enactment" (Colo Const [1876, amended 1928], art 5, § 30). It was shown that the salary of the office of the petitioner judge† was originally fixed, by enactment in the year 1907, at the sum of $4,000 per year; also that, prior to his election (in 1936), the salary of such office was continuously tied to that of the dis-

* Courts usually follow *majority* rather than *minority* opinions, especially when the former appear as having been the subject of greater care and are supported not only by separate and respectable opinions of complete concurrence but also by the clear weight of reasoned authority. For such clear weight and pronouncement thereof, see *State, ex rel. Mack,* v. *Guckenberger, post.*

† Judge Madden, the petitioner in mandamus, held the office of judge of the juvenile court of the city and county of Denver.

trict judge or judges of the county by an act of 1923 providing that the judge of his court "shall receive an *annual* salary of not less than that received by the district judge or judges of such county." It was shown further that the salaries of such district judges were raised in 1937, from $4,000 per annum to $5,000 per annum, and that the respondent fiscal officers refused to pay the petitioner at the higher rate. The respondents relied of course, as do the defendants here, on the mentioned no-increase no-decrease provision. The majority ruled (pp 208, 209):

"If it may be said that relator's salary was fixed in the sense of sum or amount at the time of his election, then on authority of *Carlile* v. *Henderson,* 17 Colo 532 (31 P 117), and *Henderson* v. *County of Boulder,* 51 Colo 364 (117 P 997), called to our attention by counsel for respondents, the contention that there was error below would be sound; and had the act of 1907 remained unchanged, the essential fixity of salary would be manifest. But in 1923, as we have seen, the legislature amended the 1907 act in the matter of the salary of the judge of the juvenile court by tying it, as to amount, to the salary of district judges. The language is, that the judge of the juvenile court 'shall receive an annual salary of not less than that received by the district judge or judges' of his county. Clearly, as we conceive, the legislature intended that the salary of the judge of the juvenile court (unless, indeed, county authorities should voluntarily pay a larger salary) shall at all times correspond with, and be not less than, that which the State pays its district judges; and only in that sense did the act of 1923 fix the salary of the judge of the juvenile court. Until the 1923 act, the act of 1907 made full revelation as to the amount of salary of the judge of the juvenile court. But when the act of 1923 became effective the amount of such salary was ascertainable only by an examination of that act *and* whatever law fixed the amount of salary

of district judges. The process of ascertainment necessarily was a continuing one; that is to say, to cognize the salary of the judge of the juvenile court at any given time, resort must be had to the law in relation to the salary of district judges then in force."

Justice Young, concurring unreservedly and specially, declared his conviction this way (pp 210, 211):

"If the amount he [the judge] is to receive is definite and certain and fixed in dollars and cents, the officer is entitled to receive the specific amount so provided, no more and no less, regardless of any legislative change in the amount made after his election or appointment. If the compensation he is to receive depends on a contingency, as for example, upon the amount of fees he shall receive when fees are fixed and the officer is allowed to retain them, then the compensation, as to the manner of its determination, is fixed, though as to the amount actually to be received it is contingent. One entering upon such an office does so with his compensation fixed though the amount he will receive in dollars and cents is uncertain. * * *

"The effect of section 30, article 5 is to give to the elected or appointed official a vested right to all the compensation that he may receive by virtue of the law providing for his compensation at the time of his election or appointment to office. If the law in force at that time is such that the compensation may vary by reason of the happening of reasonable contingencies, there is vested in the official the right to increased benefits that may accrue, and there is imposed upon him the burden of diminished benefits which may result as the contingencies do or do not arise."

Now let us ascertain whether the truncated reasoning of Justice Burke's dissent accords with the weight of authority; in fact with what this Court

approved many years ago. First let us examine OAG 1951–1952, No 1269, mentioned above. On that occasion Attorney General Roth, later circuit judge of the 7th circuit and now a distinguished member of the bench of the United States district court for the eastern division of Michigan, adopted the reasoning of *Crowe* and *Guckenberger*. Having first quoted *Crowe* (which *Guckenberger* later quoted with approval) as follows (p 41):

"In *Crowe* v. *Board of Commissioners of St. Joseph County,* 210 Ind 404, 408 (3 NE2d 76, 77), also quoted with approval in the *Guckenberger Case* [*State, ex rel. Mack,* v. *Guckenberger,* 139 Ohio St 273, 285, 286 (39 NE2d 840, 139 ALR 728)], the court said:

" 'There is no merit in the contention that an increase in the salary of an officer during his term is involved. The salary was fixed before he was elected. The amount he was to receive from time to time was made to depend upon the population of the county. It is as though the statute in existence when the officer was elected had provided that he should receive $1,000 the first year and $2,000 the second year of his term. In the statute under consideration the legislature chose to make the amount of salary dependent upon population shown by the United States census. It might continue during the latter part of the term the same as before the census. It might be more if the population increased. It might be less if it decreased.' ";

Attorney General Roth concluded:

"In my judgment this view is sound and would prevail in this State should the question ever reach our Supreme Court. Consequently, *so long as a salary, dependent in amount upon a fluctuating factor such as population, is provided for by a statute effective prior to election or appointment of any public officer such officer may receive salary increases due to changes of the salary factor without there being a*

violation of Const 1908, art 16, § 3. Indeed, the salaries of judges of probate have been so determined for some time."

The reasoning of OAG No 1269 was expressly followed by Justice KAVANAGH (then as attorney general) in 2 OAG 1955–1956, p 726, No 2822.* See also OAG 1951–1952, p 61, No 1284, wherein Attorney General Roth held that "a majority of the jurisdictions in which the question has been decided have taken the view that such constitutional provisions [no-increase no-decrease provisions] do not prohibit automatic salary changes dependent upon future events if the laws so fixing salaries are seasonably enacted."

Let us come now to our own decision of *Reigel, supra.* There the defendant, once Bay county treasurer, was found guilty of embezzlement for having drawn and retained, over and above his precedently fixed regular salary, certain collection fees which the county board of supervisors had resolved in his favor. The board's action was taken by resolution to approve the following report (p 80):

* In OAG No 2822 the posed question was:

"Having in mind the provisions of section 3, article 16 of the Michigan Constitution (1908), is it legally sound to fix the annual salary of an official in a different amount for each year of his term of office, effecting an increase year by year? By way of example, let us suppose that the board of supervisors fixed the salary of an official holding a 4-year term of office at $3,000 payable during the first year of his office, $4,000 payable during the second year of his office, $5,000 payable during the third year of office, and $7,000 payable in the final year of his office."

Attorney General Kavanagh answered:

"In the case you now put, we assume that the salary is being fixed before the election or appointment of the officer. We believe that the reasoning of the prior quoted opinion applies, and that since the amount of the salary is fixed prior to his election or appointment, there is no increasing of salary within the term. Although the amount of salary actually to be received is subject to successive annual raises, the increases are fixed by the proper body before election or appointment, rather than during the period in which the office is held."

"Your committee on ways and means, to whom was referred the matter of the salaries of the county officers, have had the same under consideration, and would recommend that the salaries of the various county officers be as follows for the next 2 ensuing years: For county treasurer, $3,800, and collection fees on liquor and other taxes."

The trial judge ruled that "the effect of this resolution was to fix the salary of the treasurer at $3,800 and the collection fees of liquor taxes, given to treasurers by statute, and it was void as to the 4% collection fees on taxes collected." A directed verdict of guilty followed, and the defendant appealed. This Court held, as against a typical no-increase no-decrease provision, effected by statute* (p 90):

"We are not satisfied that it [the statute] was intended to have the effect stated, and think that it was intended to prevent changes in salaries following the election of officers, before the beginning of or during their terms. We see no reason for saying that it was intended to abrogate section 527 [How Stat], or to affect it, except as it forbids changes during an official term. It is apparent that the amount of the salary fixed in this instance was indefinite and uncertain in a sense, because liable to be increased or diminished through variations in the amount of the collection fees. But the statute was designed to prevent repeated or untimely action by the board, and not to prohibit a method of fixing the salary which should make the amount contingent upon the work done, and which has already been approved, provided the resolution fixing the salary should state the rule by which the amount should be determined."

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* 1 How Stat, § 508, reading:

"The annual salaries of all salaried county officers which are now, or may hereafter by law, fixed by the board of supervisors, shall be fixed by said board on or before the thirty-first day of October prior to the commencement of the term of such officers, and the same shall not be increased or diminished during the term for which such officers shall have been elected or appointed."

The Chief Justice ignores such reasoning. He does not even mention the *Reigel Case.* Yet here, as in that case, the *amount* of Judge Taylor's precedently ordained State-paid compensation was "indefinite and uncertain in a sense" because it by an old and standing statute was liable to be increased, during each of his elective terms, *on account of constitutionally permitted during-term increases of the State-paid salaries of circuit judges.* (All such judges, of superior and circuit courts, are simultaneously elected for identically co-extensive 6-year terms.) Note especially from *Reigel* that the no-increase no-decrease provision did not prohibit a method of fixing the involved salary by making the amount contingent upon ascertainable future events when and if such events should occur.

The thoroughly reasoned and leading case of *State, ex rel. Mack,* v. *Guckenberger,* 139 Ohio St 273 (39 NE2d 840, 139 ALR 728), has guided our attorneys general to their quoted holdings. Such holdings have determined—for at least a decade—the right of many Michigan public officers to receive, as they have since received, salaries according to various fluctuating factors fixed by ahead-of-election legislation. Such legislation effects a valid legislative purpose. *Guckenberger* tells why (p 278):

"The purpose of the constitutional inhibition now under consideration is to make sure that the judge and the electorate are advised before he is appointed or elected what his compensation will be, with the assurance that it cannot be changed by the legislature during the term; that the judge is precluded from using his personal influence or official action to have the legislature increase his salary; and that at the same time he is protected against the legislature and the people from decreasing his compensation after his term begins. These same salutary purposes are fully and effectually preserved by the terms of

the present statute, albeit the compensation of the judge is made variable, from and after the last Federal census becoming effective during his term."

Judge Fox (sitting below; since appointed to the district court bench of the United States) propounded a visibly roguish test of the validity of such legislatively provided fluctuating factor. Citing *Crowe, Guckenberger,* and *Reigel* as authority for upholding his answer, Judge Fox said:

"Let us suppose, for example, that the legislature, in 1945, passed an act which provided—

"Justices of the Supreme Court shall receive from the treasury of the State of Michigan an annual salary of $1,000 in excess of the highest salary paid to judges of the third judicial circuit [Wayne county, including Detroit].

"It occurs to me that such a predetermined formula would be valid and binding under the Constitution of the State of Michigan."

Would that such a question were here, in company with this latest case of Taylor. With our sole right to compensation furnished by, and tied exclusively and precedently to the regularly upgraded salaries of the judges of the third circuit, *one might politely inquire whether any seated Brother then would choose Blakeley's minority dixit over what a visibly thoughtful majority wrote.*

A hard decision, that. By *Blakeley's* dissent there really would be salary trouble for the Supreme Court of Michigan. Let us never forget, just as the dissenters noted in *Blakeley* concerning Judge Madden's office and salary, that in Michigan "There is not a word in the Constitution" requiring payment of *any* salary to Michigan Supreme Court Justices. The people seemingly forgot about the matter of our compensation when they conceived and approved the Constitution of 1908.

What really is before us? In the words of Justice Holmes' most notable dissent (*Northern Securities Co.* v. *United States,* 193 US 197, 401 [24 S Ct 436, 48 L ed 679]), "What we have to do in this case is to find the meaning of some not very difficult words." The words are "same annual salary as may be payable to circuit judges." All we need do—this is Holmes again, same page—is "to read English intelligently."

Second: Referring to *Dunham* v. *Tilma,* 191 Mich 688, the Chief Justice says that "It is interesting to note that essentially the same question was raised on behalf of the plaintiff as in the instant case." Respectfully, I disagree. The same question was not raised in *Dunham,* "essentially" or otherwise. *Dunham* dealt with the specific question whether, *during and applicable to the then elective term of the superior court judge, the common council* of Grand Rapids lawfully increased *the city-paid portion of the judge's salary* (not the State-paid portion which, as we have seen, was then and there governed as to amount by said section 6). There being no extant statute tying the judge's *locally contributed portion of salary* to some "fluctuating factor," the Court properly ruled that the common council had violated the no-increase no-decrease provision of said article 16. *Dunham* does not even mention the State-paid portion of the judge's salary. Nor does it deal with said section 6.

Third: Throughout the opinion proposed by the Chief Justice the superior court is subtly downgraded to the status of a "municipal" court. Once indeed it may have been such, during the 19th century when the Constitution confined the legislature to establishment of "municipal" courts "in cities" (Const 1850, art 6, § 1). But things do change, of necessity and also by law. The corresponding section of today's Constitution, conjoined with today's

municipal law, through which the territorial jurisdiction and so the burdens of the superior court continue at quickening pace to expand outward in every direction over Kent county, authorize legislative establishment and maintenance of courts "inferior to the Supreme Court." (Const 1908, art 7, § 1). The words "municipal" and "cities" were eliminated in 1908, and there is no doubt now that the jurisdiction and powers of the superior court are equal to those of our circuit courts. As in circuit, the judgments and decrees of the court are reviewable only by this Court. Provision is made for automatic transfer to it of cases which, if originally within its concurrent territorial jurisdiction, have been commenced in the Kent circuit (CL 1948, § 727.21 [Stat Ann § 27.3631]). The rules of practice and procedure prescribed for the court are the same (CL 1948, § 727.15 [Stat Ann § 27.3625]; Court Rule No 1 [1945]). The elective term of the judge (CL 1948, § 727.2 [Stat Ann § 27-.3612]) is the same as that of our circuit judges and, if the legislature meant what it said, the State-paid salary is intendedly the same. It is a circuit court in fact which the legislature may, at any time with constitutional sanction, dub "the circuit court of Grand Rapids" rather than "the superior court of Grand Rapids."*

"The jurisdiction of the [superior] court is defined by section 13, as amended. It has original and concurrent jurisdiction with the circuit court for the county of Kent, and within its territorial limits the jurisdiction conferred is as extensive and broad as that of the circuit court." *Attorney General, ex rel. Danhof,* v. *Renihan,* 184 Mich 272, 275.

* "The superior court of Grand Rapids is a court of record having original jurisdiction concurrent with the circuit court for the county of Kent, as provided in CL 1929, § 16351." *Youdan* v. *Kelley,* 267 Mich 616, 619. [The section referred to is currently CL 1948, § 727.13 (Stat Ann § 27.3623).—REPORTER.]

CONCLUSION

This is the third and final occasion when a distinguished veteran of Michigan's judiciary will have appeared before us in effort to obtain his fully earned due. Having been burdened with the judicial power "to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts which the circuit courts of this State, within their respective jurisdictions, may in like cases issue and do by the laws of this State" (quotation from original and present section 13 of the act of 1875 [CL 1948, § 727.13 (Stat Ann § 27.3623)]); having borne, during the 1940's and early 1950's, quite a share (in addition to the work of his own court) of the work which, but for continued illnesses of elder Kent circuit judges, would normally have been processed by such judges, and living now in precarious health on borrowed time, Judge Taylor asks no more than what by law was owing to his office from and after each of the circuit court salary increase acts of the 1940's and 1950's. Tribute to his unflagging attention to duty, and to the continuously enviable condition of his docket, has been paid regularly by the statistics and annual reports of the court administrator.* Unless appellate error—once committed—must always be denied by the unwitting perpetrators thereof, we have no good reason to deny him the judgment which, at long last in the court of claims, he has rightfully won.

During the darkest hours of the Civil War President Lincoln wrote (August 22, 1862) to his old friend Horace Greeley:

* See 1957 report of the court administrator, p 29, and his 1958 report, p 43.

"I shall try to correct errors when shown to be errors, and I shall adopt new views so fast as they shall appear to be true views." (Life and Works of Abraham Lincoln, "Letters II", page 45, Centenary Edition, 1907.)*

A good thought for judges as well as presidents. I vote to affirm and therefore dissent.

KAVANAGH, J., concurred with BLACK, J.

OTIS M. SMITH and ADAMS, JJ., did not sit.

* Also in Abraham Lincoln, His Speeches and Writings, ed. by Roy P. Basler (World Publishing Co., 1946), p 652.—REPORTER.

THOMPSON *v.* STEHLE.

1. TRUSTS—JOINT SAVINGS ACCOUNT—TERMINATION BY SUBSEQUENT ACTIONS.

   Conclusion of trial court that oral trust with respect to balance of savings account in joint names of plaintiff's decedent and defendant had been terminated by action of the decedent *held,* supported by evidence (CL 1948, § 487.703).

2. SAME—ORAL TRUST—JOINT SAVINGS ACCOUNT—COMMON LAW.

   The determination of whether or not there was a valid oral trust of the balance of a savings account in the joint names of plaintiff's decedent and defendant is made according to the rules of common law, where the account was established in connection with the trust to permit the carrying out thereof in accordance with the wishes of the decedent (CL 1948, § 487.703).

REFERENCES FOR POINTS IN HEADNOTES

[2] 7 Am Jur, Banks § 434.
Deposit of fund belonging to depositor in bank account in name of himself and another. 149 ALR 879, 889.
[4] 54 Am Jur, Trusts § 196 *et seq.*

3. SAME—TERMINATION—RESTORATION OF FUND.

The termination of a trust relation operates to restore the fund subject to the trust to the original owner or his heirs.

4. SAME—TERMINATION—RESULTING TRUST.

A resulting trust arises as against the trustee as to property which had been conveyed upon an express trust for particular purposes but which trust had failed by reason of having been ineffectually or illegally declared or otherwise extinguished or terminated, the resulting trust arising in favor of the grantor, and those claiming under him, either in the property conveyed, or in the residue of the property remaining at the time of the failure or extinguishment of the trust, or after the purposes have been discharged.

5. SAME—TERMINATION—JOINT SAVINGS ACCOUNT—TITLE—RESULTING TRUST.

Title to balance of joint savings account the subject of an oral trust which had terminated did not pass to survivor but formed a resulting trust for the grantor, where evidence fails to show any intent to create a right of ownership in the trustee by reason of survival (CL 1948, § 487.703).

6. SAME—JOINT SAVINGS ACCOUNT—PRESUMPTION—EVIDENCE—INTENT.

The statutory presumption of ownership accorded survivor of joint savings account *held*, overcome by evidence presented relative to the purpose of creating the joint account, the termination of the oral trust which had been created and subsequent action of grantor in treating the account moneys as his own and leaving the property by will (CL 1948, § 487.703).

SOURIS, OTIS M. SMITH, and ADAMS, JJ., dissenting.

Appeal from Bay; Dardas (Leon R.), J. Submitted May 4, 1962. (Docket No. 73, Calendar No. 49,504.) Decided September 7, 1962. Rehearing denied November 5, 1962.

Bill by Carlton L. Thompson, special administrator of the estate of Frank D. LaLonde, deceased, against Loretta Stehle to impress trust on funds on deposit in joint bank account. Bill dismissed. Plaintiff appeals. Reversed and remanded for entry of decree granting relief prayed.

John W. Piggott, for plaintiff.

Higgs & Higgs (*F. Norman Higgs,* of counsel), for defendant.

CARR, C. J. Frank D. LaLonde, in June, 1958, prior to entering a hospital for a serious operation, made his savings account in the Peoples National Bank & Trust Company of Bay City joint with appellee, Loretta Stehle, turned over to her the key to his safety deposit box, and gave her certain oral instructions as to the disposition of money in the account in the event of his death, such instructions admittedly being to pay all debts and claims and give the balance to St. James Roman Catholic Church, Bay City. There was at this time approximately $1,900 in the account. LaLonde survived the operation and upon returning to his home, appellee returned to him the key to the safety deposit box. The savings account book was at all times in said box.

Appellee and her husband were tenants on a farm owned by Mr. LaLonde and visited him often. In February, 1959, Mr. LaLonde sold the farm and deposited in the account some $19,000. On July 7, 1959, he withdrew $10,000 and deposited the same in an account in another bank in his name only. He also made other withdrawals from the account in question. On the following day (July 8, 1959) he executed a will, the validity of which is not in question, by which he bequeathed the residue of his estate, after certain expenditures and bequests, to St. James Roman Catholic Church, Bay City. His death occurred May 20, 1960, at which time there remained in the account the sum of $9,890.

Appellant claims decedent did not intend to make a gift to appellee of the balance left in the joint account; that the joint account was created only as a

matter of convenience, and he, therefore, seeks to impress a trust on the funds therein for the use and benefit of St. James Church.

Defendant admits that "He (Mr. LaLonde) told me (in June, 1958) that if he died, which he thought he was going to, he was having a big operation, that I should * * * sell his furniture and pay his bills and give the rest to the church—I told him that is what I would do." But defendant asserts that inasmuch as decedent deposited $19,000 in the account (proceeds from the sale of his farm) and withdrew therefrom $10,000 which he placed in an account in his name only, and the next day executed his will, it was decedent's intention to leave the funds in question in the joint account and thus take advantage of the law governing joint accounts and save the cost of probate proceedings.

The matter came on for trial without a jury and appellee was called for cross-examination under the statute.* She testified that she did not know that the account was still joint until called by the county treasurer to be present when the deposit box was opened; further, that after the sale of the farm, and she and her husband ceased to work for decedent, they were not on such friendly terms with decedent as previously, and that she had seen him only 2 or 3 times since, the last time being in February, 1960. Previous to that time they had called on decedent almost every day and looked in on him often during his illness, running errands for groceries and medicine, doing lawn and garden chores, and giving help whenever he asked for it.

Defendant's witness, Lilley Groulx, testified that she had worked for the Stehles and that she and Mrs. Stehle called on decedent every day during the summer of 1958; that she often heard decedent men-

* See CL 1948, § 617.66 (Stat Ann § 27.420).—REPORTER.

tion how much he thought of the Stehles, and what a help they were to him; that one day when showing her and Mrs. Stehle an antique chair for which they expressed admiration, decedent turned to Mrs. Stehle and said, "someday you will get more than a chair." Another witness, Wilfred Barber, testified that decedent had said to him that, "She (Mrs. Stehle) was awfully good to him and she would never be sorry." Also the deposition of Birdsey Maxon (defendant's witness) contained the following:

"We (LaLonde and witness) was talking along and went by Stehle's place and he said 'there is some nice people'—I said 'I guess they are as far as I know you could not find nicer ones.' He said 'they were so good to me when I was sick, waited on me, doing things for me, took me to the doctor, took care of my berries and they are going to be well taken care of.'"

The testimony of plaintiff's witnesses (himself and relatives of deceased) tended to discredit defendant's witnesses and was aimed at bringing out the alleged ill will that existed between decedent and defendant and her husband over decedent's sale of his farm. There is no question presented as to decedent's mentality, nor as to fraud, undue influence or duress, the bank book for the joint account being in the possession of the decedent at all times during his lifetime and being in the safety deposit box at the time of his death.

The parties hereto discuss the interpretation of CL 1948, § 487.703 (Stat Ann 1957 Rev § 23.303), which reads:

"When a deposit shall be made, in any bank by any person in the name of such depositor or any other person, and in form to be paid to either or the survivor of them, such deposits thereupon and any additions thereto, made by either of such persons, upon the making thereof, shall become the property

of such persons as joint tenants, and the same together with all interest thereon, shall be held for the exclusive use of the persons so named and may be paid to either during the lifetime of both, or to the survivor after the death of 1 of them, and such payment and the receipt or acquittance of the same to whom such payment is made shall be a valid and sufficient release and discharge to said banking institution for all payments made on account of such deposits prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof.

"When a deposit has been made, or shall hereafter be made, in any banking institution transacting business in this State, in the names of 2 or more persons, payable to either or the survivor or survivors, such deposit or any part thereof or any interest or dividend thereon and any additions thereto, made by any 1 of the said persons, shall become the property of such persons as joint tenants, and the same shall be held for the exclusive use of the persons so named and may be paid to any 1 of said persons during the lifetime of said persons or to the survivor or survivors after the death of 1 of them, and such payment and the receipt or acquittance of the same to whom such payment is made shall be a valid and sufficient release and discharge to said banking institution for all payments made on account of such deposits prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof.

"The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or surviving depositor or depositors is a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors."

The trial judge in his opinion said, in part:

"Under Michigan cases, the vesting of title to funds in another by the creation of a joint bank account with right of survivorship is a statutory method of transfer of title. It has some of the elements of an *inter vivos,* yet it is not strictly such as the donor retains an element of control and the power of revocation. (See *Rasey* v. *Currey's Estate,* 265 Mich 597; *In re Renz' Estate,* 338 Mich 347.) The Michigan Supreme Court in *Jacques* v. *Jacques,* 352 Mich 127 at page 134, indicated that the joint and survivorship bank account has the effect of a testamentary disposition, but it is not a will because there is no requirement of compliance with the statutory formalities for the making of a will.

"There is no question that had Mr. LaLonde died as the result of the operation in June of 1958, that the title to the joint bank account would have passed to the defendant, impressed, however, with an oral trust to pay over any balance to the St. James Church after the payment of decedent's debts. Subsequent actions by Mr. LaLonde in regard to the account over the 2-year period immediately following the establishment of the account and before his death, clearly indicate that he had terminated the oral trust, when he made provision for the St. James Catholic Church by establishing a separate bank account in his own name and named the church as the residuary legatee under a formal will. The facts show that he increased the amount in the original bank account, after the sale of his real estate, and chose to establish a separate bank account in the Bay City bank, which he adequately disposed of by a formal will. The facts further show that he had ample opportunity to change the ownership of the original bank account before his death, and further show that he sought and had legal advice in preparing his will. Certainly, under these facts, the deceased was fully aware of the effect of the joint bank account in question, and the disposition of the funds upon his death.

"Although Loretta Stehle was in no way related to the decedent, the testimony disclosed the very close relationship between the parties to the extent that the decedent placed implicit faith in Mrs. Stehle to carry out his wishes. The will of the deceased shows that he had no close relationship with any blood relatives, in fact he chose to specifically disinherit any such relatives under paragraph 6 of his last will and testament. The uncontradicted proofs show that Mrs. Stehle had performed the little, thoughtful tasks for the deceased, that a solicitous blood relative would normally perform. The decedent set up the joint account, maintained it as originally set up, and did nothing over a 2-year period to change it.

"Not only did the plaintiff fail to overcome the statutory presumption that the deposits of this character become the property of the survivor by clear and persuasive proof, but the court must further find, from the proofs as presented, that the decedent fully intended to create a title to the bank account in Loretta Stehle upon his death."

Decree was entered in accordance with the opinion and plaintiff's suit was dismissed. It is from this decree that plaintiff takes a general appeal. The basic question in the case is whether the statutory presumption of ownership based on the creating of the joint account has been overcome by the proofs. Stated somewhat differently, was the circuit judge correct, on the record before us, in his conclusion that plaintiff was not entitled to a decree?

It is apparent from the record in the case that the arrangement between Mr. LaLonde and Mrs. Stehle was made in the first instance because of his impending operation from which he thought he would not recover. This is clear from the testimony of defendant on the hearing in circuit court. After stating that he asked her to go to the bank and obtain 2 cards that would permit the placing

of the safety deposit box in their joint names, and likewise the savings account, she further testified as to what occurred at the time. The following excerpts from her testimony indicate the exact facts involved in the situation and the purpose for which the deposit was made joint:

"*Q.* Did you have a discussion with him at that time what was to be done with the money?

"*A.* If he died.

"*Q.* What did he say?

"*A.* He told me that if he died, which he thought he was going to, he was having a big operation, that I should see—to sell his furniture and pay his bills and give the rest to the church—I told him that is what I would do.

"*Q.* The rest of what?

"*A.* The money I collected from the furniture.

"*Q.* What did he say about the money in the bank?

"*A.* Give that to the church also.

"*Q.* What church?

"*A.* I knew he went to St. James Church.

"*Q.* He told you to give it to St. James Church, didn't he?

"*A.* Yes, sir.

"*Q.* This was 2 days before he entered the hospital?

"*A.* Yes, sir.

"*Q.* This conversation took place at the time the signature cards were signed?

"*A.* Yes, sir. * * *

"*Q.* After his return, did you return the deposit book to him?

"*A.* The bank book?

"*Q.* Yes?

"*A.* No.

"*Q.* You did not return it to him?

"*A.* No, it was in his safety deposit box.

"*Q.* Mrs. Stehle, do you recall when testifying in probate court in June, 1960?

"*A.* Yes.

"*Q.* I asked you was it returned to him after his release and your answer was yes?

"*A.* Yes, I gave him the key to the safety deposit box but I did not have possession of the book—that was in the safety deposit box. * * *

"*Q.* There was no further discussion between you, it is your testimony regarding this account, after the signature cards were signed and returned to the bank?

"*A.* No.

"*Q.* Nor any further discussion what was to be done with the money?

"*A.* No.

"*Q.* You knew exactly what he wanted done—am I correct, there was no question in your mind what he wanted done with this money?

"*A.* Yes.

"*Q.* Yes—there was a question in your mind?

"*A.* No.

"*Q.* There was no question in your mind?

"*A.* No.

"*Q.* You knew you could not withdraw this money for your own use and benefit?

"*A.* I knew that.

"*Q.* You knew that from the instructions which he gave to you?

"*A.* Yes, sir.

"*Q.* And so once you returned the safety deposit key to Mr. LaLonde, that was the end of this particular relationship regarding the account, is that correct?

"*A.* Yes, sir."

Defendant was further asked if Mr. LaLonde told her that he had made a will, that he had taken care of matters the way he wanted them and that there was nothing further for her to do. To such questions defendant answered in the affirmative. She was then further questioned as follows:

"*Q.* At the time of Mr. LaLonde's death, did you know whether or not the safety deposit box was still in your joint name?

"*A.* No, sir.

"*Q.* How did you learn it was?

"*A.* I went to the bank.

"*Q.* And the bank told you it was?

"*A.* Yes, sir.

"*Q.* At that time did you know that the account that had been joint was still joint?

"*A.* I don't know.

"*Q.* You didn't ask the bank about that at that time, did you?

"*A.* No, sir.

"*Q.* The first time you knew the bank account was still joint or what was in it was when you were called into the bank to be present when the county treasurer opened it, wasn't that true?

"*A.* Right."

It is apparently conceded that in the inception of the relation created by the joint account the money therein was understood by the parties to be impressed with an oral trust by which any balance remaining after the payment of decedent's debts was to be turned over by defendant to the St. James Church. The trial judge so held in his opinion and further concluded that the acts of Mr. LaLonde in withdrawing the sum of $10,000 from the account in question and depositing it in another bank in his own name, and the making of the will naming the church as residuary legatee, constituted a termination of the oral trust. Such conclusion is fully supported by the record, especially by the testimony of defendant. No question is raised in the case as to the validity of the oral trust, which was subject to interpretation under the rules of the common law. The joint account was established in connection with such trust to permit the carrying out thereof in accordance with the wishes of Mr. LaLonde.

The question arises as to the effect on the joint account created when the trust relation terminated. It is obvious that such account was not established with the purpose in mind of benefiting defendant. Rather, it was a method for carrying out the wishes of Mr. LaLonde. To that end it was of course necessary that defendant be in the position of an owner, subject to the trust, in the event of death as the result of the operation which he contemplated.

The rule seems to be well established in Michigan that the termination of a trust relation operates to restore the fund subject to the trust to the original owner. In *Walters* v. *Pittsburgh & Lake Angeline Iron Co.,* 201 Mich 379 (1 ALR 624), the question at issue was the distribution of funds left after the termination of a trust composed of contributions from individuals, which fund was designed for the payment of benefits to injured employees. The arrangement made terminated on the taking effect of the workmen's compensation law of the State (PA 1912 [1st Ex Sess], No 10 [CL 1948, § 411.1 *et seq.* (Stat Ann § 17.141 *et seq.*)]). The decree of the circuit court provided for the distribution of the balance of the fund to those who had made contributions. In affirming the decree, this Court in its opinion said, in part (p 386):

"The applicable rule was stated by the learned trial judge when he said:

" 'The fund was deposited with and held by the company upon the express trust to disburse so much thereof as was necessary from time to time, in the payment of injury and death benefits, while the mine continued in operation. When the mine ceased operations the purposes of the trust were discharged and the trust became extinguished. Upon the happening of the event, there being no agreement or understanding, express or implied, providing for or contemplating the disposal of any balance in the fund,

a resulting trust arose in favor of all who at any time contributed to the fund.'

"It is the general rule that if a trust for a specific purpose fails by the failure of the purpose, the property reverts to the donor or his heirs. 1 Perry on Trusts and Trustees (6th ed), § 159. And in 39 Cyc p 110, the rule is stated as follows:

" 'Where property is conveyed upon an express trust for particular purposes, but, by reason of its being ineffectually or illegally declared, the trust fails, or is otherwise extinguished or terminated, a resulting trust arises as against the trustee, in favor of the grantor, and those claiming under him, in the property conveyed, or in the residue of the property remaining at the time of the failure or extinguishment of the trust, or after the purposes of the trust have been discharged.' "

It is significant that Mr. LaLonde after the termination of the oral trust treated the account as his property. He deposited the proceeds from the sale of his farm therein and then withdrew the sum of $10,000, approximately 1/2 of the account as it then stood, for deposit in another bank. Immediately following such withdrawal he made his will in which he directed the payment of debts and funeral expenses from his estate, of which he made full testamentary disposition, the principal recipient of his bounty being the St. James Church. Defendant, as she testified, did not believe that she had any interest in the account because of the termination of the trust. It is a fair inference from her statements that she had no intention of claiming the balance remaining therein at the time of Mr. LaLonde's death until she was advised by the bank that her name was on the card that had been filled out and filed with the bank at the time of the making of the arrangements immediately prior to Mr. LaLonde's entering the hospital for his operation.

The statements that Mr. LaLonde made to the witnesses who testified in defendant's behalf with reference to his feeling of gratitude toward defendant and her husband, and on which defendant relied on the hearing in circuit court, were significant as indicating that at that time he contemplated taking some action to reward them. Such statements were not consistent with the claim that Mr. LaLonde intended at the time that the balance in the joint account should upon his death become the sole property of Mrs. Stehle. Apparently he did not carry out his intention with reference to a tangible expression of his kindly feeling toward defendant and her husband. Due to the fact that the sale of the farm, which Mr. and Mrs. Stehle had occupied as tenants, was made without notice to them, the congenial relationship that had previously existed was materially affected.

It is not disputed that the account in question was made joint in the first instance in order that a disposition of the funds might be made, under the oral trust, to carry out the wishes and purposes of Mr. LaLonde. It was not intended for the benefit of defendant, and there is nothing in the record before us to justify a conclusion that the original purpose involved in the creating of the joint account was changed, except that inferences may be drawn from the acts of the owner of the account that he intended to change the situation that brought about the establishing of the oral trust by the making of a formal will taking care of his debts and disposing of his entire estate. He obviously considered that he had the right to withdraw from the account as he saw fit and, in fact, he might have obviated any question as to his intent by withdrawing the entire amount remaining therein. The fact that he did not cause the records of the bank to be changed is not in and of itself sufficient to justify a conclusion that the character of

the funds on deposit was changed in such manner as to create in defendant a right of ownership by survival in the moneys deposited by Mr. LaLonde. The conduct of both parties is clearly at variance with any such position or presumed intention.

The interpretation of the statutory provision involved has been before this Court in numerous cases, among which are *Mitts* v. *Williams,* 319 Mich 417, and *Jacques* v. *Jacques,* 352 Mich 127. The statutory presumption upon which defendant relies must be regarded as overcome by the proofs relating to the purpose of creating the joint account and subsequent acts bringing about, as the trial judge correctly held, the termination of the oral trust to which the account was subject. The incidents of such a trust were under consideration in *Gardner* v. *City National Bank & Trust Co.,* 267 Mich 270, and in *Economy* v. *Roberts,* 274 Mich 484. That such trust was subject to termination is not open to question.

For the reasons indicated the case is remanded to the circuit court with directions to set aside the decree entered in defendant's favor and to grant the relief sought by plaintiff administrator in his bill of complaint. Plaintiff may have costs.

DETHMERS, KELLY, BLACK, and KAVANAGH, JJ., concurred with CARR, C. J.

ADAMS, J. (*dissenting*). I do not believe the conclusion arrived at by Mr. Chief Justice CARR gives proper weight to the provisions of the statute* or the facts as determined by the trial judge who had the benefit of observing the witnesses. It seems to me that originally there were 2 separate transactions: (1) Frank D. LaLonde created the joint account (one which had formerly been joint between

* CL 1948, § 487.703 (Stat Ann 1957 Rev § 23.303).—REPORTER.

him and his deceased wife) with full understanding as to its consequences; and (2) he impressed upon Loretta Stehle, his joint tenant, an oral trust which ended when he recovered from his illness. However, he did not terminate the joint account as he could have done. Rather, he continued it in both his and her name. He made additional deposits to the account which he knew to be joint. When he came to make a testamentary disposition of his property, while he withdrew some funds from the account, he again did not discontinue the account but rather allowed it to remain with full knowledge that any moneys would pass to the survivor. After making his will, he told Mrs. Stehle there was nothing further she need do—that everything was taken care of. These facts, along with the testimony of the witnesses that were produced on behalf of Loretta Stehle as to the intentions of LaLonde established the creation and continuance of a joint account, as provided for under the statute, separate from the oral trust. The findings as to the facts are fully set forth in the trial judge's opinion, quoted by Mr. Chief Justice CARR, and need not be repeated. I would affirm.

SOURIS and OTIS M. SMITH, JJ., concurred with ADAMS, J.

W. J. HOWARD & SONS, INC., *v.* MEYER.

1. CONTRACTS—REMODELING OF FARMHOUSE—SUPERVISION—INSURANCE.

   Items for supervision by officer of plaintiff corporation, workmen's compensation, unemployment, and other insurance for employees *held,* not improper charges for labor under cost-plus contract for remodeling farmhouse for defendant, that contained no specifications or maximum amount for completing the project and no restrictions as to who should perform the supervisory services.

2. SAME—PROFIT AND OVERHEAD CHARGE—SUBCONTRACTED ITEMS—AMBIGUITY.

   Profit and overhead charge by general contractor on items which were subcontracted out were properly included under cost-plus contract for remodeling defendant's farmhouse that was found by the circuit judge not to be free from ambiguity.

3. SAME—CONSTRUCTION—INTENT.

   A contract is to be read in the light of the circumstances attending its execution and construed so as to effectuate the intent of the parties when it was made.

4. SAME—CONSTRUCTION.

   A promise must be interpreted in the sense in which the promisee knew or had reason to know that the promisor understood it.

5. SAME—AMBIGUITY—PRACTICAL CONSTRUCTION BY PARTIES.

   A practical interpretation given an ambiguity in a contract by the parties thereto is entitled to consideration by the court.

6. SAME—PRACTICAL CONSTRUCTION—SELF-SERVING INTERPRETATION—ACQUIESCENCE.

   The practical construction given by the parties to an ambiguity in a contract is not limited to the self-serving interpretation

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 9 Am Jur, Building and Construction Contracts § 20.
Construction of cost-plus contracts. 27 ALR 48.
[3, 4] 12 Am Jur, Contracts § 226 *et seq.*
[5] 12 Am Jur, Contracts § 249.
[8, 9] 9 Am Jur, Building and Construction Contracts § 36.
Conclusiveness of certificate or decision of architect or engineer under building construction contract. 110 ALR 137.

by one party thereto but requires the acquiescence by the other party.

7. SAME—REMODELING OF FARMHOUSE—PRACTICAL CONSTRUCTION—EVIDENCE.

It was not error for trial judge in nonjury action by building contractor to admit evidence tending to show the practical construction that the parties had placed on provision of cost-plus contract for remodeling of defendant's farmhouse relative to architect's approval of contractor's monthly statements for payment by owner.

8. SAME—APPROVAL BY ARCHITECT—FRAUD.

The decision of an architect in approving or disapproving the work as a performance of a construction contract, or in passing on questions relating thereto, is, in the absence of fraud, bad faith, or mistake, conclusive and binding on the parties, where the contract, either in express terms provides that it shall be final and conclusive, or in plain language shows that it was the intention of the parties that the person to whom the question is submitted should be the final arbiter thereof.

9. SAME—REMODELING OF FARMHOUSE—APPROVAL BY ARCHITECT.

Finding of trial court that defendant owner of farmhouse was bound by architect's action in approving remodeling contractor's statements for payment and that contractor was entitled to judgment for amount claimed *held,* not error under record presented and renders it unnecessary to discuss defendant's claim of set-off and recoupment.

Appeal from Oakland; Dondero (Stanton G.), J. Submitted June 5, 1962. (Docket No. 5, Calendar No. 49,183.) Decided September 7, 1962. Rehearing denied November 5, 1962.

Assumpsit by W. J. Howard & Sons, Inc., a Michigan corporation, against Adolph H. Meyer for sums due on building contract. Set-off and recoupment by defendant claiming overpayment. Judgment for plaintiff. Defendant appeals. Affirmed.

Forsythe & Beasley (*William R. Beasley,* of counsel), for plaintiff.

Fox, Fox & Halbrook, for defendant.

CARR, C. J. Defendant in this case, being the owner of a farmhouse in Novi township, Oakland county, Michigan, desired to remodel it. To that end he employed an architect, Norman Simmons, to prepare plans therefor. Because of the nature of the project, and the unknown factors that might develop in the course of the operation, no specifications were prepared. In accordance with the advice of the architect, plaintiff corporation was selected as the contractor. Plaintiff had previously done work for Simmons and also for a company owned by defendant. In the absence of specifications it was determined that the work should be done on a cost basis.

A written contract was prepared on a standard form of agreement issued by the American Institute of Architects for use when a stipulated sum forms the basis of payment. The record indicates that plaintiff filled out the form by typing in certain provisions in accordance with the agreement reached by the parties. The following provisions of the instrument as signed by plaintiff and defendant are material in the instant controversy:

"*Article 3. The contract sum*—The owner shall pay the contractor for the performance of the contract, subject to additions and deductions provided therein, in current funds as follows: Labor and material costs, including supervision, plus 15% overhead and profit. Monthly requests for payment will included recapitulation of labor costs and duplicate material invoices. All payments subject to approval of Mr. Norman Simmons.

"NOTE: Owner and designer to be furnished schedule of prevailing labor rates. * * *

"*Article 4. Progress payments*—The owner shall make payments on account of the contracts as provided therein, as follows:

"On or about the 5th day of each month 100% of the value, based on the contract prices of labor and materials incorporated in the work and of materials

suitably stored at the site thereof up to the 30th day of that month, as estimated by the architect, less the aggregate of previous payments; and upon substantial completion of the entire work, a sum sufficient to increase the total payments to .... percent of the contract price ....

"*Article 5. Acceptance and final payment*—Final payment shall be due 15 days after substantial completion of the work provided the work be then fully completed and the contract fully performed.

"Upon receipt of written notice that the work is ready for final inspection and acceptance, the architect shall promptly make such inspection, and when he finds the work acceptable under the contract and the contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work provided for in this contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be due the contractor, and noted in said final certificate, is due and payable.

"Before issuance of final certificate the contractor shall submit evidence satisfactory to the architect that all payrolls, material bills, and other indebtedness connected with the work have been paid.

"If after the work has been substantially completed, full completion thereof is materially delayed through no fault of the contractor, and the architect so certifies, the owner shall, upon certificate of the architect, and without terminating the contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims."

In accordance with its usual method of procedure plaintiff engaged subcontractors for certain portions of the work and paid them on the bases of statements rendered thereby. Statements covering charges made by plaintiff against defendant were

submitted from time to time to Architect Simmons. The first 6 requests for payment were approved by Simmons, the first 5 being paid in full by defendant, and the sixth request paid in part. The record indicates that the reason for such partial payment was due to a cash shortage at the time on the part of defendant. Three subsequent statements were submitted but because the aggregate cost of the project exceeded the estimated expense of remodeling, approval was delayed, but, after certain adjustments, Simmons ultimately certified to their correctness. Defendant, however, declined to make payment, and the instant suit has resulted from such refusal.

It is not disputed that the statements as prepared and served by plaintiff from time to time indicated specifically the expenditures that it had made and for which it sought payment from defendant. It is not claimed on behalf of defendant that he, or his architect, was in any way misled with reference to plaintiff's claim that it was entitled to be reimbursed and to receive payment of compensation for the various items set forth in each statement rendered. In other words, there is no claim of concealment on plaintiff's part, and apparently the controversy resulting in the litigation was due to the cost of the project over and above the estimated expense thereof. As before noted, no specifications were prepared and the basis for arriving at the estimated cost does not appear in the record.

Plaintiff in its declaration asserted the right to recover pursuant to the contract on the basis of the requests for payment, or invoices, periodically served on the architect and on defendant, on which the latter refused payment. As noted, Simmons ultimately approved the last 3 statements, and he testified in substance that the hesitancy in giving his approval was due to the overall costs of the project. He further testified that he had no specific objec-

tions to any of the items listed in plaintiff's invoices other than on 1 or 2 minor matters which were adjusted to his satisfaction. Defendant by answer to the declaration denied that the statements rendered from time to time by plaintiff were correct or in accordance with the contract as drawn, and alleged that overpayments in the aggregate sum of $11,018.69 had been made, the allowance of which sum in his favor he asserted in a plea of set-off and recoupment. Plaintiff claimed the right to recover the total amount of $7,830.40.

The case was tried before the circuit judge without a jury. After listening to the proofs and the arguments of counsel the judge came to the conclusion that under the contract as written there was "some area of ambiguity as to the items to be included in costs." He further concluded that by their conduct the parties had given a practical interpretation to the language of the agreement as prepared in the manner above indicated, that Architect Simmons was granted authority by defendant to pass on the propriety of the statements submitted by plaintiff, that Simmons acted on behalf of defendant throughout the entire transaction, and that his acts in approving the statements for payment were binding on defendant. Accordingly, judgment was entered for plaintiff in the amount claimed, with interest, and defendant's plea of set-off and recoupment was rejected. From the judgment entered, defendant has appealed.

On behalf of appellant it is insisted that the contract as written was not ambiguous or of doubtful meaning, and that, in consequence, testimony as to the practical construction placed thereon by the parties was not competent. As noted, the trial judge thought otherwise, and on behalf of plaintiff it is contended that the form of contract used was filled out in such manner as to create doubt as to the

actual intention of the parties at the time. It is, of course, a settled principle of contract law that such an instrument must be interpreted in the light of the circumstances existing at the time of its execution. Obviously the subject matter of the agreement between the parties to the instant case was somewhat unusual. The architect deemed it impossible to prepare specifications for the doing of the work, as would naturally be done in an ordinary case involving construction. Apparently the parties could not foresee exactly what might occur in the course of the remodeling or precisely what might be necessary to the carrying out of the project pursuant to the wishes of defendant and his architect.

Among the disputed items charged by plaintiff against defendant in the various statements served, including those that were paid without question, were charges for supervision by George M. Howard, an officer of plaintiff corporation. It will be noted that the contract as written included "supervision" as a proper labor charge without specifying the nature or character thereof, or by whom to be rendered. Plaintiff also charged for expenditures for insurance. The testimony taken in the case indicates that the insurance in question was for the benefit of employees and included "workmen's compensation, unemployment, social security, health and welfare, pension, vacation, and paid holidays." It is probably true that a contractor submitting an offer, or bid, for the doing of a particular operation would take such an item into account in estimating his expenses. May it be said to be an improper labor charge? Apparently the parties to this case thought not when the first statements were paid as rendered.

Question is also raised with reference to payments to subcontractors, which payments included certain items of profit and overhead. It is claimed that in

the carrying on of work for which plaintiff contracts it habitually employs the services of subcontractors for the reason that it does not have the facilities for the performance of all types of labor that may be required. Such procedure is not unusual. No claim is made that defendant and his architect were not aware thereof. Again the question arises, what did the parties intend with reference to items of this nature at the time they made their agreement, in view of the project involved? Likewise with other items included in the statements furnished by plaintiff to defendant and paid by the latter after approval of the architect, the query is involved as to what the parties had in mind with reference to expenses connected with labor that might be found necessary. Reading the contract in the light of the condition existing, and the uncertainties with reference to certain features of the proposed remodeling, we conclude that the circuit judge was right in holding that the written contract was not free from ambiguity or doubt as to the actual intention of the parties.

Appellant relies on prior decisions of this Court involving written contracts so drawn that no possible claim of uncertainty or ambiguity as to the meaning of the language used could arise. Among the cases cited are: *Finnegan* v. *Worden-Allen Co.,* 201 Mich 445; *Township of Zilwaukee* v. *Saginaw-Bay City R. Co.,* 213 Mich 61; and *L. & S. Bearing Company* v. *Morton Bearing Company,* 355 Mich 219. These decisions and others of like nature may not be regarded as controlling in the instant controversy.

In *Biltmore Land Co.* v. *Estate of Munro,* 271 Mich 125, 129, this Court quoted from prior decisions certain principles of construction of contracts, as follows:

" 'The contract is to be read in the light of the circumstances attending its execution. It should be construed so as to effectuate the intent of the parties when it was made.' *Whitman* v. *Whitman,* 207 Mich 337, 348.

" 'To ascertain the intent of the parties a contract should be construed in the light of the circumstances existing at the time it was made.' *Kellogg* v. *Kellogg Toasted Corn Flake Co.,* 212 Mich 95, 114.

" 'The promise must be interpreted in the sense in which the promisee knew or had reason to know that the promissor understood it.' *Tallcot* v. *Arnold,* 61 NY 616, quoted with approval in *Ardis* v. *Grand Rapids & I. R. Co.,* 200 Mich 400, 414."

In *W. O. Barnes Company, Inc.,* v. *Folsinski,* 337 Mich 370, 382, it was said:

"In an instance where parties to a contract have by their conduct given a practical interpretation to its provisions, such interpretation is entitled to consideration by the court. *City of Big Rapids* v. *Michigan Consolidated Gas Company,* 324 Mich 358, 367 (79 PUR NS 301); *City of Mt. Pleasant* v. *Michigan Consolidated Gas Company,* 325 Mich 501, 511 (81 PUR NS 589)."

The following comment was made in *Davis* v. *Kramer Bros. Freight Lines, Inc.,* 361 Mich 371, 375, 376, with reference to the question at issue here:

"There is no doubt that evidence of practical interpretation by the parties is admissible as an aid in the determination of the meaning to be given legal effect. But the key word in this sentence is in the plural, 'parties.' A one-sided, self-serving interpretation by one party is of no help in interpretation. Acquiescence by the other party is required to establish a practical construction by the parties and this is precisely the thrust of appellants' claim of error."

We conclude that the trial judge was not in error in admitting evidence tending to show the practical construction that the parties had placed on their contract, which construction defendant now seeks to reject. It is significant that the first statements presented to him for payment contained items that he now asserts were improperly included. Presumably he did not think so at the time of payment. Obviously he and his agent, the architect, knew the interpretation that plaintiff was placing on the contract as written and they acquiesced therein, thus indicating their approval. It may be assumed that plaintiff considered that its interpretation of the contract was not questioned, and that it might continue with the project accordingly.

Under the agreement as drawn Architect Simmons was authorized to approve for payment the statements rendered by plaintiff. This he did. The provision of the contract, above quoted, with reference to final payment thereunder, clearly indicated his authority in the premises. Significant also is the further provision requiring evidence to be submitted to the architect with reference to payment of all indebtedness connected with the work. In *Strom-Johnson Construction Co.* v. *Riverview Furniture Store,* 227 Mich 55, the building contract involved provided that payment on account should be made at reasonable intervals as the work progressed, upon certificates of the architect. With reference to the effect and conclusiveness of the architect's certificate, the Court quoted (p 66) with approval from 9 CJ, Building and Construction Contracts, § 115, p 772 as follows:

"'In general. The decision, estimate, or certificate of an architect, engineer, or superintendent, in approving or disapproving the work as a performance of a contract, or in passing on questions relating thereto, is, in the absence of fraud, bad faith, or

mistake, conclusive and binding on the parties, where the contract, either in express terms provides that it shall be final and conclusive, or in plain language shows that it was the intention of the parties that the person to whom the question is submitted should be the final arbiter thereof.' "

Attention was directed to the fact that in support of the language quoted the following Michigan cases were cited: *Wildey* v. *School District,* 25 Mich 419; *Kelly* v. *Muskegon Public Schools,* 110 Mich 529; and *Young* v. *Stein,* 152 Mich 310 (17 LRA NS 231, 125 Am St Rep 412). The contract in the *Strom-Johnson Case* contained a provision for arbitration of the architect's decisions. It was held that subject to such provision he was the final arbiter as to all claims of the owner or contractor.

The trial court was not in error in holding that defendant was bound by the action of Architect Simmons in approving the statements rendered by plaintiff and that, in consequence, the latter was entitled to judgment for the amount claimed by it. The conclusions stated render it unnecessary to discuss defendant's claim of set-off and recoupment based on the theory that the contract was not ambiguous, that practical interpretation by the parties should be disregarded, and that the language of the instrument should be given the construction contended for by defendant. The judgment entered in trial court is affirmed.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

IWREY *v.* FOWLER.

1. APPEAL AND ERROR—CONFLICTING INSTRUCTIONS—PRESUMPTIONS.
   It is to be presumed that the jury has followed an erroneous instruction when it finds pursuant thereto, where conflicting instructions are given, one of which is erroneous.

2. AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTIONS.
   Instruction given in consolidated cases arising from collision between eastbound motorist who continued eastward from behind a left-turning eastbound motorist and collided with defendant's westbound left-turning car early in the afternoon in the fore part of December, whereby jury was told at different times that both plaintiffs and defendant had the burden of proof as to plaintiff driver's contributory negligence, *held,* reversible error, where trial court failed to withdraw, correct, or modify the instruction (Court Rule No 23, § 3a [1945]).

3. SAME—LEFT TURNS—NEGLIGENCE—INSTRUCTIONS.
   Instruction given in consolidated cases arising from collision of eastbound car and left-turning westbound car wherein the trial judge stated it made no "difference if the defendant is 99.9% guilty of negligence, if the plaintiff driver is 1/10 of 1%, or in any way guilty of negligence that contributed to the accident she cannot recover" *held,* erroneous, since jury might have interpreted it as barring recovery on the basis of negligence so slight as to be immaterial, or possibly on a finding of remote lack of due care as distinguished from negligence proximately contributing to the accident.

Appeal from Wayne; Murphy (Thomas J.), J. Submitted June 6, 1962. (Docket Nos. 13, 14, Calendar Nos. 49,314, 49,315.) Decided September 7, 1962.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 3 Am Jur, Appeal and Error § 949.
53 Am Jur, Trial § 557.
[3] 38 Am Jur, Negligence §§ 367, 368.

Case by Sondra Iwrey against Ralph E. Fowler for personal injuries, and derivative suit by Seymour Iwrey for medical expense, resulting from automobile collision. Actions consolidated for trial and on appeal. Verdict and judgments for defendant. Plaintiffs appeal. Reversed and remanded for new trials.

Goodman, Crockett, Eden, Robb & Philo (*Dean Robb, Harry Philo,* and *Richard M. Goodman,* of counsel), for plaintiffs.

Erickson, Dyll, Marentay & Slocum (*Milo M. Rouse,* of counsel), for defendant.

CARR, C. J. These cases were instituted by the plaintiffs to recover on the basis of injuries sustained by Mrs. Sondra Iwrey in an automobile accident. West McNichols road in the city of Detroit runs in an east and west direction. Said thoroughfare has 2 lanes for traffic and 1 parking lane on each side of the center line. It intersects Glastonbury, which is a stop street.

The accident in question occurred on December 4, 1958, at approximately 1:30 p.m. At the time Mrs. Iwrey was driving her car in an easterly direction in the right driving lane for eastbound traffic on West McNichols. According to her testimony she was driving at a speed of approximately 30 miles per hour at all times preceding the collision. She saw defendant's car, but assumed that the driver would await her passage through the intersection.

Defendant drove west on West McNichols in the south lane of traffic thereon, intending to turn to his left at the street intersection. He testified in substance on the trial of the cases that he was proceeding at a rate of approximately 35 miles per hour as he approached the intersection but reduced his

speed to approximately 5 miles per hour, that he started to make the turn, that he observed an automobile coming from the west the driver of which indicated an intention to turn north on Glastonbury, that he did not see plaintiffs' car approaching, that he gave a signal for the making of the turn, and proceeded in a southerly direction. The result was that the right front of his car came in contact with the left front of plaintiffs' car, the course or speed of the latter vehicle not having been changed. As a result of the impact Mrs. Iwrey sustained injuries for which she seeks to recover damages in the instant case, and the other plaintiff brought his action for medical, nursing, household, and hospital expenses, and loss of time from his employment resulting from the care and treatment of his wife.

The cases were consolidated for trial before a jury, which returned verdicts in favor of the defendant. Plaintiffs' motion for a new trial was denied, and they have appealed, asserting that the trial judge committed prejudicial errors in his charge and that certain requests to charge submitted by counsel for plaintiffs were erroneously refused. They ask that the order of the trial court denying their motion be reversed and the cases remanded for retrials.

The first question presented relates to the charge of the trial judge on the matter of contributory negligence. Complaint is made of the following language therein:

"In all civil cases the burden of proof is upon the plaintiffs to establish 3 things by a preponderance of the evidence. The plaintiffs must establish first that the defendant was guilty of fault or negligence; second, that the negligence was a proximate cause of the accident, and third that they themselves were not guilty of contributory negligence. If you find that the plaintiffs have established that, and that

the defendant has failed to establish by a preponderance of the evidence that they were guilty of contributory negligence, then you would come to the question of damages."

Subsequently in the charge the judge specifically pointed out that the burden of proof on the issue of contributory negligence on the part of Mrs. Iwrey rested on the defendant.* It is argued that the charge quoted was erroneous as well as confusing to the jury, that at no time was the jury told to disregard it, and that no specific correction thereof was made. Counsel for appellants contend that the jury may have followed the erroneous statement, and that, because of the materiality of the question, prejudicial error occurred requiring reversal with a new trial. On behalf of defendant it is insisted that considering the charge in its entirety it may properly be assumed that the jury was not misled by the inadvertent language quoted.

The effect of inconsistent or contradictory statements, relating to a material issue, in instructions to the jury by the trial judge has been considered in a number of decisions of this Court. In *In re Bailey's Estate,* 186 Mich 677, 690, the trial judge, as it was claimed, made conflicting statements to the jury in a will contest with reference to the burden of proof relating to undue influence. In reversing the case and granting a new trial, it was said:

"When conflicting charges are given, one of which is erroneous, it is to be presumed that the jury may have followed that which was erroneous. *Grand Rapids & I. R. Co.* v. *Monroe,* 47 Mich 152, 154; *Madill* v. *Currie,* 168 Mich 546, 560."

The statement quoted was approved in *McGuire* v. *Rabaut,* 354 Mich 230, 237.

* Michigan Court Rule No 23, § 3a, effective June 1, 1958 (352 Mich xiv).

In *White* v. *Huffmaster,* 321 Mich 225, the trial judge in charging the jury made inconsistent statements relating to the matter of imputed negligence. In discussing the claims of the parties, it was said (pp 233, 234):

"The trial court correctly told the jury that the negligence of plaintiff's driver could not be imputed to her. *Bricker* v. *Green,* 313 Mich 218 (163 ALR 697); *Sedorchuk* v. *Weeder,* 311 Mich 6. However, in the course of the charge, he made the following statement which plaintiff's counsel insist was error:

"'As a rule, the negligence of the driver of the motorcycle would not be imputable to the particular passenger riding on that motorcycle, but that is not necessarily a determination that that negligence is not imputable. In each case, it is for you to determine.'

"It is quite possible that the jury understood from this statement that it rested with them to say whether the negligence of plaintiff's driver, if he was negligent, might be imputed to her if the jury thought it proper to do so. This was clearly error. The character of the instructions to be given in a case of this nature was considered in *Sedorchuk* v. *Weeder, supra,* 11, 12, where it was said:

"'The jury should be instructed that it should first determine whether defendant was guilty of negligence and whether such negligence was a proximate cause of the accident. If the jury should so find, then the negligence of plaintiff's driver has no bearing in the case.'

"It cannot be said that this erroneous instruction was cured by other statements in the charge. It was not withdrawn, nor did the court indicate that he wished the jury to understand that it was in any way corrected or modified. In *Pettersch* v. *Grand Rapids Gas Light Co.,* 245 Mich 277, 281 (28 NCCA 44), this Court quoted with approval the general rule on the subject of contradictory instructions as stated in 14 RCL, Instructions, § 45, pp 777, 778:

" 'Where instructions give to the jury contradictory and conflicting rules for their guidance, which are unexplained, and following either of which would or might lead to different results, then the instructions are inherently defective and erroneous. And that is true though one of the instructions correctly states the law as applicable to the facts of the case. The reason for this is that where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible, after the verdict, to know that the jury was not influenced by that instruction which was erroneous, as the one or the other must necessarily be, where the two are repugnant. A further reason is that conflicting and contradictory instructions in effect leave the jury without instructions to guide them with reference to the law arising upon the evidence in the cause.'

"See, also, *Herzberg* v. *Knight,* 289 Mich 29; *Socony Vacuum Oil Co.* v. *Marvin,* 313 Mich 528. It cannot be said in the instant case that the jury did not follow the erroneous instructions. It must be held, in consequence, that the giving of such instructions constituted prejudicial error."

We think that the rule applied in the decisions above cited must be applied in the case at bar. It cannot be affirmatively said that the jury could not have been misled to the prejudice of plaintiffs by the language above quoted from the charge. It follows that the judgments entered must be reversed and new trials granted to the appellants. It is obvious from the record that the issue of alleged contributory negligence on the part of Mrs. Iwrey was material.

Complaint is also made with reference to the following statement in the charge, likewise bearing on the question as to the contributory negligence of Mrs. Iwrey:

"Under our law it does not make any difference if the defendant is 99.9% guilty of negligence, if the plaintiff driver is 1-10th of 1%, or in any way guilty of negligence that contributed to the accident she can not recover."

It is insisted that said statement might have been interpreted by the jurors as barring recovery on the basis of negligence so slight as to be immaterial, or possibly on a finding of remote lack of due care as distinguished from negligence proximately contributing to the accident. That the instruction might have been so construed is possible. The specific reference to stated percentages might well have been confusing.

Except in the respects noted, the instructions to the jury fully and fairly submitted the issues in the cases and the claims of the parties with reference thereto. Certain of plaintiffs' requests to charge were argumentative in form and assumed, as proved, facts that were in dispute. Otherwise the subject matter of the requests was sufficiently covered in the charge as given. We find no error prejudicial to plaintiffs other than as above noted.

For the reasons stated the cases are reversed and remanded for new trials.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

DROBCZYK *v.* GREAT LAKES STEEL CORPORATION.

1. MALICIOUS PROSECUTION—WANT OF PROBABLE CAUSE—EVIDENCE.

   The fact that the jury in prosecution of plaintiff for larceny failed to find beyond a reasonable doubt that he was guilty of the offense charged against him is not evidence in later action for malicious prosecution of want of probable cause for the institution of the prosecution.

2. SAME—PROBABLE CAUSE.

   There is probable cause, as the term is used in actions for malicious prosecution, where the information possessed by the defendant is believed and is such and from such sources that the generality of businessmen of ordinary care, prudence, and discretion would prosecute upon it under the same conditions.

3. SAME—TERMINATION OF CRIMINAL PROSECUTION—WANT OF PROBABLE CAUSE—MALICE—INFERENCES.

   It is essential to the establishment of an action for malicious prosecution that plaintiff show the fact of the alleged prosecution, that it has come to a legal termination in his favor, that defendant had no probable cause for instituting the prosecution, and that he acted from malicious motives; and while malice may be inferred from a want of probable cause, want of probable cause may not be inferred from malice.

4. SAME—PROBABLE CAUSE—EVIDENCE.

   Evidence adduced in action for malicious prosecution of plaintiff for alleged larceny of a copper cooler *held*, to show, as a matter of law, probable cause for such prosecution, where the cooler was on his truck on defendant's premises where plaintiff had no right to be an hour before he normally started to work, description of load on his truck was falsified to gate-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 34 Am Jur, Malicious Prosecution § 58.
Acquittal, discharge, or discontinuance of criminal charge as evidence of want of probable cause in malicious prosecution action. 59 ALR2d 1413.
[2] 34 Am Jur, Malicious Prosecution §§ 6, 121, 122.
[5] 34 Am Jur, Malicious Prosecution § 161.

keeper and he had no pass to leave the premises as he knew was necessary, prosecution was not instituted until after thorough investigation by defendant's plant protection personnel and by public police officers and prosecutor's office, and the examining magistrate bound plaintiff over for trial.

5. SAME—WANT OF PROBABLE CAUSE—UNDISPUTED FACTS—QUESTION FOR COURT.

The question of whether the plaintiff had sustained his burden of proof of want of probable cause was a question of law for the court, where there was no dispute as to the material facts in the case.

Appeal from Wayne; Rashid (Joseph G.), J. Submitted June 8, 1962. (Docket No. 30, Calendar No. 49,179.) Decided September 7, 1962. Rehearing denied November 5, 1962.

Case by Stanley Drobczyk against Great Lakes Steel Corporation, a foreign corporation, for malicious prosecution. Judgment for defendant *non obstante veredicto*. Plaintiff appeals. Affirmed.

Kenneth J. Logan and *John H. Huchla, Jr.*, for plaintiff.

Kirby Wilson, Jr., and *Kirby Wilson, III* (*David Gooze*, of counsel), for defendant.

CARR, C. J. This is an action for damages for alleged malicious prosecution. Plaintiff was prosecuted for larceny of a large copper cooler, referred to in the record as a tuyere, the complaint being signed by John Davis, defendant's plant protection chief. Davis was joined as a party defendant in the instant case but on stipulation the action was dismissed as to him. Following his arrest plaintiff was given a preliminary examination and was bound over to the circuit court for trial. The jury acquitted him, and this suit has resulted.

In circuit court the jury returned a verdict for $20,000 in favor of the plaintiff. Defendant filed motion for judgment notwithstanding the verdict which motion was granted, the trial judge concluding that plaintiff had failed to show want of probable cause for the prosecution brought against him and also that defendant and its employees had relied on the conclusions of the police department of the city of River Rouge, following an investigation of the case by a member of said department, and on the action of the prosecutor's office in authorizing the issuance of a warrant for plaintiff's arrest following a careful investigation of the case and a report by an experienced detective of the department having the matter in charge. From the judgment entered in defendant's favor plaintiff has appealed, claiming that the trial judge was in error in granting the motion notwithstanding the verdict.

The facts in the case are not materially in dispute. For approximately a year prior to September 6, 1957, plaintiff was engaged in hauling with his truck materials for Edward C. Levy Company, which apparently was working for defendant at its plant on Zug island, situated within the city of River Rouge. Ordinarily his day's work began at 8 o'clock in the morning. On the date in question he was observed approximately an hour before that time in a claimed forbidden area of the premises, and was later seen with the copper cooler in his truck. Under plant rules obtaining at the time material could not be removed from the premises except on presentation of a pass to the keeper of the gate at which exit was sought. It appears that the gatekeeper approached by plaintiff in his truck had been advised as to the prior observations of other employees, and, no pass being presented, the truck with its load was not allowed to leave the premises.

In subsequent conversations with defendant's plant protection chief, and a representative of his own employer, throughout the investigation, and also on the subsequent trial, it was the claim of plaintiff that when he entered the grounds of the defendant on the morning in question he was approached by 3 men who asked him to use his truck for transporting the copper cooler to a warehouse located outside of the grounds, that these men told plaintiff that they had a pass to go through the gate, and that he undertook to comply with their request. The cooler was placed on the truck, and it would appear from plaintiff's statements that 2 of the men then disappeared while a third climbed into the truck cab with him. As they approached the gate the individual referred to requested that plaintiff turn around or go to another gate. Such request was not complied with.

On the query of the gatekeeper as to what the truck contained, either plaintiff or the individual with him answered, "dirt." During the conversation plaintiff's passenger alighted from the truck and fled the scene. Subsequently plaintiff was taken to the police department of the city by a representative of his own employer. The situation was discussed at some length. Plaintiff's son was called to the station to participate in the proceeding, and thereafter Detective Balaze of the department conducted a careful investigation, interviewing a number of persons and taking notes on which he based a report to the prosecutor's office.

In questioning plaintiff it was sought to obtain the names of the individuals that had participated in placing the tuyere on the truck, but such information was not forthcoming. There was no claim on plaintiff's part that he sought at the time to find out who the men were that were interested in transporting the cooler from the plant grounds, that he sought any information from them as to their employment,

or for whom they were acting in seeking removal of the property. Plaintiff requested that he be given an opportunity to try to locate and identify the parties that he claimed employed him, and was granted approximately a week for that purpose. There were, however, no results.

Following the investigation made by Detective Balaze his report was submitted to the prosecutor's office and, as before noted, the issuance of a warrant was authorized. Davis was then informed as to such action and advised that a complaint would be prepared for his signature. Accordingly Davis went either to the police department or the prosecutor's office and signed such complaint. The warrant issued and the prosecution followed.

The principal question at issue on this appeal is whether plaintiff by his proofs established a want of probable cause for the act of defendant's representative in signing the complaint. The fact that the jury failed to find beyond a reasonable doubt that plaintiff was guilty of the offense charged against him is not evidence of want of probable cause for the institution of the prosecution. In the case of *Hamilton* v. *Smith,* 39 Mich 222, 226, it was said:

"As lawful grounds may exist to justify a party in setting the criminal law in motion, although it turned out that no offense has been committed, or if committed, not by the accused, so it follows that what is probable cause is not contingent upon the fact of the guilt of the accused. This is evident. The law itself ordains that prosecution shall be the method for solving the question whether one has committed crime or not, and as prosecution is therefore a necessary antecedent, the law would violate common sense and destroy itself if it were to say that the act of prosecuting must yet wait for knowledge of the guilt of the suspected party.

"In case the information possessed is believed and is such and from such sources that the generality of business men of ordinary 'care, prudence, and discretion' would prosecute upon it under the same conditions, there is probable cause. *Gallaway* v. *Burr,* 32 Mich 332; *Fagnan* v. *Knox,* 66 NY 525; *Heyne* v. *Blair,* 62 NY 19; *Bacon* v. *Towne,* 4 Cush (58 Mass) 217; *Wheeler* v. *Nesbitt,* 24 How (65 US) 544 (16 L ed 765)."

Likewise, in *Clanan* v. *Nushzno,* 261 Mich 423, 432, the general rule in this respect was summarized as follows:

"But probable cause does not depend upon guilt. An accused party may be innocent of the crime charged against him, and yet there may exist probable cause for his arrest. In actions for malicious prosecution, guilt is a complete but not a necessary defense. It is sufficient if the one who complains has knowledge of facts sufficient to create a belief of guilt in the mind of a reasonable and ordinarily cautious man."

In *Weiden* v. *Weiden,* 246 Mich 347, 352, the Court tersely indicated the burden of proof resting on the plaintiff in a case of this kind, as follows:

"In actions for malicious prosecution 3 propositions must be established: (1) The fact of the alleged prosecution and that it has come to a legal termination in plaintiff's favor; (2) that the defendant had no probable cause; (3) that he acted from malicious motives. *Thomas* v. *Bush,* 200 Mich 224. It is a recognized rule that malice may be inferred from want of probable cause, but this is not a rule that works both ways. Want of probable cause may not be inferred from malice."

On behalf of defendant it is claimed that its employees, including Davis, acted in good faith and that the facts known to Davis were such as to justify him as a reasonably prudent man in believing that

plaintiff was a party to the larceny of the copper cooler. Emphasis is placed on the fact that plaintiff's truck was seen parked in a forbidden area on defendant's premises shortly after 7 o'clock in the morning. As before stated, under his arrangement with his employer, plaintiff was supposed to start his day's work at 8 o'clock. The copper water cooler in question, it is said, weighed approximately 600 pounds. It was loaded on the truck by 3 men. Plaintiff asserts that he did not help to load it but he does not deny that he knew the nature of the load. According to his statements he did not know any of the men, nor did he seek to find out who they were or for whom they worked, if anyone. He knew of the regulation forbidding the removal of property from the grounds without a pass, but did not seek to verify the claim of the men, who were, as he claimed, absolute strangers to him, that they had a pass. The nature of the load, the hour of the day, and all the other circumstances of the situation should have prompted plaintiff to take at least some steps to ascertain the purpose of the removal. Plaintiff must have realized, when his passenger in the truck requested as they approached the gate that he turn around, that there was something wrong. Plaintiff also knew that the answer given to the gatekeeper as to the load on the truck, either by himself or by his passenger, was false.

It is apparent that hasty action was not taken in instituting the prosecution. There was a careful investigation and a report by an experienced detective as to the results thereof. The prosecutor's office obviously felt that the issuance of a warrant was justified, and the magistrate conducting the preliminary examination must have concluded that the proofs with reference to the facts and circumstances of the case were such as to furnish a proper basis for binding plaintiff over to circuit court for trial.

We are in accord with the finding of the circuit judge, who had the advantage of seeing the witnesses and listening to their testimony on the trial, to the effect that plaintiff did not sustain the burden of proof of establishing that defendant's representative acted without probable cause to believe that larceny had been committed and that plaintiff was guilty thereof. We also agree with the judge's finding that Davis signed the warrant in question in reliance on his knowledge of the facts, including facts that developed as a result of the investigation by Detective Balaze, the position of the police department of River Rouge, and the action of the prosecutor's office in authorizing the warrant. Such authorization was given on the basis of the report of Detective Balaze. It does not appear that any prosecution would have been instituted against plaintiff in the absence of such action on the part of the police department and the prosecuting attorney of the county. It is somewhat significant that the jury in answering certain special questions submitted by the trial judge determined that the defendant did not conceal any material facts from the police or prosecutor which would have had a bearing upon plaintiff's innocence. It will be noted that defendant does not claim that affirmative advice was given but, rather, that its representative had a right to rely, and did in good faith rely, on the *action* of the police department and the prosecutor's office.

The order of the trial court in granting the motion for judgment notwithstanding the verdict finds support in the following recent decisions: *Merriam* v. *Continental Motors Corporation,* 339 Mich 546; *Modla* v. *Miller,* 344 Mich 21; and *Gooch* v. *Wachowiak,* 352 Mich 347. Inasmuch as there was no dispute as to the material facts in the case the question whether plaintiff had sustained the burden of proof on the issue of want of probable cause was a question

of law for the court. *Thomas* v. *Bush,* 200 Mich 224, 227.

The judgment is affirmed.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

FITZPATRICK *v.* RITZENHEIN.

1. AUTOMOBILES—PROXIMATE CAUSE—QUESTION FOR JURY.

   The issue of appellee's contributory negligence in action arising out of head-on collision was for jury to determine, where he admitted that he did not even see appellant's car until it was about 3 car lengths distant when starting to cross over to appellee's side of pavement although he could have seen 200 feet ahead at that point, it being a question of fact whether appellee failed to maintain a reasonable and proper lookout and whether an earlier observation of the approaching car would have enabled him to avoid the collision, hence, that his failure to see the car sooner was a proximate cause of the accident.

2. APPEAL AND ERROR—MOTION FOR DIRECTED VERDICT—JUDGMENT NON OBSTANTE VEREDICTO.

   The Supreme Court views the evidence and draws reasonable inferences therefrom in the light most favorable to the opposite party on a motion for directed verdict or for judgment *non obstante veredicto.*

REFERENCES FOR POINTS IN HEADNOTES

[1] 5A Am Jur, Automobiles and Highway Traffic § 1029.
[2] 3 Am Jur, Appeal and Error § 886.
[3] 20 Am Jur, Evidence § 97.
[5] 30A Am Jur, Judgments § 297.
[7] 30 Am Jur, Interest § 40.
[8] 14 Am Jur, Costs § 92.

3. EVIDENCE—JUDICIAL NOTICE—RULES OF PHYSICS.
Triers of facts may consider judicially-noticeable rules of physics.

4. AUTOMOBILES—POINT OF IMPACT—LOCATION OF DEBRIS.
The location of debris following a violent automobile collision does not necessarily locate the point of impact with accuracy, since debris does not always plummet from the point of collision, but may be carried some distance in the direction of force and vacuum.

5. SAME—PHYSICAL FACTS—DIRECTED VERDICT—JUDGMENT NON OBSTANTE VEREDICTO—NEW TRIAL.
Appellants' motions for directed verdict, judgment *non obstante veredicto* and for new trial were properly denied in action arising out of head-on collision, where the physical facts were such that it may not be said they necessarily negatived appellee's right to recover damages.

6. INTEREST—UNLIQUIDATED CLAIMS.
Father in his derivative action for medical and surgical treatment and hospitalization expense for his minor son who was injured in a head-on collision was not entitled to interest before jury's verdict which covered such expenses and loss of earnings of the son until he should reach the age of 21 years, where there was no demand for payment before suit, no proof as to reasonableness, necessity, or payment, and no testimony to show that the minor could and would have earned such amounts had he not been injured, such amounts being considered unliquidated before verdict.

7. SAME—UNLIQUIDATED CLAIMS.
The right to interest is statutory and does not run on an unliquidated claim in the absence of contract express or implied, except by way of damages for money withheld.

8. COSTS—FAILURE OF EITHER APPEAL OR CROSS APPEAL TO PREVAIL.
No costs are allowed where neither the appeal nor the cross appeal has prevailed.

Appeal from Kent; Hoffius (Stuart), J. Submitted April 4, 1962. (Docket Nos. 11, 12, Calendar Nos. 48,990, 48,991.) Decided September 7, 1962.

Case by John Fitzpatrick, Helen Fitzpatrick and Michigan Mutual Liability Company, a Michigan corporation, for property damage arising from auto-

mobile collision on May 30, 1954. Similar action by Helen Fitzpatrick for personal injuries. Cross declaration by defendants. Cases consolidated for trial and on appeal. Judgment for defendants for damages on cross declaration. Plaintiffs appeal. Defendants cross-appeal asking interest. Affirmed.

White & Block and *Cholette, Perkins & Buchanan,* for plaintiffs.

Allaben & Massie (*Sam F. Massie, Jr.,* of counsel), for defendants.

CARR, C. J. The automobiles of the respective parties were meeting each other and collided, the left side of each coming in contact with that of the other. There were no eyewitnesses aside from the 2 drivers. Each of them testified that the collision occurred on his right-hand side of the highway.

The jury found for defendants-cross-plaintiffs, returning substantial verdicts for each. Plaintiffs-cross-defendants appeal, assigning as error the court's denial of their motions for directed verdicts of no cause for action and for judgments *non obstante veredicto* against cross-plaintiffs, and denial of their motions for new trial. Their appeal extends only to judgments for cross-plaintiffs on their cross declarations for damages against cross-defendants, and not at all to the no-cause verdicts and judgments against plaintiffs on the claims contained in their declarations. One cross-plaintiff, William S. Ritzenhein, owner of the automobile driven by his 17-year-old son, cross-plaintiff Robert Ritzenhein, cross-appeals from the court's denial of his motion to add to his judgment interest on the amount of the verdict.

In making their motion for directed verdict against cross-plaintiffs' claims for damages, cross-defendants contended that cross-plaintiff driver should be

held guilty of contributory negligence as a matter of law because of his admission on the witness stand that although he could have seen 200 feet ahead at that point, he did not see cross-defendants' approaching automobile until it was about 3 car lengths distant, at which time he noticed that it was starting to cross over onto his side of the pavement, after which it struck the left rear of his automobile. The court was correct in holding that the question of his contributory negligence in that respect was not one of law. It was for the jury to determine whether he failed to maintain a reasonable and proper lookout, whether an earlier observation of the approaching car would have enabled him to avoid the collision, and, hence, whether his failure to see the car sooner was a proximate cause of the accident. On a motion for directed verdict or judgment *non obstante veredicto,* we view the evidence and draw reasonable inferences therefrom in the light most favorable to the opposite party. *Vukich* v. *City of Detroit,* 325 Mich 644; *Dasovich* v. *Longacre,* 324 Mich 62. Accordingly, accepting cross-plaintiff driver's version as true, the facts are that he was driving lawfully, on his right-hand side of the pavement; that if he had seen cross-defendants' automobile earlier, he would have seen it on its own right-hand side of the road giving no indication of impending danger, and he would not have seen it cross to his side of the road until it was only 3 car lengths distant. That was when he actually did see it do so, and then he had a right to assume that its driver would turn it back to its own side where it belonged. It was not negligence as a matter of law for him to so assume or to fail to take steps in the short interval and distance then available to him to avoid the collision. Applicable is *Essenberg* v. *Achterhof,* 255 Mich 55. There, defendant was driving on the wrong side of the road. Plaintiff,

meeting him, admitted that he did not see him until only 10 feet distant. Plaintiff had judgment below. On appeal defendant urged plaintiff's contributory negligence as a matter of law for failure to maintain a proper lookout. In affirming judgment for plaintiff, this Court said (p 57):

"1. Important in discussing the question of contributory negligence is the fact that, at the time of the accident, the plaintiff was riding where he had a lawful right to ride, and that defendants were driving where they had no right to drive. The plaintiff was not required to anticipate danger from vehicles traveling toward him on that side of the road. To some extent, at least, he had a right to rely on the known fact that they usually did not travel there. Naturally, he would not expect to meet automobiles where the law of the road does not permit them to travel. But if he had looked, he would have had the right to rely on the assumption that defendants also would be looking and would steer their car to their own side of the road to avoid hitting him. These were matters for the jury to consider in determining whether his failure to look for approaching vehicles was negligence. In these circumstances, it cannot be said that he was guilty of contributory negligence as a matter of law. It was a question for the jury. *Dier* v. *Voorhees,* 200 Mich 510; *Leary* v. *Fisher,* 248 Mich 574; *Dreyfus* v. *Daronco,* 253 Mich 235."

See, also, to same effect: *Patterson* v. *Jacobs,* 289 Mich 351; *Suarez* v. *Katon,* 299 Mich 38; *Odell* v. *Powers,* 284 Mich 201; *Morton* v. *Peterman,* 291 Mich 442.

On appeal cross-defendants do not stress the matter of cross-plaintiff driver's failure to see their approaching car at an earlier time. Instead, in support of their charge of his contributory negligence as a matter of law, they have changed their emphasis to a claim of incontrovertible physical facts which

render incredible the testimony of cross-plaintiff as to the side of the pavement on which the collision occurred. This is also the claimed basis for their contention that they are entitled to a new trial because the verdict is against the great weight of the evidence.

The so-called incontrovertible physical facts consist of the location of broken glass and debris and tire and skid marks on the highway, and location of cross-plaintiff's body and of the 2 automobiles after the accident, et cetera. Appellants' appendix does not bother to disclose that 2 State police officers who testified that they had seen all of this upon viewing the scene of the accident shortly after it had occurred, also testified that they could not tell where or on which side of the pavement the accident had happened. Without necessity for reciting them, it must be said that the difficulty for cross-defendants is that these physical facts are not utterly inconsistent with occurrence of the collision in the manner and at the place testified to by cross-plaintiff. Pertinent, although the facts are not identical, is the following from *Albrecht* v. *Pritchard,* 347 Mich 166, 171:

"The trouble with this contention is that it fails to consider, as triers of fact may and sometimes should, judicially-noticeable rules of physics. Contrary to popular impression, the location of debris following violent automotive collision does not necessarily locate the point of impact, with accuracy at least. Debris and broken glass do not always, if we consider physics, drop like a plummet from point of collision. Indeed, and in the present case, the trier of facts would have been justified in finding that located presence of such debris is just as consistent with plaintiff's theory as with that of defendant. It, the debris, could have come from either car, or both. If it came from defendant's car it is at least

arguable that it was carried from point of impact to final resting place by force and vacuum. If it came from plaintiff's car it similarly could have been carried some distance in the direction of such force and vacuum."

Cross-defendants cite *Carlson* v. *Brunette,* 339 Mich 188, and *Blair* v. *Consolidated Freight Company,* 327 Mich 167, as instances in which this Court held that undisputed physical facts overcame other testimony and afforded a basis for finding a party guilty of contributory negligence as a matter of law or finding a verdict to be against the overwhelming weight of the evidence. Such things must, of course, depend on whether the physical facts are conclusive of the issue involved. Not so here, as already observed. Rather, it should be said here, as this Court said in *Kube* v. *Neuenfeldt,* 353 Mich 74, 77, 78:

"The decisions in *Blair* v. *Consolidated Freight Company,* 327 Mich 167; and *Carlson* v. *Brunette,* 339 Mich 188, are not of controlling significance here. The facts involved in those cases are readily distinguishable from the situation in the case at bar. On the record before us it may not be said that the physical facts necessarily negatived plaintiff's right to recover damages, or that such facts render incredible the testimony of the driver of the Chevrolet and of other witnesses who, to a certain extent, corroborated the claim of said driver as to the place where the impact occurred within the intersection."

The motions for directed verdict, judgment *non obstante veredicto,* and for new trial, made by cross-defendants, were properly denied.

Should the trial court have added interest to the jury's verdict for cross-plaintiff William S. Ritzenhein? The verdict for him covered the amount of bills for his minor son's medical and surgical treatment and hospitalization, and loss of his son's earn-

ings until he should reach the age of 21 years. Cross-plaintiff bases his rights to interest thereon on *Gottesman* v. *Fay-Bea Construction Company,* 355 Mich 6, and *Bernstein* v. *Shifman,* 358 Mich 699. In neither did the action sound in tort. *Gottesman* was an assumpsit action brought for sums due on a dishonored check. In *Bernstein* the action was for breach of covenant to make improvements on leased property. Neither have application here. Cross-plaintiffs concede that they are not entitled to interest on the damages awarded for Robert's disability, pain and suffering, but say that the hospital and medical bills and loss of earnings represent liquidated sums or, at least, are susceptible of being made certain by mathematical calculations from known factors on which interest should be allowed. The trial court observed, however, that cross-plaintiff's production of hospital and medical bills was not supported with proofs as to their reasonableness, necessity or payment; and as for damages for loss of earnings, that there was no testimony to show that the minor could and would have earned such amounts absent the injury resulting from the collision. There was no proof of demand for payment before suit. Accordingly, the court held them not liquidated, nor entitled to draw interest before their amounts were fixed by jury verdict. The court quoted from *Township of Royal Oak* v. *City of Berkley,* 309 Mich 572, 583, 584, the following:

"With certain exceptions (see *Mitchell* v. *Reolds Farms Co.,* 268 Mich 301) and in the absence of contract express or implied, the right to interest in this State is statutory. * * * In the absence of agreement and except by way of damages for money withheld, interest does not run on an unliquidated claim. *Sweeney* v. *Neely,* 53 Mich 421."

and concluded that cross-plaintiff was not here entitled to interest as of right. We agree.

Affirmed. No costs, neither the appeal nor cross-appeal having prevailed.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

AMBROSE *v.* DETROIT EDISON COMPANY.

MASTER AND SERVANT—BREACH OF EMPLOYMENT CONTRACT—EQUALLY DIVIDED COURT.

Judgment for defendant on the pleadings in action for alleged breach of an employment contract is affirmed by an equally divided court.

Appeal from Wayne; Weideman (Carl M.), J. Submitted June 13, 1962. (Docket No. 43, Calendar No. 49,279.) Decided September 7, 1962. Rehearing denied November 5, 1962.

Case by Joseph S. Ambrose against the Detroit Edison Company, a foreign corporation, for breach of employment contract. Judgment for defendant on the pleadings. Plaintiff appeals. Affirmed by an equally divided court.

Charles Burke, for plaintiff.

Armand D. Bove, for plaintiff on application for rehearing.

Leon R. Jones, Charles W. Staiger, and *Fischer, Sprague, Franklin & Ford,* for defendant.

REFERENCES FOR POINTS IN HEADNOTE

3 Am Jur, Appeal and Error § 1160.

CARR, C. J. (*for affirmance*). Plaintiff brought this action in circuit court to recover damages for breach of an alleged contract for employment. Motion for judgment on the pleadings was submitted by defendant and was granted. The trial judge in passing on the matter proceeded on the basis of facts well pleaded in plaintiff's amended declaration and on affirmative factual allegations in defendant's answer that were not controverted. From the judgment entered, plaintiff has appealed.

The declaration alleged that in 1926 plaintiff was an employee of the Westinghouse Corporation in the city of Pittsburgh, Pennsylvania, that he was contacted by S. M. Dean, senior engineer of defendant's engineering division, and as a result of a subsequent interview he entered the employ of defendant on or about July 5, 1927. Plaintiff claims in his pleading that he was assured by Mr. Dean that he would be given an opportunity for advancement, security of employment for the future, and that promises were made with reference to future retirement and insurance plans. A retirement plan was formalized in April of 1943.

It further appears from the record before us that in 1947 defendant issued General Order 191 relating to the matter of disciplinary procedure. Under date of July 7, 1958, said order was superseded by a revised order bearing the same number. Plaintiff in the instant case relies on paragraph 14 of said order, which reads as follows:

"14. An employee will be discharged with notice when such factors as job performance, attitude, and ability, considered over a reasonable period of time have shown that it is in the best interest of the company and fair to the employee to terminate employment. In these cases, the amount of notice and pay will depend upon the circumstances."

At the time of the issuance of the order on July 7, 1958, plaintiff was on leave of absence with pay. He returned on October 1st, at which time he was discharged. He was at the time earning $1,100 per month. It is his claim in substance that paragraph 14, above quoted, constituted a part of his contract of employment and that the discharge was not fair to him.

It was the claim of the defendant as set forth in its answer filed in circuit court that Mr. Dean, with whom plaintiff alleged his original agreement for employment was made, deceased in 1949, that the details of the conversation between him and plaintiff prior to employment of the latter were not within the knowledge of any other living agent, representative, or employee of the defendant, and that, in consequence, plaintiff was necessarily precluded from testifying to the conversation claimed.* It was further asserted that the employment was subject to termination at the will of either party, that the general order, on paragraph 14 of which plaintiff relies, related, as indicated by its title, solely to the matter of discipline by suspension or discharge or otherwise, and that it did not have a contractual status. The trial judge, in a carefully considered opinion, agreed with defendant's contention and concluded that there was merely employment which plaintiff was entitled to terminate at any time and from which defendant was entitled to discharge plaintiff if it wished to do so.

Our analysis of the record brings us to the conclusion that the trial judge was not in error in granting the motion for judgment on the pleadings. The declaration filed by plaintiff did not allege that Mr. Dean was authorized to bind defendant by the promises that he is claimed to have made. Neither

* See CL 1948, § 617.65 (Stat Ann § 27.914).—REPORTER.

is there any factual showing on which to base a conclusion that as an employee of the engineering division of defendant he was authorized to make special contracts with employees, or that he was held out as having such authority. So far as appears from the pleadings there is no showing that the board of directors or other officers of the company had any knowledge whatever as to the promises and assurances claimed to have been made by Mr. Dean.

It is apparently plaintiff's theory that his original hiring was to continue until he reached an age at which he might retire with such benefits as should accrue to him at the time. If such was the nature of the understanding between himself and Mr. Dean, obviously the agreement made was one not to be performed within a year and there being no written contract, or memorandum in writing, it was void under the pertinent provision of the statute of frauds relating to oral agreements not to be performed in 1 year from the making thereof (CL 1948, § 566.132 [Stat Ann 1953 Rev § 26.922]). *Commercial Factors Corporation* v. *Zephyr Awning Corporation,* 353 Mich 251.

As indicated, plaintiff in his declaration appears to rely in part at least on his claimed arrangement with Mr. Dean. The statement of questions involved on the appeal as set forth in the brief of counsel for plaintiff also suggests such reliance. However, we find in the brief the statement that:

"Plaintiff contends that General Order No. 191 is the basis for his cause of action and any reference by the court to the conversations plaintiff had with Mr. Dean is immaterial and irrelevant."

It would appear, therefore, that we are primarily concerned at this time with the application of the General Order referred to and particularly with paragraph 14 thereof, above quoted. It should be noted

that plaintiff in count 2 of his amended declaration asserts that defendant and its agents through acts, representations, written orders, and statements (none of which are specified) induced plaintiff to believe that he was to have security with defendant company. It is further asserted that plaintiff relied on such statements to his detriment and prejudice, but there is no showing as to the nature of the detriment sustained.

Paragraph 14 of General Order No. 191 as adopted July 7, 1958, must be interpreted in the light of the purpose of such order and in connection with other provisions thereof. As before noted, the general subject of the order is "disciplinary procedure." It indicates the necessity therefor in certain cases and specifies the different actions that may be taken, including oral warnings, written warnings, suspensions, and discharge. Paragraph 13 declares that:

"13. A discharge may be either immediate or with notice. In cases of deliberate or serious violation of any of the recognized standards of good conduct on the job, whether listed in the examples which follow or not, and where there is no question about the facts, discharge should be immediate. An employee who is immediately discharged will, nevertheless, be allowed pay to the end of the work day."

The order further gave to an employee who might feel that he had been unjustly disciplined the right of appeal to higher management. Plaintiff in this case availed himself of that remedy and his appeal was heard before 3 representatives of defendant company holding equal rank with the supervisor who had discharged him. The result of the hearing was that the order of discharge was sustained. The question naturally follows whether plaintiff is entitled to have submitted to a jury for determination whether his discharge was "fair." We think that

such question must be answered in the negative. General Order No. 191 construed in the light of its purpose clearly recognizes the right of the employer to discipline an employee, including the discharge thereof. The discharge is authorized if the employer concludes that such action is necessary and proper. As incident thereto the employee, if he desires, may pursue his right of appeal to the president of the company and obtain a hearing of the character granted in the present case. Affording such remedy was, of course, in the interest of the employee and is clearly indicative of an attempt by General Order No. 191 to give finality to defendant's acts. It is generally held that an agreement for so-called permanent employment is actually one for an indefinite period, and that such employment is subject to termination at the will of either party. *Sullivan* v. *Detroit, Ypsilanti & Ann Arbor Railway,* 135 Mich 661, 673 (64 LRA 673, 106 Am St Rep 403); *Lynas* v. *Maxwell Farms,* 279 Mich 684; *Adolph* v. *Cookware Company of America,* 283 Mich 561, 568.

Insofar as claimed retirement rights are concerned, attention is directed to a provision of section 7, paragraph 2, of the plan adopted by defendant, providing in substance that the board of directors might terminate the plan at any time. Paragraph 3 of said section further declares that:

"3. The establishment of the plan shall not be construed as conferring any legal rights upon any employee or any person for a continuation of employment, nor shall it interfere with the rights of the company to discharge any employee and to treat him without regard to the effect which such treatment might have upon him as a participant of the plan."

