MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

SEPTEMBER 10, 1958 to JANUARY 12, 1959.

HIRAM C. BOND
STATE REPORTER

VOL. 354

FIRST EDITION

ROCHESTER, NEW YORK
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
1959

Copyright 1959, by James M. Hare, Secretary of State for the State of Michigan.

SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
JOHN R. DETHMERS, HOLLAND, ...	Dec. 31, 1961

ASSOCIATE JUSTICES.

LELAND W. CARR, LANSING, ...	Dec. 31, 1963
HARRY F. KELLY, DETROIT, ...	Dec. 31, 1961
TALBOT SMITH, ANN ARBOR, ...	Dec. 31, 1965
EUGENE F. BLACK, PORT HURON, ...	Dec. 31, 1963
GEORGE EDWARDS, DETROIT, ...	Dec. 31, 1959
JOHN D. VOELKER, ISHPEMING, ...	Dec. 31, 1959
THOMAS M. KAVANAGH, CARSON CITY, . .	Dec. 31, 1965

CLERK—DONALD F. WINTERS, OKEMOS.

CRIER—CLYDE E. SPRAGUE, LANSING.

ATTORNEY GENERAL—PAUL L. ADAMS, SAULT STE. MARIE.

SOLICITOR GENERAL—SAMUEL J. TORINA, DETROIT.

93596

CIRCUIT JUDGES.

1. CHARLES O. ARCH, Hillsdale.
2. PHILIP A. HADSELL, Niles.
   THOMAS N. ROBINSON, Benton Harbor.
3. VICTOR J. BAUM, Detroit.
   THEODORE R. BOHN, Detroit.
   GEORGE E. BOWLES, Plymouth.
   MILES N. CULEHAN, Detroit.
   FRANK B. FERGUSON, Detroit.
   FRANK FitzGERALD, Detroit.
   NEAL E. FITZGERALD, Detroit.
   HORACE W. GILMORE, Detroit.
   WADE H. McCREE, Jr., Detroit.
   JOSEPH A. MOYNIHAN, Detroit.[1]
   THOMAS J. MURPHY, Detroit.
   LILA M. NEUENFELT, Dearborn.
   CHESTER P. O'HARA, Grosse Pointe.
   JOSEPH G. RASHID, Detroit.
   JOSEPH A. SULLIVAN, Grosse Pointe Farms.
   VICTOR TARGONSKI, Wyandotte.
   ROBERT M. TOMS, Detroit.
   CARL M. WEIDEMAN, Detroit.
4. HARRY D. BOARDMAN, Jackson.
   JOHN SIMPSON, Jackson.
5. ARCHIE D. McDONALD, Hastings.
6. CLARK J. ADAMS, Pontiac.
   WILLIAM JOHN BEER, Berkley.
   FRANK L. DOTY, Pontiac.
   H. RUSSEL HOLLAND, Pontiac.
7. JOHN W. BAKER, Flint.
   PHILIP ELLIOTT, Flint.
   PAUL V. GADOLA, Flint.
   STEPHEN J. ROTH, Flint.
8. MORRIS K. DAVIS, Stanton.
9. RAYMOND W. FOX, Kalamazoo.
   LUCIEN F. SWEET, Kalamazoo.
10. FRED J. BORCHARD, Saginaw.
    EUGENE SNOW HUFF, Saginaw.
    JAMES E. O'NEILL, Saginaw.
11. RICHARD W. NEBEL, Munising.
12. LEO J. BRENNAN, L'Anse.
13. CHARLES L. BROWN, Traverse City.
14. HENRY L. BEERS, Muskegon.
    NOEL P. FOX, Muskegon.
15. MARK S. ANDREWS, Coldwater.

[1] Died January 8, 1959.

16. HOWARD R. CARROLL, Mount Clemens.
ALTON H. NOE, Mount Clemens.
JAMES E. SPIER, Mount Clemens.
17. FRED N. SEARL, Grand Rapids.
DALE SOUTER, Grand Rapids.
LEONARD D. VERDIER, Grand Rapids.
18. DAVID R. LOUIS, Bay City.
RICHARD G. SMITH, Bay City.
19. RUPERT B. STEPHENS, Manistee.
20. RAYMOND L. SMITH, Holland.
21. DONALD E. HOLBROOK, Clare.
22. JAMES R. BREAKEY, Jr., Ann Arbor.
23. HERMAN DEHNKE, Harrisville.
24. ARTHUR M. BACH, Bad Axe.
25. GLENN W. JACKSON, Gladstone.
26. PHILIP J. GLENNIE, Alpena.
27. EARL C. PUGSLEY, Hart.
28. HOWARD R. CAMPBELL, 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. JOHN C. SHAFFER, Gladwin.
35. MICHAEL CARLAND, Owosso.
36. CARL D. MOSIER, Dowagiac.
37. BLAINE W. HATCH, Marshall.
HAROLD E. STEINBACHER, Battle Creek.
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.
JOSEPH A. GILLIS.
GERALD W. GROAT.
PAUL E. KRAUSE.
GEORGE MURPHY.
JOHN P. O'HARA.
JOHN A. RICCA.
JOHN P. SCALLEN.
FRANK G. SCHEMANSKE.
W. McKAY SKILLMAN.

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

Superior Court of Grand Rapids, THADDEUS B. TAYLOR.

JUDICIAL CIRCUITS.

Counties.	Circuits.
Alcona	23
Alger	11
Allegan	20
Alpena	26
Antrim	13
Arenac	34
Baraga	12
Barry	5
Bay	18
Benzie	28
Berrien	2
Branch	15
Calhoun	37
Cass	36
Charlevoix	13
Cheboygan	33
Chippewa	11
Clare	21
Clinton	29
Crawford	34
Delta	25
Dickinson	41
Eaton	5
Emmet	33
Genesee	7
Gladwin	34
Gogebic	32
Grand Traverse	13
Gratiot	29
Hillsdale	1
Houghton	12
Huron	24
Ingham	30
Ionia	8
Iosco	23
Iron	41
Isabella	21
Jackson	4
Kalamazoo	9
Kalkaska	28
Kent	17
Keweenaw	12
Lake	19
Lapeer	40
Leelanau	13
Lenawee	39
Livingston	35
Luce	11
Mackinac	33
Macomb	16
Manistee	19
Marquette	25
Mason	19
Mecosta	27
Menominee	41
Midland	21
Missaukee	28
Monroe	38
Montcalm	8
Montmorency	26
Muskegon	14
Newaygo	27
Oakland	6
Oceana	27
Ogemaw	34
Ontonagon	32
Osceola	19
Oscoda	23
Otsego	34
Ottawa	20
Presque Isle	26
Roscommon	34
Saginaw	10
St. Clair	31
St. Joseph	15
Sanilac	24
Schoolcraft	11
Shiawassee	35
Tuscola	40
Van Buren	36
Washtenaw	22
Wayne	3
Wexford	28

TABLE OF CASES REPORTED.

	Page
A & M Land Development Co. *v.* Miller	681
Acme Township, Dohm *v.*	447
Aetna Insurance Company *v.* Detroit & Toledo Shore Line Railroad Company	580
Appeals by Cynthia Mills Cleveland	334
Bacon *v.* Kent-Ottawa Metropolitan Water Authority	159
Baer, Creller *v.*	408
Bagozzi, Lisowek *v.*	398
Baker *v.* Gushwa	241
Ball *v.* Sweeney	616
Bates *v.* National Bank of Detroit	263
Berger Furnace Company *v.* Collins	289
Berry *v.* Visser	38
Bierd, Sahr *v.*	353
Boeve, Troff *v.*	593
Bond, Booth *v.*	561
Booth *v.* Bond	561
Bradley *v.* County of Wayne	377
Brady (E. P.) & Company (People, *for use and benefit of*) *v.* Gilliland	247
Brin *v.* Spruance	623
Buskirk, Schankin *v.*	490
Carr *v.* Kalamazoo Vegetable Parchment Company	327
Century Insurance Company, Goldman *v.*	528
City of Detroit, London *v.*	571

PAGE

City of Detroit, New York Central Railroad Company *v.* 637
—— St. Johns, Penix *v.* 259
Cleveland *v.* Second National Bank & Trust Company 202
Cleveland (Cynthia Mills), Appeals by 334
Cohn *v.* County of Oakland 180
Collins, Berger Furnace Company *v.* 289
County of Oakland, Cohn *v.* 180
—— Wayne, Bradley *v.* 377
—— ——, Gallagher *v.* 377
—— ——, Kaminski *v.* 377
—— ——, Kronk *v.* 377
—— ——, Sumeracki *v.* 377
Creller *v.* Baer 408
Cross *v.* Fruehauf Trailer Company 455
Cutliff *v.* Densmore 586

Darnell, Kowatch *v.* 197
Deaton, Pence *v.* 547
Delph *v.* Smith 12
Densmore, Cutliff *v.* 586
Department of Revenue, Don McCullagh, Inc., *v.* 413
Detroit & Toledo Shore Line Railroad Company, Aetna Insurance Company *v.* 580
Detroit (City of), London *v.* 571
——, New York Central Railroad Company *v.* .. 637
Detroit Conveyor & Steel Corporation *v.* Milbrand 222
Dohm *v.* Township of Acme 447
Don McCullagh, Inc., *v.* Department of Revenue 413
Dorrikas, People *v.* 303
Dorwin *v.* Ford 442

PAGE

Eddy Estate, *In re* 334
E. P. Brady & Company (People, *for use and benefit of*) *v.* Gilliland 247
Estate of Eddy, *In re* 334
—— Schantz, *In re* 541
—— Traub, *In re* 263

Feldman, Portell *v.* 611
Final Account by Ruehs 541
Fine, Kelly *v.* 384
Fizzell, Harmsen *v.* 60
Flajole *v.* Gallaher 606
Ford, Dorwin *v.* 442
Franklin *v.* Franklin 543
Franklin Hotel Company, Inc., Myer *v.* 552
Freedman *v.* Mark 485
Fritts *v.* Krugh 97
Fruehauf Trailer Company, Cross *v.* 455

Gallagher *v.* County of Wayne 377
Gallaher, Flajole *v.* 606
General Accident Fire & Assurance Corporation, Ltd., *v.* Sircey 478
Genesee County Supervisors, Taliaferro *v.* 49
Gilliland, People, *for use and benefit of* E. P. Brady & Company, *v.* 247
Goldman *v.* Century Insurance Company 528
—— *v.* Scottish Union & National Insurance Company 528
Graham *v.* Thorman 629
Grand Trunk Western Railroad Company, Gray *v.* 1
—— *v.* Public Service Commission 673
Gray *v.* Grand Trunk Western Railroad Company 1
Greenough *v.* Greenough 508
Gushwa, Baker *v.* 241

PAGE

Harmsen *v.* Fizzell 60
Hearn, People *v.* 468
Herrle, Tyson *v.* 298
Hill *v.* Hill 475
Huben, Sheets *v.* 536

In re Eddy Estate 334
—— Schantz Estate 541
—— Traub Estate 263

Kalamazoo Vegetable Parchment Company, Carr *v.* 327
Kaminski *v.* County of Wayne 377
Kelly *v.* Fine 384
Kenney, People *v.* 191
Kent-Ottawa Metropolitan Water Authority, Bacon *v.* 159
Knobloch, Spelker *v.* 403
Kowatch *v.* Darnell 197
Kronk *v.* County of Wayne 377
Krugh, Fritts *v.* 97

Lebel *v.* Swincicki 427
Lisowek *v.* Bagozzi 398
London *v.* City of Detroit 571
Lookholder *v.* State Highway Commissioner .. 28

Mark, Freedman *v.* 485
McCarty, Worley *v.* 599
McCullagh (Don), Inc., *v.* Department of Revenue 413
McGuire *v.* Rabaut 230
McLay *v.* McLay 19
McNamara (Thomas L.), Inc., Schnepf *v.* 393
Milbrand, Detroit Conveyor & Steel Corporation *v.* 222

PAGE

Miller, A & M Land Development Co. *v.* 681
Moore, Wilcox *v.* 499
Muskovitz, Tata *v.* 695
Myer *v.* Franklin Hotel Company, Inc. 552

National Bank of Detroit, Bates *v.* 263
New York Central Railroad Company *v.* City of Detroit 637

Oakland County, Cohn *v.* 180
Oderfer, Ortisi *v.* 389
Ogemaw County Road Commissioners, Pfaff *v.* 575
Ortisi *v.* Oderfer 389

Pence *v.* Deaton 547
Penix *v.* City of St. Johns 259
People *v.* Dorrikas 303
—— *v.* Hearn 468
—— *v.* Kenney 191
People, *for use and benefit of* E. P. Brady & Company, *v.* Gilliland 247
Pfaff *v.* Ogemaw County Road Commissioners 575
Portell *v.* Feldman 611
Public Service Commission, Grand Trunk Western Railroad Company *v.* 673

Rabaut, McGuire *v.* 230
Revenue Department, Don McCullagh, Inc., *v.* .. 413
Roblyer *v.* Roblyer 226
Ruehs' Final Account 541

Sahr *v.* Bierd 353
St. Johns (City of), Penix *v.* 259
Schankin *v.* Buskirk 490
Schantz Estate, *In re* 541
Schnepf *v.* Thomas L. McNamara, Inc. 393
Scottish Union & National Insurance Company, Goldman *v.* 528

PAGE

Second National Bank & Trust Company, Cleveland *v.* 202
Sheets *v.* Huben 536
Sircey, General Accident Fire & Assurance Corporation, Ltd., *v.* 478
Smith, Delph *v.* 12
Sovereign *v.* Sovereign 65, 150
Spelker *v.* Knobloch 403
Spruance, Brin *v.* 623
State Highway Commissioner, Lookholder *v.* ... 28
Sumeracki *v.* County of Wayne 377
Sweeney, Ball *v.* 616
Swincicki, Lebel *v.* 427

Taliaferro *v.* Genesee County Supervisors 49
Tata *v.* Muskovitz 695
Thomas L. McNamara, Inc., Schnepf *v.* 393
Thorman, Graham *v.* 629
Township of Acme, Dohm *v.* 447
Traub Estate, *In re* 263
Troff *v.* Boeve 593
Tyson *v.* Herrle 298

Visser, Berry *v.* 38

Wayne County, Bradley *v.* 377
——, Gallagher *v.* 377
——, Kaminski *v.* 377
——, Kronk *v.* 377
——, Sumeracki *v.* 377
Wilcox *v.* Moore 499
Worley *v.* McCarty 599

Young *v.* Young 254

MICHIGAN COURT RULE AMENDMENTS.

RULE 70 B

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 term docket all appeals in which notice of no progress has been mailed at least 30 days prior to the first day of that

term. On the first day of each term, 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.

The above rule, adopted by unanimous action of the Court on April 14, 1958, and made effective as of said date, was amended by addition of the italicized portion by unanimous action of the Court on October 13, 1958, to be given immediate effect.

Amendments to the SUPREME COURT RULES concerning the STATE BAR OF MICHIGAN.

RULE 14. STANDARDS OF CONDUCT.

SEC. 3. ELIGIBILITY FOR REINSTATEMENT.

(a) He is a bona fide resident of this State, and *desires* in good faith *to be restored to the privilege* to practice law therein;

(e) His conduct since the discipline has been exemplary *and above reproach;*

RULE 15. DISCIPLINE AND REINSTATEMENT.

SEC. 8. FORMAL COMPLAINT; NOTICE OF FORMAL HEARING.

If the grievance committee finds there is reasonable cause to believe that the respondent is guilty of misconduct warranting discipline by the court, or if the respondent demands or the board orders a formal hearing, a formal complaint, setting forth the facts of the alleged misconduct shall be prepared by and subscribed with the name of counsel for the State Bar of Michigan to whom such matter is assigned. Such complaint may be signed by any grievance administrator, or by any commissioner of the State Bar of Michigan, and shall be filed with the grievance committee. Upon the filing of such complaint, it shall be the duty of the chairman of the

grievance committee to fix the time and place for a formal hearing thereon, and to cause a written notice of such hearing, together with a copy of the formal complaint, to be served upon the respondent. The notice of hearing may be signed on behalf of the committee by the chairman or any member thereof. The giving of such notice shall be conclusive evidence of the finding of reasonable cause to believe that the respondent is guilty of the alleged misconduct. Formal hearings shall be held either within the *judicial circuit* in which the alleged misconduct occurred, or within the *judicial circuit* in which the respondent has, or last had, his office or residence.

Amendments indicated by italics were approved by the Supreme Court on June 11, 1958, the word "right" being changed to "privilege" in Rule 14, § 3(a), on October 13, 1958, to take immediate effect.

TABLE OF CASES CITED.

PAGE

Abrey *v.* Duffield, 149 Mich 248 412
Acme Cut Stone Co. *v.* New Center Development Corp., 281 Mich 32 331
Agar-Ellis, *In re*, 24 LR Ch Div (Eng) 317 81
Alber *v.* Bradley, 321 Mich 255 540
Alexandrine Hotel Co. *v.* Whaling, 313 Mich 15 168
Alfred J. Brown Seed Co. *v.* Brown, 240 Mich 569 401
Allen, *In re*, 139 Mich 712 ..... 115, 121
Allison *v.* Chandler, 11 Mich 542 ..... 387, 494, 497
Alpena National Bank *v.* Hoey, 281 Mich 307 17
Anderson *v.* Seelow, 224 Wis 230 363
Andres *v.* Washtenaw Circuit Judge, 287 Mich 412 26
Andrews *v.* Lavery, 159 Mich 26 274
Anniston Manfg. Co. *v.* Davis, 301 US 337 114
Antisdel *v.* Canfield, 119 Mich 229 301
Arapahoe State Bank *v.* Houser, 162 Wis 80 16
Arnold *v.* Krug, 279 Mich 702 ..... 235, 237, 238
Arthur Jordan Foundation *v.* Commissioner of Internal Revenue, 210 F2d 885 216
Ashwander *v.* Tennessee Valley Authority, 297 US 288 114
Atchison, Topeka & S. F. R. Co. *v.* Public Utilities Commission of California, 346 US 346 ..... 661, 662
Atlantic Delaine Company *v.* James, 94 US 207 693
Attorney General *v.* Detroit Common Council, 58 Mich 213 171
———, *ex rel.* Dingeman, *v.* Lacy, 180 Mich 329 95
———, ——— Hudson, *v.* Common Council of Detroit, 164 Mich 369 58
August *v.* Collins, 265 Mich 389 17
Austin *v.* Painters' District Council, 339 Mich 462 154
Averbuch *v.* Averbuch, 80 Wash 257 155

Bacon *v.* City of Detroit, 282 Mich 150 461
——— *v.* Kent-Ottawa Metropolitan Water Authority, 354 Mich 159 191
——— *v.* Kiteley, 101 Colo 559 269–271
Badger, In Matter of, 286 Mo 139 ..... 79, 82
Bailey *v.* Mayor of New York, 3 Hill (NY) 531 450
Bailey's Estate, *In re*, 186 Mich 677 237
Baker *v.* Parkhurst, 119 Mich 542 297
Baldwin's Estate, *In re*, 311 Mich 288 347
Ball *v.* Ball, 2 Sim (Eng) 35 74
——— *v.* New York Central R. Co., 229 NY 33 8
Ballance *v.* Dunnington, 246 Mich 37 406
Baltimore & Potomac R. Co. *v.* Fifth Baptist Church, 108 US 317 ..... 7, 10
Banner Laundering Co. *v.* State Board of Tax Administration, 297 Mich 419 418

PAGE

Barnhardt *v.* Hamel, 207 Mich 232 401
Barth *v.* Owens, 178 Misc (NY) 628 15
Bartlett *v.* Melzo, 351 Mich 177 392
Basin Oil Company *v.* Baash-Ross Tool Company, 125 Cal App2d 578 494
Bassett *v.* Salter, 25 NYS2d 176, affirmed, 262 App Div 967 274
Batchelor *v.* Mandigo, 95 Cal App2d 816 507
Bay City *v.* State Treasurer, 23 Mich 499 174
Beattie *v.* Bower, 290 Mich 517 412
Behr *v.* Baker, 255 Mich 607 348
Bell *v.* Pittsburgh, 297 Pa 185 453
Bell's Gap Railroad Co. *v.* Pennsylvania, 134 US 232 421
Bennett *v.* Bennett, 336 Mich 133 ..... 156, 622
——— *v.* Hill, 342 Mich 754 ..... 360, 392
Berkey & Gay Furniture Co. *v.* Valley City Milling Co., 194 Mich 234 560
Berston *v.* City of Flint, 176 Mich 266 649
Binderup *v.* Pathe Exchange, 263 US 291 131
Biscay *v.* City of Burlingame, 127 Cal App 213 574
Bishop *v.* New York Central R. Co., 348 Mich 345 636
Blough *v.* Steffens, 349 Mich 365 573
Bomar *v.* Carstairs, 124 Tex 492 274
Bond *v.* Sharp, 325 Mich 460 550
Bonner, *In re,* 151 US 242 115
Booth's Estate, *In re,* 326 Mich 337 276
Bors *v.* Preston, 111 US 252 86
Bowen *v.* Johnston, 306 US 19 ..... 121, 122
Bowles *v.* Hoard, 71 Mich 150 463
Brae Burn, Inc., *v.* City of Bloomfield Hills, 350 Mich 425 11
Branson *v.* Bush, 251 US 182 ..... 657, 658
Breithaupt *v.* Abram, 58 NM 385 ..... 436, 437
——— *v.* ———, 352 US 432 ..... 436, 437
Brewster Loud Lumber Co. *v.* General Builders' Supply Co., 233 Mich 633 482
Bricker *v.* Green, 313 Mich 218 568
Brin *v.* Spruance, 348 Mich 29 ..... 624, 626
Brink *v.* City of Grand Rapids, 144 Mich 472 262
Brody *v.* Harris, 308 Mich 234 550
Brookman's Trust, *In re,* LR 5 Ch App (Eng) 182 273
Broomfield *v.* Abass, 320 Mich 291 302
Brougham *v.* Oceanic Steam Navigation Co. (CCA), 205 F 857 .. 131
Brown (Alfred J.) Seed Co. *v.* Brown, 240 Mich 569 401
——— *v.* Brown, 37 NH 536 155
——— *v.* City of Grand Rapids, 82 Mich 101 649
Bryant *v.* Shute, 147 Ky 268 15
Buccini (Matter of) *v.* Paterno Construction Co., 253 NY 256 ... 279
Buchanan *v.* Town of Barre, 66 Vt 129 453
Buczkowski *v.* Buczkowski, 351 Mich 216 ..... 70, 130, 132, 133
Burkhardt *v.* Burkhardt, 286 Mich 526 116
Burling *v.* Leiter, 272 Mich 448 598
Burtraw *v.* Clark, 103 Mich 383 495
Bushouse *v.* Brom, 297 Mich 616 550
Butler *v.* City of Grand Rapids, 273 Mich 674 262
——— *v.* Perry, 210 Md 332 148

PAGE

Cady *v.* City of Detroit, 289 Mich 499 114
Cain *v.* Brown, 111 Mich 657 57
Calhoun *v.* Cracknell, 202 Mich 430 219
Campau *v.* Godfrey, 18 Mich 27 96
Campbell *v.* Campbell, 292 Mich 547 628
Candler *v.* Heigho, 208 Mich 115 686
Carleton *v.* Bickford, 13 Gray (79 Mass) 591 15
Carrier *v.* Commonwealth (Ky), 242 SW2d 633 195
Carson *v.* Central R. Co., 35 Cal 325 9
Cary *v.* Bertie, 2 Vern (Eng) 333 80
Cass Farm Co. *v.* Detroit, 181 US 396 656
Cave (State, *ex rel.*) *v.* Tincher, 258 Mo 1 80
Central Trust Co. *v.* Breitenwischer, 259 Mich 532 628
Certain-teed Products Corporation *v.* Paris Township, 351 Mich 434 574
Chapin *v.* Chapin, 229 Mich 515 219–221
Charles' Estate, *In re*, 250 Mich 5 344
Charter Township of Warren *v.* Municipal Finance Commission, 341 Mich 607 ..... 166, 172, 189
Chase *v.* Stevens, 34 Cal App 98 ..... 269, 270
Chesapeake & Ohio R. Co. *v.* Public Service Commission, 347 Mich 234 ..... 679, 680
Chicago, B. & Q. R. Co. *v.* McGinnis, 79 Ill 269 9
Chicago Bank of Commerce *v.* McPherson, 62 F2d 393 214
Church *v.* Stoldt, 215 Mich 469 405
Citizens' Telephone Company of Grand Rapids *v.* Fuller, 229 US 322 421
City of Detroit *v.* Blackeby, 21 Mich 84 262
——— ——— *v.* Chapin, 108 Mich 136 170
——— ——— *v.* C. H. Little Co., 141 Mich 637 ..... 35, 36
——— Grand Rapids *v.* Grand Trunk Railway System, 214 Mich 1 ..... 651, 654, 671
——— Highland Park *v.* Oakland County Drain Commissioner, 312 Mich 407 190
——— Lansing *v.* Jenison, 201 Mich 491 670
——— Miami Beach *v.* Perell (Fla), 52 So2d 906 574
——— New Orleans *v.* Shreveport Oil Co., 170 La 431 497
——— North Muskegon *v.* Bolema Construction Company, Inc., 335 Mich 520 185
Clabaugh *v.* Wayne Circuit Judge, 228 Mich 207 ..... 15, 16
Clement *v.* Smith, 293 Mich 393 412
Cluett *v.* Rosenthal, 100 Mich 193 439
Cole *v.* Boyd, 47 Mich 98 363
Collins *v.* Greenfield, 172 Mass 78 453
——— *v.* Jackson, 54 Mich 186 691
——— *v.* Norris, 314 Mich 145 545
——— *v.* Rydman, 344 Mich 588 550
Columbus Pipe & Equipment Co. *v.* Sefansky, 352 Mich 539 686
Commissioner of Internal Revenue *v.* Upjohn's Estate (CCA), 124 F2d 773 ..... 215, 216
Commonwealth *v.* O'Brien, 119 Mass 342 313
Consumers Power Co. *v.* County of Muskegon, 346 Mich 243 533
Continental Ins. Co. *v.* H. M. Loud & Sons Lumber Co., 93 Mich 139 482
Cook *v.* Blake, 98 Mich 389 301

PAGE

Cook *v.* Marshall County, 196 US 261 421
——— *v.* Wolverine Stockyards Co., 344 Mich 207 636
Cooper *v.* Reynolds, 10 Wall (77 US) 308 131
Corey *v.* Jaroch, 229 Mich 313 482
Costello *v.* Bank of America National Trust and Savings Association, 141 F Supp 225, affirmed (CCA), 246 F2d 807 296
Cowls *v.* Cowls, 3 Gilm (8 Ill) 435 80
Coy, *In re*, 127 US 731 121
Crary *v.* Goldsmith, 322 Mich 418 348
Creuze *v.* Hunter, 2 Cox Ch (Eng) 242, 2 Ves Jr 157 80
Cristia *v.* Cristia, 317 Mich 66 545
Crowell *v.* Lambert, 10 Minn 369 86
Crusoe Bros. Co. *v.* Kudner, 136 Mich 583 296
Curran *v.* Williams, 352 Mich 278 605

Dane *v.* Jackson, 256 US 589 653
Daniels *v.* Grand Rapids Board of Education, 191 Mich 339 262
Danville H. & W. R. Co. *v.* Commonwealth, 73 Pa 29 9
Daszkiewicz *v.* Detroit Board of Education, 301 Mich 212 262
Davis *v.* Davis, 296 Mich 711 76
——— *v.* New York Central R. Co., 348 Mich 262 636
Dawson *v.* Hall, 2 Mich 390 411
Day *v.* Troyer, 341 Mich 189 392
DeCarlo *v.* Town of West Miami (Fla), 49 So2d 596 574
DeManneville *v.* DeManneville, 10 Ves Jr (Eng) 52 ..... 75, 81
Detroit & Milwaukee R Co. *v.* Van Steinburg, 17 Mich 99 570
Detroit Automobile Inter-Insurance Exchange *v.* Powe, 348 Mich 548 569
Detroit (City of) *v.* Blackeby, 21 Mich 84 262
——— *v.* Chapin, 108 Mich 136 170
——— *v.* C. H. Little Co., 141 Mich 637 ..... 35, 36
Detroit, G. H. & M. R. Co. *v.* City of Grand Rapids, 106 Mich 13 ..... 646, 647, 651, 666
Detroit Iron & Steel Co. *v.* Detroit Gray Iron Foundry Co., 240 Mich 677 535
Dingeman (Attorney General, *ex rel.*) *v.* Lacy, 180 Mich 329 95
DiPonio *v.* City of Garden City, 320 Mich 230 189
Dix-Ferndale Taxpayers' Association *v.* City of Detroit, 258 Mich 390 ..... 650, 670
Dodge *v.* Blood, 307 Mich 169 622
Dolan *v.* Chicago, M. & St. P. R. Co., 118 Wis 362 9
Domzalski *v.* Domzalski, 346 Mich 399 628
Donovan's Estate, *In re*, 266 Mich 362 344
Douglas *v.* Holcomb, 340 Mich 43 392
Dowhan *v.* Dowhan, 303 Mich 197 ..... 157, 158
Doyle *v.* Fischer, 183 Wis 599 ..... 269, 270
Dramis *v.* Dunbar, 280 Mich 300 591
Dudley *v.* Gates, 124 Mich 440 ..... 219, 221
——— *v.* Rapanos, 353 Mich 237 623
Duke of Beaufort *v.* Berty, 1 P Wms (Eng) 703 81
Dutton *v.* Shaw, 35 Mich 431 482
Dyer *v.* Sears, Roebuck & Company, 350 Mich 92 699

Eicholtz *v.* Eicholtz, 319 Mich 42 27
Elder *v.* Morse, 214 App Div (NY) 632 15
Elderton, *In re*, 25 LR Ch Div (Eng) 220 81

PAGE

Elizabethtown, L. & B. S. R. Co. *v.* Combs, 10 Bush (73 Ky) 382 9
Embree *v.* Kansas City Road District, 240 US 242 657
Emery *v.* Clark, 303 Mich 461 533
Essery *v.* State, 72 Tex Crim 414 472
Estate of Bailey, *In re,* 186 Mich 677 237
——— Baldwin, *In re,* 311 Mich 288 347
——— Booth, *In re,* 326 Mich 337 276
——— Charles, *In re,* 250 Mich 5 344
——— Donovan, *In re,* 266 Mich 362 344
——— Ford, *In re,* 339 Mich 339 276
——— Harper, *In re,* 294 Mich 453 550
——— Herbert, *In re,* 311 Mich 608 ..... 411, 412
——— Jones, *In re,* 334 Mich 392 220
——— LaFreniere, *In re,* 316 Mich 285 344
——— Martz, *In re,* 318 Mich 293 278
——— McNamara, *In re,* 166 Mich 451 347
——— Murray, *In re,* 219 Mich 70 344
——— Reh, *In re,* 196 Mich 210 36
——— Tolfree, *In re,* 347 Mich 272 348
Euclid (Village of) *v.* Ambler Realty Company, 272 US 365 574
Everett *v.* Burg, 301 Mich 734 550
Ex parte Lange, 18 Wall (85 US) 163 ..... 121, 122
——— Phillips, 19 Ves Jr (Eng) 118 81
Eyre *v.* Countess of Shaftesbury, 2 P Wms (Eng) 103 80
——— *v.* ———, 2 White & Tudor, Leading Cases in Equity (4th Am ed), p 1416 82

Farmer *v.* Fruehauf Trailer Company, 345 Mich 592 459–461
Farquar *v.* Farquar, 20 Or 69 155
Farrow *v.* Railway Conductors' Association, 178 Mich 639 16
Federal Reserve Bank of Chicago *v.* Department of Revenue, 339 Mich 587 425
Ferguson *v.* County of Muskegon, 181 Mich 335 578
Finlay *v.* Finlay, 240 NY 429 79
Fleming *v.* James S. Holden Co., 200 Mich 519 301
Flowers *v.* Wayne Circuit Judge, 218 Mich 500 25
Flynn, *In re,* 2 DeG & S (Eng) 457 80
Foley *v.* McDonald, 283 Mass 96 550
Folkerts *v.* Standish, 55 Mich 463 296
Ford *v.* Cheever, 113 Mich 440 405
——— *v.* Ford, 25 Okla 785 155
——— *v.* Hancock, 36 Ark 248 507
Ford's Estate, *In re,* 339 Mich 339 276
Foss *v.* City of Lansing, 237 Mich 633 451
Foster Machine Co. *v.* Covel Manfg. Co., 219 Mich 455 401
Freedman *v.* Freedman, 303 Mich 647 ..... 115, 121
——— *v.* Hendershott, 77 Idaho 213 506
Freiborg *v.* Chrysler Corporation, 350 Mich 104 699
Fremont State Bank *v.* Old State Bank, 240 Mich 18 ..... 295, 296
French *v.* Barber Asphalt Co., 181 US 324 656
Fretz *v.* Anderson, 5 Utah2d 290 439
Fritts *v.* Krugh 354 Mich 97 ..... 64, 86
Frost *v.* Milwaukee & N. R. Co., 96 Mich 470 584
Fuchs *v.* Fuchs, 48 Mo App 18 ..... 268, 270

PAGE

Garey *v.* Morley Brothers, 234 Mich 675 17
Gast Realty and Investment Co. *v.* Schneider Granite Co., 240 US 55 ..... 656, 657, 660, 662
General American Tank Car Corporation *v.* Day, 270 US 367 422
General Trading Co. *v.* State Tax Commission, 322 US 335 424
George Stuart, Inc., *In re*, 344 Mich 34 296
Gilman *v.* Brown, 115 Wis 1 497
Gilson *v.* Bronkhorst, 353 Mich 148 241
Gingrich & Sons *v.* City of Grand Rapids, 256 Mich 661 647
Goebel Brewing Co. *v.* State Board of Tax Administration, 306 Mich 222 420
Goldinger, *In re*, 207 Mich 99 116
Gossett *v.* Swinney, 53 F2d 772 215
Grace Harbor Lumber Co. *v.* Ortman, 190 Mich 429 622
Graham *v.* City of Grand Rapids, 179 Mich 378 649
——— *v.* City of Saginaw, 317 Mich 427 ..... 166, 649
——— *v.* United Trucking Service, Inc., 327 Mich 694 ..... 43, 46
Grand Rapids *v.* Grand Trunk Railway System, 214 Mich 1 ..... 646, 647, 651, 654, 671
Grand Rapids & Indiana R. Co. *v.* Heisel, 38 Mich 62 9
Grand Trunk Western R. Co. *v.* City of Detroit, 342 Mich 537 ... 261
Grayson-McLeod Lumber Co. *v.* Slack, 102 Ark 79 397
Greenberg *v.* Sakwinski, 211 Mich 498 301
Gregg Dyeing Co. *v.* Query, 286 US 472 423
Grieve *v.* Huber, 38 Wyo 223 71
Grix *v.* Liquor Control Commission, 304 Mich 269 381
Grover *v.* Simons, 342 Mich 480 636
Guiney *v.* Osborn, 295 Mich 559 550
Gunther *v.* Cheboygan County Road Commissioners, 225 Mich 619 262
Gustin *v.* Ziem, 289 Mich 219 614

Hall *v.* Ira Township, 348 Mich 402 ..... 166, 172
Hamilton *v.* Becker, 249 Iowa 516 440
Hammer *v.* Martin, 205 Mich 359 691
Hammitt *v.* Straley, 338 Mich 587 154
Hancock *v.* City of Muskogee, 250 US 454 657
Hans Nielsen, Petitioner, 131 US 176 ..... 121, 122
Harmsen *v.* Fizzell, 351 Mich 86 ..... 62, 63, 101, 110, 111, 116, 117, 144, 145
——— *v.* ———, 354 Mich 60 101
Harnau *v.* Haight, 209 Mich 604 295
Harper's Estate, *In re*, 294 Mich 453 550
Harrington *v.* City of Battle Creek, 288 Mich 152 261
Harris *v.* Thompson, 9 Barb (NY Sup) 350 9
Hartka *v.* Hartka, 346 Mich 453 573
Hatch *v.* Michigan Central R. Co., 238 Mich 381 670
Haukland *v.* Muirhead, 233 Mich 390 401
Havens *v.* Havens-Anthony, 335 Mich 445 628
Hayes *v.* Beyer, 284 Mich 60 301
Haynes *v.* Haynes, 43 NYS2d 315 439
Hazel Park *v.* Municipal Finance Commission, 317 Mich 582 ... 166
Health Delivery Service *v.* Michigan Mutual Liability Co., 257 Mich 482 532
Healy (People, *ex rel.*) *v.* Case, 241 Ill 279 155

PAGE

Heineman *v.* Schloss, 83 Mich 153 297
Heino *v.* City of Grand Rapids, 202 Mich 363 262
Hendershott *v.* Rogers, 237 Mich 338 32
Henderson Bridge Co. *v.* Henderson City, 173 US 592 653
Henneford *v.* Silas Mason Co., 300 US 577 424
Herbert's Estate, *In re*, 311 Mich 608 ..... 411, 412
Herp *v.* Herp, 254 Mich 33 157
Hicks *v.* Gillespie, 346 Mich 593 ..... 432, 446
Higbie *v.* Chase, 306 Mich 577 622
Highland Park (City of) *v.* Oakland County Drain Commissioner, 312 Mich 407 190
Hightower *v.* Detroit Edison Co., 262 Mich 1 348
Hill, *In re*, 78 Cal App 23 111
Hilt *v.* Weber, 252 Mich 198 ..... 590, 591
Hodgins *v.* Bay City, 156 Mich 687 450
Hormel Estate *v.* Harris, 348 Mich 201 363
Houck *v.* Little River Drainage District, 239 US 254 .. 653, 656, 657
Housten *v.* Jewett, 248 Mich 587 579
Howard *v.* Burton, 338 Mich 178 637
Howat *v.* Kansas, 258 US 181 131
Hubbard *v.* Leiter, 145 Mich 387 301
Hudson (Attorney General, *ex rel.*) *v.* Common Council of Detroit, 164 Mich 369 58
Hughes *v.* Cuming, 165 NY 91 131
——— *v.* Wayne Circuit Judge, 239 Mich 110 628
——— (People, *ex rel.*) *v.* May, 3 Mich 598 ..... 170, 171
Hunt *v.* Wayne Circuit Judges, 142 Mich 93 ..... 84, 95
Hydraulic Development Corp. *v.* Lake Erie Engineering Corp., 2 FRD 174 371

Inquiry of Mantell, *In re*, 157 Neb 900 111
In re Agar-Ellis, 24 LR Ch Div (Eng) 317 81
——— Allen, 139 Mich 712 ..... 115, 121
——— Bailey's Estate, 186 Mich 677 237
——— Baldwin's Estate, 311 Mich 288 347
——— Bonner, 151 US 242 115
——— Booth's Estate, 326 Mich 337 276
——— Brookman's Trust, LR 5 Ch App (Eng) 182 273
——— Charles' Estate, 250 Mich 5 344
——— Coy, 127 US 731 121
——— Donovan's Estate, 266 Mich 362 344
——— Elderton, 25 LR Ch Div (Eng) 220 81
——— Flynn, 2 DeG & S (Eng) 457 80
——— Ford's Estate, 339 Mich 339 276
——— George Stuart, Inc., 344 Mich 34 296
——— Goldinger, 207 Mich 99 116
——— Harper's Estate, 294 Mich 453 550
——— Herbert's Estate, 311 Mich 608 ..... 411, 412
——— Hill, 78 Cal App 23 111
——— Inquiry of Mantell, 157 Neb 900 111
——— John C. Lodge Highway, 340 Mich 254 ..... 35, 36
——— Jones' Estate, 334 Mich 392 220
——— Joseph Nowack, 274 Mich 544 115
——— Knott, 162 Mich 10 94
——— LaFreniere's Estate, 316 Mich 285 344

PAGE

In re Larson, 252 Minn 490 120
——— Leu, 240 Mich 240 117
——— Maddox, 351 Mich 358 121
——— Martz's Estate, 318 Mich 293 278
——— Matter of Badger, 286 Mo 139 ..... 79, 82
——— McKinney, 326 Mich 190 ..... 115, 121
——— McNamara's Estate, 166 Mich 451 347
——— Mills, 131 Mich 325 ..... 115, 121
——— ———, 135 US 263 115
——— Mould, 162 Mich 1 95
——— Murchison, 349 US 133 32
——— Murray's Estate, 219 Mich 70 344
——— Nowack, 274 Mich 544 121
——— Opening Leib Street, 351 Mich 314 36
——— Petition of Rogers, 243 Mich 517 37
——— Reh's Estate, 196 Mich 210 36
——— Snow, 120 US 274 122
——— Snyder, 328 Mich 277 139
——— Spence, 2 Phillips (Eng) 247 79
——— Stuart, 114 F2d 825 130
——— Tolfree Estate, 347 Mich 272 348
——— United Fuel Supply Co., 250 Mich 325 295
Irwin *v.* Meese, 325 Mich 344 253

Jackman *v.* Rosenbaum Co., 260 US 22 235
Jackson City Bank & Trust Co. *v.* Blair, 333 Mich 399 .... 592, 636
Jacoby *v.* Chouteau County, 112 Mont 70 452
Jakubiec *v.* Hasty, 337 Mich 205 569
Jaquith *v.* Hudson, 5 Mich 123 604
Jaroszewski (State, *ex rel.*) *v.* Prestidge, 249 Minn 80 148
Jeffries *v.* Sheehan, 242 Mich 167 593
Jervis *v.* Wolferstan, LR 18 Eq 18 273
John C. Lodge Highway, *In re,* 340 Mich 254 ..... 35, 36
Johnson *v.* Board of Ontonagon County Commissioners, 253 Mich 465 262
——— *v.* DiGiovanni, 347 Mich 118 16
——— *v.* Johnson, 318 Mich 21 76
——— *v.* ———, 346 Mich 418 257
——— *v.* Zerbst, 304 US 458 121
Jones *v.* Danielson, 328 Mich 402 42
——— *v.* Doonan, 265 Mich 384 381
——— *v.* How, 9 CB (Eng) 1 273
Jones' Estate, *In re,* 334 Mich 392 220
Jordan (Arthur) Foundation *v.* Commissioner of Internal Revenue, 210 F2d 885 216
Joseph Nowack, *In re,* 274 Mich 544 115

Kaiser *v.* Cobbey, 400 Ill 214 272
Kaminski *v.* Grand Trunk Western R. Co., 347 Mich 417 570
Kansas City Southern R. Co. *v.* Road Improvement District No. 6, 256 US 658 ..... 657, 658, 660, 662
Kearney *v.* Board of State Auditors, 189 Mich 666 170
Keasey *v.* Engles, 259 Mich 178 ..... 274, 275, 286, 287
Keeney *v.* New York, 222 US 525 421
Kellar *v.* United Metal Products Co., 338 Mich 651 392
Kelley *v.* City of Flint, 251 Mich 691 261

PAGE
Kelly *v.* Fine, 354 Mich 384 496
Kelsey *v.* Green, 69 Conn 291 81
——— *v.* Township of Burns, 223 Mich 173 649
Kelso *v.* Coburn, 334 Mich 43 467
Kent County Board of Education *v.* Kent County Tax Allocation Board, 350 Mich 327 ..... 166, 172, 188
Kilgannon *v.* Jenkinson, 57 Mich 325 387
Kinyon *v.* Young, 44 Mich 339 201
Kirby Terminal Co. *v.* City of Detroit, 339 Mich 155 623
Kisor *v.* Litzenberg, 203 Iowa 1183 ..... 268, 269
Kleinert *v.* Lefkowitz, 271 Mich 79 465
Knott, *In re,* 162 Mich 10 94
Knowack, Matter of, 158 NY 482 79
Konieczny *v.* Detroit & Mackinac R. Co., 164 Mich 66 569
Krause *v.* Ryan, 344 Mich 428 235
Kren *v.* Rubin, 338 Mich 288 623
Kress *v.* Department of Revenue, 322 Mich 590 420
Kuroske *v.* Aetna Life Insurance Co., 234 Wis 394 440

LaFreniere's Estate, *In re,* 316 Mich 285 344
Lally *v.* Fitz Henry, 85 Iowa 49 81
Lange, *Ex parte,* 18 Wall (85 US) 163 ..... 121, 122
Lanning *v.* Trenton & M. County Traction Corp., 3 NJ Misc 1006 569
Lansing (City of) *v.* Jenison, 201 Mich 491 670
LaPointe *v.* Chevrette, 264 Mich 482 359
Larson, *In re,* 252 Minn 490 120
L. B. Menefee Lumber Co. *v.* MacDonald, 122 Or 579 245
Leete *v.* Gould, 308 Mich 345 446
Leib *v.* Bostwick, 256 Mich 277 461
Leib Street, *In re* Opening, 351 Mich 314 36
Leonard *v.* Allen, 11 Cush (65 Mass) 241 313
Leu, *In re,* 240 Mich 240 117
Lewis *v.* Lewis, 338 Mich 197 146
Little *v.* City of Holyoke, 177 Mass 114 452
Lodge (John C.) Highway, *In re,* 340 Mich 254 ..... 35, 36
Long *v.* City of Highland Park, 329 Mich 146 574
Loomis *v.* Mack, 183 Mich 674 208
Louisville & N. R. Co. *v.* Barber Asphalt Paving Co., 197 US 430 ..... 646, 654–657, 666
Love *v.* Francis, 63 Mich 181 154
Lucas *v.* Morrison (Tex Civ App), 286 SW2d 190 497

MacKenzie *v.* Union Guardian Trust Co., 262 Mich 563 220
MacNear *v.* Malow, 282 Mich 239 168
Maddox, *In re,* 351 Mich 358 121
Malec *v.* Oleszko, 316 Mich 310 463
Manigold *v.* Manigold, 304 Mich 310 519
Manley, Bennett & Co. *v.* Woodhams, 349 Mich 586 246
Mantell, *In re* Inquiry of, 157 Neb 900 111
Marks *v.* City of Detroit, 246 Mich 517 649
Marshall *v.* Holbrook, 276 Mass 341 7
——— *v.* Ullmann, 335 Mich 66 ..... 96, 686
Martin *v.* District of Columbia, 205 US 135 ..... 654, 657
Martz's Estate, *In re,* 318 Mich 293 278
Matter of Buccini *v.* Paterno Construction Co., 253 NY 256 279

PAGE

Matter of Knowack, 158 NY 482 79
Matthews *v.* City of Detroit, 291 Mich 161 451
Mayo *v.* Latham, 159 Mich 136 691
McComb *v.* Lansing City Council, 264 Mich 609 381
McDannel *v.* Black, 270 Mich 305 154
McDonnell *v.* Brozo, 285 Mich 38 262
McGuire *v.* Rabaut, 354 Mich 230 523
McKinney, *In re,* 326 Mich 190 ..... 115, 121
——— *v.* Gillmore, 307 Mich 155 401
——— *v.* Yelavich, 352 Mich 687 247
McNamara's Estate, *In re,* 166 Mich 451 347
McNees *v.* Cincinnati Street R. Co., 152 Ohio St 269 ..... 355, 359
McNitt *v.* McNitt, 230 Mich 303 545
Meigs *v.* Weller, 90 Mich 629 297
Menefee (L. B.) Lumber Co. *v.* MacDonald, 122 Or 579 245
Meritt *v.* Swimley, 82 Va 433 81
Metropolitan Life Ins. Co. *v.* Evans, 183 Miss 859 438
Metzner *v.* Newman, 224 Mich 324 84
Meyers *v.* Jeffe, 108 NYS2d 606 15
Miami Beach (City of) *v.* Perell (Fla), 52 So2d 906 574
Michelson *v.* United States, 335 US 469 .... 311, 318, 322, 324, 325
Michigan Aero Club *v.* Shelley, 283 Mich 401 246
Miles *v.* Harkins, 335 Mich 453 628
Miller *v.* Allen, 352 Mich 95 ..... 523, 542, 543
——— *v.* ———, 353 Mich 95 234
——— *v.* Fairley, 141 Ohio St 327 550
——— *v.* Wykoff, 346 Mich 24 ..... 387, 388, 494, 495
Mills, *In re,* 131 Mich 325 ..... 115, 121
———, ———, 135 US 263 115
Miollis *v.* Pure Milk Association, 302 Ill App 115 71
Mirizio *v.* Mirizio, 248 NY 175 156
Missouri *v.* Dockery, 191 US 165 421
Mitchell *v.* Mitchell, 333 Mich 441 518
Monroe *v.* Hoffman, 276 Mich 281 401
Moon *v.* McKinstry, 107 Mich 668 691
——— *v.* Mills, 119 Mich 293 560
Moore *v.* Dempsey, 261 US 86 121
Moore's Administrator *v.* Wager's Administrator, 243 Ky 351 268, 269
Morgan *v.* Dillon, 8 Mod R (Eng) 135 81
Morton Salt Co. *v.* City of South Hutchinson (CCA), 159 F2d 897 653
——— *v.* ———, 177 F2d 889 653
Moses *v.* Pittsburg, F. W. & C. R. Co., 21 Ill 516 9
Mould, *In re,* 162 Mich 1 95
Moulthrop *v.* City of Detroit, 218 Mich 464 261
Mullins *v.* LaBahn, 244 Wis 76 18
Murchison, *In re,* 349 US 133 32
Murphy *v.* City of Chicago, 29 Ill 279 9
Murray's Estate, *In re,* 219 Mich 70 344

Nashville, C. & St. L. R. Co. *v.* Walters, 294 US 405 .. 659–661, 666
National Bank of Detroit *v.* Department of Revenue, 340 Mich 573 426
National Labor Relations Board *v.* Jones & Laughlin Steel Corporation, 301 US 1 114

PAGE

Natural Soda Products Co. *v.* City of Los Angeles, 23 Cal2d 193 494
Naugatuck R. Co. *v.* City of Waterbury, 78 Conn 193 669
Needham *v.* Smith, 4 Russ (Eng) 318 273
Nelson *v.* City of Saginaw, 106 Mich 659 649
——— *v.* Sears, Roebuck & Co., 312 US 359 420
Neville *v.* Reed, 134 Ala 317 81
New Orleans (City of) *v.* Shreveport Oil Co., 170 La 431 497
New Products Corp. *v.* State Highway Commissioner, 352 Mich 73 34
New York Central Railroad Co. *v.* Town of Glasgow, 142 W Va 291 669
Nielsen (Hans), Petitioner, 131 US 176 ..... 121, 122
Nisbett *v.* Milner, 159 Mich 337 201
Noble *v.* McKeith, 127 Mich 163 464
Northern Pacific R. Co. *v.* City of Grand Forks, — ND — (73 NW2d 348) 663
North Muskegon (City of) *v.* Bolema Construction Company, Inc., 335 Mich 520 185
Northrup *v.* City of Jackson, 273 Mich 20 261
Nowack, *In re*, 274 Mich 544 ..... 115, 121

Oakland Drain Com'r *v.* City of Royal Oak, 306 Mich 124 190
Ochs *v.* Ochs, 122 NJ Eq 143 ..... 269, 270
Oklahoma City *v.* Dolese (CCA), 48 F2d 734 574
O'Neil *v.* Ross, 98 Cal App 306 274
Opening Leib Street, *In re*, 351 Mich 314 36
Ornatowski *v.* National Liberty Ins. Co. of America, 290 Mich 241 36

Paquette *v.* Consumers Power Co., 316 Mich 501 ..... 47, 48
Paquin *v.* Van Voutum, 343 Mich 111 599
Paraiso *v.* United States, 207 US 368 288
Parks *v.* Starks, 342 Mich 443 46
Patmos *v.* Grand Rapids Dairy Co., 243 Mich 417 297
Paynton *v.* Paynton, 194 Mich 504 158
People *v.* Andrus, 331 Mich 535 473
——— *v.* Becker, 300 Mich 562 196
——— *v.* Burby, 218 Mich 46 26
——— *v.* Corder, 244 Mich 274 436
——— *v.* Dawell, 25 Mich 247 16
——— *v.* Droste, 160 Mich 66 473
——— *v.* Guillett, 342 Mich 1 473
——— *v.* Hill, 258 Mich 79 313
——— *v.* Holmes, 292 Mich 212 316
——— *v.* Huff, 173 Mich 620 313
——— *v.* Katz, 205 Misc (NY) 522 195
——— *v.* Kelsey, 303 Mich 715 ..... 313, 316
——— *v.* Lee, 231 Mich 607 307
——— *v.* Lewis, 260 NY 171 111
——— *v.* Lockhart, 342 Mich 595 405
——— *v.* Marxhausen, 204 Mich 559 438
——— *v.* Morse, 325 Mich 270 196
——— *v.* Offermann, 204 Misc (NY) 769 195
——— *v.* Piasecki, 333 Mich 122 114
——— *v.* Rosa, 268 Mich 462 313
——— *v.* Sarver, 205 Misc (NY) 523 195

PAGE

People *v.* Schleiman, 197 NY 383 472
——— *v.* Steeneck, 247 Mich 583 316
——— *v.* Utter, 217 Mich 74 471
——— *v.* Wright, 294 Mich 20 314
People, *ex rel.* Healy, *v.* Case, 241 Ill 279 155
——— Hughes, *v.* May, 3 Mich 598 ..... 170, 171
——— Wilcox, *v.* Wilcox, 22 Barb (NY) 178 80
People of City of Buffalo *v.* Beck, 205 Misc (NY) 757 195
——— Rochester *v.* Torpey, 204 Misc (NY) 1023 195
Perry *v.* City of High Point, 218 NC 714 262
Peruzzin *v.* Test, 282 App Div (NY) 550 381
Petition of Rogers, *In re*, 243 Mich 517 37
Petros *v.* Bosen, 185 Okla 351 86
Philbrick *v.* Dust, 178 Mich 605 381
Phillips *v.* City of Boston, 150 Mass 491 381
———, *Ex parte*, 19 Ves Jr (Eng) 118 81
Phillip Wagner, Incorporated, *v.* Leser (Baltimore City), 239 US 207 ..... 655, 657
Pierce *v.* Woodward, 6 Pick (23 Mass) 206 358
Poloms *v.* Peterson, 249 Mich 306 401
Pooly *v.* Luco, 76 F 146 86
Porritt *v.* Stone, 340 Mich 645 540
Porter *v.* Landis, 329 Mich 76 545
——— *v.* North Missouri R. Co., 33 Mo 128 9
Powell *v.* Employment Security Commission, 345 Mich 455 699
——— *v.* McBlain, 222 Iowa 799 ..... 268, 269
Power *v.* City of Detroit, 139 Mich 30 649
——— *v.* Power, 65 NJ Eq 93 79
Powers *v.* City of Grand Rapids, 98 Mich 393 ..... 647, 649
Pratt *v.* Valliquette, 338 Mich 397 461
Pugh *v.* Pugh, 133 W Va 501 147
Putnam *v.* Ernst, 232 Mich 682 608

Queen *v.* Gyngall, [1893] 2 QBD (Eng) 232 79
Quong Wing *v.* Kirkendall, 223 US 59 421

Rand *v.* Hanson, 154 Mass 87 16
Rappaport *v.* Department of Public Health of Indianapolis, 227 Ind 508 176
Rehn *v.* Booth, 299 Mich 311 540
Reh's Estate, *In re*, 196 Mich 210 36
Reid *v.* Gooden, 282 Mich 495 154
Rentchler *v.* Lawton, 113 Mich 14 462
Rex *v.* DeManneville, 5 East (Eng) 221 75
——— *v.* Martin, 6 Car & P (Eng) 562 313
Richards *v.* Birmingham School District, 348 Mich 490 .. 263, 355, 356
Ridgeway *v.* City of Escanaba, 154 Mich 68 261
Riebow *v.* Ensche, 220 Mich 450 219
Riemersma *v.* Riemersma, 311 Mich 453 116
Rippey *v.* Wilson, 280 Mich 233 348
Road Improvement District No. 1 *v.* Missouri P. R. Co., 274 US 188 652
Roberson *v.* United States (CCA), 237 F2d 536 322
Roberts *v.* Michigan Trust Co., 273 Mich 91 168
Robertson *v.* Smith, 191 Mich 660 597
Robinson *v.* Lake Shore & M. S. R. Co., 103 Mich 607 397

PAGE

Robison *v.* Wayne Circuit Judges, 151 Mich 315 95
Rogers, *In re* Petition of, 243 Mich 517 37
Rood *v.* City of Ames, 244 Iowa 1138 664
Rosen *v.* Cathcart, 245 App Div (NY) 736 569
Rosenberg *v.* Cyrowski, 227 Mich 508 402
——— *v.* Equitable Trust Co., 68 F Supp 991 ..... 269, 270
Rosenbrock *v.* School District No. 3, 344 Mich 335 636
Rowland *v.* Kalamazoo Superintendents of Poor, 49 Mich 553 ... 451
Royster Guano Co. *v.* Virginia, 253 US 412 658
Royston *v.* City of Charlotte, 278 Mich 255 262
Rubatt *v.* Township of Wakefield, 239 Mich 536 649
Ruediger *v.* Klink, 346 Mich 357 497
Russell *v.* Allen, 107 US 163 210
——— *v.* Myers, 32 Mich 522 387

Sadlowski *v.* Meeron, 240 Mich 306 569
Saginaw Council *v.* Saginaw Policemen and Firemen Retirement System Trustees, 321 Mich 641 ..... 166, 170, 177
Sargent *v.* Sargent, 320 Mich 33 22
Sawaya *v.* Tucson High School District No. 1 of Pima County, 78 Ariz 389 451
Schell *v.* Schell, 257 Mich 85 87
Schmidt *v.* Barclay, 161 Mich 1 540
——— *v.* Maples, 291 Mich 225 301
Schneider *v.* Pomerville, 348 Mich 49 ..... 252, 494
Schnepper *v.* Thompson, 264 Mich 691 579
School District *v.* City of Pontiac, 262 Mich 338 .. 165, 168, 170, 171, 178
School District of the City of Ferndale *v.* Royal Oak Township School District No. 8, 293 Mich 1 11
Schultz *v.* McCarty, 253 Mich 445 693
Scott *v.* Grow, 301 Mich 226 ..... 545, 694
Screws *v.* United States, 325 US 91 114
Scudder *v.* Security Trust Co., 238 Mich 318 ..... 211, 212
Second National Bank & Trust Co. *v.* Wayne Circuit Judge, 321 Mich 28 ..... 220, 339, 341
Second National Bank & Trust Company of Saginaw *v.* Reid, 304 Mich 376, certiorari denied, 320 US 745 ..... 338, 343
Seeley *v.* Price, 14 Mich 541 412
Selden *v.* Village of St. Johns, 114 Mich 698 261
Shaffer *v.* Carter, 252 US 37 423
Shelley *v.* Westbrooke, Jacob Ch (Eng) 266 80
Sheppard *v.* Michigan National Bank, 348 Mich 577 698
Sherman *v.* Korff, 353 Mich 387 568
Shimmons *v.* City of Saginaw, 104 Mich 511 649
Silberstein *v.* Silberstein, 218 NY 525 155
Simington *v.* Goldstein, 330 Mich 536 540
Sinclair Refining Co. *v.* Costin (Tex Civ App), 116 SW2d 894 ... 397
Singewald *v.* Local Union No. 7, UAW–CIO, 339 Mich 503 637
Sivaslian *v.* Akulian, 166 NYS 535 15
Skidmore *v.* B. & O. R. Co. (CCA), 167 F2d 54, certiorari denied, 335 US 816 ..... 356, 364
Slade's Case, 4 Coke Rep (Eng) 92b 278
Slaughter *v.* Slaughter, 190 Ga 229 ..... 157, 158
Smith *v.* Ritter, 292 Mich 26 76

PAGE

Smithman *v.* Gray, 203 Mich 317 16
Smolinsky *v.* Federal Reserve Life Insurance Co., 126 Kan 506 .. 16
Snow, *In re,* 120 US 274 122
Snyder, *In re,* 328 Mich 277 139
——— *v.* Mathison, 196 Mich 378 405
Solomon *v.* Neubrecht, 300 Mich 177 467
Southern Pacific Co. *v.* Gallagher, 306 US 167 424
Sovereign *v.* Sovereign, 347 Mich 205 ..... 68, 93, 152
——— *v.* ———, 354 Mich 65 ..... 145, 153
Spelman *v.* Addison, 300 Mich 690 246
Spence, *In re,* 2 Phillips (Eng) 247 79
Stabley *v.* Reliable Lumber & Wrecking Corp., 286 Mich 558 ... 628
Stacy *v.* Knickerbocker Ice Co., 84 Wis 614 240
Stark *v.* Bauer Cooperage Co. (CCA), 3 F2d 214, certiorari denied, 267 US 604 505
State *v.* Baird, 21 NJ Eq 384 80
——— *v.* Dantonio, 18 NJ 570 195
——— *v.* Grisby, 38 Ark 406 80
——— *v.* Merriman, 34 SC 16 313
——— *v.* Moffitt, 98 Terry (Del Super) 210 195
——— *v.* Stigall, 22 NJL 286 80
——— *v.* Zeller, 77 NJL 619 471
———, *ex rel.* Cave, *v.* Tincher, 258 Mo 1 80
———, *ex rel.* Jaroszewski, *v.* Prestidge, 249 Minn 80 148
State Highway Commissioner *v.* Newstead, 337 Mich 233 31
——— *v.* Ottawa Circuit Judge, 339 Mich 390 35
State Railroad Tax Cases, 92 US 575 423
Staunton *v.* City of Detroit, 329 Mich 516 ..... 432, 446
Stephenville, N. & S. T. R. Co. *v.* Baker (Tex Civ App), 203 SW 385 496
Sterling National Bank & Trust Co. of New York *v.* Charleston Transit Co., 126 W Va 42 669
Stetson *v.* Chicago & E. R. Co., 75 Ill 74 9
Stevens *v.* City of Muskegon, 111 Mich 72 450
Stewart *v.* Eaton, 287 Mich 466 15
Stier *v.* Iowa State Traveling Men's Association, 199 Iowa 118 .. 16
Striplin *v.* Ware, 36 Ala 87 80
Stuart (George), Inc., *In re,* 344 Mich 34 296
Stuart, *In re,* 114 F2d 825 130
Stubblefield *v.* Warren County, 170 Tenn 211 71
Suarez *v.* Katon, 299 Mich 38 446
Sullivan *v.* State Board of Tax Administration, 290 Mich 664 ... 381
Swingley *v.* Daniels, 123 Wash 409 ..... 269, 270
Sykes *v.* City of Battle Creek, 288 Mich 660 261
Szostak *v.* Chevrolet Motor Company, 279 Mich 603 ..... 482, 484

Talbot *v.* Earl of Shrewsbury, 4 Myl & Cr (Eng) 672 74
Taliaferro *v.* Pere Marquette R. Co., 249 Mich 281 499
Tavener *v.* Elk Rapids Rural Agricultural School District, 341 Mich 244 636
Taylor *v.* Davarn, 191 Mich 243 363
——— *v.* Lint, 338 Mich 673 628
Thomas *v.* Kansas City Southern R. Co., 261 US 481 ..... 658, 663
——— *v.* Roberts, 3 DeG & S (Eng) 758 80
Thompson *v.* Auditor General, 261 Mich 624 ..... 114, 168

PAGE

Thompson *v.* Thompson, 229 Mich 526 ..... 219, 220
Tillar *v.* Cleveland, 47 Ark 287 506
Tolfree Estate, *In re*, 347 Mich 272 348
Torgerson *v.* Hauge, 34 ND 646 ..... 268, 270
Town of Winamac *v.* Huddleston, 132 Ind 217 177
Tracy *v.* Rublein, 342 Mich 623 ..... 42, 43, 46
Travellers' Insurance Co. *v.* Connecticut, 185 US 364 ..... 422, 423
Trower *v.* Young, 40 Cal App2d 539 ..... 268, 269, 283
Tucker *v.* Rohrback, 13 Mich 73 154
Tumey *v.* Ohio, 273 US 510 ..... 32, 33
Tyler *v.* Wright, 188 Mich 561 362
Tzatzken *v.* City of Detroit, 226 Mich 603 262

Union Guardian Trust Co. *v.* Detroit Creamery Co., 265 Mich 636 461
——— *v.* Marquette Park Co., 300 Mich 89 168
Union Trust Co. *v.* Reed, 213 Mass 199 36
United Fuel Supply Co., *In re*, 250 Mich 325 295
United States *v.* Bank of New York & Trust Co., 296 US 463 ... 665
——— *v.* City of Detroit, 345 Mich 601 426
——— *v.* H. Wool & Sons (CCA), 215 F2d 95 323
——— *v.* Phillips (CCA), 217 F2d 435 323
Urbach *v.* Urbach, 52 Wyo 207 68
Urick *v.* Burge, 350 Mich 165 533

Van Allen *v.* Sprague, 206 Mich 116 622
Van Auken *v.* City of Adrian, 135 Mich 534 ..... 261.
——— *v.* Second National Bank & Trust Co. of Saginaw, Michigan (CCA), 117 F2d 938, certiorari denied, 313 US 593 337
Van Sweden *v.* Van Sweden, 250 Mich 238 7
Vickers *v.* Vickers, 95 W Va 323 155
Village of Euclid *v.* Ambler Realty Company, 272 US 365 574
Vines *v.* Vines, 344 Mich 222 22

Wade *v.* Mayo, 334 US 672 121
Wagner (Phillip), Incorporated, *v.* Leser (Baltimore City), 239 US 207 655
Walker *v.* Johnston, 312 US 275 121
Wanstead *v.* Fisher, 278 Mich 68 212
Ward *v.* Bush, 59 NJ Eq 144 ..... 269, 271
——— *v.* Roper, 7 Humph (26 Tenn) 111 80
Warde *v.* Warde, 2 Phill Ch (Eng) 786 80
Ware *v.* Nelson, 351 Mich 390 570
Warren (Charter Township of) *v.* Municipal Finance Commission, 341 Mich 607 ..... 166, 172, 189
Washtenaw County Road Commissioners *v.* Public Service Commission, 349 Mich 663 679
Washtenaw Mutual Fire Insurance Co. *v.* Budd, 208 Mich 483 ... 481
Watkins *v.* Angus, 241 Mich 690 297
——— *v.* Myers, 12 NJ 71 569
Watson *v.* Jones, 160 Fla 819 497
Wayne County Prosecuting Attorney, *ex rel.* Taxpayers, *v.* City of Highland Park, 308 Mich 425 381
Weber *v.* Enoch C. Roberts Iron Ore Co., 270 Mich 38 628
Weeks *v.* United States, 232 US 383 437
Weems *v.* United States, 217 US 349 179
Weinhardt *v.* Addison Community Schools, 347 Mich 683 96

PAGE

Wellesley *v.* Duke of Beaufort, 2 Russ (Eng) 1 ..... 77, 80
——— *v.* Wellesley, 2 Bligh (NS) (Eng) 124 ..... 77, 79, 80
Western Electric Co. *v.* Department of Revenue, 312 Mich 582 .. 420
White *v.* Huffmaster, 321 Mich 225 241
Whitehead *v.* Detroit Board of Education, 139 Mich 490 262
Whittaker *v.* Whittaker, 343 Mich 267 519
Wieda *v.* American Box Board Company, 343 Mich 182 698
Wilbur *v.* Grover, 140 Mich 187 411
Wilcox *v.* Wilcox, 14 NY 575 79
Wilcox (People, *ex rel.*) *v.* Wilcox, 22 Barb (NY) 178 80
Wilks *v.* Kempf, 352 Mich 445 ..... 234, 523, 542, 543
Wilson *v.* Jackson, 10 Mo 329 16
Winamac (Town of) *v.* Huddleston, 132 Ind 217 177
Winchester *v.* Craig, 33 Mich 205 387
Winckowski *v.* Dodge, 183 Mich 303 446
Winklemeir *v.* Daiber, 92 Mich 621 26
Wisconsin *v.* J. C. Penney Co., 311 US 435 653
Wisnaski *v.* Afman, 341 Mich 453 392
Withnell *v.* Ruecking Construction Co., 249 US 63 657
Wolbrink *v.* Sorr, 341 Mich 512 599
Wolf *v.* Colorado, 338 US 25 437
Wolgamood *v.* Village of Constantine, 302 Mich 384 185
Woodliff *v.* Baker, 279 Mich 356 71
Wright *v.* Kaynor, 150 Mich 7 545

Zebell *v.* Krall, 348 Mich 482 498

LAWS CITED AND CONSTRUED.

CONSTITUTION OF THE UNITED STATES.

	PAGE
Art 4, § 1	16
Am 4	437
Am 14	437, 642
———, § 1	30

UNITED STATES STATUTES.

	PAGE
28 USCA, § 2071	361
———, § 2072	357

MICHIGAN CONSTITUTION 1908.

	PAGE
Art 2, § 10	435, 437, 438, 440
———, § 16	30, 642
Art 5, § 21	579
Art 7, § 10	87, 94
———, § 13	87, 94, 112
Art 10, § 12	184, 185, 189
———, § 21	163, 165, 169, 179, 184, 186, 188, 190
Art 13, § 2	37
Art 14, § 2	462

REVISED STATUTES 1846.

	PAGE
Ch 103, § 57	354

COMPILED LAWS 1871.

	PAGE
§ 6026	362, 363

HOWELL'S STATUTES.

	PAGE
§ 7606	362, 363

COMPILED LAWS 1897.

	PAGE
§ 10237	362

COMPILED LAWS 1929.

	PAGE
§ 13411	598

COMPILED LAWS SUPPLEMENT 1940.

	PAGE
§§ 3663–1 *et seq.*	420
3663–44	420

COMPILED LAWS 1948.

	PAGE
§§ 42.1 *et seq.*	189
46.72	379
117.1	57
117.1 *et seq.*	51
117.2	57
117.4d	645, 670
117.6	53, 55
121.1 *et seq.*	161
121.16	179
123.741	182
123.742	182, 190
123.742 *et seq.*	181
205.51 *et seq.*	416
205.91 *et seq.*	417
211.1 *et seq.*	645
211.53	639
213.171 *et seq.*	30
213.174	31, 36
213.174a	33
213.176	36
213.179, 213.180	36
213.183	36
213.198	31
213.199	36
242.3	577
242.6, 242.7	578
242.8	577, 578
411.1 *et seq.*	631
411.10	631
438.52	504
466.2	677
469.1	676
469.2	677
469.8	676, 677
552.2, 552.3	476
552.9	476
552.9e	477
554.351 *et seq.*	208
§§ 554.381 *et seq.*	208
565.153	278
566.106	598
570.101	248
600.1 *et seq.*	246
601.26	181
606.4	83, 94
609.1	559
612.2	481
612.11	482
614.2	246
617.65	276, 411
617.66	431, 486
618.39	356, 362, 373
623.83	466
623.85	467
623.90	466, 467
623.95	466
628.32	293
637.29	120
642.1 *et seq.*	486
691.581 *et seq.*	429
691.691 *et seq.*	430, 449, 632
691.902	292
691.906	293
692.451	386, 387, 492
702.11	271
704.33	344
708.4	288
708.18	276, 288
712A.1	116
712A.1 *et seq.*	134
712A.2 (a) (6)	113
712A.17	111
712A.20	109, 113
712A.22	95
722.541	27, 69, 73, 94
750.316	470

COMPILED LAWS SUPPLEMENT 1952.

	PAGE
§§ 211.7	645
224.21	577

COMPILED LAWS SUPPLEMENT 1954.

	PAGE
§ 205.51	416

COMPILED LAWS SUPPLEMENT 1956.

	PAGE
§§ 42.1 *et seq.*	189
117.1 *et seq.*	51
117.7, 117.8	54
117.9	58
117.14a	57
124.251 *et seq.*	162
124.281 *et seq.*	162
242.1	577, 578
257.401	548
257.401 *et seq.*	566
§§ 257.672	42
257.705	239
413.15	404
436.22	404
609.13	400, 576, 577
703.6	116
710.9	141
712A.1 *et seq.*	134
712A.2	86, 90, 95, 113
712A.18	95, 110, 113

MICHIGAN STATUTES ANNOTATED.

	PAGE
§§ 5.522	379
7.521 *et seq.*	420
8.171 *et seq.*	30
8.199	31
8.200	36
9.593	577
9.596, 9.597	578
9.598	577, 578
17.150	631
19.12	504
22.261	677
22.761	676
22.762	677
22.768	676, 677
27.1 *et seq.*	246
27.46	181
27.545	83
§§ 27.593	559
27.654	481
27.663	482
27.711 *et seq.*	429
27.812	246
27.914	276, 411
27.915	431, 486
27.1019	356, 362, 373
27.1461 *et seq.*	430, 449, 632
27.1582	466
27.1584	467
27.1589	466, 467
27.1594	466
27.1886	293
27.2161	386, 387, 492
27.2272	120

MICHIGAN STATUTES ANNOTATED 1943 REVISION.

	PAGE
§§ 27.2417 *et seq.*	486
27.3178(81)	271
27.3178(284)	343
27.3178(414)	288
27.3178(428)	276, 288

MICHIGAN STATUTES ANNOTATED 1944 CUMULATIVE SUPPLEMENT.

	PAGE
§ 7.555(4)	420

MICHIGAN STATUTES ANNOTATED 1947 CUMULATIVE SUPPLEMENT.

	PAGE
§ 25.89(5)	477

MICHIGAN STATUTES ANNOTATED 1949 REVISION.

	PAGE
§§ 5.2071	57
5.2071 *et seq.*	51

MICHIGAN STATUTES ANNOTATED 1949 REVISION—Continued.

	PAGE
§§ 5.2072	57
5.2077	645, 670

MICHIGAN STATUTES ANNOTATED 1950 REVISION.

	PAGE
§§ 7.1 *et seq.*	645
7.97	639
7.521 *et seq.*	416
7.555(1) *et seq.*	417
17.191 *et seq.*	631

MICHIGAN STATUTES ANNOTATED 1952 REVISION.

	PAGE
§§ 9.2101	548
9.2101 *et seq.*	566
9.2372	42
9.2405	239

MICHIGAN STATUTES ANNOTATED 1953 REVISION.

	PAGE
§§ 26.321	248
26.573	278
26.906	598
26.1191 *et seq.*	208
26.1201 *et seq.*	208

MICHIGAN STATUTES ANNOTATED 1953 CUMULATIVE SUPPLEMENT.

	PAGE
§§ 7.7	645
7.521	416
9.121	577
17.191 *et seq.*	631

MICHIGAN STATUTES ANNOTATED 1954 REVISION.

	PAGE
§ 28.548	470

MICHIGAN STATUTES ANNOTATED 1957 REVISION.

	PAGE
§§ 18.993	404
25.82, 25.83	476
25.311	27, 69, 73, 94

MICHIGAN STATUTES ANNOTATED 1957 CUMULATIVE SUPPLEMENT.

	PAGE		PAGE
§§ 5.46(1) *et seq.*	189	§§ 5.2088	58
5.570(1) *et seq.*	181	5.2093(1)	57
5.570(11)	182	7.521 *et seq.*	416
5.570(12)	182, 190	7.555(1) *et seq.*	417
5.2071 *et seq.*	51	8.171 *et seq.*	30
5.2085	53, 55	8.174	31, 36
5.2086, 5.2087	54	8.175	33

MICHIGAN STATUTES ANNOTATED 1957 CUMULATIVE SUPPLEMENT—Continued.

	PAGE
§§ 8.177	36
8.180, 8.181	36
8.184	36
9.591	577, 578
17.189	404
19.842	292
19.846	293
25.89	476
27.545	94
27.605	400, 576, 577
27.711 *et seq.*	429
27.1461 *et seq.*	430, 449, 632
§§ 27.3178(206)	116
27.3178(284)	344
27.3178(549)	141
27.3178(598.1)	116
27.3178(598.1) *et seq.*	134
27.3178(598.2)	86, 90, 95, 113
27.3178(598.17)	111
27.3178(598.18)	95, 110, 113
27.3178 (598.20)	109, 113
27.3178(598.22)	95

MICHIGAN STATUTES ANNOTATED 1958 REVISION.

	PAGE
§§ 5.2533(1) *et seq.*	162
5.2533(31) *et seq.*	161
5.2533(46)	179
5.2769(51) *et seq.*	162

SESSION LAWS.

	PAGE
1848, Act 38	429
1873, Act 192	75
——, ——, § 1	69
——, Act 198	677, 679
1879, Act 163	76
1885, Act 15	362
1893, Act 206	645
——, ——, § 7, subd 8	645
——, ——, § 53	639
1899, Act 179	420
1907, Act 122	208
1909, Act 279	51, 57
——, ——, § 2	58
——, ——, § 4d	645
——, Act 283	578, 579
——, ——, ch 4	578
——, ——, ——, § 21	577–579
——, ——, ch 22	578
——, ——, ——, § 1	577–579
——, ——, ——, § 3	577–579
——, ——, ——, §§ 6–8	578, 579
1915, Act 280	208, 212
——, ——, § 1	208
——, Act 301	578, 579
——, Act 314	246
——, ——, ch 6, § 4	83
1921, Act 270, § 1	676–678
1921, Act 270, § 2	676, 677
——, ——, § 8	677–680
1925, Act 352	30
——, ——, § 4a	33
——, ——, § 6	36
——, ——, §§ 9, 10	36
——, ——, § 13	36
——, ——, § 28	30
——, ——, § 29	36
——, Act 373	208
1927, Act 92	30
1931, Act 336	676
1933, Act 167	416, 420
——, ——, § 1	416
——, ——, § 4	419
1937, Act 94	417
——, ——, § 4	420
1939, Act 288, ch 4, § 33	343
——, ——, ch 12A	149
——, ——, ——, § 1	136
——, ——, ——, § 2	90
——, ——, ——, § 17	137
——, ——, ——, §§ 19, 20	141
——, ——, ——, § 21	138, 141
——, ——, ——, § 24	141
——, Act 297	429
1944 (1st Ex Sess), Act 54	134
1947, Act 50	344

SESSION LAWS—Continued.

	PAGE
1947, Act 359	189
1949, Act 300	548
1952, Act 54	645
——, Act 196	162
1953, Act 53	631
——, Act 193	113
——, Act 198	631
——, Act 204	416
1955, Act 233	162
1957, Act 4 .. 161–164, 167, 168, 173, 174, 178, 179	
1957, Act 4, § 16 .. 163, 164, 179	
——, ——, § 18 .. 163, 164, 179	
——, ——, § 19	179
——, Act 185 .... 181, 188, 190	
——, ——, § 12	190
——, Act 210 ..... 51, 53	
——, Act 255	141
——, Act 257 ..... 476, 477	

COLORADO.

	PAGE
Const 1876, Art 6, § 1, as amended 1912	86

ENGLAND.

	PAGE
12 Halsbury's Statutes of England, p 940	75
20 Halsbury's Statutes (2d ed), § 8, p 374	74
12 Car, ch 24	74
2 & 3 Vict (1839), ch 54	75
36 & 37 Vict (1873), ch 12, § 1	75
56 & 57 Vict (1893), ch 54	75
Stat Law Revision (No 2) 1893	75

CHARTERS.

	PAGE
Detroit, title 4, ch 8, § 11	639
———, title 6, ch 3	667
———, ———, ———, § 1	642
———, ———, ———, § 2 ..... 640, 642, 646	
———, ———, ———, §§ 3, 4 ..... 640, 642	
St. Johns, p 12	261

ORDINANCES.

	PAGE
Detroit Zoning, § 3.3(b), p 9	573, 574

ADMINISTRATIVE RULES AND REGULATIONS.

	PAGE
Wayne County Civil Service Commission, Civil Service Law (1955), Rule No 16, §§ 1, 2, 5, 7, 8, p 114 *et seq.*	380

MICHIGAN COURT RULES (1945).

	PAGE
No 10, § 5	25
No 18 ..... 71, 333	
No 19, § 1	246
No 23, § 3a, effective June 1, 1958	569
No 24	591
No 33, § 3	150
No 37, § 6 ..... 354, 356, 358	
——, § 7 ....356, 360, 367, 370–373	
No 48	627
No 66, § 7	521
No 67 (added October 30, 1956) 518, 524, 542, 543	

MICHIGAN COURT RULES (1945)—Continued.

	PAGE
No 70	528
——, § 2, as amended October 30, 1956	53
——, § 5	522, 524–527
No 70, § 5(b), as added October 30, 1956	234
No 74, § 2	150

TEXTS CITED.

PAGE

11 ABAJ 773, 778, An Appraisal of English Procedure 372
13 ABAJ 715, 716, A New Development in Jury Trial, Green ... 356, 359
3 Am Jur, Arbitration and Award, §§ 122, 123, pp 944–946 331
———, ———, § 133, p 956 331
10 Am Jur, Charities, § 52, pp 621, 622 212
11 Am Jur, Constitutional Law, § 63, pp 676, 677 171
12 Am Jur, Constitutional Law, p 326 32
———, Contracts, § 390, p 968 397
17 Am Jur, Divorce and Separation, § 554, p 650 155
19 Am Jur, Equity, §§ 100, 101 96
23 Am Jur, Fraud and Deceit, § 48 402
25 Am Jur, Habeas Corpus, §§ 78–80, 83 115
37 Am Jur, Municipal Corporations, § 6, pp 623, 624 172
43 Am Jur, Public Officers, § 381, p 163 381
53 Am Jur, Trial, § 124 253
55 Am Jur, Usury, § 24, p 342 507
58 Am Jur, Witnesses, § 658, p 363 310
———, Zoning, § 11, p 946 7
American Law of Charities, Zollman, § 61 215
6 ALR 723, 731 7
59 ALR 1398 ..... 15, 16
71 ALR 1504 310
89 ALR 511, 523 463
97 ALR 746 15
113 ALR 901 68
145 ALR 767 381
154 ALR 1063 505
10 ALR2d 1351 550
15 ALR2d 432 147
36 ALR2d 1333 569
Ames, Two Theories of Consideration, 13 Harv L Rev 29 285
Appraisal of English Procedure, 11 ABAJ 773, 778 372
Bible, Deuteronomy 23:19, 20 504
———, Leviticus, 25:35–37 504
2 Biennial Report of the Attorney General, 1956, vii 34
Black's Law Dictionary (4th ed), p 36, "accretion" 588
3 Blackstone, Commentaries, p 404 357
———, ———, p 426 80
Boring, Langfeld and Weld's Psychology—A Factual Textbook, p 447 239
Botein, Trial Judge, p 273 101
23 California L Rev 633 661
6 Callaghan, Michigan Pleading & Practice, § 42.127, p 598 16
Cardozo, Growth of the Law, p 66 135

PAGE

Century of Family Law, 1857–1957 (Graveson and Crane), pp 59, 60 74
Coke Litt 89a, Hargrave's note 70, 186b 81
———, 294.b 357
Common Law, The (Holmes), p 345 278
Contracts, 3 Corbin, § 579, p 250 280
———, Pollock (9th Eng ed, 1921), p 194 285
Contracts to Make Wills, Sparks, pp 92, 93 284
1 Cooley, Taxation (4th ed), § 144 653
———, ———, § 320 654
3 Corbin, Contracts, § 579, p 250 280
22 CJ, p 483 313
8 CJS, Bankruptcy, § 295, p 1018 461
14 CJS, Charities, § 12, p 439 *et seq.* 214
20 CJS, Counties, § 215, p 1068 452
26 CJS, Deeds, § 163, pp 1102, 1103 608
40 CJS, Homesteads, § 80, p 520 462
62 CJS, Municipal Corporations, § 85, p 202 58
72 CJS, Process, § 100 15
Court Rules Amended, Honigman, 35 MSBJ, No 11 (1956), pp 36, 38 522
Criminal Evidence, 3 Rice, § 375 313
Current Trends in State Legislation, 1953–1954, Wright, p 223, "Recent Legislation Affecting Defendant's Appearance in Court" 70
Domestic Relations, Long (3d ed), § 267 77
———, Tiffany (3d ed), p 344 76
Driver Education Textbook of American Automobile Association, "Sportsmanlike Driving" (2d ed), p 72 375
Driver, The Special Verdict—Theory and Practice, 26 Wash L Rev 21 357
Edwards, Michigan's Juvenile Code after Fifty Years, 31 MSBJ, August, 1952, p 24 94
English Woman, The, 1580–1650, by Wallace Notestein, pp 69–107 (Studies in Social History, Longmans, 1955) 74
Equity Jurisprudence, 3 Pomeroy (4th ed), p 3141 81
Evidence, 1 Taylor, § 352 313
———, Thayer (1898), p 140 357
———, 6 Wigmore (3d ed), § 1790, p 237 282
Family Law, A Century of, 1857–1957 (Graveson and Crane), pp 59, 60 74
2 FRD 67, The Rule-Making Power, Harris 373
2 FRD 138, Use of Special Verdicts under Rules of Civil Procedure, Nordbye 356
Federal Rules of Civil Procedure, rules 8–10 361
———, rule 49, subd (a) 357
Fifteen Mill Tax Amendment and Its Effect, E. Blythe Stason, 31 Mich L Rev 371 ..... 164, 166, 172
2 Fonblanque, Equity, pt 2, ch 2, § 1 ..... 80, 81
Graveson and Crane, A Century of Family Law, 1857–1957, pp 59, 60 74
Green, A New Development in Jury Trial, 13 ABAJ 715, 716 ..... 356, 358
Growth of the Law, p 66, Cardozo 135

PAGE

Guides for Juvenile Court Judges, National Probation and Parole Association, 59–61 ..... 111, 112
Harris, The Rule-Making Power, 2 FRD 67 373
13 Harv L Rev 29, Two Theories of Consideration, Ames 285
History of English Law (2d ed), 2 Pollock & Maitland, 631 358
Holmes, The Common Law, p 345 278
Honigman, Court Rules Amended, 35 MSBJ, No 11 (1956), pp 36, 38 522
———, Michigan Court Rules Annotated, Rule No 66, § 12, p 638 521
———, ———, p 704 150
Hunter, Introduction to Roman Law (9th ed, 1934), p 30 74
1 Jarman on Wills (8th ed), p 28 ..... 273, 286
———, ———, pp 438, 439 286
Jury Trial (New Development in), Green, 13 ABAJ 715, 716 358
26 LRA NS 577 157
Legal Effect of Contracts to Devise or Bequeath Prior to the Death of the Promisor (Sparks), 53 Mich L Rev 1 284
Liddy's Digital Safety Rule 239
Lipscomb, Special Verdicts under the Federal Rules, 25 Wash ULQ 185 356
Long, Domestic Relations (3d ed), § 267 77
McCormick, Evidence, § 268, p 567 282
McFarland's *Human Factors in Highway Transport Safety*, Vol. 64, S.A.E. Transactions, p 730 (1956) 239
15 McQuillin, Municipal Corporations (3d ed), § 41.15, p 330 174
Measure for Measure, Shakespeare, act 2, sc 2, lines 117–122 137
3 Metzenbaum, The Law of Zoning (2d ed), p 1811 7
2 Mich Civil Jur, Automobiles & Motor Vehicles, § 512, p 580 .. 568
Michigan Court Rules Annotated (Honigman), Rule No 66, § 12, p 638 521
———, ———, p 704 150
53 Mich L Rev 1, Sparks, Legal Effect of Contracts to Devise or Bequeath Prior to the Death of the Promisor 284
31 MSBJ, August, 1952, p 24, Michigan's Juvenile Code after Fifty Years, Edwards 94
35 MSBJ, No 11, p 38 525
———, ———, p 40 ..... 525, 526
36 MSBJ, No 3, March, 1957, p 20, What is This Thing Called Hearsay?, Reed 282
37 MSBJ, July, 1958, p 14, Virtue, "What is a Family Court?" .. 89
———, No 8, August, 1958, pp 10, 13 47
Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 Yale L J 575 357
National Probation and Parole Association, Guides for Juvenile Court Judges, 59–61 ..... 111, 112
Nordbye, Use of Special Verdicts under Rules of Civil Procedure, 2 FRD 138 356
13 North Carolina L Rev 491 661
Notestein (Wallace), The English Woman, 1580–1650, pp 69–107 (Studies in Social History, Plumb, Longmans, 1955) 74
Otis, Improvements in Statement of Findings of Fact and Conclusions of Law, 1 FRD 83 360
4 Page, Wills (3d ed), § 1417, p 167 279

PAGE

Plumb, Studies in Social History (The English Woman, 1580–1650, pp 69–108, Wallace Notestein) 74
Pollock, Principles of Contract (9th Eng ed, 1921), p 194 285
2 Pollock & Maitland, History of English Law (2d ed), 631 358
3 Pomeroy, Equity Jurisprudence (4th ed), p 3141 81
4 Pomeroy, Equity Jurisprudence (5th ed), § 1307 82
Prosser on Torts (2d ed), § 48, pp 258, 259 45
Psychology, A Factual Textbook, Boring, Langfeld and Weld, p 447 239
Recent Legislation Affecting the Defendant's Appearance in Court, p 223, Wright (Current Trends in State Legislation, 1953–1954) 70
Reed, What is This Thing Called Hearsay?, 36 MSBJ, No 3, March, 1957, p 20 282
2 Restatement, Torts, § 302, comment 1, p 821 46
———, ———, § 447, pp 1196, 1197 47
———, ———, § 929 495
3 Rice on Criminal Evidence, § 375 313
Roman Law, Introduction to, Hunter (9th ed, 1934), p 30 74
19 RCL, Municipal Corporations, § 3, p 691 172
20 RCL, Parent and Child, § 14, p 599 81
Saint Chrysostom's Fifth Homily on the Gospel of St. Matthew, 10 A Select Library of the Nicene and Post-Nicene Fathers of the Christian Church (Schaff ed, 1888), pp 31, 35 504
1 Schouler, Marriage, Divorce, Separation and Domestic Relations (6th ed), § 742 75
Selected Essays on Family Law (1950), p 609 704
10 A Select Library of the Nicene and Post-Nicene Fathers of the Christian Church (Schaff ed, 1888), pp 31, 35, Saint Chrysostom's Fifth Homily on the Gospel of St. Matthew 504
Shakespeare, Measure For Measure, act 2, sc 2, lines 117–122 ... 137
Sparks, Contracts to Make Wills, pp 92, 93 284
———, Legal Effect of Contracts to Devise or Bequeath Prior to the Death of the Promisor, 53 Mich L Rev 1 284
Special Verdict—Theory and Practice, 26 Wash L Rev 21, 22, 24 ..... 369, 370
Stason (E. Blythe), Fifteen Mill Tax Amendment and Its Effect, 31 Mich L Rev 371 ..... 164, 166, 172
Story, Equity Jurisprudence (10th ed), §§ 1337, 1342 82
3 Story, Equity Jurisprudence (14th ed), §§ 1745, 1747 81
Studies in Social History, Longmans, 1955 (The English Woman, 1580–1650, pp 69–107, Wallace Notestein) 74
Sunderland, Verdicts, General and Special, 29 Yale L J 253 356, 364
Taxation, 1 Cooley (4th ed), § 320 654
1 Taylor on Evidence, § 352 313
Thayer, Evidence (1898), p 140 357
Theobald on Wills (9th ed), ch 10, p 61 273
Tiffany, Domestic Relations (3d ed), p 344 76
Trial Judge, Botein, p 273 101
Two Theories of Consideration, Ames, 13 Harv L Rev 29 285
23 U of Kansas City L Rev 194, 195 369
Verdicts, General and Special, Sunderland, 29 Yale LJ 253 364
Virtue, "What is a Family Court?," 37 MSBJ, July, 1958, p 14 .. 89

PAGE

25 Wash ULQ 185, Special Verdicts under the Federal Rules, Lipscomb, ... 356
26 Wash L Rev 21, The Special Verdict—Theory and Practice, Driver 357, 369
26 Wash L Rev 22, Special Verdict—Theory and Practice 369
26 Wash L Rev 24, Special Verdict—Theory and Practice 370
What Every Driver Must Know, Hare and Richardson (1956 ed) 239
What is This Thing Called Hearsay?, Reed, 36 MSBJ, No 3, March, 1957, p 20 282
2 White & Tudor, Leading Cases in Equity (4th Am ed), pp 1416, 1446 80
6 Wigmore, Evidence (3d ed), § 1729, p 90 282
———, ———, § 1790, p 237 282
Wills, 1 Jarman (8th ed, 1951), pp 28, 438, 439 286
———, 4 Page (3d ed), § 1417, p 167 279
———, Theobald (9th ed), ch 10, p 61 273
Wright, Recent Legislation Affecting the Defendant's Appearance in Court, p 223 (Current Trends in State Legislation, 1953–1954) 70
29 Yale LJ 253, Verdicts, General and Special, Sunderland . 356, 364
32 Yale LJ 575, A Brief History of Special Verdicts and Special Interrogatories, Morgan 357
44 Yale LJ, pp 1261, 1262 661
YB 48 Ed III 2, pl 4 278
Zollman, American Law of Charities, § 61 215
Zoning, 3 Metzenbaum (2d ed), p 1811 7

JUNE TERM, 1958.*

GRAY *v.* GRAND TRUNK WESTERN RAILROAD COMPANY.

1. MUNICIPAL CORPORATIONS—ZONING—MANUFACTURING DISTRICT—RAILROAD SWITCHING YARD—CONSTRUCTION OF ZONING ORDINANCE.

   Municipal zoning ordinance in which territory sought to be used by railroad for switching yard was zoned for manufacturing purposes did not bar such proposed use, since it was not included in specifically enumerated prohibited uses, the principle that inclusion by specific mention excludes what is not mentioned being applicable.

2. PUBLIC UTILITIES—CORPORATIONS—ULTRA VIRES.

   All activities of a public service corporation, unless *ultra vires*, must be in furtherance of its corporate function.

3. RAILROADS—SWITCHING YARD—PUBLIC DUTIES.

   The operation of a freight switching yard is peculiarly in keeping with the public duties of a railroad and is not designed to serve some mere private need, since the interchange of traffic is an essential part or act in the transportation.

4. MUNICIPAL CORPORATIONS — CONTRACTS — RAILROADS — CONSIDERATION.

   Legislative action of city in executing an agreement with a railroad whereby latter acquired, for various enumerated considerations, property upon which it proposed to operate an auxiliary freight switching yard in order to better serve manufacturer shippers in the industrial area *held*, not arbitrary or capricious.

---

* Continued from Volume 353.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Zoning § 133.
[2] 13 Am Jur, Corporations § 739.
[3] 44 Am Jur, Railroads § 357.
[4] 38 Am Jur, Municipal Corporations § 487.
[5, 6] 44 Am Jur, Railroads § 358.
[7] 38 Am Jur, Municipal Corporations § 494.
[8] 11 Am Jur, Constitutional Law § 198.
[9] 39 Am Jur, Parties § 75.
[10] 28 Am Jur, Injunctions § 350.

5. RAILROADS—NOISE—VIBRATION—NUISANCE.

The unavoidable amount of noise and vibration incident to the normal operation of a railroad does not constitute an actionable nuisance.

6. SAME—SWITCHING YARD—NUISANCE.

It is not to be anticipated that the establishment of an auxiliary freight switching yard by a railroad incident to the service it renders to nearby industries will result in an actionable nuisance.

7. MUNICIPAL CORPORATIONS—LEGISLATIVE POWER—EXTENSION OF STREET—SWITCHING YARD.

A city's agreement not to extend a specified street across an auxiliary freight switching yard which defendant railroad proposed to establish in order to serve nearby industrial plants *held,* clearly within the legislative power of city commission.

8. CONSTITUTIONAL LAW—LEGISLATIVE BODY—COURTS.

The good-faith action of a law-making body, acting for the public welfare, may not be questioned by a court.

9. INJUNCTION — PARTIES — INTERVENTION — PLEADINGS — EVIDENCE — DISCRETION OF COURT.

It was not an abuse of judicial discretion for trial court to deny the intervention, as parties plaintiff, of some 50 persons, whose appearance on the opening day of trial in suit to enjoin the establishment of an auxiliary freight switching yard pursuant to an agreement between defendant railroad company and defendant city, where it is conceded that it would not have altered either the pleadings or the proofs.

10. COSTS — PUBLIC QUESTION — RAILROAD SWITCHING YARD — INJUNCTION.

No costs are allowed in suit to enjoin the establishment of railroad switching yard pursuant to agreement between the railroad and city, where a public question is involved.

Appeal from Oakland; Hartrick (George B.), J. Submitted April 17, 1958. (Docket No. 56, Calendar No. 47,723.) Decided September 10, 1958.

Bill by George W. Gray and other property owners against Grand Trunk Western Railroad Company and the City of Pontiac to enjoin development of

freight switching yard. Bill dismissed. Plaintiffs appeal. Affirmed.

Robert W. Hodge, for plaintiffs.

F. R. Henderson and *R. L. Livesay* (*Patterson & Patterson and Barrett,* of counsel), for defendant Grand Trunk Western Railroad Company.

William A. Ewart, for defendant City of Pontiac.

SMITH, J. This case involves the location of a new freight switching yard in the northern part of the city of Pontiac. Adjacent property owners sought injunctive relief. It was their objection that the proposed construction would violate the city's zoning ordinance and "would be a continuing nuisance." The trial chancellor held that a "sustainable, factual violation of the ordinance is not here established" and that "the allegations of nuisance are in the nature of conjecture rather than factual." The plaintiffs are before us on a general appeal.

The record discloses that the defendant Grand Trunk Western Railroad Company constructed a "belt line" single-track railroad across the northern part of the city of Pontiac many years ago, that portion west of Baldwin avenue being completed in the year 1920. This is the area in which it is proposed that the new "industrial support yard" be located. The need for such yard has arisen from the inadequacies of the present Johnson avenue yard to service the rail traffic involved. Testimony was presented to the trial chancellor that "during the last few years there has been a great change in the service required at the motor company plants because of the increase in use of cars especially equipped for certain types of parts. There are cars equipped directly for engines and transmissions and are dif-

ferent types of cars altogether. In the old days they used the box cars. * * * It means we have to have twice as many cars in the terminal as we had before due to the fact that the cars have to go in the plant and loaded, the specially equipped cars put in." There have been, in addition, substantial increases in production at the Pontiac Motor plant and the Fisher Body plant. As a result and these and related factors the defendant railroad has received complaints from shippers in the area that the service is inadequate and must be improved, and from public authorities that it has blocked street crossings excessively, with resulting impedance of traffic flow. In addition, we are told, the railroad has been informed that if it cannot provide additional yard facilities the shippers "would have to consider that before building any additional plants in Pontiac."

The railroad, accordingly, began a survey of different sites available for additional yard facilities and selected the site here in issue. In order to construct the yard at this site the railroad approached the city of Pontiac for the purchase of property at this location owned by the city. Negotiations ensued, the city retaining Mr. Charles Blackman, a consulting engineer from Louisville, Kentucky, for purposes of exploration of other possible sites. After an exhaustive consideration of various factors, including such matters as comparative costs, grade levels, street crossings, distances from plants served, adjacent housing and industries, viaducts required, track space, and related matters, the defendant city and railroad entered into the agreement here under consideration upon May 21, 1957. Its provisions are summarized by appellees as follows:

"(1) That the city sell to the railroad the property required.

"(2) That it execute its conveyance.

"(3) The city agrees to forego any future attempts to extend Stanley avenue to the north across the support yard at grade.

"(4) The railroad agrees to construct and maintain a chain link fence on both the north and south sides of the yard.

"(5) The ballast of the yard to be washed pea gravel with calcium chloride to be used if any dust results.

"(6) To provide a green belt of tree planting on a part of the northerly side of the yard, and to construct embankment on the south side and place a climbing vine on the link fence on the south side.

"(7) The railroad consents to the extension of Columbia avenue across the belt line at grade.

"(8) The railroad consents to the extension of Hollywood avenue across the belt line at grade and agrees to donate to the city without compensation an easement for a public roadway for that purpose.

"(9) That the railroad will construct and maintain a pedestrian overpass over the yard, plans to be prepared by the railroad and approved by the city. The cost of construction and future maintenance repair to be borne 1/2 by the railroad and 1/2 by the city.

"(10) No Sunday switching in the yard except 'in cases of national emergency or as required to fulfill its common carrier and/or tariff obligations under Federal or State laws.'

"(11) All buildings in the yard to be of either painted sheet steel material or masonry block.

"(12) The railroad agrees during 1958 to make changes in the P. O. & N. yard which will minimize switching over Columbia avenue and Montcalm street.

"(13) Only diesel power to be used in the yard.

"(14-a-b-c) Construction and maintenance of the yard to be subject to inspection by the city, with recourse by the city for the remedy of mandatory injunction to enforce the provisions of the agreement as to construction and maintenance."

The attack upon this agreement, as has been noted, relates primarily both to alleged violation of zoning and to nuisance. We will consider the objections made in the order asserted.

First, as to zoning, the ordinance here to be considered was adopted by the city in 1938. The area under consideration is therein zoned as "Manufacturing 1." Likewise in the so-called "Master Plan for the City of Pontiac, Michigan" adopted April 21, 1948, the area is designated as "Manufacturing." As to the location of railroads and appurtenances thereto, the zoning ordinance discloses careful thought. We find that in Residence 1 districts "Railway rights-of-way" are permitted. In Residence 2 districts the permissive use as to railroads is broader, there being permitted not only the railroad right-of-way, but also "passenger stations, trackage and structures incidental thereto" but not including "freight stations or yards, shops, roundhouses or other storage, repair or servicing facilities." In what zone, then, are such functions permissible? We find no such permitted user in Residence 3 districts. Coming, however, to the Manufacturing districts, with which we are here concerned, the pattern of the ordinance changes. In these districts, rather than listing the permitted uses, the draftsmen have listed only the prohibited uses. Not only, however, is there no prohibition therein of railroad activities, but, on the contrary, we find on the zoning map (attached to the zoning ordinance) that the Johnson avenue freight yard, hereinbefore mentioned, and the area surrounding it, are zoned "Manufacturing 1." The trial court's conclusion that a freight yard is not a prohibited use in areas zoned Manufacturing 1 is inescapable. The catch-all phrase (following 51 specified forbidden uses in the zone) that forbade "any other trade, industry or use that is injurious, noxious, offensive, or hazardous by reason of the

emission of odor, dust, fumes, smoke, noise or vibration" does not derogate from the accuracy of the conclusion. Such clauses are properly construed in accordance with the principle *expressio unius est exclusio alterius*. As we held in *Van Sweden* v. *Van Sweden,* 250 Mich 238, 241:

"The statute does not include a carpenter's helper in its mention of business callings, unless the language 'or any person coming within the provisions of this act,' serves as a catch-all. If such were its purpose, it could have been made plain by omitting special mentioned callings and stating that the act applies to every employer. The enumerated callings are easily comprehended, and a search of the act and its amendments fails to disclose any further inclusion by the term, 'any person coming within the provisions of this act.' It is a familiar rule that inclusion by specific mention excludes what is not mentioned."

See, also, to the same effect as to zoning laws, *Marshall* v. *Holbrook,* 276 Mass 341 (177 NE 504); 3 Metzenbaum, The Law of Zoning (2d ed), p 1811; 58 Am Jur, Zoning, § 11, p 946.

Appellants, however, insist that the operation of switching yards involves "inherent nuisances," and, moreover, that such operation is performed in the road's private capacity, rather than in its capacity in the service of the public, thereby, it is argued, subjecting it to an enlarged measure of liability. *Baltimore & Potomac R. Co.* v. *Fifth Baptist Church* (1883), 108 US 317 (2 S Ct 719, 27 L ed 739). The distinction made, even if valid (and we note from 6 ALR 723, 731, that it is taken only by a minority of the courts), is both slippery and tenuous, involving, as it does, a categorization (as either public or private) of the many and diverse activities of a public service corporation, all of which, unless *ultra vires,* must be in furtherance of its corporate func-

tion. So far as the operation of a freight switching yard is concerned, it seems peculiarly in keeping with the public duties of a railroad. As the New York court of appeals held in *Ball* v. *New York Central R. Co.*, 229 NY 33, 40, 41 (127 NE 493):

"In the transportation of freight the railroads act in a public capacity and in the proper discharge of their duty to the public. The interchange of traffic is an essential part or act in the transportation. The public is entitled to an efficient and prompt service in the way of transportation of persons and freight and the railroad is shielded from responsibility for consequential and incidental damages from careful and nonnegligent acts, which are necessary and unavoidable, to bring about such service. (Citing cases.) The freight terminal yard is the natural and normal place for interchanging movements. When by reason of an increase of traffic or other just reason the interchanging movements cannot be accomplished within the yard they may be facilitated and aided by the use of the tracks connected with and adjacent to the yard. The defendant was justified in any use of its tracks in connection with the yard which was reasonably necessary and incidental to that lawful situation."

In the case before us we agree with the trial chancellor that the switching yard in question is essential to a proper operation of the railroad in the public interest and is not designed to serve some mere private need. The testimony amply sustains the position that expanded yard facilities in the proposed location are necessary to the proper flow of railroad traffic to and from industrial plants in the city of Pontiac. It follows, then, that we cannot hold the legislative action of the city in the premises to have been arbitrary or capricious.

The "inherent nuisance" argument is equally without merit. There is no doubt, of course, that a rail-

road, in its normal operations, subjects those nearby to a certain unavoidable amount of noise and vibration. Such do not, however, constitute an actionable nuisance as that term is employed in the law. Justice COOLEY stated the principle in the early case of *Grand Rapids & Indiana R. Co.* v. *Heisel,* 38 Mich 62, 70 (31 Am Rep 306), in these terms:

"The railroad is not a public nuisance, and no right of action can arise against the company until by negligence or improper management they do or suffer to be done something injurious to the abutting proprietor which the permission to occupy the street would not justify. The general principle here stated has been recognized in the following cases: *Moses* v. *Pittsburg, F. W. & C. R. Co.,* 21 Ill 516; *Murphy* v. *City of Chicago,* 29 Ill 279 (81 Am Dec 307); *Stetson* v. *Chicago & E. R. Co.,* 75 Ill 74; *Chicago, B. & Q. R. Co.* v. *McGinnis,* 79 Ill 269; *Elizabethtown, L. & B. S. R. Co.* v. *Combs,* 10 Bush (73 Ky) 382 (19 Am Dec 67); *Carson* v. *Central R. Co.,* 35 Cal 325; *Porter* v. *North Missouri R. Co.,* 33 Mo 128. It is a legal solecism to call that a public nuisance which is permitted to competent authority; *Harris* v. *Thompson,* 9 Barb (NY Sup) 350; *Danville, H. & W. R. Co.* v. *Commonwealth,* 73 Pa 29, and cases cited. The nuisance, whether it be public or private, must be found in the subsequent misconduct of the railroad company, and not in their acceptance of the permission to occupy the highway."

See, also, *Dolan* v. *Chicago, M. & St. P. R. Co.,* 118 Wis 362 (95 NW 385), wherein the court held as follows:

"It must follow that, if a railway company exercises reasonable and proper diligence and care in the location of its yards and in its management, it has performed its whole duty. Impossibilities cannot be required. Duties cannot be imposed, and punishments inflicted, simply because the duties have been performed. If injury results to others, it must in

such case be *damnum absque injuria*. The same rule must apply which applies to noise and smoke and steam resulting from the operation of the railroad. If these annoyances result simply from the necessary and proper operation of the road, they must be borne. If the company use the best and most improved devices to prevent injury to others, it is protected by its franchises. If it is negligent in this regard, it must respond in damages, if a nuisance is thereby created."

This is not to say, of course, that a railroad may not, through negligent or oppressive operation, make itself liable to either the damage or the injunctive remedy, but we will not anticipate such conduct. Such cases relied upon by appellant, as *Baltimore & Potomac R. Co.* v. *Fifth Baptist Church, supra*, are not in point. That case involved the erection of an engine house and machine shop, after protest, within 5–1/2 feet of church premises, the placing thereon of 16 smokestacks lower than the windows of the main room of the church, and the discharge into the church of smoke, cinders, steam and dust, frequently compelling the pastor to suspend his remarks, soiling the apparel of the congregation, and causing a diminution in the attendance both of the congregation and the Sunday school. We do not deny the authority of the case, but, rather, its applicability.

The trial chancellor, having heard the testimony and viewed the premises, concluded his opinion with the following observations:

"The value of the respective properties is seemingly dependent upon the industrial health of the city of Pontiac. The proposed expansion of the yard is essential to this condition. Any diminution of facilities for adjacent industrial plants or their expansion in the opinion of the court, would have a more depreciating influence upon the homes in the area than the establishment of the yard.

"The city commission as a legislative function has authorized the auxiliary yard. The proposed installation is not in violation of any restrictive covenant or zoning regulations. There is nothing in the record to indicate that the yard will be an actionable nuisance.

"It may also be pointed out that the commission has taken every precaution to avoid such a contingency. Its location next to the belt line in an industrial area could have long been foreseen as a probable contingency."

There is no merit in additional errors claimed by appellants. That portion of the agreement of May 21st reciting that the city would forego any present or future efforts to extend Stanley avenue at grade across the support yard is clearly within the legislative competence of the city commission.

We are constrained once more (*cf., Brae Burn, Inc.,* v. *City of Bloomfield Hills,* 350 Mich 425) to observe that the wisdom or desirability of action by the law-making body is not before us. The ultimate power is vested in such body and, save as to constitutional restraints, its good faith in acting for the public welfare is not to be questioned by us. Likewise, we find no abuse of judicial discretion in the court's denial of the intervention as parties plaintiff, on the opening trial date, of some 50 persons whose appearance, appellants concede, "would not have altered either the pleadings or the proofs." See *School District of the City of Ferndale* v. *Royal Oak Township School District No. 8,* 293 Mich 1 (127 ALR 661).

The case before us involves a balancing of the equities of the parties in the interests of the public good. We find in the agreement under consideration a legislative recognition of the interests of the adjacent home owners and recognition of the interests of the railroad, of the shippers, and of the com-

munity itself, together with an agreed provision for the employment of the remedy of mandatory injunction in event of dereliction by the railroad. We are not persuaded of error.

The decree of the trial chancellor is affirmed. No costs, a public question.

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

DELPH *v.* SMITH.

1. JUDGMENT—JURISDICTION—DEFECTS IN SUMMONS—WAIVER—NEW YORK.

   Defects in summons in New York action in that no return date and no county designated for trial are shown and certification of the complaint by plaintiff was dated some 2 months after date of the complaint and proof of service of the complaint are not jurisdictional and subject to timely amendment or waiver unless the opposite party has been prejudiced by them.

2. SAME—DEFECTS IN SUMMONS—PREJUDICE.

   Defendant in action on New York judgment could not have been prejudiced by defects in summons in New York, where he claims never to have seen such documents.

3. SAME—COLLATERAL ATTACK—JURISDICTION—SERVICE OF PROCESS.

   A collateral attack upon the service of process in another State, attested by a judicial officer, may be made by party who was shown not to have been personally served, in order to show a lack of jurisdiction.

4. SAME—FULL FAITH AND CREDIT—WANT OF JURISDICTION.

   The full faith and credit clause of the Constitution of the United States requires recognition of the judgments of sister States but collateral attack may be made in the courts of this State by showing that the judgment sought to be enforced was void

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3, 5, 6] 30A Am Jur, Judgments § 881.
[4] 30A Am Jur, Judgments § 880.

for want of jurisdiction in the court which issued it (US Const, art 4, § 1).

5. SAME—COLLATERAL ATTACK—JURISDICTION—BURDEN OF PROOF—EVIDENCE—CORROBORATION.

The party being sued in this State on the judgment of a sister State and who subjects such judgment to collateral attack for lack of jurisdiction in the court which rendered it because of lack of service of process has the burden of proof of showing that he was not served with a summons in the sister State by clear and convincing proof and with substantial corroboration as the officer's return of service is presumed to be true.

6. SAME—JURISDICTION—SERVICE OF PROCESS—EVIDENCE.

Trial judge's finding that New York judgment was invalid for want of service of process on defendant in New York *held*, supported by record showing his lack of knowledge of such default judgment and continuance of his residence in that State for a year and a half after the entry of judgment without attempt to enforce it there or for several years more.

7. PROCESS—DENIAL—CIRCUMSTANTIAL EVIDENCE—RETURN—FINDING OF TRIAL JUDGE.

Any circumstantial evidence worthy of consideration in support of denial of service, presented by the interested party, will suffice to make the denial of service of process prevail over the officer's return, providing that the trial judge so considers.

Appeal from Wayne; Bohn (Theodore R.), J. Submitted May 29, 1958. (Docket No. 102, Calendar No. 47,389.) Decided September 10, 1958.

Assumpsit by Marion F. Delph against Gordon R. Smith on a judgment entered in the State of New York. Judgment for defendant. Plaintiff appeals. Affirmed.

Arthur C. Lumley, for plaintiff.

Moll, Desenberg, Purdy & Glover, for defendant.

EDWARDS, J. Plaintiff and appellant brought suit in assumpsit in Wayne county circuit court against her former husband, the defendant and appellee

herein. The suit was based upon a default judgment entered in her favor in the supreme court of New York on August 3, 1948, in the sum of $2,763.95, plus interest.

By answer and at trial the defendant-appellee attacked the New York judgment as invalid because of defects in the summons and complaint, and because he claimed that he had never been personally served.

The defects complained of are that, on the summons as contained in this record, no return date and no county designated for trial are shown, and that the certification of the complaint by plaintiff is dated July 29, 1948, whereas the complaint is dated May 26, 1948, and the proof of service indicates service on May 29, 1948.

At trial of this matter before the circuit judge, the plaintiff offered a certified copy of the judgment, a proof of service of the summons and complaint indicating service of same by a deputy sheriff, and an affidavit showing that defendant was not in military service on July 15, 1948. Plaintiff then called defendant under the statute, elicited proofs of the marriage and divorce of the parties, and the fact that on the date of claimed service and for 2 years thereafter defendant lived in New York in Westchester county, and rested.

On further examination of defendant by his own counsel, and later by opposition counsel, defendant emphatically denied service of the summons and complaint upon him, and further denied any knowledge of entry of the default judgment until commencement of the suit in Michigan.

It appears from this record that judgment was entered August 3, 1948. It likewise appears without dispute that defendant was a resident of New York's Westchester county for at least a year and a half thereafter. The record discloses no attempt

to enforce the judgment during that period, or for several years thereafter.

As to the defects in the summons, it appears clear to this Court that the later New York rule, supported by more authority, is that such defects are not viewed as jurisdictional and are regarded as subject to timely amendment or waiver unless the opposite party has been prejudiced by them. *Elder* v. *Morse,* 214 App Div 632 (212 NYS 581); *Barth* v. *Owens,* 178 Misc 628 (35 NYS2d 632); *Sivaslian* v. *Akulian,* 166 NYS 535; *Meyers* v. *Jeffe,* 108 NYS2d 606. See annotation, 97 ALR 746.

Patently, the omissions or errors in the documents which defendant-appellee claims never to have seen could not have worked to his prejudice.

Considerably greater difficulty, however, attends decision on the remaining point in this case. Under English common law and under the case law of some of our States, no collateral attack upon service attested by a judicial officer is permitted. 72 CJS, Process, § 100.

The long-established rule in Michigan is, however, to the contrary. In *Clabaugh* v. *Wayne Circuit Judge,* 228 Mich 207, this Court allowed direct attack upon an officer's return of service in the same proceeding.

And Justice POTTER held that an Illinois judgment was subject to attack by one who was shown not to have been personally served. *Stewart* v. *Eaton,* 287 Mich 466 (120 ALR 1354).

The general rule is stated thus in ALR:

"It appears to be the general rule that, where an action is brought in one State on a judgment rendered in another State, the officer's return of service of process in the sister State is not conclusive as to the parties, and may be attacked to prove lack of jurisdiction. *Bryant* v. *Shute* (1912), 147 Ky 268 (144 SW 28); *Carleton* v. *Bickford* (1859), 13 Gray (79

Mass) 591 (74 Am Dec 652). And see *Stier* v. *Iowa State Traveling Men's Association* [199 Iowa 118, 201 NW 328] (reported herewith), *ante,* 1384. See, also, *Rand* v. *Hanson* (1891), 154 Mass 87 (28 NE 6, 12 LRA 574, 26 Am St Rep 210); *Arapahoe State Bank* v. *Houser* (1916), 162 Wis 80 (155 NW 906); *Wilson* v. *Jackson* (1847), 10 Mo 329: Compare *Smolinsky* v. *Federal Reserve Life Insurance Co.* [126 Kan 506, 268 P 830] (reported herewith), *ante,* 1394." 59 ALR 1398.

We recently restated the same principle as to Michigan:

"The full faith and credit clause of the United States Constitution (art 4, § 1) requires recognition of the judgments of sister States. Nonetheless, of course, collateral attack may be made in the courts of this State by showing that the judgment sought to be enforced was void for want of jurisdiction in the court which issued it. *People* v. *Dawell,* 25 Mich 247 (12 Am Rep 260); *Farrow* v. *Railway Conductors' Association,* 178 Mich 639; *Smithman* v. *Gray,* 203 Mich 317; 6 Callaghan, Michigan Pleading & Practice, § 42.127, p 598 ff." *Johnson* v. *DiGiovanni,* 347 Mich 118, 126.

Clear as the above authority may sound, our current case is not easy to decide. The quantum of evidence required by our Court to overthrow proof of service regular on its face is considerable.

The circuit judge who heard the suit in Wayne county received briefs on this problem and entered a formal opinion which accurately stated the general rule pertaining to the evidence required, thus:

"The burden of showing that he was not served with summons in the New York court falls on the defendant. There is a presumption in favor of an officer's act, and that his return is true. Therefore, the burden does fall upon the person who attacks it to show clearly and convincingly that the return is false. The rule is well stated in the case of *Clabaugh*

v. *Wayne Circuit Judge,* 228 Mich 207, where it was said (p 211):

" 'That the party attacking an officer's return has the burden of overcoming the verity which attaches to the unqualified official return of an officer acting under his official oath to the satisfaction of the court required to determine the fact, there can be no doubt.'

"Generally the courts have hesitated to set aside a process on the claim of the defendant alone that he was not served. In the case of *August* v. *Collins,* 265 Mich 389, the court rejected the naked claim of the defendant that he was not served with process, and stated (p 395):

" 'Collins' claim that he had not been served with process rests upon his positive denial of service and his uncertain relation of circumstances, some of which were told him by his wife. There was no corroboration. In a direct attack upon the judgment, corroboration would have been necessary to impeach the return of service.'

"In *Alpena National Bank* v. *Hoey,* 281 Mich 307, it was held (p 312):

" 'The security of judicial proceedings demands that the showing to impeach an officer's return of service of process shall be clear and convincing, *Garey* v. *Morley Brothers,* 234 Mich 675, and with substantial corroboration of a defendant's denial of service, *August* v. *Collins,* 265 Mich 389.'

"Plaintiff, from the foregoing citations, contends that more than the naked claim of denial of personal service must be made by the person who asserts lack of personal service."

The trial judge, with these principles in mind, proceeded to determine as a matter of fact that there had been no personal service upon defendant-appellee, and that the New York judgment was invalid for want of jurisdiction. Reciting that defendant, on the witness stand before him, "not only denied service but [also] denied any knowledge of the judgment

being entered until the case was started in Detroit," he characterized the testimony of the defendant as "clear and convincing."

Plaintiff-appellant in this matter relied entirely upon the certificate of service and judgment. We are confronted, on the contrary, by the strong and unequivocal finding of fact of the judge who heard the case.

We note that there is no address beyond the name of the town given on the proof of service as to where service was had.

In addition, there is the unrefuted and unexplained lengthy delay in any attempt to enforce the judgment.

Confronted by a somewhat similar record, the supreme court of Wisconsin affirmed a trial judge's finding of want of jurisdiction for enforcement of an Illinois decree, with these words:

"Any circumstantial evidence worthy of consideration in support of the denial of service by the interested party, will suffice to make the denial prevail over the return, providing, of course, that the trial judge so considers." *Mullins* v. *LaBahn,* 244 Wis 76, 83 (11 NW2d 519).

Affirmed. Costs to appellee.

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

McLAY v. McLAY.

1. DIVORCE—CUSTODY OF CHILDREN—DISCRETION OF COURT.
   The Supreme Court is reluctant to overrule the trial court in a suit involving the custody of children of divorced parents in the absence of a clear abuse of discretion.

2. COURTS—ORDERS—NOTICE OF HEARING—JURISDICTION.
   The failure to notice an order for hearing might subject the order to being vacated on proper motion but did not deprive the court of jurisdiction to hand down the order or render the order entered void.

3. DIVORCE — MODIFICATION OF DECREE — JURISDICTION TO ENTER ORDER.
   Order of trial court, prepared instanter by attorney for defendant wife and giving her custody of parties' 2 young children for a probationary period of 6 months, modifying decree of divorce wherein custody had been given to father, is not disturbed, where issue of voidability was not raised in the trial court by motion to vacate or a motion for rehearing.

4. SAME—ADJOURNMENT—DISCRETION OF COURT.
   It was not an abuse of discretion on the part of the trial court to deny husband's motion for adjournment at hearing on wife's petition for custody of 2 minor children, because husband's attorney was unable to be present, where trial judge was the same one who had granted the original decree of divorce, was familiar with the parties, 1 adjournment had already been had, there were out-of-town witnesses present, the husband was himself an attorney, the absent attorney's presence could not be promised for a considerable time and no showing was made by the husband of any effort to secure or summon witnesses prior to date set for hearing or as to what such witnesses would testify if called.

REFERENCES FOR POINTS IN HEADNOTES

[1] 17A Am Jur, Divorce and Separation § 817.
[2] 14 Am Jur, Courts § 195.
[3–5] 17A Am Jur, Divorce and Separation § 837.

5. SAME—CUSTODY OF CHILDREN—PROBATIONARY PERIOD WITH MOTHER—STATUTES.

Trial court's order modifying decree of divorce so as to give wife custody of 2 children of the parties, born in 1952 and 1955, for a probationary period of 6 months following her recovery from illness *held,* not to have shown that trial court did not take into account the best interests of the children, in view of the statute favoring custody in the mother of children of tender years (CL 1948, § 722.541).

Appeal from Oakland; Doty (Frank L.), J. Submitted June 10, 1958. (Docket No. 53, Calendar No. 47,625.) Decided September 10, 1958.

Bill by Wallace D. McLay against Susan Williams McLay resulted in decree of divorce. Thereafter defendant petitioned for modification changing custody of minor children. Decree modified. Plaintiff appeals. Affirmed.

Wallace D. McLay, in propria persona (*William John Beer,* of counsel).

Lewis & Watkins, for defendant.

EDWARDS, J. Two small children, aged 6 and 3 years, are the subject of this appeal. Their parents, having divorced each other, now dispute over which shall have custody of the children.

The nature of the order appealed from plays a great part in our decision and illustrates the limitations upon the character of appellate review of custody disputes over minor children.

The order entered on November 12, 1957, by the Oakland county circuit judge, who had previously granted the divorce, modified the custody provisions of the preceding decree as follows:

"It is further ordered and adjudged, that for a full period of 6 months from and after the date

hereof, defendant, Susan Williams McLay, shall have the care, custody and control of Daniel Wallace McLay and Catherine Sutton McLay, the minor children of said marriage; plaintiff, Wallace D. McLay, at the expiration of said 6-month period, by proper application therefor, may seek review of the award of custody of said minor children herein made, but if no such application is made, or if such application is made and is denied, the care, custody and control of said minor children by said Susan Williams McLay shall become and be permanent during the minority of each of said children, or until the further order of the court."

Because of the time factor involved above, this Court granted an order staying execution of the change of custody contemplated and sought records and briefs from the parties while maintaining the *status quo* of the children. On motion of appellee here, and after full consideration of the briefs and record presented, on March 4, 1958, this Court vacated its stay order, thereby allowing the 6-months probationary change of custody contemplated by the circuit judge to take place.

This Court recognized then, as it does now, that in the normal course of formal appeal the 6-months period of probationary custody would run so that our ultimate decision might well be moot by the time it was announced. And, indeed, it appears likely that the trial judge will already have heard the reports on the 6 months of maternal custody, and already have made a new decision prior to release of this opinion.

We recite this history to point to the obvious fact that the proximity of the trial judge to the parties, and the relative flexibility of his decisions, both predetermine great reliance on the part of this Court upon his judgment as to the facts and as to the motivation and intentions of the parties involved in a

custody dispute of this nature. We phrase this attitude in our cases as a reluctance to overrule the chancellor who heard the custody dispute—absent a clear abuse of discretion. *Vines* v. *Vines,* 344 Mich 222; *Sargent* v. *Sargent,* 320 Mich 33.

With all of this to the contrary notwithstanding, we proceed to relate the background facts essential to decision.

Susan Williams McLay and Wallace D. McLay were married September 7, 1944. Two children were born to them, Daniel Wallace McLay on February 13, 1952, and Catherine Sutton McLay on May 7, 1955. Difficulties between the parents approached such a state that the husband filed a bill of complaint for divorce. A subsequent property settlement agreement between the parties was filed reciting, among other things, the wife's illness and her inability to supervise and care for the 2 children.

On July 23, 1956, an uncontested decree of divorce was granted Wallace D. McLay, based in large measure upon the property settlement agreement which was incorporated in the decree. The nature of this agreement as it bore on custody undoubtedly has influenced (although, of course, it did not control) the subsequent action of the circuit judge, and we quote the relevant portions:

"At such time as (1) wife shall have recovered from her illness above mentioned and again be able to care for and supervise the raising of said children, or (2) the children are not receiving the care and supervision of husband's mother at her residence, as aforesaid, wife at any time thereafter may, by written notice to husband, request the care, custody and supervision of said minor children and a modification of this agreement as to their care, custody and support. If the parties hereto then are unable to agree upon suitable provisions for the care, custody and support of said children within 30

days from the sending of said notice, wife may apply to the circuit court for the county of Oakland, State of Michigan for determination of her right to the care and custody of the said minor children and extent of husband's liability for their support."

Subsequent to the divorce, the children lived with their father and his mother until June, 1957, when the father remarried, whereupon they continued residing with the father and his new wife. No question is raised which in any way reflects upon the care given the children while in the father's custody.

Meantime, the wife sought help for her mental and emotional problems and subsequently entered the University of Michigan, seeking a teacher's certificate in education.

On September 17, 1957, an attorney for the mother filed a petition for modification of the divorce decree by the transfer of custody of the minor children from the father to the mother. The petition recited the illness which had occasioned custody being placed, without contest, in the father at the time of entry of the decree, and claimed complete recovery therefrom.

On the date scheduled for hearing, October 14, 1957, counsel for the mother agreed to an adjournment to November 12, 1957. The father, a lawyer, appeared *in propria persona* and sought an adjournment on the grounds that attorney Walter Nelson, his chosen counsel, was otherwise engaged in court work in Wayne county. The judge indicated an intention to proceed with the hearing, granting a brief adjournment for the father to secure the services of his own law partner who was present in the building, and who did appear and represented the father during the balance of the hearing.

Evidence presented by the mother included that of a psychiatrist on the staff of the University of Mich-

igan hospital who testified unequivocally that she was not mentally ill at the times of his recent examinations, and that of a professor in the school of education at the University of Michigan whose testimony was as follows:

"*Q.* Now, in your work with her, during the period that you were one of her professors and the times that you have seen her since, in view of your background in the field of psychology, have you formed any opinions as to Mrs. McLay's emotional status, emotional stability?

"*Mr. Houston:* I object to the question. I don't believe this witness has been qualified as an expert.

"*The Court:* I think so. I think he is qualified. He may answer.

"*A.* Well, on the basis of her work in the course and knowledge of her work with children and her student teaching and other contacts where I have seen her, she performs certainly like any other normal person.

"*Q.* Would you have any hesitancy in recommending her for a teaching certificate?

"*A.* No, I wouldn't. If I would have, we would have had to take steps to discourage this.

"*Q.* You feel, then, that she reacted during that period in a rather normal manner as a layman would use the term?

"*A.* From all the observations I have had, yes."

The court also had the benefit of the testimony of the Episcopalian chaplain of the University of Michigan, and an opportunity to see and hear Mrs. McLay herself on the witness stand. The court also had a report and recommendation of the friend of the court, which the record indicates he ultimately followed.

At the conclusion of the hearing, the circuit judge announced the 6-months probationary custody order in favor of the mother which we have already re-

cited. Subsequently, the attorney for the mother prepared the order and presented it to Mr. Houston, attorney for the father at the hearing, who declined to approve same. Thereafter, without noticing the entry of the order for hearing, the attorney for the mother presented same to the circuit judge who entered it as the order of the court.

Appellant father, in this appeal, claims the circuit judge did not have jurisdiction to enter the order, that he abused his discretion in failing to grant an adjournment, and that he failed to take into account the best interests of the children.

The argument pertaining to jurisdiction is based upon the failure to notice the proposed order for hearing under Michigan Court Rule No 10, § 5 (1945), which recited:

"Whenever an order has been granted in any proceeding it shall be noticed and presented for signature within 10 days after the granting of the same. If such order is not so presented or time extended by the court, it will be considered as abandoned, and a new application for such order may be made only to the judge granting the original order, or his successor, upon such terms as may appear just and equitable."

The order was presented and signed and filed within the 10 days referred to. Our question is whether failure to notice renders the order abandoned and void as claimed by appellant.

We consider the order subject to being vacated on proper motion. In *Flowers* v. *Wayne Circuit Judge,* 218 Mich 500, Justice WIEST, dealing with this identical problem, wrote:

"If the decree granted by Judge Hosmer was settled and signed without notice to the attorney for Mr. Flowers a motion should have been made to set it aside."

We do not, however, consider that failure to follow the terms of this administrative rule deprived the court of jurisdiction to hand down the order, or rendered the order as entered void. There is no question but that the order complied with the decision of the court announced from the bench at the close of the hearing.

Further, if the order be considered voidable and, hence, subject to reversal on appeal, we have no indication in this record that such an issue was submitted to the court below by motion to vacate, or on motion for rehearing. *Andres* v. *Washtenaw Circuit Judge,* 287 Mich 412.

As to the claim of abuse of discretion on the part of the circuit judge in failing to grant the adjournment of the hearing requested, we have reviewed the record with care. We take into account the fact that the circuit judge had heard the original divorce matter and was familiar with the parties, the fact that there had been 1 adjournment of the instant petition, that there were out-of-town witnesses present, that the adjournment request was based on unavailability of counsel whose presence could not be promised for a considerable period of time, that the father was known to the judge as a lawyer and known to him to have a competent law partner immediately available, and finally, that there was no showing made by appellant of any effort to secure or summon witnesses prior to the date set for hearing or as to what such witnesses would testify if called.

Although we feel, even so, that an adjournment at the close of petitioner's testimony might have been more desirable, we cannot say that refusal under the circumstances enumerated was an abuse of discretion. *Winklemeir* v. *Daiber,* 92 Mich 621; *People* v. *Burby,* 218 Mich 46.

As to the last of appellant's questions, we hold that a review of this record does not show that the circuit judge failed to take into account the best interests of the children. The order entered was in conformity with the original expressed agreement of both father and mother, and was obviously contemplated on the happening of certain contingencies in the court's original decree. Further, although not mandatory, there is a statutory preference favoring custody in the mother of children of tender years. CL 1948, § 722.541 (Stat Ann 1957 Rev § 25.311); *Eicholtz* v. *Eicholtz,* 319 Mich 42.

The judge heard testimony which was ample to support his finding as to her recovery of fitness for custody. And, finally, the very nature of the 6-months probationary order entered indicated a careful and considerate approach to the difficult and continuing problem confronting him.

Affirmed. Costs to appellee.

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

LOOKHOLDER *v.* STATE HIGHWAY COMMISSIONER.

1. CONSTITUTIONAL LAW—DUE PROCESS—FAIR TRIAL—FAIR TRIBUNAL.

   A fair trial in a fair tribunal is a basic requirement of due process (US Const, Am 14, § 1; Mich Const 1908, art 2, § 16).

2. SAME—DUE PROCESS—FAIR TRIAL—JUDGES.

   A fair trial, as required by due process, requires not only an absence of actual bias on the part of the judge, but also that no man be a judge in his own case or try cases where he has an interest in the outcome (US Const, Am 14, § 1; Mich Const 1908, art 2, § 16).

3. HIGHWAYS AND STREETS—CONDEMNATION PROCEEDINGS—DISQUALIFICATION—CIRCUIT COURT COMMISSIONER.

   A circuit court commissioner of the county, or acting in the county, in which is located land sought to be condemned for highway purposes may hear the matter of necessity in the event the statutory highway authority is disqualified to hear and determine such matter (CL 1948, § 213.174a).

4. SAME—CONDEMNATION PROCEEDINGS—DUE PROCESS—DISQUALIFICATION OF DEPUTY.

   Conduct of hearing on necessity in condemnation proceedings of land for highway purposes did not result in a denial of due process due to disqualification of person who had been deputized to conduct the hearing by the State highway commissioner because of previous service as an assistant attorney general, where before deputization by the commissioner he had resigned as such assistant (US Const, Am 14, § 1; Mich Const 1908, art 2, § 16).

5. JUDGES—DUE PROCESS—DISQUALIFICATION—ATTORNEY AND CLIENT—ETHICS.

   The fact that an attorney has represented a client with respect to identified subject matter in a proceeding which has come to a definite end, does not itself disqualify him from acting judicially at some later date in a new proceeding involving

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 12 Am Jur, Constitutional Law § 573.
[3–5] 18 Am Jur, Eminent Domain § 315.
[6, 7] 18 Am Jur, Eminent Domain § 232.
[8] 19 Am Jur, Estates § 2.
[9] 18 Am Jur, Eminent Domain § 319.
[10] 18 Am Jur, Eminent Domain § 308.
[11] 18 Am Jur, Eminent Domain § 313.
[12] 18 Am Jur, Eminent Domain § 378.

the same subject matter, even though his former client stands before him in the position of an interested litigant, as ethical considerations do not alone determine questions of due process (US Const, Am 14, § 1; Mich Const 1908, art 2, § 16).

6. EMINENT DOMAIN—LEASEHOLD AS PROPERTY.

A leasehold, and rights derived from a leasehold, constitute property for the taking of which just compensation must be made or secured.

7. SAME—INTEREST IN LAND—LEASEHOLD.

An "interest in land," as that term is used in the highway condemnation act, embraces and includes leasehold interests and rights derived therefrom (CL 1948, § 213.174).

8. WORDS AND PHRASES—INTEREST IN LAND.

"Interest," in common speech in connection with land, includes all varieties of titles and rights, comprehending estates in fee, for life and for years, mortgages, liens, easements, attachments, and every kind of claim to land which can form the basis of a property right.

9. EMINENT DOMAIN—HIGHWAYS AND STREETS—LANDLORD AND TENANT—PRECEDENT NEGOTIATIONS—CONDITION PRECEDENT TO CONDEMNATION PROCEEDINGS.

Lessees of land, sought for State highway purposes, irrespective of the duration or value of their interest, were equally entitled to precedent and good-faith negotiations toward acquisition of their interest, as the lessors; hence, where the State highway commissioner failed to negotiate separately with the lessees, condemnation proceedings to acquire the land were prematurely instituted to the legal detriment of both the lessors and the lessees (Const 1908, art 13, § 2; CL 1948, § 213.174).

10. SAME—CONDEMNATION PROCEEDINGS—COURTS.

It is the duty of courts, when reviewing condemnation proceedings to acquire land for highway purposes, to see that the requirements of constitutionally authorized law are strictly observed as a condition of validity of such proceedings (Const 1908, art 13, § 2; CL 1948, § 213.174).

11. SAME—CONDEMNATION FOR HIGHWAYS—CONSTRUCTION OF STATUTES—JURISDICTION—WAIVER—ESTOPPEL.

The statute authorizing condemnation of interests in land for highway purposes is to be strictly construed, and its jurisdictional requirements must be established in fact and may not rest upon technical waiver or estoppel (Const 1908, art 13, § 2; CL 1948, § 213.174).

12. COSTS—CONDEMNATION PROCEEDINGS—HIGHWAYS AND STREETS.
No costs are allowed on certiorari by owners of interests in land sought to be taken for highway purposes upon reversal of judgment because proceedings brought were invalid.

Appeal from Kalamazoo; Fox (Raymond W.), J. Submitted June 6, 1958. (Docket No. 38, Calendar No. 47,523.) Decided September 10, 1958. Rehearing denied October 13, 1958.

Certiorari by Harry Lookholder, David Lookholder, Loren W. Brummit and Edyth M. Brummit against Charles M. Ziegler, State Highway Commissioner, to review condemnation proceedings in the matter of the improvement of State trunk-line highways US–12 and US–131. Writ quashed. Plaintiff appeals. Reversed and remanded for entry of order declaring condemnation proceedings invalid.

Kenneth A. Fricke, for plaintiffs Lookholder.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *Samuel D. Frane* and *Victor H. Meier,* Assistants Attorney General, for defendant.

BLACK, J. To review condemnation proceedings instituted under PA 1925, No 352, as amended (CL 1948, § 213.171 *et seq.* [Stat Ann and Stat Ann 1957 Cum Supp § 8.171 *et seq.*]), appellants sued out—in the Kalamazoo circuit—certiorari to the State highway commissioner. The writ, following due trial, was dismissed. Appellants are here with the record by application and grant of leave to appeal.

We granted leave for the purpose of reviewing an asserted denial of due process* arising from the appointment of an allegedly interested "person" (see section 28 of the act as added by PA 1927, No 92

* US Const, Am 14, § 1; Mich Const 1908, art 2, § 16.—REPORTER.

[CL 1948, § 213.198 (Stat Ann § 8.199)]) to act in the place and stead of the State highway commissioner, and for the purpose of considering an asserted right of appellants Lookholder, as owners of the involved title in fee, and of appellants Brummit, as term lessees of defendants Lookholder, to separate good faith offers under the statute (CL 1948, § 213.174 [Stat Ann 1957 Cum Supp § 8.174])* prior to and as a condition of validity of the mentioned proceedings.

First: It was represented in the application for leave to appeal that the specially deputized "person," in this case former† assistant attorney general Willard L. Mikesell, had appeared as counsel for the State in a previous proceeding, instituted under the same statute, the design of which was condemnation of the same property of appellants. On this hypothesis it was, and now is, asserted that Mikesell was "interested" in the outcome; that he thereby was disqualified to sit and hear judicially, and that due process was denied by Mikesell's determination —which determination was later upheld by the State highway commissioner and next by the circuit court—to proceed over timely objection in the capacity of a special statutory deputy. Thus the spectacle of the attorney general—in the apparent person of his assistant—sitting as a "deputized person" to preside, hear and evaluate the testimony taken or to be taken in a statutory proceeding where he—the attorney general—must and does represent adversary interests of the State, instinctively gave rise to serious question whether a "hearing" of such nature affords due process for those who, by force of the proceeding, are opposed to the State and its chief legal representative.

* See pertinent construction of section 213.174 in *State Highway Commissioner* v. *Newstead*, 337 Mich 233.

† We say "former" in view of Mr. Mikesell's resignation from the attorney general's department on February 19, 1956.

The question whether due process is denied, when the judge or tribunal assigned to preside and conduct the requisite hearing has an alleged "interest in the outcome," is occasionally delicate and usually difficult.* The reason becomes apparent on reflective examination of *In re Murchison,* 349 US 133, 136 (75 S Ct 623, 99 L ed 942), wherein the supreme court opened its considered discussion of this phase of due process by saying: "A fair trial in a fair tribunal is a basic requirement of due process." *Murchison* follows *Tumey* v. *Ohio,* 273 US 510 (47 S Ct 437, 71 L ed 749, 50 ALR 1243), wherein the unanimous opinion of the court, written by Chief Justice Taft, led the way in expression of authoritative and modern thought upon the subject. The 2 cases impelled recent readjustment of section 635 (headed "Requirement of Impartiality") of the topic "Constitutional Law," in 12 Am Jur at page 326. See the following new note, appended to the text of said section 635 (page 29 of 1958 pocket supplement):

"A fair trial, as required by due process, requires not only an absence of actual bias on the part of the judge, but also that no man be a judge in his own case or try cases where he has an interest in the outcome. And every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law."

The only well-defined and manifestly necessitous exception to this rule of due process, that of the case or proceeding where there is no judge or officer not equally disqualified to act (see *Tumey* v. *Ohio, supra*), has no place in the case before us. Section

* We held, under the act of 1925 in its originally enacted form, that due process is denied when the necessity of taking is not determined judicially (*Hendershott* v. *Rogers,* 237 Mich 338).

4a of the act of 1925, as amended (CL 1948, § 213.174a [Stat Ann 1957 Cum Supp § 8.175]), provides:

"In the event the board or commissioner shall for any reason be disqualified to hear and determine the matter of necessity, as provided in this act, such matter of necessity only shall be heard by a circuit court commissioner of the county in which the property sought to be condemned is located or by a circuit court commissioner acting in such county, as provided by law, and in case any disqualification shall be alleged against any board or commissioner before or during such hearing on necessity, such board or commissioner if they deem such allegation well-founded, may call upon a circuit court commissioner, qualified as hereinbefore provided, to hear the matter and make the determination herein prescribed, and on the day set for hearing a continuance for such purpose to a day certain, may be had if necessary."

Here, assuming for the moment that the specially deputized commissioner (Mr. Mikesell) was disqualified in the name of due process, the requirements of such process easily could have been satisfied by relevant utilization of the very statute under which these proceedings were instituted. As was said in *Tumey* (pages 522, 523 of report): "We are not embarrassed by such considerations here for there were available in this case other judicial officers who had no disqualification either by reason of the character of their compensation or their relation to the village government."

The foregoing is fully explanatory of the salient reason for grant of leave to appeal in this case. However, and since submission here, we have learned that Mr. Mikesell was not in fact an assistant to the attorney general when the present proceedings were instituted (June 4, 1956) or when the hearing in question was conducted June 26, 1956 (the briefs of

all parties are strangely silent on this rather crucial point of fact). Mr. Mikesell, between the occasion of the previous statutory proceedings and institution of the present ones, had resigned his position as assistant to the attorney general.* Consequently, he was not disqualified for reasons relating to due process so far as shown in this record.

There being no claim of disqualification of Mikesell on any other ground and no evidence of "an interest in the outcome" on his part (from and after the date of said resignation), it is ruled that appellants have failed to sustain their contention that the conduct of this hearing and its result denied them due process. The fact that an attorney has represented a client with respect to identified subject matter in a proceeding which has come to a definite end, does not of itself disqualify him from acting judicially at some later date in a new proceeding involving the same subject matter, even though the same party (his former client) stands before him in the position of an interested litigant. Ethics may or may not suggest his course in such an instance. Be that as it may, ethical considerations, *standing alone,* do not determine questions of due process.

In arriving at foregoing conclusions we have not overlooked *New Products Corp.* v. *State Highway Commissioner,* 352 Mich 73. There the related—but not presently applicable—question was whether the State highway commissioner and his deputy were disqualified (p 86) "on the ground that by previous conduct he [the commissioner] had committed himself to the particular project in question." We held as against such assigned point that there was no disqualification.

* See 2 Biennial Report of the Attorney General, 1956, vii.

Second: The second question, outlined at beginning of this opinion, depends for solution on the following facts:

Appellants Brummit were and are term lessees of one of the 2 parcels of involved and adjacent real estate. They conduct a filling and service station business thereon. The balance of such real estate is owned and possessed outright by appellants Lookholder. Such is used in part for dwelling purposes. Prior to institution of these proceedings the commissioner negotiated exclusively with appellants Lookholder. His final offer to them, for the entire premises and interests sought for highway purposes (including the leasehold of appellants Brummit) was $68,000.* The Brummits were not approached and were offered nothing, presumably on assumption that it was the coerced duty of the 2 lessors and the 2 lessees, on imminent peril of condemnation, to negotiate amongst themselves for the purpose of "whacking up" that which the commissioner had offered the lessors for all.

The attorney general, recognizing that good-faith negotiation toward acquisition by agreement is a condition precedent to valid condemnation proceedings (*State Highway Commissioner* v. *Ottawa Circuit Judge,* 339 Mich 390), seeks to justify the practice of omitting negotiations with these lessees on grounds of convenience and need for summary acquisitive action, supported by citation of what we think are inapplicable cases from other jurisdictions. The argument is not impressive considering the settled rule in Michigan that a leasehold, and rights derived from a leasehold, constitute "property," for the taking of which just compensation must be made or secured (*City of Detroit* v. *C. H. Little Co.,* 141 Mich 637; *In*

* Singularly, such was the exact amount awarded below for all rights and interests taken by the commissioner.

re John C. Lodge Highway, 340 Mich 254; *In re Opening Leib Street,* 351 Mich 314).

Here the ultimate question is whether the appellant lessees fall within definitive scope of the expression (see section 4 of the act of 1925, as amended; CL 1948, § 213.174 [Stat Ann 1957 Cum Supp § 8.174]) "any person interested in any such property."* We hold, for reasons given in *Little, Lodge,* and *Leib, supra,* and for reason that the word "interest" as applied to land embraces and includes leasehold interests and rights derived therefrom (*In re Reh's Estate,* 196 Mich 210),† that the appellant lessees were and are as much entitled to precedent and good-faith negotiation toward acquisition of their "interest" as were the appellant lessors, and that the State highway commissioner was and is burdened with the duty of attempted good-faith purchase of the Brummit leasehold as a condition of validity of any proceeding looking toward statutory acquisition of such leasehold. Any other construction of the statute would spur to the judicial front another question of due process and probably a separate one addressed to equal protection.

The unwarranted assumption that a term lessee, of property sought to be acquired by eminent domain, is not a "person interested" in such property,

* Note that the same expression, in variant yet corresponding phraseology, is employed as needed throughout the act. See sections 6, 9, 10, 13 and 29 of said Act No 352, as amended (CL 1948, §§ 213.176, 213.179, 213.180, 213.183 and 213.199 [Stat Ann 1957 Cum Supp §§ 8.177, 8.180, 8.181, 8.184 and Stat Ann § 8.200]).

† "The general rule is that the word 'interest' is broader and more comprehensive than the word 'title.' It embraces both legal and equitable rights. It covers rights in property less than title thereto, rights different from title, rights which may be enforced, legal rights.

" 'Interest, in common speech in connection with land, includes all varieties of titles and rights. When given its plain and natural meaning it comprehends estates in fee, for life and for years, mortgages, liens, easements, attachments, and every kind of claim to land which can form the basis of a property right.' *Union Trust Co.* v. *Reed,* 213 Mass 199, 201 (99 NE 1093)." (*Ornatowski* v. *National Liberty Ins. Co. of America,* 290 Mich 241, 248.)

sprouts, we think, from thought that a tenant has no substantial interest in the premises he occupies and that acquisition of the fee includes and accomplishes acquisition of his rights. Such an assumption has no foundation either in the law of property or in the statute under which the commissioner has proceeded. While the duration and value of a tenant's term is not decisive of presence or absence of right on his part to separate negotiations under the statute, it is not out of order to note that term lessees of business property can and sometimes do hold an "interest" which is of even greater value—at the time of negotiation or taking—than that of the fee itself. Here, and for aught this record makes known to the commissioner or to this Court, such indeed may be the case.

Highway condemnation proceedings of necessity are brutal at best. Property and interests in property can be taken, and dispossession speedily effected, on short notice and summary hearing. A great deal of power, easily abused, is thus confided by Constitution and statute to highway commissioners when proceedings are instituted by them "in the official discharge of their duties" (Const [1908], article 13, § 2). Perforce, and when due appeal is made to the courts for review of such proceedings, it is the plain duty of the latter to see that the requirements of constitutionally authorized law are strictly observed as a condition of validity of such reviewed proceedings.* In the performance of that duty, and having upheld the asserted right of these lessees to

* Thirty years ago this Court was confronted with claim, made by the State highway commissioner, that a landowner's failure to seasonably "raise the point of no proper effort to acquire" operated as a waiver of such point. Having held that a bona fide distinguished from casual endeavor by purchase is both mandatory and jurisdictional, the Court went on to say: "The statute of eminent domain is to be strictly construed, and its jurisdictional conditions must be established in fact and may not rest upon technical waiver or estoppel." (*In re Petition of Rogers*, 243 Mich 517, 522.)

precedent separate negotiations under the statute, we are obliged to rule that the proceedings below were prematurely instituted to the legal detriment of appellants Lookholder as well as appellants Brummit. Such ruling calls for judgment accordingly in the court below.

Reversed and remanded for entry of judgment in circuit declaring that the proceedings brought there by certiorari are invalid. No costs.

DETHMERS, C. J., and CARR, KELLY, SMITH, EDWARDS, and VOELKER, JJ., concurred.

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

BERRY *v.* VISSER.

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

   Evidence is viewed favorably to plaintiff when examined by the Supreme Court on appeal from denial of motions for directed verdict and for judgment notwithstanding the verdict.

2. AUTOMOBILES — PARKING — VIOLATION OF STATUTE — PROXIMATE CAUSE—QUESTIONS FOR JURY.

   Evidence showing defendants' cattle truck had been parked in easterly lane of north and south 4-lane super highway at dusk in mid-January previous to when it was struck by right front portion of car in which plaintiff was a guest passenger pre-

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 886.
[2] 5A Am Jur, Automobiles and Highway Traffic § 403.
[3, 4] 5A Am Jur, Automobiles and Highway Traffic § 405.
Stopping vehicle on traveled portion of highway as affecting responsibility for collision between vehicles. 131 ALR 562.

sented a question for jury as to whether defendant driver was violating the statute as to illegal parking and as to whether such violation was negligence constituting a proximate cause of the accident (CLS 1956, § 257.612).

3. SAME—SUPER HIGHWAY—PARKING OR STOPPING ON PAVEMENT.
Parking or stopping an automobile on the pavement on a super highway is not justifiable except in the case of practicable necessity (CLS 1956, § 257.612).

4. SAME—FORESEEABLE CONSEQUENCES OF NEGLIGENCE—VIOLATION OF STATUTE—REQUESTS TO CHARGE.
Defendant driver of cattle truck who parked it in easterly northbound lane of 4-lane super highway at dusk in mid-January was bound to anticipate or foresee injuries to passengers of other northbound vehicles on the same highway, where he had been parked in violation of statute, hence, requests to charge were properly denied where they would have absolved defendants from liability if jury found negligence of driver of car which collided with rear end of truck so parked was the sole cause of the accident (CLS 1956, § 257.612).

Appeal from the Superior Court of Grand Rapids; Taylor (Thaddeus B.), J. Submitted June 6, 1958. (Docket No. 44, Calendar No. 47,502.) Decided September 10, 1958.

Case by Juanita Berry against Andrew Visser and James K. Baker for personal injuries sustained in collision of motor vehicles. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Williams & Damon (*John E. Damon,* of counsel), for plaintiff.

Mitts, Smith & Haughey, for defendants.

BLACK, J. At dusk on January 14, 1955, plaintiff Juanita Berry was riding in an automobile driven by her husband. The automobile, under circumstances to be related, collided with the rear end of defendant

Visser's cattle truck.* Juanita was injured. Her ensuing suit for personal injuries, brought against defendant Visser as owner of the cattle truck and defendant Baker as employee-operator thereof, was tried to court and jury in the superior court of Grand Rapids. The jury found in favor of Juanita and awarded her damages in the sum of $12,500. Judgment entered on the verdict. Defendants appeal.

The collision occurred in or near the intersection of east-west Rupert street with north-south highway US–131 (Plainfield avenue at the point), near the northerly outskirts of Grand Rapids. Both vehicles prior to the collision had been proceeding northward on Plainfield. The cattle truck, theretofore driven by defendant Baker, had been stopped on the pavement of Plainfield for the purpose of inquiry by Baker, at a gasoline and service station situated at the northeast corner of Plainfield and Rupert, for travel directions. Baker, having stopped the truck in the extreme right-hand lane of northbound traffic on Plainfield, just north of the northerly end of the northeast tangent leading from Rupert to Plainfield, went into the station for the above purpose. He returned to the truck and was about to start forward, or had just started forward (the proof is disputed here), when this "rear-end" collision occurred.

Both highways are conventionally curbed at this point, as is the mentioned tangent. The usual exit and entrance pavements, leading into the service station from each highway, are shown in the photographic exhibits. A grassed and generally square-shaped plot, bounded by the curbed tangent and the service station pavements, forms the northeast

* The cattle truck was of conventional 2-axle 4-wheel design. It was not a tractor-trailer combination.

corner of the highway intersection. It is opposite such plot, and parallel to the Plainfield curb forming the westerly boundary of the plot, that the truck had been stopped by Baker.

Plainfield north and south of the mentioned intersection is a 4-lane super highway extending through a partially but not fully settled area. The paved width thereof, from curb to curb, is 44 feet. The respective north and south lanes of traffic-travel are not separated, that is to say, the parallel strips of pavement extend laterally from curb to curb without separation excepting for painted traffic lines.

Following trial of the case defendants, pursuing due and reserved motions for directed verdict, moved for judgment notwithstanding the verdict of the jury or, in the alternative, for a new trial. The trial judge, having considered the motion, prepared and filed a comprehensive opinion in which each of defendants' present specifications of error were carefully considered. Judgment notwithstanding and a new trial were both denied. The opinion supplies, as follows, the remaining facts that are necessary to satisfactory understanding of the questions brought here:

"Plaintiff was a guest passenger in an automobile being driven by her husband on highway US–131, which was involved with a truck of the defendant in an accident which occurred in the evening hours of January 14, 1955. The accident occurred approximately just after 6, and if it was not dark the sun had set and the evening dusk had settled upon the highway. Motor vehicles were traveling with their lights on. The point where the accident occurred is on the top of a hill. The highway descending to the south and rising again to another elevation. There are 4 lanes of traffic, and plaintiff's husband struck the left rear of defendant's truck, which was standing in the outside lane, being the easterly lane

of traffic, with the right front of his car as he attempted to pass. This is a congested and busy highway and there were at least 3 other cars traveling in close proximity to the car in which the plaintiff was riding. Apparently 1 of the cars was passing the plaintiff's car in the inner lane, and there was at least another car driving close behind which was turning into the inner lane to pass plaintiff's car."

The trial judge went on to say, with respect to the principal reviewable question:

"The act of defendant Baker in parking the truck on the highway was a matter of convenience. No emergency existed and no compelling necessity. There was no excuse for violation of the statutes. The entrance to the oil station was as available to him as to others. I am convinced that following the determination in the above case, and also in *Tracy* v. *Rublein,* 342 Mich 623, that this court did not err in submitting the question of negligence to the jury. We are also of the opinion that the duties of a guest passenger were also properly outlined in accordance with the suggestions in *Jones* v. *Danielson,* 328 Mich 402."

First: Defendants insist that their motion for instructed verdict, made at close of the plaintiff's case and again at close of the proofs, should have been granted. The motion so repeated presented below, and presents here, this question:

Whether, considering the statute* and the related circumstances as testified, it was shown in evidence that defendant Baker could and should, on the occasion, have stopped or parked the cattle truck other

* Sec. 672. "Outside of the limits of any city and village, it shall be unlawful to stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practicable to stop, park or to leave such vehicle off such part of said highway." CLS 1956, § 257.672 (Stat Ann 1952 Rev § 9.2372).

than on the pavement of Plainfield and, even though it be found that such showing was made, whether Baker's violation of the statute was proximately connected by evidence with the collision. Plaintiff points to the convenience of stopping or parking the truck, off Plainfield, by entry into Rupert or, but a few feet north of the position where the truck was stopped, of driving into the Plainfield entrance to the service station. Defendants, on the other hand, insist that it was not "practicable" to stop or leave the truck other than on the paved portion of Plainfield. They point to the curbing of Plainfield; to the want of the usual shoulder strip of a paved way; to a testified difficulty of driving the truck in and then out of the indicated places, and contend that the statute does not compel a motorist, on penalty of violation thereof, "to drive upon private property" for stopping or parking purposes. So go the respective contentions.

We hold that the successive motions for directed verdict, and the subsequent motion for judgment notwithstanding verdict, were properly denied. The proof viewed favorably to plaintiff as of close of her case (likewise at close of the proofs) made out an even stronger case of actionable negligence on the part of defendants than was shown by the similarly contending plaintiffs in *Graham* v. *United Trucking Service, Inc.*, 327 Mich 694; and *Tracy* v. *Rublein*, 342 Mich 623. In view of our repeated rulings that violation by a motorist of a traffic safety statute, if duly found, amounts to negligence per se, and that the question of causal connection between such violation and the asserted injury is usually one of fact for the jury, we decline further dissertation. The jury, on the proof as received, was authorized to find that defendant Baker did violate the statute and that such violation was an actionable cause of the colli-

sion. This brings us to the more difficult question of jury instruction.

Second: Defendants submitted 24 rather lengthy requests for jury instruction. These are printed in the appellants' appendix and take up 15 pages thereof. Most of them, employing variant yet complementary language of approach, are constructed upon defendants' vigorously argued contention that if it be found that plaintiff's driver "saw or could have seen the defendants' vehicle and had the means at hand to have stopped," then the defendants' negligence, if found as a fact, would not legally constitute a proximate cause of the collision.* Proffered in prominent support are defendants' requested instructions numbered 18 and 19. They read:

"If you find that the defendants' vehicle could have been seen by the driver of the plaintiff's vehicle for a sufficient distance to the south of the defendants' vehicle as the plaintiff's vehicle approached it from the rear and that the driver of that vehicle should have seen it and after he saw it had the means at hand and the opportunity driving at the rate of speed that he was driving to have stopped his vehicle before running into it, then whether or not you find the defendants' vehicle was moving or stopped at the time of the collision, there is no negligence on the part of the defendants that was a proximate cause of this accident under such circumstances and the plaintiff would not be entitled to recover.

"If, ladies and gentlemen of the jury, you find that the driver of the plaintiff's vehicle acting as

* That the reader may comprehend with due accuracy what is pressed upon us, we quote the following from defendants' brief:

"In the case at bar, if the plaintiff's driver saw or could have seen the defendants' vehicle and had the means at hand to have stopped, then the defendants' negligence, if any, would not be a proximate cause of the accident and defendants should not be held liable. This theory of the case was never presented to the jury although the defendants did request charges in this respect."

a reasonably prudent person, driving at the rate of speed that he was driving, could have seen the defendants' vehicle whether it was stopped or moving in time to have stopped his vehicle before running into it, then the plaintiff would not be liable as there is no negligence on the part of the plaintiff that was a proximate cause of this accident."

These requests, with the others mentioned above (all of which—in their submitted form—were denied by the trial judge), are argued as proper for the case on theory that the asserted negligence of Mr. Berry (if found by the jury) might lawfully be found (by the jury) as constituting an "intervening cause" (sometimes and more accurately called a "superseding cause"); one that came into active operation after Baker's negligence occurred and after Baker's negligence ceased its causal effect; all with the effect of relieving defendants from liability to Mrs. Berry. Authorities from some other jurisdictions are cited in support.