Inasmuch as plaintiff's employment ended before he reached the age of retirement, and was rightfully terminated, he has no claim for damages based on the

theory of loss of retirement benefits. It must be said also that his rights in the group insurance policy maintained by defendant terminated with his employment except, as pointed out by defendant, he had the right to convert to an individual policy. He did not choose to avail himself of that privilege.

On the basis of the record before us we conclude that defendant was entitled to judgment on the pleadings, and such judgment is affirmed.

DETHMERS, KELLY, and ADAMS, JJ., concurred with CARR, C. J.

BLACK, J. (*for reversal*). This is another case where the defendant would move the plaintiff out of court, summarily and with prejudice, on gratuitous assumption that the latter has no proof, and will be able before trial to obtain no proof, with which to support the well-pleaded allegations of his declaration. The moving party's present position is weak in that it moves for final judgment solely on strength of the pleadings, absent any semblance of support of its legal position by affidavit or testimony as is required when motion to dismiss or motion for summary judgment is presented under Court Rule No 18 or Court Rule No 30 (1945).

Aside from the above, my principal objection to Chief Justice CARR's opinion is that my Brothers presurmise with the circuit judge that plaintiff will turn out to be an incompetent witness at trial and, proceeding from that not yet valid assumption, conclude that plaintiff will not be able to adduce competent proof supporting such allegations. My answer is that the competence of a person to testify, under the opposite party statute (CL 1948, § 617.65 [Stat Ann § 27.914]), is determinable when and only when that person is "examined as a witness in his own behalf." This plaintiff has never been sworn, and so we again

determine an evidentiary question before trial which, upon trial, may never arise depending (for one thing apart from others) on the last minute tactical decision of defendant to object or waive objection, or to put upon the stand some witness whose testimony may open the statutory door. Finally, the defendant made no point of, and definitely did not rely upon, any claim that plaintiff would be an incompetent witness. Here are all of the reasons specified by it in the motion for judgment Chief Justice CARR has approved:

"1. Plaintiff has failed to allege more than a contract of employment at the will of the defendant which could be terminated at any time by the defendant, with or without cause.

"2. The plaintiff was discharged with ample cause.

"3. The contract of employment attempted to be alleged in the pleadings is void under the statute of frauds.

"4. Plaintiff voluntarily failed and neglected to convert life insurance rights he possessed under defendant's group life insurance program and any damages resulting to plaintiff therefrom are the result of his said failure to convert.

"5. Any claim by plaintiff for damages under defendant's pension plan is premature at this time."

I oppose this convenient practice of throwing a case out of court before the suitor is given that genuine day in court which, by means of solemnly issued statements and trumpeted hosannahs, we do proclaim for him each year on Law Day. The only alleged excuse for the practice is that the steadily developing litigatory load on our courts requires a sort of automated justice and that the honored tradition of fair and full trial no longer can be handled—as of yore—by today's judicial manpower. Mere utterance thereof exposes the malignant error both of practice and excuse.

Plaintiff's right to trial is subject to be cut off only upon motion made under either of the aforesaid court rules. Then, possibly, the conclusion reached by the court might receive that deposed and requisite support which so far is wanting of record. Let the defendant, by the opening paragraph of its brief-presented counterstatement, declare the facts upon which these cautionary sentiments are expressed (quotation from pages 1 and 2 of defendant's brief):

"We recognize that this is an appeal from a judgment on the pleadings entered in favor of the defendant, on motion for such judgment, and that in such a case, the court must assume that all of the well-pleaded allegations of the plaintiff's declaration are true. However, in accepting this assumption, we trust this Court will not ignore the fact that defendant has pleaded a good and meritorious defense in this case."

When the parties are agreed that a plaintiff has filed a "well-pleaded" declaration and that the defendant has "pleaded a good and meritorious defense," the result is a triable issue, resolution of which should be made by a trial, or, if before trial, only upon motion presented under either of said court rules. To this I must add that even though plaintiff's case may appear weak, that conclusion provides no reason for rushing him from the courtroom, particularly upon motion to the pleadings.

I would reverse and remand for entry of order denying defendant's said motion.

KAVANAGH, SOURIS, and OTIS M. SMITH, JJ., concurred with BLACK, J.

CLARK *v.* STATE BOARD OF REGISTRATION IN MEDICINE.

1. APPEAL AND ERROR—BRIEF AND APPENDIX—MOTION TO STRIKE—PREJUDICE.

   Plaintiff's motion to strike certain statements from brief and appendix of attorney general is denied, where they relate to matters that are not of controlling significance insofar as the issues are presented in his appeal from revocation of license to practice medicine and appellant has not been prejudiced by such statements (CL 1948, § 338.51 *et seq.*, as amended).

2. PHYSICIANS AND SURGEONS—REVOCATION OF LICENSE—CROSS-EXAMINATION.

   Appellant, whose license to practice was revoked by State board of registration in medicine, *held*, not to have been prejudiced by assistant attorney general's interruption of plaintiff's counsel in latter's cross-examination of the complaining witness, where it does not appear that the interruptions were inspired by any improper motive and were occasioned by reason of irrelevancy of the questions asked and were apparently made in the belief that the cross-examination should be kept within proper bounds (CL 1948, § 338.51 *et seq.*, as amended).

3. SAME — REVOCATION — HEARING — CROSS-EXAMINATION — PREJUDICE — EVIDENCE.

   Finding of circuit judge that claim appellant had been denied due process of law because of occasional interruptions of his counsel's cross-examination of the complaining witness at revocation hearing, or by prejudice on the part of the board members or any of them, had not been substantiated on judicial review of the board's action *held*, supported by record that showed, among other things, that the board had previously undertaken to restore his license subject to a condition apparently intended for his benefit (CL 1948, § 338.51 *et seq.*, as amended).

REFERENCES FOR POINTS IN HEADNOTES

[3, 4, 6] 41 Am Jur, Physicians and Surgeons §§ 58–61.
[5] 41 Am Jur, Physicians and Surgeons § 58.

4. SAME—REVOCATION OF LICENSES—CREDIBILITY OF WITNESSES—QUESTION FOR BOARD.

The credibility of witnesses appearing before the State board of registration in medicine in a proceeding to revoke the license of a practitioner is primarily a matter to be determined by the board members, especially where there is an issue of fact as to whether or not he was guilty of conduct highly improper and indecent in character, and involving moral turpitude (CL 1948, § 338.51 *et seq.*, as amended).

5. SAME—REVOCATION OF LICENSE—CONVICTION OF CRIMINAL OFFENSE.

The conviction of a criminal offense in a court of competent jurisdiction is not essential to the right to revoke a license to practice medicine (CL 1948, § 338.51 *et seq.*, as amended).

6. SAME—REVOCATION OF LICENSE—DUE PROCESS—OVERWHELMING WEIGHT OF EVIDENCE.

Licensee to practice medicine was not denied the essentials of due process in proceeding to revoke his license merely because the State board of registration in medicine accepted testimony of the complaining witness as to misconduct, denied by licensee, the decision of the board to revoke being within its authority and not arbitrary nor contrary to the overwhelming weight of the evidence (CL 1948, § 338.51 *et seq.*, as amended).

Appeal from Ingham; Hughes (Sam Street), J. Submitted June 13, 1962. (Docket No. 51, Calendar No. 49,454.) Decided September 7, 1962.

Petition by Ronald E. Clark against the Michigan State Board of Registration in Medicine for judicial review of decision revoking license to practice medicine and surgery. Order of board upheld. Plaintiff appeals. Affirmed.

Abel J. Selburn and *Norman L. Zemke,* for plaintiff.

Frank J. Kelley, Attorney General, *Eugene Krasicky,* Solicitor General, and *Myron A. McMillan,* Assistant Attorney General, for defendant.

CARR, C. J. Plaintiff and appellant was granted a license by defendant board to practice medicine in this State. Said license was issued July 6, 1943, and was revoked by defendant on February 28, 1956. The reasons for such revocation are not of controlling significance insofar as the issues presented in the pending proceeding are concerned. For such reason appellant's motion to strike certain statements from the brief and appendix filed by the attorney general is denied. Appellant has not been prejudiced thereby.

Approximately 1 year after such revocation defendant restored appellant's license, undertaking to subject such action to the observance of the following statement in the order:

"Provided that, you continue under the care and treatment of a qualified psychiatrist with said psychiatrist to furnish this board with a report of progress semiannually."

On July 12, 1958, the board entered an order, without a hearing, revoking appellant's license. Thereupon suit was instituted in the circuit court for the county of Ingham for injunctive relief. Following a hearing, an opinion was filed by the circuit judge summarizing prior proceedings and concluding that defendant board should conduct a full hearing on a definite statement of charges preferred against appellant, and the case was remanded to the board for such purpose.

In accordance with the direction of the circuit court the defendant served written notice on appellant that a hearing would be had before the board on the 15th day of October, 1959, "to determine whether your license to practice medicine in the State of Michigan should be revoked." The notice further advised appellant that the question to be determined at the hearing was whether his conduct

toward a certain named woman in his office, on or about May 16, 1958, constituted unprofessional and dishonest conduct within the meaning of the statute under which the hearing was had. Pursuant to a request for a more specific notice as to the issue involved, appellant was further advised that the charge against him involved the taking of indecent liberties with the person of the woman named, and that such an act would constitute an offense involving moral turpitude.

The hearing as noticed was held before the board and the woman named in said notice testified that appellant made advances to her of such character as to constitute conduct that may properly be classified as indecent in nature, indicating a lack of emotional control on the part of the appellant. Appellant denied the conduct charged against him and offered testimony, negative in character, tending to support his denial. The members of the board, however, accepted the sworn testimony of the complaining witness and decided that appellant had engaged in conduct of such character as to involve moral turpitude, and gross unprofessional and dishonest conduct within the meaning of section 3 of the controlling statute* (PA 1959, No 142 [CLS 1956, § 338.53, Stat Ann 1961 Cum Supp § 14.533]). An order was entered accordingly revoking appellant's license and directing that it be returned to the board forthwith.

Following such order a petition for review was filed in Ingham county circuit court under the provisions of PA 1952, No 197, as amended.† The trial judge hearing the matter filed a written opinion sustaining the action of the defendant board in

* PA 1899, No 237, as amended (CL 1948 and CLS 1956, § 338.51 *et seq.*, as amended [Stat Ann 1956 Rev and 1961 Cum Supp § 14.531 *et seq.*]).

† CLS 1956, § 24.101 *et seq.* (Stat Ann 1961 Rev § 3.560[21.1] *et seq.*).

the revocation of the license. In said opinion the circuit judge rejected the claims of the appellant that he was denied due process of law in the hearing and that the findings of fact by the board were contrary to the great weight of the evidence. The claim that members of the board were prejudiced against appellant was declared to be not sustained by the record. From the order as entered an appeal has been prosecuted to this Court.

Counsel for appellant argue that he was denied due process of law in that they were not allowed the full and free exercise of the right of cross-examination of the complaining witness, and assert further that the evidence was not given fair consideration because of prejudice on the part of the board members. At the hearing an assistant attorney general appeared as counsel for the board. He made objection to certain questions asked of the complaining witness by counsel for appellant on the ground that the matters involved were not relevant to any issue in the case. We are not impressed that appellant was prejudiced by the conduct of counsel. It does not appear that the interruptions of the cross-examination were inspired by any improper motive. Apparently the assistant attorney general deemed it to be his duty to object to irrelevant testimony, and believed that the cross-examination should be kept within proper bounds.

We do not find any substantial basis for the claim that members of the board were prejudiced against appellant, and that because of their attitude they did not give fair consideration to the proofs. The members of the board were acting in their official capacity. The fact that they undertook to restore appellant's license in 1957, subject to a condition apparently intended for his benefit, is scarcely consistent with the claim now made. We agree with the finding of the circuit judge that the record does

not support the claim that appellant was not afforded due process of law on the hearing before the board because of occasional interruptions of his counsel's cross-examination of the complaining witness, or by prejudice on the part of the board members or any of them.

The credibility of the witnesses appearing before the defendant board on the hearing was primarily a matter to be determined by the board members. If the complaining witness testified truthfully the conclusion might well be drawn that appellant was guilty of conduct highly improper and indecent in character, and involved moral turpitude. He denied the conduct charged against him, and hence the issue was squarely presented whether he was guilty thereof. The board determined that issue, as it had a right to do. Conviction of a criminal offense in a court of competent jurisdiction was not essential to the right to revoke the license. *Hanson* v. *Michigan State Board of Registration in Medicine,* 253 Mich 601, 608. In the case cited this Court held that in a proceeding to review the revocation of a license granted to a medical practitioner the board's finding of facts based on competent evidence is binding upon the court. The opinion also discussed the essentials of due process. Measured by the tests applied in that case it must be said that there was no denial of due process in the proceeding now before us. In *In re Van Hyning,* 257 Mich 146, this Court sustained the revocation of a license of a physician to practice medicine and surgery on the ground that there was competent evidence to support the findings. There, as in the case at bar, the objections made were based on alleged unfairness on the part of members of the board, and the conduct of the hearing was characterized by counsel as "arbitrary."

As before indicated, the board was well within its rights in accepting as correct the testimony of the complaining witness, notwithstanding that such testimony was denied by appellant and that 2 witnesses produced by him, one his employee and the other admittedly having impaired hearing, claimed that they did not see or hear any indication of the incident on which the charge leading to revocation of license was based. It may not be said, as counsel for appellant argue, that the factual findings of the board were "contrary to the overwhelming weight of the evidence." Our review of the record satisfies us that the claims made on behalf of appellant are not supported by the record before us, that the defendant board had the requisite authority to revoke the license, and that the order entered by the circuit court of Ingham county should be affirmed. An order will enter accordingly, with costs to appellee.

DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, and OTIS M. SMITH, JJ., concurred.

ADAMS, J., did not sit.

HOUSE *v.* HOUSE.

1. DIVORCE—CUSTODY OF CHILD—CHANGE OF CIRCUMSTANCES.

   Trial court's denial of husband's motion to dismiss divorced wife's second petition to modify decree as to custody of daughter who was then 5–1/2 years of age, which motion was based on ground that the question as to custody and support of the child was *res judicata* by virtue of determination made on first petition which had been filed nearly 14 months theretofore, *held*, proper, where the award of custody to the wife made pursuant to her second petition was made upon a showing that her unfortunate mental condition had steadily improved, her financial condition had also improved, and she was gainfully and permanently employed, the trial judge being then convinced that the mother had conclusively established her fitness for the child's custody.

2. SAME—CUSTODY OF CHILD—PUBLIC POLICY—MODIFICATION OF DECREE.

   Order granting custody of 5–1/2-year-old daughter to divorced mother some 3–1/2 years after decree which had lodged custody with father, upon proofs showing a material improvement in the wife's circumstances during 16-month period between orders on first and second petitions to modify decree as to custody, *held*, within the jurisdiction of the court and in accord with the general principle of public policy recognized by statute as to custody of a child of such tender years (CL 1948, § 722.541).

Appeal from Oakland; Adams (Clark J.), J. Submitted August 11, 1962. (Docket No. 68, Calendar No. 49,904.) Decided September 7, 1962.

Bill by Patricia Ann McManus House against James Stowe House for divorce resulted in decree

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 17A Am Jur, Divorce and Separation § 837 *et seq.*

for defendant on cross bill. Subsequent petition for modification of decree placed custody of minor child with plaintiff. Defendant appeals. Affirmed.

Patterson & Patterson and Barrett, for plaintiff.

Edwin J. Mercer (*Smith & Pratt,* of counsel), for defendant.

CARR, C. J. The parties to this case were married on December 31, 1954. To the marriage a daughter was born on June 1, 1956. In December, 1957, Mrs. House started suit for divorce, charging the defendant in the case with extreme and repeated cruelty. Defendant filed answer and cross bill, and in due time the case came on for hearing. A property settlement was entered into between the parties, which the court approved, and no testimony was introduced in support of the averments of plaintiff's bill of complaint. Final decree was entered December 5, 1958, granting a divorce to defendant and cross plaintiff and giving to him the custody of the minor child of the parties, then approximately 2–1/2 years of age.

Following the entry of the decree Mrs. House removed to the city of New York where she obtained congenial and remunerative employment. The decree of divorce granted to her reasonable rights of visitation of the child, the custody of which she was allowed to have on alternate weekends from 10 a.m. on Saturday to 6 p.m. on Sunday. On August 26, 1959, she filed a petition to amend the decree with reference to the rights of visitation granted to her, setting up her then circumstances which apparently had greatly improved following the granting of the divorce decree. As a result the visitation provision was modified so as to permit her to have custody of the child from October 10,

1959, through and including October 31, 1959, subject to certain specified conditions.

Such arrangement was apparently not wholly satisfactory to Mrs. House, and on April 19, 1960, she filed a second petition seeking extended rights of visitation. On May 12th thereafter a stipulation was filed in the case providing for her custody of the child from June 10, 1960, through and including July 10th following. An order was entered by the court based on the stipulation, which order required that Mrs. House post a bond in the sum of $500 to insure the carrying out of her obligation under the order.

With the right of custody of her child for a limited period, as set forth under the said amendment to the decree of divorce, Mrs. House on September 27, 1960, filed a petition alleging that she was steadily employed in New York City, that she was able to support herself and make contribution to the support of her child, that she had successfully overcome her emotional difficulties, and had developed a manner of life consistent with properly rearing her daughter. She asserted that as the natural mother of said child she was the person best suited to give it the affection and attention which a child of such tender years deserves. To the petition for modification of the decree answer was filed on behalf of the child's father.

Proofs were taken and on February 16, 1961, the court entered an order continuing the custody and control of the minor child in the father "until further order of the court", but granting to the mother the right to have the child with her for a 3-month period during the summer of each year, with rights of visitation during such period on the part of the father. Mrs. House was also given the right to have the child with her during the Christmas vacation, subject to the condition that such visitation

period should not interfere with her school attendance. Mrs. House was also granted the right to visit the child when in the custody of the father in the Detroit area.

The opinion rendered by the trial judge on which the order was based indicates his conclusion that a material change of circumstances had occurred since the date of the original decree entered on December 5, 1958, with special reference to plaintiff's economic, physical, and mental condition. Apparently, however, he hesitated to grant the full measure of relief sought by Mrs. House, quite possibly concluding that changes in the existing situation should be brought about in a progressive manner.

On November 16, 1961, Mrs. House filed a second petition to amend the decree with reference to the custody of the child, alleging the situation then existing and her ability to give the child a mother's care and attention. Defendant's motion to dismiss the petition on the ground that the question as to the custody and support of said child was *res judicata* was denied by the court. Somewhat extensive proofs were taken in support of the averments of the petition and the answer thereto, as a result of which the trial judge determined that the best interests of the child of the parties required that the principal custody and control thereof be given to the mother. An order was entered accordingly granting the relief sought by the petition but giving to the father the right of custody for not less than 2 months during the summer of each year together with visitation privileges during the Christmas vacation and also the right of visitation on occasions when the father should be in the city of New York or such other place as the mother and child might be living. From such order defendant and cross-plaintiff has appealed.

On behalf of appellant it is claimed that the question raised by the petition involved in the present appeal was *res judicata* by virtue of the determination of the court on the first petition filed by Mrs. House for the modification of the decree with reference to the custody of the child. As before noted, the circuit judge denied the motion to dismiss based on such ground. A consideration of the record justifies the conclusion that the unfortunate mental condition which existed on the part of the mother at the time of the hearing of the divorce case had steadily improved, that her financial condition had also improved, that she was gainfully employed, and apparently permanently so, at the time of the last hearing. It is obvious that the proofs submitted on such hearing were much more complete and convincing than the testimony on the hearing of the first petition for change of custody.

It is apparent from the record that the trial judge was quite familiar with the facts of the case and with the situation of both parties thereto. It is a fair conclusion that he considered it the part of wisdom, and in the interest of the welfare of the child, to withhold from the mother the custody that she sought until she had *conclusively* established her fitness therefor. The problem presented is somewhat analogous to that involved in *Sargent* v. *Sargent,* 320 Mich 33, and *Sperti* v. *Sperti,* 326 Mich 620. Under the circumstances involved we think that the motion to dismiss the petition for modification was properly denied. The trial judge was correct in determining that he had jurisdiction to proceed on the basis of the proofs before him.

It is further claimed on behalf of appellant that the proof of change of circumstances was not sufficient to justify the action of the court in amending the decree of divorce in the manner indicated. That there were material changes, particularly with ref-

erence to the condition and situation of the plaintiff following the granting of the decree of divorce, is not open to serious question. The testimony on the last hearing indicated an ability on her part to care for her child properly and to give it the affection so essential to the proper rearing of a child of tender years. The proofs indicate that the little girl was strongly attached to her mother, a natural condition with which there should be no interference. It is also true that as the child grows older the necessity for the guidance of her mother will become more imperative.

Th order involved in the instant appeal was entered June 6, 1962, approximately 3-1/2 years after the entry of the final decree of divorce, and nearly 16 months after the order on the prior petition for custody. As before suggested, the changed circumstances on which the circuit judge relied in modifying the decree were progressive in character. It may not be said that such showing was insufficient to justify the amendment of the decree. It is a fair conclusion from the record that there was a material improvement in such circumstances during the period intervening between the first and the second order modifying custodial provisions of the decree.

The order here in question is in accord with the general principle of public policy recognized in CL 1948, § 722.541 (Stat Ann 1957 Rev § 25.311), stating the rule that custody of a child of tender years should be given to the mother, if a proper and competent person, but subject, of course, to the underlying rule that the best interests of the child must be deemed to be controlling. The general principle recognized and applied by the trial judge is exemplified in the following cases: *Eichholtz* v. *Eichholtz,* 319 Mich 42; *Reynolds* v. *Reynolds,* 323 Mich 332; *Vines* v. *Vines,* 344 Mich 222; and *McLay* v. *McLay,* 354 Mich 19.

The decree of the trial court is affirmed. Appellee may have costs.

DETHMERS, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

KELLY, J., did not sit.

McDANIEL *v.* CAMPBELL, WYANT & CANNON FOUNDRY.

1. WORKMEN'S COMPENSATION—SILICOSIS—STATUTORY MAXIMUM.
   The imposition of a maximum limit of $10,500 as to amount of workmen's compensation payable for silicosis and dust diseases did not effect an unreasonable classification, or a denial of the equal protection of the laws, where, although a lower maximum than for other occupational diseases or injuries, it appears silicosis occurs in relatively few industries, that the cost of unlimited workmen's compensation insurance therefor would be prohibitive and that workers afflicted with silicosis are more readily employable in other occupations than workers suffering from other compensable injuries or disabilities (CLS 1956, § 417.4).

2. SAME—SILICOSIS—TIME OF EXPOSURE—STATUTORY MAXIMUM.
   The limitation of $10,500 as maximum amount of workmen's compensation payable for death or disability due to silicosis was intended to apply whether all or only some of the exposure to conditions causing the disease was following adoption of the amendment of the workmen's compensation act so limiting the employer's liability (CLS 1956, § 417.4).

REFERENCES FOR POINTS IN HEADNOTES

[3] 15 Am Jur, Damages §§ 148, 199.
58 Am Jur, Workmen's Compensation § 327 *et seq.*
[4] 14 Am Jur, Courts § 130; 58 Am Jur, Workmen's Compensation § 484 cum supp.
[5] 14 Am Jur, Costs § 98.

3. Same—Medical Expense—Reimbursement.

Provision of workmen's compensation act that the employee entitled to benefits "shall be reimbursed for the reasonable expense incurred by or on his behalf in providing" reasonable medical, surgical, and hospital services and medicines or other attendance or treatment requires the employer to make payment of such sum whether the employee has been legally subjected to payment therefor or not (CLS 1956, § 412.4).

4. Same—Interest on Award.

Rule of law by Supreme Court whereby old rule that no interest was allowable on an award of workmen's compensation is overruled is construed prospectively so that awards made after award on which majority of Supreme Court declared interest should be allowed should also bear interest (Carr, C. J., and Kelly, J., dissenting).

5. Costs—Workmen's Compensation—Statutory Maximum—Interest.

No costs are allowed on appeal from order affirming liability of the employer for death due to silicosis with interest thereon, but modifying the award by applying statutory maximum, since neither party has prevailed in full.

Appeal from Workmen's Compensation Appeal Board. Submitted October 18, 1961. (Docket No. 68, Calendar No. 49,191.) Reargued June 14, 1962. (Docket No. 60.) Decided September 7, 1962. Certiorari denied by supreme court of the United States January 21, 1963.

Joel McDaniel presented his claim against Campbell, Wyant & Cannon Foundry Company, employer, and Michigan Mutual Liability Company, insurer, for workmen's compensation because of disability from silicosis. Award to plaintiff. Defendant appeals. Affirmed in part and reversed in part to apply silicosis liability limitation.

Marcus, McCroskey, Finucan, Libner & Reamon (*Jerry S. McCroskey,* of counsel), for plaintiff.

Amberg, Law & Fallon (*Francis X. Fallon, Thomas A. Ryan, Jr.,* and *Roger Law,* of counsel), for defendant.

DETHMERS, J. Defendants appeal from what they apparently deem to be, *inter alia,* an overruling by the workmen's compensation appeal board of this Court's decision in *Gauthier* v. *Campbell, Wyant & Cannon Foundry Company,* 360 Mich 510. In that case Mr. Justice EDWARDS wrote for the entire Court, in part, as follows (pp 512–514, 522–524):

"This appeal seeks to have this Court declare unconstitutional the statutory maximum limitation now placed upon workmen's compensation for industrial silicosis victims. * * *

"The constitutional provisions relied upon by appellant are:

" 'No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.' US Const, am 14, § 1. * * *

"The inequality complained of is that the maximum set for victims of death or disability due to silicosis is a different and lower maximum than that set for death or disability resulting from other compensable injuries or diseases. Hence, appellant argues that she is the victim of an arbitrary and unreasonable classification. * * *

"The legislative scheme as exemplified in the silicosis amendments included both monthly gradations and overall maximum limitations on benefits designed to lessen the economic impact on industry of accumulated exposure.

"This was recognized in the portion of the opinion of the appeal board upon which appellant depends:

" 'The limitation in section 4 arose out of the original fear of accrued liability in dust disease cases. The special treatment of such cases was certainly reasonable in the beginning. However, more than 21 years have passed since that time. Without question the purpose of the limitation is obsolete.' * * *

"In this case, we deal with a compensation claim based upon an employment of 23 years' exposure to silica dust in a foundry. * * * For 19 of these

years of exposure, there was no law which provided any form of recovery for the disease which ultimately killed decedent as to the occupation in which he was employed. * * *

"Decedent worked for 4 years after passage of the statute which first gave him any protection. * * *

"Any argument that the scheme is now 'obsolete' as to future disabilities must wait consideration on a record which presents some facts from which it might be deduced that the legislative reasoning had lost all value with passage of time and change of circumstances."

Plaintiff-appellee says, and the appeal board held, that this is the case presenting such a record, because all of his 9 years of exposure to silica dust in defendant's or any employment occurred after the effective date of PA 1943, No 245, thus involving no problem of accrued liability, and that, therefore, application, as in *Gauthier,* of the $10,500 maximum fixed by CLS 1956, § 417.4 (Stat Ann 1960 Rev § 17.223), to plaintiff's case would constitute a denial of equal protection of the laws and hence be unconstitutional.

In essence, plaintiff says that in *Gauthier* this Court recognized a basis (accrued liability antedating the statute) for the classification rendering it and the limit reasonable there but that that basis is lacking as applied to the facts in the case at bar, and that, accordingly, the limit is unreasonable and unconstitutional, if held applicable to his claim. This presupposes that the classification has no support in reason other than that stated in *Gauthier.* Defendants urge others, however, which plaintiff brushes aside as merely "fascinating". Plaintiff seems to suggest that if the reasons which would justify the classification in a particular case are not the ones of which the legislature can be shown to have been thinking at the time it made the classification, then

the latter must fall when the reason the legislature did have in mind is insufficient for that case. There is no support for this doctrine. It is enough if a state of facts can be conceived which would form a reasonable basis for the classification. *Naudzius* v. *Lahr,* 253 Mich 216 (74 ALR 1189, 30 NCCA 179); *Miller* v. *Detroit Savings Bank,* 289 Mich 494. These cases and others hold, as well, that the burden rests on the party assailing it to prove the absence of a reasonable basis therefor. What has plaintiff proved in that respect? The most he claims to have shown is that his exposure began after enactment of the remedial statute, and that, as he contends, there is, therefore, no factor or problem of accrued liability in his case to justify the classification and $10,500 limitation.

What are some factual bases, other than that of accrued liability, which defendants say reasonably can be conceived to sustain the classification?

1. Exposure to silicosis and other dust diseases is limited to a relatively narrow segment of industry, consisting largely of mining, quarrying, cutting, grinding and polishing of metal, and foundry work. To this effect, see opinion in *Gauthier,* pp 520–522, quoting from 1 Larson, The Law of Workmen's Compensation, § 41.20, and from the governor's commission of inquiry (House Journal, 1937, pp 158–160 [Michigan]). See, also, September, 1958, issue of Public Health Reports, published by the United States department of health, education and welfare, Vol 73, No 9, pp 839–842, disclosing results of a cost study by the occupational health program of the United States public health service. It shows that for the years 1950 to 1955, two-thirds of the discovered cases of silicosis were associated with mining and quarrying, 16% with foundry work, and 18% with pottery, stone, silica brick, tile, clay and glass industries. Defendants urge that this concentration

on relatively few industries of the insurance cost for care and compensation for persons affected with such diseases might conceivably involve financial risks and burdens so confiscatory as to drive them out of business or out of the State whose laws provide for, but place no limit on, such compensation. This was noted by Larson, in the quotation in *Gauthier,* with respect to the monument industry in Wisconsin, where statutorily imposed full coverage, without limits, caused the insurance premium for monument workers to soar higher than the payroll itself, with the result that the entire industry was closed down.

2. As appears from the above mentioned cost study and published report thereof (see pp 844, 845) average compensation costs, per case, for silicosis, run far higher than in compensation cases generally; and, further, silicosis accounts for a very high percentage (1/3 to 90%) of all occupational diseases. From these factors, the report concludes, with respect to limits in compensation laws in cases of silicosis, that:

"If restrictions in laws were lifted, the costs would undoubtedly skyrocket to unforeseen proportions." (p 845)

3. Workers affected by silicosis are more readily employable in other occupations, where there is no exposure to dust, than is true with workers suffering from other compensable injuries or disabilities.

We think these come within the *Naudzius* characterization of reasonably conceivable facts which would and do sustain the statutory classification and limitation. The statutory imposition of a $10,500 limit on silicosis and dust disease cases, even though not made applicable to other cases of compensable disability, represents a classification which is reasonable. It does not involve a denial of equal protection of the laws. We hold it constitutional as applied to

the facts at bar as we did to those in *Gauthier*. That the legislature intended it to apply in both situations cannot be doubted from the language of the statute.

Defendants also contend that the appeal board erred in granting plaintiff reimbursement from defendants for the use and benefit of the Muskegon County Sanatorium for the cost of his hospitalization there, which plaintiff had not paid and for which he had not been charged. CLS 1956, § 412.4 (Stat Ann 1960 Rev § 17.154), provides:

"The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of his employment, reasonable medical, surgical and hospital services and medicines or other attendance or treatment recognized by the laws of this State as legal, when they are needed * * * *If the employer shall fail, neglect or refuse so to do such employee shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the commission."** (Emphasis supplied.)

Defendants quote from section 3a of the so-called tuberculosis statute, CL 1948, § 329.403a (Stat Ann 1956 Rev § 14.363[1]), as follows:

"Expenditures of public funds for the treatment or control of tuberculosis or for the treatment, isolation or control of persons afflicted with tuberculosis, *shall be considered expenditures for the protection of the public health,* and not as moneys advanced in the nature of welfare or relief. *No person shall be under legal obligation to make reimbursement for such expense so incurred,* unless the State commissioner of health and the county of settlement, after reasonable

* The powers and duties of the workmen's compensation commission, here referred to, and elsewhere in this opinion, have been transferred to the workmen's compensation department and the workmen's compensation appeal board, and the commission has been abolished. See CLS 1956, §§ 408.2, 408.9 (Stat Ann 1960 Rev §§ 17.6[8], 17.6[15]). —REPORTER.

notice and upon fair hearing under rules of procedure to be determined by the State commissioner of health, shall have found that the person so hospitalized or treated, or the person or persons legally liable for his support, are possessed of sufficient income or estate to enable them to make such reimbursement in whole or in part without materially affecting their reasonable economic security or support, in the light of their respective resources, obligations, and responsibilities to dependents. *No such order shall be made retroactive unless* said State commissioner of health and the county of settlement shall find that the person to be charged has been guilty of misrepresenting or withholding knowledge of facts material to the issue. Receipts under any such order, and moneys voluntarily paid as reimbursement, shall be distributed pro rata to the funds out of which the expenditures were made." (Emphasis supplied.)

Defendants then say that the State commissioner of health has not conducted a hearing or made an order as specified in the last above statutory quotation, and conclude that, therefore, as provided therein, "no person shall be under legal obligation to make reimbursement for such expense so incurred" in the county sanatorium for plaintiff's treatment and care. Hence, say defendants, the above quoted language from the workmen's compensation act that the "employee shall be reimbursed for the reasonable expense incurred by or on his behalf in providing" medical and hospital services "by an award of the commission" has no application here because plaintiff has incurred no expense, has not been charged for such service, is not obligated to make reimbursement, and has paid nothing for it, and so there is nothing for which plaintiff can be reimbursed. They urge that it would be a misnomer to call payment therefor to him, under such circumstances, reimbursement when it would really amount to a windfall. The stat-

ute seems, however, to use the word in no technical sense, because it expressly provides that a plaintiff shall be "reimbursed" not only when the expense is incurred by him, but even when incurred on his behalf.

We think the expense in question, incurred by the sanatorium on plaintiff's behalf, comes within the meaning of the reimbursement provision of the compensation statute. It provides for reimbursement of plaintiff. True, the statute does not make express provision for such reimbursement to plaintiff for the use and benefit of another, such as the sanatorium which incurred the expense on plaintiff's behalf. If, however, the appeal board sees fit to place such strictures on the reimbursement due plaintiff from defendants, we see no reason for complaint on the part of defendants who must pay at all events. It cannot much concern them who receives the benefit as between plaintiff and the sanatorium. Certainly public policy or legislative intent as expressed in either act can hardly be said to be offended if the effect of the award is to cause reimbursement of the institution which provided the care for plaintiff. In fact, it accomplishes directly what the above quoted provision in the so-called tuberculosis statute contemplates by the less direct method of proceedings at the instance of the State commissioner of health. Even if it be conceded that plaintiff is not liable under the tuberculosis statute, the fact is not thereby obviated that the sanatorium incurred the expense on his behalf, for which defendants are bound to make reimbursement, that is payment, under the compensation statute.

Finally, defendants raise the question whether, under this Court's decision in *Wilson* v. *Doehler-Jarvis Division of National Lead Company,* 358 Mich 510, interest should be added to the award, as the appeal board did in this case. On December 16, 1958,

the hearing referee found that plaintiff sustained a compensable personal injury on December 10, 1956, and awarded compensation, subject to the $10,500 limitation, but without interest. Defendant filed application to the appeal board for review. Plaintiff filed cross-application for review as to the $10,500 limit, but neither party raised or requested review of the interest question. On November 10, 1960, the appeal board entered its order affirming the award of compensation but modifying it by eliminating the $10,500 limitation and providing, *sua sponte,* for interest on all past due benefits at 5% per annum from due date till paid. In *Wilson* v. *Doehler-Jarvis* the plaintiff was injured in January of 1951, resulting in his disablement in August of 1952 and his death in February of 1955. In May of 1954 he had filed application for hearing and adjustment of claim. Hearing was commenced in September of 1954. Plaintiff died in February of 1955 and in March application was filed on behalf of his dependents for death benefits. In February of 1956 the hearing referee granted compensation and in October of 1956 the appeal board entered its order granting compensation. This was affirmed by this Court July 15, 1958 (353 Mich 363). It is since the latter date that all of the proceedings in the instant case occurred. Plaintiff's disablement in this case on December 10, 1956, followed by 10 months the hearing referee's award to plaintiff Wilson's dependents and by 2 months the appeal board's affirmance in that case. Query well, should interest allowed Wilson's dependents be denied on this plaintiff's compensation when his disability and award came after the referee's and appeal board's award in *Wilson,* merely because the date when this Court affirmed, with modifications, the circuit judge's allowance of interest in *Wilson* came later (January 4, 1960) than the date of this plaintiff's injury and disablement?

That question projects into the foreground the statement in the opinion of the majority of this Court, in approving interest, in *Wilson* v. *Doehler-Jarvis,* 358 Mich 510, 517, that, "This decision shall not, however, be regarded as retroactive." What was meant by that language?

Plaintiff suggests that the members of this Court signing the opinion containing that language meant thereby simply to insure that the decision should not occasion reopening of cases in which interest had not been allowed and which already had been closed on the date of that opinion. Such construction, at all events, appears to pose no constitutional difficulties.

Defendants insist, however, that the express denial, in *Wilson,* of retroactive effect for the new holding allowing interest, should be read in the light of the language of the majority of the 7 members of this Court participating in the decision in *Parker* v. *Port Huron Hospital,* 361 Mich 1, 26, in which note is taken of the fact that "It has been suggested, in the event this Court were to overrule the immunity exception, that it should do so on a prospective basis" to which, in that same opinion (p 28), the response is made, "we believe the new rule should apply to the instant case and to all future causes of action arising after September 15, 1960, the date of filing of this opinion." That, say defendants, should apply here, as relates to the new *Wilson* holding on interest. That is not the view expressed in the 2-man dissent in *Jochen* v. *County of Saginaw,* 363 Mich 648, written by the writer of the 4-man majority opinion in *Parker.* It interpreted the mentioned language in *Wilson* against retroactivity as above suggested by plaintiff.

Not having joined in the majority opinion in either *Wilson* or *Parker,* and remaining unpersuaded still that it is or was within the judicial province, in

Wilson, to amend the compensation statute to make it provide for interest, nevertheless, if the law now be as therein pronounced and I am confronted with the necessity of applying either or both of those majority opinions, then I must conclude that plaintiff's construction of the questioned sentence in *Wilson* should be adopted. When new law comes into being by legislative enactment susceptible of 2 different interpretations, one producing a constitutional result and the other one which would be unconstitutional, it is a rule of statutory construction to adopt that which squares with constitutionality, on the presumption that the legislature intended to do and accomplish that which is constitutional. *Sullivan* v. *Michigan State Board of Dentistry,* 268 Mich 427, and cases cited therein. Ought not law created by this Court to be accorded equal deference and presumption of constitutionality? For this Court to announce in *Wilson,* on January 4, 1960, that the old law as stated in *Fowler* v. *Muskegon County,* 340 Mich 522, which denied that plaintiff the right to interest on workmen's compensation benefits, was then being overruled and that under the new or true law plaintiff Wilson was entitled to such interest, but now, in 1962, without overruling *Wilson* but, in fact, professing that it is still the law, to say to plaintiff McDaniel that his claim for like interest, to which he would be entitled under that present law, is denied because his cause of action for compensation accrued before this Court spoke on the interest question in *Wilson,* is to deny plaintiff McDaniel equal protection of the laws. On January 4, 1960, a majority of this Court declared the law to be that plaintiffs are entitled to interest on workmen's compensation benefits from due date until paid. Until that law is overruled by this Court it cannot, constitutionally, fail to apply it to cases coming before it, absent some intervening statute to the contrary,

unless it confesses the error in that case and recognizes *Fowler* anew.

Accordingly, plaintiff's interpretation of the indicated sentence in the opinion in *Wilson* should be adopted, if for no other reason, to permit the opinion and law therein announced to bear the stamp of constitutionality, at least insofar as "equal protection of the laws" is concerned.

Affirmed in part and reversed in part, as above indicated, and remanded for entry of an order consistent herewith. No costs, neither party having prevailed in full.

ADAMS, J., concurred with DETHMERS, J.

BLACK and KAVANAGH, JJ., concurred in result.

CARR, C. J. (*for modification of award*). For the reasons set forth in the dissenting opinion in *Wilson* v. *Doehler-Jarvis Division of National Lead Company,* 358 Mich 510, 519, we cannot agree that interest should be allowed in the instant case on the award of compensation in plaintiff's favor. The rights and obligations of the parties in a proceeding of this nature rest wholly on the statute. The legislature has not seen fit to provide in the workmen's compensation law that awards thereunder shall draw interest. The issue of public policy in this respect was and is a matter for legislative determination.

With respect to the other questions involved in the case at bar, we are in accord with the conclusions reached by Justice DETHMERS in his opinion.

KELLY, J., concurred with CARR, C. J.

SOURIS, J. (*concurring in affirmance in part, reversal in part*). I am not persuaded plaintiff has borne his burden of proving the absence of a rea-

sonable basis for the maximum limitation appearing in our workmen's compensation act upon benefits paid for death or disability resulting from industrial silicosis. Nor do I believe that defendants, distinguished from plaintiff, are in any position to complain about the appeal board's order granting plaintiff reimbursement of medical expenses for the use and benefit of the county sanatorium, which incurred those expenses in plaintiff's behalf. Finally, the appeal board's award of interest upon all past due benefits from due date until paid was correct for the reasons I set forth in my opinion in the case of *Drake* v. *Norge Division, Borg-Warner Corporation,* 367 Mich 464.

For the foregoing reasons, I concur in the disposition made of this case by Mr. Justice Dethmers.

Otis M. Smith, J., concurred with Souris, J.

CITY OF BELDING *v.* IONIA COUNTY TREASURER.

1. Fines—Apportionment to Libraries.

Penal fine moneys are required to be apportioned in counties having no county library to local units having public libraries on the basis of the proportion that the number of school-age children in each such unit bears to the total number of school-age children in all such units entitled thereto in the county notwithstanding some of such children may be counted in more than 1 district, and even though such apportionment may require adjustment of payments of future funds to be received (CLS 1956, §§ 340.913, 340.915).

References for Points in Headnotes

[3] 14 Am Jur, Costs § 91.

2. SAME—APPORTIONMENT TO LIBRARIES—RECORD OF ESTABLISHMENT.
The legal establishment of a school district library may not be the subject of a collateral attack in mandamus action for apportionment of penal fine moneys because of the loss of records of the original referendum election, where there has been long public acquiescence in the exercise by school district of the powers and functions appertaining to operation of a school district library (CLS 1956, §§ 340.913, 340.915).

3. COSTS — PUBLIC QUESTION — APPORTIONMENT OF PENAL FINE MONEYS.
No costs are allowed in mandamus proceeding relative to apportionment of penal fine moneys, a public question being involved.

Appeal from Ionia; Davis (Morris K.), J. Submitted April 4, 1962. (Docket No. 21, Calendar No. 49,131.) Decided September 7, 1962.

Mandamus by the City of Belding, a municipal corporation, in its own right and acting in behalf of the Alvah N. Belding Memorial Library, against Kathleen Maloney, Ionia County Treasurer, and Belding Area Schools to enforce payment of pro rata share of penal fines collected and earmarked by statute for library purposes. Attorney General intervened on prior appeal. On remand from Supreme Court apportionment made to plaintiff. Intervenor appeals. Reversed and remanded for reapportionment.

Leo Bebeau and *Gemuend & Barnes* (*Raymon W. Barnes,* of counsel), for plaintiff.

Frank J. Kelley, Attorney General, *Eugene Krasicky,* Solicitor General, and *Maxine Boord Virtue,* Assistant Attorney General, for intervenor.

DETHMERS, J. This mandamus case makes its second appearance here. The background and relevant facts are to be found in our previous opinion

reported at 360 Mich 336. Involved is apportionment of Ionia county penal fine moneys to libraries entitled thereto. We held that plaintiff city was entitled to an apportionment for its public library on the basis of school-age children within its borders, unless a forfeiture had been effected. We remanded for taking of proofs and a determination as to whether plaintiff had forfeited its rights and, if not, for determination, also, of the number of children of school age residing within plaintiff city and apportionment accordingly.

On remand, it was stipulated that there was no forfeiture on plaintiff's part and that there were 1,330 children of school age in plaintiff city and, in addition to those, another 30, or 1,360, in defendant Belding Area School District. Also, taking note of our reference to *Stuart* v. *School District No. 1 of the Village of Kalamazoo,* 30 Mich 69, plaintiff stated that it did not contest the legal establishment of defendant school district's library and its right to a portion of the penal fine moneys, but it insists that that defendant's share must be apportioned only on the basis of school-age children in the district but outside of the city.

The court, on remand, ordered the defendant county treasurer to pay to plaintiff city, out of the county's penal fine moneys, $6,483.80, being a sum representing the product of 1,330 times the figure which is the quotient of total penal fine moneys in the county treasury divided by the total number of children of school age in local units which have public libraries in Ionia County and are entitled to library moneys.

The attorney general, as intervenor, has taken an appeal. His position is that the $6,483.80 should be divided equally between plaintiff city and defendant school district because the library of each serves

the 1,330 school-age children residing in plaintiff city.

We disagree with the order of the circuit court and with the positions of both the plaintiff and the attorney general.

The applicable statutory and constitutional provisions, referred to in our previous opinion, contain no authority whatsoever for the 50-50 split proposed by the attorney general. Neither do they authorize, for the purpose of making the apportionment for defendant school district, exclusion of 1,330 school-age children residing therein from the count of school-age children in the district merely because they also happen to reside in plaintiff city.

Section 915 of the statute (CLS 1956, § 340.915 [Stat Ann 1959 Rev § 15.3915]) provides for an annual statement, from the superintendent of public instruction to the county clerk and county treasurer, of the townships, cities, and school districts in the county entitled to receive library moneys, giving the number of school-age children in each as reported to his office by such local units. Sections 913* and 915, read together, call for apportionment by the county treasurer, in counties having no county library, of the penal fine moneys to each of those local units having public libraries and entitled to receive library moneys on the basis of the proportion that the number of school-age children in each such unit bears to the total arrived at by adding the number of school-age children in all such units entitled thereto in the county. It will be objected that the 1,330 children in plaintiff city are thus included both in the count for plaintiff city and in that for defendant school district, to the prejudice of units elsewhere in the county where but 1 library exists. We cannot read the statute as providing

* CLS 1956, § 340.913 (Stat Ann 1959 Rev § 15.3913).—REPORTER.

for anything other than precisely that result. Units having no such library and not entitled to receive library moneys, of course, receive nothing at all. There is nothing unconstitutional about this or violative of the statute.

If apportionment to plaintiff as herein outlined leaves the fund in the hands of the county treasurer insufficient to pay both plaintiff and defendant school district on that basis, because of previous apportionments to units not involved in this suit in amounts in excess of that which would have been paid to them under the formula herein mentioned, we apprehend that adjustments may be made from moneys later coming in to the county's penal fines fund.

Question is raised concerning the import of the reference in our previous opinion to the *Stuart Case*. Proof of loss of records of the original referendum election for the district library's establishment is not a *sine qua non*. We think that case, applied to the facts at bar, fairly indicates that after long public acquiescence in the exercise by a school district of the powers and functions appertaining to operation of a school district library, its legal establishment is not subject to collateral attack as would be the case here.

Reversed and remanded for issuance of writ commanding apportionment by the county treasurer to plaintiff in conformity herewith.

No costs, a public question being involved.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, and OTIS M. SMITH, JJ., concurred.

ADAMS, J., did not sit.

MAYABB *v.* GRAND TRUNK WESTERN RAILROAD COMPANY.

1. TRIAL—DISAGREEMENT OF JURY—MOTION FOR JUDGMENT BY BOTH SIDES WITHOUT RESERVATION.

   The trial court has the power to decide the issues where, although a jury has been impaneled and disagreed, both sides have moved for judgment without reservation as to right to trial by jury if the respective motion were decided adversely, as each party has waived the right to have any issue submitted to the jury (CL 1948, §§ 691.691, 691.701).

2. APPEAL AND ERROR—DISAGREEMENT OF JURY—MOTION FOR JUDGMENT BY BOTH SIDES—QUESTIONS REVIEWABLE.

   On appeal from judgment for defendant, entered after jury had disagreed and each side had moved without reservation for judgment in its favor, the case is treated as though it was a nonjury case and the matter for determination by the Supreme Court is whether or not there was evidence from which the trial judge could find for defendant (CL 1948, §§ 691.691, 691.701).

3. SAME—MOTION FOR JUDGMENT—WITHDRAWAL OR MODIFICATION OF MOTION.

   It was error for the trial court to permit plaintiff, after decision of the case in favor of defendant upon its motion for judgment after disagreement of the jury and each side had moved for judgment, to withdraw or qualify his motion for judgment (CL 1948, §§ 691.691, 691.701).

4. RAILROADS—AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.

   The issue of contributory negligence of plaintiff motorist who was injured in his collision with defendant's railroad engine was properly determined to be a question of fact under the evidence adduced, and trial court's decision for defendant was not against the clear preponderance.

REFERENCES FOR POINTS IN HEADNOTES

[4] 5A Am Jur, Automobiles and Highway Traffic § 1028.
44 Am Jur, Railroads § 631.

Appeal from Macomb; Spier (James E.), J. Submitted April 5, 1962. (Docket No. 30, Calendar No. 49,310.) Decided September 7, 1962.

Case by William F. Mayabb, Jr., by Twila J. Cronk, his guardian, against Grand Trunk Western Railroad Company, a Michigan corporation, for personal injuries sustained in collision of automobile and train. Upon disagreement of jury, judgment for defendant entered on motion. Plaintiff appeals. Affirmed.

Carl M. Weideman, Jr., for plaintiff.

Reinhardt A. Nank and *Earl C. Opperthauser,* for defendant.

DETHMERS, J. A collision occurred in broad daylight at a railroad crossing between a northbound automobile owned and driven by plaintiff and defendant's eastbound train. Plaintiff was severely injured physically and rendered mentally incompetent. From judgment for defendant, plaintiff appeals.

Plaintiff claims negligence on defendant's part in the following respects: (1) failure to keep its right-of-way free from bushes and foliage obstructing the view between its train and plaintiff as he approached the railroad tracks; (2) failure to sound its whistle as train approached the crossing; (3) failure to maintain adequate signs warning of the location of the tracks; (4) failure to have train under control and running it at a speed greater than would permit stopping it within the assured clear distance ahead.

Defendant claims that plaintiff was guilty of contributory negligence in that, although he lived nearby and was familiar with the crossing and its loca-

tion, the embankment on which the railroad track was located could be seen from 1/4 mile south on the road, there was a cross-buck railroad crossing sign at the northwest corner of the crossing, though one was missing at the southeast corner, a standard railroad crossing approach sign was some 250 feet south of the crossing, and the whistle of the train was timely sounded, nevertheless, in spite of all that, he drove his car at from 40 to 50 miles per hour onto the railroad right-of-way and ran into the side of the cowcatcher attached to the front of the locomotive, which, defendant says, was traveling at a rate of 30 miles per hour.

Touching the above contentions, the chief conflict in the testimony relates to the blowing of the train's whistle.

The trial resulted in a jury disagreement and the jurors were discharged. Thereupon, counsel for defendant said he felt he was entitled to renew his earlier motion for a directed verdict under CL 1948, § 691.691 (Stat Ann 1959 Cum Supp § 27.1461), but that he now also moved for judgment upon the evidence and proofs taken, under CL 1948, § 691.701 (Stat Ann § 27.1471), applicable in cases of jury disagreement. No reservation was made by counsel for defendant, in connection therewith, as to right to trial by jury if the motion were decided adversely to him. Counsel for plaintiff then arose and said:

"If the court please, I would make the same motion on behalf of the plaintiff, that the evidence presented to the jury proved negligence as a matter of law; that the damages resulting therefrom and proximate cause were not contested.

"The only issue raised in argument was contributory negligence and that there was no evidence to substantiate that, and, therefore, move for directed verdict—rather, judgment for the plaintiff, and ask that the same jury be impaneled to assess damages."

He made no reservation in connection therewith.

These motions having been made, the court announced that the motion for judgment on the evidence as made by defendant under CL 1948, § 691.701 (Stat Ann § 27.1471), was granted on the basis of the evidence and proofs taken, and also that defendant's original motion for directed verdict "should have been granted and is now granted" because plaintiff was guilty of contributory negligence as a matter of law. Thereafter, plaintiff's counsel said that he had not intended, by his motion, to waive his right to jury trial but to reserve it. The court then permitted plaintiff's counsel to withdraw his motion for judgment, and viewed the case as decided as a matter of law on defendant's motion for a directed verdict. From the court's permitting plaintiff thus to withdraw his said motion or, in effect, to place a qualification on it after the court had decided the case on the merits, defendant cross-appeals.

A controlling question may be considered to be whether, on this appeal, review is as on a trial without jury to determine whether judgment below is against the clear preponderance of the evidence or is as from a directed verdict or judgment *non obstante veredicto* for defendant with plaintiff entitled to have the evidence viewed here in the light most favorable to him.

Defendant cites *Cardinal* v. *Reinecke,* 280 Mich 15, and *Shiovitz* v. *New York Life Ins. Co.,* 281 Mich 382, for the proposition that when both parties, without reservation, move for directed verdict and a verdict is directed, the case is to be considered as having been left for court decision on the facts, but if either party makes reservation of right to go to a jury, there is no waiver by either.

Plaintiff, in turn, cites *Kane* v. *Detroit Life Insurance Company,* 204 Mich 357; *Burkheiser* v.

City of Detroit, 270 Mich 381; and *Arnold* v. *Krug,* 279 Mich 702, as holding that submission by a party of requests to charge negatives his intent to waive a jury trial in making a motion for directed verdict. Also cited is *In re Frazee's Estate,* 307 Mich 404, in which counsel's motion for directed verdict was accompanied by the statement that he hoped that the court would submit the case to the jury without indicating how it felt on certain matters. This Court held that that amounted to a reservation of right to jury trial.

In *Mellios* v. *Dines,* 341 Mich 175, 181, this Court said:

"When, at the close of all testimony, plaintiff made a motion for a directed verdict, and defendants renewed their previous motion for a directed verdict, the court then had the power to decide the issues, as at that time neither motion had any conditions or qualifications attached to it. Subsequently defendants attempted to qualify their motion, but by arguing the cause to the trial court, they waived the right to submit any issue to the jury. Defendants are now estopped to claim that their motion was qualified."

Applicable here is the following from *Long* v. *Dudewicz,* 355 Mich 469, 472, 473:

"We do not have the usual case of a motion by defendant for a directed verdict or a motion *non obstante veredicto,* but a situation where both parties unconditionally asked for a directed verdict in their favor. Both parties having asked for a directed verdict, counsel cannot now complain that there was an issue of fact for the jury. The court properly dismissed the jury and considered both the issues of fact and law. Plaintiff, the loser in this case, cannot renege. *St. Mary's Power Co.* v. *Chandler-Dunbar Water-Power Co.,* 133 Mich 470; *Culligan* v. *Alpern,* 160 Mich 241; *Germain* v. *Loud,* 189 Mich 38; *Kyselka*

v. *Northern Assurance Co.,* 194 Mich 430; *City National Bank* v. *Price's Estate,* 225 Mich 200; *West* v. *Newton,* 229 Mich 68; *Mills* v. *Anderson,* 238 Mich 643.

"In the case of *City National Bank* v. *Price's Estate,* 225 Mich 200, 212, Justice STEERE, writing for the Court, said:

" 'While there may be room for conflicting inferences from this testimony, both parties without reservation requested a directed verdict and put it up to the court to pass upon whatever the record presented. There was, therefore, no error in the court's assuming to do so. *Culligan* v. *Alpern,* 160 Mich 241; *Germain* v. *Loud,* 189 Mich 38; *Kyselka* v. *Northern Assurance Co.,* 194 Mich 430.'

"In *Kyselka* v. *Northern Assurance Co.,* 194 Mich 430, 439, 440, Justice BROOKE, writing for the Court, said:

" 'In the light of the dialogue which occurred between the court and counsel for both parties at the conclusion of the case, we are of opinion that counsel cannot now complain even if in the determination by the court a question of fact was involved. *Culligan* v. *Alpern,* 160 Mich 241; *Germain* v. *Loud,* 189 Mich 38.'

"A similar situation to the instant case is reported in *Germain* v. *Loud,* 189 Mich 38, where Justice OSTRANDER said (p 44):

" 'While, perhaps, different minds might be differently affected by the testimony which is substantially undisputed—different minds might draw different inferences—counsel for both parties requested the court to decide the controlling question, and it was not error for the court to do so. *Culligan* v. *Alpern,* 160 Mich 241.'

"We find the lower court in this instance, in view of the motions of both counsel, acting at the conclusion of proofs in the same capacity he would have acted had the case been tried before him without a jury.

"In our review on this appeal we find ourselves in the position of determining whether or not there was evidence from which the trial judge could find for the defendant."

In view of the motions of both parties, made without reservations, the case was properly before the court as finder of the facts when he decided it on the merits. As stated in *Long,* above, after that decision was made plaintiff could not renege, seek a jury trial and have another crack at it. He cannot be permitted to play fast and loose with the court by consenting, in effect, to decision on the facts by the court until such decision is made adversely to him and then seeking to withdraw such consent and to go once again to a jury. Strangely enough, plaintiff still argues in his brief on appeal that he is entitled to a holding here that as a matter of law defendant was guilty of negligence which was a proximate cause of plaintiff's injury and that he was free from contributory negligence as a matter of law and that the cause be remanded for submission to a jury solely on the question of damages. That is precisely what he asked for in making his motion for judgment.

The fact that the parties submitted requests to charge before the case was submitted to the jury does not serve to bring the case within the meaning of *Kane, Burkheiser,* and *Arnold,* above, because here the case had already been submitted to the jury under the court's instructions and the jury had already been discharged when plaintiff's motion was made. He could not, at that time, in moving for a judgment, be considered to have indicated an intent to reserve right to jury trial and to have negatived his intention to waive a jury solely by reason of his previous requests to charge offered before submission of the case to the jury and before its disagreement and subsequent discharge.

The trial court erred in permitting plaintiff, after decision of the case, to withdraw or qualify his motion for judgment.

Our remaining question, then, is whether the court's finding plaintiff guilty of contributory negligence, not only as a matter of law, but also as a matter of fact, is against the clear preponderance of the evidence. The positive testimony of the engineer of having blown the whistle and of disinterested witnesses that they heard it, opposed by negative testimony of others in the vicinity that they had not heard it, testimony concerning the presence of such warning signs as were there, of visibility of the embankment 1/4 of a mile distant on the road, and of plaintiff's familiarity with the surroundings and location of the track combine to leave the entire question of his contributory negligence one of fact, as to which the court's decision was not against the clear preponderance.

Under the above holding, questions concerning rulings on admissibility of evidence and instructions need not be considered.

Affirmed. Costs to defendant.

CARR, C. J., and KELLY, OTIS M. SMITH, and ADAMS, JJ., concurred with DETHMERS, J.

BLACK, J. (*concurring*). To demarcate the practice pursued below, the better to record with accuracy the procedural nature of decision here, it should be noted that defendant made due motion for directed verdict at close of proofs and, with its motion, pointedly requested that decision of such motion be reserved in event of denial; whereupon the trial judge announced that defendant's said motion was denied with right of defendant to renew it later

under the statute.[1] (The judge referred, of course, to the Empson act.[2])

Thus, the jury having been discharged for disagreement, and there having been no verdict against the moving party, the case was left subject to retrial or motion by either party—and determination thereof—for judgment under the act of 1927 (CL 1948, § 691.701 [Stat Ann § 27.1471]).[3] Such normal practice was not, however, pursued by the parties. Instead, and immediately following discharge of the jury, each party moved for judgment in his or its favor under and in accordance with these conditions:

"*Mr. Nank* [*for defendant*]: If the court please, the defendant moves the court for directed verdict at this time pursuant to the provisions of the statute which provide for such a move to be made after a jury has disagreed and been discharged. I can find the section if Your Honor wishes me to.

"Perhaps you are quite familiar with it. It provides at any time within 60 days after the jury has been discharged the motion for a directed verdict can be made, and the court can act upon it. I don't know whether it is the court's pleasure to listen to such a motion at this time, or whether he wishes to notice it for hearing and present argument to the court. We are prepared to argue if that meets with Your Honor's pleasure at this time.

"*The Court:* What is counsel's pleasure at this time?

"*Mr. Weideman:* Well, frankly, Your Honor, I think that—

"*The Court:* You want to argue now?

"*Mr. Weideman:* We are all as familiar with it now as we ever will be, unless the record is tran-

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[1] Whether plaintiff made like motion during trial is not shown. I assume he made no such motion prior to discharge of the jury.

[2] CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1959 Cum Supp § 27.1461 *et seq.*).—REPORTER.

[3] For difference of practice under the Empson act and the disagreement statute, see *Central Electric Co.* v. *LeMoine*, 263 Mich 117.

scribed, and, I think, Your Honor's opinion probably more particularly.

"*The Court:* I would like to check on the authority. You are asking for granting of the motion which I reserved judgment on, and not the—

"*Mr. Nank:* This is separate statutory section.

"*The Court:* Not Empson act judgment notwithstanding the verdict?

"*Mr. Nank:* No, this is—we feel we are entitled to renew our earlier motion for directed verdict as made at the close of all the proofs, but now that the jury has been discharged the statutory section that provides for directed verdict by the court also comes into bearing.

"*The Court:* Let's check the statute on it.

"*Mr. Nank:* I will be glad to look for it. It will only take a minute.

"Thereupon the court and counsel adjourned to the court's chambers, shortly returning to the courtroom.

"*Mr. Weideman:* If the court please, I would make the same motion on behalf of the plaintiff, that the evidence presented to the jury proved negligence as a matter of law; that the damages resulting therefrom and proximate cause were not contested.

"The only issue raised in argument was contributory negligence and that there was no evidence to substantiate that, and, therefore, move for directed verdict—rather, judgment for the plaintiff, and ask that the same jury be impaneled to assess damages, and I would also serve notice that is provided in the statute and Mr. Nank goes on the assumption he did serve notice on my motion, and let the court decide the both matters now.

"*Mr. Nank:* Defendant will waive the plaintiff's motion.

"*The Court:* Well, motion for judgment on the evidence will be granted.

"*Mr. Weideman:* To whom, sir?

"*The Court:* Judgment will be granted of no cause for action for the reason that, (1) as a matter of

law I don't believe there was proof of any negligence on the part of the defendant, and, (2) that there was contributory negligence on the part of the plaintiff.

"*Mr. Weideman:* As a matter of law?

"*The Court:* As a matter of law. You prepare the judgment. This judgment—I am getting confused in my statement here.

"*Mr. Nank:* I am sorry, Your Honor.

"*The Court:* First, the court reserved a ruling on the motion for directed verdict made by the defendant. That was done, in addition to the reserving the right to enter judgment notwithstanding the verdict. I will now rule on the motion that was made by defendant at the close of the case for a judgment for the defendant on the grounds that the plaintiff was guilty of contributory negligence, as a matter of law. That motion should have been granted and is now granted.

"I also hold that, in view of the disagreement of the jury, and the motion now having also been made —* * * [CL 1948, § 691.701 (Stat Ann § 27.1471)] —I don't know the status right now of the matter because both parties have made that motion—but I do say that under that statute, and on the basis of the evidence and proofs taken the court enters a judgment of no cause for action.

"Now, that disposes of it in 2 ways, both the ruling on the prior motion you made and ruling on the motion you have now made under this statute. That is all I need on the record on this last motion.

"*Mr. Weideman:* So that the record be clear, sir, my motion, and I believe defendant's motions, were each based upon a proposition that, as a matter of law, the court should rule one way or the other, and clearly it was not and is not my intention to argue the question of fact to Your Honor. This is a right which the plaintiff did reserve his trial by a jury, and my motion was one purely that, as a matter of law, I felt plaintiff was entitled to judgment, just as defendant did. I didn't want the question whether

or not the factual situation was to be submitted to Your Honor to be raised later.

"*The Court:* I am not sure whether motion by both parties under this statute doesn't take it away from jury trial.

"*Mr. Nank:* I am uncertain in that respect.

"*The Court:* I am fearful it might seem as though you had both made it at the close of the proofs before it went to the jury. I think that takes it away from the jury. I don't think you intended that.

"*Mr. Weideman:* I certainly didn't and I would like the record to show reservation in that regard.

"*The Court:* I don't think the plaintiff intended to bring that about. Defendant made motion and I granted it and judgment is entered on the basis of the evidence and proofs taken."

Even if we were to extend, to post trial proceedings as portrayed above, the analogy of cases holding that unconditional and conflicting motions for *directed verdict* (made when a jury is still around to *receive direction*) operate as waiver of jury trial, I nevertheless find in the foregoing colloquy good reason for holding that plaintiff did not, as claimed, waive whatever right to jury retrial he possessed as of discharge of the jury. For apt reason I go back to the genesis of the waiver rule and, employing it as a guide, submit that plaintiff did promptly "set the judge right" respecting his motion; also that the trial judge expressly agreed with plaintiff that there was no waiver and that his decision to enter judgment for defendant was upon the law applicable to the case and that only. In short, Judge Spier definitely ruled that defendant was entitled to judgment as a matter of law. No decision upon the facts was made, as the judge made clear.

Refer now to *St. Mary's Power Co.* v. *Chandler-Dunbar Water-Power Co.*, 133 Mich 470, 478, 479. There, both parties having unreservedly moved for a directed verdict, the trial judge proceeded to take

the case from the jury and enter judgment for the defendant. On plaintiff's appeal it was held (p 479):

"It does not appear that an exception was taken at the time, or that the court was informed that he was in error in understanding that plaintiff did not claim the right to go to the jury on the question of fact. The plaintiff owed it to the judge to set him right about this, if he was wrong, and, not having done so, cannot now ask a reversal upon that ground."

The *St. Mary's Case* is, as indicated, the root of the rule of waiver. When the opposite is shown, that is, that the appellant seasonably made it clear to the trial judge that he by his motion did not waive right to a verdict of the jury, there is no waiver. The list of cases and quotations taken by Justice DETHMERS from *Long* v. *Dudewicz,* 355 Mich 469 recognize this, as does *Arnold* v. *Krug,* 279 Mich 702, in which latter case the following appears (p 706):

"It follows also that one may reserve his right to go to the jury, on denial of his motion to direct, by any definite claim to the court to that end, made upon the record. The reservation need not be by written request to charge."

If this be so far right, there remains the original question: Whether the trial judge erred in entering judgment for defendant under the disagreement statute. I agree with Justice DETHMERS that the judge did not err in entry of such judgment, but for different reasons. The purely negative testimony which was offered in support of plaintiff's charge that the engine's whistle was not blown, per statute, did not rise to the dignity of sufficient proof under the rule of *Dalton* v. *Grand Trunk W. R. Co.,* 350 Mich 479. Furthermore, plaintiff's remaining proof failed, as a matter of law, to establish that other

acts charged as actionable negligence were causally connected with this grade crossing collision.

I concur in affirmance.

KAVANAGH and SOURIS, JJ., concurred with BLACK, J.

McKINNEY v. LARGES.

1. APPEAL AND ERROR—MOTION FOR DIRECTED VERDICT—EVIDENCE.
The proofs adduced must be viewed in the light most favorable to plaintiffs in determining whether or not the trial judge erred in granting motions for directed verdicts, since the trial court must determine whether or not there are questions of fact for the jury to decide.

2. AUTOMOBILES — NEGLIGENCE — EVIDENCE — SLIPPERY PAVEMENT — SPEED — CONTROL OF VEHICLES — PROXIMATE CAUSE.
Evidence presented by plaintiff in action against taxicab owner and operator and owner and operator of colliding car as to proximate cause of collision resulting in injuries to herself and son *held,* sufficient to submit case to jury, where record shows that accident occurred in mid-February about 9:30 in the evening on a slippery pavement, that taxicab was driven at speed of 35 to 40 miles an hour notwithstanding plaintiff warned as to excessive speed for the conditions, and other defendant's oncoming car was slipping and zigzagging for 3 or 4 car lengths before collision occurred.

CARR, C. J., and DETHMERS and KELLY, JJ., dissenting.

Appeal from Wayne; Fitzgerald (Neal), J. Submitted April 6, 1962. (Docket Nos. 39, 40, Calendar Nos. 48,888, 48,889.) Decided September 7, 1962.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 886.
[2] 5A Am Jur, Automobiles and Highway Traffic §§ 1017, 1029.

Case by Bertha Lee McKinney against Richard M. Larges, Bobby Coleman, Jr., and Harold E. Bouchard for personal injuries sustained in collision of taxicab and automobile. Similar action by Dwight McKinney, by next friend. Cases consolidated for trial and on appeal. Directed verdicts and judgments for defendants. Plaintiffs appeal. Reversed and remanded.

Bledsoe, Ford & Bledsoe (*Harold E. Bledsoe,* of counsel), for plaintiffs.

Vandeveer, Haggerty, Doelle, Garzia, Tonkin & Kerr, for defendants Larges and Coleman.

Butler & Martin (*Kenneth F. Martin,* of counsel), for defendant Bouchard.

DETHMERS, J. (*dissenting*). Plaintiffs appeal from directed verdicts of no cause for action entered at the conclusion of their proofs in these 2 cases, consolidated for trial and appeal. Plaintiffs' claims arise out of injuries sustained when the taxicab in which they were passengers, owned by defendant Larges and driven by his employee, defendant Coleman, collided with an automobile owned and driven by defendant Bouchard. The court stated, as reason for its direction of verdicts, that plaintiffs had failed to show any negligence on defendants' part which was a proximate cause of the collision.

Plaintiffs' brief, for its statement of facts, states:

"The pertinent testimony of the plaintiffs relating to the questions of negligence and proximate cause was as follows. (Page references are to transcript.)

"Bertha McKinney—direct examination:

"'. . . Along about February 16, 1957 . . . (Page 8) Did you board a taxicab? Yes, I did . . . It was on Chene. . . . In the City of Detroit?

Yes . . . To what destination . . . ? 973 East Fort street. . . . about 9:30 or a quarter of ten . . . in the evening. (Page 9) . . . What direction did he travel? . . . towards downtown. . . . Southerly? Yes. . . . What happened? . . . As I got in I cautioned him about the weather and conditions (Page 10). It was snowing and icy, very slippery. (Page 11) I gave him (cab driver) my address where I was going, and I asked him to be cautious, because it was slippery and bad outside. . . . He taken off pretty fast. . . . He said I didn't have anything to worry about, that they had plenty of insurance. (Page 13) . . . at the intersection of Chene and Watson what happened? There was an accident. . . . the 2 cars collided. . . . Did you see it? (other car). Yes . . . it was coming . . . from towards the river . . . from towards downtown . . . Northerly . . . ? Yes . . . (Page 14) . . . How far would you say it was away when you first saw it? About 3 or 4 car lengths apart. And as a result of having observed the speeds at which cars were traveling, can you give in your own estimation about the speed that the car was traveling in which you were riding? Between the miles of 35 or 40 miles an hour. . . . Was that car traveling at that speed when you saw this car 3 or 4 car lengths away? (Page 15) Yes it was. Before the accident? Yes . . . immediately before this accident did you say anything to the driver . . . ? I was talking about the weather being slippery and bad outside . . . I screamed and I yelled "stop". . . . Was your boy in the car with you? Yes, he was . . . He was seated on the right side. What was it that made you scream? The car was going this way. (waves her right hand in zigzag fashion). . . . Do you mean to indicate by that that the car started slipping? Yes, it did. Is that when you screamed? (Page 16) Yes it was. When the car started slipping and you screamed, how far was the car that was approaching in a northerly direction . . . ? . . . approxi-

mately about 3 car lengths apart. And did these 2 cars then come together? Yes. I don't remember what happened after. There was a crash? Yes. . . . And what was the next thing you knew? When I was in the hospital.'

"Bertha McKinney, examined by Mr. Tonkin (Page 24):

" 'What did you see this other car do? . . . I seen the lights of it. . . . Were you sitting behind the driver? Yes.'

"Bertha McKinney—Redirect. (Page 110):

" '. . . as a result of this accident . . . what happened to you . . . ? I had a fractured arm, a broken nose, and my teeth on the lower bottom was cracked. I had a big lump in the back of my head. My back was all bruised, and across my chest. . . . Was there an open wound? Yes there was.'

"Direct Examination of Dwight McKinney—(Page 35):

" 'Now were you about February 15th (16th) in an automobile on the streets of the city of Detroit? Yes. With your mother? Yes, sir. . . . What street . . . ? It was Chene. . . . An accident happened. . . . Where were you sitting in that car? I was sitting on the side . . . on the opposite seat of the driver, and looking out of the window. Did you see this car that collided with the car in which you were driving? Well, I had a short glance. I looked in front, and then I looked back out the window. I didn't know what had happened until the accident had occurred (Page 36). Did you hear your mother scream? Yes, sir. You didn't see the accident? You didn't see the cars come together? No, sir . . . Did anything happen to you? Yes, sir, I got both of my front teeth broken out.' "

In its opinion, denying plaintiffs' motion for new trial, the court said:

"All of the plaintiffs' testimony with reference to the happening of the accident is contained between pages 13 and 16 of the trial record. The testimony

indicated that the streets were very icy and slippery. The plaintiff Bertha McKinney testified that the driver of the cab in which she was riding was driving between 35 and 40 miles an hour. The only statement that she made with regard to the car that was approaching, and with which they collided, was that she saw it coming in a northerly direction toward her, and that it was slipping and zigzagging. There was no testimony whatsoever that the approaching car was on any other than its own side of the street. There was no testimony to indicate that her driver was not in his own proper lane. Nothing was said concerning any point of contact, or that would indicate in any way where the collision occurred. There was nothing in the testimony from which a jury could decide whether the speed of the car in which the plaintiffs were riding had anything to do with the cause of the accident. There was no evidence that the approaching car turned or skidded in front of the plaintiffs' driver, or that their driver turned into his path. There was no testimony of any kind to indicate that either car was ever anyplace but on its own side of the street. The indicated slipping or zigzagging by the other car was never detailed. There was nothing to indicate what caused it or where it took place, and therefore it cannot be evidence of negligence. The speed of that approaching vehicle was never testified to. There is, in summation, absolutely nothing in this record to indicate how or why this accident happened. The jury would have been faced with the problem of determining which of these drivers was to blame. Without a pure unsupported guess, they would be unable to decide this question. They would be in equally as bad a position if they were to attempt to determine that both drivers were to blame, because of the complete absence of facts in the record.

"Even if the plaintiffs' driver was going 40 miles an hour, his speed would not be a proximate cause of the accident if the other party had suddenly turned in front of him from, let us say, a distance

of 10 feet. Under the conditions then and there existing, there would have been a collision regardless of the speed at which he was driving, and the speed therefore would not have been a proximate cause of the accident.

"In short, the court directed a verdict because, under any test, the plaintiffs failed to establish a case. There was no direct evidence as to the cause of the accident or its happening, nor were there any facts from which legitimate inferences could be drawn that would indicate whether one or the other, or both, were to blame.

"In the opinion of the court, the plaintiffs' attorney was so anxious to prove all of the damages he possibly could, that he neglected the prime essential of establishing negligence. He was given an opportunity to recall his principal witness, Bertha McKinney, but he did not even then produce any further testimony on the question of negligence. After extensive argument on the motion for a directed verdict, he did not ask to reopen his case for that purpose. It, therefore, must be assumed that he had no testimony other than that already in the record; and which was insufficient, in the opinion of the court, to make a question for the jury.

"The motions will be denied."

The trial court's statement concerning what plaintiffs' proofs showed or failed to show is fully borne out by the record. We agree with its conclusions that they failed to establish how, or where on the street the accident happened, to show of what specific negligence, if any, any defendant was guilty, or anything that any one of them did or failed to do that was a proximate cause of the collision.

The judgments should be affirmed. Costs to defendants.

CARR, C. J., and KELLY, J., concurred with DETHMERS, J.

KAVANAGH, J. The facts with reference to the above entitled cases are set forth in the opinion of Justice DETHMERS. Plaintiffs appeal from directed verdicts of no cause for action entered at the conclusion of their proofs in these 2 cases, consolidated for trial and appeal.

The trial court's reason for granting the directed verdicts at the close of plaintiffs' proofs was that plaintiffs had failed to show any negligence on defendants' part which was a proximate cause of the collision.

In passing upon whether or not the trial judge erred in granting the motions for directed verdicts for the reason given, we must view the proofs—as he should have—in the light most favorable to plaintiffs. *Shaw* v. *Bashore,* 353 Mich 31; *DeLuca* v. *Wonnacott,* 358 Mich 319. The instant case may be one in which, as the trial court indicated, plaintiffs' attorneys did not prove all the facts from which legitimate inferences could be drawn that would indicate defendants were negligent and that their negligence was a proximate cause of the accident. We and the trial judge are not to determine whether we could have done better, but rather to determine from the facts shown whether or not, on favorable view, there were questions of fact presented for the jury to decide. We shall proceed to examine the evidence to determine if this is true.

The proofs disclose and plaintiffs' pleadings allege that plaintiffs were passengers for hire in defendants' common carrier taxicab; that the cab was driven at excessive speed on an icy, snowy, slippery pavement in such a manner that the defendant cab driver was unable to control the vehicle and thus avoid a collision with defendant Bouchard's automobile, which was seen by plaintiff Bertha Lee McKinney some 3 or 4 car lengths away skidding and

slipping on the icy pavement. Defendant Bouchard admits the skidding in the pretrial statement.

Viewed in the most favorable light, the proofs show the following:

Plaintiff Bertha Lee McKinney and her son Dwight boarded the cab on Chene street and asked the driver to take them to an address on East Fort street. It was snowing and the streets were icy and slippery. The cab took off at a fast speed and maintained a speed at from 35 to 40 miles per hour. Bertha McKinney warned the driver of the excessive speed. He replied that she didn't have anything to worry about, that they had plenty of insurance, and continued to drive at a high speed. As they approached Chene and Watson streets Bertha McKinney observed the lights of defendant Bouchard's car 3 or 4 car lengths away. The car was skidding. She yelled and screamed. The car and cab collided. Serious injuries resulted to both Bertha McKinney and her son Dwight McKinney.

On favorable view, we think the proofs at the time the motions for directed verdicts were made showed the cab driver was proceeding 35 to 40 miles per hour along a busy street which was covered with snow and was icy and slippery, and that he continued to drive at such a high rate of speed even after a warning from plaintiff Bertha McKinney.

It is both unnecessary and improper for us to say whether or not this constituted negligence on the part of the driver of the cab. We believe we have fulfilled our judicial function when we say, as we do, that we feel reasonable people might well disagree on that question. We suggest that jurors might infer that the defendant cab driver was driving at an excessive rate of speed on an icy, slippery street and that his speed, under the conditions prevailing, was such that he was unable to turn out

to the right and avoid the oncoming skidding car of defendant Bouchard.

We suggest that under the same unusual conditions—the icy, slippery, snowy street—if the defendant cab driver had not been traveling at such a high rate of speed he might have been able to stop or avoid the accident, and that his failure to drive at a rate of speed in keeping with the prevailing condition of the street (and particularly after the warning of Bertha McKinney) might be negligence which was a proximate cause of the accident.

It is apparent that defendant Bouchard was also driving at a high rate of speed for the existing conditions and that he was skidding and sliding sideways in the direction of defendants' cab. It is a fair inference that Bouchard's car was over on the cab's side of the street when viewed by Mrs. McKinney. Why would she scream if such were not the case? We do not suggest that this necessarily constitutes proof of negligence which was a proximate cause of the accident. But again we point out that reasonable minds might differ as to whether or not a proper inference would be that Bouchard was driving too fast for conditions and, therefore, might be guilty of negligence which was a proximate cause of the accident.

We cannot agree with the finding of the trial court nor with Justice DETHMERS' conclusion that plaintiffs failed to establish of what specific negligence, if any, defendants were guilty; or that plaintiffs failed to show defendants had been guilty of any negligence that was a proximate cause of the injuries. We conclude, under the favorable view, that facts were submitted from which a jury might so find.

We also conclude that a jury question as to negligence and proximate cause has been shown and that the trial court's directed verdicts of no cause for

action must be, and are, reversed and the matter remanded for full trial.

Plaintiffs shall have costs.

BLACK, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred with KAVANAGH, J.

CLARK *v.* GRAND TRUNK WESTERN RAILROAD COMPANY.

1. EVIDENCE—JUDICIAL NOTICE—LOSS OF PASSENGER SERVICE ON RAILROADS.

   Courts may judicially notice the rights of railroads to terminate passenger service on poorly patronized lines between relatively small population centers and the feelings of dwellers in a community on the subject of the loss of such train service.

2. TRIAL—APPEALS TO PASSION OR PREJUDICE.

   Parties to an action in court are entitled to a fair trial on the merits of the case, uninfluenced by appeals to passion, prejudice, sympathies on matters not at issue, self-interest of jurors, and jurors' personal situations.

3. SAME—IMPROPER ARGUMENT—APPEAL TO JURORS' SELF-INTEREST.

   Improper argument, in action by passenger against railroad company for injuries received from assault in railroad station, by defense counsel in appeal to jurors by posing rhetorical question as to "What effect would a decision for the plaintiff in this case have upon business and upon you as individuals, as owners of businesses, as farmers, as owners of property?" *held*, reversible error, especially where it had been preceded by newspaper articles to the effect that a $1.20 ticket costing the railroad company a $90,000 lawsuit was a good reason for the railroads wanting to get out of the passenger business.

4. APPEAL AND ERROR—SAVING QUESTION FOR REVIEW—IMPROPER ARGUMENT.

   Plaintiff's counsel saved point as to improper argument for review, where he objected to the argument and the trial court made a ruling holding the argument improper although counsel

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REFERENCES FOR POINTS IN HEADNOTES

[2] 53 Am Jur, Trial § 495.
[3] 53 Am Jur, Trial § 499.
[4] 3 Am Jur, Appeal and Error §§ 374–376.

did not include a request to charge on the matter, it appearing that a charge would have been useless to erase the matter, designedly made, from the minds of the jurors.

Appeal from Lapeer; Quinn (Timothy C.), J. Submitted April 10, 1962. (Docket No. 49, Calendar No. 49,067.) Decided September 7, 1962.

Assumpsit and case by Marilyn Ann Clark against Grand Trunk Western Railroad Company, a Michigan corporation, for personal injuries sustained in defendant's passenger station. Verdict and judgment for defendant. Plaintiff appeals. Reversed and remanded for new trial.

Leitson, Dean, Dean & Abram (*Max Dean,* of counsel), for plaintiff.

Earl C. Opperthauser, for defendant.

DETHMERS, J. Plaintiff, a young woman, was assaulted, stabbed, and robbed by 2 assailants, while she sat alone in defendant's depot, sometime past midnight, after having alighted from defendant's train on which she had been a passenger for hire. She sued for damages resulting from her injuries. She appeals from judgment for defendant based on jury verdict of no cause for action.

The case was tried in a relatively small county-seat town. On the day trial commenced an article about the case appeared in the local newspaper, containing the following:

"$1.20 TRAIN TICKET &
"$90,000 DAMAGE SUIT

"* * * It is the first case of its kind, a railroad attorney said, 'And,' he added, 'when a $1.20 ticket costs us a $90,000 lawsuit it's another good reason why the railroads want to get out of the passenger business.' "

Defendant says that this news story was probably based upon statements made by defendant's counsel during pretrial proceedings some 3 months before trial. Shortly after the pretrial a like story had appeared in the same newspaper. The article, printed on the day trial commenced, came to the attention of the trial judge who thereupon cautioned the jury not to read the story until after they had decided the case and, if possible, to avoid reading that paper until later.

Thereafter, when Mr. Opperthauser, defendant's attorney, was making his closing argument to the jury, he made the statements as quoted below and the following occurred:

"In law this type claim as presented by Mr. Dean would be known I believe, as a precedent setting case and I want to point out to each and every one of you that you are here to decide this case and your decision can make law.

"*Mr. Dean* (attorney for plaintiff): I think this is highly improper.

"*The Court:* There is nothing before us to indicate that, Mr. Opperthauser.

"*Mr. Opperthauser:* All right, Your Honor, regardless of precedent setting or not, it's the first case of this type to be tried and could be of far reaching importance.

"*Mr. Dean:* That isn't true. There have been many cases similar to this and this is improper argument.

"*Mr. Opperthauser:* You haven't shown any to the court and I haven't yet run across any. Regardless of whether or not we are right or wrong, the point I want to make is this. What effect would a decision for the plaintiff in this case have upon business and upon you as individuals, as owners of businesses, as farmers, as owners of property?

"*Mr. Dean:* Your Honor, I feel that he is attempting to appeal to something which has nothing to do

with this case. I don't think the jury will be moved by it but still I think it's highly improper.

"*The Court:* I think I would class it as improper argument."

We may, if for no other reason than our familiarity with the subject stemming from the several cases recently before us involving the rights of railroads to terminate passenger service on poorly patronized lines between relatively small population centers (see *Chicago & North Western R. Co.* v. *Public Service Commission,* 329 Mich 432; *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Public Service Commission,* 332 Mich 291; *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Public Service Commission,* 338 Mich 9), take judicial notice of the existence of the problem presented and the strong feelings of dwellers in a community on the subject of loss of such train service. The effect of the 2 news stories, if read by the persons who were jurors in this case, and, even if not read, of the quoted statements of defendant's attorney, on the minds and emotions of those jurors, and the possible appeal thereof to prejudice and self-interest on the part of any of them, can well be imagined. It is obvious from counsel's conduct, after the court had admonished the jury not to read the news story, that such an appeal is exactly what was intended and that it was made with design.

In *Layton* v. *Cregan & Mallory Co., Inc.,* 269 Mich 574, 583, a negligence action, this Court, in holding that plaintiff's attorney had made statements in his argument to the jury which appealed to passion and prejudice, resulting in reversible error, said:

"The general principle underlying all these cases is that the parties are entitled to a fair trial on the merits of the case, uninfluenced by appeals to passion or prejudice."

In *Antosik* v. *Michigan Alkali Co.,* 166 Mich 415, in reversing judgment for plaintiff, this Court held that it was improper for counsel in his argument to the jury to appeal to their sympathies on matters not at issue in the case.

In *Narciso* v. *Mauch Chunk Township,* 369 Pa 549 (87 A2d 233, 33 ALR2d 438), argument by defense counsel to the jury that the suit was not in reality against the township but against its taxpayers was held to be a prejudicial appeal to the jurors' self-interest, passion, and prejudice, requiring reversal of judgment on verdict for defendant. See report of that case and annotation, 33 ALR2d 438, 442.

Appeals to jurors' personal situations and attempts, in argument, to apply a hypothetical set of facts, like those involved in the case, to the jurors personally constitute reversible error. *McDonald* v. *Champion Iron & Steel Co.,* 140 Mich 401; *Hughes* v. *City of Detroit,* 161 Mich 283 (137 Am St Rep 504); *Morrison* v. *Carpenter,* 179 Mich 207 (Ann Cas 1915D, 319); *Mortensen* v. *Bradshaw,* 188 Mich 436.

Also cited by plaintiff as cases in which reversal in this Court has resulted from improper argument of counsel to the jury are the following: *Rauhala* v. *Maki,* 172 Mich 112; *Remey* v. *Detroit United Railway,* 141 Mich 116; *Geist* v. *Detroit City Railway,* 91 Mich 446; *Seabury* v. *Detroit United Railway,* 194 Mich 423; *Selby* v. *Detroit Railway,* 122 Mich 311; *Ward* v. *Reed,* 134 Mich 392.

Defendant says plaintiff has not saved the above point for review because he did not ask the court to instruct the jury to disregard the improper argument. Cited for this is *Marr* v. *Saginaw County Agriculture Society,* 364 Mich 373, and cases cited therein. In *Marr* reliance was placed on *Curth* v. *New York Life Ins. Co.,* 274 Mich 513, in which this Court said that, in order to save the point, it was

not enough for counsel merely to take an exception but fail to ask the trial judge to make a ruling. Here plaintiff objected and the trial court did make a ruling, holding the argument to be improper. It is true that the plaintiff did not, in his requests to charge, include one on this point. We think that not fatal to his right to have the matter reviewed here.

In *McDonald* v. *Champion Iron & Steel Co.*, 140 Mich 401, improper argument and an appeal to the jurors to consider what they would take for the death of a son under circumstances similar to those presented in the case was held so prejudicial as to constitute error, considered on review even though not objected to on trial. We think applicable here, from *Steudle* v. *Yellow & Checker Cab & Transfer Co.*, 287 Mich 1, 11–13, the following:

"Exceptions were noted to this argument by appellant, but the court was not requested to warn the jury or charge them that the same was improper and should be disregarded.

"In the case of *Curth* v. *New York Life Ins. Co.*, 274 Mich 513, and cases there cited, we held that in order to base error upon a claim of improper argument there should not only be an objection but the court should be requested to charge or caution the jury. Most of the cases concerned with the question seem to involve a single transgression which presumably occurred inadvertently.

"We believe the record in the instant case shows a deliberate course of conduct on the part of counsel for plaintiff aimed at preventing defendant from having a fair and impartial trial. We think the course of misconduct was so persistently followed that a charge of the court in an effort to obviate the prejudice would have been useless. * * *

"It is our conclusion that the argument as made so inflamed the minds of the jury against the defendant that a charge to disregard it would have

been useless; and that, therefore, it was unnecessary for the defendant to request such a charge."

The statement to the jurors in the Pennsylvania case of *Narciso* v. *Mauch Chunk Township, supra,* above, appealing to their self-interest as taxpayers, certainly is matched in prejudicial effect, here, by the appeal to the jurors' self-interest as to what would be the consequences to them "as individuals, as owners of businesses, as farmers, as owners of property" if, as implied, a verdict for plaintiff should result in discontinuance of railroad passenger service in their area. An instruction to ignore the statement could not have erased it from the jurors' minds. To make plaintiff's rights dependent upon the results of speculation as to whether it affected their judgment and decision is not compatible with the concept of a fair trial, to which every party is entitled. Plaintiff is entitled to a new trial, free from such influences.

Inasmuch as the case must be tried again, it may be helpful to note that we perceive no merit in plaintiff's other claims of error.

Reversed and remanded for new trial, with costs to plaintiff.

CARR, C. J., and KELLY, OTIS M. SMITH, and ADAMS, JJ., concurred with DETHMERS, J.

BLACK, J. (*concurring*). I agree with Justice DETHMERS' reasons for holding that the circuit court's judgment should be reversed, yet cannot concur with his cavalier dismissal of appellant's "other claims of error." He says, without further enlightenment: "Inasmuch as the case must be tried again, it may be helpful to note that we perceive no merit in plaintiff's other claims of error."

So far, in the foregoing posture of the case, the profession is not advised respecting the nature of

appellant's "other claims," and other members of this Court are so far not informed as to Justice DETHMERS' reasons for rejection thereof. The void should be filled lest the counsel in this case be the only ones who know that we have or have not declared that "slight" contributory negligence bars recovery.

Appellant alleges error in the following instruction:

"If you find that the railroad was not guilty of negligence in this case which was a proximate cause of plaintiff's injuries, you need not deliberate any further, you would then find for the defendant and your verdict would be no cause for action. If you do find the defendant guilty of such negligence, then you must determine whether or not the plaintiff was in any way guilty of any negligence which contributed to or was a proximate cause of her injuries. If she was guilty of such negligence, however slight, she is not entitled to recover and in that instance your verdict would also be no cause for action."

Appellant asserts, quite correctly, that "slight" negligence does not authorize recovery when—in a case of tort not arising from contractual relations—such negligence is charged against a defendant; also that it does not bar recovery when charged as contributory in such a case. The concluding sentence of the quoted instruction was accordingly erroneous and should not be repeated on retrial in case contributory negligence again becomes an issue for jury consideration. "Slight negligence is never actionable" (*People* v. *Campbell,* 237 Mich 424, 429), and negligence which is not actionable at suit of one injured thereby cannot be contributory. For recent consideration of the subject and specification of reasons for outlawing such argumentative instructions, see *Busch* v. *Lilly,* 257 Minn 343 (101 NW2d 199). And see recent rejection of the alleged distinction

between "mere" negligence and actionable negligence. *Schattilly* v. *Yonker,* 347 Mich 660, 669.

The right standard to be applied here is simply that of ordinary care in the circumstances of action or omission of action, and that standard is the one by which the law measures the conduct of both plaintiff and defendant in a case like this when the one charges actionable negligence and the other charges contributory negligence.

What was said by Justice CAMPBELL, for the unanimous Court in *Michigan Central R. Co.* v. *Coleman,* 28 Mich 440, 449 (4 Am Neg Cas 1), establishes the point:

"While recognizing to some extent the bearing of these principles some of the rulings below departed from them. The jury were told that carriers of passengers are 'legally bound to exert the utmost care and skill in conveying their passengers, and are responsible for the slightest negligence or want of skillfulness either in themselves or their servants.' 'That the law is, that common carriers of passengers are bound to the utmost care and skill in the performance of their duty. That the degree of responsibility to which carriers of passengers are subjected is not ordinary care, which will make them liable for ordinary neglect, but extraordinary care which renders them liable for slight neglect. It is the danger to the public which may proceed even from slight faults, unskillfulness or negligence of passenger carriers or their servants, and the helplessness in which passengers by their conveyances are, which make this duty of extraordinary care a legal one.'

"The language used would fairly permit the jury to find anything to be negligence which could by any possibility be avoided. But negligence is neither more nor less than a failure of duty."

The presented question may be tested easily by assuming that plaintiff rather than defendant had recovered below, and by assuming further that the

trial judge had instructed the jury that "slight" negligence on the part of the defendant railroad would, if causal, require a verdict of liability in the absence of contributory negligence. Would not the railroad then be in rightful position to complain of reversible error? The *Michigan Central Case* above answers directly.

The fact is that the trial judge, by explicit instruction, held the defendant railroad to the ordinary (and proper) measure of duty, but, upon turning to the plaintiff's duty, held her on penalty of barred recovery to a standard of great or extraordinary care (for definitions, see 45 CJ, Negligence, § 34, p 666; 65 CJS Negligence, § 8-B, p 370).* This was unfair as well as reversibly erroneous.