Concededly, the presented question—under what circumstances will subsequent causal acts, not attributable to the defendant, relieve the defendant of liability—has given the courts considerable trouble. See Professor Prosser's carefully considered discussion (Prosser on Torts [2d ed], § 48, pp 258, 259). Yet we find no difficulty of solution so far as concerns the particular circumstances of this collision and the applicable weight of authority as reflected in our State and elsewhere. Here the doctrine of foreseeable consequences takes full effect. Here we have a 4-lane super highway designed for heavy, continuous and relatively fast traffic. It is no justifiable place for parked or stopped vehicular obstruction, excepting only in the case of "practicable" necessity. The statute says so. So does the motoring horse sense of those who must and do regularly drive on modern super highways.

Here—and we shall presently come to the rule upon which our declaration is made—it was entirely within the province of the jury to find as a fact, from and on strength of the evidentiary circumstances presented before it, that defendant Baker had good reason to foresee that a northward proceeding motor vehicle might (with or without negligence on the part of its driver) collide with the substantial obstruction he, Baker, had left upon this super highway. As against such foreseeable act or omission of another the jury of right could, and (as we must infer from the verdict) did, find that Baker was under a duty to protect this plaintiff and other similarly situated users of the highway from "that occasional negligence which is one of the ordinary incidents of human life and therefore to be anticipated" (2 Restatement, Torts, § 302, comment 1, p 821). This conclusion is in accord with our holdings in *Graham* and *Tracy, supra,* and with the careful analysis presented in the opinion of then associate and now Chief Justice DETHMERS in *Parks* v. *Starks,* 342 Mich 443, the concise summary of which is as follows (p 448 of report):

"In the instant case the record fairly presented a question of fact as to whether the danger should have been foreseen or anticipated by defendant and whether plaintiff's injuries were the natural and probable consequence of defendant's negligence."

To this we add that requested jury instructions which, in their proposed application to a factual situation as at bar, do not take into account the element of foreseeability of a third party's negligence, are properly rejected. This merely complements the general rule that an intervening negligent act of a third person is not a superseding cause if, in the given case, the defendant at the time of his negligent conduct should have realized or anticipated that a

third person might so negligently act or proceed. Such is the pith of 2 Restatement, Torts, § 447, pp 1196, 1197; likewise the trend of the times. Professor James has recently written for us, under the title "Practical Changes in the Field of Negligence" and under the heading "Expanding Notions of What Is Foreseeable" (37 MSBJ, No 8, August, 1958, pp 10, 13):

"There has been an increasingly broad recognition of foreseeability of harm in situations where, at the turn of the century, courts were likely to deny negligence as a matter of law. Thus, there was formerly considerable reluctance to regard intervening wrongful or criminal acts as foreseeable in law, while today, most courts have no such reluctance where foreseeability is indicated as a matter of fact by the evidence."

Without intending a dictum of approval or disapproval of our decision in *Paquette* v. *Consumers Power Co.,* 316 Mich 501, it is not out of order to say that if we were disposed to apply the matter-of-law rules of *Paquette* to a case like this (where the jury-judged violator of the statute is a *defendant* rather than a *plaintiff*), it would be necessary for *Paquette's* separate reason to hold that the trial judge did not err in denying defendants' said requests. In *Paquette,* under extremely difficult weather conditions affecting or causing the stopping or parking of the Paquette car on the pavement, it was held that the *plaintiff* violator of this statute (Paquette) was guilty of causal negligence as a matter of law. Thus, and hypothetically reversing matters by assuming in the *Paquette Case* that Mrs. Smrchek was riding with her husband in the oncoming car and, on account of injuries suffered in the collision, was the *plaintiff* and Paquette the *defendant,* she on authority of reasoning in *Paquette* would

have become entitled to instruction that Paquette was guilty of causal negligence as a matter of law. This must be so unless we are to say that corresponding rules on corresponding facts apply to *plaintiffs* but not to *defendants*.

If, in *Paquette,* the defendants were entitled to peremptory instruction that Paquette was guilty of causal negligence, why was the present plaintiff not entitled to peremptory instruction that defendant Baker—the violator in more aggravating circumstances than plaintiff Paquette—was guilty of causal negligence? We need not answer the question now. We insert it merely to show that Michigan is more closely aligned with the stated general rule of foreseeability, as applied to the effect of an intervening cause, than with the minority authorities on which defendants rely.

It is ruled on these premises that the requested instructions, aimed as they are toward absolution from liability of defendants on the theory that negligence on the part of Mr. Berry, if found, constituted *the* proximate cause of this collision, are unfounded in law. Hence, such requests were properly rejected by the trial judge. This means that the motion for new trial was rightly denied.

No other question requires discussion. Affirmed, with costs to plaintiff.

DETHMERS, C. J., and CARR, KELLY, SMITH, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

OCTOBER TERM, 1958.

TALIAFERRO *v.* GENESEE COUNTY SUPERVISORS.

1. MUNICIPAL CORPORATIONS—STATUTES—NEW CORPORATION.
   There cannot be at the same time, within the same territory, 2 distinct municipal corporations, exercising the same powers, jurisdiction, and privileges; hence, a new municipality cannot be formed out of, or embrace territory already included within, the limits of an incorporated city, except under statutes providing that on the establishment of the new corporation the corporate existence of the prior corporation shall cease.

2. SAME—NEW CORPORATION INCLUDING EXISTING CORPORATION.
   There is no legal right in a petitioner to an election seeking to incorporate a new city from territory occupied by a duly incorporated city (CLS 1956, § 117.9).

3. SAME—CONSOLIDATION OF CITIES AND TOWNSHIP AREAS.
   It would be necessary to follow the legislative method of consolidation in order to incorporate the territory of 3 existing cities in addition to all of certain townships and parts of others, thereby affording the electors of each city and unincorporated area opportunity to express approval or disapproval of consolidation (CL 1948, § 117.6, as amended by PA 1957, No 210; CLS 1956, §§ 117.7, 117.9).

4. COSTS—PUBLIC QUESTION—NEW CITY INCORPORATION.
   No costs are allowed in mandamus proceeding to compel the county board of supervisors to hold an election for incorporation as a new city territory presently occupied by 3 cities, all of 3 townships and portions of 5 other townships, a public question being involved (CL 1948, § 117.6, as amended by PA 1957, No 210; CLS 1956, §§ 117.7, 117.9).

Original petition for mandamus by Robert L. Taliaferro against the Board of Supervisors of Gen-

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 37 Am Jur, Municipal Corporations § 15.
[3] 37 Am Jur, Municipal Corporations § 21.
[4] 14 Am Jur, Costs § 91; 35 Am Jur, Mandamus § 393.
Amount of attorney's compensation in mandamus proceedings. 143 ALR 787.

esee County to compel vote upon the incorporation of a new city of Flint. Submitted September 19, 1958. (Calendar No. 47,935.) Writ denied October 8, 1958.

White & Newblatt (*Stewart A. Newblatt,* of counsel) and *G. Franklin Killeen,* for plaintiff.

John G. David, Corporation Counsel (*Cozadd & Shangle,* of counsel), for defendant.

KELLY, J. Petitioner seeks this Court's order compelling the board of supervisors of Genesee county to call "a special meeting and thereat resolve to submit to the qualified electors in the territory sought to be incorporated in the petition herein referred to, the question of the incorporation of said territory at the general election to be held on the 4th day of November, 1958."

The petition addressed to the board (filed June 6, 1958) was entitled "Petition for Incorporation of a New City of Flint." This petition sought to create a new city composed of the present cities of Flint, Mt. Morris and Grand Blanc, and all of the townships of Burton, Genesee and Grand Blanc, and a portion of the townships of Mt. Morris, Flint, Mundy, Thetford and Vienna.

The petition was signed by residents of the various cities and townships, as follows:

City of Flint	1,745
Burton township	217
Flint township	166
Genesee township	125
Grand Blanc township	75
Mt. Morris township	120
Mundy township	14
Thetford township	14
Vienna township	12
City of Grand Blanc	19
City of Mt. Morris	54

On August 12, 1958, the board of supervisors adopted the following resolution:

"That the petition for incorporation of a new city of Flint is hereby declared and found to be not in conformity with the provisions of PA 1909, No 279, as amended.* That the signing thereof is insufficient and that the petition contains incorrect statements.

"Be it further resolved that no further proceedings pursuant to said petition be had."

August 13, 1958, petitioner filed petition for mandamus. On the 21st day of August, 1958, this Court entered the following order:

"It is ordered that said defendant, said board of supervisors of Genesee county, do show cause unto this Court on or before September 9, 1958, why a peremptory writ of mandamus should not issue."

August 20, 1958, defendant board filed its brief, and on September 4, 1958, petitioner moved this Court for an order permitting arguments and briefs to be submitted upon typewritten record and briefs, and in said petition stated:

"That your petitioner has asserted in his original petition that said election upon said question of the proposed incorporation is entitled to be scheduled for the general election of November 4, 1958, and for that purpose ballots must be printed and distributed to the various political subdivisions comprising the area sought to be incorporated, and further, that petitions for charter commissioner must be filed within ample time to determine who has qualified to run for that post and to be placed upon the ballot;—therefore, an extreme emergency exists."

On September 4, 1958, defendant filed motion for the granting of a reasonable time for the preparation

* CL 1948 and CLS 1956, § 117.1 *et seq.*, as amended by PA 1957, No 210 (Stat Ann 1949 Rev and Stat Ann 1957 Cum Supp § 5.2071 *et seq.*).—REPORTER.

and filing of briefs. In this motion defendant quoted the following from petitioner's brief:

"It presents to this Court or any other court to which it might have been addressed, question of statutory authority which has far-reaching and spectacular consequences. The importance of the basic legal issue of whether the proposed incorporation may be accomplished under the statute is so great as to require boundless research, inquiry, and preparation. That social, economic, and political consequences of the highest magnitude are involved is undoubtedly recognized by the Court. No one appreciates more than the writer the unfairness of requesting this Court to determine this issue under the pressure of time forced by this mandamus proceeding, which was compelled upon the petitioner through the improper acts of the board in refusing to limit themselves to the authority vested in them by the statute, as to whether or not the statute had been complied with in regard to the form of the petition and the accuracy of the statements therein.

"The improper action of the board has compelled this petitioner to present his mandamus petition without the benefit of presenting evidence in the record as to the reasonableness of the proposed incorporation and the social, economic, political and fiscal necessity for the construction of the statute in the manner which he asserts. The petitioner certainly does not state that the language of the statute should be ignored for the purpose of determining the legality of the incorporation petition, for it is the function of the legislature to foresee the need for such an interpretation. However, to be absolutely candid, the statute is capable and susceptible to both interpretations. * * *

"The conduct of the board, as stated above, forces this Court to determine a proper construction of the statute with such speed as may justifiably be said by the Court to prevent a mature reflection upon the problem. The petitioner feels the Court is justified

under the clear language of the statute to order the board to perform its statutory and ministerial function of submitting the question to the electorate and to save the question of whether such a purpose (incorporation) may be accomplished with territory which includes both unincorporated territory and 3 existing municipal corporations. * * * Therefore, the Court need not decide that which the board seeks to have decided at this time."

Defendant's attorney, under affidavit, states:

"The questions involved are of great magnitude and that representatives of several Michigan municipalities have made inquiry of deponent concerning the same and have expressed the desire of filing *amicus curiae* briefs."

On the 9th day of September, 1958, this Court ordered that "defendant's application for an extension of time to file brief and appendix is denied. Plaintiff's motion for leave to submit case on typewritten briefs and on the pleadings and briefs heretofore filed is granted. It is further ordered that further typewritten briefs by the parties shall be filed with the clerk of this Court and served on opposing counsel on or before September 19, 1958, not less than 10 copies of each such brief to be filed, and that on said date the case shall be submitted for determination. It is further ordered that on or before October 10, 1958, the parties hereto shall cause to be filed in accordance with the Court Rule pertaining thereto* printed copies of their final briefs and a joint appendix, or appendices, containing the pleadings in the cause."

CL 1948, § 117.6, as last amended by PA 1957, No 210 (Stat Ann 1957 Cum Supp § 5.2085), reads, in part, as follows:

* Court Rule No 70, § 2 (1945), as amended October 30, 1956. 347 Mich xxix.—REPORTER.

"Cities may be incorporated or territory detached therefrom or added thereto, or consolidation made of 2 or more cities or villages into 1 city, or of a city and 1 or more villages into 1 city, or of 1 or more cities or villages together with additional territory not included within any incorporated city or village into 1 city, by proceedings originating 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 according to the last preceding United States census, * * * which number shall be in no case less than 100, and not less than 10 of the signatures to such petition shall be obtained from each city, village or township to be affected by the proposed change."

CLS 1956, § 117.7 (Stat Ann 1957 Cum Supp § 5.2086) provides in part:

"Said petition shall accurately describe the proposed boundaries of the city, or of the territory to be annexed thereto or detached therefrom, and if the purpose is to incorporate a new city, it shall represent that the territory described contains not less than 2,000 inhabitants and an average of not less than 500 inhabitants per square mile."

CLS 1956, § 117.8 (Stat Ann 1957 Cum Supp § 5.2087) reads, in part, as follows:

"Said petition shall be addressed to the board of supervisors of the county in which the territory to be affected by such proposed incorporation, consolidation or change of boundaries is located, and shall be filed with the clerk of said board not less than 30 days before the convening of such board in regular session, or in any special session called for the purpose of considering said petition, and if, before final action thereon, it shall appear to said board or a majority thereof that said petition or the signing thereof does not conform to this act, or contains

incorrect statements, no further proceedings pursuant to said petition shall be had, but, if it shall appear that said petition conforms in all respects to the provisions of this act, and that the statements contained therein are true, said board of supervisors shall, by resolution, provide that the question of making the proposed incorporation, consolidation or change of boundaries shall be submitted to the qualified electors of the district to be affected at the next general election, occurring in not less than 40 days after the adoption of such resolution, and if no general election is to occur within 90 days, said resolution may fix a date preceding said general election for a special election on such question."

Petitioner's statement of questions involved (No 1) states:

"Does the petition conform to the provisions of CL 1948, § 117.6, as amended (Stat Ann 1957 Cum Supp § 5.2085), which requires such petition to be signed by qualified electors who are freeholders 'residing within the cities, villages or townships affected thereby to a number not less than 1% of the population of the territory to be affected thereby' when the petition contains only 15 signatures from residents of Thetford township, which has a population of 2,404, 13 signatures from residents of Vienna township, which has a population of 3,993, and 17 signatures from residents of Mundy township, which has a population of 2,694?

"Petitioner says: YES; that the 1% requirement of the statute applies to the total number of signatures upon the petition, only, and not to the cities, villages, and townships on an individual basis."

To incorporate the new city of Flint and carry petitioner's plan to fruition, 3 incorporated cities would be assimilated with an area and population as follows:

1. Flint, with a land area of approximately 29.9 square miles, and a population of 163,143;

2. Grand Blanc, with a land area of approximately 2 square miles, and a population of 998;

3. Mt. Morris, with a land area of approximately 1 square mile, and a population of 2,890.

Defendant insists that the incorporation of the new city cannot be accomplished in the manner proposed and can only be accomplished by a consolidation. Defendant states:

"If a petition were filed with the board of supervisors praying for *consolidation* of the territory described in the present petition, and an election were to be had thereon, the electors and freeholders of each local government would each have to vote in favor of the consolidation before any consolidation could be effected, and if the qualified electors of any 1 of the governmental units voted in the negative, then the entire consolidation would fail as the question voted upon would be the consolidation of the entire group of governmental units.

"It is apparent that the proponents of the petition filed with the supervisors are well aware of the foregoing fact and are well aware that they could never get the approval of each of the governmental units to the consolidation and it is likewise quite obvious that for this reason they have not set forth in their petition that they are seeking a consolidation but they (for their purpose) conveniently state that they are seeking the *"incorporation"* of a city and are attempting by such maneuver to compel the electors and freeholders residing in the 8 townships and the cities of Grand Blanc and Mt. Morris to be included into 1 overall government against their will."

Petitioner answers defendant's contention, by stating:

"The board asserts that the statute means that the only method by which an area which contains more than 1 city can be made into a larger city is by 'consolidation.' As stated, this is merely an assertion. The statute is not clear on this point and that which

the board says is a proper conclusion from the language is only 1 interpretation thereof. It is equally susceptible to the interpretation that a new city may be created from '1 or more cities or villages together with additional territory not included within any incorporated city or village' by incorporation. * * *

"It is urged by the board that this proposed incorporation is invalid because it has never been accomplished in Michigan. This is certainly a very poor reason upon which to base a conclusion that it cannot be done. It is also possible that it has never been done because the problems of a large, urban complex have never faced us before in the light of modern thought and concepts of governmental powers over health and welfare. The Court should not bind itself to the nineteenth century concepts so long as the statute may reasonably justify modern interpretations which advance the health and welfare of the people."

The home-rule act (PA 1909, No 279, as amended) provides in section 1 thereof (CL 1948, § 117.1 [Stat Ann 1949 Rev § 5.2071]) that "each organized city shall be a body corporate," and further provides in section 2 (CL 1948, § 117.2 [Stat Ann 1949 Rev § 5.2072]) that "each city now existing shall continue with all its present rights and powers until otherwise provided by law."

The city of Flint was in existence before the home-rule act of 1909, but the cities of Mt. Morris and Grand Blanc were incorporated under the provisions of the 1909 act, and have existed as cities from 1930 to the present time.

CLS 1956, § 117.14a (Stat Ann 1957 Cum Supp § 5.2093[1]) provides for the dissolution of cities, or the surrender of charters, but no proceedings have ever been held to terminate the charters of Mt. Morris or Grand Blanc.

We held in *Cain* v. *Brown,* 111 Mich 657, that a municipal corporation once created cannot be dis-

solved or cease to exist except by legislative provision or consent, and failure of the people of a village for a term of years to hold an election does not effect a dissolution.

In the case of *Attorney General, ex rel. Hudson,* v. *Common Council of Detroit,* 164 Mich 369 (decided February 1, 1911) we held (pp 377, 388):

"At the very outset of the act it is provided:

" 'Sec. 2. Each city now existing shall continue with all its present rights and powers until otherwise provided by law.'

" 'Until otherwise provided by law' can scarcely be said to refer to subsequent sections of the act itself, but must be held to refer to some future law. * * * This construction is in harmony with the letter and spirit of the Constitution (1908) to provide a municipal constitution for all cities, in conformity with the fundamental principles of which and the Constitution and general laws of the State each city may govern itself according to the judgment of its electorate."

62 CJS, Municipal Corporations, § 85, p 202, states:

"There cannot be at the same time, within the same territory, 2 distinct municipal corporations, exercising the same powers, jurisdiction, and privileges. Hence, a new municipality cannot be formed out of, or embrace territory already included within, the limits of an incorporated town, village, or city, except under statutes providing that on the establishment of the new corporation the corporate existence of the prior corporation shall cease."

CLS 1956, § 117.9 (Stat Ann 1957 Cum Supp § 5.2088) reads:

"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. * * * This section

shall not be construed so as to give any city the authority to proceed hereunder to attach territory from any other city unless the question relative thereto has been voted upon by the voters of the entire cities affected."

We commend counsel for the petitioner and defendant for the complete and carefully prepared briefs they have submitted. We see no necessity for additional briefs. We cannot agree with petitioner that we should order the election to be held and subsequent thereto determine whether said election met statutory requirements.

In determining legislative intent from the statutes, we conclude:

(1) That it was not the legislative intent that petitioner had the legal right to an election seeking to incorporate territory into a new city from territory occupied by a duly incorporated city;

(2) That to achieve a result such as is sought by petitioner, the legislative method of consolidation would have to be employed, giving to the electors of the several cities and unincorporated areas the opportunity, by a majority vote in each city and unincorporated area, to express approval or disapproval of consolidation;

(3) That if the legislature had intended otherwise, said intent would have been expressed in clear and definite language.

There is no necessity of determining the other questions presented by petitioner.

Petitioner's prayer for writ of mandamus is denied. No costs, a public question being involved.

DETHMERS, C. J., and CARR, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

HARMSEN *v.* FIZZELL.

ON REHEARING.

1. INFANTS—ABANDONMENT BY PARENT OR GUARDIAN—JURISDICTION OF PROBATE COURT.

   The probate court would be vested with jurisdiction as to minor children whose parents or guardian are alleged to have abandoned them or who were otherwise without proper custody or guardianship (Const 1908, art 7, § 13; CLS 1956, § 712A.2; CL 1948, §§ 712A.11).

2. SAME—WAIVER OF NOTICE—COLLATERAL ATTACK.

   A waiver of service of process or notice of hearing, signed by attorney for mother in proceedings as to dependent and neglected children, while subject to attack by mother, if unauthorized, would not be subject to collateral attack by father in habeas corpus proceeding to obtain custody of his children following his release from mental hospital (CL 1948, § 712A.12).

3. SAME—DEPENDENT AND NEGLECTED CHILDREN—JURISDICTION OF PROBATE COURT—COUNTY AGENT'S REPORT.

   A statutorily-authorized report of the county agent, based upon investigation of facts alleged in petition relative to dependent and neglected children constituted a proper basis for the probate court's acceptance of jurisdiction, where service of notice of hearing on the petition had been made upon the

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children § 37.

[2] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children §§ 64, 65.

Right of parent to notice and hearing before being deprived of custody of child. 76 ALR 242.

[4] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children § 87.

[5] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children §§ 80, 86.

[6] 25 Am Jur, Habeas Corpus § 80; 27 Am Jur, Infants § 108.

[7] 25 Am Jur, Habeas Corpus § 80.

[8] 25 Am Jur, Habeas Corpus § 78.

father, then committed to a mental hospital and service upon mother had been waived and there was an absence of dispute over any jurisdictional fact (Const 1908, art 7, § 13; CLS 1956, § 712A.2; CL 1948, §§ 712A.11–712A.13, 712A.17).

4. SAME—DEPENDENT AND NEGLECTED CHILDREN—ORDER OF PROBATE COURT—JURISDICTION.

An order of the probate court taking jurisdiction over dependent and neglected children upon petition, as to which notice of hearing had been given, and which sought to give that court temporary custody was a final and appealable order (Const 1908, art 7, § 13; CLS 1956, § 712A.2; CL 1948, §§ 712A.11–712A.13, 712A.17).

5. SAME—JURISDICTION OF PROBATE COURT—CUSTODY OF DEPENDENT AND NEGLECTED CHILDREN.

An order of the probate court taking jurisdiction over minor children as dependent and neglected children, pursuant to petition to give the court custody, but which order failed to state whether the custody was temporary or permanent as required by statute was, therefore, defective and voidable, but not void, where the facts plainly show the probate court had jurisdiction as to the children and he was authorized by statute to assume jurisdiction (Const 1908, art 7, § 13; CLS 1956, § 712A.2; CL 1948, §§ 712A.11–712A.13, 712A.17).

6. SAME—CUSTODY.

The paramount consideration in all cases involving the custody of children is always what is demanded by the child's best interests.

7. HABEAS CORPUS—CUSTODY OF CHILDREN—EQUITY.

Habeas corpus is essentially equitable in its nature when it involves the custody of a child.

8. SAME—CUSTODY OF CHILDREN—BURDEN OF PROOF.

Record in father's habeas corpus proceeding to recover custody of his minor children after his release from a mental hospital *held*, to show that his petition should have been dismissed, where it appears essential to the well-being of the children that he make a showing of reasonable continuity of mental stability, of capacity for steady employment, and of the existence of a legally-constituted family and home wherein there is a reasonable possibility of proper care for his children.

DETHMERS, C. J., and CARR and KELLY, JJ., dissenting.

Appeal from Berrien; Robinson (Thomas N.), J. Submitted on rehearing April 18, 1958. (Docket No. 98, Calendar No. 47,013.) Decided July 15, 1958. Rehearing denied September 9, 1958. Certiorari denied by Supreme Court of the United States January 19, 1959.

Habeas corpus by Gordon L. Harmsen against Deane Fizzell, Theo Fizzell, William Johnston, and Donna Johnston to obtain return of his children into his custody. Orders granting plaintiff custody. Defendants appeal. Reversed.

A. H. Lee, for plaintiff.

James L. Colman, for defendants Fizzell.

A. G. Preston, Jr., for defendants Johnston.

CARR, J. (*dissenting*). This case was first submitted at the June, 1957, term of Court. On December 24, 1957, the holding of the circuit judge was sustained by a 4-to-4 decision, Mr. Justice SHARPE writing for affirmance. The case is reported 351 Mich 86. Following the retirement of Justice SHARPE on December 31st last, a motion for a rehearing was granted by a divided Court and the cause has again been submitted at the present term on the briefs and appendices of counsel originally filed.

When the case was previously before us the issues of fact involved were thoroughly considered and discussed. In his opinion Justice SHARPE set forth the legal principles at issue and his reasons for upholding the action of the circuit court. I am in accord therewith. No purpose would be served by restating those reasons or enlarging thereon. The prior disposition of the case should not be changed on rehearing.

The order of the circuit court should be affirmed, with costs to appellee.

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

EDWARDS, J. This matter came before the Court for decision on December 24, 1957, with the result of affirmance of the action of the circuit judge by an equally-divided Court, with Mr. Justice SHARPE writing for affirmance and the writer for reversal.

Subsequent thereto timely application for rehearing was filed and, with a change in the composition of the Court, was approved by a 5–3 vote on March 4, 1958.

The previous decision involved 2 legal issues of some import: First, whether a writ of habeas corpus may properly be used to attack procedural errors in a neglect case before the juvenile court, involving temporary custody of children, when the record clearly shows jurisdiction to hear and dispose of the case; and, second, whether in a habeas corpus proceeding pertaining to child custody, the circuit judge hearing same must, while giving consideration to the rights of a petitioning parent, take into account also the best interest and welfare of the child.

The opinion entered by the writer in *Harmsen* v. *Fizzell,* 351 Mich 86, and signed by 3 other members of this Court, answered the first question in the negative and the second in the affirmative. For the purpose of decision of this case on rehearing, the prior opinion is incorporated herein by reference.

The judgment of the circuit court is reversed. Costs to appellants.

KAVANAGH, J., concurred with EDWARDS, J.

SMITH, J. (*concurring*). This case involved the grant or denial of a writ of habeas corpus. The only issue involved in the case, as in all habeas corpus cases, was the jurisdiction of the court, here the

jurisdiction of the juvenile division below. We held that there was jurisdiction. With this holding we again express our concurrence. The great historic writ is a "palladium of liberty," not a mere writ of error. Once a court has the parties and the subject matter properly before it, as did the juvenile division in this case, its jurisdiction is not so feeble that it comes or goes with procedural errors made or resisted, objections claimed or foregone, proofs withheld or deficient, judgment sound or judgment reversible. Thus we properly denied the writ and upheld the involved jurisdiction of the Berrien county probate court.

The matter of probate court jurisdiction, sitting in juvenile division, will be found discussed in more detail in the case of *Fritts* v. *Krugh,* 354 Mich 97.

Reversed. Costs to appellants.

BLACK and VOELKER, JJ., concurred with SMITH, J.

SOVEREIGN *v.* SOVEREIGN.

1. APPEARANCE—SPECIAL APPEARANCE—JURISDICTION—GENERAL APPEARANCE.

   A party who filed a special appearance and then asked the court to hold the matter is *res judicata*, that no cause of action has been stated and that the merits are such that plaintiff did not come into court with clean hands, did not thereby deny jurisdiction of the court but invoked it and thereby effected a general appearance.

2. EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

   Generally, equity will not entertain jurisdiction where by statute a full and adequate legal remedy has been provided.

3. SAME—JURISDICTION—CUSTODY OF CHILDREN.

   A court of chancery has jurisdiction to determine the custody of a child whose separated parents unsuccessfully sought to obtain a divorce and each dispute the other's right to custody of boy born in 1948, there being no specific statutory remedy available in any court.

Appeal from Bay; Louis (David R.), J. Submitted October 16, 1957. (Docket No. 77, Calendar No. 47,363.) Decided October 13, 1958.

Petition by Will F. Sovereign against Mary K. Sovereign, originally for annulment, amended to ask determination of custody of child independent of

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appearances §§ 10, 16.
[2] 19 Am Jur, Equity § 101.
[3] 17A Am Jur, Divorce and Separation § 827; 19 Am Jur, Equity § 152.

Power of court which denies divorce or legal separation to award custody or make provision for support of child. 113 ALR 901, 151 ALR 1380.

any other proceeding. Petition dismissed. Plaintiff appeals. Reversed and remanded.

Poppen, Street & Sorensen (*Harold M. Street,* of counsel), for plaintiff.

Amici curiae:

Paul L. Adams, Attorney General, *Stanton S. Faville,* Chief Assistant Attorney General, *Samuel J. Torina,* Solicitor General, and *Maxine Boord Virtue,* Assistant Attorney General.

Jason L. Honigman, Chairman of the Civil Procedure Committee of the Judicial Conference.

Charles W. Joiner, Chairman of the Committee on Civil Procedure, State Bar of Michigan.

SMITH, J. (*concurring*). The case before us squarely presents this issue: Does a court of chancery have jurisdiction over the allegedly abused or neglected children of a marriage if the bill filed is addressed solely to their welfare and contains no prayer for annulment or divorce? To put it in other terms, is chancery jurisdiction as to custody of such children only subordinate and ancillary to some other well-recognized subject of equity jurisdiction? Or, in the alternative, is the custody of such children, in and of itself, a proper sphere of equitable jurisdiction? We can conceive of few topics of equal importance to our people as the divorce rate soars and as the children of the marriage are cast without.* A few such tragedies are too many. When tens of thousands are affected it becomes a national re-

* An estimated 382,000 divorces and annulments were granted in 1956, special report of the United States Department of health, education, and welfare, national office of vital statistics, Vol 48, No 3, April 9, 1958.

proach. We approach the issue tendered with humility, consoled only by the thought that in our scheme of things such decisions must of necessity be made by those on the woolsack, however imperfect their attainments.

The action before us, in chancery, comes to us from the county of Bay, the residence of petitioner Will F. Sovereign. The petition prayed annulment of his marriage to Mary K. Sovereign, determination of property rights, award of custody of their son, Will F. Sovereign, Jr. (born January 1, 1948, now with the defendant-mother), and injunctive relief. These prayers were coupled with the traditional invocation of the chancellor's powers, "such other and further relief as shall appear agreeable to equity and good conscience." Process was served personally upon the defendant in the city of Saginaw by Deputy Sheriff Howard Maturen. No question is raised as to the validity of the service. Defendant thereafter entered "a special appearance * * * for the sole purpose of making a motion to dismiss the petitioner's petition to annul marriage, award custody, and determine property rights, for the following reasons:

"(1) The subject matter of said suit is barred by a prior decree.

"(2) The petition does not state a cause of action.

"(3) The court does not have jurisdiction.

"(4) The petitioner does not come into court with clean hands.

"This motion is based upon the files and records of this cause and the files and records of the case of Mary K. Sovereign *v.* Will F. Sovereign, in the circuit court for the county of Saginaw, in chancery, Case No. 29,905, and the opinion of the Supreme Court of the State of Michigan reported in 347 Mich 205, and upon the affidavit of Mary K. Sovereign, hereto annexed."

These parties have been before our Court upon a prior occasion. In the case of *Sovereign* v. *Sovereign,* 347 Mich 205, we reversed the decree of divorce (and order amending the same) entered below and held that "decree may enter here dismissing" the bill, brought by the wife, and the cross bill. In the case at bar, in the hearing upon the motion above described, defendant argued that (in view of the former divorce action) the doctrine of *res judicata* barred the action before the Court. Petitioner, however, conceding that "the main purpose of this petition is to determine custody," stated that in view of defendant's opposition he would "amend and withdraw the annulment and property settlement angle and leave it solely as a petition to determine custody."

Before proceeding to our consideration of the arguments made in support of the parties' respective positions, we will note that we find no need to rule upon a point raised by *amici curiae* that jurisdiction over the child may have remained in the chancellor who heard the former divorce action despite our dismissal of the bill and cross bill. The parties have not urged this position and we find nothing in the pleadings, orders, or decree suggesting such attempted retention of jurisdiction. The matter of continuing jurisdiction under these circumstances is cloudy and confused and much may depend upon the essence of the relief asked by the parties, that is, whether in the particular case custody is merely incidental to divorce, or divorce incidental to custody. See *Urbach* v. *Urbach,* 52 Wyo 207 (73 P2d 953, 113 ALR 889). The cases pro and con will be found in an annotation to the *Urbach Case,* in 113 ALR 901.

Petitioner's bill having relied, in part, upon CL 1948, § 722.541 (Stat Ann 1957 Rev § 25.311),* defendant first urged that the petition "does not state a cause of action nor does the court have jurisdiction" under such statute independent of a divorce or separate maintenance proceeding. Petitioner, while not conceding the inapplicability of the statute, argued in reply that even without statute, chancery had jurisdiction, pointing to the fact that the home was irrevocably broken, the parties living apart, the boy's welfare endangered and that he was vulnerable to successive pullings and haulings as the parents each in turn might seek to gain his custody by stratagem, wile, or force. A court of chancery, petitioner asserted, "stands virtually open as to a minor child whose interests are involved. * * * We have a boy here who has a future ahead of him, who needs to be protected, and I am calling upon the court of chancery to do that." The court, however, in a careful and thoughtful summary of the law, disagreed, pointing out considerations of public policy militating against awards of custody in event of minor or temporary disagreement between the parents, there being no proceeding pending for divorce or separate maintenance, and suggesting the possi-

* "Sec. 1. That in case of the separation of husband and wife having minor children, the mother of said children shall be entitled to the care and custody of all such children under the age of 12 years, and the father of such children shall be entitled to the care and custody of all such children of the age of 12 years or over: Provided, That any probate court or any court of competent jurisdiction may, on petition and hearing thereof, make and enforce such order or orders as it may deem just and proper as to the care and custody of such minor children, excepting in cases where an order or decree may have been made by any court in chancery, regarding such children: And provided, further, That nothing in this act shall prevent any court of competent jurisdiction from making and enforcing any such order or orders as it may deem just and proper as to the care and custody of such minor children in the same manner and with like effect as it could if this act had not been passed."

bility of relief in the probate court. An order dismissing the petition was thereupon entered.

A procedural point must first be settled. In response to the petition and summons, defendant entered what was captioned a "special appearance." The special appearance is an anomaly, a tribute to the ingenuity of the common law. The defendant, in an action *in personam,* is permitted to walk before the bar of justice and argue that he is not there. Obviously this requires a sort of magic. We find it in the utterance of certain words ("I appear before you specially") but it is a tricky business because if he does certain things regarded as inconsistent with his incantation (such as arguing the merits) the magic is gone, the hour has struck, and he is legally, as well as physically, present. The device serves, however, a useful purpose. It permits a litigant to test the validity of the legal proceedings themselves prior to shouldering the not inconsiderable burdens of time and money required for the litigation on the merits.* A defendant, in other words, is entitled to challenge jurisdiction prior to trial on the merits.

Nevertheless the word "jurisdiction" remains and we must again address ourselves to it. Its loose use only betrays us into error. Thus defendant asserted in *Buczkowski* v. *Buczkowski,* 351 Mich 216, that the court had no "jurisdiction" (actually meaning that it was in error) to make a certain disposition of property, although the persons and the subject matter were properly before the court. We there pointed out that, given these elements, the court had jurisdiction in the legal sense, and, as far as its alleged error was concerned, if it had jurisdiction to hear and decide it also had jurisdiction to make

* See, generally, Wright, Recent Legislation Affecting the Defendant's Appearance in Court, p 223, in Current Trends in State Legislation, 1953–1954, published under the auspices of the legislative research center of the University of Michigan Law School.

a mistake. In the matter before us, similarly, we are faced with the meaning of the word "jurisdiction." It is elementary that in an action *in personam* (as distinguished from an action *in rem,* or *quasi in rem,* with neither of which we are here concerned) a court must have jurisdiction over the person and jurisdiction over the subject matter. As to the former, a defendant may assert that he was never properly served, a problem of some complexity with respect to persons who exist only in the eyes of the law, such as corporations. No claim of defect in service is made here. As to subject matter, "jurisdiction" is concerned with the type of action the court is empowered to hear and decide. Thus a probate court has no "jurisdiction" over a bill to quiet title. The assertion of both such defects (*i.e.,* person and subject matter) we have held, may, under Court Rule No 18 (1945) be joined without constituting a general appearance (*Woodliff* v. *Baker,* 279 Mich 356) though the weight of authority in the courts of the nation having passed on the issue is to the contrary. Further than that, however, we do not go. If the defendant asks other relief, which can be granted only upon the hypothesis that the court has jurisdiction, he has made a "general appearance." *Miollis* v. *Pure Milk Association,* 302 Ill App 115 (23 NE2d 582) (a motion to strike on the ground that a cause of action had not been stated held to invoke the jurisdiction of the court on the merits); *Stubblefield* v. *Warren County,* 170 Tenn 211 (93 SW2d 1269) (defense of statute of limitations held to be upon the merits and amounting to a general appearance); *Grieve* v. *Huber,* 38 Wyo 223 (266 P 128) (plea of former final judgment bore such "substantial relation to the cause" as to amount, in conjunction with other pleas, to a general appearance). We are not bemused by the form of words used, by the caption as special or general. We look to the relief asked.

Here the defendant asks the court to hold that the matter is *res judicata,* that no cause of action has been stated, and that the merits are such that plaintiff did not come into court with clean hands. In so asking, defendant is not, in truth, denying jurisdiction but invoking it, not denying the court's power to hear and decide issues going to the merits, but insisting that the court do just that. The appearance made was a general appearance.

We come now to the heart of the case. All parties involved are before the chancellor, father, mother and child. The prayer for annulment has been stricken from the bill, as well as that for division of property. What remains is a naked prayer for custody. It is asserted that the father and mother have been living apart for some 5 years, that a decree of divorce has been denied them, that the mother is associating the child with "an ex-convict and a man of utterly dissolute character * * * [with whom she has] maintained an illicit and adulterous relationship," that she has neglected the child, is morally unfit for his custody, and has concealed his whereabouts upon the occasion of his father's attempted visits. Although answer was not filed, we deem it proper to note that the mother filed an affidavit in support of her motion to dismiss in which she stresses the school and church affiliations of her son and sets up allegations which, if true, reflect adversely upon the father. A counteraffidavit, also, was filed by the father, traversing certain of the mother's allegations. The picture painted, in its entirety, is dark and somber. When we read that (upon the occasion of one attempted visit) the father "could hear his son crying in the bedroom, but defendant refused to come to the door or permit the boy to see his father," we are sensitive to the anguish of the father, and the distress of the mother, but we are even more sensitive to the plight of the child. In

this situation does the chancellor have, in the technical and legal sense, "jurisdiction" to make a custodial order as to the child? Or, is he without jurisdiction of the subject matter, in the same legal position as a traffic referee who might purport to grant a divorce? If, moreover, such jurisdiction exists, what is its source?

In the resolution of these questions, of such transcending importance to our people, we have had the assistance of briefs *amici curiae,* filed, at our request, by the attorney general, by the Honorable Jason L. Honigman, chairman of the civil procedure committee of the judicial conference, and by Professor Charles W. Joiner, chairman of the committee on civil procedure of the State Bar of Michigan. We acknowledge our debt to their research.

Our first inquiry relates to petitioner's prayer in his bill that custody of the minor child be awarded petitioner pursuant to the provisions of CL 1948, § 722.541 (Stat Ann 1957 Rev § 25.311). This section of our statute (quoted in full, *supra*) provides, in part, that "in case of the separation of husband and wife having minor children, the mother of said children shall be entitled to the care and custody of all such children under the age of 12 years, and the father of such children shall be entitled to the care and custody of all such children of the age of 12 years or over."

The proper interpretation of this section involves much of history. Contained in its few phrases are years of struggle. Adequate description of the status of women in the home and in society during the years of development and growth of our early common law requires a Shakespearian, not a judicial, pen. The picture we receive, sketchy as it is, of late 16th and early 17th century women is, by today's standards, a depressing one. She was regarded as a creature (the choice of words is not our own) of lim-

ited intellectual attainments or possibilities. Education was largely denied her. There were few schools for even the girls of the wealthier families and the training given in those was limited to that of a "polishing nature, music and the arts." There was almost no opportunity for the rigorous intellectual discipline given to young men. They were married young, pawns in their father's hands for the attainment of title or prestige. They could not possibly hope to reach, in fact, they were not "meant" to reach, intellectual equality with their husbands. Their existence, socially and economically, pivoted around that of a dominant husband, authoritarian and paternalistic.[1]

Such being the predominant social and moral beliefs, rare indeed were the circumstances under which a court of law would interfere with a father's custody of his infant children. The father's claims were so exclusive that a comparison with the position of the *pater familias* in Roman law, with its right to sell the child in the open market, or even put to death,[2] inevitably comes to mind. The English father might, if he wished, deny the mother access to the child during his life (*Ball* v. *Ball,* 2 Sim 35 [57 Eng Rep 703]). And even after death his withered hand might prevent their reunion through his appointment of a testamentary guardian under the authority of the statute, 12 Car 2, c 24,[3] as amended by the wills act of 1837.[4] As stated by Lord Chancellor Cottenham in *Talbot* v. *Earl of Shrewsbury,* 4 Myl & Cr 672, 683 (41 Eng Rep 259), "It is proper that

[1] The English Woman, 1580–1650, by Wallace Notestein, pp 69–107, from Studies in Social History, edited by J. H. Plumb. Longmans, 1955.

[2] Hunter, Introduction to Roman Law (9th ed, 1934), p 30, cited in Selected Essays on Family Law (1950), p 609.

[3] See section 8, 20 Halsbury's Statutes of England (2d ed), p 374.—REPORTER.

[4] A Century of Family Law, 1857–1957, edited by Graveson and Crane, pp 59, 60.

mothers of children thus circumstanced [*i.e.,* where the father had appointed a testamentary guardian] should know that they have no right, as such, to interfere with testamentary guardians." Not surprising, then, the holdings in such cases as the *DeManneville Cases** where the mother left the father shortly after the birth of the infant "on account, as she alleged, of ill-treatment, and kept the child whom she was nursing with her." The husband, however, "found means, by force and stratagem, to get into the house where she was, and had forcibly taken the child then at the breast, and carried it away almost naked in an open carriage in inclement weather; with a view, as the mother apprehended, of taking it out of the kingdom." The court hearing the habeas corpus, was clear as to the law: "But he is the person entitled by law to the custody of his child" and it was held, *per curiam,* that "the child be remanded to the custody of the father." (*Rex* v. *DeManneville,* 5 East 221, 223, 224, *supra.*)

Much of the cruelty of the early law was modified by statute† in England, and an enlightened public conscience found expression in other countries as well. It was in the same year as the passage of the custody of infants act, *supra,* that our legislature passed PA 1873, No 192, providing as follows:

"Sec. 1. That in case of the separation of husband and wife, having minor children, the mother of said children shall be entitled to the care and custody of all of such children under the age of 12 years; and the father of such children shall be entitled to the

* *Rex* v. *DeManneville,* 5 East 221 (102 Eng Rep 1054); *DeManneville* v. *DeManneville,* 10 Ves Jr 52 (32 Eng Rep 762).

† Talfourd's act of 1839; custody of infants act of 1873, cited in 1 Schouler, Marriage, Divorce, Separation and Domestic Relations (6th ed) (1921), § 742.

See 2 & 3 Vict (1839), ch 54, repealed by custody of infants act, 1873, 36 & 37 Vict, ch 12, section 1 of which was repealed as no longer necessary by Stat Law Revision (No 2), 1893, 56 & 57 Vict, ch 54. See, also, 12 Halsbury's Statutes of England, p 940.

care and custody of all of such children of the age of 12 years and over: *Provided,* That nothing in this act shall prevent any court of competent jurisdiction from making and enforcing any such order or orders as it may deem just and proper as to the care and custody of such minor children, in the same manner and with like effect as it could if this act had not been passed."

In 1879 the statute was amended by PA 1879, No 163 to its present form by the addition of a new proviso clause inserted immediately before the original proviso clause (and by the insertion of the word "further" in the original proviso clause) stating:

"Provided, That any probate court or any court of competent jurisdiction may, on petition and hearing thereof, make and enforce such order or orders as it may deem just and proper as to the care and custody of such minor children, excepting in cases where an order or decree may have been made by any court in chancery, regarding such children."

It is clear that this statute was not a statute conferring jurisdiction. The legislature's awareness of existing jurisdictions is shown in the original act as well as its amendment. It was the purpose of this statute to temper the harshness of the early common law which had so favored the father's custodial position, even though in this country the doctrine had never attained the full sweep and authority of the early English law. (Tiffany, Domestic Relations [3d ed], p 344.) Petitioner's reliance, then, upon this statute, as a source of jurisdiction in chancery is misplaced. It is directed at custody. It confers no jurisdiction. (It is clear, also, that it does not operate to restrict chancery's jurisdiction respecting child custody. *Smith* v. *Ritter,* 292 Mich 26, 29; *Davis* v. *Davis,* 296 Mich 711, 713; *Johnson* v. *Johnson,* 318 Mich 21, 24.)

It must not be thought, however, that during the period of the English law, above described, chancery stood idly by, lamenting its impotence. "From an early date * * * the court of chancery exercised jurisdiction to control the father's legal right to his child, so far as such right existed, and where for immorality or other reason the father was an unfit person to have the custody of the child, it was given to another, the welfare of the child being the controlling consideration." Long, A Treatise on the Law of Domestic Relations (3d ed), § 267. One of the leading cases of the later period was that of *Wellesley* v. *Duke of Beaufort,* 2 Russ 1 (38 Eng Rep 236) (see, also, *Wellesley* v. *Wellesley,* 2 Bligh [NS] 124 [4 Eng Rep 1078]) ruling upon a most incredible set of facts. Here the father, both diseased and dissolute, guilty of abuse and ill-treatment of his wife, living in adultery, sought for his children the companionship of others "of the most depraved habits," and deliberately endeavored to train the children in habit and speech, it was testified, so as to "inevitably destroy their moral and civil characters." The lord chancellor's intervention on behalf of the children was unanimously affirmed by the house of lords. On the matter of jurisdiction Lord Redesdale first analogized the father's position with respect to his child, to that of a trustee. "Why," he asked, "is the parent entrusted with the care of his children? Because it is generally supposed he will best execute the trust reposed in him; for that it is a trust, of all trusts the most sacred, none of your lordships can doubt." (*Wellesley* v. *Wellesley, supra,* 128.) He then denied that the father "has that absolute right, which is contended for at the bar" and stated (pp 129, 130), "We find that now, for 150 years, the court of chancery has assumed an authority with respect to the care of infants." Lord Manners was equally explicit, holding (pp 141–143):

"With respect to the first question, I acknowledge I have not attempted to explore the origin, or to ascertain the commencement of the jurisdiction. If I had so done, I should have been anticipated in every thing which might have been said usefully upon the subject, by my noble and learned friend; for it seems to me, indeed, abundantly sufficient for the purpose of this case, that this jurisdiction has been uniformly asserted and repeatedly exercised by successive chancellors for a period of more than a century. I have looked into the cases referred to on the subject, to discover if any chancellor hesitated, or has entertained a doubt as to this jurisdiction. I do not find, from the time of Lord Nottingham to the present day, that any doubt has been stated by the court with respect to the existence of such a jurisdiction. It has, then, become the established jurisdiction of the court; it has become the practice of the court, and as such, a part of the law of the land. Indeed, it is a strong confirmation of this jurisdiction, that, on a writ of habeas corpus being applied for by the father, to have the children restored to him, in the court of king's bench, that court enquires whether they are wards of the court of chancery, and whether there are any proceedings in that court respecting them. If the court of king's bench finds there are such proceedings, it declines to grant the writ. This would be a dereliction of their duty if no such jurisdiction exists; this seems to be a strong judicial recognition of the existence of this jurisdiction, to be exercised by the chancellor in the court of chancery. Upon that ground, therefore, I can entertain no doubt. There was an observation of Mr. Brougham on the subject, that the jurisdiction could not exist, because you could not ascertain the limits of it. That objection applies to every case where there is a discretion in the judge; where the result of the facts is not a question of law, but a question of discretion. It is therefore impossible to say what are the limits of that jurisdiction; every case must depend upon its own circumstances. With respect to the juris-

diction, I should agree with Lord Thurlow, that it is too well established, to be open to question." *Wellesley* v. *Wellesley* (1828).

It is from this historical and equitable background that we find Mr. Justice Cardozo holding, in *Finlay* v. *Finlay,* 240 NY 429, 433 (148 NE 624, 40 ALR 937):

"If we were to assume with the plaintiff that the writ has been denied to him, there would remain his remedy by petition to the chancellor or to the court that has succeeded to the chancellor's prerogative (*Queen* v. *Gyngall,* [1893] 2 QBD 232; *In re Spence,* 2 Phillips 247, 248 [41 Eng Rep 937]; *Wilcox* v. *Wilcox,* 14 NY 575; *Matter of Knowack,* 158 NY 482 [53 NE 676, 44 LRA 699]; *Power* v. *Power,* 65 NJ Eq 93 [55 A 111]). Nothing in the habeas corpus act affects that jurisdiction, inherent in courts of equity, or changes or diminishes the remedy available. * * *

"We find no sufficient reason for discarding this historic remedy and establishing in its place, or even as a supplement, a remedy by action. The difference is more than formal. The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate and careful parent' (*Queen* v. *Gyngall, supra*), and make provision for the child accordingly."

To the same effect is the holding of the Missouri court in *In Matter of Badger,* 286 Mo 139 (226 SW 936, 14 ALR 286), the court holding (pp 145–147, 149):

"These cases * * * will be found to authorize the conclusion that courts of equity, clothed as they are with this general power, may include in its exercise the determination of the personal rights of in-

fants. If this conclusion be correct, jurisdiction in the instant case may properly be predicated thereon.

"But if resort be had to the illogical refuge that the exercise of the court's power as applied to the case at bar, is not included within and made a part of its general power, then the propriety of that exercise may be sustained on the ground that the protection of infants, even from their parents, is one of the exceptions to the limitation under discussion and constitutes one of the well-established grounds for the exercise of equity jurisdiction in the protection of personal rights. *Shelley* v. *Westbrooke,* Jacob Ch 266 (37 Eng Rep 850); *Warde* v. *Warde,* 2 Phill Ch 786 (41 Eng Rep 1147); *Creuze* v. *Hunter,* 2 Cox Ch 242 (30 Eng Rep 113, 2 Ves Jr 157, 30 Eng Rep 570); *Thomas* v. *Roberts,* 3 DeG & S 758 (64 Eng Rep 693, 19 LJ Ch NS 506); *State* v. *Grisby,* 38 Ark 406; *Cowls* v. *Cowls,* 3 Gilm (8 Ill) 435 (44 Am Dec 708); *State* v. *Stigall,* 22 NJL 286; *People, ex rel. Wilcox,* v. *Wilcox,* 22 Barb (NY) 178; *Ward* v. *Roper,* 7 Humph (26 Tenn) 111; *State* v. *Baird,* 21 NJ Eq 384; *Striplin* v. *Ware,* 36 Ala 87; *In re Flynn,* 2 DeG & S 457 (64 Eng Rep 205); *Eyre* v. *Countess of Shaftesbury,* 2 P Wms 103 (24 Eng Rep 659), as annotated, 2 White & Tudor, Leading Cases in Equity (4th Am ed), pp 1416, 1446.

"Whether this jurisdiction had its origin in the fiction of the right of the king as *parens patriae,* to which we referred approvingly in *State, ex rel. Cave,* v. *Tincher,* 258 Mo 1 (166 SW 1028, Ann Cas 1915D, 696), which right it is contended reverted to the king as the general protector of all the infants in the realm after the abolition of the court of wards (3 Blackstone's Commentaries, p 426; 2 Fonblanque, Equity, bk 2, pt 2, ch 2, § 1, note *a*;* *Eyre* v. *Countess of Shaftesbury,* 2 P Wms 103, 118 [24 Eng Rep 659, 664]; *Wellesley* v. *Wellesley,* 2 Bligh [NS] 124, 136 [4 Eng Rep 1078]; *Wellesley* v. *Duke of Beaufort,* 2 Russ 1, 20 [38 Eng Rep 236]; *Cary* v. *Bertie,*

* See Fonblanque, Equity (Ballow) (4th Am ed by Laussat), book 2, pt 2, ch 2, § 1, note *a,* p 468.—REPORTER.

2 Vern 333 [23 Eng Rep 814]; *Morgan* v. *Dillon,* 8 Mod R 135 [88 Eng Rep 361]; *DeManneville* v. *DeManneville,* 10 Ves Jr 52, 63 [32 Eng Rep 762]; *Ex parte Phillips,* 19 Ves Jr 118 [34 Eng Rep 463]); or that it arose from considering guardianship in the nature of a trust, and trusts being the favored objects of equity, that the jurisdiction had this broad general foundation (*Duke of Beaufort* v. *Berty,* 1 P Wms 703, 705 [24 Eng Rep 579]; 3 Story, Equity Jurisprudence [14th ed], § 1745 and notes); or that it had its origin in one of the old common-law writs in relation to wards (Coke Litt 89a, Hargrave's note 70, 186b; 2 Fonblanque, Equity, bk 2, pt 2, ch 2, § 1); or that it was originally an usurpation for which the best possible excuse was that it afforded opportunity for the beneficent exercise of a power peculiarly equitable in its nature which had not otherwise been sufficiently provided for, is immaterial so far as any of these theories may in a determinative way affect the matter at issue. (3 Story, Equity Jurisprudence, § 1747 and notes.) We have stated them simply to show the manner in which the question has been mooted; even this array will not suffice to cover the entire field of conjecture, for it is at best nothing more, to which resort has been had to account for the origin of this jurisdiction. This much is certain, it exists and has been exercised by courts of equity for more than 2 centuries in England and in the different States of this republic for shorter periods of time but for like reasons and purposes. See English and American cases cited in 3 Pomeroy, Equity Jurisprudence (4th ed), notes 1 and 2 to section 1304, p 3141; *In re Agar-Ellis,* 24 LR Ch Div 317 (53 LJ Ch NS 10, 50 LT NS 161); *In re Elderton,* 25 LR Ch Div 220 (53 LJ Ch NS 258, 50 LT NS 26); 20 RCL, Parent and Child, § 14, p 599; *Neville* v. *Reed,* 134 Ala 317 (32 So 659, 92 Am St Rep 35); *Kelsey* v. *Green,* 69 Conn 291 (37 A 679, 38 LRA 471); *Lally* v. *Fitz Henry,* 85 Iowa 49 (51 NW 1155, 16 LRA 681); *Meritt* v. *Swimley,* 82 Va 433 (3 Am St Rep 115). * * *

"Brushing aside, therefore, these purely technical

questions as to wardship and the possession of property, what are the impelling reasons for the exercise of the jurisdiction of courts of equity in cases as at bar? The welfare of the child, its life, health and moral and intellectual being are, in a proper exercise of the court's power, to be kept well in view in all controversies concerning its custody, care and control. In addition, if the court be imbued with that spirit of patriotism which should always prompt judicial action along with a proper consideration of the rights of litigants, the welfare of the child should be looked to as a future member of society upon whom in the fullness of time will fall its share of the burdens and responsibilities of citizenship. This may be more homiletic than juridical, but is not the judiciary more immediately charged with the public welfare than either of the other coordinate powers of government?"

We agree with the *Badger Case, supra,* that theories differ as to the origin of the jurisdiction of chancery in the premises (see, also, note to *Eyre* v. *Countess of Shaftesbury,* 2 White & Tudor, Leading Cases in Equity (4th Am ed), pp 1416, 1517) but we do not think exhaustive examination of the question would advance our discussion of the issue. As Story notes in his Equity Jurisprudence (10th ed), § 1337, "But, whatever may be the true origin of the jurisdiction of the court of chancery over the persons and property of infants, it is now conceded, on all sides, to be firmly established and beyond the reach of controversy." It is, as he points out in a later section (§ 1342), "a jurisdiction which seems indispensable to the sound morals, the good order, and the just protection of civilized society." Pomeroy (4 Pomeroy, Equity Jurisprudence [5th ed], § 1307) is equally explicit:

"In addition to its power to appoint guardians, the court of equity will also exercise its jurisdiction, in a

proper case, and to promote the highest welfare of the infant, where there is already a guardian, natural or legal, by controlling the *person* of the infant, and by removing it personally from the custody of its natural or legal guardian, even from the custody of its own parents. * * * The jurisdiction is a delicate one; it rests in the highest degree upon the enlightened discretion of the court, and will only be exercised when plainly demanded as the means of securing the infant's present and future well-being. It is well settled, therefore, that a court of equity may interfere on behalf of infants, and remove them from the custody and control of their father or mother, whenever the habits, practices, instruction, or example of the parent, exerting a personal influence on the infants, tend to corrupt their morals and undermine their principles; or when the parent is neglecting their education suitable for their condition in life; or is endangering their property; or is guilty of ill-treatment or cruelty towards them."

The learned author adds, by way of footnote, comments particularly germane to the issue before us:

"My only purpose is to cite authorities establishing the jurisdiction; but these very cases will disclose the circumstances which call for its exercise. There is one fundamental rule, *viz.,* that the exercise of the jurisdiction depends upon the sound and enlightened discretion of the court, and has for its sole object the highest well-being of the infant; it should never, therefore, be influenced by any *sentimental* considerations in behalf of either the mother or the father."

The pertinence of the English law, as well as the wide sweep of chancery's powers in this jurisdiction, is revealed in CL 1948, § 606.4 (Stat Ann § 27.545), dealing with jurisdiction in chancery, commencing with the familiar words:

"Sec. 4. The powers and jurisdiction of the circuit courts and circuit judges in chancery, in and for

their respective counties, shall be co-extensive with the powers and jurisdiction of the courts and judges in chancery in England as existing on March first, 1847, with the exceptions, additions and limitations created and imposed by the Constitution and laws of this State."

It was thus that we held in *Hunt* v. *Wayne Circuit Judges,* 142 Mich 93, 113 (3 LRA NS 564, 7 Ann Cas 821) (a suit testing the validity of statute creating the juvenile court):

"In England the court of chancery, originally the keeper of the king's conscience in his paternal relations to all his subjects, has uniformly assumed to place the interest of the child above the natural rights of parents and the legal rights of guardians, and in this country the same courts have exercised the same jurisdiction, basing such jurisdiction equally upon the inherent power of the court and upon statutory authority."

Likewise in *Metzner* v. *Newman,* 224 Mich 324, 331 (33 ALR 98) (bill in chancery on behalf of an infant to validate a compromise settlement of will contest):

"Our chancery court has, from its inception, been the protector and guardian of infants and their property rights. By statute some of this jurisdiction is shared by our probate courts. Our chancery courts acquired this right and jurisdiction by the adoption of the common law."

We conclude that, upon this bill as filed, the chancellor had inherent jurisdiction to protect the welfare of the infant. But the trial chancellor's misgivings arose not only from his uncertainty as to his inherent jurisdiction but also as to the jurisdiction of the probate court in the premises. Does the remedy here sought (custody of the child) lie exclusively with the juvenile division of the probate court?

The matter of the jurisdiction of the juvenile division of the probate courts has been so beclouded by a welter of conflicting claims and assertions that it may be well to re-examine the subject in the light of the presently applicable constitutional and statutory provisions. We will examine *seriatim* some of the assertions made with respect to it:

1. Frequently, either as an introductory sentence or as a clincher to argument, it is said that modern courts of chancery are without jurisdiction as to children because there is now an adequate remedy at law. (This refers to the legislation common today respecting juvenile courts and their functions.) The answer here is that general propositions, such as "equity acts *in personam*," equity will not act "if there is an adequate remedy at law," and so forth, do not answer specific cases. The general proposition concerning the adequacy of the legal remedy is, of course, countered by another equally axiomatic: Where equity has traditional jurisdiction it is not ousted or abridged by a statute which, without more, confers jurisdiction over the subject matter to courts of law. The maxims thus having neutralized each other we turn to matters more specific.

2. It is sometimes said that chancery does not now "retain" for all purposes its "former" broad jurisdiction over children. In support thereof it is pointed out that the Constitution of 1908 placed in the probate courts "original [but not *exclusive* original] jurisdiction in all cases of juvenile delinquents and dependents."

But this, it will be observed, is not a grant of "exclusive" original jurisdiction in all such cases. It is on this very point (of exclusive *vs.* nonexclusive jurisdiction) that we find at least 2 categories of constitutional provisions: (a) Some, like Michigan, do not purport to make juvenile jurisdiction exclusive in any court. (b) Others, like Colorado (see

constitutional amendment of 1912, art 6, § 1) contain language employing the term "exclusive" with respect to juvenile court legislation.

Our Constitution, then, grants "original jurisdiction" to probate in certain cases. This term "original jurisdiction" has a meaning well settled in the law. It simply means jurisdiction to hear and decide cases in the first instance, as opposed to appellate jurisdiction. But there is a vast difference between a court having *exclusive* original jurisdiction of certain types of cases, and a court having merely original jurisdiction. It is the difference between monogamy and polygamy. The cases are legion* holding that original jurisdiction does not mean exclusive jurisdiction and we would do well to respect the well-known differentiation made in both constitutional and statutory language lest we render even more obscure a concept (jurisdiction) already giving much difficulty to our Court (*Fritts* v. *Krugh,* 354 Mich 97).

Thus the Constitution of 1908 does not grant exclusive original jurisdiction to the probate courts and we cannot add it. The legislature did purport to grant exclusive jurisdiction to the probate courts† in cases involving what is usually denominated delinquency but we do not have such a case before us. Our case involves not delinquency but a contest between parents for custody arising out of custodial deficiencies alleged by one of the parents themselves to be so grave as to amount to neglect.

3. The exercise by the circuit court in chancery of its historic powers with respect to neglected children has sometimes been pictured as an attempted "revival" by chancery of presumably lost or aban-

* See *Bors* v. *Preston,* 111 US 252 (4 S Ct 407, 28 L ed 419); *Crowell* v. *Lambert,* 10 Minn 369; *Petros* v. *Bosen,* 185 Okla 351 (91 P2d 735); *Pooly* v. *Luco,* 76 F 146.

† See CLS 1956, § 712A.2 (Stat Ann 1957 Cum Supp § 27.3178 [598.2]).

doned powers, in the teeth of constitutional and statutory prohibition thereof. This position is sought to be buttressed by an underlining of the constitutional grant to probate of (exclusive or original?) jurisdiction in *all* cases of juvenile delinquents and dependents, together with a delineation of the alleged catastrophic effects of concurrent jurisdiction shared by chancery and probate, resulting in confusion, delay and damaging detention of children.

We will comment briefly. First, as to the law. There is (a) no constitutional grant of exclusive jurisdiction as to either delinquent, dependent, or neglected children in the probate courts; there is (b) not even a statutory grant of exclusive jurisdiction to probate, save in one situation (that of delinquency) and that case is not here. Thus with respect to the case before us there has been neither loss nor abandonment by chancery of any of its powers and any talk of attempted revival of powers is completely without foundation in the law.

As to concurrent jurisdiction, this is not a situation of our Court's creation nor is it subject to our destruction. The basic conflict between chancery and probate is constitutional. The circuit courts in chancery have a constitutional original jurisdiction in *all* civil and criminal matters (not taken from them by the Constitution or prohibited by law):* the probate courts have a constitutional original jurisdiction in *all* cases of juvenile delinquents and dependents.† Thus since the Constitution establishes 2 courts with original jurisdiction, neither, as we pointed out *supra,* has exclusive jurisdiction. Concurrent jurisdiction is the creature of the Constitution, not of the courts and it has been exercised for many years. *Schell* v. *Schell,* 257 Mich 85, remains authoritative, save as modified by statute.

* Art 7, § 10.
† Art 7, § 13.

Thus the legal argument advanced resolves itself into this: With respect to the case before us, that of an allegedly neglected child, a nonexistent constitutional provision, plus an imaginary statutory prohibition of jurisdiction, have been combined to effectuate a wholly hypothetical loss of chancery jurisdiction, resulting in some kind of no-man's land in the jurisdiction of the courts. Chancery's historic jurisdiction having been thus neatly disposed of by a series of fictions, it is asserted that it would be unwise to attempt to revive or re-create it for reasons of policy, described in such terms as catastrophic and damaging.

Aside from the fact that there need be no recreation of what has never been destroyed, the policy argument itself opens a wide door. The problems involving today's juveniles are numerous and complex, and many State agencies deal with them, not only the agencies of the law, such as the courts and the corrections commission, but also civic and church groups, all working devotedly for the public good. As is natural with a problem so complex, various groups advocate and stress various solutions. Specifically, with respect to the courts, forces have been battling in this State for years to effect a supremacy, in these juvenile matters, of either probate or chancery. Should either court handle exclusively such matters? If so, which one? We hear of probate's specialized staffs, skills, procedures, and so forth, of reasons, many of them persuasive, why probate should be the only court dealing in children's matters. Per contra, it is pointed out that probate has no jurisdiction whatever in divorce causes, where the problems of the children are often paramount, and that it lacks chancery's historic and powerful weapons of remedy, solace and protection; that is to say, that it lacks power to use the injunction, the historic equitable trust, the traditional chancery or-

der *in personam,* and other unique and powerful devices through which the conscience of the chancellor found ready expression in the years past and which should remain as available to the infant victim of modern industrial society as they were with respect to the abuses of a simpler day. From still another quarter we hear that the only workable solution is some kind of a family court having all of chancery's historic powers, plus the specialized staffing of probate.*

But the choice between these competing considerations has not yet been made and it is not for us to make. True, we have the power (since no court sits above us) but we have not the right to solve the whole business simply by ruling that chancery's historic powers are either atrophied through disuse or entirely prohibited by law, following which we could reverse all exercise by chancery of its ancient and powerful remedies, and thus we might establish the exclusive jurisdiction of probate in all children's cases.

But of this we will have no part. Such action is not the interpretation of statutory language or language shrouded in ambiguity, for we all know what "exclusive" means and what "original jurisdiction" means as here employed. Nor is this the filling-in of "interstitial gaps" in legislation. This is the deliberate addition of language (*exclusive* original jurisdiction) that the legislature and constitutional convention knew how to use but did not use, we thus effectuating by our own act a social policy, through court control, that these bodies refrained from effectuating, and as to the wisdom of which there is much debate among zealous partisans, all equally well-meaning, equally motivated by the highest ideals.

* See discussion of this and related problems in 37 MSBJ, July, 1958, p 14, Virtue, "What is a Family Court?"

Such action we cannot take. We are not at large. We are a court. Our constitutional restraints are none the less effective, none the less binding, because their application is confided to our own hands and hearts. The trust in judicial self-restraint reposed in us by our form of government will be discharged with a devotion commensurate with the faith implicit in its delegation.

In the light of the above, is there any impediment to the exercise by chancery in this case, of its inherent jurisdiction? We turn to the applicable statutes, general reference to which has been made in the above discussion. The jurisdiction of the juvenile division of the probate court is set forth in section 2 of chapter 12A of the probate code, as amended (CLS 1956, § 712A.2 [Stat Ann 1957 Cum Supp § 27.3178 (598.2)]). It is there provided, in part, as follows:

"Sec. 2. Except as provided herein, the juvenile division of the probate court shall have:

"(a) Exclusive original jurisdiction superior to and regardless of the jurisdiction of any other court in proceedings concerning any child under 17 years of age found within the county

"(1) Who has violated any municipal ordinance or law of the State or of the United States; or

"(2) Who has deserted his home without sufficient cause or who is repeatedly disobedient to the reasonable and lawful commands of his parents, guardian or other custodian; or

"(3) Who repeatedly associates with immoral persons, or who is leading an immoral life; or is found on premises occupied or used, for illegal purposes; or

"(4) Who, being required by law to attend school, wilfully and repeatedly absents himself therefrom, or repeatedly violates rules and regulations thereof; or

"(5) Who habitually idles away his or her time; or.

"(6) Who repeatedly patronizes or frequents any tavern or place where the principal purpose of the business conducted is the sale of alcoholic liquors.

"(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county

"(1) Whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals or well-being, or who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship; or

"(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian or other custodian, is an unfit place for such child to live in, or whose mother is unmarried and without adequate provision for care and support."

The statutory scheme is manifest. The first subdivision above (a) concerns what is usually referred to the delinquency situation, although the use of the word itself has been avoided in order to avoid so stigmatizing the child. The subdivision concerns jurisdiction relating to various illegal acts committed by the child, law-breaking, incorrigibility, and similar offenses. There is none of that even alleged in the present case, hence, we do not get into the constitutional question turning upon the purported statutory grant of "exclusive original jurisdiction superior to and regardless of the jurisdiction of any other court" when such other court is a court of chancery having first obtained jurisdiction over the child in a proceeding properly brought before it. The resolution of that question, freighted with potentialities of an unseemly tug-of-war between 2 courts, with an infant as the prize, we may thus de-

fer. The second subdivision above (b) refers to situations usually described as those of "neglect." Taken together, the 2 subdivisions encompass a variety of situations in which the welfare of the child is endangered, either through his own acts or the acts or failures of others. In such situations, sufficiently grave, parental control may be regarded as forfeited and may be displaced by that of appropriate agencies of the State.

The normal parental custody is not, however, to be lightly usurped. The intervention of the State, through its proper agencies, is exercised only in the cases of the most impelling necessity. As above noted, here we are not dealing with what is sometimes referred to as the delinquency situation, that is, where the control of the parents has been so lax, or ineffective, as to be nonexistent and the child itself has been guilty of proscribed acts. No such acts are alleged and thus the statutory grant of exclusive jurisdiction to the juvenile division of the probate court in such cases is not involved. Nor do we rule upon any phase of the difficult and delicate matter of the concurrent jurisdiction between chancery and probate, merely, as above, recognizing its existence, since the jurisdiction of the juvenile division of the probate court has not been invoked and it has not purported to exercise such jurisdiction. Similarly, we are not ruling upon the extent of probate jurisdiction, power, or authority to award custody to a third person in the situation presented where only one of the parents is at fault, the other being ready, able and willing properly to care for the child. No third person is here involved. We mention these limitations not only because the diligence of *amici curiae* has directed our attention to the gravity of such issues, but because we have no wish to encumber the law in a delicate and complex area with a mass of dicta. We will meet these situations as they arise,

guided, as always, by our abiding concern for those infants deprived of normal parental care either through human weakness or despair, or the inexorable march of a seemingly malignant fate.

In the matter before us we have a case in which the welfare of a child is allegedly threatened by pernicious influences. The child himself is not delinquent. Neither is he abandoned to strangers. Both parents are alive and both expressing solicitude for his welfare. If there is neglect, it is denied, with the counterassertion of proper school and church influences. The controversy lies in the realm of moral influences, arising out of bitter and apparently irreconcilable conflict between mother and father. This is the area in which the chancellor has, for many years, asserted his great powers in the protection of the welfare of the unfortunate child of the unfortunate parents. Nothing in our Constitution or statutes strips him of these historic powers, so repeatedly exercised. The court of chancery, then, having jurisdiction over the persons, may and must, in the exercise of its inherent jurisdiction over the subject matter, proceed to its final determination on the merits.

The order dismissing the petition is reversed and the cause remanded for further proceedings not inconsistent herewith. No costs, a public question.

BLACK and VOELKER, JJ., concurred with SMITH, J.

EDWARDS, J. The appeal presented to us is a contest as to child custody between 2 bitterly estranged parents. A final decision in a preceding divorce case denied divorce to each (*Sovereign* v. *Sovereign,* 347 Mich 205).

The circuit judge felt that he had neither statutory nor inherent authority to hear the dispute, and dismissed the petition.

Mr. Justice SMITH would reverse on the ground that the circuit court is heir to the powers formerly assumed and exercised by the court of chancery in relation to children's cases.

We find no specific statutory provisions which deal with this particular custody problem. For that matter, there appears to be little case law on the subject except the dictum in *In re Knott,* 162 Mich 10, which supports Mr. Justice SMITH's result. Thus, as to this immediate problem which would otherwise fall into a jurisdictional no-man's land, we feel the general and historic chancery power of the circuit court is applicable.

We do not, however, agree that the circuit courts of Michigan sitting in chancery retain for all purposes the broad jurisdiction over children formerly exercised by the chancery courts.

Article 7, § 10, of the Constitution (1908), does give circuit courts "original jurisdiction in all matters civil and criminal not excepted in this Constitution and not prohibited by law."

See, also, CL 1948, § 606.4 (Stat Ann 1957 Cum Supp § 27.545); CL 1948, § 722.541 (Stat Ann 1957 Rev § 25.311).

But since the turn of the century, Michigan has been one of the leading States in the development of a court with specialized powers and functions in relation to dependent, neglected and delinquent children.* Jurisdiction as to this category of cases was placed by the Constitution of 1908, art 7, § 13 in the probate courts:

"They shall also have original jurisdiction in *all* cases of juvenile delinquents and dependents." (Emphasis supplied.)

* See writer's comment, Michigan's Juvenile Code after Fifty Years, 31 MSBJ, August, 1952, p 24.

(See, also, *Hunt* v. *Wayne Circuit Judges,* 142 Mich 93 (3 LRA NS 564, 7 Ann Cas 821); *Robison* v. *Wayne Circuit Judges,* 151 Mich 315, handed down prior to the constitutional amendment just quoted; and *In re Mould,* 162 Mich 1, and *Attorney General, ex rel. Dingeman,* v. *Lacy,* 180 Mich 329, decided subsequent thereto.)

Further, as authorized by the Constitution, detailed legislation spelling out the jurisdiction and the powers of disposition of the probate court, juvenile division, in relation to children has been adopted. CLS 1956, §§ 712A.2, 712A.18 (Stat Ann 1957 Cum Supp §§ 27.3178[598.2], 27.3178[598.18]).

Further, by specific statutory enactment, the circuit courts are granted appellate powers over the decisions of the probate court, juvenile division. CL 1948, § 712A.22 (Stat Ann 1957 Cum Supp § 27.3178 [598.22]).

These constitutional and statutory provisions appear to follow a popular and legislative design in the creation of a division of the probate court with special jurisdiction, special powers of disposition, and specialized staffing as to children's problems in dependency and delinquency cases.

We feel the revival of the use by the circuit court in chancery of broad powers in children's cases concurrent with the constitutional and statutory powers of the probate court, juvenile division, would be catastrophic for the children for whom this State has plainly intended to create these specialized services. The confusion and delay attendant upon the exercise of original jurisdiction by both circuit and probate courts in dependency and delinquency cases would confound court administration and undoubtedly result in lengthened and more damaging detention of children pending disposition.

Fortunately, the constitutional and statutory provisions which we have cited, by creating specific ex-

ceptions to the general jurisdiction of the circuit courts, prohibit any such undesirable result.

Further, where by statute a full and adequate legal remedy has been provided, it is generally held that equity will not entertain jurisdiction. *Campau* v. *Godfrey,* 18 Mich 27 (100 Am Dec 133); *Marshall* v. *Ullmann,* 335 Mich 66; *Weinhardt* v. *Addison Community Schools,* 347 Mich 683; 19 Am Jur, Equity, §§ 100, 101.

In the particular fact situation presented by the instant petition, however, we have a different problem. Here, we have no allegations or showing of dependency or delinquency. The custody controversy is between 2 persons who are the natural and legal parents of the child. With prior dismissal of the divorce suits, there is no specific statutory remedy available in any court—indeed, there is no provision for adjudication of this parental dispute over child custody at all—absent general chancery jurisdiction. Hence, we concur with Mr. Justice SMITH in reversal for hearing by the chancellor.

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

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

FRITTS v. KRUGH.

1. PARENT AND CHILD—PROBATE COURT—PERMANENT WARD.
An order of the probate court which makes a child the permanent ward of such court acts to sever all parental rights of the natural parents (CL 1948, § 712A.20).

2. HABEAS CORPUS—CUSTODY OF CHILDREN.
The question of the validity of a probate court order making a child the permanent ward of that court is presented by a writ of habeas corpus sued out by a natural parent seeking recovery of custody of such child which has not been adopted.

3. PARENT AND CHILD—JURISDICTION OF PROBATE COURT—NOTICE.
A notice to the natural parents of a child that the hearing on a

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children § 84.
[2, 13] 25 Am Jur, Habeas Corpus § 78.
[3] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children § 64.
Right of parent to notice and hearing before being deprived of custody of child. 76 ALR 242.
[4] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children § 62.
[5, 9] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children §§ 22, 24.
[6] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children § 76.
[7] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children § 53.
[8] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children §§ 4, 7.
[10] 11 Am Jur, Constitutional Law § 97.
[11, 12] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children §§ 71, 78, 87; 39 Am Jur, Parent and Child § 26.
[14, 15] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children § 37; 39 Am Jur, Parent and Child §§ 20, 26.
[17] 31 Am Jur, Juvenile Courts and Delinquent, Dependent and Neglected Children § 50.
[18] 25 Am Jur, Habeas Corpus § 80.
[19] 25 Am Jur, Habeas Corpus § 160.
[20] 39 Am Jur, Parent and Child § 24.
[21] 25 Am Jur, Habeas Corpus § 10.
[22] 25 Am Jur, Habeas Corpus § 158.

petition to the probate court to take jurisdiction of the child for the purpose of putting the child up for adoption gave sufficient notice to the parents that their parental rights were at stake in the event the court found the necessary facts to establish its jurisdiction over the children, it being unnecessary for the notice of hearing to contain reference to any particular method of adoption (CL 1948, § 712A.20).

4. INFANTS—PROBATE COURT—JURISDICTION—SUFFICIENCY OF PETITION.

Mother's petition to probate court to take jurisdiction over her 2 children, then 1-1/2 and 2-1/2 years of age, which recited that her husband had quit his job, said he did not want the children, drank continually, beat her up which frightened the children, said he was leaving for his parents' home in Arkansas, that she had to have financial help to feed the children and wanted to put them up for adoption, *held*, not inadequate to allege jurisdictional facts of neglect (CL 1948, § 712A.20).

5. SAME—DEPENDENT CHILDREN—JURISDICTION OF PROBATE COURT.

The probate court had jurisdiction of the persons and the subject matter for purposes of hearing the complaint as to neglect of 2 minor children, where the children resided in the county, the essential parties had notice and the mother's petition sufficiently alleged neglect and dependency of the children (CL 1948, § 712A.20).

6. PARENT AND CHILD—PERMANENT CUSTODY OF PROBATE COURT—JURISDICTION.

A final order of permanent custody of minor children, acting to sever all parental rights, must be based on legal evidence and cannot be based on hearsay and report alone, where jurisdictional facts are in dispute, even though the statute authorizes informality of hearing (CL 1948, §§ 712A.17, 712A.20).

7. INFANTS—DEPENDENT CHILDREN—HEARING—EQUITY.

A juvenile court hearing as to neglected and dependent children is not a criminal, but essentially and legally a civil, proceeding of a chancery nature and rules of equity procedure and evidence should be followed (CL 1948, §§ 712A.17, 712A.20).

8. COURTS—PROBATE COURT—DEPENDENT CHILDREN—JURISDICTION—STATUTES.

The probate court has no inherent powers, its right to take jurisdiction of neglected and dependent children and to govern their lives being based entirely on Constitution and statute (Const 1908, art 7, § 13; CL 1948, §§ 712A.2, 712A.20).

9. INFANTS—DEPENDENT CHILDREN—PROBATE COURT—EVIDENCE OF NEGLECT.

There must be some testimony of neglect of a child before the probate court has the power to take jurisdiction of the child and enter a valid order of disposition of the child (CLS 1956, § 712A.18).

10. STATUTES—CONSTRUCTION.

Statutes will be construed as constitutional wherever possible by reasonable and permissible interpretation.

11. INFANTS—PROBATE COURT—PERMANENT CUSTODY—EVIDENCE OF NEGLECT.

The entry of an order by the probate court for permanent custody of a child due to neglect must be based upon testimony of such a nature as to establish or seriously threaten neglect of the child for the long-run future (CL 1948, § 712A.20).

12. SAME—DEPENDENT CHILDREN—PROBATE COURT—JURISDICTION—EVIDENCE OF NEGLECT.

An order of the probate court which took permanent custody of 2 minor children clearly exceeded the statutory authority of the court and was void, where there was no evidence of neglect, either of long duration in the past, or from which any reasonable prediction of future neglect of permanent duration could be made (CL 1948, § 712A.20).

13. JUDGMENT—PROBATE COURT—HABEAS CORPUS.

An order affecting personal liberty which clearly exceeds the probate court's statutory authority may be attacked by habeas corpus, even where the court had jurisdiction of the persons and the subject matter (CL 1948, § 712A.20).

14. PARENT AND CHILD—FITNESS OF PARENTS—STATUTORY STANDARDS.

The fitness of the natural parents as parents and the question of their neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered the children (CL 1948, § 712A.20).

15. SAME—DEPENDENT CHILDREN—EVIDENCE OF NEGLECT.

There must be real evidence of long-time neglect, or serious threats to the future welfare of the child, to overthrow permanently, as distinguished from temporarily, the natural and legal right of parents of the custody and nurture of their own children, such rights not being subject to termination as a result of a brief marital dispute, or even by a temporary period of desertion by 1 of the parents (CLS 1956, § 703.6).

16. SAME—RE-ESTABLISHMENT OF HOME.

A father whose parental rights have not been legally severed should be given society's assistance at every point in his effort to re-establish a proper home for the children for whose care he has the right and duty to provide.

17. SAME—RESTORATION OF CUSTODY—HABEAS CORPUS.

Parents of 2 minor children, whose parental rights had not been legally severed *held,* entitled to restoration of their custody, where record shows that since mother petitioned the probate court for their custody the parents have been reunited, he has worked steadily and supported his family which now includes 2 more children, and that wife has kept house, since there has not been shown such unfitness as would have required the dismissal of the writ of habeas corpus.

18. HABEAS CORPUS—CUSTODY OF CHILDREN.

Habeas corpus proceedings pertaining to the custody of children are essentially equitable in nature.

19. COSTS—HABEAS CORPUS—CUSTODY OF CHILDREN.

No costs are allowed on appeal in habeas corpus proceedings in circuit court, where order restoring custody of 2 children to natural parents is modified and affirmed.

20. PARENT AND CHILD—CUSTODY OF CHILDREN—PRESUMPTION OF FITNESS—BURDEN OF PROOF.

The burden of disproving a natural parent's fitness to have custody of his or her own child is upon the person challenging it, since there is a presumption that the parent is a fit person and the right of a parent to the custody of a child is paramount or superior to that of any other person.

21. HABEAS CORPUS—NATURE OF WRIT.

The writ of habeas corpus is the precious safeguard of personal liberty.

22. SAME—RES JUDICATA—PREJUDICE.

Issues decided on writ of habeas corpus would not be with prejudice to rights which the parties may have to call attention of the proper courts of facts, if any, which raise issues not disposed of on habeas corpus.

SMITH, BLACK, and VOELKER, JJ., dissenting.

Appeal from Berrien; Robinson (Thomas N.), J. Submitted October 11, 1957. (Docket No. 53, Calendar No. 46,998.) Decided October 13, 1958. Rehearing denied December 2, 1958.

Habeas corpus by Doyle A. Fritts, Sr., and Lileth Marie Fritts against Jack H. Krugh, Marguerite Krugh, Dale Wells Graham and Inez Gertrude Graham to regain custody of children taken from them by probate proceedings. Orders granting plaintiffs custody. Defendants appeal. Modified and affirmed.

Arthur E. Leckner, for plaintiffs.

Gore & Williams (*Charles W. Gore,* of counsel), for defendants.

EDWARDS, J.

"A judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders."[1]

With some significant exceptions, this is a companion case to that of *Harmsen* v. *Fizzell,* 351 Mich 86, rehearing granted March 4, 1958,[2] in which this Court dealt with a petition for writ of habeas corpus in relation to 2 children, heard before and granted by the same circuit judge because of procedural errors claimed to have been made by the same probate judge.

In this case, too, the circuit judge, after the hearing on the writ of habeas corpus, entered orders which would have the effect of removing 2 children from proposed adoptive homes where they had been placed by probate court authority and returning them to parental custody. The foster parents with whom the children have lived most of their lives to date appeal.

This story starts with the somewhat abrupt abandonment of a minor mother and 2 small children by

[1] Botein, *Trial Judge,* p 273.

[2] Opinion in rehearing, 354 Mich 60.—REPORTER.

her husband in July of 1952. The mother tells the story simply:

"My name is Lileth Fritts, and the wife of Doyle Fritts. I am the mother of Sally and Doyle Fritts, the children involved in this case. Sally was born December 19, 1949. Doyle was born December 17, 1951. I am 24. * * *

"*Q.* What is the date of your birth?

"*A.* July 25, 1931. * * *

"*Q.* Directing your attention to the first day of July, 1952, where were you living?

"*A.* Watervliet.

"*Q.* Michigan?

"*A.* Yes.

"*Q.* And prior to that date was your husband living with you?

"*A.* No.

"*Q.* Prior to July 1st was he living with you?

"*A.* No.

"*Q.* Did he leave you sometime before that date that you called here at the juvenile division of the probate court?

"*A.* Yes, he left.

"*Q.* And was that the result of some argument you had there?

"*A.* Yes.

"*Q.* And how long had he been away before you came down here?

"*A.* About 2 weeks.

"*Q.* And during that time did you have Doyle and Sally with you?

"*A.* Yes. I heard from him within the 2 weeks. I knew where he went. He went to Bald Knob, Arkansas. He had relatives there. His mother and father. To locate him I wrote his mother immediately. I had $20 while he was away. My husband gave it to me before he left.

"*Q.* Did you have an argument before he left?

"*A.* Yes.

"*Q.* And did he tell you where he was going?

"*A.* No.

"*Q.* Did he send you any money within that 2 weeks?

"*A.* No.

"*Q.* Do you remember telling the person in charge of the juvenile division of the court that you had no milk for your children?

"*A.* Yes.

"*Q.* Tell the court something about that.

"*A.* Well, I went to the law.

"*Q.* You mean the police?

"*A.* Yes.

"*Q.* Go on.

"*A.* And asked them to give me some milk and some money, but my husband paid it back.

"*Q.* Did the police at Watervliet give you some money?

"*A.* Yes.

"*Q.* And your husband paid them back?

"*A.* Yes.

"*Q.* Did you come down to the juvenile court alone?

"*A.* Yes.

"*Q.* And what happened when you went to the juvenile court?

"*A.* Well, I just went in and told Mrs. Malcolm that I wanted to put my children up for adoption; that I couldn't take care of them.

"*Q.* And did you sign anything that day?

"*A.* Yes, I signed 1 paper she made out for the children.

"*Q.* You signed a paper who made out?

"*A.* Mrs. Malcolm. I think that's what her name is.

"*Q.* The judge's name is Malcolm Hatfield; his wife is Mrs. Malcolm Hatfield. Are you talking about her, or are you talking about Mrs. Milton?

"*A.* Yes, Mrs. Milton.

"*Q.* Let the record show that. I have in my hands a file of the juvenile division of the probate court for Berrien county, which is in evidence, and on top show you a paper and ask you if your signature appears on that paper?

"*A.* Yes.

"*Q.* Is that the paper you refer to when you say you signed a paper?

"*A.* Yes.

"*Q.* Did you read all this before you signed it?

"*A.* Yes.

"*Q.* And that is what you told Mrs. Milton?

"*A.* Yes.

"*Q.* Where were your children that day?

"*A.* They was with my sister.

"*Q.* You left them with your sister?

"*A.* Yes.

"*Q.* Did you have occasion to go to the court later?

"*A.* Yes.

"*Q.* How many days later?

"*A.* I went 2 days later.

"*Q.* What was the purpose of that call?

"*A.* The same thing. I wanted to see if they was going to put them up for adoption. I knew I couldn't take care of them.

"*Q.* You asked them that?

"*A.* Yes. They told me they wanted me to sign adoption papers for the children. Two days later I signed another paper, 1 in front of Judge Hatfield, the adoption paper he wanted me to sign. This is the paper. I am speaking of, where I asked for the appointment of Hazel Wallsmith as guardian *ad litem.* That was what I signed that day. I signed the 1 in front of Judge Hatfield, July 3d. These 2. I told them how old I was.

"*Q.* Now, I show you another paper in this file which bears the signature of Lileth Marie Fritts and ask you if your signature appears on this paper which I will read.

"*A.* Yes.

"*Q.* (Reading): 'The undersigned being the mother of the said legitimate minor child and having legal authority to make and execute this consent, do hereby consent to the adoption of said child and the change of name of said child, as prayed for in petition of said court.' Did you sign that?

"*The Court:* What is the date of that?

"*Mr. Leckner:* The date is July 2, 1952; and that has to do with Doyle, and you signed another just like it for Sally?

"*A.* That's right, signed for both. Hazel Wallsmith signed that at the same time. I left Watervliet and went to my sister's after the 1st of July. I stayed there a day after he left and I stayed with her until I went back to my husband. I went back to him about 2 weeks after I gave my children up. I brought my children down here and I went to Wichita, Kansas. My husband was there."

The sworn petition signed by the mother on July 1, 1952, served to place most of these facts before the probate court:

"STATE OF MICHIGAN,

Cause No. ....

"The probate court for the county of Berrien,

Juvenile Division.

"In the matter of the petition concerning Sally Ann Fritts, Doyle Almo Fritts, Jr., Minor.

"I, Lileth Marie Fritts, respectfully represent that I reside in the US–12 2d house from Long's Television of Watervliet in said county, and make this petition as mother

"I further represent that said children are residents of Watervliet in Berrien county, and is now residing with and under the custody and control of mother, and father and ..... was born on

Sally, was born Dec. 19, 1949
Doyle, " 17, 1950

"I further represent upon information and belief that said children's father has quit his job. He has told me that he doesn't want his children. He drinks continually and beats me up which frightens the children. The father of these children said he was going to Bald Knob, Arkansas, c/o with Mr. and Mrs. Lester Fritts. I had to appeal to the police at Coloma last week for milk for the children

"I would like to put the children in an adoptive home where they will be well cared for.

"I further represent that the names, relationship, ages and residences of nearest of kin and guardian of said child ...., as I am informed and believe, are as follows:

NAME	RELATIONSHIP	AGE	RESIDENCE
Doyle Almo Fritts, Sr.	father		Last known Probable Address: Bald Knob, Ark. c/o Lester Fritts
Lileth Marie Fritts	mother		going to live with Frances Bridgman, Chicago Ave. Bus (Winans Ave) Benton Harbor or to New Carlyle, Ind. c/o Mrs. Wm. Webb

"I therefore, pray that the juvenile court take jurisdiction of said child.

/S/ "MRS. DOYLE FRITTS
"P.O. LILETH MARIE FRITTS"

It appears clear, however, that prior to hearing upon this petition the mother rejoined her husband at his former home in Bald Knob, Arkansas, and that they then determined to seek return of their children. On receipt of notice of hearing on the adoption petition, the father wrote the probate judge:

"7–22–52

"*Mrs. Malcolm Hatfield*

"I am writing to you regarding my children Sally Ann Doyle Jr. Me and my wife have talk things over we have decided to make a home for are children. Wish to know if we could get them befor the 4th of August. If so write and let me know soon.

"Your Truly
"DOYLE FRITTS

"My add—
Doyle Fritts
5247 N. Arkansas St.
Wichita, Kansas."

And when the hearing date of August 4, 1952, arrived, Mr. and Mrs. Fritts and her mother were in the courtroom. Mr. Fritts' version of that hearing is as follows:

"After I wrote this letter to the probate judge I came to St. Joseph. I appeared in the judge's office on August 4th. The judge wrote to me and told me when the hearing would be held, so I was here. There was no stenographer in the judge's office when I appeared. There was no lawyer representing me. Nobody suggested to me that I get a lawyer. I was not sworn. My wife was not sworn. No one was sworn. I said there was no stenographer there.

"*Q.* Tell us what happened when you were in the room there?

"*A.* Mrs. Milton read the copy of the paper she had there, and when she got through reading it the judge told us within, after 6 months time, if we got along good, he would see that we got the kids back."

The report read by the county agent, Mrs. Frances Milton, recited the facts previously referred to above. Her report also detailed 3 separate conferences at which she and the probate judge had unsuccessfully attempted to dissuade the mother from her announced intention of giving up the children. The report was apparently drafted, however, before advice of the reconciliation of the parents and their decision to seek to regain their children. The report concluded:

"Recommendation: In view of the preceding, I recommend that, for the future security of these children, they be made permanent wards of this court and committed to the Michigan Childrens Institute for the purpose of that institution giving consent to their adoption."

Mrs. Milton, the assistant county agent, gave testimony pertaining to the August 4th hearing not

much different from that previously quoted from the plaintiff:

"*Q.* Now, at the time of the hearing on August 4th, I understand that you were present, Mrs. Milton?

"*A.* I was.

"*Q.* And on that occasion was Mr. Fritts present?

"*A.* I think that was the date he was present, yes. And, Mrs. Fritts and her mother from Indiana. On that occasion I read the report, in the presence of all those people. The probate judge was present.

"*Q.* And did Mr. and Mrs. Fritts say anything about the report, about the truth or falsity of it on that occasion?

"*A.* Not to my remembrance.

"*Q.* And what, if you remember, did the judge say or do on that occasion while the Frittses were there?

"*A.* Well, he talked with them awhile, and then at the end he gave his decision, and whenever—I'm not a stenographer, but whenever Judge Hatfield gave his decision at the end of anything I always asked him to repeat it slowly so that I could get it down word for word; and I read it back to him word for word so that he knew I had it down verbatim as he gave it, his decision.

"*Q.* And that happened on that occasion?

"*A.* Well, I always did that, so I am sure I did it that time.

"*The Court:* What was his decision on that occasion?

"*A.* My remembrance is that he wished to find out whether the children would adjust in the new homes to which they had been sent.

"*The Court:* They had been there a few days?

"*A.* Oh, yes. And if they didn't adjust in those homes and if at the end of a period of time, in case the children did not adjust in those homes, and if the natural parents could prove that they were capable and willing, able in every respect to give them desirable homes, then they would be the first in line to be considered."

At the end of the hearing, the probate judge entered the following order pertaining to Sally Ann and a similar one pertaining to Doyle:

"It is hereby ordered, that the said Sally Ann Fritts be and she is is hereby made a permanent ward of this court and is hereby committed to the Michigan Children's Institute at Ann Arbor, Michigan, subject to the rules and regulations governing that institution, and for the purpose of adoption.

"And it is further ordered, that should this child for any reason fail to adjust in her present environment, and should the natural parents at that time prove that they have been able to re-establish a satisfactory family life and are then able to properly care for this child, they will be first in line for the replacement of this child."

It should be noted that these orders, by making these children "permanent wards" of the probate court, if valid, acted to sever all parental rights of these parents to these children. CL 1948, § 712A-.20 (Stat Ann 1957 Cum Supp § 27.3178[598.20]).

The habeas corpus proceeding before the circuit court and this appeal before us pose the question squarely as to whether these orders were valid. (It should be noted that, although petitions are pending, no subsequent adoption orders have ever been entered.)

The trial judge's opinion found the order of the probate judge void because the notice to the parents of the hearing did not refer to commitment to the Michigan Children's Institute.

We do not agree. The notice did tell the parents that the hearing contemplated was upon the subject of permanent custody and adoption. No more specific information could have been given to tell them that their parental rights as to their children were at stake. In the event the court found the necessary facts to establish its jurisdiction over the children,

various dispositions were available to the probate judge under the statute (CLS 1956, § 712A.18 [Stat Ann 1957 Cum Supp § 27.3178(598.18)]). It was not essential for the notice of hearing to contain reference to any particular method of adoption.

Nor do we feel that the petition upon which the hearing was based was inadequate to allege jurisdictional facts of neglect. (See *Harmsen* v. *Fizzell*, 351 Mich 86, 95–97.)

In short, we find no procedural deficiency in this record of sufficient substance to warrant the use of habeas corpus; and we note again:

"For us to pry with legal diligence at the technical crevices in old cases which pertain to child custody and adoption matters could spring open a Pandora's box of troubles." *Harmsen*, 351 Mich 86, 106.

After this much has been said, it still is true that there is revealed on this record a glaring defect of substance which undoubtedly moved the circuit judge to his basic decision in this case and which serves to justify his use of the remedy of habeas corpus.

A distinguished group of juvenile court judges has recently published a careful study of juvenile court proceedings. In it the characteristics of a juvenile court hearing are noted:

"There are 3 aspects to a juvenile court hearing, 2 of which are purely legal and the 3d socio-legal. They are: (1) the determination of jurisdiction to hear the case; (2) the adjudication of the issue of delinquency, neglect (or dependency); and (3) the determination of disposition.

"It is necessary first to determine the jurisdictional facts, *i.e.*, that the alleged act falls within the purview of the statutes fixing the court's jurisdiction of the subject matter, and that all necessary parties have been given due notice so that the requirements of due process have been met.

"Having determined that the court has jurisdiction of both subject matter and person, the court should then proceed to determine the facts." National Probation and Parole Association, Guides for Juvenile Court Judges, pp 59, 60.

We believe the probate court had jurisdiction of the persons and the subject matter for purposes of hearing the neglect complaint. The children resided in the county concerned. The essential parties had notice. The mother's petition in the instant case served to allege neglect and dependency of the 2 children. The essential facts alleged were the father's abandonment of her and them, the break-up of the family and the absence of any support for the children.

When the day set for hearing arrived, however, the probate court was on ample notice that the facts pertaining to neglect had changed materially and that the question of the court's right to take custody of these children was in dispute. In the absence of legal representation, the father's letter of July 22d should have been regarded as placing the issue of neglect in dispute.

Where jurisdictional facts are in dispute, even though the statute authorizes informality of hearing (CL 1948, § 712A.17 [Stat Ann 1957 Cum Supp § 27.3178(598.17)]), a final order of permanent custody acting to sever all parental rights must be based on legal evidence and cannot be based on hearsay and report alone. *Harmsen,* 351 Mich 86, 103; *In re Hill,* 78 Cal App 23 (247 P 591).

See, also, *People* v. *Lewis,* 260 NY 171 (183 NE 353, 86 ALR 1001); *In re Inquiry of Mantell,* 157 Neb 900 (62 NW2d 308, 43 ALR2d 1122).

"Where there is a dispute about the basic facts, adult witnesses should be sworn. Placing of children under oath should be in the sound discretion of the court, subject to statutory provisions, if any. It is

good policy to permit parents, the child, and witnesses to give testimony in narrative form with as few technical objections as possible. It should be remembered, however, that the juvenile court hearing is not a criminal, but essentially and legally a civil proceeding of a chancery nature, and the rules of equity procedure and evidence should be followed. Unimportant technicalities need not be emphasized. In addition, the judge should eliminate hearsay and accept the testimony of competent witnesses only. Guaranteeing the basic rights of the individual is a responsibility of the judge even though the child or his parents may not be aware of or claim them at the time." National Probation and Parole Association, Guides for Juvenile Court Judges, p 61.

The glaring defect in this proceeding to which we have referred pertains to the evidence (or lack thereof) presented at the hearing upon which the probate judge based his order.

We note at the outset that the probate court has no inherent powers. Its right to take jurisdiction of children and to govern their lives is based entirely on Constitution and statute. The Michigan Constitution (1908), art 7, § 13, provides that:

"In each county organized for judicial purposes, there shall be a probate court. The jurisdiction, powers and duties of such courts and of the judges thereof shall be prescribed by law, and they shall also have original jurisdiction in all cases of juvenile delinquents and dependents."

Our Michigan statute provides:

"Except as provided herein, the juvenile division of the probate court shall have: * * *

"(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county

"(1) Whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide

proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals or well-being, or who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship." CLS 1956, § 712A.2 (Stat Ann 1957 Cum Supp § 27.3178[598.2]).*

Another section provides, in cases where neglect or dependency is established, for the court to enter either temporary or permanent custody orders:

"The court in all cases involving custody shall state in the order for disposition or any supplemental order of disposition whether the child is placed in the temporary or permanent custody of the court. If the child is placed in the temporary custody of the court, no supplemental order of disposition providing permanent custody, or containing any other order of disposition shall be made except at a hearing pursuant to issuance of summons or notice as provided in sections 12 and 13 of this chapter. If the child is placed in the permanent custody of the court, all parental rights are terminated, though such rights may be reinstated by a supplemental order of disposition." CL 1948, § 712A.20 (Stat Ann 1957 Cum Supp § 27.3178[598.20]).

There must, therefore, be some testimony of neglect before the probate court has the power to take jurisdiction of the child and to enter valid order under the disposition section of the code (CLS 1956, § 712A.18 [Stat Ann 1957 Cum Supp § 27.3178(598.-18)]).

After some consideration of the problem, we distinguish here between the testimony which would afford support for an order taking temporary custody for reasons of neglect and that necessary to support a permanent custody order.

* Prior to the amendment by PA 1953, No 193, this matter was contained in subdivision (a)(6) of CL 1948, § 712A.2.

Such a distinction may not be found clearly spelled out in the statute (section 20) quoted above. Yet we note the obvious unconstitutionality of the statute if facts of purely temporary neglect could suffice to support the entry of a permanent custody order severing all parental rights. Where, for example, a wholly normal family is confronted with the sudden emergency of a house destroyed by fire—the proven lack of proper shelter for the children for the next 24 or 48 hours could not, under our concept of due process, support an order of the court taking permanent custody and severing all parental rights.

We seek to save legislation from unconstitutionality wherever possible by reasonable and permissible interpretation. *People* v. *Piasecki,* 333 Mich 122; *Cady* v. *City of Detroit,* 289 Mich 499; *Thompson* v. *Auditor General,* 261 Mich 624; *Screws* v. *United States,* 325 US 91 (65 S Ct 1031, 89 L ed 1495, 162 ALR 1330); *Anniston Manfg. Co.* v. *Davis,* 301 US 337 (57 S Ct 816, 81 L ed 1143); *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 US 1 (57 S Ct 615, 81 L ed 893, 108 ALR 1352); *Ashwander* v. *Tennessee Valley Authority,* 297 US 288 (56 S Ct 466, 80 L ed 688).

Here, we find the legislative intent plainly set forth in the use of the words "temporary" and "permanent." In accordance with that legislative intent, we hold that, while evidence of temporary neglect may suffice for entry of an order taking temporary custody, the entry of an order for permanent custody due to neglect must be based upon testimony of such a nature as to establish or seriously threaten neglect of the child for the long-run future.

In our instant case, at the time of hearing, the probate judge had before him no evidence of neglect, either of long duration in the past, or from which any reasonable prediction of future neglect of permanent duration could be made. The order taking

permanent custody of these children clearly exceeded the statutory authority of the court and was void.

Even where, as here, a court has jurisdiction of the persons and the subject matter, an order affecting personal liberty which clearly exceeds the court's statutory authority may be attacked by habeas corpus. *In re Mills,* 131 Mich 325; *In re Allen,* 139 Mich 712; *In re Joseph Nowack,* 274 Mich 544.

See, also, *Freedman* v. *Freedman,* 303 Mich 647; *In re McKinney,* 326 Mich 190; *In re Mills,* 135 US 263 (10 S Ct 762, 34 L ed 107); *In re Bonner,* 151 US 242 (14 S Ct 323, 38 L ed 149); 25 Am Jur, Habeas Corpus, §§ 78–80, 83.

We hold that the orders entered by the probate judge taking permanent custody of these children were void for want of proof of essential jurisdictional facts of neglect.

Nor did the provisional aspect of the order serve to obviate its basic invalidity. It is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents. Their fitness as parents and the question of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered the children.

In the absence of evidence of neglect such as we have referred to, the very preamble to the sections of the probate code dealing with juveniles establishes the strong preference for parental custody.

"While proceeding under this chapter, the probate court shall be termed the juvenile division of the probate court.

"Proceedings under this chapter shall not be deemed to be criminal proceedings.

"This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the court shall receive such care, guidance and control, *preferably in his own home,* as will be con-

ducive to the child's welfare and the best interest of the State and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to the care which should have been given to him by them." CL 1948, § 712A.1 (Stat Ann 1957 Cum Supp § 27.3178 [598.1]).

There must be real evidence of long-time neglect, or serious threats to the future welfare of the child, to overthrow permanently the natural and legal right of parents to the custody and nurture of their own children. CLS 1956, § 703.6 (Stat Ann 1957 Cum Supp § 27.3178[206]); *In re Goldinger,* 207 Mich 99; *Burkhardt* v. *Burkhardt,* 286 Mich 526; *Riemersma* v. *Riemersma,* 311 Mich 453. Such rights are not subject to termination as a result of a brief marital dispute, or even by a temporary period of desertion by 1 of the parents.

In *Harmsen,* 351 Mich 86, 110, we said:

"We are not unmindful of the fact that a father whose parental rights have not been legally severed should be given society's assistance at every point in his effort to re-establish a proper home for the children for whose care he has the right and duty to provide."

On the present record, there was even greater reason for society to attempt to help reunite and restore this family.

We are not unmoved by the plight of the foster parents and by the possibility of real damage in the lives of these 2 children. The circuit judge noted:

"The testimony taken at the hearing in this court discloses that Jack H. Krugh and Marguerite R. Krugh and Dale Wells Graham and Inez Gertrude Graham, now providing homes and care, support and education for Doyle Almo Fritts and Sally Ann Fritts, respectively, are as qualified in every respect as foster parents of said children as it is possible to

obtain. They are all giving a full measure of devotion, love and affection to these children as a spirit of unselfishness and self sacrifice that leaves nothing for challenge. The children themselves are shown to be well adjusted and happy in their present environment, fully responsive to the excellent care they are receiving from these foster parents."

It is greatly to be regretted that the original appeal from the denial of a motion to vacate the permanent custody order was not promptly brought to issue. We cannot, however, say on this record that these parents of limited education and means had ever abandoned their efforts to regain their 2 children.

We also note such testimony pertaining to recent years as bears upon the fitness of the parents. Two more brief separations of man and wife in 1955 were followed by prompt reconciliation. The basic facts appear to be that the father and mother of our 2 children have lived together in the intervening years; that he has worked steadily and supported his family; that she has kept house and borne 2 more children; and at the time of hearing before the circuit court there was a history of an intact family marred by 3 marital arguments and brief separations. We are not prepared to say that these of and by themselves suffice to prove such unfitness as would have required the circuit judge to dismiss their petition.

We regard habeas corpus proceedings pertaining to custody as essentially equitable in nature. *In re Leu,* 240 Mich 240; *Harmsen* v. *Fizzell,* 351 Mich 86. We affirm the decision of the circuit judge but remand these matters for the entry of orders allowing a reasonable time for the transfer of physical custody from the present foster parents to the parents under the supervision of the appropriate arm of the court with the purpose of occasioning as little damage as possible in the lives of these children.

Modified and affirmed. No costs.

ADDENDUM

In view of the important human and legal issues posed by this case and the conflicting opinions herein, those who sign this opinion desire to re-emphasize several points.

The circuit judge who heard the petition for the writ of habeas corpus found the orders of the Berrien county probate court juvenile division to be void, and in the course of our appellate process his decision on this point is before us for review. These orders were entered August 4, 1952.

Let us carefully note the state of the record before the probate court on that date. There was a sworn complaint. Its allegations of neglect and dependency were disputed by the parents who, reunited, were present in the courtroom to contest it. As far as this record discloses, no witness was called except the county agent whose report was based largely on what she had been told. Nothing resembling legal evidence was offered to establish abuse of or neglect of the children. Such *charges* as the record contains pertaining to the father's treatment of the mother have apparently never been tried in any court and, while uttered under oath in complaint form by the mother, have never been repeated by her in the husband's presence with right of confrontation and cross-examination. In effect, the mother's own statements about her husband in the midst of a marital dispute repeated in hearsay form have been employed to defeat her own efforts to regain custody of her children. We reiterate that where the fundamental facts of neglect are in dispute, our Constitution and statute require some legal evidence to support the court's assertion of jurisdiction.

We again make reference to the disputed orders which we have previously held void:

"It is hereby ordered, that the said Sally Ann Fritts be and she is hereby made a permanent ward

of this court and is hereby committed to the Michigan Children's Institute at Ann Arbor, Michigan, subject to the rules and regulations governing that institution, and for the purpose of adoption.

"And it is further ordered, that should this child for any reason fail to adjust in her present environment, and should the natural parents at that time prove that they have been able to re-establish a satisfactory family life and are then able to properly care for this child, they will be first in line for the replacement of this child."*

The concept of the relationship of his court to the family entertained by the probate judge, and exemplified in his orders, is one for which we find no warrant in the law of this State or, for that matter, any one of these United States.

It will be noted that these orders do not indicate a final judgment on the part of the probate judge on the facts presented to him that the parents are either unable, unwilling or incapable of offering a proper home and guardianship to these children. On the contrary, the orders on their face suggest the conclusion that, while the parents may well prove to be proper custodians for their own children, the probate judge had, in his view, succeeded in finding parents for each of them who were superior to those whom nature and the Deity had provided.

We have previously noted the strong preference for parental guardianship in the prefatory paragraph to the juvenile sections of our probate code and in our Michigan case law. In a recent case, the supreme court of Minnesota phrased this preference thus:

"It is too well settled to require citations that the right of a parent to the custody of a child is paramount or superior to that of any other person; that a mother is presumed to be a fit and suitable

* A similarly-worded order was entered in relation to Doyle Fritts.

person to be entrusted with the care of her child; and that the burden of disproving this presumption rests upon the person challenging it." *In re Larson,* 252 Minn 490 (91 NW2d 448, 453).

We believe that no such discretion as these orders seem to assert is vested by the law of this State in a probate judge sitting in the juvenile division, absent facts upon which a finding could be made, that the natural and legal parents of a child had become incapable of discharging the duties of parenthood according to the accepted standards of society, or had by their own conduct so neglected, abused or abandoned their children as to constitute an abdication and waiver of their rights of parenthood.

In our view, the orders entered were beyond the statutory power conferred upon the probate judge and were void. In the language of our habeas corpus act, "the jurisdiction of such court * * * has been exceeded." CL 1948, § 637.29 (Stat Ann § 27.2272).

We now turn to the concept of the writ of habeas corpus at issue in this case. There is no need to recite the great use in the history of the development of freedom which the courts have made of this writ of last resort. Nor do we think our State or nation have reached such a point of civilized development that the powers exercised under this writ should now be narrowly circumscribed.

The suggestion is made to us that the court which hears a writ of habeas corpus and finds a court order offered in justification of the detention or deprivation of freedom concerned, may only inquire as to whether or not the other court had jurisdiction in the narrow sense of (1) jurisdiction of the persons; and (2) jurisdiction of the subject matter of the dispute. This view would have the advantage of resolving many past varying usages of the word "ju-

risdiction." But it has the disadvantage of depriving the courts in a hearing on a writ of habeas corpus of the power to strike down an unjust order which is patently *ultra vires,* or an order entered in obvious violation of constitutional rights. The United State supreme court has many times, in cases of great historic importance, employed a broader concept of the power of habeas corpus. *Ex parte Lange,* 18 Wall (85 US) 163 (21 L ed 872); *Hans Nielsen, Petitioner,* 131 US 176 (9 S Ct 672, 33 L ed 118); *Moore* v. *Dempsey,* 261 US 86 (43 S Ct 265, 67 L ed 543); *Johnson* v. *Zerbst,* 304 US 458 (58 S Ct 1019, 82 L ed 1461, 146 ALR 357); *Bowen* v. *Johnston,* 306 US 19 (59 S Ct 442, 83 L ed 455); *Walker* v. *Johnston,* 312 US 275 (61 S Ct 574, 85 L ed 830); *Wade* v. *Mayo,* 334 US 672 (68 S Ct 1270, 92 L ed 1647). This Court has likewise employed the same broad view of the powers of the writ of habeas corpus. *In re Mills,* 131 Mich 325; *In re Allen,* 139 Mich 712; *In re Nowack,* 274 Mich 544; *Freedman* v. *Freedman,* 303 Mich 647; *In re McKinney,* 326 Mich 190; *In re Maddox,* 351 Mich 358.

In discussing arguments for restrictions upon the use of the writ of habeas corpus, Mr. Chief Justice Hughes said:

"But the rule, often broadly stated, is not to be taken to mean that the mere fact that the court which tried the petitioner had assumed jurisdiction, necessarily deprives another court of authority to grant a writ of habeas corpus. As the court said in the case of *In re Coy,* 127 US 731, 757, 758 (8 S Ct 1263, 32 L ed 274), the broad statement of the rule was certainly not intended to go so far as to mean, for example, 'that because a Federal court tries a prisoner for an ordinary common-law offense, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States, or any connection with a statute of the United

States, and punishes him by imprisonment, he cannot be released by habeas corpus because the court which tried him had assumed jurisdiction.' Despite the action of the trial court, the absence of jurisdiction may appear on the face of the record (see *In re Snow,* 120 US 274 [7 S Ct 556, 30 L ed 658]; *Hans Nielsen, Petitioner,* 131 US 176, 183 [9 S Ct 672, 33 L ed 118]) and the remedy of habeas corpus may be needed to release the prisoner from a punishment imposed by a court manifestly without jurisdiction to pass judgment.

"It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. *Ex parte Lange,* 18 Wall (85 US) 163 (21 L ed 872)." *Bowen* v. *Johnston,* 306 US 19, 26, 27 (59 S Ct 442, 83 L ed 455).

We hold that the orders entered upon the record of this hearing, as certified to us by the participating parties, represented an erroneous concept of the power conveyed by statute upon the probate court sitting in juvenile division, and that, being based upon no evidence of permanent neglect, they represented a fundamental miscarriage of justice as to these petitioners and exceeded the statutory powers of the probate judge who entered them.

As indicated previously, we likewise hold that a permanent deprivation of parental rights, based upon the record certified to us here, would represent, if authorized by statute, a violation of due process of law as far as these parents are concerned.

We believe that these petitioners presently have no other remedy than the petition for the writ here considered. The suggestion that a motion to restore parental rights once lost is the equivalent of the right to contend that such rights were severed in violation of both statute and Constitution does not in our view require more than the noting of our disagreement.

We have previously indicated that after determining the legal issue pertaining to the permanent custody orders attacked by the writ of habeas corpus before him, the circuit judge had the additional duty, since habeas corpus proceedings in relation to custody of children are essentially equitable in nature, to concern himself with the welfare of the children as of the time he heard the case. We find no reason upon the record written before him to hold that he failed in his duty in this regard.

It is, of course, obvious that what we decide in relation to this case becomes *res judicata* only as to the issues which were litigated and decided at the circuit court hearing on the petition for writ of habeas corpus, and that it constitutes no prejudice to any rights which the parties may have to call the attention of the proper courts to facts, if any, which raise issues not disposed of there.

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

SMITH, J. (*dissenting*). We would do well to take a hard second look at what is proposed here.

It is proposed that we hold to be "void" the order made by the probate court respecting these unfortunate children who, in their short lives, have known so much of what some of us would describe as neglect. It is proposed, let us stress, not that we find the determination of the probate judge to be merely erroneous, but to be utterly void. We are to hold that it is a complete nullity. A "void" judgment, as we all know, grounds no rights, forms no defense to actions taken thereunder, and is vulnerable to any manner of collateral attack (thus here, by habeas corpus). No statute of limitations or repose runs on its holdings, the matters thought to be settled thereby are not *res judicata,* and years

later, when the memories may have grown dim and rights long been regarded as vested, any disgruntled litigant may reopen the old wound and once more probe its depths. And it is then as though trial and adjudication had never been. It is no answer to say that such things cannot happen in a modern society, particularly where the security of children's lives is involved. This case speaks for itself. Sally Fritts, one of the children before us, was 2–1/2 years of age when her mother petitioned to put her children "in an adoptive home where they will be well cared for." The situation at that time may be gleaned, in part, from the report of the investigation for adoption, made by the assistant county agent. It states, in part, as follows:

"The father was a drinker and left his family more than once. The mother tried several times to give her children away. At last she just left them crying in the office of the juvenile division of the probate court. She said that she would not keep them if she had money."

At this writing Sally is almost 9 years of age. Most of her life has been spent in the home she now knows and but few years of childhood remain. The plight of the mother at the time of giving up her children was tragic beyond words. But is it within our power to salve those wounds after these many years? Are we now to re-create her tragedy in the lives of the children? And what of the situation of those who have cared for these children through the long years of infancy?

This, then, is our problem. Mr. Justice EDWARDS holds that the order of the probate court taking permanent jurisdiction of these children was entered without "jurisdiction" and therefore "void." It would be well to keep constantly before us that this is the one situation above possibly all others

in the law in which the orders of a court should be vested with every security and finality at our command, namely, that involving the care and custody of children. Yet it is to this very situation that it is proposed to apply the most devastating weapon in the entire legal armory, the doctrine of lack of jurisdiction, of complete invalidity, of nullity. We cannot agree. Not only are we satisfied as to the evidentiary showing made in this particular case, but we are keenly aware of the force of precedent and have no wish to jeopardize the security of past and present custodial orders by the holding that a subsequent disagreement, on our part, with the probate court, on the sufficiency of the proofs of neglect (or like question) means that the probate court had no jurisdiction, and that its order was void, and is subject to collateral attack at any time. This is not to say that errors made by the courts of original jurisdiction may not be corrected. There is an orderly process of appeal provided for these matters and it should be timely utilized. We are not confronted, then, with the situation in which the only practicable avenue of redress was the great historic writ of habeas corpus. What is sought here is simply the substitution of the writ of habeas corpus for the right of appeal under the statute, or, at the election of these parents, for the right enjoyed by them to apply at any time in probate court for a new or supplemental order of disposition. It is proposed, simply, that we approve the habeas corpus because, it is said, the evidence upon which the probate court acted was so weak that it had no jurisdiction to enter the order and, hence, it was "void." The cost of what is here proposed, in terms of human interests involved, is staggering. How many other custodial orders may likewise be called "void" after many years have passed without appeal we have no way of knowing. Much would de-

pend upon the strictness with which we might view the showing made. We are now, however, disposed to undertake that experiment.

Just what is this error so all-pervading that its commission makes a nullity of the court's process? The circuit judge pointed to irregularities in the procedures employed by the probate judge. These, however, were not jurisdictional. On this phase of the case I agree with the careful analysis of Mr. Justice EDWARDS. The probate court did, in spite of such, obtain jurisdiction over the persons and over the subject matter. Where, then, lies the error so pernicious as to make the probate order a nullity? According to Mr. Justice EDWARDS there is a "glaring defect" in the evidence "presented at the hearing upon which the probate judge based his order." And what is this glaring defect? There was, we are told, insufficient evidence of neglect.

So, just at this point, we reach the crux of the case: There is a difference of opinion between some of our Court and the probate court on the sufficiency of the evidence of neglect. We will assume, *arguendo,* that there was such a deficiency, that our brethren so believing are right, although we are keenly aware that we are the Supreme Court not because we are always right but that we are always right because we are the Supreme Court. At any rate, the probate court, we will assume, was in error. Mr. Justice EDWARDS holds that this makes its order "void," that the court lost jurisdiction, that its order was a nullity, in short, that all that was done amounted to no more than a pompous, cruel travesty of make believe. Not merely are we to hold the order erroneous, we emphasize, subject to correction as all other errors in the law are corrected, but void. And this with respect to a matter (*i.e.,* was there "neglect"?) with respect to which wide differences of opinion may honestly exist among reasonable and sincere men,

and with respect to a branch of the law (the welfare of children) in which the most pressing need for security of adjudication exists.

The case before us well illustrates the pitfalls lurking in every step of the path proposed. At the time of the hearing on August 4th, the probate court had before it a sworn petition by the mother that the father did not want his children, that "he drinks continually and beats me up, which frightens the children," that the father had left them and that she had found it necessary to go to the public authorities for aid. He had also the report of the assistant county agent that "this is not the first break-up which the Fritts family has undergone. It appears that there has been trouble during most of their married life. The pattern of constant discord is there. On the information which has been gathered, it would appear that if the parents do live together, the discord would be a most pernicious influence on their children. If the parents do not live together, the children would have no security."

But not only did the probate judge have before him at this hearing these instruments, with their authors, but he had the parents themselves, and while we do not know precisely what transpired, since no stenographic notes were taken, we do have transcribed a hearing dated September 16th, at which the hearing of August 4th was explored in detail. At no time upon this date (September 16th) did Mr. Fritts see fit to refute the charges made against him, a course of action which would seem to suggest itself to any normal person who had been slandered thereby. As to the marital discord, which my Brother would confine to isolated instances, we find in the record of September 16th the following (the assistant county agent is on the stand):

"*Q*. Do your records disclose that Mr. Fritts told you prior to the hearing he wanted his children back?

"*A*. Yes, he called me. I made an appointment with him; he came over and said he wanted to get the children back. They admitted their family life had been a history of discord but they planned to do better."

The fruition of their plans to do better may be judged, in part, by the fact that Mrs. Fritts, while in Kansas, and less than a year before the habeas corpus hearing, petitioned for divorce on the grounds of "gross neglect of duty and extreme mental cruelty," and obtained a court order restraining Mr. Fritts from molesting her. This was on January 13, 1955. On June 25th, she was back in court, asserting that she, relying on his promises, "took him back and they again lived together as man and wife" but that, subsequent thereto, he was again guilty of "gross neglect of duty and extreme mental cruelty toward the plaintiff," and again she obtained a restraining order. We observe, also, that in the hearing on September 16th, Mrs. Fritts confirmed the truth of the matters alleged in her petition, coupling this, however, with the assertion that she wanted the children returned to her. Finally, with respect to this hearing, in view of the fact that the judgment of the probate judge is assailed as being so utterly lacking in foundation as to render his order void, we think, in all fairness to him that his statement made at the close of the hearing should be made a part of our opinion:

"This mother has, with substantial cross-examination, brought out what happened and I want her to know this, that we followed her wishes all the way through in placing those children in identically the kind of home she wanted after trying to dissuade her from this action on 3 different occasions. The point

I want her to know is that the children would suffer greatly if they were moved at this time. I don't want to give an opinion now."

If in all of these charges, repeated and undenied, before the probate judge on August 4th, and the reports then available to him, there is not sufficient evidence of "neglect" the word has a poverty of meaning heretofore unknown to us. In this respect, Mr. Justice EDWARDS holds that "at the time of the hearing, the probate judge had before him no evidence of neglect, either of long duration in the past, or from which any reasonable prediction of future neglect of permanent duration could be made." The emphasis here is apparently upon time, upon the elements of "long" duration and "permanent" duration. The difficulty with the distinction sought to be drawn, emphasized as it is with respect to temporary and permanent orders, is that we cannot define how long long is. How many times must the mother be required to appeal to the public authorities? How many times must the children go hungry? How often must the children witness the mother's beatings? The criterion, in our opinion, depends not upon the clock or calendar but upon all of the surrounding circumstances, the nature of the act or acts, the conditions under which committed, the provocations or lack thereof, and all of the many-colored hues going to make up the spectrum of life.

This determination I would leave in the trier or triers of the facts to whom jurisdiction is confided by statute. But when all is said and done (and here lies the point of my difference with Mr. Justice EDWARDS), the decision of the probate judge upon the issue of neglect remains a matter to be corrected if in error, but not of *jurisdiction*. If he is wrong, if he makes a mistake, indeed, if he blunders, it is only that and nothing more. If he has jurisdiction of the

parties and of the subject matter he does not lose it by making a mistake, for he has jurisdiction to make mistakes. (*Buczkowski* v. *Buczkowski,* 351 Mich 216.)

We need not, we assume, protest our jealousy of the rights of natural parents to their children. But these rights are not indestructible by the parents themselves. The parents may, by their own acts of cruelty or degradation, forfeit rights that we, under other circumstances, would protect and implement by every resource at our command. The beatings administered the mother by the father of the children may be suffered by the mother with whatever philosophy and fortitude she can muster. But we are not prepared to say that exposure to the spectacle, in addition to the balance of the matters shown, cannot constitute neglect of the moral welfare of the children. The persistence of reprehensible home conditions to a period only shortly antedating the hearing in habeas corpus is more than suggested by exhibits A, B, C and D, the instruments from the district court for the county of Sedgwick, Kansas, in which Mr. and Mrs. Fritts were then residing, petitioning for divorce and for an order restraining her husband from molesting her.

The question here under examination, whether an erroneous (even conceding it to be such) finding of neglect results in a "void" order, on the theory that the court thus lost "jurisdiction" because of its error, had recent examination by one of the distinguished courts of the nation, the court of appeals for the District of Columbia, then comprising Justices Edgerton, Stephens, and Rutledge. This court, in the case of *In re Stuart,* 72 App DC 389 (114 F2d 825), had under consideration an appeal from a judgment (of the juvenile court of the District of Columbia) that a child "was without adequate parental care and support and that she should be placed under the

guardianship of a certain person." The court, after reviewing the proceedings and the evidence, concluded that the findings of inadequate parental care and the order transferring the child's custody were without warrant in the evidence. With respect to the issue before us, that of jurisdiction, the court held as follows (pp 833, 834):

"By way of further clarification of the meaning of the act we comment upon an argument of the appellant: It is said in the appellant's brief: 'Jurisdiction of the juvenile court under the act * * * is dependent upon the evidence and in this case the evidence shows no such lack of parental care and support as would give the juvenile court jurisdiction to make appellant a ward of the court.' And throughout the oral argument of the appellant it was insisted that the juvenile court was without 'jurisdiction' to make the order appealed from.

"While it is sometimes loosely said that a court has no 'jurisdiction' to make an order not supported by the evidence necessary to prove the cause of action set forth in the complaint which invokes the action of the court, it is important to point out, for the sake of clarity in respect of the power of the juvenile court, that in the proper sense of the word jurisdiction a court has jurisdiction, in the sense that its erroneous action is voidable only and not void, when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the complaint is not obviously frivolous. *Binderup* v. *Pathe Exchange* (1923), 263 US 291, 305, 306 (44 S Ct 96, 68 L ed 308); and see *Howat* v. *Kansas* (1922), 258 US 181, 189 (42 S Ct 277, 66 L ed 550); *Cooper* v. *Reynolds* (1870), 10 Wall (77 US) 308, 316 (19 L ed 931); *Brougham* v. *Oceanic Steam Navigation Co.* (CCA 1913), 205 F 857, 859; *Hughes* v. *Cuming* (1900), 165 NY 91, 95 (58 NE 794). In this proper sense of the word jurisdiction the juvenile court in the instant case had jurisdiction to make the order

appealed from. The parties were before it, the case described in the petition was within the class of cases which the act gives the court power to deal with—to-wit, a case involving a question of adequate parental care of a person under the age of 18—and the petition on its face stated a cause of action. That the evidence failed to support the petition did not affect the jurisdiction of the court, in the proper sense of the term, to hear the cause and to make the order. But it did, as we have pointed out above, make the action of the court erroneous and subject to reversal on appeal."

The decision is eminently sound. The loose use of the word "jurisdiction" as synonymous with "error" can only serve to introduce untold confusion in the law. *Buczkowski* v. *Buczkowski, supra.* Thus, as we write, we find in the record of an automobile-accident case now before us the assertion made to the trial court (upon objections made to jury charges) that such court "was without jurisdiction in the matter, after having denied defendant's motion for a directed verdict * * * to charge the jury that, as a matter of law, Mr. ——— was guilty of negligence."

If by this it is meant that the trial court, having jurisdiction of the parties and the subject matter, lost such jurisdiction because of the allegedly erroneous charge, it is complete and utter nonsense. A court, having jurisdiction, does not lose it by erroneously charging, by erroneously directing a verdict, or as here by (allegedly) erroneously entering an order respecting custody.

We have not, in the above, weighed the merits of the respective parents. We have not matched, as in the prize ring, the claims of the distraught natural mother, whose feelings as she abandoned her children are probably beyond our full understanding, against those of the foster mothers, as they embrace, awaiting our decision, those children who, as has been said, grew in their hearts rather than under

them. We have not done these things because, although their tragedies are not remote from us, our primary concern is the welfare of the children.

Let there be no misunderstanding in anyone's mind about the lack of justification for what the majority is here doing. We are not acting under the whip of an inexorable statute which we have neither the will nor the wit to interpret, for there is no statute commanding this result. The common law does not demand it. Apt precedent denies it. Why, then? Simply and solely because of our majority's stumbling over one of the most basic concepts known to the law, that of "jurisdiction" to hear and decide. This concept, if misapplied, is so perilous to the stability of the judicial process, to the principles of *res judicata,* that we recently in a unanimous opinion warned the profession against its loose use. We cautioned not to confuse a court's reaching the "correct" result with its jurisdiction to hear and decide. We pointed out that a court having jurisdiction of the parties and the subject matter has also the jurisdiction to err. Having said all of this in *Buczkowski, supra,* a few scant weeks ago, we now plunge into the very pit over which we posted the warning and we drag the Fritts children in with us.

We will climb out, of course. The sun will not set on this day before we will be forced to devise ways first to distinguish, then to repudiate, then to bury, this case as authority. No court can live with the proposition that jurisdiction to hear and decide depends upon evidence sufficient to justify the remedy prayed, for we do not reach the question of remedy in the matter before us until we have crossed the bridge of jurisdiction. But what, in the meantime, of these children? Are they never to know surcease from sorrow? Were their cups not filled to overflowing 6 years ago? Are we now to add the hemlock?

The circuit judge was in error in deciding that the probate court did not have jurisdiction of the matter before it. The writs issued in circuit should therefore be dismissed, without costs.

BLACK and VOELKER, JJ., concurred with SMITH, J.

BLACK, J. (*dissenting*). I make bold to say that, on review here of habeas corpus proceedings instituted for the purpose of determining custody of children of tender years,* our first act should be that of self-appointment of this Court as a sort of temporary guardian of the rights and interests of the diminutive and tragically interested party or parties for whom—as a rule and as here—no counsel appears. In this case the natural parents (formerly of Arkansas, late of Michigan, and now of Kansas) vie with the would-be adoptive and 6-year-continuous foster parents for immediate as well as final custody of 2 little children. In the shadowed valley between these grimly contentious forces walk the innocent and utterly defenseless sister and brother known in this record as Sally Ann and Doyle Almo Fritts. We may well liken their position to that of Hansel and Gretel in the forest. No guardian or counsel stood by their side in the courts below. None speaks to us now in their separate behalf. Send well to this Court, in all good time, the courage and the wisdom with which to confess the error of today's myopic majority, thus to attend the welfare and legal rights of the two. And grant that, before the inevitably ultimate right of this case comes to final if belated judgment, Sally and Doyle Fritts are still within reach of orderly process to be issued by the

* This case concerns the jurisdiction of Michigan probate courts, sitting in juvenile division, under the act of 1944, as amended (PA 1944 [1st Ex Sess], No 54). By the act a new chapter, "to stand as chapter 12A thereof," was added to the probate code of 1939. In this opinion I shall refer to the chapter by section numbers. The official chapter citation is CL 1948 and CLS 1956, § 712A.1 *et seq.* (Stat Ann 1957 Cum Supp § 27.3178 [598.1] *et seq.*).

Berrien county probate court in accordance with such final judgment.

I fully agree with the reasoning of Mr. Justice SMITH and join him in concluding that these writs of habeas corpus should be dismissed. There is more to be said, however, lest as the impending legal storm rages, as it surely will over today's wholly indefensible decision of a bare foursome sitting here, these youngsters are spirited beyond our borders and beyond effective recall of that order of recant (however mincing and equivocal it may be) we are sure to enter when the impact of majority decision becomes known in Michigan probate courts and is fully realized in our conference room. This Court and our people will never be able to live with the incredible and blindly posted doctrines the undersigned do now reject, and the only question is one of time; time when 4 of our Brothers perceive—and act to correct—their grievous folly.

Cardozo tells us that judges "march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative;" that they "deplore the sacrificial rite" and perform it with averted gaze, "convinced as they plunge the knife that they obey the bidding of their office." (The Growth Of The Law, p 66.) My Brothers surely march thus here, not fully realizing what they do. Would that the Constitution required each member of this Court to personally witness the heartsickening scene of execution of today's majority sentence; that of tearing 2 fear-stricken little ones from the only homes of love and care they know or remember. We might in such case recall these writs on the spot, leaving a jury to determine that which of right should be settled in Berrien county's circuit court juryroom.

Aside from the impact of today's sentence on these children, what is it that appalls us (we who have studied the *partial record* on which today's majority

has written plus the *remaining record* our minority has seen fit, since submission of the case, to bring here from the Berrien county clerk's office)? It is this precise and decidedly aberrant determination of the majority:

That a Michigan court of record concededly may have jurisdiction of the parties and subject matter brought before it in an entirely proper statutory proceeding (noncriminal in nature*) and yet, before the day of hearing is over and for want of what to our majority is a sufficient record of supporting proof, *lose jurisdiction to proceed to judgment* (the judgment whether tainted with error or otherwise being quite within scope and range of the statute under which court and parties have assumed to proceed) *and, at the same time and by force of the same allegedly deficient record, lose jurisdiction over the subject matter* (in this case the protection and welfare of infants who, in their own unrepresented right, are entitled to continued exercise of that jurisdiction to the point of final judgment or attainment by them of age 17).

Today's error will spread its inescapable contagion beyond the confines of Berrien county to the outermost boundaries of Michigan. Until we proceed to inexorable self-correction, a menacing cloud of jurisdictional doubt will have been cast upon every order hitherto issued, in juvenile division of probate (on strength of which supposedly final and happily concluded adoption proceedings may depend), where the record discloses a paucity of proof, or a dissatisfactory record of proof, or an absence of "real evidence of long-time neglect," supporting such order. And this our majority proceeds to do in the face of an ignored section of the statute declaring that the

* Section 1 of said chapter 12A specifically declares that "Proceedings under this chapter shall not be deemed to be criminal proceedings."

hearing in question may be informal; that "stenographic notes or other transcript" need be taken or made only when requested by counsel or ordered by the court, and that "the general public may be excluded" from such hearing (section 17 of said chapter 12A).* Ah, yes, we must find a way to unfetter this habeas corpus proceeding from the hard-to-get-around and already firmly seated jurisdiction of the juvenile division over these children. The only way is the way of necessity, and we shall pursue it to sentence of the children even though necessity knows no law. Thus,

"Man, proud man,
Drest in a little brief authority,
Most ignorant of what he's most assured * * *
Plays such fantastic tricks before high heaven
As makes the angels weep."

(Isabella's denunciation of the sentencing judge in Measure For Measure, act 2, sc 2, lines 117–122.)

This case will be known in future years as Michigan's judicial wosbird of 1958—the occasion when 4 members of the Supreme Court of Michigan sentenced 2 sinless little children to a strange and portentously darkened life in a faraway State without pretense of providing them with the fundamental rights—to counsel and jury trial—we guarantee to the meanest of our adult citizens. Withal, the professed concern of my Brothers, for the welfare of the innocents they now condemn, is positively chilling. I turn to the record facts, including those—brought here since submission of the case—my Brothers would ignore.

Sally Ann Fritts was born at Little Rock, Arkansas, December 19, 1949. Doyle Almo Fritts was born

* In this case, and certainly by permission of the statute, no stenographic record of the hearing on August 4, 1952, was taken or made. No wonder the "record" isn't letter perfect.

at Watervliet (in Berrien county), December 17, 1950. In July of 1952—this my Brothers in majority concede—the Berrien county probate court, sitting in juvenile division, became vested with statutory jurisdiction over Sally and Doyle on account of the outright tragedy of the father's neglect and desertion and the repeatedly presented plea of the mother that they receive care from the court she could not give, followed by the statutory steps my Brothers have related. They—the mother and children—had no food and the children needed milk. The little boy, then less than 2 years old, was suffering from impetigo and was in need of immediate medical care. The distraught mother declared to the juvenile division that she was unable to care for them and that she wanted "to put the children in an adoptive home where they will be well cared for." On the third occasion, when she sought aid in the probate office, the mother left the children there, the latter crying their forlorn grief, saying "Well, I'm leaving them anyway." This, to the undersigned, amounted to utter abandonment of forsaken waifs, yet it suggests no criticism of a desperate mother. She had little alternative and was quite destitute. The father—petitioner here for release of our gracious writs of habeas corpus—had deserted the whole family and had gone back to his original home at Bald Knob, Arkansas.

So the juvenile division proceeded to statutory hearing and entry of the orders my Brothers pronounce jurisdictionally defective. Such orders were entered under date of August 4, 1952.* In form they

* August 18, 1952, the parents filed a petition (obviously authorized by section 21 of said chapter 12A) to set aside the orders of August 4th. Such petition, after full hearing with the parents represented by counsel, was denied September 27, 1952. The parents thereupon filed certain papers in probate looking toward appeal from the order of denial but did not pursue such appeal further. This abandoned appeal of 1952 is the one to which my Brother EDWARDS refers (*ante*, p 117).

duplicate the juvenile division order considered in *In re Snyder,* 328 Mich 277, which order was reversed on appeal to circuit, and confirmed as against such reversal on appeal to this Court, with no question raised by anyone—including any member of this Court—as to jurisdiction of the juvenile division to enter such "permanent" order.

The record of Mrs. Fritts' troubles, since she rejoined her husband at Wichita, Kansas, is replete with more evidence upon which a constituted trier or triers of fact (distinguished from a court hearing jurisdictional questions in a habeas corpus proceeding) might well conclude that a return of custody to these parents is not yet in order.* On January 14, 1955, Mrs. Fritts filed her petition for divorce against Mr. Fritts in the district court of Sedgwick county, Kansas, alleging parentage of Sally Ann, Doyle Almo and Jimmy Dale (born since the probate hearing of 1952); alleging neglect of duty and cruelty on the part of Mr. Fritts, and alleging that her husband "should be restrained and enjoined from molesting or annoying the plaintiff at any time." The district court thereupon issued its order restraining Mr. Fritts from molesting or annoying Mrs. Fritts, as in her bill prayed, and ordered him to pay a biweekly amount for "temporary child support and alimony" plus attorney fees. On June 24, 1955, Mrs. Fritts filed an amended petition, alleging birth of a fourth child (Ronald Leslie) and alleging further as follows:

"That on January 14, 1955, plaintiff filed a petition for divorce against the defendant; that after defendant promised the plaintiff that he would discontinue his acts which constituted extreme mental cruelty

* The point made here, and I shall come to it later, is that there as yet has been no trial of the merits of the pending statutory petition by which these parents ask restoration to them of custody of these children.

and gross neglect of duty, plaintiff, relying upon these promises, took him back and they again lived together as man and wife."

In her amended petition Mrs. Fritts went on to allege:

"That plaintiff, since taking her husband back has performed each and every duty devolving upon her as the wife of the defendant but he, disregarding his duties, marriage vows and promises, has been guilty of gross neglect of duty and extreme mental cruelty toward the plaintiff."

This record of continued marital discord, save only as testified later in relation to what obviously was a shaky reconciliation of the parents (see opinion of Mr. Justice EDWARDS on this), is the only information this appellate Court has before it, in this year 1958, on strength of which we are asked to approve transfer of child custody—by habeas corpus thwarting direct and pending appeal—from excellent homes and foster parents within our jurisdiction to a troubled home beyond reach of our process. Convinced that the proper forum for enlightened and legally rightful determination of such critical issue has not as yet been utilized and that it stands open to all interested parties (in the Berrien county circuit court), I will have no part in any such abuse and misuse of our constitutional writ.

First: The question of jurisdictional validity of the probate court orders of August 4, 1952.

Mr. Justice SMITH has considered this question at length. Fully agreeing with his views, I am moved to add this: So long as jurisdiction to enter a "supplemental order of disposition" continues (and such jurisdiction of the juvenile division remains intact to this day, so far as concerns Sally and Doyle Fritts, regardless of validity of the orders of August 4th), no order—entered in juvenile division—may proper-

ly be termed as "severing all parental rights" (the quoted expression is that of Mr. Justice EDWARDS).* This I think was made plain, even to the legally unskilled, by the grant of continuing jurisdiction to issue supplemental orders "at any time while said child is under the jurisdiction of said court," which grant the reader will find in dovetailed seriation as shown by sections 19, 20, 21 and 24 of said chapter 12A. Indeed, the very section my Brothers in majority rely upon echoes this necessary—when we consider the rather manifest need for continuity of jurisdiction in such cases—declaration of legislative intent. That section (section 20) concludes: "If the child is placed in the permanent custody of the court, all parental rights are terminated *though such rights may be reinstated by a supplemental order of disposition.*" Perforce, there is no finality of any order when the order itself, by command of a self-incorporating statute, is made subject to the retained and continuing power of the court to "affirm, modify, or set aside" any and all such orders. Witness the complementing and cooperative provisions of sections 20 and 21 of the statute. The fate of a child in our courts is not—or at least should not be—a life or death single shot at the apple on the youngster's head like, say, the one opportunity of driving home a mechanic's lien. The statute, referring to said chapter 12A, says just that. So does even a soupcon of common sense.

Even an unanimous determination of this Court, of jurisdictional invalidity of the 2 orders of August 4th, would in no manner support these misguided

* Such an order—finally "severing all parental rights"—may of course be entered with the effect provided by section 9 of chapter 10 of the probate code (CLS 1956, § 710.9, Stat Ann 1957 Cum Supp § 27.3178 [549]), as last amended by PA 1957, No 255, pertaining to adoption proceedings. No such order has as yet been entered in the pending proceedings (in Berrien probate) looking toward adoption of Sally by Mr. and Mrs. Graham and adoption of Doyle by Mr. and Mrs. Krugh.

writs of habeas corpus. The juvenile division admittedly was possessed of jurisdiction over Sally and Doyle when the hearing of August 4th commenced. If its orders of that day were void for any reason— and this I vigorously dispute—the conceded jurisdiction over Sally and Doyle Fritts remained steadfast and became an appropriate subject of a new proceeding under the statute or continuation of the one rightfully commenced. Is this not clear? Well, these parents recognized and proceeded on strength of the conclusion just voiced when they filed (August 18, 1955) their statutory petition for restoration of custody and appealed to circuit from denial thereof.

This brings us to the discovered record fact of filing in probate of said petition of August 18th; denial thereof in probate; due appeal to circuit (by the parents) from denial thereof; motion in circuit (by Mr. and Mrs. Krugh and Mr. and Mrs. Graham) to dismiss appeal on ground that the orders of August 4, 1952, constituted an adjudication in bar of hearing and determination of the petition of August 18th; due submission of said motion to dismiss appeal; filing of the circuit judge's opinion in which he held that the motion to dismiss should be denied, and entry of order in circuit "That the aforesaid petition (of August 18th) be tried on its merits *de novo*.* The circuit judge's opinion denying such motion to dismiss is both enlightening and sound. I concur fully with his conclusion. He ruled (quoting from his unvacated and unchallenged opinion filed March 15, 1956):

* These record facts are taken from the original and separate Berrien county circuit court file entitled "In the Matter of the Estate of Sally Ann Fritts and Doyle Almo Fritts, Jr." Such file bears Berrien circuit court No B-1400. It now reposes, along with the record first certified here, in our clerk's office.

"The question of whether or not the probate court had jurisdiction, or whether any of its orders as actually entered were *res judicata* of that question, or of any issue as to the contents and effect of such orders, becomes immaterial as applied to the situation existing now, or at least at the time of the filing of the petition denied in probate court which is the basis of this appeal.

"The petition appears to raise the question of the current status of these children in fact and in law. It should be heard on its merits *de novo* so that this court may determine the status of the children, and if then required, based on the petition as filed determine the issue of custody thereby raised.

"The motion to dismiss the appeal is denied without costs, and petitioners may prepare an order for signature accordingly."*

All in all it is something more than remarkable to find an appeal pending in circuit, from denial of a statutory petition for supplemental order of disposition, held in abeyance by one judicial hand as the other proceeds by habeas corpus in the same court to question and deny the jurisdiction of the court from which such appeal has been taken. And such is the more unseemly when the same court has just certified, as against the asserted jurisdictional question,

* It is suggested that we have no right to consider this additional file and that resort thereto may amount, so far as concerns the present litigant parties, to a denial of due process. To this view of due process—perforce through a small knothole—my answer is short. I am interested more in due process for these children than in misguided process for those who have brought here a curtailed and misleading record; a record which, but for the vigilance of our reporter during his customary check—against such curtailed record—of the foregoing opinions of Justices EDWARDS and SMITH, doubtless would have eliminated from sight of this Court the crucial fact that habeas corpus to settle this issue of custody has indeed and in fact been substituted for a presently pending appeal from denial of a statutory petition for settlement of the same issue. Yes, I propose to provide due process for all, children and contenders alike. It is bad enough to innocently decide a case the wrong way on account of an inadequate and error-causing record but infinitely worse to persist with such error after the decisive record facts are brought here and made known.

that the pending appeal should proceed to trial for the purpose of determining the statutory and real issue all parties, including the involved children, are entitled to have settled. That issue now is whether Mr. and Mrs. Fritts, on 1958 (not 1956) proofs to be taken, are entitled by said petition (for restoration of custody) to a "supplemental order of disposition" in their favor.

Second: Should habeas corpus be interposed, and substituted for, the pending appeal from probate court?

The case must be a rarity where any court has permitted parties to utilize habeas corpus as a means to move aside, and thus impede or supersede, regular and pending litigation in which the same issue—presented in the petition for habeas corpus—is due for settlement or overriding adjudication. Our rule, consonant with unanimous authority, is that habeas corpus cannot be substituted for appeal or error. We apply the rule—must apply it—in at least a score of cases each year when petitions for habeas corpus are brought before us to review appealed or appealable jail or prison sentences. Most surely, and in every case save this singular one involving these Berrien county children, we shall continue to apply it *when it is shown that an appeal aimed at the relevant point of adjudication is pending and waiting trial.*

In the recent and duplicating case of *Harmsen* v. *Fizzell,* 351 Mich 86, 106, Mr. Justice EDWARDS, supported by this writer and 2 other members of the Court, found occasion to consider the general rule to which I refer. After having treated "technical legal problems" brought here in *Harmsen* to test jurisdiction of the same juvenile division, our Brother went on to say:

"More needs, however, to be said, for this case does not involve a criminal proceeding where the right of a person to freedom from restraint is at issue. What is sought here is the use of the writ of habeas corpus as a substitute for statutory appeal to review long past orders of the probate court or to gain a hearing *de novo* on the issues purportedly adjudicated therein."

I rise to remark that *Harmsen* was a proceeding in habeas corpus, wherein 4 present members of our Court headed by Justice EDWARDS wrote to sustain Berrien county probate (juvenile division) jurisdiction—as against habeas corpus in Berrien circuit—on this sound premise (p 109): "Children are not chattels to which legal title may properly be determined by a technical writ." Yet here our Brother writes to yield juvenile division jurisdiction over—as well as jurisdictional title to—these children, and to do so by issuance of "technical writs." And this he does after having just extolled the superior virtues and advantages of the juvenile division, with its "special jurisdiction, special powers of disposition, and specialized staffing as to children's problems in dependency and delinquency cases." (*Sovereign* v. *Sovereign,* 354 Mich 65, 95, handed down this day). *Quid est?* Or is there something "special" about the jurisdiction of the Berrien juvenile division which requires that its advantages be applied to Ruth and David Harmsen but not to the equally needful Sally and Doyle Fritts?

Third: The immediate welfare of these children. Aside from the above we come to the always-controlling question of present welfare of these children. If, as this Court rightfully declares with reiterant monotony in child custody cases, our prime goal is the greatest good we can do by the child, then Sally and Doyle Fritts should remain in these foster homes pending orderly trial, preferably by jury, of the stat-

utory issue their parents have voluntarily submitted to the juvenile division and brought to the circuit court by appeal. We need not dwell upon the parlous and uncertain life into which these infants—judging from this not-up-to-date record—will be thrust should they be sent by these writs to Kansas. We need not describe the praiseworthy environment of Sally's life since she was enabled—just 6 years ago—to enter and become part of the home of Mr. and Mrs. Graham. Neither must we write details of corresponding and quite undisputed facts disclosing that little Doyle mercifully knows and remembers only the home and care Mr. and Mrs. Krugh have bestowed on him since he was 20 months old. Probably, in all history of this Court, no better record of proper, loving and continuous care of little ones, by foster parents desiring their adoption, has been laid before us. Without assuming to decide the ultimate and properly triable issue—whether the natural parents are entitled to restoration of custody by a supplemental or new order,—our present course on these facts is accurately charted. The children should stay where they are until the mentioned issue is tried to verdict and judgment.

There is a special and separate reason for the determination I espouse. These children are now—and have been for 6 years— subject to the jurisdiction of the Berrien county probate court, juvenile division. Should they be sent away, by these writs to a distant State, effective jurisdiction will have been lost to Michigan and cast upon Kansas. And in Kansas there may be no Krughs or Grahams available to take over when and if the next—from past experience—abandonment of Sally and Doyle takes place.

Recognizing, as I do, judicial authority to send infants beyond our borders and beyond judicial recall (*Lewis* v. *Lewis,* 338 Mich 197, 200), we should in this case announce the important qualification

other courts in their wisdom have seen fit to plainly record. As was said in the annotated case of *Pugh* v. *Pugh,* 133 W Va 501, 509 (56 SE2d 901, 905, 15 ALR2d 424, 430):

"When the award of custody of an infant to a resident of another State, or the removal of the infant to another jurisdiction, will not serve, or is detrimental to, the welfare of the child, such award or such removal will not be permitted (citing numerous authorities). The power of the circuit court to award the custody of the child to the petitioner, who is not a resident of this State, and to permit her to remove the child from its jurisdiction and to the State of California, is clear beyond question. It should not exercise that power, however, unless the award of custody to a person who is not a resident of this State and the permission to take the child out of this State promote the welfare of the child."

The subject will be found thoroughly briefed in the above-cited annotation, starting on page 432, under the heading "Nonresidence as affecting one's right to custody of child." The entire annotation (15 ALR2d 432) may be summarized as a boresightedly accurate declaration of power and duty to release a child from the jurisdiction—to that of another State—when and only when it is found that the welfare of the child will best be promoted by an order for such release. Here there is no such finding, below or in our majority opinion, and none could be fashioned from this complete record without resort to transparent distortion.* In these circumstances (and entirely apart from other considerations pre-

* Under date of October 19, 1955 (the petition for order of restoration having been recently filed), the Berrien county juvenile officer filed his detailed report with recommendation. It concludes, and I believe it to be the right fact-conclusion we should reach, as follows:

"It would be a perversion of justice to tear these children away from their present homes and place them back in a home where there is continual strife and insecurity."

sented in this opinion) I would resolve the doubt—there is none in my mind—in favor of present retention, of Berrien county's statutory probate jurisdiction, by and through dismissal of these writs. As was said in *Butler* v. *Perry,* 210 Md 332, 342 (123 A2d, 453, 458):

"We do not suggest for an instant that if the best interests of a child required it that the child should not be sent out of the State. * * * We merely say that in a close case, such as the case before us, one consideration is that the court may exercise much more effective control when custody is kept in the State."

The supreme court of Minnesota had recent occasion to consider the application of a mother, made under circumstances much like those shown here, for custody of her young son and for leave to take him from Minnesota to her place of residence in Ohio (*State, ex rel. Jaroszewski,* v. *Prestidge,* 249 Minn 80 [81 NW2d 705]). The court's reasoning to denial of that application is, in my view, decisively good for the case at bar. The court said (p 90):

"It is always difficult for a court to decide that a natural mother shall be deprived of the custody of her child. However, under the facts and circumstances here, we feel that it will not be for the best interests of the child at his tender age to take him away from the home and environment, church and school connection, which he has known up to now, and place him in the custody of respondent.

"The record shows that he has been raised and cared for by appellants since he was a few months old; that they still desire to have him live with them; and that the boy seems happy and contented with his present home and environment. We believe that a serious emotional upset could result if a transfer of custody were made at this time. One of the considerations in our decision is the fact that there has been

no satisfactory showing of a stable home or proper environment if custody were given to the respondent, nor has there been any convincing showing that her type of work and life have changed sufficiently so that the child should now be placed in her custody."

Summary

This case—one of review and approval of issuance of "technical writs" divesting the juvenile division of jurisdiction over 2 children whose right to exercise of such jurisdiction stands unquestioned by word or reason—goes into our reports crying in vain for answer, by our quadriad majority, of 2 stark questions: Was the juvenile division possessed of no jurisdiction, under said chapter 12A, to hear and determine the yet pending and ready-to-be-tried statutory petition by the natural parents for restoration of custody? When and by what act or reasoning has the juvenile division lost its acquired jurisdiction over Sally and Doyle Fritts; the jurisdiction which concededly was vested in and with such division when the gavel announced the opening of court on August 4, 1952?

From such want of answer sprouts our incredible mistake in this case; that of release of these writs when no one here knows—any more than do the probate and circuit judges below—what today's fact-picture in Kansas (distinguished from that of more than 2 years ago) is or may be. Writs of habeas corpus either issue, or they do not. Let us hope that these errantly signed writs are arrested—short of the State line—before it is too late.

I vote to reverse with remand for dismissal of the writs and with instruction to proceed toward prompt trial of the pending appeal from probate court. Further, I would recommend to the circuit court that consideration be given to its discretion to order that such appeal be transferred to the jury

calendar (See section 3 of Court Rule No 33 [1945] and author's comment under section 2 of Court Rule No 74 [1945])* and to provide by order for the appointment of a guardian and vigorous trial counsel for the real parties in interest, Sally and Doyle Fritts.

SMITH and VOELKER, JJ., concurred with BLACK, J.

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

* Honigman, Michigan Court Rules Annotated, p 704.

SOVEREIGN *v.* SOVEREIGN.

1. JUDGMENT—RES JUDICATA.
   The defense of *res judicata* involves the same subject matter and the same parties in order to be successful.

2. DIVORCE—RES JUDICATA.
   The defense of *res judicata* in second suit for divorce was not available, where the plaintiff wife in her sworn bill of complaint relied upon acts subsequent to final decision in the prior case.

3. HUSBAND AND WIFE—SUPPORT OF WIFE AND MINOR CHILDREN.
   A married man's obligation to support his wife and minor children remains with him until a dissolution of the marital relationship.

REFERENCES FOR POINTS IN HEADNOTES

[1] 30A Am Jur, Judgments §§ 363, 397.
[2, 5] 17 Am Jur, Divorce and Separation § 547.
Decree in suit for separation as *res judicata* in subsequent suit for divorce or annulment. 138 ALR 346.
[3] 26 Am Jur, Husband and Wife § 340; 39 Am Jur, Parent and Child § 35.
[6] 30A Am Jur, Judgments § 328.
Distinction between judgments as bar to cause of action and as estoppel as to particular fact. 88 ALR 574.
[7] 41 Am Jur, Pleading § 333.

4. SAME—PREVIOUS SUIT FOR DIVORCE—SUPPORT OF WIFE AND MINOR CHILDREN.

The fact that defendant husband was found not entitled to decree of divorce in previous suit therefor did not relieve him of his continuing obligation to support his wife and minor children.

5. DIVORCE—RES JUDICATA—ESTOPPEL BY JUDGMENT.

Plaintiff wife who filed a sworn bill of complaint in second suit for divorce and relied upon defendant husband's misconduct since final determination of prior suit for divorce, in that he failed to provide a home for plaintiff and their minor child or to support either of them and had deliberately subjected her to additional expense of annulment proceedings, notwithstanding he was a man of substantial income and ability to support plaintiff and their child, was not barred from relief by the principle of *res judicata* or of estoppel by judgment.

6. JUDGMENT—ESTOPPEL BY JUDGMENT—PLEADINGS—EVIDENCE.

The doctrine of estoppel by judgment is applied only as to such matters within the scope of the pleadings in the previous litigation as necessarily had to be adjudicated in order for the previous judgment or decree to be rendered, or as to such matters within the scope of the pleadings as might or might not have been adjudicated, but which are shown by aliunde proof to have been actually litigated and determined.

7. EQUITY—MOTION TO DISMISS—PLEADING.

The court considers matters well pleaded in the bill of complaint to be true for the purpose of disposition of the motion to dismiss.

8. DIVORCE—SECOND SUIT—CONTINUANCE OF MISCONDUCT.

The continuance of misconduct which prevented the entry of a decree of divorce in a prior suit after such decree could be a defense available to the opposite party in second suit.

Appeal from Saginaw; Carroll (Howard R.), J., presiding. Submitted April 9, 1958. (Docket No. 14, Calendar No. 47,628.) Decided October 13, 1958.

Bill by Mary K. Sovereign against Will F. Sovereign for divorce. Bill dismissed on motion. Plaintiff appeals. Reversed and remanded.

Irving M. Hart (*Walter Martin,* of counsel), for plaintiff.

Poppen, Street & Sorensen (*Harold M. Street,* of counsel), for defendant.

KAVANAGH, J. Plaintiff filed a bill of complaint in the Saginaw county circuit court on May 22, 1957, praying for divorce from the bonds of matrimony, custody of the minor child, temporary and permanent alimony, support and maintenance, court costs, and a temporary injunction restraining the defendant from attempting to interfere with plaintiff's sole custody of the minor child.

Plaintiff alleges a previous divorce case in the Saginaw circuit court. Following a decision by the lower court that plaintiff's bill of complaint should be dismissed and defendant granted a decree on his cross bill, appeals were taken by the parties to the Supreme Court. The Supreme Court, as reported in *Sovereign* v. *Sovereign,* 347 Mich 205, found that the actions of both parties were such that neither party was entitled to a decree of divorce. The Court authorized the entry of a decree in the circuit court dismissing the bill and cross bill.

Plaintiff further alleges that subsequent to the decision in the Supreme Court on December 6, 1956, that said defendant has been guilty of several acts of extreme and repeated cruelty: (1) that defendant has failed to provide a home for the plaintiff and the minor child of the parties; (2) that defendant has failed to support and maintain this plaintiff and has contributed absolutely nothing to her support and maintenance since December 6, 1956; (3) that defendant has contributed nothing to the support and maintenance of the minor child of the parties; (4) that said defendant has deliberately provoked additional financial burdens upon plaintiff by filing annul-

ment proceedings in the Bay county circuit court;* (5) that the defendant is a man of substantial financial means and has substantial income and ability to provide support and maintenance for plaintiff and the minor child of the parties.

On May 29, 1957, defendant moved the court to dismiss the bill of complaint filed in the above entitled cause; to dismiss the petition for temporary alimony, support and attorney fees, and to dissolve the temporary injunction heretofore issued for the following reasons:

"1. The bill of complaint does not state a cause of action.

"2. The court has no jurisdiction over the subject matter of the action.

"3. The action is barred by a prior decree.

"4. There is a prior action pending between the same parties involving the same subject matter in another court of equal and concurrent jurisdiction.

"5. The plaintiff is wholly without equity and is barred from equitable relief by her prior misconduct and current adulterous association with a Mr. V.

"6. The temporary injunction was improvidently and improperly issued.

"7. The proceeding is brought in bad faith, with full knowledge that plaintiff does not come into court with clean hands and is barred from equitable relief.

"8. The proceeding is a fraud upon the court in that the bill of complaint does not disclose all the facts which it is plaintiff's duty to disclose to the court."