Appellant's next point is that the question of contributory negligence was not properly in the case at all; that the defendant railroad failed to carry its burden in such regard, and that the question should not have been submitted for jury consideration. There may be merit in the point, since it is not clear that plaintiff owed any duty—self-protective or otherwise—to act other than she did on the occasion. I would not determine the point now, however, since the parties agreed, after the jury had retired for deliberation:

"Whereupon the counsel for each party stipulated that the charge was agreed upon with plaintiff's ex-

* Prosser defines (Prosser on Torts [2d ed], pp 149, 150):

"*Slight Negligence.* This has been defined as 'an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use,' or in other words, a failure to exercise great care. It is said, therefore, not to be the same thing as a slight want of ordinary care, which is merely ordinary negligence. It finds its chief application in cases, such as those of bailments for hire or of carriers injuring passengers, where there is an obligation to use great care, and it results in liability where lack of ordinary care would not. But the term also has been used in a very general comparative sense, as contrasted with gross negligence, where the comparative negligence rule is applied."

ception as to the contributory negligence charge containing the phrase in 'the slightest degree'."

Appellant's final point is that the jury's verdict was and is contrary to the overwhelming weight of the evidence. Here I agree with Justice DETHMERS that such allegation is without merit. On this record a properly instructed jury, well within its prerogative, could have returned a verdict for the defendant railroad as well as for the plaintiff.

KAVANAGH, SOURIS, and ADAMS, JJ., concurred with BLACK, J.

WILLIAMS *v.* COUNTY OF BAY.

1. MUNICIPAL CORPORATIONS—ANNEXATION TO CITIES UNDER 15,000—PETITIONS—SIGNATURES.

   Petitions for annexation of 3 separate areas of territory to home-rule city with population of 4,558 which bore requisite number of signatures from city and township in general, although there were no signatures from 1 area and only 2 signatures from another area, *held*, not defective for lack of signatures under pertinent statute providing that for such purpose the "district to be affected" includes "the whole of each city, village or township from which territory is to be taken or to which territory is to be annexed" (CLS 1956, § 117.9).

2. SAME—ANNEXATION—DATE OF ELECTION.

   It was error for the trial court to set the date for an election as to annexation of territory to a home-rule city, such being a matter within the province of the board of supervisors (CLS 1956, § 117.8).

REFERENCES FOR POINTS IN HEADNOTES

[1–7] 37 Am Jur, Municipal Corporations §§ 23–34.
[8] 14 Am Jur, Costs § 91.

3. SAME—HOME-RULE CITIES—ANNEXATION—ELECTORS ENTITLED TO VOTE.

Only electors residing in township area affected by annexation petitions may vote on question of annexation to city of less than 15,000 population (CLS 1956, § 117.9).

4. SAME—ATTACHMENT OF VALID AND INVALID PETITIONS.

Notwithstanding petition for annexation of territory to a home-rule city was defective and it and 3 others for annexation of 3 other areas were attached together and each of the 4 were signed by the several electors and each contained a different map and was easily distinguishable and separable from the others in the set, the 3 petitions were valid and entitled to affirmative action by the board of supervisors (CLS 1956, § 117.9).

5. SAME—ANNEXATION—ALTERNATIVE PROCEDURES.

Petitions for annexation of separate township areas to home-rule city of less than 15,000 were not defective because an alternative method for annexation as to 1 area containing no population was not void, where the use of the alternative method was permissive, not required (CLS 1956, § 117.9).

6. SAME—ANNEXATION—MAPS.

Maps attached to petitions for annexation of separate areas to home-rule city of less than 15,000 population *held*, not defective or to have failed to accurately portray the lands to be annexed as described in the petitions (CLS 1956, § 117.9).

7. SAME—ANNEXATION—PETITIONS.

Petitions to annex separate areas to home-rule city of less than 15,000 population verified by circulators who did not materially misrepresent matters involved in petitions, and which are regular and in due form on their face, should not have been rejected by the board of supervisors (CLS 1956, § 117.9).

8. COSTS—PUBLIC QUESTION—ANNEXATION TO HOME-RULE CITY.

No costs are allowed in mandamus proceeding to compel submission of annexation questions to electors, a public question being involved (CLS 1956, § 117.9).

Appeal from Bay; Holbrook (Donald E.), J., presiding. Submitted April 4, 1962. (Docket No. 58, Calendar No. 49,442.) Decided September 7, 1962. Rehearing denied November 5, 1962.

Mandamus on three initiatory petitions by Durward J. Williams against the County of Bay and its

board of supervisors to compel submission of annexation questions to electors. City of Essexville intervened as party plaintiff and Charter Township of Hampton was added as party defendant. Writ granted. Defendants appeal. Modified, affirmed, and remanded.

Dilley & Dilley (*Albert R. Dilley,* of counsel), and *Carlton L. Thompson,* for plaintiffs.

B. J. Tally (*Norman J. Miller,* of counsel), and *Martin B. Legatz,* for defendants.

DETHMERS, J. Petitions, addressed to the board of supervisors of Bay county, were filed in the county clerk's office proposing annexation to the city of Essexville of 4 areas in Hampton township. The board found the petitions to be defective and rejected them.

Mandamus was commenced in the circuit court to compel the board of supervisors to submit the annexation questions, with respect to 3 of the areas, to the electors of the district to be affected as defined by statute. The board's finding of defective petitions as to the fourth area has not been contested.

From judgment for plaintiffs ordering issuance of a writ of mandamus to require the board of supervisors to call an election on annexation of the 3 areas this appeal is taken.

Essexville is a city of 4,558 population according to the 1960 United States census. The petitions bore the requisite number of signatures of electors who were freeholders from the city and from the township in general. With respect to 1 of the 3 areas, however, no signatures were procured, and in another only 2, from electors of the area to be annexed. Defendants say that lack of signatures by such electors renders the petitions defective. This they rea-

son from the provision in section 9 of the home-rule act (CLS 1956, § 117.9 [Stat Ann 1961 Cum Supp § 5.2088]):

"Provided, however, That territory may be attached or detached to or from cities having a population of 15,000 or less if a majority of the electors voting on the question in the city to or from which territory is to be attached or detached, and a majority of the electors from that portion of the territory to be attached or detached, as the case may be, both vote in favor of such proposition."

It will be noted that this provision distinguishes annexations of township areas to cities of populations of less than 15,000 from those to larger cities in which the electors of the remainder of the township are also entitled to vote on the question. Defendants reason that if township electors outside the area to be annexed are not permitted by statute to vote on the annexation question then it must follow that they are not qualified to sign petitions therefor. Support for their position is said to be found in *City of Dearborn* v. *Village of Allen Park,* 348 Mich 449. There petitions were filed for incorporation as a city of a village and adjacent uninhabited township territory. This Court quoted from the above noted section of the statute, the following:

"Provided, however, That when a territory is proposed to be incorporated as a city only the residents of the territory to be incorporated shall vote on the question of incorporation."

On the strength of that provision this Court held that only electors in the area to be incorporated were entitled to sign the petitions and to vote on the question. Section 6 of the statute (CLS 1956, § 117.6, as amended by PA 1957, No 210 [Stat Ann 1961 Cum Supp § 5.2085]), provides, however, with respect to incorporation of home-rule cities, or the

annexation of territory thereto or detachment therefrom, or consolidation, et cetera, that proceedings for such purposes may be originated "by petition therefor signed by qualified electors who are freeholders residing within the cities, villages or townships to be affected thereby, to a number not less than 1% of the population of the territory affected thereby". Section 9 defines "district to be affected" as follows:

"The district to be affected by every such proposed incorporation, consolidation or change of boundaries shall be deemed to include the whole of each city, village or township from which territory is to be taken or to which territory is to be annexed."

In the *Dearborn Case, supra,* this Court seems to have contradicted that definition by stating, with respect to proceedings for incorporation as a city, that the area affected consists "of the area proposed to be incorporated only." By analogy the case seems helpful to defendants' contention on this point. Not to be overlooked, however, is the statement in this Court's opinion in that case (p 454), which considerably dilutes the analogy, that:

"In *Presque Isle Prosecuting Attorney* v. *Rogers Township,* 313 Mich 1, it was held that when petitions are filed for the incorporation of territory which includes a village and additional unincorporated area, it is a new incorporation and not a consolidation or annexation, hence the statutes applicable to consolidation or annexation do not necessarily govern for the incorporation of a city."

Accordingly, by its own terms, the language of the *Dearborn Case* is not necessarily controlling here. The language of section 6 of the act, to the effect that the proceedings such as this for annexation to a city may be originated by petition signed by electors of the cities or townships to be affected thereby

and the definition in section 9 of "the district to be affected" as including the whole of each township from which territory is to be taken, are clearly contrary to defendants' position. It seems to us that the doubtful analogy of Court decision here must yield to the unequivocal language of the governing statute. The 3 petitions were not defective for the reason so far considered.

The defendants' contention that the court erred in fixing the election date on which it directed the board of supervisors to submit the annexation question, as to 3 of the areas, to the electors appears to be sound. *North Main Land Co.* v. *Willson,* 245 Mich 537; CLS 1956, § 117.8 (Stat Ann 1961 Cum Supp § 5.2087). A stay having been granted by this Court and the date fixed by the trial court for such election having passed without the election, the matter of fixing the date for the election will properly revert to the board of supervisors for determination.

Defendants are correct in their position that the court erred in directing that the annexation question as to all 3 areas be submitted to the electors of the respective districts affected thereby. As already noted, that would include the electors of the entire township, whereas the statute, as quoted above, relating to annexation by a city of less than 15,000 population, restricts voting in the township to electors in the township areas to be annexed by the city. *Warren Products, Inc.,* v. *City of Northville,* 356 Mich 481. The exception is in the case of an area to be annexed which has no qualified electors residing therein, in which situation, under 1 of the provisions of section 9 of the act, the question is submitted to the qualified electors of the district to be affected, namely, the city and the township, who vote collectively thereon, a majority voting collectively in favor thereof accomplishing the annexation.

Four petitions, each for the annexation of 1 of the 4 areas, respectively, were circulated together, 1 set in the city and another in the township, and all 4 of each set were signed by the same electors in the same sequence. When filed with the clerk the 4 petitions of each set and the 2 sets were fastened together. Because the petitions for annexation of 1 of the 4 areas were admittedly defective in that they propose to annex a portion of another city in which no signatures were procured, it has become a matter of dispute as to whether the 2 sets constitute 1 petition which, if thus defective in 1 part, is defective *in toto,* or whether, though all of the parts were bound together, they still remained, in fact, 4 separate petitions, the defect of 1 leaving the other 3 intact. The board of supervisors held the former and the trial court the latter to be the case. We agree with the trial court. The fact that all the petitions were fastened together for filing, that each set of 4 had on top of 1 petition a printed slip reading "Sign all 4 copies" and that there are 4 in each set that were signed by the same electors in the same sequence, does not obviate the fact that each of the 4 described separate property and contained a different map and was separately signed by the several electors and was easily distinguishable and separable from the others in the set. We approve the trial court's finding that there were 4 petitions and that 3 were valid, entitled to affirmative action by the supervisors.

Defendants say, as to an area proposed to be annexed where no qualified electors reside that the "alternate method" provided in section 9 of the statute is the only one which may be employed. This provides for petitions signed by holders of record title of more than 1/2 of the area to be annexed, to be filed with the annexing city's council and the township board, and that such annexation may then be

accomplished by the affirmative majority vote of such council and board. Section 6 of the act also provides that, when less than 10 qualified electors reside in the area to be annexed, signatures of holders of record title of over 1/2 the area will suffice in lieu of the minimum of 10 signatures from the township otherwise required. Petitions so signed are addressed to the board of supervisors as distinguished from the alternate method provided in section 9. These alternate methods are permissive, but not required. See *Goethal* v. *Kent County Supervisors,* 361 Mich 104. Lack of 10 qualified electors in any of the 3 areas to be annexed did not make use of the alternate method compulsory. The petitions were not defective on this score.

Examination of the record does not persuade us, nor did it persuade the trial judge, that the maps attached to the petitions were defective or failed to accurately portray the lands to be annexed as described in the petitions.

Section 6 of the act requires that "Such petition shall be verified by the oath of 1 or more petitioners." The circulators, who were also petitioners, did verify the petitions. It appears from the testimony of one, taken at the trial, that he did not have the personal knowledge of matters in connection with circulating the petitions to which he had certified. Nevertheless, as the trial court found, the requisite number of signatures appear on the petitions, the latter are regular and in due form on their face, and no question has been raised as to the sufficiency of numbers of signers nor as to the qualifications of the signers as being freeholder electors of the city or township as therein represented. There was nothing before the board of supervisors in this connection to warrant its rejection of the petitions.

The proofs in the case do not support defendants' claim that the circulators of the petitions were guilty

of such misrepresentation to the signers as to invalidate the petition.

The judgment below is modified in accord herewith, and so affirmed, with remand to the trial court with directions to refer the matter to the board of supervisors for submission of the question of annexation of the 3 areas in the township to the qualified electors of the city of Essexville and of the township areas proposed to be annexed having qualified electors residing therein, or if none reside in the area to be annexed, then to the qualified electors of the city of Essexville and of the township of Hampton who shall vote collectively thereon, at a time and manner as determined by the board of supervisors and provided by law.

No costs, a public question being involved.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

BEDWELL *v.* EMPLOYMENT SECURITY COMMISSION.

1. UNEMPLOYMENT COMPENSATION—DISQUALIFICATION FOR BENEFITS —ISSUES OF FACT—COURTS.

   It is not within the province of either the Supreme Court or the circuit court to determine issues of fact when reviewing determinations by the appeal board of the employment security commission as to disqualification for benefits of claimants for unemployment compensation (CLS 1956, § 421.29, subd [1][b]).

2. SAME—FINDING OF APPEAL BOARD—EVIDENCE—COURTS.

   The finding of the appeal board of the employment security commission that there was a labor dispute and that it caused the unemployment for which claimants sought compensation, being supported by evidence on record, was not subject to reversal by the circuit court upon review by certiorari accorded by statute (CLS 1956, § 421.29, subd [1][b]).

3. SAME—LEATHER MANUFACTURER—LABOR DISPUTE—FINDING OF APPEAL BOARD—EVIDENCE.

   Testimony of defendant leather manufacturer's plant manager that layoffs of employees were made only to prevent loss through spoilage or obsolescence and not to reduce inventory at plant where the fact that there was a labor dispute was conceded, supported finding of appeal board of the employment security commission that the unemployment of claimants was due to labor dispute (CLS 1956, § 421.29, subd [1][b]).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 48 Am Jur, Social Security, Unemployment Insurance, and Retirement Funds § 49.

[3, 4] 48 Am Jur, Social Security, Unemployment Insurance, and Retirement Funds § 36.

Construction and application of provisions for disqualification from unemployment benefits because of labor disputes. 28 ALR 2d 287.

4. SAME—PERIOD OF LAYOFF—LABOR DISPUTE—EVIDENCE—DISQUALIFICATION FOR BENEFITS.

The fact that there was evidence that the time necessary to process materials used in the manufacture of leather to a stage where it would not spoil was less than the period involved in the layoff imposed by defendant employer did not make erroneous the determination of the appeal board of the employment security commission that the unemployment for which claimants sought benefits was due to labor dispute disqualifying them therefor as against the great weight of the evidence, where there was evidence that union had given a 60-day notice that strike would occur upon termination of existing collective bargaining contract and various efforts to obtain extensions of time were unavailing prior to employer's order to lay off employees as successive steps in processing materials were completed to prevent spoilage and prepare for shipment (CLS 1956, § 421.29, subd [1][b]).

5. SAME—CONSOLIDATED CLAIMS—APPEAL AS OF RIGHT.

Appeal of employer, taken as of right and without leave, from judgment of circuit court in consolidated cases of claimants for unemployment compensation *held*, proper, notwithstanding no one of the claims amounted to as much as $500, but in the aggregate totaled much more than that sum, in view of the past practice in such cases and present court rule provision in recognition thereof (Court Rule No 60, § 1, as amended in 1961).

6. SAME—COSTS.

No costs are allowed on appeal from judgment in favor of claimants for unemployment compensation, where reversal of judgment of circuit court results in affirmance of determination of appeal board of employment security commission and no costs had been requested by appellant.

Appeal from Muskegon; Fox (Noel P.), J. Submitted April 12, 1962. (Docket No. 66, Calendar No. 49,241.) Decided September 7, 1962.

Jack D. Bedwell and others presented their claims for unemployment compensation which were denied with finding of disqualification because of labor dispute. Upon certiorari joining Michigan Employment Security Commission, its Appeal Board, and

the employer, Whitehall Leather Company, Division of General Shoe Corporation, as defendants, circuit court set aside order of commission. Defendant employer appeals. Reversed, affirming the disqualifying order of the commission.

Marcus, McCroskey, Finucan & Libner (*Paul A. Williams,* of counsel), for plaintiffs.

Beaumont, Smith & Harris (*Frank E. Cooper,* of counsel) and *Sessions & Barlow,* for defendant Whitehall Leather Company.

DETHMERS, J. This is an unemployment compensation case. The ultimate issue is whether the facts in the case bring it within the disqualification-for-benefits provisions of CLS 1956, § 421.29, subd (1) (b) (Stat Ann 1960 Rev § 17.531, subd [1] [b]), applicable to unemployment due to a stoppage of work existing because of a labor dispute. The appeal board found that the stoppage of work was caused by a labor dispute, but the circuit court, on certiorari, held that it was caused by the defendant employer's desire to reduce its production and the inventory of its product in process of production and that the decision of the appeal board was against the great weight of the evidence. On defendants' appeal here the question is whether the circuit court was correct in so holding with respect to the decision of the appeal board.

Defendant employer, hereinafter called the defendant, is engaged in the manufacture of leather, which involves several successive processing steps. It is a wholly-owned subsidiary of General Shoe Corporation, which buys all of its production.

On April 8, 1957, the union representing defendant's employees served a 60-day notice on defendant that the collective bargaining contract between them

would terminate on June 8, 1957. The contract contained the following clause:

"(C) SPOILAGE & PROPERTY PROTECTION.

"(1) Should a strike or work stoppage occur, all perishable stock in process shall be worked into a nonperishable state, which means working the stock into crust. Necessary care shall be given the skins and hides on the company's premises to prevent spoilage; and maintenance requirements for the proper operation of the tannery are hereby guaranteed to the company."

Defendant claimed that if a strike occurred and all work stopped at once, with hides in the several stages of processing, those not completed would be subject to putrefaction and obsolescence, with a threatened potential loss to defendant of $122,850. At a meeting between union and company officials on April 26th defendant so informed the union and requested that an agreement be made that the necessary employees would continue to work past the June 8th strike deadline in order to finish up all work in process and thus avoid such loss. This the union refused, stating that, unless a new contract were entered into by June 7th, a strike would commence at midnight of that date. Defendant advised that, unless such agreement were made, it would be necessary for it to discontinue the initial step in the leather processing with consequent layoffs of employees engaged in that step, not later than May 20th, with similar subsequent, progressive discontinuances and layoffs in the successive steps, in order to insure that there would be no unprocessed or unfinished hides subject to spoilage or obsolescence left, if or when a strike should commence and operations cease on June 8th. Later, defendant approached the union again with a proposal for such agreement and advised that, if not agreed upon,

initial layoffs would have to begin on May 6th to make certain that everything in process would be completed by June 8th. The proposed agreement was not approved by the union.

The initial layoffs commenced, accordingly, on May 6th and followed progressively in the succeeding steps. On June 6th a new contract was entered into and a strike averted. The employees then were called back to work, commencing on June 10th in the initial stage and thereafter, step by step, in the remaining stages.

Claims for compensation are for the period of the indicated temporary layoffs.

In its decision the appeal board said:

"In the instant case, the claimant, through the union, caused the collective bargaining agreement to be terminated on midnight, June 7, 1957, and refused the employer's request to put into effect an extension agreement that would have continued operations after June 7, 1957. Because of this action on the part of the union, the employer was compelled to take the action it did on May 6, 1957, by dropping the 'soaking' operation.

"The record establishes that on the basis of past experience it would take between 18-1/2 and 19-1/2 days to bring the leather to the crust stage where spoilage through putrefaction could be averted temporarily and between 24 or 25 days to finish the goods in process to a point where they would be ready for shipment. The employer concluded that because of the work in process and the threatened work stoppage it was necessary to discontinue 'soaks' on May 6th. The employer further contended that had it not been for the labor dispute the work stoppage of May 6th would not have occurred. In support of this contention the employer's unrebutted testimony established that it had not wanted to discontinue 'soaks'; that several attempts were made to extend the primary contract in order to continue the

'soak' operation up to the termination date of the primary contract; that there was never a problem of being unable to sell its inventory, so the large inventory at the time of negotiations was of little concern; that over the past 16 years there had never been a question of the parent company not taking all the production of the employer; that general economic conditions were such as to make the employer confident that the arrangement would be continued; and, that having failed in getting an agreement to extend production beyond June 7, 1957, the employer, fearful that it would lose over $100,000 in leather spoilage if it continued full production to June 7, 1957, discontinued the initial processing on May 6, 1957. * * *.

"The union advised the employer on April 26, 1957, that it desired to reopen the collective bargaining agreement and negotiate several issues. By this action, the union caused the primary collective bargaining contract to be terminated as of midnight, June 7, 1957, and required the employer to negotiate a new contract prior to that date or the plant would be struck and pickets posted. Therefore, as of April 26, 1957, a labor dispute existed in the establishment of the employer and the claimants were directly interested in the labor dispute.

"This appeal board is of the opinion that the employer ceased the initial processing operation on May 6, 1957, because the union refused to approve an extension agreement protecting the employer against possible spoilage of its work in process and that it resumed operations as soon as possible following the settlement of the labor dispute and recalled its employees as each succeeding operation was resumed following the 'soak' operation. In taking the action of suspending the 'soak' operation, the employer did so because of the statements of the union that the plant would be closed down and pickets placed around the plant if no agreement was worked out by midnight, June 7, 1957. The employer had

the right to rely on these statements and protect its property in an orderly fashion."

The circuit court, in reversing the appeal board, seized upon 1 statement in the testimony of defendant's plant manager that on April 26th the inventory of sides of leather in a certain stage of processing was higher than normally carried. From this, the court concluded that layoffs by defendant were occasioned by the desire to reduce that inventory. Such conclusion is, of course, contrary to that drawn by the appeal board from the fact that defendant sought to persuade the union to agree to finish, after the strike deadline, all hides in process at that time, which discloses a desire not to reduce but to continue production. However, it is neither for us nor the circuit court to determine the issues of fact. That there was a labor dispute was conceded in testimony by the union's president, who further testified that the unemployment was brought about by layoffs in anticipation of a possible strike, and was caused by the union opening the contract. Defendant's plant manager positively testified that the layoffs were only to prevent loss through spoilage or obsolescence and not to reduce inventory. The finding of the appeal board that there was a labor dispute and that it caused the unemployment is supported by such evidence and that recited in its opinion as above quoted. It was error for the circuit court to make its own appraisal of the testimony and to pick and choose from the testimony and inferences therefrom in order to reach a holding that the decision of the appeal board was against the great weight of the evidence. *Miller* v. *F. W. Woolworth Company,* 359 Mich 342; *Federal Trade Commission* v. *Algoma Lumber Company,* 291 US 67 (54 S Ct 315, 78 L ed 655). As said in *Peaden* v. *Employment Security Commission,* 355 Mich 613, 631:

"Our function is exhausted once it is found, as we have found, that the evidentiary record permitted the appeal board to draw such conclusion."

Point is made that the old labor contract had provided, with respect to spoilage and property protection in case of strike, only for working perishable stock in process into crust, whereas defendant, during negotiations, asked that the union agree to work stock to completion, ready for shipment. Also, it is argued, although the appeal board accepted express testimony for defendant to the contrary, that the time necessary for working stock from commencement to crust was less than the period from May 6th, when layoffs commenced, to June 7th, when the old contract terminated. Neither point, if correct, rebuts the appeal board finding that a labor dispute existed and that it caused the layoffs and unemployment. We hold that the decision of the appeal board that plaintiff's unemployment was due to a stoppage of work caused by a labor dispute was not against the great weight of the evidence. It should have been affirmed accordingly.

A large number of defendant's employees had claims like that of the named plaintiff herein. No one of the claims amounted to as much as $500, but in the aggregate they totaled far in excess of that amount. The cases of all the claimants were, by stipulation and with court approval, consolidated and treated as one case before the circuit court and disposed of by a single order in that court, which thereafter certified, for purposes of taking this appeal, that more than $500 was involved. Defendant took its appeal here as of right without leave granted. Plaintiff moved this Court to dismiss the appeal on the ground that leave to appeal was required. The motion to dismiss was denied, with directions that the question be briefed in connection with submission of the questions raised on appeal. In a long

list of cases, extending at least from *Chrysler Corp.* v. *Smith,* 297 Mich 438 (135 ALR 900), to *Linski* v. *Employment Security Commission,* 358 Mich 239, this Court has considered appeals taken as of right, without leave, in unemployment compensation cases. In *Lee* v. *Employment Security Commission,* 346 Mich 171, Mr. Justice BLACK took note of this fact and existence of an apparent uncertainty as to required practice. Accordingly, he concluded to accept the claim of appeal therein as a duly granted application for leave to appeal. Other members of the Court evidently accepted the appeal as of right as properly taken. I see no reason for any other course here. Reference is made to the subsequent adoption by this Court, effective December 1, 1961, after appeal was taken in this case, of the amendment to Court Rule No 60, § 1 (1945),* expressly permitting taking of appeals as of right in this kind of case. It is urged that this represents recognition that the procedure theretofore was otherwise. We think rather that the amendment was in recognition of and intended to clarify what had long been the practice, right or wrong, in these cases. We consider the appeal properly before us.

The order of the circuit court is reversed, and the decision of the appeal board, holding the claimants disqualified for benefits for the reason that their unemployment was due to a stoppage of work existing because of a labor dispute, is affirmed. No costs, none having been requested.

CARR, C. J., and KELLY, BLACK, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred with DETHMERS, J.

KAVANAGH, J., concurred in result.

* See 364 Mich xiv.—REPORTER.

CINDERELLA THEATRE COMPANY, INC., *v.* UNITED DETROIT THEATRES CORPORATION.

1. LANDLORD AND TENANT—STATUTES—IMPLIED COVENANTS.
   The statutory provision against implying covenants applies to the lease of a theater (CL 1948, § 565.5).

2. COVENANTS—IMPLIED COVENANTS—STATUTES.
   The statutory provision that "no covenant shall be implied in any conveyance of real estate, except oil and gas leases," should not be so literally applied as to defeat the clear intent of the parties to an instrument as gathered from its context (CL 1948, § 565.5).

3. LANDLORD AND TENANT—CONSTRUCTION OF LEASE.
   Rule that leases are to be construed against the lessor and in favor of the lessee does not apply where latter drafted the instrument.

4. SAME—CONTRACTS—COURTS.
   A court cannot make a new contract for the parties to a lease.

5. SAME—CORPORATIONS—ASSIGNMENT OF LEASE.
   A corporate lessee may not assign its lessee interest under a 15-year lease to a wholly-owned, completely dominated, and insufficiently capitalized subsidiary corporation and thereby escape its existing liability under the lease.

6. CORPORATIONS—PARENT AND SUBSIDIARY.
   The corporate fiction will be disregarded where the parent corporation's domination of the subsidiary is so complete as to make them practically indistinguishable or to make the subsidiary a mere tool, agency, or instrumentality of the parent, so that the third party, dealing with the parent, will suffer loss unless the parent corporation be held.

REFERENCES FOR POINTS IN HEADNOTES

[2] 14 Am Jur, Covenants, Conditions and Restrictions § 14.
[3] 32 Am Jur, Landlord and Tenant § 128.
[4] 32 Am Jur, Landlord and Tenant § 127.
[5] 32 Am Jur, Landlord and Tenant § 356 *et seq.*
[6–8] 13 Am Jur, Corporations §§ 7, 8.
[12] 19 Am Jur, Estoppel §§ 83–86.

7. SAME—PARENT AND SUBSIDIARY—EVASION OF LEGAL OBLIGATIONS—SEPARATE ENTITIES—FRAUD.

The courts will disregard the separate corporate entity theory when a subsidiary corporation exists to evade the legal obligations of the parent corporation, without regard to actual fraud.

8. SAME—SEPARATE ENTITY—FRAUD.

Corporate separate existence will be disregarded where to recognize it would be to sanction a fraud or promote injustice.

9. ASSIGNMENTS—AGENT—EXISTING LIABILITY.

An assignment to a mere dummy or agent is not sufficient to relieve an assignor from an existing liability.

10. ACTION—SCOPE OF DECISION—VALIDITY OF ASSIGNMENTS.

A decision to set aside the assignment of 15-year lease of a theater property on the ground that that assignment is invalid does not call for decision as to validity of future assignments.

11. LANDLORD AND TENANT—ASSIGNMENT OF LEASE—ESTOPPEL.

Assignment of 15-year leasehold interest of theater to wholly-owned, completely dominated, and insufficiently capitalized subsidiary corporation that was organized with same officers as defendant corporate lessee is set aside notwithstanding claimed estoppel by cashing of first month's rent check, where it appears the lessee-assignor had remained in possession after the purported assignment and delay in return of deposit which lease required upon an assignment, and where defendant lessee had not been prejudiced by such conduct on the part of the lessor.

12. ESTOPPEL—PREJUDICE.

An estoppel does not exist unless the party claiming same was misled to its prejudice and acts are done in reliance upon conduct calculated to mislead.

Appeal from Wayne; Gilmore (Horace W.), J. Submitted April 3, 1962. (Docket No. 3, Calendar No. 49,353.) Decided September 7, 1962.

Bill by Cinderella Theatre Company, Inc., a Delaware corporation, against United Detroit Theatres Corporation and Pontiac Theatre Corporation, both Michigan corporations, to invalidate assignment of lease and to determine liability of original lessee. Decree for plaintiff. Defendants appeal. Affirmed.

Crawford, Sweeny, Dodd & Kerr (*Robert G. Rus-*

sell, Richard H. May, and *Harry M. Nayer,* of counsel), for plaintiff.

Butzel, Eaman, Long, Gust & Kennedy (*Rockwell T. Gust, David A. Howell,* and *James D. Ritchie,* of counsel), for defendants.

KELLY, J. This is an appeal from a decree which set aside an assignment of a lease by defendant United Detroit Theatres Corporation (UDT), lessee, to defendant Pontiac Theatre Corporation (Pontiac), and provided that plaintiff (Cinderella), lessor, should recover from the assignor UDT the unpaid rental instalments accruing after the assignment up to the date of the decree.

August 5, 1937, a 15-year lease was entered into between plaintiff and UDT for the Cinderella Theatre, which is located on the east side of Detroit, and on July 30, 1952, the lease in suit was entered into by plaintiff Cinderella and defendant UDT for a 15-year term commencing at the expiration of the first lease and extending to August 31, 1967, at a total rental of $589,995, to be paid at the rate of $3,277.75 per month.

Twenty-eight days after the effective date of the current lease, namely September 29, 1952, Pontiac was incorporated by an officer and by a director of UDT, and on October 7, 1952, UDT became the sole stockholder in Pontiac. On that same day the board of directors of Pontiac authorized its officers to enter into an agreement with UDT whereby Pontiac would take over the current Cinderella Theatre lease.

Between the 1952 incorporation of Pontiac and November 8, 1958, when UDT assigned this lease to Pontiac, Pontiac remained dormant and UDT operated the Cinderella Theatre at a loss, with losses particularly heavy in the 2 years preceding the assignment.

During the summer of 1958 the officers and directors of UDT decided to bring to an end Cinderella's loss by assigning the lease to Pontiac. Plaintiff's president, being advised of this fact, notified UDT that an assignment to a dummy corporation would not be recognized, and UDT responded by its letter of August 27, 1958, stating:

"Our attorneys have informed me that the language of the lease, and of article 14 in particular, makes no requirement that we assign to a financially sound assignee and further, that this article does not prohibit the assigning of the lease to a 'so-called' dummy corporation."

Article 14 of the lease, entitled "Right of assignment" provides as follows:

"It is further expressly understood and agreed that no assignment or conveyance of this lease or the leasehold estate hereby created may be made by the lessee unless and until the lessee shall have first deposited with the lessor as advance rent the further sum of $39,333, which said deposit shall be applied to the payment of the rental accruing under this lease during the last 12 months of the 15th year of the term hereof, and unless the assignee shall assume and agree to perform all of the covenants and conditions of this lease on the part of the lessee to be performed. Upon said additional deposit in this article provided for being made, and notice given by the lessee to the lessor of such assignment accompanied by a copy of the document of assignment and assumption, the lessee, United Detroit Theatres Corporation, shall automatically be relieved and released from each and every of the covenants in this lease contained.

"It is further expressly understood and agreed that if and in the event, after said additional deposit of $39,333 provided for in this article is made, this lease be terminated by the lessor by reason of default on the part of the lessee or its assignee in the pay-

ment of the rental hereinabove reserved and agreed to be paid, or by reason of the default of the lessee or its assignee in the observance or performance of any other covenant or condition of this lease on the part of the lessee or its assignee, then and in such event said sum of $39,333 deposited with the lessor pursuant to the provisions of this article shall also belong to and be kept and retained by the lessor free and discharged of any and all claims, rights or interest of the lessee and its assignee therein and thereto and as and for liquidated damages of the lessor occasioned by such default on the part of the lessee or its assignee."

November 6, 1958, UDT forwarded to plaintiff its certified check in the sum of $39,333, and on November 8, 1958, UDT notified plaintiff that the assignment had been effected to its wholly owned subsidiary, Pontiac, and enclosed a copy of the instrument of assignment and assumption.

After the assignment Pontiac paid the rent for the first month, but on January 7, 1959, Pontiac notified plaintiff that it could not meet the tax payments due on January 15, 1959, nor could it pay the January rental. No rent payment other than December, 1958, has ever been made.

May 15, 1959, appellee commenced this present suit against UDT and Pontiac, and tendered back to UDT the check for $39,333 that UDT had forwarded to plaintiff.

The court, in finding for plaintiff, stated that article 14 called not only for payment of $39,333 but, also, called for an agreement by the assignee to assume all the conditions of the lease; that if the parties wished to provide for termination by payment of liquidated damages they could have done so, but they went beyond that; that UDT for all intents and purposes did not assign to anyone because it assigned to Pontiac, set up for the sole purpose of re-

ceiving the assignment; that Pontiac was not capitalized in any way that would indicate a good-faith intention to operate the theater; that Pontiac exercised no independent judgment of officers; that there was no severability between the 2 corporations and Pontiac was clearly and completely an instrumentality or another portion of UDT; that this was merely an assignment by UDT to itself; and the court concluded this general thought by saying:

"I cannot conceive of Pontiac being anything but the tool, instrumentality and agency of the parent and it is my opinion that is not what was intended by the writers of article 14, and, therefore, I think the plaintiff is entitled to relief with respect to this assignment and the court will enter a decree setting aside this assignment."

Appellants contend that article 14, which is silent regarding the qualifications of a prospective assignee, cannot be construed to require that such assignee be an independent corporation capable of performing the covenants of the lease and that "arriving at a contrary conclusion, the lower court (1) ignored the Michigan statute (CL 1948, § 565.5 [Stat Ann 1953 Rev § 26.524]) which provides: 'No covenant shall be implied in any conveyance of real estate, except oil and gas leases'; (2) construed the lease in plaintiff's (*lessor's*) favor, thereby disregarding the well-settled Michigan rule that the provisions of a lease are to be construed *against the lessor,* and *in favor of the lessee* * * * ; and (3) disregarded the *Alexander Case* (*Alexander* v. *Theatre Realty Corporation,* 253 Ky 674 [70 SW2d 380])."

In re appellants' reference to the statute providing "No covenant shall be implied in any conveyance of real estate, except oil and gas leases," we agree that this provision would apply to the present lease.

Minnis v. *Newbro-Gallogly Co.,* 174 Mich 635 (44 LRA NS 1110). This statutory prohibition, however, should not be so literally applied as to defeat the clear intent of the parties as gathered from the context of the instrument. *Real Estate Stores, Inc.,* v. *Harris,* 321 Mich 623.

As to appellants' claim that the court "construed the lease in plaintiff's (lessor's) favor, thereby disregarding the well-settled Michigan rule that the provisions of a lease are to be construed against the lessor, and in favor of the lessee," appellee answers by stating that the legal department of Paramount Pictures prepared the lease and drafted same without any provision for its voluntary termination and to this statement appellants answer by stating that while Paramount presumably acted for appellants, yet Paramount only copied article 14 from the previous lease.

Considering appellants' claim that the court erred in disregarding the case of *Alexander* v. *Theatre Realty Corporation, supra,* we quote the syllabi in that case:

"Tenant cannot by assignment of lease relieve himself of liabilty resulting from privity of contract.

"Provision in 99-year lease for tenant's release from liability thereunder in case of assignment and assignee's assumption of lease covenants permitted tenant to obtain release by assigning leasehold to corporation which tenant knew was insolvent, where lease further required maintenance by tenant of deposit in amount aggregating almost 1/3 of price paid for leased premises.

"The evidence disclosed that the lessor had purchased the lots for $792,000, and that he apparently took no thought as to who should be his lessee or as to lessee's responsibility, but relied for his protection on provision of lease requiring $250,000 deposit by tenant to guarantee its performance. The lease not only required deposit of this amount, but

maintenance thereof through the lease term and pledging of additional securities in case of depreciation in value of those deposited.

"Court cannot read additional words into contract, but must construe contract as made."

The lease and the facts presented to the Kentucky court differ from the present lease and facts, as is evidenced by the following from the Kentucky opinion (pp 685, 686):

"It is easily to be conceived that, without this provision in the lease, requiring of any and all tenants, whether the lessee or later assignees, a deposit of $250,000 of securities forfeitable to the landlord as liquidated damages upon tenant's default in the performance of the lease covenants, it would reasonably appear that by clause 16 it was the intention of the parties, in order to protect the lessor in the good-faith carrying out of the terms of the vendor's offer of sale of the property, made on the condition that vendor should receive a long-term lease from him, that equitable considerations might in such case require that lessee, in exercising the given right of assignment, should be confined to an assignment made in good faith to one apparently responsible or who could reasonably be expected to perform its covenants, and that such qualification upon the right to assign might have to be imposed by implication in construing the clause, to avoid a fraudulent overreaching of the landlord, buying the property upon the faith of substantially receiving from lessee in part consideration of his purchase, in fact as well as in form, such long-term lease promising a fixed income.

"In such instance, appellant's claim that such qualification should be imposed upon a tenant's right of assignment as a matter of law, for the purpose of giving effect to what must needs have been in such case the intention of the parties, and also to prevent the lease from becoming unfairly 'one-sided' or lacking in mutuality, might very justly merit our serious

consideration. Clause 16 of the lease, without its further provision for the pledging of securities for its performance, would render the responsibility of the lessee or his subsequent assignee a matter of important concern to lessor, as otherwise the lessee might, under the provisions of clause 16, secure a long-term lease, which, while binding upon lessor, would only bind lessee for such period as he found operating under it profitable, when he might, through assignment, step from under its obligations when found no longer to his liking.

"However, we do not conceive that situation or case, presenting such persuasive facts, to be the one here presented, or decided."

In addition to the *Alexander Case,* appellants emphasize *Ramey* v. *Koons* (CCA 5), 230 F2d 802, stating the court erred in not following this decission which also holds that a trial court cannot make a new contract for the parties.

The *Ramey Case, supra,* was an appeal from an order of the United States district court, southern district of Florida, where it was held that where the lease agreement was complete and unambiguous, parol evidence to supplement it was inadmissible; that the assignment was not shown to be fraudulent, and that no fraud was committed by incorporating the corporation as assignee of the lease for the precise purpose of avoiding liability by the lessee.

The portion of the lease in question in the *Ramey Case* was paragraph 13, which read:

"It is understood that the tenant will assign this lease and upon such assignment and the assumption by assignee of the obligations hereunder, the tenant shall be released from all obligations hereunder."

In the opinion on appeal, the court stated (pp 805, 806):

"The appellant pleads that the lessee, Charles A. Koons, expressly represented that the assignment

of the lease would be to a responsible corporation with substantial assets, but that the assignment was to an irresponsible corporation without assets. This, the appellant urges to be fraud. * * *

"In a somewhat different approach the appellant urges that the assignment is fraudulent because the corporate assignee is a 'straw', the alter ego of the appellee, Charles A. Koons, and that the assignment was made for the purpose of relieving Koons and his partnership from liability on the lease. As a guide toward a decision on this question, we look to the Florida supreme court and find the following:

" 'The law is well settled that the organization of a corporation for the purpose of evading an existing personal liability on the part of those who became its stockholders will not be allowed to achieve that purpose, for in such case the courts will "pierce the veil of the corporate fiction" and hold the stockholders of the corporation to their personal liability, even though the corporation was regularly organized in accordance with the statutes. Not that the law deems it reprehensible to form a corporation in order to limit one's risk to the amount of his investment in the stock, so far as future liabilities of the corporation are concerned; for this is legitimate and an every day occurrence.

" 'Thus Prof. Wormser, in the book referred to [The Disregard of the Corporate Fiction and Allied Corporate Problems] (p 18), says:

" ' "Such a decision is entirely correct, because, if the corporation has been validly organized in its inception, the use of the corporation to prevent the incurring of personal obligations in the future is entirely proper and legitimate. The policy of our law today sanctions incorporation with the consequent immunity from individual liability. It follows that no fraud is committed in incorporating for the precise purpose of avoiding and escaping personal responsibility. Indeed, that is exactly why most people incorporate, and those dealing with corporations know, or at least are presumed to know, the

law in this regard."' *Bellaire Securities Corporation* v. *Brown,* 124 Fla 47, 68, 69 (168 So 625, 633).

"In the case before us the parties agreed that the tenant would assign the lease and upon the assumption of its obligations by the assignee the tenant would be released. As said in the foregoing quotation from Professor Wormser, '"no fraud is committed in incorporating for the precise purpose of avoiding and escaping personal responsibility"'. To hold otherwise 'would completely destroy the corporate entity as a method of doing business and it would ignore the historical justification for the corporate enterprise system'. *Advertects, Inc.,* v. *Sawyer Industries* (Fla), 84 So 2d 21, 23, 24."

While we agree with appellants that the *Alexander* and *Ramey Cases* held that a court cannot make a new contract for the parties, yet the *Ramey* lease differs so definitely from the Cinderella lease that we disagree with appellants that *Alexander* and *Ramey* fully support appellants' position. The *Ramey Case* did not deal with incorporating for the purpose of avoiding a present and existing liability but involved incorporating for the purpose of escaping future personal responsibility. Further, the *Alexander* and *Ramey Cases* did not deal with a situation where the assignor remained in possession and control after the assignment, and appellee contends:

"By creating Pontiac with insufficient capital to operate as a business and by maintaining complete and absolute control over its activities, UDT has sought to avoid the burdens of the lease and yet retain its benefits. In effect, Pontiac is but an assumed name under which UDT is and has been operating the Cinderella Theatre,"

and to sustain such conclusion, appellee calls attention that the record before us proves that:

(1) "Prior to November 8, 1958, Pontiac not only agreed to accept the assignment of the lease but also

entered into an oral management agreement with the UDT, by the terms of which UDT was to supervise the buying and booking of films at the Cinderella, was to handle finances, advertising, maintenance, and take care of accounting and auditing";

(2) "The assignment in question was executed on behalf of Pontiac and UDT by Mr. Harold Brown and Mr. E. J. Welling who held identical positions in both corporations. The instructions that Mr. E. J. Welling received with respect to the assignment as an officer of UDT in no way differed from the instructions he received with respect to the assignment as an officer of Pontiac";

(3) "From the date of assignment until the date of trial, no salaries were paid by Pontiac to any of its officers";

(4) "Films which are exhibited in the Cinderella Theatre are booked and purchased by Mr. Thomas Beyerly who is an employee of UDT, and is paid by UDT and not by Pontiac. All contracts entered into by the Cinderella Theatre are signed by Woodrow Praught, president of both UDT and Pontiac. However, Mr. Praught receives no salary from Pontiac";

(5) "Price-Waterhouse performs auditing services for the Cinderella Theatre and is paid therefor by UDT, not Pontiac";

(6) "Nearly 1 year after the assignment, in October of 1959, the stationery of UDT still listed the Cinderella as 1 of its theaters. In addition, UDT listed the Cinderella Theatre as one of its theaters in gift books sold to the public, and the uniforms of the ushers of the Cinderella Theatre in April of 1961 bore the insignia 'U.D.T.' ";

(7) "In a press release prepared by UDT and submitted to the Detroit newspapers in February of 1959 when Mr. Praught was appointed president of UDT, the Cinderella was listed as a UDT theater."

Appellants complain in regard to "The trial court's reliance on *Herman* v. *Mobile Homes,* 317 Mich 233."

The court's reference to that case in its opinion is as follows:

"Plaintiff relies, however, upon the fairly recent case in Michigan, *Herman* v. *Mobile Homes,* 317 Mich 233, which discusses the rights and duties between corporations and their subsidiaries when dealing with third persons, and it cites as significant in the interpretation of article 14 the language quoted with approval by the court of Mr. Justice Cardozo on page 245 where he says:

" 'Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice. * * * The logical consistency of a juridical conception will indeed be sacrificed at times when the sacrifice is essential to the end that some accepted public policy may be defended or upheld. This is so, for illustration, though agency in any proper sense is lacking, where the attempted separation between parent and subsidiary will work a fraud upon the law (citing cases). At such times unity is ascribed to parts which, at least for many purposes, retain an independent life, for the reason that only thus can we overcome a perversion of the privilege to do business in a corporate form.'[1]

"Also from that opinion, on page 246, the quotation with approval from the Tennessee case, where the court said:

" 'It is not necessary for one to show that he has been misled, deceived or actually defrauded, to enable him to invoke this rule. It is enough that the parent corporation's domination of the subsidiary was so complete as to make them practically indistinguishable or to make the subsidiary a mere tool,

[1] From *Berkey* v. *Third Avenue R. Co.,* 244 NY 84, 95 (155 NE 58, 50 ALR 599).—REPORTER.

agency or instrumentality of the parent; and that he will suffer loss unless the parent be held."[2] * * *

"This was merely an assignment, as far as the court can see, by United Detroit Theatres to itself, or an attempted assignment, and as such it does not in my opinion comply with the language of article 14 and I think it comes within the language of the *Herman Case,* 246, which I have just quoted, where it says it is not necessary to show that one has been misled, deceived or actually defrauded to invoke the rule. It is enough that the parent corporation's domination of the subsidiary is so complete as to make the subsidiary a mere tool, agency or instrumentality of the parent, and I cannot conceive of Pontiac being anything but the tool, instrumentality and agency of the parent and it is my opinion that is not what was intended by the writers of article 14, and, therefore, I think the plaintiff is entitled to relief with respect to this assignment and the court will enter a decree setting aside this assignment."

Appellants' objection to the court's consideration of the principles of law in the *Herman Case* are as follows:

"In the *Herman Case,* the plaintiff had certain dealings with a subsidiary and it was held that such subsidiary was the agent of its parent and that the parent was liable under the principles of agency. * * * Plaintiff's dealings were with UDT, the parent corporation, and not with Pontiac, the subsidiary. The alleged liability of UDT to plaintiff in no way arises from its relationship as the parent of Pontiac—it arises, if at all, under the lease agreement."

We agree with appellants that in the *Herman Case* plaintiff dealt with a subsidiary and that the transaction in the present appeal arises under the lease agreement between UDT and Cinderella. We do not

[2] From *Tennessee Consol. Coal Co.* v. *Howe Ice & Coal Co.,* 25 Tenn App 316, 321 (156 SW2d 454, 458).—REPORTER.

conclude, however, that the court was misled by considering the principle enunciated in *Herman,* namely "Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent."

People, ex. rel. Attorney General, v. *Michigan Bell Telephone Co.,* 246 Mich 198 (PUR 1929B, 455, PUR 1929E, 27), involves a quo warranto proceeding by the attorney general to oust a telephone company. The proofs disclose that defendant was only an instrumentality of a foreign corporation in conducting its business, and this Court in deciding that a judgment of limited ouster would be entered, stated (pp 204, 205):

"Where a corporation is so organized and controlled and its affairs so conducted as to make it a mere instrumentality or agent or adjunct of another corporation, its separate existence as a distinct corporate entity will be ignored and the 2 corporations will be regarded in legal contemplation as 1 unit. *In re Muncie Pulp Co.* (CCA 2), 139 F 546; *Interstate Telegraph Co.* v. *B. & O. Telegraph Co.* (D Md), 51 F 49; Wormser on Disregard of the Corporate Fiction, p 54. When a corporation exists as a device to evade legal obligations, the courts, without regard to actual fraud, will disregard the entity theory. *Higgins* v. *California Petroleum & Asphalt Company,* 147 Cal 363 (81 P 1070); *Brundred* v. *Rice,* 49 Ohio St 640 (32 NE 169, 34 Am St Rep 589); *Donovan* v. *Purtell,* 216 Ill 629 (75 NE 334, 1 LRA NS 176).

"That the Michigan company is a mere agent or instrumentality of the American company is established. We think that it is also apparent that a purpose of the separate entity is to avoid full investigation and control by the public utilities commission of the State to the injury of the public. The difference in entity going out, the contract goes with

it. The American company cannot contract with itself."

Appellants state: "The reasoning of the Court in *Gledhill* (*Gledhill* v. *Fisher & Co.*, 272 Mich 353 [102 ALR 1042]) is applicable here and would require a like holding of *nonliability* of the parent corporation, UDT," and quote from said decision as follows (pp 359, 360):

"The organization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud justifying the disregard of the corporate entity. In *Elenkrieg* v. *Siebrecht,* 238 NY 254, 261, 262 (114 NE 519, 34 ALR 592), the court stated:

" 'Whether or not the corporation is the creature of Siebrecht is not a determining feature. Whether it be a subterfuge is misleading. Many a man incorporates his business or his property and is the dominant and controlling feature of the corporation. He may do so for the very purpose of escaping personal liability.'

"Wormser, in his 'Disregard of the Corporate Fiction and Allied Corporate Problems,' goes far in holding a parent corporation liable for the debts of its subsidiary where the latter is formed for a fraudulent purpose, but he distinctly limits the rule as follows (p 18):

" 'It follows that no fraud is committed in incorporating for the precise purpose of avoiding and escaping personal responsibility. Indeed, that is exactly why most people incorporate, and those dealing with corporations know, or at least are presumed to know, the law in this regard.' "

In disagreeing with appellants that this case is "applicable here and would require a like holding of *nonliability,*" we quote further from *Gledhill* v. *Fisher & Co., supra,* as follows (pp 360, 361, 364):

"A subsidiary may be formed for the very reason that prompts individuals to form corporations, to protect themselves from personal liability, to make only its capital liable, to say to those that deal with it, 'here is the amount of our capital stock; we are a *bona fide* corporation organized for legitimate purposes and doing business in a legal manner. If you want to deal with us on the basis of our liability as shown by our capital set up, you may do so, and if not, you may refrain from so doing.' There was no fraud in the purchase of the property by the subsidiary without disclosing the ownership of its capital stock. The record does not show that any reliance was placed on who the purchasers were. It was a time when there was a tremendous inflation in real estate, as evidenced by the many cases that have reached this court. The depression and accompanying deflation in values were not foreseen. Plaintiffs and their vendee agreed upon a price. Plaintiffs knew or should have known that they could only look to the corporation vendee, or the property in the event of a default. A large down payment was made, the depression came, plaintiffs took back their property and retained all that had been paid on it by vendees. * * *

"At the time the contract was entered into, no inquiry was made as to who constituted the incorporators of the defendant corporation. Plaintiffs dealt with the corporation just as they would have dealt with any other company in reliance upon the capital stock of the purchasing company and the inherent value of the real estate itself. There is no proof in this case that the defendant (subsidiary) corporation was in any way the agent or tool of the corporation which controlled its capital stock, or that it was not a corporation organized in good faith to pay for, acquire and hold the property purchased."

The supreme court of California in 1939 heard and considered an assignment of a lease by a financially responsible corporation owned by father and son, to

a corporation which had no assets and owned by the son and his wife (*Shea* v. *Leonis,* 14 Cal 2d 666 [96 P2d 332]). In deciding that the rule that the lessee can relieve himself of liability for rent by making an assignment even though the assignee is insolvent would not control or apply, the court stated (p 669):

"The stockholders of the corporation assignee, * * * while enjoying the benefits of the lease, cannot equitably claim that they may escape its burdens through the device of taking the assignment of lease in the name of a corporation which is without other assets and has been organized by them for the purpose of taking such an assignment.

" 'Corporate separate existence will be disregarded where to recognize it would be to sanction a fraud or promote injustice. * * *

" 'It may be said in addition that the assignment is, in effect, as plaintiffs allege, no assignment at all and that the new corporation is but the old one under another name. An assignee cannot escape liability by an assignment which is merely colorable. (1 Tiffany, Real Property [2d ed] 184; 16 RCL, Landlord and Tenant, § 369, p 866.)' "

An assignment to a mere dummy or agent was declared not sufficient to relieve defendant of liability by the appellate division of the New York supreme court in *Century Holding Co.* v. *Ebling Brewing Co.,* 185 App Div 292 (173 NYS 49). There the court said (p 299):

"If, however, Sudbrink (assignee) was the mere agent or dummy of the defendant (assignor), and if the defendant intended to remain in possession, keeping control of the property, * * * which assumptions are amply sustained by the evidence, it certainly cannot be said that there was any *bona fide* transfer of the lease to Sudbrink which would relieve defendant from its liability to pay rent to the plain-

tiff. The circumstances surrounding the transfer of the lease are more than suspicious and were sufficient to warrant the jury in finding that Sudbrink was a mere agent or dummy of the defendant. If this be true, the defendant could not rid itself of liability by such assignment."

We call attention to 16 RCL, Landlord and Tenant, § 369, which was quoted with approval in appellants' cited case of *Alexander* v. *Theatre Realty Corporation, supra,* 688, as follows:

"If the reassignment is not colorable merely, the assignee may relieve himself from subsequently accruing liabilities, without regard to the intent with which the reassignment is made and irrespective of the financial condition of the person to whom the reassignment is made."

Appellee claims that Pontiac was "formed for the express purpose of receiving an assignment and compelling termination of the lease." This claim is considered along with the fact that Messrs. Brown and Welling held identical positions in UDT and Pontiac, that the assignment was executed by both of them, and the following from the cross-examination of Mr. Welling:

"*Q.* What were the gross receipts for the period commencing November 8, 1958, and ending at the end of November, the last day of November?

"*A.* This indicates that receipts for the 2 weeks ending November 25th amounted to $5,105.10.

"*Q.* What were the receipts for the month of December?

"A. For the 5 weeks ending December 30th they were $10,192.51.

"*Q.* Could you give them to me for the month of January?

"*A.* Theater receipts for the 4 weeks ending January 27, 1959, amounted to $10,348.69.

"*Q.* Mr. Welling, what is the amount of the monthly rent of the Cinderella?

"*The Court:* $3,277.75, according to article 1 of the lease. O.K. $3,277.

"*Q.* Were the total receipts that were received by Pontiac from the operation of the Cinderella in November of 1958 were the five thousand some odd dollar figure that you read, is that correct?

"*A.* That is right.

"*Q.* And from that figure Pontiac was able to pay 1 month's rent?

"*A.* Yes.

"*Q.* If I understand you correctly the receipts for the next 2 months were ten thousand some odd dollars each month; that would be December and January?

"*A.* Yes. * * *

"*Q.* As an officer of Pontiac, did you ever receive any orders or instructions as to what bills you should or should not pay for Pontiac?

"*A.* Yes.

"*Q.* Those instructions relate to rent?

"*A.* Yes.

"*Q.* What were those instructions?

"*A.* To pay all of our bills before we paid the rent.

"*The Court:* When were those instructions given to you?

"*A.* Approximately the time of the assignment.

"*The Court:* And from whom?

"*A.* I received my instructions from Mr. Brown.

"*Q.* Were those instructions given to you before or after the assignment?

"*A.* After the assignment, as I recall it. * * *

"*Q.* Did you receive any specific instructions or orders with respect to the taxes that were due?

"*A.* Yes, at the time that telegram was sent.

"*Q.* You were instructed not to pay the taxes?

"*A.* Yes.

"*Q.* By whom were you instructed?

"*A.* Mr. Brown."

The trial court stated that his decision should be based on the validity of the assignment and that he was not called upon to decide any future assignments. We agree with the trial court.

The construction of article 14 neither involves an application of the parol evidence rule, nor the statute prohibiting covenants by implication, and we agree with the trial court's finding that:

"I cannot conceive of Pontiac being anything but the tool, instrumentality and agency of the parent and it is my opinion that is not what was intended by the writers of article 14, and, therefore, I think the plaintiff is entitled to relief with respect to this assignment and the court will enter a decree setting aside this assignment."

The record proves that the assignment was merely "colorable" and the court did not err in finding that the purported assignor, UDT, had remained in possession after the purported assignment.

We conclude by stating that we see no merit to appellants' claim that plaintiff was estopped to deny the validity of the assignment by reason of cashing the first month's rent check and in delaying the return of the deposit check for $39,333.

This court has repeatedly held that estoppel does not exist unless the party claiming same was misled to its prejudice and acts are done in reliance upon conduct calculated to mislead. *Odgers* v. *Lentz*, 319 Mich 502, and *Cudahy Brothers Co.* v. *West Michigan Dock & Market Corp.*, 285 Mich 18.

Appellants offered no evidence or testimony on the estoppel issue and the record does not disclose that appellants were prejudiced by the conduct of the appellee.

Affirmed. Costs to appellee.

CARR, C. J., and DETHMERS, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

In re COOCH ESTATE.

GREITZER *v.* RING.

1. WILLS—REVOCATION—EVIDENCE.

Issue as to whether the intended will consisted of 1 or 2 pages, and whether, if it consisted of 2 pages, the testatrix later destroyed the second page thereof *held*, for jury under evidence presented in contest of undated instrument presented for probate.

2. SAME—REVOCATION—EVIDENCE—DECLARATIONS OF TESTATRIX.

A will may be revoked by burning, tearing, canceling, or obliteratıng it with the intention of revoking it by the testatrix or by some person in her presence and by her direction, or by some other duly executed will, codicil, or other duly-executed testamentary disposition, and declarations of the testatrix with respect to the matter of revocation should be permitted to go to the jury at least where there is some other evidence to support the claim that the instrument is not as complete as testamentarily intended (CL 1948, § 702.9).

3. SAME—ABSENCE OF DATE.

The absence of a date on will presented for probate supported claim of contestants that such instrument was not complete as testamentarily intended.

4. SAME—STATUTES.

The issue of whether or not an instrument presented for probate should be admitted to probate is to be determined by the law of this State, not law taken from elsewhere, there being statutory provisions pertinent to such matter.

CARR, C. J., and DETHMERS and KELLY, JJ., dissenting.

Appeal from Allegan; Smith (Raymond L.), J. Submitted April 4, 1962. (Docket No. 14, Calendar No. 49,089.) Decided September 7, 1962.

REFERENCES FOR POINTS IN HEADNOTES

[1] 57 Am Jur, Wills § 570.

[2] 57 Am Jur, Wills §§ 456, 562–565.

Admissibility of declarations of testator on issue of revocation of will. 172 ALR 354.

In the matter of the estate of Bertha Cooch, deceased, Hilda Greitzer presented will for probate. Contest entered by Roy Ring and 3 other heirs. Order disallowing will entered in probate court. Directed verdict and judgment in circuit court admitting will to probate. Contesting defendants appeal. Reversed and remanded for new trial.

Dilley & Dilley (*Albert R. Dilley,* of counsel), for plaintiff, proponent.

Leo W. Hoffman and *Frederick D. McDonald,* for defendants, contestants.

KELLY, J. (*dissenting*). Bertha Cooch, 83 years of age, a resident of the village of Wayland, Allegan county, died at her home November 19, 1959. She left surviving her 13 nieces and nephews, and made bequests to 4 of them in her will but made no provision for the disposition of the residue of her estate.

Plaintiff Hilda Greitzer, a niece, was named executrix. Upon filing the will for probate, plaintiff's brother, defendant LeRoy Ring, and 3 other nieces and nephews of deceased, filed objections to the admission of the will, claiming undue influence, lack of mental capacity, and that the purported will had been revoked.

The probate judge disallowed the will on the grounds of insufficient proof to show that it was the last will and testament of deceased and that it had been procured by undue influence. Plaintiff appealed to the circuit court and the trial resulted in a directed verdict in favor of the will. From this determination, defendants appeal.

We shall first consider if the document offered for probate was the last will and testament of deceased. It is defendants' claim that the document offered (exhibit 1) is but 1 page of a 2-page will and

that deceased had torn up the other page, thereby revoking the will.

The confusion on this point stems from the fact that the witnesses to the will, aged neighbors of deceased, had witnessed a prior will of deceased. They (Edward Blaine and Bertha Blaine) testified that late in 1958 or early in 1959, the deceased came to their house and asked them to sign as witnesses to her will. This will had 2 pages, both of which were signed by them. At a later date, 4 or 5 months before deceased's death in November, 1959, plaintiff's husband, John Greitzer, came to the Blaine home and asked them to come over to the deceased's house to witness her will. They went over, and deceased, in their presence, tore up a piece of paper, which deceased stated was a part of her will, and then she asked them to sign her new one, which had 1 page. They did not see the contents of the wills and at first stated that they would not know if the will offered for probate was in fact the second page of the 2-page first will or whether it was the 1-page second will.

The document offered for probate was undated, but otherwise appears to be complete in and of itself. There is no reference to any other page, or that it is a part of a will.

The claim that it is 1 page of a 2-page will is not supported by any evidence, but defendants seek to infer this from alleged declarations of the deceased to Attorney Leo W. Hoffman and to defendant LeRoy Ring and his wife, Mildred Ring, that she had torn up her will.

Witnesses Edward and Bertha Blaine, having witnessed 2 wills for deceased and not having seen the contents of either, were at first confused on this point, but, after being shown a document (Exhibit 2) dated December 9, 1958, which made certain testamentary dispositions and which was signed by the

deceased and witnessed by them, concluded that the undated document, the will offered for probate, would be the will signed at deceased's home some 4 or 5 months prior to her death.

We agree with the trial court's determination that the document offered for probate was the legally executed last will and testament of deceased.

We next consider if this will was revoked. The statute (CL 1948, § 702.9 [Stat Ann 1943 Rev § 27.3178(79)]), relative to revocation of a will, states:

"No will nor any part thereof shall be revoked, unless by burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil in writing, executed as prescribed in this chapter; or by some other writing, signed, attested and subscribed in the manner provided in this chapter for the execution of a will; excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."

The will obviously was not burned, torn, canceled, or obliterated, nor has another will or codicil executed by the deceased revoking this will been brought forth, although at a guardianship proceeding several months prior to her death, it appears deceased did have a discussion with Attorney Leo W. Hoffman relative to the drawing up of a new will and the probate judge advised her that she should have a new one drawn. Was, then, testatrix's declarations to various witnesses that she had torn up part of her will sufficient to revoke the will?

No case is cited by either party similar to the situation presented here. In 57 Am Jur, Wills, p 322, § 460, it is stated that there can be no revoca-

tion by parol declarations of the testator without an overt act.

There is no revocation even if testator is prevented from doing so by fraud. Minnesota has a statute similar to ours, and in *Graham* v. *Burch,* 47 Minn 171 (49 NW 697, 28 Am St Rep 339), the testator placed his will in a stove with kindling not yet ignited, intending the will to be destroyed when the fire should be lighted. A person present, with the design of thwarting the purpose of the testator (and during his absence), took the will out of the envelope and secreted it, so it was thereby saved from destruction without the knowledge and consent of the testator. It was held that the will, in the absence of an overt act, had not been revoked even though the act was prevented by fraud.

Illinois also has a statute similar to ours, and in *Bohleber* v. *Rebstock,* 255 Ill 53 (99 NE 75, 41 LRA NS 105, Ann Cas 1913D, 307), the deceased wanted to change his will but was too feeble to leave his home. Certain beneficiaries refused to call a lawyer and threatened violence to anyone who would bring a lawyer or assist deceased in changing his will. The Illinois court in rejecting a bill in equity to have the will set aside also held that in the absence of some overt act as required by the statute there could be no revocation even under these circumstances, stating (pp 56, 57):

"Prior to the enactment of any legislation upon this subject in England, the question whether an intention to revoke a will was sufficient to constitute a revocation was considered by the courts, and the courts held that such an intention was sufficient to effect a revocation. These decisions led to such uncertainty in the stability of wills and to such suspicion that wills were being defeated by perjury that an act was passed defining what was necessary to the revocation of a will by the testator in his

lifetime, and, as above stated, the various States of this country have enacted similar legislation. It will be seen our statute provides that no will or codicil shall be revoked otherwise than by burning, canceling, tearing or obliterating the same by the testator himself, or by someone in his presence and by his direction and consent, or by some other will or codicil duly executed. Under similar statutes the courts of this country have practically uniformly held, and text-book writers also lay down the rule, that the mere intention to revoke a will, unaccompanied by any act of the testator to execute that intention, will not be sufficient to revoke the will, even though the execution of the intention was frustrated by the fraud and improper conduct of other persons. Slight acts of tearing, burning or canceling, with the purpose and intention of revoking a will, may be sufficient for that purpose, but the intention to revoke, unaccompanied by any of the acts of destruction required by the statute, is insufficient."

See, also, *Trice* v. *Shipton,* 113 Ky 102 (67 SW 377, 101 Am St Rep 351).

Revocation could be accomplished only by the overt acts required by statute, or by another will or codicil. Deceased failed to do either, and revocation based solely upon her declaration that she had torn up her will cannot be allowed. To hold otherwise would open the door to the fraudulent practices which the statute is designed to avoid.

Defendants also seek to have the will set aside on the claim that it was obtained through undue influence. This is based upon the testimony of defendant LeRoy Ring, his wife, Mildred, and defendants' witness Myrtle Lawther, to the effect that deceased told them plaintiff and her husband just moved in without her knowing it; that they mistreated her; that plaintiff's testimony indicated there was some discussion of deceased deeding her house to them and making a will; that plaintiff in March,

1959, caused a petition to be prepared declaring deceased to be mentally incompetent, and that plaintiff discouraged their visits to deceased.

Testimony of neighbors of the deceased, on the other hand, depict the deceased as being mentally sound, fond of and appreciative of plaintiff and her husband and of what they were doing for her. Deceased's physician testified that she was mentally competent up to a time shortly before her death.

The burden of showing undue influence is upon the contestants of the will to establish by satisfactory proof the existence of fraud or undue influence of such character as to vitiate the instrument. *In re Johnson's Estate,* 326 Mich 310.

Influence to void a will must be such as prevented testator from doing as he pleased with his property, and it may be shown by indirect or circumstantial evidence, but it must be evidence of probative force beyond mere suspicion. *In re Langlois Estate,* 361 Mich 646.

In the instant case there is no direct proof of undue influence, nor can it be said that undue influence has been shown, indirectly or circumstantially, by satisfactory proofs. It would seem that had plaintiff and her husband exercised such claimed influence over deceased they would have procured a deed to the house and a will disposing of all of deceased's property in a more generous portion to plaintiff than under the present will. The specific alleged acts of mistreatment consisted of the refusal by plaintiff to give deceased a peppermint candy until she took her medicine and that on this occasion plaintiff twisted a cup out of her hand; that plaintiff's husband once threw deceased to the floor when deceased did not answer plaintiff's call. This last act, even if true, occurred after the will was executed. If the refusal to give deceased a peppermint was to

get her to take her medicine, we fail to see how it could be considered undue influence.

Defendants also claim deceased was feeble-minded, although they do not specifically challenge the will on this ground. Suffice it to say, that this claim is not supported by the evidence and is even contrary to the testimony of defendant LeRoy Ring and his wife, Mildred Ring.

The dispositions made by deceased in the will, while not disposing of all her property, were to the natural objects of her bounty. The most that could possibly be said of defendants' assertions, is that they raise a suspicion of undue influence. As stated in *In re Langlois Estate, supra,* this is not enough.

The directed verdict of the lower court should be affirmed. Costs to appellee.

CARR, C. J., and DETHMERS, J., concurred with KELLY, J.

KAVANAGH, J. We cannot agree with Justice KELLY's disposition of this case. The question of revocation was for the jury and not the trial judge. The conflicting testimony given by witnesses Edward and Bertha Blaine, the general purport of which is related in Justice KELLY's opinion, presents this issue:

Whether after due execution and attestation the intended last will and testament consisted of 1 or 2 pages; whether, if it consisted of 2 pages, the testatrix later destroyed the second page thereof; and whether in these circumstances of doubt Attorney Hoffman's testimony accurately reflected an intent to revoke on the part of such testatrix. Mr. Hoffman testified:

"She didn't want Hilda to have it and she had torn up the other part of the will and she didn't

think it was any good, that she wanted me to draw a new will."

Which version of recollection by witnesses Edward and Bertha Blaine did the trial judge have a right to accept as a matter of law? Justice Kelly says the second; whereas we conclude the trial judge had no choice and that he should have submitted the question to the jury. See *Erickson* v. *Soyars,* 356 Mich 64, 69, where Justice Dethmers, writing for the Court, said:

"A witness may correct his testimony. It is for the jury to determine the truth of the testimony given under such circumstances. *Erickson* v. *Milwaukee, L. S. & W. R. Co.,* 93 Mich 414, 418."

In *Alley* v. *Klotz,* 320 Mich 521, Justice Carr, in a unanimous opinion, stated (p 532):

"It was for the jury, also, to weigh conflicting statements made by any witness, and determine which statements, if either, were correct."

Justice Carr then went on to cite *Neesley* v. *Lord,* 297 Mich 163, to the same effect. See, also, *Wilson* v. *City of Detroit,* 299 Mich 473.

There is some testimony that Mrs. Cooch tore up a piece of paper in the presence of 2 witnesses and said to them that what she tore up was a part of her will. Further, the instrument as submitted bears no date. Since wills usually bear dates, the absence thereof supports the claim of appellants that such instrument is not complete as testamentarily intended.

Whether the trial judge was right in directing a verdict for the proponent is a matter governed by Michigan law, not law taken from 2 or 3 other States. In Michigan the rule is stated in the case of *Lawyer* v. *Smith,* 8 Mich 411, 423, 424 (77 Am Dec 460), where it was said:

"It was for the jury to give such weight to their evidence as they might think it entitled to, under all the circumstances of the case.

"But the judge erred, we think, in refusing to receive evidence of the declarations of the testatrix that she had destroyed her will, and in not admitting a letter of hers, stating her will was destroyed. Such evidence is not admissible as proof in itself of a revocation, for the statute provides, 'no will, nor any part thereof, shall be revoked unless by burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction;' 'or by some other will, codicil or other writing executed in the manner provided for the execution of a will.'* * * * A will found as this was, in a barrel among old letters and other papers of no account, and in the mutilated condition stated, needs some explanation of these circumstances to admit it to probate. The piece torn out at the top and the separation of the half sheets cannot be accounted for by the age of the instrument. They are evidence of violence, or an intentional injury to the instrument; but whether done by the testatrix or some other person; and if done by her, whether accidentally, or intentionally and for the purpose of revoking her will, were questions of fact to be determined by the jury. *To aid them in arriving at a correct conclusion on these points, and not as separate and independent evidence of a revocation, we think the declarations of the testatrix should have been permitted to go to the jury, for what they were worth, under all the circumstances.*" (Emphasis supplied.)

Justice KELLY errs in relying upon the general rules which appear in 57 Am Jur, Wills, p 322, § 460. It is to be noted there are no Michigan cases cited in support of the text. *Lawyer* v. *Smith, supra,* sets forth the Michigan rule.

* For statute, now current, see CL 1948, § 702.9 (Stat Ann 1943 Rev § 27.3178[79]).—REPORTER.

The judgment of the circuit court is reversed and the case remanded for new trial. Appellants shall have costs.

Black, Souris, Otis M. Smith, and Adams, JJ., concurred with Kavanagh, J.

POLLEY *v.* POLLEY.

1. Divorce—Support of Children—Modification of Decree.
   The trial court in suit for divorce has authority to revise and alter its decree concerning the care, custody, and maintenance of children and make a new decree concerning them as the circumstances of the parents and the benefit of the children shall require (CL 1948, § 552.17).

2. Same—Support of Children—Modification of Decree.
   Modification of provisions of decree of divorce for support of children is within the discretion of the trial court and will not be interfered with unless abused (CL 1948, § 552.17).

3. Same—Modification of Decree—Support of Children—Discretion of Court.
   Order of trial court modifying decree of divorce but failing to relieve husband of decretal obligation to pay wife child support money for month period of summer during which he had been awarded their custody *held*, not an abuse of discretion under record presented (CL 1948, § 552.17).

4. Same—Costs—Modification of Decree.
   No costs are allowed defendant wife, appellee on appeal from order modifying decree of divorce, where she filed no brief in Supreme Court.

References for Points in Headnotes

[1–3] 17A Am Jur, Divorce and Separation § 861.
[4] 17 Am Jur, Divorce and Separation §§ 641, 644, 645.

Appeal from Sanilac; Bach (Arthur M.), J. Submitted June 6, 1962. (Docket No. 16, Calendar No. 49,567.) Decided September 7, 1962.

Bill by Robert D. Polley against Ruth M. Polley resulted in decree of divorce. Subsequent petition by plaintiff for modification of decree granted except as to prayer for abatement in payment of support money for minor children during summer month visitation. Plaintiff appeals. Affirmed.

George E. Benko, for plaintiff.

KELLY, J. The parties hereto obtained a decree of divorce on May 16, 1960, such decree giving custody of the 2 children of the parties to the mother and providing that the father make support payments of $27 per week. Said decree also provided for rights of visitation by the father and that the father "shall have the right to the custody of the said children for the month of July of each year."

Plaintiff father had custody of the children in the summer of 1961 and during the period they were in his custody he refused to make support payments. An order to show cause was issued and plaintiff was ordered to make such payments to defendant mother. Plaintiff then filed a petition to modify the decree in several respects, but particularly:

"That during the time when the plaintiff has custody of said children the alimony payments shall not be paid by the plaintiff to the defendant.

"Further, that the alimony payments should be reduced from $27 per week to $21 per week."

An order was entered modifying the original decree and granting plaintiff's petition in every respect as prayed, except "that the motion requesting modification of the alimony payments whereby the plaintiff would not pay child support during the 1

month in the summer when he has custody of the children is denied."

It is from this portion of the order that plaintiff appeals contending that during the period he has custody of the children he should not be required to make support payments to the mother.

CL 1948, § 552.17 (Stat Ann 1957 Rev § 25.97), gives the court authority to revise and alter its decrees concerning the care, custody, and maintenance of children and make a new decree concerning them as the circumstances of the parents and the benefit of the children shall require. We have held that the modification of the provisions of a decree for divorce for support of children is within the discretion of the trial court and the exercise of such discretion will not be interfered with unless abused. See *Newberry* v. *Newberry,* 332 Mich 265.

We find no abuse of discretion and affirm the order modifying the decree. No costs, appellee not having filed a brief.

CARR, C. J., and DETHMERS, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

ANNEBERG *v.* ANNEBERG.

1. DIVORCE—SUPPORT OF CHILDREN—INCREASE IN FATHER'S INCOME.
   Order of trial court modifying decree of divorce to provide for an increase in the payments for support of minor children based upon a percentage of father's income when and if expected increase to $12,500 or more per year occurs but limited to $250 per month per child *held,* not an abuse of discretion.

2. SAME—SUPPORT OF CHILDREN—DISCRETION OF COURT.
   A trial court in a suit for divorce has a wide range of discretion in determining support payments for minor children and the Supreme Court will not reverse unless there is a clear abuse of that discretion.

3. WORDS AND PHRASES—DISCRETION OF COURT—ABUSE OF DISCRETION.
   The term *discretion of court* involves the idea of choice, of an exercise of the will, of a determination made between competing considerations; and in order to have an *abuse of discretion* in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.

Appeal from Oakland; Beer (William John), J. Submitted June 12, 1962. (Docket No. 45, Calendar No. 49,750.) Decided September 7, 1962.

Bill by Joan A. Anneberg against Allen D. Anneberg resulted in decree of divorce. Subsequent modification provided increase in support for minor chil-

REFERENCES FOR POINTS IN HEADNOTES

[1] 17A Am Jur, Divorce and Separation §§ 861, 862.
[2] 17A Am Jur, Divorce and Separation § 851.

dren based on percentage of defendant's gross earnings. From modifying order and denial of motion for rehearing defendant appeals. Affirmed.

Howlett, Hartman & Beier (*Dean G. Beier,* of counsel), for plaintiff.

Carl F. Ingraham, for defendant.

KELLY, J. Plaintiff was granted a decree of divorce from defendant in September, 1959, which decree provided she was to have the custody of the 2 minor children of the parties and that defendant was to pay $43.25 per child, semimonthly. On November 17, 1960, plaintiff petitioned for modification of the decree, and defendant was ordered to pay the sum of $193 per month for the support of the children.

Plaintiff again petitioned the court for modification of the decree on January 24, 1962, alleging that defendant was about to terminate his position as resident physician at St. Joseph Mercy Hospital at Pontiac, where he was earning $485 per month, and accept employment at a clinic in Carroll, Iowa, where, it was contended, his earnings would be somewhere between $18,000 and $20,000 per year. Defendant answered the petition stating that he understood his earnings would be $12,500 per year and that he expected to start his employment there on February 3, 1962.

The petition came on for hearing on January 29, 1962, and the court determined that the same percentage of defendant's income as then represented support payments for the children would be the percentage of defendant's increased income that would be allowed as future support payments, such payments however not to exceed $500 per month. An order was entered in conformity with the court's

opinion calling for the payment by defendant for support of the 2 minor children of the parties until they each shall, respectively, attain the age of 18 years, or until the further order of the court, 1/2 of an amount equal to 39.7% of defendant's gross earnings, provided that such sum shall not exceed $250 per month per child, together with all necessary medical, dental, and hospital care for the said minor children.

Defendant filed a motion for rehearing and reconsideration of this order, which came on for hearing February 19, 1962. The lower court reaffirmed its previous ruling and defendant appeals.

Defendant contends in this appeal that in determining the amount of support payments the income of the father is not the sole criterion but that needs of the children must also be considered. He states that no proof was furnished in regard to the children's needs and, therefore, there should not have been an increase in the support payments.

The record discloses that a report by the friend of the court had been filed and after hearing arguments of counsel the court brought the hearing on the petition to a close by stating:

"Here is the disposition, gentlemen. It will require a little mathematical ability on the part of each of you. I want you to determine the percentage of the doctor's income that is presently going to the support of the children. You will apply the same percentage to his increased income but not to exceed $500 per month for the 2 children. That ought to resolve the difficulties."

The court could have properly concluded that no useful purpose would be served by putting in proofs, and the court eliminated appellant's claim that an order should not be entered because it would deal with something prospective in nature by providing

that the increase was to come when and if appellant's financial status changed.

Appellant requests this Court to set aside the modification and restore the order of November 14, 1960, which, in effect, would be a declaration that an award based on defendant's earnings of less than $6,000 per year should not be changed if and when defendant's annual earnings were doubled, or more. This prayer of appellant's, this Court will not grant.

Deciding support payments for minor children in divorce suits is a matter of judicial determination in which the trial court has a wide range of discretion and this Court will not reverse unless there is a clear abuse of that discretion. The following from *Spalding* v. *Spalding,* 355 Mich 382, 384, 385, is brought to attention:

"The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."

A clear abuse of discretion is not evidenced in the result reached by the trial court. The modification order of January 29, 1962, is affirmed. Costs to appellee.

CARR, C. J., and DETHMERS, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

YORK *v.* LITTERAL.

TRUSTS—EQUITABLE LIEN—PRETRIAL STATEMENT.

An equitable lien was properly impressed upon property defendant is found to have purchased in his own name with money supplied by plaintiff notwithstanding trial court did not make a finding of fraud as alleged in plaintiff's bill to establish a trust, where pretrial statement shows defendant was sufficiently advised as to the facts testified to by plaintiff.

Appeal from Jackson; Dalton (John C.), J. Submitted June 14, 1962. (Docket No. 62, Calendar No. 48,987.) Decided September 7, 1962.

Bill by Dortha F. York against Tilman Litteral to establish trust in property purchased in defendant's name on land contract. Decree for plaintiff. Defendant appeals. Affirmed.

Owen Dudley, for plaintiff.

Rappleye & Perlos, for defendant.

KELLY, J. Appellee filed her bill of complaint to establish a trust and other relief, claiming that some time before September 11, 1953, defendant informed her that they could purchase a home in Jackson for $4,000, providing they could raise $500 to make a down payment; that she borrowed the $500 and gave same to defendant with the understanding that the

REFERENCES FOR POINTS IN HEADNOTE

54 Am Jur, Trusts § 208.

property would be purchased in their joint names; that defendant obtained the contract showing him as the sole purchaser; that she was advised by defendant on many occasions that he would see to it that the contract would be changed to show plaintiff and defendant were joint owners; that she continued to make payments out of her earnings and did make 33 payments of $50 each from October 10, 1953, to July 11, 1956, at which time she ceased making payments because of defendant's absolute refusal in July, 1956, to have the contract corrected as he had promised.

Defendant denied plaintiff had made any payments and claimed all payments were made by him, but the court, believing plaintiff, ordered defendant to pay her $2,650 and granted an equitable lien on the property to secure said payment.

Defendant presents only 1 question on appeal, namely: whether he was prejudiced because plaintiff's bill of complaint contained an allegation that defendant fraudulently obtained the money from plaintiff and, since the court did not find there was fraud, whether appellant was misled into defending on the grounds of fraud.

An examination of the bill of complaint and pretrial statement shows that defendant was sufficiently advised as to the facts that were testified to by plaintiff and we see no merit to defendant's contention. See *Manley, Bennett & Co.* v. *Woodhams,* 349 Mich 586, and *Kent* v. *Klein,* 352 Mich 652.

Affirmed. Costs to appellee.

CARR, C. J., and DETHMERS, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

DRAKE *v.* NORGE DIVISION, BORG-WARNER CORPORATION.

1. WORKMEN'S COMPENSATION—INTEREST ON PAST DUE AMOUNTS—OCCUPATION-CONNECTED DISABILITY.

   Interest at the rate of 5% on all past due amounts under an award of workmen's compensation, made in 1960 on a claim filed in 1958 for an occupation-connected disabling heart attack which had occurred in 1953, *held*, proper where review was limited to review of workmen's compensation appeal board's determination as to when interest began to accrue and appeal board had found that notice and claim for benefits were timely made (CL 1948, §§ 412.3, 417.2, 417.3).

2. SAME—INTEREST—PENALTY—USE OF ANOTHER'S MONEY.

   The imposition of interest on past due amounts under an award of workmen's compensation is not made as an imposition of a penalty but is a charge made for the use of another's money, hence, notice of plaintiff's claim, or lack of such notice, is not pertinent to the issue of whether or not interest should be allowed (CL 1948, §§ 412.3, 417.2, 417.3).

3. SAME—INTEREST.

   Interest on an award of workmen's compensation is payable on unpaid amounts as of the date the benefits accrue (CL 1948, §§ 412.3, 417.2, 417.3).

CARR, C. J., and KELLY, J., dissenting.

Appeal from Workmen's Compensation Appeal Board. Submitted October 13, 1961. (Docket No. 71, Calendar No. 49,187.) Decided September 10, 1962.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 58 Am Jur, Workmen's Compensation § 484 cum supp.

Clayton Drake presented his claim against Norge Division, Borg-Warner Corporation, for compensation because of injury to heart and was given award including interest from date of injury. Defendant appeals with hearing limited to question of interest. Affirmed.

Marcus, McCroskey, Finucan, Libner & Reamon (*Paul A. Williams,* of counsel), for plaintiff.

Cholette, Perkins & Buchanan (*Edward D. Wells,* of counsel), for defendant.

SOURIS, J. Weekly compensation benefits and medical expenses were awarded to plaintiff by the workmen's compensation appeal board in October of 1960 on a claim filed in 1958 for an occupation-connected disabling heart attack which occurred in 1953, weekly benefits to begin as of the last day of plaintiff's employment in 1953. The appeal board awarded interest on all past due amounts at the rate of 5% per annum. We granted leave to appeal limited to review of the appeal board's determination of the time when interest began to accrue.

In *Wilson* v. *Doehler-Jarvis,* 358 Mich 510, which involved a claim under the workmen's compensation law for death benefits and expenses of the employee's last illness and burial, this Court first determined that awards for such benefits and expenses should bear interest from the time such awards themselves became due. The majority of the Court which reached that conclusion, and in the process overruled (p 517) *Fowler* v. *Muskegon County,* 340 Mich 522, considered the commentary of Dean Roscoe Pound on the case of *Parker* v. *Brinson Construction Co.* (Fla), 78 So2d 873, which commentary appears in 16 NACCA Law Journal 135, 136, and the Minnesota cases of *Brown* v. *City of Pipestone,* 186

Minn 540 (245 NW 145), and *Bourdeaux* v. *Gilbert Motor Co.,* 220 Minn 538 (20 NW2d 393), in concluding that interest should be paid on compensation awards in the same manner in which interest is paid in actions *ex contractu,* that is, from the time of the accrual of the cause of action. Reliance was placed (pp 518, 519) upon the following language from *Brown* v. *City of Pipestone,* as quoted in *Bourdeaux* v. *Gilbert Motor Co.* (p 541): "Here was a contract debt due at the times when the compensation instalments should have been paid under the provisions of the act, and we see no reason why it should not, like any other debt, bear interest at the legal rate when it is subsequently decided that the debt existed." In the *Wilson Case,* interest was ordered computed and paid on the medical and burial expenses and on the instalments of death benefits from their respective due dates from and after the employee's death.

We do not consider it significant that *Wilson* v. *Doehler-Jarvis* involved a claim for death benefits as distinguished from a claim by the disabled employee himself for weekly compensation benefits as is involved here. However, this case does involve a factual circumstance relied upon by defendant to distinguish it from *Wilson.* In *Wilson,* the claim for death benefits was made shortly after the employee's death, the employer having had knowledge of the employee's own prior claim and of his death. Thus, the award of interest as of the date of death, the date death benefits became due, did not involve imposition upon the defendant of an obligation to pay interest on a claim as of a time when the defendant had no way of knowing of its possible liability for such claim. In the case at bar, on the contrary, plaintiff suffered his occupationally disabling heart attack in 1953 but no claim was made

until 1958.* Defendant contends that under such circumstances, it should not be required to pay interest during the 5-year period preceding its actual notice of plaintiff's claim.

Defendant emphasizes its belief that the imposition of interest in such cases is punishment for deliberate refusal to pay a lawful obligation and concludes therefrom that it should be spared such punishment at least until the date in 1958 when it received notice of plaintiff's claim and thereafter refused to pay it voluntarily. Such a concept of the purpose of interest in cases such as this does not conform to the views expressed in the majority's opinion in *Wilson.*

While it is true that in *Wilson* the interest involved covered a period during which the employer refused to pay benefits, the decision was not based upon a finding that the employer's refusal was malicious or vexatious or wilfully dilatory and, therefore, punishable by the imposition of a penalty. It was based upon a finding that the delay was without merit and, in that sense, wrongful. But interest was not imposed for that reason, as the opinion carefully points out. It was imposed (pp 516, 517) because the employer benefited from the use of money determined to be due the employee and because the employee had to do without its use. Imposition of interest upon the past due benefits punished no one; it charged for the use of another's money.

Were we considering a penalty, as defendant suggests we are, defendant's notice of plaintiff's claim, or lack of such notice, might be pertinent to our inquiry. But here, under the standards established in *Wilson* v. *Doehler-Jarvis, supra,* we seek only

* The appeal board found, in the circumstances of this case, that notice and claim for benefits were timely made. In this appeal, we do not review that finding.

to preserve to victims of compensable occupational disabilities the full measure of that which our legislature has provided. The legislature has provided that workmen's compensation benefits accrue as of the eighth day after injury or on the date of injury (CL 1948, § 412.3 [Stat Ann 1960 Rev § 17.153]) or as of the date of disablement (CL 1948, §§ 417.2 and 417.7 [Stat Ann 1960 Rev §§ 17.221 and 17.226]), any one of which dates could be, and not infrequently is, substantially earlier than the day notice of claim first is given the employer. Unless interest is charged for past due benefits awarded, the employee inevitably will receive less than he is entitled to receive. By the same token, unless interest is charged for past due benefits awarded, the employer will have had the free use of money determined to have been due the employee. Our belated recognition of the elementary nature of the equities involved in this controversy finally establishes a parity between the employee who ultimately collects accrued benefits and the employer who redeems a claim by paying benefits in advance,—at a commuted value, of course (CL 1948, § 412.22 [Stat Ann 1960 Rev § 17.172]).

Affirmed. Costs to plaintiff.

BLACK, KAVANAGH, and OTIS M. SMITH, JJ., concurred with SOURIS, J.

CARR, C. J. (*dissenting*). While in the employ of defendant, plaintiff on January 23, 1953, sustained a disabling heart attack. He did not at the time file a claim under the workmen's compensation act* of the State, presumably being advised by his physician, as it is claimed, that there was no connection between his work and the heart condition. It is not

* PA 1912 (1st Ex Sess), No 10, as amended (CL 1948, § 411.1 *et seq.*, as amended [Stat Ann 1960 Rev § 17.141 *et seq.*]).

disputed that at the time the physician reported to the employer that "the present disability was not due to the patient's occupation."

Under date of July 17, 1958, plaintiff made application for hearing and adjustment of claim. Shortly prior thereto the physician who had treated him in 1953 following his heart attack expressed the opinion that plaintiff's work "may have caused this attack." The hearing referee denied compensation on the ground that statutory requirements with reference to notice and claim had not been observed. Such decision was reversed by 2 members of the workmen's compensation appeal board and plaintiff was awarded compensation from January 24, 1953, at the rate of $32 per week for total disability, until the further order of the compensation department. He was also granted $561 for medical expenses, with interest on all weekly payments past due, and on the item of medical expense, at the rate of 5% per annum. On leave granted defendant has appealed, the question at issue relating to the matter of interest.

The action of the appeal board with reference to interest was based on the decision of a majority of this Court in *Wilson* v. *Doehler-Jarvis Division of National Lead Company,* 358 Mich 510. In that case application was made for entry of judgment in circuit court on the basis of unpaid workmen's compensation award. The appeal was from the circuit court judgment. The appeal board had not allowed interest.

The statute as enacted by the legislature and amended from time to time does not authorize the allowance of interest on payments required to be made under an award of compensation. Nor may authority to make such addition be implied from any provision of said statute. It must be borne in mind that we are dealing here with an obligation

imposed by law and the incidents thereof have been prescribed by the legislature. In *Luyk* v. *Hertel,* 242 Mich 445, 447, Mr. Justice WIEST, speaking for the Court, said:

"The workmen's compensation law is a departure, by statute, from the common law, and its procedure provisions speak all intended upon the subject. Rights, remedies, and procedure thereunder are such and such only as the statute provides. If the statute is short of what it should contain in order to prevent injustice, the defects must be cured by future legislation and not by judicial pronouncement. * * *.

"Rules of law and procedure, applicable to common-law actions, may not be considered in construing the workmen's compensation act, for such act is in derogation of the common law and substitutes its own code of procedure, inclusive of review. See *Andrejwski* v. *Wolverine Coal Co.,* 182 Mich 298 (Ann Cas 1916D, 724, 6 NCCA 807)."

The rule of interpretation so declared was followed by this Court in *Fowler* v. *Muskegon County,* 340 Mich 522. After referring to the holding in *Kermott* v. *Ayer,* 11 Mich 181, 184, where it was declared that "interest in Michigan is purely statutory", this Court unanimously held (p 526) that:

"Under our holding in the *Luyk Case, supra,* the remedy for all matters connected with compensation must be found in the statute, and our holding in the *Kermott Case, supra,* is that interest is statutory. It must follow that where the statute does not provide for interest, none can be granted."

We think the correct rule of law was recognized in the above cited cases. The statute clearly points out the procedure to be followed in order to reach a determination as to the liability of an employer for the payment of compensation under the act, and the extent of liability in that respect. Certainly it

cannot be said that, in the absence of a specific agreement between employer and employee, the possible obligation under the statute must be recognized in advance of such determination. Clearly the legislature has not seen fit to impose any penalty for failure of such prepayment.

The present case presents a striking example of the policy of requiring the payment of interest on an award from the date of disability. For 5-1/2 years, according to the finding of the appeal board, plaintiff did not know that he had any claim for compensation, and it is even more apparent that defendant had no reason to believe that there was any possible liability on its part for the payment of an award under the statute. It is a matter for the legislature to determine the right to interest on compensation payments, if such is to be allowed. As well stated in *Luyk* v. *Hertel, supra,* we are not dealing here with legal and procedural rules applicable to common-law actions. The statute is controlling rather than incidents involved in the application of contract law.

For the reasons above stated and for further reasons set forth in the dissenting opinion in *Wilson* v. *Doehler-Jarvis, supra,* the order of the workmen's compensation appeal board should be modified by eliminating the award of interest therefrom.

KELLY, J., concurred with CARR, C. J.

DETHMERS, J. (*concurring*). For the reasons set forth in my opinion in *McDaniel* v. *Campbell, Wyant & Cannon Foundry Company,* 367 Mich 356, 358, I concur in affirmance.

ADAMS, J., took no part in the decision of this case.

BISCEGLIA MOTOR SALES, INC., *v.* STUDEBAKER-PACKARD CORPORATION.

1. ABATEMENT AND REVIVAL — PENDENCY OF ACTION IN FEDERAL COURT.

Plaintiff's action for damages for wrongful termination of automobile dealer sales agreement, first brought in the Federal court which was yet pending at time defendant moved to dismiss similar action brought in State court, required the grant of defendant's motion, since plaintiff had the exclusive right to decide within the limits of time and venue as to just how and in what available court it may best sue defendant and may not sue in more than 1 court at a time, it being immaterial that Federal court had or had not finally adjudicated a second count, where adjudication on first count would be conclusive upon the parties in respect of the matters involved in the second count (15 USC [1958 ed], § 1221 *et seq.*).