On May 31, 1957, plaintiff filed an answer to the motion to dismiss, and on July 16, 1957, filed an amended bill of complaint. She alleges, under paragraph 5-a, that she has continued to live in the home of the parties; that she has ceased the actions complained of which would be a basis for a divorce ac-

* See 354 Mich 65.—REPORTER.

tion against her; that she has conducted herself properly as befitting a loyal and devoted wife to her marital obilgations; that she has continued to rear and care for the minor child, and has been a good and kind mother to him; that following the decision of December 6, 1956, she expected that defendant would likewise reform his conduct; that she expected defendant to return to his domicile so that they could attempt to make a success of their marriage and rear the minor child of the parties in a normal home; that defendant has refrained from so doing, and through his attorney has informed plaintiff that no reconciliation will ever be possible.

On July 19, 1957, the trial court filed a written opinion granting the motion to dimiss. On July 22, 1957, an order was entered dismissing the plaintiff's bill of complaint. The order included a finding that in the absence of condonation or a reversal of the finding of the trial court, the rule of *res judicata* applies.

From the opinion of the trial court it would appear that his reasons for granting the motion to dismiss were: (1) the lack of clean hands on the part of plaintiff; and (2) the decision in the previous action rendered *res judicata* a determination of all matters growing out of the matrimonial relationship. No testimony was taken. The bill of complaint is a sworn bill of complaint.

This Court has often said that for a defense of *res judicata* to be successfully pleaded it must involve the same subject matter, the same parties. *Tucker* v. *Rohrback,* 13 Mich 73; *Love* v. *Francis,* 63 Mich 181 (6 Am St Rep 290); *McDannel* v. *Black,* 270 Mich 305; *Reid* v. *Gooden,* 282 Mich 495; *Hammitt* v. *Straley,* 338 Mich 587; *Austin* v. *Painters' District Council,* 339 Mich 462.

In this action the same subject matter is not involved since the acts of extreme and repeated cruelty

relied upon by plaintiff in her sworn bill of complaint are acts subsequent to the decision of the Supreme Court in the previous case on December 6, 1956. Certainly the law would not forever relieve the defendant of any future marital duties simply because in a prior decree it was determined that he had been guilty of misconduct which would justify the Court in refusing him a decree of divorce. His obligation to resume and carry on the responsibilities and duties of the married life, including support of his wife and minor child, remains with him until a dissolution of the marital relationship. As a wrongdoer he is not beyond the pale of the law in the sense that he is relieved of these obligations. His failure to perform them subsequent to December 6, 1956, might be evidence of extreme and repeated cruelty which would justify a court to grant plaintiff a decree of divorce. The rule is found in 17 Am Jur, Divorce and Separation, § 554, p 650, as follows:

"It is only when enough has occurred since the rendition of the first decree to entitle the plaintiff to relief that a divorce will be granted in the subsequent proceeding." (Citing *People, ex rel. Healy,* v. *Case,* 241 Ill 279 [89 NE 638, 25 LRA NS 578]; *Brown* v. *Brown,* 37 NH 536 [75 Am Dec 154]; *Ford* v. *Ford,* 25 Okla 785 [108 P 366, 27 LRA NS 856]; *Farquar* v. *Farquar,* 20 Or 69 [25 P 146, 23 Am St Rep 93]; *Averbuch* v. *Averbuch,* 80 Wash 257 [141 P 701, Ann Cas 1916B, 873]; *Vickers* v. *Vickers,* 95 W Va 323 [122 SE 279, 41 ALR 266].)

In *Silberstein* v. *Silberstein,* 218 NY 525 (113 NE 495), the wife sued for a separation from her husband. The court found that her charges were not proved against the husband, but that the wife was guilty of abandonment and desertion. The court entered a dismissal of the action. Subsequent to the dismissal she asked to return to him, but he refused to live with her or to contribute to her support. The

wife then brought a second suit for separation. The husband, in defense of the second suit, asserted that the former judgment was conclusive evidence, not only of his innocence, but of her guilt, and that the abandonment put an end to his duty to her forever. Justice Cardozo wrote the opinion on appeal, and said (p 528):

"We think the judgment in the first action does not have the effect which has thus far been attributed to it."

In the later case of *Mirizio* v. *Mirizio,* 248 NY 175 (161 NE 461), Justice Cardozo, again writing the opinion for the court on the same issue said (pp 179, 181):

"We are told that her error has barred his door to her forever. * * * Whatever her errors may have been, the plaintiff is the defendant's wife. He has never offered her a home, nor paid a dollar to maintain her. Not yet has the law released him from the duty of support."

In the case of *Bennett* v. *Bennett,* 336 Mich 133, Chief Justice DETHMERS, writing the opinion for the Court, mentions the 2-month period following the decree dismissing the first suit (p 135):

"We cannot say, on an examination of the entire record, that, had we been in the position of the trial judge, we would have found otherwise than he did with respect to the conflicting claims of parties concerning the conduct of each during that period."

The Court refused to reverse the lower court in the *Bennett Case* for the reasons that the trial judge heard the witnesses, observed their demeanor and was in the best position to determine their credibility and to conclude what the facts in the case really were. No mention was made by the Supreme Court that a

dismissal of the previous bill precluded the introduction of testimony with reference to a new period.

In the Michigan case of *Herp* v. *Herp,* 254 Mich 33, Justice NELSON SHARPE, writing the opinion for the Court, said (p 35):

"On this record, the evidence of the refusal or neglect of the defendant must be confined to the time between August, 1929, when the former bill was dismissed, and January 15, 1930, when this bill was filed."

The Michigan case of *Dowhan* v. *Dowhan,* 303 Mich 197, dealing with a factual situation similar to the one in the instant case, held as follows (p 199):

"The instant suit in Oakland county, based on new and different facts which arose subsequent to the original suit in Wayne county, is not barred by the principle of *res judicata* or estoppel by judgment; nor is the second action barred by an appeal pending in the first action."

The Court went on to say that this question was considered by the supreme court of Georgia in *Slaughter* v. *Slaughter,* 190 Ga 229 (9 SE2d 70, 129 ALR 156), and that other authorities on the same subject are annotated in 26 LRA NS beginning at page 577. Justice BUSHNELL then quoted from the *Slaughter Case* as follows (p 200):

" 'These later acts could not have been alleged in the former suit and could not have been passed on by the court in that case. * * *

" 'If the second suit cannot be maintained, it is only because of the principle of *res judicata* or of estoppel by judgment. * * * The doctrine of *res judicata* is to be applied only when the cause of action is the same. * * * The doctrine of estoppel by judgment is applied only as to such matters within the scope of the pleadings in the previous litigation as necessarily had to be adjudicated in order for the previous

judgment or decree to be rendered, or as to such matters within the scope of the pleadings as might or might not have been adjudicated, but which are shown by aliunde proof to have been actually litigated and determined.'" (*Slaughter* v. *Slaughter, supra,* 230.)

The Court in the *Dowhan Case* also quoted from *Paynton* v. *Paynton,* 194 Mich 504, 507, as follows (p 200):

"'The decree of the Illinois court seems to have been a final decree establishing the fact that defendant was not an habitual drunkard when it was rendered in 1911; but that, of course, would have no tendency to show that she had not become one when this suit was begun in 1915.'"

On a motion to dismiss it is elementary that we consider the matters well pleaded in the bill of complaint to be true for the purpose of disposition of the motion to dismiss. It would therefore appear that the circuit court should not have granted the motion to dismiss for the reasons given, since the matter is not *res judicata* as to the new period. If, on a new trial of the cause, it develops that plaintiff is still continuing the old acts, then, certainly, the defense of recrimination would be available to defendant, and a denial of plaintiff's prayer for a decree of divorce could be entered.

For the above reasons, the decision of the lower court granting the motion to dismiss is reversed and the cause is remanded.

DETHMERS, C. J., and CARR, KELLY, SMITH, BLACK, EDWARDS, and VOELKER, JJ., concurred.

BACON *v.* KENT-OTTAWA METROPOLITAN WATER AUTHORITY.

1. CONSTITUTIONAL LAW—CONSTRUCTION OF TAX LIMITATION AMENDMENT.

   The 15-mill tax-limitation amendment to the Constitution expresses a limitation of the legislative as well as local power of taxation (Const 1908, art 10, § 21, as added in 1932 and amended in 1948).

2. EVIDENCE—JUDICIAL NOTICE—ECONOMIC DEPRESSION.

   Judicial notice is taken of the widespread economic depression endured during 1932 when the 15-mill tax-limitation amendment to the Constitution was proposed and adopted (Const 1908, art 10, § 21, as added in 1932 and amended in 1948).

3. CONSTITUTIONAL LAW—CONSTRUCTION OF AMENDMENT—TAX LIMITATION.

   The intent of the 15-mill tax-limitation amendment to the Constitution was to impose a general limitation upon the exercise of the State's power to tax property, the evil or abuse sought to be remedied being excessive taxation imposed by governmental agencies without the consent of those burdened (Const 1908, art 10, § 21, as added in 1932 and amended in 1948).

4. SAME—LEGISLATURE.

   The legislature may not repeal a duly-voted provision of the Constitution.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 51 Am Jur, Taxation § 156 *et seq.*
[2] 20 Am Jur, Evidence § 120.
[4] 11 Am Jur, Constitutional Law § 4.
[5] 11 Am Jur, Constitutional Law § 61.
[6] 11 Am Jur, Constitutional Law § 39.
[7, 8] 37 Am Jur, Municipal Corporations § 3; 51 Am Jur, Taxation § 565.
What is municipal corporation within constitutional or statutory tax exemption provisions. 108 ALR 577.
[9] 38 Am Jur, Municipal Corporations § 408 *et seq.*
[10] 2 Am Jur, Appeal and Error § 13.

5. SAME—CONSTRUCTION—INTENT.

The object of construction, as applied to a written constitution, is to ascertain and give effect to the intent of the people in adopting it.

6. SAME—PRESUMPTION AS TO KNOWLEDGE OF EXISTING LAW.

The framers of a constitution are presumed to have a knowledge of existing laws and to act in reference to that knowledge.

7. SAME—CONSTRUCTION OF AMENDMENT—TAX LIMITATION—MUNICIPAL CORPORATIONS.

"Municipal corporations," as the term was fixed by custom and subsequent judicial decision in excepting clause of 15-mill tax-limitation amendment to the Constitution, includes incorporated villages, fourth-class cities, home-rule cities, charter townships and school districts (Const 1908, art 10, § 21, as added in 1932 and amended in 1948).

8. MUNICIPAL CORPORATIONS—WATER AUTHORITY—TAX LIMITATION—CONSTITUTIONAL LAW.

Water authority, organized pursuant to statute providing method of financing water supply system for area consisting of several incorporated cities and townships as local component units, was not a municipal corporation included within exception of the 15-mill tax-limitation amendment to the Constitution, hence, such portions of the territory as were otherwise subject to the limitation were not removed from its operation by act providing the authority with power to tax property "unlimited as to rate or amount," such quoted provision being unconstitutional (Const 1908, art 10, § 21, as added in 1932 and amended in 1948; PA 1957, No 4, §§ 16, 18).

9. CONSTITUTIONAL LAW—TAX LIMITATION—EVASION BY SUBTERFUGE.

Attempts to evade tax-limitation provisions in Constitution by subterfuge are universally frowned upon even though the motive for doing so is worthy (Const 1908, art 10, § 21, as added in 1932 and amended in 1948).

10. APPEAL AND ERROR—QUESTIONS REVIEWABLE—WATER AUTHORITY—CONSTITUTIONAL LAW.

Determination of whether or not water authority act provision for payment of water rates by the constituent municipal corporation from revenues not earmarked for other purposes violates the uniformity clause of the Constitution *held*, unnecessary, where provision of same act permitting imposition of taxes "unlimited as to rate or amount" is held unconstitutional (PA 1957, No 4, §§ 16, 18, 19).

11. COSTS—CONSTITUTIONAL LAW—TAXATION.

No costs are allowed in suit wherein provisions of water authority act relating to imposition of taxes are held unconstitutional (Const 1908, art 10, § 21, as added in 1932 and amended in 1948; PA 1957, §§ 16, 18).

Appeal from Kent; Verdier (Leonard D), J. Submitted June 17, 1958. (Docket No. 57, Calendar No. 47,806.) Decided October 13, 1958. Rehearing denied December 2, 1958.

Bill by Carter Bacon, a taxpayer, against Kent-Ottawa Metropolitan Water Authority to enjoin, as violative of constitutional 15-mill restriction, development of a water-supply system to be financed by general obligation bonds. City of East Grand Rapids intervened as party plaintiff. Bill dismissed. Plaintiff and intervening plaintiff appeal. Reversed and remanded for entry of decree.

Vander Veen, Freihofer, Cook & Bryant (*Stephen A. Bryant,* of counsel), for plaintiffs.

Varnum, Riddering, Wierengo & Christenson (*Clifford C. Christenson* and *Eugene Alkema,* of counsel) and *Miller, Canfield, Paddock & Stone* (*John H. Nunneley* and *Stratton S. Brown,* of counsel), for defendant.

BLACK, J. This bill, in essence one for declaratory relief, was filed in the Kent circuit. The plaintiff, Carter Bacon, is a taxpayer of the city of East Grand Rapids. The city of East Grand Rapids, by petition for and duly authorized intervention, supports plaintiff's bill and prays for the same relief; that of enjoining defendant permanently from pursuit of resolved proceeedings which, if valid, are made so by PA 1957, No 4 (CL 1948, § 121.1 *et seq.* [Stat Ann

1958 Rev § 5.2533(31) *et seq.*]).* The bill, following due hearing below, was dismissed. Plaintiff, and the named intervenor, appeal from the decree of dismissal.

---

* Act No 4 was conceived and designed, by the herein identified local units of government, to provide new methods of financing a proposed area-wide public water-supply system. In its brief the defendant authority relates, as follows, the legal and political history of the act:

"In view of the urgent need for water and the impossibility of obtaining water from the city [of Grand Rapids], and with the realization that this problem would only become more critical in the future as development continues, representatives of these various municipalities [referring here to the local units which, joining under said Act No 4, have now incorporated the defendant authority] began discussing the common problem as early as 1953. As a result of these discussions and a preliminary engineering survey, a water authority was formed under the provisions of PA 1952, No 196 (CLS 1956, § 124.251 *et seq.*, Stat Ann 1958 Rev § 5.2533 [1] *et seq.*). That authority then joined with the city of Grand Rapids and the Grand Rapids chamber of commerce to retain the consulting engineering firm of Black & Veatch of Kansas City, Missouri, to make an overall survey of the water needs of the metropolitan area. This survey concluded that existing supply facilities were inadequate for the then maximum day demands, to say nothing of expected future needs, and set out in general terms a program for the construction of facilities deemed adequate to meet the estimated needs of the metropolitan area until the year 2000.

"Further study showed that proceedings under Act No 196, would be futile. In the meantime PA 1955, No 233 (CLS 1956, § 124.281 *et seq.*, Stat Ann 1958 Rev § 5.2769 [51] *et seq.*), had been adopted and a series of meetings were held to incorporate an authority under that act which would include the city of Grand Rapids. Basically Act No 233 authorizes the incorporation of an authority with power to issue bonds to finance a water-supply system. Each member municipality would then contract to purchase water from this authority and pledge its full faith and credit to pay its share of the cost of the project. After further study it was concluded that this was not a feasible method of financing because several townships would become members and they would be subject to the constitutional 15-mill limitation. This would in the opinion of the authority's financial advisors, either make the bonds completely unmarketable or else result in a prohibitive interest rate because of the risk that these townships would not be able to meet their obligations within their 15-mill limitation.

"After further consideration it was concluded that existing methods of financing the construction of a facility of the size required to serve the entire area were not adequate because of the complexities resulting from the necessary inclusion of both townships and cities. As a result, after careful and thorough study, PA 1957, No 4 was proposed to and adopted by the legislature and signed by the Governor."

The defendant Kent-Ottawa Metropolitan Water Authority was organized as a "municipal corporation" under the provisions of said Act No 4. The city of Zeeland, the city of Hudsonville, the city of Grandville, the city of East Grand Rapids, the Ottawa county township of Georgetown and the Kent county townships of Wyoming and Paris, compose—under section 2 of the act—the incorporating local units. Following such incorporation due proceedings under the act were pursued to adoption (September 19, 1957) of the resolution in question. The resolution declares intent to proceed with the acquisition and construction of public water-supply facilities (featured by an intake leading from Lake Michigan through and to the component municipalities) at an estimated cost (this applies only to "the first stages of said ultimate project") of $10,923,000. It goes on to declare intent "To finance the initial cost of said project" by and through issuance of "general obligation bonds of the authority" in a sum not exceeding $10,930,000, "under and by virtue of the provisions of PA 1957, No 4."

The decisive question before us is whether:

(a) Looking at sections 16 and 18 of the act (the 2 sections respectively authorize *levy by the authority* of property taxes "to pay the principal and interest on the bonds maturing prior to the next tax collection period" and levy by the authority of property taxes to provide funds "for administration expenses of the authority and such other purposes of the authority as may be determined to be necessary"), and

(b) With thought concentrated on the sentence in section 16 reading "The tax for the purpose of paying the bonded indebtedness shall be unlimited as to rate or amount;" the act by granting such general taxing power to the authority violates article 10, § 21 (adopted in 1932 and amended in 1948), known as the

15-mill amendment of Michigan's Constitution (1908).

First: Summary of opinion and legal background.

Through and by means of an attritional series of judicial decisions the 15-mill amendment has been bruised, beaten and backed to the brink of sterile and forceless words. No intervening act of the electorate brought this about.[1] Bench law made of generated public necessity and pressured regression brings us this day to the last act and final scene. By the decree we are due to sign, this Constitutional restriction of the power of property taxation either will live on, probably in its present atrophied form, or perish forever. So far as concerns the power to limit "the total amount of taxes assessed against property for all purposes," the legislature—in event we sustain sections 16 and 18 of said Act No 4—will reign over the Constitution.

In the case before us, the defendant authority, proclaiming under Act No 4 that it is a "municipal corporation" within meaning of the last exception[2] set forth in the amendment and that it is armed with a "charter" which exempts it from effect of the amendment, moves now that this Court push the already battered amendment into the abyss where it may be destroyed by and at the will of the legislature.[3] We

[1] The 1948 amendment of said section 21 was solely enacted to enlarge the elective scope of the so-called first exception.

[2] In this opinion we shall refer to the phrase—"or when provided for by the charter of a municipal corporation"—as the "last" or "final" exception.

[3] E. Blythe Stason, then professor and now dean of the law school of the University of Michigan, writing presciently at the time (1933), foresaw employment of legislation to amend charters of municipal corporations as a means of getting around the limitation as applied to the taxable property of such municipal corporations. He did not, of course, foresee (any more than did the initiators and framers of the amendment) that new agencies, unknown at the time to the commonly-understood definition of a municipal corporation, would be set up by legislation dubbing them "municipal corporations" and providing them with chartered taxing power designed to evade the limitation. In "Fifteen Mill Tax Amendment and Its Effect," 31 Mich L

cannot support the motion. Our reasons are to follow.

The amendment as adopted by the people in 1932 read this way:

"Sec. 21. The total amount of taxes assessed against property for all purposes in any one year shall not exceed 1 and 1/2 per cent of the assessed valuation of said property, except taxes levied for the payment of interest and principal on obligations heretofore incurred, which sums shall be separately assessed in all cases; Provided, that this limitation may be increased for a period of not to exceed 5 years at any one time, to not more than a total of 5 per cent of the assessed valuation, by a 2/3 vote of the electors of any assessing district, or when provided for by the charter of a municipal corporation; Provided further, That this limitation shall not apply to taxes levied in the year 1932."

In 1933 it was rewritten by the Court (*School District* v. *City of Pontiac,* 262 Mich 338) to read this way (p 351 of report):

"The total amount of taxes assessed against property for all purposes in any one year shall not exceed one and one-half per cent. of the assessed valuation of said property: Provided, That this limita-

Rev 371, under subtopic "Amendment of Municipal Charters" (p 381), Dean Stason wrote:

"However, it will not be necessary for the legislature to shift the entire burden to other sources if it takes advantage of the provision contained in the fifteen-mill amendment authorizing an increase of the limit from 15 to 50 mills. The amendment provides that the limit may be increased 'when provided for by the charter of a municipal corporation.' Probably nothing in the laws of the State of Michigan prevents the State legislature from amending all of the municipal charters in Michigan at any time it sees fit, and thus enabling municipalities to levy in excess of 15 mills to whatever extent may be permitted by legislative act up to the ultimate limit of 50 mills. The legislature may do this with reference to all types of municipal corporations existing in Michigan, including incorporated villages, 'fourth class' cities, special charter cities and home rule cities."

To the final sentence just quoted Dean Stason added the following significant note:

"These are all the classes of municipal corporations that can exist under the laws of Michigan."

tion may be increased for a period of not to exceed five years at any one time to not more than a total of five per cent. of the assessed valuation, by a two-thirds vote of the electors of any assessing district, or (that this limitation may be increased) when provided for by the (present or future) charter of a municipal corporation."

From the first parenthetical insertion shown in the quotation just made it will be noted that the final exception was thereby freed from the halter of the specified 50-mill limit (See Stason comment, quoted *supra*). The assault was on but not over. Next and in succession it was held that special assessments do not come within the scope and purpose of the all-inclusive and easily understood phrase: "The total amount of taxes assessed against property for all purposes" (*Graham* v. *City of Saginaw,* 317 Mich 427);[1] that the legislature could at will modify or amend the charters of municipal corporations, thus authorizing legislation enlarging or diminishing the taxing powers of such corporations without regard for the limitation (*Hazel Park* v. *Municipal Finance Commission,* 317 Mich 582; *Saginaw Council* v. *Saginaw Policemen and Firemen Retirement System Trustees,* 321 Mich 641); that charter townships are "municipal corporations" within the meaning of said final exception (*Charter Township of Warren* v. *Municipal Finance Commission,* 341 Mich 607); and finally that school districts are "municipal corporations" within meaning of such exception (*Hall* v. *Ira Township,* 348 Mich 402; *Kent County Board of Education* v. *Kent County Tax Allocation Board,* 350 Mich 327).[2] This case presents the close for the kill.

[1] In *Graham* (a chancery case) this holding was recorded *sua sponte.*

[2] We are not, in the present case, immediately concerned with the wisdom or legal soundness of any one or all of these amendment-eroding decisions. We *are* concerned, in this case of Bacon, lest errors of the past (if any) lead or force us into still greater error—that of authorizing final annihilation of the 15-mill amendment by legislative action.

Other decisions affecting scope of the amendment require no discussion because they do not relate to or premonish the final step defendant proposes; a holding that since the legislature stands free to set up governmental authorities or entities at will, it may—merely by calling each such authority or entity a "municipal corporation" and by providing in a legislative "charter" for each the power to tax property without regard for the 15-mill limitation—hand to each such authority or entity the power to utterly nullify the amendment within its charter-defined area. To put it another way: If such lawfully may be done in the case of this Kent-Ottawa authority, so can it be done in the case of every like "authority" which, by legislative act, is now or hereafter assigned a public task. Indeed, and for example: Should we pronounce lawful the power of property taxation as provided by said Act No 4, there is no reason why legislation declaring the Mackinac bridge authority a "municipal corporation," and providing it with a legislative "charter" authorizing levy by it—without limit as to rate or amount—of a State-wide property tax with which to pay its outstanding bonded indebtedness, cannot also be enacted without offense to the Constitution. The illustration may be impertinent, yet it serves to show the lengths to which we are asked to go in this case of Bacon.

The amendment having been voted into the Constitution as an express limitation of the legislative as well as local power of taxation, it becomes our clear duty to protect whatever remains of the elector-intended right of property taxpayers (mostly homeowners) to say when and to what extent they are to pay more than the amendment-declared maximum millage amount. This must be so unless by the interpretation presently sought we are obliged to hold that the final exception was intended to be construed as referring to any instrument or agency of govern-

ment which has been or will be organized and branded a "municipal corporation" by present or future act of the legislature. This brings us to the direct question of interpretation.

Second: Interpretation of the constitutional exception—"When provided for by the charter of a municipal corporation"—as applied to Act No 4.

As we shall see, our duty in exploring this question is to scrutinize the prevailing conditions and the "existing laws" which unitedly formed the circumstances under which this amendment of 1932 was conceived and voted into the Constitution. The burden of unrestricted property taxation had grown to the point of confiscation. The people were aroused and determined to restrict—permanently—the power of property taxation which then reposed generally in legislative(State and local) hands. Added to their tax troubles, the people were enduring a great and widespread economic depression, the devastating nature and effect of which we judicially notice.* With homes and farms everywhere threatened by sale for delinquent property taxes, and with the legislature failing to take decisive action in the direction of tax limitation, a desperate electorate took matters into its own lawful hands. As was so well said in early 1933 of the initiatory purpose (*School District* v. *City of Pontiac,* 262 Mich 338, 347, 348):

"Careful study of the amendment leads to these conclusions: Clearly the intent was to provide by the fundamental law of the State, which had not theretofore contained such provision, a general lim-

* *Roberts* v. *Michigan Trust Co.*, 273 Mich 91; *MacNear* v. *Malow*, 282 Mich 239; *Union Guardian Trust Co.* v. *Marquette Park Co.*, 300 Mich 89; *Alexandrine Hotel Co.* v. *Whaling*, 313 Mich 15. The situation was so bad that this Court, having granted mandamus to compel holding of the 1933 tax sale, withheld the writ "in view of existing emergency" (*Thompson* v. *Auditor General*, 261 Mich 624, 628).

itation upon the exercise of the taxing power of the State. The evil or abuse sought to be remedied was excessive taxation imposed by governmental agencies without the consent of those upon whom the burden was placed."

Of such economic conditions the 15-mill amendment of 1932 was conceived, initiated, supported and adopted. But what about the *existing law* defining "a municipal corporation," with respect to which the people presumptively determined to apply such final exception? Was it intended to include an "authority" which—a quarter century later—has been authorized or created by legislative act and dubbed, by legislative fiat, "a municipal corporation"? To speak plainly, an affirmative answer to this last question—if given—will automatically grant to the legislature the power of outright repeal of a duly-voted constitutional provision.

The presumption to which we refer is that the framers and electors meant this exception to be interpreted in accordance with existing laws and legal usages of the time, and also in accordance with common understanding of such existent laws and usages (see extended quotations and citations below). These general premises considered, grave questions loom. Did the people will that the expression "a municipal corporation" should be construed as meaning or referring to some entity or agency other than those already commonly known or recognized by "existing laws" as municipal corporations? Did they bother to resolve a statewide constitutional limitation upon the power of property taxation and, by the same instrument of resolution, mean to provide the legislature with power to nullify the limitation as applied to legislatively manufactured new types of "municipal corporations"? Are we to say that the

electors of 1932 planned to hand the existing or any future legislature the power and authority to undo, at will, that which became the essence of their resoundingly successful initiatory effort? For answer we turn first to our own cases. They are especially applicable (we have previously said so) to the very amendment now to be construed, the latter being "a wholly new and additional constitutional provision" (*School District* v. *City of Pontiac, supra*), aimed at a defined evil, and designed in specific rather than flexible terms.

In *School District* v. *City of Pontiac, supra,* we said this on approach to then invoked interpretation of the amendment:

"Fortunately the pertinent fundamental guides for such construction have been clearly and concisely stated in former decisions of this Court:

" 'It is a maxim that the object of construction, as applied to a written Constitution, is to ultimately ascertain and give effect to the intent of the people in adopting it. * * *

" 'In construing constitutional provisions where the meaning may be questioned, the Court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished.' *Kearney* v. *Board of State Auditors,* 189 Mich 666, 671, 673." (p 346 of report.)

In *Saginaw Council* v. *Saginaw Policemen and Firemen Retirement System Trustees,* 321 Mich 641, 647 (another case where this Court was called upon to construe the 15-mill amendment), the following appears:

"In *City of Detroit* v. *Chapin,* 108 Mich 136, 142 (37 LRA 391), we quoted with approval from *People, ex rel. Hughes,* v. *May,* 3 Mich 598, 610, the following:

" 'The framers of a Constitution are presumed to have a knowledge of existing laws, * * * and to act in reference to that knowledge.'*

"And in *School District* v. *City of Pontiac, supra,* 348, we said:

" ' In drafting the amendment, as well as in its adoption, the people were mindful of existing conditions and sought to so frame the amendment as to be in accord with such existing conditions.'

"In 11 Am Jur, Constitutional Law, § 63, pp 676, 677, appears the following:

" ' A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them.' "

And in *Attorney General* v. *Detroit Common Council,* 58 Mich 213, 216 (55 Am Rep 675), the interpretive rule was brought to bear directly upon the "essential character" of municipal corporations "as fixed by usage and recognition when the Constitution was adopted." There the Court, speaking through Mr. Justice CAMPBELL, said:

"It is also well settled that our State polity recognizes and perpetuates local government through various classes of municipal bodies whose essential character must be respected, as fixed by usage and recognition when the Constitution was adopted. And any legislation, for any purpose, which disregards any of the fundamental and essential requisites of such bodies, has always been regarded as invalid and unconstitutional."

Under Michigan law, "as fixed by usage and recognition" when the amendment was adopted, incorpo-

* The complete quotation from *People, ex rel. Hughes,* v. *May* (quoted, in part, above)is more satisfactory and comprehensive. It reads (pp 610, 611 of report):

"Now the framers of a Constitution are presumed to have a knowledge of existing laws, and of their construction and the mode of their administration, and to act in reference to that knowledge as much as legislators are, and in this light we construe both constitutional and statutory law."

rated villages, fourth-class cities, special charter cities and home-rule cities were known as and commonly referred to as municipal corporations (see Stason, *ante,* pp 164, 165). To these and for the purposes of the amendment we have by case law added charter townships (*Charter Township of Warren* v. *Municipal Finance Commission,* 341 Mich 607) and—by virtue of the application of decisions long antedating 1932—school districts (*Hall* v. *Ira Township,* 348 Mich 402; *Kent County Board of Education* v. *Kent County Tax Allocation Board,* 350 Mich 327). Have we now reached the point of no return? Certainly one more operation will remove the last yard of entrails we have chosen to leave in the peritoneal cavity. This writer does not propose to operate and instead will defend the amendment against any such fatal judicial surgery.

Ruling Case Law, a standard and reliable general text of the nineteen-twenties and thirties, gives us this direct and relevant insight into the "existing laws" of the times (19 RCL, Municipal Corporations, § 3, p 691):

"Not every public corporation is a municipal corporation. 'Municipal,' it is true, has 2 meanings, one of which is 'pertaining to the internal government of a State or nation' and in that sense every corporation formed for governmental purposes is a municipal corporation. In its primary sense, however, 'municipal' means 'pertaining to a town or city or to its local government,' and it is in this sense that it is used in the phrase 'municipal corporation.' "

American Jurisprudence, the recognized successor of Ruling Case Law, pursues the definitional distinction in much the same language. We quote (37 Am Jur, Municipal Corporations, § 6, pp 623, 624):

"All municipal corporations are public bodies created for civil or political purposes; but all civil, political, public corporations are not, in the proper

use of language, municipal corporations. A municipal corporation must be distinguished, on the one hand, from other governmental bodies which although municipal are not corporations, and, on the other hand, from corporations which although public are not municipal. While the term 'municipal corporation' is sometimes used, in its broader meaning, to include such public bodies as the State and each of the governmental subdivisions of the State,—such as counties, parishes, townships, hundreds, et cetera, —it ordinarily applies only to cities, villages, and towns which are organized as full-fledged public corporations."

We hold on these sound premises that the defendant authority is not "a municipal corporation" within meaning, purpose, spirit, or intent of the 15-mill amendment. It therefore must be ruled that said Act No 4, insofar as it authorizes levy by such authority of property taxes "unlimited as to rate or amount," is unconstitutional. To such ruling, and for reference in like cases said to be coming here, we are constrained to append the following general thoughts upon the subject of evasion of the Constitution by subterfuge:

Appellants charge in their brief, without answer or denial by appellee, that the property tax sections of said Act No 4 constitute an unabashed scheme to defeat a constitutional limitation by political contrivance of unconstitutional nature. We are forced to agree. The act on its face—speaking as it does in terms of "unlimited" property taxation—flouts the constitutional tax limitation. The defendant authority has conceded in so many words that said Act No 4 was "proposed to and adopted by the legislature" to enable the several involved townships (all of which were and now individually remain fettered by the 15-mill amendment) to levy property taxes without regard for the 15-mill limitation. Such being the case,

those sections of the act which purport to authorize unlimited property taxation in these townships should receive short shrift here. McQuillin says (15 McQuillin, Municipal Corporations [3d ed], § 41.15, p 330):

"Attempts to evade debt-limitation provisions by subterfuge are universally frowned upon, and it has been said that 'arguments of convenience, of policy, or of present necessity, should not be allowed, by loose construction, to weaken the force or limit the extent' of such provisions."

This is a time of inflation and impatience with tax limitations, just as it was fourscore and seven years ago. At that time a like question confronted this Court. Artfully conceived legislation sought to end-run, without regard for constitutional sidelines, "several [constitutional] provisions expressly prohibiting the State from being a party to, or interested in, any work of internal improvement, or engaged in carrying on any such work, except in the expenditure of grants made to it; and also from subscribing to, or being interested in, the stock of any company, association or corporation, or loaning its credit in aid of any person, association or corporation."

In striking down such constitutionally offensive legislation, the purpose of which was much akin to that which we now scrutinize in the shape of said Act No 4, Mr. Justice COOLEY, speaking for us as well as for Justices CAMPBELL and CHRISTIANCY, laid down certain principles to which this Court again may—and should—declare its allegiance. We quote (*Bay City* v. *State Treasurer,* 23 Mich 499, 504, 505):

"All these provisions were incorporated by the people in the Constitution as precautions against injudicious action by themselves, if in another time of inflation and excitement they should be tempted to incur the like burdensome taxation in order to ac-

complish public improvements in cases where they were not content to wait the result of private enterprise. The people meant to erect such effectual barriers that if the temptation should return, the means of inflicting the like injury upon the credit, reputation and prosperity of the State should not be within the reach of the authorities. They believed these clauses of the Constitution accomplished this purpose perfectly; and none of its provisions had more influence in recommending that instrument to the hearty good will of the people.

"In process of time, however, a majority in the legislature were found willing, against the solemn warning of the executive, to resort again to the power of taxation in aid of internal improvement. It was discovered that though 'the State' was expressly inhibited from giving such aid in any form, except in the disposition of grants made to it, the subdivisions of which the State was composed were not under the like ban. Decisions in other States were found which were supposed to sanction the doctrine that, under such circumstances, the State might do indirectly through its subdivisions what directly it was forbidden to do. Thus a way was opened by which the whole purpose of the constitutional provisions quoted might be defeated. The State could not aid a private corporation with its credit, but it might require each of its townships, cities and villages to do so. The State could not load down its people with taxes for the construction of a public improvement, but it might compel the municipal authorities, which were its mere creatures, and which held their whole authority and their whole life at its will, to enforce such taxes, one by one, until the whole people were bent to the burden."

Having recorded these great principles, all of which are directly applicable to legislation which has been conceived of a purpose to evade constitutional limitations, our learned predecessor went on to say (p 506 of report):

"Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power."

A case presenting the same question and the same arguments of necessity as have come to us here is *Rappaport* v. *Department of Public Health of Indianapolis,* 227 Ind 508, 519–521 (87 NE2d 77). The court said, and we adopt these views:

"To shift a governmental function from an old governmental unit to a new one in the same area in effect would, to the extent of indebtedness incurred by the new unit, in connection with the exercise of such function, enlarge the debt limit within which the exercise of the function had been financed. This has been done by the statute under consideration. With this in mind, and with the further fact in mind, that substantial control remains in the city, with only a little change in mechanics, we are almost compelled to think that the change was made for the purpose of circumventing the constitutional debt limitation, and, even though made with the best of motives, it transgresses our fundamental law. If within our constitution, as it is, we cannot finance necessary hospital additions and improvements then we should amend the constitution, not flout it. * * *

"We may look only to the effect and result, and, if the new legislation, however desirable, appears to be

a device which in fact serves to circumvent the constitutional debt limitation provision, we have no choice but to condemn it. Paraphrasing the words of Judge Elliott, in the case of *Town of Winamac* v. *Huddleston* (1892), 132 Ind 217, at page 218 (31 NE 561, 562), we may regret that the bonds to build additions to and improvements in the Indianapolis City Hospital may not be issued 'but we cannot escape the force of the strong and plain provisions of our organic law.' "

Summary.

We do not question the power of the legislature to call any commission, board, bureau, authority, entity, or tribunal, to which some public or municipal duty or job has been committed or assigned, "a municipal corporation." We do deny legislative power to circumvent the 15-mill amendment by calling any legislative creature "a municipal corporation" when that creature would not, in 1932, have been properly classed as " a municipal corporation."

An affirmance here would give our judicial blessing to an incestuous marriage of various local units of government, at least 3 of which are tax-inhibited by the Constitution, for the purpose of bringing forth an illegitimate property-tax offspring already named—by the willing and midwifing legislature—"a municipal corporation." By such a semantic device we are asked to endow the gargantuan child with "unlimited" powers of property taxation some, if not all, of the multiple parents do not enjoy. It should be clear that we cannot do this, and that an appropriate summary of the case may easily be made by paraphrasing as, follows, the concluding paragraph of *Saginaw Council* v. *Saginaw Policemen and Firemen Retirement System Trustees, supra* (pp 647, 648):

It must be assumed that the people, in adopting a constitutional amendment providing for a 15-mill tax limitation which might be increased by charter provision of a municipal corporation, were conversant with and had in mind the fact that it then was the established law in Michigan that cities and villages and, at most, school districts, were the only units of government which were known and classed as "municipal corporations," and that an excepting phrase worded; "or when provided for by the charter of a municipal corporation," would be faithfully gauged and applied by this Court according to such established law.

This squares with the horizon-clear view our Court —then "on location"—was given of the amendment as it passed through the elective and judicial process in 1932–1933. In *School District* v. *City of Pontiac, supra* (pp 352, 353), discussion of the mentioned final exception was concluded this way:

"In passing, it may also be stated we think there is much force in the argument set forth in the brief for the city of Pontiac that in the framing and adoption of this amendment there was in contemplation the fact that, outside of chartered cities, there was no general limitation upon the exercise of the power of taxation; and that in assessment districts other than cities the limitation in the amendment should be applied unless otherwise determined by the requisite vote of the electors; but that in cities having a charter provision action of this character had already been taken by the local electors in adopting their various city charters, and therefore the action so taken should be respected by excepting such districts from the general limitation of 1–1/2% embodied in the amendment insofar as the power of taxation was exercised for the city's local needs."

Our declared holding obviates necessity for consideration of another grave question, whether said Act

No 4 (gazing particularly at section 19 thereof) violates the uniformity clause (Const 1908, art 10, § 3).

The chancellor's decree is reversed and the case is remanded for entry of a new decree declaring that sections 16 and 18, PA 1957, No 4, are unconstitutional. No costs.

SMITH, VOELKER, and KAVANAGH, JJ., concurred with BLACK, J.

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

EDWARDS, J. (*concurring*). For reasons ably stated in Mr. Justice BLACK's opinion, I concur that section 16, PA 1957, No 4* represents a patent evasion of both the language and purpose of section 21, article 10, of the Constitution (1908). I feel, however, that the opinion places too much emphasis upon interpreting constitutional language as of the time of its adoption. "In the application of a constitution, * * * our contemplation cannot be only of what has been but of what may be." *Weems* v. *United States,* 217 US 349, 373 (30 S Ct 544, 54 L ed 793, 19 Ann Cas 705).

* CL 1948, § 121.16 (Stat Ann 1958 Rev § 5.2533[46]).—REPORTER.

COHN *v.* COUNTY OF OAKLAND.

1. MUNICIPAL CORPORATIONS—JOINT SEWAGE-DISPOSAL SYSTEM—TAXATION.

   Decree upholding contract between county and a city and 3 townships located within the county for establishment of a joint sewage-disposal system, to be financed by a bond issue with costs prorated upon such 4 municipalities in accordance with basis stated in the agreement is affirmed by the Supreme Court, DETHMERS, C. J., and KELLY, CARR, and EDWARDS, JJ., for affirmance but modifying trial court's decree dismissing bill by deleting portion thereof declaring the provision of the Constitution limiting taxation of property to 15 mills not violated and SMITH, BLACK, VOELKER, and KAVANAGH, JJ., for reversal on the ground that such provision of the Constitution prohibited the levy of a tax by the township to meet the obligations imposed by the contract (Const 1908, art 10, § 21, as amended in 1948; CL 1948, § 601.26; PA 1957, No 185, § 12).

2. COSTS—JOINT SEWAGE-DISPOSAL SYSTEM—CONTRACTS.

   No costs are allowed in suit to determine validity of contract between county and a city and 4 townships, all located within the county, for purpose of establishing a joint sewage-disposal system (PA 1957, No 185, § 12).

Appeal from Oakland; Hartrick (George B.), J. Submitted July 30, 1958. (Docket No. 62, Calendar No. 47,807.) Decided October 13, 1958. Rehearing denied December 2, 1958. See 355 Mich 610.

Bill by Irwin I. Cohn against the County of Oakland, its board of supervisors, its board of public works, the Townships of Farmington, West Bloomfield and Southfield and the City of Keego Harbor to enjoin proceedings under proposed plan for a

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 37 Am Jur, Municipal Corporations § 135.
Power of municipalities or other political subdivisions to engage in a joint project or enterprise. 123 ALR 997.

[2] 14 Am Jur, Costs § 35.

sewage-disposal system, to invalidate certain contracts between governmental agencies and to determine void any proposed tax levy within the district. Bill dismissed. Plaintiff appeals. Affirmed by an equally divided court.*

Avern L. Cohn, for plaintiff.

Harry J. Merritt, Corporation Counsel, for defendant Oakland County.

Claude H. Stevens, for defendants Oakland County, its board of supervisors, its board of public works and the Township of West Bloomfield.

Thomas J. Dillon, Jr., for defendant City of Keego Harbor.

Joseph T. Brennan, Jr., for defendant Township of Farmington.

James C. Allen, for defendant City of Southfield, successor of Township of Southfield.

Amicus Curiae on rehearing: State of Michigan, by *Paul L. Adams,* Attorney General, *Samuel J. Torina,* Solicitor General, and *G. Douglas Clapperton* and *Florence N. Clement,* Assistants Attorney General.

CARR, J. (*for modification and affirmance*). Acting through its board of supervisors the county of Oakland has established a department of public works pursuant to authority granted by PA 1957, No 185 (CL 1948, § 123.742 *et seq.* [Stat Ann 1957 Cum Supp § 5.570(1) *et seq.*]). The statute contemplates the appointment of a board of public works which shall be in immediate control of the department, subject to general supervisory authority granted to the board of supervisors. Power is given to a

* See CL 1948, § 601.26 (Stat Ann § 27.46).—REPORTER.

county proceeding under the statute to acquire, operate, and maintain water supply and sewage-disposal systems. Among the methods provided for financing any such work of public improvement deemed essential for the public health and welfare is:

"By the issuance of bonds in anticipation of the collection of amounts to become due under contracts whereby a municipality or municipalities agree to pay certain sums toward the cost of the acquisition, improvement, enlargement, or extension of any project which may be made hereunder." CL 1948, § 123.741 (Stat Ann 1957 Cum Supp § 5.570[11]).

In accordance with the language quoted specific authority is given for the making of a contract between a county and any one or more of its municipalities for the payment of the cost of a water supply, or sewage disposal, system over a period not exceeding 40 years. By such contract each municipality, which term by express provision of the statute includes a township, is required to pledge its full faith and credit for the payment of obligations that may be issued pursuant to the statute, in reliance on such contracts, and to levy each year a tax which is declared not to be "within any statutory or charter limitation," in an amount sufficient to permit discharge of its contractual obligation. It is also provided that any such municipality may raise funds in any one or more of the following methods:

"(a) By service charges to users of the system;

"(b) By special assessment upon lands benefited;

"(c) By the exaction of charges for the connection of properties, directly or indirectly, to the system;

"(d) By setting aside any State collected funds disbursed to the municipality and usable therefor; and

"(e) By setting aside any other available moneys." CL 1948, § 123.742 (Stat Ann 1957 Cum Supp § 5.570[12]).

The county is required to advance funds, if necessary, for the payment of principal and interest of bonds, subject to the right to be reimbursed for any advances so made.

In the instant case the department of public works prepared and submitted to the board of supervisors plans for the establishment of the Farmington sewage-disposal system for the purpose of serving the city of Keego Harbor, the township of Farmington, and portions of Southfield and West Bloomfield townships in said county, such area to be known as the Farmington sewage-disposal district. The plan contemplates construction work to be carried on by the county through its department of public works. The total cost is estimated at $4,900,000, and it is proposed, pursuant to resolution of the board of supervisors which duly approved said plan, to issue bonds in that amount, maturing serially over a period of 30 years.

Under date of November 1, 1957, the board of public works of Oakland county entered into an agreement with the defendant townships and city, subject to approval by the board of supervisors of Oakland county, for the establishing of the sewage-disposal system, the financing thereof through the proposed bonding issue, the division of the cost among the 4 municipalities named in accordance with a definite basis therein set forth, and the payment of the amount charged to each such municipality in 30 annual instalments beginning with the year 1960. The board of supervisors, by appropriate resolution reciting the contract with the municipalities, authorized the issuance of the bonds, subject to the approval of the Michigan finance commission. It further appears from the record that each of the defendant townships, by its township board, adopted a resolution fixing the amount of the charge for connecting property within such township to the disposal sys-

tem. The Southfield township board fixed the amount of such charge at $200, and each of the other townships specified $250. No question is raised as to action taken on the part of the city of Keego Harbor.

The plaintiff in the instant case is the owner of property located in that portion of West Bloomfield township included within the sewage-disposal district. He filed his bill of complaint in the circuit court of Oakland county claiming that the connection charges fixed by the resolutions adopted by the boards of the defendant townships are unlawful because not proportional to the cost of making such connections, that the contract between the county and defendant townships is void because meeting the obligation of each township as thereby created will require the levy of a tax in excess of the maximum limited under article 10, § 21, of the State Constitution (1908), and because the obligation on the part of the county to advance money if necessary for the payment of principal and interest of bonds when due, subject to the right of reimbursement, is in violation of article 10, § 12, of the Constitution (1908), on the theory that it involves a pledging of the county's credit. Plaintiff sought a decree sustaining his respective contentions and enjoining defendants from proceeding with the construction and financing of the sewage-disposal system.

On the hearing of the case testimony was offered tending to establish the advantages of the proposed disposal system from the standpoint of the public health as well as in connection with the establishing of new homes, the protection of those previously established in the territory concerned, and the general development of the lands within the district. The record indicates that a considerable proportion of such lands is not, because of percolation, adapted to the use of septic tanks as a method of sewage disposal. The circuit judge filed a written opinion hold-

ing that plaintiff's claims were not well-founded, and entered a decree specifically sustaining the validity of the connection charges, and the taxing authority of the townships, and further denying that the obligation assumed by the county of Oakland constituted a pledge of its credit in violation of article 10, § 12, of the State Constitution (1908). Plaintiff's bill of complaint was dismissed, and he has appealed.

It is the claim of appellant, in substance, that the so-called connection charges imposed pursuant to the resolutions of the township boards must bear reasonable relation to the actual cost of making connections between private property and the sewage-disposal system. As before pointed out, the raising of money by the exaction of such charges is specifically authorized by the statute. Significant in this regard as to the legislative intent is the inclusion of words indicating the right to make the charge whether the connection is made "directly or indirectly." The terms used indicate that the legislature had in mind not merely a fee for making a physical connection but, rather, an initial charge for the rendition of service. The holding of this Court in *City of North Muskegon* v. *Bolema Construction Company, Inc.*, 335 Mich 520, is significant in this regard. There, by ordinance of the plaintiff city, the charge of $100 for making a connection with a public sewer was made. As against the objection that such sum was excessive and disproportionate to the actual cost, it was said (p 527):

"In our opinion the amount of the charge is within the sound discretion of the city officials, especially when considered in relation to the objectives of the program in maintaining the system and paying off the bonds in the manner required by statute."

The prior case of *Wolgamood* v. *Village of Constantine*, 302 Mich 384, was cited with approval.

The reasons underlying said decisions are applicable here. The establishment of the sewage-disposal district is unquestionably conducive to the public health and welfare and, hence, tending to the betterment of living conditions in the territory affected. The charge of which plaintiff complains is actually made as a condition precedent to the reception of the benefits that may reasonably be anticipated as resulting. So viewed, it may not be regarded as excessive or otherwise unlawful.

Article 10, § 21, of the Michigan Constitution (1908), as amended at the general November election in 1948, reads as follows:

"The total amount of taxes assessed against property for all purposes in any one year shall not exceed one and one-half per cent of the assessed valuation of said property, except taxes levied for the payment of interest and principal on obligations heretofore incurred, which sums shall be separately assessed in all cases: Provided, That this limitation may be increased for a period of not to exceed twenty years at any one time, to not more than a total of five per cent of the assessed valuation, by a majority vote of the electors of any assessing district, or when provided for by the charter of a municipal corporation: Provided further, That this limitation shall not apply to taxes levied in the year 1932."

Appellant's principal contention is based on the claim that the defendant townships cannot keep within the constitutional limitation as above set forth and still raise sufficient funds to meet the obligations assumed under the contract with the county. Whether in any of said townships action has been taken with the end in view of increasing the limitation by a vote of the electors does not appear, nor is any specific showing made as to the effect of such possible increases. There is no proof that the assumed obligations may not be met in future years by the levy of

taxes not in excess of the alleged constitutional limitation on which plaintiff relies, or by the raising of funds other than by taxation.

As before pointed out, the legislature in adopting the act of 1957 authorized several methods that might be adopted to raise necessary funds. Included therein are the making of service charges to users of the system and special assessments upon lands benefited. Defendant townships are also at liberty to use funds that may be disbursed thereto by the State and other available moneys. It is a fair inference that the legislature intended to authorize each municipality assuming liability contemplated by the statute to meet its obligations other than by resort to taxation, if it wishes to do so. Appellant's argument is predicated, at least in part, on the claim that the so-called connection charges authorized by the township boards concerned are invalid and, hence, may not be lawfully collected. For the reasons above stated, such claim is not well-founded. Testimony introduced on the hearing in circuit court indicated that each of the 3 townships concerned will be able in the future to raise necessary funds in accordance with the act of the legislature by procedures that may not be claimed to violate the constitutional restriction. Commenting on this proof, the circuit judge said in his opinion:

"The administrative officers of the townships have estimated the revenues from the project plus the contingency of a township levy within legal limitations will be sufficient to meet the obligation to the county. The court is in no position nor is it justified in drawing a contrary conclusion."

The statement is supported by undisputed proofs, and we are in accord therewith.

The factual situation presented here does not require, or render proper, the consideration and de-

termination of defendants' claims that the townships of the State are chartered municipalities within the meaning of article 10, § 21, of the Constitution (1908, as amended), that the charter of each is found in legislative enactments of general application, that the legislature may by statute, constituting a part of such charter, authorize an increase of the 15-mill tax limitation, and that PA 1957, No 185, has accomplished that result as to the defendant townships. Attention is directed to *Kent County Board of Education* v. *Kent County Tax Allocation Board*, 350 Mich 327, in support of the claim made. However, the county school district involved in that action was created by vote of its electors for educational purposes, pursuant to statutory authority. In taking such action the ballot used specified that the annual tax to be levied should be limited to "1/2 mill." Commenting on the situation, it was said (p 330):

"The decisive question is whether the school electors, having voted to effectuate the ballot-identified sections of the code and having provided that 'any annual property tax levied for administration shall be limited to 1/2 mill,' thereby voted legal authorization of an annual tax—in addition to the constitutionally permissible 15 mills—for the purposes of the mentioned sections of the code."

The question was answered in the affirmative. It thus appears that the voters had approved an increase in the rate of taxation in the district over and above the constitutionally limited rate. Presumably the argument made that all townships of the State are chartered municipalities would apply with equal force to all counties and school districts. It is unnecessary in this case to discuss the effect of such a theory, if adopted, on the interpretation and application of the 15-mill amendment to the Constitution. It may be further noted that there is nothing

before us to indicate that any of the 3 defendant townships are charter townships, incorporated as such under the provisions of PA 1947, No 359 (CL 1948 and CLS 1956, § 42.1 *et seq.* [Stat Ann 1957 Cum Supp § 5.46(1) *et seq.*]), which was considered by this Court in *Charter Township of Warren* v. *Municipal Finance Commission,* 341 Mich 607.

The situation here involved is somewhat analogous to that presented in *DiPonio* v. *City of Garden City,* 320 Mich 230. Action was there brought to enforce defendant's liability on a contract for extensions to its sewer system. The defendant claimed that the contract was *ultra vires* and void on the theory that it did not have power to bind itself to raise money to meet its obligation other than by the issuance of revenue bonds. Defendant further pointed out that it was a home-rule city, and that under the statute its rate of taxation could not exceed 2% of the assessed valuation of real and personal property. In sustaining a judgment in plaintiff's favor this Court recognized that the question before it was whether the contract was *ultra vires* as claimed by the defendant. Such issue was decided against the city. A like conclusion follows in the instant case.

Appellant's claim that imposing on the county the obligation to pay principal and interest of bonds that may fall due, with right of reimbursement against the other defendants, violates article 10, § 12, of the Constitution (1908), is without merit. The sewage-disposal system is a project designed for the protection of the public health, and as such is within the scope of the police power. The expense of establishing such system and of operating it is obviously intended to rest on a self-liquidating basis. The practical situation is that the county, if funds are not immediately available for the payment of principal and interest due on the bonds to be issued, shall make necessary advances with the right of reimbursement

from the defendant townships and city. The power of the legislature to impose such requirement on the county finds support in *Oakland Drain Com'r* v. *City of Royal Oak,* 306 Mich 124; and *City of Highland Park* v. *Oakland County Drain Commissioner,* 312 Mich 407.

A decree will enter dismissing the bill of complaint and modifying, in accordance with this opinion, the decree entered by the circuit court. No costs are allowed.

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

BLACK, J. (*for reversal*). The plaintiff taxpayer filed this bill to enjoin the defendants from continuation of proceedings taken by them pursuant to the provisions of PA 1957, No 185. The target of the bill is section 12 of said Act No 185.* Plaintiff says and defendants deny that any contract executed pursuant to said section 12 would collide with and fall before the 15-mill amendment (Const 1908, as amended, article 10, § 21). The bill was dismissed below. Plaintiff appeals.

All parties agree that the primary purpose of the suit is that of obtaining an early answer to this stated question:

"May the townships lawfully levy a tax to meet their obligations under the contract without regard to the 15-mill limitation of article 10, § 21, of the Michigan Constitution (1908) on the theory that townships are 'municipal corporations' within the meaning of the term as used in section 21 and, hence, not subject to its limitations?"

The stated question is answered in the negative. Adequate reasons for such negative answer will be

* CL 1948, § 123.742 (Stat Ann 1957 Cum Supp § 5.570[12]).—REPORTER.

found in *Bacon* v. *Kent-Ottawa Metropolitan Water Authority,* 354 Mich 159, handed down herewith.

The case should be reversed and remanded for entry of decree granting plaintiff relief according to the tenor of this opinion. No costs.

SMITH, VOELKER, and KAVANAGH, JJ., concurred with BLACK, J.

PEOPLE v. KENNEY.

1. WORDS AND PHRASES—SPEEDWATCH.

   A speedwatch is a mechanical device by means of which speed of motor vehicles is reliably determined within a mile or two per hour.

2. EVIDENCE—SPEED—MECHANICAL DEVICES.

   It is not necessary that a court find that a mechanical device for the measurement of speed of vehicles could not err in order to admit its findings as evidence to be weighed by the trier of the facts along with all other evidence to determine the guilt or innocence of the party.

3. CRIMINAL LAW—DRIVING AT EXCESSIVE SPEED—SPEEDWATCH—EVIDENCE.

   Evidence of reading of speedwatch was properly admitted in prosecution of city bus driver for driving his vehicle at an excessive speed, where it appears the instrument was properly set up, was checked by the officers before operating it, was periodically checked by experts to determine whether or not it was operating correctly, the operating officer observed the speed

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 5A Am Jur, Automobiles and Highway Traffic § 1254.
Proof, by means of radar or photographic devices, of violation of speed regulations. 49 ALR2d 469.

[4] 5A Am Jur, Automobiles and Highway Traffic § 1253.

of the defendant's vehicle and testified as to his estimate of the speed and all rights of the defendant were protected; defendant's claim that he was unable to cross-examine the speedwatch being without merit.

4. SAME—DRIVING AT EXCESSIVE SPEED—SPEEDWATCH—EVIDENCE. Finding of guilt of driving city bus in excess of permitted speed *held*, justified by evidence adduced, including evidence of reading of speedwatch.

Appeal from the Recorder's Court for the City of Detroit, Traffic and Ordinance Division; Watts (John D.), J. Submitted June 12, 1958. (Docket No. 49, Calendar No. 46,905.) Decided October 13, 1958.

Henry C. Kenney was convicted of driving a motor vehicle at excessive illegal speed. Affirmed.

Nathaniel H. Goldstick, Corporation Counsel, and *Lawrence E. Eaton,* Assistant Corporation Counsel, for plaintiff.

Clarence A. Reid (*Clarence A. Reid, Jr.*, of counsel), for defendant.

KAVANAGH, J. Detroit policemen operating a "speedwatch" issued a traffic ticket to defendant charging him with speeding 40 miles an hour in a 30-mile zone on February 14, 1956.

The speed of the defendant's motor vehicle was determined by the use of a speedwatch. It is to be noted that the defendant is a driver of a Detroit department of street railways bus, and the arresting officers were connected with the Detroit police department. No evidence was offered on behalf of the defendant with reference to the accuracy of the speedwatch. Very little cross-examination was carried on by defendant's attorney. This is mentioned

to indicate that the factual situation might be different in a contested case.

Defendant's counsel made a motion to suppress the evidence obtained from the speedwatch for the following reasons: (1) that an unlawful arrest was made, since the charge is a misdemeanor, and no offense was committed in the presence of the arresting officer; (2) that there is no Michigan statute authorizing the use of evidence obtained from a speedwatch; (3) that the speedwatch is not scientifically or mechanically reliable and, therefore, should fall within the same category as the lie detector and drunkometer.

A speedwatch is a mechanical device by means of which speed is determined. Two rubber tubes are placed on the road 132 feet apart. These road tubes are hollow in the center, and are attached at the end upon the curb to a mercury switch. The slightest impulse by a car hitting one of these road tubes will create an impulse of air that will come into this little mercury switch, and tip the mercury tube, thus making an electrical contact between the 2 electrodes, which will complete a circuit from that tube clear back to the speedwatch.

The speedwatch, itself, is set anywhere from 50 to 600 feet beyond the tubes. There is a separate circuit through each tube and back to the speedwatch. In the control box there is a toggle switch. An officer observing a car approaching the first tube throws the toggle switch, and when the front wheels of a car hit the tube, that completes a circuit, which energizes a solenoid which, in turn, brings a lever down to start the watch. Then, as the officer observes a car approaching the second road tube, he throws the switch to the second tube position, which again, when the front wheels hit that tube, creates a circuit through to the control box which stops the watch. The elapsed time is mechanically computed

by the speedwatch and the average speed for the 132 feet is recorded. The reading remains on the watch until removed by the officer.

The 2 officers testified that they had been working with the speedwatch for some 6 months, and that previously they had training in its use. They further testified that on the 14th day of February, 1956, they took the speedwatch equipment and set it up for the day, checked the cord for distance, making the road tubes 132 feet apart, nailed the hose down so that it could not be moved, connected it with the machine, returned to the car, and placed the machine in operation. Before timing any vehicles one individual operated the speedwatch in order to check it for accuracy and the partner drove the police car over the tubes at 30 miles per hour. The speedwatch registered a speed of 30 miles per hour.

Officer Moore testified that he observed the defendant for approximately 100 to 200 feet and estimated the speed of the vehicle as being over the speed limit of the street; that he then placed the speedwatch in operation, and the clock registered 41 miles per hour. He stopped the defendant and gave him a ticket for driving 40 miles per hour in a 30-mile per hour zone.

The prosecution offered the testimony of Albert Blume, a watchmaker and jeweler who had been in that business for upwards of 40 years, who testified that he was employed to check the Detroit police department speedwatches, and that he checked the one in question on January 17, 1956, February 17, 1956, and again on March 17, 1956, and that on each date the watch was accurate. He further testified that it would be impossible for the watch to be inaccurate unless it were damaged, and that there was no question in his mind as to the accuracy of the watch.

The prosecution further introduced the testimony of the manufacturer of the speedwatch. He testified that in the event anything went wrong with the watch no significant reading whatsoever would be recorded.

The trial judge denied the motion to suppress and permitted the introduction of the evidence from the speedwatch.

Although there have been no decisions of this Court there have been several decisions in courts of other States which have dealt comprehensively with the evidential problems presented by the use of mechanical devices for the measurement of speeds of vehicles. See *State* v. *Dantonio,* 18 NJ 570 (115 A2d 35, 49 ALR2d 460); *State* v. *Moffitt,* 9 Terry (Del Super) 210 (100 A2d 778); *People* v. *Offermann,* 204 Misc 769 (125 NYS2d 179); *People of City of Rochester* v. *Torpey,* 204 Misc 1023 (128 NYS2d 864); *People* v. *Katz,* 205 Misc 522 (129 NYS2d 8); *People* v. *Sarver,* 205 Misc 523 (129 NYS2d 9); *People of City of Buffalo* v. *Beck,* 205 Misc 757 (130 NYS2d 354); *Carrier* v. *Commonwealth* (Ky), 242 SW2d 633. Particularly since World War II members of the public have become generally aware of the use of speed-radar methods indicating the presence of such watches and their distance and speed. The particular method used in the operation of the speedwatch apparently is not as complicated as radar methods, and because of its simplicity has been adopted by numerous law-enforcement bodies. The writings on the subject assert that when properly operated the speedwatch accurately records the speed of a motor vehicle, at least reliably so, within a mile or two per hour.

The testimony in this case seems to indicate that the method of operation is simple and accurate. All of the testimony seems to point to the fact that checks were made on this particular speedwatch by an expert at least 3 times in 60 days, and each time

it was found to be working accurately, including a check 3 days after the ticket was issued. No testimony was introduced on behalf of defendant in support of his motion to indicate that the instrument was mechanically and scientifically inaccurate.

It is not necessary that the court find that the instrument could not err in order to admit its findings as evidence. It is not contended that the readings were conclusive, but that they merely constituted admissible evidence to be weighed by the trier of the facts along with all other evidence to determine the guilt or innocence of the party.

The situation in this case is unlike that of *People* v. *Morse,* 325 Mich 270, in which there was testimony that the "Harger Drunkometer" had received general acceptance by the medical profession and general scientific recognition in establishing the alcoholic content of a subject's blood and thus the extent of his intoxication. There was also testimony in the *Morse Case* of 5 doctors that most of the medical profession do not regard the instrument as being reliable. The same situation was true in *People* v. *Becker,* 300 Mich 562 (139 ALR 1171), in regard to the polygraph.

It would seem that where, as in this case, it was shown by testimony that the instrument was properly set up, was checked before using by the officers operating it, where it was shown that constant periodical checks were made by experts to determine whether or not the instrument was operating correctly, and where the officer operating the instrument observed the speeding vehicle and testified as to his estimation of the vehicle's speed, that all of the rights of the defendant were protected, and that under these circumstances the court properly admitted the evidence.

The other contention by the defendant that he was unable to cross-examine the speedwatch does not appear to have any merit.

The same situation would prevail with respect to the speedometer of a motor vehicle or motorcycle which is duly accepted as evidence in traffic cases.

Under the proofs in this case showing constant checking of the machine by experts, testimony of expert operators, and testimony of observation of the arresting officer of the speed of the bus, defendant appellant's motion to dismiss the complaint and suppress the evidence was properly denied. The admission of the evidence was not reversible error. The finding of guilt was justified by the evidence.

Affirmed.

DETHMERS, C. J., and CARR, KELLY, SMITH, BLACK, EDWARDS, and VOELKER, JJ., concurred.

KOWATCH v. DARNELL.

1. REFORMATION OF INSTRUMENTS—SEVERAL PURCHASERS FROM COMMON OWNER.

   It was not essential in suit between purchasers for reformation of deeds by State highway commissioner of excess State land in parcel adjoining city lots, owned by plaintiff and defendant neighbor purchasers thereof, that there have been a binding agreement as to land to be purchased entered into between the purchasers, where each took with notice of what the others intended to buy and thought they were buying, which, in turn, coincided with what the seller intended to sell to each.

REFERENCES FOR POINTS IN HEADNOTES

[2] 45 Am Jur, Reformation of Instruments § 38.
[3] 55 Am Jur, Vendor and Purchaser § 757.
[5] 45 Am Jur, Reformation of Instruments §§ 123, 124.

2. SAME—MISTAKE OF COMMON GRANTOR—SUCCESSION.

Plaintiffs succeeded to the right of their grantor to have reformation of deed of land to defendants where both plaintiffs and defendants purchased land from the grantor simultaneously and he made a mistake in the descriptions which resulted in the conveyance of more land to the defendants than they had agreed to take and such conveyance resulted in a corresponding diminution of the parcel conveyed to plaintiffs.

3. VENDOR AND PURCHASER—MISTAKE—BONA FIDE PURCHASERS.

Grantees in deed who received more land than they had intended to buy from grantor who simultaneously and mistakenly conveyed a correspondingly lesser portion of his land to plaintiffs were not bona fide purchasers of the additional land, where the grantees and their son who acted as their agent, knew of the intentions of all of the parties with respect to amount of land conveyed.

4. REFORMATION OF INSTRUMENTS—MISTAKE OF COMMON GRANTOR—REIMBURSEMENT—EVIDENCE.

Defendants who purchased land from the same grantor who simultaneously sold to plaintiffs but mistakenly conveyed more to defendants than they had intended to purchase and a corresponding lesser amount to plaintiffs were not entitled, upon decreed reformation of the deeds, to reimbursement from plaintiffs for such additional land under evidence submitted in suit for reformation of deeds, where it was not shown that defendants had paid more for amount they received or that plaintiffs had paid less for amount they received than that intended to have been conveyed.

5. SAME—EVIDENCE—CURING ERROR.

Claimed error in admission of testimony in suit for reformation of deeds *held*, without merit, where defects in questions asked were cured by subsequent questions and answers and the substance of the answers was established by other proofs.

Appeal from Ingham; Hayden (Charles H.), J. Submitted June 6, 1958. (Docket No. 43, Calendar No. 46,413.) Decided October 13, 1958.

Bill by John Kowatch, Loraine Kowatch and Walter S. Surine against Ray Darnell, Jr., Bessie A. Darnell, Raymond F. Darnell, Gertie Darnell and Charles M. Ziegler, as State highway commissioner,

for reformation of deeds. Decree for plaintiffs. Defendants Darnell appeal. Affirmed.

Fred C. Newman, for defendants Darnell.

DETHMERS, C. J. Plaintiffs Kowatch owned a parcel of property and plaintiff Surine owned one abutting it on the north. Somewhat south was property leased by defendant Ray Darnell, Jr., and wife, Bessie. The defendant State highway commissioner held title to a strip of land bordering on the west the properties of plaintiffs and extending south to include an area immediately west of the piece leased by the Darnells. This strip was excess land, not needed for highway purposes, which the commissioner intended to sell. Plaintiffs and the Darnells desired to purchase it together. While there is dispute about it and objection to the admissibility of some of the testimony supporting the finding, we are in complete agreement with the trial court's opinion that the competent evidence establishes that the plaintiffs and defendants had reached an understanding, based on discussions between them and the commissioner's representatives, that the intention of them all was that the strip would be sold and conveyed in 3 parts, as follows: to Surine all of that portion of the strip contiguous to his property, to the Kowatches all of that portion adjacent on the west to their property, and to the Darnells that portion of the strip south of the Kowatches' south boundary line extended west. These 3 would-be purchasers engaged the services of one attorney to handle the transaction for them and he did so. After deeds had been executed by the commissioner and delivered to the attorney it was discovered that the descriptions therein did not conform to the intent of the parties as above set forth. The attorney gave the deeds to Darnell, Jr., who had them recorded.

The deed to Darnells conveyed, in addition to that portion of the strip intended to be deeded to them, an additional 33 feet north of the Kowatches' south boundary line. The description in the Kowatches' deed included the remainder of the property west of theirs and a portion of the strip west of Surine's property. Surine's deed described only the northerly portion of the property intended to be conveyed to him. On the same day that the commissioner conveyed to Darnell, Jr., and wife, they, in turn, conveyed the property so deeded to them to his father and mother, the other defendants Darnell, who had furnished the money for the son's purchase in the first place.

Plaintiffs' bill prayed for reformation of the descriptions in the 3 deeds to make them conform to the above stated intent of the parties. From decree granting plaintiffs the relief prayed, the defendants Darnell appeal.

Defendants' contention seems to be that plaintiffs are not entitled to the relief prayed because the evidence fails to establish that any binding agreement ever was entered into between the plaintiffs and the Darnells. That is not a prerequisite. Each of the purchasers took with notice of what the others intended to buy and thought they were buying, which, in turn, coincided with what the seller intended to sell to each. When the commissioner conveyed to the Kowatches something other than he and the Kowatches intended that they should have, they could have maintained an action for reformation against him on the ground of mutual mistake. When the Darnells received a conveyance of the land which had been intended for the Kowatches, with full knowledge of the facts, they were in no better position to contest a suit for reformation than the commissioner would have been had he not conveyed to them. By the same token, after the commissioner conveyed to

the Darnells by a deed containing an erroneous description, he could have maintained an action for reformation against them to recapture title to the parcel which he had intended to sell and thought he had conveyed to the Kowatches. By his conveyance to them the Kowatches succeeded to such right. *Nisbett* v. *Milner,* 159 Mich 337.

The senior Darnells, for whom their son acted to all practical intents and purposes as agent in the transaction, knew of the intentions of all the parties, as well as did their son, and are no more in the position of bona fide purchasers than was he. *Kinyon* v. *Young,* 44 Mich 339.

The Darnells claim the right to reimbursement in the amount which they allegedly paid for land required by the decree to be conveyed by them to the Kowatches. The record does not show that the Darnells paid for more than the land which was intended to be conveyed to them or that the Kowatches paid for less than that which was intended to be theirs. Darnells' claim in this connection is without support in the evidence.

Assignments of error as to the admission of testimony are without merit. If the questions objected to were not proper in form, as being leading and calling for conclusions, such defect was cured by subsequent questions and answers, and the substance of the answers was established by other proofs.

Affirmed.

KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

CARR, J., did not sit.

CLEVELAND *v.* SECOND NATIONAL BANK & TRUST COMPANY.

1. TRUSTS—CHARITABLE TRUSTS—PUBLIC POLICY.
   The public policy of this State regards with favor trusts for religious, educational, charitable and benevolent purposes (CL 1948, § 554.351 *et seq.*; § 554.381 *et seq.*).

2. SAME—CHARITABLE TRUSTS—PURPOSE—INDEFINITE BENEFICIARIES.
   Provisions of will providing for a trust for charitable or social welfare institutions, movements or purposes *held*, not invalid as uncertain and indefinite with respect to intended beneficiaries (CL 1948, § 554.351 *et seq.*).

3. SAME—CHARITABLE TRUSTS—INDEFINITENESS.
   A measure of indefiniteness enters into any public charitable trust as the purposes to be attained, in effect, require judicial recognition thereof.

4. SAME—CHARITABLE TRUSTS—RULE AGAINST PERPETUITIES.
   Trusts for public charitable purposes are upheld under circumstances under which private trusts would fail, since public charitable trusts are not within the rule against perpetuities and they must be for an indefinite number of persons.

REFERENCES FOR POINTS IN HEADNOTES

[1, 5, 10, 12] 10 Am Jur, Charities § 12.
[2] 10 Am Jur, Charities §§ 28, 88.
[3] 10 Am Jur, Charities § 96.
[4] 10 Am Jur, Charities § 17.
[6] 57 Am Jur, Wills §§ 1133, 1137.
[7, 8] 10 Am Jur, Charities § 52.
[9] 57 Am Jur, Wills §§ 1148, 1149.
[11] 10 Am Jur, Charities § 102.
[14] 21 Am Jur, Executors and Administrators § 539.
[15] 21 Am Jur, Executors and Administrators § 538.
[16] 21 Am Jur, Executors and Administrators § 12.
[17] 21 Am Jur, Executors and Administrators § 539; 57 Am Jur, Wills § 1034.

5. SAME—CHARITABLE TRUSTS—INCOME—SOCIAL WELFARE INSTITUTIONS AND PURPOSES.

Testamentary provisions establishing trust for charitable and educational provisions and permitting income to be used for charitable or social welfare institutions or purposes *held*, not open to objection that it was invalid in that testator authorized use of the income from the trust for purposes not necessarily charitable or educational (CL 1948, § 554.351 *et seq.*).

6. WILLS—CONSTRUCTION—INTENT.

The cardinal principle in the interpretation of wills is to carry out the intention of the testator if it is lawful and can be discovered and the whole will is to be taken together and is to be so construed as to give effect, if it be possible, to the whole.

7. TRUSTS—CHARITABLE TRUSTS—PERMISSIBLE PURPOSES.

The permissible purpose or scope of a public charitable trust is as varying as the wants of humanity.

8. SAME—CHARITABLE TRUSTS—PURPOSES.

A public charitable trust may have more than 1 purpose.

9. WORDS AND PHRASES—ASSOCIATED WORDS.

The meaning of a word may be ascertained by reference to the meaning of words associated with it and in its general environment.

10. TRUSTS—CHARITABLE TRUSTS.

Public charitable trusts, being of necessity, indefinite and uncertain in respect to beneficiaries, are interpreted liberally, since the imposition of a requirement of certainty of object and too great a limitation upon the discretionary powers of trustees more often tends to defeat the dominant charitable purpose of the testator than to effectuate it.

11. SAME—CHARITABLE TRUSTS—SOCIAL WELFARE PURPOSES.

The fact that the term "social welfare," was applied to organizations and purposes in connection with expenditure of income of testamentary trust set up for charitable and educational purposes, would not permit use of the income for other than charitable or educational purposes, where questioned term was associated, in each instance used, with the word "charitable," first conjunctively and then disjunctively, and the context does not indicate that the form of expression was of controlling significance.

12. SAME—CHARITABLE TRUSTS—STATUTES.

Will setting up a trust for charitable and educational purposes,

primarily for benefit of residents of city and county where testator resided *held*, to have established a valid trust when construed in accordance with rules set forth in pertinent statute (CL 1948, § 554.351 *et seq.*).

13. WILLS—INTENT—CONSTRUCTION.

The intent of the testator, as specifically declared at the outset of the will, may not be permitted to be defeated by technical construction of a subsequent term, especially when such construction is not indicated.

14. EXECUTORS AND ADMINISTRATORS—FINAL ACCOUNT—APPROVAL—RES JUDICATA.

The failure of an heir of testator to challenge order of probate court approving final account of the executor under will setting up a testamentary trust and assigning residue to the trustee is binding upon the descendant of such heir.

15. JUDGMENT—PROBATE COURT ORDER APPROVING FINAL ACCOUNT—COLLATERAL ATTACK.

An unappealed order approving the final account of an executor and discharging him upon effecting distribution of the property theretofore in his hands is not subject to attack in a collateral proceeding.

16. ESTATES OF DECEDENTS—JURISDICTION—PROCEEDING IN REM.

The administration of a decedent's estate is not in the nature of a suit between parties but rather, a proceeding *in rem*, and when the court has once acquired jurisdiction it is empowered to make all orders necessary to the proper administration of the estate.

17. WILLS—CONSTRUCTION—APPROVAL OF FINAL ACCOUNT—RES JUDICATA.

The order of a court having jurisdiction to administer an estate, allowing the executor's final account and making distribution pursuant to a construction of the testator's will, is valid and binding as the construction of the will, if not appealed from.

Appeal from Saginaw; Huff (Eugene Snow), J. Submitted June 5, 1958. (Docket No. 30, Calendar No. 47,605.) Decided October 13, 1958.

Bill by Cynthia Mills Cleveland against Second National Bank & Trust Company of Saginaw, a national banking corporation, R. Perry Shorts and Gerald B. Rousseau to have declared void certain trust provisions in the will of Arthur D. Eddy, and

praying for distribution of corpus as intestate property. Bill dismissed. Plaintiff appeals. Affirmed.

William Alfred Lucking, for plaintiff.

John D. Currie, Gilbert A. Currie and *Thomas G. Long,* for defendants.

CARR, J. This case involves the interpretation and validity of certain provisions of the last will and testament of Arthur D. Eddy, a resident of Saginaw county. Testator died April 22, 1925, leaving as his heirs a sister, who was the mother of the plaintiff in the instant case, and his widow. Mr. Eddy was the owner of all of the capital stock of C. K. Eddy & Sons, a Michigan corporation, which stock, it is claimed, was valued at $3,600,000. The will was duly probated. Federal estate and Michigan inheritance taxes, together with expenses of administration, amounted to approximately $500,000.

The testator undertook to create by the tenth paragraph of his will a trust for the promotion of "charitable and educational purposes." He directed that certificates representing 1/3 of the capital stock of C. K. Eddy & Sons should pass to trustees named by him, from which property there should be created the C. K. Eddy Family Memorial Fund. The instrument set forth Mr. Eddy's reasons for his action and his desire that the people of Saginaw might be permanently benefited thereby. The income from the trust estate was directed to be applied by the trustees in accordance with the following specific provisions:

"(a) To the payment of all necessary expenses properly chargeable to the maintenance and execution of said trust estate, including said trustees' reasonable fees for services in connection therewith.

"(b) Not exceeding 50% of the net income re-

ceived from said trust estate shall be used by the trustees as donations from time to time to the Saginaw Welfare League, and to any of the charitable and social welfare institutions or movements, including any organized health programs of the city of Saginaw, or the county of Saginaw, Michigan. I hereby authorize the trustees to use their own discretion as to which particular charitable or social welfare institutions or movements of the city of Saginaw or Saginaw county shall be benefited by such donations, it being my desire that the trustees shall be free to use their own judgment in such matters and to make donations from time to time in such amounts and to such particular causes as in their judgment are most worthy and entitled to financial support. It is my expressed desire, however, that said percentage of income from said trust estate shall be actually expended by the trustees for charitable and social welfare purposes and not permitted to accumulate for any unreasonable time.

"(c) Not exceeding 30% per year of the net income received from said trust estate shall be used by the trustees to maintain or assist in the maintenance of a good uniformed band for the city of Saginaw. It is my preference that such band be operated under the direction of the city government, the trustees to reimburse the city for all necessary expenses of maintenance thereof up to but not exceeding the amount herein provided for such purpose, such payments to be made to the city from time to time as thought advisable by the trustees. If, however, the city shall at any time fail to provide such band for the benefit of its citizens, then the trustees shall have the authority to provide same at a cost per year not exceeding the amount herein provided for such purpose. If for any reason, at any time, the use of said income or any part thereof for said specified purpose shall be deemed unnecessary, impractical or unwise by my trustees, then my said trustees shall use the same for such other charitable or educational purposes for the benefit of the people

of the city of Saginaw as in their judgment are practical and wise, including the construction of buildings for charitable or educational purposes if they deem advisable, it being my expressed desire, however, that said percentage of income from said trust estate shall be actually expended by the trustees for such public purposes and not permitted to accumulate for any unreasonable period of time.

"(d) Not exceeding 20% of the net income received from said trust estate shall be used by the trustees for educational purposes by financing in full or in part deserving boys or girls, and men and women from 15 to 30 years of age, residents of Saginaw county, Michigan, in their endeavors to continue their education in any of the public schools, colleges or universities of the State of Michigan, provided always that such persons are, in the judgment of the trustees, in need of and worthy of such financial assistance. I hereby authorize the trustees to use their own discretion at all times or that of such persons or agency as they may select for the purpose as to the particular persons who shall be benefited thereby, the amount of money to be granted them in each case and the reasonable conditions under which such financial assistance is to be granted and continued."

The eleventh paragraph of the will directed the trustees to publish a full and itemized report of the trust annually in order that the people of Saginaw may be kept informed with reference to the subject matter. The testator further specified that in the event that any of the provisions of the will should be held invalid or ineffectual for any reason the instrument should be construed without reference to such provision or provisions.

It will be noted that subdivision (b) of paragraph 10 refers to "charitable and social welfare institutions" and also to "charitable and social welfare purposes." Such institutions are also referred to in

the disjunctive. Emphasizing these provisions, plaintiff brought the instant suit in circuit court attacking the validity of the trust on the ground that the directions of the testator authorized the use of income from the trust for purposes not necessarily charitable or educational. It is argued that "social welfare" may be construed as including many things that may be conducive to the economic advantage of the people of the community in general, but which are not essentially of a public charitable nature. It is further contended that if subdivision (b) is invalid for the reason indicated the entire trust must fall due to the fact that the carrying out of the purposes of said subdivision are an essential part of the plan of the testator.

The public policy of the State of Michigan as expressed in legislative enactments and interpreted in decisions of this Court regards with favor trusts for religious, educational, charitable and benevolent purposes. Counsel in the instant case have emphasized the provisions of PA 1915, No 280 (CL 1948, § 554.351 *et seq.* [Stat Ann 1953 Rev § 26.1191 *et seq.*]). Said act was substantially a re-enactment of PA 1907, No 122, the sufficiency of the title of which was in question in *Loomis* v. *Mack*, 183 Mich 674, the act being sustained by an evenly divided Court. It may be noted that PA 1925, No 373 (CL 1948, § 554.381 *et seq.* [Stat Ann 1953 Rev § 26.1201 *et seq.*]), with reference to gifts, grants, devises and bequests, in trust or otherwise, for public welfare purposes, was apparently intended to classify gifts or grants for the benefit of the public welfare as analogous to such transfers for religious, educational, charitable and benevolent purposes.

Section 1 of PA 1915, No 280, reads as follows:

"No gift, grant, bequest or devise, whether in trust or otherwise to religious, educational, charitable or

benevolent uses, or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, or anything therein contained which shall in other respects be valid under the laws of this State, shall be invalid by reason of the indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities. If in the instrument creating such a gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes, shall vest in such trustee. If no such trustee shall be named in said instrument or if a vacancy occurs in the trusteeship, then the trust shall vest in the court of chancery for the proper county, and shall be executed by some trustee appointed for that purpose by or under the direction of the court; and said court may make such orders or decrees as may be necessary to vest the title to said lands or property in the trustee so appointed."

Following a hearing in the trial court a decree was entered dismissing plaintiff's bill of complaint. The trial judge concluded that paragraph 10 of the will was not open to the objections urged by plaintiff, that the intention of the testator was to create a trust for public charitable and educational purposes, and that the provisions of the will, construed together, clearly indicated such an intent. Plaintiff has appealed from the decree, insisting here, as in the trial court, that the provisions of subdivision (b) of paragraph 10 must necessarily be construed as contemplating and attempting to authorize expenditures from the trust for purposes that may not be construed as charitable or educational. Defendants insist that the conclusion of the trial judge was correct and that under applicable rules of interpretation

the paragraph in question must be regarded as creating a trust for charitable and educational purposes within the purview of the statute above cited and quoted in part.

The suggestion in plaintiff's behalf that the language of paragraph 10 of the will is uncertain and indefinite with respect to intended beneficiaries thereunder is without merit. The language of the will indicates that Mr. Eddy, for the reasons set forth in the instrument, desired to do something of lasting benefit for the people of his community. It has been repeatedly recognized in judicial decisions that a measure of indefiniteness enters into any charitable trust. The purposes to be attained in effect require that this be so. In *Russell* v. *Allen,* 107 US 163 (2 S Ct 327, 27 L ed 397), the plaintiffs by suit in equity questioned the validity of certain conveyances in trust for educational purposes, such conveyances being "for the use and benefit of the Russell Institute of St. Louis, Missouri." It was claimed on behalf of the plaintiffs that the Russell Institute had not been established at the time of the execution of the deeds, and that the beneficiaries of the trust were uncertain and indefinite. Commenting on the objections urged, it was said, in part (pp 166, 167):

"The principal grounds upon which the plaintiffs seek to maintain their bill are that the deeds create a perpetuity; that the uses declared are not charitable; and that, if the uses are charitable, there are no ascertained beneficiaries and no donee capable of assuming and administering the trust, and the uses are too indefinite to be specifically executed by a court of chancery. But these positions, as applied to the facts of the case, are inconsistent with the fundamental principles of the law of charitable uses, as established by the decisions of this and other courts exercising the ordinary jurisdiction in equity.

"By the law of England from before the Statute of 43 Eliz, ch 4, and by the law of this country at the present day (except in those States in which it has been restricted by statute or judicial decision, as in Virginia, Maryland, and more recently in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity."

Counsel for appellant directs attention to *Scudder* v. *Security Trust Co.*, 238 Mich 318. Involved was a testamentary trust expressed as being established "for the welfare and comfort of elderly men and women who are entirely without means for their maintenance and support." In sustaining the trust the Court pointed out that the provisions of the will were sufficiently certain to permit enforcement. In the course of the discussion it was said (p 324):

"Here is a trust, a trustee capable of executing it, a definite charitable purpose, and a particular class from which the beneficiaries are to be selected."

We think it obvious that the language quoted was merely intended to indicate the nature of the controversy before the Court. On behalf of appellant it is insisted that the statement should be construed as prescribing a test to be applied in determining the validity of a trust of the nature involved in the

instant case. We are not in accord with such claim for the reason that it is apparent that the Court was referring to the facts in the case before it, and without any intent to prescribe, or attempt to prescribe, a rule of general application. It may not be assumed that there was any intent to affect, by way of dicta, decisions in other cases involving educational or charitable trusts.

Counsel for appellant also calls attention to *Wanstead* v. *Fisher,* 278 Mich 68, in which *Scudder* v. *Security Trust Co., supra,* was cited. The comment above with reference to said case is equally applicable under the facts in *Wanstead* v. *Fisher.* It may be noted further that the Court recognized that the trust, being one for educational purposes, was to be construed liberally to the end that the intention of the testatrix might be carried out. It was also recognized (p 73) that:

"It is elementary that the cardinal principle in the interpretation of wills is to carry out the intention of the testator if it is lawful and can be discovered; and that the whole will is to be taken together and is to be so construed as to give effect, if it be possible, to the whole."

The Court also cited and quoted PA 1915, No 280, above set forth in part.

The prevailing view with reference to the scope and purposes of charitable trusts is set forth in 10 Am Jur, Charities, § 52, pp 621, 622, as follows:

"Reverting to the definition of a legal charity, it will be easily seen that it is impossible to specify the innumerable objects or purposes for which a charitable trust may be created. The difficulty is inherent in the subject matter itself. A charitable trust or a charity is a donation in trust for promoting the welfare of mankind at large, of a community, or of some class forming a part of it, indefinite as to

numbers and individuals. It may, but it need not, confer a gratuitous benefit upon the poor, or look to the care of the sick or the insane, or seek to spread religion or piety. Schools and libraries, equally with asylums, hospitals, and religious institutions, are included within its scope. Therefore, the enforcement of charitable uses cannot be limited to any narrow and stated formula. As has been well said, it must expand with the advancement of civilization and the daily increasing needs of men. New discoveries in science, new fields and opportunities for human action, and the differing conditions, character, and wants of communities and nations change and enlarge the scope of charity; and where new necessities are created, new charitable uses must be established. The underlying principle is the same; its application is as varying as the wants of humanity.

"Charity in its legal sense comprises 4 principal divisions: (1) Trusts for the relief of poverty; (2) trusts for the advancement of education; (3) trusts for the advancement of religion; and (4) trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do, either directly or indirectly. The American Law Institute recognizes 6 divisions, separating the fourth class into 3 distinct groups, and states that charitable purposes include: (1) The relief of poverty; (2) the advancement of education; (3) the advancement of religion; (4) the promotion of health; (5) governmental or municipal purposes; and (6) other purposes the accomplishment of which is beneficial to the community. It also points out that a charitable trust can be created for 2 or more purposes stated in this classification. Thus, a trust to establish a scholarship for poor boys is a trust for the relief of poverty and for the advancement of education. So, a trust

to provide medical assistance for the poor is a trust for the relief of poverty and for the promotion of health."

Of like import is 14 CJS, Charities, § 12, p 439 *et seq.*

Consistent with the general principles recognized in the language above quoted from American Jurisprudence is the decision of the circuit court of appeals of the sixth circuit in *Chicago Bank of Commerce* v. *McPherson,* 62 F2d 393. In that case an attack was made on the validity of certain charitable trusts created by the will of Charles F. Ruggles of Manistee, Michigan. Among other provisions, said will undertook to create a trust estate from which the income should be devoted to "charitable, benevolent, educational and public welfare uses in the State of Michigan." The intent was further expressed that the needs and requirements of residents of Manistee county, and of the "charitable, benevolent, educational and public welfare institutions serving the inhabitants of the said county" should be given preference over like needs and requirements of other persons and institutions as beneficiaries under the trust. Validity of the provisions in question was assailed on the ground that the objects and beneficiaries were indefinite, and that the purposes mentioned by the testator were not necessarily charitable. In sustaining the trust, it was said, in part, by Judge Simons who wrote the opinion of the court (pp 397, 398):

"It seems clear that Ruggles originally intended a charitable trust in its broadest sense, and that the addition of public welfare uses to its objects indicated no change in purpose. As was said by the court of appeals of the eighth circuit in passing upon a sequence of descriptive words of similar import to those, in the disposition here involved: 'The word "charitable" is the dominant word, coloring and

conditioning those which follow, and that an overriding charitable intent is disclosed.' *Gossett* v. *Swinney,* 53 F2d 772, 778, an application of the maxim *noscitur a sociis.* It seems to us not insignificant that the testator here declared: 'It is my desire and intent that the reasonable *needs* and *requirements* of the inhabitants of Manistee county, and of the charitable, benevolent, educational and public welfare *institutions,* shall at all times be given preference over the like needs and requirements of other persons and institutions.' This, in the environment in which it is used, is language clearly indicative of a charitable purpose, and one public rather than private in its scope. * * *

"In considering other grounds for attack upon the validity of the trust, we need add little to the comment of the district judge. The State of Michigan, after following a settled policy for nearly a century in denying validity to charitable trusts, completely reversed that policy, and upon each occasion broadened the scope of its legislation, until it is now the settled policy of the State expressly declared in its law to interpret them liberally. Zollman, American Law of Charities, § 61. Charitable trusts are of necessity indefinite and uncertain in respect to beneficiaries, and the modern view is that certainty of objects and too great a limitation upon the discretionary powers of trustees more often tends to defeat the dominant charitable purpose of the testator than to effectuate it. Objects of private beneficence in one generation may no longer require a testator's bounty in the next, and classes of beneficiaries in normal times tend to disappear. Michigan has adopted an enlightened, forward looking view. It ought not lightly to be ignored in the face of the express declaration of its legislature and the decisions of its courts."

In *Commissioner of Internal Revenue* v. *Upjohn's Estate,* 124 F2d 73, the circuit court of appeals of the sixth circuit, in construing as exempt from taxa-

tion under the Federal income tax law a testamentary bequest to trustees "for such civic, charitable, educational or religious purposes, and for such purposes of general and public welfare as in their discretion may seem desirable, or as in their opinion would be approved by me if I were then present," said (p 77):

"It is axiomatic, as a principle of construction, that words in a statute, or a written instrument, are not to be measured separately but each term is to be construed in its association with other terms and in its general environment."

A like conclusion was reached by the circuit court of appeals of the seventh circuit in *Arthur Jordan Foundation* v. *Commissioner of Internal Revenue,* 210 F2d 885. The plaintiff Foundation was created as a perpetual trust by an agreement between the donor and named trustees. The purposes of the trust and the duties of the trustees were indicated in the following language (p 886):

"To apply the entire earnings and profits thereof solely to charitable, educational, religious, literary, scientific purposes and social advancement, including music and the arts, in order to promote the well-being of mankind throughout the world, and particularly in the United States."

In reaching the conclusion indicated, it was said (p 888):

"The commissioner suggests, first, that here the beneficial purposes for which the trust income was directed to be applied are not confined to those which are sanctioned by the code. Specifically, it is said that the applications of funds to 'social advancement, including music and the arts,' is not a use for which the statute allows deduction. We think this argument is wholly without merit. As the court stated in *Commissioner of Internal Revenue* v. *Upjohn's Estate* (6 Cir), 124 F2d 73, 77, 'We do not

understand that to come within the statute its exact words must define the limits of a charitable trust.' In that case a direction that the trust funds were to be used, in part, for 'civic' and 'general and public welfare' purposes was held to be proper under the statute."

In the case at bar the testator, in creating the trust, specified at the outset that the income should be used "for charitable and educational purposes as herein specified." Such statement indicates his intent with reference to the nature of the memorial fund that he created. Consistent therewith is his statement indicating his feelings toward the people of Saginaw, and his desire to permanently benefit them. The term "social welfare" as applied to organizations and purposes in subdivision (b) is associated in each instance with the word "charitable." It will be noted that said institutions are first referred to in the conjunctive, suggesting that the testator had in mind institutions organized for charitable purposes having a social welfare aspect, or, in other words, public charity. While the word "or" is subsequently used, it seems apparent that the testator did not intend a different meaning. The context does not indicate that the form of expression is of controlling significance. The reference to "charitable and social welfare purposes" further suggests that in the mind of the testator such purposes were identical, alike referring to activities designed to benefit the people of Saginaw county generally through the extension of aid and assistance constituting charity in the legal sense of the term. The intent of the testator as specifically declared at the outset may not be permitted to be defeated by technical construction of a subsequent term, especially when such construction is not indicated. In accordance with rules of interpretation applicable to instruments creating trusts for the purposes specified in the statute, above

quoted, we conclude that the tenth paragraph of the will creates a trust for charitable and educational purposes, and that under the provisions of the statute it is valid.

This brings us to a consideration of the second question raised in the case. The defendant Second National Bank & Trust Company, then sole executor under the will, on May 2, 1934, filed its final account, and petitioned for assignment of the residue in accordance with the terms of the will. On the 10th of May, 1935, an order was entered approving the account and further providing that:

"It is further ordered that administration on said estate be and the same is hereby closed and the residue assigned according to the terms of the will to the testamentary trustee."

No appeal from said order was taken, and it is the claim of the defendants in the present suit that it was *res judicata*. It is contended in substance that such order was requisite to proper probate procedure in the case, that directing the turning over of the subject matter of the trust to the trustee in accordance with the will necessarily involved a construction of said will, and that, in consequence, the trustee was entitled to proceed in the performance of its duties. On behalf of appellant it is argued in substance that the probate court was wholly without jurisdiction to make a valid order in the premises and that, in consequence, the action taken is subject to collateral attack. It is further suggested that inasmuch as plaintiff was not an heir of testator she was not in position to challenge said order at the time it was entered. It does not appear that her mother, under whom she claims, was for any reason barred from taking an appeal. In view of the nature of the rights that appellant is asserting, the failure of her mother to act is binding on her.

The question presented has been heretofore passed on by this Court in *Chapin* v. *Chapin,* 229 Mich 515. The will there involved, which created a trust, was probated in Cook county, Illinois, with ancillary proceedings in Berrien county, Michigan. The widow and 2 of the sons of the testator were appointed as executors and duly qualified as such. Probate proceedings were had in conformity with the statute and the final account of the executors was submitted and allowed. A petition was then filed reciting the proceedings taken and asking that the court issue letters of trusteeship authorizing and empowering the trustees designated to manage and control the property of the estate in Michigan in accordance with the will. Such an order was entered on January 15, 1917. Several years later a bill was filed in the circuit court of Berrien county asking a construction of the will. As in the case at bar, defendants made the claim that the order of the probate court, from which no appeal had been taken, was *res judicata.* In sustaining such claim, it was said (p 525):

"The executors after their appointment and qualification could not be lawfully discharged until they had turned over the property in their hands as shown by their final account to the persons lawfully entitled to it. The duty does not rest upon them to determine such persons. It rests upon the court. To do so the judge of probate must construe the will, that is, determine from its terms to whom the executors should make delivery. Having done so by his order committing the management, control and disposal of the trust property to the trustees, we are of the opinion that their right thereto is not subject to collateral attack. *Dudley* v. *Gates,* 124 Mich 440; *Riebow* v. *Ensch,* 220 Mich 450; and *Calhoun* v. *Cracknell,* 202 Mich 430, may be read with profit. See, also, the authorities cited and quoted from in *Thompson* v. *Thompson,* 229 Mich 526, handed down herewith."

In *Thompson* v. *Thompson,* 229 Mich 526, the will in question was admitted to probate following the death of testatrix. Thereafter plaintiff filed his final account as executor and asked that the probate court make an order determining the legal heirs of the deceased and assigning the residue of the estate to the persons entitled thereto. The order for hearing was published as required by statute. Thereafter, on the date specified in the notice, the probate court entered its order assigning the residue of the estate to plaintiff in accordance with the last will and testament of deceased. It was held that such order was not subject to attack in a collateral proceeding, the Court citing *Chapin* v. *Chapin, supra.* Plaintiff brought suit to quiet title against defendant, a son of the testatrix, who claimed that he was not bound by the order of the court because he was at the time a minor. In rejecting the claim this Court pointed out that the administration of estates is not in the nature of a suit between parties but, rather, a proceeding *in rem,* and that when the court has once acquired jurisdiction it is empowered to make all orders necessary to the proper administration of the estate. The *Chapin Case, supra,* was followed in *In re Jones' Estate,* 334 Mich 392, 399. See, also, *Second National Bank & Trust Co.* v. *Wayne Circuit Judge,* 321 Mich 28.

Counsel for appellant cities *MacKenzie* v. *Union Guardian Trust Co.,* 262 Mich 563, in support of his claim that the order of the probate court of Saginaw county entered in May, 1935, is not *res judicata* as to plaintiff. The claim was there made that the allowance of 3 annual accounts filed by an executor in probate court, after proper statutory notice, involved construction of the will creating a trust and amounted to an adjudication as to the propriety of the method of treatment of beneficiaries under the will. Such claim was rejected, this Court holding

that an annual account of an executor or administrator is final as to the amount of money received and disbursements made, in the absence of fraud or breach of trust, but that it does not involve the construction of the will under which the executor acts. In the case at bar we are not dealing with an annual report by the surviving executor, but, rather, with the final report and an order assigning the residue in accordance with the terms of the will. With reference to such a situation, the Court in the case last cited said (p 580):

"If, however, upon the conclusion of the probate of the estate of a testator, upon the allowance of the administrator's final account, the assignment of the residue of the property of the estate is made in accordance with the construction of the will of the deceased by the probate court, then, under such circumstances, the court having to construe the will in order to make a proper order of distribution, such order of distribution properly entered is valid and binding as a construction of the will, if not appealed from. *Dudley* v. *Gates,* 124 Mich 440."

It is somewhat significant that *Dudley* v. *Gates,* cited in the language above quoted, was also cited and relied on in *Chapin* v. *Chapin, supra.* The reasons underlying the foregoing decisions are equally applicable in the case at bar. We are in accord with the finding of the trial judge that the order of the probate court of Saginaw county of May 10, 1935, not having been appealed, is *res judicata* and constitutes a bar to plaintiff's present action.

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

DETHMERS, C. J., and KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

DETROIT CONVEYOR & STEEL CORPORATION *v.* MILBRAND.

1. PLEADING—IMPLIED WARRANTY—EXPRESS WARRANTY.
   No warranty may be implied where declaration is based on an express guarantee.

2. APPEAL AND ERROR—FINDING OF TRIAL COURT—EVIDENCE—ROOF REPAIR—EXPRESS WARRANTY.
   Trial court's finding that defendant's $210 job on plaintiff's roof and which satisfactorily met requirements for 2 years was a repair job and that plaintiff had failed to prove defects of material and workmanship *held,* supported by evidence presented in action for alleged breach of an 8-year express guarantee against all defects of material and/or workmanship.

Appeal from Wayne; Noe (Alton E.), J., presiding. Submitted June 4, 1958. (Docket No. 20, Calendar No. 47,217). Decided October 13, 1958.

Action by Detroit Conveyor & Steel Corporation, a Michigan corporation, against Otto Milbrand, Phyllis Milbrand and Alice Milbrand, copartners doing business as Milbrand Maintenance Company, for breach of warranty in respect to roofing job. Judgment for defendants at close of plaintiff's proofs. Plaintiff appeals. Affirmed.

Sosin & Lasky, for plaintiff.

I. Ernest Sachs (*I. R. Starr,* of counsel), for defendants.

REFERENCES FOR POINTS IN HEADNOTES

[1] 46 Am Jur, Sales § 334.

KELLY, J. Plaintiff's declaration alleges:

(1) That defendants offered to install a new roof on plaintiff's factory using a certain brand of roofing material supplied by plaintiff;

(2) That defendants guaranteed material and workmanship against defects for a period of 8 years;

(3) That 2 years after installation the roof began to leak because of inadequate material and improper workmanship;

(4) That plaintiff was damaged in the amount of $5,325, consisting of $1,725 to repair the roof and $3,600 for rain damage to steel equipment stored in the building.

At the conclusion of plaintiff's proofs the trial court found plaintiff had failed to prove breach of express warranty and entered judgment against plaintiff.

The guarantee upon which plaintiff relied is contained in defendants' proposal of June 13, 1949, which provided:

"We propose to furnish and install:

"Confirming our quotation of June 8, we will brush clean the entire roof area of the above address and will cut and cement and properly roof in all loose or buckled areas with new roofing and plastic cement. The saddle as the sump rings will be re-roofed with a new ply of 15# felt. All flashing will be touched up and repaired and taped as was indicated to you. After this is done, we will spray coat the entire area with your Rufferseal material using all the material which you now have on hand. This material will be installed with a high pressure pump system and will be heated so that it will flow on in a neat and uniform manner, giving a smooth finish when completed. The application will be uniform throughout the entire area and you may rest assured that this will be the best way to apply this coating.

"Complete job for the sum of ..... $210.
"This roof then will carry our 8–year guarantee against any and all defects of material and/or workmanship.
"Milbrand Maintenance Co.
"Otto I. Milbrand.

"For the sum of .....
"Contract accepted: 6–14–49
"Per: W. HOESCH."

Plaintiff contends that the words "guarantee against any and all defects of material and/or workmanship" mean to guarantee "a watertight roof for 8 years." Plaintiff endeavors to read into the contract an implied guarantee to this effect. Plaintiff's declaration is based on express guarantee, and, therefore, no warranty can be implied.

The court correctly decided that plaintiff did not prove defects of material and workmanship. Plaintiff's expert witness, Richard Brown, who was the only witness testifying on this point, establishes the court's conclusion in this regard. The court correctly decided that defendants' $210 job, which satisfactorily met requirements for 2 years, was a repair job. Brown's job, costing $1,725, consisted of building a new roof over the roof defendants had repaired.

Brown testified:

"*A.* Well it was my notion that Mr. Hoesch wanted a new permanent roof; so, the only thing I could do was to figure out a new roof applied over the old one. * * *

"*Q.* Well, to go back to my original question, were the repairs made by you necessary to effect a waterproof roof?

"*A.* You mean the work done by us?

"*Q.* Yes.

"*A.* From a permanent point of view they were. * * *

"*Q.* You mentioned the word specifications a moment ago. For a roof of this slope, would you say that the work that had, that the roof as it was when you first examined it, was it properly installed for that type of slope?

"*A.* The roll roofing that was there was installed as good as you could do that type of specification on so flat a roof. The trouble is the curling at the laps—the laps don't fit perfectly. That particular kind of roof is designed for a greater slope such as 2-inch to the foot or more.

"*Q.* When you say that particular kind of roof was designed for that kind of slope, what exactly do you mean?

"*A.* We are talking about the rolled roofing that was the finished surface of the roof as I first saw it, and that was the material that was lapped only 2 inches.

"*Q.* Should it have been lapped more than 2 inches, in your opinion?

"*A.* That particular piece of roofing is not designed to lap more than 2 inches. So, it was lapped in a way it was designed for, but the fact that the roof deck is so flat that water had a tendency to lie on it, and therefore, would back up in these openings in the laps.

"*Q.* What kind of roof should have been put on this kind of sloping roof?

"*A.* On a flat roof such as that, we always recommend a gravel-surfaced roof.

"*Q.* That is what you ultimately did?

"*A.* Yes, sir."

Appellant claims that the trial court erred in considering the equities of the parties. We agree that considering the equities of the parties no other decision could have been reached.

We further find that applying principles of law the trial judge properly entered judgment for defendants.

Affirmed, costs to appellees.

CARR, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred with KELLY, J.

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

ROBLYER *v.* ROBLYER.

DIVORCE—ALIMONY—CONTEMPT—EVIDENCE.

Findings of trial court that defendant husband was in contempt for nonpayment of alimony and child support money and was financially able to purge himself of such contempt, notwithstanding injury to back *held*, supported by record showing defendant had remarried and had purchased a new home.

Appeal from Kalamazoo; Sweet (Lucien F.), J. Submitted June 12, 1958. (Docket No. 23, Calendar No. 47,457.) Decided October 13, 1958.

Bill for divorce by Charlotte L. Roblyer against Vernon P. Roblyer resulted in decree for plaintiff with provision for payment of permanent alimony

---

REFERENCES FOR POINTS IN HEADNOTES

17 Am Jur, Divorce and Separation §§ 805, 806.

Inability to comply with order to pay alimony or support money as defense to contempt charge. 22 ALR 1260, 31 ALR 650, 40 ALR 547, 76 ALR 392, and 120 ALR 705.

Pleading and burden of proof in contempt proceedings, as to ability to comply with order for payment of alimony or child support. 53 ALR2d 591.

and support. Defendant was found guilty of contempt for nonpayment and his petition for reduction and cancellation of arrears was dismissed. Defendant appeals. Affirmed.

Crum, Allen & Mullen (*C. H. Mullen,* of counsel), for plaintiff.

Marjorie Lee Luna, for defendant.

KELLY, J. Defendant requests this Court to "set aside the order finding him guilty of contempt of court, and prays that this court cancel the alimony arrearage and discontinue the alimony for the support of plaintiff."

December 28, 1953, plaintiff was granted a divorce. The decree ordered that her husband (defendant) pay her $10 per week for 200 weeks and, in addition, $15 per week for the support of their child. Defendant failed to make the weekly payments to his divorced wife and on October 10, 1956, the friend of the court filed a petition to show cause why defendant should not be held in contempt.

One week later defendant filed his petition to reduce alimony and cancel arrearages, alleging (1) "That defendant was injured December 27, 1955, at which time he received injuries to his back, resulting in cracked vertebrae. That he received workmen's compensation for a total period of 22 weeks, part of the time at $32 per week, and the remaining portion at $34 per week. That during said period and up to the present time he has made every effort to keep up payments for the support of the child, but he has been unable to make any payments toward the alimony for the support of plaintiff;" and (2) "That at the time said decree was entered, plaintiff was unemployed and claimed she was unable to work. That she is now regularly employed, according to his

best information and belief, at Fairmount Hospital, Kalamazoo, Michigan, where she makes substantial earnings."

In finding defendant guilty of contempt, the court stated:

"From his testimony there can be no question but that he has been guilty of contempt of the provisions contained in the decree with reference to the payment of support money for his son and alimony for his former wife. The defendant would have us believe that he sincerely understood and believed that the payments provided for in the decree were only to be made out of his earnings. The defendant is an intelligent individual and a man of some wide business experience. He admittedly understands rather complicated provisions of the income tax law. I can't believe that he could have honestly and sincerely construed the decree, which is clear and explicit in its terms, as he would have us believe. * * *

"He may purge himself of the contempt of which this court now finds him guilty, and he is in a position to purge himself of such contempt upon payment of the arrears, whatever they are, let's say in the approximate amount of $1,420. I say he is in position to purge himself because during the period in which he was in contempt and in which he was failing to make the payments he, through business transactions, received in excess of $10,000 in one transaction, which money he used in the purchase of a home, which home is unencumbered. He should have no trouble at all in raising the money to pay the arrears. He is in contempt. He is not entitled and he will not be accorded any consideration on his petition for reduction. My suggestion would be that he purge himself of this contempt by paying up the arrears; that after he has his compensation hearing on July 28th, if he feels and if his attorney feels that he is entitled to consideration in the matter of some reduction, then the matter be brought before the court and to the attention of the court, but the court will

not consider any petition by him in that regard as long as he remains in arrears."

The decree provided that the weekly payments to plaintiff should cease if she remarried; there was, however, no such provision if she sought and obtained employment.

Defendant remarried and bought a new home after the decree. His attitude toward the obligations he had created through his previous marriage is disclosed by his testimony as follows:

"*Q.* You felt you could use your own judgment and substitute your own decision for that of the court, is that correct?

"*A.* That's right.

"*Q.* You felt your thinking was better on that than the judge's was when he signed the decree?

"*A.* Well, I have no way of proving it, but—

"*Q.* Just answer my questions. You felt your thinking on that, and the way you had worked it out was better than the judge's when he signed the decree?

"*A.* Yes, I figured there should be a change into it.

"*Q.* In the decree?

"*A.* That's right.

"*Q.* But you never petitioned the court to have the decree changed?

"*A.* No, I did not. I am not looking for trouble.

* * *

"*Q.* The decree sets up certain times when you could have the boy. Have you tried to get him?

"*A.* No. I just figured it might make trouble.

"*Q.* I am not asking you why you did, but I am asking, you didn't in accordance with the decree?

"*A.* I told you I didn't.

"*Q.* He is getting to be a pretty big boy, isn't he?

"*A.* Yes.

"*Q.* Did you speak to him this morning?

"*A.* I didn't know it was him.

"*Q.* What?

"*A.* Actually, I didn't know it was him.

"*Q.* It has been so long since you have seen him?
"*A.* That's right."

The record sustains the findings of the trial court. Affirmed. Costs to appellee.

DETHMERS, C. J., and CARR, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

McGUIRE *v.* RABAUT.

1. APPEAL AND ERROR—APPENDIX—TRANSCRIPT.

A fair presentation of issues to the Supreme Court, as required by court rule, is not made, where appendix does not contain testimony of driver of car in which plaintiff was riding when collision occurred with defendant's car at intersection, necessitating resort to single copy of typewritten transcript (Court Rule No 70, § 5 [b], as added October 30, 1956).

2. AUTOMOBILES — THROUGH HIGHWAYS — ANTICIPATION OF NEGLIGENCE.

The driver on a through highway is entitled to assume that drivers on subordinate streets will yield him the right-of-way and he is not bound to anticipate unlawful or negligent acts on their part but he must exercise reasonable care for his own protection.

3. SAME—THROUGH HIGHWAYS—YIELDING RIGHT-OF-WAY.

A driver on a through highway is entitled to assume that his right-of-way would not be contested by a driver upon a subordinate street until it becomes clear that the latter is going to challenge or obstruct the right-of-way and it then becomes the duty of the driver on the through highway to avoid the impending collision.

REFERENCES FOR POINTS IN HEADNOTES

[2] 5A Am Jur, Automobiles and Highway Traffic §§ 304, 306.
[3, 6] 5A Am Jur, Automobiles and Highway Traffic § 306.
Right-of-way at street or highway intersections. 21 ALR 974, 37 ALR 493, and 47 ALR 595.
—— as dependent upon or independent of care or negligence. 136 ALR 1497.
[4, 7] 5A Am Jur, Automobiles and Highway Traffic § 1095.
[5] 53 Am Jur, Trial § 557.
[8] 5A Am Jur, Automobiles and Highway Traffic § 1097.

4. SAME—THROUGH HIGHWAY—STOPPING—INSTRUCTIONS.
   Instruction that driver on through street need not look to his right at an intersection, since he is entitled to believe he is protected from danger from that direction by a stop sign, although error, was not reversible, where it could not have affected the result under circumstances presented, showing that the intersecting street was narrower than the distance required to stop a car travelling at a lawful speed.

5. TRIAL—ERRONEOUS INSTRUCTIONS.
   It is presumed that a jury may have followed an instruction which is erroneous if 2 conflicting instructions are given, one of which is erroneous.

6. AUTOMOBILES—THROUGH HIGHWAY—YIELDING RIGHT-OF-WAY—INTERSECTIONS.
   The purpose of a through highway, to move a large volume of traffic at relatively high speeds, is incapable of fulfillment if driver thereon be required to drive so that he could stop in case drivers on subordinate intersecting streets were not to yield the right-of-way at each intersection.

7. SAME—ERRONEOUS INSTRUCTIONS—THROUGH HIGHWAYS—OBSERVATION AT INTERSECTION.
   Verdict for defendant is not disturbed notwithstanding erroneous instruction as to defendant driver not being required to make observation to right at blind intersection, where even if a proper instruction had been given, the result could not have been different.

8. SAME—CONTRIBUTORY NEGLIGENCE OF HOST DRIVER—NEGLIGENCE OF DEFENDANT.
   Claim that too much emphasis in the instructions was laid upon the contributory negligence of driver of car in which plaintiff was a guest passenger *held,* not to have shown reversible error, where charge as a whole fairly presented the issues and the jury found no negligence on part of defendant.

Appeal from Wayne; Neuenfelt (Lila M.), J. Submitted April 9, 1958. (Docket No. 23, Calendar No. 47,206.) Decided October 13, 1958.

Case by Ruth H. McGuire against Charles Rabaut, McKesson-Robbins, a Maryland corporation, and Bejin Cartage Company, a Michigan corporation,

for injuries sustained as guest passenger upon collision of motor vehicles. Verdict and judgment for defendants. Plaintiff appeals. Affirmed.

Henry G. Totzke and *Irving H. Small,* for plaintiff.

Giltner, Humpsch, Giltner & Miley, for defendants.

SMITH, J. Here we consider an automobile collision between 2 cars at a "blind" intersection, a term we will in due course explain in some detail. One of the cars was traveling east on a through street, guarded at the intersection before us by a stop sign, the other north upon a subordinate street. For purposes of clarity we will adopt the terminology of prior cases and describe the through-street driver as the favored driver and the other as the subordinate driver.

The accident occurred at the corner of Hastings street and East Milwaukee, in the city of Detroit, about 9:30 on an evening in late April. It was dark. The pavement was wet. Plaintiff was a guest passenger in a car driven north on Hastings street by Mr. J. B. Crane. Defendant Charles Rabaut was driving east on Milwaukee in a truck owned by defendant Bejin Cartage Company and hired by McKesson-Robbins, a Maryland corporation.

Traffic on Hastings street is required to stop before entering into the intersection at Milwaukee street. The stop sign at the intersection of Milwaukee and Hastings was the only traffic control at that point. The corner itself, as we have noted, was described in the record as a "blind" corner. As to the meaning of such expression we quote from the testimony of officer Livingston:

"I should have indicated it as a blind street corner actually. They are quite numerous throughout the

city, especially in the older sections of town. Congress and Larned are wonderful examples. Driving down either way where the buildings are built right up to the sidewalk on all corners, we construe that as a blind corner. * * *

"*The Court:* Let's take the corner going east on Milwaukee and going north—only 2 corners—

"*A.* The corner going north and east I would construe as a blind corner."

The described condition here arises from the fact that a New York Central viaduct, running in a northeasterly-southwesterly direction, crosses directly over Hastings street immediately adjacent to and just south of the Milwaukee street intersection, also crossing Milwaukee just east of the intersection. At the southwest corner of the intersection the exhibits disclose concrete abutments and steel girders obstructing the view to the left (west) of a driver proceeding north on Hastings. Likewise there is a similar obstruction of view for a driver proceeding in an easterly direction on Milwaukee as he seeks to make observation to his right (south) on Hastings. More especially, it would appear from the photographic exhibits that a driver going in a northerly direction in Hastings would have to bring his car to the crosswalk, and thus slightly into the intersection, before he could see to his left whether or not it was safe to proceed, since the steel girders, upon concrete supports, apparently extend into the Milwaukee street crosswalk. The driver proceeding in an easterly direction on Milwaukee is correspondingly handicapped. Thus the record, with ample justification, refers to this corner as a "dangerous" corner. We note, also, in the exhibits, traffic control lights at the intersection, but at the time of the accident such had not been installed.

As the car in which plaintiff was a passenger approached Milwaukee the driver slowed down, he

testified, until he came to a "rolling stop." He looked to his left, "didn't see anything coming," shifted gears, moved forward, "and that was all I remember." He thinks he was 4 or 5 feet out into the intersection when he made his observation. When he woke up, he says, he was in the hospital.*

The favored driver, defendant Rabaut, testified that, knowing the corner was dangerous, he slowed slightly (to 20 miles per hour) prior to approaching the intersection, then "looked to the right, that is south on Hastings street, and from your point of vantage there at the crosswalk, I was at the edge of the crosswalk, you can see 25 or 30 feet down Hastings, and I saw nothing." The collision followed, it being disputed whether the car hit the truck or the truck hit the car. Plaintiff was seriously injured. After some 8 days of trial the case was submitted to the jury, which returned a verdict for defendants, upon which judgment was entered. The case is before us upon alleged errors in instructions given. These will be set forth is due course.

The difficulties in this case, as in other arterial highway versus subordinate street cases, arise from an apparent conflict between 2 equally sound and equally applicable principles of law. The first is that a driver on an arterial highway is entitled to assume that subordinate drivers will yield him the right-of-way. He is not bound to anticipate unlawful or negligent acts on their part. At the same time, however, the favored driver must conform to the standard of due care imposed upon him as well as the

* Appellant's appendix contains none of Crane's testimony. To obtain it we have had recourse to a typewritten transcript of great length, only one copy of which is available to the court. Such presentation does not meet the "requirements of a fair presentation of the issues to the court." Court Rule No 70, § 5(b), as added October 30, 1956. See 347 Mich xxx. For elaboration, see *Miller* v. *Allen*, 352 Mich 95, and the supplement attached to our opinion in *Wilks* v. *Kempf*, 352 Mich 445, 446, 451–453.

rest of mankind, namely, that he shall exercise reasonable care for his own protection. But what does this actually mean in terms of arterial travel? Therein lies our problem. Its importance* to the motoring public may justify its comprehensive reexamination.

It is clear, at the one extreme, that the favored driver is not permitted to lower his head, close his eyes, and charge blindly through intersections on the theory that such is his "right" simply because he is the favored driver. It was Justice Holmes who said that "such words as 'right' are a constant solicitation to fallacy."† The favored driver's rights are not so broad. It remains his duty to exercise reasonable care under the circumstances. We explored this matter in *Krause* v. *Ryan,* 344 Mich 428, 432, holding that:

"It is not necessary in approaching an intersection, as we said in *Arnold* v. *Krug,* 279 Mich 702, 707, that he 'have his car under such control * * * that he may stop at once and avoid collision with persons who may illegally come into his path.' Lacking notice otherwise, he may assume that others using the highways will comply with the rules of the road and properly posted signs and he is not guilty of contributory negligence in acting upon such assumption. It should not, however, be assumed from the foregoing that he may proceed blindly upon the arterial, secure in the supposition that he can do no wrong. He must remain alert to the hazards surrounding him and with which he is confronting others. We do not propose to attempt an enumeration of the various actions required of him. So far as the question in this case is concerned, he is undoubtedly required to

* The publication of the National Safety Council, Accident Facts, 1957 edition, p 49, lists failure to yield the right-of-way as (except for excessive speed) the most important driver violation in fatal accidents in urban areas in the year 1956.

† *Jackman* v. *Rosenbaum Co.,* 260 US 22, 31 (43 S Ct 9, 67 L ed 107).

make observation of the traffic apparently to cross his path from intersecting streets and to act reasonably in the light of such observation."

The favored driver is thus not required to have his car under such control as to be able to avoid collision with a subordinate driver coming illegally into his path. At what point, then, does the second principle (that of exercising reasonable care for his own protection) come into operation, requiring him to take steps to avoid collision with a subordinate driver? Only at that point when his continuing observations (which he must make, despite the fact that he is on an arterial highway) reveal, or should reveal to the reasonably prudent man, an impending danger. It is at this time that his duty of care with respect to the subordinate driver arises, and his post-observation negligence, or lack thereof, is measured by his actions after this point. Consequently, in the case before us the favored driver was entitled to assume, as he approached the Hastings intersection, that his right-of-way would not be contested by a subordinate driver. He was entitled to rely upon this assumption until it became clear to him (or, until, as a reasonable man, considering pertinent surrounding circumstances of traffic and terrain, it should have been clear to him) that a subordinate driver was going to challenge or obstruct his right-of-way. At this point his duty to attempt to avoid the impending collision began. It is from this point onward, and not before, with respect to a crossing subordinate driver appearing in his path, that we scrutinize his acts to determine whether or not he is guilty of negligence for failure to act as a reasonably prudent person, and, in all fairness to him, we must measure his conduct in the light of the emergency then presented, if not of his making.

We come now to the asserted errors in the charge given. With reference to the negligence of the favored driver, the defendant, the court charged, in part, that:

" 'Drivers approaching the trunk line are required to stop before entering the intersection whether anyone is at or near the crossing or in sight on the trunk highway. It is an improved road—usually hard surfaced. Its purpose is to afford rapid transit. The driver is entitled to assume that those approaching it will obey the law and stop. He is not obliged to have his car under such control at each intersecting road that he may stop at once and avoid collision with persons who may illegally come into his path.

" 'On the other hand, he must keep such lookout ahead and to the sides and down intersecting highways as a reasonably prudent person would do in order to discover possible danger and must act carefully upon the existing conditions.' "*

The substance hereof was repeated in various forms. However, at one point there was added the instruction that the favored driver was "not required to look to the right because he has good reason to believe that he is protected from danger in that direction by the stop sign." This was error. The favored driver must make observation despite his favored status, as we have seen, and no device or sign will remove this burden from him. The question now facing us is whether this error was prejudicial to the plaintiff. In considering the effect of conflicting instructions, one of which is erroneous, we presume that the jury may have followed that which was erroneous. *In re Bailey's Estate*, 186 Mich 677. Of course, if it appears from the evidence, or by some part of the record, that the error could not have affected the result, that the verdict, under

* The court, in its charge, quoted this from *Arnold* v. *Krug*, *supra* 707, 708.—REPORTER.

proper instructions, could not have been different, we do not reverse. Against such background let us examine the situation in the case before us. The parties agree that the favored driver, some 25 feet west of the intersection, had slowed down to 20 miles per hour and that Hastings street is 28 feet wide at this point. The favored driver also testified, and his testimony is supported by the exhibits, that due to the fact that this is a blind corner he could not see to his right, south on Hastings street, until he reached the crosswalk. As he put it, "You don't see anything until you get to the crosswalk." But, at 20 miles per hour, was it then possible for him to avoid collision if a car northbound on Hastings entered the intersection in his path? We have seen that the favored driver is not required to have his car under such control that he may bring it to a stop at each intersection he approaches upon the theory that some reckless, or semiconscious, or suicidal subordinate driver will dispute his passage. This would bring traffic on arterial highways, for all practical purposes, to a complete stop. At each successive intersection the arterial driver would have to slow down to a few miles per hour, and at blind corners he would be required literally to nudge his car forward into the intersection, until he crossed the threshhold of vision for the subordinate street, lest he not be able to stop instantly should danger threaten. But the purpose of the through highway is to move great volumes of traffic at relatively high speeds. Such purpose cannot be accomplished if our application of the standard of due care does not take into account the unique function of the arterial highway. Thus it was that we said in *Arnold* v. *Krug*, 279 Mich 702, 707, that, "The right-of-way accorded to a driver upon a trunk-line highway is something more than the privilege of going through the inter-

section in advance of a car which reaches it at the same time."

As for the effect of the erroneous instruction, let us recapitulate: Defendant Rabaut was traveling east at 20 miles per hour, close to the southerly curb of Milwaukee. At this speed his statutory stopping distance* upon a dry, smooth road (and Milwaukee, as we have seen, was wet) was 30 feet. This is 2 feet greater than the 28-foot width of Hastings at this point. But this stopping distance is "upon initial application of the service (foot) brake." If we add to this distance as we must, for a realistic appraisal of the situation, the distance traveled during the so-called "thinking time" or "reaction time" of the favored driver (the time required for him to perceive the physical object, appreciate the danger, decide what to do, and then start to do it) we get a far greater total stopping distance. We will not explore this aspect of the matter, since the statutory braking time alone exceeds the width of the intersection, save to note that the total stopping distance at this speed ranges from a distance of some 52 feet, reached by the application of Judge Ralph W. Liddy's well-known and thoughtful computations, to that of approximately 48 feet, computed in accordance with the formula published by the secretary of State of Michigan.† Upon the facts before us, then, we have a situation in which a driver proceeding at a lawful speed and in a lawful manner on an arterial highway is contested in his right-of-way by

* CLS 1956, § 257.705 (Stat Ann 1952 Rev § 9.2405).

† See Liddy's "Digital Safety Rule" and booklet "What Every Driver Must Know," Hare and Richardson (1956 edition).

The so-called "reaction" time for an individual depends upon a variety of factors, including his health, age, sensitivity to visual (or auditory) stimulation, elements of distraction, intensity of stimuli, and others. See, generally, Boring, Langfeld, and Weld's Psychology—A Factual Textbook—p 447 ff. Also, McFarland's "Human Factors in Highway Transport Safety," Vol 64 S.A.E. Transactions, p 730 (1956).

a subordinate driver under such circumstances that collision is inevitable. Before the favored driver can even react to the situation and put his foot on the brakes he is across the center line of the subordinate street and into the contested area. Under these circumstances an instruction that the favored driver need not look to his right ("because he has good reason to believe that he is protected from danger in that direction by the stop sign") while erroneous, will not necessitate reversal. The favored driver's negligence in not looking* was not, as a matter of law, a proximate cause of the collision. Even had he looked, diligently, there was nothing he could have done, after discovery of the danger, upon these facts, to avoid collision. The deficiency in plaintiff's case lies in the area of proximate cause. We need no more than cite the classic case of *Stacy* v. *Knickerbocker Ice Co.*, 84 Wis 614 (54 NW 1091), wherein it was held that negligence in failing to fence thin ice was not a cause of the death of runaway horses which a fence could not have halted had it been there. "The fence of the statute," held the court (p 616), "would have been but gossamer before those powerful horses, frantic with fright, upon whom 2 strong men could make no impression."

The jury's verdict in favor of the favored driver will not be disturbed by us, despite the erroneous instruction. Even a proper instruction could not have changed the verdict.

Plaintiff also argues that the instructions so emphasized the contributory negligence of plaintiff's driver (which, if it existed, was not imputable to plaintiff) that it misled the jury. Certain sentences, taken out of context, support appellant's claim. The charge as a whole on this point, however, fairly pre-

* We have not overlooked his testimony, which the jury was entitled to believe, that he did, in fact, look to the south, his right.

sented the issues. *Gilson* v. *Bronkhorst,* 353 Mich 148. Since this situation (of the plaintiff guest passenger) is fairly repetitive we deem it pertinent to observe that, as pointed out by Mr. Justice CARR in *White* v. *Huffmaster,* 321 Mich 225, 233, quoting an earlier case:

" '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.' "

Affirmed. Costs to appellees.

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

BAKER *v.* GUSHWA.

1. PLEADING—EVIDENCE—UNFAIR ADVANTAGE.

Courts must allow a pleader a little looseness of expression so as to make provision for the uncertainty of the proof, provided that no unfair advantage is taken of the opponent thereby (CL 1948, § 614.2; Court Rule No 19, § 1 [1945]).

2. SAME—DECLARATION.

A declaration must contain such specific allegations as will reasonably inform the defendant of the nature of the cause

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur, Pleading § 63.
[2] 41 Am Jur, Pleading § 77.
[3] 41 Am Jur, Pleading § 74.
[4] 5A Am Jur, Automobiles and Highway Traffic § 936.
[5] 38 Am Jur, Negligence § 186.
[6] 5A Am Jur, Automobiles and Highway Traffic § 304.

he is called upon to defend (CL 1948, § 614.2; Court Rule No 19, § 1 [1945]).

3. SAME—SUFFICIENCY OF DECLARATION.

A liberal attitude is taken in passing upon the sufficiency of pleadings, the chief object of the declaration being to apprise plainly the opposite party of the cause of action and the claim of plaintiff (CL 1948, § 614.2; Court Rule No 19, § 1 [1945]).

4. SAME—VARIANCE—AUTOMOBILES—INTERSECTION OF PRIVATE DRIVE AND PUBLIC HIGHWAY—PREJUDICE.

A variance, if there was any, between declaration and proofs adduced on behalf of plaintiff *held*, not to have misled defendant to his prejudice in action arising from collision at or near intersection of private drive and public highway, where declaration averred that plaintiff "did drive out onto the public highway, going in an easterly direction and at a slow rate of speed, and that just as he did enter upon the public highway, the defendant did come over the crest of the hill * * * and at a high and unlawful rate of speed did drive into plaintiff's truck" and testimony showing collision occurred just as front of plaintiff's truck came to within 6 or 8 inches from hitting edge of pavement and stopped.

5. NEGLIGENCE—TEST OF CONTRIBUTORY NEGLIGENCE.

The matter of contributory negligence is tested by what plaintiff should have seen in the exercise of due care, not what he could have seen as a matter of fact.

6. AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—INTERSECTION OF PRIVATE DRIVE AND PUBLIC HIGHWAY.

The issue of contributory negligence of plaintiff truck driver *held*, properly submitted to jury in action against motorist for injuries sustained in collision at or near intersection of private drive and public highway.

Appeal from Wexford; Campbell (Howard L.), J. Submitted June 6, 1958. (Docket No. 37, Calendar No. 47,387.) Decided October 13, 1958.

Case by Harold Baker against Theodore Gushwa for personal injuries arising from collision of motor vehicles. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

H. Murray Campbell, for plaintiff.

James C. Herrinton, for defendant.

SMITH, J. This is an automobile accident case. The plaintiff had jury verdict and judgment. In our Court defendant primarily urges a fatal variance between pleadings and proofs.

The accident occurred about 2 in the afternoon of a March day in a rural area. The roads were clear in the center, with slush on the outer sides. At the place of the accident, Meauwataka road, an east-west highway between 17 and 18 feet in width, is intersected on the south side only by a private drive from the Paul House home. It is stipulated that an automobile approaching this driveway from a westerly direction (as was the defendant) can observe a truck stopped in the private driveway from a distance of 2/10 of a mile and the driver of the plaintiff's truck stopped in the private driveway can observe such automobile for an equal distance.

Plaintiff, driving in a northerly direction upon the private driveway, was taking a cow to the market. It was, we are told, a good, fat butcher cow, stepping around a little bit in the truck. "You have to be very cautious," he states, "when you're hauling a cow in a pickup." At any rate he stopped, he testified, 3 times before he entered the highway from the private drive. Once, when about 12 feet from the road, looking both ways, and again, with similar observation, when about 5 feet farther on. He then moved to the edge of the pavement "and this snowplow blinked its lights." (The snowplow was about 400 feet to his right and was apparently warning of an on-coming danger.) Plaintiff looked quickly around and saw, for the first time, a car approaching him, "hugging the low side of the road," proceeding at about 50 miles per hour and making no effort to get to the

other side. Plaintiff "tried to cramp" his wheels around and get on the shoulder of the road. He had come to a complete stop when he was struck on the left door by the right front of defendant's car. At this time part of plaintiff's vehicle, "the left front corner would be touching the pavement—the tarvia," the bumper or tire, he testified, being on the paved portion of the highway at the time of the accident.

Trial was had to a jury which returned a verdict in plaintiff's favor in the sum of $1,000 and judgment thereon was duly entered.

Defendant's first assignment of error relates to the issue of variance. There was, he asserts, "a fatal variance between the declaration and a portion of the testimony submitted into evidence by plaintiff and appellee with respect to the location of the automobile accident." This variance is said to arise from the fact that paragraph 4 of the declaration charged, in part, as follows:

"4. That the plaintiff prior to entering the public road had stopped his pickup and had looked in either direction and from his left did find the road free and clear from automobiles, and on his right did see a snowplow approaching from the east, or the plaintiff's right; that the plaintiff thereupon did drive out onto the public highway, going in an easterly direction and at a slow rate of speed, and that just as he did enter upon the public highway, the defendant did come over the crest of the hill to the east[*sic*] of the private driveway out of which plaintiff was coming, and at a high and unlawful rate of speed, did drive into plaintiff's truck, striking it on the right left[*sic*] door with force and violence, thereby damaging said truck and injuring plaintiff, as hereinafter set forth."

Paragraph 5, it is pointed out, alleges that defendant was operating his automobile "upon said highway." Defendant points out to us that at the trial,

plaintiff not only confirmed the allegations of paragraph 4, but, he also argues, the defendant testified that the accident occurred in the private driveway, quoting in support thereof the following portions of the record:

"*Q.* All right, did I understand you, witness, to say that when this—when Mr. Gushwa's car struck you that your car—your truck—was stopped?

"*A.* My truck was stopped.

"*Q.* It was not moving at all?

"*A.* That's right.

"*Q.* And how far would you say that you were out towards the tarvia?

"*A.* Well, of course the tarvia is broke up, but within 6 or 8 inches, I'd say, from hitting the edge of the pavement. I was not out onto the highway."

Is there a fatal variance in the above, between the public highway and the private driveway? A pleader, obviously, must have a degree of latitude. The matter was well put in *L. B. Menefee Lumber Co.* v. *MacDonald,* 122 Or 579, 589, 590 (260 P 444, 448):

"A pleader cannot always know in advance what his proof will establish. If all pleaders could foresee the results which their proof will produce, there would be practically no lawsuits; almost all cases would be settled before the courts were reached. This uncertainty as to the unknown proof should caution the courts to allow the pleader a little looseness of expression so as to make provision for the uncertainty of the proof, provided that no unfair advantage is taken of the opponent thereby. * * * We do not believe that the pleadings misled the plaintiff, nor do we find any indication that the situation denied plaintiff a fair presentation of his case. The creation and interpretation of the rules of procedure are not the ultimate end of the law; rules of procedure are merely an avenue of approach."

We are likewise, in this jurisdiction, committed to the notice theory of pleading. As we held in *Manley, Bennett & Co.* v. *Woodhams,* 349 Mich 586, 592, 593:

"In this jurisdiction the judicature act of 1915,* and court rules pursuant thereto, placed the emphasis squarely upon the notice feature of pleading, discarding ancient and technical tests, phrases and formulae:

" 'In the actions which are in this act retained, the forms of declaration now in common use may be employed; but no declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend.' CL 1948, § 614.2 (Stat Ann § 27.812).

" 'The declaration shall contain such specific allegations as will reasonably inform the defendant of the nature of the cause he is called upon to defend.' Mich Court Rule No 19, § 1 (1945).

"In accordance therewith, as observed by Mr. Justice NORTH in *Spelman* v. *Addison,* 300 Mich 690, 702: 'In recent years, at least, this Court has taken a liberal attitude in passing upon sufficiency of pleadings.' The chief object of the declaration, we held in *Michigan Aero Club* v. *Shelley,* 283 Mich 401, 408 (1938 US Av R 134, 1 CCH Av 750), 'is to apprise plainly the opposite party of the cause of action and the claim of plaintiff.' "

We cannot conclude upon these pleadings and this record that defendant could reasonably have been surprised, misled to his prejudice, or placed at a disadvantage by the variance (if any) between the evidence and the pleadings submitted in the cause. Thus there has been no fatal variance. Moreover, it is not clear beyond doubt that there was any variance whatsoever. The fact of the matter seems to be that

* The footnote appended here (p 592 of report) reads as follows: "PA 1915, No 314 (CL 1948, § 600.1 *et seq.* [Stat Ann § 27.1 *et seq.*])."

plaintiff's truck was both on and off the public road. At least a part of it, the bumper or tire, according to the testimony noted, *supra,* was on the paved portion.

Defendant urges, also, that plaintiff "was contributorily negligent as a matter of law." It is argued that plaintiff must be held to have seen what was plainly there to be seen. This is not an infallible test for contributory negligence. As we held in *McKinney* v. *Yelavich,* 352 Mich 687, 697, the question is not what the plaintiff could have seen as a matter of fact, but what he should have seen in the exercise of due care. The issue here was properly submitted to the jury.

Affirmed. Costs to appellee.

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

PEOPLE, *for use and benefit of* E. P. BRADY & CO., *v.* GILLILAND.

1. EVIDENCE—MEASUREMENT OF GRAVEL.

   The measurement of amount of gravel delivered from stock pile to road under highway construction subcontract for covering surface where evidence of weight was not available was properly made by subtracting the amount delivered on the road from the amount stockpiled.

2. CONTRACTS—GRAVEL—FINDINGS OF TRIAL COURT—PREPONDERANCE OF EVIDENCE.

   Findings of trial court for plaintiff in subcontractor's nonjury action against road construction contractor for gravel furnished and compacted pursuant to contract with defendant *held,* not against the preponderance of the evidence under the proofs submitted.

REFERENCES FOR POINTS IN HEADNOTES

[1] 9 Am Jur, Building and Construction Contracts §§ 137, 139.
[2] 9 Am Jur, Building and Construction Contracts § 141.
[3] 53 Am Jur, Trial § 123.
[4] 14 Am Jur. Costs § 11.

3. TRIAL—REOPENING OF PROOFS—DISCRETION OF COURT.

The matter of reopening of proofs upon plaintiff's motion, made after defendant had sought a judgment upon the close of plaintiff's proofs, *held,* within the sound discretion of the trial court which will not be interfered with in the absence of an abuse of discretion.

4. COSTS—APPEAL AND CROSS APPEAL.

No costs are allowed upon affirmance of judgment for plaintiff, where defendant appealed and plaintiff cross-appealed, since neither party has prevailed in full.

Appeal from Ingham; Salmon (Marvin J.), J. Submitted June 6, 1958. (Docket No. 45, Calendar No. 47,581.) Decided October 13, 1958. Rehearing denied December 2, 1958.

Nonjury action in the name of the People of the State of Michigan, for the use and benefit of E. P. Brady & Co., a Michigan corporation, against William H. Gilliland and Standard Accident Insurance Company, a Michigan corporation, on guaranty bond for contract price of material and labor furnished on county road construction job. Judgment for plaintiff. Defendant appeals. Plaintiff cross-appeals. Affirmed.

McCune & Austin (*William A. Austin,* of counsel), for plaintiff.

Isadore Isackson, for defendants.

SMITH, J. The E. P. Brady & Co., a Michigan corporation, entered into 2 contracts with defendant William H. Gilliland. The contracts related to the construction of a county road in Iosco county.

Defendant Gilliland, hereafter termed defendant, was the prime contractor with the State of Michigan.* His contract called for covering an aggregate

* Action here joined the surety on the bond required by CL 1948, § 570.101 (Stat Ann 1953 Rev § 26.321).

surface course of 48,700 square yards of gravel to a compacted thickness of 5 inches. Plaintiff E. P. Brady & Co., hereafter termed plaintiff, offered, with respect to this project, as follows:

"QUOTATION No. 139
Date June 9, 1955

To W. H. Gilliland
R.R. #2, Alpena, Michigan
PROJECT OR USE: Iosco Co. Project #C5 35–31, C1 (S 1319 (1)

For the above-captioned project or use we propose to furnish all of the purchaser's requirements of the following materials at the prices, terms, and conditions named herein, and on the back hereof:

Estimated Quantity	Kind of Material	Price per yd.	F.O.B.
10,590 yds.	M.S.H.D. 4.01	2.40	Stockpile West End of Job"

In addition to furnishing the gravel, as above, plaintiff also offered to compact the same:

"QUOTATION No. 139A
Date June 9, 1955

Sub-Contract

To W. H. Gilliland
R.R. #2, Alpena, Michigan
PROJECT OR USE: Iosco Co. Project #CS 35–31, C1 (S 1319 (1)

For the above-captioned project or use we propose to furnish all of the purchaser's requirements of the following materials at the prices, terms, and conditions named herein, and on the back hereof:

Estimated Quantity	Kind of Material	Price per yd.	F.O.B.
10,590 yds. Placed	Compacted on Road	.45	In Place"

Both of these offers were accepted by defendant on July 2, 1955. The question before us relates to performance.

It is plaintiff's contention that he furnished 11,303.565 yards of gravel in performance of one contract, entitling him to $27,128.56, and that he placed and compacted 10,748.567 yards, entitling him to $4,836.86, totalling $31,965.42. Of this amount, he claimed, there was $8,771.35 unpaid and he demanded judgment in such sum. The trial judge awarded him a total of $6,111.63. Defendant appealed and plaintiff cross-appealed.

Most of the argument at the trial related to the fundamental questions as to how much gravel had been delivered to the job, and, subsequent to delivery, actually placed and compacted on the road. If there had been competent and satisfactory proofs as to the weight of gravel delivered the problem would be simplified, but such proofs apparently were not available. Certain original weight slips had been burned and there were large, unreasonable, and unexplainable discrepancies between the amounts of gravel claimed to be delivered and that actually placed on the road. Under these circumstances the trial court concluded that he was "not satisfied with the proof as to delivery, on that [weight] basis" and made his determination from the testimony as to the quantity of gravel stock-piled and delivered on the road. We agree that upon the proofs as presented such was an entirely proper method of determination.

It was plaintiff's claim that he placed and compacted on the road 10,748 yards of gravel. Defendant asserts that this is an excessive figure. It is his position that:

"It takes 6 inches to make 5 inches if compacted. Therefore, the said plaintiff should have used 8,111 cubic yards of gravel instead of 10,748.567. 8,111 yards at a total of $2.85 comes to $23,116.35, which

makes a difference of $8,849.07 between figures of plaintiff and defendant. Defendants allege that the plaintiff could not have used as much gravel which it claims and that it is unable to sustain its allegations of the amount of gravel compacted on the job. Plaintiffs [defendants?] further allege that considering the area to be covered the plaintiffs could not have used as much gravel as claimed."

On this issue much testimony was taken. According to witness Rodney V. Meade, the "general rule of thumb" is that it requires 6 inches of loose gravel for a compacted thickness of 5 inches. Likewise, witness Quaine testified that "2 layers of 3 inches will do it and give you compaction in good shape, give you a 5-inch compaction." On the other hand it was testified that "rules of thumb" were subject to variations depending upon the roadbed, the amount of moisture in the ground, the gradation of the gravel, and other factors. "You can estimate, roughly, you might compact from probably 15 to 35%." Specifically, as to this particular road, witness Edsel testified that "we had our spreader out for about 3–1/2 inches, and we made two 3–1/2-inch passes to get approximately 7 inches of loose gravel to get 5 compacted, and then, of course, we didn't get it and had to sweeten." The trial court concluded, upon this and other testimony not necessary to set forth, that 7 inches of gravel had been placed on the 48,700 square yards and that 9,435 cubic yards had been required for this purpose. In addition to the gravel spread as described above, additional gravel was required "in order to stabilize" the road in certain spots. "They [the trucks] would get stuck in places and had to dump ahead of the spreaders * * * it [the gravel] didn't actually go through the spreaders but was dumped." This amount was not separately measured in any way but was submitted as a percentage of the total, of which the court allowed only a

part, stating that the higher figure claimed was "unreasonable," the road having at this time been accepted for surfacing. We are not persuaded of error in the determination so made in the light of the entire testimony as to road conditions. It appeared, also, that due to underlying soil conditions the gravel normally required for the final required thickness had to be "sweetened" with additional amounts in certain spots. That is, "additional gravel has to be put on after the aggregate surface supposedly has been placed and compacted. There isn't the required depth of aggregate in position." Continuing with the computations from the standpoint of gravel used, the trial court allowed an amount of 490 cubic yards for the approaches and an amount of 200 cubic yards as "a fair and reasonable amount of stock-pile loss." The court thus concluded that 10,650 cubic yards had been stock-piled and of this amount, 10,450 yards (stock-pile total, less shrinkage or loss) had been spread and compacted. From the amount so computed to be due, the court subtracted the contract price for 420 cubic yards taken from a second stock pile for which plaintiff had previously been paid in full. The total sum thus found due plaintiff, making allowance for payments theretofore made, was $6,111.63 (correction of arithmetical errors made in computing the contract price for gravel spread and for gravel taken from the second stock pile, reduces this figure to $6,060.43).

Although there was controversy as to most, if not all, of the factual determination thus made, it does not appear to us that the trial court was in error in proceeding and concluding as he did on the proofs before him. It cannot be said, upon this record, that the evidence clearly preponderates in favor of the cause of defendant-appellant Gilliland. See *Schneider* v. *Pomerville,* 348 Mich 49.

At the close of plaintiff's proofs defendant asked the court for judgment in his favor upon the theory that plaintiff had not established the amount of gravel used on the job. The court, upon plaintiff's request, thereupon permitted the recall of a former witness to the stand for the purpose of taking additional testimony. We need not pass upon the question as to whether or not plaintiff had made out a prima facie case up to this time, for we are committed to the position that a reopening of the proofs upon plaintiff's motion is a matter within the sound discretion of the trial court, with which discretion we will not interfere, absent a showing of abuse thereof, which, in this case does not appear. See 53 Am Jur, Trial, § 124; *cf., Irwin* v. *Meese,* 325 Mich 344.

The questions raised on cross appeal, relating to the amount of gravel stock-piled, and allowance for gravel required to stabilize the roadbed, have been considered in the foregoing. The judgment, corrected for arithmetical errors heretofore indicated, is affirmed. Neither party having prevailed in full, no costs.

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

YOUNG *v.* YOUNG.

1. DIVORCE—EVALUATION OF PROPERTY—DISCRETION OF COURT—EVIDENCE.

   Trial court's evaluation of property to be divided in suit for divorce at $1,127,598.60, based upon testimony of husband's accountant as to value of stock and holdings of an unlisted family-owned corporation devoted to the distribution of fermented beverages, rather than over $2,000,000 as claimed by wife, through testimony of expert witness who dealt in stocks and bonds but who was unfamiliar with the particular corporation, its holdings and its stock *held*, not an abuse of discretion.

2. SAME—DIVISION OF PROPERTY—DISCRETION OF COURT.

   Trial court's division of property in divorce suit, valued by him at $1,127,598.60, whereby wife received $292,680.11 and their 2 children $259,427.11, *held*, neither unfair nor an abuse of discretion.

3. SAME—TRANSFER OF CORPORATE STOCKS.

   It was not error for trial judge in suit for divorce to award wife stocks in various corporations other than the family-owned corporation in which she had held stock in her own name and take latter from her so as to prevent her continued and persistent harmful interference with the proper management of the company.

4. SAME—ATTORNEY FEES.

   Allowance of $7,000 to wife's attorney for fees *held*, not inadequate and not an abuse of discretion, notwithstanding the amount involved was somewhat larger than usual.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 17A Am Jur, Divorce and Separation § 931.
[4] 17 Am Jur, Divorce and Separation § 636.
[4] Amount of attorney's compensation in actions involving divorce, alimony, or other familial or domestic relations matters. 56 ALR2d 115.
Financial condition of parties as affecting amount of allowance of suit money in divorce suit. 35 ALR 1099.

Appeal from Wayne; Weideman (Carl M.), J. Submitted June 10, 1958. (Docket No. 54, Calendar No. 47,107.) Decided October 13, 1958. Rehearing denied December 2, 1958.

Bill by William P. Young, Sr., against Hazel M. Young for divorce. Decree granted on cross bill of defendant. Defendant appeals, attacking division of property. Affirmed.

Walter M. Nelson, for plaintiff.

Wurzer, Higgins & Starrs and *Davidow & Davidow,* for defendant.

VOELKER, J. In 1954 the plaintiff and appellee filed a bill of complaint for divorce from his wife on the grounds of cruelty, alleging that the parties had lived and cohabited as husband and wife from 1934 to 1951 when the conduct of the wife rendered further marital relationship impossible. Defendant wife filed an answer of denial to the bill of complaint along with a cross bill for divorce on the ground of adultery. Her cross bill was uncontested. The primary dispute below involved the value and division of the marital property.

The parties began their romance in 1926, seven years prior to the husband's divorce from his first wife. In 1934 they were married shortly after appellee went through bankruptcy. The first few years of their marriage were financially difficult, but in the early 1940's fortune smiled—the appellee acquired a beer distributing franchise and, thus endowed, things began measurably to improve. In less than 10 years he had acquired a fortune in excess of a million dollars. As their material fortunes improved their marital fortunes deteriorated until a divorce court took over. We are now faced with the

problem of passing on the division of the spoils made below.

While the wife's countersuit for divorce was uncontested, as noted, the litigants managed to take up some 2,000 typewritten pages of testimony in the trial court, largely on the subject of value and division of property. Fortunately the attorneys were somewhat more considerate when they drafted their briefs and appendices; we were obliged to wade through only slightly more than 1,000 printed pages. Boiled down even more drastically, we uncover 3 main issues. Did the chancellor err in setting the value of the assets to be divided at $1,127,598.60? Did he allow the aggrieved wife her proper share? Is $7,000 adequate compensation for her attorneys?

Appellant argues that the value of the family holdings is in excess of $2,000,000. The major cause for the sharp divergence of opinion on the subject of value arises mostly from a dispute over the value of the stocks and holdings of Better Brands Distributing Company, an unlisted family-owned corporation devoted to the distribution of fermented beverages. Appellee supported his claim of value by the testimony of a certified public accountant who had worked with the corporation for several years. Appellant in turn supported her claim of greater value by the testimony of an expert witness who dealt regularly in stocks and bonds, but who was unfamiliar with the Better Brands corporation, its holdings, and its stock.

The chancellor accepted the opinion of the husband's accountant as to value. Appellant objects and urges that his testimony should have been disregarded because of his past close relationship with the corporation and the husband. In other words she argues bias. Perhaps there was bias, but we have only her unsupported assertion. We think bias must be shown by something more. Were we to hold that

past relationship and familiarity with what he undertakes to testify about alone discredits such a witness then we will have put a premium upon ignorance and have judicially enshrined hunch and guess. We find no error or abuse of discretion by the court in accepting the testimony of this witness or in reaching the value that was reached.

Appellant complains that, in any case, the share accorded her was inadequate. (She got $292,680.11; her 2 children got between them some $259,427.11.) There is no mathematical formula in Michigan for the settlement of this vexing problem; rather it is wisely left to the broad discretion of the learned chancellor who has the benefit—and often the dubious pleasure—of having the feuding parties wrangle in his presence. See, generally, *Johnson* v. *Johnson,* 346 Mich 418. With his closer view of the entire situation he is ordinarily in a better position to make an equitable division than we.

In this case the chancellor had before him evidence not only of the husband's adultery but also of the wife's uncertain temperament, her relationship with the husband for 7 years while he was married to another woman (which might possibly suggest that she had some reason to prepare herself for the shock of continued extramarital activities by him), her rancorous infliction of damage upon her husband's health and business, and many other vexatious things too petty and numerous to dwell upon. We do not for a moment suggest that we cannot be moved by the plight of a woman who complains that she and her 2 children got only half a million dollars from the chancellor; we do hold that on the record before us we do not consider the division made unfair or an abuse of a necessarily wide discretion.

A related question is appellant's allegation that the trial judge erred in taking from her stocks in the Better Brands corporation which she had previously

held in her own name. We will not discuss this in detail as the opinion and decree of the chancellor shows clearly that this action (actually it was an exchange, for the court gave her in return, among other things, certain "blue chip" stocks listed on national stock exchanges) was necessary in order to prevent her continued and persistent harmful interference with the proper management of the company. Stated bluntly, there was abundant evidence below that she was out to wreck her husband and his business. Here again the trial judge had a front seat and his opinion on the best course in these trying circumstances will not be upset.

As for appellant's final allegation that an allowance of $7,000 for her attorney fees was not adequate, we have found no evidence in the record that would suggest an abuse of discretion in that regard. Essentially this was a fight over money. That the amount involved was somewhat larger than in the ordinary divorce case did not necessarily measurably increase the work required or enlarge the rather elementary legal principles involved.

This Court finds no prejudicial error or abuse of discretion by the chancellor. Rather we think he reached a fair and equitable result in a vexing case. The decree of the trial court is accordingly affirmed, with costs to the appellee.

SMITH, BLACK, EDWARDS, and KAVANAGH, JJ., concurred with VOELKER, J.

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

PENIX *v.* CITY OF ST. JOHNS.

MUNICIPAL CORPORATIONS—BASEBALL PARK BLEACHERS—GOVERNMENTAL FUNCTION—SOVEREIGN IMMUNITY.

Declaration in baseball game spectator's action against city for injuries received when bleachers collapsed at city ball park failed to state a cause of action, where there was no averment of performance of a proprietary function, there being at best only a claim against the city resulting from its employees' negligent performance of a governmental function as to which the doctrine of sovereign immunity presently applies.

Appeal from Clinton; Cash (Paul R.), J. Submitted April 8, 1958. (Docket No. 5, Calendar No. 47,474.) Decided October 13, 1958.

Case by Betty Penix against the City of St. Johns, a municipal corporation, for personal injuries sustained when park bleachers collapsed. Motion to dismiss denied. Defendant appeals. Reversed and remanded for dismissal.

Timothy M. Green, for defendant.

DETHMERS, C. J. Defendant city appeals, on leave granted, from denial of its motion to dismiss. The

---

REFERENCES FOR POINTS IN HEADNOTES

39 Am Jur, Parks, Squares, and Playgrounds § 39; 52 Am Jur, Theaters, Shows, Exhibitions, and Public Resorts §§ 49, 65, 78.

Duty and liability of owner or keeper of place of amusement respecting injuries to patrons from collapse of seats or part of grandstand structure. 22 ALR 648, 44 ALR 207, 53 ALR 860, 61 ALR 1296, and 98 ALR 571.

motion was based on 2 grounds: (1) that as appears from the allegations of plaintiff's declaration timely notice of her claim was not presented to the city commission, as required by the city charter, and (2) that her declaration alleges damages resulting from the negligence of defendant's employees in performance of a governmental function. Pertinent provisions of the declaration follow:

"2. That the defendant, the city of St. Johns, is a municipal corporation located in Clinton county, Michigan, whose corporate authority extends over a certain municipal park within the confines of its corporate limits. That such said city park is under the custody and control of the city of St. Johns, and is operated by city employees.

"3. That on or about the 24th day of July, 1955, plaintiff, while attending a softball game at said park, utilized certain bleachers situated next to the ball field. That due to a defect in erecting said bleachers, or keeping them in repair, the bleacher gave way beneath the plaintiff, causing her to fall to the ground, first striking her head against another board in the bleachers, in her descent.

"4. That it was the duty of the defendant to keep said bleachers in reasonable repair and reasonably safe and fit for public use; the defendant's employees being the persons who moved, disassemble, and erect the said bleachers, keep them in a state of repair, and inspect them.

"5. That as a result of said defect, and the defendant's inability to keep said bleachers in a state of repair to reasonably assure the safety of the public using them, the defendant [plaintiff?] suffered a severe blow and traumatic injury to the base of her skull, impairment to her nervous system to an extent that she was unable to be gainfully employed, carry on household duties as a wife and mother, and was in fact, an invalid for a period of several months.

"6. That within 60 days thereafter, and on or about the 26th day of July, 1956, plaintiff, through her hus-

band, served due notice upon the city manager of the city of St. Johns, of the extent of the injury and her intention to claim damages thereof, in accordance with the ordinance and statute made and provided, and under the control and direction of the city manager of the city of St. Johns, Michigan, the defendant herein."

On the first point, it is defendant's contention that service of the notice of claim upon defendant's city manager did not comply with the city charter requirement that the claim be presented to the city commission and that such failure is fatal to plaintiff's suit, citing *Selden* v. *Village of St. Johns,* 114 Mich 698; *Van Auken* v. *City of Adrian,* 135 Mich 534; *Ridgeway* v. *City of Escanaba,* 154 Mich 68; *Moulthrop* v. *City of Detroit,* 218 Mich 464; *Kelley* v. *City of Flint,* 251 Mich 691; *Northrup* v. *City of Jackson,* 273 Mich 20; *Harrington* v. *City of Battle Creek,* 288 Mich 152; *Sykes* v. *City of Battle Creek,* 288 Mich 660; *Grand Trunk Western R. Co.* v. *City of Detroit,* 342 Mich 537. None of these cases presented the question, before us here, whether service of the claim upon the city manager complies with the requirement of presenting it to the city commission. In *Ridgeway* v. *City of Escanaba, supra,* this Court said that substantial compliance with the requirement for service of such notice of claim is sufficient. We do not believe the language of the charter should be construed to require that the claim be handed to members of the commission individually or presented to that body while they are assembled in official meeting. The city's charter (p 12) provides that the powers and duties of the city manager shall be, *inter alia,* "to have general supervision over all public improvements, works and undertakings" and "to attend all meetings of the city commission, with the right to take part in the discussions." One might reasonably assume that a claim of the kind in question served on

the city manager would be presented and come to the attention of the city commission. We think that this amounted to substantial compliance with the charter requirement and that plaintiff's case ought not to fail for the reasons urged by defendant in this connection. For similar facts and a holding in accord with this view, see *Perry* v. *City of High Point,* 218 NC 714 (12 SE2d 275).

Nothing in plaintiff's declaration can be construed as constituting an averment of performance of a proprietary function by defendant city out of which plaintiff's claim for damages is alleged to arise. We think the case should have been dismissed on the ground that the averments of the declaration, construed most favorably to plaintiff, allege, at best, only a claim against the defendant city resulting from its employees' negligent performance of a governmental function as to which the doctrine of sovereign immunity applies. *Royston* v. *City of Charlotte,* 278 Mich 255; *City of Detroit* v. *Blackeby,* 21 Mich 84 (4 Am Rep 450); *Butler* v. *City of Grand Rapids,* 273 Mich 674; *Johnson* v. *Board of Ontonagon County Commissioners,* 253 Mich 465; *Daszkiewicz* v. *Detroit Board of Education,* 301 Mich 212; *Whitehead* v. *Detroit Board of Education,* 139 Mich 490; *Brink* v. *City of Grand Rapids,* 144 Mich 472; *Daniels* v. *Grand Rapids Board of Education,* 191 Mich 339 (LRA1916F, 468); *Heino* v. *City of Grand Rapids,* 202 Mich 363 (LRA1918F, 528); *Gunther* v. *Cheboygan County Road Commissioners,* 225 Mich 619; *Tzatzken* v. *City of Detroit,* 226 Mich 603; *McDonnell* v. *Brozo,* 285 Mich 38.

Reversed and remanded for entry of order dismissing the case. Costs to defendant.

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

EDWARDS, J. (*concurring*). The opinion filed by Chief Justice DETHMERS in this case is based upon ample case precedent by which Michigan has to this point followed the doctrine of governmental immunity. I concur that this is the law, while retaining the grave doubts expressed in my dissent in *Richards* v. *Birmingham School District,* 348 Mich 490, 514, as to whether or not it should continue to be. This case is, of course, distinguished from the *Richards Case* by the fact that no proprietary function question is presented here.