2. APPEAL AND ERROR—QUESTIONS REVIEWABLE—RECORD.

Determination of question of fact as to status of plaintiff corporation as one winding up its affairs or one which was a going concern in default is not made, where record is not sufficient to permit resolution of such question, determination of the case being exclusively on ground that pendency of action in Federal court for same cause required dismissal of plaintiff's action (15 USC [1958 ed], § 1221 *et seq.*; Court Rule No 18, § 3 [1945]).

Appeal from Kalamazoo; Fox (Raymond W.), J. Submitted April 6, 1962. (Docket No. 34, Calendar No. 49,386.) Decided September 10, 1962.

Case by Bisceglia Motor Sales, Inc., a Michigan corporation, against Studebaker-Packard Corporation and Citizens Motor Sales, Inc., both Michigan corporations, for damages sustained from conspiracy resulting in termination of dealer sales agree-

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 1 Am Jur 2d, Abatement, Survival and Revival § 5.

ment. Motion to dismiss denied. Defendant Studebaker-Packard Corporation appeals. Reversed and remanded.

James Thomas Sloan, Jr., for plaintiff.

Uhl, Bryant, Wheeler & Upham (*Gordon B. Wheeler*, and *Bodman, Longley, Bogle, Armstrong & Dahling*, with *Henry C. Bogle, Carson C. Grunewald*, and *George D. Miller, Jr.*, of counsel), for defendant Studebaker-Packard Corporation.

BLACK, J. September 28, 1957, plaintiff commenced suit, in the United States district court for the western district of Michigan, against above defendant Studebaker-Packard. The complaint alleges generally that the named defendant is accountable to the plaintiff, in damages, for wrongful termination of a dealer sales agreement made between the plaintiff dealer and the defendant manufacturer of motor vehicles. The first count charges an actionable violation by defendant Studebaker-Packard of the so-called automobile dealer's franchise act (15 USC [1958 ed], § 1221 *et seq*). The second count charges Studebaker-Packard, and present defendant Citizens Motor Sales, with conspiracy to deprive plaintiff of its rights under the mentioned sales agreement.

On motion of defendant Studebaker-Packard the district court struck count 2, assigning that a non-Federal cause could not be joined with a cause based upon Federal statute. This (district court) suit is still pending. As of the date of present submission (April 6, 1962) it remained untried.

The instant suit was commenced by the same plaintiff June 30, 1959, in the Kalamazoo circuit. The cause alleged is identical in substance and purpose with count 2 above. The only difference between count 2 and the present suit is that Citizens Motor Sales is named as defendant here; whereas in the

district court suit it is named in said count 2 as a coconspirator only.

Defendant Studebaker-Packard moved to dismiss the present suit, assigning pendency of the district court suit and incapacity of plaintiff to sue for want of filing of its annual corporate report due May 15, 1959. The motion was denied. Defendant Studebaker-Packard reviews on application for and grant of leave.

Defendant Studebaker-Packard's motion to dismiss, upon showing of pendency of the district court suit, should have been granted. The carefully briefed question—whether the respectively pending causes are the same or substantially so—is beside the point since all agree that count 2 of plaintiff's complaint in district court presented the same substantial cause as does the plaintiff's instant declaration. True, count 2 has been stricken upon motion. But the district court's order in that regard is interlocutory and subject to possible revision upon subsequent motion or, possibly, upon review of final judgment in the case. Until the count is withdrawn or otherwise disposed of with prejudice (neither fact is shown), it remains to harass the defendants within meaning and prohibitory purpose of our uniform practice. See *Pinel* v. *Campsell,* 190 Mich 347, *Chapple* v. *National Hardwood Co.,* 234 Mich 296 (44 ALR 804), and Court Rule No 18, § 1 (d) (1945). As said in *Chapple* (p 298):

"The courts quite uniformly agree that parties may not be harassed by new suits brought by the same plaintiff involving the same questions as those in pending litigation. If this were not so repeated suits involving useless expenditures of money and energy could be daily launched by a litigious plaintiff involving one and the same matter. Courts will not lend their aid to proceedings of such a character, and the holdings are quite uniform on this subject."

It is deemed not amiss that the following general conclusions be added. Since accrual of its pleaded cause or causes this plaintiff has possessed the exclusive right to decide, within limits of time and venue, just how and in what available court it may best sue the defendants for damages arising out of the pleaded subject matter, that is, breach as alleged of the mentioned dealer sales agreement. Each of the pending actions, even with count 2 eliminated in district court, is predicated upon substantially the same facts as respects plaintiff vis-a-vis Studebaker-Packard and Citizens Motor Sales. On the face of this record, if the district court suit proceeds to trial and final judgment, the result with or without adjudication of count 2 would be conclusive upon the parties in respect of the matters involved in the second. See, to the point, *Cameron* v. *Cameron,* 235 NC 82 (68 SE2d 796, 31 ALR2d 436). I perceive no prejudice to a plaintiff so situated by requiring that he either withdraw his first suit or proceed to exclusive trial thereof.

With respect to defendant Studebaker-Packard's second question, stated above, plaintiff relies upon *Division Avenue Realty Co.* v. *McGough,* 274 Mich 163; *J. H. Eastman Company* v. *Beasley,* 285 Mich 74; and *John J. Gamalski Hardware, Inc.,* v. *Wayne County Sheriff,* 298 Mich 662 (136 ALR 1155), and says that "it is not a going corporation"; that "it has been engaged in winding up its affairs and collecting its assets," and that for such winding up purposes the corporation has access to the courts despite the prohibition of section 87 of the general corporation act (CL 1948, § 450.87 [Stat Ann § 21.87]). Defendant Studebaker-Packard disputes all this, arguing that:

"As long as the charter remains suspended but not terminated, a corporation may, by curing its default, reassume the full exercise of all of its pow-

ers; this is not the case when the charter has expired or terminated. There are simple and expeditious procedures available to a corporation which wishes to wind up its affairs in accordance with the statute and preserve its right to sue in the courts of this State. Failure to comply with these statutory procedures, as in the case of appellee, should carry the consequences intended by the legislature and imposed by this Court in *Meldman Cartage Co.* v. *Fruehauf Trailer Co.*, 271 Mich 304, cited above."

If it were necessary to determine such second question, I would hold that it presents a disputed and as yet unsettled issue of fact. See Court Rule No 18, § 3 (1945). By affidavit identifying significant correspondence, filed by plaintiff in opposition to defendant Studebaker-Packard's said motion, plaintiff insists that its status was and is that of a corporation engaged in winding up affairs and terminating corporate status distinguished from that of a going corporation which is in default. If the former, it continued under the *McGough Case* to have access to the courts. If the latter, it has no present access to the courts since the statutory penalty became fully effective and remains so. Such disputed question of status cannot be resolved, properly, without a more certain record of easily ascertainable fact. For that reason, and referring expressly to Court Rule No 18, § 3 (1945), I refrain from meritorious decision of the stated second question and vote to reverse and remand for entry of order of dismissal on exclusive ground that the pendency of plaintiff's district court suit calls for such dismissal. Appellant should, of course, have costs.

KELLY, KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., concurred with BLACK, J.

SOURIS, J. (*concurring*). I concur in reversal, but not for the reason stated in Mr. Justice BLACK's opinion.

In addition to the claim that a prior suit for the same cause was pending in the Federal district court, defendant's motion to dismiss also was based upon a claim that by virtue of the provisions of CL 1948, § 450.87 (Stat Ann § 21.87), plaintiff had lost its legal capacity to sue, having failed to file its 1959 annual report and to pay the privilege fee required by CLS 1956, § 450.82 (Stat Ann 1961 Cum Supp § 21.82).

We have recently reviewed this subject in the case of *Industrial Coordinators, Inc.*, v. *Artco, Inc.*, 366 Mich 313. In that case defendant failed to object to the plaintiff's capacity, or lack thereof, until after plaintiff had cured its default by filing its annual report and paying the privilege fee. We there held that under such circumstances the defense belatedly sought to be raised was no longer available. In this case, however, motion to dismiss was timely made and decided while plaintiff's corporate powers continued to be suspended. Plaintiff's declaration should have been dismissed, but only for the reason that plaintiff lacked capacity to sue during the period its corporate powers were thus suspended.

Reversed and remanded. Costs to appellant.

CARR, C. J., and DETHMERS, J., concurred with SOURIS, J.

KRONINGER *v.* ANAST.

1. MUNICIPAL CORPORATIONS—NONCONFORMING MULTIPLE DWELLING.
   A city may stop the use of a multiple dwelling that does not conform to the housing law by declining to exercise its discretion to continue the nonconforming use (CL 1948, §§ 125.404, 125.450, 125.451).

2. SAME—DISCRETION OF OFFICERS—STATUTES.
   The court may not substitute its discretion for that vested by statute in a city's officials.

3. FRAUD—IGNORANCE OF FALSITY OF STATEMENTS RELIED UPON.
   One who obtains property of another who relies upon untrue statements though they were made in ignorance of their falsity, must be held responsible as for a legal fraud.

4. VENDOR AND PURCHASER—RESCISSION OF LAND CONTRACT—MULTIPLE DWELLING—DISCRETION OF OFFICERS.
   Defendants' statements that 3-story wooden multiple dwelling property sold plaintiffs could be used as a 7-family apartment house, though innocently made, warranted rescission of the land contract, where city elected not to exercise its discretion to permit the use of the property for 7-family occupancy, or to permit the occupancy of the third floor of the property (CL 1948, §§ 125.404, 125.450, 125.451).

Appeal from Oakland; Dondero (Stanton G.), J. Submitted June 6, 1962. (Docket No. 8, Calendar No. 49,470.) Decided September 10, 1962.

Bill by Richard P. Kroninger and Lucille Kroninger against Gregory Anast and Vera Anast for rescission of contract to purchase real property and for accounting and restitution. City of Pontiac add-

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REFERENCES FOR POINTS IN HEADNOTES

[1] Power to terminate lawful nonconforming use existing when zoning ordinance was passed, after use has been permitted to continue. 42 ALR2d 1146.
[3] 23 Am Jur, Fraud and Deceit § 122 *et seq.*
[4] 55 Am Jur, Vendor and Purchaser § 593.

ed as party defendant to promote final determination of related controversies. Cross bill by defendants Anast against the city to establish right to continued use of third floor property for multiple dwelling purposes. Decree for plaintiffs. Defendants Anast appeal. Affirmed.

Howlett, Hartman & Beier (*James L. Howlett,* of counsel), for plaintiffs.

Leon H. Hubbard, for defendants Anast.

William A. Ewart, for defendant City of Pontiac.

BLACK, J. The chancellor's opinion is a model of comprehensive brevity. It states the essential facts fairly and presents all issues as follows:

"This is a suit by contract vendees for rescission on the ground that they are unable to use the real estate involved for the purpose and to the extent that it was represented they could use same by the defendant vendors. The defense is that the building involved has been used as a 7-family apartment down through the years, and that such use can be continued as a nonconforming use under the zoning code of the city of Pontiac. Said city was brought in as a party and pleaded not only the zoning code, but the State housing law as well.

"On trial the proofs abundantly show, and the court so finds, that the use of the building as a 7-family apartment antedates the adoption of the zoning code of the city, and is therefore a permissive use as nonconforming under that code.

"Defendants freely admit that they represented to the plaintiffs that the property could be used as a 7-family apartment. All of the testimony adduced at trial bears this out. Defendants had no reason to believe otherwise since they and their predecessors in title had used the building as a 7-family apartment down through the years without any interference by the city officials or otherwise.

"Proceeding on the theory that estoppel cannot run against the city, the crux of this case is whether or not the city can stop the use as represented under the housing law. A perusal of that law, PA 1917, No 167, as amended, indicates that the city can stop the continued use of the building as a 7-family apartment. Section 4 of the act, being CL 1948, § 125.404 (Stat Ann 1958 Rev § 5.2774), provides as follows:

" 'If any dwelling, or any part thereof, is occupied by more families than provided in this act, or is erected, altered, or occupied contrary to law, such dwelling shall be deemed an unlawful structure, and the health officer or such other appropriate public official as the mayor may designate, may cause such dwelling to be vacated. And such dwelling shall not again be occupied until it, or its occupation as the case may be, has been made to conform to the law.'

"CL 1948, § 125.450 (Stat Ann 1958 Rev § 5.2821), limits the number of apartments and the occupancy of a wooden multiple dwelling. CL 1948, § 125.451 (Stat Ann 1958 Rev § 5.2823), then provides as follows:

" 'No existing wooden building shall be so altered, or have its occupancy so changed as to conflict with provisions of section 50 (CL 1948, § 125.450 [Stat Ann 1958 Rev § 5.2821]): Provided, however, that the enforcing official may permit the occupancy of the third floor of an existing dwelling by not more than 2 families if of class "a," or 6 sleeping rooms, if of class "b." '

"And the statute then sets up standards within which the city officials may exercise this discretion.

"The city of Pontiac has elected not to exercise its discretion to permit the use of the property for 7-family occupancy, or to permit occupancy of the third floor of the property involved. The court cannot substitute its discretion for that of the city officials. Under these circumstances, the representations of the defendants, which were relied on by the plaintiffs, were false, even though innocently made. Defendants must be held responsible for their

untrue statements even though made in ignorance of their falsity—14 Mich 109.* These representations as to the use that could be made of the building involved in the contract were of the essence of the contract and were of such a character that it cannot be said that the minds of the parties met. This renders the contract between the parties void and rescission must be granted.

"An accounting between the parties will be ordered to determine the amount of money due to either party.

"A decree may enter accordingly."

The only discussible question is whether the innocent yet false representation of defendants Anast, made by them in the inducement, constituted actionable fraud. Citing *McIntyre* v. *Lyon,* 325 Mich 167, and the quotation therein by *Candler* v. *Heigho,* 208 Mich 115, 121, of the general rule stated in 20 Cyc, p 13, defendants Anast point to the chancellor's finding that they had no reason to believe the representation they had made was false.

The point is not well taken, since the question considered in both the *McIntyre* and *Candler Cases* was whether the respective plaintiffs actually relied upon the representations they said were actionable. Here there is no question on that score. These plaintiffs did rely upon the representation of defendants Anast "that the property could be used as a 7-family apartment" and, on strength thereof, proceeded to purchase what defendants Anast wanted to sell. The representation even though honestly believed by defendants Anast made out a case of fraud warranting rescission.

The controlling rule came to initial consideration and adoption when *Converse* v. *Blumrich,* 14 Mich 109 (90 Am Dec 230), was decided. Mr. Justice

* *Converse* v. *Blumrich, post.*—REPORTER.

COOLEY, writing for the unanimous Court, concluded (p 123):

"If one obtains the property of another, by means of untrue statements, though in ignorance of their falsity, he must be held responsible as for a legal fraud (citing cases)."

The rule has been followed ever since. See extended discussion and citation appearing in *Aldrich* v. *Scribner,* 154 Mich 23 (18 LRA NS 379), and *Rosenberg* v. *Cyrowski,* 227 Mich 508; also *Essenburg* v. *Russell,* 346 Mich 319. In the *Aldrich Case* this rule, citing *Converse* v. *Blumrich* and other like cases, was quoted with approval (p 26):

"But an equally careful examination of the cases adjudicated in this State satisfies me that the doctrine is settled here, by a long line of cases, that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity."

Decree affirmed. Costs to plaintiffs.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., concurred with BLACK, J.

SOURIS, J. (*concurring*). I concur in affirmance, the parties to the land contract having made a mutual mistake concerning the permissible use of the property. *Harris* v. *Axline,* 323 Mich 585, at p 589.

PECAR *v.* GLAVIN.

1. APPEAL AND ERROR—FRAUD—OIL AND GAS LEASE—RECORD.
   Appeal from order dismissing action for fraud in sale of interest in oil and gas lease is dismissed, where record presented does not include the lease, plaintiff's answer to defendant's motion to dismiss was not accompanied by a supporting affidavit, and no testimony taken to enable trial court or Supreme Court to determine questions plaintiffs have brought up (Court Rules No 18, § 3; No 67, § 6; No 70, § 5 [1945]).

2. COSTS—DISMISSAL OF APPEAL.
   No costs are allowed on dismissal of appeal from order dismissing action, where neither the record filed on appeal nor appellant's appendix presents a sufficient basis to permit a determination of the case on the merits (Court Rules No 18, § 3; No 67, § 6; No 70, § 5 [1945]).

Appeal from Wayne; Gilmore (Horace W.), J. Submitted June 8, 1962. (Docket No. 33, Calendar No. 49,465.) Appeal dismissed September 10, 1962.

Case by Leroy H. Pecar and Ann M. Pecar against Clem Glavin, doing business as Glavin Oil Company, for fraud in sale of oil and gas lease. Cause dismissed on motion. Plaintiff appeals. Appeal dismissed.

Orville F. Sherwood and *James C. Worth,* for plaintiffs.

Cozadd & Shangle (*Charles B. Cozadd,* of counsel), for defendant.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 568 *et seq.*
[2] 14 Am Jur, Costs § 96.

PER CURIAM. Plaintiffs sued defendant for damages, alleging fraud and duly precedent rescission. The subject matter of the alleged fraud is referred to in the declaration as a "certain oil and gas lease" of Isabella county property. The lease, according to the declaration, named Central Michigan Oil Company as lessee. It was recorded in Isabella county and, according to the declaration, was "owned" by defendant at the time of the presently outlined transaction.

Plaintiffs alleged that defendant fraudulently induced them to purchase his interest in the lease by assignment for which they paid him $12,000; that the lease turned out worthless, and that they are entitled to recover from defendant the amount so paid. Defendant moved to dismiss, assigning expiration prior to suit of the 2-year period of limitation set forth in CL 1948, § 451.120 (Stat Ann 1959 Rev § 19.760). Plaintiffs countered with allegation that the mentioned lease did not constitute a "security" within meaning of the cited statute. The presiding judge granted defendant's said motion without opinion (so far as the record discloses). Plaintiffs appeal.

The original record does not include the lease. Neither does the appellant's appendix. No stipulation respecting its construable content is made to appear. Plaintiffs' answer to defendant's said motion came into court with no supporting affidavit per indicative requirement of Court Rule No 18, § 3 (1945). And no testimony was taken upon which the court below and this Court in turn might judge and determine fairly the question or questions plaintiffs have brought up.

The appeal is dismissed. See Court Rule No 67, § 6 (1945)* and author's comment thereunder (Hon-

* As added and amended. See 347 Mich xxii and 355 Mich xiv.—REPORTER.

igman, Michigan Court Rules Annotated, 1959 pocket supp., pp 197–199); also Court Rule No 70, § 5 (1945).* No costs.

CARR, C. J., and DETHMERS, KELLY, BLACK, SOURIS, and ADAMS, JJ., concurred.

KAVANAGH and OTIS M. SMITH, JJ., did not sit.

* As added. See 347 Mich xxviii.—REPORTER.

BURNS v. VAN LAAN.

1. DEATH—DAMAGES—RECOVERY BY PERSONAL REPRESENTATIVE.
   Whatever damages a wife may have suffered, or may hereafter suffer, in consequence of her husband's death, became suable and recoverable only by action brought in the name of the personal representative of her husband's estate under the death act, as amended, in view of the exclusive provisions of that act and interpretations thereof by the Supreme Court (CL 1948, §§ 691.581–691.583).

2. SAME—DAMAGES—UNITARY ACTION—CONSORTIUM—EQUALLY DIVIDED COURT.
   The death act, as amended, seeks to avoid a multiplicity of suits and provides a unitary action for death and survival in the plaintiff personal representative who is a statutory trustee for all eligible beneficiaries of such unitary right and exclusively entitled to recover in their behalf all legally recoverable damages each has suffered on account of the wrongful death, the court being equally divided as to whether loss of consortium may be included within the term "pecuniary injury" when the decedent is a spouse (CL 1948, §§ 691.581–691.583).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 16 Am Jur, Death § 145 *et seq.*

Appeal from Kent; Vander Wal (John H.), J. Submitted June 7, 1962. (Docket No. 23, Calendar No. 49,322.) Decided September 10, 1962.

Case by E. Lois Burns against George J. Van Laan, Vern Sturges, and Kent County Oil Company, a Michigan corporation, for loss of consortium of husband killed in collision of motor vehicles. Previously judgment had been entered against defendant Van Laan in suit under the death act. Cause dismissed on motions. Plaintiff appeals. Affirmed.

Vander Veen, Freihofer & Cook (*Donald F. Oosterhouse,* of counsel), for plaintiff.

Hayes & Davis (*Kenneth T. Hayes,* of counsel), for defendant Van Laan.

Cholette, Perkins & Buchanan (*Don V. Souter,* of counsel), for defendants Sturges and Kent County Oil Company.

BLACK, J. Plaintiff's husband lived approximately 24 hours following mortal injury caused by defendants' wrongful act. Suit under the death act[1] resulted in a judgment against the defendants, in favor of the decedent's personal representative, in the sum of $25,000. The judgment was duly satisfied. Distribution of the proceeds was made as provided by section 2 of the wrongful death statute (CL 1948, § 691.582 [Stat Ann 1959 Cum Supp § 27.712]), the present plaintiff as widow being one of the beneficiary-distributees. She subsequently filed this suit against the same defendants claiming in her own right that defendants' wrongful act caused an actionable loss of consortium. Judge Vander Wal, of the

[1] CL 1948, §§ 691.581–691.583 (Stat Ann 1959 Cum Supp §§ 27.711–27.713).—REPORTER.

Kent circuit, granted defendants' motion to dismiss. He ruled:

"Therefore, the court holds that (1) damages for loss of consortium due to a negligent injury is recognized in this State; (2) no cause of action lies for loss of consortium in instantaneous wrongful death; (3) that such a cause of action, if any, apparently may be and should be included in the wrongful death action under the wrongful death act. And, therefore, since plaintiff did not include these damages to her in her claim here as administratrix under the wrongful death act, there is no authority for allowing her to file for those same damages in a separate action.

"Plaintiff is claiming in this case, not damage for the brief 24-hour period but for damages for the loss of consortium after death for the life expectancy of the husband. Therefore, for the reasons above stated, the motions to dismiss are herein granted."

We agree with Judge Vander Wal's conclusion (3) that whatever compensatory damages plaintiff may have suffered, or may hereafter suffer, in consequence of her husband's death, became suable and recoverable as against the defendants only by action brought in the name of the decedent's personal representative under the death act as amended in 1939.[2] Such ruling is dictated particularly by the exclusive provisions of the death act aforesaid and the interpretation thereof made in *MacDonald* v. *Quimby,* 350 Mich 21.

We said, in *MacDonald* (p 29):

"The statute clearly shows that the legislature provided for 1 action for wrongful death, to be commenced by the administrator or administratrix, thus avoiding a multiplicity of suits. We find that the

[2] See, in accord, *Hoekstra* v. *Helgeland,* 78 SD 82 (98 NW2d 669); also District Judge Freeman's carefully considered opinion in the unreported case of *Miracle* v. *Ellis Trucking Co.* (ED Mich SD), February 3, 1961, No 20423.

plaintiff-administratrix in this case occupied a trust relationship toward all who had a claim for damages against defendants, and we quote with approval from *Wiener* v. *Specific Pharmaceuticals, Inc.*, 298 NY 346, 350 (83 NE2d 673); and *Janes* v. *Sackman Bros. Co.* (CCA2), 177 F2d 928."

MacDonald's approval of what was said by the court of appeals of the second circuit fully reflects our considered holding that the act of 1939 "created a unitary action for death and survival" and that a decedent's personal representative, suing thereunder, becomes a statutory trustee for *all* eligible beneficiaries of such unitary right and is exclusively entitled to recover, in their behalf, *all* legally recoverable damages each has suffered on account of the wrongful death. It follows that *all* damages suffered by this plaintiff widow on account of the wrongful and mortal injury to her husband became recoverable not by her but by such personal representative in her behalf. Such is the essence of *MacDonald's* ruling.

Now for the ultimate question: In the like case of *Lampe* v. *Lagomarcino-Grupe Company*, 251 Iowa 204, 207 (100 NW2d 1, 3, 4), the court unequivocally held, and we agree, that "neither husband nor wife may sue in an individual capacity for the damages resulting from such wrongful death (citing authorities)." The court then referred to a previously cited authority (*Acuff* v. *Schmit*, 248 Iowa 272 [78 NW2d 480]) and reasoned to what in our view was the only proper conclusion (pp 208, 209):

"From *Acuff* v. *Schmit, supra,* it will be seen we are committed to the rule that a wife has a cause of action against one who has wrongfully or negligently so injured her husband as to deprive her of his consortium. It is clear, too, from a reading of the authorities, that the damages must stop when death occurs. In this case, plaintiff's husband sur-

vived the collision only a few minutes. This, then poses the question, did plaintiff prove damages were sustained by her in any amount capable of calculation? We hold she did not, and that the trial court was right in sustaining defendant's motion for judgment notwithstanding the verdict.

"Appellant asks: 'Can it be fairly said * * * that the wife of the husband who was incapacitated, sustained a loss and the widow of the deceased husband did not? Was the wife with the emasculated husband worse off after her husband's accident than was the widow after her husband's death?'

"The answer is that each had her remedy. The widow, as in this case, had, through the estate, the benefit of an action for the death of her husband. [Iowa Code Ann] § 635.9. By its verdict the jury, on count 1, undertook to compensate plaintiff, through the executrix as a proper conduit, for all the loss she sustained."

By *MacDonald's* ruling the judicial aim was that of "avoiding a multiplicity of suits" where death has been caused wrongfully. Too, we aimed toward due assurance that interested parties may sue, defend, negotiate, settle, receive, and pay in reliance upon the exclusiveness of such statutory right of action. The *Lampe Case* is in full accord.

For pertinent rules disclosing what is *not* recoverable by a surviving widow under our form of Lord Campbell's act, see 16 Am Jur, Death, § 199, p 133; 17 CJ, Death, § 207(b), p 1333; 25 CJS, Death, § 104, p 1254, and the leading case of *Michigan Central R. Co.* v. *Vreeland,* 227 US 59 (33 S Ct 192, 57 L ed 417, Ann Cas 1914C, 176). Reference, with intent of adoption thereof, is made to the following continued portion of the supreme court's opinion of *Vreeland* (pp 71, 72):

"A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, 'not only to express the charac-

ter of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation.' Patterson, Railway Accident Law, § 401.

"Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

"In *Tilley* v. *Hudson River R. Co.*, 24 NY 471, 476, and 29 NY 252, the court stated that 'the word "pecuniary" was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though grievous and painful to be borne, cannot be measured or recompensed in money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of damages.'

"To the same effect are the cases of *Schaub* v. *Hannibal & St. J. R. Co.*, 106 Mo 74 (16 SW 924), which was followed by the circuit court of appeals for the eighth circuit in *Atchison T. & S. F. R. Co.* v. *Wilson* (CCA 8), 48 F 57; *Lett* v. *St. Lawrence & O. R. Co.*, 11 Ont App 1; *Pennsylvania Railroad* v. *Goodman*, 62 Pa 329, 339; *Louisville, N. A. & C. R. Co.* v. *Rush*, 127 Ind 545 (26 NE 1010); Tiffany, Death by Wrongful Act, §§ 154 to 162, inclusive; Patterson, Railway Accident Law, §§ 401 to 406."[3]

[3] See our pursuit of *Vreeland's* precepts in *Lincoln* v. *Detroit, & M. R. Co.*, 179 Mich 189, 204 (51 LRA NS 710); *Fors* v. *LaFreniere*, 284 Mich 5, 12, and *Sipes* v. *Michigan Central R. Co.*, 231 Mich 404, 407.

Having so concluded, and then having declared that "no hard and fast rule by which pecuniary damages may in all cases be measured is possible", the supreme court went on to criticize, as reversible error, the following instruction to the jury (p 73):

"In addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men and measure, as far as you can, what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband."

Of the *Vreeland Case* the district court for the District of Columbia said (*Ciarrocchi* v. *James Kane Co.,* 116 F Supp 848, 850):

"At common law, a wife has no right of action for loss of consortium or other injury on account of the *death* of her husband by wrongful act. The *Hitaffer Case* [*Hitaffer* v. *Argonne Co., Inc.,* 87 App DC 57, 183 F2d 811, 23 ALR2d 1366] only gave her a right of action for loss of consortium in case of *injury.* That no civil action can be maintained at common law for wrongful *death* is noted by a statement in the leading case of *Michigan Central R. Co.* v. *Vreeland* (1913), 227 US 59, 67 (33 S Ct 192, 195, 57 L ed 417, Ann Cas 1914C, 176), that, 'Nothing is better settled than that, at common law, the right of action for an injury to the person is extinguished by the death of the party injured.' The doctrine has been considered as derivative of: the common-law maxim, 'a personal right of action dies with the person'; a human life cannot be evaluated in terms of money; and, where a wrongful death is merged with a felony, the civil wrong is merged with the crime. However open the doctrine may be to criticism, its existence

and rigidity may not now be questioned." (Italics by district court.)

Turning now to our own history of pertinent construction of Michigan's century-old death act: Speaking in 1885 of a case where the wrongfully taken decedent left 3 dependent children and a widow "not their mother," this Court said, unanimously with respect to the statutory power bestowed on juries (the power to "give such damages as they shall deem fair and just, with reference to the *pecuniary* injury resulting from such death"):

"Courts should not allow juries to give anything that goes beyond a fair *pecuniary compensation* based on the *actual pecuniary loss.*" *Staal* v. *Grand Rapids & Indiana R. Co.*, 57 Mich 239, 246.[4]

The statute has been accepted thus by the legislature—also by this Court with continued unanimity—ever since; a matter of 77 years. Nevertheless, plaintiff unabashedly proposes that we should write new interpretive words into such venerably interpreted statute; words which would enable a widow, or surviving husband for that matter, to recover more than that "actual pecuniary loss" the statute—by word of this Court—says is the sole basis for her recoverable right.[5]

Two reasons for plaintiff's said proposal are proffered in support. One is that a similarly situated

[4] This case of *Staal* has since been the "Bible," so to speak, when questions of evidence and measure of pecuniary loss have arisen in cases where a husband or father has been wrongfully taken. See quotation thereof in the *Wechsler Case (Wechsler* v. *Mroczkowski)*, 351 Mich 483, at 490, 491.

[5] "When the legislature has spoken, and declared one interest superior to another, the judge must subordinate his personal or subjective estimate of value to the estimate thus declared. He may not nullify or pervert a statute because convinced that an erroneous axiology is reflected in its terms. Even when the legislature has not spoken, he is to regulate his estimate of values by objective rather than subjective standards, by the thought and will of the community rather than by his own idiosyncrasies of conduct and belief." Cardozo, "The Growth of the Law", Yale University Press, pp 94, 95.

widow "should be allowed a common-law remedy for such loss as a natural and logical extension of our recent ruling in *Montgomery* v. *Stephan,* 359 Mich 33." The other, upon reference to a Georgia case, is that "a permissible policy of the legislature" should be fully effectuated "by making homicide expensive." (Both quotations are taken from Justice SOURIS' opinion.)

Let us examine the proposal. So far, save when the legislature ordains otherwise (like say in the dramshop act[6]), the policy of Michigan's law of damages in negligence cases has been compensation —not punishment. For wrongful death cases this was made clear in the *Staal Case, supra.* So if Georgia permits recovery of punitive damages in negligence cases, so Georgia has that right; yet we liking our own policy of compensatory damages need not follow her guide. What our legislature *may* do as "a permissible policy," that is, extend to the statutory right of action the result of the ruling in the *Montgomery Case,* has not yet been done. When and if that is done will be time enough for judicial talk about "making homicide more expensive" than it is.

The whole argument for and against "extension of our recent ruling in *Montgomery* v. *Stephan*" adds up to this: Some in today's situation of longtime and steadily unanimous construction of an old statute would "extend" the power of the judiciary to rewrite that statute so that it means what in *Staal* we said it does not mean. Others—the writer being one—would respect the almost conclusive force of the doctrine of "legislative acquiescence" where, as here, such acquiescence is proven by many years of unanimous interpretation; the legislature meanwhile remaining acquiescently compliant.

[6] CL 1948, § 436.22, as amended by PA 1961, No 224 (Stat Ann 1961 Cum Supp § 18.993).—REPORTER.

In that great field where the common law grows or withers the judiciary is the primary actor. The judiciary did act upon that precept in the *Montgomery Case*. But here we deal with a right of action, new in every respect and unknown to the common law, existing only by statute. By the admittedly exclusive nature of that right the beneficiaries of the cause are restricted to a statutory class and are permitted through the decedent's personal representative to recover a specially compensatory measure of damage. The *statute* provides the widow's remedy for the wrongful taking of her husband; whereas the *common law* provides the wife's remedy where the husband is actionably disabled with resultant loss to her.

A further comparison of the 2 cases—*Montgomery* and Burns—may enlighten those who would "extend" *Montgomery* to Burns. In *Montgomery* the wife was left for the actuarial duration with a crushing burden over and above the burden she would have carried had death of her husband ensued. According to the declaration the husband was made a mental and physical cripple the wife would have to care for; for such duration. Here the tragedy of death has eliminated that burden and has provided for this widow the special compensatory award she has already received. The distinction should be kept in mind, as most lawyers skilled in the field of negligence law do with attentive care. A serious personal injury case (*Montgomery* for example), other factors such as liability being the same, is usually fraught with potentially heavier damages than if the same injury had been mortal. There is a good reason for the distinction so long as our death act continues to limit recovery to that "fair pecuniary compensation" the beneficiaries are shown as having suffered.

Other considerations aside, there is a forcefully supervening reason why *Montgomery's* rule of the common law should not be "extended" to and incorporated in Michigan's wrongful death statute. The majority opinion of *Montgomery* was planted upon the reasoning of *Hitaffer* v. *Argonne Co., Inc.*, 87 App DC 57 (183 F2d 811, 23 ALR2d 1366), certiorari denied 340 US 852 (71 S Ct 80, 95 L ed 624). Valiant efforts to support and criticize such reasoning were made in the opponent opinions of Justices TALBOT SMITH and CARR. The case was referred to, in the 2 opinions, no less than 13 times. Yet *Hitaffer* has been questioned (*Brown* v. *Curtin & Johnson, Inc.*, 95 App DC 234 [221 F2d 106]), and then overruled (*Smither and Company* v. *Coles*, 100 App DC 68 [242 F2d 220]; certiorari denied 354 US 914 [77 S Ct 1299, 1 L ed 2d 1429]), by the very court of its origin, with respect to this distinct point of "extension" of its doctrine. Hence, it is safe only to say that the state of the law in the courts of the District of Columbia is as related in *Ciarrocchi* v. *James Kane, Co., supra; O'Neil* v. *Shelton Bros. Trucking Co.* (DC DC), 116 F Supp 654, and quotation of *O'Neil* in *Brown* v. *Curtin & Johnson, Inc., supra.* Such courts stand today for no "extension" of *Hitaffer.*. See quotation of *Ciarrocchi, ante,* p 491.

To summarize:

1. "Pecuniary injury" is not, by recognized authority construing conventional death statutes, interpreted as including loss by the widow of what former Justice TALBOT SMITH calls "conjugal fellowship,"[7] suffered from and after the husband's death.

2. The right declared by *Montgomery* in favor of Mrs. Burns abated when her husband died and was superseded by a new and distinct right of recovery, by her through Mr. Burns' personal representative,

[7] *Montgomery* v. *Stephan, supra,* at page 36.

"with reference to the pecuniary injury" (CL 1948, § 691.582 [Stat Ann 1959 Cum Supp § 27.712]) shown in her behalf when the first case, brought by the husband's fiduciary, was tried and determined.

To avoid possible misunderstanding of these rulings it is stressed that we are applying standard rules of damages as determinative of the extent of recovery permitted when the right of action provided by Michigan's death statute is asserted in behalf of a surviving widow. Other rules, not presently material, may apply when the statutory beneficiary is a surviving husband, a surviving parent or parents (see *Wycko* v. *Gnodtke,* 361 Mich 331 and cases cited with approval in *Paskvan* v. *Allouez Mining Co.,* 185 Mich 329, 337–339), a surviving child, or some other survivor belonging to the declaredly eligible class. Note how *Vreeland* treats these distinctions, pp 73, 74.

Further, and in similar avoidance, it is emphasized that this opinion does not limit or otherwise restrict that broad rule of evidence which, in cases of wrongful death, is and has been requisite to proper understanding by the jury of the pecuniary loss it must appraise. As approved in *Paskvan* at page 339, with multitudinous citations given in support including the *Staal Case, supra,* it is true generally that:

"Any fact which tends to show the amount of the pecuniary loss to the beneficiaries is competent evidence, whether it tends to increase or diminish the damages.";

also that, as taken from Thompson on the Law of Negligence in *Peklenk* v. *Isle Royale Copper Co.,* 187 Mich 644, 649, 650:

"In jurisdictions where the statute makes the recovery turn upon the dependency of the beneficiaries

on the deceased for support, the circumstances, age, health, and means of support of the beneficiaries may be proved, for the purpose of showing whether such beneficiaries would in all likelihood have received financial aid from the deceased."

For echo of these evidentiary precepts, see *Wechsler* v. *Mroczkowski,* 351 Mich 483, 490, 491.

Judgment of dismissal affirmed. Costs to defendants.

CARR, C. J., and DETHMERS and KELLY, JJ., concurred in result.

SOURIS, J. (*concurring*). Plaintiff sued in her individual capacity to recover damages for loss of her husband's consortium resulting from his death allegedly caused by defendants' negligence. Although a $25,000 judgment had previously been obtained against defendants in part for plaintiff's benefit under our wrongful death act,* she claims that damages for loss of her husband's consortium are not recoverable under that act and, therefore, that she should be allowed a common-law remedy for such loss as a natural and logical extension of our recent ruling in *Montgomery* v. *Stephan,* 359 Mich 33, in which we recognized the right of a wife to recover damages at common law for such loss resulting from the negligent injury of her husband which does not result in death.

Defendants assert that damages for loss of consortium resulting from a death caused by wrongful act or negligence are recoverable, if at all, exclusively under our death act and, hence, that plaintiff's action was properly dismissed by the trial court on their motion. I agree, for the reasons set forth in the forepart of Mr. Justice BLACK's opinion, that

* PA 1848, No 38, as amended (CL 1948, § 691.581 *et seq.* [Stat Ann 1959 Cum Supp § 27.711 *et seq.*]).

this action was properly dismissed, the death act providing plaintiff's exclusive remedy for whatever actionable losses she suffered as a result of her husband's death.

However, I believe that plaintiff was entitled to claim and recover damages for loss of her husband's consortium in the death action. Admittedly, there is a split of respected authority in our sister States which have pertinent statutory language identical or similar to ours on whether such losses are compensable to a surviving spouse in a death action. Where statutes limit recovery, as does ours, to "pecuniary" injuries, some courts have held that damages to a surviving spouse may be awarded only for so-called economic losses,—that is, for loss of a husband's support or of a wife's services. Such, indeed, was the United States supreme court's interpretation of the Federal employers' liability act (which did not even contain language of limitation like "pecuniary injury") in the case of *Michigan Central R. Co.* v. *Vreeland,* 227 US 59 (33 S Ct 192, 57 L ed 417, Ann Cas 1914C, 176), decided in 1913 and arising in Ohio. As is clearly evident from Mr. Justice BLACK's quotation from *Vreeland,* the controlling factor was whether the loss could be measured by some standard,—was it possible to set a pecuniary valuation upon the loss? Some courts have held that the loss of a deceased spouse's society and companionship is incapable of valuation "by any recognized measure of damages" (*Vreeland, supra,* p 71). But other courts have not so quickly relieved the wrongdoer of liability for such losses notwithstanding the difficulty of the task of valuation. Reference will be made to decisions from these courts later. First, however, it may be helpful to review briefly the common law, the harshness of which necessitated adoption of death acts in England and in this country,

and recent developments in our law touching upon the subject of consortium.

At the early common law, although a woman could not sue for damages for loss of her husband's consortium caused by his negligent injury, her husband could maintain an action for such damages if she were the victim. See *Montgomery* v. *Stephan, supra.* But even the husband's right to damages abated upon the wife's death from such injuries, *Baker* v. *Bolton* (1808), 1 Campb 493 (170 Eng Rep 1033), a result compelled by the ancient common law's insistence that no civil action could be maintained for the death of a human being caused by the wrongful act or negligence of another. *Higgins* v. *Butcher* (1606), Yelv 89 (80 Eng Rep 61). We need not explore the reasons for this rule, for they were carefully analyzed by Mr. Justice CHRISTIANCY in *Hyatt* v. *Adams,* 16 Mich 180.

From such a background of manifest injustice came the enactment of Lord Campbell's act, 9 and 10 Vict, ch 93, in England in 1846. By that act damages for injuries resulting from death caused by wrongful act of negligence were allowed to be recovered at law by the executor or administrator of the decedent for the benefit of the wife, husband, parent, or child of the decedent.

American States, including Michigan in 1848, enacted similar statutes. Currently, our statute, PA 1848, No 38, as amended (CL 1948, § 691.581 *et seq.* [Stat Ann 1959 Cum Supp § 27.711 *et seq.*]), allows recovery of damages for the pain and suffering of the decedent, for the medical, hospital, funeral, and burial expenses for which the estate is liable and for "the pecuniary injury resulting from such death" to decedent's surviving spouse and next of kin.

Thus in Michigan, by statute, the ancient common law has been modified so that an action now can be maintained for the death of a human being caused by

the wrongful act or negligence of another. With respect to a surviving spouse's right to recover damages in such statutory action, it is limited to his or her "pecuniary injury resulting from such death."

As noted above, in determining what are a surviving spouse's pecuniary injuries, many courts, including our own (*In re Olney's Estate*, 309 Mich 65, 84), have construed such statutory language to limit recovery for their benefit to damages for the loss of a wife's services or of a husband's support. To repeat, the theory, often expressed, is that other injuries to the surviving spouse, such as the loss of a husband's or wife's society and companionship (which, together with their services in the marital relation, we call their consortium), are considered not susceptible of pecuniary valuation and, therefore, their loss is not allowed to be recompensed in money.

The net result of all of this has been that surviving husbands and wives are entitled to recompense for losses resulting from the wrongful death of their spouses but only for some, but not all, of the elements of loss for which a husband could recover, at common law, when his wife was negligently injured by another. In other words, common-law juries in many jurisdictions are considered fully competent to measure a husband's loss of the consortium of his injured wife,—all elements of such loss,—but those same jurors, when hearing a death case brought under a wrongful death statute, are considered incapable of evaluating the pecuniary injury done to a wife or even to a husband by loss of the spouse's consortium made permanent by wrongful death.

This was not so in Michigan, however, where the virtue of consistency prevailed for many years, perhaps at the expense of justice. For in Michigan, until 1960, neither the husband nor the wife could sue at common law for loss of consortium resulting from the spouse's negligent injury by another. *Blair* v.

Seitner Dry Goods Co., 184 Mich 304, 314 (LRA 1915D, 524, Ann Cas 1916C, 882). Prior to 1960, we recognized no common-law right of either spouse to recover damages for loss of consortium where death did not result from another's negligence or wrongful act; where death did result, by statute and judicial construction we permitted a surviving husband to recover for loss of his wife's services and a surviving wife to recover for loss of her husband's support, but for nothing more.

In 1960, however, we finally acknowledged that loss of a spouse's consortium can be measured by a jury in a common-law action for negligence not resulting in death and that a wife's loss thereof can be recompensed in money damages. *Montgomery* v. *Stephan, supra.* The question now is, should we acknowledge that the same loss of consortium, differing only in degree because death has made it permanent, can be recompensed likewise where damages are sought under the statute for wrongful death? That question is ours to answer as well as the legislature's, for nothing yet in the wrongful death act, except as we construe it, bars recovery for such losses. The legislature has not said that a surviving spouse may not be recompensed in damages for loss of the society or companionship of a husband or wife wrongfully killed by another; this Court said so because we once believed such damages could not be measured judicially. Now, since *Montgomery* v. *Stephan, supra,* we know that they can, just as has been done for centuries by judges and juries in other jurisdictions in actions for criminal conversation and alienation of affections, pp 43, 44. Since such losses now can be measured at common law in this State in actions for negligence where death does not occur, I see no reason to continue to insist that they cannot be measured in actions under our statute where death

does occur,—the only difference between the losses being one of degree.

There is precedent from other jurisdictions, as well as the logic of consistency, to support the conclusion that damages may be recovered in behalf of a surviving spouse in a death action for the pecuniary value of the loss of such noneconomic interests of a marriage as are known within the concept of consortium. See *Beeson* v. *Green Mountain Gold Mining Co.* (1880), 57 Cal 20; *Newton* v. *Thomas* (1955, 1956), 137 Cal App 2d 748, 769 (291 P2d 503, 516); *Spangler* v. *Helm's New York-Pittsburgh Motor Express* (1959), 396 Pa 482 (153 A2d 490); *Vines* v. *Arkansas Power & Light Co.* (1960), 232 Ark 173 (337 SW2d 722); *Continental Bus System, Inc.*, v. *Toombs* (Tex Civ App 1959), 325 SW2d 153, 167; *Nichols* v. *United States Fidelity & Guaranty Co.* (1961), 13 Wis2d 491 (109 NW2d 131); *Johnson* v. *Charleston & Western Carolina R. Co.* (1959), 234 SC 448 (108 SE2d 777); *Complete Auto Transit, Inc.*, v. *Floyd* (CCA 5, 1958), 249 F2d 396, relying upon *Blue's Truck Line, Inc.*, v. *Harwell* (1938), 59 Ga App 305, 310 (200 SE 500, 502); *Hall* v. *Gillins* (1958), 13 Ill2d 26 (147 NE2d 352); and *Moss* v. *Hirzel Canning Co.* (1955), 100 Ohio App 509 (137 NE2d 440). There are other cases, many others. See West's General Digest (3d ser) and its 6 decennial digests under the heading Death, § 88. See, also, 74 ALR 11, particularly § VI b, at p 72 *et seq.*, and supplements.

It is my belief that we should now candidly announce that the obstacle to judicial ascertainment of such damages no longer exists in actions under the statute any more than it does in actions for common-law negligence. Once, long ago, this Court might well have been justified in judicially limiting the statutory language of "pecuniary injury" to preclude recovery of damages for death-induced loss of a spouse's consortium because it was believed such

damages were incapable of judicial ascertainment. Now, however, in the absence of other rational basis for relieving a death-dealing wrongdoer of the consequences of his acts, we must either allow recovery of damages for a surviving spouse's loss of consortium, the evidentiary bar being no longer an obstacle in death cases any more than it is in mere injury cases, or we must perpetuate this injustice by reliance upon what we all must recognize as a bare legal fiction of judicial impotence. I would let the financial burden rest upon him who causes provable loss to fully effectuate a permissible policy of the legislature to preserve human life "by making homicide expensive." *Western & Atlantic R. Co.* v. *Michael* (1932), 175 Ga 1, 13 (165 SE 37, 42).

Subject to the foregoing, I concur in affirmance.

KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., concurred with SOURIS, J.

In re KING ESTATE.

1. TRUSTS—WILLS—WIDOW'S ALLOWANCE—PROVISION FOR MAINTENANCE—DATE OF VESTING.

   Residuary and trust clauses of testator's will which unqualifiedly ordered payment to his wife of $700 per month during her life or until the trust property shall be exhausted and medical, surgical, hospital, and nursing expenses for her to the extent that such expenses exceeded $700 per month vested in her a legal right thereto as of testator's death that was unaffected by probate court's award of $1,000 per month for period of 1 year as her widow's allowance (CLS 1956, § 702.68).

REFERENCES FOR POINTS IN HEADNOTES

[1] 57 Am Jur, Wills §§ 1560, 1561.

2. SAME—CONSTRUCTION OF PROVISION FOR MAINTENANCE—INTENT.
A trust for support and maintenance, created by a residuary devise, is not technically a legacy for maintenance, but identical considerations are involved in construing it in ascertaining testator's intent, hence, such a trust is normally construed as accruing from the date of the death.

3. SAME—CONSTRUCTION OF PROVISION FOR MAINTENANCE OF WIDOW.
Courts must assume that a testator who makes trust provision for his widow's maintenance, without reference to whether or not she petitions for and receives more, by the statute, from the estate proper, intends that she be paid from the trust as of his death.

Appeal from Antrim; Brown (Charles L.), J. Submitted June 26, 1962. (Docket No. 64, Calendar No. 49,714.) Decided September 10, 1962.

In the matter of the estate of Kenneth T. King, deceased, the executor, National Bank of Detroit, petitioned for construction of will in respect to propriety of paying trust benefits in addition to widow's allowance. Probate and circuit courts directed trust provisions to be paid only after payment of widow's allowance for 1 year. Widow, as plaintiff requesting payments, appeals. Reversed and remanded.

Williams, Thompson & Coulter (*K. E. Thompson,* of counsel), for plaintiff.

Charles H. Menmuir, for defendant executor.

BLACK, J. The testator, Kenneth T. King, devised and bequeathed the residue of his estate to a designated trustee. His primary purpose was that of providing a lifetime income of $700 per month for his widow by that part of the residuary and trust clauses which directed the trustee:

"(b) To pay to my wife, Edith Apted King, $700 per month during her life or until said trust property shall be exhausted, and in addition thereto to pay all

medical, surgical, hospital and nursing expenses for my wife to the extent that such expenses shall exceed $700 per month."

The will with codicils was duly admitted to probate. Upon statutory petition the probate judge granted the widow an allowance of $1,000 per month, limiting the allowance to the usual period of 1 year. See CLS 1956, § 702.68 (Stat Ann 1959 Cum Supp § 27.3178[138]).

The allowance was duly paid. Shortly before expiration of the 1-year period, and prior to closing of the estate and appointment of the residuary trustee, the executor filed a petition for construction of the will, reciting:

"That a question of construction has arisen; namely whether the widow is entitled to the widow's allowance of $1,000 per month as well as the amount designated to be paid by the trustee of $700 per month during the probate of the estate, or is the widow only entitled to the widow's allowance during probate and before the trustee is appointed."

The probate court and the circuit court in turn held that the payment of monthly income to the widow, under quoted (b) above, should not commence until expiration of the 1-year period. The opinions of both courts are related in the record as being "that the testator did not intend that his wife should be paid both a widow's allowance of $1,000 per month allowed by the probate court for 1 year, and, in addition thereto, $700 per month, or a total of $1,700 per month for 1 year." From such ruling of the circuit court the widow (since remarried) appeals.

The only reviewable question is whether the probate court's statutory award to the widow lessened (to extent of the amount paid thereunder) the widow's legal right to receive, from and after her husband's death, the monthly income he had provided

by quoted subparagraph (b). We hold it did not, there being no suggestion in the will of intent that the exercise of judicial discretion under the statute should affect what under the law was a vested legal right. In a word, the testator by omission of qualifying words must be taken as having desired that the monthly income directed by subparagraph (b) should be paid by the trustee from the trust estate, as of the testator's death, according to a well-known rule of testamentary construction.

Like provisions for support, usually of the testator's widow, to be effected by instalment payments from the income or corpus (or both) of a testamentary trust, are generally held as being payable from the time of the testator's death rather than from some later date, such as when the trustee receives the trust estate from the testator's personal representative. See *Poole* v. *Union Trust Co.*, 191 Mich 162, 171 (Ann Cas 1918E, 622); 4 Page on Wills (Lifetime ed) §§ 1591, 1592, pp 526–535. The reason is well stated in *Holmes* v. *Hrobon*, 93 Ohio App 1, 52, 53 (103 NE 2d 845, 873):*

"On page 641 of 70 ALR it is stated that even though the trust cannot be set up until the administration is complete '* * * in the sight of the law the trust is in progress from the testator's death unless a contrary intent is apparent in the will. If this were not so, the time when the income should become payable would be subject to the caprice or neglect of executors, or casual delays in the probate; and hence income which accrues between the death of the testator and the setting apart of the fund for the purposes of the trust must be paid to the beneficiary.' "

We expressly adopt, as explanatory of the general rule and consistent with the *Poole Case, supra,* the

* Affirmed as to such reason and the point thereof in *Holmes* v. *Hrobon*, 158 Ohio St 508 (110 NE2d 574).

following discussion which appears in *In re Marre's Estate,* 18 Cal 2d 184, 189, 190 (114 P2d 586, 590):

"It is true, of course, that a trust for support and maintenance, created by a residuary devise including both real and personal property, is not technically a *legacy* for maintenance, since a legacy is ordinarily a bequest of money or personal property. *Estate of Ross,* 140 Cal 282, 290 (73 P 976); Thompson, Wills (2d ed), p 19, § 11; 24 Words and Phrases (Perm ed), 517. Identical considerations are involved, however, in ascertaining the testator's intent whether the gift is a legacy for maintenance, a trust of personal property for that purpose (*cf. In re Mackay,* 107 Cal 303 [40 P 558]), or a similar trust consisting of both real and personal property. (See *Estate of Dare,* 196 Cal 29 [235 P 725].) The nature of the property placed in trust should not require different conclusions where it appears that the testator's motives and desires were identical. We are compelled, therefore, in accord with our decision in *Estate of Dare, supra,* to hold that the testatrix is presumed to have intended that the payments for the beneficiary's support should accrue from the date of her death, under the circumstances here presented."

To summarize: Any purposeful testator desiring that the stated general rule be not applied, in the testamentarily uncontrollable event of judicial award of a statutory allowance, need only say so. A sentence of no more than 10 words will suffice. Failing in such regard, the courts must assume desire on his part that such general rule be applied; that his wish is that the widow be paid from the trust as of his death whether or not she petitions for and receives more, by the statute, from the estate proper.

Reversed and remanded for entry of circuit court judgment in accord herewith. Costs to appellant.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

CHRISTINE BUILDING COMPANY *v.* CITY OF TROY.

KLIPFEL *v.* SAME.

CAMPUS ESTATES, INC., *v.* SAME.

1. MUNICIPAL CORPORATIONS—ZONING—REASONABLENESS OF ORDINANCE.

The reasonableness of a zoning restriction must be tested according to existing facts and conditions and not some condition which might exist in the future.

2. SAME—ZONING—POLICE POWER.

Zoning regulations constitute a valid exercise of the police power only when they have a rational relation to the public health, safety, welfare and prosperity of the community and are not such an unreasonable exercise of the police power as to become arbitrary, destructive, or confiscatory, a test to be applied in the light of existing conditions.

3. SAME—ZONING ORDINANCE—PRESUMPTIONS.

The determination of the reasonableness of a zoning ordinance must be made upon the facts presently involved, there being a presumption in favor of validity.

4. SAME—ZONING ORDINANCE—CONSTITUTIONALITY.

A zoning ordinance may not be held invalid unless the objections urged on constitutional grounds appear on the face of the measure in question, or are established by competent proof.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Zoning §§ 21, 22.
[2] 58 Am Jur, Zoning § 14.
[3] 58 Am Jur, Zoning § 16.
[5] 58 Am Jur, Zoning § 26.
[6] 3 Am Jur, Appeal and Error § 815.
[7, 8] 3 Am Jur, Appeal and Error § 912.
[9, 10] 58 Am Jur, Zoning § 52.
[13] 14 Am Jur, Costs § 91 *et seq.*

5. SAME—ZONING ORDINANCE—PUBLIC HEALTH, SAFETY, AND GENERAL WELFARE.

A zoning ordinance, to be justified, must have advanced the public health, safety, and general welfare of the people.

6. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW.

The Supreme Court hears and considers chancery cases *de novo* on the record on appeal.

7. SAME—CHANCERY CASES—FINDINGS OF TRIAL COURT.

The Supreme Court gives considerable weight to the findings of the trial judge in equity cases primarily because he is in a better position to test the credibility of the witnesses by observing them in court and hearing them testify than is an appellate court which has no such opportunity.

8. SAME—CHANCERY CASES—FINDINGS OF TRIAL COURT.

The Supreme Court will not ordinarily disturb the findings of the trial judge in an equity case unless, after an examination of the entire record, it reaches the conclusion that it would have arrived at a different result had it been in the position of the trial court.

9. MUNICIPAL CORPORATIONS—ZONING ORDINANCE—MINIMUM LOT SIZE.

Finding of trial judge in suit to declare city zoning ordinance void as to plaintiffs' tracts because unreasonable and void, where it provided for minimum area per lot of 1/2 acre, *held,* correct under record presented.

10. SAME—ZONING—MINIMUM LOT SIZE—PUBLIC HEALTH, SAFETY, AND GENERAL WELFARE.

Imposition of minimum size of 1/2 acre upon lots in zone which included plaintiffs' tracts that were in an area serviced by sewers *held,* not to bear a reasonable relation to any present danger directly affecting the public health, safety, and general welfare.

11. SAME—ZONING ORDINANCES—REASONABLENESS.

The power granted municipalities to enact zoning ordinances is at all times limited by the word *reasonable.*

12. SAME—ZONING—CLASSIFICATION NOT PRESENTLY IMPOSED.

A court has no legal duty, right, or obligation to undertake to pass on the reasonableness of the purpose of zoning plaintiffs' property with reference to a classification not presently imposed thereon.

13. COSTS—NEITHER PARTY PREVAILING IN ENTIRETY.

No costs are allowed on appeal in suit to declare a zoning ordinance invalid as to plaintiffs' tracts and on their cross appeal to have the court pass upon the validity of a classification not presently imposed thereon, where neither party has prevailed in the entirety.

KELLY, SOURIS, and ADAMS, JJ., dissenting.

Appeal from Oakland; Holland (H. Russel), J. Submitted January 5, 1962. (Docket Nos. 38-40. Calendar Nos. 49,335–49,337.) Decided September 10, 1962.

Bill by Christine Building Co., Inc., a Michigan corporation, against the City of Troy, a municipal corporation, to declare zoning ordinance void as to its property because of excessive area restriction, and praying for injunction restraining enforcement of any other than a particular and less restrictive zoning classification. Similar bills by Mae Klipfel and Campus Estates, Inc., a Michigan corporation. Causes consolidated for hearing and on appeal. Decree for plaintiffs declaring ordinance void as to plaintiffs' properties but denying declaratory relief. Defendant appeals. Plaintiffs cross-appeal. Affirmed.

N. L. Smokler (*Travis, Warren & Nayer,* of counsel), for plaintiffs.

Burke & Osgood (*Stanley E. Burke,* of counsel), for defendant.

Amicus Curiae:

Irvin H. Yackness, for Building Association of Metropolitan Detroit.

KAVANAGH, J. Defendant city appeals from a decree of the circuit court for the county of Oakland

holding void as to the plaintiffs' property a provision in defendant city's zoning ordinance pertaining to a lot size restriction of 21,780 square feet as unreasonable and not in any way related to the general welfare of the community.

Plaintiffs cross-appeal with reference to a particular provision of the decree wherein the court refused to pass upon the question of minimum lot sizes other than that specified in the ordinance of 21,780 square feet, on the theory this was a legislative function and the court would only have the right to pass on the ordinance after it had been adopted by the legislative body.

The 3 cases were consolidated for trial below because they involved similarly situated lands and the same basic issues.

Plaintiffs Christine Building Company, Inc., and Mae Klipfel each own contiguous 40-acre parcels of land. Another parcel of land is involved containing 120 acres owned by the third plaintiff, Campus Estates, Inc. This latter parcel is not adjacent to the 2 parcels owned by the other plaintiffs but is located about a mile away. All plaintiffs are desirous of developing their property for residential purposes.

The 3 suits involved are an attack on the constitutionality, the legality, and the reasonableness of defendant city's Ordinance No 23 because of the lot size restrictions imposed on plaintiffs' property by article 14* of the ordinance.

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* The pertinent portion of article 14 of Ordinance No 23 of the city of Troy, the schedule of regulations, limiting height and bulk of buildings and land use, reads as follows:

	Use District	Minimum Size Lot Per Unit Area in sq. ft.	Width in feet
R–1A	One-Family Residential	30,000	150
R–1B	One-Family Residential	21,780	110
R–1B1	One-Family Residential	15,000	100
R–1C	One-Family Residential	10,500	85
R–1D	One-Family Residential	8,500	75
R–1E	One-Family Residential	7,500	60

The parcels of land involved are zoned under the ordinance as R–1B. This zoning regulation requires that each lot have a half acre or 21,780 square feet with a width of 110 feet. Plaintiffs, who have sought to have their property rezoned, contend they should be permitted to use their property as R–1D, which permits lots to contain only 8,500 square feet with a width of 75 feet.

The plaintiffs in essence say:

1. There is no public necessity for their property being platted in lots the size required in the R–1B classification.

2. That the present zoning restrictions on their property result economically in the ordinance being confiscatory and unreasonable.

3. That the ordinance is unconstitutional because the lot size requirements are not related to health, safety, or general welfare and exceeds a proper exercise of the police power.

4. That the city has no right under the laws of this State to arbitrarily use zoning to control the population and maintain or improve property values or aesthetics, except as an incidental result of protecting directly the health, safety, and welfare of the community.

Defendant city of Troy contends that Ordinance No 23 is a valid exercise of its police powers.

The real crux of defendant's position is that Ordinance No 23 tends to limit the density of the population in proportion to the sewer capacity of the Evergreen interceptor system, which serves the area. Defendant contends this relationship between ultimate population and the sewer facilities directly involves the matter of health. Defendant urges that its right to have its inhabitants use the Evergreen interceptor sewer system is limited by contract and cannot be altered.

Defendant further maintains that the zoning plan of the city of Troy is a comprehensive one based upon a master plan and that any comprehensive plan must have a graduated lot size to accommodate people with different tastes and different pocketbooks. Defendant says the character of the neighborhood adjacent to and surrounding the 3 subject parcels is of such a nature that lots having a size of only 8,500 square feet would not be harmonious with the area to the east and south of the two 40-acre parcels or with the area to the west of the 120-acre parcel.

In substance, the city says it adopted a sewer plan for the general area to serve an estimated population of 21,300 people in the year 2000 A.D. The city then zoned so as to limit the area to that figure.

Testimony disclosed there were presently only about 2,000 persons in the sewer district.

Defendant city contends its testimony and exhibits support the following:

1. The present zoning of the subject parcels would create the maximum density of population that could be serviced by available sanitary sewers, and, therefore, bears a direct relation to the public health, safety, and general welfare.

2. The comprehensive zoning plan of the city of Troy, as evidenced by Ordinance No 23 and as applied to the parcels in question, constitutes a valid exercise of the police power and bears a substantial relation to the public health, safety and general welfare.

3. The present zoning, as applied to the subject parcels, tends to preserve the established character of the neighborhood, stabilizes the value of property therein and promotes the general welfare.

4. Operation of the zoning ordinance as applied to plaintiffs' property does not render it worthless or almost worthless.

5. Where the court has decided that a provision of a municipal zoning ordinance governing the minimum lot size is unreasonable and, therefore, void, it does not then have the right to impose upon the subject parcel a smaller minimum lot size.

Defendant's exhibit A is a contract between the city of Detroit and the county of Oakland. The total amount of sewage (or volume per cubic foot per second) to be received by the city of Detroit from the Evergreen interceptor was regulated by the contract between Oakland county and the city of Detroit. The designed capacity of the interceptor was fixed by the terms of the Evergreen sewage disposal system agreement (exhibit B) between the county of Oakland, the city of Troy, and other participating municipalities.

The Evergreen contract established Troy's maximum population to be served at 21,300 people. According to the terms of the contract and because of the designed capacity of the sewer, a population of 21,300 people is the maximum population that could be served by the interceptor within the city of Troy.

The trial court found from the testimony and from the exhibits:

It would not be economical, from the standpoint of the developer, to build on building sites on these 3 properties on lots 1/2 acre in size, if the homes are to be sold at popular prices, meaning from $17,000 to $20,000.

Homes in the 3 parcels built on lots having a minimum size of 21,780 square feet and costing $25,000 and upwards would be in an extremely poor competitive position with houses selling at the same figure in nearby areas or developments, and would not meet with ready sales.

It is obviously desirable on the part of the plaintiffs to realize as much profit out of their land as possible and, subject to this desire, they would like

to build on lots having not more than 8,500 square feet. It was agreed where septic tanks were necessary, the building sites needed to be larger than if serviced by a sewer system.

The trial court found as a fact that within the city of Troy other areas using septic tanks adjacent to plaintiffs' property had much smaller lot sizes than those permitted under Ordinance No 23.

The trial court further found the reduction from 21,780 square feet to 8,500 square feet would not only result in a great economic and financial gain to the land developers, but in a greatly increased burden upon the land because of population and services that would be required. The trial court found although plaintiffs' profits from the land would be greatly curtailed, it could not be said the imposition of the minimum lot size of 21,780 square feet would amount to outright confiscation of the land.

The trial court failed to find a relationship between the lot size restriction and any present consequential effect on the public health, safety, and general welfare, and concluded the 21,780-square-foot lot size was a void provision as to the plaintiffs.

The trial court stated the city had no right to arbitrarily use zoning to control population and to maintain and improve property values or aesthetics, except as an incidental result of directly protecting public health, safety, and general welfare.

The court concluded, under the facts in this case and the law applicable thereto, the zoning restriction of a minimum lot size of 21,780 square feet was unreasonable, discriminatory, and not related to the protection of health, safety, and general welfare, and thus not within the power of defendant city to enforce as relates to the subject property.

The trial court went on to say it was of the opinion there devolved upon it no legal duty, right, or obligation to switch from the role of chancellor to that of

municipal legislator for the purpose of rezoning the subject property, and refused to pass on the question of whether a minimum lot size of 8,500 square feet was reasonable.

Our courts have consistently held that the reasonableness of a zoning restriction must be tested according to existing facts and conditions and not some condition which might exist in the future. See the discussion in *Comer* v. *City of Dearborn,* 342 Mich 471, 477, where Justice CARR quotes from the case of *Corthouts* v. *Town of Newington,* 140 Conn 284, 288 (99 A2d 112, 38 ALR2d 1136), as follows:

" 'Zoning regulations constitute a valid exercise of the police power only when they have a "rational relation to the public health, safety, welfare and prosperity of the community" and are "not such an unreasonable exercise of [the police] power as to become arbitrary, destructive or confiscatory." *State* v. *Hillman,* 110 Conn 92, 100, 105 (147 A 294). Whether a zoning ordinance meets this test must be determined in the light of existing conditions, in order that the purpose for which the police power is invoked may be promoted. *Village of Euclid* v. *Ambler Realty Co.,* 272 US 365, 387 (47 S Ct 114, 71 L ed 303, 54 ALR 1016).' "

This Court has held on numerous occasions that in determining the reasonableness of a zoning ordinance each case must be determined upon its own facts. See *Senefsky* v. *City of Huntington Woods,* 307 Mich 728 (149 ALR 1433); *Hitchman* v. *Township of Oakland,* 329 Mich 331; *Hungerford* v. *Township of Dearborn,* 362 Mich 126.

In the case of *Hitchman* v. *Township of Oakland,* 329 Mich 331, Justice CARR outlined some of the ground rules for testing the actions of a legislative body with reference to the reasonableness of a zoning ordinance. Justice CARR said (p 335):

"Under the act, arbitrary action or the unreasonable exercise of authority may not be justified. A zoning ordinance must be reasonable in its operation. This is the test of its legality. *City of North Muskegon* v. *Miller,* 249 Mich 52, 57; *Moreland* v. *Armstrong,* 297 Mich 32, 36. Every case of this character must be determined on its own facts. *Senefsky* v. *City of Huntington Woods,* 307 Mich 728, 737 (149 ALR 1433). The presumption is in favor of validity. A statute or ordinance may not be held invalid unless the objections urged on constitutional grounds appear on the face of the measure in question, or are established by competent proof. *Portage Township* v. *Full Salvation Union,* 318 Mich 693; *Northwood Properties Company* v. *Royal Oak City Inspector,* 325 Mich 419."

In the instant case, the population in the area involved presently amounts to 2,051. The city anticipates that by the year 2000 it will exceed 21,300. If we are going to speculate as to the future we might well recognize the possibilities of technological advances with reference to sewage disposal. By the year 2000 the city might find itself able to handle and service a population much greater than the 21,300 limitation.

Though each zoning case stands by itself and the reasonableness of the zoning must be judged by the circumstances of the case, in the final analysis, we must consider whether the particular provisions of the zoning law have advanced the public health, safety, and general welfare of the people. See *Pere Marquette R. Co.* v. *Muskegon Township Board,* 298 Mich 31.

We hear and consider chancery cases *de novo* on the record on appeal. *Johnson* v. *Johnson,* 363 Mich 354; *Osten-Sacken* v. *Steiner,* 356 Mich 468; *Futernick* v. *Cutler,* 356 Mich 33; *A & C Engineering Co.* v. *Atherholt,* 355 Mich 677; *Straith* v. *Straith,* 355

Mich 267; *Ball* v. *Sweeney,* 354 Mich 616. This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases. This is primarily because the trial judge is in a better position to test the credibility of the witnesses by observing them in court and hearing them testify than is an appellate court which has no such opportunity. We do not ordinarily disturb the findings of the trial judge in an equity case unless, after an examination of the entire record, we reach the conclusion we would have arrived at a different result had we been in the position of the trial judge. The trial judge here found, after listening to the witnesses testify and examining the exhibits, that the plaintiffs had shown the zoning ordinance to be unreasonable and arbitrary. After an examination of the entire record, we feel the trial judge reached a correct conclusion.

The limitation placed upon the city of Troy with reference to the Evergreen interceptor sewer can be changed by negotiation with the other municipalities. Self-imposed limitations by the city fathers cannot be considered as a restraint on their ability to further contract in the future.

A municipality might reasonably use zoning to control population when there is a present danger directly affecting the public health, safety, and welfare. However, the record in this case does not disclose such a situation. The city admits there are 8,500-square-foot lots in areas where sewers do not exist and are considered safe for a part of the city of Troy. Is it reasonable, then, when part of the city of Troy is without sewers, to contend health and safety demand 21,780-square-foot lots on plaintiffs' property where a present sewer system exists?

The power granted municipalities to enact zoning ordinances is at all times limited by the word "reasonable." There can be no question that in the in-

terest of the public health, safety, and general welfare, the municipality has authority to adopt a proper zoning ordinance; but in adopting any ordinance it must meet the test of reasonableness. The ordinance here involved fails to meet such a test so far as its application to plaintiffs' property.

We agree with the trial court that he has no legal duty, right, or obligation to undertake to pass, under the present record, on the reasonableness of the purpose of zoning the plaintiffs' property with reference to the 8,500-square-foot classification. It will be time enough for the court to review this matter if and when the municipal legislative body has rezoned plaintiffs' property.

The decree of the lower court is affirmed. Neither party having prevailed in the entirety, neither shall have costs.

CARR, C. J., and DETHMERS, BLACK, and OTIS M. SMITH, JJ., concurred with KAVANAGH, J.

ADAMS, J. (*dissenting*). The question in this case is the extent to which a city may fix minimum lot sizes in residential areas as a part of its overall city plan.

The city of Troy has a total area of 32–1/2 square miles of which approximately 28 square miles are residential. A young city, it was incorporated in 1955.

Pursuant to PA 1931, No 285, § 6 (CL 1948, § 125.36 [Stat Ann 1958 Rev § 5.2996]), Troy recently formulated a city master plan. The statute provides that the plan shall contain the following:

"Such plan, with the accompanying maps, plats, charts, and descriptive matter shall show the commission's recommendations for the development of said territory, including, among other things, the general location, character, and extent of streets,

viaducts, subways, bridges, waterways, water fronts, boulevards, parkways, playgrounds and open spaces, the general location of public buildings and other public property, and the general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power, and other purposes; also the removal, relocation, widening, narrowing, vacating, abandonment, change of use or extension of any of the foregoing ways, grounds, open spaces, buildings, property, utilities or terminals; the general location, character, layout and extent of community centers and neighborhood units; and the general character, extent and layout of the replanning and redevelopment of blighted districts and slum areas; *as well as a zoning plan for the control* of the height, *area, bulk,* location, and use of buildings and premises." (Emphasis supplied.)

CL 1948, § 125.37 (Stat Ann 1958 Rev § 5.2997), further provides:

"In the preparation of such plan the commission shall make careful and comprehensive surveys and studies of present conditions and future growth of the municipality and with due regard to its relation to the neighboring territory. The plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, *as well as efficiency and economy in the process of development;* including, among other things, adequate provision for traffic, the promotion of safety from fire and other dangers, adequate provision for light and air, *the promotion of the healthful and convenient distribution of population,* the promotion of good civic design and arrangement, *wise and efficient expenditure of public funds,* and the adequate provision of

public utilities and other public requirements." (Emphasis supplied.)

Troy's city plan was prepared by Vilican-Leman & Associates, Inc., a firm of city planners, that has done municipal planning for many communities including the cities of Hamtramck, Highland Park, Port Huron, Birmingham, and St. Clair Shores. George Vilican, the head of that firm, who testified for defendant city, was conceded to be eminently qualified in this field.

The master plan for the city was made up of 3 areas—the industrial, the commercial, and the residential. The plan took into account not only Troy but also the adjacent communities of Pontiac, Avon township, Shelby, Bloomfield township, Bloomfield Hills, Sterling, Southfield, Warren, Madison Heights, Royal Oak, Berkley, Huntington Woods, Oak Park, Ferndale, and Hazel Park. Every portion of the master plan was presented to the public and was adopted by the city planning commission and the city commission.

George Skrubb, who has taught planning at Harvard University, worked as a city planning engineer and who is now Oakland county planning director and a full member of the American Institute of Planners, testified for the city. He specifically approved the methods that were followed in preparing the plan by the city planners for the city of Troy.

Both the master plan and the zoning ordinance adopted pursuant to it are based upon the theory that, in addition to the major component parts of a city, planning is necessary in terms of schools, parks, sewers, roads, water supply and other facilities. The plan for the city of Troy is based upon an ultimate population of 134,000 people. The city had a population of 19,382 on May 10, 1961.*

* Mr. Justice KAVANAGH'S opinion refers to 2,000 persons in the sewer district at present and 21,300 persons by 2000 A.D.

Mr. Vilican testified that if there was to be a greater population density than that presently planned for, then adequate provision has not been made for various facilities that will be needed in the future such as parks and schools. He also testified that the roads as now planned would be inadequate to carry the additional burdens which would be created. By following the master plan, he testified that there would be an orderly development of the community. Waste would be avoided. Condemnation and the tearing down of buildings to create sites for public facilities that would be needed but that are not now planned for would be unnecessary.

While the basic plan for the community looks to completion between the years 1980 and 2000, the plan would be subject to review from time to time and replanning could be done if the same seemed to be indicated. The planning period for the city which has been used is the comparatively short period of from 20 to 40 years—less than the time allowed for the amortization of many buildings.

The overall residential plan calls for lots ranging from 30,000 square feet down to 8,500 square feet. At the time when plaintiffs purchased their properties, they knew that the properties were zoned for residential lots of 21,780 square feet. Out of a total of 28 square miles of the city used for residential purposes, 16.2 miles are zoned for residential lots of 15,000 feet or less.

No testimony was offered in opposition to the city master plan or to the general zoning ordinance which was adopted pursuant to it. Authority for the zoning ordinance is to be found in PA 1921, No 207, relating to city or village districts or zones, section 1 of which, being CL 1948, § 125.581 (Stat Ann 1958 Rev § 5.2931), reads in part:

"Such regulations shall be made in accordance with a plan designed to lessen congestion on the public streets, to promote public health, safety and general welfare, and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development."

Plaintiffs attack the zoning of their properties to a minimum lot size of 21,780 square feet as unreasonable and ask this Court to rule that a minimum lot size of 8,500 square feet is reasonable because a dwelling can be built on such a lot without creating any health hazard as long as sewer facilities are available.

The zoning ordinance does not have the effect of confiscating the properties of the plaintiffs. Robert J. Silberstein, builder, developer, and secretary of Christine Building Co., Inc., and Campus Estates, Inc., testified that if the lot areas were reduced to 8,500 square feet, a profit of $100,000 could be realized from the land development. He envisioned the sale of at least 50 homes a year in a subdivision of 100 lots. But, when asked if it would be possible to build on the land as now zoned and recoup the investment which had been made, he stated he thought this was possible.

There is no evidence that, in setting up the zoning plan for the city of Troy, plaintiffs' properties were dealt with unfairly or arbitrarily in terms of the overall plan for the city. Other subdivisions in the immediate area of plaintiffs' properties are zoned for 30,000-square-foot lots. According to the testimony of developers of those subdivisions, the lots are being built upon and the properties sold, though admittedly not at the rate of 50 lots per 100-lot-subdivision per year.

In addition to taking into account the general character of the area, plaintiffs' lots were also so zoned because of the limitations of the area in terms of sewer capacity. These limitations are self-imposed and might be removed, though only with great difficulty. The present sewer project for the area is the result of a county-wide planning program involving many communities. The construction of additional sewers at this time by the city of Troy alone would not be economically feasible. It required the combined efforts over a period of years of the cities of Troy, Birmingham, Bloomfield Hills, Southfield, Lathrup Village, village of Westwood, and the townships of Bloomfield and Pontiac to negotiate and accomplish the construction of the Evergreen sewer and arrange for the city of Detroit to handle the sewage from it. If plaintiffs' properties are reduced as to minimum lot size, and as a consequence the planned sewer capacity for the area is pre-empted, then other properties in the area that are conforming to the city plan will inevitably lack sewer facilities. If the present zoning must be altered by a holding that it is unreasonable, then a point of attack upon the city has been established whereby any subdivider will be able to abrogate the city's residential zoning program except as to an absolute minimum lot size. A cancerous situation will result which will permit almost any city plan to be destroyed piecemeal without any examination or consideration of the overall city plan, even though the reasonableness of such plan has been virtually conceded by the failure of the plaintiffs to present any testimony in opposition thereto. See *Brae Burn, Inc.*, v. *City of Bloomfield Hills*, 350 Mich 425, 436.

The criteria used by the city for lot size within various areas of the city has been the general character of the neighborhood, the facilities available, or to be made available. The criteria contended for by

the plaintiffs is the absolute minimum in terms of sanitation, salability and profitability, regardless of whether or not there is a resulting depreciation in the neigborhood and in adjacent properties, and regardless as to whether or not there are any problems created in terms of traffic hazards, school congestion, inadequate water supply, or otherwise. If problems develop in these areas, this is no concern of plaintiffs. If more schools are needed, or more sewers, or more roads, they *can* be built even though as a financial matter they may be completely unfeasible. This will be a proper concern not for these plaintiffs, who will long since have "developed" the properties, but for the purchasing homeowners who have been left holding the tax bag.

Whether or not the city of Troy has developed a reasonable plan for that city, or the plan is faulty, is not the question here at issue. The undisputed facts are that the city under expert, professional engineers has planned its future as best it could, in the light of present knowledge, full well realizing that such a plan may have to be altered and that it may not succeed as now envisioned. With a population of 19,000, Troy made plans for a city of 134,000. All economic groups are afforded an opportunity to share in the growth and the life of the city. Under these circumstances, it cannot be said that the city has gone beyond the powers and authority conferred upon it by the legislature of this State under the city planning act and the city zoning act.

Support for the views herein expressed can be found in the cited statutes and in the recent cases of *Northwood Properties Co.* v. *Royal Oak City Inspector,* 325 Mich 419; *Scholnick* v. *City of Bloomfield Hills,* 350 Mich 187, and *Brae Burn, Inc.,* v. *City of Bloomfield Hills, supra.* The critical question is whether or not a municipality may make plans for its future as an organic whole. Or is any such

planning subject to destruction because a property viewed separately, even though it is an integral part of that whole, would create no immediate hazard to health and welfare if developed with minimum lot sizes. In my opinion, the general welfare would best be served by orderly planning and zoning by the body corporate. Restrictions as to lot size are no more outside the bounds of local legislative discretion than the zoning of one area for factories to the exclusion of a residential use. *Lamb* v. *City of Monroe,* 358 Mich 136.

I would reverse the decision of the trial judge and dismiss the plaintiffs' bill of complaint.

KELLY and SOURIS, JJ., concurred with ADAMS, J.

HARRIS *v.* CITY OF DETROIT.

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK — 1-INCH DEPRESSION.

A depression in a sidewalk occasioned by settling of 1 slab approximately 1 inch below the preceding slab did not constitute such a state of disrepair as to render municipality, within which such sidewalk was located, liable for damages incident to accident caused by such depression (CLS 1956, § 242.1).

SOURIS, OTIS M. SMITH, and ADAMS, JJ., dissenting.

Appeal from Wayne; Moynihan, Jr. (Joseph A.), J. Submitted April 4, 1962. (Docket No. 17, Calendar No. 49,239.) Decided September 10, 1962.

REFERENCES FOR POINTS IN HEADNOTE

25 Am Jur, Highways § 488.

Degree of inequality in sidewalk which makes question for jury or for court, as to municipality's liability. 37 ALR2d 1187.

Case by Eliza Harris against the City of Detroit for personal injuries sustained in fall on sidewalk on March 9, 1960. Cause dismissed on motion. Plaintiff appeals. Affirmed.

Charfoos & Charfoos (*Lawrence S. Charfoos,* of counsel), for plaintiff.

Nathaniel H. Goldstick, Corporation Counsel, *Alfred Sawaya* and *Andrew F. Valenti,* Assistant Corporation Counsel, for defendant.

KAVANAGH, J. Plaintiff filed a declaration in the circuit court for the county of Wayne against defendant city of Detroit seeking to recover for damages growing out of injuries suffered when she allegedly tripped on a depressed sidewalk. Plaintiff alleged one of the slabs had settled into the ground approximately 1 inch below the preceding slab. Plaintiff based this action on the general highway law, as amended,* which provides for recovery of damages for injuries suffered upon any of the highways or streets in this State by reason of failure to keep such highway or street in reasonable repair.

Defendant city of Detroit appeared and filed a motion to dismiss stating:

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* PA 1909, No 283, ch 22, § 1, as amended (CLS 1956, § 242.1 [Stat Ann 1958 Rev § 9.591]), reads as follows:

"Any person or persons sustaining bodily injury upon any of the public highways or streets in this State, by reason of neglect to keep such public highways or streets, and all bridges, sidewalks, crosswalks and culverts on the same in reasonable repair, and in condition reasonably safe and fit for travel by the township, village, city or corporation whose corporate authority extends over such public highway, street, bridge, sidewalk, crosswalk or culvert, and whose duty it is to keep the same in reasonable repair, such township, village, city or corporation shall be liable to and shall pay to the person or persons so injured or disabled, and to any person suffering damages by reason of such injury, just damages, to be recovered in an action of trespass on the case before any court of competent jurisdiction."

1. That the declaration failed to state a cause of action upon which plaintiff could recover from defendant city.

2. That on the face of plaintiff's declaration it appears the alleged defective sidewalk was approximately 1 inch below the other squares.

3. That no liability was imposed on the city, a municipal corporation, within the meaning of the statute, where anyone trips over a depression of less than 2 inches in depth.

The trial judge granted the motion to dismiss, apparently relying upon *Berry* v. *City of Detroit,* 341 Mich 702.

Plaintiff appeals, presenting one question:

Under CLS 1956, § 242.1 (Stat Ann 1958 Rev § 9.591), is a defect in a sidewalk wherein there is less than a 2-inch difference in levels, as a matter of law, nonactionable?

Plaintiff, both in her brief and in oral argument, admits that the rule in Michigan, supported by a long list of cases beginning with *Bennett* v. *City of St. Joseph,* 146 Mich 382, and culminating with *Berry* v. *City of Detroit, supra,* is that a depression in a walk which does not exceed 2 inches in depth will not render a municipality liable for damages incident to an accident caused by such depression. It is to be noted that most of these cases are unanimous opinions of this Court. Plaintiff would have us abolish this long-established rule of law without citing any reason or authority for the change in position. We find no reason for doing so.

The trial court was correct in granting the motion to dismiss. The order granting the motion to dismiss is affirmed, with costs in favor of defendant.

CARR, C. J., and DETHMERS, KELLY, and BLACK, JJ., concurred with KAVANAGH, J.

ADAMS, J. (*dissenting*). The question in this case is whether or not this Court shall continue to hold as it has in the past that, under CLS 1956, § 242.1 (Stat Ann 1958 Rev § 9.591), a person cannot, as a matter of law, recover for injuries received because of a defect of less than 2 inches in a city sidewalk.

In 1893, *Bigelow* v. *City of Kalamazoo,* 97 Mich 121, was decided. A description of the scene of the accident in that case and the reasons barring recovery as a matter of law, are set forth in the majority opinion:

"Portage street was unpaved, and in wet weather very muddy. A streetcar track occupied the center of the street. The walk was constructed of 2 planks, 4 inches thick, and from 12 to 16 inches in width. Between the planking a space of 16 inches, and a space outside of the plank, had been paved with cobblestones. The rail in use by the street railway was the ordinary flat rail. The planking had been raised above the street grade, so that at the car tracks the surface of the plank was 2 inches higher than the rail. Short planks had been laid between the rails. The ends of the planking were from 2 to 4 inches from the rail. In this condition it was found that the planking, being above the rail, interfered with the scrapers attached to the street cars, and the city authorities caused the ends of the planks to be chamfered off, commencing back several inches from the ends. Plaintiff's decedent stepped upon the beveled edge of 1 of these planks, her foot slipped, and she fell forward. The court submitted the case to the jury, and a verdict for the defendant resulted.

"Upon the case made, defendant was entitled to a verdict, and it is unnecessary to consider the questions raised by plaintiff. The alleged defect in the crosswalk was part of a plan adopted, which was rendered necessary by existing conditions. Crosswalks are constructed for the convenience of pedestrians.

This walk was elevated of necessity; otherwise, it would have been of little value. The railway tracks were necessarily lower than the walk. It became necessary either to cut off the planks to allow for the use of the scrapers, or to chamfer them down so as to allow the scraper to pass over them. By adopting the other plan, another and greater danger would have been presented. In all of our cities these conditions present themselves. Even in our most prominent thoroughfares, paved in the most approved manner, curbs must be carried, and at the crossings they are from 2 to 6 inches higher than the pavement. The curb must be left bare, and inattentive people be liable to stumble, or, as is frequently done, a plank is placed upon an incline, upon which pedestrians carelessly advancing are liable to slip. In either case there is the minimum of danger. The walk is not absolutely safe, but it cannot be said that it is not in a reasonably safe condition. The same is true of nearly all of our alley crossings. Gutters are necessarily left for the passage of water. These crossings are not absolutely safe, but they may be reasonably so. Neither streets, sidewalks, nor crosswalks can be constructed upon a dead level. People are liable to stumble over a Persian rug upon a parlor floor, and streets cannot be made less dangerous than drawing rooms. Crosswalks upon our unpaved streets are usually constructed in this identical manner. Streetcar tracks are necessarily constructed at the street grade. Of necessity we must have gutters at these railway tracks. These gutters have abrupt edges, and must be wide enough to admit of wheels, the play of wheels, and the passage of the scraper, or the walk at the intersection of the tracks must be chamfered off, as in the present case. To have shortened the planking, leaving holes large enough to admit a foot, would increase the danger rather than diminish it. *The construction of a crosswalk in accordance with the requirements of the locality, adopting the means usually adopted, and which are best adapted for the convenience of the*

public, cannot be said to be negligent construction. Cities are not required to keep streets in a condition absolutely safe for travel. A crosswalk must be reasonably safe; reasonably safe in view of the purpose for which it is constructed, the necessary uses of the street, and all the varying conditions." (Emphasis supplied.)

The most significant thing about the majority opinion of the Court is the italicized portion. Under the conditions existing at that time, the city had constructed a walk that would cause the minimum amount of danger, other known and available methods of construction being likely to be more dangerous. One Justice dissented, agreeing with the circuit judge that the condition raised a question for the jury as to whether or not the walk was a reasonably safe one.

Prior to this case, in the case of *Sebert* v. *City of Alpena,* 78 Mich 165, the duty of cities to keep their streets in reasonable repair was affirmed by this Court and it was held that the question of whether or not the duty had been performed was for a jury, taking into account all of the circumstances, such as the time of the day or night, the location and size of the defect, and any other of the facts or circumstances surrounding the accident.

However, following the decision in the *Kalamazoo Case,* the proposition gradually hardened into a rule of law that where a defect in a walk was less than 2 inches in depth, the walk would be considered to be safe and the city free from negligence. The process is worth noting. In *Weisse* v. *City of Detroit* (1895), 105 Mich 482, 484, 485, it was said:

"In cities having many miles of walks it would be an utter impossibility to make these walks absolutely safe, and the legislature did not intend to impose that duty upon municipalities by this act, whatever con-

struction the act of 1879* may have had. It would require an army of men in the city of Detroit to do this. Inspectors are not expected to carry around with them a smoothing plane or an adz to plane or hew down every small protuberance against which people might stumble and fall. The fact that this plank was not nailed down does not seem to have caused the injury. It was the same as if it had been nailed, but was 1–1/2 or 2 inches above the other, so that the question is squarely presented whether such a rise is a defect in the walk so that it is not reasonably safe. While not desiring to relieve municipalities from the duties and responsibilities fairly cast upon them by this act, we should be careful not to cast a burden upon them which it was not the intent of the legislature to create."

In the year 1899, in the first cement sidewalk case —*Jackson* v. *City of Lansing*, 121 Mich 279— it was held that because cement sidewalks may, by freezing and thawing, become broken, or, by constant travel, may wear through the outer crust and into the grouting, a defect of about 1–1/2 inches would be no greater obstacle to reasonably safe travel than the rise in the walks which had been involved in previous cases before the Court. *Weisse* v. *City of Detroit, supra; Yotter* v. *City of Detroit,* 107 Mich 4; *Shietart* v. *City of Detroit,* 108 Mich 309.

By 1906, in *Bennett* v. *City of St. Joseph,* 146 Mich 382, the Court abandoned an examination into the facts of the particular case and disposed of a claim for damages involving a depression from 1–1/2 to 2 inches in depth by saying:

"This court has repeatedly held that depressions equal to, and deeper than, this, and elevations constituting as great, or greater, obstructions than this

* PA 1879, No 244 required "good repair, so that they shall be safe and convenient for public travel at all times." The statute then in force, PA 1887, No 264, employed the term "reasonable repair."

depression, do not constitute negligence on the part of municipalities."

Recently in *Berry* v. *City of Detroit,* 341 Mich 702, that rule of law was upheld even though the Court recognized that the rule has been criticized. *Parker* v. *City and County of Denver,* 128 Colo 355 (262 P2d 553, 37 ALR2d 1177).

Mr. Justice KAVANAGH has correctly stated the present status of this judge-made rule of law. Under the long line of decisions of this Court, if the rule of *stare decisis* is to be applied, an order granting the motion to dismiss and affirming the trial court should be entered. However, this judge-made rule of law, perhaps proper when it was conceived, is applicable to other times and other conditions which have long since faded from our present Michigan scene of superhighways, supermarkets, and supercities.

In *Bricker* v. *Green,* 313 Mich 218 (163 ALR 697), the circumstances are set forth under which a rule of law determined by this Court might appropriately be re-examined and overruled. There is no need to repeat those circumstances. However, the words of Mr. Justice Cardozo, quoted in *Bricker,* pp 234, 235, do bear repetition:

" 'That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be

stationary. Change of this character should not be left to the legislature.

"'If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.' "*

The days when walks are constructed of "2 planks, 4 inches thick, and from 12 to 16 inches in width," with a space of 16 inches between the planking and the space outside the plank paved with cobblestones are no longer any more extant than the horse as a usual means of transportation. The present rule serves only to insulate municipalities from what may well be, in given circumstances, proper responsibility under the statutes "to keep * * * sidewalks * * * in reasonable repair, and in condition reasonably safe and fit for travel." CLS 1956, § 242.1 (Stat Ann 1958 Rev § 9.591). The correct rule was enunciated in *Sebert* v. *City of Alpena, supra,* wherein the Court held that the necessities of travel must be examined in a given case and that if there is a question as to whether or not there was a dangerous condition, it should be submitted to the jury under proper instructions from the court.

In *Beach* v. *City of Des Moines,* 238 Iowa 312 (26 NW2d 81), the Iowa supreme court held, in a case involving a depression of about 1–1/2 to 2–1/2 inches, that the trial court erred in granting defendant city's motion for directed verdict. The court said (p 337):

"The height of an elevation or the depth of a depression are not decisive determinants on the question of liability in cases of this kind."

See, also, *Alber* v. *City of Dubuque* (1960), 251 Iowa 354 (101 NW2d 185).

* William L. Storrs Lectures before the Law School of Yale University in 1921.—Cardozo, The Nature of the Judicial Process, pp 151, 152.

In *Loughran* v. *City of New York,* 298 NY 320 (83 NE2d 136), the court made this cogent comment in reversing a judgment for the city:

"For the past 20 years at least, this court has declined to recognize any such principle as that urged by the city. On the contrary, we have held that there is no rule that the liability of a municipality in a case of this sort turns upon whether the hole or depression, causing the pedestrian to fall, is 4 inches—or any other number of inches—in depth or constitutes 'a trap'. * * * As we but recently observed, there is no requirement that 'a hole in a public thoroughfare * * * be of a particular depth before its existence can give rise to a legal liability.' *Wilson* v. *Jaybro Realty & Development Co.,* 289 NY 410, 412 (46 NE2d 497, 498). A municipality's liability depends on whether or not, having in mind the circumstances of each case, it has neglected and failed to keep its public thoroughfares—whether the sidewalk of a street or the pathway in a park—in a condition reasonably safe for pedestrians."

In *Parker* v. *City & County of Denver, supra,* prior Colorado decisions holding that depressions or elevations of specified depths or heights constituted actionable negligence *per se* were overthrown. The elevation in question was from 1 to 2 inches. After reviewing the authorities, the court said (pp 360, 361):

"We believe it improper and error for a court to undertake to determine actionable negligence by a fraction of an inch for if the depression in *City of Colorado Springs* v. *Phillips,* 76 Colo 257 (230 P 617), is held to be good law, then if the depression or elevation is 2 inches or less there is no actionable negligence, whereas, if it is a fraction of an inch over 2 inches it may be actionable and require a jury's determination of negligence. This is an absurd situation, and we cannot subscribe thereto. It has

been announced in many decisions, some of which we shall cite hereinafter, that each case necessarily must be determined by the surrounding circumstances, and generally the matter must be left to a jury."