SMITH, BLACK, VOELKER, and KAVANAGH, JJ., concurred with EDWARDS, J.

In re TRAUB ESTATE.

BATES v. NATIONAL BANK OF DETROIT.

1. INDEMNITY—CONSTRUCTION OF CONTRACT.
   An indemnity contract is to be strictly construed against him who claims to be an indemnitee.
2. ESTATES—WORDS AND PHRASES—HEIRS—WORDS OF LIMITATION.
   The words to the grantee *and his heirs* are normally construed as words of limitation and not of purchase, since they merely delimit the estate given and do not designate those who take by remainder.

REFERENCES FOR POINTS IN HEADNOTES

[2] 57 Am Jur, Wills § 1368.
[3, 8] 12 Am Jur, Contracts § 375.
[4] 21 Am Jur, Executors and Administrators § 337.
[5, 10] 57 Am Jur, Wills §§ 1425, 1427.
[6] 12 Am Jur, Contracts § 235.
[7] 20 Am Jur, Evidence § 585.
[9] 57 Am Jur, Wills § 1464.
[11] 21 Am Jur, Executors and Administrators §§ 348, 408.
[11] Necessity of presenting claim against decedent's estate for specific performance of contract to make a will in favor of another or to will the latter a specified sum or property. 113 ALR 1070.
[12] 21 Am Jur, Executors and Administrators § 368.

3. CONTRACTS—CONSTRUCTION—PRESUMPTIONS—WILLS.

It will not be presumed that written agreement whereby deceased brother-in-law had given up his interest in estate of his childless brother to latter's widow in return for her promise to leave stock in the brothers' family corporation to him upon widow's death was to have been a promise on her part that was personal to the brother-in-law and would die with him.

4. SAME—PRESUMPTIONS—CONSTRUCTION—CONSIDERATION.

It is a presumption of law, in the absence of express words, that the parties to a contract intend to bind not only themselves, but their personal representatives, a presumption extending not only to the obligation of the contractual performance but to the corresponding right to receive the consideration therefor, where not personal in nature.

5. WILLS—DEATH OF LEGATEE—LAPSE OF LEGACY.

A legacy which is given upon a valuable consideration, as in payment of a debt of testator, does not lapse at common law upon the death of the legatee prior to the death of the testator.

6. CONTRACTS—AMBIGUITY—PAROL EVIDENCE.

A court will admit testimony as to antecedent agreements, communications and other factors to aid in construing an ambiguous written agreement, the parol evidence rule to the contrary notwithstanding.

7. EVIDENCE—HEARSAY—MENTAL STATE OF ACTOR.

It is not objectionable to the hearsay rule that the mental state of the actor be established by either word or deed, where his belief, understanding, or intent is material, words being received, not for their own testimonial trustworthiness, but as proof of a state of mind.

8. CONTRACTS—RIGHT TO POSSESSION—DEATH OF PROMISEE.

A promisee's contract right to possession of personalty upon a fixed date does not die with him where he dies before such date, upon the theory that after death he cannot "possess" anything, especially where the promisee has furnished a substantial consideration to the promisor.

9. SAME—WILLS—ENFORCEMENT—CONSIDERATION.

The fact that a form of obligation of childless widow who received life use of all of her late husband's stock in family corporation was her promise to make a will in which she would leave promisee brother-in-law all of the stock at her death would not make it less enforceable as a contract obliga-

tion, since the true consideration was the thing promised, not the form of the promise or the fact that merely a promise was made.

10. WILLS — DEATH OF LEGATEE PRIOR TO TESTATOR — LAPSE OF LEGACY.

A debt, represented by a legacy or bequest, but for value received, used, and kept remains collectible despite its form, so long as unpaid and is to be distinguished from a legacy or bequest in the gratuitous sense, as the former does not lapse upon the death of the legatee prior to the death of the testator.

11. ESTATES OF DECEDENTS—CLAIM AGAINST ESTATE—INTEREST—COSTS.

Judgment on claim against estate of deceased childless widow, with interest and costs, as by statute made and provided, is ordered entered, where, in return for life use of brother-in-law's interest in estate of her late husband, she had agreed to leave him her stock in family corporation, but had failed to keep her promise after death of brother-in-law (CL 1948, §§ 708.4, 708.18).

12. SAME—TARDY CLAIM—REFEREE'S FEE.

It was within the discretion of the probate court to impose the burden of the referee's fee upon claimant against the estate of the decedent, where claim against the estate was tardy.

DETHMERS, C. J., and CARR and KELLY, JJ., dissenting.

Appeal from Wayne; Maher (Thomas F.), J. Submitted April 16, 1958. (Docket No. 93, Calendar No. 47,550.) Decided October 13, 1958. Rehearing denied January 12, 1959.

Barbara Traub Bates filed her claim against the estate of Mary Clark Traub, deceased, for breach of contract to make specific provision in will. National Bank of Detroit and Peter J. Monaghan, co-executors of will, Dorothy May Roehm, a beneficiary, and Margaret Davis Greig, guardian of Margaret Caron Kraatz, minor, a beneficiary, joined in objection and defense. Claim disallowed in probate and circuit courts. Plaintiff appeals. Reversed and remanded for entry of judgment for plaintiff.

Moll, Desenberg, Purdy & Glover, for plaintiff.

Snider, Feikens, Dice & Thompson, for defendants Roehm and Greig.

Monaghan, Monaghan & Crawmer (*James H. LoPrete,* of counsel on application for rehearing), for coexecutor defendants.

DETHMERS, C. J. (*dissenting*). William H. Traub, husband of the decedent, Mary Clark Traub, was the brother of Robert C. J. Traub, and the latter was the father of plaintiff, Barbara Traub Bates. The brothers owned equally all the stock, except 2 shares held by their respective wives, in the Traub Realty Company. They also had major stockholdings in Traub Brothers & Company, engaged in the jewelry business. In addition, they owned parcels of real estate as tenants in common.

In 1931 William died, intestate and without issue, leaving his wife and brother as sole heirs. It is stipulated that Robert's interest in William's estate was worth $86,000. Differences arose between Robert and William's widow, Mary, over the handling of real estate and conducting of the jewelry business, she contending that more dividends should be paid. An eminent lawyer, who for many years had been attorney for the Traubs, succeeded, in 1933, in working out a compromise agreement between them. He drafted an extensive instrument setting forth its provisions with evident skill and care and in detail. It was executed by Robert and his wife and by Mary, individually and as administratrix of the estate of William, on August 28, 1933. Under its terms the realty company was dissolved and its assets, real and personal, were divided between Robert and Mary on a specified basis, as were also certain pieces of real estate which had been owned by the brothers as tenants in common, Mary, as heir of William, agree-

ing, with respect to one of the latter parcels allotted to Robert, to convey the same to him and to protect and indemnify him "his heirs, personal representatives and assigns, from any and all claims that may at any time be asserted against said property by the creditors of the William H. Traub Estate." Under the contract Robert and Mary agreed that each should pay 1/2 of certain joint obligations of Robert and William allowed as claims against the latter's estate; and, finally, the agreement contained the provision here in controversy, reading as follows:

"Fourth: In consideration of the foregoing Robert C. J. Traub agrees that upon the closing of the estate of William H. Traub, deceased, or prior thereto in the event that Mary Clark Traub as administratrix of the estate of William H. Traub, deceased, obtains permission to convey to him the property described as part 1, in paragraph second of this agreement, that he will assign and convey to Mary Clark Traub individually all of his interest in the estate of William H. Traub, deceased, excepting the parcel last described. Elisabeth Taylor Traub agrees to join in such assignments and conveyances. In consideration of the foregoing transfers and of the matters contained in this agreement Mary Clark Traub agrees to forthwith make a will bequeathing to Robert C. J. Traub all of the shares of stock in Traub Brothers & Company now held by her individually and as heir-at-law of William H. Traub, deceased, and as assignee of Robert C. J. Traub, and further agrees in no manner to revoke such bequest, to the end that upon her death Robert C. J. Traub shall become possessed of said shares of stock free from any and all liens and encumbrances."

In 1934 the jewelry company was in financial difficulties and Robert put $50,000 into it, taking a preferred stock issue therefor. This saved the company, which gradually revived in the 1930's. Robert continued as its president and chief executive officer

until his death in 1950. In 1951 the company lost money. In 1952 the stockholders sold their stock, including all the Traub interests, at $11 per share. From that sale Mary realized $58,179. She died in 1954, leaving a will which contained no bequest to Robert or his estate or daughter, the plaintiff herein. Plaintiff filed a tardy claim against Mary's estate for damages for breach of her contract agreement to bequeath the stock to Robert, the claim being for the amount Mary had received for it.

The referee appointed by the probate court filed a report recommending disallowance of the claim. The probate court confirmed the report, disallowed the claim, and, because of the tardiness of its filing, ordered plaintiff to reimburse the executor of Mary's estate in the amount of $900, paid to the referee for his fees. The circuit court affirmed on appeal there, from which plaintiff appeals here.

The first question plaintiff raises is whether Mary's agreement to bequeath her stock in Traub Brothers & Company to Robert created a right personal to him so that it did not pass to plaintiff as his sole residuary legatee. Defendants rephrase the question as being whether the agreement committed Mary to name a substituted beneficiary in the event Robert predeceased her. We hold that the answer must be found in the intent of the contracting parties which is controlling.

Plaintiff says: that the right created in Robert by contract to have the stock bequeathed to him is one which will descend to his heirs or personal representatives, citing: *Trower* v. *Young,* 40 Cal App2d 539 (105 P2d 160); *Powell* v. *McBlain,* 222 Iowa 799 (269 NW 883); *Kisor* v. *Litzenberg,* 203 Iowa 1183 (212 NW 343); *Moore's Administrator* v. *Wager's Administrator,* 243 Ky 351 (48 SW2d 15); *Fuchs* v. *Fuchs,* 48 Mo App 18; *Torgerson* v. *Hauge,* 34 ND 646 (159 NW 6, 3 ALR 164); that the right will pass

under his will, citing: *Chase* v. *Stevens,* 34 Cal App 98 (166 P 1035); *Ochs* v. *Ochs,* 122 NJ Eq 143 (192 A 502); *Doyle* v. *Fischer,* 183 Wis 599 (198 NW 763, 33 ALR 733); that it is a right that may be assigned, citing: *Rosenberg* v. *Equitable Trust Co.,* 68 F Supp 991; *Swingley* v. *Daniels,* 123 Wash 409 (212 P 729); and that such bequest by Mary, had it been made pursuant to the contract, would not have elapsed, upon Robert's predeceasing her, like an ordinary legacy, citing such cases as *Bacon* v. *Kiteley,* 101 Colo 559 (75 P2d 590); and *Ward* v. *Bush,* 59 NJ Eq 144 (45 A 534). Examination of these cases cited by plaintiff discloses the following: In *Trower,* dismissed on motion, the complaint alleged that the promisor, who had agreed for a consideration to bequeath and devise 1/2 of her estate to promisees, had frequently confirmed and reiterated that her agreement was for the benefit not only of promisees, but also their heirs and distributees. This clearly established the intent of the contracting parties that the devises and bequests were not to lapse. The court's holding merely gave effect to the expressed intent of the parties. There is no comparable evidence in the instant case. In *Powell* the question of the lapse of a bequest was not directly discussed, evidently because of the applicability of Iowa's antilapse statute, to which reference was made in the opinion. In *Kisor* there were 2 beneficiaries of the promise to make a devise, of whom 1 predeceased and 1 survived the promisor. The court found from the testimony concerning the oral agreement evidence of an intent that the entire property was to be left to the 2 beneficiaries or to the survivor of them in the event 1 of them should predecease the promisor. In *Moore's Administrator* the promisor had agreed to make the third-party beneficiary of the contract "an equal heir with the rest of the children." An incident of such equality was the right of the issue of

the third-party beneficiary to take by right of representation, the same as in the case of the rest of promisor's children, in the event that said beneficiary should predecease the promisor. In *Fuchs* the question of lapse of a legacy was not discussed, but the Missouri antilapse statute applied. In *Torgerson* the question of lapse of a legacy was not directly discussed, but there, too, there was an applicable North Dakota antilapse statute. In *Chase* the agreement expressly provided that promisor would make a will leaving her property to the promisee "or his estate." In *Ochs* the court found evidence of an intent that promisor was to leave his property by will to the promisee or to those to whom the promisee might direct. What the court actually did was apply the New Jersey antilapse statute because it found no expression of a contrary intent by the promisor. In *Doyle* no question of lapse was involved because the legatee survived the promisor. In *Rosenberg* the agreement provided that the "bequest shall be binding should either or both (promisor or promisee-legatee) die without a will." The court found this language to be expressive of an intent that the agreement of the promisor should be operative even upon the death of the promisee-legatee. In *Swingley* the legatee survived the promisor-testator and, hence, no question of lapse was involved. In *Bacon* the testatrix made the bequest as provided by her agreement and permitted it to stand as her last will and testament until she died, 14 years after the legatee's death, evidencing an intent that the legacy was not to lapse. The agreement in that case to make the bequest was made in consideration of and to discharge an antecedent debt. The Colorado court in that case said (p 561):

"A general rule is that a legacy lapses by the death of the legatee, in testator's lifetime, if no successor

be named. * * * In case of a bequest to discharge a debt the rule changes because the reason changes. Here the thing in the testator's mind is the debt, not the person, and since had the debt been paid in legatee's lifetime it would have passed to his estate and gone to his heirs, and testator's intent been thus effectuated, the law so holds and the legacy does not lapse."

In *Ward* the problem presented to the court was the intent of the testatrix in making a bequest to one who thereafter predeceased her. Pursuing reasoning comparable to that of the Colorado court in *Bacon* the New Jersey court found an intent on the part of testatrix that the legacy was not to lapse because given to extinguish an antecedent debt. Upon analysis, it appears, then, that the above cases, relied upon by plaintiff, fall into 2 groups: (1) those in which bequests were saved by antilapse statutes, and (2) those in which the courts found evidence or expression of an intent on the part of the testator or of the parties to the contract to make a bequest that would not lapse. The antilapse statute group is of no aid to plaintiff here because the Michigan statute, CL 1948, § 702.11 (Stat Ann 1943 Rev § 27-.3178[81]), protects only the issue of predeceasing children and certain blood relatives of a testator and there was no such relationship between Robert and Mary. On the other hand, in the group of cases in which the courts found intent against lapse, such findings were based on contract provisions, testimony, or other proofs absent in the instant case. They are not of material assistance in arriving at the intent of Robert and Mary and thus determining the meaning of their contract.

In response to plaintiff's contention that rights of a promisee under a contract to leave property by will do not differ from those under other contracts and are, therefore, assignable and survive the death

of the promisee, defendants say that an understanding is necessary of the true nature and essence of such rights, and that controlling of the latter must be the intent of the contracting parties, disclosed, so they insist, in this case by clear and unambiguous terms of the contract. These show, defendants urge, that nothing more than a simple legacy was intended, subject to the rules of law applicable thereto. From this defendants reason, correctly we think, that the true nature of Robert's right to the bequest was such that it was contingent on his surviving testatrix, whereupon he would become possessed of a right which, so long as the bequest was not paid to him, would be assignable by him and would survive his death; but nothing more could pass from him to his heirs or assignees than he had in his lifetime, namely, full right to the bequest upon testatrix's death during his life, or nothing if he predeceased her. In this connection the Illinois court, in *Kaiser* v. *Cobbey,* 400 Ill 214 (79 NE2d 604), in considering rights created under an agreement to bequeath property by will and the question of lapse of the legacy made in pursuance thereof by reason of the death of the third-party beneficiary prior to that of the promisor-testatrix, said (p 223):

"These observations all go to the point that conditions were contained in the contract by the use of the word 'will,' the law of wills, and the ambulatory nature of wills. Since the agreement between the parties was to make wills and the law of wills would never have given William (third-party beneficiary) anything by the performance of the contract to make a will, it logically follows he never had any right to any of the property of Luella that he could pass on to heirs or assignees. A vested interest cannot be created by the contract unless its full performance would have put the title in William during his lifetime. The operation of the law of wills, which was

a part of the contract, under the facts in this case, prevents such a result."

So here defendants urge that it was the intent of Robert and Mary to give the ordinary meaning, common to the law of wills, to the words "agrees to forthwith make a will bequeathing to Robert," which were incorporated into the contract by a skilled attorney conversant with the legal significance of the terms. This, say defendants, is emphasized by the further language inserted by him in the contract to the effect that the bequest was to be made "to the end that upon her death Robert C. J. Traub shall become possessed of said shares of stock." Defendants point out that the attorney, in drafting the agreement, was not unmindful of the rights of Robert's heirs, as evidenced by its provision, hereinbefore noted, with respect to a parcel of land thereunder to be conveyed by Mary to Robert, that she agreed to protect and indemnify Robert and his heirs and assigns from any claims at any time asserted against the property by William's creditors. Defendants contend that testimony indicating a fondness on the part of William and Mary for plaintiff and a frequently expressed intention to make her the object of their bounty fails to establish that Mary intended to bind herself, by the contract, to make a bequest to Robert immune to lapse.

For the proposition that a bequest made pursuant to a contract supported by a valid consideration is subject to the general law of lapse the same as one made without consideration or contract, defendants cite 1 Jarman on Wills (8th ed), p 28; *Needham* v. *Smith*, 4 Russ 318 (38 Eng Rep 825); *Jones* v. *How*, 9 CB 1 (137 Eng Rep 790); *In re Brookman's Trust* (1869), LR 5 Ch App 182 (39 LJ Ch 138, 22 LT 891): *Jervis* v. *Wolferstan* (1874), LR 18 Eq 18 (43 LJ Ch 809, 30 LT 452); Theobald on Wills (9th ed), ch

10, p 61; *Andrews* v. *Lavery,* 159 Mich 26; *Keasey* v. *Engles,* 259 Mich 178; *Bassett* v. *Salter,* 25 NYS2d 176, affirmed in 262 App Div 967 (30 NYS2d 134); *O'Neil* v. *Ross,* 98 Cal App 306 (277 P 123); *Bomar* v. *Carstairs,* 124 Tex 492 (79 SW2d 841). The referee, probate and circuit courts concluded that to be the law in Michigan under the holding in *Keasey.* In that case a husband and wife made a joint will bequeathing and devising their property to the survivor of them and, upon the death of the survivor, specified portions thereof to their daughter-in-law. The husband died first and then the daughter-in-law. The wife then executed a codicil to the joint will revoking the legacy to the daughter-in-law and making new devises of the property therein mentioned. Suit was brought by the executor of the daughter-in-law's estate against the estate of the wife for specific performance of the contract between the husband and wife to make the joint will. Viewing the contract as supported by adequate consideration and therefore enforceable and irrevocable so as to entitle the daughter-in-law to specific performance had she survived the husband and wife, this Court nevertheless held that the most her representative could ask after her death is that the contract to make the joint will be enforced and that the most the court could decree would be that, at the surviving wife's death, the joint will be given effect as her will according to its provisions and legal import and, finally, that such legal import would be that the death of the daughter-in-law-legatee prior to the death of the testatrix caused the legacy to lapse. Plaintiff seeks to distinguish *Keasey* on the ground that there the daughter-in-law beneficiary gave no consideration for the contract while in the instant case Robert did. Had the consideration in *Keasey* moved from the daughter-in-law, the result, under the reasoning of this Court, would have been no different inasmuch as

this Court held in effect that the consideration moving between husband and wife in making the contract for the joint will was sufficient to support the contract and make it enforceable by the daughter-in-law third-party beneficiary had she survived the wife. While we do not consider it significant, it may be observed that the plaintiff in the case at bar is in no different position than was the daughter-in-law in *Keasey* in that the consideration moved from neither of them but from the promisee in the contract. The indicated distinction between the 2 cases is not controlling of a different result. It should be noted that this Court's decision in *Keasey* was announced 15 months before eminent counsel prepared the contract in the case at bar. He can scarcely have been unaware of its purport. Had it been the intent that plaintiff was to have the bequest if Robert predeceased Mary, it would have been simple for such counsel to have phrased the contract in terms leaving such intent clear and unmistakable. The fact that it was made to speak in terms of a will and bequest leads to the conclusion that the parties intended a simple legacy subject to the law of wills, including the possibility of lapse. It was competent for the parties to contract as they did. It is for us to determine their intent in so contracting and to give it effect. We do not find it to have been in accord with plaintiff's claim. Had the bequest been made as agreed, it would have lapsed. Not having been made, action will not lie for damages for breach of the agreement to make it, which, if kept, could not have benefited plaintiff.

The court properly excluded (1), as hearsay, testimony concerning what the attorney who drafted the contract had told the witness, some time after its execution and in the presence of Robert but absence of Mary, its meaning was, (2), as self-serving, an envelope on which Robert had written his interpre-

tation thereof, and (3), as equally within the knowledge of the deceased,* testimony of statements allegedly made by Mary to the witness while he was acting as attorney for the plaintiff and executor for Robert's estate when he asked her what she intended to do about carrying out her obligation to plaintiff under the provision of the contract here under consideration. Except for the self-serving writing, the excluded evidence had scant evidentiary value to establish the intent of the parties in executing the contract.

Plaintiff contends that the provisions of CL 1948, § 708.18 (Stat Ann 1943 Rev § 27.3178[428]), construed in *In re Booth's Estate,* 326 Mich 337, and in *In re Ford's Estate,* 339 Mich 339, as permitting the Court to require even a successful tardy claimant to pay referee's fees, ought not to be applied to plaintiff in this case because all the equities are so strongly in her favor. This is hardly persuasive in view of our holding against her.

The order should be affirmed, with costs to defendant.

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

SMITH, J. The facts, stripped of nonessentials, are these: Robert C. J. Traub and William Traub had been in business together. After William died, dissension arose between his widow, Mary, and the surviving brother, Robert. Mary felt that the management of the store was at fault; that there should be more dividends, and that the business and some of the real estate should be sold. A compromise of differences was sought. Agreement (the one before us) was finally reached: Robert received certain

* See CL 1948, § 617.65 (Stat Ann § 27.914).—REPORTER.

assets, bonds and real estate. He gave up certain assets, including his interest in William's estate, worth approximately $86,000. Mary likewise received certain properties. The agreement also provided that "In consideration of the foregoing transfers and of the matters contained in this agreement" Mary would "forthwith" leave to Robert in her will all of her Traub company stock. He died without receiving the stock, having predeceased her. Robert's daughter, his sole heir, seeks it, or its value (it was sold before Mary's death) from Mary's estate. Recovery is opposed. The grounds will appear in due course.

We can see nothing here but a simple contract. Payment is resisted upon this ground: The agreement says merely that the stock is to go to Robert upon Mary's death. It does not say it is to go to his heirs or, indeed, to anyone else. It is argued, therefore, that the true intent is that it not go to Robert's heir-at-law but that the right thereto is personal to him and dies with him. Appellant asserts the intent was otherwise.

Was the omission in the agreement of apt reference to some other person to take in Robert's place, should he predecease Mary, an oversight, indeed, a blunder? We have difficulty with this assumption. It clashes with the careful thought evidenced within the four corners of the instrument, particularly since we find that the words "heirs, personal representatives and assigns" are used in the paragraph concerning indemnification against claims by creditors of William Traub's estate with respect to certain properties conveyed to Robert. The frequency with which the courts repeat that an indemnity contract is to be "strictly construed against him who claims to be an indemnitee" well justifies the precision in description employed in this paragraph. Here such words were meaningful and they

were thus utilized. But it is of the essence of the matter before us that the mere addition of the word "heirs" to a dispositive clause would have solved nothing with respect to our problem even had they been added. The words "to Robert and his heirs" are normally construed as words of limitation, not of purchase, *In re Martz's Estate,* 318 Mich 293. Their addition would have added nothing to the will clause under consideration.[1] They merely delimit the estate given and do not designate those who take by remainder.

There was a period in our law, all must agree, when "the word was the talisman." The law itself would imply nothing. Let individuals guard their own interests, was the philosophy, both as to contract and tort, and not come snivelling to the courts if they weren't sharp enough to look out for themselves. Thus it was not until *Slade's Case*[2] that the law itself would imply a promise to pay the debt defined in the action of debt, and similar in philosophy was Persay's argument in the time of Edward III[3] (1327–1377) that "I never heard that one should have a writ of covenant against executors, nor against other person but the very one who made the covenant, for a man cannot oblige another person to a covenant by his deed except him who was party to the covenant."

In modern times we read these cases with a curious eye, until such a case as the one before us arises. For here the argument is made that the omission by the draftsman of some word or words, exactly what words we are not told, means that Robert's rights to the stock for which he surrendered, among other things, an interest worth $86,000 in his broth-

[1] See, also, as to real property CL 1948, § 565.153 (Stat Ann 1953 Rev § 26.573).

[2] 4 Coke Rep 92b (76 Eng Rep 1074) (1602).

[3] YB 48 Ed III 2, pl 4, quoted in Holmes, The Common Law, p 345.

er's estate, runs only to "the very one who made the covenant" and he (Robert) being dead, his right to the return promised him, the consideration or its equivalent, goes to the grave with him. Of course it is theoretically possible for parties to make such a self-defeating agreement (and we will examine in due course the reasons advanced in support of such an agreement) but all presumptions of both reason and law are against such construction. As Cardozo put it, quoting an earlier case, "It is a presumption of law, in the absence of express words, that the parties to a contract intend to bind not only themselves, but their personal representatives," *Matter of Buccini* v. *Paterno Construction Co.*, 253 NY 256, 259 (170 NE 910), and this presumption extends not only to the obligation of contractual performance but the corresponding right to receive the consideration therefor, where not personal in nature.

Thus, if a lawyer sells his library for $5,000 to be paid to him within the year, we take it to be clear that his widow, 6 months hence, as sole heir-at-law, may collect the money even though the contract said not one word about payment to her. Nor do we regard the case as vastly different if the payment was to be by a "bequest" or a "legacy" in the purchaser's will, if it be clear only that the "bequest" or the "legacy" is the payment of the debt agreed upon in consideration of the library.* It has been many years since courts have allowed the garb of words to cloak the substance beneath, either converting the crafty to the cloth or investing the good with the attributes of evil. Actually what we have here is simply the payment of a debt.

* Such a bequest or legacy, if made, will not lapse in event the legatee predeceases the testator. See 4 Page, Wills (3d ed), § 1417, p 167: "A legacy which is given upon a valuable consideration, as in payment of a debt of testator's, does not lapse at common law."

The essence of this agreement with respect to the stock is thus clear on its face. Mary is to have a life interest therein, with the dividend advantages (in which she was primarily interested and which, in fact, was in large part responsible for the family dissension), and Robert is to receive the stock upon her death. But we are not without enlightenment in addition to the agreement itself. By way of preface we should say that in event of ambiguity in an instrument we make use of all possible aids in construction, the parol evidence rule to the contrary notwithstanding. 3 Corbin, Contracts, § 579, p 250, states the principle with clarity:

"As long as the court is aware that there may be doubt and ambiguity and uncertainty in the meaning and application of agreed language, it will welcome testimony as to antecedent agreements, communications, and other factors that may help to decide the issue."

In the contract before us we must conclude from the positions taken by the litigants that a real and not a strained or fanciful, ambiguity existed. The understanding of the promisor, then, Mary Clark Traub, becomes significant. The agreement was hers, it had been executed by her, it had adjusted her differences with her brother-in-law Robert, and she had lived with it down through the years. What was her understanding of its content? How did she construe its requirements? The record on this is clear and will speak for itself. The incident narrated took place in the year 1945, some 12 years after the execution of the agreement:

"*Q.* Now, did you on any occasion overhear any statement by Mary Clark Traub as to the dividend policy of the company? Answer yes or no?

"*A.* Yes.

"*Q.* Will you tell us where and when you heard those statements made?

"*A.* On many occasions, and one which stands out in my mind with special vividness, was at the home of Robert Traub in Bloomfield Hills in the summer of 1945. Mrs. Traub took exception to the dividend policy of the company.

"*Q.* What people were present on that occasion?

"*A.* On this occasion Mr. and Mrs. Robert C. J. Traub were present; they were the hosts. Mrs. William H. Traub was there. I was there. I believe the daughter Barbara was there, but I am not sure.

"*Q.* Was this an evening occasion?

"*A.* This was a social occasion. We had stopped there to have a drink before going to the Bloomfield Hills Country Club for dinner. We withheld discussing jewelry business.

"*Q.* Will you relate what statements were made by Mrs. Mary Clark Traub on that occasion concerning the jewelry business?

"*A.* She complained vigorously that the company's dividend policy was niggardly, and she said that she was getting along in years, the stock wasn't doing her a great deal of good, and they should pay more dividends. She accused Robert Traub of building up the company by withholding dividends so that the stock would be more valuable when it came back to the Traubs.

"*The Court:* What was the date of this again?

"*A.* 1945. It was the summer of Hiroshima and the end of the war with Japan.

"*Q.* Anything else said by her on that occasion with respect to the dividend policy?

"*A.* When it was pointed out to her that dividends had to be paid out of earnings, that they might impair capital, she suggested that they get a bank loan in order to pay dividends; that she wasn't getting any younger and she resented the policy of building up, as she put it, building up the value of the stock so that it would be more valuable to the Traubs when it came back to them."

The identity of "the Traubs" referred to also is abundantly clear from the record, meaning Robert, and his daughter Barbara, whom the William Traubs, childless as they were, had regarded as the natural object of their affections. "I can't recall the exact words," the court was told, "but it was understood that she [Barbara] was to have their estate when they got through with it, because they had no children of their own."

Testimony similar to Mary's, offered both as to the understanding of the scrivener, Peter J. Monaghan, Sr., and of the promisee, Robert C. J. Traub, of the meaning of the agreement, was excluded on the ground of hearsay. We will not let the exclusion pass without comment. Where the belief, understanding, or intent of an actor is material, it is not objectionable to the hearsay rule that such mental state be established by either deed or word. In the latter event, the words are not received for their own testimonial trustworthiness but as proof of a state of mind. See McCormick, Evidence, § 268, p 567; 6 Wigmore, Evidence (3d ed), §§ 1729, 1790, pp 90, 237; Reed, What Is This Thing Called Hearsay? 36 MSBJ, No 3, March, 1957, p 20. We will not vex the issue further since the Monaghan and Robert Traub evidence, even if admissible, as to their belief, intent, and state of mind respecting the agreement, would be cumulative, only, to that of the promisor herself, Mary Traub, whose quoted testimony is clear and was received without objection.

As opposed, then, to the presumption of modern law that we have described in Cardozo's words, and to the understanding of the promisor herself, what do we find per contra? It is asserted that the intent of the parties was that only Robert, personally, was to be paid. So expressed we have a mere conclusion. Where do appellees find this asserted intent, so at variance with a man's natural instincts for the wel-

fare of the natural objects of his bounty, so diametrically opposed to the presumption of law, so contradictory of the promisor's belief that her stock was to go "back to the Traubs"? First, after reciting the controverted clause (Mary "agrees to forthwith make a will bequeathing to Robert C. J. Traub all of the shares of stock"), the appellees say "What could be a more clear expression of an intent to commit Mary Clark Traub to make only a simple bequest to Robert C. J. Traub." Also, "No possible intent can be found in the clearly expressed agreement that would commit Mary Clark Traub to name a substituted beneficiary in the event Robert C. J. Traub predeceased her." These are exclamations and expostulations, not reasons. Next, the presence of words concerning "heirs" in the indemnity clause is contrasted with their absence elsewhere in the agreement. This we have already commented upon. Finally, it is said, that since Robert was to have "possession" of the stock at Mary's death, under the terms of the contract, it meant that the stock was intended only to go to him personally. This is a complete *non sequitur*. Contracts for the sale of chattels frequently provide that the purchaser may take possession on a fixed date. This has never (in modern times) formed, and cannot today form, the basis for decision that a promisee's contract rights die with him, upon the theory that after his death he cannot "possess" anything, since we all know that shrouds have no pockets. The above constitutes the sum total of all that appellees can bring to bear on the matter of the asserted "intent" that Robert's rights should go to the grave with his remains, much like a cause of action for personal injuries under ancient tort law. We must, therefore, reject the appellees' distinction of such cases as *Trower* v. *Young*, 40 Cal App2d 539 (105 P2d 160), as differing from the case before us as to intent.

It is clear, of course, that where the contract involves the rendition of some service of a highly personal nature, such as the painting of a portrait, a different rule prevails. If the artist dies the promisee need not accept the work of another. But, even in such case, the death of the artist after he has furnished the portrait does not relieve the subject of the duty to pay his heirs. This, indeed, is the situation before us. Robert's consideration, including his relinquishment of his $86,000 interest in William's estate, had been furnished in full.

So much for the asserted "intent" that the stock would go only to Robert himself. But appellees have another string to their bow. A will was to be the "vehicle of transfer" of the stock and this, it is asserted, somehow changes Mary's obligations and Robert's rights. But the fact that a will was to be the means, the machinery,* so to speak, for getting the stock to Robert should not be allowed to defeat the basic agreement, if the will should fail in its purpose, or, indeed, never be executed. We might as well say that the death of a messenger relieves the obligor of the obligation the messenger was conveying to the obligee at the time of the messenger's death. Here the bargain made was for stock, not merely for a clause in a will. And, moreover, will Mary's obligation be deemed unenforceable by heirs-at-law if we call it a "bequest," though fully enforceable had we called it a "debt"? If so, we must deny its contractual origin and obligatory nature, deny the persistence of an unpaid debt, and thus glorify form at the expense of substance, reverting to medieval principles when the word was the law and the law was the word, when the only benefit came to the "very one" who made the covenant, when the ob-

* See Sparks, Legal Effect of Contracts to Devise or Bequeath Prior to the Death of the Promisor, 53 Mich L Rev 1, 33; also, Sparks, Contracts to Make Wills, 1956, pp 92, 93.

ligation itself was destroyed if the writing were destroyed, when a debtor could not be sued in debt unless he uttered the magic words of promise, for none would the law imply.

This is word-worship. To say that Mary's "sole commitment was to make a *bequest* to Robert C. J. Traub," as appellees do, is to obscure the issue before us. It relates to an obligation, not to a gift, not to a mere form of words. It can be discharged only by stock, not by words of bequest. To say, as appellees do, that Mary Traub was committed "to make only a simple bequest" is to say that a bequest clause per se was of the essence of the agreement. Since we all know that simple "bequest" clauses can be changed at will and that such bequests will lapse if the legatee predeceases the testator, Mary's obligation, under this theory, was slight indeed. The agreement made, that the bequest clause itself is of the essence of the agreement, is reminiscent of a suggested theory of consideration in the making of bilateral contracts, namely, that the mere making of the promise was what the promisee was after and once he got it he had received his consideration.* We have long since agreed, however, that the words of promise are not his consideration. They are merely a means of expression. The true consideration lies in the *thing* promised. This is the substance, not the empty verbiage mouthed by the promisor.† Nor, here, is it the clause in the will. Until Robert or his heirs receive the stock or its equivalent, whether by will or by Western Union messenger, the debt remains unpaid.

The essence of all of this is that consideration passed to Mary Clark Traub and it is too late in the

* See Ames, Two Theories of Consideration, 13 Harv L Rev 29 (1899).

† "Moving of the lips to speak or of the fingers to write is not what the promisor offers or the promisee accepts." Pollock, Principles of Contract (9th Eng ed, 1921), p 194.

law to maintain that she need not either return her bargained-for consideration or, if not available, its value. While it seems clear to us that under the terms of the contract itself the consideration in stock or its value must be paid in return to Robert, or his successors in right and interest, let us assume that through the operation of some rule of law the contract itself became unenforceable. Is the promisor now freed of the burden? Clearly not. There is merely a change in masters. The conscience now controls, and this is as true at law as in chancery. In such circumstances the contract is not the measure of the obligation but, rather, the obligation is the measure of the contract. Even under the English law of wills, relied upon by appellees (1 Jarman, Wills [8th ed, 1951], p 28), there will be no lapse if the "bequest" is in discharge of a moral obligation. 1 Jarman, *supra,* pp 438, 439.

The distinction to be drawn is that between a mere gift, a legacy or bequest in the gratuitous sense, and the payment of a debt for value received, used, and kept. The latter remains collectible despite its form, so long as unpaid. Here, then, we see the distinction between the case before us and many cases such as *Keasey* v. *Engles,* 259 Mich 178, thought to be controlling by appellees. The *Keasey Case* turned upon the determination by the Court that a gift was involved. The contract there under consideration (between husband, Leverett, and wife, Amanda) was that a gift should be made to a third person, named Emma. She was to receive it, however, as the Court is careful to explain (p 182), not "*in praesenti* at death of Leverett, with merely the right of enjoyment postponed, * * * but the gift itself was deferred until the death of Amanda." Since, however, Emma herself predeceased Amanda the Court held that "her legacy lapsed." If the essence of the contract, as the Court held, was to make a defeasible

gift, the donee Emma could not complain too persuasively to us that her gift was not broader in scope, vested with a greater longevity. Her donors had dealt her a bob-tailed flush and she could not fill her hand through the operation of law. But the essence of our case is not a narrowly-circumscribed gift. It is a debt. The instrument is replete with the concept of consideration, of exchange, of the *quid pro quo*. We have no remote donee suing her benefactor, but a promisee himself (in legal effect) suing his promisor. It is the difference between looking a gift horse in the mouth and demanding the payment of an honest debt. As a matter of fact if in the *Keasey Case* the promisor had been suing the promisee, the Court's answer would have been clear. The contract between promisor and promisee, says the Court (p 181), "is irrevocable." And so, we hold, is it here. In return for Mary's promise to convey the stock to him at her death so that (in her own words) it might go back to the Traub family, Robert stripped himself, and his estate, of substantial assets. It is both illegal and immoral that he, or his estate, should not receive the bargained-for return. Supporting Robert's claim we have not only the terms of the agreement itself (and appellees have not yet disclosed to us the magic words required in addition to those there placed by astute counsel) but a presumption of law, unrebutted. Appellees, indeed, offered no testimony whatever. In addition to all of this we have the wholly consistent understanding of the promisor herself. And opposed thereto what? A chimerical "intent," supported only by exclamation and expostulation. More is required, in this Court, to support a conclusion so clearly opposed to the bargain made, a result so obviously at variance with the most fundamental considerations of justice.

We will not, it is to be hoped, emulate what Justice Holmes[1] described as "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert."

The judgment of the circuit court is reversed. The cause is remanded for the entry of judgment on the claim for $58,179, with interest and costs as by statute made and provided.[2] We will not substitute our discretion for that of the probate court imposing the burden of the referee's fee upon the tardy claimant,[3] appellant here.

BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred with SMITH, J.

---

1 *Paraiso* v. *United States*, 207 US 368, 372 (28 S Ct 127, 52 L ed 249).

2 See CL 1948, § 708.4 (Stat Ann 1943 Rev § 27.3178 [414]).—REPORTER.

3 See CL 1948, § 708.18 (Stat Ann 1943 Rev § 27.3178 [428]).—REPORTER.

BERGER FURNACE COMPANY *v.* COLLINS.

1. ASSIGNMENTS—ACCOUNTS RECEIVABLE—PAYMENT OF ANTECEDENT DEBT.

   The payment of an antecedent debt of the assignor to the assignee of accounts receivable under an unfiled assignment prior to the time when assignor became indebted to plaintiff in no way prejudiced plaintiff, whether the payment was made pursuant to or independent of the assignment, since at the time of such payment plaintiff had no claim or right against the assignor (CL 1948, §§ 691.902, 691.906).

2. SAME—PAYMENT OF ANTECEDENT DEBT—TITLE TO MONEY—ACCOUNTS RECEIVABLE.

   Money paid to assignee by assignor's debtors became the property of the assignee, where applied to payment of an antecedent debt even though the assignment of the assignor's accounts receivable had not been filed, and was not held in trust by the assignee for assignor's creditors who did not become such until some 15 months after extinguishment of the antecedent debt (CL 1948, §§ 691.902, 691.906).

3. SAME—ACCOUNTS RECEIVABLE—SECURITY FOR FUTURE ADVANCES—FILING—DELIVERY.

   Filing in the office of the register of deeds of an assignment of accounts receivable is not an essential step to perfecting such an assignment when given as security for payment of future advances, such assignment being perfected upon its delivery (CL 1948, §§ 691.902, 691.906).

REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur, Assignments § 112.
[2, 4] 4 Am Jur, Assignments § 96.
[3] 4 Am Jur, Assignments § 88; 24 Am Jur, Fraudulent Conveyances § 76.
[5] 24 Am Jur, Fraudulent Conveyances § 92.
[6, 8] 4 Am Jur, Assignments § 83.
[7] 4 Am Jur, Assignments § 88.

4. SAME—ACCOUNTS RECEIVABLE—ANTECEDENT DEBT—FUTURE ADVANCES—FILING.

Moneys collected by garnishee defendant from the principal defendant's debtors after an unfiled assignment of accounts receivable was executed and delivered were not held in trust by the assignee, where first collections were in payment of an antecedent debt of the assignor and payment thereof was completed before defendant incurred any obligation to plaintiff and later collections were in payment of future advances which were made after obligation to plaintiff was incurred but as to which the assignment was not required to be filed (CL 1948, §§ 628.32, 691.902, 691.906).

5. FRAUD—PREFERENTIAL PAYMENT OF CREDITOR.

A fraud is not committed by a debtor who pays or secures the payment of his obligation to one or certain of his creditors in preference to others.

6. ASSIGNMENTS—ACCOUNTS RECEIVABLE—FILING—PAYMENT.

The fact that garnishee defendant held an assignment of defendant's accounts receivable, even if invalid and not perfected because not filed, did not operate to render invalid the otherwise valid payment to it (CL 1948, §§ 628.32, 691.902, 691.906).

7. SAME—ACCOUNTS RECEIVABLE—FILING—PAYMENT.

The failure to file an assignment of accounts receivable goes only to the validity and effectiveness to convey title to an account remaining unpaid but is in nowise controlling of the validity of the payment of the account by the debtor to the assignee or the availability of the proceeds to the assignor's other creditors in garnishment (CL 1948, §§ 628.32, 691.902, 691.906).

8. SAME—ACCOUNTS RECEIVABLE—STATUTES—PAYMENT.

The assignment of accounts receivable act does not make payment of the debt to the assignee under an unperfected assignment void as to the assignor's creditors (CL 1948, §§ 628.32, 691.902, 691.906).

Appeal from Wayne; O'Hara (Chester P.), J. Submitted June 10, 1958. (Docket No. 55, Calendar No. 47,688.) Decided October 13, 1958.

Action by Berger Furnace Company, a foreign corporation, against Richard Collins, doing business

as Collins & Son Heating Contractors, for goods sold and delivered, resulting in judgment, with garnishment proceedings against Star Steel Supply Company, a Michigan corporation, to secure funds received by it under an assignment of accounts receivable. From a judgment against it, garnishee defendant appeals. Reversed.

Kahn & Kahn (*Kenneth F. Kahn,* of counsel), for plaintiff.

Harry N. Grossman, for garnishee defendant.

DETHMERS, C. J. On March 30, 1954, defendant gave garnishee defendant an assignment of accounts receivable as security for an antecedent debt and to secure payment of future advances. The assignment was not filed in the office of the register of deeds. By June 30, 1954, the antecedent debt had been paid. Thereafter garnishee defendant made further advances to defendant on a running account until April of 1956. During March and April of 1956, garnishee defendant received a total of $20,175 in payment on defendant's account from persons owing defendant accounts covered by the assignment. Between October 10, 1955, and June 30, 1956, plaintiff sold defendant merchandise on which there was a balance due plaintiff of $19,025.37, for which it brought suit on June 25, 1956, and obtained judgment on March 25, 1957. On November 14, 1956, plaintiff caused a writ of garnishment in that action to be served on garnishee defendant in an effort to recover its claim out of the above-mentioned payments made to garnishee defendant by defendant's debtors.

On trial of the statutory issue, the trial court held that the mentioned payments to garnishee defendant were made pursuant to an unfiled and, hence, unper-

fected assignment to secure an antecedent debt, that the assignment was invalid and void as to defendant's other creditors and that, therefore, the payments were, in garnishee defendant's hands, subject to garnishment by defendant's creditors, including plaintiff.

The pertinent statutory provisions are:

"A written assignment of an account receivable is, and shall be deemed to be, so far perfected at the time it is delivered that no purchaser from, nor any creditor of, the assignor can thereafter acquire any right in the account receivable so assigned equal or superior to the rights of the assignee therein, notwithstanding any action or any inaction by any person and, without limiting the generality of the foregoing, notwithstanding that no notice, either actual or constructive, of such assignment be given to the obligor or any other person, and notwithstanding that any subsequent purchaser from or any creditor of the assignor thereafter shall receive payment, in whole or in part, of such account receivable, or shall receive a negotiable instrument in payment or as evidence, in whole or in part, of such account receivable, or shall effect a novation in respect of such account receivable, or shall obtain a judgment, order or decree for the payment of such account receivable: Provided, however, That in the event an assignment of an account receivable is made as security for an antecedent indebtedness other than pursuant to a written agreement by the assignor to do so made at or prior to the time when such indebtedness, or any part thereof, was first incurred, such assignment shall not be deemed to be so perfected unless at the time of the delivery thereof a notice of assignment is on file as provided in section 3 of this act, or if not then on file, until such a notice of assignment is so filed." CL 1948, § 691.902 (Stat Ann 1957 Cum Supp § 19.842).

"An assignment of an account receivable is not, and shall not be deemed to be, invalid for the reason that: * * *

"(d) neither such assignment nor any copy or notice thereof is recorded or filed in any public office except in case a notice of assignment is required to be filed in order that such assignment be perfected." CL 1948, § 691.906 (Stat Ann 1957 Cum Supp § 19.846).

"If any person garnisheed shall have in his possession any of the property aforesaid of the principal defendant, which he holds by a conveyance or title that is void as to creditors of the defendant, or if any person garnisheed shall have received and disposed of any of the property aforesaid of the principal defendant, which is held by a conveyance or title that is void as to creditors of the defendant, he may be adjudged liable as garnishee on account of such property and for the value thereof, although the principal defendant could not have maintained an action therefor against him." CL 1948, § 628.32 (Stat Ann § 27.1886).

It will be noted that the antecedent debt secured by the assignment had been paid more than 15 months before plaintiff advanced credit to defendant. That payment, whether made pursuant to, or independent of, the assignment, prejudiced no rights of plaintiff because at that time plaintiff had no claim or right against defendant. When garnishee defendant received that payment it had every right to apply it to the antecedent debt due it from defendant. That debt thereupon became extinguished and the money became garnishee defendant's absolutely and in no sense, as plaintiff claims, in trust for those who, 15 months later, might or did become creditors of defendant. The payment of that money to garnishee defendant in discharge of the antecedent debt was not a conveyance or payment void as to defendant's creditors. It follows that plaintiff

may not recover those moneys in garnishment, regardless of whether the payment came from defendant directly or from defendant's debtors under the assignment.

May plaintiff recover from garnishee defendant moneys received by it from defendant's debtors, under the assignment, after plaintiff became a creditor of defendant, in payment of advances made by garnishee defendant to defendant after execution of the assignment? Filing is not, under the statute, an essential step to perfecting an assignment of accounts receivable given as security for payment of future advances. The statute provides that such assignment is perfected upon its delivery. When, in June of 1954, the antecedent indebtedness had been paid up and thereafter, in October of 1955, when plaintiff began advancing credit to defendant, the assignment remained only as security for payment of advances made after its execution. It was such advances that were paid by the moneys received by garnishee defendant in March and April of 1956. The quoted language of the garnishment statute imposes liability on a garnishee defendant if he has obtained from defendant and holds property by a conveyance or title void as to defendant's creditors. The assignment was not a fraud on plaintiff's rights nor void as to it when given because plaintiff was not then a creditor of defendant. When plaintiff became a creditor the assignment was not then void as to it because the assignment then stood only as security for payment of advances made after its execution, for which purpose filing was not requisite to its perfecting and validity. Accordingly, it must be said with respect to these payments on advances made after execution of the assignment, as hereinbefore said concerning payment of the antecedent debt, that they do not constitute assets in garnishee defendant's hands held in trust for defendant's

other creditors, amenable to their demands in garnishment.

It is plaintiff's theory that the assignment is indivisible, that it is invalid, for lack of filing, with respect to the antecedent debt, and, therefore, invalid in its entirety, even as security for payment of the future advances. Assuming this, arguendo, to be correct, would it follow that garnishee defendant received and holds the moneys paid it in March and April of 1956 "by a conveyance * * * that is," to quote the garnishment statute, "void as to creditors of the defendant"? We hold not.

"It is the settled law of this State that, laying aside the Federal bankruptcy act, a debtor may prefer one creditor to another. *Harnau* v. *Haight,* 209 Mich 604, and authorities there cited." *Fremont State Bank* v. *Old State Bank,* 240 Mich 18, 22.

"A fraud is not committed by a debtor who pays or secures the payment of his obligation to one creditor or to certain of his creditors in preference to others." *In re United Fuel Supply Co.,* 250 Mich 325, 331.

There is no claim here that defendant gave garnishee defendant an unlawful preference. Direct payment of the sums in question by defendant to garnishee defendant on its account would not have been void as to defendant's creditors. Collection by defendant of the accounts receivable due it and payment of the proceeds by it to garnishee defendant would not have been void as to defendant's creditors. Payment, at defendant's direction, of such accounts receivable by defendant's debtors directly to garnishee defendant, independent of any assignment, would not have been a conveyance or payment void as to defendant's other creditors. The fact that garnishee defendant held such an assignment of accounts receivable, even if invalid and not perfected

because not filed, did not operate to render invalid the otherwise valid payment to it. *Costello* v. *Bank of America National Trust and Savings Association,* 141 F Supp 225, affirmed (CCA), 246 F2d 807. See, also, *Fremont State Bank* v. *Old State Bank, supra; Crusoe Bros. Co.* v. *Kudner,* 136 Mich 583; *Folkerts* v. *Standish,* 55 Mich 463. In the *Costello Case* the district court said (p 231):

"The fact that the account, itself, was never effectively transferred as against the assignor's creditors or subsequent assignees does not mean that the proceeds could not be."

Speaking of the California accounts receivable statute, similar to the Michigan statute, the court of appeals said (p 813):

"The primary purpose of the statute was to protect the assignee against a claim by the trustee while at the same time maintaining the practice of non-notification financing. Other objectives were secondary and incidental. It would be strange indeed if such a statute, enacted to benefit the assignee were to be used to deprive the assignee of rights it would have if the statute had not been passed, or if there had been no assignment and the debt simply paid from the payments on the contract."

In re George Stuart, Inc., 344 Mich 34, is cited by plaintiff for the proposition that an assignee acquires no title under the assignment of an account receivable given as security for an antecedent debt where he fails to perfect it by filing. In that case the account receivable so assigned remained unpaid. The question was whether the unfiled assignment was effective to give the assignee the right to collect the as yet unpaid account and thereafter keep the proceeds in preference to assignor's other creditors. This Court held that the assignment was not absolute, but one given as security for payment of an

antecedent debt and that, because not filed and perfected, it was invalid and not effective to give assignee title to the uncollected account receivable as against assignor's other creditors. The case is not in point here where the question presented is not whether the assignment effectively transferred to assignee title to an unpaid account receivable, but whether actual payment of the account receivable to assignee constituted a conveyance void as to assignor's creditors. As above indicated, the answer must be in the negative. Failure to file the assignment goes only to the validity and effectiveness of the assignment to convey title to an account remaining unpaid but is in nowise controlling of the validity of the payment of the account by the debtor to the assignee or the availability of the proceeds to assignor's other creditors in garnishment.

In this connection plaintiff cites *Watkins* v. *Angus,* 241 Mich 690; and *Patmos* v. *Grand Rapids Dairy Co.,* 243 Mich 417. Involved were sales made in violation of the bulk sales law which the statute renders void. There is no comparable provision in the assignment of accounts receivable act making payment under an unperfected assignment void as to assignor's creditors. These cases would, therefore, be inapposite, even though the assignment were to be held invalid and void as to them. Also cited are *Heineman* v. *Schloss,* 83 Mich 153; *Meigs* v. *Weller,* 90 Mich 629; *Baker* v. *Parkhurst,* 119 Mich 542. In *Heineman* and *Meigs* the Court held mortgages given to the garnishee defendants were fraudulent and therefore ineffective against the mortgagors' other creditors. In *Baker* the expressed finding of fraud on mortgagor's creditors was planted on failure to file the chattel mortgage. We conclude, however, from reading the opinion, that persuasive to its decision in the case was the court's recital of facts disclosing fraudulent collusion between mortgagor

and mortgagee of which an agreement to withhold the mortgage from filing was but a part. In the instant case no fraud was perpetrated on defendant's creditors. The payment of its indebtedness to garnishee defendant, even though made by defendant's debtors under the assignment, was neither fraudulent nor void as to defendant's other creditors.

Judgment for plaintiff against garnishee defendant reversed, with costs.

CARR, KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

TYSON *v.* HERRLE.

BROKERS—COMMISSIONS—CONTRACTS—PERFORMANCES.

Defendant owner of retail liquor business, conducted on leased premises, did not become obligated to plaintiff broker under written contract to pay commission "upon completion of deal" where plaintiff never did complete the deal, the contract did not impose a duty upon defendant to secure from the landlords a lease similar to the one he had with them, and trial court did not make a finding that defendant's actions prevented plaintiff from securing the lease for the purchasers and completing the deal.

Appeal from Wayne; Rashid (Joseph G.), J. Submitted July 17, 1958. (Docket No. 61, Calendar No. 47,558.) Decided October 13, 1958.

REFERENCES FOR POINTS IN HEADNOTES

8 Am Jur, Brokers § 180.

Real-estate broker's right to commissions as affected by failure or refusal of customer to comply with valid contract. 51 ALR 1390, 73 ALR 926.

Action in common pleas court by William B. Tyson, doing business as Tyson & Company, against Walter H. Herrle for real-estate dealer's commission. Judgment for defendant. Plaintiff appealed to circuit court. Judgment for defendant. Plaintiff appeals. Affirmed.

Larry Middleton (*Harold Helper,* of counsel), for plaintiff.

Richard D. Dunn, for defendant.

DETHMERS, C. J. Defendant owned a liquor business, operated, under State license, on premises leased to him at a monthly rental of $250. The lease also covered 2 adjacent vacant lots used for parking purposes. Plaintiff, a real-estate broker, employed a salesman. He presented to defendant a written instrument signed by 2 persons, hereinafter called purchasers, offering to purchase the license and business for $27,500. The offer contained the following provision: "This offer is contingent upon securing of 5 (year) lease at a monthly rental of $250 dollars per month which includes 2 four-room flat above premises." Defendant signed an acceptance of the offer, which contained a provision that "upon completion of this deal" he would pay plaintiff a commission of $2,500 for services rendered. Defendant testified that, at that time, he told the salesman that he could have it if he could close the deal within 10 days. Plaintiff then attempted to obtain a lease for the purchasers on the above-specified terms. The 2 landlords refused to give such lease, saying that they wanted more money. Plaintiff testified that one of them also told him that defendant had changed his mind about selling. The landlord in question denied having made such statement to plaintiff. One of the purchasers testified that thereafter defendant

told them that the landlords wanted $350 per month rent and that they then told plaintiff that they had no deal unless he could get a lease similar to the one in effect and that they would hold off on the deal until the matter of such lease was "straightened out." Plaintiff testified that within a few days after the acceptance was signed defendant told him that he had changed his mind and would not go through with the deal with purchasers. Defendant denied this on the witness stand. A couple of weeks later defendant sold the license and business to another for $28,500 and the landlords signed a written statement to the effect that they would grant him a 5-year lease at a rental of $250 per month, plus the amount of the taxes assessed against the 2 lots; subsequently, they executed such lease.

Plaintiff sued in the common pleas court of the city of Detroit, on the agreement, for the $2,500 commission. The trial judge held for plaintiff. On appeal to circuit court the judgment below was reversed and judgment entered of no cause for action. Plaintiff appeals here.

Much of the discussion in the case has centered around the question whether plaintiff produced a purchaser ready, willing and able to purchase on defendant's terms. It is to be noted, however, that this is not a suit on a listing agreement. By the contract on which this suit is brought, defendant agreed to pay plaintiff "upon completion of this deal." Completion of the deal was contingent, under the written offer to purchase, upon securing for purchasers a 5-year lease at a monthly rental of $250. Such lease was never secured nor was the deal completed. The trial court's decision was based on a holding that the stated condition in the offer to purchase was for the benefit of the purchasers and not of defendant and that, therefore, he could not take advantage of its nonoccurrence. That misses the point, how-

ever, that defendant was not obligated to pay plaintiff until the deal was completed, and that all plaintiff ever did for defendant was to furnish him with a contract to purchase which contained a contingency such as to leave it utterly unenforceable in his hands as against the purchasers. For such service on plaintiff's part defendant did not agree to pay. The eventuality upon which defendant was to become obligated to plaintiff never having occurred, defendant is not obliged to pay him. *Schmidt* v. *Maples,* 291 Mich 225; *Fleming* v. *James S. Holden Co.,* 200 Mich 519; *Antisdel* v. *Canfield,* 119 Mich 229.

Plaintiff urges that he is entitled to recover, even though the deal was not completed, because such completion was prevented by defendant's failure to perform his undertaking to secure a lease for the purchasers. The agreement imposed no such duty on defendant.

Plaintiff cites *Cook* v. *Blake,* 98 Mich 389; *Hubbard* v. *Leiter,* 145 Mich 387; *Greenberg* v. *Sakwinski,* 211 Mich 498; and *Hayes* v. *Beyer,* 284 Mich 60, for the proposition that he is entitled to recover if completion of the deal failed because defendant prevented the securing of the lease. The cited cases support the contention. The difficulty for plaintiff is that the trial judge did not find as a fact that defendant did obstruct or prevent the securing of the lease and there is insufficient evidence to prove it. Plaintiff describes as acts preventing securing of the lease, (1) defendant's statement to the purchasers that the landlords wanted $350 per month and failure to state that they would take $250 per month, plus the taxes on the lots, and (2) defendant's sale of the business to another who secured such lease. This argument is scarcely persuasive in view of plaintiff's negotiations with and being told by one of the landlords that they wanted more rent, and his reply that he would have to discuss the matter with his purchasers, fol-

lowing which neither he nor his purchasers ever again contacted the landlords, although no reason appears why they should not have done so and secured a lease such as the subsequent purchaser ultimately did. Plaintiff cites *Broomfield* v. *Abass,* 320 Mich 291, as authority that the law does not require one to do a needless thing. The fact that the landlords wanted more money is not shown by the evidence to be chargeable to defendant. His statement to plaintiff and purchasers that the landlords wanted more money, which plaintiff had already learned from one of the landlords, did not make further negotiations with the latter impossible or a useless thing. If, as plaintiff testified and defendant denied, defendant did tell plaintiff within a couple of days after signing the acceptance that he had changed his mind about selling to purchasers, the negotiation of a lease between landlords and purchasers would, nevertheless, have made the offer and acceptance effective and enforceable against defendant. Such course of action would hardly have been useless. Defendant testified, and it was not denied at trial, that he gave plaintiff's salesman 10 days following signing of the acceptance to close the deal. It is not shown that defendant's sale to another occurred until after the expiration of that 10-day period. Under the circumstances, it is understandable why the trial court did not make a finding that actions on defendant's part prevented securing the lease for purchasers and completion of the deal. Such finding, if made, would not have been supported by the evidence.

Affirmed, with costs to defendant.

CARR, KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

PEOPLE *v.* DORRIKAS.

1. ARSON—FIRE—INFERENCES—ACCIDENT—PROXIMATE CAUSE.
   The mere fact that a fire has occurred affords no proper basis for an inference that it was wrongfully set, as, under such circumstances, it may be assumed that it was the result of accident or some natural cause.

2. SAME—EVIDENCE—MOTIVE—INSURANCE—INCOME.
   Evidence presented in prosecution for arson, which tended to eliminate the possibility of defective wiring and also spontaneous combustion and that the fire damaging defendant's restaurant did not result from any natural or providential causes, together with fact that he had recently trebled insurance coverage while income was declining, *held,* sufficient to submit cause to jury and to support its verdict of guilty.

3. WITNESSES—QUALIFICATIONS—VALUE OF BUSINESS.
   Testimony of witness as to value of restaurant business *held,* properly excluded in prosecution for arson, where no proper foundation had been laid in that no showing was made that the witness was qualified to testify as to the value of the business.

4. COURTS—SUPREME COURT—SUPERVISORY CONTROL OVER LITIGATION—SAVING QUESTION FOR REVIEW—OBJECTION.
   The Supreme Court, in the exercise of supervisory control over all litigation, has the right to consider manifest and serious errors although objection was not made by the party who

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 22 Am Jur, Fires §§ 43, 75.
[2] 4 Am Jur, Arson § 67.
[3] 58 Am Jur, Witnesses § 642.
[4] 14 Am Jur, Courts §§ 264, 268, 271.
[5–7, 9] 20 Am Jur, Evidence § 326; 58 Am Jur, Witnesses §§ 657–661. Cross-examination of character witness for accused with reference to particular acts or crimes. 47 ALR2d 1258.
[8] 14 Am Jur, Criminal Law § 129.

appeals, since the inherent power of the Supreme Court is not limited by what the appellant is entitled to as a matter of right.

5. CRIMINAL LAW—CROSS-EXAMINATION OF CHARACTER WITNESS.

Generally, a witness testifying to the good reputation or character of a defendant in a criminal prosecution may be interrogated on cross-examination with respect to rumors or reports of particular acts imputed to defendant and as to what the witness has heard of specific charges of misconduct made against the defendant, not to establish such acts but to test the credibility of the character witness, by ascertaining his good faith, information and accuracy; such cross-examination being limited as to time and, in some instances, place.

6. EVIDENCE—REPUTATION—CHARACTER—HEARSAY.

Testimony as to the reputation for citizenship, or for honesty and integrity is based on hearsay.

7. CRIMINAL LAW—CROSS-EXAMINATION OF CHARACTER WITNESS—DISCRETION OF COURT—INSTRUCTIONS.

The wide discretion lodged in a trial court with reference to limiting cross-examination of character witnesses in regard to hearsay testimony in a prosecution for crime is accompanied by the responsibility of the trial court to determine, in the absence of the jury, whether or not criminal acts, referred to by the prosecutor as having been committed by the defendant, actually took place, the time of their commission and relevancy to issue being tried and to instruct the jury carefully as to the reason for admission of testimony of such criminal acts.

8. SAME—FAIR TRIAL—COURTS.

An appellate court has the responsibility to ascertain if a defendant in a prosecution for crime has had a fair and impartial trial, a trial free from prejudicial errors.

9. SAME—CROSS-EXAMINATION OF CHARACTER WITNESS—OBJECTIONS—FAIR TRIAL—INSTRUCTIONS.

Defendant, on trial for arson and who did not take the witness stand, *held,* to have been denied a fair trial, where during cross-examination of his character witness 6 questions were asked as to whether witness had heard of arrests and convictions of defendant in other States for crimes of disorderly conduct, robbery, vagrancy, violation of liquor laws, bank robbery and rape and, notwithstanding no objection was made by defendant's counsel the trial judge did not ascertain out of

presence of jury whether such acts were actually committed and as to the time and place of the acts and failed to instruct the jury as to purpose of such testimony and limitations upon the use they might make of it.

DETHMERS, C. J., and CARR and KELLY, JJ., dissenting.

Appeal from Washtenaw; Breakey, Jr. (James R.), J. Submitted June 12, 1958. (Docket No. 51, Calendar No. 47,295.) Decided October 13, 1958.

James Dorrikas was convicted of arson. Reversed and new trial granted.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *Edmond F. DeVine,* Prosecuting Attorney, *Eugene B. Calder,* Assistant Prosecuting Attorney, for the people.

Conlin, Conlin & Parker, for defendant.

CARR, J. (*dissenting*). The defendant in this case was engaged, on May 10, 1953, and for some time prior thereto, in the operation of a restaurant located at 29 North Huron street in the city of Ypsilanti. The building was not owned by defendant but was leased or rented by him. Between 10 and 11 o'clock in the late evening of the date mentioned fire was discovered in the place of business. When the fire department arrived the blaze was apparently confined to the basement, but shortly thereafter the first floor of the restaurant collapsed in part. The damage from actual burning was limited to the basement, and to the first floor of the restaurant.

In connection with the removal of debris from the premises an investigation was conducted by 2 members of the Michigan State police who had training and experience in the investigation of fires suspected as incendiary. Defendant was prosecuted on

a charge of arson, the case being tried before a jury. During the progress of the trial a motion for a directed verdict was made on behalf of defendant on the ground that the proofs introduced by the people were insufficient to permit submission of the case to the jury. The motion was denied. Following the completion of the proofs, the arguments of counsel, and the charge of the court, the jury returned a verdict of guilty, and sentence was imposed. A motion for a new trial was submitted and denied. Defendant has appealed.

On behalf of appellant it is contended that the evidence in the case was insufficient to establish the *corpus delicti,* and, also, that the prosecution failed to establish with the requisite degree of certainty that defendant was guilty of the offense of arson, if such offense had been committed. These claims require a consideration of the testimony on which the cause was submitted to the jury. The police officers who made the investigation testified that they found in the basement, which apparently was used in connection with the restaurant, a mattress filled with kapok, which had been folded over from one end. In the fold was discovered a small amount of excelsior and corrugated paper. It was the claim of the people, in substance, that the fire had been started with the paper and excelsior and had spread to the mattress. The proofs established that the contents of said mattress would burn slowly, giving off an intense heat in so doing. The witnesses claimed further that the floor of the restaurant at the time of the examination indicated that the place of greatest damage from fire was immediately above the mattress.

Defendant was questioned concerning the mattress, stating, according to the testimony, that it belonged to him and that he had kept it for some time in a closet in the basement. The police officers re-

ferred to further stated that the electric wiring in the basement was examined by them for the purpose of discovering whether a short circuit, possibly responsible for the fire, had occurred therein. They found no indication of such situation. Testimony was also offered indicating that the contents of the mattress were of a character that precluded the possibility of spontaneous combustion.

It was shown by the prosecution that prior to a date preceding the fire by some weeks defendant had carried fire insurance in the sum of $10,000, that the carrier of such insurance declined to renew the policy, and that defendant procured insurance elsewhere in the total sum of $22,000, together with a policy for $6,500 against loss sustained by business interruption, and a further policy for $1,500 covering property of defendant located on the third floor of the building. It was also shown by uncontradicted testimony that shortly before the fire occurred defendant procured for the occupant of an apartment on the second floor of the building a policy of insurance covering her property. Defendant suggested such action, and delivered the policy to the insured named therein. Further evidence was offered indicating that defendant's income from the restaurant had been declining for some time prior to the fire. On the basis of the testimony introduced it was the claim of the prosecution that a motive was established on the part of defendant for the commission of the crime charged.

The mere fact that a fire has occurred affords no proper basis for an inference that it was wrongfully set. Under such circumstances it may be assumed that it was the result of accident or some natural cause. *People* v. *Lee,* 231 Mich 607, 612. In the case at bar, however, proofs were offered from which the jury might properly have concluded that the fire in defendant's restaurant did not result from any

natural or providential cause. The testimony of the officers tended to eliminate the possibility of defective wiring and, also, spontaneous combustion. The presence of the excelsior and charred paper in the fold of the mattress suggests that such combustible materials were placed there by human agency. That defendant might have gone to the basement prior to his leaving the restaurant at approximately 7 o'clock in the evening is not open to question. Materials used in connection with the operation of the business were stored in the basement, as appeared from the testimony of defendant's employee who was working there on May 10, 1953. As proprietor of the restaurant business defendant had right of access to the premises at all times.

The testimony with reference to the decline in earnings of the restaurant and the taking out of the insurance policies, above mentioned, clearly suggest a motive on defendant's part. Without discussing the evidence in further detail, we conclude that the trial judge was not in error in denying the motion for a directed verdict, or in submitting the cause to the jury. No claim is made that there was any error in the charge as to the law governing the case. The verdict returned may not be said to have been unsupported by sufficient proofs.

On the trial counsel for defendant sought to introduce the testimony of a witness with reference to an offer claimed to have been made to rent the restaurant business and the equipment therein. The purpose of such testimony was, as stated by counsel, to establish the value of defendant's interest. There was no showing, however, that the party making the offer was familiar with the rental value of such businesses, that he was experienced in the operation of restaurants, or that he had knowledge as to the earnings of the restaurant in question. Objection was interposed on behalf of the people and sustained

by the trial judge on the ground that no proper foundation had been laid. The ruling was correct. No showing was made that the witness was qualified to testify as to the value of the business.

Defendant did not testify in his own behalf. His counsel called, among other witnesses, one who had known defendant for 11 years and testified to satisfactory business relations with him. In answer to the question as to the reputation of defendant "for honesty and integrity" in the community in which he lived and carried on his business, he said that such reputation was good. On cross-examination the character witness was asked if he had ever heard of defendant having been involved in various offenses in Illinois, in Wisconsin, and in Indiana. No objection was made to any of such questions, 6 in number, the witness answering in the negative in each instance. At the conclusion of the cross-examination defendant rested. On behalf of appellant it is now claimed that the asking of the questions of the character witness constituted prejudicial and reversible error. On behalf of the people it is argued that the cross-examination was proper as bearing on the extent of the knowledge of the witness in testifying to good reputation, and also on his credibility.

Defendant was ably represented on the trial by competent and experienced counsel. If the questions were deemed objectionable no reason is advanced why an objection was not interposed. There was no motion to strike the testimony nor does it appear from the record that there was any specific request to the court to instruct the jury with reference to it. It is quite possible that had reports or rumors of the prior difficulties with the law, referred to in the questions to the character witness, been circulated in Ypsilanti to the knowledge of the witness, his opinion as to defendant's reputation might have been other than as expressed. Rumors and reports of

violations of the law committed by defendant elsewhere, if circulated in the city of Ypsilanti, might well have affected his reputation therein.

The general rule seems to be well established that a character witness who has testified to the good reputation of the defendant in a criminal case may be asked on cross-examination, for the purpose of testing his credibility and indicating the weight to be given to his testimony, whether he has heard reports of prior conduct on the part of defendant tending to affect his reputation for honesty and integrity. The general rule is summarized in 58 Am Jur, Witnesses, § 658, p 363, as follows:

"A witness as to character may, on cross-examination, be interrogated as to what he has heard in the community respecting the character of the party inquired about. While there is some authority to the contrary, it is generally held that a character witness may be cross-examined as to the existence of reports of particular acts and vices or associations of the person concerning whom he testified which are inconsistent with the reputation attributed to him by the witness—not to establish the truth of the facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given his testimony. Such testimony tends to show either that the witness is unfamiliar with the reputation concerning which he has testified, or that his standards of what constitutes good repute are unsound."

A comprehensive note on the general subject of the cross-examination of character witnesses is found in 71 ALR 1504. In the course of the discussion, it is there said (pp 1505, 1514):

"According to the overwhelming weight of authority, a witness testifying to the good reputation or character of a defendant in a criminal prosecution may be interrogated on cross-examination with respect to rumors or reports of particular acts im-

puted to the defendant, and as to what the witness has heard of specific charges of misconduct made against the defendant. * * *

"The purpose of the cross-examination of the defendant's character witness with reference to particular acts of the defendant is not to establish such acts as facts, or to prove the truth of the rumors or charges inquired about, but merely to show the circulation of rumors of such acts, and to test the credibility of the character witness, by ascertaining his good faith, information, and accuracy."

The above statements are supported in the annotation by extensive citations.

In *Michelson* v. *United States,* 335 US 469 (69 S Ct 213, 93 L ed 168), in discussing at some length the basis of so-called character testimony and practical incidents pertaining thereto, it was said, in part (pp 479, 482, 483):

"The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that he is, but the name that he has which is put in issue. Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from

profiting by a mere parade of partisans. * * *

"Since the whole inquiry, as we have pointed out, is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed.

"A character witness may be cross-examined as to an arrest whether or not it culminated in a conviction, according to the overwhelming weight of authority. This rule is sometimes confused with that which prohibits cross-examination to credibility by asking a witness whether he himself has been arrested.

"Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness.

"Arrest without more may nevertheless impair or cloud one's reputation. False arrest may do that. Even to be acquitted may damage one's good name if the community receives the verdict with a wink and chooses to remember defendant as one who ought to have been convicted. A conviction, on the other hand, may be accepted as a misfortune or an injustice, and even enhance the standing of one who mends his ways and lives it down. Reputation is the net balance of so many debits and credits that the law does not attach the finality to a conviction, when the issue is reputation, that is given to it when the issue is the credibility of the convict.

"The inquiry as to an arrest is permissible also because the prosecution has a right to test the qualifications of the witness to bespeak the community opinion. If one never heard the speculations and rumors in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation."

Prior decisions of this Court are in accord with the general rule as above indicated. Thus in *People* v. *Huff,* 173 Mich 620, 624, it was said:

"It is well settled that, when a witness is called to attack or defend character, he can only be asked, on his examination in chief, as to the general character of the person in question; and he will not be allowed to testify as to particular facts, either favorable or unfavorable to such person; but, upon cross-examination, he may then be asked, with a view to test the value of his testimony, as to particular facts. 1 Taylor on Evidence, § 352; 3 Rice on Criminal Evidence, § 375; *State* v. *Merriman,* 34 SC 16 (12 SE 619)."

Likewise, in *People* v. *Hill,* 258 Mich 79, the Court, in discussing the scope of cross-examination of a character witness in a criminal case, said (p 85):

"There is a difference in the rules governing the introduction of rebuttal testimony and governing cross-examination. A witness who testifies to another's good reputation may be cross-examined to test his knowledge and candor (22 CJ, p 483); for that purpose it has been held he may be asked if he has heard of specific cases of misconduct. He may be asked these questions only to test his credibility and ascertain the weight to be given to his testimony. *Rex* v. *Martin,* 6 Car & P 562 (172 Eng Rep 1364); *Leonard* v. *Allen,* 11 Cush (65 Mass) 241; *Commonwealth* v. *O'Brien,* 119 Mass 342 (20 Am Rep 325)."

Of like import is *People* v. *Rosa,* 268 Mich 462, 465.

We are not dealing in the instant case with the cross-examination of a defendant in which questions have been propounded for the purpose of establishing that the accused has committed crimes other than the one for which he is on trial, but of which he has not been convicted. A typical illustration of such a case is afforded by *People* v. *Kelsey,* 303 Mich 715, to which counsel for appellant have referred in

their brief. Said decision and others of like nature, including *People* v. *Wright,* 294 Mich 20, are not in point with reference to the scope of the cross-examination of character witnesses. Testimony as to a defendant's reputation for citizenship, or for "honesty and integrity," is based, as has been repeatedly pointed out in decisions dealing therewith, on hearsay. Such fact naturally has a bearing on the right of the cross-examiner to test the knowledge and credibility of the character witness by inquiries as to whether he *has heard* of prior acts of misconduct on the part of such defendant.

We find no error in the case, and the verdict and sentence should be affirmed.

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

KAVANAGH, J. The defendant in this case was convicted of the crime of arson by a jury in the Washtenaw county circuit court.

The facts with reference to the case have been presented in detail in the opinion of Mr. Justice CARR.

Appellant makes several claims of error, which he feels justify the granting of a new trial, all of which have been answered by Justice CARR in his opinion. I respectfully disagree with only one of his conclusions.

At the trial of the cause defendant did not take the stand on his own behalf. He did, however, in defense, present a character witness who was a professor of sociology and criminology at Michigan State Normal College (now Eastern Michigan College), who testified that he had been connected with the college for 27 years; that he had known the defendant, Mr. Dorrikas, for 11 years, and had business relations with him during that whole period.

He further testified that defendant's reputation for honesty and integrity in the area of the city of Ypsilanti in which defendant lived and carried on his business was good. The following cross-examination was carried on by the prosecuting attorney:

"*Q.* Dr. Thompson, you say you are a professor of sociology and criminology at the Michigan State Normal College?

"*A.* Yes, sir.

"*Q.* And for how long a period has that been?

"*A.* Twenty-seven years.

"*Q.* And you have testified, that Mr. Dorrikas' reputation for honesty and integrity is good? Is that right?

"*A.* Yes, sir.

"*Q.* Now, it has been good during the time that you have known him, is that correct?

"*A.* Yes.

"*Q.* Now, Dr. Thompson, have you ever heard that James Dorrikas was arrested and convicted in Peoria, Illinois, of the crime of disorderly conduct?

"*A.* No, sir.

"*Q.* Have you ever heard, sir, that in Peoria—or in, yes, in Peoria, Illinois, James Dorrikas was arrested for robbery?

"*A.* No, sir.

"*Q.* Have you ever heard that in Milwaukee, Wisconsin, James Dorrikas was arrested for vagrancy?

"*A.* No, sir.

"*Q.* Have you ever heard that he has been arrested for violation of the liquor laws?

"*A.* No, sir.

"*Q.* Have you ever heard that he was arrested in the State of Indiana, and convicted of the crime of bank robbery?

"*A.* No, sir.

"*Q.* Have you ever heard, sir, that in Peoria, Illinois, James Dorrikas was arrestd for contributing to the delinquency of a minor child—for rape?

"*A.* No, sir.

"*Mr. Calder:* That is all, sir.
"*Mr. De Otte:* That is all.
"*The Court:* The defense rests?
"*Mr. De Otte:* That is right."

No objection was made to the cross-examination by defendant's attorney, and no instruction was given the jury by the trial judge as to the purpose of such cross-examination and the limited consideration that they could give to it.

Defendant in his motion for new trial, and on appeal here, contends that this cross-examination and the failure of the trial court to properly instruct the jury were prejudicial to his rights.

Ordinarily where no timely objection was made to the introduction of such testimony and no request to charge was made, this Court would not examine the points relied upon for reversal, and except under unusual circumstances we have no disposition to relax this rule. Nevertheless, as in a number of previous cases, this Court, in the exercise of supervisory control over all litigation, has often asserted the right to consider manifest and serious errors although objection was not made by the party who appeals. The inherent power of this Court to prevent fundamental injustice is not limited by what appellant is entitled to as a matter of right. *People* v. *Steeneck*, 247 Mich 583; *People* v. *Holmes*, 292 Mich 212; *People* v. *Kelsey*, 303 Mich 715.

While it is admitted that the general rule seems to be well established that a character witness who has testified to the good reputation of the defendant in a criminal case may be asked on cross-examination, for the purpose of testing his credibility and indicating the weight to be given to his testimony, whether he has heard reports of prior conduct on the part of defendant tending to affect his reputation for honesty and integrity, it is equally well established

that such cross-examination shall be limited as to time and, in some instances, place. The admissibility of cross-examination of this type and its effect has been the subject of comment on the part of textbook writers and other students of the law for a number of years. The number of decisions of appellate courts, both in the State of Michigan and other States of the union as well as the United States supreme court, indicates to even the casual observer that this particular field of the law has been a very controversial one. This undoubtedly has resulted from trying to write fair and just rules for the conduct of criminal cases, which would preserve the presumption of innocence surrounding a defendant in a criminal case and preserve from prejudice the constitutional rights of a defendant who does not take the stand, while at the same time making it possible for the authorities whose duty and responsibility it is to prosecute those, thought to be guilty of crime, to have a fair opportunity to learn whether or not witnesses who testify as to the character and reputation of a defendant have adequate knowledge of this reputation, and to test their credibility as witnesses so that a jury may arrive at the proper weight to be given to their testimony.