For other decisions see, also: *Blasick* v. *City of Yakima* (1954), 45 Wash2d 309 (274 P2d 122); *Ray* v. *Salt Lake City* (1937), 92 Utah 412 (69 P2d 256, 119 ALR 153); *Stratton* v. *City of Kansas City, Missouri* (Mo, 1960), 337 SW2d 927; *McKay* v. *City of Atlanta* (1950), 80 Ga App 797 (57 SE2d 432); *City of Louisville* v. *Verst* (1948), 308 Ky 46 (213 SW2d 517); *Poppen* v. *City of Watertown* (1952), 74 SD 402 (53 NW2d 616); *Reeves* v. *City of Springfield* (1960), 111 Ohio App 387 (171 NE2d 178); *Rudd* v. *Village of Bovey* (1958), 252 Minn 151 (89 NW2d 689).

The decision of the trial judge should be reversed and the case remanded for further proceedings in accordance with the usual and familiar principles applicable where a claim of negligence is involved. If upon a careful consideration of all the facts and circumstances, it is the opinion of the trial judge that, as a matter of law, no negligence existed on the part of the city, then, he should so rule and direct a verdict for the defendant. On the other hand, if under all the facts and circumstances of the case, it appears that there is a question as to whether or not the city was negligent, then such question should be submitted to the jury for its determination.

SOURIS and OTIS M. SMITH, JJ., concurred with ADAMS, J.

BLACK, J. (*concurring*). This is not a case where, by a nonunanimous and nonmature decision challenged at the bar, a standing statute is shown as having been misconstrued and misapplied. An ex-

ample of that kind of judicial blunder was examined and set right in *Park* v. *Employment Security Commission,* 355 Mich 103. Here a 70-and-more-year-old statute, which by its terms created the very right of action this plaintiff pleads, has been construed by a long series of unanimous decisions as denying such right where the pleader is unable to allege and prove a violation of what lawyers have come to know as the "2-inch rule." The sole question is whether any "cogent circumstances" are disclosed, or may be judicially noticed, which might lead us to depart from that which was settled so many years ago. I perceive none, and so would stand by the general rule which is applicable to *stare decisis* in the field of statutory construction distinguished from that of the common law. Such general rule appears in 14 Am Jur, Courts, § 66, pp 287, 288. It was the subject of some little debate in the *Park Case, supra.*

Stressed for special emphasis is the fact that we are asked to overrule unanimous cases construing an unamended statute; not a case or line of cases announcing a rule of the common law. As to the latter a court of final appeal has a duty as well as a license; that of tending with care to the sustenance and growth of law made not and amended not by appointed legislative bodies. A prominent instance was *Bricker* v. *Green,* 313 Mich 218 (163 ALR 697) and the discourse of Mr. Justice Cardozo found therein. That great writer was not discussing *stare decisis* in today's context when he wrote what we find quoted in the *Bricker Case.* He was treating the rightful application of *stare decisis* to the *common law* and, immediately following such quotation, supplied 2 illustrations of *common-law* rules which, to him, warranted judicial change. One was the "rule of the common law that a surety is discharged from liability if the time of payment is extended by contract between the principal debtor and the creditor

without the surety's consent." (p 152.) The other was the "rule of the common law that a parol agreement, though subsequently made, is ineffective to vary or discharge a contract under seal." (p 155.)

I prefer to take today's text from an earlier chapter (Nature of the Judicial Process, Cardozo, p 129):

"In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful. I think the difficulty has its origin in the failure to distinguish between right and power, between the command embodied in a judgment and the jural principle to which the obedience of the judge is due. Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law."

Returning finally to the premises upon which it is said we should overrule, it is pointed out that concrete sidewalks have replaced wooden sidewalks since the turn of the century, and reference is made to "other conditions which have long since faded from our present Michigan scene of superhighways, supermarkets and supercities." I do not glean the relevance of these "other conditions," yet would gently suggest that there is indeed another modern and possibly overlooked "condition" which has a direct bearing on questions of duty and risk occasioned by walking on any kind of a sidewalk, wooden or concrete, split or broken, young or old.

In the days of old, so we are told, milady walked with sturdy shoes and serviceable heels, designed for

safe ambulation over those wooden sidewalks and other less stable municipal footings. Now, speaking only as a discreet and respectful observer, I marvel that she is able to stay upright on the newest and best of walkways, wooden (we still have them) or concrete, as those spikes called heels get longer and sharper. No, Brothers, there is no change of condition or risk suggesting overthrow of the 2-inch rule. There is a change, and an even greater risk, over which city fathers have and will have no control whatever. Such are not of the kind which lead courts to overrule earlier decisions.

I concur in affirmance.

PETROSKY *v.* DZIURMAN.

1. EVIDENCE—STATUTORY PRESUMPTION—REBUTTAL—QUESTION FOR JURY.

   There must be clear, positive, and credible rebutting evidence opposing a statutory presumption in order to eliminate it from consideration, otherwise the question of whether such presumption has been overcome should be settled by the jury under proper instructions.

2. SAME—OPPOSITE PARTY AS WITNESS.

   The plaintiff is not bound by the testimony of the opposite party whom he has called for cross-examination, where there is other evidence which directly disputes it (CL 1948, § 617.66).

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial §§ 185–187.
[2, 6] 58 Am Jur, Witnesses §§ 796, 797.
[3] 53 Am Jur, Trial § 350.
[4] 53 Am Jur, Trial § 401.

3. TRIAL—MOTION FOR DIRECTED VERDICT—TESTIMONY OF OPPOSITE PARTY WITNESS TREATED AS A WHOLE.

The trial court in determining issue presented by a motion for a directed verdict in a case where the plaintiff has called the defendant as a witness may not select isolated portions thereof and claim a force and effect for such portions of his testimony which the whole of his testimony does not warrant but such opposite party's testimony as a witness must be treated as a whole (CL 1948, § 617.66).

4. AUTOMOBILES—REAR-END COLLISION—STATUTORY PRESUMPTION—DEFENDANT AS OPPOSITE PARTY—CREDIBILITY.

Evidence presented by defendant when called as an opposite party in action arising out of a rear-end collision *held*, merely circumstantial and not the clear, positive, and credible evidence necessary to rebut the statutory presumption in view of other contradictory proofs raising a serious question as to the credibility of defendant's testimony, hence, it was error to direct a verdict for defendant (CLS 1956, § 257.402; CL 1948, § 617.66).

5. SAME—REAR-END COLLISION—CREDIBILITY.

A question was presented for consideration by jury in action arising out of rear-end collision on wet pavement, where immediately after the accident defendant said nothing about a brake failure either to plaintiff or investigating police officers, but claimed there was such failure at the trial, where he also testified he drove 20 miles from the collision to his home, he had had regular inspection of and attention to his brakes and had consumed 3 bottles of beer at the race track where he had spent the afternoon prior to accident, there being a serious question as to the credibility of his testimony (CLS 1956, § 257.402).

Per CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ.

6. WITNESSES—TESTIMONY OF OPPOSITE PARTY.

Testimony on cross-examination of the opposite party, called under the statute, stands in no different position than it would if the adversary of the party calling the witness had called the witness, since the statute makes the witness subject to cross-examination by the opposite party without qualification, although it does not give the right to make such witnesses the witnesses of the adversary of the party calling them; the statute also providing that the party calling such opposite party

as a witness shall not be bound by, and may contradict, such testimony (CL 1948, § 617.66).

Per BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ.

Appeal from Macomb; Noe (Alton H.), J. Submitted April 6, 1962. (Docket No. 35, Calendar No. 49,158.) Decided September 10, 1962.

Case by Harold Petrosky and General Accident, Fire & Life Assurance Corporation, Ltd., his subrogee, against Michael Dziurman for personal injuries and property damage resulting from rear-end automobile collision. Directed verdict and judgment for defendant. Plaintiffs appeal. Reversed and remanded for new trial.

Harry T. Ward, Jr., and *Albert Lopatin,* for plaintiffs.

Ward, Plunkett & Cooney (*John D. Peacock,* of counsel), for defendant.

KAVANAGH, J. Plaintiffs—Harold Petrosky and his subrogee, the General Accident, Fire & Life Assurance Corporation, Ltd.—appeal from the trial court's order granting a motion by defendant for directed verdict.

The record discloses the following facts: On June 25, 1958, at about 5 p.m., plaintiff Petrosky and defendant were both traveling in a westerly direction on Five Mile road in the township of Redford, Wayne county. The weather was hazy; the pavement was wet. Plaintiff stopped for a traffic light at the intersection of Five Mile road and Beech Daly road. He was facing west behind another vehicle, waiting for the light to change. He observed defendant's vehicle approaching about 150 to 200 feet behind, but paid no attention to it, believing defendant would stop.

Plaintiff's vehicle was struck in the rear by defendant's vehicle and plaintiff was rendered unconscious by the force of the collision.

After the plaintiff regained consciousness, he asked defendant what had happened. Defendant stated, "I slid into you." Nothing was said at that time about any brake failure.

The Redford township police department was called to investigate the accident. Defendant testified he told the police his brakes wouldn't grab. However, plaintiffs' exhibit 16, which is defendant's statement in his own handwriting to the police at the scene of the accident stated, *"Step on brake—brake did grab."*

The officer who investigated the accident testified that if defendant had told him of brake failure, he would not have permitted defendant to drive his car from the scene of the collision. The officer also testified defendant had been drinking.

Defendant testified he had spent the afternoon at the Detroit race track, had consumed 3 bottles of beer, watched 3 races, and left the track about 4:30 p.m. After leaving the track, defendant drove to a friend's home to borrow money, but did not find his friend at home. He then decided to try to borrow from someone else and was on his way to the other person's home when he struck plaintiff's automobile.

Defendant also testified that his story of how he got home from the accident was hard to believe, but that following the accident he got in his car and drove it without any brakes from the scene of the collision to Center Line, Michigan, a distance of over 20 miles; that the next day he tried to start his car to drive it to a garage and it failed to start; that he had it towed to a garage for repairs.

The special defense of brake failure was not raised or pleaded for approximately 1-1/2 years after the accident. No evidence of brake failure was

offered by an expert witness, nor was there any other testimony or evidence presented corroborating defendant's testimony.

At the close of plaintiffs' proofs, the trial judge directed a verdict for defendant.

The trial judge in his opinion granting the motion for directed verdict found that the presumption of the statute* with reference to a rear-end collision was in plaintiffs' favor at the conclusion of plaintiffs' testimony. He found that plaintiffs, having called defendant under the statute for examination, were bound by that testimony. The court concluded defendant's testimony indicated he was free from negligence. The court said:

"Now, he (the plaintiff) could have by simply resting, without anything more, had the benefit of the presumption and then placed the burden on the defendant to show that the brake failure was the reason for overcoming a presumption, and the case could have gone to the jury on that theory. But the theory is no longer present. It is no longer possible to say that the burden is on the defendant to show this affirmative defense because the plaintiff has accepted that as a part of his case and has made it a part of his case and is bound by the testimony. As I see it, there has been nothing to show anything to the contrary."

Defendant's statement on cross-examination was that he had been using his brakes just prior to the collision and had no reason to suppose they would not hold when normally applied; that he had his brakes lined about 8 months before and had them checked periodically when he had his battery checked. This the court apparently considered as evidence of defendant's freedom from negligence.

* See PA 1949, No 300, § 402 (CLS 1956, § 257.402, Stat Ann 1960 Rev § 9.2102).—REPORTER.

Plaintiffs appeal, claiming that a jury question was raised in this case from defendant's own testimony of his actions.

The stated question on appeal is:

"Is the uncorroborated testimony of the defendant regarding an alleged brake failure sufficient to rebut the statutory presumption of prima facie negligence in a rear-end collision so as to entitle the defendant to a directed verdict at the close of the plaintiffs' proofs?"

The rule applicable to the elimination of a statutory presumption as a matter of law from the jury's consideration is set forth in *Garrigan* v. *LaSalle Coca-Cola Bottling Co.*, 362 Mich 262, where Justice SOURIS, writing the majority opinion for this Court said (p 264):

"When the trial court undertakes to eliminate a statutory presumption as a matter of law from the jury's consideration, at the very least there must be clear, positive, and credible evidence *opposing* the presumptions. (Citing cases.)"

Justice BLACK in a concurring opinion in *Garrigan* traced the history of this evidentiary question and concluded that this Court has apparently settled in favor of the rule of *Gillett* v. *Michigan United Traction Co.*, 205 Mich 410, that an applicable presumption vanishes or does not vanish depending on jury appraisal of testimony which assertedly and possibly has rebutted the presumption. Justice BLACK said (p 270):

"When the judge, presiding at jury trial of a negligence case, assumes to instruct that an admittedly applicable presumption has vanished, he should have before him 'direct, positive and credible rebutting evidence' on the basis of which he really may pronounce death sentence for the presumption. Otherwise the question whether such presumption

has been overcome should be settled—on proper instruction of course—in the jury room."

Justice CARR, in his dissenting opinion in the *Garrigan Case,* said (p 283):

"We are not confronted by a situation in which the proofs were merely circumstantial or of such nature as to raise a serious question as to their credibility."

The rule of law is equally clear where a plaintiff under the statute (CL 1948, § 617.66 [Stat Ann § 27.915]) calls the opposite party for cross-examination, the plaintiff is not bound by such testimony where there is other evidence which directly disputes it.

In the consideration of defendant's testimony, the trial court may not select isolated portions thereof and claim a force and effect for such portions of his testimony which the whole of his testimony does not warrant. The testimony of the opposite party as a witness must be treated as a whole. *In re Estate of Taylor,* 271 Mich 404; *Fleegar* v. *Consumers Power Co.,* 262 Mich 537. In the *Fleegar Case* the Court held that the testimony of the defendant when called under the statute (p 541) "must be weighed and considered the same as that of any other witness."

In *Cebulak* v. *Lewis,* 320 Mich 710 (5 ALR2d 186), this Court said (p 724):

"The statutory presumption now under consideration in the instant case can be overcome only by evidence that is clear, positive, and credible. (Citing cases.) This would seem to cast upon the defendants here the burden of producing clear, positive, and credible proof to overcome the presumption."

Was such "clear, positive, and credible evidence" shown in the instant case so that the trial court was

justified in removing the statutory presumption from the jury as a matter of law?

Defendant argues that this "clear, positive, and credible evidence" was the fact that the defendant was in the habit of having his automobile checked frequently for such things as oil and brake changes and adjustments; further, that he had the brakes repaired the previous October or November and the brake fluid was checked when he put gasoline in the car. The work done in October or November consisted of the brakes being relined and checked by brake specialists. The date of the accident was June 25, 1958.

The evidence reveals the testimony that defendant did not mention brake failure at the time of the accident. Defendant made out a report in his own handwriting as to how the accident happened, which is in evidence as exhibit 16. The exhibit said nothing of brake failure; and, on the contrary, said "the brake did grab." Defendant's testimony was that after the accident he drove the supposedly brakeless automobile from the scene of the accident to Center Line, Michigan, over 20 miles away. Defendant himself with reference to these facts testified, "It's hard to believe but I did it." No mention was made to police officers, plaintiff, or anyone else, with reference to brake failure until the case had been at issue for almost 1–1/2 years.

This is not the kind of "direct, positive, and credible rebutting evidence" which can form the basis for pronouncing the death sentence for the statutory presumption, particularly since there was in the instant case contradictory evidence offered by the plaintiff (exhibit 16) which disputed defendant's testimony.

Therefore, we conclude the trial judge was confronted by a situation in which the proofs were

merely circumstantial and of such a nature as to raise a serious question as to their credibility.

Applying the "favorable view" doctrine as we are required, we hold the trial court erred in directing a verdict for defendant for the reason that "clear, positive, and credible" evidence was not introduced to rebut the statutory presumption, and that testimony regarding brake failure was contradicted by other proofs and was of such nature as to raise a serious question as to its credibility.

The order directing a verdict for defendant is reversed and set aside and the case is remanded to the lower court for a new trial. Plaintiff shall have costs.

CARR, C. J., and DETHMERS, KELLY, BLACK, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred with KAVANAGH, J.

BLACK, J. (*concurring*). I concur with Justice KAVANAGH, yet with present writing am not satisfied that we are being entirely fair with the trial judge. The judge applied 1 of 2 lines of contradictory decisions handed down with respect to the unamended act of 1909 (CL 1948, § 617.66 [Stat Ann § 27.915]),* saying that the plaintiff "chose" to make defendant "his own witness under the statute", and that he was "bound" accordingly as certain of said decisions have erroneously affirmed. Some explanation is due; hence the following submission.

There is no need to repeat now what 4 of us said of the cited statute in *Monaghan* v. *Pavsner,* 347 Mich 511, 518, 527–530. That is all of record. Nevertheless, our failure since then—to definitely resolve the question—has led some judges, as Judge

* PA 1909, No 307, consisted of a single section which was reenacted as section 66 of chapter 17, PA 1915, No 314. PA 1909, No 307, has not been specifically repealed.—REPORTER.

Noe here, to assume that the errant rule still applies and that the concluding phrase of the statute does not mean what it says. There is no other explanation for the judge's action, he having said that the fact alone, of utilization by plaintiff of the statute, lifted the burden of overcoming the statutory presumption of negligence from defendant's shoulders and warranted a directed verdict of not guilty. See quotation, in Mr. Justice KAVANAGH'S opinion, of Judge Noe's reason for upholding defendant's testimony as a matter of law.

It is time to say with the assurance of firmness that one party by calling the opposite party under the statute does not make such opposite party his witness and that he is "bound" by the testimony of such called party to no greater extent than if the same testimony had been given by the called party as a part of his own case. Have we not, on frequent or infrequent occasion, forgotten or overlooked the very purpose as well as the plain wording of this statute? It concludes, and has concluded for a half century, by saying that "the party so calling and examining such witness shall not be bound to accept such answers as true."

The sound rule to which we should return was announced by the Court when its members were "there," as the saying goes, referring to the time when the statute was debated and adopted. It is simply this: "Defendant's testimony so developed stood in no different position in the case than it would had it been called out by cross-examination after he had taken the stand in his own behalf." The quotation is from the 1916 case of *Aphoresmenos* v. *McIntosh,* 189 Mich 680, 683, 684. That case was expressly followed, by the exact language quoted, in *Waller* v. *Sloan,* 225 Mich 600, 604, 605, and *City of Detroit* v. *Porath,* 271 Mich 42, 76. In

the last cited case the Court said, unanimously (p 75):

"Testimony elicited upon cross-examination of the opposite party, or his agents, stands in no different position than it would if the adversary of the party calling the witness had called him himself. The act makes the agents and servants of a party subject to cross-examination by the opposite party without qualification. The statute does not give the right to make such witnesses the witnesses of the adversary of the party calling them. *Jones* v. *Pere Marquette R. Co.*, 168 Mich 1. Except as the statute provides the party calling such witnesses shall not be bound by, and may contradict, their testimony, no other right is conferred by the statute. *Johnson* v. *Union Carbide Co.*, 169 Mich 651."

Tested by this obvious horse sense of our occasionally ignored legal fathers, defendant's credible or incredible testimony (that the brakes of his car failed without fault attributable to him) made an issue for determination in the jury room; not the courtroom. Plaintiffs were no more "bound" by such testimony than if defendant had given it exclusively after plaintiffs had rested their case.

I concur in reversal for new trial.

KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred with BLACK, J.

STACEY *v.* MIKOLOWSKI.

1. CANCELLATION OF INSTRUMENTS—EXISTENCE OF OPTION TO PURCHASE LAND—MEETING OF THE MINDS.

   Trial court's finding, in suit for specific performance of option to purchase real estate wherein defendant filed a cross bill to cancel the option and for rescission of note and mortgage, that there had not been a meeting of the minds with respect to the execution of the mortgage and option and vacating the option and rescinding the mortgage and note *held*, supported by testimony adduced showing, among other things, defendant had not understood the transaction.

2. APPEAL AND ERROR—CHANCERY CASES—FINDINGS OF TRIAL JUDGE.

   The Supreme Court in hearing a chancery case *de novo* gives great weight to the findings of fact of the trial judge, where he had the opportunity of seeing the witnesses while testifying, and does not reverse under such circumstances unless a different conclusion would have been reached from a reading of the entire record.

Appeal from Macomb; Noe (Alton H.), J. Submitted April 11, 1962. (Docket No. 62, Calendar No. 48,766.) Decided September 10, 1962.

Bill by William J. Stacey and Stella Stacey against Louis Mikolowski for specific performance of contract for sale of real estate upon exercise of option. Cross bill for cancellation of option and rescission and discharge of note and mortgage. Decree for defendant. Plaintiffs appeal. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 49 Am Jur, Specific Performance § 51.
[2] 3 Am Jur, Appeal and Error § 897.

Manuel Zechman (*Meyer Weisenfeld,* of counsel), for plaintiffs.

Guy L. Frost and *Florence M. Schoenherr,* for defendant.

KAVANAGH, J. This matter came on to be heard upon the bill of complaint seeking specific performance of an option dated February 13, 1957, granting to plaintiffs the right to purchase a parcel of land owned by defendant, defendant having filed a cross bill of complaint seeking cancellation of the purported option and rescission of the real-estate mortgage and note.

At the conclusion of the proofs the trial court found that defendant did not understand the nature of the transaction and believed he had executed only a mortgage and note, and that the option on its face did not show adequate consideration. The lower court further found that defendant, because of lack of mental capacity and undue influence, did not understand nor did he voluntarily execute the option, and that the sale price of $12,000 was inadequate and unconscionably inequitable. The court entered a decree canceling and vacating the option and rescinding the mortgage and note.

From this decree plaintiffs have taken an appeal.

Although 6 stated questions are raised in appellants' brief, there are basically only 2 questions involved in this appeal: (a) Was the option price fair and adequate under the circumstances of this case? (b) Did the optionor understand the terms of the option, or should he have understood its terms under the circumstances of the case?

Plaintiffs filed their bill of complaint in the Macomb county circuit court for specific performance of an option, copy of which was attached to the bill of complaint. They alleged that on February 13,

1957, defendant executed an option granting plaintiffs the right to purchase certain real property described in the bill of complaint for the sum of $12,000. The bill alleged that simultaneously therewith the defendant executed a note for $4,000 secured by a mortgage on real estate covered by the option. The mortgage was recorded in the office of the register of deeds of Macomb county. The bill alleged that the defendant refused to perform in accordance with the terms of the option. Attached to the bill was a copy of a letter exercising the option on the part of plaintiffs.

Defendant answered the bill admitting the option, mortgage and note were executed, but claiming that the option was induced through the fraud, misrepresentation and coercion of plaintiffs.

Defendant claimed it was represented to him by the plaintiffs at the time of the execution of the documents that the option was conditional and was not to be exercised unless and until there was default in the payment of the mortgage. Defendant alleged there had been no default in payment of the mortgage at the time of the attempt to exercise the option.

Defendant alleged in his cross bill that after the death of his wife on August 2, 1955, he was despondent, and became an habitual alcoholic; that plaintiffs operated a bar where defendant spent a great part of his time drinking intoxicating beverages; that plaintiff William J. Stacey induced defendant to borrow $4,000 from him secured by note and mortgage and to execute the option.

Plaintiffs filed an answer to this cross bill denying they were guilty of any fraud, duress, or coercion and alleging that defendant was at all times the moving party in obtaining the loan; that defendant was sober at the time the agreement was made and the papers were drafted; and denied defendant was entitled to have the option canceled.

A lengthy testimonial record discloses that the defendant was a man upwards of 54 years of age, who only completed the sixth grade in school, who had but very little business experience, and who had never owned any real estate except his home. There was testimony by his 2 sons and another witness to the general effect that he spent most of his time during the several months just preceding the execution of the option and mortgage at the Grand Duchess Bar operated by plaintiffs. While at the bar he drank extensively and appeared to be under the influence of intoxicating liquor on numerous occasions when he returned from the bar. On 1 occasion defendant was arrested for drunk driving.

Defendant himself testified he had only known Mr. Stacey since he started going to the bar, but that he became reasonably well acquainted with him and had been loaned money by Mr. Stacey; that Mr. Stacey had purchased drinks for him both at his bar and at other locations; that they had driven around the city together; that during their travels a discussion was had about Stacey and defendant entering the building business—defendant to put up the land and Stacey, who was doing home development in the area, would have homes constructed on it; but they were unable to agree upon a deal that would work satisfactorily for both.

Defendant testified that Mr. Stacey, on learning defendant was indebted to a brother and in need of some money, suggested he would loan him $4,000 on his property and take a note and mortgage back. They visited 2 real-estate men, who gave estimates on the value of the property—one of them indicating a value of $3,500 per acre and the other a value of $60,000. Upon the expression of opinion by the second real-estate dealer (a Mr. Heath), Mr. Stacey said: "No, let's get out of here. That man doesn't know what he's talking about." Stacey then pro-

posed they go to an attorney to draw the papers for the mortgage. Defendant suggested going to his attorney. Plaintiff refused saying, he would have nothing to do with him, "he's a crook." They went to another attorney's office but he was not available. They then approached an attorney whom the plaintiff knew and plaintiff arranged for the papers to be drawn. They returned on a subsequent date to sign the papers. After the papers were executed, no copy was given to defendant. It was his understanding that he had only signed a mortgage and note.

Testimony by 2 bartenders was to the effect that defendant never drank in plaintiffs' bar other than Coca Cola and an occasional beer. They further testified plaintiff William Stacey was not well acquainted with defendant, never loaned him any money, and never bought him any drinks nor permitted them to buy him drinks.

Plaintiff William Stacey testified the defendant approached the question of borrowing some money from him or selling the property to him. He further testified he wasn't interested in the property at all, but nevertheless, at the request of defendant, he decided to loan him the money and to take the option to purchase.

The mortgage for $4,000 was for a 5-year term. The option to purchase for $12,000 was for a like 5-year term, and provided that if any payments had been made on the mortgage prior to the exercising of the option there would be an adjustment toward the sale price of $12,000.

Mr. Van Howe, a realtor, testified for defendant as to the value of the property. He explained in great detail the facts he took into consideration in arriving at his appraisal figure. These included in part, the zoning of the property, the amount of traffic, the asking price on other property in the

area, the previous asking price on this property under a listing some 3 years earlier, conversations with other realtors as to the value of the property, the fact that Socony Mobil Gas Company took an option to purchase the same property for $29,500 some 2 or 3 years previously. He then testified the value of the property was $37,700.

From a reading of the complete record we cannot say the trial court erred in finding there was not a meeting of the minds of the parties with respect to the execution of the mortgage and option. The record supports the position of the trial court that the defendant did not understand the nature of the transaction he entered into with plaintiffs. It discloses ample testimony to support the position of the trial judge that defendant believed he was executing only a $4,000 note and mortgage. The trial judge properly gave consideration to the fact the option price was fixed at $12,000 and testimony disclosed the property was worth at least $20,000 to $25,000 more than that amount. We think the trial judge correctly concluded that had the defendant understood what he was doing, he would certainly not sign an option to sell the property for $12,000 when he had executed a previous option to sell the property for $29,500.

We do not pass upon the question of whether the trial judge erred in refusing to permit plaintiffs' attorney, who prepared the papers, to testify as to whether or not he properly explained the transaction to defendant. Even if the trial judge did err in this respect, we do not believe he or this Court would reach a different conclusion after a consideration of the whole record. The record amply supports the finding that defendant did not understand the transaction.

In our opinion the record amply sustains the conclusions of the trial court. The trial judge, who

had the opportunity of viewing the witnesses and hearing their testimony, resolved the issues in favor of defendant. While on a chancery appeal we hear the matter *de novo,* we do give great weight to the findings of fact of the trial judge who had the opportunity of seeing the witnesses while testifying. We do not reverse under such circumstances unless we find from a reading of the entire record we would have reached a different conclusion. *Ball* v. *Sweeney,* 354 Mich 616; *Straith* v. *Straith,* 355 Mich 267; *A & C Engineering Co.* v. *Atherholt,* 355 Mich 677; *Futernick* v. *Cutler,* 356 Mich 33; *Osten-Sacken* v. *Steiner,* 356 Mich 468; *Township of Superior* v. *Township of Ypsilanti,* 361 Mich 456; *Resh* v. *Fox,* 365 Mich 288. We have examined the record and see no reason for disturbing the trial judge's findings.

The decree of the lower court is affirmed. Defendant shall have costs.

CARR, C. J., and DETHMERS, KELLY, BLACK, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

DROULARD *v.* CZERWINSKI.

1. MECHANICS' LIENS—EVIDENCE—ESCROW AGREEMENT.
   Admission into evidence of escrow agreement between fee owners, land contract purchasers, and escrow agent was improper in suit to foreclose mechanics' lien on the premises, where the escrow agent was not a party to the proceeding and no relief was sought by plaintiff by virtue of the agreement, since it was not material to the facts of the case (CL 1948, § 570.5, as amended by PA 1958, No 213).

2. SAME—CLAIM OF LIEN—RECORDING STATEMENT OF ACCOUNT—TIME.
   Claim of lien under the mechanics' lien statute was fatally defective, where the verified statement or account was not recorded with the register of deeds until more than 60 days had expired (CL 1948, § 570.5, as amended by PA 1958, No 213).

Appeal from St. Clair; Streeter (Halford I.), J. Submitted June 6, 1962. (Docket No. 12, Calendar No. 49,487.) Decided September 10, 1962.

Bill by Donald A. Droulard against Robert Czerwinski, Arthur W. Cooper, New Haven Savings Bank, a Michigan corporation, Karl Kromer, and Biegmamina Kromer to foreclose labor lien. Decree for plaintiff. Defendant Karl Kromer, individually and as executor of the estate of Biegmamina Kromer, deceased, appeal. Reversed and bill dismissed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 36 Am Jur, Mechanics' Liens § 273.
[2] 36 Am Jur, Mechanics' Liens § 131.

Johnston & Wendt (*Ivan A. Johnston,* of counsel), for defendants Kromer.

ADAMS, J. Plaintiff filed a bill to foreclose a labor lien. Defendants Karl Kromer and Biegmamina Kromer, each the owner of an individual 1/2 interest in the property, filed an answer in which they affirmatively pleaded failure to comply with the provisions of the lien statute.

At the opening of the trial, the attorney for the Kromers moved to dismiss the bill of complaint. The court took the motion under advisement.*

Upon the hearing, it appeared that plaintiff was a subcontractor for labor in connection with repairs to a building that had been damaged by fire. Plaintiff began furnishing labor to the contractor, Robert Czerwinski, on June 3, 1959, and finished on November 20, 1959. The notice of intention to claim a lien was served on Arthur W. Cooper, the contract purchaser, on December 3, 1959, but on no other person. The statement of account and lien, dated February 3, 1960, was filed February 4, 1960 with the register of deeds. The statement of account and lien was served on Arthur W. Cooper only, and not upon the fee owners, Karl Kromer and Biegmamina Kromer.

Upon the trial there was admitted into evidence, over the objection of defendants, an escrow agreement, dated May 26, 1959, between Arthur W. Cooper, party of the first part, Karl Kromer and Biegmamina Kromer, parties of the second part, and Clinton H. Sherman, escrow agent, party of the third part, for the disposition by the escrow agent of the proceeds from insurance paid as a result of a fire loss to the premises. After provision for the payment of taxes and of principal and interest due on the land contract, the agreement provides that

* See CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1959 Cum Supp § 27.1461 *et seq.*).—REPORTER.

the escrow agent shall pay the cost of rebuilding and restoring the premises insofar as the funds will extend and until their exhaustion. The escrow agent is not a party to this proceeding, nor did plaintiff seek any relief by virtue of this agreement. Under the circumstances, it was not material to the facts in this case and should not have been received in evidence.

The provisions of the mechanics' lien statute (CL 1948, § 570.5, as amended by PA 1958, No 213 [Stat Ann 1959 Cum Supp § 26.285]) are clear. A laborer who wishes to avail himself of the statute is required to make and record with the register of deeds a statement or account of his claim. "Such verified statement or account shall be recorded within 60 days from the date on which the last of * * * the labor * * * shall have been performed by the person claiming the lien." Plaintiff's statement for account of lien was not made until February 3, 1960, 75 days after the last of the work was performed. Plaintiff's attempt to claim a lien was fatally defective.

Other questions raised do not require discussion.

Motion to dismiss the bill of complaint should have been granted. The trial court erred in granting a decree of foreclosure. The decree is vacated. Plaintiff's bill of complaint is dismissed with prejudice. Costs to appellant Karl Kromer and to the estate of Biegmamina Kromer, deceased.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, and OTIS M. SMITH, JJ., concurred.

LESKI *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

1. INSURANCE—AUTOMOBILES—FARM TRACTORS—COVERAGE.

   Provision of automobile insurance policy wherein definition of automobile specifically excluded coverage of "a farm type tractor or other equipment designed for use principally off public roads, except while actually upon public roads" intended to exclude coverage of a farm tractor while in its ordinary place of usage but extended coverage to its operation on the road while going to and from farms or when used on the road for hauling.

2. SAME—CONSTRUCTION OF POLICY—AMBIGUITY.

   Courts should construe policies of insurance which are not standard policies strictly or most strongly against the insurer in case of reasonable uncertainty, doubt, or ambiguity.

3. SAME—AUTOMOBILES—FARM TRACTOR—PUBLIC HIGHWAY—CONSTRUCTION OF POLICY.

   The term *while actually upon a public highway,* as used in automobile insurance policy in clause extending coverage to farm tractors so used, is construed most strongly against the insurer so as to cover fatal injuries to insured's son received while operating the tractor en route to farm across an interstate public highway while on the right-of-way in a place which could be used for travel although not intended for normal travel use, some less than 2 months before the highway was officially opened for public use although there was evidence of common and recent usage of the route followed by decedent, such policy provision being an ambiguous one.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5A Am Jur, Automobile Insurance §§ 2n, 7n, 27, 28.
What is an "automobile" or a "car" within coverage of automobile liability policy. 74 ALR2d 1264.

[2, 3, 5] 5A Am Jur, Automobile Insurance § 3.

[4] 3 Am Jur, Appeal and Error §§ 899, 900.

4. APPEAL AND ERROR—NONJURY CASES—CLEAR WEIGHT OF THE EVIDENCE.

The Supreme Court does not reverse the determination of the trial court in a nonjury case unless it is found that the judgment rendered is contrary to the clear weight of the evidence.

5. INSURANCE—AUTOMOBILES—FARM TRACTORS—PUBLIC HIGHWAY—AMBIGUITY.

Trial court's finding of ambiguity in clause of automobile insurance policy extending coverage to operation of farm tractors *while actually upon a public highway held,* to support judgment for insured for fatal injuries to her son while operating such a tractor within the right-of-way of an interstate highway less than 2 months prior to its official acceptance although on a place not ever intended for public travel but on a route which was not then barricaded and which had been commonly used by parties whose destination was the same as decedent's.

Appeal from Calhoun; Magnotta (Alfonso A.), J. Submitted June 14, 1962. (Docket No. 18, Calendar No. 49,556.) Decided September 10, 1962.

Assumpsit by Margaret L. Leski, individually and as administratrix of the estate of Fred R. Leski, deceased, against State Farm Mutual Automobile Insurance Company, a foreign corporation, for death benefits under limited insurance policy. Judgment for plaintiff. Defendant appeals. Affirmed.

Hatch & Sculthorp, for plaintiff.

Fraser, Trebilcock, Davis & Foster, for defendant.

KAVANAGH, J. This action was instituted to recover for the death on May 8, 1960, of plaintiff's son under defendant's policy insuring the life of plaintiff or any member of her family.

Defendant appeals from a judgment in favor of plaintiff entered in the circuit court of Calhoun county following a trial by the court without a jury.

Plaintiff was the holder of a policy of defendant State Farm Mutual Automobile Insurance Company,

which policy provided coverage up to $1,000 with respect to medical and funeral expenses incurred in connection with an accident involving injuries to the insured or a relative living in the insured's family. In addition, the policy afforded a death indemnity up to $5,000 in case of the death of an insured or a relative of the insured occurring while occupying a land motor vehicle not operated on rails or crawler-treads but excluding a farm type tractor or equipment designed for use principally off public roads, except while such tractor or equipment was actually upon public roads.

The decedent, Fred R. Leski, at the time of the accident was en route from a farm owned by his employer located south of highway I–94 in Marengo township, Calhoun county, Michigan, to another farm on the north side of the highway. The accident in question occurred within the right-of-way of highway I–94 between the cities of Marshall and Albion. This stretch of highway in the general area of the accident scene is located immediately to the west of the present Partello road interchange. As completed, the stretch of highway consists of 2 main strips of concrete pavement separated by a medial divider running in an easterly and westerly direction.

On May 8, 1960, the construction of highway I–94 was not completed and there were no fences or physical obstructions erected along the I–94 right-of-way or parallel thereto. Prior thereto, the east-west strips of the main pavement were in place, but the shoulders abutting said strips and the Partello road overpass were not completed. These strips of highway I–94 were officially opened to public vehicular travel by the State highway commissioner on July 1, 1960.

Prior to, during, and after the date of the accident, persons not connected with the construction

of the highway or the State highway department utilized the main strips of I–94 for vehicular transportation, although without the approval of the State highway department. On at least 1 occasion, only 2 or 3 days after the accident, the project engineer offered to let a private vehicle travel from the city of Albion to the Partello road interchange on I–94.

Plaintiff's decedent, Fred R. Leski, in going from one farm to the other, drove the tractor from the farm situated to the south of the right-of-way across the east-west concrete strip and medial divider in a general northerly direction until he reached the north edge of the earthen embankment constituting the grade denominated as ramp "C" of the interchange. At that point, his tractor was turned in a northeasterly direction and was driven approximately 500 feet on a course generally paralleling the curvature of partially completed ramp "C". At a point on the northern-most arc of the grading of ramp "C", decedent again turned his tractor in a northerly direction and entered into a ditch. While attempting to climb the northerly embankment of the ditch, to go into a field, the tractor, due to the incline and soft ground, tipped backward toward the south inflicting fatal injuries to decedent.

The place where the accident occurred was situated within the right-of-way of I–94, and the northerly bank of the ditch was situated approximately 32 feet north of the presently paved portion of ramp "C" and approximately 24 feet north of the now constructed north shoulder of ramp "C". It is admitted that the situs of the accident was not situated within that part of highway I–94 intended or designed for vehicular traffic, but it is also admitted that it is conceivable that under abnormal or emergency conditions a motor vehicle might enter upon or travel over the place where the accident occurred.

Stipulated facts indicate that the plaintiff and her family, including the decedent and numerous others, used the temporary Partello road crossing of I–94 almost daily. In order to gain access to 19 Mile road, it was necessary for them, after crossing I–94 and joining Partello road, to turn southwesterly and travel upon the fill dirt or earthen embankment used for the approach for the bridge which was to be built. This mode of access to 19 Mile road was expressly authorized by the State highway department. The earthen embankment or approach was joined by ramp "C". Ramp "C", however, was not open to traffic on that date. No permission had been given to decedent by the State highway department to use the highway or highway right-of-way on or prior to the date of the occurrence of the accident.

However, plaintiff's witness, Jerry Elyea, testified that approximately 1 month prior to the accident in question he drove a tractor from the Elyea home to their land north of I–94 using almost exactly the same route as decedent. En route he conversed with members of the highway construction crew and then proceeded on the tractor to the northerly Elyea land. He was not stopped by the construction crew nor told not to cross the highway at that point.

Ruth Elyea testified for plaintiff that approximately 3 days after the accident she was approached by a representative of the State highway department, who informed her that persons working the Elyea farm were not to cross the highway.

Plaintiff Margaret L. Leski, mother of decedent, testified that prior to and on the date of the accident there were no barricades or barriers on I–94 at the Partello road interchange. She further testified that going to and from her employment she observed this interchange on the average of 4 times daily, and that wire barricades were placed immediately to the east and west of temporary Partello road where it

crossed the main strips of I–94 within 1 week following the accident.

The sole question in this case is: Can the language of coverages "C" and "S" of defendant's insurance policy providing medical and accidental death benefits in connection with certain operations of a farm tractor *"while actually upon public roads"* be reasonably construed to include the situs of the accident causing the death of plaintiff's decedent, Fred R. Leski?

The policy in question provided:

"INSURING AGREEMENT—THE OWNED AUTOMOBILE. * * *

"Coverage C—Medical payments. To pay reasonable expenses incurred within 1 year from the date of accident for necessary medical, surgical, X-ray, dental, ambulance, hospital, professional nursing and funeral services, eyeglasses, hearing aids and prosthetic devices:

"Division 1. To or for the named insured and each relative who sustains bodily injury, caused by accident, while occupying or through being struck by the owned automobile, or any other land motor vehicle or trailer not operated on rails or crawler-treads, but not (1) a farm type tractor or equipment designed for use principally off public roads, except *while actually upon public roads.* * * *

"Conditions—Insuring Agreements 1 and 2. * * *

"The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder. Any payment shall not constitute admission of liability of the insured or company. * * *

"INSURING AGREEMENT 4—AUTOMOBILE DEATH INDEMNITY, SPECIFIC DISABILITY AND TOTAL DISABILITY INSURANCE.

"Coverage S.

"Division 1—Death indemnity. To pay the principal sum stated as applicable in the exceptions of the declarations in event of the death of each insured which shall result directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while occupying or through being struck by an automobile, provided the death shall occur:

"(1) within 90 days from the date of such accident, or

"(2) within 1 year after the date of the accident and during a period of continuous total disability as defined under coverage T. * * *

"DEFINITIONS—INSURING AGREEMENT 4 * * *

"Automobile—means a land motor vehicle, trailer, or semitrailer not operated on rails or crawler-treads, but does not mean: (1) a farm type tractor or other equipment designed for use principally off public roads, except *while actually upon public roads.*" (Emphasis supplied.)

The trial court found in its opinion that the provision "while actually upon public roads" in the insurance policy in question was ambiguous and that a fair interpretation of this provision of the contract would include the situs of the accident in the instant case, and rendered a judgment in the amount of the policy.

Defendant contends the policy in question is an automobile insurance policy and not a policy generally covering the operation of farm tractors of the type here involved. Defendant also says farm tractors of this type are expressly excluded from coverage under the policy unless, and only unless, the accident occurs while the farm tractor is actually upon public roads.

Defendant contends the conclusion is, therefore, inescapable that the manifest underwriting intent was to exclude from coverage of the policy the risks normally attending the operation of a farm tractor

in its ordinary place of usage. To this extent we agree. A description of the ordinary place of usage would be in and about the fields and premises of a farm. Admittedly, this accident did not occur in such a place. What, then, did the underwriter intend? It seems clear that it intended to extend the coverage to operation of a farm tractor in other than its ordinary place of usage; in other words, in a type of operation in which the tractor would be used on the road going to and from farms or when used on the road for hauling.

In arriving at a construction of the language in an insurance contract, it is a well-established rule that, in case of reasonable uncertainty, doubt, or ambiguity, courts should construe policies of insurance which are not standard policies strictly or most strongly against the insurer. See *Century Indemnity Co.* v. *Schmick,* 351 Mich 622; *Francis* v. *Scheper,* 326 Mich 441. In view of the apparent uncertainty and doubt which surrounds the provisions of the policy in this case, we apply the above rule of law.

The trial court found as a matter of fact, and it is supported by the record, that others besides decedent used this same route to pass from ramp "C" to the field, although at the time of such use it was not a road officially opened to public travel by the State highway department.

Several witnesses testified of the common usage of the area of the interchange in its incomplete state to pass from one side of the more than 1/4-mile-long interchange to the other.

Defendant contends that a proper construction of the critical policy language "while actually upon public roads" should be in terms of what a layman would understand these words as meaning in everyday parlance. We believe that a reasonable understanding of the preceding language by a layman would be

that he was purchasing a policy of insurance that would protect him in the event of an accident at the place and in the manner which caused decedent's death.

The cases cited by both plaintiff and defendant and the dictionary definitions of the word "public" and the word "road" are not applicable in this case. Here we are determining what construction the parties placed upon these critical words at the time of purchase of the policy. We believe a reasonable interpretation is the one applied by the trial court, and that had the defendant insurance company desired to exclude the situs of the accident it would have been a simple matter for it to do so.

The fact we are dealing with a farm tractor in other than its ordinary place of usage, the fact that we are construing an insurance contract provision that is uncertain or at least doubtful, the fact that we are dealing with a record that discloses some common usage of the area where the accident occurred, the fact that we are dealing with the provisions of an insurance contract which must be construed most strongly against the insurer, and the fact that at least 1 reasonable interpretation of the provision involved would include the situs of the accident, leads us to the conclusion that the finding of the trial court was supported by the record.

We do not reverse in a case tried by the court without a jury under these circumstances unless we find that the judgment is contrary to the clear weight of the evidence. A reading of this record does not bring us to such a conclusion.

The judgment of the trial court is affirmed. Plaintiff shall have costs.

Carr, C. J., and Dethmers, Kelly, Black, Souris, Otis M. Smith, and Adams, JJ., concurred.

GOODWILL INDUSTRIES OF DETROIT *v.* WHITSITT.

1. REPLEVIN—POSSESSION—DEMAND.

   No demand before filing replevin action is necessary where defendant claims title and right of possession to property, or exercises possession or control over the property with knowledge of the plaintiff's adverse claim, since a demand under such circumstances would be an idle ceremony.

2. CHATTEL MORTGAGES—NOTICE—SHERIFF'S SALE—BONA FIDE PURCHASER.

   Purchaser at sheriff's sale of car against which plaintiff's chattel mortgage had been recorded in Wayne county could not possibly be a bona fide purchaser at the sale held in Presque Isle county where the chattel mortgage had not been recorded but fact of existence of the chattel mortgage was, by plaintiff's attorney, brought to the notice of the deputy sheriff in charge and all persons present, including individual defendant who was secretary-treasurer of corporate defendant.

3. REPLEVIN—PLEADING—PARTIES.

   The filing of an answer by defendant, added by stipulation and order making it a full party defendant, cured the defect of instituting replevin action against an improper defendant.

Appeal from Presque Isle; Glennie (Philip J.), J. Submitted June 7, 1962. (Docket No. 26, Calendar No. 49,426.) Decided September 10, 1962.

Replevin by Goodwill Industries of Detroit, a nonprofit corporation, against Neil Whitsitt for

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REFERENCES FOR POINTS IN HEADNOTES

[1] 46 Am Jur, Replevin § 56.
[2] 10 Am Jur, Chattel Mortgages § 102.
[3] 46 Am Jur, Replevin §§ 70, 98.

possession of automobile seized and sold on writ of execution. Millersburg Seed & Grain Elevator, Inc., a Michigan corporation, intervened and added as party defendant. Judgment for plaintiff. Defendants appeal. Affirmed.

Philip T. Van Zile and *Charles C. Menefee,* for plaintiff.

Kopietz, Burau & Schuster, for defendants.

KAVANAGH, J. Defendants appeal from a judgment entered in the circuit court for the county of Presque Isle in favor of plaintiff giving it possession of a 1956 Buick automobile.

It is alleged by defendants: (1) that the trial court erred in refusing to grant defendants' motion to dismiss based upon failure to demand possession of the property prior to issuance of the writ of replevin; (2) that a writ of replevin cannot lawfully issue against a defendant not in possession of the property replevied; (3) that a chattel mortgage must be recorded in the county where a mortgagor resides to be proper notice to a bona fide purchaser at sheriff's sale; (4) that the trial court erred in not granting Millersburg Seed & Grain Elevator, Inc., a money judgment against the plaintiff for $725 plus interest and costs.

Plaintiff, Goodwill Industries of Detroit, a nonprofit corporation, loaned to one of its employees, Garland E. Tubbs, the sum of $700 to purchase a 1956 Buick automobile. Prior to going to Detroit Tubbs was a resident of Onaway in Presque Isle county. He obtained a job with Goodwill Industries of Detroit, and temporarily lived at Warren in Macomb county until he could find a home in Detroit. Under date of August 1, 1960, Tubbs gave to plaintiff his note for $700 secured by a chattel mortgage on

the car. The chattel mortgage was duly recorded in Wayne county. It was not recorded in Macomb or Presque Isle county.

On October 20, 1960, Tubbs quit his job with plaintiff and returned to Onaway, taking the mortgaged automobile with him. After leaving his employment he made no further payments on the car and there is a balance due on his note of some $500.

Tubbs, while living in Onaway, Presque Isle county, prior to going to Detroit, had become indebted to Millersburg Seed & Grain Elevator, Inc., by reason of the sale of certain merchandise to him. Tubbs was also indebted to one Thomas P. Smith, doing business as Tom's Speedway 79 Gasoline Station, of Onaway, for merchandise purchased. Millersburg and Smith instituted 2 separate suits before a justice of the peace in Onaway and recovered judgments on the debts. Prior to the entry of the judgments plaintiff advised the justice of the peace before whom the suits were pending of its chattel mortgage on the car. After taking default judgments against Tubbs, writs of execution were issued and levy was made against the mortgaged car. Sheriff's sale was advertised for February 2, 1961, by the Presque Isle county sheriff. Plaintiff's attorney attended the sale and advised the deputy sheriff in charge and all persons present, including defendant Whitsitt, who was the secretary-treasurer of Millersburg Seed & Grain Elevator, Inc., of plaintiff's mortgage on the automobile. Whitsitt informed plaintiff's attorney that he would not recognize the validity of plaintiff's mortgage or its right to possession of the car, since the mortgage had not been recorded in Presque Isle county.

At the sale Millersburg Seed & Grain Elevator, Inc., bid $485 for the car. This was the only bid. All others attending the sale left after the announcement by plaintiff's attorney of Goodwill's mortgage

on the car. Following this announcement and a discussion with Whitsitt about Goodwill's mortgage, the deputy sheriff finally sold the car to Millersburg Seed & Grain Elevator, Inc. The car was moved to Tom's Speedway 79 Station for preparation for resale.

Plaintiff filed this replevin action against defendant Whitsitt personally. Pursuant to the writ of replevin, the sheriff took possession of the car.

After commencement of the replevin action, Millersburg filed a petition on April 11, 1961, to intervene as party defendant. Subsequently, Goodwill Industries of Detroit, Neil Whitsitt and Millersburg Seed & Grain Elevator, Inc., entered into a stipulation permitting Millersburg to be added as a defendant. The trial court entered the following order:

"Upon filing and reading the attached stipulation of the parties herein, by their attorneys, to add Millersburg Seed & Grain Elevator, Inc., a Michigan corporation, as party defendant,

"It is hereby ordered, that Millersburg Seed & Grain Elevator, Inc., a Michigan corporation be added as party defendant in the above entitled cause and that defendant, Millersburg Seed & Grain Elevator, Inc., a Michigan corporation file an answer to plaintiff's declaration within 15 days from the entry of the order so adding Millersburg Seed & Grain Elevator, Inc., a Michigan corporation, as party defendant."

Millersburg Seed & Grain Elevator, Inc., filed an answer setting up by way of affirmative defenses that it was the title holder of record of the vehicle in question and was an innocent bona fide purchaser for value, and that prior to the purchase of the vehicle it investigated the records in the office of the register of deeds for Presque Isle county and found

no outstanding liens or encumbrances against the vehicle.

At the trial Millersburg moved for a money judgment, waived its right to possession of the car, and elected to take the cash value thereof. Defendant Whitsitt's defense was that he did not have possession of the car at the time suit was commenced.

At the conclusion of the trial, the court entered judgment awarding possession of the car to plaintiff. The trial court also filed its opinion setting forth fully its findings of fact and conclusions of law supporting the judgment. Defendants appeal.

We find, under the circumstances in this case, and considering the actions of Neil Whitsitt on learning of plaintiff's mortgage and his statements to the effect the mortgage lien would not be recognized, that the trial court was correct in ruling that a demand under the circumstances would not be necessary and would be an idle gesture. See *Breitenwischer* v. *Clough,* 111 Mich 6 (66 Am St Rep 372), and *Log-Owners' Booming Co.* v. *Hubbell,* 135 Mich 65 (4 LRA NS 573), holding that in replevin where defendant claims title and right of possession to property, or exercises possession or control over property, with knowledge of the plaintiff's adverse claim, no demand by plaintiff before suit is ordinarily necessary. The reasoning of the Court was that defendant's retention of possession and claim of title was inconsistent with the supposition that he would restore the property if a formal demand were made. Under such circumstances the law does not require a demand since it would be an idle ceremony and, therefore, unnecessary. In the instant case the statements of Neil Whitsitt that Millersburg would not recognize the mortgage lien of plaintiff was such a circumstance.

We also find that the trial judge was correct in ruling that Millersburg Seed & Grain Elevator, Inc.,

could not possibly be a bona fide purchaser at the sheriff's sale, having had notice of plaintiff's mortgage. There was actual notice by plaintiff's attorney. Millersburg, prior to the sale of the property to it at the sheriff's sale, had full knowledge of the chattel mortgage lien claimed by plaintiff. Under such circumstances, appellants gained no protection from plaintiff's chattel mortgage on the basis of failure to properly record the mortgage in Macomb or Presque Isle county. The rule in Michigan provides the statute protects only subsequent creditors *without notice.* See the discussion in *Detroit Trust Co.* v. *Detroit City Service Co.,* 262 Mich 14.

We further find that the trial court did not err in granting a judgment in favor of plaintiff, since by stipulation and order the Millersburg Seed & Grain Elevator, Inc., became a party defendant.

Tom's Speedway 79 Station was in actual possession of the car as agent of Millersburg Seed & Grain Elevator, Inc. This is undisputed. Under the circumstances in this particular case—the stipulation adding Millersburg Seed & Grain Elevator, Inc., as a party defendant—the filing of its answer cures the defect of instituting the suit against an improper defendant. The general rule set forth in *Bellows* v. *Goodfellow,* 276 Mich 471, and in the other cases therein cited, is not applicable. Millersburg by the stipulation and order became a full party defendant and was placed in exactly the same position as if the suit had been started against it.

In summary we conclude, therefore, that the trial court was correct in holding that no demand need be made on defendants prior to institution of the replevin suit under the circumstances in this case; that Millersburg Seed & Grain Elevator, Inc., was not a bona fide purchaser for value without notice; that the trial court did not err in refusing to grant the

motion to dismiss the replevin because it was brought against the wrong defendant.

The judgment of the trial court is affirmed. Plaintiff shall have costs.

CARR, C. J., and DETHMERS, KELLY, BLACK, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

IMMANUEL EVANGELICAL LUTHERAN CHURCH *v.* FROMM.

1. RELIGIOUS SOCIETIES—INDIVIDUAL'S RIGHT TO WORSHIP—COURTS.
   A court may not interfere with an individual's free exercise of his right to worship as he wishes and in determining the right to possession of the tangible property of a church does not interfere with anyone's right to withdraw from such church and worship as he sees fit (US Const, Am 1).

2. SAME—PRESBYTERIAN GOVERNMENT—MERGER—CONGREGATION.
   A church with a presbyterian form of government may merge with another church through affirmative action taken by the body to which delegates have been sent by the church, since a congregation under such a government is without power to effect the merger.

3. SAME — PRESBYTERIAN GOVERNMENT — AMENDMENT OF LOCAL CHURCH CONSTITUTION—SEVERANCE OF PROPERTY.
   An amendment of the constitution of a local church with a presbyterian form of government, which would permit such local church to sever its connection with its controlling body

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REFERENCES FOR POINTS IN HEADNOTES

[1] 11 Am Jur, Constitutional Law § 312.
45 Am Jur, Religious Societies § 59.
[2] 45 Am Jur, Religious Societies § 78.
[3, 5] 45 Am Jur, Religious Societies § 12.
[4] 45 Am Jur, Religious Societies § 41.
[6] 45 Am Jur, Religious Societies § 61.

to which it had elected delegates, without the consent of the controlling body, is void and ineffective to transfer property away from the church to which it had been dedicated and which had been using it for 22 years.

4. SAME—COURTS—GOVERNING BODY—JURISDICTION.

A court will not interfere with the action taken by the governing body of a church except to determine whether the governing body had jurisdiction to do what it did.

5. SAME—CHANGE OF CREED.

A church incorporated for the promotion of a defined fundamental religious faith or doctrine cannot by amendment change its religious creed or faith except by unanimous vote of its members.

6. SAME—PROPERTY HELD IN TRUST—COURTS—DIVERSION OF PROPERTY.

The property of a church is impressed with a trust to carry out the purposes of its organization; and a court though not concerned with religious doctrines, will not permit a violation of the trust by a diversion of the property to other uses sought to be made of it, because of a change in faith of the majority.

7. SAME—DAMAGES.

No award of monetary damages is made in suit to determine the right to the possession of church property, where, although defendants' acts are declared illegal, they have conducted services which have been attended by adherents to the faith to which the property had been dedicated and any damages would be a highly speculative matter.

Appeal from Saginaw; Beers (Henry L.), J., presiding. Submitted April 10, 1962. (Docket No. 53, Calendar No. 48,782.) Decided September 10, 1962.

Bill by Immanuel Evangelical Lutheran Church, of Saginaw, Michigan, a Michigan corporation, David Yauck and others against Alex Fromm, Jr., Daniel Mathes, Norman A. Mentor, and others to establish right to church property. Decree for plaintiffs. Defendants appeal. Affirmed.

Albert A. Smith and *Albert C. Reinert,* for plaintiffs.

Curry & Curry and *Martin & Martin,* for defendants.

KAVANAGH, J. This case involves the right to use and possession of church property of Immanuel Evangelical Lutheran Church of Saginaw, Michigan. The property consists of the church building, 2 residences, and cash assets.

A bill of complaint was filed on June 22, 1959, by 6 individuals in their own names and in the name of Immanuel Evangelical Lutheran Church in its corporate capacity, asking that they be awarded possession of church property, injunctive relief, and monetary damages. The suit was commenced against 10 named defendants. Eight of the named defendants were elected officers of Immanuel Evangelical Lutheran Church. The other 2 defendants were Reverend Daniel Mathes, appointed pastor by defendant group, and Dr. Norman A. Mentor, president of the Michigan District of the American Lutheran Church.

Plaintiffs aver in their bill of complaint that Immanuel Evangelical Lutheran Church is a religious corporation organized under the laws of the State of Michigan; that the incorporators adopted the discipline, rules, and usages of the German Evangelical Synod of North America; and that the corporation and congregation have been so governed continuously by the Evangelical and Reformed Church, with which the Synod affiliated in 1934. They further aver that this church was founded as a mission church and that plaintiffs are members of Immanuel Church who remain steadfast and loyal to the discipline, rules, and usages of the German Evangelical Synod of North America and its continuing body of

the Evangelical and Reformed Church, Michigan-Indiana Synod.

Plaintiffs further represent that defendants have conspired together to withdraw the congregation and its physical assets from the Evangelical and Reformed Church and affiliate with the American Lutheran Church. They state this conduct by defendants was begun without any official action by the church council of the Immanuel Evangelical Lutheran Church of Saginaw, Michigan, or the congregation, and without notice to any officer of the Michigan-Indiana Synod of the Evangelical and Reformed Church.

Plaintiffs further allege that an application for withdrawal was presented to the annual conference of the Michigan-Indiana Synod of the Evangelical and Reformed Church, which on May 7, 1958, passed a resolution that the congregation consists of those who remain faithful to the Evangelical and Reformed Church and that such faithful members retain all rights, title, and possession to the assets of the congregation.

Plaintiffs further aver that pastor Daniel Mathes has occupied the pulpit and parsonage since April 26, 1959, and preaches the doctrine of the American Lutheran Church, which is contrary to the German Evangelical Synod of North America and its continuing body, the Evangelical and Reformed Church. Plaintiffs aver that defendants have excluded the individual plaintiffs from entering the church property since early in 1958. Plaintiffs prayed for a temporary injunction, which the lower court did not grant.

Defendants allege in division 1 of their answer that the church as a Michigan corporation is governed in accordance with its constitution and bylaws by its officers and directors, and that the duly elected and qualified officers and directors of said corpo-

ration are several of the defendants. Defendants further aver in their answer that none of the officers and directors ever authorized commencement of this suit, and that the plaintiffs who instituted the suit did so unlawfully and without any color of right or authority.

In division 2 of their answer, defendants admit that after incorporation the church adopted the discipline, rules and usages of the German Evangelical Synod of North America. They deny the incorporators worshiped as a "Reformed Church" or that the corporation and congregation have been governed by the discipline, rules and usages of the Evangelical and Reformed Church. They deny the church was founded as a mission church. They deny the church or its congregation is affiliated with the American Lutheran Church. They deny application for withdrawal from synod membership was made in the sense pleaded by plaintiffs. Defendants aver the church is in full control and possession of all its real and personal property and deny they have illegally seized and taken possession and control of the property owned by the church. They aver that they are the lawful officers and directors of the church and that they have performed all their duties. They deny they are disloyal members of the church and that there has been any departure from church doctrine since April 26, 1959, and aver that the doctrine preached in the Immanuel Evangelical Lutheran Church is exactly the same doctrine which has been preached in that church since it was organized in 1924. Defendants aver that doctrine is not contrary to the doctrine of the German Evangelical Synod of North America. They deny plaintiffs have been excluded from entering upon church property and aver plaintiffs are welcome to attend church services and are at liberty to take part in church functions.

After a lengthy trial of the case in the Saginaw county circuit court, in chancery, the court entered a decree in favor of plaintiffs and found that plaintiff Immanuel Church has a representative or presbyterian form of government; that plaintiff church corporation is subject to the discipline, rules and usages of the Evangelical and Reformed Church, and specifically the Michigan-Indiana Synod. The decree further held that the right to possession of all the real and personal property of the church is in the plaintiff corporation and those members adhering to the discipline, rules and usages of the Evangelical and Reformed Church, and those officers of said corporation elected under the supervision of the president of the Michigan-Indiana Synod on October 6, 1958, or their duly elected or appointed successors in office.

The decree commanded the defendants to desist and refrain from representing that they are the legal officers of the corporation and ordered them to forthwith account and turn over to the duly constituted officers and directors of plaintiff corporation all the real and personal property together with all records, moneys, books, bank accounts and bonds which they hold or control or have collected in the name of the Immanuel Evangelical Lutheran Church of Saginaw, Michigan.

Defendants have taken a general appeal from the decree of the trial court raising the following questions:

The first question raised is: Should defendants' written motion to dismiss have been granted? This motion was based on 3 propositions:

1. That the grievance procedure provided under the constitution of Immanuel Church had not been exhausted by plaintiffs or the church prior to instituting this action in civil court.

2. That a civil court cannot interfere with the constitutional rights, State and Federal, involving freedom of worship.

3. That the church corporation is not a proper party plaintiff, not having been authorized by defendants, who claim to be the proper officers, to join in instituting the action.

The second question raised is: Did the congregation of Immanuel Church forfeit its rights to its own church properties by legally amending its local constitution terminating membership in the Synod?

The third question raised is: Under the corporate charter of Immanuel Church, are the plaintiffs entitled to the control and possession of the local church property in affiliation with the United Church of Christ?

The trial judge in a very exhaustive opinion made a number of findings of fact, which an examination of the record discloses are amply supported by the evidence presented in the case. We think he ably applied the law to the facts in this case. We do not think we could state the issues involved and the authorities determining them any better than did the trial judge. We, therefore, adopt the trial judge's opinion as the opinion of this Court:

"In considering this case, it is well to bear in mind the provision of article 1 of [amendments to] the Constitution of the United States:

" 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'

"Following this fundamental law of the land, the courts have always zealously guarded the right of the individual to worship as he wishes. There is no question in this case but that any of the parties hereto may withdraw from the plaintiff church and worship in any manner they see fit. The only question the court deals with here is the right to the

possession of the tangible property of the church. No question of religious belief is here involved.

"The Immanuel Evangelical Lutheran Church of Saginaw was organized and incorporated as a church in 1924. The incorporators filed articles of association in accordance with the Michigan law on April 29, 1924. The fourth article reads:

" 'Fourth, The members of said church or society shall worship and labor together according to the discipline, rules and usages of the German Evangelical Synod of North America * * * as from time to time authorized and declared by the General Conference of said church.'

"The article 6, section 2, of the constitution of the German Evangelical Synod of North America provides:

" 'Section 2. Form of government. The government of the Evangelical Synod of N. A. shall be representative, and shall be vested in the following branches: legislative, executive, and judicial.'

"The church continued as a member of the German Evangelical Synod of North America until the year of 1934, when the German Evangelical Synod of North America merged with the so-called Reformed Church to form the Evangelical and Reformed Church. The constitution of the Evangelical and Reformed Church provides that the government shall be legislative, administrative, and judicial. The Immanuel Lutheran Church continued following the merger as a member of the Evangelical and Reformed Church up to and including the time of trial of this case.

"This case consumed the better part of 5 weeks of trial, many questions were raised and argued, the court admitting a wide range of testimony in order that both sides might fully present their respective claims. Much of the testimony taken, in my opinion, is immaterial to the decision of this case as are many of the legal questions raised by counsel. To avoid making this opinion unduly prolix, I will not mention

those questions which I do not deem necessary to this decision.

"The church has an interesting history which I will not detail except to say that this church stems from the organizing of a church in Russia during the reign of Queen Catherine the Great about 1764. These people had immigrated into the Volga valley from Germany. Because of necessity, one minister frequently served what we know as the Calvinist and also the Reformed faiths. Late in the 1870's, the government of Russia commenced conscription of these people into the Russian army, and many of them left Russia and settled in other parts of the world. Many went to South America and a great many came to the United States. This emigration continued over a considerable period of years, and a number of these people became residents of the Saginaw area. In the early days they had no church of their own and apparently attended various churches until in 1924 a group of the Volga German people organized for the purpose of forming a church of the same type and character as they had formerly attended in Russia. This organization culminated in the organization of Immanuel Lutheran Church; the incorporation thereof and adoption of articles of association, bylaws, and so forth, as I have previously stated, in the year 1924. The church prospered and continued, as I have said, under the government of the German Evangelical Synod of North America and subsequently the Evangelical and Reformed Church until about the year 1958. The minister of this church, the Rev. Eichhorn, was a Volga German. He came to this country about the year 1924, became pastor, and continued as pastor of this church until the year 1958 when he tendered his resignation and retired under a retirement plan or pension paid to him by the Evangelical and Reformed Church. During the entire period I have mentioned, it is not disputed that the church body conducted themselves under the discipline and usages of the 2 respective synods.

"The organization of the Evangelical and Reformed Church, of which Immanuel Lutheran Church is a member, consists of a general synod at its head, 33 intermediate synods named upon a geographical basis throughout the country, and 2,700 congregations comprising 800,000 members. We are here concerned with the synod known as the Michigan-Indiana Synod. The 2,700 congregations elect delegates to the intermediate synod who in turn name the delegates to the general or supreme synod. It is thus demonstrated without question we have here a representative form of church government commonly called presbyterian, being in nature the same as our representative State government as contradistinguished from the pure democratic or congregational form of church government. Throughout the years the congregation of Immanuel Lutheran Church elected its representatives to represent the church in the governing body of the Michigan-Indiana Synod, which representatives in turn elected representatives to the general synodical council.

"Following the resignation of the Rev. Eichhorn, a dispute arose among the members of the church as to acquiring a minister to take his place. This dispute stems from a proposed merger of the Evangelical and Reformed Church with other churches, which merger has not as yet taken place but is in the process of accomplishment. Following the resignation, a majority of the church members voted to bring into the church a minister of an entirely different denomination, not of the Evangelical and Reformed Church.

"Meetings were held by the church body which I will not detail, votes were taken, and resolutions adopted in which by the orderly process of representative government delegates were elected to attend the synodical meetings and instructed to attempt to gain permission from the synod for the church to withdraw from the Evangelical and Reformed organization, take the church property, and affiliate with another church. At all times there was a minority

of members of the congregation who opposed this move. Representatives of the church did attend the synodical meetings, proposed resolutions, and were unsuccessful in gaining the permission of the synod so to do.

"At a meeting of the congregation held on November 24, 1957, the following question was proposed and voted upon:

" 'Should the church council take necessary steps to sever all [our] relationship with the Evangelical and Reformed Church as of the end of the year and seek Lutheran synodical affiliation?'

"A majority of the members voted in favor of this proposal, a minority voted against it. As I have previously stated, efforts were continuously made by the representatives of the church body to gain permission of the synod to withdraw.

"On May 5, 1959, at the twenty-first annual conference of the Michigan-Indiana Synod, we find the following in the minutes of that meeting:

" 'Rev. Jack E. Yates presided and called upon the resolutions committee to present the resolution concerning the request of the Immanuel Evangelical Lutheran Church of Saginaw, Michigan. After due discussion, a motion was made and seconded that the representatives of the dissident group be given the privilege to address synod. Mr. Harold Martin spoke in their behalf. A standing vote was then called for and the resolution was unanimously adopted.'

"The resolution referred to is a resolution adopted by the synod refusing the application of the Immanuel Church's representatives to withdraw. That resolution, so far as material here, reads:

" 'Whereas, Michigan-Indiana Synod of the Evangelical and Reformed Church (hereinafter referred to as synod) in regular annual session at Taylor, Michigan, on May 6 and 7, 1958, officially acted upon the application of a group of members of Immanuel Evangelical Lutheran Church of Saginaw, Michigan, (hereinafter referred to as Immanuel Church) to

withdraw that congregation from the Evangelical and Reformed Church; and

" 'Whereas, synod adopted a resolution as set forth in the official minutes of said session, which resolution is incorporated herein by reference; and'

"Following this unsuccessful effort to withdraw the congregation from the Evangelical and Reformed Church, the facts disclose that the majority then called a pastor not of the Evangelical and Reformed Church, and proceeded thereafter upon the theory that this church has a congregation government and is not one of a presbyterian nature. Shortly thereafter this suit was commenced by Immanuel Lutheran Church, a Michigan corporation, as one plaintiff, together with other members of the congregation who were continuing under that name and who did not wish to withdraw the church from the Evangelical and Reformed control. At certain meetings the president of the Michigan-Indiana Synod, acting under his power of president, convened the members who wished to remain with the congregation and officers were elected and the church authorized to proceed in this litigation. The other members of the church, being in the majority and having acquired a pastor of another denomination, took over the operation of the church property, no longer recognized the Evangelical and Reformed Synod as its governing authority, and proceeded with what is apparently the plan, as stated in the aforesaid question voted upon, to seek other synodical affiliation.

"Defendants earnestly contend that the plaintiff church has a congregational form of government. In support of this argument, their claim is that this congregation never ratified the merger heretofore referred to between the German Evangelical Synod of North America and the Evangelical and Reformed Church. The fallacy in this argument is apparent. At the time of the merger between the 2 aforesaid denominations, this congregation had a presbyterian form of government and it was, therefore, not necessary that it ratify such a merger; in fact, it had no

power to do so. A second very forcible reason for my not being able to so hold is that the records of the church's activities refute this contention. Even though there is no written ratification of this merger, the congregation of this church has proceeded under the jurisdiction of the Evangelical and Reformed Church for a period of more than 22 years and has at all times contributed money to and conducted its business as a part of that church organization. From the time of this church's inception, it has recognized the authority of the synod. Its constitution, article 11, provides:

"All properties of the congregation are and shall remain in the undivided possession of the congregation. In case of a division (in the congregation) the judgment of the Evangelical Synod of North America in regard to the right of possession shall be obtained and recognized as final.

"On 1 occasion a dispute arose over the use of the church as property by the so-called brotherhoods. The officers called upon the synod and the synod resolved the dispute.

"Apparently recognizing the proposition that some change would have to be made in the basic rules governing this church in order to accomplish their purpose, the defendants attempted to amend article 7 of the local constitution by deleting that article from the constitution. Article 7 reads as follows:

" '1. The congregation shall be a member of the Evangelical Synod of the North America and accept the duties and rights as a member of this church body as stipulated in its constitution.

" '2. Only pastors affiliated with the Evangelical Synod of North America shall be permitted to become members of this church.'

"A similar effort was made in the case of *Borgman* v. *Bultema,* 213 Mich 684. In that case the majority of the congregation attempted as here to amend the church's constitution so as to permit a majority of the congregation to change the church's form of gov-

ernment. The Court summarily dealt with that attempt as follows, quoting on page 705 of the opinion:

" 'The amendment attempted is void. It is an effort to set up in this church of presbyterial form of government a congregational form of government. What was said in *Fuchs* v. *Meisel,* 102 Mich 357, 373 (32 LRA 92), is applicable:

" ' "In the freedom of conscience and the right to worship allowed in this country, the defendants and the members of this church undoubtedly possessed the right to withdraw from it, with or without reason. But they could not take with them, for their own purposes, or transfer to any other religious body, the property dedicated to and conveyed for the worship of God under the discipline of this religious association; nor could they prevent its use by those who choose to remain in the church, and who represent the regular church organization." '

"This after the fact attempt by amendment of the church's constitution to withdraw the property of the church from the control of its governing body is void as stated in the *Bultema Case.* The action itself, however, does serve to demonstrate the fact that the members of this church have definitely recognized their position as being under the control of the synod.

* * *

"Again referring to the *Bultema Case,* the case of *Holwerda* v. *Hoeksema,* 232 Mich 648, is referred to. There the governing body of the church is known as the classis, and in speaking of the action of the governing body the Court said at page 652:

" 'Whether the decision of the classis, excluding defendants, was prudent or imprudent, right or wrong, we have no right to inquire. Nor will we undertake to determine whether the decision was in accordance with the canon law of the church, except insofar as it may be necessary to do so in determining whether the classis had jurisdiction of the matter, whether the act is that of the society itself.' Citing *Borgman* v. *Bultema,* 213 Mich 684.

"All of the cases I have examined, at least those that follow the great weight of authority in this country which the Michigan Court has always followed, demonstrate that where the determination has been made that the church is one of a representative form of government the Court will not interfere in any manner with the decisions of the governing body except to determine whether the governing body had jurisdiction to do what it did. The rule followed by the Michigan Court and by most of the courts of this country is concisely stated in the footnote found in 70 ALR 75, at page 85:

" 'A church incorporated for the promotion of a defined fundamental religious faith or doctrine cannot by amendment change its religious creed or faith except by unanimous vote of its members; its property is impressed with a trust to carry out the purposes of its organization; the court, though not concerned with religious doctrines, will not permit a violation of the trust by a diversion of the property to other uses sought to be made of it, because of a change in faith of the majority. *Mattson* v. *Saastamoinen* (1926), 168 Minn 178 (209 NW 648).'

"There are cases, as cited in defendants' brief, which would seem to vacillate somewhat upon the proposition that a majority of a church congregation may withdraw church property from control of a governing body. These, however, are exceptions and are by no means the rule.

"As I have previously stated, there is no question of the right of these defendants to join any church they want to, but in so doing they may not take the church property with them. In other words, the defendants may not violate the trust impressed upon this church's property by its original organizers.

"One other question remains to be decided. In the prayer for relief the plaintiffs seek monetary damages against the defendants by reason of their occupancy of the church property. While the holding of the court is that the actions of the defendants in this case have been illegal, it appears that the

church was continued under the pastorate of a minister of another church and that many of the congregation although retaining allegiance to the Evangelical and Reformed Church nevertheless made use of the church property in attendance at church services. The award of damages would be an extremely difficult matter and in my opinion would be highly speculative. For that reason I do not see fit to award monetary damages in this case.

"A decree may be prepared granting the prayer of the bill of complaint and an injunction issued restraining the defendants as therein prayed. The plaintiffs will recover costs."

In view of the above disposition of the factual and legal matters involved in the case, the other questions raised by defendants on appeal need no further answer.

The decree of the trial court is affirmed. Plaintiffs shall have costs.

CARR, C. J., and DETHMERS, KELLY, BLACK, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

SCHOOL DISTRICT OF THE CITY OF LANSING *v.* STATE BOARD OF EDUCATION.

1. MUNICIPAL CORPORATIONS—EDUCATION—LEGISLATURE.
   Education is not inherently a part of the local self-government of a municipality except insofar as the legislature may choose to make it such, as control of our public school system is a State matter delegated and lodged in the State legislature by the Constitution.

2. SCHOOLS AND SCHOOL DISTRICTS—STATE CONTROL.
   The policy of the State is to retain control of its school system, to be administered throughout the State under State laws by local State agencies organized with plenary powers to carry out the delegated functions given it by the legislature.

3. SAME—DELEGATION OF POWER—ALTERATION OF BOUNDARIES.
   The legislative power to alter school district boundaries may be delegated to subordinate authorities (CLS 1956, §§ 340.461–340.465, as amended by PA 1957, No 135).

4. SAME—ALTERATION OF BOUNDARIES.
   The legislature provided sufficient standards in the statutory provisions for the detachment of territory from one school district and attachment thereof to another in requiring that the territory be contiguous to the district to which it was to be attached, in requiring that designated parties may request such action, that approval of the electors at an annual or special election be given, prescribing the notice to be given of the meeting of the county board of education at which

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REFERENCES FOR POINTS IN HEADNOTES

[1] 37 Am Jur, Municipal Corporations § 107.
[2] 47 Am Jur, Schools §§ 6–8.
[3–5] 47 Am Jur, Schools §§ 18, 19.
[3] Discretion of administrative officers as to changing boundaries of school district. 65 ALR 1523, 135 ALR 1096.
[6–8] 47 Am Jur, Schools § 23.
[9] 14 Am Jur, Costs § 91.

the matter was to be considered, filing of map showing in detail the new boundaries, and for an equitable payment for the taking of property, and for an accounting (CLS 1956, §§ 340.461–340.465, as amended by PA 1957, No 135).

5. SAME—ALTERATION OF BOUNDARIES—TRANSFER OF PROPERTY—EQUITABLE PAYMENT.

The determination of equitable payment by a county board of education or joint boards in requiring district to which territory is attached to pay for real or personal property transferred to it would require the exercise of its discretion gained through its business experience, time in the community, and knowledge of property values, and an abuse of such discretion would be subject to judicial review (CLS 1956, § 340.465).

6. SAME—APPROVAL OF ANNEXATION—EQUAL PROTECTION OF LAW.

It was not a denial of equal protection of the laws for the legislature to accord the right of approval of the school tax electors in school district from which detachment of area is sought before annexation may become effective and not accord the school tax electors of the district to which it is to be attached the same right, since the electors in neither district have an absolute right to vote on the annexation question (US Const, Am 14; Mich Const 1908, art 2, § 1; CLS 1956, § 340.461, as amended by PA 1957, No 135).

7. SAME—ANNEXATION—APPROVAL—PARTIES.

A school district is not a proper party to raise the question of whether or not its residents have the right to vote on the transfer of territory in an annexation proceeding, since it is an agency of the State government and not in a position to attack its parent, such right, if existing at all, existing in the voters and not in the school district (CLS 1956, § 340.461, as amended by PA 1957, No 135).

8. SAME—ANNEXATION—REVIEW BY STATE BOARD OF EDUCATION.

Contention that State board of education had not actually considered the appeal to it from action taken by joint county boards of education in attaching property to plaintiff district and requiring it to make a payment for certain property therein *held*, without merit under record presented.

9. COSTS—PUBLIC QUESTION—SCHOOL DISTRICTS—ANNEXATION.

No costs are allowed in proceeding to review annexation of territory by joint county boards of education to plaintiff district, public questions being involved (CLS 1956, §§ 340.461–340.465, as amended by PA 1957, No 135).

Appeal from State Board of Education. Submitted April 4, 1962. (Docket No. 45, Calendar No. 49,460.) Decided September 10, 1962.

Certiorari by the School District of the City of Lansing against the State Board of Education to review approval of action taken by joint county boards of education transferring a portion of Community school district to Lansing school district. Affirmed.

Joseph W. Planck, for plaintiff.

Frank J. Kelley, Attorney General, *Eugene Krasicky,* Solicitor General, *Gerald J. O'Reilly,* Assistant Attorney General, for defendant.

Amici Curiae:

Leo A. Farhat, Prosecuting Attorney, and *John Robert Dethmers,* Civil Assistant, for Alton J. Stroud, Ingham County Superintendent of Schools.

Cummins, Butler & Hovey (*James R. B. Hovey,* of counsel), for Community School, Ingham and Clinton Counties.

KAVANAGH, J. The school district of the city of Lansing appeals on leave granted from the approval by the State board of education of a transfer of property from a community school district located partially in DeWitt township, Clinton county, and partially in Lansing township, Ingham county. The area involved is located just north and east of the city of Lansing.

The community school district of that area petitioned the joint county boards of education under

the school code of 1955[1] for a transfer to the school district of the city of Lansing of that portion of Community school district located west of Coolidge road as it runs north and south through its school district.

The joint county boards of education of Ingham, Eaton, and Clinton counties heard the petition and on May 2, 1961, granted the transfer, requiring and exacting a payment from the school district of the city of Lansing of the sum of $29,471 as payment for properties it would receive by the transfer.

The school tax electors of the community district approved the transfer, as required by the school code.

Appeal was taken to the State board of education by the school district of the city of Lansing. A hearing was held and at the conclusion of the taking of testimony and arguments the State board of education approved the transfer, made specific findings of fact, and approved the payment of the sum of money for the property.

Plaintiff school district raises the following questions:

1. Are the sections of the school code dealing with transfer of property between districts unconstitutional in that they provide no standards which the county board or the joint boards and the State board of education shall follow in the transfer of school property to another school district?

2. Are the same sections of the school code unconstitutional for failing to provide a standard to determine an equitable payment by the school district where a transfer of property is made?

3. Is section 461 of the school code unconstitutional as denying to plaintiff the equal protection of the laws, in that it grants a vote on the question

[1] CLS 1956, § 340.1 *et seq.*, as amended (Stat Ann 1959 Rev § 15.3001 *et seq.*).—REPORTER.

of transfer of territory to the district from which detachment is made, while denying a vote to the district to which the territory is transferred?

4. Did the State board of education actually consider the appeal?

Unlike the delegation of other powers by the legislature to local governments, education is not inherently a part of the local self-government of a municipality except insofar as the legislature may choose to make it such. Control of our public school system is a State matter delegated and lodged in the State legislature by the Constitution. The policy of the State has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies organized with plenary powers to carry out the delegated functions given it by the legislature.

We are concerned here with sections 461 through 465 of the school code of 1955[2] dealing with transfer

[2] "Sec. 461. The county board of education may, in its discretion, detach territory from 1 district and attach it to another when requested to do so by resolution of the board of any district whose boundaries would be changed by such action, or when petitioned by not less than 2/3 of the resident owners of the land to be transferred. The county board of education shall take final action in regard to the resolution or petition within a period of 60 days of the receipt of the resolution or petition. Only territory contiguous to a district may be transferred. Whenever the latest available taxable valuation of the area to be detached is more than 10% of the latest available taxable valuation of the entire school district from which it is to be detached, the action of the county board of education directing such detachment shall not be valid unless approved, at an annual or special election called for that purpose in the district from which the detachment is to be made, by an affirmative vote of a majority of the school tax electors of the district, voting thereon." CLS 1956, § 340.461, as amended by PA 1957, No 135 (Stat Ann 1959 Rev § 15.3461).

"Sec. 462. The county superintendent of schools shall give at least 10 days' notice of the time and place of the meeting of the county board of education and of the proposed alteration in school district boundaries to be considered at said meeting, by posting such notice in at least 5 public places in each of the districts whose territory may be affected by such alteration and by publication at least once prior to such meeting in a newspaper of general circulation in the territory of the affected districts." CLS 1956, § 340.462 (Stat Ann 1959 Rev § 15.3462).

of territory between school districts.

Plaintiff school district does not challenge the authority of the legislature, subject always to constitutional restrictions, to organize and control school districts in the State, including its power to provide for the alteration of boundaries of school districts. It agrees that the legislative power to alter school district boundaries may be delegated to subordinate authorities. Plaintiff merely says that no standard or yardstick has been provided for the guidance of the subordinate authority. Plaintiff school district then proceeds to review

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"Sec. 463. Whenever the territory of districts the boundaries of which would be affected by the proposed alteration extends into 2 or more counties, or whose boundaries as a result of the proposed alteration would extend into 2 or more counties, the county boards of education of all such counties shall meet jointly and sit as a single board to consider and act upon the request for the transfer of territory. The resolution or petition for the transfer of territory, as set forth in section 461 of this act, may be addressed to and filed with the county board of any one of such counties and it shall then be the duty of the county superintendent of schools of such county to call the joint meeting of the affected county boards and to give the notice of such meeting as set forth in section 462 of this act. At such joint meeting of the county boards of education, they shall elect 1 of their members chairman and another secretary thereof." CLS 1956, § 340.463, as amended by PA 1957, No 135 (Stat Ann 1959 Rev § 15.3463).

"Sec. 464. When the county board of education or the joint county boards of education have approved alterations in the boundaries of school districts, such board or joint boards shall cause a map to be prepared showing in detail the boundaries of the affected districts before the alteration in boundaries and the boundaries of territory annexed or detached. A copy of such map bearing the certification of the county superintendent of schools or the secretary of the joint boards shall be filed with the secretary of each affected district and with each affected township supervisor or city assessor." CLS 1956, § 340.464 (Stat Ann 1959 Rev § 15.3464).

"Sec. 465. In the resolution ordering the transfer of property, the county board or joint boards shall determine the effective date of such transfer, which shall not be less than 10 days from the date of the resolution, and shall determine whether any personal property of a school district is to be transferred and, when any real property owned by a school district is transferred to another district, determine an equitable payment for the taking of such property. The board or joint boards may require an accounting from the affected districts and, for the purpose of making its determination, may adjourn from time to time or subject to the call of the president of the board or chairman of the joint boards." CLS 1956, § 340.465 (Stat Ann 1959 Rev § 15.3465).

cases from other States construing their respective statutes. We find no merit in the contentions of plaintiff school district.

The legislature provided the county board of education may, in its discretion, when requested to do so by resolution of the board of any district whose boundaries would be changed by such action, or when petitioned by not less than 2/3 of the resident owners of land to be transferred, detach territory from one district and attach it to another.

The legislature further provided that only territory contiguous to a district may be transferred.

The legislature provided that when the latest available taxable valuation of an area to be detached is more than 10% of the latest available taxable valuation of the entire school district from which it is to be detached, the action shall not be valid until approved at an annual or special election for that purpose in the district from which the detachment is to be made.

The legislature also provided that the county superintendent of schools shall give at least 10 days' notice of the time and place of the meeting of the county board of education and of the proposed alteration of school district boundaries to be considered at said meeting.

The legislature further provided that whenever the territory of districts the boundaries of which would be affected by the proposed alteration extends into 2 or more counties, or whose boundaries as a result of the proposed alteration would extend into 2 or more counties, the county boards of education of all of such counties shall meet jointly and sit as a single board to consider and act upon the request for transfer. The legislature provided how such a petition under those circumstances may be presented.

The legislature provided that when the county board or joint county boards have approved alterations in the boundaries, such board or boards shall cause a map to be prepared showing in detail the new boundaries of the affected districts and cause a copy of such map to be filed with the secretary of each affected district and with each affected township supervisor or city assessor.

The legislature also provided that in the resolution ordering the transfer of property, the county board or joint boards shall determine the effective date of such transfer, which shall not be less than 10 days from the date of the resolution. It provided the county board or joint boards shall determine whether any personal property is to be transferred and, when any real property owned by a school district is transferred to another district, determine an equitable payment for the taking of such property. It provided that the board or joint boards may require an accounting from the affected districts and, for the purpose of making its determination, may adjourn from time to time subject to the call of the president of the board or chairman of the joint boards.

The legislature certainly expected the board or joint boards, in determining "equitable payment" for property taken, would exercise its discretion gained through its business experience, time in the community, and knowledge of property values, all gained as a result of experience in educational matters. Any abuse of the board's discretion would be subject to judicial review.

It should be apparent that while the legislature may not have taken care of every conceivable possibility in delegating this administrative function to its agent, it has set up sufficient standards for the guidance of the administrative body so as to meet all constitutional tests.

The third question raised by plaintiff school district is whether section 461 of the school code of 1955 is unconstitutional as denying to plaintiff the equal protection of the laws in that it grants a vote on the question of transfer of territory to the district from which detachment is made, while denying a vote to the district to which the territory is transferred.

Plaintiff does not question that the authority to alter boundaries may be delegated without the consent of the inhabitants of the territory annexed or the municipality to which it is annexed, or even against its express protest. Its claim is that to deny one district a vote with reference to the transfer and permit a vote in the other district is to deny the equal protection of the laws contrary to the provisions of both the State and Federal Constitutions.[3] These objections have been disposed of against plaintiff's contention by the following decisions, which we content ourselves with citing: *Hunter* v. *City of Pittsburgh,* 207 US 161 (28 S Ct 40, 52 L ed 151); *Attorney General, ex rel. Battishill,* v. *Springwells Township Board,* 143 Mich 523.

In order to deny the equal protection of the laws contrary to the provisions of the State and Federal Constitutions, it would be necessary for the electors in plaintiff school district to have an absolute right to vote on the annexation question. The above mentioned decisions clearly indicate they do not have such a right. The legislature is the only body that could give plaintiff school district such a right. This it has omitted. Not being entitled to the right, the fact that it is given to one district and not to the other does not deny the equal protection of the

[3] US Const, Am 14, § 1; Const (1908), art 2, § 1.—REPORTER.

laws contrary to the provisions of the State and Federal Constitutions.

We do not believe plaintiff is a proper party to raise the question of whether or not its residents have the right to vote on the transfer. This right, if existing at all, would exist in the voters and not in the school district. Plaintiff school district is an agency of the State government and is not in a position to attempt to attack its parent. The question of how and where individuals would vote is a question between the individuals themselves and the government.

The remaining question is whether the State board of education actually considered the appeal. Examination of the record of this case discloses a substantial amount of testimony on the part of members of the Lansing school board and arguments of its attorney as well as the attorney for defendant. The record contains the amended order dated July 19, 1961, reciting that the State board of education had heard sworn testimony of witnesses and oral arguments, and being fully advised in the premises made certain findings of fact. This indicates the State board gave serious consideration before disposing of the questions involved. We find no merit in plaintiff school district's contention in this regard.

The action of the State board of education is affirmed. Public questions being involved, no costs are allowed.

Carr, C. J., and Kelly, Black, Kavanagh, Souris, and Otis M. Smith, JJ., concurred.

Dethmers and Adams, JJ., did not sit.

KALAMAZOO MUNICIPAL UTILITIES ASSOCIATION *v.* INGHAM CIRCUIT JUDGE.

CONSUMERS POWER COMPANY *v.* PUBLIC SERVICE COMMISSION.

1. PUBLIC SERVICE COMMISSIONS—REVIEW OF RATE ORDERS—PUBLIC UTILITIES—INTERVENTION.

   A party dissatisfied with an order of the public service commission in a proceeding involving rates to be charged by a public utility may review such order by chancery suit in the Ingham circuit court against the commission as a defendant, participation by other interested parties being limited to the grant of leave to intervene in the discretion of the trial court (CLS 1956, § 462.26).

2. SAME—INTERVENTION ON REVIEW—DISCRETION OF COURT.

   Trial court's denial to unincorporated association of consumers of electric power of leave to intervene in suit by public utility company against public service commission to review order as to rates to be charged consumers of electric power *held*, not reviewable, where there is no showing of an abuse of the discretion lodged by statute in the trial court, notwithstanding plaintiff had been permitted to participate in the proceeding before the commission (CLS 1956, § 462.26).

3. COSTS—STATUTES—PUBLIC UTILITIES—INTERVENTION IN REVIEW OF COMMISSION'S ORDERS.

   No costs are allowed in certiorari to review denial of leave to intervene in chancery suit to review order of public service commission, a statutory question being involved (CLS 1956, § 462.26).

REFERENCES FOR POINTS IN HEADNOTES

[1] 43 Am Jur. Public Utilities and Services § 224 *et seq.*
[2] 43 Am Jur, Public Utilities and Services § 230.

Appeal from Ingham; Salmon (Marvin J.), J. Submitted January 11, 1962. (Docket No. 75, Calendar No. 48,806.) Decided September 10, 1962.

In a chancery action by Consumers Power Company to vacate and set aside an order of the Michigan Public Service Commission, the Kalamazoo Municipal Utilities Association, an unincorporated association, filed petition for leave to intervene, which was denied. Following proceedings instituted in mandamus against Marvin J. Salmon, Ingham County Circuit Judge, the Kalamazoo Utilities Association was granted leave to appeal in the nature of certiorari. Denial of leave to intervene affirmed.

Edward J. Ryan, for plaintiff Kalamazoo Municipal Utilities Association in certiorari for intervention.

Don T. McKone, Maxwell F. Badgley and *Harold P. Graves,* for plaintiff Consumers Power Company in chancery proceedings.

PER CURIAM. On application to this Court, leave to appeal was granted appellant from an order denying its petition for leave to intervene in proceedings in the Ingham county circuit court, in chancery, between Consumers Power Company and the public service commission. The circuit court proceedings were commenced pursuant to the provisions of CLS 1956, § 462.26 (Stat Ann 1961 Cum Supp § 22.45), the statutory procedure provided for review of the commission's actions.

The commission's order which is the subject matter of the statutory appeal in the trial court below requires Consumers Power Company to charge a very substantial portion of its cost of acquiring the municipal electric plant of the city of Kalamazoo

against its stockholders' equity instead of permitting it to be treated as an operating expense recoverable in the future by increased rates to be charged its customers.

Appellant, an unincorporated association of electric power consumers and ratepayers in the city of Kalamazoo, had been granted the right by the commission to participate, and it did participate, in the proceedings before the commission which resulted in the order from which the statutory appeal to circuit court was taken by Consumers Power Company. When the association sought leave to intervene in the circuit court, the circuit judge denied it the right to do so. It is his denial of the right to intervene in the statutory appeal proceedings in the circuit court which is sought to be reviewed here.

Appellant, in effect, asserts an absolute right to intervene in the statutory appeal proceedings in the circuit court. It bases this claimed right on the fact that it was allowed by the public service commission to participate in the administrative proceedings before the commission and should, therefore, be allowed to participate in the judicial review of those proceedings. It also claims that, as an association of consumers of electric power, it is a "party in interest," within the meaning of the above-cited statute and, as such, itself could have invoked the statutory appeal procedures had it been dissatisfied with the commission's order and, therefore, has the right to participate in such appellate procedures when invoked by another party.

CLS 1956, § 462.26 (Stat Ann 1961 Cum Supp § 22.45), sets forth the procedure by which appeals may be taken from orders of the public service commission. It provides that the party dissatisfied with any such order commence suit in chancery in Ingham circuit against the commission as defendant and that the commission be served with a subpoena and a copy

of the complaint. It specifically also provides for participation by other interested parties in the following language: "on leave of court any interested party may file an answer to said complaint." Nothing in the statute accords an absolute right to participate except to the dissatisfied party in interest who institutes suit and to the commission. Any other "interested party" may be accorded the right to participate, but only upon exercise of the chancellor's discretion by grant of leave therefor.

Denial of such leave, like other discretionary judicial actions, is reviewable by this Court only upon a showing of abuse of such judicial discretion. *Spalding* v. *Spalding,* 355 Mich 382, 384, 385. No such showing having been made by appellant, we cannot grant the relief it requests. Affirmed. No costs, a statutory question being involved.

CARR, C. J., and DETHMERS, KELLY, BLACK, and SOURIS, JJ. concurred.

KAVANAGH, J., concurred in result.

OTIS M. SMITH and ADAMS, JJ., did not sit.

CARRIER CORPORATION v. CENTRAL STATION AIR CONDITIONING CO.

1. JUDGMENT—PAROL EVIDENCE—EXCLUSIVE FRANCHISE AGREEMENT —INFORMAL COLLOQUY.

   Judgment on trial court's own motion dismissing defendant's cross declaration for damages for breach by plaintiff of what defendant claimed was an exclusive franchise agreement, based on application of parol evidence rule during an informal colloquy between court and counsel before defendant had made a formal opening statement, before any motion for such purpose by plaintiff, and before any proofs were offered, *held*, improvident and reversible error, especially where defendant's claims did not all depend upon first establishing an exclusive franchise agreement and the written agreement could be construed, possibly, as a grant of an exclusive right without resort to inadmissible parol evidence.

2. CONTRACTS—DISTRIBUTOR'S AGREEMENT FOR SALE OF AIR-CONDITIONING EQUIPMENT—CONSTRUCTION—EXCLUSIVENESS.

   The reservation, in distributor's franchise agreement, of the manufacturer of air-conditioning equipment of the right to make sales to governmental units, utilities, carriers, to manufacturers who install the equipment in their own product, and to special accounts and industries designated therein but otherwise giving the distributor the right to a commission on sales in its territory even when other distributors effected the sale, permits a fair inference that the distributor was being granted the exclusive right to make all other sales in the designated territory.

Appeal from Wayne; Murphy (Thomas J.), J. Submitted June 7, 1962. (Docket No. 19, Calendar No. 49,332.) Decided September 10, 1962.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 23 Am Jur, Franchises §§ 17, 37.

Assumpsit by Carrier Corporation, a Delaware corporation, against Central Station Air Conditioning Co., a Michigan corporation, for materials sold and delivered, with cross declaration by defendant claiming damages arising from breach of dealer's agreement. Judgment for plaintiff. Defendant appeals from dismissal of cross declaration. Reversed and remanded.

Miller, Canfield, Paddock & Stone (*George E. Bushnell, Jr., Richard B. Gushee* and *George E. Parker, III,* of counsel, and *James H. Greene,* of Syracuse, New York, of counsel), for plaintiff.

Seymour F. Posner and *Norman L. Zemke,* for defendant.

SOURIS, J. Plaintiff, a manufacturer of air conditioning and heating equipment, sued defendant in assumpsit to recover the cost of equipment purchased from it by defendant. A judgment was entered in plaintiff's favor from which no appeal has been taken. Defendant does, however, appeal from a judgment of no cause entered on the trial court's own motion on defendant's cross declaration for damages for breach by plaintiff of what defendant calls an exclusive franchise agreement.

Before impaneling the jury to hear proofs on defendant's cross declaration,* the trial court asked defendant's counsel for an explanation of the theory of his cross declaration so that the court could advise the jury of the nature of the case when it was impaneled. In the resulting colloquy, defendant's counsel claimed that the written agreement between the parties, a copy of which had been attached to the

* Defendant conceded much of plaintiff's original claim and proofs were taken as to the balance thereof, trial by jury having been waived as to plaintiff's claim only.

cross declaration, was ambiguous and incomplete and that he intended to offer evidence of prior and contemporaneous oral agreements to prove that the franchise was an exclusive one. The trial judge took the position that parol evidence could not be admitted for the purpose suggested by defendant and, on the assumption that defendant's whole claim depended upon its first establishing that it held an exclusive franchise from plaintiff, entered judgment of no cause against defendant.

We cannot condone such precipitous summary disposition of lawsuits. This case was disposed of by final judgment on the basis of the parol evidence rule applied during an informal colloquy between court and counsel before any proofs were offered,—indeed before appellant's opening statement was made formally and even before a demanded jury was impaneled. It was not based upon a timely motion striking at the heart of the cross declaration, but was entered on the court's own initiative.

It seems apparent to us, from our review of the proceedings below, that plaintiff's counsel did not move for dismissal or summary judgment before trial for at least 2 reasons: (1) the cross declaration discloses on its face that defendant's claims did not all depend upon its success in first establishing an exclusive franchise agreement, and (2) the written agreement itself could be construed, possibly, as a grant of exclusive right without resort to inadmissible parol evidence. For these same reasons we have concluded the judgment was improvident and must be set aside.

The cross declaration seeks damages for several alleged breaches of the agreement between the parties not dependent in any way upon the nature of the franchise granted by the written agreement. At least as to that portion of defendant's claims, therefore, it should have been afforded an opportunity to

present its proofs even if it could not prove it had an exclusive franchise.

But the trial court was wrong also in its assumption that an exclusive franchise could be proved only by use of parol evidence. It is quite unlikely that that error would have been committed had the trial been allowed to proceed with evidentiary questions raised and decided during its course in the normal fashion. It appears from the transcript of proceedings below that the trial judge assumed that the written agreement was silent on the subject of the nature of the franchise,—that is, whether it was exclusive or nonexclusive,—in which event he would have to construe it as granting a nonexclusive right, the parol evidence rule barring evidence of a contrary prior or contemporaneous agreement. Inexplicably, counsel did not advise him that there were terms in the agreement from which an exclusive franchise could be inferred without necessity for reliance upon parol evidence.

Paragraph 6 of the agreement, entitled "Reserved Selling Privilege", reads as follows:

"6. All rights without limitation are and shall be reserved to Carrier to sell within distributor's territory either direct or through others any products without any obligation to pay distributor any commission or other charges on the following sales:

"(a) To the United States or any State government or any municipal government, or any department or bureau thereof, any public utility, any interstate or intercity buyers, or to any buyers for installation on shipboard and for passenger vehicles and for express or freight carrying vehicles.

"(b) To manufacturers who install such equipment in or with their product.

"(c) To persons, firms or corporations upon the terms and conditions now or hereafter set forth in what is designated by Carrier as 'special accounts and industries.' ".

By that provision plaintiff Carrier reserved the right to make sales within defendant's designated territory, directly or through others, to any of the customers described in subparagraphs (a), (b), or (c). Its reservation of the right to make *only* such sales, directly or through others, certainly permits a fair inference that defendant was being granted the exclusive right to make all other sales within the designated territory.

Paragraph 11 of the "appendix", attached to the basic agreement, provides:

"11. Dealer shall limit the sale of Carrier products to the territory set forth in (5) of this appendix. In exceptional cases where a Carrier dealer sells a Carrier product for installation outside his franchised territory, then the dealer making the sale will, before accepting the order, secure from the Carrier dealer in whose territory the installation is to be made, an approval and agreement as to making the sale, the installation, providing for service, and the distribution of profit on such sale, and the dealer agrees that in case he makes such a sale without securing said dealer's approval, he will pay to said dealer, upon demand, 70% of the gross profit on such sale. This provision shall not apply in case product sold hereunder is a bona fide installation in selling dealer's territory and later removed or resold by the purchaser for use in another territory.

"For the purpose of this agreement, the gross profit on any sale of Carrier products is the difference between the net product cost to dealer, exclusive of installation expense, and the selling price to the customer.

"Any disputes between dealers relating to such sales shall be submitted in writing to the Carrier district office in charge of dealer's territory and its decision hereon shall be binding and final. All claims for division of profits must be made to Carrier within 6 months from date of initial installation."

That provision also permits an inference that the franchise granted was exclusive. Its meaning can be restated as follows: that defendant was to have the exclusive right to sell in his specified territory and that he could not sell in any other territory; that if others sold in defendant's territory, they would have to have his advance agreement on the distribution of profit on such sale; that failing such prior agreement, 70% of the gross profit on such sale would be paid to the franchise holder in whose territory the sale was made; and that disputes between franchise holders relating to sales within their territories would be resolved by plaintiff.

We conclude that the trial court erred in depriving defendant of its right to proceed to trial on the erroneous ground that it would be barred by the parol evidence rule from establishing its claim that it held an exclusive franchise from plaintiff.

Judgment reversed and remanded for further proceedings. Costs to appellant.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, OTIS M. SMITH, and ADAMS, JJ., concurred.

PEOPLE v. WRIGHT.

1. SEARCHES AND SEIZURES—REMOTENESS OF INFORMATION.
   A search warrant may not properly be issued based only on facts disclosed by affidavit as they existed 6 days earlier.

2. SAME—GAMING—SALE OF LIQUOR WITHOUT LICENSE.
   Seizure of liquor and gambling paraphernalia under warrant issued solely upon an affidavit as to conditions existing 6 days theretofore *held*, improper, since a search warrant must issue, if at all, upon an existing cause, hence, informations charging defendant with maintaining and operating a gaming room and a place where liquor was served without a license were properly quashed.

Appeal from Jackson; Simpson (John), J. Submitted June 14, 1962. (Docket No. 56, Calendar No. 49,603.) Decided September 10, 1962.

George Wright was charged with maintaining and operating a gaming room and a place where liquor was served without a license. Motion granted quashing informations. The people appeal. Affirmed.

Frank J. Kelley, Attorney General, *Eugene Krasicky,* Solicitor General, *James C. Fleming,* Prosecuting Attorney, *William C. Ghesquiere,* Assistant Prosecuting Attorney, for the people.

Owen Dudley, for defendant.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 47 Am Jur, Searches and Seizures § 26.
[2] 24 Am Jur, Gaming and Prize Contests § 57.
30 Am Jur, Intoxicating Liquors § 465.

SOURIS, J. The question presented in this case is whether a search warrant properly may be issued based only upon facts disclosed by affidavit as they existed 6 days earlier.

Defendant was charged with maintaining and operating a gaming room and a place where liquor was served without a license. The police seized liquor and gambling paraphernalia in a search of the premises authorized by warrant. Defendant moved to quash the informations based in part upon the claim that the affidavit upon which the search warrant was issued referred to facts too remote in time from the date the warrant was issued. Judge Simpson, of the Jackson circuit, granted defendant's motion and the people, on leave granted, now appeal.

Walter Powell made an affidavit that on February 18, 1961, he entered defendant's premises, known as the "Big Four Club" or the "Child's Welfare Building," and purchased alcoholic liquor and observed others doing the same and gambling on the premises. The affidavit was submitted to a justice of the peace, in support of a request for a search warrant, on February 24th. With that affidavit there was submitted another by a police officer in which it was stated that the police officer had investigated Powell's complaint and had conducted a surveillance of the premises, but that affidavit does not contain any factual statement of the results of such investigation or surveillance. In short, the justice of the peace had nothing before him upon which he could conclude that the situation disclosed by Powell's affidavit to have existed on February 18th continued to exist during the intervening period to the date request was made for issuance of the search warrant.

Judge Simpson was correct in quashing the information. In *People* v. *Chippewa Circuit Judge*, 226 Mich 326, 328, this Court said:

"The right to issue a search warrant rests upon facts existing at the time the showing is made for the warrant. This is made clear by the Constitution and every statutory provision with reference to search warrants. If Mr. Burdeno, in his dwelling, sold Mr. Forsyth a pint of whisky on April 15, 1923, he may be prosecuted for doing so, but such sale alone afforded no ground for a finding of reasonable cause to believe that on June 21, 1923, whisky 'is being kept, possessed and stored (in such dwelling) for the purpose of being sold, furnished or given away as a beverage.' Cause 66 days old, without any intervening facts disclosing continuing cause, will not justify a search warrant. A search warrant must issue, if at all, upon an existing cause. A search warrant is no general arm for ferreting out crime, but a special proceeding, based on present cause, hedged by strict constitutional provisions, must be speedily executed and cannot be issued on a showing of facts existing over 60 days before and not in any way brought down to the date the warrant is issued."

People v. *Chippewa Circuit Judge* involved a case in which the search warrant issued was based on facts 66 days old. In *People* v. *Mushlock,* 226 Mich 600, we said, at p 602:

"There is no hard and fast rule as to how much time may intervene between the obtaining of the facts and the making of the affidavit upon which the search warrant is based, but it may be stated that the time should not be remote. This question was considered in the opinion filed March 5, 1924, in the case of *People* v. *Chippewa Circuit Judge, ante,* 326. We think that case is controlling of the instant case, and that the search warrant was improvidently issued."

In the case at bar, the people erroneously rely upon the case of *People* v. *Willis,* 243 Mich 164. In that case the affidavit involved alleged that it was

based upon observations made by the affiant *within* 4 days next preceding the date of the affidavit. *People* v. *Brown,* 240 Mich 59, is also cited by the people in this case in support of their contention. In that case we did say that a lapse of 4 days was not too remote. The opinion does not indicate whether or not there were other facts presented to establish the continuing nature of the acts referred to in the affidavit. In any event, the proper rule is stated in *People* v. *Chippewa Circuit Judge, supra,* that no warrant may issue except upon a showing that facts exist at the time of issuance to justify such a "special proceeding * * * hedged by strict constitutional provisions."

Powell's affidavit related facts 6 days stale. The factual situation presented by that affidavit, without more, was too remote to justify the issuance of a search warrant. We are left to surmise what information, if any, the police obtained from their intervening investigation and surveillance of defendant's premises. Failure to state what was observed during the investigation and surveillance described in the police officer's affidavit, permits an inference that nothing was observed to indicate that the offenses allegedly committed on February 18th continued to be committed at the time request was made on February 24th for the search warrant.

No other questions sought to be raised in this appeal, and which were considered by the trial judge, need be decided in the light of the foregoing.

Affirmed.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH and OTIS M. SMITH, JJ., concurred.

ADAMS, J., did not sit.

CRIMANDO *v.* PACIFIC NATIONAL FIRE INSURANCE COMPANY.

1. INSURANCE—PROOF OF LOSS—OPTION TO REPAIR OR PAY—APPOINTMENT OF UMPIRE.

   The filing by the insured of a petition for the selection of an umpire did not operate, of itself, to suspend the right of the insurer under fire insurance policy to exercise its 30-day option after receipt of proof of loss to make its election to repair the damaged property or pay to the insured the amount of the loss (CLS 1956, § 500.2832).

2. SAME—PROOF OF LOSS—OPTION TO REPAIR OR PAY—APPOINTMENT OF UMPIRE.

   Insurer, under standard fire insurance policy containing option to pay for loss or repair at any time within 30 days following receipt of proof of loss, which did not exercise the option within such 30-day period was not in a position to complain about appointment of umpire for appraisal of loss, where, although petition for appointment was filed on twelfth day after proof of loss was received by insurer, the order of appointment was made 34 days after proof of loss (CLS 1956, § 500.2832).

BLACK, J., for dismissal of appeal.

Appeal from Wayne; Neuenfelt (Lila M.), J. Submitted June 7, 1962. (Docket No. 20, Calendar No. 49,449.) Decided September 10, 1962.

Petition by Leo Crimando and Rose Crimando against Pacific National Fire Insurance Company, a

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 29A Am Jur, Insurance § 1700.
Time within which insurer must make election to rebuild, repair, or replace insured property. 29 ALR2d 720.

foreign corporation, for appointment of an umpire in connection with adjustment of fire loss. From order appointing umpire, defendant appeals. Affirmed.

Philip Weiss and *Jesse R. Bacalis,* for plaintiffs.

Adams & Wade (*Ralph H. Adams,* of counsel), for defendant.

OTIS M. SMITH, J. This is an appeal from an order appointing an umpire. On May 18, 1961, premises owned and occupied by plaintiffs and appellees were damaged by fire. The defendant and appellant insurance company had in full force and effect on that date a certain standard form fire insurance policy. On June 29, 1961, the company received an appraisal notice, together with a proof of loss, from the insured. The company acknowledged receipt of the proof of loss and the appraisal notice on July 6, 1961. At the same time the company rejected the request of the insured to submit the fire loss controversy to appraisal. Thereafter, the insured filed a petition for the selection of an umpire in the circuit court for the county of Wayne, to which an answer was filed on July 20, 1961. On August 2, 1961, an order was entered by the circuit judge appointing an umpire, from which order the company now takes its appeal.

The fire insurance policy which covered the premises is known as the Michigan standard policy and is set forth in CLS 1956, § 500.2832 (Stat Ann 1957 Rev § 24.12832). The crucial provision of said contract reads as follows:

"It shall be optional with this company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving

notice of its intention so to do within 30 days after the receipt of the proof of loss herein required."

Appellant argues that the order appointing the umpire was premature in that the company had 30 days from the date of service of proof of loss to make its election either to repair the damaged property or to pay to the insured the amount of the loss. The company points out that the proof of loss having been received on June 29, 1961, it had until July 28, 1961, to exercise its option. The appendix shows that the insured filed their petition on July 11, 1961, and that an order was entered on August 2, 1961. It is not claimed, nor does the record disclose, that the company indicated, in any way, its exercise of the option within the 30-day period permitted under the terms of the policy. The filing of the petition for the selection of an umpire by the insured did not operate, of itself, to suspend the exercise of the option on the part of the company. Not having complied with the terms of its policy, appellant is not now in a position to attack successfully the order of August 2d.

It is not necessary to decide other questions raised, including whether or not the order appointing an umpire, under the circumstances presented, is appealable.

Affirmed, with costs to appellees.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, and ADAMS, JJ., concurred with OTIS M. SMITH, J.

BLACK, J. (*for dismissal of appeal*). I would dismiss this appeal for want of application and grant of leave, as I would have done when plaintiffs' first motion to dismiss it came to abortive consideration last December. Even under the amendment of section 1 of Court Rule No 60 (1945), effective Decem-

ber 1, 1961 (364 Mich xiv),* appeal from an order such as the majority reviews here may not as before be claimed of right. The majority opinion exhibits full well that here, again, too much of the Court's time is wasted upon trifling and nonconsequential matters of an interlocutory nature, all with deleterious effect upon the really important task the Constitution has assigned us, that is, the making of stable and carefully considered legal precedents.

The failure of an appellate court to enforce its own rules means there are no rules excepting as variable discretion and the day-to-day state of judicial disposition may incline that court. Such, manifestly, is the oft-deplored government by men rather than law. For direct illustration, examine our record of indecision shown in *Lee* v. *Employment Security Commission,* 346 Mich 171, 179, 180 and *Rowe* v. *State Highway Commissioner,* 366 Mich 151. Now, in the case before us, an even more censurable illustration comes as it must to exhibition in our reports.

Judge Neuenfelt's order of August 2, 1961, exhibits the judicious discretion of a statutory minister only and prejudices no right this insurer may not plead defensively and issuably when and if its treasury is threatened by suit on the policy; a suit plaintiffs could not start and cannot start "unless all the requirements of this policy have been complied with," including the requirement of appraisal with participation of a duly appointed umpire. Now, all this in focus, consider what these thoroughly whipsawed plaintiffs are up against on account of our failure to timely dismiss defendant's said appeal on the 2 separate occasions when plaintiffs pleaded that we do so. The next to last of the "provisions, stipulations and agreements" set forth in the standard form

* See discussion of this question in *Bedwell* v. *Employment Security Commission,* 367 Mich 415, handed down herewith.

(CLS 1956, § 500.2832 [Stat Ann 1957 Rev § 24-.12832]) provides:

"*Suit.* No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

Plaintiffs' loss having been sustained May 18, 1961, and there having been no appraisal and so no award to date on account of defendant's unauthorized appeal, it seems to me that this Court owes plaintiffs a confession of error with token reference to that law of waiver and estoppel which bars a plea of limitation when conduct renders the plea inequitable. See *St. Matthews Lutheran Church* v. *United States Fidelity & Guaranty Co.*, 222 Mich 256, and *Scarborough* v. *Atlantic Coast Line R. Co.* (CCA 4), 178 F2d 253 (15 ALR2d 491), certiorari denied 339 US 919 (70 S Ct 621, 94 L ed 1343); also 34 Am Jur, Limitation of Actions, § 411, p 323.

I would dismiss defendant's appeal.

KAVANAGH, J. (*concurring*). I concur in the opinion of Justice OTIS M. SMITH. Our error occurred on October 5, 1961, prior to the amendment of section 1 of Court Rule No 60, effective December 1, 1961 (364 Mich xiv). By the adoption of such rule we impliedly agreed to sustain prior action of the Court.

ABSTRACT & TITLE GUARANTY COMPANY *v.* WILLIAMS.

1. PLEADING—AMENDMENT—LEAVE OF COURT.

   Plaintiff's pleading which contained matters occurring before the filing of the bill of complaint constituted such pleading an amended one rather than a supplemental pleading which latter required leave of court to file, and where the pleading was filed without leave of court after defendant's motion to dismiss had been filed but before answer, it was both proper and timely under pertinent statute and court rule (CL 1948, § 614.15; Court Rule No 26, § 1 [1945]).

2. APPEAL AND ERROR—QUESTIONS REVIEWABLE—RECEIPT OF AMENDED PLEADING.

   The Supreme Court declines to discuss whether or not defendant corporate appellant received copies of plaintiff's amended pleading, where there is nothing in the record to show that the question was raised in the trial court.

3. NOTICE—WAIVER—ORDER DENYING MOTION TO DISMISS.

   A waiver of notice of entry of an order denying a defendant's motion to dismiss was effected by the initialling by its attorney of approval of the order entered.

4. JUDGMENT—SETTING ASIDE DEFAULT—ATTORNEY AND CLIENT—CONFLICT OF INTEREST.

   Entry of order denying motion to set aside default against defendant-appellant *held,* not improper, where attorney who had filed motion represented he was appearing for both defendants disclosed at the hearing thereon that he had discovered a possible conflict of interest between the 2 defendants and elected to represent the other defendant, the circuit judge

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REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur, Pleading § 291 *et seq.*
[2] 3 Am Jur, Appeal and Error § 324.
[3] 37 Am Jur, Motions, Rules, and Orders § 31.
[4] 30A Am Jur, Judgments § 726.
[5, 6] 30A Am Jur, Judgments § 632.

adjourned the matter for 3 weeks, and, on the adjourned date, set the default aside as to one defendant but not as to defendant-appellant whose failure to appear at the adjourned hearing is not satisfactorily explained (Court Rule No 28, § 4 [1945]).

5. SAME—SETTING ASIDE DEFAULT—DISCRETION OF COURT.
Whether or not a defendant against whom a default has been entered is entitled to have the default set aside is within the discretion of the trial court (Court Rule No 28, § 4 [1945]).

6. SAME—SETTING ASIDE DEFAULT—DISCRETION OF COURT.
It was not an abuse of discretion on the part of the trial court to decline to set aside default entered against defendant-appellant, where, notwithstanding its present claim, it has a meritorious defense to plaintiff's action seeking rescission of title insurance policies, the circuit judge did not so find, and defendant had not traversed the significant allegations in plaintiff's bill constituting the gravamen of its complaint and has shown no reasonable excuse for failure to answer after having been served with a bill of complaint (Court Rule No 28, § 4 [1945]).

Appeal from Wayne; Fitzgerald (Neal), J. Submitted October 10, 1961. (Docket No. 47, Calendar No. 49,020.) Decided September 10, 1962.

Bill by Abstract & Title Guaranty Company, a Michigan corporation, against F. J. Williams and Flann, Inc., a Michigan corporation, to rescind title insurance policies. Motion by defendant Flann, Inc., to set aside default decree entered against it. Motion denied. Defendant Flann, Inc., appeals. Affirmed.

Miller, Canfield, Paddock & Stone, for plaintiff.

Gregory M. Pillon, for defendant.

OTIS M. SMITH, J. Flann, Inc., claims appeal from an order denying a motion to set aside a default decree rendered against it. The default of both

defendants was taken for failure to answer the plaintiff's bill of complaint seeking rescission of title insurance policies purchased for the defendants. For reasons enumerated below the trial judge set aside the default of defendant, F. J. Williams, but properly refused to accord the same relief to appellant, Flann, Inc.

Appellant argues 2 questions on appeal. First, that the default and the default decree were improperly taken, and second, that the circuit judge erred in refusing to set aside the default and the default decree against Flann, Inc.

With respect to the first question, appellant asserts that the trial judge permitted the plaintiff to file a supplemental pleading to his bill of complaint without first obtaining leave of court as required by CL 1948, § 614.15 (Stat Ann § 27.825).* This assertion is incorrect. The matters referred to in this pleading occurred before the filing of the bill of complaint; as such, it was an amended rather than a supplemental pleading. *Wood* v. *Truax,* 39 Mich 628; *Rennells* v. *Potter,* 198 Mich 49. Court Rule No 26, § 1 (1945), provides that a plaintiff may amend his bill of complaint at any time before answer, or within 15 days thereafter, without leave of court. "Within the provisions of this rule, a plaintiff may amend his declaration or bill of complaint without leave of court, whenever an objection is made either by answer or motion to dismiss before answer." Honigman, Michigan Court Rules Annotated, p 262. Flann, Inc., filed a motion to dismiss on April 22, 1960. An order denying said motion was entered July 6, 1960. Plaintiff filed its amended pleading June 30, 1960. The answer of appellant Flann, Inc., was not filed until September

* "Supplemental pleadings, showing matters arising since the original pleadings were filed, may be filed by either party by leave of court."

2, 1960. It was not necessary, under the circumstances, for plaintiff to obtain permission of the court before amending its complaint. *Coates* v. *Milner Hotels, Inc.,* 311 Mich 233; *Plastray Corporation* v. *Cole,* 324 Mich 433 (8 ALR2d 1199).

Appellant says "the mistake fatal to the plaintiff's proceedings is lack of proof of service of the bill of complaint upon Flann, Inc., the defendant-appellant, and also lack of proof of service showing when the amended bill of complaint was served on the defendant-appellant." The record shows in the return of service on the original summons that a copy of the summons and of the bill of complaint were served on Mary F. Pillon, resident agent for Flann, Inc. Apparently, appellant was not aware of the proof of service of the bill of complaint on file. As to whether or not appellant received copies of the amended pleading, there is nothing in the record to show that this question was raised below and we therefore decline to discuss it now. Appellant further claims error in that, allegedly, it did not receive notice of an order denying appellant's motion to dismiss made below. The record shows that appellant's attorney initialed his approval of the order entered. This constituted a waiver of notice. *Kirn* v. *Ioor,* 266 Mich 335, 337.

The second question raised is whether or not the circuit judge erred in refusing to set aside the default and default decree against Flann, Inc. Following entry of the order of default against both defendants, a motion was made by Max Chomsky, who indicated that he was appearing for both defendants, to set aside the default. This motion was filed on August 26, 1960. The motion was noticed for hearing and at the hearing Chomsky advised the circuit judge that he had discovered a possible conflict of interest between the 2 defendants and that he, therefore, had elected to represent only

one, F. J. Williams. On account of this assertion, the circuit judge adjourned the matter for 3 weeks. On the adjourned date Flann, Inc., did not appear. No satisfactory reason appears in the record for the appellant's failure to attend the adjourned hearing. On that date, the circuit judge entered an order setting aside the default as to the defendant, F. J. Williams. On the same date, that is, September 19, 1960, upon the motion of plaintiff a default decree was entered rescinding the policy of title insurance as to the appellant, Flann, Inc. It is clear from the record that appellant knew that Chomsky declined to represent it well in advance of the adjourned date, September 19th.

Appellant also claims that it has a meritorious defense to the plaintiff's action. Apparently, the circuit judge did not so find. In this connection, it is important to note that significant allegations in plaintiff's bill constituting the gravamen of the complaint were answered by appellant in a manner not constituting a traverse. Absent the showing of a meritorious defense or a reasonable excuse for failure to answer after having been properly served with a bill of complaint, the defendant cannot now complain of the trial court's refusal to set aside the default. *Gold* v. *Weisman,* 279 Mich 352. Whether appellant was entitled to an order setting aside the default rested within the sound discretion of the trial court. Court Rule No 28, § 4 (1945). We find no abuse of that discretion and therefore the judgment is affirmed, with costs to appellee.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, and SOURIS, JJ., concurred.

ADAMS, J., took no part in the decision of this case.

FLYNN *v.* FLYNN.

1. DIVORCE—JURISDICTION—STATUTES.
   Jurisdiction in divorce proceedings is strictly statutory.

2. SAME—EQUITY—STATUTES.
   Only those powers of equity which are set forth in the statutory law on divorce may be exercised by a court of equity in a divorce proceeding.

3. SAME—STATUTES—JURISDICTION—PROPERTY.
   A court in a divorce proceeding has no jurisdiction to dispose of entireties property to persons other than the parties to the proceeding (CL 1948, § 552.102).

4. SAME—PROPERTY—LIFE ESTATES TO PARTIES—REMAINDERS TO CHILDREN.
   Provision of decree in suit for divorce whereby court decreed a life estate to the parties with remainders over to their children was properly held invalid (CL 1948, § 552.102).

5. SAME—PROPERTY—TENANCY BY ENTIRETY—TENANCY IN COMMON.
   Parties to a suit for divorce become tenants in common as to property theretofore held as tenants by the entireties, in the absence of other disposition of ownership by the decree of divorce (CL 1948, § 552.102).

6. SAME—PROPERTY—TENANCY BY ENTIRETY—TENANCY IN COMMON.
   Order invalidating provision of decree of divorce relative to entireties property whereby life estates in various parcels were given to parties with remainder over to their children *held,* proper, but further provision bestowing fee simple title thereto in the property to which life estate had theretofore been given was error, since the pertinent statute provided for disposition of entireties property by vesting it in the parties as tenants in common in the absence of other disposition (CL 1948, § 552.102).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 17 Am Jur, Divorce and Separation § 274 *et seq.*
[3–6] 17A Am Jur, Divorce and Separation § 924 *et seq.*
[7] 14 Am Jur, Costs § 11.

7. SAME—COSTS—FAILURE OF EITHER PARTY TO PREVAIL IN FULL.
No costs are allowed on appeal from order invalidating provision of divorce decree purporting to give parties thereto a life estate in their real estate and remainders over to their children and then giving the property in fee simple to the respective parties, where latter provision was in error, since neither party has succeeded fully.

BLACK, KAVANAGH, and SOURIS, JJ., dissenting as to action to be taken on remand.

Appeal from Wexford; Peterson (William R.), J. Submitted October 11, 1961. (Docket No. 54, Calendar No. 49,143.) Decided September 10, 1962.

Bill by Martha Adoree Flynn against Melburn N. Flynn for divorce resulted in decree incorporating property settlement. On subsequent petition of defendant, order entered invalidating portion of decree. Plaintiff appeals. Reversed and remanded for entry of order invalidating property settlement insofar as it set up life estates and remainders, and additionally to adjudge that entireties property be held in common.

Burton A. Hines, for plaintiff.

Jack W. Korn, for defendant.

OTIS M. SMITH, J. This is an appeal from an order invalidating a portion of a decree of divorce. The decree was entered January 5, 1951, by a visiting circuit judge sitting in chancery. The order is dated January 12, 1961, and was made by the present resident judge who held that the provisions of the decree which purported to dispose of realty held as tenants by the entireties by creating life estates in the parties with remainders over to their children "exceeded the jurisdiction of the Court and are, therefore, invalid." The court decreed

that the parties thereafter should own the respective parcels in fee simple.

In his opinion, the circuit judge wrote as follows:

"The powers and jurisdiction of the circuit court in the disposition of property of parties who may be divorced by the court are entirely statutory. The court has carefully considered the cases and concludes that the instant case is governed by *Maslen* v. *Anderson,* 163 Mich 477, and *Rex* v. *Rex,* 331 Mich 399. There is simply no statutory authority for such a disposition as a means of property settlement and no other cause or justification for such a decree provision appears either in the findings of the decree or in the transcript of testimony and counsel's argument that appears in the file."

In the original proceeding, plaintiff took proofs on her bill of complaint on December 19, 1950, after defendant had filed his answer and cross bill. At the hearing both parties appeared in open court with their attorneys. However, neither of the original attorneys is participating in the present appeal. After brief testimony as to the marriage, the issue of the parties, and the grounds for divorce, plaintiff's attorney advised the court, on the record, that he and defendant's attorney, after consultation with their clients, had arrived at a proposed settlement of the property and alimony matters. He spoke for the record as follows: *"There are several pieces of real property, and it is the desire of both of the parties that after their deaths these properties shall belong to their 3 children or to the survivors of the 3 children in equal shares."* This statement was followed by a detailed oral presentation of the proposed settlement of property and alimony, including not only the disposition of entireties realty but also personalty. Further, it included provisions pertaining to occupancy privi-

leges, the assumption of business obligations and so on.

After his recital, plaintiff's attorney apparently turned to defendant's attorney and asked this question: *"Have I substantially stated the agreement of the parties?"* Defendant's attorney responded by saying, among other things, *"I think you have covered it very nicely."* The court was then advised that a proposed decree would be prepared jointly. The colloquy was ended by the court in its statement that a decree would be granted and that "The property settlement made and entered into, as shown by stipulation stated by counsel on the record, is hereby ratified and confirmed and will be incorporated in the decree."

In the section of the decree labeled "property settlement", the items of the stipulation are recited with greater formality and specificity. The decree also sets forth that both parties appeared in open court with their attorneys and that the matters in dispute between the parties with respect to their several properties had been amicably adjusted.

This decree which was said to have been prepared jointly, and which bears no marks of dispute, provides further as follows:

"It is expressly ordered, adjudged and decreed that all of the real property above described shall be transferred to and shall be held by each of the parties for life, with remainder over to the issue of these parties, provided, however, that each party shall have the power to mortgage or encumber such real estate for the purpose of maintaining or developing the properties for the benefit of such issue."

This provision was apparently made pursuant to the statement of plaintiff's attorney, quoted above, that it was the desire of the parties, after their deaths, to have title rest in their children.

It should be pointed out further that in view of the agreement of the parties as to property matters, no finding was made in the decree nor in the invalidating order that the property distribution was equitable. No testimony was offered on this point at either hearing.

Appellant-wife, who was plaintiff below, contends that the order invalidating a portion of the decree is erroneous because it voids a portion of the decree which was based upon a property settlement agreed to by the parties after commencement of suit, which settlement was ratified and incorporated into the decree. Appellant also contends that the court erred in disposing of the entireties property to the parties in fee simple, once it decided that a portion of the decree was invalid. Between the time of the lower court's opinion, filed November 21, 1960, and the order in question, filed January 12, 1961, appellant made a petition to correct the settlement portion of the decree. Appellant claimed in this petition that in view of the court's opinion holding the real property disposition invalid there was no actual, legal distribution of said property in the decree of divorce. The record does not disclose that any action was taken on the petition. Appellant now argues that if the property disposition were invalid then the parties are now legally tenants in common, citing CL 1948, § 552.102 (Stat Ann 1957 Rev § 25.132):

"Every husband and wife owning real estate as joint tenants or as tenants by entireties shall, upon being divorced, become tenants in common of such real estate, unless the ownership thereof is otherwise determined by the decree of divorce."

Appellee urges, on the other hand, the parties never consented to the creation of life estates with remainders over to their issue. Appellee is silent

as to the meaning of the statement of plaintiff's attorney relative to the desire of the parties. He says, at any rate, the court exceeded its jurisdiction and statutory authority. Having thus concluded, he states that the order invalidating a portion of the decree merely deletes the offending part by nullifying the life estates and remainders, and then settles the matter properly according to "the true intention of the parties" by giving in fee simple the same parcels which, colorably, each had previously held as life tenants under the decree.

It is difficult to understand how the parties, and the original attorneys in the case, and also the trial judge can now be charged with error in understanding the intention of the parties with respect to the real property. The record amply supports the disposition made in the decree. There is hardly any other construction which can be placed upon the colloquy of counsel. The decree confirms this conclusion.

But the crucial question is whether the judge had the authority to decree a life estate to the parties with remainders over to their children. Jurisdiction in divorce proceedings is strictly statutory. *Rex* v. *Rex,* 331 Mich 399. Although under our present law, divorce cases are heard on the chancery side of the court only those powers of equity which are set forth in the statutory law on divorce may be exercised. *Maslen* v. *Anderson,* 163 Mich 477.

In the *Maslen Case,* the issue of the jurisdiction of the court in divorce proceedings came up on a bill to quiet title. The cloud upon the title was created by a decree of divorce which had been previously entered. In the divorce proceeding the defendant husband did not enter his appearance in the cause and the bill was taken as confessed. However, the defendant had knowledge of and had orally consented to the terms of the decree. In the suit to

quiet title this Court, on appeal, decided that the provisions in the decree were invalid which purported to place a lien upon the property of the divorce defendant's estate if he did not pay $5,000 in cash to each of his children upon reaching majority; likewise, a provision in the decree requiring payments of $10 per month to his divorced wife if she would maintain her own mother in her home. We held in the *Maslen Case* that those portions of the decree were void and of no effect for want of jurisdiction in the court to make the same. We held also that even if these provisions constituted a "family settlement" they could not be sustained in a divorce proceeding.

Appellant places heavy reliance on *Newton* v. *Security National Bank of Battle Creek,* 324 Mich 344. In this case, plaintiff filed a bill of complaint in 1948 challenging the validity of certain property provisions in a divorce decree rendered in 1920. In the original divorce proceeding the defendant-husband, Newton, plaintiff here, entered his appearance but filed no answer to the bill of complaint. Throughout the case he was actively represented by counsel. While the suit was pending the parties executed a stipulation and property settlement agreement providing that 1/3 of the father's property, which had been recently received through an inheritance, should be retained by him free of all marital rights; 1/3 should be transferred to his wife; and the remaining 1/3 should be transferred to a trustee to be designated by the court to be held in trust for the son of the parties, who was then 1 year old. The stipulation as to the trust fund included various provisions, including 1 for the distribution of the corpus of the trust upon the son reaching the age of 30 years.

Shortly after the decree in the divorce case was entered, plaintiff transferred 1/3 of this estate and the approximate sum of $50,000 to the trustees in

accordance with the property settlement agreement. It appears that the trust had been administered according to the stipulation except for the terminal provision of transferring the corpus of the trust to the son-beneficiary. In the *Newton Case,* it was contended that the court had no jurisdiction over the subject matter so as to give it power to establish such a trust of plaintiff's property distributable to his son in the manner set forth in the stipulation and, of course, the decree. Distinguishing the *Newton Case* from the *Maslen Case,* we said (p 353):

"Plaintiff seems to proceed upon the theory that the trust in this case was the result of the decree of divorce, and that as such it was in excess of the court's statutory powers. The trust was in reality the result of the property settlement between the parties, which they had a right to make, and which the court had a right to confirm."

In *Rex* v. *Rex, supra,* the parties contested the case. The critical item in the decree in *Rex,* insofar as our present inquiry is concerned, required the setting up of a trust by the plaintiff-father consisting of capital stock in 2 corporations which he owned. The trust was to be for the benefit of the children of the parties. The decree was drawn to operate as the trust instrument if plaintiff failed to execute the same. We held that all provisions in the decree requiring the setting up of such trust were illegal and void and were ordered deleted.

This Court said in *Rex* v. *Rex,* as follows (p 409):

"Jurisdiction in divorce proceedings is strictly statutory. The court cannot decree payment direct to children upon their reaching majority, or even during minority, or create a lien for such payment. We have held that provisions in a divorce decree, even by consent, providing payment of a sum to the

wife's mother and sums to the children at majority, are void."

This latter reference was, of course, to the *Maslen Case.*

We agree with the circuit court, at least to this extent, that there was no authority for disposing of entireties property to persons other than the parties thereto who were plaintiff and defendant in the divorce case. We construed the section of the statute cited above in *Allen* v. *Allen,* 196 Mich 292. We said (p 296) "The language of the statute is unambiguous, and clothes the court with plenary authority to award the whole or any part of the lands held by the parties as tenants by the entireties *to either of the parties.*" (Emphasis supplied.) It is clear therefore that there was no authority in the court to decree a life estate to the parties with remainders over to their children.

Next we come to that portion of the order invalidating the decree which purports to give to the respective parties in fee those parcels which he or she held under the decree as life tenants. We think this portion of the order is in error. Once it is determined that the decree is invalid as to the disposition of entireties property, it can only follow that such property remained undistributed by the decree. The ownership of entireties property not otherwise having been determined, the statute provides that the parties became tenants in common as to such property. The record does not disclose any findings upon which a different determination could be based. The order invalidating the decree is affirmed insofar as it finds want of authority, but it is reversed insofar as it purports to bestow fee simple title as aforesaid.

Reversed and remanded for the entry of an order

consistent with this opinion. No costs, neither party having succeeded fully.

CARR, C. J., and DETHMERS and KELLY, JJ., concurred with OTIS M. SMITH, J.

BLACK, J. (*dissenting*). I am unable to sign the opinion proposed for disposition of this case. That opinion, like the opinion below, depends for its worth on a case (*Maslen* v. *Anderson,* 163 Mich 477) which, with respect to the jurisdiction of the court in divorce cases to approve and consummate property settlement agreements, was expressly overruled by *Newton* v. *Security National Bank of Battle Creek,* 324 Mich 344, 353. Further, the opinion ignores our settled rule that one who has partaken of the fruits of a divorce decree cannot be heard to question the jurisdiction of the court which rendered it. (*Norris* v. *Norris,* 342 Mich 83, 87, following as to such point *Newton, supra.*) Finally, no court of equity should undertake to decide whether an unappealed and decade-old decree, which by consent of the parties and operation of statute apparently vested specific property rights in third persons (here the children of the litigating parties), is void as to such vesting, such third persons never having been brought before the court. Even in the case my Brother would follow (*Maslen, supra*), the interested children of the parties were haled into court and so became bound by the court's final decree.

As to the "property settlement" portion of the decree entered January 5, 1951, both parties unconditionally stipulated thereto and asked the court to approve and incorporate same in its decree, which was done. See detail in Mr. Justice OTIS M. SMITH's opinion, to which the following evidence of Mr. Flynn's firm agreement and consent should be added:

The defendant husband, present petitioner for invalidation of the property settlement portion of the decree of 1951, was represented at the time by attorney H. Murray Campbell of Cadillac. We find, in the original record, Mr. Campbell's affidavit filed January 11, 1951. Therein Mr. Campbell averred that he personally "filed the original decree of divorce dated January 3, 1951, with the Wexford county clerk on January 5, 1951, and that as attorney for defendant he retained a true copy of said decree and has notice thereof as to the filing."

The decreed property settlement was the joint creature of the presently contending parties. They intended, and legally authorized the court to effectuate such intention in their behalf, to convey—fully under the statute (CL 1948, § 622.18 [Stat Ann § 27.1448])*—7 parcels of real estate to their children with retention by them of separate and respective life estates as provided in the consented portion of the decree of 1951. Such decree provided, immediately following the part quoted by my Brother and in due conformity with the cited statute:

"It is further ordered that if either party shall fail to execute proper instruments of transfer as required in this decree, the other party shall have leave to record a certified copy of this decree in the office of the register of deeds of any county where such property is located and such recording shall

* "Sec. 18. After the entry and enrollment of any final decree affecting or determining the title to real estate, a copy of such decree, duly certified by the clerk of the county in which the same was entered, under the seal of the court, may be received and recorded in the office of the register of deeds of the proper county, and shall have the same effect as the original decree; and if such decree shall direct the execution of a conveyance or other instrument affecting the title to real estate, the record of such certified copy shall have the same effect as the record of such conveyance or other instrument affecting the title to real estate would have if duly executed pursuant to said decree."

This section appears in general chapter 22 of the judicature act of 1915 (PA 1915, No 314), headed "Of judgments and decrees."

operate as a transfer of the interest of the party who is in default in the same manner and to the same effect as if a proper conveyance had been executed and delivered."

Thus the promptly recorded decree automatically effected valid conveyances by the parties, one to the other, and to their children with reservation of such separate life estates. Vested rights were created, not alone by force of the property-conveying consent of the parties but also by force of the cited statute. To say otherwise would unsettle many land titles in Michigan where, as in this instance, part or the whole of the realty subject matter of a divorce case has been disposed of by agreed property settlement, decretal approval thereof, and recording of the decree with its statutory language of conveyance. Indeed, this case presents clear proof that court and counsel proceeded in 1951, with respect to property rights and disposition thereof, according to the undoubted right of lawyers and judges to rely upon the current law of property. The *Newton Case,* unanimous save only as to Justice DETHMERS' concurrence in result, had been handed down but 20 months prior to the hearing conducted by Judge Holbrook on December 19, 1950, which hearing culminated in the decree dated January 3, 1951.

The question of jurisdiction is controlled by *Newton* v. *Security National Bank of Battle Creek, supra.* The ultimate and pertinent conclusion expressed by the Court was that the consent trust, like the consented and decretally executed conveyances here, was "the result of the property settlement between the parties, which they had a right to make, and which the court had a right to confirm." (p 353.) *Newton* quotes in support *West* v. *West,* 241 Mich 679, and *In re Berner's Estate,* 217 Mich 612, to which one might well add *Palmer* v. *Fagerlin,* 163 Mich

345, 349, handed down by the Court less than a month before release of *Maslen's* opinion.

Rex v. *Rex,* 331 Mich 399, also relied upon by the chancellor in making the appealed order of invalidation, is not opposed to the *Newton Case* or its stated conclusion. *Rex* presented question whether, in a divorce suit, the court could require the husband (over his vigorous objection and without his consent) to place his personalty, "from which he derives his income," in trust "for his 3 sons, 2 of whom are now more than 21 years of age, and the third is now near his majority." The Court, for stated reasons, held that the trial chancellor erred in such regard. Further, and unlike *Newton* and this case of Flynn, Mr. Rex raised the question upon entry of the divorce decree and immediately reviewed. He did not, as in *Newton's Case* and now in Flynn's case, accept the benefits provided for him by the decree, and so did not bring himself within the rule of *Jackson City Bank & Trust Co.* v. *Frederick,* 271 Mich 538, which rule was applied in *Newton's Case* and followed later in *Norris* v. *Norris, supra.*

Aside from the foregoing, there is an insuperable objection to affirmance of this appealed order. The 3 children of the parties are the record legal owners of the realty subject matter, subject to the respective life estates of record. Mr. Flynn's petition for invalidation shows on its face all these facts and, in addition, discloses his recent vain effort to obtain quitclaim deeds from the 2 adult children and from the guardian of the third (yet a minor). In this state of things the children should have been brought in as necessary parties to any proceeding by which Mr. Flynn would cut off their record interest. We have a statute providing for such action (CL 1948, § 612.10 [Stat Ann § 27.662]) and the trial chancellor upon his own motion should have denied ju-

dicial action until such requisite parties were brought in and permitted to plead.* Finally, no reason appears for failure to bring them in.

The reason for such joinder of necessary parties is well known. "It is a general rule in equity that all parties entitled to litigate the same questions are necessary parties." (*Nashville & D. Railroad Co.* v. *Orr,* 85 US 471, 473 [21 L ed 810].) For full exposition see 1 Pomeroy's Equity Jurisprudence (5th ed), § 114, p 153, quoted fully in *Love* v. *Wilson,* 346 Mich 327, 331. As was said in *Watson* v. *Lion Brewing Co.,* 61 Mich 595, 604, 605 (bracketing the Flynn children for emphasis):

"There is no claim that any of the Schmidtgall [Flynn] children are dead, and, from the record, it is to be presumed that they are all living, although their exact whereabouts does not appear. Not being made parties, and no one appearing for them, no great pains seems to have been taken to ascertain their present residence. * * *

"These Schmidtgall [Flynn] children were necessary parties to this suit. The complainant had no right to proceed without making them parties. When it was developed, upon the taking of proofs, that these children existed, the complainant's bill should have been dismissed, unless amended so as to make them proper parties. And such an amendment could not cure the defect in the bill, under complainant's theory, unless they were made parties defendant, which was not done in this proceeding. * * *

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* As said of like necessary parties, in *Hoe* v. *Wilson,* 76 US 501, 504 (19 L ed 762):

"No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence the case cannot proceed without their presence before the court. The objection was not taken by the defendant, but the court should, *sua sponte,* have caused the bill to be properly amended, or have dismissed it, if the amendment were not made. Instead of this being done the cause was heard and decided upon its merits. This was manifest error."

"Here, then, we have a case proceeding in equity, to determine the interests of these children in lands, in which premises the proofs show they are legally and equitably entitled to a greater or less share, depending in amount upon the lawfulness of their birth, if the complainant has any interest in the same.

"And in the suit both parties, as joined in issue, —complainant and defendants,—are laboring, under different theories, to establish the fact that these children have absolutely no interest. By no theory of an equitable nature can such a course of procedure be justified without the opportunity being afforded these children to appear in court and defend their rights."

The appealed order should be reversed with remand of the record for such further proceedings as may be consistent with the above. Following such remand all necessary parties should be brought before the court forthwith, by order entered pursuant to aforesaid section 612.10.

Mrs. Flynn should be awarded costs.

KAVANAGH and SOURIS, JJ., concurred with BLACK, J.

ADAMS, J., took no part in the decision of this case.

STANDARD-TOCH CHEMICALS, INC., *v.* VICTOR PAINT CO.

1. COURTS—SET-OFF—RECOUPMENT—JUSTICES OF THE PEACE—COMMON PLEAS COURT.

   The law of set-off and recoupment in justice courts governs in the common pleas court (CL 1948, § 669.11; PA 1915, No 314, ch 69, § 17a, as added by PA 1959, No 249).

2. REPLEVIN—POSSESSION—SET-OFF—RECOUPMENT.

   The only issue in a replevin action is right of possession and claims by way of set-off or recoupment are not permissible defenses to the action.

3. JUSTICES OF THE PEACE—SET-OFF.

   Set-off can only be allowed in actions in justice court founded on demands which could themselves be the subject of set-off according to law (CL 1948, § 669.11).

4. SAME—REMOVAL OF CAUSE TO CIRCUIT COURT—SET-OFF—RECOUPMENT.

   The statute permitting removal of a cause from the justice court to the circuit court where a claim by way of set-off or recoupment exceeds the monetary jurisdiction of the justice court only permits such removal where the set-off and recoupment would otherwise be permissible (PA 1915, No 314, ch 69, § 17a, as added by PA 1959, No 249).

5. SAME—REMOVAL OF CAUSE TO CIRCUIT COURT—STATUTES.

   There is no inherent power in the common pleas court to transfer a case to circuit court, such power being derived only from statute (PA 1915, No 314, ch 69, § 17a, as added by PA 1959, No 249).

6. REPLEVIN—COMMON PLEAS COURT—SET-OFF—REMOVAL OF CAUSE TO CIRCUIT COURT.

   Order of circuit court affirming order of common pleas court dismissing motion by defendant to remove cause to circuit court, based on claim of set-off in excess of monetary jurisdiction of the common pleas court, *held*, proper, where the defense of set-

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REFERENCES FOR POINTS IN HEADNOTES

[2, 6] 46 Am Jur, Replevin § 62.
Set-off, counterclaim, and recoupment in replevin or other action for possession of personal property. 151 ALR 519.
[3] 31 Am Jur, Justices of the Peace § 102.

off was not interposable in plaintiff's action of replevin (CL 1948, § 669.11; PA 1915, No 314, ch 69, § 17a, as added by PA 1959, No 249).

Appeal from Wayne; Moynihan, Jr. (Joseph A.), J. Submitted January 5, 1962. (Docket No. 42, Calendar No. 49,169.) Decided September 10, 1962.

Replevin in Detroit common pleas court by Standard-Toch Chemicals, Inc., a foreign corporation, against Victor Paint Co. Eastgate Corp., a Michigan corporation, for possession of a paint-mixing machine. Defendant, claiming set-off and recoupment, sought removal of case to circuit court. Motion dismissed. Defendant appeals. Affirmed.

Lewis & Watkins, for plaintiff.

Grossman, Hyman & Grossman, for defendant.

OTIS M. SMITH, J. This is an appeal from an order of the Wayne circuit court affirming an order of the common pleas court of Detroit which dismissed appellant's motion to remove a cause from common pleas court to circuit court. Appellee, a foreign corporation, by its attorneys, filed a declaration in replevin claiming illegal detention by appellant of a certain paint-mixing machine. In answer to the replevin suit, appellant denied that appellee had a right to return of the machine because of a separate understanding between the parties outside of the lease agreement. Appellant also filed set-off and recoupment in the amount of $5,125 based on an allegation of damages resulting from unfit, unusable and unmerchantable paint, which appellee had furnished appellant for use in connection with the paint-mixing machine. The monetary jurisdiction of common pleas court is $3,000. Appellant also filed an affidavit

for removal of proceedings to circuit court under PA 1915, No 314, ch 69, § 17a, as added by PA 1959, No 249 (CL 1948, § 669.17a [Stat Ann 1959 Cum Supp § 27.3244(1)]).

The statute in question reads as follows:

"If a defendant claims an amount by way of set-off or recoupment which exceeds the monetary jurisdiction of the court, and accompanies the notice of the claim with an affidavit stating that the claim asserted is in his belief justly due and owing him, the plea and notice of set-off or recoupment shall be recorded and the proceedings removed to the circuit court to which appeal of the cause would ordinarily lie. The justice shall forward to the circuit court the original or attested copies of all papers in the action and cause the action to be filed therein. Thereafter no proceedings shall be had before the justice, and the action shall be prosecuted in the circuit court. No removal shall occur under this section until the defendant pays the plaintiff's costs legally incurred up to that time, together with an entry fee of $6, which entry fee the justice shall pay to the clerk of the circuit court at the time the papers are filed in the circuit court."

Appellant delivered to the plaintiff the costs incurred by appellee up to that time. At the hearing on the motion to remove the proceedings to circuit court, the common pleas judge entered an order denying said motion. He took note of the statute under which removal was sought and held that appellant's claim of set-off and recoupment could not be asserted since neither set-off nor recoupment constitutes a defense to a replevin suit in the common pleas court.

The essential question at issue involves construction of the statute above cited. This statute is a 1959 amendment to the law of set-off and recoupment in justice courts, which law governs in the common pleas court. Set-off and recoupment in justice courts

are treated in the following statutes, CL 1948, §§ 669-.11–669.17, and CL 1948, § 669.17a, as added by PA 1959, No 249 (Stat Ann and Stat Ann 1959 Cum Supp §§ 27.3238–27.3244[1]). CL 1948, § 669.11 (Stat Ann § 27.3238), reads in part as follows:

"In the following cases, and under the following circumstances, a defendant may set off demands which he has against the plaintiff: * * *

"4. It can be allowed only in actions founded on demands which could themselves be the subject of set-off according to law."

Obviously, this limitation on the right to set-off should be read in conjunction with the transfer statute above cited and upon which appellant sought to remove proceedings to the circuit court. We have consistently held that the only issue in a replevin action is right of possession and that claims by way of set-off or recoupment are not permissible defenses to the action. *Dearing Water Tube Boiler Co.* v. *Thompson,* 156 Mich 365 (24 LRA NS 748); *Rubin* v. *Gallagher,* 294 Mich 124; *Multiplex Concrete Machinery Co.* v. *Saxer,* 310 Mich 243. It is clear, therefore, that set-off can only be allowed in actions in justice court founded on demands which could themselves be the subject of set-off according to law. The cases are clear that replevin is not such an action in which set-off can be had according to law.

Appellant argues, however, that the statute relied upon permits a party absolutely to remove to circuit court in a case in which set-off and recoupment alleged are in excess of the monetary jurisdiction of the justice court. No such broad construction can be read into the statute under which appellant proceeds. The statute was obviously intended to permit removal to circuit court those cases in justice court, wherein set-off and recoupment would otherwise be permissible, but when the amount claimed is in excess of the monetary jurisdiction of the justice court.

Appellant relies upon the *Multiplex Case* already cited. In *Multiplex,* the action in replevin was begun in circuit court and certain defenses were raised by way of set-off and recoupment. Therein, the question was whether or not the matter could be transferred from the law side of circuit court to the chancery side. We held that in order to prevent a multiplicity of suits and to grant complete relief the transfer would be permitted.

Several distinctions between *Multiplex* and the instant case clearly appear. The first is that in the present proceedings removal from the court of common pleas to circuit court is sought under a statute which sets forth the conditions under which a transfer is allowable. The right to transfer is limited and we have so indicated. Further, there is no inherent power in the common pleas court to transfer a case to circuit court, such power being derived only from the statute. Nor can it be said that the common pleas court has the power to transfer a case to the chancery side of circuit court absent a statutory provision so empowering it. This is not to say that the circuit court sitting in chancery may not, when its jurisdiction is properly invoked, take cognizance of a proper case. Herein, we have merely inquired as to the right to transfer a cause under the set-off and recoupment law pertaining to justice courts when the monetary jurisdiction exceeds that court. This right is limited to actions founded on demands which could themselves be the subject of set-off according to law. For the reasons set forth above, we conclude that the circuit court order affirming the common pleas court order dismissing appellant's motion to remove the cause to circuit court should be affirmed.

Affirmed, with costs to appellees.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, and ADAMS, JJ., concurred.

BOBCO *v.* METROPOLITAN INSURANCE COMPANY.

1. WORDS AND PHRASES—IGNITION.
   An ignition is a burning.

2. INSURANCE—ACCIDENT AND HEALTH POLICY—DOUBLE INDEMNITY—BURNING BUILDING.
   Provision of comprehensive personal accident and health insurance policy for double indemnity if bodily injuries are sustained "in consequence of the burning of any building in which the insured shall be at the commencement of the fire" requires a showing, not only of a burning, but that the building itself, as distinguished from its contents, was burning.

3. SAME—ACCIDENT AND HEALTH POLICY—DOUBLE INDEMNITY—BURNING BUILDING—PAINT VAPORS EMANATING FROM WALLS.
   Paint vapors, even though they emanate from the walls of a building, *held,* not a part of the building in action to recover double indemnity under comprehensive personal accident and health insurance policy provision for bodily injuries sustained "in consequence of the burning of any building in which the insured shall be at the commencement of the fire", where it was believed that the explosion or burning of the paint vapors came from an extension cord or a light bulb that had been placed inside the water tank for illumination.

4. APPEAL AND ERROR—QUESTIONS REVIEWABLE—INSURANCE—WATER TANK—PRESENCE OF DECEASED INSIDE TANK.
   Whether or not water tank, interior of which plaintiff's deceased was engaged to paint, was a building and whether or not deceased was in it, within the meaning of double indemnity provision of accident and health insurance policy, when fatal

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REFERENCES FOR POINTS IN HEADNOTES

[2, 3] 29A Am Jur, Insurance § 1285.
Effect of provision for coverage or double indemnity in case of injury or death in consequence of burning of building. 55 ALR2d 398.
[4] 3 Am Jur, Appeal and Error § 824.

injuries were sustained, are not decided, where recovery under such provision is denied because the structure, as distinguished from its contents, is determined as not having burned.

Appeal from Wayne; Sullivan (Joseph A.), J. Submitted January 4, 1962. (Docket No. 28, Calendar No. 49,153.) Decided September 10, 1962.

Action by Mary Bobco against Metropolitan Life Insurance Company, a New York corporation, for double indemnity benefits because of death of husband occasioned by fire and explosion. Judgment for defendant. Plaintiff appeals. Affirmed.

Jesse R. Bacalis, for plaintiff.

Dickinson, Wright, McKean & Cudlip (*William G. Warren* and *Charles F. Clippert,* of counsel), for defendant.

ADAMS, J. This is an action on a comprehensive personal accident and health policy which was issued by defendant to Steven Bobco, plaintiff's husband. The policy contains a provision for double indemnity, if bodily injuries are sustained "in consequence of the burning of any building in which the insured shall be at the commencement of the fire."

On July 22, 1958, Steven Bobco and his employee, Mr. Martichuski, were painting the interior of a water tank in Farmdale, Ohio. The tank stood approximately 12 feet above the ground upon a steel platform. A temporary scaffolding had been placed adjacent to the platform so that the top of the scaffolding was level with the bottom of the tank. From the scaffolding, Mr. Bobco and his helper had entered the tank through a manhole. They were taking turns painting the interior of the tank.

Shortly after noon, Mr. Bobco started to enter the tank. Mr. Martichuski was standing on the scaf-

folding. Mr. Bobco had one foot inside the manhole. His head and shoulders up to his chest were inside the tank when Mr. Martichuski saw a blue flame through the manhole opening. Mr. Martichuski reached for Mr. Bobco. There was a roar. Both men were knocked off the scaffolding a distance of about 20 feet. Bobco was severely burned. He lived only 20 hours. Martichuski was burned about his wrists.

Defendant paid the face amount of the policy, but refused to pay under the double indemnity provisions, claiming that the water tank was not a building within the meaning of the policy, that Mr. Bobco's death did not result from "the burning of a building." And finally, that Mr. Bobco was not in the building within the meaning of the policy when the accident took place.

The trial judge sitting, without a jury, held that the proofs did not show death resulted "from the burning of the building," within the meaning of the policy. Judgment was entered for the defendant. From this judgment, plaintiff appeals.

Was there a burning? Martichuski saw a blue flame. After the accident, Bobco's clothes were in flames; he suffered third-degree burns over approximately 35% of the total body surface.

Plaintiff's expert witness testified that, in his opinion, a burning took place first; followed almost simultaneously by an explosion. Defendant's expert witness stated the process was the reverse. In any event, the fire and the explosion were practically simultaneous, defendant's witness stating "we are talking about which came first, the chicken or the egg." Both expert witnesses testified that whether there was an explosion or a burning, there would have had to have been an ignition first to start either process and that an ignition is a burning. It was believed the ignition came from an extension cord

or a light bulb that had been placed inside the tank for illumination.

Under the testimony of both expert witnesses, the first cause of either an explosion or a burning was an ignition, which is a burning. The inner surface of the tank was burned in part. The vapors within the tank were related to the surface in that it was the "mother" substance for the vapors.

However, the language of the policy is "If such bodily injuries are sustained (c) *in consequence of the burning of any building* in which the insured shall be at the commencement of the fire." (Emphasis supplied.)

Our inquiry cannot end once it has been determined there has been a burning. The further question arises—of what? There is nothing to show that the burning began with the walls and then was transmitted to Steven Bobco. The burning began with an arc, proceeded to an explosion or flame, or both. The flame was transmitted to plaintiff's decedent and to the building.

A number of courts have passed upon language similar to or the same as that contained in this policy.

In *Maryland Casualty Co.* v. *Edgar* (1913, CCA 4), 203 F 656, the causal connection was found to be lacking where the decedent threw a match into a cellar, causing an explosion from a layer of gasoline on top of water in the basement. Though the building was burned, recovery was denied.

In *Farley* v. *Aetna Life Insurance Co.* (1918), 200 Mo App 460 (207 SW 281), the decedent was working on a switchboard. Apparently a short circuit caused oil to be sprayed over him. His clothes were set on fire. It was held that the resultant death was not caused by the burning of a building, even though the 7′ x 30′ switchboard, affixed to the building, was scorched by the flash.

In *Kreiss* v. *Aetna Life Insurance Co.* (1920), 229 NY 54 (127 NE 481), the fire apparently began with gloves saturated with gasoline which the decedent was attempting to dry over a gas fire. Recovery was denied even though the resulting fire spread to the building.

In *L'Ecuyer* v. *Indemnity Life & Accident Co.* (1916), 97 Kan 540 (155 P 1088), the fire or explosion began from a kerosene can and then spread to the building. Again recovery was denied because there was no causal relationship between the burning of the building and the injury to the decedent.

In *Provident Life & Accident Ins. Co.* v. *Brooks* (1948, CCA 5), 170 F2d 909, the decedent smelled gas, struck a match, and suffered fatal injuries in the resulting explosion. Recovery was denied even though the wooden parts of the building were seared by flames.

In the case of *Pacific Mutual Life Insurance Co.* v. *Walt,* 198 Tenn 59 (277 SW2d 434, 55 ALR2d 392), the supreme court of Tennessee construed almost identical language to bar recovery where a 65-year-old man apparently set his bed on fire from smoking. He was found on the floor. The mattress of the bed was badly burned, the floor only slightly. It was held that this was not a burning of the building, but rather of the contents, and so not covered by the policy. See, also, *Houlihan* v. *Preferred Accident Insurance Co.,* 196 NY 337 (89 NE 927, 25 LRA NS 1261).

Plaintiff cites the case of *Wilkinson* v. *Aetna Life Insurance Company* (1909), 240 Ill 205 (88 NE 550, 25 LRA NS 1256, 130 Am St Rep 269), in which case the court construed the contract language to include, even though it did not so state, the contents of the building, saying the insured (p 213) "was contracting for indemnity against an accident from fire while he was in a building and not alone from

the burning of a building." In the *Wilkinson Case,* there was evidence to indicate that the decedent, an inveterate cigar smoker, somehow started a fire in the loose material lying on the floor in a loft of a brick barn. The fire was transmitted to the loft proper. Deceased was burned either by the burning of the contents or the burning of the building or both. Neither the facts nor the law of that case jibe with the present one.

The same is true with regard to *Aetna Life Insurance Company* v. *Smith* (1927, CCA 5), 19 F2d 140, in which case it appeared that the decedent, while working in his garage, set the whole gasoline saturated dirt floor on fire. The floor was burned to a depth of 2–1/2 inches. The deceased was obliged to run through the flames in order to escape from the garage. It was held that the flames arising from the burning floor could have been the efficient cause of death.

In the present case, the burning of Steven Bobco was not "in consequence of the burning of any building," but rather was the result of the burning of the paint vapors. Paint vapors, even though they emanate from the walls of a building, are not a part of a building.

Since this matter is disposed of upon the single point above discussed, our review is so limited, and we do not pass upon other questions such as whether or not the water tank was a building within the meaning of the policy, or whether or not Mr. Bobco was in a building, within the meaning of the policy, when the injuries were sustained.

Affirmed. Costs to appellee.

CARR, C. J., and DETHMERS, KELLY, BLACK, SOURIS, and OTIS M. SMITH, JJ., concurred with ADAMS, J.

KAVANAGH, J., concurred in the result.

PETTAWAY *v.* McCONAGHY.

1. TORTS—RECIPIENT OF WORKMEN'S COMPENSATION—PARTIES—CORPORATE VEIL.

   An injured employee of a corporation would be unable to proceed against a defendant as the alleged third-party tortfeasor, where he is the sole stockholder, president, and manager of the corporate employer, should the corporate veil be pierced because of the almost complete identity between the defendant and the corporation from which plaintiff had received workmen's compensation (CLS 1956, § 413.15).

2. WORKMEN'S COMPENSATION—RECOVERY FROM THIRD-PARTY TORTFEASOR.

   An injured employee may recover workmen's compensation and either he or his employer or both may sue the third-party tortfeasor causing the injury, recovery by the employer being for the workmen's compensation paid the employee (CLS 1956, § 413.15).

3. SAME—COMMON-LAW ACTION FOR TORT—PARTIES.

   Provision of workmen's compensation act allowing an injured employee to recover workmen's compensation *and* then proceed against "some person other than a natural person in the same employ or the employer" excluded from the common-law action *all* natural persons who are carrying on the activities of the employer, regardless of what the activities may be (CLS 1956, § 413.15).

REFERENCES FOR POINTS IN HEADNOTES

[1] 13 Am Jur, Corporations §§ 7, 8.

[2] 58 Am Jur, Workmen's Compensation §§ 60, 358.

Workmen's compensation: rights and remedies of employee and employer against third person whose negligence caused injury to employee. 19 ALR 766, 782, 27 ALR 493, 500, 37 ALR 838, 844, 67 ALR 249, 266, 88 ALR 665, 678, 106 ALR 1040, 1053.

[3] 58 Am Jur, Workmen's Compensation § 60 *et seq.*

[5] 58 Am Jur, Workmen's Compensation § 206.

4. TORTS—OFFICER OF CORPORATE EMPLOYER WHICH HAS PAID WORKMEN'S COMPENSATION.

Action against defendant, who was the sole stockholder, president, and manager of corporation from which plaintiff, injured employee, had recovered workmen's compensation was properly dismissed as he was a natural person in the same employ of the employer excepted from liability as a third-party tortfeasor (CLS 1956, § 413.15).

5. SAME—SAFETY DEVICES ON PRESS—GROSS NEGLIGENCE—PARTIES.

The failure of defendant, sole stockholder, president, and general manager of employer corporation which had paid workmen's compensation to plaintiff, to place proper safety devices on converted press for protection of operator, even if constituting gross negligence and wilful misconduct, would not make defendant liable as third-party tortfeasor (CL 1948, § 408.65; CLS 1956, § 413.15).

Appeal from Wayne; Rashid (Joseph G.), J. Submitted April 6, 1962. (Docket No. 38, Calendar No. 49,234.) Decided September 10, 1962.

Case by James Pettaway against John J. McConaghy for personal injuries sustained while employed in factory operated by a corporation in which defendant was an officer and majority stockholder. Dismissed on motion. Plaintiff appeals. Affirmed.

Goodman, Crockett, Eden, Robb & Philo (*Harry M. Philo,* of counsel), for plaintiff.

Carl F. Davidson, for defendant.

ADAMS, J. This is an appeal from order of the circuit judge granting defendant's motion to dismiss plaintiff's declaration. Plaintiff lost both hands while operating a press at the plant of the American Asbestos Products Co., Inc. Plaintiff received an award for compensation and is presently receiving payments under the workmen's compensation act.[1]

[1] PA 1912 (1st Ex Sess), No 10, as amended (CL 1948, § 411.1 *et seq.*, as amended [Stat Ann 1960 Rev § 17.141 *et seq.*]).—REPORTER.

Plaintiff declared against defendant as an officer, director, majority stockholder, and general supervisor of American Asbestos Products Co., Inc. Plaintiff alleged that defendant converted a press from manual to automatic operation in violation of CL 1948, § 408.65 (Stat Ann 1960 Rev § 17.25).[2] It is claimed the press, as converted, did not have a proper safety device for the protection of the operator. Plaintiff alleges that as a result of the negligent acts of defendant he lost his hands and sustained other injuries.

Two questions are raised. The first is whether there is a possible liability of defendant under CLS 1956, § 413.15 (Stat Ann 1960 Rev § 17.189),[3] or whether defendant falls under the exceptions from

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[2] "It shall be the duty of the owner of any factory, storehouse or warehouse, or his agent, superintendent or other person in charge of the same, to furnish or supply, or cause to be furnished or supplied, and equip all machinery in use with proper shifters or other mechanical contrivances for the purpose of throwing belts on or off pulleys. It shall be unlawful for any person, firm, copartnership or corporation, to operate or cause to be operated, any of the machinery or equipment mentioned in this section, without it being first properly equipped with proper safety devices and guards. All gearing and belting shall be provided with proper safeguards, and when necessary, machinery shall be provided with loose pulleys. All vats, saws, pans, planers, cogs, set screws, gearing and machinery of every description shall be properly guarded. * * * It shall be unlawful for any person, firm or corporation, or agent thereof, to install or place in operation any of the machinery or equipment mentioned in this section unless the same be equipped with proper safeguards, or unless the same be approved by the commission or factory inspector."

[3] "Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but such injured employee or his dependents or their personal representative may also proceed to enforce the liability of such third party for damages in accordance with the provisions of this section. If the injured employee or his dependents or personal representative does not commence such action within 1 year after the occurrence of the personal injury, then the employer or its compensation insurance carrier may, within the period of time for the commencement of action prescribed by statute, enforce the liability of such other person in the name of that person."

liability as being "a natural person in the same employ or the employer." The second is whether defendant is liable because of gross, wilful, and wanton misconduct. The trial judge held that under any theory presented by the pleadings or on the argument of the motion to dismiss, defendant must be held to be either the employer or "a natural person in the same employ" as the plaintiff.

Defendant is the sole stockholder, president, and manager of the American Asbestos Products Co. Defendant was generally in the office and regularly took trips around the plant. He was on the job managing and supervising. There is such a complete identity between the defendant and the corporation as to suggest that one was simply the alter ego of the other. However, the trial court did not so hold. Nor are we asked to do so on this appeal. If the corporate veil were pierced because of the almost complete identity between the corporation and defendant, then plaintiff would be unable to proceed under CLS 1956, § 413.15 (Stat Ann 1960 Rev § 17.189).

Turning to the other exemption from third party liability—"a natural person in the same employ"—plaintiff would have us define these words to mean only a fellow employee, excluding defendant and thereby permitting plaintiff to pursue his claim.

Under the workmen's compensation law, the common-law theories of negligence, contributory negligence, negligence of a fellow employee, and assumption of risk,[4] were virtually done away with in return for speedy compensation to an injured employee and practically exclusive liability under the statute of the employer. Part 3, § 15 of the statute reopens the door, insofar as tort liability goes, where the injury for which compensation is payable was caused

[4] See CL 1948, § 411.1 (Stat Ann 1960 Rev § 17.141).—REPORTER.

under circumstances creating a liability in some person other than a natural person in the same employ or the employer. Since the 1952 amendment to this section, the employee is no longer required to make an election as to whether or not to pursue his common-law remedy against the third person, or his remedy under the act against the employer. Now, if the injury is one that is compensable, the employee, as has been done in this case, may obtain compensation under the act. It is noteworthy that section 15 is not for his sole benefit alone. The employer also is a party to the proceedings under said section and may after a period of 1 year initiate proceedings himself to recover from the offending third person the workmen's compensation paid to the employee, if proceedings were not initiated by the employee.

Taking into account the statutory scheme, it would seem that the construction of part 3, § 15 which plaintiff would have us make, would result in many difficulties. The first and most manifest would be to determine in each case whether or not an individual is a fellow employee and so free from liability, or is not a fellow employee because of being a foreman, or a member of another department, or engaging in some corporate activity that is not related to the plaintiff's duties, in consequence of which he would be liable to the injured employee and possibly to the employer.

It would appear that the legislature intended, by the amendatory act of 1952 (CLS 1956, § 413.15), not only a continuation of the exemption of employers from liability provided for by section 4 of part 1 of the workmen's compensation act (CL 1948, § 411.4), but also to exempt from liability under such amendatory act *all* natural persons who are carrying on the activities of the employer, regardless of what those activities may be.

The trial judge properly held that the defendant falls within the exception of the statute.

The second question raised by the plaintiff is whether or not he can recover because his injury was caused by the gross negligence and wilful and wanton misconduct of defendant.

The cases cited by plaintiff in support of this proposition (*Artonio* v. *Hirsch,* 3 App Div 2d 939 [163 NYS2d 489], and *D'Agostino* v. *Wagenaar,* 183 Misc 184 [48 NYS2d 410], aff'd 268 App Div 912 [51 NYS2d 756]) do not appear to be wilful and wanton misconduct cases, but rather cases in which the plaintiff was either injured by a fellow employee, acting outside the course of his employment, or, at a time when he was off work, engaging in some activity wholly unrelated to his employment. No such exception because of gross negligence and wilful and wanton misconduct appears in the language of the statute nor does there appear to be any basis for the same in the cases cited.

The trial court properly granted the motion to dismiss.

Affirmed, with costs to appellee.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, and OTIS M. SMITH, JJ., concurred.

A'ENO *v.* LOWRY.

DAMAGES—NECK INJURY—ADEQUACY OF VERDICT—GREAT WEIGHT OF EVIDENCE.

Verdict of $500 for plaintiff in action for neck injury received in an automobile accident *held*, not against the great weight of evidence nor inadequate, where there was evidence that she was released from the hospital on the same day as the accident, returned to work 10 days later, and continued to receive some treatment for the next 3 or 4 months, and evidence presented an issue of fact as to whether difficulty she had with her hand and arm a year later was attributable to defendant's negligence or some other causes.

BLACK, KAVANAGH, and OTIS M. SMITH, JJ., dissenting.

Appeal from Oakland; Dondero (Stanton G.), J. Submitted April 10, 1962. (Docket No. 48, Calendar No. 49,156.) Decided September 10, 1962. Rehearing denied November 5, 1962.

Case by Nickie M. A'Eno against Francis E. Lowry and John Francis Lowry for personal injuries sustained in automobile collision. Verdict and judgment for plaintiff. Motion for new trial denied. Plaintiff appeals claiming verdict grossly inadequate. Affirmed.

Floyd T. Schermerhorn, for plaintiff.

Sullivan, Elmer, Eames & Moody (*Blair Moody, Jr.*, of counsel), for defendants.

REFERENCES FOR POINTS IN HEADNOTE

15 Am Jur, Damages § 233.

Adequacy of damages in action by person injured for personal injuries to neck not resulting in death. 16 ALR2d 446.

ADAMS, J. This action arises out of an accident that occurred on March 6, 1959. Plaintiff was driving north on US–10. The highway was icy. Defendant John Francis Lowry was proceeding south. Lowry's car went out of control, careened across the highway, and struck plaintiff's automobile. Plaintiff sued, claiming some permanent disability in her hand and arm, pain and suffering, and necessary treatment by 4 doctors at an expense of $579.25. The jury brought in a verdict for $500.

Plaintiff contends that a new trial should be granted because the verdict is grossly inadequate. If a new trial is granted, plaintiff claims it should be restricted to the question of her damages.

Following the accident, plaintiff was taken to a hospital. She was released the same day and returned to work 10 days later. Dr. Cullen treated the plaintiff for 2 or 3 days. An X ray of her neck disclosed no fracture. He described her injury as a "sacroiliac strain" and on March 30, 1959, he wrote evaluating her condition as "disability lasting 2 weeks." Plaintiff continued to receive some treatment for the next 3 or 4 months. She complained of headaches.

Plaintiff had been selling real estate. In June, she shifted to the sale of automobiles because this job would not require as much driving or standing. In the fall of the year she went to New Orleans where she was employed as the manager of a bar. In November and December she paid 3 visits to a doctor. Two X rays were taken.

In the spring of 1960 it appears that she had some difficulty with her hand and arm. She thought that it was from holding a telephone in her hand too much. She received further medical treatment.

Doctors Joseph C. Cullen, Lewis Cohen, and Edward M. Gates testified with regard to plaintiff's injuries. Dr. Cullen could not recall that plaintiff

had ever mentioned to him any difficulty with her fingers or her elbow. Plaintiff exhibited her hands to the jury. Dr. Cohen, while attributing her disability to injuries to the neck, testified that the X rays of the neck showed no fractures and no definite abnormalities. He stated that if scar tissue were to develop, which in turn would affect the arm and hand, this would normally occur within a period of 3 months of the injury. Dr. Gates was unable to associate the injury to the arm and hand with the injury to the neck. He found no limitation of motion or other objective finding of injury.

The verdict is less than the total claimed for medical bills but on the basis of the testimony, the jury might properly have concluded that all of the medical bills were not for treatment of injuries received by plaintiff in the automobile accident. Other claimed financial losses were not clearly made out. Plaintiff does not appear to have suffered any loss of earnings, except for a 10-day period immediately following the accident. She undoubtedly experienced some pain and suffering.

The situation in the present case differs from the situation in *Fordon* v. *Bender,* 363 Mich 124, wherein the negligence of the defendant having been determined and the injuries having clearly flowed therefrom, this Court held that the plaintiff was entitled to recover his damages, including pain and suffering; or again from the situation in *Mosley* v. *Dati,* 363 Mich 690, wherein the jury failed to make an award for pain and suffering that was clearly a result of defendant's negligence. In the present case, there was issue of fact as to whether or not plaintiff's difficulty with her hand and arm was attributable to the negligence of the defendant or, occurring as it did almost a year after the accident, was from other causes and consequently not a part of her damages.

It cannot be said that the verdict of the jury is against the great weight of the evidence in this case. Under familiar rules, the matter was peculiarly one for decision by a jury. *Teller* v. *George,* 361 Mich 118; *Brown* v. *Arnold,* 303 Mich 616; *Griggs* v. *Saginaw & F. R. Co.,* 196 Mich 258. The verdict of the jury and the decision of the trial judge, refusing a new trial, are affirmed. Costs to appellees.

CARR, C. J., and DETHMERS, KELLY, and SOURIS, JJ., concurred with ADAMS, J.

KAVANAGH, J. (*dissenting*). To properly understand and dispose of the presented question there should be added, to the facts submitted by Justice ADAMS, the following:

Plaintiff, in support of her claim for a judgment, introduced proofs showing a loss of earnings amounting to $1,500; doctors' and hospital bills amounting to $579.25; $77 repairs to car; and $450 depreciation loss on car, making a total of $2,606.25. These together with compensation for pain, suffering, and permanent partial disability constituted her alleged cause of action.

Defendants denied negligence and alleged contributory negligence.

The jury brought in a verdict for plaintiff in the sum of $500.

Plaintiff is here on appeal from the denial of her motion for a new trial alleging:

1. The verdict was contrary to law and grossly inadequate.

2. The verdict was contrary to the great weight of the evidence.

3. The verdict was contrary to the specific instruction of the court relative to damages.

Justice ADAMS in his opinion tries to distinguish the facts in this case from those in *Fordon* v. *Bender,*

363 Mich 124, and *Mosley* v. *Dati,* 363 Mich 690, on the theory that the injuries in those cases clearly flowed from the negligence of the defendant. He then proceeds to hold that in the case before us there was an issue of fact as to whether or not plaintiff's difficulty with her hand and arm was attributable to the negligence of defendants or, occurring as it did almost a year after the accident, was from other causes and consequently not a part of her damages.

The record does not sustain any of these contentions. Dr. Lewis Cohen of Pontiac, Michigan, testified on behalf of plaintiff, as a specialist on rehabilitation involving electromyography used in diagnosis of diseases resulting from injuries to the cervical region of the spine. He treated plaintiff beginning on October 4, 1960, for pain in the neck, lower spine, numbness of left hand and left fourth and fifth fingers. The electromyographic examination disclosed a lesion of the left seventh cervical nerve root, abnormality of sensation and atrophy of the left hand—a condition likely to be permanent and which might grow progressively worse.

On direct examination, Dr. Cohen described his findings as follows:

"*Q.* Well, now, would you tell the jury what was the result of your physical finding?

"*A.* The most important results, as far as the abnormalities in the physical examination, the reflexes and the feeling and coordination and the muscle strength of the extremities were normal except for moderate muscle atrophy at the ulnar aspect of the left hand. That means that the side of the left hand, adjacent to the little finger, was not as full on the left side as it was on the right side. And over this same area of the left hand, the medial aspect of the left hand and also of the left 4th and 5th fingers, the medial aspect, there was some failure

of the sensation. In other words, she couldn't feel a pin prick on the medial aspects of the 4th and 5th fingers and on the medial aspect of the left hand.

"The hand grip was measured on both sides, and measured 60 pounds on each side.

"Another finding on the examination—these are all abnormalities which I am taking out of the examination report—the posterior cervical spine was tender to palpation and percussion. There is no muscle spasm, but there is moderate limitation of motion on attempting rotation of the head to the left. And, as I have noted, she could turn about 50 to 75% to the left, but beyond that it was painful. * * *

"The electromyographic examination was abnormal in that it revealed a lesion of the left seventh cervical nerve root.

"*Q.* Is that in the neck, Doctor?

"*A.* Yes. The spine—."

Dr. Joseph C. Cullen, testifying as plaintiff's witness, said he had treated plaintiff beginning about 2 or 3 days after the accident for injuries in the cervical, dorsal, and lumbar areas of the spine until she left for the South in October 1959, and continued treating her upon her return to Detroit. He testified of her complaints of disability in the neck and back throughout her treatment and he had found it necessary to send her to Dr. Curtis for further examination.

The only witness sworn by defendants was one Dr. Edward M. Gates. He testified he first saw the plaintiff and examined her on October 14, 1960, one year and 7 months after the accident, and he found the abnormal atrophy condition of the left hand, forehand and fingers, as described by Dr. Cohen. Dr. Gates was asked if in his opinion the atrophy of the left hand had a causal connection with the plaintiff's injury and accident. He did not answer the question, but indicated he felt it was a typical

ulnar type loss, rather than a cord injury or root loss. He testified that this type of ulnar lesion is more what is seen from injury to the elbow, normally associated with secretaries and Bell Telephone operators. He further indicated this ulnar lesion was not associated with any other root lesion, and then went on to explain:

"Now to specifically associate, we will say, to a cervical spine injury—and we have seen nerve root injuries from cervical injuries—we usually have fracture present. And, as far as I know, there is no fracture present here or a cervical dislocation."

Dr. Gates indicated he usually found this type of thing in a typical whiplash type injury. Under cross-examination, Dr. Gates testified:

"*Q.* And you saw Mrs. A'Eno on 1 occasion?
"*A.* Yes.
"*Q.* Just 1 time only?
"*A.* Yes.
"*Q.* And you made an examination of her on behalf of the defendant in this cause?
"*A.* Yes."

Dr. Gates testified further as follows:

"*Q.* Now, Dr. Cohen has testified that his examination upon Mrs. A'Eno by this electromyogram disclosed a lesion of the left seventh cervical nerve root.
"Now there was nothing in your examination that you would feel that you could reasonably dispute Dr. Cohen in this respect, is there?
"*A.* He found no other nerve root lesion?
"*Q.* His interpretation was a lesion of the left seventh cervical nerve root, by this electromyogram.
"*A.* Could I see his report?
"*Q.* Is that the one dated 10–4–60?
"*A.* Yes.
"*Q.* Do you want to read that to the jury, Doctor?
"*A.* 'Using intramuscular electrodes, the major muscles of both upper extremities, shoulder girdles,

and posterior cervical muscles were surveyed (4th cervical to 1st thoracic spinal nerve innervation), bilaterally. "Findings: 1. Denervation fibrillation potentials are localized in the left teres major, left triceps brachii, left abductor digiti quinti, 1st dorsal interosseus and adductor pollicis muscles. 2. Polyphasic potentials are seen frequently in the above-noted muscles during voluntary contraction. Interpretation: Lesion of the left seventh cervical nerve root."'

"*Q.* The interpretation was that it was a lesion of the left seventh cervical nerve root; is that right?

"*A.* Yes.

"*Q.* Now you are in no position to dispute Dr. Cohen in that finding?

"*A.* In what respect?

"*Q.* Well, to say that it wasn't true or it wasn't so.

"*A.* Only on the basis that electromyography is not gospel.

"*Q.* But you have used it as gospel in many of your other cases?

"*A.* No; we have used it as correlative findings of the patient's clinical symptoms.

"*Q.* As a matter of fact, this symptom of that anesthesia in these fingers on the left hand, and the moderate degree of atrophy on the edge of the hand, that is a symptom which leads directly to the seventh cervical nerve?

"*A.* But it also could be of the ulnar nerve itself, which is part of the seventh cervical nerve root.

"*Q.* But the ulnar nerve is further along in the chain of nerves for the chain of sensations, which is located at the elbow?

"*A.* Yes; but the muscles are not supplied by a single nerve root.

"*Q.* But now had you sent this patient to Dr. Cohen, as you have sent other patients to Dr. Cohen, to secure this electromyogram examination, you would have accepted, without question or argument, his interpretation of the finding of this electromyogram?

"*A.* I would have correlated it with my clinical findings.

"*Q.* You would have correlated it. Now you got no history of her banging open doors with her elbow, did you?

"*A.* No, sir.

"*Q.* There was nothing in her history or your examination of the elbow to indicate that the elbow had any reasonable source of the affectation of this hand that was there?

"*A.* No, sir; I don't think I implied that.

"*Q.* Well, as long as we understand it. Then we can exclude the elbow as being any source at all?

"*A.* Not necessarily.

"*Q.* From your examination.

"*A.* Not necessarily.

"*Q.* Then will you explain to the jury why we cannot exclude the elbow, if you haven't found anything in your examination or anything about the elbow to indicate a source of this condition? Will you explain?

"*A.* You may not find any abnormality in the elbow *per se.* That does not mean that in the past the patient has not traumatized or injured the nerve at the level of the elbow.

"*Q.* Then you have no history of that trauma, have you?

"*A.* No.

"*Q.* And that suspicion of the possibility of a trauma is purely speculation?

"*A.* It is purely speculation.

"*Q.* And she did have an injury to her neck—

"*A.* Yes. * * *

"*Q.* You didn't see her until nearly 2 years after this accident. So, you had no chance to examine what part of her body was injured.

"*A.* That is a distinct disadvantage.

"*Q.* And there could have been considerable improvement in some of these injuries up until the time you saw her?

"*A.* That is right.

"*Q.* Then you would only know about these injuries by her history?
"*A.* That is right.
"*Q.* And you didn't get any more history than what you read to the jury here today?
"*A.* That is right."

On redirect examination of Dr. Gates the following questions and answers were given:

"*Q.* Your opinion, Doctor, based on your findings, what specific nerve involvement here do we have?
"*A.* Well, this is ulnar distribution.
"*Q.* Pardon, sir?
"*A.* This is ulnar distribution.
"*Q.* And, from that point, you would then arrive at the conclusion that it is, should I use the words, 'just as likely' that such an injury could occur at the elbow than hypothetically in the neck?
"*A.* Yes."

Dr. Gates was asked the following questions and gave the following answers on recross examination:

"*Q.* Doctor, you don't know whether she hurt her elbow in this crash or not, do you?
"*A.* No.
"*Q.* And if it was the ulnar nerve, it is supplied by the seventh cervical, isn't it?
"*A.* It is one of the roots.
"*Q.* Well, the real damage that you see and find located in the ulnar nerve could have its stem, or its source, in the seventh cervical?
"*A.* It could have part of it."

An examination of the entire testimony of Dr. Gates does not negate in any way the testimony of plaintiff's doctors. Certainly it cannot be said that this speculative testimony should be given the weight attributed to it by Justice ADAMS.

Clearly, this case is one in which the language used by Justice BIRD in *Walker* v. *Britton,* 193 Mich 174, is directly applicable (p 176):

"The trial court explained to the jury in detail what their duties were in the premises, and opened the way for them to find that defendant was without fault, but they persisted in finding him guilty, and they should have followed that finding by an allowance of some reasonable compensation for what she had lost and suffered by reason of that negligence. The sum allowed is so grossly inadequate, and bears so little relation to what was shown to have been plaintiff's actual damages, that the verdict should have been set aside on the ground that it was clearly against the weight of the evidence."

In *Mosley* v. *Dati,* 363 Mich 690, Justice SOURIS in referring to *Fordon* v. *Bender,* 363 Mich 124, indicated that we there reversed a judgment for inadequacy of a jury verdict in a personal injury case because the great weight of the evidence compelled an award of damages for pain and suffering and because failure to award such damages by returning a verdict equal only to plaintiff's special damages manifested disregard by the jury of proper instructions given by the court. He then proceeded to say in the *Mosley Case* (p 691):

"We are compelled to reach the same result in the case at bar and for the same reasons. There was evidence from plaintiff that he suffered pain immediately after the impact at the scene of the injury and a policeman testified that, indeed, plaintiff then complained of pain."

Justice SOURIS went on to conclude that having found there was pain and suffering and having awarded damages to compensate plaintiff for the medical cost of relieving such pain, the jury could fail to award plaintiff damages for the pain already endured only by arbitrary, capricious disregard of the trial judge's explicit instructions to the jury. The Court, therefore, set aside the verdict.

In the instant case, the jury did not even allow the actual amount of the medical expenses which were shown to have been paid for services to alleviate the pain, suffering, and disability growing out of the accident involved in this cause. The use of the flat sum of $500 indicates the jury disregarded the instructions of the court and the testimony as to damages. We conclude the verdict is against the great weight of the evidence.

In view of the above, the verdict should be set aside. The judgment should be reversed and a new trial as to damages only should be granted. Plaintiff should have costs.

BLACK and OTIS M. SMITH, JJ., concurred with KAVANAGH, J.

BOARD OF EDUCATION OF THE CITY OF DETROIT *v.* FLANZ.

1. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—NEW TRIAL.
   The trial court was without jurisdiction to grant a new trial in condemnation proceedings by school district, except to prevent an obvious miscarriage of justice, where motion for such purpose was not filed until 15 days after verdict was confirmed, and further time had not been allowed within 6-day period allowed by statute in which to move for a new trial (CL 1948, § 213.33).

2. APPEAL AND ERROR—QUESTIONS REVIEWABLE—NEW TRIAL—DISCRETION OF COURT.
   The sole question properly before the Supreme Court on appeal from order confirming an award in condemnation proceedings

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 18 Am Jur. Eminent Domain § 366.
[2] 18 Am Jur, Eminent Domain § 373 *et seq.*

and denying a new trial therein is whether or not there was an abuse of discretion by the trial court in denying the motion for new trial (CL 1948, § 213.33).

3. EMINENT DOMAIN—REVIEW OF AWARD—DISCRETION OF COURT. Denial of motion for new trial and to set aside order confirming jury's award in school district's condemnation proceeding *held*, not an abuse of discretion, where the motion involved was late and award made was carefully reviewed by the trial court and higher than the amount which had been offered prior to condemnation (CL 1948, § 213.33).

Appeal from Recorder's Court of Detroit; Schemanske (Frank G.), J. Submitted April 12, 1962. (Docket No. 65, Calendar No. 49,387.) Decided September 10, 1962.

In the matter of the petition of the Board of Education of the City of Detroit, a public corporation, for the taking by condemnation of private property. Motion by Anthony Flanz to set aside award of jury, to set aside confirmation of award, and for rehearing. Motion denied. Defendant Anthony Flanz appeals. Affirmed.

Harry A. Spector, for plaintiff.

Alan N. Brown, for defendant.

ADAMS, J. This is an appeal from order of the recorder's court for the city of Detroit confirming condemnation award and denying motion to set aside the award of the jury and grant a rehearing.

The condemnation petition was filed on October 4, 1960. On October 25, 1960, appellant entered his personal appearance on a form which stated "If a lawyer is to represent you, he should enter your appearance." Appellant claims he was later told his property was not going to be condemned and that consequently he did not have time to prepare

for trial. However, appellant was represented by counsel at the trial. The contention is further contradicted by appellant's testimony on direct examination, in which he stated "about 2 weeks back—that's when we found out what we would get."

Appellant's expert witness fixed a total value for the premises of $29,919. Expert witness for the appellee set a value of about $21,000. The jury, after viewing the premises, awarded $23,000 for the property and $250 removal damages. The verdict was confirmed February 2, 1961. Proof of service of confirmation of award was filed February 6, 1961.

On February 15, 1961, there was a substitution of attorneys for appellant. On February 17th, objection was made to confirmation of the award, together with motion to set it aside and grant a new trial. Fifteen days had elapsed from date of confirmation of the verdict. Six days is allowed for motion for a new trial. CL 1948, § 213.33 (Stat Ann 1958 Rev § 8.23). The court, further time not having been allowed within the 6-day period, was without jurisdiction to grant a new trial, except to prevent an obvious miscarriage of justice. *Breisacher* v. *Judge of Recorder's Court,* 223 Mich 254. It may be observed that while the proper time for a motion for new trial had passed at this point in the proceedings, there was still ample time to perfect an appeal to this Court for a review on the merits. This appellant failed to do.

The trial judge in denying the motion stated:

"Substituted counsel for defendant Anthony Flanz has brought what is admittedly a dilatory motion to set aside the jury's award and the court's confirmation."

Nevertheless, the judge considered the claim that the appraisal method used was unfair; that nothing was allowed for loss of business; that the claim that

Flanz did not know until just before the hearing that his property was to be taken, and concluded:

"The jury had every method of appraisal before them, together with details from both appraisers. It also appears that these petitioners received the largest award* and that the award was higher than the amount offered by the city prior to condemnation."

On April 11, 1960, the court denied the motion for a new trial. On April 25, 1960, appellant took a general appeal to this Court, assigning 7 objections to the award, none of which goes to the question of abuse of discretion by the trial judge in denying the motion for new trial. That is the sole question properly before this Court at this time. There was no abuse of discretion. *Fabro* v. *Soderstrom,* 252 Mich 455. If anything, the trial judge was overly lenient in affording petitioner—whose timely appeal to this Court should have been taken some 2 months earlier—a full reconsideration.

The decision of the trial court is affirmed. Costs to appellee.

CARR, C. J., and DETHMERS, KELLY, SOURIS, and OTIS M. SMITH, JJ., concurred with ADAMS, J.

BLACK and KAVANAGH, JJ., concurred in result.

* For any of the parcels involved in the proceeding.

NORTHLINE DRUGS #2, INC., *v.* LIQUOR CONTROL COMMISSION.

1. MANDAMUS—SPECIALLY DESIGNATED MERCHANT'S LICENSE TO SELL WINE AND BEER.

   Petition for mandamus to compel issuance of specially designated merchant's license for sale of wine and beer is dismissed, where decision of Supreme Court shortly before oral argument of case is recognized by the attorney general as controlling and license has now been issued.

2. COSTS—MANDAMUS—SPECIALLY DESIGNATED MERCHANT'S LICENSE TO SELL WINE AND BEER.

   No costs are allowed in mandamus proceeding to compel issuance of license to plaintiff to sell wine and beer as a specially designated merchant on dismissal of petition.

Original mandamus by Northline Drugs #2, Inc., a Michigan corporation, against Michigan Liquor Control Commission and its members to compel issuance of specially designated merchant's license for sale of wine and beer. Submitted June 5, 1962. (Calendar No. 49,613.) On subsequent granting of license, petition for mandamus dismissed September 10, 1962.

Philip Weiss and *Jesse R. Bacalis,* for plaintiff.

Frank J. Kelley, Attorney General, *Eugene Krasicky,* Solicitor General, and *Thomas H. Healy,*

REFERENCES FOR POINTS IN HEADNOTES

[1] 34 Am Jur, Mandamus § 184 *et seq.*
[2] 34 Am Jur, Mandamus § 393.

Jr., Assistant Attorney General, for defendant.

Amicus Curiae:

Stanton, Taylor, McGraw & Collison (*John W. McGraw,* of counsel), for Otto Taylor Construction Company.

PER CURIAM. In the month preceding oral argument of this case, this Court decided *Kroger Co.* v. *Liquor Control Commission,* 366 Mich 481. In recognition of the controlling applicability of the *Kroger Case,* the attorney general advised the defendants Liquor Control Commission and its members that a license should be issued to the plaintiff. On July 2, 1962, the commission entered an order approving plaintiff's application and on July 9, 1962, a license was accordingly issued.

Petition for writ of mandamus is dismissed. No costs.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

FORD *v.* GARTNER HARDWARE COMPANY.

This case is controlled by *Burns* v. *Van Laan*, 367 Mich 485.

Appeal from Monroe; Weipert, Jr. (William J.), J. Submitted October 10, 1961. (Docket No. 45, Calendar No. 49,036.) Decided September 10, 1962.

Case by Christine Ford against Gartner Hardware Company, a Michigan corporation, and William Simonds for personal injuries and for certain damages arising from the death of her husband in automobile collision. Motion granted striking certain portions of declaration. Plaintiff appeals. Affirmed.

James J. Kelley, Jr., for plaintiff.

Ready & Braunlich, for defendants.

BLACK, J. This case was reassigned May 23d, to the writer, immediately after the like case of *Burns* v. *Van Laan*, 367 Mich 485, was scheduled for submission during the present June term. It is controlled by the *Burns Case*, decided this day.

Affirmed, with costs to appellees.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, and OTIS M. SMITH, JJ., concurred.

ADAMS, J., took no part in the decision of this case.

AYERS *v.* GENTER.

ANDERSON *v.* SAME.

1. JUDGMENT—RES JUDICATA—WORKMEN'S COMPENSATION.
   The doctrine of *res judicata* is applicable to a decision rendered in workmen's compensation proceedings.

2. SAME—COLLATERAL ESTOPPEL.
   The doctrine of collateral estoppel is applicable to bar plaintiff's right of recovery in tort action against defendant who had been found to be a coemployee in earlier proceeding to recover workmen's compensation in which plaintiff had been proceeded against as a member of a defendant partnership, notwithstanding there may be more numerous issues raised in the tort action.

3. PARTNERSHIP — WORKING PARTNER AS EMPLOYEE — WORKMEN'S COMPENSATION.
   A working partner is not normally considered an employee of a partnership in the absence of statutory sanction but such has been specifically provided in the workmen's compensation act (CLS 1956, § 411.7).

4. SAME—WORKING PARTNER—ACTION AGAINST COEMPLOYEE—WORKMEN'S COMPENSATION.
   A working partner occupies the position of an employee in this State so far as the workmen's compensation act is concerned, and, as such, cannot maintain an action against his coemployee; a partnership being barred for the same reason as the employer's rights are no greater than those of his injured employee (CLS 1956, §§ 411.7, 413.15).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 5] 58 Am Jur, Workmen's Compensation §§ 51, 493.
Res judicata as regards decisions or awards under workmen's compensation acts. 122 ALR 550.
[3, 4] 58 Am Jur, Workmen's Compensation § 146.
Workmen's compensation: interest in the business or in corporation or firm owning the business as affecting right to compensation. 15 ALR 1288, 81 ALR 644.
[6] 41 Am Jur, Pleading § 342.

5. PARTIES—RES JUDICATA—PARTICIPATION AS WITNESS IN PRIOR PROCEEDING.

Participation as a witness in a prior proceeding to recover workmen's compensation does not so qualify an individual as a party as to prohibit him from maintaining his own tort action against the defendant who had been found to be a coemployee of the partnership of which plaintiff herein and plaintiff in the workmen's compensation proceeding were employees, since plaintiff herein is not bound by the prior ruling (CLS 1956, §§ 411.7, 413.15).

6. JUDGMENT—SUMMARY JUDGMENT—ISSUES OF FACT.

It was error to grant summary judgment against plaintiff in his action against defendant for injuries received when defendant was preparing to dynamite some frozen earth on a construction project on which they were working, where pleadings have raised issues of fact upon which plaintiff is not estopped or otherwise prevented from being heard.

Appeal from Mason; Stephens (Rupert B.), J. Submitted January 3, 1962. (Docket Nos. 15, 16, Calendar Nos. 49,126, 49,127.) Decided September 20, 1962.

Case by Earl E. Ayers against Clyde C. Genter for personal injuries sustained in explosion during construction job excavation. Similar action by Roger L. Anderson, employee of Ayers. Summary judgments for defendant. Plaintiffs appeal. Affirmed as to plaintiff Ayers. Reversed as to plaintiff Anderson.

Mitts, Smith, Haughey & Packard (*C. A. Mitts,* of counsel), for plaintiffs.

Charles H. Menmuir, for defendant.

OTIS M. SMITH, J. As general contractor, defendant Genter entered into a contract with a school district in Mason county to construct a new addition. The Ayers Plumbing & Heating Company, of which

the plaintiff Ayers is a copartner and plaintiff Anderson is an employee, subcontracted to install a 5,000-gallon fuel oil tank underground outside the school as part of the school's heating system.

On the morning of February 9, 1957, plaintiffs attempted to excavate a hole for installation of the tank by using a crane shovel. However, the shovel was unable to penetrate the frozen surface of the earth. Just as the parties were about to abandon the project for that day, defendant Genter arrived on the scene and suggested dynamiting the frozen earth. Having had prior experience in the use of explosives, defendant Genter assumed some direction of the dynamiting operation. As plaintiff Ayers and Genter were sharpening a drill, an explosion occurred, seriously injuring all litigants. Apparently, sparks from the grindstone set off certain dynamite caps which were on the ground nearby.

Following the accident, both plaintiffs accepted benefits from the workmen's compensation insurance carrier for Ayers Plumbing & Heating Company. The defendant Genter also submitted a claim against the Ayers firm, which was contested on the ground that he was not an employee of Ayers at the time of his injury. The workmen's compensation appeal board sustained an award to Genter; leave to appeal was denied by this Court.

Plaintiffs then proceeded to file respective negligence actions against the defendant Genter. Relying upon the findings of the workmen's compensation appeal board that he, Genter, was in fact an employee of the Ayers firm, and also on our decision in *Sergeant* v. *Kennedy,* 352 Mich 494, that an employee may not sue a coemployee in tort for injuries sustained in circumstances otherwise compensable under the compensation act, the defendant filed a motion to dismiss and then later moved for summary judgment in both actions.

The trial court granted summary judgment against both plaintiffs but on different grounds. In the Ayers case the court ruled a prior determination that the defendant was an employee could not be relitigated between the parties; and since no other question of fact was involved plaintiff was barred by the decision in the *Sergeant Case*. After reviewing defendant's motion for summary judgment in the Anderson suit, the affidavits in support thereof, and pretrial depositions, the trial court concluded that the defendant would have been entitled to an instruction to a jury that the defendant and Anderson were coemployees at the time of the explosion. Hence, under this ruling, the plaintiff Anderson was considered also barred by part 3, § 15 of the compensation act, CLS 1956, § 413.15 (Stat Ann 1960 Rev § 17.189), as interpreted in the *Sergeant Case*. Appeal is taken from the judgments entered in both actions. Since the issues raised in behalf of respective plaintiffs differ somewhat, we shall consider the claims seriatim.

In behalf of plaintiff Ayers, argument is raised that the decision of the workmen's compensation appeal board concerning the defendant's status as an employee is not *res judicata* in a subsequent personal injury action between the parties. It is clear that in this jurisdiction the doctrine of *res judicata* is applicable to a decision rendered in workmen's compensation proceedings. *Lumbermen's Mutual Casualty Co.* v. *Bissell,* 220 Mich 352 (28 ALR 874); *American Life Insurance Co.* v. *Balmer,* 238 Mich 580; *Besonen* v. *Campbell,* 243 Mich 209; *Hebert* v. *Ford Motor Co.,* 285 Mich 607. Nonetheless, Ayers claims that the doctrine has no application to his present tort action because the issues raised before the trial court are more numerous than the question determined by the appeal board. He also argues that he is now suing in his own personal right, whereas he was a party in

the workmen's compensation proceeding as a member of the partnership. Although many authorities seem not to distinguish the 2 principles, collateral estoppel rather than *res judicata* herein governs. Granting that issues raised in the tort action may be more numerous, it was adjudged previously that the defendant Genter was an employee of Ayers at the time of his injury. As to this particular issue, plaintiff Ayers is now estopped from relitigating it. *Jones* v. *Chambers,* 353 Mich 674; *Besonen* v. *Campbell, supra.**

Another question posed by appellant Ayers may be stated as follows: Is a copartner of an employing partnership firm barred by the workmen's compensation act from suing, as an employer, an employee of the partnership firm for damages in tort for injuries arising from the same cause for which compensation is payable under the act to such copartner as an employee of the partnership firm?

Absent statutory sanction a working partner is not normally considered an employee of a partnership. The conceptual difficulty of considering a partner both employer and employee has led almost every court to deny compensation. *Brewer* v. *Central Construction Co.,* 241 Iowa 799 (43 NW2d 131). Also, 58 Am Jur, Workmen's Compensation, § 146, p 677; 3 Schneider, Workmen's Compensation (Perm ed, 1943), § 812; Horovitz on Workmen's Compensation (1944), pp 198, 199; 1 Larson, The Law of Workmen's Compensation (1952), § 54.30. Be that as it may, Michigan has specifically provided by statute that a working partnership member may be regarded as an employee. CLS 1956, § 411.7(2) (Stat Ann 1960 Rev § 17.147[2]). His status as an employee under the act has been further clarified by court decision. *Gallie* v. *Detroit Auto Accessory Co.,* 224 Mich 703;

* See, also, 88 ALR 574 and 122 ALR 550.

Wilcox v. *Wilcox Brothers,* 232 Mich 140; *Kramer* v. *Charlevoix Beach Hotel,* 342 Mich 715 (8 NCCA3d 133). While conceding that a working partner in this State has been vested with a dual personality, 2 points must be made concerning appellant Ayers' right to sue as an employer. First, Earl Ayers brought a tort action in his own right and not on behalf of the partnership entity, of which he is a member, and which partnership was in essence the defendant Genter's employer. If Ayers were bringing suit on behalf of the employing partnership firm, he should have joined his copartner as plaintiff. *Kunze* v. *Cox,* 113 Mich 546 (67 Am St Rep 480); *Reed* v. *Gould,* 105 Mich 368 (55 Am St Rep 453). Secondly, while statutory provision (CLS 1956, § 413.15 [Stat Ann 1960 Rev § 17.189]) permits an employer to enforce the liability of a third-party tortfeasor, the employer's rights are no greater than those of his injured employee. The test of liability is whether the employee could have held the tortfeasor liable for his injuries. *Utley* v. *Taylor & Gaskin, Inc.,* 305 Mich 561. As stated before, the employer in this case was the partnership entity. The appellant Ayers as a working partner occupies the position of employee. As such he cannot maintain suit against his coemployee, nor can the partnership maintain a similar action in his stead for the same reason. *Sergeant* v. *Kennedy,* 352 Mich 494.

The plaintiff Anderson's suit differs principally from that of Ayers in that he was not a party to the compensation proceedings in which defendant was found to be an employee of the Ayers' partnership. In spite of the fact that Anderson's participation was that of a witness, appellee suggests that the board's finding with respect to his status should be *res judicata* as to plaintiff Anderson's negligence action as well. However expedient the defendant's proposition may appear in light of the circumstances pre-

sented here, no precedent justifies holding the plaintiff bound by the workmen's compensation ruling. As yet he has not had his day in court. According to the accepted tenets of *res judicata,* participation as a witness in a prior proceeding does not qualify an individual as a party so as to prohibit him from maintaining his own action. *Bania* v. *Kashmerick,* 324 Mich 596.

Finally, the question left for our consideration is whether the trial court erred in granting summary judgment against appellant Anderson. This depends upon whether there is any fact which appellant Anderson has a right to litigate in the present forum. Based upon the pleadings, it is clear that Anderson claims that Genter was not an employee of Ayers, while Genter asserts the contrary. Other issues are presented as well. Anderson is neither estopped nor otherwise prevented from being heard on these issues.

The judgment as to appellant Ayers is affirmed with costs to appellee; as to appellant Anderson, the judgment is reversed and remanded with costs to appellant.

CARR, C. J., and DETHMERS, KELLY, KAVANAGH, SOURIS, and ADAMS, JJ., concurred with OTIS M. SMITH, J.

BLACK, J., concurred in the result.

KRATOCHVIL *v.* CITY OF GRAYLING.

1. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — PRESUMPTIONS — ABSENCE OF EYEWITNESSES.

   One who dies as the result of an accident to which there are no eyewitnesses is presumed to have been free from contributory negligence.

2. DEATH—ELECTROCUTION—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

   Evidence presented in an action under the death act for loss of plaintiff's husband, a sawyer at lumber mill, *held,* not to have overcome presumption that decedent who had been electrocuted had not been guilty of contributory negligence, where there was no evidence decedent had been negligent (CL 1948, § 691.581 *et seq.*).

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

   Contributory negligence of a plaintiff is now a matter of affirmative defense in this State with the burden of proving it resting on defendant (Court Rule No 23, § 3a, as added in 1958).

4. DEATH—NEGLIGENCE—PROXIMATE CAUSE—EVIDENCE.

   It is necessary in an action for the negligent death of plaintiff's decedent, brought under the death act, that defendant be shown to have been guilty of negligence which was the proximate cause of the decedent's death (CL 1948, § 691.581 *et seq.*).

5. SAME—NEGLIGENCE—PROXIMATE CAUSE—FINDING BY TRIAL COURT.

   It is necessary that the trial court in the first instance, rather than the Supreme Court, make a finding that the death of a plaintiff's decedent was proximately caused by negligence of

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REFERENCES FOR POINTS IN HEADNOTES

[1] 38 Am Jur, Negligence § 293.
[3] 38 Am Jur, Negligence § 286.
[4] 16 Am Jur, Death § 77.
[6] 39 Am Jur, New Trial § 121.

defendant, in order to hold latter liable in an action under the death act (CL 1948, § 691.581 *et seq.*).

6. NEW TRIAL—DEATH—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
A complete new trial, and not a trial limited to damages only, is required in action under the death act for alleged negligence of defendant in electrocuting plaintiff's decedent, where at the first trial the trial court made no finding, one way or the other, as to defendant's negligence and erroneously found plaintiff's decedent to have been guilty of contributory negligence (CL 1948, § 691.581 *et seq.*).

Appeal from Crawford; O'Keefe (Dennis J.), J. Submitted June 5, 1962. (Docket No. 6, Calendar No. 49,280.) Decided October 1, 1962.

Case by Ruth Kratochvil, administratrix of the estate of Wencil E. Kratochvil, against the City of Grayling, a municipal corporation, under the death act for damages resulting from electrocution of deceased. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

Miltner & Miltner (*Frank H. Miltner,* of counsel), for plaintiff.

Running & Wise (*William L. Wise,* of counsel), for defendant.

DETHMERS, J. Plaintiff brought this suit on March 3, 1960, under the wrongful death act,* as administratrix of the estate of her deceased husband, Wencil E. Kratochvil, hereinafter called decedent. The case was tried by the court without a jury. From judgment of no cause for action and denial of her motion for new trial, plaintiff appeals.

Decedent was employed as a sawyer by a lumber

* CL 1948, § 691.581 *et seq.* (Stat Ann and Stat Ann 1959 Cum Supp § 27.711 *et seq.*).—REPORTER.

company. From the sawing operation the sawdust was blown through a sectional exhaust pipe to a sawdust pile. When the pipe became plugged with sawdust it was decedent's duty to clean it. The pipe extended up the side of the sawdust pile and over the top of it. A path used for climbing to the top of the pile extended alongside the pipe.

The defendant city owned and operated an electric power plant. Under easement it had constructed a 4,800-volt, uninsulated power line across the place where the pile was located. At the time in question it was about 7 feet above the top of the pile. Rain the previous day had left the pile wet.

Defendant frequently had cautioned decedent's employer about the dangers of having the sawdust piled so near to the power line. On a number of occasions the pile, for that reason, had been moved by bulldozers. Decedent and his fellow employees also had been warned of the danger in connection with the power line.

On the morning in question decedent had started the saw engine, was seen to work at it, then to sit down for a while, and then to try to start the engine again. After some logs had been cut decedent and a fellow employee piled them at a location some 100 feet distant. After that, decedent was not seen for about 1 hour. Then a fellow employee found his dead body, lying on a sort of plateau in the side of the sawdust pile. No one had seen him die. No one had seen him climb the pile. It was testified that he had turned off the saw, but left the sawdust blower going.

At the top of the wet pile it was found that the sawdust freshly blown there that morning was disturbed, as if someone had walked there. There was a gap of about 8 feet in the blower pipe at the top of the pile, under the power line. A corresponding

length of such pipe was found down the side of the pile. A fresh depression in the sawdust at the top of the pile was found about 10 feet distant from where the gap in the pipe existed and where the power line crossed. It looked like something had landed there and then rolled down. Beyond this depression and down the side of the pile the sawdust was disturbed in a straight line to the point, further down, where decedent's body was found. Medical testimony indicated that a human body receiving a powerful electric shock could be hurled through the air from 8 to 15 feet.

The coroner was called immediately. He, together with the sheriff and a deputy, came, examined the scene and talked with persons present, including decedent's fellow employees. He found what appeared to be 2 burn marks on decedent's lower lip, 1 under his chin, and a bluish discoloration of his left cheek which he testified is caused by electrical shock. There were no burns or marks on decedent's hands or elsewhere on his body. His gloves were found lying near the pipe at the top of the pile. The coroner then prepared a death certificate, certifying that death was caused by electrocution.

Plaintiff's declaration alleged that decedent's death was by electrocution caused by defendant's negligence. Defendant's answer denied that death was caused by electrocution, denied its own negligence, and affirmatively pleaded contributory negligence on decedent's part. Plaintiff, by reply, denied the latter.

After trial, the court filed a written opinion in which no finding was made one way or the other as to whether defendant was guilty of negligence which was a proximate cause of decedent's death. Under the facts recited above, we could not have held that it was against the clear preponderance of the evi-

dence for the trial court to have found, had it so found, that decedent's death was caused by electrocution resulting from negligence of defendant which was a proximate cause thereof.

The opinion of the trial court, in finding against plaintiff, as a ground therefor, limited itself to consideration of its finding that decedent had been guilty of contributory negligence.

Plaintiff properly cites *Kruis* v. *Grand Rapids, G. H. & M. R. Co.*, 190 Mich 105, for the proposition that when no one saw the accident and there is no evidence to the contrary, decedent is presumed to have been free from contributory negligence. Plaintiff started with the benefit of that presumption. The trial judge said, however, that the presumption was overcome by testimony. We find no such testimony in the case. There is not one word of testimony as to what decedent did or how he came to be electrocuted, other than that it is a reasonable inference that he was on the top of the wet pile and that while there current from the high voltage wire passed into his body, killing him and causing him to be hurled violently into the sawdust and to roll part way down the pile. The court and defendant say that decedent knew or should have known of the presence of the dangerous wire and have avoided contact. The court, in this connection, quoted from 18 Am Jur, Electricity, § 76, the following:

"Where a person seeing such a wire knows that it is, or may be, highly dangerous, it is his duty to avoid coming in contact therewith, rather than to accept its presence as an invitation to make such contact. Accordingly, a person who, knowing of the dangerous character of electric wires, purposely comes in contact with them is guilty of contributory negligence and cannot recover for the resulting injury."

This seems to be at the bottom of the court's finding decedent guilty of contributory negligence. But there is no evidence that decedent accepted an invitation to make contact with the wire, or purposely came in contact with it. It is not shown whether, as plaintiff suggests may have happened, he was holding a section of the pipe and accidentally stumbled in such fashion that it came in contact with the wire and his face or what did happen. That leaves plaintiff, then, where she started, with the benefit of the presumption mentioned in the *Kruis Case*. Furthermore, since that case was decided in 1916, something new has been added. In 1958 this Court adopted Michigan Court Rule No 23, § 3a,* changing the rule theretofore obtaining in Michigan and providing, as to contributory negligence of a plaintiff, that it is a matter of affirmative defense with the burden of proving it resting on defendant. No such proof is to be found in this case. The case should, therefore, be reversed and remanded for new trial.

Plaintiff requests that on remand the issue to be tried be limited solely to fixing of plaintiff's damages. As already indicated, no determination of defendant's negligence or, if any, whether it was a proximate cause of decedent's injury and death and plaintiff's damages, was made in the court below. Before plaintiff may recover, that finding of fact must be made. That is not the proper function of this Court. It must be made, if at all, by the trial court. Plaintiff says the court could not have found decedent guilty of contributory negligence without first having found defendant guilty of negligence which was a proximate cause. The point is that the trial court, nevertheless, did decide on contributory negligence of decedent without ever having decided the question of defendant's negligence and proximate cause

* See 352 Mich xiv.—REPORTER.

thereof at all, as amply appears from its opinion. Plaintiff cites *Shpakow* v. *Brown,* 300 Mich 678, and *Shaver* v. *Associated Truck Lines,* 322 Mich 323, to the effect that we must assume the court made every finding of fact which was necessary to his decision. In those cases the findings in question were necessary to the lower court's decision for the prevailing party and affirmance thereof here. In the instant case findings of defendant's negligence and proximate cause were not necessary to decision of the case in its favor. It cannot be assumed, therefore, that such finding was made, and the cited cases are no authority for so holding. Accordingly, we must remand for complete new trial. Costs to plaintiff.

CARR, C. J., and KELLY, BLACK, KAVANAGH, SOURIS, OTIS M. SMITH, and ADAMS, JJ., concurred.

SCHOOL DISTRICT OF THE CITY OF ROYAL OAK *v.* STATE TENURE COMMISSION.

1. INJUNCTION—STATE TENURE COMMISSION—EXHAUSTION OF ADMINISTRATIVE REMEDY.

   A court of chancery does not have jurisdiction to enjoin the State tenure commission from holding a hearing on teacher's demand for hearing on school board's failure to renew her contract for tenth year of service, the third year after she had become 60 years of age, because of board's announced policy of retirement of teachers, but alleged by her to have been contrary to provisions of the tenure act, where the statutory administrative remedy provided by that act had not been exhausted (CL 1948, § 38.71 *et seq.*).

2. SAME—IRREPARABLE INJURY.

   Equity should not be used to obtain injunctive relief, where there is no proof that complainant would suffer irreparable injury.

3. APPEAL AND ERROR—QUESTIONS REVIEWABLE—JURISDICTION OF STATE TENURE COMMISSION.

   Whether or not the State tenure commission has jurisdiction or authority to act or pass upon a retirement policy and program of a board of education is not determined on appeal in a board's suit to enjoin the commission from holding a hearing in which such question had been raised (CL 1948, § 38.71 *et seq.*).

4. COSTS—PUBLIC QUESTION—INJUNCTION—HEARING BY STATE TENURE COMMISSION.

   No costs are allowed in suit to enjoin State tenure commission from holding a hearing on teacher's demand for hearing on

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REFERENCES FOR POINTS IN HEADNOTES

[1] 28 Am Jur, Injunctions § 46.
[2] 28 Am Jur, Injunctions §§ 47, 48.
[4] 14 Am Jur, Costs § 91.

school board's failure to renew her contract, a public question being involved (CL 1948, § 38.71 *et seq.*).

Appeal from Oakland; Adams (Clark J.), J. Submitted June 8, 1962. (Docket No. 32, Calendar No. 49,471.) Decided October 1, 1962.

Bill by School District of the City of Royal Oak against Michigan State Tenure Commission and its members to enjoin it from taking jurisdiction of retirement of teacher, the teacher claiming she was, in effect, illegally discharged. Bill dismissed. Plaintiff appeals. Affirmed.

James G. Hartrick (*Robert L. Templin,* of counsel), for plaintiff.

Frank J. Kelley, Attorney General, and *Eugene Krasicky,* Solicitor General, for defendants.

Amicus Curiae:

Cyril E. Bailey, for Michigan Federation of Teachers.

KELLY, J. Esther Palmer, not a party to this suit, was employed by plaintiff school board as a teacher for the school years 1950–1951 through 1958–1959, the last 2 years (since Mrs. Palmer reached age 60) being on an annual contract basis. Plaintiff board did not renew her contract for the ensuing year, and instead sent her a letter stating that her contract would not be renewed. Mrs. Palmer retained counsel and demanded a hearing under the teachers' tenure act (CL 1948, § 38.71 *et seq.* [Stat Ann 1959 Rev § 15.1971 *et seq.*]). Plaintiff board advised her counsel that Mrs. Palmer was not being discharged, but

retired. Thereafter, however, plaintiff received an amended petition for hearing and notice of hearing that the cause would be heard by defendant commission.

Plaintiff board filed its bill of complaint in the Oakland county circuit court seeking to restrain defendant commission from holding any hearings on the matter or assuming any jurisdiction relating thereto. Plaintiff, in its bill of complaint, stated that the provisions of the teachers' tenure act had applied to it since June, 1943, and that in 1944 the board adopted its policy for retirement, which policy states:

"At the age when teachers may retire under the State retirement act, all such teachers shall cease to be on continuing contract, and contracts shall be deemed renewed from year to year until such teachers, on 60 days' notice to the board of education, elect to retire; or until the board, by a majority vote of the whole membership at least 60 days before the end of the school year, refuses such renewal of the contract."

Plaintiff further stated that in view of its policy for retirement, the jurisdiction of the Michigan State tenure commission did not apply, nor did the provisions of said act.

Injunction issued, and defendant commission filed answer claiming plaintiff's retirement policy is violative of the teachers' tenure act; that the matters raised in the bill of complaint are within the jurisdiction of the commission and it should be given an opportunity to pass thereon; also, that plaintiff had an adequate remedy at law after it had exhausted its administrative remedies.

The matter came on for hearing before Hon. Clark J. Adams, circuit judge of Oakland county, who held

that "the tenure commission has the authority and responsibility to determine its jurisdiction over controversies between school boards and their teacher employees."

Appellant presents only 1 question, namely:

"Does the Michigan State tenure commission have any jurisdiction or authority to act or pass upon a retirement policy and program of a board of education?"

Appellee counters, stating the question involved is: Does a court of chancery have jurisdiction to enjoin the Michigan State tenure commission from holding a hearing where the controlling board has not exhausted its administrative remedies and has an adequate remedy at law?

The trial court correctly determined that a court of chancery did not have jurisdiction to enjoin the State tenure commission from holding a hearing; that it was the responsibility of the commission to determine "whether or not her [Mrs. Palmer's] discharge was an act of the board under a reasonable retirement policy (in which event the commission would have no jurisdiction) or on the contrary, was the discharge of Mrs. Palmer in violation of the provisions of the tenure act."

The court also said:

"There was then, by statute, a remedy available to Mrs. Palmer and to the board. For some unexplained reason the plaintiff board desires to avoid this statutory procedure. Obviously it had not exhausted its administrative remedies when it sought relief from this chancery court. Such attempted avoidance of statutory remedy is not permitted. * * *

"Because the plaintiff school district has an adequate legal remedy and has failed to exhaust the ad-

ministrative remedy provided by law, its prayer for equitable relief is denied."

We will not indulge in the presumption that the discretionary power conferred upon the commission will be arbitrarily exercised. See *Prawdzik* v. *City of Grand Rapids,* 313 Mich 376 (165 ALR 1165).

Appellant, in its bill of complaint, alleged that it would suffer hardship if the State tenure commission took jurisdiction over the appeal of Mrs. Palmer, but no proof was offered to support that allegation. Equity should not be used to obtain injunctive relief where there is no proof that complainant would suffer irreparable injury. See *Michigan Salt Works* v. *Baird,* 173 Mich 655; *City of Owosso* v. *Union Telephone Co.,* 185 Mich 349.

In affirming the chancellor's denial of plaintiff's request for equitable relief, we are not directly nor indirectly passing upon the question presented by appellant, namely: "Does the Michigan State tenure commission have any jurisdiction or authority to act or pass upon a retirement policy and program of a board of education?"

Affirmed. No costs, a public question being involved.

CARR, C. J., and DETHMERS, BLACK, KAVANAGH, SOURIS, and OTIS M. SMITH, JJ., concurred.

ADAMS, J., did not sit.

PEOPLE *v.* DELANEY.

1. CRIMINAL LAW—PRELIMINARY EXAMINATION—BINDING OVER FOR TRIAL.

   It is necessary that an examining magistrate find that a crime has been committed and that there is probable cause to believe the accused guilty thereof in order to bind him over for trial (CL 1948, § 766.1 *et seq.*).

2. SAME—PRELIMINARY EXAMINATION—PROBABLE CAUSE.

   The question of whether or not it is shown on preliminary examination that there is probable cause to believe the accused has committed the crime charged is for consideration and determination by the examining magistrate (CL 1948, § 766.1 *et seq.*).

3. SAME—PRELIMINARY EXAMINATION—CERTIORARI—DISCRETION OF EXAMINING MAGISTRATE.

   The function of the circuit court on the writ of certiorari from order of examining magistrate discharging an accused is to determine whether or not the magistrate has abused his discretion (CL 1948, § 766.1 *et seq.*).

4. SAME—PRELIMINARY EXAMINATION—CERTIORARI—EVIDENCE.

   Circuit judge committed error on certiorari to examining magistrate from latter's discharge of accused on charge of obtaining money by false pretenses in binding defendants over for trial, where the judge wrongfully took into consideration information which had come to his attention in the trial of another case and substituted his judgment for that of the examining magistrate in weighing the evidence (CL 1948, § 750.218, as amended by PA 1957, No 69; § 766.1 *et seq.*).

5. FALSE PRETENSES—EVIDENCE—CHECKS.

   Evidence that payment of checks was refused because of insufficient funds *held,* insufficient to justify holding defendant

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REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur, Criminal Law § 241.

payee-indorsers for trial on charge of obtaining money by false pretenses, where checks were properly drawn by an authorized party on an active bank account and were presented and cashed by indorsee without misrepresentation (CL 1948, § 750.218, as amended by PA 1957, No 69).

Appeal from Oakland; Adams (Clark J.), J. Submitted June 14, 1962. (Docket No. 55, Calendar No. 49,532.) Decided October 1, 1962.

Robert Delaney, Edward Delaney, and Emmet Delaney were charged with obtaining money by false pretenses. Complaint dismissed by examining magistrate. Upon certiorari to circuit court order entered binding over defendants for trial. Defendants appeal. Reversed.

Frank J. Kelley, Attorney General, *Eugene Krasicky,* Solicitor General, *George F. Taylor,* Prosecuting Attorney, and *Robert L. Templin,* Assistant Prosecuting Attorney, for the people.

Ray Cashen and *Robert S. Axford,* for defendants.

KAVANAGH, J. On February 28, 1961, defendants were charged with obtaining money by false pretenses contrary to the provisions of PA 1931, No 328, § 218, as amended.* The complaint and warrant alleged that the money was obtained between the 1st and 19th days of October, 1959.

Preliminary examination was held on March 10, 1961. There was introduced and received in evidence 6 checks aggregating $1,146. These checks had been drawn on the Brighton State Bank by the Rite-Way Softener Service and signed by one Emmet Delaney. Two of the checks were made payable to defendant

* CL 1948, § 750.218, as amended by PA 1957, No 69 (Stat Ann 1959 Cum Supp § 28.415).

Robert Delaney, 3 to defendant Edward Delaney, and 1 to defendant Emmet Delaney. They were indorsed by the respective payees and cashed at the Buffet Bar in the city of Farmington at various times between the 1st and 19th of October, 1959. The owner of the bar testified she and her employees were well acquainted with the defendants and that she had been cashing checks for them for a period of about 1–1/2 to 2 years.

A bank identification card showing the existence of the checking account in the name of the Rite-Way Softener Service with Emmet Delaney authorized to sign checks was received into evidence. There was also offered and received in evidence a bank statement of the Brighton State Bank showing the deposits and withdrawals on said account during the month of October, 1959. The bank statement showed 17 deposits from October 1, 1959, through October 19, 1959, totaling $78,583.60. It showed no overdraft until October 21, 1959, and then one totaling only $11.15.

On March 17, 1961, the examining magistrate filed a lengthy written finding of the court. He concluded:

"Therefore to find that the crime charged in the complaint had been committed, the court must find that the checks in question were false or bogus, designedly used with intent to defraud and cheat. * * *

"All of the checks offered in evidence were regular on their face. There was no proof that the drawer was not a legitimate concern with an active checking account with the drawee bank, that the payee on each check was fictitious, that the payee on the check was not the same person as the indorser. When the checks were presented for clearance payment was refused, not because of any irregularity or anything not genuine about them but rather because of insufficient funds. Only to use the term in the vernacular

could the checks be called bogus or perhaps in a more common term 'rubber.'"

The magistrate found: (1) there was insufficient evidence of false representation; (2) the checks in question in and of themselves were valid, regular and genuine on their face and not false or bogus; (3) as to the evidence submitted, the State had not shown there was reasonable cause to believe a crime had been committed. The magistrate therefore dismissed the charges and discharged the defendants from custody.

On April 6, 1961, the Oakland county circuit court, on application by the prosecutor, ordered a writ of certiorari to issue. The examining magistrate filed his return to the writ and the prosecution made a motion to bind said defendants over to the circuit court. Defendants replied to said motion, which came on for hearing May 22, 1961.

The circuit court, after listening to the respective arguments, handed down its opinion and entered an order binding said defendants over for trial in the circuit court.

Defendants are here on leave granted raising 3 questions, only one of which we shall discuss:

Did the circuit court have the right to go outside the testimony taken before the examining magistrate and substitute its judgment in the place and stead of the examining magistrate and order the defendants bound over for trial?

The circuit court filed the following opinion:

"The court has examined the opinion of the justice wherein he ordered that the warrant be dismissed and the respondents discharged from custody and notes that the justice said that it is his responsibility to make a 'finding that the evidence adduced before him is sufficient within the purview of the statute to constitute the crime charged in the complaint.' I

take it from that wordy sentence that he thinks it is the responsibility of the justice court to determine whether the respondents are guilty or innocent of the charge as brought.

"He also says, and I am quoting again from the justice, that the checks themselves were 'regular and genuine on their face and not false or bogus.' Of course he must have completely closed his eyes in that instance because this case has been in this court before and if there was anything obvious and evident in the trial of the cause, it is the fact those checks were not regular and genuine on their face. They were completely false and completely bogus. As a result of those false tokens money was obtained and certainly was obtained with intent to defraud those from whom it was taken.

"The court finds the examining justice did abuse his discretion in this cause. The judgment is set aside and the order will enter binding these 3 respondents over for trial."

This Court in the early case of *Yaner* v. *People,* 34 Mich 286, said (pp 287–289):

"The legislature, in substituting or permitting examinations instead of indictments, did not intend thereby to withdraw from, or deprive a person accused of crime of any substantial right which previously existed. It was not designed that an examination in form only should be gone through with, and the accused bound over and put upon trial in the circuit court for an offense which the magistrate did not judicially determine to have been committed. * * *

"And it is only when it shall appear from such examination that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, that he can be held for trial. * * * The

clear evident intent of this statute* was, that the magistrate should exercise his best judgment in the matter; that he should from the testimony determine whether the crime charged in the warrant had been committed."

In the case of *People* v. *Evans,* 72 Mich 367, this Court held (p 387):

"The statute requires the justice, after 'an examination of the whole matter,' to come to an opinion as to whether or not an offense has been committed; and, if of opinion that there has been, then as to whether there is probable cause to believe the accused guilty thereof, and thereupon to discharge or hold him to answer according to the conclusion reached."

See, also, *People* v. *Medley,* 339 Mich 486.

This Court has held that primarily the question of probable cause is for consideration and determination by the examining magistrate. *People* v. *Dellabonda,* 265 Mich 486.

The function of the circuit court on the writ of certiorari was to determine whether as a matter of law the examining magistrate abused his discretion. While the circuit court may not agree with the findings of the magistrate, it has no right to substitute its judgment for his except in case of a clear abuse of discretion. Clearly, the circuit judge in this instance wrongly took into consideration information which had come to his attention in the trial of another case. Also, he substituted his judgment for that of the examining magistrate in weighing the evidence. This he did not have a right to do. It would appear that he based his allegation of abuse of discretion upon his finding that the checks were

* Reference is to earlier statutes, many of the provisions of which are now incorporated in the code of criminal procedure. See CL 1948, § 766.1 *et seq.* (Stat Ann 1954 Rev § 28.919 *et seq.*).—REPORTER.

not regular and genuine on their face and that they were completely false and completely bogus.

The evidence introduced at the examination indicates the checks were properly drawn by an authorized party; that they were presented and cashed at the bar without misrepresentation; that during the period of their existence, large deposits were made to the bank account upon which they were drawn.

Many reasons might have existed for the return of the check for insufficient funds, such as garnishment of the account. The record discloses no attempt to obtain the cashing of the checks by false representations. The checks on their face were not false or bogus, nor was the circuit judge justified in so holding. It was not the function of the circuit judge to substitute his judgment for that of the examining magistrate.

The order binding the defendants over for trial and the order setting aside the judgment of the examining magistrate are reversed.

CARR, C. J., and DETHMERS, KELLY, BLACK, KAVANAGH, SOURIS, and OTIS M. SMITH, JJ., concurred.

ADAMS, J., did not sit.

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ABATEMENT AND REVIVAL.

Plaintiff's action for damages for wrongful termination of automobile dealer sales agreement, first brought in the Federal court which was yet pending at time defendant moved to dismiss similar action brought in State court, required the grant of defendant's motion, since plaintiff had the exclusive right to decide within the limits of time and venue as to just how and in what available court it may best sue defendant and may not sue in more than 1 court at a time, it being immaterial that Federal court had or had not finally adjudicated a second count, where adjudication on first count would be conclusive upon the parties in respect of the matters involved in the second count (15 USC [1958 ed], § 1221 *et seq.*). *Bisceglia Motor Sales, Inc.*, v. *Studebaker-Packard Corporation*, 472.

ABSENCE—See NEGLIGENCE (8).

ABUSE OF DISCRETION—See WORDS AND PHRASES (1).

ACCIDENT—See AUTOMOBILES (1, 6); MUNICIPAL CORPORATIONS (27); NEGLIGENCE (1).

ACCIDENT INSURANCE—See APPEAL AND ERROR (23); INSURANCE (7, 8).

ACCOUNTING—See SCHOOLS AND SCHOOL DISTRICTS (3); TAXATION (5, 6).

ACQUIESCENCE—See CONTRACTS (6); FINES (2).

ACTION.

A decision to set aside the assignment of 15-year lease of a theater property on the ground that that assignment is invalid does not call for decision as to validity of future assignments. *Cinderella Theatre Company, Inc.*, v. *United Detroit Theatres Corporation*, 425.

See PARTNERSHIP (2).

ADEQUACY OF VERDICT—See DAMAGES.

ADJOURNMENT—See EQUITY.

ADMINISTRATIVE LAW—See INJUNCTION (1).

ADMISSIBILITY—See CRIMINAL LAW (3).

AFFIDAVIT—See APPEAL AND ERROR (16); SEARCHES AND SEIZURES.

AGENT—See ASSIGNMENTS.

AGGRAVATION OF NONCOMPENSABLE DISABILITY—See WORKMEN'S COMPENSATION (2).

AGGRAVATION OF PRE-EXISTING CONDITION—See WORKMEN'S COMPENSATION (1).

AIR-CONDITIONING EQUIPMENT—See CONTRACTS (10).

ALTERATION OF BOUNDARIES—See SCHOOLS AND SCHOOL DISTRICTS (2–4).

AMBIGUITY—See CONTRACTS (2, 5); INSURANCE (2–4); WILLS (1).

AMENDMENT—See APPEAL AND ERROR (22); EQUITY; PLEADING; RELIGIOUS SOCIETIES (3).

ANNEXATION—See COSTS (10, 13); MUNICIPAL CORPORATIONS (9–15); SCHOOLS AND SCHOOL DISTRICTS (3, 5–7).

ANNUAL PRIVILEGE FEE—See TAXATION (6).

ANSWER—See JUDGMENT (5); PLEADING.

ANTENUPTIAL CONTRACTS—See HUSBAND AND WIFE.

APPEAL AND ERROR.

1. The Supreme Court does not review a nonjury case *de novo* nor substitute its judgment for that of the trial court as to what the facts are as established by the proofs, the Supreme Court's determination in such respect being limited solely to whether the trial court's finding of facts is against the clear preponderance of the evidence. *Merrill* v. *Shumway*, 14.
2. It was too late, from and after rendition of the jury's verdict, to question procedure taken whereby the fact that a special question which had been presented by the defendants was stated to the jury as having been presented by them, although such designation of origin was improper, where counsel for neither party saved the question for review, the importance of errors of such nature, and their consequent effect as being either reversible or harmless, being judged in part by the attitude of counsel toward them when time yet remains to set things right in the jury room (CL 1948, § 618.39). *Reetz* v. *Rigg*, 36.
3. The Supreme Court is a court of review in law cases, not of retrial, and considers duly raised and saved questions only. *Id.*
4. The testimonial record is viewed in the light most favorable to the plaintiff on his appeal from order granting defendant's motion for a judgment notwithstanding the verdict. *Barnebee* v. *Spence Brothers*, 46.
5. The testimonial record of a chancery case that is appealed to the Supreme Court should be in such comprehensive shape as to permit decision on review, *de novo*, of all issues necessary to effectuation of complete and final grant or denial of relief as the nature of the fully assembled case may require. *Kenny* v. *Village of Novi*, 75.

APPEAL AND ERROR—Continued.

6. Suit attacking certain village regulations is ordered remanded to trial court with jurisdiction to permit final determination by the trial court in the matter so that such court may, with additional testimony or stipulated additional facts, consider and determine presented issues as possibly affected by post-appeal events and recertification to the Supreme Court for submission and determination of such questions as may then be made to appear. *Id.*
7. A decision of the Supreme Court denying any relief to plaintiff, former judge of the superior court of Grand Rapids, for additional salary during 3 six-year terms of office, renders it unnecessary to discuss defendants' asserted defenses of statute of limitations and plaintiff's failure to observe provision of court of claims act with reference to time of notice of an intent to file a claim and the filing of such claim (CL 1948, §§ 691.111a, 691.117). *Taylor* v. *Auditor General*, 257.
8. It is to be presumed that the jury has followed an erroneous instruction when it finds pursuant thereto, where conflicting instructions are given, one of which is erroneous. *Iwrey* v. *Fowler*, 311.
9. The Supreme Court views the evidence and draws reasonable inferences therefrom in the light most favorable to the opposite party on a motion for directed verdict or for judgment *non obstante veredicto*. *Fitzpatrick* v. *Ritzenhein*, 326.
10. Plaintiff's motion to strike certain statements from brief and appendix of attorney general is denied, where they relate to matters that are not of controlling significance insofar as the issues are presented in his appeal from revocation of license to practice medicine and appellant has not been prejudiced by such statements (CL 1948, § 338.51 *et seq.*, as amended). *Clark* v. *State Board of Registration in Medicine*, 343.
11. On appeal from judgment for defendant, entered after jury had disagreed and each side had moved without reservation for judgment in its favor, the case is treated as though it was a nonjury case and the matter for determination by the Supreme Court is whether or not there was evidence from which the trial judge could find for defendant (CL 1948, §§ 691.691, 691.701). *Mayabb* v. *Grand Trunk Western Railroad Company*, 374.
12. It was error for the trial court to permit plaintiff, after decision of the case in favor of defendant upon its motion for judgment after disagreement of the jury and each side had moved for judgment, to withdraw or qualify his motion for judgment (CL 1948, §§ 691.691, 691.701). *Id.*
13. The proofs adduced must be viewed in the light most favorable to plaintiffs in determining whether or not the trial judge erred in granting motions for directed verdicts, since the trial court must determine whether or not there are questions of fact for the jury to decide. *McKinney* v. *Larges*, 387.
14. Plaintiff's counsel saved point as to improper argument for review, where he objected to the argument and the trial court made a ruling holding the argument improper although counsel did not include a request to charge on the matter, it appearing

APPEAL AND ERROR—Continued.

that a charge would have been useless to erase the matter, designedly made, from the minds of the jurors. *Clark* v. *Grand Trunk Western Railroad Company*, 396.

15. Determination of question of fact as to status of plaintiff corporation as one winding up its affairs or one which was a going concern in default is not made, where record is not sufficient to permit resolution of such question, determination of the case being exclusively on ground that pendency of action in Federal court for same cause required dismissal of plaintiff's action (15 USC [1958 ed], § 1221 *et seq.*; Court Rule No 18, § 3 [1945]). *Bisceglia Motor Sales, Inc.*, v. *Studebaker-Packard Corporation*, 472.

16. Appeal from order dismissing action for fraud in sale of interest in oil and gas lease is dismissed, where record presented does not include the lease, plaintiff's answer to defendant's motion to dismiss was not accompanied by a supporting affidavit, and no testimony taken to enable trial court or Supreme Court to determine questions plaintiffs have brought up (Court Rules No 18, § 3; No 67, § 6; No 70, § 5 [1945]). *Pecar* v. *Glavin*, 483.

17. The Supreme Court hears and considers chancery cases *de novo* on the record on appeal. *Christine Building Company (Klipfel, Campus Estates, Inc.)* v. *City of Troy*, 509.

18. The Supreme Court gives considerable weight to the findings of the trial judge in equity cases primarily because he is in a better position to test the credibility of the witnesses by observing them in court and hearing them testify than is an appellate court which has no such opportunity. *Id.*

19. The Supreme Court will not ordinarily disturb the findings of the trial judge in an equity case unless, after an examination of the entire record, it reaches the conclusion that it would have arrived at a different result had it been in the position of the trial court. *Id.*

20. The Supreme Court in hearing a chancery case *de novo* gives great weight to the findings of fact of the trial judge, where he had the opportunity of seeing the witnesses while testifying, and does not reverse under such circumstances unless a different conclusion would have been reached from a reading of the entire record. *Stacey* v. *Mikolowski*, 550.

21. The Supreme Court does not reverse the determination of the trial court in a nonjury case unless it is found that the judgment rendered is contrary to the clear weight of the evidence. *Leski* v. *State Farm Mutual Automobile Insurance Company*, 561.

22. The Supreme Court declines to discuss whether or not defendant corporate appellant received copies of plaintiff's amended pleading, where there is nothing in the record to show that the question was raised in the trial court. *Abstract & Title Guaranty Company* v. *Williams*, 620.

23. Whether or not water tank, interior of which plaintiff's deceased was engaged to paint, was a building and whether or not deceased was in it, within the meaning of double indem-

APPEAL AND ERROR—Continued.

nity provision of accident and health insurance policy, when fatal injuries were sustained, are not decided, where recovery under such provision is denied because the structure, as distinguished from its contents, is determined as not having burned. *Bobco* v. *Metropolitan Insurance Company,* 645.

24. The sole question properly before the Supreme Court on appeal from order confirming an award in condemnation proceedings and denying a new trial therein is whether or not there was an abuse of discretion by the trial court in denying the motion for new trial (CL 1948, § 213.33). *Board of Education of the City of Detroit* v. *Flanz,* 668.

25. Whether or not the State tenure commission has jurisdiction or authority to act or pass upon a retirement policy and program of a board of education is not determined on appeal in a board's suit to enjoin the commission from holding a hearing in which such question had been raised (CL 1948, § 38.71 *et seq.*). *School District of the City of Royal Oak* v. *State Tenure Commission,* 689.

See COSTS (7, 8, 11, 12); UNEMPLOYMENT COMPENSATION (5); WORKMEN'S COMPENSATION (8).

APPEAL BOARD—See UNEMPLOYMENT COMPENSATION (1–4, 6).

APPEARANCE—See JUDGMENT (3).

APPENDIX—See APPEAL AND ERROR (10); COSTS (11).

APPOINTMENT OF UMPIRE—See INSURANCE (5, 6).

APPORTIONMENT—See COSTS (9); FINES.

APPRAISAL—See INSURANCE (6).

APPROVAL—See CONTRACTS (7–9); NOTICE; SCHOOLS AND SCHOOL DISTRICTS (3, 5, 6); TRIAL (3).

ARBITRATION AND AWARD—See INSURANCE (5, 6).

ARCHITECTS—See CONTRACTS (7–9).

ARGUMENT—See APPEAL AND ERROR (14); TRIAL (12).

ARREST—See COSTS (2); HABEAS CORPUS (6); MALICIOUS PROSECUTION (1–3).

ASSAULT AND BATTERY—See COSTS (2).

ASSESSED VALUATION—See COURTS (4).

ASSESSMENT—See COSTS (3); TAXATION (1, 3, 4).

ASSESSMENT ROLL—See DRAINS (1, 2).

ASSIGNMENTS.

An assignment to a mere dummy or agent is not sufficient to relieve an assignor from an existing liability. *Cinderella Theatre Company, Inc.,* v. *United Detroit Theatres Corporation,* 425.

See ACTION; LANDLORD AND TENANT (4, 5).

ASSOCIATIONS—See PUBLIC SERVICE COMMISSIONS (2).

ATTORNEY AND CLIENT—See JUDGMENT (3); PARTIES (1); WITNESSES (1–4).

ATTORNEY GENERAL—See APPEAL AND ERROR (10); MANDAMUS; PHYSICIANS AND SURGEONS (1).

AUDITOR GENERAL—See TAXATION (2, 3).

AUTHORITY—See FALSE PRETENSES.

AUTOMOBILES.

1. Finding of trial court in nonjury case that southbound defendant motorist on his right-hand side of 2-lane through highway, driving at a lawful speed, was not guilty of negligence as he drove into right side of westbound car in which plaintiff was a guest passenger, where latter car had not stopped as required before entering the through highway, was on right-hand side of its highway, and view of it was obstructed by a high, earthen bank immediately northeast of the intersection *held,* not against the clear preponderance of the evidence, there being insufficient time, after car in which plaintiff was riding came into view and failed to stop as required, for defendant to do anything to avoid the accident (CLS 1956, § 257.651). *Merrill* v. *Shumway,* 14.

2. Whether or not westbound defendant motorist at dusk in December was causally negligent, as charged by plaintiffs, in striking 10-year-old northbound bicyclist on westerly side of intersection when he was several feet north of the centerline *held,* properly left to jury. *Shafkind* v. *Kroll,* 42.

3. The discovered negligence rule was not applicable to westbound motorist on north side of street at dusk in December in colliding with 10-year-old bicyclist who was several feet north of centerline on westerly side of intersection, where his causally negligent conduct continued until time of impact. *Id.*

4. Failure of trial court to instruct jury that northbound right-turning motorist was guilty of negligence *per se* in failing to accord right-of-way to northbound plaintiff pedestrian on east crosswalk even though plaintiff's counsel had failed to make a request so to charge, based on State statute making such a failure by a motorist negligence *per se,* although he had made a request based on applicable local ordinance which differed in that its violation was merely evidence of negligence and not negligence *per se* and such request had been given *held,* reversible error, since plaintiff's proofs depended in very large part upon application of the statute to support his claim that defendant's driver was negligent (CLS 1956, § 257.612). *Sakorraphos* v. *Eastman Kodak Stores, Inc.,* 96.

5. Instruction given in consolidated cases arising from collision between eastbound motorist who continued eastward from behind a left-turning eastbound motorist and collided with defendant's westbound left-turning car early in the afternoon in the fore part of December, whereby jury was told at different times that both plaintiffs and defendant had the burden of proof as to plaintiff driver's contributory negligence, *held,*

AUTOMOBILES—Continued.

reversible error, where trial court failed to withdraw, correct, or modify the instruction (Court Rule No 23, § 3a [1945]). *Iwrey* v. *Fowler*, 311.

6. Instruction given in consolidated cases arising from collision of eastbound car and left-turning westbound car wherein the trial judge stated it made no "difference if the defendant is 99.9% guilty of negligence, if the plaintiff driver is 1/10 of 1%, or in any way guilty of negligence that contributed to the accident she cannot recover" *held*, erroneous, since jury might have interpreted it as barring recovery on the basis of negligence so slight as to be immaterial, or possibly on a finding of remote lack of due care as distinguished from negligence proximately contributing to the accident. *Id.*

7. The issue of appellee's contributory negligence in action arising out of head-on collision was for jury to determine, where he admitted that he did not even see appellant's car until it was about 3 car lengths distant when starting to cross over to appellee's side of pavement although he could have seen 200 feet ahead at that point, it being a question of fact whether appellee failed to maintain a reasonable and proper lookout and whether an earlier observation of the approaching car would have enabled him to avoid the collision, hence, that his failure to see the car sooner was a proximate cause of the accident. *Fitzpatrick* v. *Ritzenhein*, 326.

8. The location of debris following a violent automobile collison does not necessarily locate the point of impact with accuracy, since debris does not always plummet from the point of collision, but may be carried some distance in the direction of force and vacuum. *Id.* 327.

9. Appellants' motions for directed verdict, judgment *non obstante veredicto* and for new trial were properly denied in action arising out of head-on collision, where the physical facts were such that it may not be said they necessarily negatived appellee's right to recover damages. *Id.*

10. Evidence presented by plaintiff in action against taxicab owner and operator and owner and operator of colliding car as to proximate cause of collision resulting in injuries to herself and son *held*, sufficient to submit case to jury, where record shows that accident occurred in mid-February about 9:30 in the evening on a slippery pavement, that taxicab was driven at speed of 35 to 40 miles an hour notwithstanding plaintiff warned as to excessive speed for the conditions, and other defendant's oncoming car was slipping and zigzagging for 3 or 4 car lengths before collision occurred. *McKinney* v. *Larges*, 387.

11. Evidence presented by defendant when called as an opposite party in action arising out of a rear-end collision *held*, merely circumstantial and not the clear, positive, and credible evidence necessary to rebut the statutory presumption in view of other contradictory proofs raising a serious question as to the credibility of defendant's testimony, hence, it was error to direct a verdict for defendant (CLS 1956, § 257.402; CL 1948, § 617-.66). *Petrosky* v. *Dziurman*, 540.

AUTOMOBILES—Continued.

12. A question was presented for consideration by jury in action arising out of rear-end collision on wet pavement, where immediately after the accident defendant said nothing about a brake failure either to plaintiff or investigating police officers, but claimed there was such failure at the trial, where he also testified he drove 20 miles from the collision to his home, he had had regular inspection of and attention to his brakes and had consumed 3 bottles of beer at the race track where he had spent the afternoon prior to accident, there being a serious question as to the credibility of his testimony (CLS 1956, § 257.402). *Id.*

See ABATEMENT AND REVIVAL; DAMAGES; INSURANCE (1, 3, 4); RAILROADS.

BAD FAITH—See CONTRACTS (8).

BANKS AND BANKING—See TRUSTS (1, 2, 5, 6).

BEER—See COSTS (15); MANDAMUS.

BIAS—See WORDS AND PHRASES (1).

BICYCLES—See AUTOMOBILES (2, 3).

BILLS AND NOTES—See CANCELLATION OF INSTRUMENTS.

BINDING OVER FOR TRIAL—See CRIMINAL LAW (4).

BONA FIDE PURCHASER—See CHATTEL MORTGAGES.

BOUNDARIES—See SCHOOLS AND SCHOOL DISTRICTS (2–4).

BRAKES—See AUTOMOBILES (12).

BREACH OF CONTRACT—See MASTER AND SERVANT.

BRIEF—See APPEAL AND ERROR (10); DIVORCE (6).

BROKERS.

1. It was reversible error in nonjury case to award judgment to plaintiff after excluding evidence of events subsequent to time of execution of preliminary agreement to purchase land in action to recover real-estate commission based on defendant seller's letter setting forth his express agreement to pay plaintiff the commission "upon the date of consummation of the deal," where preliminary agreement executed on the same day as the letter, provided for consummation of the sale by payment of $75,000 down and the execution of a land contract, on specified terms, within 30 days after delivery of an abstract of title or title policy showing seller to have marketable title; seller had refused payment of commission because deal had not been consummated; and record fails to disclose whether or not the deal had been consummated before rescission 2 months after purchasers had taken possession. *Fortner* v. *Connell*, 146.
2. The real-estate broker will not be denied his commission where a condition precedent to payment of the commission fails to occur because of the seller's inaction. *Id.*

BROKERS—Continued.

3. The exclusion of evidence that down payment on purchase price called for by the preliminary agreement to purchase land had not been made, and evidence of the seller's efforts to complete the sale *held*, reversible error in nonjury case for broker's commission; the execution of the preliminary agreement setting forth how consummation was to be effected not being sufficient to satisfy condition precedent to right to commission specifically contingent upon "consummation of the deal." *Id.*
4. Judgment for plaintiff for commission on sale of property of defendant's decedent under contract for payment of commission "upon the date of consummation of the deal," *held*, error, where defendant seller's evidence bearing upon the issue of who was responsible for failure of consummation was excluded. *Id.* 147.

BUILDING—See APPEAL AND ERROR (23); INSURANCE (7, 8).

BURDEN OF PROOF—See AUTOMOBILES (5); EASEMENTS (3); MALICIOUS PROSECUTION (8); MUNICIPAL CORPORATIONS (2); NEGLIGENCE (2, 9).

BURNING—See APPEAL AND ERROR (23); INSURANCE (7, 8).

CABBAGES—See WITNESSES (3).

CANCELLATION OF INSTRUMENTS.

Trial court's finding, in suit for specific performance of option to purchase real estate wherein defendant filed a cross bill to cancel the option and for rescission of note and mortgage, that there had not been a meeting of the minds with respect to the execution of the mortgage and option and vacating the option and rescinding the mortgage and note *held*, supported by testimony adduced showing, among other things, defendant had not understood the transaction. *Stacey* v. *Mikolowski*, 550.

CERTIORARI—See COSTS (14); CRIMINAL LAW (6, 7); UNEMPLOYMENT COMPENSATION (2).

CHANCERY CASES—See APPEAL AND ERROR (5, 17–20); COSTS (14); PUBLIC SERVICE COMMISSIONS (1).

CHANGE OF CIRCUMSTANCES—See DIVORCE (1, 2).

CHANGE OF CREED—See RELIGIOUS SOCIETIES (5, 6).

CHATTEL MORTGAGES.

Purchaser at sheriff's sale of car against which plaintiff's chattel mortgage had been recorded in Wayne county could not possibly be a bona fide purchaser at the sale held in Presque Isle county where the chattel mortgage had not been recorded but fact of existence of the chattel mortgage was, by plaintiff's attorney, brought to the notice of the deputy sheriff in charge and all persons present, including individual defendant who was secretary-treasurer of corporate defendant. *Goodwill Industries of Detroit* v. *Whitsitt*, 569.

CHECKS—See FALSE PRETENSES.

CHURCH—See RELIGIOUS SOCIETIES (3, 7).

CIRCUIT COURT—See COURTS (1–3); CRIMINAL LAW (6, 7); JUSTICES OF THE PEACE (2, 3); PUBLIC SERVICE COMMISSIONS (1); REPLEVIN (4); TAXATION (2); UNEMPLOYMENT COMPENSATION (1, 2, 5, 6).

CIRCUIT JUDGES—See JUDGES.

CLAIM AGAINST STATE—See APPEAL AND ERROR (7).

CLAIM OF LIEN—See MECHANICS' LIENS (2).

CLASSIFICATION—See CONSTITUTIONAL LAW (1, 3, 4); COSTS (12); MUNICIPAL CORPORATIONS (26); WORKMEN'S COMPENSATION (11).

COLLATERAL ATTACK—See FINES (2).

COLLATERAL ESTOPPEL—See JUDGMENT (7).

COLLECTIVE BARGAINING—See LABOR RELATIONS (1–3); UNEMPLOYMENT COMPENSATION (4).

COLLOQUY—See JUDGMENT (2).

COMMERCIAL AREA—See MUNICIPAL CORPORATIONS (8).

COMMISSIONS—See BROKERS (1, 2, 4); CONTRACTS (10).

COMMON LABOR—See WORKMEN'S COMPENSATION (5, 6).

COMMON LAW—See TRUSTS (2); WITNESSES (2, 4); WORKMEN'S COMPENSATION (19).

COMMON PLEAS COURT—See COURTS (5); JUSTICES OF THE PEACE (3); REPLEVIN (4).

COMPENSABLE INJURY—See WORKMEN'S COMPENSATION (4).

CONDEMNATION PROCEEDINGS—See APPEAL AND ERROR (24); EMINENT DOMAIN.

CONDITION PRECEDENT—See BROKERS (2).

CONDITIONS—See BROKERS (1).

CONFESSION—See CRIMINAL LAW (2, 3).

CONFLICT OF INTEREST—See JUDGMENT (3).

CONGREGATION—See RELIGIOUS SOCIETIES (2).

CONSENT—See PARTIES (1).

CONSENT DECREE—See JUDGMENT (1).

CONSOLIDATED CASES—See AUTOMOBILES (5); UNEMPLOYMENT COMPENSATION (5).

CONSORTIUM—See DEATH (3).

CONSTITUTION—See RELIGIOUS SOCIETIES (3).

CONSTITUTIONAL LAW.

1. A legislative body may properly resort to classification under the police power. *Local No. 1644, AFSC&ME, AFL-CIO,* v. *Oakwood Hospital Corporation,* 79.

2. An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections (US Const, Am 14; Mich Const 1908, art 2, § 16). *International Salt Company* v. *Wayne County Drain Commissioner,* 160.

3. Provisions of State Constitution presently setting forth districts for election of State senators *held,* invalid prospectively as a denial of equal protection of law under the Constitution of the United States for lack of a rational basis for the invidiously discriminating apportionment made (US Const, Am 14; Mich Const 1908, art 5, §§ 2, 4, as amended in 1952). *Scholle* v. *Secretary of State,* 176.

4. Provisions of the Constitution of Michigan relative to arrangement of senatorial districts, as such provisions stood before adoption of amendments hereby declared invalid, prohibit an arrangement of such districts which would result in some districts having more than twice the population of others, per BLACK, KAVANAGH, SOURIS, and OTIS M. SMITH, JJ., such disparity of population being also offensive to the equal protection clauses of the State and Federal Constitutions per BLACK and KAVANAGH, JJ. (US Const, Am 14; Mich Const 1908, art 2, § 1; art 5, §§ 2, 4, as amended in 1952). *Id.*

5. Legislation relative to apportionment of senatorial districts in accordance with the State Constitution as it stood before adoption of amendments hereby declared invalid, as construed to prohibit any district from having more than twice the population of any other district, may properly be enacted by a legislature which includes a *de facto* senate whose existence is continued for all valid purposes for balance of current term, but not thereafter (Const 1908, art 5, §§ 2, 4, as amended in 1952). *Id.* 177.

See COSTS (5, 6); COURTS (1, 3, 4); DRAINS (1, 3–5); ELECTIONS; MUNICIPAL CORPORATIONS (21); OFFICERS; RELIGIOUS SOCIETIES (1); SCHOOLS AND SCHOOL DISTRICTS (5).

CONSTRUCTION CONTRACT—See CONTRACTS (8).

CONSTRUCTION OF CONTRACTS—See CONTRACTS (3–7, 10); HUSBAND AND WIFE (4).

CONSTRUCTION OF LEASE—See LANDLORD AND TENANT (2).

CONSTRUCTION OF POLICY—See INSURANCE (1–3).

CONSTRUCTION OF TRUST—See TRUSTS (9, 10).

CONSTRUCTION OF WILLS—See WILLS (1–3).

CONSUMMATION OF DEAL—See BROKERS (1, 3, 4).

CONTRACTS.

1. Items for supervision by officer of plaintiff corporation, workmen's compensation, unemployment, and other insurance for employees *held*, not improper charges for labor under cost-plus contract for remodeling farmhouse for defendant, that contained no specifications or maximum amount for completing the project and no restrictions as to who should perform the supervisory services. *W. J. Howard & Sons, Inc.*, v. *Meyer*, 300.
2. Profit and overhead charge by general contractor on items which were subcontracted out were properly included under cost-plus contract for remodeling defendant's farmhouse that was found by the circuit judge not to be free from ambiguity. *Id.*
3. A contract is to be read in the light of the circumstances attending its execution and construed so as to effectuate the intent of the parties when it was made. *Id.*
4. A promise must be interpreted in the sense in which the promisee knew or had reason to know that the promisor understood it. *Id.*
5. A practical interpretation given an ambiguity in a contract by the parties thereto is entitled to consideration by the court. *Id.*
6. The practical construction given by the parties to an ambiguity in a contract is not limited to the self-serving interpretation by one party thereto but requires the acquiescence by the other party. *Id.*
7. It was not error for trial judge in nonjury action by building contractor to admit evidence tending to show the practical construction that the parties had placed on provision of cost-plus contract for remodeling of defendant's farmhouse relative to architect's approval of contractor's monthly statements for payment by owner. *Id.* 301.
8. The decision of an architect in approving or disapproving the work as a performance of a construction contract, or in passing on questions relating thereto, is, in the absence of fraud, bad faith, or mistake, conclusive and binding on the parties, where the contract, either in express terms provides that it shall be final and conclusive, or in plain language shows that it was the intention of the parties that the person to whom the question is submitted should be the final arbiter thereof. *Id.*
9. Finding of trial court that defendant owner of farmhouse was bound by architect's action in approving remodeling contractor's statements for payment and that contractor was entitled to judgment for amount claimed *held*, not error under record presented and renders it unnecessary to discuss defendant's claim of set-off and recoupment. *Id.*
10. The reservation in distributor's franchise agreement, of the manufacturer of air-conditioning equipment of the right to make sales to governmental units, utilities, carriers, to manufacturers who install the equipment in their own product, and to special accounts and industries designated therein but otherwise giving the distributor the right to a commission on sales in its territory even when other distributors effected

CONTRACTS—Continued.

the sale, permits a fair inference that the distributor was being granted the exclusive right to make all other sales in the designated territory. *Carrier Corporation* v. *Central Station Air Conditioning Co.*, 605.

See COSTS (16); LANDLORD AND TENANT (3).

CONTRIBUTORY NEGLIGENCE—See AUTOMOBILES (5, 7); DEATH (4); NEGLIGENCE (8, 9); NEW TRIAL; RAILROADS.

CONTROL—See AUTOMOBILES (10).

CONVICTION—See MALICIOUS PROSECUTION (1, 3); PHYSICIANS AND SURGEONS (4).

COPPER COOLER—See MALICIOUS PROSECUTION (7).

CORPORATION AND SECURITIES COMMISSION—See TAXATION (5).

CORPORATIONS.

1. The corporate fiction will be disregarded where the parent corporation's domination of the subsidiary is so complete as to make them practically indistinguishable or to make the subsidiary a mere tool, agency, or instrumentality of the parent, so that the third party, dealing with the parent, will suffer loss unless the parent corporation be held. *Cinderella Theatre Company, Inc.*, v. *United Detroit Theatres Corporation*, 424.
2. The courts will disregard the separate corporate entity theory when a subsidiary corporation exists to evade the legal obligations of the parent corporation, without regard to actual fraud. *Id.* 425.
3. Corporate separate existence will be disregarded where to recognize it would be to sanction a fraud or promote injustice. *Id.*

See APPEAL AND ERROR (15); CHATTEL MORTGAGES; CONTRACTS (1); LANDLORD AND TENANT (4, 5); TAXATION (6); TORTS.

COST-PLUS CONTRACTS—See CONTRACTS (2, 7).

COSTS.

1. No costs are allowed in suit to declare invalid a municipal zoning ordinance as applied to 3-block area midway on 27-block portion of a through arterial highway in defendant city whereby use was limited to residential purposes, a public question being involved. *Alderton* v. *City of Saginaw*, 29.
2. No costs are allowed on affirmance of judgment against defendant police officers for assault and battery, where plaintiff had appealed from such judgment because of trial court's elimination from jury's consideration of counts alleging false arrest and malicious prosecution. *Arnold* v. *Jarvis*, 59.
3. No costs are allowed in suit to sell lands for nonpayment of taxes on appeal from order granting petitioner's motion to strike objections interposed that land was in county other than county where taxes were assessed (CL 1948 and CLS 1956, § 211.1 *et seq.*). *Auditor General* v. *Klenk*, 65.

COSTS—Continued.

4. No costs are allowed in 2 suits to enjoin enforcement of township zoning ordinance as to conduct of ornamental iron sales business. *Bauer* v. *Township of Redford*, 71.

5. No costs are allowed in suit to set aside drain tax assessment against plaintiff's property because of failure to receive notice of hearing on review of apportionment of benefits, in view of the nature of the question involved (US Const, Am 14; Mich Const 1908, art 2, § 16; PA 1956, No 40, § 154, as amended by PA 1957, No 61). *International Salt Company* v. *Wayne County Drain Commissioner*, 161.

6. No costs are allowed in proceeding involving the election of State senators, a public question being involved (US Const, Am 14; Mich Const 1908, art 5, §§ 2, 4, as amended in 1952). *Scholle* v. *Secretary of State*, 178.

7. No costs are allowed where neither the appeal nor the cross appeal has prevailed. *Fitzpatrick* v. *Ritzenhein*, 327.

8. No costs are allowed on appeal from order, affirming liability of the employer for death due to silicosis, with interest thereon, but modifying the award by applying statutory maximum, since neither party has prevailed in full. *McDaniel* v. *Campbell, Wyant & Cannon Foundry*, 357.

9. No costs are allowed in mandamus proceeding relative to apportionment of penal fine moneys, a public question being involved. *City of Belding* v. *Ionia County Treasurer*, 370.

10. No costs are allowed in mandamus proceeding to compel submission of annexation questions to electors, a public question being involved (CLS 1956, § 117.9). *Williams* v. *County of Bay*, 407.

11. No costs are allowed on dismissal of appeal from order dismissing action, where neither the record filed on appeal nor appellant's appendix presents a sufficient basis to permit a determination of the case on the merits (Court Rules No 18, § 3; No 67, § 6; No 70, § 5 [1945]). *Pecar* v. *Glavin*, 483.

12. No costs are allowed on appeal in suit to declare a zoning ordinance invalid as to plaintiffs' tracts and on their cross appeal to have the court pass upon the validity of a classification not presently imposed thereon, where neither party has prevailed in the entirety. *Christine Building Company (Klipfel, Campus Estates, Inc.)* v. *City of Troy*, 510.

13. No costs are allowed in proceeding to review annexation of territory by joint county boards of education to plaintiff district, public questions being involved (CLS 1956, §§ 340.461–340.465, as amended by PA 1957, No 135). *School District of the City of Lansing* v. *State Board of Education*, 592.

14. No costs are allowed in certiorari to review denial of leave to intervene in chancery suit to review order of public service commission, a statutory question being involved (CLS 1956, § 462.26). *Kalamazoo Municipal Utilities Association* v. *Ingham Circuit Judge (Consumers Power Company* v. *Public Service Commission)*, 601.

15. No costs are allowed in mandamus proceeding to compel issuance of license to plaintiff to sell wine and beer as a specially

COSTS—Continued.

designated merchant on dismissal of petition. *Northline Drugs #2, Inc.*, v. *Liquor Control Commission*, 672.

16. No costs are allowed in suit to enjoin State tenure commission from holding a hearing on teacher's demand for hearing on school board's failure to renew her contract, a public question being involved (CL 1948, § 38.71 *et seq.*). *School District of the City of Royal Oak* v. *State Tenure Commission*, 689.

See DIVORCE (6, 15); LABOR RELATIONS (3); UNEMPLOYMENT COMPENSATION (6); WORKMEN'S COMPENSATION (6, 10).

COUNTIES—See COSTS (3); FINES (1); TAXATION (1, 4).

COUNTY BOARD OF EDUCATION—See COSTS (13); SCHOOLS AND SCHOOL DISTRICTS (3, 4, 7).

COURT ORDER—See ELECTIONS (2).

COURT RULES—See APPEAL AND ERROR (15, 16); AUTOMOBILES (5); COSTS (11); CRIMINAL LAW (1); JUDGMENT (3–5); NEGLIGENCE (9); PLEADING; TRIAL (1, 2, 8, 9); UNEMPLOYMENT COMPENSATION (5).

COURTS.

1. The superior court of Grand Rapids, organized under a statute entitled "An act to provide for a municipal court in the city of Grand Rapids, to be called 'The superior court of Grand Rapids'" is a municipal court, not a *circuit court*, within provision of the Constitution prohibiting increases in salary of any "public officer, except circuit judges" after election or appointment (Const 1908, art 16, § 3; CL 1948, § 727.1 *et seq.*, as amended). *Taylor* v. *Auditor General*, 256.
2. The establishment by the legislature of the superior court of Grand Rapids, thereby relieving the circuit court of the county within which it was located of a portion of its business, did not destroy or materially affect the jurisdiction conferred upon circuit court of that county or circuit courts elsewhere in the State (CL 1948, § 727.1 *et seq.*, as amended). *Id.*
3. Municipal courts, such as the superior court of Grand Rapids, derive their powers from legislative action, whereas circuit courts are invested by the Constitution with powers of which they cannot be deprived by the legislature (Const 1908, art 7, §§ 8–12; CL 1948, § 727.1 *et seq.*, as amended). *Id.*
4. Precedents from other States where salaries of public officers were subject to increase by virtue of increase in population or assessed valuation of property do not support claim of right under statute to increase of salary for judge of superior court of Grand Rapids when circuit judges' salaries were increased, since such latter action is done by legislative action, and except for circuit judges, the Constitution specifically prohibits the increase of salaries of public officers after election or appointment (Const 1908, art 16, § 3; CL 1948 and CLS 1956, § 727.6). *Id.* 257.

COURTS—Continued.

5. The law of set-off and recoupment in justice courts governs in the common pleas court (CL 1948, § 669.11; PA 1915, No 314, ch 69, § 17a, as added by PA 1959, No 249). *Standard Toch Chemicals, Inc.*, v. *Victor Paint Co.*, 640.

See APPEAL AND ERROR (15); LANDLORD AND TENANT (3); RELIGIOUS SOCIETIES (1, 4, 6); SCHOOLS AND SCHOOL DISTRICTS (4); UNEMPLOYMENT COMPENSATION (1, 2).

COVENANTS.

The statutory provision that "no covenant shall be implied in any conveyance of real estate, except oil and gas leases," should not be so literally applied as to defeat the clear intent of the parties to an instrument as gathered from its context (CL 1948, § 565.5). *Cinderella Theatre Company, Inc.*, v. *United Detroit Theatres Corporation*, 424.

See LANDLORD AND TENANT (1).

COVERAGE—See INSURANCE (1).

CREDIBILITY—See APPEAL AND ERROR (20); AUTOMOBILES (11, 12); PHYSICIANS AND SURGEONS (3).

CREED—See RELIGIOUS SOCIETIES (5, 6).

CRIMINAL LAW.

1. No opinion on the propriety of the 2 adjournments of the hearing on writ of habeas corpus is expressed on granted leave to appeal from order denying motion to quash information charging defendant with first-degree murder, where the habeas corpus proceedings are not before the Supreme Court for review (CL 1948, § 637.1 *et seq.*; Court Rule No 60, § 1 [b] [1945]). *People* v. *McCager*, 117.
2. Motion to quash information, charging defendant with first-degree murder, based upon his alleged illegal detention at time his confession was obtained, was properly denied, where at such time he was being detained at the direction of the judge who had issued a writ of habeas corpus pending his determination thereof (CL 1948, § 637.1 *et seq.*). *Id.*
3. Questions as to the admissibility of an alleged confession to first-degree murder, after affirmance of order denying motion to quash information, are to be resolved by trial judge if the confession was otherwise inadmissible than because obtained while he was being detained pursuant to the direction of judge who had issued writ of habeas corpus pending such judge's final determination thereof, or, if questions of fact must be resolved, by jury under proper instruction of the trial judge (CL 1948, § 637.1 *et seq.*). *Id.*
4. It is necessary that an examining magistrate find that a crime has been committed and that there is probable cause to believe the accused guilty thereof in order to bind him over for trial (CL 1948, § 766.1 *et seq.*). *People* v. *Delaney*, 694.
5. The question of whether or not it is shown on preliminary examination that there is probable cause to believe the accused has committed the crime charged is for consideration and de-

CRIMINAL LAW—Continued.

termination by the examining magistrate (CL 1948, § 766.1 *et seq.*). *Id.*

6. The function of the circuit court on the writ of certiorari from order of examining magistrate discharging an accused is to determine whether or not the magistrate has abused his discretion (CL 1948, § 766.1 *et seq.*). *Id.*
7. Circuit judge committed error on certiorari to examining magistrate from latter's discharge of accused on charge of obtaining money by false pretenses in binding defendants over for trial, where the judge wrongfully took into consideration information which had come to his attention in the trial of another case and substituted his judgment for that of the examining magistrate in weighing the evidence (CL 1948, § 750-.218, as amended by PA 1957, No 69; § 766.1 *et seq.*). *Id.*

See FALSE PRETENSES; HABEAS CORPUS (3, 4); MALICIOUS PROSECUTION (6); PHYSICIANS AND SURGEONS (4).

CROSS APPEAL—See COSTS (7, 12).

CROSS-EXAMINATION—See EVIDENCE (5); PHYSICIANS AND SURGEONS (1, 2); WITNESSES (5).

CUSTODY—See CRIMINAL LAW (2); HABEAS CORPUS (6).

CUSTODY OF CHILDREN—See DIVORCE (1–3, 5).

DAMAGES.

Verdict of $500 for plaintiff in action for neck injury received in an automobile accident *held*, not against the great weight of evidence nor inadequate, where there was evidence that she was released from the hospital on the same day as the accident, returned to work 10 days later, and continued to receive some treatment for the next 3 or 4 months, and evidence presented an issue of fact as to whether difficulty she had with her hand and arm a year later was attributable to defendant's negligence or some other causes. *A'Eno* v. *Lowry*, 657.

See DEATH (1–3); NEW TRIAL; RELIGIOUS SOCIETIES (7).

DATES—See WILLS (6).

DEALERS SALES AGREEMENT—See ABATEMENT AND REVIVAL.

DEATH.

1. The assumption of an obligation to make part of the monthly mortgage payments on the home of parents of 24-year-old son and his other contributions toward the home and for family use, even though voluntary, was sufficient to place his parents in the class of next of kin suffering pecuniary loss recoverable under the death act (CL 1948, §§ 691.581, 691.582). *Mooney* v. *Hill*, 138.
2. Whatever damages a wife may have suffered, or may hereafter suffer, in consequence of her husband's death, became suable and recoverable only by action brought in the name of the personal representative of her husband's estate under the

DEATH—Continued.

death act, as amended, in view of the exclusive provisions of that act and interpretations thereof by the Supreme Court (CL 1948, §§ 691.581–691.583). *Burns* v. *Van Laan*, 485.

3. The death act, as amended, seeks to avoid a multiplicity of suits and provides a unitary action for death and survival in the plaintiff personal representative who is a statutory trustee for all eligible beneficiaries of such unitary right and exclusively entitled to recover in their behalf all legally recoverable damages each has suffered on account of the wrongful death, the court being equally divided as to whether loss of consortium may be included within the term "pecuniary injury" when the decedent is a spouse (CL 1948, §§ 691.581–691.583). *Id.*

4. Evidence presented in an action under the death act for loss of plaintiff's husband, a sawyer at lumber mill, *held*, not to have overcome presumption that decedent who had been electrocuted had not been guilty of contributory negligence, where there was no evidence decedent had been negligent (CL 1948, § 691.581 *et seq.*). *Kratochvil* v. *City of Grayling*, 682.

5. It is necessary in an action for the negligent death of plaintiff's decedent, brought under the death act, that defendant be shown to have been guilty of negligence which was the proximate cause of the decedent's death (CL 1948, § 691.581 *et seq.*). *Id.*

6. It is necessary that the trial court in the first instance, rather than the Supreme Court, make a finding that the death of a plaintiff's decedent was proximately caused by negligence of defendant, in order to hold latter liable in an action under the death act (CL 1948, § 691.581 *et seq.*). *Id.*

See APPEAL AND ERROR (23); HUSBAND AND WIFE (4); NEW TRIAL; TRUSTS (8–10); WORKMEN'S COMPENSATION (12).

DEBRIS—See AUTOMOBILES (8).

DECLARATIONS OF TESTATRIX—See WILLS (5).

DE FACTO OFFICERS—See CONSTITUTIONAL LAW (5); OFFICERS.

DEFAULT—See APPEAL AND ERROR (15); JUDGMENT (3–5).

DELEGATION OF POWER—See SCHOOLS AND SCHOOL DISTRICTS (1, 2).

DEMAND—See COSTS (16); INJUNCTION (1); INTEREST (1); REPLEVIN (1).

DE NOVO REVIEW—See APPEAL AND ERROR (5, 17, 20).

DEPOSITS—See LANDLORD AND TENANT (5).

DEPRECIATION BENEFITS—See TAXATION (6).

DIRECTED VERDICT—See APPEAL AND ERROR (9, 13); AUTOMOBILES (9, 11); TRIAL (13).

DISABILITY—See WORKMEN'S COMPENSATION (12, 15).

DISAGREEMENT OF JURY—See APPEAL AND ERROR (11, 12); TRIAL (10).

DISCHARGE—See HABEAS CORPUS (4).

DISCOVERED NEGLIGENCE—See AUTOMOBILES (3).

DISCRETION OF COURT—See APPEAL AND ERROR (24); DIVORCE (4, 5, 7, 8); EMINENT DOMAIN (2); JUDGMENT (4, 5); PUBLIC SERVICE COMMISSIONS; TRIAL (1, 2); WORDS AND PHRASES (1).

DISCRETION OF EXAMINING MAGISTRATE—See CRIMINAL LAW (6).

DISCRETION OF OFFICERS—See MUNICIPAL CORPORATIONS (17); VENDOR AND PURCHASER.

DISCRIMINATION—See CONSTITUTIONAL LAW (3, 4); OFFICERS.

DISMISSAL AND NONSUIT—See EQUITY.

DISMISSAL OF BILL—See PARTIES (3).

DISPARITY OF POPULATION—See CONSTITUTIONAL LAW (4, 5).

DISQUALIFICATION FOR BENEFITS—See UNEMPLOYMENT COMPENSATION (1, 4).

DISTRIBUTOR'S AGREEMENT—See CONTRACTS (10).

DIVORCE.

1. Trial court's denial of husband's motion to dismiss divorced wife's second petition to modify decree as to custody of daughter who was then 5–1/2 years of age, which motion was based on ground that the question as to custody and support of the child was *res judicata* by virtue of determination made on first petition which had been filed nearly 14 months theretofore, *held,* proper, where the award of custody to the wife made pursuant to her second petition was made upon a showing that her unfortunate mental condition had steadily improved, her financial condition had also improved, and she was gainfully and permanently employed, the trial judge being then convinced that the mother had conclusively established her fitness for the child's custody. *House* v. *House,* 350.
2. Order granting custody of 5–1/2-year-old daughter to divorced mother some 3–1/2 years after decree which had lodged custody with father, upon proofs showing a material improvement in the wife's circumstances during 16-month period between orders on first and second petitions to modify decree as to custody, *held,* within the jurisdiction of the court and in accord with the general principle of public policy recognized by statute as to custody of a child of such tender years (CL 1948, § 722.541). *Id.*
3. The trial court in suit for divorce has authority to revise and alter its decree concerning the care, custody, and maintenance of children and make a new decree concerning them as the circumstances of the parents and the benefit of the children shall require (CL 1948, § 552.17). *Polley* v. *Polley,* 455.

DIVORCE—Continued.

4. Modification of provisions of decree of divorce for support of children is within the discretion of the trial court and will not be interfered with unless abused (CL 1948, § 552.17). *Id.*

5. Order of trial court modifying decree of divorce but failing to relieve husband of decretal obligation to pay wife child support money for month period of summer during which he had been awarded their custody *held*, not an abuse of discretion under record presented (CL 1948, § 552.17). *Id.*

6. No costs are allowed defendant wife, appellee on appeal from order modifying decree of divorce, where she filed no brief in Supreme Court. *Id.*

7. Order of trial court modifying decree of divorce to provide for an increase in the payments for support of minor children based upon a percentage of father's income when and if expected increase to $12,500 or more per year occurs but limited to $250 per month per child *held*, not an abuse of discretion. *Anneberg* v. *Anneberg*, 458.

8. A trial court in a suit for divorce has a wide range of discretion in determining support payments for minor children and the Supreme Court will not reverse unless there is a clear abuse of that discretion. *Id.*

9. Jurisdiction in divorce proceedings is strictly statutory. *Flynn* v. *Flynn*, 625.

10. Only those powers of equity which are set forth in the statutory law on divorce may be exercised by a court of equity in a divorce proceeding. *Id.*

11. A court in a divorce proceeding has no jurisdiction to dispose of entireties property to persons other than the parties to the proceeding (CL 1948, § 552.102). *Id.*

12. Provision of decree in suit for divorce whereby court decreed a life estate to the parties with remainders over to their children was properly held invalid (CL 1948, § 552.102). *Id.*

13. Parties to a suit for divorce become tenants in common as to property theretofore held as tenants by the entireties, in the absence of other disposition of ownership by the decree of divorce (CL 1948, § 552.102). *Id.*

14. Order invalidating provision of decree of divorce relative to entireties property whereby life estates in various parcels were given to parties with remainder over to their children *held*, proper, but further provision bestowing fee simple title thereto in the property to which life estate had theretofore been given was error, since the pertinent statute provided for disposition of entireties property by vesting it in the parties as tenants in common in the absence of other disposition (CL 1948, § 552.102). *Id.*

15. No costs are allowed on appeal from order invalidating provision of divorce decree purporting to give parties thereto a life estate in their real estate and remainders over to their children and then giving the property in fee simple to the respective parties, where latter provision was in error, since neither party has succeeded fully. *Id.* 626.

See HUSBAND AND WIFE (2, 4).

DOUBLE INDEMNITY—See APPEAL AND ERROR (23); INSURANCE (7, 8).

DRAINS.

1. Statute providing for the giving of notice, to persons whose names and addresses appear upon the last city or township tax assessment roll as owning land within special assessment district, of public meeting for review of apportionment of benefits is a proper and permissible means of according due process, where it was in addition to publication of the notice in a newspaper and posting in 5 conspicuous public places in each city, village, and township where the district is located (US Const, Am 14; Mich Const 1908, art 2, § 16; PA 1956, No 40, § 154, as amended by PA 1957, No 61). *International Salt Company* v. *Wayne County Drain Commissioner*, 160.
2. The sending of notice by first class mail of public meeting for review of apportionment of benefits in a drain proceeding to landowners whose names appeared on city or township tax assessment rolls is a method reasonably calculated to apprise each taxpayer to whom the notice is sent of his rights and liabilities although service by publication in newspapers, or by posting, is not sufficient alone, as a matter of law, to afford reasonable notice (PA 1956, No 40, § 154, as amended by PA 1957, No 61). *Id.* 161.
3. Provision of drain code that failure to send notice by mail of public hearing on review of apportionment of benefits, if such notice shall have been published and posted, should not constitute a jurisdictional defect invalidating the tax, must be disregarded in order to hold statute valid that provides for the giving of such notice to property owners within the special assessment district by first class mail (US Const, Am 14; Mich Const 1908, art 2, § 16; PA 1956, No 40, § 154, as amended by PA 1957, No 61). *Id.*
4. The presumption of regularity of the official action of the drain commissioner in mailing his notice of public meeting for review of apportionment of benefits cannot be given the conclusive effect as sought to be provided by statute, but must yield to a showing as to the actual facts in order to constitute due process of law (US Const, Am 14; Mich Const 1908, art 2, § 16; PA 1956, No 40, § 154, as amended by PA 1957, No 61). *Id.*
5. Plaintiff property owner in drain district to whom it is not shown that there had been mailed a notice of hearing for review of apportionment of benefits by first class mail *held*, entitled to a hearing relating to the assessment against its property, under evidence presented (US Const, Am 14; Mich Const 1908, art 2, § 16; PA 1956, No 40, § 154, as amended by PA 1957, No 61). *Id.*

See COSTS (5); PARTIES (1, 3).

DUE PROCESS—See CONSTITUTIONAL LAW (2); DRAINS (1, 4); PHYSICIANS AND SURGEONS (2, 5).

DUSK—See AUTOMOBILES (2, 3).

DUST DISEASES—See WORKMEN'S COMPENSATION (3, 11).

DYNAMITE—See JUDGMENT (8).

EARNING CAPACITY—See WORKMEN'S COMPENSATION (4, 6).

EARNINGS—See INTEREST (1).

EASEMENTS.

1. Trial court's finding that plaintiffs had acquired no easement by prescriptive use of private way during 32-year period since division of farm on easterly side of lake between 2 brothers to whom their mother had conveyed it shortly prior thereto *held*, proper under evidence presented, where, although the way was visible and had been used before severance of the estates, it was not reserved, it does not appear to have been a way of necessity, in view of use made of farm lane to westerly end of the property, and the use which had been made of the claimed way was permissive. *Ketchel* v. *Ketchel*, 53.
2. The law will not imply a grant of serviency by the severing grantor if there is no visible dependency at the time of severance. *Id.*
3. A party who claims that grant of an easement may be implied, upon severance, has the burden of proving the factor of visible dependency by preponderant proof. *Id.*
4. A way constitutes an easement appurtenant to the estate granted and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises, where the owner of the entire estate had made the granted part of it visibly dependent for the means of access upon the other through the use of the way. *Id.*

EDUCATION—See MUNICIPAL CORPORATIONS (28).

ELECTIONS.

1. The secretary of State, as chief election officer of the State, may not presently permit the election of State senators in the absence of valid legislation or constitutional provision authorizing him to do so. *Scholle* v. *Secretary of State*, 177.
2. The secretary of State is ordered to apply to the Supreme Court, in the event valid legislation is not adopted for holding of primaries and election of State senators within 33-day period allowed therefor, for instructions and orders enabling him to call and conduct a special State-wide primary election of candidates 62 days hence, and conduct a State-wide election of number of senators allowed by Constitution prior to adoption of invalid amendment (Const 1908, art 5, §§ 2, 4, as amended in 1952). *Id.*
3. The Supreme Court retains jurisdiction of proceeding wherein election of State senators in conformity to provisions of State Constitution as they stood prior to adoption of invalid amendments thereto is accomplished and complete disposition of the matter is adequately provided (US Const, Am 14; Mich Const 1908, art 5, §§ 2, 4, as amended in 1952). *Id.* 178.

See COSTS (6); LABOR RELATIONS (3); MUNICIPAL CORPORATIONS (10, 11).

ELECTRICITY—See PUBLIC SERVICE COMMISSIONS (2).

ELECTRIC UTILITY COMPANY—See TAXATION (5, 6).

ELECTROCUTION—See DEATH (4); NEW TRIAL.

EMINENT DOMAIN.

1. The trial court was without jurisdiction to grant a new trial in condemnation proceedings by school district, except to prevent an obvious miscarriage of justice, where motion for such purpose was not filed until 15 days after verdict was confirmed, and further time had not been allowed within 6-day period allowed by statute in which to move for a new trial (CL 1948, § 213.33). *Board of Education of the City of Detroit* v. *Flanz*, 668.
2. Denial of motion for new trial and to set aside order confirming jury's award in school district's condemnation proceeding *held*, not an abuse of discretion, where the motion involved was late and award made was carefully reviewed by the trial court and higher than the amount which had been offered prior to condemnation (CL 1948, § 213.33). *Id.* 669.

See APPEAL AND ERROR (24).

EMPHYSEMA—See WORKMEN'S COMPENSATION (1).

EQUALLY DIVIDED COURT—See DEATH (3); LABOR RELATIONS (3); MASTER AND SERVANT.

EQUAL PROTECTION—See CONSTITUTIONAL LAW (3, 4); OFFICERS; SCHOOLS AND SCHOOL DISTRICTS (5); WORKMEN'S COMPENSATION (11).

EQUITABLE LIEN—See TRUSTS (7).

EQUITY.

Visiting judge to whom injunction suit had been assigned for adjudication properly denied relief to plaintiffs who had theretofore been denied adjournment by presiding judge of circuit where cause was set for trial, in order to make further amendment, which denial had been followed by denial of permission to submit to a nonsuit. *Landowners of Sexton-Kilfoil Drainage District* v. *Wayne County Drain Commissioner*, 150.

See DIVORCE (10); TAXATION (3).

ERROR OF EXPRESSION—See WILLS (3).

ESCROW—See MECHANICS' LIENS (1).

ESTOPPEL.

An estoppel does not exist unless the party claiming same was misled to its prejudice and acts are done in reliance upon conduct calculated to mislead. *Cinderella Theatre Company, Inc.*, v. *United Detroit Theatres Corporation*, 425.

See JUDGMENT (7, 8); LANDLORD AND TENANT (5).

EVIDENCE.

1. The mails today are recognized as an efficient and inexpensive means of communication. *International Salt Company* v. *Wayne County Drain Commissioner*, 160.
2. Triers of facts may consider judicially-noticeable rules of physics. *Fitzpatrick* v. *Ritzenhein*, 327.
3. Courts may judicially notice the rights of railroads to terminate passenger service on poorly patronized lines between relatively small population centers and the feelings of dwellers in a community on the subject of the loss of such train service. *Clark* v. *Grand Trunk Western Railroad Company*, 396.
4. There must be clear, positive, and credible rebutting evidence opposing a statutory presumption in order to eliminate it from consideration, otherwise the question of whether such presumption has been overcome should be settled by the jury under proper instructions. *Petrosky* v. *Dziurman*, 539.
5. The plaintiff is not bound by the testimony of the opposite party whom he has called for cross-examination, where there is other evidence which directly disputes it (CL 1948, § 617.66). *Id.*

See APPEAL AND ERROR (1, 4, 9, 13, 21); AUTOMOBILES (1, 10–12); BROKERS (3, 4); CONTRACTS (7); CRIMINAL LAW (3, 7); DAMAGES; DEATH (4, 5); DRAINS (4, 5); EASEMENTS (1, 3); FALSE PRETENSES; INJUNCTION (2); INTEREST (1); JUDGMENT (2); MALICIOUS PROSECUTION (1, 2, 4, 7); MECHANICS' LIENS (1); MUNICIPAL CORPORATIONS (7); NEGLIGENCE (1, 2, 7); PHYSICIANS AND SURGEONS (2, 5); RAILROADS; TAXATION (3); TRIAL (8); TRUSTS (1, 5–7); UNEMPLOYMENT COMPENSATION (2–4); WILLS (1, 4, 5); WORKMEN'S COMPENSATION (1).

EXAMINATION—See WITNESSES (1, 3).

EXAMINING MAGISTRATE—See CRIMINAL LAW (5–7).

EXCLUSIVE AGREEMENT—See CONTRACTS (10); JUDGMENT (2).

EXPERTS—See NEGLIGENCE (2).

EXPLOSION—See INSURANCE (8).

EXPOSURE—See WORKMEN'S COMPENSATION (12).

EXTRINSIC EVIDENCE—See WILLS (1).

EYEWITNESSES—See NEGLIGENCE (8).

FAILURE OF EITHER PARTY TO PREVAIL IN FULL—See COSTS (8, 12); DIVORCE (15).

FALSE ARREST—See COSTS (2); MALICIOUS PROSECUTION (1).

FALSE PRETENSES.

Evidence that payment of checks was refused because of insufficient funds *held*, insufficient to justify holding defendant payee-indorsers for trial on charge of obtaining money by false pretenses, where checks were properly drawn by an authorized party on an active bank account and were presented

FALSE PRETENSES—Continued.

and cashed by indorsee without misrepresentation (CL 1948, § 750.218, as amended by PA 1957, No 69). *People* v. *Delaney*, 694.

See CRIMINAL LAW (7).

FARMHOUSE—See CONTRACTS (1, 2, 7, 9).

FARMS—See EASEMENTS (1).

FARM TRACTORS—See INSURANCE (1, 3, 4).

FEDERAL COURT—See APPEAL AND ERROR (15).

FEES—See TAXATION (6).

FEE TITLE—See DIVORCE (15).

FELLOW SERVANT—See JUDGMENT (7); PARTIES (4); PARTNERSHIP (2).

FILING—See APPEAL AND ERROR (7).

FINES.

1. Penal fine moneys are required to be apportioned in counties having no county library to local units having public libraries on the basis of the proportion that the number of school-age children in each such unit bears to the total number of school-age children in all such units entitled thereto in the county notwithstanding some of such children may be counted in more than 1 district, and even though such apportionment may require adjustment of payments of future funds to be received (CLS 1956, §§ 340.913, 340.915). *City of Belding* v. *Ionia County Treasurer*, 369.
2. The legal establishment of a school district library may not be the subject of a collateral attack in mandamus action for apportionment of penal fine moneys because of the loss of records of the original referendum election, where there has been long public acquiescence in the exercise by school district of the powers and functions appertaining to operation of a school district library (CLS 1956, §§ 340.913, 340.915). *Id.* 370.

FIRE INSURANCE—See INSURANCE (5).

FRANCHISE—See CONTRACTS (10); JUDGMENT (2).

FRAUD

One who obtains property of another who relies upon untrue statements though they were made in ignorance of their falsity, must be held responsible as for a legal fraud. *Kroninger* v. *Anast*, 478.

See APPEAL AND ERROR (16); CONTRACTS (8); CORPORATIONS (2, 3); MALICIOUS PROSECUTION (1, 3); TRUSTS (7).

GAMING—See SEARCHES AND SEIZURES (2).

GATEKEEPER—See MALICIOUS PROSECUTION (7).

GENERAL CONTRACTOR—See NEGLIGENCE (6).

GENERAL MANAGER—See TORTS (1, 3).

GENERAL WELFARE—See MUNICIPAL CORPORATIONS (1, 2, 19, 22, 24).

GOING CONCERN—See APPEAL AND ERROR (15).

GOVERNING BODY—See RELIGIOUS SOCIETIES (3, 4).

GRAND RAPIDS—See APPEAL AND ERROR (14); COURTS (1).

GREAT WEIGHT OF EVIDENCE—See DAMAGES; UNEMPLOYMENT COMPENSATION (4).

GROSS NEGLIGENCE—See TORTS (3).

GUARDIAN AND WARD—See NEGLIGENCE (3).

GUEST—See AUTOMOBILES (1).

HABEAS CORPUS.

1. The ancient writ of habeas corpus, a restraint upon governmental despotism, has been inherited full grown as it was known in England in 1789. *People* v. *McCager*, 116.
2. Habeas corpus is a civil proceeding the main purpose of which is to cause the release of persons illegally confined, to inquire into the authority of law by which a person is deprived of his liberty (CL 1948, § 637.1 *et seq.*). *Id.*
3. Application for the writ of habeas corpus is not made in the criminal proceedings but in new and independent civil action instituted to enforce a civil right, the right to personal liberty (CL 1948, § 637.1 *et seq.*). *Id.*
4. The effect of a successful application for a writ of habeas corpus is to obtain discharge of applicant from custody even though he be held under criminal process, as the writ of habeas corpus is of paramount authority over all other writs (CL 1948, § 637.1 *et seq.*). *Id.*
5. The authority under which an original commitment of an applicant for habeas corpus took place is superseded upon the return of the writ and production of the body of the party suing it out, the safe-keeping of the prisoner being entirely under the control and direction of the court to which the return is made, and he may be brought before the court from time to time until it is determined whether he shall be discharged or absolutely remanded (CL 1948, § 637.1 *et seq.*). *Id.*
6. Defendant's liberty was the exclusive responsibility of the judge who issued writ of habeas corpus after defendant was produced in court on the day following his arrest, in response to the writ of habeas corpus and until final hearing thereon, irrespective of the nature of his detention before he was first produced in court in response to the writ (CL 1948, § 637.1 *et seq.*). *Id.* 117.

See CRIMINAL LAW (1–3).

HEAD-ON COLLISION—See AUTOMOBILES (7, 9); INTEREST (1).

HEALTH INSURANCE—See APPEAL AND ERROR (23); INSURANCE (7, 8).

HEARING—See APPEAL AND ERROR (25); COSTS (5, 16); DRAINS (1–3, 5); INJUNCTION (1); JUDGMENT (3); PARTIES (3); PHYSICIANS AND SURGEONS (2).

HIGHWAYS AND STREETS—See AUTOMOBILES (1); COSTS (1); INSURANCE (1, 3, 4); MUNICIPAL CORPORATIONS (8).

HOME-RULE CITY—See COSTS (10); MUNICIPAL CORPORATIONS (9–15).

HOMICIDE—See CRIMINAL LAW (1–3).

HOSPITAL EXPENSES—See INTEREST (1).

HOSPITALS—See LABOR RELATIONS.

HUSBAND AND WIFE.

1. Antenuptial agreements are expressly authorized by statute in this State (CL 1948, § 557.5). *In re Muxlow Estate (Appeal of Bryce)*, 133.
2. Generally, an antenuptial contract which provides for, facilitates, or tends to induce a separation or divorce of the parties after marriage, is contrary to public policy, and is, therefore, void (CL 1948, § 557.5). *Id.*
3. An antenuptial agreement may not legally limit the husband's obligation to support his wife to the sum of $100 per year (CL 1948, § 557.5). *Id.*
4. Antenuptial agreement which did not effectively bar either party from claiming an interest in the property of the other had their marital relation terminated prior to the death of one of the parties, nor effectively limit husband's obligation to support wife, may not be said to make separation or divorce more attractive to either party, hence, was not void as against public policy (CL 1948, § 557.5). *Id.*

IDENTITY OF ASSESSORS—See TAXATION (4).

IGNITION—See WORDS AND PHRASES (2).

IGNORANCE OF FALSITY—See FRAUD.

IMPACT—See AUTOMOBILES (8).

IMPLIED COVENANTS—See COVENANTS; LANDLORD AND TENANT (1).

IMPLIED GRANT—See EASEMENTS (1–3).

INCOME—See DIVORCE (7).

INCOME TAXES—See TAXATION (6).

INDICTMENT AND INFORMATION—See CRIMINAL LAW (1–3); SEARCHES AND SEIZURES (2).

INFANTS—See NEGLIGENCE (3).

INFERENCES—See APPEAL AND ERROR (9); MALICIOUS PROSECUTION (6).

INGHAM—See PUBLIC SERVICE COMMISSIONS (1).

INJUNCTION.

1. A court of chancery does not have jurisdiction to enjoin the State tenure commission from holding a hearing on teacher's demand for hearing on school board's failure to renew her contract for tenth year of service, the third year after she had become 60 years of age, because of board's announced policy of retirement of teachers, but alleged by her to have been contrary to provisions of the tenure act, where the statutory administrative remedy provided by that act had not been exhausted (CL 1948, § 38.71 *et seq.*). *School District of the City of Royal Oak* v. *State Tenure Commission*, 689.
2. Equity should not be used to obtain injunctive relief, where there is no proof that complainant would suffer irreparable injury. *Id.*

See APPEAL AND ERROR (25); COSTS (4, 16); JUDGMENT (1); PARTIES (3).

INSTRUCTIONS—See APPEAL AND ERROR (8, 14); AUTOMOBILES (4–6); CRIMINAL LAW (3); TRIAL (5, 8, 9).

INSUFFICIENT FUNDS—See FALSE PRETENSES.

INSURANCE.

1. Provision of automobile insurance policy wherein definition of automobile specifically excluded coverage of "a farm type tractor or other equipment designed for use principally off public roads, except while actually upon public roads" intended to exclude coverage of a farm tractor while in its ordinary place of usage but extended coverage to its operation on the road while going to and from farms or when used on the road for hauling. *Leski* v. *State Farm Mutual Automobile Insurance Company*, 560.
2. Courts should construe policies of insurance which are not standard policies strictly or most strongly against the insurer in case of reasonable uncertainty, doubt, or ambiguity. *Id.*
3. The term *while actually upon a public highway*, as used in automobile insurance policy in clause extending coverage to farm tractors so used, is construed must strongly against the insurer so as to cover fatal injuries to insured's son received while operating the tractor en route to farm across an interstate public highway while on the right-of-way in a place which could be used for travel although not intended for normal travel use, some less than 2 months before the highway was officially opened for public use although there was evidence of common and recent usage of the route followed by decedent, such policy provision being an ambiguous one. *Id.*
4. Trial court's finding of ambiguity in clause of automobile insurance policy extending coverage to operation of farm tractors *while actually upon a public highway held*, to support judgment for insured for fatal injuries to her son while operating such a tractor within the right-of-way of an interstate highway

INSURANCE—Continued.

less than 2 months prior to its official acceptance although on a place not ever intended for public travel but on a route which was not then barricaded and which had been commonly used by parties whose destination was the same as decedent's. *Id.* 561.

5. The filing by the insured of a petition for the selection of an umpire did not operate, of itself, to suspend the right of the insurer under fire insurance policy to exercise its 30-day option after receipt of proof of loss to make its election to repair the damaged property or pay to the insured the amount of the loss (CLS 1956, § 500.2832). *Crimando* v. *Pacific National Fire Insurance Company,* 615.
6. Insurer, under standard fire insurance policy containing option to pay for loss or repair at any time within 30 days following receipt of proof of loss, which did not exercise the option within such 30-day period was not in a position to complain about appointment of umpire for appraisal of loss, where, although petition for appointment was filed on twelfth day after proof of loss was received by insurer, the order of appointment was made 34 days after proof of loss (CLS 1956, § 500.2832). *Id.*
7. Provision of comprehensive personal accident and health insurance policy for double indemnity if bodily injuries are sustained "in consequence of the burning of any building in which the insured shall be at the commencement of the fire" requires a showing, not only of a burning, but that the building itself, as distinguished from its contents, was burning. *Bobco* v. *Metropolitan Insurance Company,* 645.
8. Paint vapors, even though they emanate from the walls of a building, *held,* not a part of the building in action to recover double indemnity under comprehensive personal accident and health insurance policy provision for bodily injuries sustained "in consequence of the burning of any building in which the insured shall be at the commencement of the fire", where it was believed that the explosion or burning of the paint vapors came from an extension cord or a light bulb that had been placed inside the water tank for illumination. *Id.*

See APPEAL AND ERROR (23); CONTRACTS (1); WORKMEN'S COMPENSATION (11).

INTENT—See CONTRACTS (3, 8); INSURANCE (1); TRUSTS (6, 9); WORKMEN'S COMPENSATION (12).

INTEREST.

1. Father in his derivative action for medical and surgical treatment and hospitalization expense for his minor son who was injured in a head-on collision was not entitled to interest before jury's verdict which covered such expenses and loss of earnings of the son until he should reach the age of 21 years, where there was no demand for payment before suit, no proof as to reasonableness, necessity, or payment, and no testimony to show that the minor could and would have earned such amounts had he not been injured, such amounts being considered unliquidated before verdict.. *Fitzpatrick* v. *Ritzenhein,* 327.

INTEREST—Continued.

2. The right to interest is statutory and does not run on an unliquidated claim in the absence of contract express or implied, except by way of damages for money withheld. *Id.*

See COSTS (8); WORKMEN'S COMPENSATION (8–10, 14–17).

INTERSECTIONS—See AUTOMOBILES (1–3).

INTERSTATE HIGHWAY—See INSURANCE (3).

INTERVENING CAUSE—See NEGLIGENCE (6, 7).

INTERVENTION—See COSTS (14); PARTIES (1–3); PUBLIC SERVICE COMMISSIONS.

INTOXICATING LIQUORS—See AUTOMOBILES (12); COSTS (15); MANDAMUS; SEARCHES AND SEIZURES (2).

INVENTORY—See UNEMPLOYMENT COMPENSATION (3).

INVITEE—See NEGLIGENCE (3).

IRREPARABLE INJURY—See INJUNCTION (2).

JOINT SAVINGS ACCOUNT—See TRUSTS (1, 2, 5, 6).

JUDGES.

The salary of the judge of the superior court of Grand Rapids may not be increased during his term of office, since he is neither legally nor factually a circuit judge within the exception to the general prohibition in the Constitution against increase of salary of public officers after election or appointment (Const 1908, art 16, § 3; CL 1948, § 727.1 *et seq.*, as amended). *Taylor* v. *Auditor General*, 256.

See APPEAL AND ERROR (7); COURTS (1, 4); EQUITY.

JUDGMENT.

1. Consent decree whereby plaintiffs were permitted to continue nonconforming use under defendant township zoning ordinance of their ornamental iron sales business but not to use the premises for manufacturing, fabricating, or other uses not permitted by the ordinance *held*, unambiguous and in avoiding outright litigatory loss in first suit to enjoin enforcement of the ordinance adjudicated the rights of both parties with respect to both first and second suits brought for the same purpose in that plaintiffs were prohibited from continuing incidental shopwork, such as welding, fabricating, cutting, and grinding. *Bauer* v. *Township of Redford*, 71.

2. Judgment on trial court's own motion dismissing defendant's cross declaration for damages for breach by plaintiff of what defendant claimed was an exclusive franchise agreement, based on application of parol evidence rule during an informal colloquy between court and counsel before defendant had made a formal opening statement, before any motion for such purpose by plaintiff, and before any proofs were offered, *held*, improvident and reversible error, especially where defendant's claims did not all depend upon first establishing an exclusive

JUDGMENT—Continued.

franchise agreement and the written agreement could be construed, possibly, as a grant of an exclusive right without resort to inadmissible parol evidence. *Carrier Corporation* v. *Central Station Air Conditioning Co.*, 605.

3. Entry of order denying motion to set aside default against defendant-appellant *held*, not improper, where attorney who had filed motion represented he was appearing for both defendants disclosed at the hearing thereon that he had discovered a possible conflict of interest between the 2 defendants and elected to represent the other defendant, the circuit judge adjourned the matter for 3 weeks, and, on the adjourned date, set the default aside as to one defendant but not as to defendant-appellant whose failure to appear at the adjourned hearing is not satisfactorily explained (Court Rule No 28, § 4 [1945]). *Abstract & Title Guaranty Company* v. *Williams*, 620.
4. Whether or not a defendant against whom a default has been entered is entitled to have the default set aside is within the discretion of the trial court (Court Rule No 28, § 4 [1945]). *Id.* 621.
5. It was not an abuse of discretion on the part of the trial court to decline to set aside default entered against defendant-appellant, where, notwithstanding its present claim, it has a meritorious defense to plaintiff's action seeking rescission of title insurance policies, the circuit judge did not so find, and defendant had not traversed the significant allegations in plaintiff's bill constituting the gravamen of its complaint and has shown no reasonable excuse for failure to answer after having been served with a bill of complaint (Court Rule No 28, § 4 [1945]). *Id.*
6. The doctrine of *res judicata* is applicable to a decision rendered in workmen's compensation proceedings. *Ayers* v. *Genter (Anderson* v. *Same)*, 675.
7. The doctrine of collateral estoppel is applicable to bar plaintiff's right of recovery in tort action against defendant who had been found to be a coemployee in earlier proceeding to recover workmen's compensation in which plaintiff had been proceeded against as a member of a defendant partnership, notwithstanding there may be more numerous issues raised in the tort action. *Id.*
8. It was error to grant summary judgment against plaintiff in his action against defendant for injuries received when defendant was preparing to dynamite some frozen earth on a construction project on which they were working, where pleadings have raised issues of fact upon which plaintiff is not estopped or otherwise prevented from being heard. *Id.* 676.

See ABATEMENT AND REVIVAL.

JUDGMENT NON OBSTANTE VEREDICTO—See APPEAL AND ERROR (4, 9); AUTOMOBILES (9).

JUDICIAL NOTICE—See EVIDENCE (1–3).

JURISDICTION—See APPEAL AND ERROR (6, 25); COURTS (2); DIVORCE (2, 9, 11); DRAINS (3); ELECTIONS (3); EMINENT DOMAIN

JURISDICTION—Continued.

(1); INJUNCTION (1); JUSTICES OF THE PEACE (2); RELIGIOUS SOCIETIES (4); REPLEVIN (4).

JURY—See APPEAL AND ERROR (11, 13); TRIAL (1, 2, 10–12).

JUSTICES OF THE PEACE.

1. Set-off can only be allowed in actions in justice court founded on demands which could themselves be the subject of set-off according to law (CL 1948, § 669.11). *Standard-Toch Chemicals, Inc.*, v. *Victor Paint Co.*, 640.
2. The statute permitting removal of a cause from the justice court to the circuit court where a claim by way of set-off or recoupment exceeds the monetary jurisdiction of the justice court only permits such removal where the set-off and recoupment would otherwise be permissible (PA 1915, No 314, ch 69, § 17a, as added by PA 1959, No 249). *Id.*
3. There is no inherent power in the common pleas court to transfer a case to circuit court, such power being derived only from statute (PA 1915, No 314, ch 69, § 17a, as added by PA 1959, No 249). *Id.*

See COURTS (5).

LABOR DISPUTE—See UNEMPLOYMENT COMPENSATION (2–4).

LABOR RELATIONS.

1. A hospital, as an employer, has a duty to bargain collectively with representatives of the employees under the labor mediation act (PA 1939, No 176, as amended by PA 1949, No 230). *Local No. 1644, AFSC&ME, AFL-CIO*, v. *Oakwood Hospital Corporation*, 79.
2. The classification of hospitals and public utilities under the labor mediation act, separately from other employers, and compelling such 2 classes to engage in collective bargaining in good faith with representatives of their employees, and prohibiting latter from striking, is in harmony with the general purpose of the act to promote industrial peace and to insure continued operation which is in the public interest (PA 1939, No 176, as amended by PA 1949, No 230). *Id.*
3. Provision of decree in suit to compel defendant hospital to engage in collective bargaining with plaintiff local union, that defendant pay costs of holding election to determine whether plaintiff union represented a majority of defendant's employees, which election had been conducted under the direction of the court is affirmed by a court equally divided as to whether the defendant should pay all or only 1/2 of such cost (PA 1939, No 176, as amended by PA 1949, No 230). *Id.*

See UNEMPLOYMENT COMPENSATION (4).

LADDERS—See NEGLIGENCE (5, 6).

LAND CONTRACT—See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. The statutory provision against implying covenants applies to the lease of a theater (CL 1948, § 565.5). *Cinderella Theatre Company, Inc.*, v. *United Detroit Theatres Corporation*, 424.
2. Rule that leases are to be construed against the lessor and in favor of the lessee does not apply where latter drafted the instrument. *Cinderella Theatre Company, Inc.*, v. *United Detroit Theatres Corporation*, 424.
3. A court cannot make a new contract for the parties to a lease. *Id.*
4. A corporate lessee may not assign its lessee interest under a 15-year lease to a wholly-owned, completely dominated, and insufficiently capitalized subsidiary corporation and thereby escape its existing liability under the lease. *Id.*
5. Assignment of 15-year leasehold interest of theater to wholly-owned, completely dominated, and insufficiently capitalized subsidiary corporation that was organized with same officers as defendant corporate lessee is set aside notwithstanding claimed estoppel by cashing of first month's rent check, where it appears the lessee-assignor had remained in possession after the purported assignment and delay in return of deposit which lease required upon an assignment, and where defendant lessee had not been prejudiced by such conduct on the part of the lessor. *Id.* 425.

See ACTION.

LARCENY—See MALICIOUS PROSECUTION (4, 7).

LAYOFFS—See UNEMPLOYMENT COMPENSATION (3, 4).

LEASES—See ACTION; LANDLORD AND TENANT.

LEATHER MANUFACTURER—See UNEMPLOYMENT COMPENSATION (3, 4).

LEAVE OF COURT—See PLEADING.

LEFT TURNS—See AUTOMOBILES (5, 6).

LEGISLATURE—See COURTS (3); MUNICIPAL CORPORATIONS (28).

LIBERTY—See HABEAS CORPUS.

LIBRARIES—See FINES.

LICENSES—See APPEAL AND ERROR (10); COSTS (15); MANDAMUS; NEGLIGENCE (3); PHYSICIANS AND SURGEONS; SEARCHES AND SEIZURES (2).

LIENS—See TRUSTS (7).

LIFE ESTATES—See DIVORCE (12, 14, 15).

LIMITATION OF ACTIONS—See APPEAL AND ERROR (7).

LIMITATION ON AWARD—See WORKMEN'S COMPENSATION (3).

LOT SIZE—See MUNICIPAL CORPORATIONS (23, 24).

LUMBER MILL—See DEATH (4).

MAILS—See DRAINS (2–5); EVIDENCE (1).

MAINTENANCE—See TRUSTS (8–10).

MALICE—See MALICIOUS PROSECUTION (6).

MALICIOUS PROSECUTION.

1. Trial judge properly found plaintiff had made no case for false arrest and malicious prosecution by defendant police officers, where it appears that at trial by a recorder's court judge, sitting as a magistrate, on charge of drunkenness in a public place, there was presented evidence upon which he was convicted, although on appeal, taken by way of a motion for a new trial and tried by another recorder's court judge plaintiff herein was discharged, there being no evidence that the conviction which had been obtained was secured by fraud or unfair means, hence, it was conclusive evidence of probable cause. *Arnold* v. *Jarvis*, 59.
2. The fact that one judge had found plaintiff guilty as charged and that another judge, on retrial, had found him not guilty, made no jury question of whether there was or was not probable cause for plaintiff's arrest and prosecution. *Id.*
3. The fraud or perjury necessary to be alleged and proved in order to prevent a conviction from being evidence of probable cause in civil action for false arrest and malicious prosecution must be extrinsic, or collateral fraud or perjury. *Id.*
4. The fact that the jury in prosecution of plaintiff for larceny failed to find beyond a reasonable doubt that he was guilty of the offense charged against him is not evidence in later action for malicious prosecution of want of probable cause for the institution of the prosecution. *Drobczyk* v. *Great Lakes Steel Corporation*, 318.
5. There is probable cause, as the term is used in actions for malicious prosecution, where the information possessed by the defendant is believed and is such and from such sources that the generality of businessmen of ordinary care, prudence, and discretion would prosecute upon it under the same conditions. *Id.*
6. It is essential to the establishment of an action for malicious prosecution that plaintiff show the fact of the alleged prosecution, that it has come to a legal termination in his favor, that defendant had no probable cause for instituting the prosecution, and that he acted from malicious motives; and while malice may be inferred from a want of probable cause, want of probable cause may not be inferred from malice. *Id.*
7. Evidence adduced in action for malicious prosecution of plaintiff for alleged larceny of a copper cooler *held*, to show, as a matter of law, probable cause for such prosecution, where the cooler was on his truck on defendant's premises where plaintiff had no right to be an hour before he normally started to work, description of load on his truck was falsified to gatekeeper and he had no pass to leave the premises as he knew was necessary, prosecution was not instituted until after thorough investigation by defendant's plant protection per-

MALICIOUS PROSECUTION—Continued.

sonnel and by public police officers and prosecutor's office, and the examining magistrate bound plaintiff over for trial. *Id.*

8. The question of whether the plaintiff had sustained his burden of proof of want of probable cause was a question of law for the court, where there was no dispute as to the material facts in the case. *Id.* 319.

See COSTS (2).

MANDAMUS.

Petition for mandamus to compel issuance of specially designated merchant's license for sale of wine and beer is dismissed, where decision of Supreme Court shortly before oral argument of case is recognized by the attorney general as controlling and license has now been issued. *Northline Drugs #2, Inc.*, v. *Liquor Control Commission*, 672.

See COSTS (9, 10, 15); FINES (2).

MANUFACTURING—See JUDGMENT (1).

MAPS—See MUNICIPAL CORPORATIONS (12, 14); SCHOOLS AND SCHOOL DISTRICTS (3).

MASTER AND SERVANT.

Judgment for defendant on the pleadings in action for alleged breach of an employment contract is affirmed by an equally divided court. *Ambrose* v. *Detroit Edison Company*, 334.

See NEGLIGENCE (3).

MECHANICS' LIENS.

1. Admission into evidence of escrow agreement between fee owners, land contract purchasers, and escrow agent was improper in suit to foreclose mechanics' lien on the premises, where the escrow agent was not a party to the proceeding and no relief was sought by plaintiff by virtue of the agreement, since it was not material to the facts of the case (CL 1948, § 570.5, as amended by PA 1958, No 213). *Droulard* v. *Czerwinski*, 557.

2. Claim of lien under the mechanics' lien statute was fatally defective, where the verified statement or account was not recorded with the register of deeds until more than 60 days had expired (CL 1948, § 570.5, as amended by PA 1958, No 213). *Id.*

MEDICAL EXPENSE—See WORKMEN'S COMPENSATION (13).

MEDICINE, STATE BOARD OF REGISTRATION IN—See PHYSICIANS AND SURGEONS (1–3, 5).

MEETING OF THE MINDS—See CANCELLATION OF INSTRUMENTS.

MERGER—See RELIGIOUS SOCIETIES (2).

MINERS—See WORKMEN'S COMPENSATION (5, 6).

MINORS—See NEGLIGENCE (3).

MISCARRIAGE OF JUSTICE—See EMINENT DOMAIN (1).

MISTAKE—See CONTRACTS (8).

MODIFICATION OF DECREE—See DIVORCE (1–6).

MODIFICATION OF MOTION—See APPEAL AND ERROR (12).

MORAL TURPITUDE—See PHYSICIANS AND SURGEONS (3).

MORTGAGES—See CANCELLATION OF INSTRUMENTS.

MOTION FOR JUDGMENT—See APPEAL AND ERROR (11, 12); TRIAL (10).

MOTIONS AND ORDERS—See EMINENT DOMAIN (1); NOTICE.

MOTION TO DISMISS—See APPEAL AND ERROR (16); COSTS (11); NOTICE; PARTIES (1); PLEADING.

MOTION TO QUASH—See CRIMINAL LAW (1–3).

MOTION TO STRIKE—See APPEAL AND ERROR (10).

MULTIPLE DWELLINGS—See MUNICIPAL CORPORATIONS (16); VENDOR AND PURCHASER.

MULTIPLICITY OF SUITS—See DEATH (3).

MUNICIPAL CORPORATIONS.

1. A municipal zoning ordinance, to be valid, must bear a direct and substantial relation to the objectives of police power, the preservation of the public health, safety, morals, and general welfare of the community as a whole. *Alderton* v. *City of Saginaw*, 28.
2. The party attacking a municipal zoning ordinance has the burden of establishing affirmatively that the ordinance has no real or substantial relation to public health, morals, safety, or general welfare. *Id.*
3. A municipal zoning ordinance is presumed valid. *Id.*
4. The validity of each municipal zoning ordinance must be determined on its own facts and circumstances. *Id.* 29.
5. More than a debatable question must be presented as to the validity of a municipal zoning ordinance before a court may find invalid action by legislative body which adopted the zoning ordinance and hold the ordinance invalid so far as it applies to particular tract involved. *Id.*
6. Determination as to the validity of a municipal zoning ordinance restricting use of property to residential purposes, requires that consideration be given to the character of the district, its peculiar suitability for particular uses, the conservation of property values and character of building and population development, unsuitability and lack of market for residential purposes and whether it will become "dead land" or nonincome-producing land without residential value. *Id.*
7. The Supreme Court gives weight and careful consideration to the findings of the lower court who heard the testimony, saw

MUNICIPAL CORPORATIONS—Continued.

the exhibits, and, in most instances, was familiar with the area involved in disputed application of a municipal zoning ordinance. *Id.*

8. Conclusion of trial court that recently adopted municipal zoning ordinance, restricting use of 3 blocks midway of 27-block portion of only through arterial highway in that part of city to multiple family residential use, accessory uses, and listed waiver uses, such as office and professional buildings, was invalid as applied to such area *held* proper under record showing the area was commercial not only in the adjacent portions but within the 3-block area itself, no new residences were being constructed, that such residences as were there were 50 years old, or more, that traffic will not be substantially reduced, and value as commercial area is considerably more than as residential. *Id.*

9. Petitions for annexation of 3 separate areas of territory to home-rule city with population of 4,558 which bore requisite number of signatures from city and township in general, although there were no signatures from 1 area and only 2 signatures from another area, *held*, not defective for lack of signatures under pertinent statute providing that for such purpose the "district to be affected" includes "the whole of each city, village or township from which territory is to be taken or to which territory is to be annexed" (CLS 1956, § 117.9). *Williams* v. *County of Bay*, 406.

10. It was error for the trial court to set the date for an election as to annexation of territory to a home-rule city, such being a matter within the province of the board of supervisors (CLS 1956, § 117.8). *Id.*

11. Only electors residing in township area affected by annexation petitions may vote on question of annexation to city of less than 15,000 population (CLS 1956, § 117.9). *Id.* 407.

12. Notwithstanding petition for annexation of territory to a home-rule city was defective and it and 3 others for annexation of 3 other areas were attached together and each of the 4 were signed by the several electors and each contained a different map and was easily distinguishable and separable from the others in the set, the 3 petitions were valid and entitled to affirmative action by the board of supervisors (CLS 1956, § 117.9). *Id.*

13. Petitions for annexation of separate township areas to home-rule city of less than 15,000 were not defective because an alternative method for annexation as to 1 area containing no population was not void, where the use of the alternative method was permissive, not required (CLS 1956, § 117.9). *Id.*

14. Maps attached to petitions for annexation of separate areas to home-rule city of less than 15,000 population *held*, not defective or to have failed to accurately portray the lands to be annexed as described in the petitions (CLS 1956, § 117.9). *Id.*

15. Petitions to annex separate areas to home-rule city of less than 15,000 population verified by circulators who did not materially misrepresent matters involved in petitions, and which are

MUNICIPAL CORPORATIONS—Continued.

regular and in due form on their face, should not have been rejected by the board of supervisors (CLS 1956, § 117.9). *Id.*

16. A city may stop the use of a multiple dwelling that does not conform to the housing law by declining to exercise its discretion to continue the nonconforming use (CL 1948, §§ 125.404, 125.450, 125.451). *Kroninger* v. *Anast*, 478.

17. The court may not substitute its discretion for that vested by statute in a city's officials. *Id.*

18. The reasonableness of a zoning restriction must be tested according to existing facts and conditions and not some condition which might exist in the future. *Christine Building Company (Klipfel, Campus Estates, Inc.)* v. *City of Troy*, 508.

19. Zoning regulations constitute a valid exercise of the police power only when they have a rational relation to the public health, safety, welfare and prosperity of the community and are not such an unreasonable exercise of the police power as to become arbitrary, destructive, or confiscatory, a test to be applied in the light of existing conditions. *Id.*

20. The determination of the reasonableness of a zoning ordinance must be made upon the facts presently involved, there being a presumption in favor of validity. *Id.*

21. A zoning ordinance may not be held invalid unless the objections urged on constitutional grounds appear on the face of the measure in question, or are established by competent proof. *Id.*

22. A zoning ordinance, to be justified, must have advanced the public health, safety, and general welfare of the people. *Id.* 509.

23. Finding of trial judge in suit to declare city zoning ordinance void as to plaintiffs' tracts because unreasonable and void, where it provided for minimum area per lot of 1/2 acre, *held*, correct under record presented. *Id.*

24. Imposition of minimum size of 1/2 acre upon lots in zone which included plaintiffs' tracts that were in an area serviced by sewers *held*, not to bear a reasonable relation to any present danger directly affecting the public health, safety, and general welfare. *Id.*

25. The power granted municipalities to enact zoning ordinances is at all times limited by the word *reasonable*. *Id.*

26. A court has no legal duty, right, or obligation to undertake to pass on the reasonableness of the purpose of zoning plaintiffs' property with reference to a classification not presently imposed thereon. *Id.*

27. A depression in a sidewalk occasioned by settling of 1 slab approximately 1 inch below the preceding slab did not constitute such a state of disrepair as to render municipality, within which such sidewalk was located, liable for damages incident to accident caused by such depression (CLS 1956, § 242.1). *Harris* v. *City of Detroit*, 526.

28. Education is not inherently a part of the local self-government of a municipality except insofar as the legislature may choose

MUNICIPAL CORPORATIONS—Continued.

to make it such, as control of our public school system is a State matter delegated and lodged in the State legislature by the Constitution. *School District of the City of Lansing* v. *State Board of Education*, 591.

See APPEAL AND ERROR (6); COSTS (1, 10); COURTS (3).

MURDER—See CRIMINAL LAW (1–3).

NECK INJURY—See DAMAGES.

NEGLIGENCE.

1. The finding of trial court in a nonjury case that leakage of water in a business building, due to fracture of a rusty cast iron plate attached to bottom of water meter with 4 bolts on 1 of which a washer was missing, was not the type of an accident that commonly does not happen except in consequence of negligence *held*, not against the clear preponderance of the evidence under record showing there was a question of fact presented. *Liberty Mutual Insurance Company* v. *City of Bay City*, 8.
2. The trial court in nonjury action for damage due to leakage of water properly considered testimony by defendant's expert witnesses as to possible causes of fracture of plate attached to bottom of water meter, other than rustiness and insufficient or improper attachment to the meter, for while defendant did not have burden of proving what caused the break, it could present testimony of water hammer or hammer lock to refute plaintiff's theory of cause. *Id.* 9.
3. Declaration in action by guardian of minor who was injured when defendant's Venetian blind fell and struck her face and head *held*, not to have stated a cause of action, where it failed to aver whether she was a trespasser, invitee, licensee, or employee, stated only conclusions that she was lawfully upon the premises, that she had a right to attempt to raise the blind, and that defendant had a duty to keep the blind safe for her use. *Carlton* v. *Parker Dairy Company*, 23.
4. The question of negligence is one of law for the court where the facts are such that all reasonable men must draw the same conclusion from them. *Barnebee* v. *Spence Brothers*, 46.
5. Whether or not general contractor was negligent in permitting a 32′ extension ladder to remain upright and yet untied to scaffolding during day it was not being used and on which there were unusually gusty winds was properly left for consideration of jury. *Id.*
6. Whether or not the action of fellow employees of subcontractor, by whom plaintiff was employed, in moving lower end of 32′ extension ladder that was not secured at the top, a foot or more toward the structure against which it was leaning and some 5 feet west of its former position on the ground was an intervening cause which absolved defendant general contractor from liability for negligence in permitting it to remain in its position on an unusually gusty, windy day until it fell and injured plaintiff in midafternoon was a matter for jury's determination. *Id.*

NEGLIGENCE—Continued.

7. Proximate cause, including the operation of intervening forces, is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case. *Id.* 47.
8. One who dies as the result of an accident to which there are no eyewitnesses is presumed to have been free from contributory negligence. *Kratochvil* v. *City of Grayling*, 682.
9. Contributory negligence of a plaintiff is not a matter of affirmative defense in this State with the burden of proving it resting on defendant (Court Rule No 23, § 3a, as added in 1958). *Id.*

See AUTOMOBILES (1, 2, 4, 6, 10); DAMAGES; DEATH (5, 6); NEW TRIAL.

NEWSPAPERS—See TRIAL (12).

NEW TRIAL.

A complete new trial, and not a trial limited to damages only, is required in action under the death act for alleged negligence of defendant in electrocuting plaintiff's decedent, where at the first trial the trial court made no finding, one way or the other, as to defendant's negligence and erroneously found plaintiff's decedent to have been guilty of contributory negligence (CL 1948, § 691.581 *et seq.*). *Kratochvil* v. *City of Grayling*, 683.

See APPEAL AND ERROR (24); AUTOMOBILES (9); EMINENT DOMAIN (1); MALICIOUS PROSECUTION (1).

NEXT OF KIN—See DEATH (1).

NIGHTTIME—See AUTOMOBILES (10).

NONCONFORMING USE—See MUNICIPAL CORPORATIONS (16).

NONJURY CASES—See APPEAL AND ERROR (1, 11, 21); AUTOMOBILES (1); BROKERS (1); NEGLIGENCE (1, 2); TRIAL (1, 2).

NOTICE.

A waiver of notice of entry of an order denying a defendant's motion to dismiss was effected by the initialling by its attorney of approval of the order entered. *Abstract & Title Guaranty Company* v. *Williams*, 620.

See APPEAL AND ERROR (7); CHATTEL MORTGAGES; CONSTITUTIONAL LAW (2); COSTS (5); DRAINS; SCHOOLS AND SCHOOL DISTRICTS (3); UNEMPLOYMENT COMPENSATION (4).

OBJECTION—See APPEAL AND ERROR (14); COSTS (3); TAXATION (3).

OBSERVATION—See AUTOMOBILES (7).

OBSTRUCTION TO VIEW—See AUTOMOBILES (1).

OCCUPATIONAL DISEASE—See WORKMEN'S COMPENSATION (2, 3, 11, 12).

OFFICERS.

1. Senators in the presently constituted State senate, although elected under provisions of the State Constitution that are invalid by reason of being a denial of equal protection of laws under the Constitution of the United States, are continued for the balance of their current term, but not thereafter, as *de facto* officers for all valid purposes (US Const, Am 14; Mich Const 1908, art 5, §§ 2, 4, as amended in 1952). *Scholle* v. *Secretary of State,* 177.
2. The acts of the senate, created under an untouched provision of the Constitution, while continuing to function after constitutional provisions apportioning the senatorial districts are declared void as a denial of equal protection of law under the Fourteenth Amendment of the Constitution of the United States, are upheld as the acts of a *de facto* body (US Const, Am 14; Mich Const 1908, art 5, § 1; §§ 2, 4, as amended in 1952). *Id.*

See CHATTEL MORTGAGES; COURTS (1, 4); JUDGES; MUNICIPAL CORPORATIONS (17); TORTS; VENDOR AND PURCHASER.

OIL AND GAS LEASES—See APPEAL AND ERROR (16).

OPENING STATEMENT—See JUDGMENT (2).

OPPOSITE PARTY—See AUTOMOBILES (11, 12); EVIDENCE (5); TRIAL (13); WITNESSES (5).

OPTION—See CANCELLATION OF INSTRUMENTS; INSURANCE (5, 6).

ORAL TRUST—See TRUSTS (1, 2, 5, 6).

ORDINANCES—See AUTOMOBILES (4); COSTS (1, 4, 12); JUDGMENT (1); MUNICIPAL CORPORATIONS (1–8, 18, 20–23, 25).

ORNAMENTAL IRON SALES BUSINESS—See COSTS (4); JUDGMENT (1).

OVERHEAD CHARGE—See CONTRACTS (2).

OVERWHELMING WEIGHT OF EVIDENCE—See PHYSICIANS AND SURGEONS (5).

PAINT VAPORS—See INSURANCE (8).

PARENT AND CHILD—See DEATH (1).

PARENT AND SUBSIDIARY CORPORATION— See CORPORATIONS (1, 2); LANDLORD AND TENANT (4, 5).

PAROL EVIDENCE—See JUDGMENT (2).

PARTIES.

1. Whether or not appellants, alleged landowners in drainage district in which proceedings were pending to clean out, relocate, widen, deepen, straighten, and extend the drain, had sought and obtained the right to intervene in suit to enjoin the carrying out of the contemplated project, actually acquired the status of intervenors *held,* questionable, where subsequent action consisted in having attorney present, but apparently

PARTIES—Continued.

inactive, at pretrial conference and at hearings, until motion to dismiss bill of complaint had been granted, in view of their inaction and failure actively to participate in the proceedings, since they had consented that their intervention should be in subordination to, and in recognition of, the propriety of the main proceedings (CLS 1956, § 280.1 *et seq.*, as amended; CL 1948, § 612.11). *Landowners of Sexton-Kilfoil Drainage District* v. *Wayne County Drain Commissioner*, 150.

2. Intervenors who come into action in subordination to the main proceedings may not broaden the issues which were litigated between the principal parties (CL 1948, § 612.11). *Id.*
3. Appellants who came into suit to enjoin a drainage project upon their acceptance of permission to intervene as parties plaintiff were wholly subordinate to the prerogative of the original plaintiffs to direct and control the course of the litigation, hence, where the bill filed by the original plaintiffs was dismissed without a hearing on the merits, there is nothing left for the appellants to adopt or rely upon were they to have a hearing as sought (CL 1948, § 612.11). *Id.* 151.
4. Participation as a witness in a prior proceeding to recover workmen's compensation does not so qualify an individual as a party as to prohibit him from maintaining his own tort action against the defendant who had been found to be a coemployee of the partnership of which plaintiff herein and plaintiff in the workmen's compensation proceeding were employees, since plaintiff herein is not bound by the prior ruling (CLS 1956, §§ 411.7, 413.15). *Ayers* v. *Genter (Anderson* v. *Same)*, 676.

See DIVORCE (11, 12); REPLEVIN (2); SCHOOLS AND SCHOOL DISTRICTS (6); TAXATION (2); TORTS (1, 3); WORKMEN'S COMPENSATION (19).

PARTNERSHIP.

1. A working partner is not normally considered an employee of a partnership in the absence of statutory sanction, but such has been specifically provided in the workmen's compensation act (CLS 1956, § 411.7). *Ayers* v. *Genter (Anderson* v. *Same)*, 675.
2. A working partner occupies the position of an employee in this State so far as the workmen's compensation act is concerned, and, as such, cannot maintain an action against his coemployee; a partnership being barred for the same reason as the employer's rights are no greater than those of his injured employee (CLS 1956, §§ 411.7, 413.15). *Id.*

See JUDGMENT (7); PARTIES (4).

PASSENGERS—See AUTOMOBILES (1); TRIAL (12).

PASSENGER SERVICE—See EVIDENCE (3).

PASSES—See MALICIOUS PROSECUTION (7).

PASSION—See TRIAL (11); WORDS AND PHRASES (1).

PAVEMENT—See AUTOMOBILES (7, 10).

PAYMENT—See CONTRACTS (7, 9); COSTS (3); FALSE PRETENSES; FINES (1); INSURANCE (5, 6); INTEREST (1); SCHOOLS AND SCHOOL DISTRICTS (3, 4, 7); TAXATION (1–3).

PEDESTRIANS—See AUTOMOBILES (4).

PENAL FINE MONEYS—See COSTS (9).

PENALTY—See WORKMEN'S COMPENSATION (16).

PENDENCY OF ACTION—See ABATEMENT AND REVIVAL; APPEAL AND ERROR (15).

PERJURY—See MALICIOUS PROSECUTION (3).

PERMISSIVE USE—See EASEMENTS (1).

PERSONAL REPRESENTATIVE—See DEATH (2).

PETITIONS—See MUNICIPAL CORPORATIONS (9, 12, 14, 15).

PHYSICAL FACTS—See AUTOMOBILES (9).

PHYSICIANS AND SURGEONS.

1. Appellant, whose license to practice was revoked by State board of registration in medicine, *held*, not to have been prejudiced by assistant attorney general's interruption of plaintiff's counsel in latter's cross-examination of the complaining witness, where it does not appear that the interruptions were inspired by any improper motive and were occasioned by reason of irrelevancy of the questions asked and were apparently made in the belief that the cross-examination should be kept within proper bounds (CL 1948, § 338.51 *et seq.*, as amended). *Clark* v. *State Board of Registration in Medicine*, 343.
2. Finding of circuit judge that claim appellant had been denied due process of law because of occasional interruptions of his counsel's cross-examination of the complaining witness at revocation hearing, or by prejudice on the part of the board members or any of them, had not been substantiated on judicial review of the board's action *held*, supported by record that showed, among other things, that the board has previously undertaken to restore his license subject to a condition apparently intended for his benefit (CL 1948, § 338.51 *et seq.*, as amended). *Id.*
3. The credibility of witnesses appearing before the State board of registration in medicine in a proceeding to revoke the license of a practitioner is primarily a matter to be determined by the board members, especially where there is an issue of fact as to whether or not he was guilty of conduct highly improper and indecent in character, and involving moral turpitude (CL 1948, § 338.51 *et seq.*, as amended). *Id.* 344.
4. The conviction of a criminal offense in a court of competent jurisdiction is not essential to the right to revoke a license to practice medicine (CL 1948, § 338.51 *et seq.*, as amended). *Id.*
5. Licensee to practice medicine was not denied the essentials of due process in proceeding to revoke his license merely because the State board of registration in medicine accepted testimony of the complaining witness as to misconduct, denied by licensee,

PHYSICIANS AND SURGEONS—Continued.

the decision of the board to revoke being within its authority and not arbitrary nor contrary to the overwhelming weight of the evidence (CL 1948, § 338.51 *et seq.*, as amended). *Id.*

See APPEAL AND ERROR (10); INTEREST (1); WITNESSES (1, 3, 4).

PLEADING.

Plaintiff's pleading which contained matters occurring before the filing of the bill of complaint constituted such pleading an amended one rather than a supplemental pleading which latter required leave of court to file, and where the pleading was filed without leave of court after defendant's motion to dismiss had been filed but before answer, it was both proper and timely under pertinent statute and court rule (CL 1948, § 614.15; Court Rule No 26, § 1 [1945]). *Abstract & Title Guaranty Company* v. *Williams*, 620.

See APPEAL AND ERROR (22); EQUITY; JUDGMENT (5, 8); NEGLIGENCE (3); REPLEVIN (2); TRIAL (8); WITNESSES (3).

POLICEMEN—See AUTOMOBILES (12); COSTS (2); MALICIOUS PROSECUTION (1, 7).

POLICE POWER—See CONSTITUTIONAL LAW (1); MUNICIPAL CORPORATIONS (1, 19).

POPULATION—See CONSTITUTIONAL LAW (4, 5); COURTS (4); OFFICERS (1).

POSSESSION—See BROKERS (1); LANDLORD AND TENANT (5); REPLEVIN (1, 3).

POSTING—See DRAINS (1–3).

PRACTICAL CONSTRUCTION—See CONTRACTS (5–7).

PRECEDENTS—See COURTS (4).

PREJUDICE—See APPEAL AND ERROR (10); ESTOPPEL; LANDLORD AND TENANT (5); PHYSICIANS AND SURGEONS (2); TRIAL (11).

PRELIMINARY EXAMINATION—See CRIMINAL LAW (4–7).

PREPONDERANCE OF EVIDENCE—See APPEAL AND ERROR (1); AUTOMOBILES (1); NEGLIGENCE (1); RAILROADS.

PRESBYTERIAN GOVERNMENT—See RELIGIOUS SOCIETIES (2, 3).

PRESCRIPTIVE USE—See EASEMENTS (1).

PRESIDENT—See TORTS (1, 3).

PRESQUE ISLE COUNTY—See CHATTEL MORTGAGES.

PRESS—See TORTS (3).

PRESUMPTIONS—See APPEAL AND ERROR (8); AUTOMOBILES (11); DEATH (4); DRAINS (4); EVIDENCE (4); MUNICIPAL CORPORATIONS (3, 20); NEGLIGENCE (8); TRUSTS (6).

PRETRIAL—See PARTIES (1); TRUSTS (7).

PRIMARIES—See ELECTIONS (2).

PRISONER—See HABEAS CORPUS (5).

PRIVATE WAY—See EASEMENTS (1).

PRIVILEGED COMMUNICATIONS—See WITNESSES (1–4).

PROBABLE CAUSE—See CRIMINAL LAW (4, 5); MALICIOUS PROSECUTION.

PROBATE COURT—See TRUSTS (8).

PROFIT—See CONTRACTS (2).

PROOF OF LOSS—See INSURANCE (5, 6).

PROPERTY—See DIVORCE (11–14); RELIGIOUS SOCIETIES (3, 6, 7).

PROSECUTING ATTORNEY—See MALICIOUS PROSECUTION (7).

PROSPECTIVE OPERATION OF DECISION—See WORKMEN'S COMPENSATION (9).

PROXIMATE CAUSE—See AUTOMOBILES (3, 6, 7, 10); DEATH (5, 6); NEGLIGENCE (2, 6, 7).

PUBLICATION—See DRAINS (1–3).

PUBLIC HEALTH—See MUNICIPAL CORPORATIONS (1, 2, 19, 22, 24).

PUBLIC INTEREST—See LABOR RELATIONS (2).

PUBLIC POLICY—See DIVORCE (2); HUSBAND AND WIFE (2, 4).

PUBLIC QUESTION—See COSTS (1, 6, 9, 10, 13, 16).

PUBLIC SAFETY—See MUNICIPAL CORPORATIONS (1, 2, 19, 22, 24).

PUBLIC SERVICE COMMISSIONS.

1. A party dissatisfied with an order of the public service commission in a proceeding involving rates to be charged by a public utility may review such order by chancery suit in the Ingham circuit court against the commission as a defendant, participation by other interested parties being limited to the grant of leave to intervene in the discretion of the trial court (CLS 1956, § 462.26). *Kalamazoo Municipal Utilities Association* v. *Ingham Circuit Judge (Consumers Power Company* v. *Public Service Commission)*, 601.
2. Trial court's denial to unincorporated association of consumers of electric power of leave to intervene in suit by public utility company against public service commission to review order as to rates to be charged consumers of electric power *held*, not reviewable, where there is no showing of an abuse of the discretion lodged by statute in the trial court, notwithstanding plaintiff had been permitted to participate in the proceeding before the commission (CLS 1956, § 462.26). *Id.*

See COSTS (14); TAXATION (5, 6).

PUBLIC UTILITIES—See COSTS (14); LABOR RELATIONS (2); PUBLIC SERVICE COMMISSIONS (1); TAXATION (5).

PULMONARY FIBROSIS—See WORKMEN'S COMPENSATION (1).

QUESTION FOR COURT—See MALICIOUS PROSECUTION (8); NEGLIGENCE (4).

QUESTION FOR TRIER OF FACTS—See APPEAL AND ERROR (1, 13); AUTOMOBILES (2, 7, 10); EVIDENCE (4); NEGLIGENCE (1, 5–7); PHYSICIANS AND SURGEONS (3); RAILROADS; UNEMPLOYMENT COMPENSATION (1); WILLS (4).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (3, 7, 11, 15, 22–25); CRIMINAL LAW (1); WORKMEN'S COMPENSATION (3).

RAILROADS.

The issue of contributory negligence of plaintiff motorist who was injured in his collision with defendant's railroad engine was properly determined to be a question of fact under the evidence adduced, and trial court's decision for defendant was not against the clear preponderance. *Mayabb* v. *Grand Trunk Western Railroad Company*, 374.

See EVIDENCE (3); TRIAL (12).

RATE ORDERS—See PUBLIC SERVICE COMMISSIONS.

REAR-END COLLISION—See AUTOMOBILES (11, 12).

REBUTTAL—See AUTOMOBILES (11); EVIDENCE (4).

RECORDS AND RECORDING—See APPEAL AND ERROR (5, 15, 16, 20, 22); CHATTEL MORTGAGES; CONTRACTS (9); COSTS (11); FINES (2); MECHANICS' LIENS (2); MUNICIPAL CORPORATIONS (8, 23); NEGLIGENCE (1); PHYSICIANS AND SURGEONS (2); SCHOOLS AND SCHOOL DISTRICTS (7).

RECOUPMENT—See COURTS (5); JUSTICES OF THE PEACE (2); REPLEVIN (3).

REFERENDUM—See FINES (2).

REGISTER OF DEEDS—See MECHANICS' LIENS (2).

REIMBURSEMENT—See WORKMEN'S COMPENSATION (13).

RELIGIOUS SOCIETIES.

1. A court may not interfere with an individual's free exercise of his right to worship as he wishes and in determining the right to possession of the tangible property of a church does not interfere with anyone's right to withdraw from such church and worship as he sees fit (US Const, Am 1). *Immanuel Evangelical Lutheran Church* v. *Fromm*, 575.
2. A church with a presbyterian form of government may merge with another church through affirmative action taken by the body to which delegates have been sent by the church, since a congregation under such a government is without power to effect the merger. *Id.*

RELIGIOUS SOCIETIES—Continued.

3. An amendment of the constitution of a local church with a presbyterian form of government, which would permit such local church to sever its connection with its controlling body to which it had elected delegates, without the consent of the controlling body, is void and ineffective to transfer property away from the church to which it had been dedicated and which had been using it for 22 years. *Id.*
4. A court will not interfere with the action taken by the governing body of a church except to determine whether the governing body had jurisdiction to do what it did. *Id.* 576.
5. A church incorporated for the promotion of a defined fundamental religious faith or doctrine cannot by amendment change its religious creed or faith except by unanimous vote of its members. *Id.*
6. The property of a church is impressed with a trust to carry out the purposes of its organization; and a court though not concerned with religious doctrines, will not permit a violation of the trust by a diversion of the property to other uses sought to be made of it, because of a change in faith of the majority. *Id.*
7. No award of monetary damages is made in suit to determine the right to the possession of church property, where, although defendants' acts are declared illegal, they have conducted services which have been attended by adherents to the faith to which the property had been dedicated and any damages would be a highly speculative matter. *Id.*

REMAINDERS—See DIVORCE (12, 14, 15).

REMAND—See APPEAL AND ERROR (6).

REMODELING—See CONTRACTS (1, 2, 7, 9).

REMOVAL OF CAUSE—See JUSTICES OF THE PEACE (2, 3); REPLEVIN (4).

REPAIR—See INSURANCE (5, 6).

REPLEVIN.

1. No demand before filing replevin action is necessary where defendant claims title and right of possession to property, or exercises possession or control over the property with knowledge of the plaintiff's adverse claim, since a demand under such circumstances would be an idle ceremony. *Goodwill Industries of Detroit* v. *Whitsitt*, 569.
2. The filing of an answer by defendant, added by stipulation and order making it a full party defendant, cured the defect of instituting replevin action against an improper defendant. *Id.*
3. The only issue in a replevin action is right of possession and claims by way of set-off or recoupment are not permissible defenses to the action. *Standard-Toch Chemicals, Inc.*, v. *Victor Paint Co.*, 640.
4. Order of circuit court affirming order of common pleas court dismissing motion by defendant to remove cause to circuit

REPLEVIN—Continued.

court, based on claim of set-off in excess of monetary jurisdiction of the common pleas court, *held*, proper, where the defense of set-off was not interposable in plaintiff's action of replevin (CL 1948, § 669.11; PA 1915, No 314, ch 69, § 17a, as added by PA 1959, No 249). *Id.*

REQUEST TO CHARGE—See AUTOMOBILES (4); TRIAL (8, 9).

RESCISSION—See BROKER (1); CANCELLATION OF INSTRUMENTS; JUDGMENT (5); VENDOR AND PURCHASER (1).

RESERVATION—See TRIAL (10).

RESERVE FOR DEFERRED FEDERAL INCOME TAXES—See TAXATION (6).

RESIDENCE USE—See COSTS (1); MUNICIPAL CORPORATIONS (6, 8).

RESIDUARY CLAUSE—See WILLS (2).

RES JUDICATA—See DIVORCE (1); JUDGMENT (6); PARTIES (4); WORKMEN'S COMPENSATION (7).

RESTORATION OF FUND—See TRUSTS (3).

RESULTING TRUST—See TRUSTS (4, 5).

RETIREMENT—See INJUNCTION (1).

REVIEW OF APPORTIONMENT OF BENEFITS—See COSTS (5); DRAINS.

REVOCATION—See APPEAL AND ERROR (10); PHYSICIANS AND SURGEONS; WILLS (4, 5).

RIGHT-OF-WAY—See AUTOMOBILES (4); INSURANCE (4).

RULES OF PHYSICS—See EVIDENCE (2).

SAFETY DEVICES—See TORTS (3).

SALARY—See APPEAL AND ERROR (7); COURTS (1, 4); JUDGES.

SALES—See CHATTEL MORTGAGES; CONTRACTS (10); COSTS (3); SEARCHES AND SEIZURES (2); TAXATION (1–3).

SANDER—See WORKMEN'S COMPENSATION (1, 2).

SAVING QUESTION FOR REVIEW—See APPEAL AND ERROR (2, 3, 14).

SAWYER—See DEATH (4).

SCAFFOLDING—See NEGLIGENCE (5).

SCHOOLS AND SCHOOL DISTRICTS.

1. The policy of the State is to retain control of its school system, to be administered throughout the State under State laws by local State agencies organized with plenary powers to carry

SCHOOLS AND SCHOOL DISTRICTS—Continued.

out the delegated functions given it by the legislature. *School District of the City of Lansing* v. *State Board of Education*, 591.

2. The legislative power to alter school district boundaries may be delegated to subordinate authorities (CLS 1956, §§ 340.461–340.465, as amended by PA 1957, No 135). *Id.*

3. The legislature provided sufficient standards in the statutory provisions for the detachment of territory from one school district and attachment thereof to another in requiring that the territory be contiguous to the district to which it was to be attached, in requiring that designated parties may request such action, that approval of the electors at an annual or special election be given, prescribing the notice to be given of the meeting of the county board of education at which the matter was to be considered, filing of map showing in detail the new boundaries, and for an equitable payment for the taking of property, and for an accounting (CLS 1956, §§ 340.461–340.465, as amended by PA 1957, No 135). *Id.*

4. The determination of equitable payment by a county board of education or joint boards in requiring district to which territory is attached to pay for real or personal property transferred to it would require the exercise of its discretion gained through its business experience, time in the community, and knowledge of property values, and an abuse of such discretion would be subject to judicial review (CLS 1956, § 340-.465). *Id.* 592.

5. It was not a denial of equal protection of the laws for the legislature in accord the right of approval of the school tax electors in school district from which detachment of area is sought before annexation may become effective and not accord the school tax electors of the district to which it is to be attached the same right, since the electors in neither district have an absolute right to vote on the annexation question (US Const, Am 14; Mich Const 1908, art 2, § 1; CLS 1956, § 340.461, as amended by PA 1957, No 135). *Id.*

6. A school district is not a proper party to raise the question of whether or not its residents have the right to vote on the transfer of territory in an annexation proceeding, since it is an agency of the State government and not in a position to attack its parent, such right, if existing at all, existing in the voters and not in the school district (CLS 1956, § 340-.461, as amended by PA 1957, No 135). *Id.*

7. Contention that State board of education had not actually considered the appeal to it from action taken by joint county boards of education in attaching property to plaintiff district and requiring it to make a payment for certain property therein *held*, without merit under record presented. *Id.*

See APPEAL AND ERROR (25); COSTS (13, 16); EMINENT DOMAIN (2); FINES (2); INJUNCTION (1); MUNICIPAL CORPORATIONS (28).

SEARCHES AND SEIZURES.

1. A search warrant may not properly be issued based only on

SEARCHES AND SEIZURES—Continued.

facts disclosed by affidavit as they existed 6 days earlier. *People* v. *Wright*, 611.

2. Seizure of liquor and gambling paraphernalia under warrant issued solely upon an affidavit as to conditions existing 6 days theretofore *held*, improper, since a search warrant must issue, if at all, upon an existing cause, hence, informations charging defendant with maintaining and operating a gaming room and a place where liquor was served without a license were properly quashed. *Id.*

SECRETARY OF STATE—See ELECTIONS (1, 2).

SELF-INTEREST—See TRIAL (11, 12).

SELF-SERVING INTERPRETATION—See CONTRACTS (6).

SENATORS—See CONSTITUTIONAL LAW (3–5); COSTS (6); ELECTIONS; OFFICERS.

SEPARATE ENTITY—See CORPORATIONS.

SET-OFF AND RECOUPMENT—See CONTRACTS (9); COURTS (5); JUSTICES OF THE PEACE (1, 2); REPLEVIN (3, 4).

SETTING ASIDE DEFAULT—See JUDGMENT (3–5).

SEVERANCE OF ESTATE—See EASEMENTS (4).

SHERIFFS AND CONSTABLES—See CHATTEL MORTGAGES.

SIDEWALKS—See MUNICIPAL CORPORATIONS (27).

SIGNATURES—See MUNICIPAL CORPORATIONS (9).

SILICOSIS—See COSTS (8); WORKMEN'S COMPENSATION (1–3, 11, 12).

SKILLED EMPLOYMENT—See WORKMEN'S COMPENSATION (5, 6).

SON—See DEATH (1).

SPECIAL ASSESSMENT DISTRICT—See DRAINS (3).

SPECIAL ELECTION—See ELECTIONS (2).

SPECIALLY DESIGNATED MERCHANT—See COSTS (15); MANDAMUS.

SPECIAL QUESTIONS—See APPEAL AND ERROR (2); TRIAL (3–7).

SPECIFICATIONS—See CONTRACTS (1).

SPECIFIC PERFORMANCE—See CANCELLATION OF INSTRUMENTS.

SPEED—See AUTOMOBILES (1, 10).

SPOUSE—See DEATH (3).

STATE BOARD OF EDUCATION—See SCHOOLS AND SCHOOL DISTRICTS (7).

STATEMENT OF ACCOUNT—See MECHANICS' LIENS (2).

STATES—See MUNICIPAL CORPORATIONS (28); SCHOOLS AND SCHOOL DISTRICTS (1).

STATE SENATORS—See CONSTITUTIONAL LAW (3–5); COSTS (6); ELECTIONS; OFFICERS.

STATE TENURE COMMISSION—See APPEAL AND ERROR (25); COSTS (16); INJUNCTION (1).

STATUTE OF LIMITATIONS—See APPEAL AND ERROR (7).

STATUTES—See ABATEMENT AND REVIVAL; APPEAL AND ERROR (2, 7, 10–12, 15, 24, 25); AUTOMOBILES (1, 4, 11, 12); COSTS (3, 5, 8, 10, 13, 14, 16); COURTS; COVENANTS; CRIMINAL LAW; DEATH; DIVORCE (2–5, 9–14); DRAINS; ELECTIONS (1, 2); EMINENT DOMAIN; EVIDENCE (4, 5); FALSE PRETENSES; FINES; HABEAS CORPUS (2–6); HUSBAND AND WIFE; INJUNCTION (1); INSURANCE (5, 6); INTEREST (2); JUDGES; JUSTICES OF THE PEACE; LABOR RELATIONS; LANDLORD AND TENANT (1); MECHANICS' LIENS; MUNICIPAL CORPORATIONS (9–17, 27); NEW TRIAL; PARTIES; PARTNERSHIP; PHYSICIANS AND SURGEONS; PLEADING; PUBLIC SERVICE COMMISSIONS; REPLEVIN (4); SCHOOLS AND SCHOOL DISTRICTS (2–6); TAXATION; TORTS; TRIAL (3–7, 10, 13); TRUSTS (1, 2, 5, 6, 8, 10); UNEMPLOYMENT COMPENSATION; VENDOR AND PURCHASER; WILLS (5, 7); WITNESSES (1, 5); WORKMEN'S COMPENSATION.

STOCK AND STOCKHOLDERS—See TORTS (1, 3).

STOPPING—See AUTOMOBILES (1).

STOREKEEPERS—See WITNESSES (3).

STRIKES—See LABOR RELATIONS (2); UNEMPLOYMENT COMPENSATION (4).

SUBCONTRACTOR—See CONTRACTS (2); NEGLIGENCE (6).

SUMMARY JUDGMENT—See JUDGMENT (8).

SUPERIOR COURT OF GRAND RAPIDS—See APPEAL AND ERROR (7); COURTS (1–4); JUDGES.

SUPERVISION—See CONTRACTS (1).

SUPERVISORS, BOARD OF—See MUNICIPAL CORPORATIONS (12, 15).

SUPPORT OF CHILDREN—See DIVORCE (3–5, 7, 8).

SUPPORT OF WIFE—See HUSBAND AND WIFE (3, 4).

SUPREME COURT—See APPEAL AND ERROR (1, 3, 5–7, 9, 11, 16, 18–22, 24); CRIMINAL LAW (1); DEATH (2, 6); DIVORCE (6, 8); ELECTIONS (2, 3); MANDAMUS; MUNICIPAL CORPORATIONS (7); UNEMPLOYMENT COMPENSATION (1); WORKMEN'S COMPENSATION (3, 9, 14).

SURPLUS—See TAXATION (6).

TANKS—See APPEAL AND ERROR (23).

TAXATION.

1. A court of equity has complete and plenary jurisdiction to consider and determine objections of owners of property to sale of their property for nonpayment of taxes on ground of invalid assessment by officers of the wrong county (CL 1948 and CLS 1956, §§ 211.60, 211.67, 606.4). *Auditor General* v. *Klenk*, 65.
2. The auditor general, as an officer of the State, enjoys no position superior to that of any other suitor in chancery when he comes into the circuit court of each county with the annual petition for sale of land for nonpayment of taxes (CLS 1956, § 211.61). *Id.*
3. The auditor general, as petitioner for sale of lands for nonpayment of taxes must do equity, if he is to have equity in such a proceeding, hence, a property owner who raises an objection to the assessment as being void for some recognized reason, and the auditor general is unable to meet the objector's pleading and proof, and the objector's own conduct is not inequitable, is entitled to an adjudication of invalid assessment with stated reason for such adjudication (CLS 1956, § 211.61). *Id.*
4. The determination of whether an assessment for taxes is proper includes a determination of the identity of the proper officers charged with the duty of making the assessment and the county in which they function (CL 1948 and CLS 1956, § 211.1 *et seq.*). *Id.*
5. The corporation and securities commission must abide by the accounting and tax-calculating procedures an electric utility company has followed under orders of the public service commission, where the latter commission has been vested by statute with authority to regulate such utility and to prescribe its uniform methods of keeping accounts (CL 1948 and CLS 1956, § 460.1 *et seq.*). *Detroit Edison Company* v. *Corporation & Securities Commission*, 104.
6. *Surplus* of an electric utility corporation for purposes of determining the annual franchise fee to be paid by the corporation is governed by pertinent accounting procedures prescribed by the public service commission pursuant to statutory authority conferred upon it and observed by the corporation, hence, reserve for deferred Federal income taxes, established to meet possibility of higher income taxes when accelerated depreciation benefits as to certain property were exhausted, was not to be included as surplus in computing the corporation's annual privilege fee (CLS 1956, § 450.304; CL 1948 and CLS 1956, § 460.1 *et seq.*). *Id.*

See COSTS (3).

TAXICABS—See AUTOMOBILES (10).

TEACHERS—See COSTS (16); INJUNCTION (1).

TENANCY BY ENTIRETY—See DIVORCE (13, 14).

TENANCY IN COMMON—See DIVORCE (13, 14).

TERMINATION—See TRUSTS (1, 3-5).

TERM OF OFFICE—See APPEAL AND ERROR (7); COURTS (1, 4); JUDGES.

THEATERS AND SHOWS—See ACTION; LANDLORD AND TENANT (1, 5).

THIRD-PARTY TORTFEASOR—See TORTS; WORKMEN'S COMPENSATION (18).

THROUGH HIGHWAY—See AUTOMOBILES (1).

TIME—See MALICIOUS PROSECUTION (7); MECHANICS' LIENS (2); WORKMEN'S COMPENSATION (12).

TITLE—See TRUSTS (5).

TITLE INSURANCE—See JUDGMENT (5).

TORTS.

1. An injured employee of a corporation would be unable to proceed against a defendant as the alleged third-party tortfeasor, where he is the sole stockholder, president, and manager of the corporate employer, should the corporate veil be pierced because of the almost complete identity between the defendant and the corporation from which plaintiff had received workmen's compensation (CLS 1956, § 413.15). *Pettaway* v. *McConaghy*, 651.
2. Action against defendant, who was the sole stockholder, president, and manager of corporation from which plaintiff, injured employee, had recovered workmen's compensation was properly dismissed as he was a natural person in the same employ of the employer excepted from liability as a third-party tortfeasor (CLS 1956, § 413.15). *Id.* 652.
3. The failure of defendant, sole stockholder, president, and general manager of employer corporation which had paid workmen's compensation to plaintiff, to place proper safety devices on converted press for protection of operator, even if constituting gross negligence and wilful misconduct, would not make defendant liable as third-party tortfeasor (CL 1948, § 408.65; CLS 1956, § 413.15). *Id.*

See JUDGMENT (7); PARTIES (4); WORKMEN'S COMPENSATION (18, 19).

TOWNSHIPS—See COSTS (4); JUDGMENT (1).

TRAFFIC—See MUNICIPAL CORPORATIONS (8).

TRANSFER FROM NONJURY TO JURY CALENDAR—See TRIAL (1, 2).

TRANSFER OF PROPERTY—See SCHOOLS AND SCHOOL DISTRICTS (3, 4).

TRESPASS—See NEGLIGENCE (3).

TRIAL.

1. The transfer of a cause from the nonjury calendar to the jury

TRIAL—Continued.

calendar of the trial court after the expiration of 15 days after the cause was at issue without a demand for a jury trial having been made is a matter for discretion of the trial court (Court Rule No 33, § 3 [1945]). *Merrill* v. *Shumway*, 14.

2. Trial court's denial of motion to transfer cause, arising from automobile accident at intersection, from nonjury calendar to jury calendar, filed more than 5 months after the cause was at issue, *held*, not an abuse of discretion, where trial court stated in denial of motion to transfer that the case could and would be heard much sooner and more expeditiously if left on the nonjury calendar (Court Rule No 33 [1945]). *Id.*

3. A special question that is timely presented to the court and approved by it as to form and substance for submission to the jury is adopted by the court and submitted to the jury as an interrogatory of the court, not of counsel, and in such regard the duty of the court is no different than if the question had been drafted and redrafted by the court (CL 1948, § 618.39). *Reetz* v. *Rigg*, 35.

4. The trial judge has inherent power to draft and submit special questions to the jury regardless of request by counsel (CL 1948, § 618.39). *Id.*

5. The submission of special questions to the jury, when requested, is required by statute, but such statutory command does not forbid the court, in the exercise of its inherent power, from submitting on its own motion special questions which will aid in reaching a proper verdict, its right in such respect being coextensive with its power to give instructions generally (CL 1948, § 618.39). *Id.*

6. The specific object of special questions is that of ascertainment by the court, whether the jury has properly applied the law as given by the court to the jury's findings of fact (CL 1948, § 618.39). *Id.* 36.

7. It is improper to submit special questions or requested instructions as having emanated other than from the court (CL 1948, § 618.39). *Id.*

8. It is the duty of the court to present to the jury the substantial issues in the cause raised by the pleadings and supported by evidence governing the rights of the parties, whether or not any specific instructions are requested by counsel (Court Rule No 37, § 9 [1945]). *Salvorraphos* v. *Eastman Kodak Stores, Inc.*, 96.

9. Counsel who desire additional or more specific instructions upon any particular point, after the court instructs the jury on the basic elements of the case, must frame a special request to the court to charge as desired or be deemed satisfied with instructions as given, and an exception based upon the want of sufficiency on particular points of law cannot be assigned as error (Court Rule No 37, § 9 [1945]). *Id.*

10. The trial court has the power to decide the issues where, although a jury has been impaneled and disagreed, both sides have moved for judgment without reservation as to right to trial by jury if the respective motion were decided adversely,

TRIAL—Continued.

as each party has waived the right to have any issue submitted to the jury (CL 1948, §§ 691.691, 691.701). *Mayabb* v. *Grand Trunk Western Railroad Company*, 374.

11. Parties to an action in court are entitled to a fair trial on the merits of the case, uninfluenced by appeals to passion, prejudice, sympathies on matters not at issue, self-interest of jurors, and jurors' personal situations. *Clark* v. *Grand Trunk Western Railroad Company*, 396.
12. Improper argument, in action by passenger against railroad company for injuries received from assault in railroad station, by defense counsel in appeal to jurors by posing rhetorical question as to "What effect would a decision for the plaintiff in this case have upon business and upon you as individuals, as owners of businesses, as farmers, as owners of property?" *held*, reversible error, especially where it had been preceded by newspaper articles to the effect that a $1.20 ticket costing the railroad company a $90,000 lawsuit was a good reason for the railroads wanting to get out of the passenger business. *Id.*
13. The trial court in determining issue presented by a motion for a directed verdict in a case where the plaintiff has called the defendant as a witness may not select isolated portions thereof and claim a force and effect for such portions of his testimony which the whole of his testimony does not warrant but such opposite party's testimony as a witness must be treated as a whole (CL 1948, § 617.66). *Petrosky* v. *Dziurman*, 540.

TRUCKS—See MALICIOUS PROSECUTION (7).

TRUSTS.

1. Conclusion of trial court that oral trust with respect to balance of savings account in joint names of plaintiff's decedent and defendant had been terminated by action of the decedent *held*, supported by evidence (CL 1948, § 487.703). *Thompson* v. *Stehle*, 284.
2. The determination of whether or not there was a valid oral trust of the balance of a savings account in the joint names of plaintiff's decedent and defendant is made according to the rules of common law, where the account was established in connection with the trust to permit the carrying out thereof in accordance with the wishes of the decedent (CL 1948, § 487.703). *Id.*
3. The termination of a trust relation operates to restore the fund subject to the trust to the original owner or his heirs. *Id.* 285.
4. A resulting trust arises as against the trustee as to property which had been conveyed upon an express trust for particular purposes but which trust had failed by reason of having been ineffectually or illegally declared or otherwise extinguished or terminated, the resulting trust arising in favor of the grantor, and those claiming under him, either in the property conveyed, or in the residue of the property remaining at the time of the failure or extinguishment of the trust, or after the purposes have been discharged. *Id.*

TRUSTS—Continued.

5. Title to balance of joint savings account the subject of an oral trust which had terminated did not pass to survivor but formed a resulting trust for the grantor, where evidence fails to show any intent to create a right of ownership in the trustee by reason of survival (CL 1948, § 487.703). *Id.*
6. The statutory presumption of ownership accorded survivor of joint savings account *held,* overcome by evidence presented relative to the purpose of creating the joint account, the termination of the oral trust which had been created and subsequent action of grantor in treating the account moneys as his own and leaving the property by will (CL 1948, § 487.703). *Id.*
7. An equitable lien was properly impressed upon property defendant is found to have purchased in his own name with money supplied by plaintiff notwithstanding trial court did not make a finding of fraud as alleged in plaintiff's bill to establish a trust, where pretrial statement shows defendant was sufficiently advised as to the facts testified to by plaintiff. *York* v. *Litteral,* 462.
8. Residuary and trust clauses of testator's will which unqualifiedly ordered payment to his wife of $700 per month during her life or until the trust property shall be exhausted and medical, surgical, hospital, and nursing expenses for her to the extent that such expenses exceeded $700 per month vested in her a legal right thereto as of testator's death that was unaffected by probate court's award of $1,000 per month for period of 1 year as her widow's allowance (CLS 1956, § 702.68). *In re King Estate,* 503.
9. A trust for support and maintenance, created by a residuary devise, is not technically a legacy for maintenance, but identical considerations are involved in construing it in ascertaining testator's intent, hence, such a trust is normally construed as accruing from the date of the death. *Id.* 504.
10. Courts must assume that a testator who makes trust provision for his widow's maintenance, without reference to whether or not she petitions for and receives more, by the statute, from the estate proper, intends that she be paid from the trust as of his death. *Id.*

See RELIGIOUS SOCIETIES (6).

UMPIRE—See INSURANCE (5, 6).

UNDISPUTED FACTS—See MALICIOUS PROSECUTION (8).

UNEMPLOYMENT COMPENSATION.

1. It is not within the province of either the Supreme Court or the circuit court to determine issues of fact when reviewing determinations by the appeal board of the employment security commission as to disqualification for benefits of claimants for unemployment compensation (CLS 1956, § 42.129, subd [1][b]). *Bedwell* v. *Employment Security Commission,* 415.
2. The finding of the appeal board of the employment security commission that there was a labor dispute and that it caused the unemployment for which claimants sought compensation,

UNEMPLOYMENT COMPENSATION—Continued.

being supported by evidence on record, was not subject to reversal by the circuit court upon review by certiorari accorded by statute (CLS 1956, § 421.29, subd [1][b]). *Id.*

3. Testimony of defendant leather manufacturer's plant manager that layoffs of employees were made only to prevent loss through spoilage or obsolescence and not to reduce inventory at plant where the fact that there was a labor dispute was conceded, supported finding of appeal board of the employment security commission that the unemployment of claimants was due to labor dispute (CLS 1956, § 421.29, subd [1][b]). *Id.*
4. The fact that there was evidence that the time necessary to process materials used in the manufacture of leather to a stage where it would not spoil was less than the period involved in the layoff imposed by defendant employer did not make erroneous the determination of the appeal board of the employment security commission that the unemployment for which claimants sought benefits was due to labor dispute disqualifying them therefor as against the great weight of the evidence, where there was evidence that union had given a 60-day notice that strike would occur upon termination of existing collective bargaining contract and various efforts to obtain extensions of time were unavailing prior to employer's order to lay off employees as successive steps in processing materials were completed to prevent spoilage and prepare for shipment (CLS 1956, § 421.29, subd [1][b]). *Id.* 416.
5. Appeal of employer, taken as of right and without leave, from judgment of circuit court in consolidated cases of claimants for unemployment compensation *held*, proper, notwithstanding no one of the claims amounted to as much as $500, but in the aggregate totaled much more than that sum, in view of the past practice in such cases and present court rule provision in recognition thereof (Court Rule No 60, § 1, as amended in 1961). *Id.*
6. No costs are allowed on appeal from judgment in favor of claimants for unemployment compensation, where reversal of judgment of circuit court results in affirmance of determination of appeal board of employment security commission and no costs had been requested by appellant. *Id.*

See CONTRACTS (1).

UNIONS—See LABOR RELATIONS (3); UNEMPLOYMENT COMPENSATION (4).

UNITARY ACTION—See DEATH (3).

UNITED STATES—See ABATEMENT AND REVIVAL.

UNLIQUIDATED CLAIMS—See INTEREST.

VALUE—See MUNICIPAL CORPORATIONS (6, 8).

VENDOR AND PURCHASER.

Defendants' statements that 3-story wooden multiple dwelling property sold plaintiffs could be used as a 7-family apartment

VENDOR AND PURCHASER—Continued.

house, though innocently made, warranted rescission of the land contract, where city elected not to exercise its discretion to permit the use of the property for 7-family occupancy, or to permit the occupancy of the third floor of the property (CL 1948, §§ 125.404, 125.450, 125.451). *Kroninger* v. *Anast*, 478.

VENETIAN BLIND—See NEGLIGENCE (3).

VERDICTS AND FINDINGS—See APPEAL AND ERROR (18–20); AUTOMOBILES (1); CANCELLATION OF INSTRUMENTS; CONTRACTS 2, 9); DEATH (6); EASEMENTS (1); INSURANCE (4); MUNICIPAL CORPORATIONS (7, 23); NEGLIGENCE (1); NEW TRIAL; TRIAL (6); UNEMPLOYMENT COMPENSATION (2–4); WORKMEN'S COMPENSATION (1).

VESTING—See TRUSTS (8).

VIOLATION OF ORDINANCE—See AUTOMOBILES (4).

VIOLATION OF STATUTES—See AUTOMOBILES (4).

VISIBLE DEPENDENCY—See EASEMENTS (2–4).

VOLUNTARY CONTRIBUTIONS—See DEATH (1).

WAIVER—See NOTICE; TRIAL (10).

WANT OF PROBABLE CAUSE—See MALICIOUS PROSECUTION (4, 6, 8).

WARNINGS—See AUTOMOBILES (10).

WARRANT—See SEARCHES AND SEIZURES (2).

WATER METER—See NEGLIGENCE (1, 2).

WATER TANK—See APPEAL AND ERROR (23).

WAYNE COUNTY—See CHATTEL MORTGAGES.

WAY OF NECESSITY—See EASEMENTS (1).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (21); CRIMINAL LAW (7); DAMAGES; PHYSICIANS AND SURGEONS (5); UNEMPLOYMENT COMPENSATION (4).

WET PAVEMENT—See AUTOMOBILES (12).

WIDOW—See TRUSTS (10).

WIDOW'S ALLOWANCE—See TRUSTS (8).

WILLS.

1. Extraneous facts and circumstances, not discernible from testamentary instrument itself, may be examined when the language used in it is not clear and unambiguous, but when the language is clear and free from ambiguity, resort may not be had to extrinsic evidence. *In re Wilson Estate (Sturges* v. *Brown)*, 143.

WILLS—Continued.

2. Provision of will that "all the rest, residue and remainder of my property, both real and personal, wherever situated, which I own and all property over which at the time of my death I shall have any power of appointment, general or special, including [listed tangible personalty], I give, devise and bequeath to my sister. * * * Upon the death of my sister * * * it is my desire that this property be divided equally between my brothers then living" *held*, unambiguous, and to have granted the sister a fee interest in the residue and expressed a desire, or a wish, that whatever remained be divided among the surviving brothers. *Id.*
3. Probate and circuit judges who heard respective claims of parties as to proper construction to be given residuary clause of will properly declined to consider evidence that tended to indicate that someone in the office of the attorney who drafted the codicil affecting residuary clause had committed an error of expression, where there is no ambiguity in the will. *Id.* 144.
4. Issue as to whether the intended will consisted of 1 or 2 pages, and whether, if it consisted of 2 pages, the testatrix later destroyed the second page thereof *held*, for jury under evidence presented in contest of undated instrument presented for probate. *In re Cooch Estate (Greitzer* v. *Ring)*, 445.
5. A will may be revoked by burning, tearing, canceling, or obliterating it with the intention of revoking it by the testatrix or by some person in her presence and by her direction, or by some other duly executed will, codicil, or other duly-executed testamentary disposition, and declarations of the testatrix with respect to the matter of revocation should be permitted to go to the jury at least where there is some other evidence to support the claim that the instrument is not as complete as testamentarily intended (CL 1948, § 702.9). *Id.*
6. The absence of a date on will presented for probate supported claim of contestants that such instrument was not complete as testamentarily intended. *Id.*
7. The issue of whether or not an instrument presented for probate should be admitted to probate is to be determined by the law of this State, not law taken from elsewhere, there being statutory provisions pertinent to such matter. *Id.*

See TRUSTS (6, 8).

WINDING UP AFFAIRS—See APPEAL AND ERROR (15).

WINDS—See NEGLIGENCE (5, 6).

WINE—See COSTS (15); MANDAMUS.

WITNESSES.

1. The language of the statute setting forth the privilege from disclosure attending the relation of physician and patient may not be extended beyond its plain terms, hence, that statutory privilege is not applicable to the relation between physician who did not attend plaintiff for the purpose of treating her or for the purpose of contemplated surgery, but to obtain information for the benefit of the attorney at whose request

WITNESSES—Continued.

the examination was made (CL 1948, § 617.62). *Lindsay* v. *Lipson*, 1.

2. The common-law rule as to privileged communications between attorney and client is given a somewhat liberal interpretation. *Id.*

3. Information obtained by physician from plaintiff woman, injured at defendant's store when head of cabbage was tossed by an employee of defendant in the direction of another employee, upon an examination made at the request of her attorney to enable him to prepare pleadings properly and to try the cases she and her husband intended to institute, was a privileged communication not subject to disclosure over plaintiffs' objection since it was consistent with the privilege attending the relation of attorney and client. *Id.*

4. Information conveyed by a client to attorney, either directly, or through the client's or attorney's agent, including physicians who are requested to examine the client preparatory to trial and not for treatment or performance of surgery, is privileged from disclosure under the common-law rule as to privileged communications between attorney and client. *Id.* 2.

5. Testimony on cross-examination of the opposite party, called under the statute, stands in no different position than it would if the adversary of the party calling the witness had called the witness, since the statute makes the witness subject to cross-examination by the opposite party without qualification, although it does not give the right to make such witnesses the witnesses of the adversary of the party calling them; the statute also providing that the party calling such opposite party as a witness shall not be bound by, and may contradict, such testimony (CL 1948, § 617.66). *Petrosky* v. *Dziurman*, 540.

See APPEAL AND ERROR (20); AUTOMOBILES (11, 12); EVIDENCE (5); NEGLIGENCE (8); PARTIES (4); PHYSICIANS AND SURGEONS (3); TRIAL (13).

WORDS AND PHRASES.

1. The term *discretion of court* involves the idea of choice, of an exercise of the will, of a determination made between competing considerations; and in order to have an *abuse of discretion* in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias. *Anneberg* v. *Anneberg*, 458.

2. An ignition is a burning. *Bobco* v. *Metropolitan Insurance Company*, 645.

WORKING PARTNER—See PARTNERSHIP.

WORKMEN'S COMPENSATION.

1. Workmen's compensation appeal board's finding that plaintiff was entitled to workmen's compensation because of disability is affirmed, where there is competent evidence to support the

WORKMEN'S COMPENSATION—Continued.

finding, it being shown that dust and sand from sanding machine at which he worked could have contributed to and aggravated a pre-existing silicotic condition and medical testimony was that he had extensive pulmonary fibrosis, emphysema, and silicosis. *Clarkson* v. *Lufkin Rule Company*, 19.

2. Provision of workmen's compensation act permitting reduction of award for occupational disease where noncompensable disability or death from any other cause is aggravated, prolonged, accelerated, or in any wise contributed to by an occupational disease *held*, inapplicable, where plaintiff's previous silicotic condition, noncompensable because antedating the occupational disease amendment to the workmen's compensation act, was aggravated by an occupational exposure to sander dust (CL 1948, § 417.8). *Id.*
3. Claim of error on part of hearing referee in awarding plaintiff workmen's compensation "until further order of the department" without providing for the $10,500 limitation in statute pertinent to silicosis and other dust diseases, which claim was not mentioned in application for review by workmen's compensation appeal board nor urged upon the board, came too late when raised for first time in Supreme Court (CLS 1956, § 417.4). *Id.* 20.
4. An injury is not compensable under the Michigan workmen's compensation act unless it impairs the employee's earning capacity in the employment in which he was working at the time of injury (CL 1948, § 412.11). *Kaarto* v. *Calumet & Hecla, Inc.*, 128.
5. Miner who was burned by mine explosion that did not impair his earning capacity as a skilled employee but did limit him in the performance of common labor, presently the only employment available in his community, *held*, not entitled to workmen's compensation, since his earning capacity in the employment at which he was working at the time of injury has not been impaired (CL 1948, § 412.11). *Id.*
6. No costs are allowed in proceeding to recover workmen's compensation by miner whose injury impaired his earning capacity at common labor but not in the skilled employment at which he was working at the time of injury (CL 1948, § 412.1). *Id.* 129.
7. The doctrine of *res judicata* applies to workmen's compensation claims before the workmen's compensation department. *Willis* v. *Michigan Standard Alloy Casting*, 140.
8. Claim for interest on all benefits awarded to plaintiff which were paid after their due date was improperly allowed by workmen's compensation department and its appeal board, where made after expiration of period for appeal from affirmance of the award by the appeal board. *Id.*
9. Interest on an award of workmen's compensation on which period for taking an appeal had expired before decision of Supreme Court allowing interest on such awards prospectively was not a case pending before the department. *Id.* 141.
10. No costs are allowed on reversal of award of workmen's com-

WORKMEN'S COMPENSATION—Continued.

pensation appeal board improperly allowing interest on delayed payment of workmen's compensation. *Id.*

11. The imposition of a maximum limit of $10,500 as to amount of workmen's compensation payable for silicosis and dust diseases did not effect an unreasonable classification, or a denial of the equal protection of the laws, where, although a lower maximum than for other occupational diseases or injuries, it appears silicosis occurs in relatively few industries, that the cost of unlimited workmen's compensation insurance therefor would be prohibitive and that workers afflicted with silicosis are more readily employable in other occupations than workers suffering from other compensable injuries or disabilities (CLS 1956, § 417.4). *McDaniel* v. *Campbell, Wyant & Cannon Foundry*, 356.

12. The limitation of $10,500 as maximum amount of workmen's compensation payable for death or disability due to silicosis was intended to apply whether all or only some of the exposure to conditions causing the disease was following adoption of the amendment of the workmen's compensation act so limiting the employer's liability (CLS 1956, § 417.4). *Id.*

13. Provision of workmen's compensation act that the employee entitled to benefits "shall be reimbursed for the reasonable expense incurred by or on his behalf in providing" reasonable medical, surgical, and hospital services and medicines or other attendance or treatment requires the employer to make payment of such sum whether the employee has been legally subjected to payment therefor or not (CLS 1956, § 412.4). *Id.*, 357.

14. Rule of law by Supreme Court whereby old rule that no interest was allowable on an award of workmen's compensation is overruled is construed prospectively so that awards made after award on which majority of Supreme Court declared interest should be allowed should also bear interest. *Id.*

15. Interest at the rate of 5% on all past due amounts under an award of workmen's compensation, made in 1960 on a claim filed in 1958 for an occupation-connected disabling heart attack which had occurred in 1953, *held*, proper where review was limited to review of workmen's compensation appeal board's determination as to when interest began to accrue and appeal board had found that notice and claim for benefits were timely made (CL 1948, §§ 412.3, 417.2, 417.3). *Drake* v. *Norge Division, Borg-Warner Corporation*, 464.

16. The imposition of interest on past due amounts under an award of workmen's compensation is not made as an imposition of a penalty but is a charge made for the use of another's money, hence, notice of plaintiff's claim, or lack of such notice, is not pertinent to the issue of whether or not interest should be allowed (CL 1948, §§ 412.3, 417.2, 417.3). *Id.*

17. Interest on an award of workmen's compensation is payable on unpaid amounts as of the date the benefits accrue (CL 1948, §§ 412.3, 417.2, 417.3). *Id.*

18. An injured employee may recover workmen's compensation and either he or his employer or both may sue the third-party

WORKMEN'S COMPENSATION—Continued.

tortfeasor causing the injury, recovery by the employer being for the workmen's compensation paid the employee (CLS 1956, § 413.15). *Pettaway* v. *McConaghy*, 651.

19. Provision of workmen's compensation act allowing an injured employee to recover workmen's compensation *and* then proceed against "some person other than a natural person in the same employ or the employer" excluded from the common-law action *all* natural persons who are carrying on the activities of the employer, regardless of what the activities may be (CLS 1956, § 413.15). *Id.*

See CONTRACTS (1); COSTS (8); JUDGMENT (6, 7); PARTIES (4); PARTNERSHIP; TORTS.

WORKMEN'S COMPENSATION APPEAL BOARD—See WORKMEN'S COMPENSATION (1).

WORSHIP—See RELIGIOUS SOCIETIES (1).

WRONG SIDE OF ROAD—See AUTOMOBILES (7).

ZONING—See COSTS (1, 4, 12); JUDGMENT (1); MUNICIPAL CORPORATIONS (1–8, 18–26).