It seems to us that appellate courts ordinarily have very wisely left this responsibility with the trial judge and have allowed him considerable discretion in determining whether or not particular questions may be asked of such a witness, and have wisely relied upon the trial judge to properly instruct the jury in this regard. Ordinarily we would not believe in an appellate court substituting its judgment on this question for that of the trial court. However, as in this case, where no instruction has been given the jury, and where there is nothing in the record to show whether the trial court was informed as to when, if at all, these alleged acts took

place, where so far as the record is concerned, it might well be only a figment of the imagination of the prosecuting attorney, used for the definite purpose of prejudicing the minds of the jurors, we cannot refuse to act.

It would seem that the trial judge failed to use proper care to protect the defendant's rights.

Justice Jackson, speaking for the United States supreme court in *Michelson* v. *United States,* 335 US 469 (69 S Ct 213, 93 L ed 168), with reference to limiting cross-examination of character witnesses in regard to hearsay testimony, said (p 480):

"Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse."

Justice CARR quotes at considerable length from the *Michelson Case* in support of his opinion. However, in order to properly understand the decision in that case, it seems to me that greater discussion is needed. In this case Justice Jackson delivered the opinion of the court. Mr. Justice Frankfurter wrote a concurring opinion, in which he said (p 487):

"Despite the fact that my feelings run in the general direction of the views expressed by Mr. Justice Rutledge in his dissent, I join the court's opinion."

Justice Frankfurter felt that great leeway should be given to the trial judge. Justice Rutledge was joined by Justice Murphy in the dissenting opinion in which he wrote to establish what he called the only fair rule to foreclose the entire line of inquiry concerning specific incidents in the defendant's past, both on cross-examination and on new evidence in rebuttal.

Justice Jackson, in the *Michelson Case,* said (pp 471, 472):

"Defendant called 5 witnesses to prove that he enjoyed a good reputation. Two of them testified that their acquaintance with him extended over a period of about 30 years and the others said they had known him at least half that long. A typical examination in chief was as follows:

"'*Q*. Do you know the defendant Michelson?

"'*A*. Yes.

"'*Q*. How long do you know Mr. Michelson?

"'*A*. About 30 years.

"'*Q*. Do you know other people who know him?

"'*A*. Yes.

"'*Q*. Have you had occasion to discuss his reputation for honesty and truthfulness and for being a law-abiding citizen?

"'*A*. It is very good.

"'*Q*. You have talked to others?

"'*A*. Yes.

"'*Q*. And what is his reputation?

"'*A*. Very good.'

"These are representative of answers by 3 witnesses; 2 others replied, in substance, that they never had heard anything against Michelson.

"On cross-examination, 4 of the witnesses were asked, in substance, this question: 'Did you ever hear that Mr. Michelson on March 4, 1927, was convicted of a violation of the trade-mark law in New York City in regard to watches?' This referred to the 20-year-old conviction about which defendant himself had testified on direct examination. Two of them had heard of it and 2 had not.

"To 4 of these witnesses the prosecution also addressed the question the allowance of which, over defendant's objection, is claimed to be reversible error:

"'Did you ever hear that on October 11, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods?'

"None of the witnesses appears to have heard of this.

"The trial court asked counsel for the prosecution, *out of presence of the jury,* 'Is it a fact according to the best information in your possession, that Michelson was arrested for receiving stolen goods?' Counsel replied that it was, and to support his good faith exhibited a paper record which defendant's counsel did not challenge.

"The judge also on 3 occasions warned the jury, in terms that are not criticized, of the limited purpose for which this evidence was received.[3]" (Emphasis supplied.)

In footnote 3, Justice Jackson said (pp 472, 473);

"In ruling on the objection when the question was first asked, the court said:

" 'I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation of the defendant is being tested. Is that clear?'

"In overruling the second objection to the question the court said:

" 'Again I say to the jury there is no proof that Mr. Michelson was arrested for receiving stolen goods in 1920, there isn't any such proof. All this witness has been asked is whether he had heard of that. There is nothing before you on that issue. Now would you base your decision on the case fairly in spite of the fact that that question has been asked? You would? All right.'

"The charge included the following:

" 'In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been

arrested for receiving stolen goods. I tried to give you the instruction then that that question was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideration only in weighing the evidence of the character witnesses.' "

Justice Jackson further said (p 481):

"The trial judge was scrupulous to so guard it in the case before us. He took pains to ascertain, out of presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation. He satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box."

Subsequently, in the opinion dealing with the amount of time that had elapsed since the commission of the previous acts witness was asked about, the Court indicated that the trial judge was allowed a good deal of discretion and indicated that a trial judge, in his discretion, may well exclude inquiry about rumors of an event so remote, unless recent misconduct revived them. Justice Jackson said (p 484) that events a generation old are likely to be lived down and dropped from the present thought and talk of the community and to be absent from the knowledge of younger or more recent acquaintances.

It might also be said our system proposes to give a criminal an opportunity to reform, and if he does reform, in all fairness he should not be subjected to embarrassment for previous mistakes.

In the instant case, if these acts happened at all, they must have happened more than 11 years prior to the trial when defendant was living away from his present community.

The majority opinion in the *Michelson Case* pointed out that 2 of the witnesses dated their acquaintance with the defendant as commencing 30 years before the trial. Defendant, on direct examination voluntarily called attention to his conviction 20 years before. The court under these circumstances could not say that the admission into evidence of this past conviction was an abuse of discretion. Under these safeguards, above set forth, Justice Jackson affirmed the judgment of the lower court.

It is to be noted that the *Michelson Case* was decided December 20, 1948. Since that time 2 cases have been decided by courts of appeal, one in October, 1956, the case of *Roberson* v. *United States* (CCA), 237 F2d 536. Judge Rives there said (p 540):

"The district court and this court are, of course, bound by the majority opinion of the supreme court, but a careful reading of that opinion persuades us to the view that it marks out the extreme limits of permissible cross-examination. Further, the supreme court itself implied essential safeguards which have not been observed in the present case. For example, the court made repeated note of the fact that the trial court had ascertained *out of the presence of the jury* that the arrest or conviction had actually occurred. 335 US 472, 481 (69 S Ct 216, 221, 93 L ed 171, 172, 176), and footnote 18 on the latter page."

Further on in the opinion Judge Rives quotes the words of Judge Harlan, now Mr. Justice Harlan, in regard to government counsel conducting the prosecution (p 541):

"'We may also add that it is incumbent on prosecuting attorneys to be scrupulous in not stepping out of bounds on this sort of cross-examination.' *United States* v. *H. Wool & Sons* (CCA), 215 F2d 95, 99."

Concluding his opinion, Judge Rives said (pp 541, 542):

"In his final charge to the jury, the learned district judge ably and correctly instructed them. We apprehend, however, that it was then too late to cure the repeated errors. Before we can accord entire verity to a verdict of guilty, that verdict must result from a trial fairly conducted in every material respect in accordance with the rules of law, and, inadvertently this trial was not so conducted."

The court reversed the conviction and remanded the case for a new trial.

Also, in the case of *United States* v. *Phillips* (CCA), 217 F2d 435, decided December 2, 1954, in which the court reversed a conviction and remanded for new trial on other grounds, the court had this to say in the opinion of Judge Major (pp 443, 444):

"We perhaps should not conclude without mention of another matter which under the circumstances would be difficult to excuse as nonprejudicial error. The defendant called 8 character witnesses who testified as to his good reputation among his friends and associates for honesty, integrity and fair dealing. On cross-examination of 1 of such witnesses, a Mr. Gallagher, the following questions were asked by the government:

"'Did you hear that in the year 1934, well, specifically, that in January of 1934, in September of 1934, and in October of 1934, Mr. Phillips was arrested

for issuing checks to defraud. Did you ever hear of that? * * *

" 'Did you hear that in July of 1934 and in September of 1934, Mr. Phillips had been arrested for obtaining money under false pretenses? * * * These are 2 additional. Did you ever hear of that?'

"Defendant objected to these questions on the basis that they were highly prejudicial, which objection was overruled by the court. To each question the witness answered, 'No,' that is, that he had never heard of the charges implied by the questions. At the time these questions were thus propounded and answered, no instruction was given to the jury as to their relevancy or as to the purpose for which they could be considered. The record is entirely devoid of any showing as to whether the defendant had in fact been arrested, as implied by the questions. Neither does the record disclose except by vague inference that the court was at any time advised that the government was prepared to prove such arrests. The most that is shown is that after the conclusion of the trial, in a colloquy between the court and counsel on defendant's motion for a new trial, the court in response to an inquiry by government's counsel stated that he recalled that there was submitted to him during the trial the *Michelson Case, Michelson* v. *United States,* 335 US 469 (69 S Ct 213, 93 L ed 168).

"More than that, the final charge to the jury made no reference to the cross-examination of this character witness or the purpose for which it was permitted. It is true that the government tendered an instruction (No. 11–A) purporting to state the reason for and purpose of the cross-examination. The instruction as proposed was objected to by the defendant on the basis that it assumed a number of matters which were not in proof, including the assumption that the defendant had actually been arrested, as implied by the questions. The court refused to give the instruction and in doing so stated, 'There is not any proof in the case that could be pro-

duced that defendant was arrested.' It is now argued by the government that the court's refusal to give the instruction under the circumstances forecloses the defendant from claim of error on appeal. With this we do not agree. In the first place, it is doubtful if any instruction could have been given at that late time which would have dissipated the harmful effect of the cross-examination. In the second place, when the instruction was refused by the court because of its form, the duty devolved upon the government to tender a proper instruction. Upon its failure to do so, we think it was the duty of the court of its own volition to instruct the jury as to the purpose for which the cross-examination was permitted, as well as the extent to which it could be considered by the jury.

"Both sides rely upon the *Michelson Case* in support of their positions on the cross-examination under discussion. It is true the court in that case approved a similar cross-examination under the facts and circumstances before it. There, however, the trial court at the time of the occurrence twice instructed the jury as to the limited purpose for which the examination could be utilized and again so instructed the jury in its final charge, see footnote to *Michelson, supra,* 335 US at pages 472, 473 (69 S Ct at pages 216, 217, 93 L ed at page 172). The supreme court, referring to the precautionary means employed by the trial court, stated 335 US at pages 480, 481 (69 S Ct at page 221, 93 L ed at page 176).

" 'Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse. The trial judge was scrupulous to so guard it in the case before us. He took pains to ascertain, out of presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation. He satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed

or asking a groundless question to waft an unwarranted innuendo into the jury box.'

"In the instant case no such precautionary measures were taken. In fact, there were no precautionary measures of any kind. For aught that is disclosed by the record, the jury was at liberty to consider the damaging implication inherent in the government's cross-examination for any and all purposes."

It is apparent from a reading of these cases that the appellate courts mentioned believe the United States supreme court would not permit the type of cross-examination carried on in the instant case without (1) the trial judge determining, in the absence of the jury, whether or not the criminal acts actually took place, the time of their commission, and a determination as to whether they were relevant to the issue being tried, and (2) the trial judge making a careful instruction to the jury as to the reasons testimony as to the criminal acts is being admitted.

We need not extend this opinion for further discussion of the questions and facts involved. With due respect to the learned circuit judge who presided at this trial, it is to be pointed out that he was somewhat handicapped by failure of counsel to make objections to the questions. Regardless of all other questions and considerations, however, it is the heavy responsibility of a reviewing court to ascertain if a defendant has had a fair and impartial trial, a trial free from prejudicial errors. In the instant case, it is our considered judgment that the defendant did not have such a trial. Since the record discloses the trial judge's failure to make inquiry out of the presence of the jury as to whether such acts were actually committed and as to the time and place of the acts, and the trial judge's failure to properly instruct the jury as to the purpose of such testimony and the limitations upon the use they might make of

it, defendant was deprived of a fair trial.

The conviction appealed from is reversed and the cause is remanded for new trial.

SMITH, BLACK, EDWARDS, and VOELKER, JJ., concurred with KAVANAGH, J.

CARR v. KALAMAZOO VEGETABLE PARCHMENT COMPANY.

1. ARBITRATION AND AWARD—SCOPE OF AWARD.

An award of an arbitrator must conform to the submission and may cover no matters outside the submission to arbitration as the arbitrator derives his power solely from the agreement between the parties.

2. SAME—EQUITY.

An arbitrator is not a chancellor and possesses no equitable powers except as the agreement of submission may expressly grant such.

3. SAME—SCOPE OF RELIEF.

An arbitrator has no right to dictate specific types of relief outside the scope of the submitted issue or issues, once he has decided the latter.

4. SAME—DISCHARGE OF EMPLOYEE—SENIORITY—BACK PAY—SCOPE OF ARBITRATOR'S AWARD.

The authority of an arbitrator was exhausted when he determined the question as to whether plaintiff had been unjustly dis-

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 3 Am Jur, Arbitration and Award §§ 122, 123.
[2] 3 Am Jur, Arbitration and Award §§ 85, 92.
[3] 3 Am Jur, Arbitration and Award § 123.
[5] 31 Am Jur, Labor §§ 119, 121.
[5] Matters arbitrable under arbitration provisions of collective labor contract. 24 ALR2d 752.
[6] 19 Am Jur, Estoppel § 190.
[6] Pleading waiver, estoppel, and res judicata. 120 ALR 8.

charged, the collective bargaining agreement as distinguished from the agreement to arbitrate, having provided as to reinstatement, restoration of seniority rights and back pay in the event an employee's discharge was found to be unwarranted, hence, the arbitrator's denial of back pay was without his authority.

5. MASTER AND SERVANT—UNJUST DISCHARGE—BACK PAY—ARBITRATION—COLLECTIVE BARGAINING AGREEMENT—ESTOPPEL.

Plaintiff employee who was found by arbitrator to have been unjustly discharged by defendant employer was entitled, under collective bargaining agreement to treat arbitrator's decision as merely a determination of the submitted issue of unjust discharge and was entitled to disregard the arbitrator's denial of back pay, where the matter of back pay in such event had been provided for in the collective bargaining agreement, hence, his acceptance of re-employment did not raise an estoppel to recovery of back pay.

6. ESTOPPEL—PLEADING—MOTION TO DISMISS.

The defendant in a law case may not interpose the affirmative defense of estoppel and, on the strength of such defense, move to dismiss the plaintiff's declaration (Court Rule No 18 [1945]).

DETHMERS, C. J., and CARR and KELLY, JJ., dissenting.

Appeal from Kalamazoo; Fox (Raymond W.), J. Submitted June 10, 1958. (Docket No. 21, Calendar No. 47,588.) Decided October 13, 1958.

Action by James Carr against Kalamazoo Vegetable Parchment Company, a Michigan corporation, for wages lost because of alleged illegal discharge. Cause dismissed on motion. Plaintiff appeals. Reversed.

Ford, Kriekard & Brown (*Gordon H. Kriekard,* of counsel), for plaintiff.

Sharpe, Stapleton, Huff, Adams & Burgie (*John S. Adams,* of counsel), for defendant.

KELLY, J. (*dissenting*). Plaintiff seeks back wages which he claims defendant owes him because of illegal discharge in violation of a collective bargaining agreement between defendant and plaintiff's union, the International Brotherhood of Paper Makers and Parchment Local No 323.

Article 5 (i) of the agreement provided:

"If the employee is proved to have been unjustly discharged, he shall be reinstated with full seniority and shall receive pay for all time lost from work."

Plaintiff was discharged by defendant July 21, 1956. Plaintiff and defendant, being unable to adjust the matter under the collective bargaining agreement, agreed to the following arbitration agreement:

"On July 21, 1956, James Carr, a member of Parchment Local No. 323, International Brotherhood of Paper Makers, AFL–CIO, entered a grievance because he was terminated by the KVP Company. The KVP Company terminated this employee for cause, and the committee representing Parchment Local No. 323 did not feel there was justifiable evidence to warrant discharge. This grievance was not settled in any of the steps as provided for in the contract prior to arbitration, and therefore the parties in this agreement agreed to submit the dispute to arbitration."

On September 25, 1956, the arbitration hearing was held, all parties agreeing to adhere to the decision rendered by the arbitrator appointed by the American Arbitration Association, rather than the 3 arbitrators specified by the collective bargaining agreement. On October 23, 1956, the arbitrator rendered his opinion, in which he stated:

"Under all of the circumstances and the reasons set forth above, the arbitrator is of the opinion that while the grievant was guilty of an offense that amounted to violation of the shop rule against dis-

obedience and that he also may be considered to have neglected his duty, the imposition of the penalty of discharge was not justifiable under the circumstances. * * *

"The grievant, James Carr, is to be immediately reinstated to work with full seniority but without any back pay."

Plaintiff returned to work on October 25, 1956, but claimed his discharge had been found to be not justified and that, therefore, he was entitled to the loss of back pay. To recover this back pay he filed this suit on December 17, 1956.

Defendant filed its motion to dismiss, alleging that the pleadings failed to state a cause of action and that furthermore, plaintiff, having accepted the benefits of the award, cannot now dispute the validity of such award.

Raymond W. Fox, circuit judge for the county of Kalamazoo, granted the motion and in his written opinion stated:

"The award of the arbitrator reads as follows: 'The grievant, James Carr, is to be immediately reinstated to work with full seniority but without any back pay.' In the opinion dictated by the arbitrator, he finds that although the grievant was guilty of an offense which amounted to a violation of the shop rule against disobedience and that he had neglected his duty, the imposition of the penalty of discharge was not justifiable. Therefore, in the opinion of the arbitrator, 'it would be the better and more fair view for an arbitrator to fit the penalty to the offense within the range standard set by the parties rather than hold himself estopped from doing so where the parties have not instructed him otherwise.' For this reason the award reinstates the plaintiff with full seniority but without any back pay.

"By returning to work under the award, plaintiff received substantial benefits from the award. His actions and the actions of the defendant in reinstat-

ing him with full seniority amounted to an acceptance of the award, and in the opinion of this court he should be held and he is held to have waived any right which he might otherwise have had to object to the award. (See 3 Am Jur, Arbitration and Award, § 133, p 956.) 'One receiving the fruits of an award should not be allowed thereafter to question its validity.' It is argued by counsel for the plaintiff that the award is valid in part and void in part, and that the acceptance by the plaintiff was only of the valid portion of the award. Is the award divisible as plaintiff contends? In the opinion of the court it is not. It clearly was not intended to be divisible by the arbitrator, and in the opinion of this court it is not divisible."

This Court agrees with the trial court and we, therefore, should affirm the order granting the motion to dismiss. Costs to appellee.

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

BLACK, J. I cannot agree with my Brother. His opinion does not touch the initial and, as I believe, decisive question posed below on motion to dismiss. That question is whether—accepting the well-pleaded allegations of plaintiff's declaration as true—the arbitrator was possessed of authority to determine anything over and beyond the submitted issue of unjust discharge.

Nothing is better settled, in the legal area of common law and statutory arbitration, than that the award must conform to the submission and that it may cover no matters outside the submission (3 Am Jur, Arbitration and Award, §§ 122, 123, pp 944–946). The reason stems from a universal holding—"that the arbitrator derives his power solely from the agreement between the parties." (*Acme Cut*

Stone Co. v. *New Center Development Corp.*, 281 Mich 32, 45 [112 ALR 865].) Here the arbitrator assumed to determine that which the shop contract has settled, that is, plaintiff's right to back pay should his discharge be found "unjust." He—the arbitrator—had no right to do so. It follows that the arbitrator's readily severable appendage (denying back pay) must be regarded as a nullity.

An arbitrator is not a chancellor. He possesses no equitable powers excepting as the submission may expressly grant such. He is in no position to mollify, qualify, or straddle, and he has no right to dictate specific types of relief outside the scope of the submitted issue or issues, once he has decided the latter.

In this case the plaintiff employee declares on a lawful provision of a shop contract reading: "If the employee is proved to have been unjustly discharged, he shall be reinstated with full seniority and shall receive pay for all time lost from work." As previously indicated, such contract assures the discharged employee all seniority rights, and back pay, once it has been found by the provided procedure that his discharge was unwarranted. Pursuing agreed procedure, the question of plaintiff's claimed unjust discharge was put to the arbitrator for determination. He decided that issue by ruling that plaintiff had been unjustly discharged. His jurisdiction and authority stopped there and the shop contract took over for admeasurement of plaintiff's rights.

Turning now to the question of estoppel arising, as claimed, from the acceptance by plaintiff of reemployment. Plaintiff was at liberty to treat the arbitrator's decision as no more and no less than a decision of the submitted issue of unjust discharge. Such was plaintiff's right as a matter of contract law. He returned to work at once (had he not done

so, he might have lost his contracted rights) and looks now to a court of law to provide him with that which is called for by the shop contract (in event of unjust discharge), that is, "pay for all time lost from work."

The question of estoppel as pleaded by defendant* was not properly before the circuit court on motion to dismiss. It is not before this Court in turn. The defendant in a law case may not interpose the affirmative defense of estoppel and, on strength of such defense, move to dismiss the plaintiff's declaration. Court Rule No 18 (1945) specifies the instances in which a defendant may move to dismiss where defensively pleaded defects do not appear upon the face of the declaration or bill. The present defense (that plaintiff having gone back to work is estopped to sue for back wages) is not included within or contemplated by the procedural purview of said Rule No 18. Defendant's motion to dismiss thus was out of order, so far as concerns reliance on "acceptance of benefits" and alleged estoppel to sue.

It is hardly necessary to say that the undersigned would decide this appeal solely by appraisal of plaintiff's declaration. On its face and as against the motion to dismiss, that declaration states a cause of action.

I vote to reverse with remand for entry of order denying motion to dismiss. Costs to plaintiff.

SMITH, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred with BLACK, J.

* Defendant's affirmative defense, as pleaded, reads this way: "That on the 25th day of October, 1956, defendant, acting in accord with the terms of said award, offered employment to said plaintiff, which employment plaintiff that day accepted and which employment continues to the date hereof. That plaintiff having accepted the benefits of said award cannot now dispute the validity of the same."

In re EDDY ESTATE.

APPEALS BY CYNTHIA MILLS CLEVELAND.

1. TRUSTS—ACCOUNTS—TRUSTEE'S FEES—JURISDICTION OF PROBATE COURT.

   Probate court *held,* to have jurisdiction to hear and allow accounts and fees of testamentary trustee of trust set up in will probated in same court after testamentary estate had been closed therein.

2. SAME—TRUSTEE—FRAUD—NEGLIGENCE—EVIDENCE.

   Claim of fraudulent and negligent conduct on part of testamentary trustee in the administration of the trust *held,* not sustained, under record presented.

3. STATUTES—AMENDMENT—PROCEDURE.

   Changes in a statute affecting procedure in litigating a matter apply to existing proceedings theretofore commenced (PA 1939, No 288, ch 4, § 33, as amended by PA 1947, No 50).

4. APPEAL AND ERROR—CIRCUIT COURT—PROBATE COURT.

   The scope of an inquiry on appeal from an order of the probate court is limited to the matters raised by the notice of appeal and reasons assigned in support thereof, the hearing in the circuit court not being a hearing *de novo.*

REFERENCES FOR POINTS IN HEADNOTES

[1] 54 Am Jur, Trusts §§ 507, 527.
[2] 54 Am Jur, Trusts §§ 300, 311, 321.
[3] 50 Am Jur, Statutes § 468.
[4] 3 Am Jur, Appeal and Error § 812.
[5] 54 Am Jur, Trusts §§ 512, 532.
[6] 54 Am Jur, Trusts § 523.
[7] 54 Am Jur, Trusts § 527.
[8] 54 Am Jur, Trusts § 509.
[8] Necessity of proof by trustee that charges or expenses for which he claims credit upon an accounting were proper disbursements. 13 ALR 364.
[9–11] 54 Am Jur, Trusts § 530.
[12] 14 Am Jur, Costs § 71.

5. TRUSTS—ACCOUNTS—FEES—ORDERS—RECITALS—WAIVER OF DEFICIENCIES—STATUTES—AMENDMENT.

An appellant who failed to question the recitals in probate court order approving a testamentary trustee's account and fixing his fee, made while statute required recital in detail of the extraordinary services for which the allowance of an extraordinary fee was made and of the reasons for considering the case an unusual one and void if the order did not contain such recitals, waived the deficiencies, especially after statute was amended to remove provision voiding an order not containing the recitals (PA 1939, No 288, ch 4, § 33, as amended by PA 1947, No 50).

6. SAME—ATTORNEY FEES—REMAINDERMAN.

Attorney's fees for trust remainderman appellant's counsel, sought in the amount of $46,000 for services rendered incident to testamentary estate and later trust estate matters in courts other than the one in which the fees were sought to be allowed, were properly denied.

7. SAME—FEES—SUPREME COURT—DISCRETION OF COURT.

Only in case of manifest abuse of discretion on the part of a circuit court in reviewing the allowance of attorney, executor and trustee fees by the probate court will the decision of the trial court be overruled by the Supreme Court.

8. SAME—ACCOUNTS—BURDEN OF PROOF—ATTORNEY FEES.

The failure to periodically render statements in regard to time and service by a testamentary trustee casts doubts on charges and fees, the burden of proof being on the trustee for attorneys' fees by way of showing valuable results even though they be negative.

9. SAME—TRUSTEE'S FEES—ACCOUNTS—RECORD.

Allowance of $35,000 as trustee's fee for administration of trust assets of upwards of a half million dollars for period of 7-1/2 years during which the trust was involved in much litigation in State and Federal trial and appellate courts *held,* supported by record, notwithstanding annual reports had not been filed for the period.

10. SAME—ATTORNEY FEES—RECORD.

Attorney fees totalling $15,500 for testamentary trustee are approved, where record supports finding that such fees were reasonable.

11. SAME—ATTORNEY FEES—ADDITIONAL TESTIMONY AS TO REASONABLENESS.

Judgment as to attorney fees in the sum of $22,500 for testamentary trustee is reserved for submission of proofs to circuit court commissioner and forwarding to the clerk of the Supreme Court for purposes of enabling Supreme Court to determine reasonableness.

12. COSTS—CONSOLIDATED APPEALS—EVIDENCE—ATTORNEY FEES.

The question of costs on consolidated appeals of various orders involving a large testamentary estate and trust is deferred until final determination, where opportunity is afforded for supplying testimony as to reasonableness of attorney fees.

Appeal from Saginaw; Huff (Eugene Snow), J. Submitted June 5, 1958. (Docket Nos. 31–36, Calendar Nos. 47,606–47,611.) Decided October 13, 1958.

Cynthia Mills Cleveland, a remainderman of the testamentary trust established by the will of Arthur D. Eddy, deceased, filed objections to the allowance of annual accounts and the allowance of certain fees and expenses in connection with its administration, and instituted various proceedings for injunctive relief and mandamus against Second National Bank & Trust Company of Saginaw, Michigan, a Federal banking corporation, and the probate judge of Saginaw county to accomplish a complete review of the administration and the invalidation of certain orders of the probate and circuit courts. From orders dismissing bills and petitions and from orders sustaining probate court allowance of attorney fees and extraordinary trustee's fees, plaintiff appeals. Matters consolidated on appeal. Affirmed, in part, and referred for further testimony. See 356 Mich 120.

William Alfred Lucking, for plaintiff.

John D. Currie, Gilbert A. Currie and *Thomas G. Long,* for defendants.

KELLY, J. Arthur D. Eddy, a resident of Saginaw, died April, 1925, leaving a will and an estate valued at over $3,000,000. The ninth paragraph of the will created a trust of 1/3 of the estate to continue during the lives of Laura S. Eddy and Lila Eddy Doebler, with remainder on the death of the survivor 1/2 to "my said niece, Cynthia Mills Cleveland, if surviving," or, if she were not surviving, to her issue. and the other 1/2 to a charitable trust under paragraph 10 of the will.

A bill of complaint was filed in the Saginaw circuit court on June 8, 1934, by the trustee (Second National Bank & Trust Company of Saginaw) seeking a construction of the will, and appellant, Cynthia Mills Cleveland, was named defendant as remainderman. She removed the case to the Federal court and filed a cross bill charging that the trustee's negligence caused the trust estate to suffer large losses and, further, that the bank had used moneys belonging to the trust for the benefit of the bank.

On February 7, 1939, appellant's cross bill was dismissed and, in addition to taxable costs, the bank's litigation expenses were charged against appellant's interest in the trust. From this dismissal and order, appellant appealed, with a companion case, to the United States court of appeals, 6th circuit, and the judgments were affirmed February 14, 1941 (*Van Auken* v. *Second National Bank & Trust Co. of Saginaw, Michigan,* 117 F2d 938, 1009); later certiorari was denied by the United States supreme court on June 2, 1941 (313 US 593, 594 [61 S Ct 1118, 1119, 85 L ed 1547]).

To understand this appeal the writer of this opinion deems it advisable to set forth a brief and condensed history of litigation that followed:

November 28, 1941: Appellant filed her petition in Saginaw probate court seeking delivery of her legacy and final accounting and for an order dis-

regarding the Federal court's judgment. The probate court denied her petition and appellant appealed to the circuit court where the probate court's order of dismissal was affirmed. Appellant appeals to this Court and said appeal is now before us as 1 of 5 appeals that have been consolidated as 1 general appeal.

January 15, 1942: Appellant filed her bill of complaint in the Saginaw circuit court seeking a trial *de novo* on all issues submitted to and determined by the Federal court. The trustee bank sought and obtained a writ of prohibition, which was granted by this Court (*Second National Bank & Trust Company of Saginaw* v. *Reid,* 304 Mich 376). Appellant's petition for certiorari was denied by the United States supreme court on October 11, 1943 (320 US 745 [64 S Ct 48, 88 L ed 443]).

August 24, 1945: The bank filed a bill in the Saginaw circuit court for partition of the real estate as between the tenth paragraph trust, testator's widow and the beneficiaries of the ninth paragraph trust. Cynthia Mills Cleveland appeared, contested the proceeding and, after decree entered February 13, 1947, took an appeal to the Michigan Supreme Court. She later took the portion partitioned to her and dismissed the appeal. Her portion was of an approximate value of $180,000.

November 8, 1945: Order entered by the Saginaw probate court, counsel for Cynthia Mills Cleveland being present, for distribution of the assets of the ninth paragraph trust except $100,000 par value of United States obligations belonging to the trust "as security for any sums which said testamentary trustee shall be finally held to be entitled to charge against or have reimbursement for out of the assets of said trust." The order was expressed to be without prejudice to the claims and contentions of Cynthia Mills Cleveland therein referred to. The assets

so dealt with had a then value of $700,000 nearest round figure, including the 1/6 interest in the real estate partitioned as stated above. All of said assets, except said $100,000, have been taken by said Cynthia Mills Cleveland.

November 24, 1945: Saginaw probate court, after hearing, allowed the annual accounts of the bank as trustee and fixed the fee of trustee. This order was appealed and the circuit court's approval is now on appeal to this Court.

January 22, 1946: Appellant filed her bill of complaint in the Wayne circuit court, alleging that the Saginaw probate court was without jurisdiction to enter the orders of November 8th and November 24th, above referred to, and seeking a mandatory injunction requiring the bank to turn over the $100,000 retained. The bank filed a petition for writ of prohibition against further proceedings in Wayne county, which was granted by this Court on April 6, 1948 (*Second National Bank & Trust Co.* v. *Wayne Circuit Judge,* 321 Mich 28).

May 26, 1948: Appellant filed a bill in the Saginaw circuit court asking that the probate court be prohibited from proceeding further in regard to paragraph 9 of the trust. This is now before us on appeal.

June 14, 1948: Appellant filed in the Saginaw circuit court a petition for mandamus seeking to compel the probate judge to vacate the orders of November 8th and November 24th, referred to above. This matter is now before us on appeal.

March 16, 1950: Appellant filed a bill in the Saginaw circuit court charging the officers and attorneys of the bank with fraud and wrongdoing in the administration of the ninth paragraph of the trust, and seeking to hold them personally liable. This suit is still pending in the circuit court.

August 21, 1950: Appellant filed petition in probate court to surcharge the bank as trustee. Petition

denied by both the probate court and the circuit court, and now on appeal to this Court.

May 21, 1956: Bill filed in Saginaw circuit court against trustee, involving the $100,000 fund granted to the bank as security. This case is still pending and is not on appeal here.

Five cases are on appeal here, as noted above. These cases were all pending in the Saginaw circuit court and were disposed of by the October 28, 1957, decree and subsequent orders. Claims of appeal were filed here on November 18, 1957.

Appellant contends the Saginaw probate court did not have jurisdiction to approve the accountings and make allowances as contained in the order of November 24, 1945.

Ten years after testator's death, the administration was closed by the probate court's order of May 10, 1935. Approximately 1 year previous (June 8, 1934) the bank sought a construction of the will in the circuit court and appellant removed the case to the Federal court on the grounds of diversity of citizenship and filed her cross bill, as referred to above. Through appellant's activities this Federal court action did not terminate until June 2, 1941, when the United States supreme court denied relief. Between June 2, 1941, and January 28, 1946, when appellant filed her bill of complaint in the Wayne circuit court, we have noted above the litigation caused by appellant filing petition in the probate court and bills of complaint in the Saginaw circuit court, or her appeals to the circuit court, Supreme Court, circuit court of appeals and the United States supreme court.

The Wayne circuit court action resulted in this Court granting a writ of prohibition, which definitely established the jurisdiction of the Saginaw probate court and that court's right to enter the November

24, 1945, order, as is established from the following, set forth in the judgment:*

"The probate court for the county of Saginaw at the time of the entry of its orders of November 8, 1945, and November 24, 1945, in the matter of the trust under the ninth paragraph of the will of Arthur D. Eddy, deceased, had sole and exclusive jurisdiction as against all other courts at law or in chancery of the State of Michigan to hear and determine all questions and matters remaining open between the parties to said trust in relation to the administration of said trust, the handling of the assets and funds thereof, the accounting by the trustee for its acts and doings, expenditures and disbursements made, the allowance of compensation to the trustee and the time and manner of distribution of the property of said trust and the closing thereof; and said probate court will continue to have such sole and exclusive jurisdiction until said trust shall be finally closed on the records of said probate court save only as appeal to the circuit court for the county of Saginaw (in manner and effect as provided by statute) has been heretofore taken from said order of November 24, 1945, or may be taken from any order hereafter made by said probate court in the premises."

In *Second National Bank & Trust Co.* v. *Wayne Circuit Judge,* 321 Mich 28, 41, 43, this Court stated:

"It appears that after the Federal court judgment of February 7, 1939, had been affirmed on appeal by the United States circuit court of appeals on February 14, 1941, and certiorari denied by the United States supreme court on June 2, 1941, Mrs. Cleveland on November 28, 1941, filed a petition in the Saginaw county probate court for an order requiring the bank as trustee to make immediate delivery of all trust assets then in possession of the bank due her. It also appears that under the Federal court

* 19 Supreme Court Journal, p 256.—REPORTER.

judgment there was a provision for retention of the shares of stock of C. K. Eddy & Sons until such expenses and disbursements had been determined and paid. * * *

"The above order was an adjudication that the probate court of Saginaw county could not order something done contrary to the unperformed provisions of the Federal court judgment. It was not an adjudication that the probate court could not hear other accounts of the bank as trustee."

We see no merit in appellant's contention that the probate court did not have jurisdiction to issue the order of November 24, 1945.

Did the probate court and circuit court err in refusing to agree with appellant that the trustee bank had negligently administered the trust and used trust funds for the trustee bank's benefit?

Appellant made a similar claim in the Federal matter which was tried before Federal Judge Tuttle, and in the brief submitted in this appeal, charges the trustee with "making and carrying out its excessively dangerous scheme (in the first Federal testamentary trustee's equity accounting action, before Hon. Arthur J. Tuttle) of hiding and covering up its many serious speculative losses in the Eddy trusts." In her brief, appellant further charges: "The lower Federal court covered this up by a Federal judgment on February 7, 1939, * * * which judgment protected trustee bank from liability for speculative losses of about $800,000 as shown by the Wooden and Benson audit of 1936. Those were the real reasons for this trustee bank continuing C. K. Eddy & Sons in existence from 1939 to 1945—until prices and values of assets of C. K. Eddy & Sons had partially recovered, so as to show, by the then badly depreciated value of the American dollar—much smaller losses."

When Judge Tuttle refused appellant's claim of wrongdoing and culpable negligence, an appeal was taken to the circuit court of appeals, where Judge Tuttle's decision was approved. Not content with the Federal court's finding, appellant sought a determination in Michigan courts by filing her 93-page bill of complaint (January 15, 1942) seeking an overthrow of the Federal order of February, 1939.

This Court commented on this charge of fraud and wrongdoing in our decision in *Second National Bank & Trust Company of Saginaw* v. *Reid,* 304 Mich 376, 393, 395, as follows:

"A reading of the amended bill of complaint, the interlocutory order, the findings of the district judge, the judgments, shows that the charge of fraud in this respect is utterly unfounded. * * *

"The record itself before us negates such fraud, or any other fraud."

The trustee bank has been in the trust business since 1915 and has handled and administered over 1,000 trusts. This bank has never been charged with fraud or mismanagement of any trust estate until the claim was first made by appellant in this case. Appellant failed to sustain her charges that trustee bank was guilty of fraudulent and negligent conduct in administering the trust.

Did the lower court err in not finding that the probate order (November 24, 1945) was void because trustee bank failed to comply with PA 1939, No 288, ch 4, § 33 (Stat Ann 1943 Rev § 27.3178 [284])?

The statute requirement referred to provided that the order "recite in detail the extraordinary services for which such allowance is made, giving the amount allowed for each item thereof, or the reasons for considering the case one of unusual difficulty or responsibility; and in case the order does not contain such

recitals as herein required, the same shall be void and of no effect."

The order of November 24, 1945, recites that "a fair and reasonable charge for the services rendered by the said trustee in the care and management of said estate from May 10, 1938, to the present time, and including the litigation in the Federal courts and in the Michigan courts, is $35,000."

In taking her appeal to the circuit court, appellant did not raise a question of sufficiency of recitals in the order, and when the matter was before the circuit court PA 1947, No 50, had amended the prior act by removing the provision voiding an order which did not contain the required recitals.* In *In re Donovan's Estate,* 266 Mich 362 (91 ALR 1418), we held that changes in procedure apply to existing proceedings.

Appellant's 10-page appeal did not question the sufficiency of the recital and was not before the circuit court.

In *In re Charles' Estate,* 250 Mich 5, 8, this Court said:

"The failure of contestant to object to the character or form of the petition and order, at the hearing in probate court and in her claim of appeal, worked a waiver of the deficiencies in them."

In *In re LaFreniere's Estate,* 316 Mich 285, 290, we held:

"On the appeal the scope of the inquiry was limited to the matters raised by the notice of appeal and reasons assigned in support thereof. *In re Murray's Estate,* 219 Mich 70. It was, in consequence, not a hearing *de novo.*"

The court did not err in refusing to find the probate order void.

* See, currently, CL 1948, § 704.33 (Stat Ann 1957 Cum Supp § 27.3178[284]).—REPORTER.

Did the court err in refusing appellant's counsel's request for $46,000 for legal services?

This $46,000 claim can be split into the $28,000 item for 1934 services; the 1938 claim for $10,000, and the 1942 claim for $8,000.

The $28,000 claim is based on the fact that when the matter was before the Federal court, appellant's counsel, Mr. Lucking, called to the attention of the trustee's attorney that if $540,000 of income were distributed in one taxable year ($180,000 to testator's widow, $180,000 to testator's sister, and $180,000 to the charitable trust), such distribution would result in a Federal income tax against the testator's widow and sister of over $80,000 each, and because "appellant's counsel Lucking objected strenuously to the Federal court and defendant trustee" the plan to distribute the $540,000 was abandoned.

R. Perry Shorts, president of trustee bank, testified:

"They found $540,000 of income was undistributed surplus—undistributed earnings. * * *

"Mr. Lucking warned them that if they would declare that dividend in one taxable year, to Mrs. Doebler and Mrs. Morgan, it would cost them nearly $100,000 in taxes. * * * And upon Lucking telling them that, the entire project fell to the ground."

We quote from Mr. Lucking's brief in regard to the 1938 claim of $10,000 earned fees:

"Lucking's claim of an added $10,000—

"The 1938 scheme—This is similar to * * * (Lucking's claim of $28,000) with a little different set of facts, namely, that in 1938, the bank proposed to distribute an accumulation of income of $477,000 in one year which would have given Doebler (a sister) $160,000, and Mrs. Morgan (widow) $160,000—on which they would have had to pay an income tax of approximately $70,000 each in the year of distribution.

"This ill-advised plan was stopped by Lucking, who thus saved 2 of the legatees $70,000 each—Mrs. Morgan afterwards got the $70,000 from the distribution of corpus, and Mrs. Doebler's daughter (Cleveland) received 1/2 of the distribution of the proposed corpus, and the other half went to the charitable trust.

"In each case the services were valued by Mr. Sprague at 7% of $70,000 or $5,000 or a total of $10,000."

Frederic B. Besimer, Detroit attorney, who was present at the Federal court hearing as attorney for trustee under deed of trust from Lila Eddy Doebler, testified in regard to Lucking's suggestions, as follows:

"Without being able to specify the particularity as to time and place, I have a definite recollection of a discussion between counsel—by counsel I mean yourself (Mr. Lucking), Mr. O'Keefe, myself and I believe Frank Rockwith—when you insisted that this was poor judgment because of the adverse tax effect any such distribution—lump sum distribution—would have. Now I think that that took place in the halls of the district court at Bay City, not only at the time that this particular testimony was introduced but you insisted on that from time to time during the proceedings."

Lucking's claim for $8,000 in fees is based on services rendered in filing his chancery bill (January 15, 1942) to determine the validity of the Federal judgment of February 7, 1939.

The bank amended its June 8, 1934, bill which asked for a construction of the will and a distribution of surplus and income, and in its amendment omitted its prayer in regard to distribution. The record sustains Mr. Lucking that he recommended such a change. Appellant, however, did not file any pleadings concerning this matter before it was withdrawn

and it never was at issue in the case or subject to any hearing. Plaintiff's counsel did not make this claim in the court where, it is claimed, the services were rendered.

The court did not err in denying appellant's counsel's request for attorney fees.

Did the court err in allowing $70,000 fees (trustee $35,000—trustee's attorney $35,000)?

At the outset of the discussion on this question we believe the following legal principles, which we will apply, should be set forth:

In *In re McNamara's Estate,* 166 Mich 451, this Court dealt with the reasonableness of fees for extraordinary services of administrator and attorneys' fees for legal services, and said (pp 453, 456):

"It is said in the brief that the amount of compensation * * * to be paid to certain attorneys for legal services depended upon the reasonableness of the charges, and that whether they were or were not reasonable was a question of fact for a jury. Under repeated decisions of this Court, some of which are referred to in this opinion, it was for the court, and not for a jury, to determine whether the disbursements referred to in the brief should be allowed. * * *

"If there are circumstances disclosed which call for the exercise, first by the probate court, and upon appeal by the circuit court, of the discretion which with respect to the allowance of fees to administrators and others is reposed in those courts, nothing but a manifest abuse of such discretion will be reviewed by this Court."

And in *In re Baldwin's Estate,* 311 Mich 288, 311, we said:

"In the allowance of items of this character as a charge in favor of or against an executor a measure of discretion is vested in the trial court; and it is only when there appears to have been a manifest

abuse of such discretion that the decision of the trial court will be overruled."

See, also, *In re Tolfree Estate,* 347 Mich 272 (65 ALR2d 1008).

The failure to periodically render statements in regard to time and service casts doubts on charges and fees; the burden of proof is on the bank claimant for attorneys' fees; there must be valuable results accomplished and negative results have an important bearing. *Rippey* v. *Wilson,* 280 Mich 233; *Hightower* v. *Detroit Edison Co.,* 262 Mich 1 (86 ALR 509); *Behr* v. *Baker,* 255 Mich 607; *Crary* v. *Goldsmith,* 322 Mich 418.

Appellant contends the $70,000 fee item is a "'punishment' of Cleveland for asking that the said Federal court's jurisdiction in equity to enter the final testamentary accounting Federal equity judgment of February 7, 1939, be determined by this Supreme Court—which this Supreme Court did by its opinion in 304 Michigan 376."

Each year previous to July, 1941, the yearly account filed by the trustee had, after hearing, been allowed by the probate court. Appellant filed objections to the account for the period from July 1, 1941, to April 30, 1942, and no hearing was held on that account or any account thereafter before the hearing resulted in the November 24, 1945, order.

From Lila Eddy Doebler's death (May, 1938) the trustee did not file an account asking for trustee's fees, either ordinary or extraordinary, until the account of March 2, 1945, which requested the fee, which was granted, and which is now before us on this appeal.

The petition, in addition to reciting the ordinary duties of the trustee, set forth the trustee's activities in the Federal court litigation, the prohibition proceedings, and the prohibition against which the latter were directed.

The Federal court judgment (November 30, 1943) provided:

"The items set forth in the statement submitted to this court by the trustee for expenses in the State courts of Michigan, including the proceedings for writ of certiorari to the United States supreme court from the Supreme Court of Michigan, were not incurred in the course of or in connection with the litigation in this cause, and are deemed not to be within the purview of said paragraph 8 or the jurisdiction of this court, and accordingly are not adjudicated by this order, but are left open, to be by the trustee submitted to the probate court for the county of Saginaw, under which the administration of said trust has been had, in and as a part of the final account of the trustee to said probate court on the closing of said trust, the allowance of the trustee's fees, and making distribution of the property thereof."

The bank's president and its trust officer were examined and cross-examined at length.

George E. Parker, Jr., vice-president and trust officer in charge of the trust department of the National Bank of Detroit, said that he "examined the trustee's accounts and the petitions that accompanied the accounts, the petition for fees; I read the opinions of the appellate courts in each of the matters that has been in litigation in the years in question," and that he had "a very good understanding" of the nature of services required by the trustee. He testified:

"The services I am talking about involved the responsibilities and the duties of the trustee in following the management of the assets of C. K. Eddy & Sons, the stock of which they held in this trust, as well as the duties and responsibilities of the trustee in defending the trust estate in the several suits that were brought by the beneficiary of the trust.

"*Q.* There was a substantial hazard to the trustee all the way through the litigation, was there not?

"*A.* In my opinion there was.

"*Q.* Well, based upon what you have read, and the record here of the accounts, petitions for trustee's fees, and the testimony of Mr. Tessin that you heard, and the statement that he read, and the opinions of the court indicated at the end of the litigation, what would you say as to the reasonableness of the fee which the trustee asks of $35,000?

"*A.* I think it's extremely reasonable."

Mr. Tessin, the trustee bank's vice-president and trust officer, testified:

"In addition to having charge of the assets that were worth probably in excess of $500—or $600,000 from the date of Mrs. Doebler's death in May, 1938, to the time that the hearing was had in November, 1945, the trustee was almost constantly engaged in litigation largely brought about by Mr. Lucking as attorney for Cynthia Mills Cleveland, the remainderman of that trust. It was the duty of the trustee to defend itself and defend the trust estate and to look after the property, answer the questions, engage attorneys, consult with them at various times, appear in court, go over its records extending over many years past; and it was as a result of that background and history, probably somewhat covered in the testimony or the answer that I gave * * * in reciting the litigation that I said 'that in my opinion a fee of $35,000 covering the 7-1/2 years of litigation and other work would not be out of line, and I think would be reasonable.' "

Appellant offered no proof to refute the testimony of either Tessin or Parker. Counsel for appellant testified as to what he thought would be reasonable attorneys' fees, but did not offer any such testimony in regard to trustee's fees. His position seems to be that the trustee bank could have liquidated C. K. Eddy & Sons at any time after 1939 and its failure to do so is a bar to receiving trustee fees for the period covered in this appeal. The record does not

sustain his contention. The record does sustain the court's award of $35,000 trustee's fees.

Trustee bank paid the attorneys' fees without submitting the claims therefor to the probate court or giving to the plaintiff the opportunity to object.

The firm of Butzel, Eaman, Long, Gust & Bills, of Detroit, on October 19, 1943, submitted to the bank a bill for $12,500 for "services in prohibition proceedings brought in Michigan Supreme Court to perpetually stay further proceedings in Saginaw circuit court in chancery, in suit begun by Cynthia Mills Cleveland and pending before Judge Neil E. Reid, and to vacate orders heretofore made by Judge Reid therein, including services in United States supreme court opposing application for certiorari made by Cynthia Mills Cleveland." On October 22, 1943, the bank issued its check for this amount, plus $37.14 for additional costs incurred by said firm.

Attorney Jerome Weadock, of the Saginaw firm of Weadock & Weadock, testified that the firm of Butzel, Eaman, Long, Gust & Bills "have a national reputation as being leaders of the American Bar;" that he had thoroughly acquainted himself with the briefs and records in the prohibition case and in his opinion the $12,500 fee was reasonable.

James K. Watkins, a practicing attorney of Detroit, questioned by Mr. Long, testified as follows:

"*Q.* And did you examine the briefs in the Michigan Supreme Court in the prohibition?

"*A.* I did.

"*Q.* And in the United States supreme court in the certiorari case?

"*A.* I did, yes sir.

"*Q.* How long have you known me?

"*A.* Oh, I should think 30 years.

"*Q.* We have both been practicing in Detroit for that length of time?

"*A.* That is correct.

"*Q.* Now, based on the investigation you have just told us about and having in mind that the bill that our firm rendered for services in the prohibition case was $12,500, do you have an opinion as to the reasonableness of that bill?

"*A.* I have.

"*Q.* And will you state what your opinion is?

"*A.* I think that considering the amounts involved, the importance of the litigation, your long standing as a member of the bar and the results achieved, the bill was fair and reasonable."

Attorneys Weadock and Watkins were the only attorneys not associated with the litigation who testified in regard to the reasonableness of this fee. Attorney Lawrence M. Sprague, who plaintiff's attorney Lucking describes as one who "sat through as Cleveland's associate counsel—entire Federal court hearings and 304 Michigan 376, prohibition and circuit court motion to dismiss proceedings," testified that in his opinion a reasonable fee for this firm would be $8,500.

The record justifies the trial court's conclusion that $12,500 was a reasonable fee to pay Butzel, Eaman, Long, Gust & Bills, and said finding is approved by this Court.

Attorney Hugo E. Braun's statement for fees in the amount of $3,000 was dated June 7, 1945, and approved by the trustee bank's board of directors and its trust committee on June 19, 1945. The record discloses that the fee was reasonable and we find that the court was justified in allowing same.

We reserve judgment as to whether fees in the amount of $22,500 allowed attorneys O'Keefe and Rockwith were reasonable, and we refer this question to the circuit court with instructions that a circuit court commissioner be designated for the sole purpose of taking any further proof that either appellant or appellees desires to introduce in regard

to the reasonableness of the legal fees paid to attorneys O'Keefe and Rockwith. Ten copies of such testimony shall be forwarded by said circuit court commissioner to the clerk of this Court.*

The findings of the lower court in the respective cases on appeal here are approved and affirmed, with the exception of the allowance of the legal fees paid to attorneys O'Keefe and Rockwith.

The question of costs will be decided upon final determination of this appeal.

DETHMERS, C. J., and CARR, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

* See 356 Mich 120.—REPORTER.

SAHR *v.* BIERD.

AUTOMOBILES—MINOR PASSENGER—NEGLIGENCE—INTERSECTIONS—REQUEST TO CHARGE—SPEED—ZIGZAGGING CAR.

Plaintiff, a 10-year-old boy in westbound car, driven by his one-armed father on a through highway in broad daylight after having consumed some beer, *held*, entitled to a new trial, because of trial court's failure to give requested instruction to the effect that if jury found southbound defendant motorist had driven out into the intersection in the path of vehicle occupied by plaintiff, then defendant was guilty of negligence as a matter of law and his conduct at least 1 of the causes of the accident and plaintiff's injuries, where testimony shows defendant observed the westbound car some 250 to 300 feet away approaching the intersection at estimated speed of 80 miles an hour and zigzagging across the road.

REFERENCES FOR POINTS IN HEADNOTES

5A Am Jur, Automobiles and Highway Traffic § 1092.

Appeal from Saginaw; Huff (Eugene Snow), J. Submitted June 10, 1958. (Docket No. 8, Calendar No. 47,413.) Decided October 13, 1958.

Case by Kenneth Sahr, a minor by his next friend, against Jack M. Bierd for personal injuries sustained in automobile collision. Verdict and judgment for defendant. Plaintiff appeals. Defendant cross-appeals. Reversed and remanded for new trial.

van Benschoten & van Benschoten, for plaintiff.

Heilman & Purcell, for defendant.

SMITH, J. Here we have an automobile accident at the intersection of 2 country roads. It happened in broad daylight. The roads were clear and dry. A jury verdict was returned for defendant. Plaintiff asserts error, pointing to the court's refusal to submit 2 special questions to the jury, to the court's refusal of the charge that if upon the facts shown the defendant drove out into the intersection he was guilty of negligence as a matter of law, and to the court's inclusions of instructions upon intervening negligence when nothing had intervened. The case will be reversed. If defendant in truth drove out into the intersection under the conditions presented he was guilty of negligence as a matter of law and the jury should have been so instructed.

The inclusion of the special questions, and the controversy over their use, compels us, as well, to examine in detail this cumbersome procedural device which came into the law to lessen the peril of the jury's attaint. It was made statutory at an early time in this jurisdiction[1] and has since been embodied in our court rules.[2] It is prolific of disagree-

[1] See Rev Stat 1846, ch 103, § 57.
[2] Court Rule No 37, § 6 (1945).

ment, dissent (see our recent division in *Richards* v. *Birmingham School District*, 348 Mich 490), and distinctions so dubious that Mr. Justice Hart of the supreme court of Ohio (*McNees* v. *Cincinnati Street R. Co.*, 152 Ohio St 269, 284 [dissent] [89 NE2d 138, 146]) referred to them as metaphysical. Viewing the procedure in operation we are not impressed with its utility.

The plaintiff was a 10-year-old boy. He was riding in a Chrysler automobile being driven by his father in a westerly direction on Hess road, a 2-lane, hard-surfaced, east and west, through highway. There is testimony that the father had had some beer prior to the accident. He had a restrictive driver's license only, since he had but one arm, and was required to have a knob on his steering wheel.

Defendant Jack Bierd was driving his Ford south on Towerline road. This also was a hard-surfaced, 2-lane road, running generally north and south. A stop sign at the Hess-Towerline intersection required traffic on Towerline to stop before entering Hess.

It is undisputed that the 2 cars collided. As to how and why they collided the parties differ. Plaintiff asserts that the defendant turned left through the intersection in the path of plaintiff's oncoming car and that the collision actually occurred in the northeast corner of the intersection "where defendant had no right to be." Defendant, however, testified that he came to a full stop "about even with the culvert, which was 2 or 3 feet off Hess," and that he was standing still when hit and had not entered the intersection.

Appellant first asserts error in the refusal of the trial court to submit to the jury 2 special questions:

1. "Did the collision occur on the northeast corner of the intersection of Hess and Towerline road as claimed by the plaintiff?

2. "Did the collision occur on Towerline road north of Hess road as claimed by the defendant?"

In support of his claimed right to the submission of such questions, appellant cites to us CL 1948, § 618.39 (Stat Ann § 27.1019), providing as follows:

"In all cases where an issue of facts is tried before any court of record, the court shall at the request in writing, of the counsel of either party, instruct the jury if they return a general verdict, also to find upon particular questions of facts, respecting which the issue is joined, to be stated in writing, and shall direct a written finding thereon: Provided, Such special questions shall not exceed 5 in number, and shall be each in single, short sentences, readily answered by yes or no. The special verdict, or finding, shall be filed with the clerk, and entered upon the minutes, and when any special finding of facts shall be inconsistent with a general verdict, the former shall control the latter, and the court give judgment accordingly."

Thus appellant relies upon the "special questions" statute, also a part of Court Rule No 37, § 6 (1945), rather than the "special verdict" section of the court rules, section 7 of Rule 37. As Justice BLACK has pointed out in *Richards* v. *Birmingham School District,* 348 Mich 490, 512, 514, these sections are not to be confused. Section 6 (special questions, or special interrogatories) is an outgrowth of an ancient practice. Section 7 (the rule-authorized special verdict) is a modern device, urged by the leading students of our generation,[1] espoused by distinguished judges,[2] made a part not only of our State practice

[1] See Sunderland, Verdicts, General and Special, 29 Yale LJ 253; Green, A New Development in Jury Trial, 13 ABAJ 715; Lipscomb, Special Verdicts under the Federal Rules, 25 Wash ULQ 185.

[2] Nordbye, Use of Special Verdicts under Rules of Civil Procedure, 2 FRD 138; Frank, J., in *Skidmore* v. *B. & O. R. Co.* (CCA), 167 F2d 54 (certiorari denied, 335 US 816 [69 S Ct 34, 93 L ed 371]). Our debt to the exhaustive analysis of this famous judge must be affirmatively stated, and with emphasis.

but of the Federal practice as well,[3] commended by those who have employed it,[4] yet permitted by us of the profession to gather dust in the back room. Meanwhile the jury function, guaranteed us by the Constitution, is permitted slowly to break down under the weight of burdens far beyond its capabilities, as the numbers of the jury-waived cases now so eloquently attest. We have too much faith in the jury function to acquiesce tacitly in its gradual elimination.

The problems confronting us in this case cannot be answered upon authority and principle without an examination of the origins and purposes of the special practice which it is here sought to employ. Behind the rule under examination we have one of the darkest of the common-law doctrines, that of the attaint of the jury. This, as Thayer tells us,[5] was for centuries the great check upon the jury. If, upon appeal to a grand jury, the verdict of the first jury was found to be erroneous (even if "based upon a misconception of a nice point of law," Morgan, *supra*, p 576) the first judgment was reversed and (3 Blackstone, Commentaries, *404) "the judgment by the common law was, that the jurors should lose their *liberam legem* (free law) and become forever infamous; should forfeit their goods and the profits of their lands; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict."[6]

---

[3] Rule 49, subd (a) of the Federal Rules of Civil Procedure, adopted in accordance with 28 USCA (1952), § 2072.

[4] See Driver, The Special Verdict—Theory and Practice, 26 Wash L Rev 21.

[5] Thayer, Evidence (1898), p 140; see, also, Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 Yale LJ 575.

[6] See, also, Co Litt, 294.b.—REPORTER.

The obvious unfairness to the jury of such procedures resulted in their being permitted to bring in a special verdict at a very early period in the common law. (Scott, Fundamentals of Procedure, 95.) They merely found the facts in issue, the court deciding on the legal effect of such facts. A primary difficulty with the common-law special verdict, however, was the rigid rule that if the judge failed to require the jury to find on every material issue of ultimate fact the verdict could not stand. As Dean Leon Green described it (A New Development in Jury Trial, 13 ABAJ 715, 716):

"When employed, it must be complete; the jury must find all the material facts, disputed and undisputed, and not merely the evidence from which the facts can be inferred, nor mere conclusions. Nothing must be left for the judge to do except pronounce judgment upon the facts found. The changes which have been rung on these requisites are numberless, likewise unintelligent and futile. At bottom the special verdict represents a valuable idea, but as put into operation it has no vitality. To require such excessive exactness of a lay body, or even of lawyers, in the heat of trial, is to demand the impossible. Such requirements cramped the life out of the special verdict. While provision for it is found in most States, it is practically just so much dead weight. Had its development been normal it should have superseded the general verdict centuries ago."

As distinguished from the common-law special verdict the early law* also saw the use of special interrogatories. (This is generally the procedure authorized by statute and Court Rule No 37, § 6, quoted, *supra*.) The answers to the special questions are not (as was the common-law special verdict) used in lieu of a general verdict but rather to explain and to test

* 2 Pollock & Maitland, History of English Law (2d ed), 631; *Pierce* v. *Woodward*, 6 Pick (23 Mass) 206, 208.

it. The general charge, with all its length and complexity, and the general verdict, remain in use, the special questions merely revealing how the jury dealt with specific issues. If (it is provided by statute) the special findings are "inconsistent" with the general verdict the former shall control. Here lies the first great difficulty. When, in truth, do we have an inconsistency? Modern courts, in effecting reconciliation between the general verdict and the answers to the special questions, have resort to niceties of reasoning and subtleties of thought that would cause even a medieval logician to blanch. In *McNees* v. *Cincinnati Street R. Co.,* 152 Ohio St 269 (89 NE2d 138), the plaintiff's decedent had suffered a coronary thrombosis while operating one of defendant's buses under adverse conditions, due to equipment casualty, during a heavy fog, and while being pushed by another bus. The special question (as to whether "the cause of Taylor McNees' death" was "the mental strain and excitement of the driving conditions" then prevailing) was answered affirmatively. The general verdict, however, was for the defendant. These were held to be reconcilable by the court on the ground that the special question related only to cause, and that it said nothing of proximate cause. See, also, *LaPointe* v. *Chevrette,* 264 Mich 482. It will not profit us to explore their murky techniques of such reconciliations. The point to be made is that any legal doctrine requiring the final result of a controversy to turn upon what in effect are *two* simultaneous verdicts invites disagreement and discord. We need only to go to the digests for further illustrations. Dean Green's observations, made many years ago in 13 ABAJ 715, 716, are equally applicable today: "Innumerable refinements have been developed in their [the special questions'] use and especially in determining when the general verdict is controlled by the special finding, and all in

all, the practice rather tends to retard than to expedite the disposition of cases, and has not met any wide approval."

In addition to the difficulties encountered by reason of the reconciliation doctrine, the form of the questions themselves has given rise to much litigation. (This difficulty, it is noted, will also be encountered in the modern special verdict procedure authorized in Court Rule No 37, § 7 [1945].) In the case before us appellee, correctly discussing both special questions as governed by the same principles, objects to the first question (relating to the corner of the intersection where the accident occurred) on the ground that answer thereto "would in no manner settle the question as to whether or not such entry was negligent, or whether such negligence, if any, was a proximate cause of the accident." Appellee misconstrues the nature of the answer demanded by the rule. The requirements are that it must be an ultimate fact as distinguished from an evidentiary fact (although this is, obviously, a matter of degree only) and it must have a controlling, rather than a collateral, bearing upon the verdict and issues. *Bennett* v. *Hill,* 342 Mich 754. As to the factual aspect, it is impossible, we know, to frame a comprehensive definition of an ultimate fact, or to draw a precise boundary line between evidentiary facts and ultimate facts, since an ultimate fact in one case will not be so in another. Different issues may be involved. The Hon. Merrill E. Otis, one of our most distinguished Federal judges, in speaking before the judicial conference of the eighth circuit (Improvements in Statement of Findings of Fact and Conclusions of Law, 1 FRD 83, 85, 86) expressed the pertinent factors in these words:

"Requirements 3 and 4 have been stated hundreds of times by appellate courts, scores of times by the

supreme court of the United States. In its wording the principle is simple. The difficulty in its application is in determining what are the ultimate facts in a given case. It seems to be conceded by all who have given serious thought to the matter that it is not possible to form a definition which will be a sure guide at all times. We know that an ultimate fact is to be distinguished from mere evidence. The supreme court has said that. Old Equity Rule 25, 28 USCA following section 723,* which concerns the framing of a complaint in equity, makes that distinction. The distinction is presented in the very word 'ultimate' in the phrase 'ultimate fact.' Perhaps, in any given case, we may say that a fact which is offered in evidence for the purpose of proving some other fact is not itself an 'ultimate fact.' Perhaps we may say as to any fact, whether it has been directly proved in evidence or is an inference from facts proved, if it serves the sole function of supporting (not some other inference of fact) but the final legal conclusion that either plaintiff or defendant shall prevail, perhaps we may say as to such a fact, it is an 'ultimate fact.' It occurs to me that there are 2 tests with which every Federal judge is familiar which the judge may use to determine whether facts he is considering for his findings are ultimate facts. The tests are these. 1. If he were drawing a complaint for the plaintiff in the case before him what allegations of fact would he make to support the prayer of his complaint? 2. If the case were a jury case, what facts would he in his charge require the jury to find as a basis for a verdict for the plaintiff? These are the 'ultimate facts' required to support a judgment for the plaintiff. I consider that often a finding of 1 ultimate fact (or 2 or 3 ultimate facts at the most) may be sufficient to support a judgment for the defendant."

* See 28 USCA (1928), Judicial Code and Judiciary, Equity Rules. Rule 25, referred to, has been incorporated in the Federal Rules of Civil Procedure, principally in Rules 8, 9 and 10. Section 723, referred to, is now 28 USCA, § 2071.—REPORTER.

As to the requirement that the answer to a special question be "controlling" of the main issue, we examined this aspect of the problem with care in the opinion on rehearing in *Tyler* v. *Wright,* 188 Mich 561, 567, wherein we held:

"Upon the rehearing in this case, counsel for defendants questioned the rule laid down by this Court for the submission of special questions to the jury. In holding that the trial court was not in error in refusing to submit the proffered questions, it was said in the opinion:

" 'Neither question, standing by itself, calls for an answer which would have been controlling. Under the statute which allows the submission of special questions they must be so framed as to call for an answer which may be controlling of the main issue.'

"We were persuaded by the discussion had upon the rehearing that this construction given the statute (CL 1897, § 10237)* was rather too restricted. While no express construction of this phase of the statute appears to have been made by this Court, we are of the opinion that if the questions proposed, taken singly or as a whole, call for findings which might be controlling of the main issue, they should be submitted by the trial court. The questions in controversy, which are set out in the opinion, taken together, come within this rule, and therefore should have been submitted."

In the case before us the primary issue was whether defendant had pulled into the intersection in the path of the oncoming car and had been there struck, or whether he was struck as he sat helpless on Towerline road without having entered the intersection to any substantial extent. The answers to the special questions proposed dealt directly with this issue and the answers thereto, under the principles above set forth, would be both relevant and controlling. Thus

* CL 1948, § 618.39 (Stat Ann § 27.1019) re-enacted a part of CL 1871, § 6026; How Stat 1882, § 7606, as amended by PA 1885, No 15; CL 1897, § 10237.—REPORTER.

they were unobjectionable as to content. So much, however, cannot be said for their form. The function of the special question is to determine facts without regard to their effect upon their general verdict, and, hence, upon the results to the litigants. To inform the jury of the correlation of their answers with the claims of the parties litigant is to frustrate the entire purpose of the quizzing. We ruled upon this issue in the case of *Taylor* v. *Davarn,* 191 Mich 243, 251, wherein we said, quoting an earlier case, that:

"'The object of the statute (CL 1871, § 6026; How Stat 1882, § 7606)* requiring the jury to answer specifically questions giving their conclusions on the fact necessary to be found to entitle a party to recover, was to ascertain whether or not they had found sufficient facts from the evidence to support their general verdict under the law as given them by the court. It is the province of the jury to find these facts from the evidence, without aid or suggestion from the court, and this can never be done if the jury are told in advance what facts are necessary to be found to support the verdict, or what answers to the questions propounded will be consistent therewith, or what they must find in order to answer a question propounded in the negative or affirmative. This practice will make the general verdict control the findings, instead of the findings control the general verdict; and thereby the object of the framers of the statute will be defeated. This was the result of the practice indulged in this case. The effect is to make the court, and not the jury, decide the main issues in the case. *Cole* v. *Boyd,* 47 Mich 98. The special findings of the jury were sufficient to support the general verdict, had the proceedings upon which they were based not been erroneous.'"

See, also, *Anderson* v. *Seelow,* 224 Wis 230 (271 NW 844). The case of *Hormel Estate* v. *Harris,* 348

* See footnote on page 362.—REPORTER.

Mich 201, relied upon by appellant, did not purport to rule upon this issue. The questions were, therefore, properly denied.

The confusion existing between section 6 and section 7 procedures (compare, *e.g.*, concurring opinion in *Skidmore* v. *B. & O. R. Co.* [CCA], 167 F2d 54, 70, referring to comparable paragraphs [a] and [b] of Rule 49, Federal Rules of Civil Procedure) may warrant a discussion of the latter in order that its vastly different procedures be thoroughly recognized and appreciated. Both involve the use of special questions. But here the similarity stops. Under section 7 there is no general verdict by the jury and there is no general charge to the jury. The jury merely answers written questions concerning material issues of fact. The court then applies the law and renders judgment. This procedure was framed for reasons well stated by Professor Sunderland in his leading article in 29 Yale LJ 253, 258–260 (Verdicts, General and Special), reading, in part, as follows:

"The peculiarity of the general verdict is the merger into a single indivisible *residuum* of all matters, however numerous, whether of law or fact. It is a compound made by the jury which is incapable of being broken up into its constituent parts. No judicial reagents exist for either a qualitative or a quantitative analysis. The law supplies the means for determining neither what facts were found, nor what principles of law were applied, nor how the application was made. There are therefore 3 unknown elements which enter into the general verdict: (a) the facts; (b) the law; (c) the application of the law to the facts. And it is clear that the verdict is liable to 3 sources of error, corresponding to these 3 elements. It is also clear that if error does occur in any of these matters it cannot be discovered, for the constituents of the compound cannot be ascertained. No one but the jurors can tell what was put into it

and the jurors will not be heard to say. The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi. Both stand on the same foundation—a presumption of wisdom. The court protects the jury from all investigation and inquiry as fully as the temple authorities protected the priestess who spoke to the suppliant votary at the shrine. It is quite probable that the law is wise in not permitting jurors to testify as to how they compounded their verdict, for all stability would disappear if such inquiries were open. But it does not follow that there is not some better way of deciding controversies than by means of this mysterious agency. If the compound cannot be subjected to analysis perhaps it can be dispensed with.

"As to the first element in the general verdict, the finding of *facts,* it is much better done by means of the special verdict. Every advantage which the jury is popularly supposed to have over the court as a trier of facts, is retained, with the very great additional advantage that the analysis and separation of the facts in the case which the court and the attorneys must necessarily effect in employing the special verdict, materially reduces the chance of error. It is easy to make mistakes in dealing at large with aggregates of facts. The special verdict compels detailed consideration. But above all it enables the public, the parties and the court to see what the jury really has done. The general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it. But the special verdict enables errors to be localized so that the sound portions of the verdict may be saved and only the unsound portions be subject to redetermination through a new trial. The morale of the jury also is aided by throwing off the cloak of secrecy, for only through publicity is there developed the proper feeling of responsibility in public servants. So far, then, as the facts go, they can be much more effectively, conveniently and usefully

tried by abandoning the general verdict and substituting the special verdict.

"As to the second element in the general verdict, the *law,* it is a matter upon which the jury is necessarily ignorant. The jurors are taken from the body of the county, and it is safe to say that the last man who would be called or allowed to sit would be a lawyer. They are secondhand dealers in law, and must get it from the judge. They can supply nothing themselves; they are a mere conduit pipe through which the court supplies the law that goes into the general verdict. But while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for 12 men can easily misunderstand more law in a minute than the judge can explain in an hour. Indeed, can anything be more fatuous than the expectation that the law which the judge so carefully, learnedly and laboriously expounds to the laymen in the jury box will become operative in their minds in its true form? One who has never studied a science cannot understand or appreciate its intricacies, and the law is no exception to this rule. The very theory of the jury and its general verdict is thus predicated upon a premise which makes practically certain an imperfect or erroneous view of the principles of law which are to be compounded into the verdict. The instructions upon the law given by the court to the jury are an effort to give, in the space of a few minutes, a legal education to 12 laymen upon a branch of the law involved in the case. Law cannot be taught in any such way. As to this element, accordingly, the general verdict is almost necessarily a failure.

"As to the third element in the general verdict—the *application of the law to the facts,* we find the same difficulty as in the case of the first element,—a merging of the law into the verdict in such a way that it is impossible to tell how or whether the jury applied the law. They may have applied it in a wholly wrong way, or they may have failed to apply it at all. No analysis of the verdict can be made

which will throw any light on the process. Since the case can ordinarily go to the jury only if a verdict either way is legally possible, whatever the jury does is presumed to be right, and this presumption excludes any inquiry from the jurors themselves. Cases may arise where the verdict shows on its face a failure to properly apply the law, usually as relating to the measure of damages, but in the vast majority of cases the verdict is a complete mystery, throwing a mantle of impenetrable darkness over the operations of the jury. Whether the jurors deliberately and openly threw the law into the discard, and rendered a verdict out of their own heads, or whether they applied the law correctly as instructed by the court, or whether they tried to apply it properly but failed for lack of understanding,—these are questions respecting which the verdict discloses nothing. So far, therefore, as the third element goes, the general verdict is an unknown and unknowable mystery, with the balance of probability against it."

It was to avoid these serious defects in the general verdict procedure that our court rules have embodied section 7 of Rule No 37 (1945), providing:

"Sec. 7. In any civil case, the court in its discretion may at any time, on its own motion or on request of either party, direct the jury to find a special verdict, and in such case no general verdict shall be returned. Such verdict shall be prepared by the court in the form of questions in writing, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. Instructions to the jury shall be limited to such matters as are material to the question submitted. Whenever any special verdict shall be submitted to a jury and there is omitted therefrom some controverted matter of fact not brought to the attention of the trial court by request for submission, but essential to sustain the judgment, such matter of fact shall be deemed determined by the court in conformity with its judgment, and the neglect or omission to request a finding

by the jury on such a matter shall be deemed a waiver of a jury trial *pro tanto* and a consent that such omitted fact be determined by the court. The finding or determination of such omitted fact by the court may be reviewed on appeal without any exception thereto."

Under this procedure the jury is not expected to assimilate that mass of abstract law known as the instructions or the general charge. The difficulties with the charge have been known to the profession for years. Dean Green's well-known study, Judge and Jury, examines the problem on page 351 thereof:

"The instructions of a judge to a jury normally relate to the law applicable to the possible findings of facts, stated hypothetically, which are supported by the evidence. In any but the simplest cases, they are long and involved, phrased in terms of the nicest distinctions, capable of being understood only by lawyers, and, more frequently than not, inaccurate. No one seriously claims that they are understood by juries or that they assist a jury in reaching a verdict. For most part they are ritual. Nevertheless, these instructions are the greatest single source of reversible error and both trial and appellate courts would be relieved of their greatest source of annoyance if the general charge could be eliminated from trial procedure."

Thoughtful jurists have been no less outspoken. It was Judge Driver of the Federal bench who put the problem in these terms:

"Appellate courts must assume that the jury has dutifully considered, has understood and has correctly applied the instructions and, therefore, that if the court's statement of the law is in any substantial particular incorrect, incomplete, or inaccurate, the general verdict has thereby been affected. The assumption, of course, is absurd. It is impossible in a few minutes to educate 12 laymen on the law of

a case, embracing, as it often does, complex and technical rules of law, involved exceptions, and finely drawn legal instructions. Many times in my experience the foreman of a jury has sent me a note by the bailiff asking some question which indicated that the jurors did not have even a vague conception of the meaning of the court's instructions." (The Special Verdict—Theory and Practice, 26 Wash L Rev 21, 22.)

Much the same criticism is often voiced by members of the bar. Mr. Leonard O. Thomas, of the Kansas Bar, addresses himself to the subject in his article in 23 U of Kansas City L Rev 194, 195:

"It is interesting to note that, if all juries followed the court's instructions, there would, in the ordinary case, be no purpose whatever in requiring them to answer any special questions. Every question would be answered in accordance with the court's instructions, and there would be no inconsistency between the answers and the general verdict. However, 90 years' experience with the juries' answers to special questions has demonstrated that juries do frequently render verdicts based on passion or prejudice and not in accordance with the instructions. One of the reasons is not the venality of the members of the jury, or their lack of sympathy with the law given by the court, but their inability to understand the instructions. Thus in an ordinary negligence action in Kansas the instructions may number 20 pages or more of complicated rules of exceedingly technical abstract law. It is no wonder that a jury that wishes to render an unbiased verdict is frequently unable to understand what verdict it must render on the facts found. This 90 years of experience in Kansas has led our appellate court to recognize the imperfection in the jury system and to base its affirmance or reversal of a case primarily on the answers to the special questions and not the instruction. Thus, judgments are very seldom reversed in Kansas on the instructions, which state general rules of law only,

but are reversed very frequently on the answers to the special questions."

The section 7 procedure is designed to eliminate this criticism. Under the procedure of this section no general charge is given, although, as noted hereafter, some instruction to the jury as to the law cannot be avoided. The jury, under the procedure, undertakes merely a fact-finding function, and it has been suggested that under the constraint of answering particular fact questions they will adhere more closely to the evidence adduced. As was said by Judge Driver:* "I have reason to believe also that while many jurors will complacently acquiesce in a general verdict they are much more hesitant about subscribing to a special verdict fact finding which they think is not supported by the evidence." Moreover, since the questions presented are not identified with either party, or related to his winning or losing (the court, in fact, not the jury, decides the case) the danger that a verdict will be controlled by bias or prejudice is lessened. The intricacies and chances of error inherent in general instructions (which remain even under the special interrogatories procedure) are avoided. In fact, if the court misapplies the law to the facts it may correct its own error and without the need for a special trial. Moreover, the greatest single source of difficulty with the common-law special verdict has been eliminated. Under the old practice it was required that the jury find all of the material facts in issue. The omission of any would necessitate a new trial. Under the modern practice, however, and that embodied in section 7 of our rules, controverted matters of fact essential to sustain judgment but not brought to the attention of the trial court by requests for submission are

* The Special Verdict—Theory and Practice, 26 Wash L Rev 21, 24.

deemed determined by the court in conformity with its judgment, and the omission to request such finding deemed a waiver of jury trial *pro tanto*. Thus has been eliminated the danger of necessity for new trial because of inadvertent omission of findings of some material fact. So far as the appellate tribunal is concerned, the specific findings upon the material issues should simplify and expedite its work.

The special verdict procedure is not, of course, to be thought of as a panacea. The distinction between an ultimate fact and a mere evidentiary fact must still be made. Moreover, the whole process may be defeated simply by an ultraliteral* interpretation of the word "fact" since (once we go beyond such basic facts as those of birth and death) most material facts seem to involve the application to human conduct of legal standards, thus arriving at a material and ultimate "fact" (*e.g.*, of negligence). It may happen, of course, that a case will be so complicated, the application of the law to the facts so involved, that little or nothing would be gained in simplicity by attempting the special verdict procedure. Even in such case, however, the utilization of another modern device, the pretrial procedure, should enable the factual issues to be narrowed to the point where a special verdict might be employed. If this seems impracticable the procedure need not be used, for the rule wisely leaves its application to the discretion of the trial court. It should be noted again, also, that the special verdict procedure of section 7 does not completely eliminate instructions to the jury. To some degree they must have guidance and explanation as to legal terms sometimes necessary to be employed in the questions.

* *Cf., Hydraulic Development Corp.* v. *Lake Erie Engineering Corp.*, 2 FRD 174: "It is unnecessary to say that the courts are uniformly disposed to be liberal in applying the rules of procedure as to interrogatories."

Thus difficulties will remain. The problem of the litigated issue has no easy solution. But in the final analysis, whether the special verdict works to simplify the administration of justice and lower its cost will depend upon whether we of the profession want it to work. We would do well, in the light of today's prolific multiplication of boards, bureaus, and commissions, all deciding controverted issues of law (a function nonetheless judicial in fact because sugar-coated with a "quasi") to ponder Professor Sunderland's words of over a quarter-century ago, spoken in Detroit at a joint meeting of the American Bar Association and the Michigan State Bar Association, with reference to our professional attitude towards procedural problems:

"The profession is inclined to take a rather fatalistic attitude, as though rules of practice, especially if hallowed by long observance, were immutable, like the law of gravity, and the public must make the best of them, just as it makes the best of the various forces of nature. But the profession is suffering from the complaisance which affects every monopolistic institution. Instead of expecting commercial, industrial and social relations to adjust themselves to the obsolete equipment with which the judicial establishment does business, the profession should, as it has done in England, scrap a large part of the machinery and provide new devices to correct the defects which have become an intolerable burden upon society."*

The special verdict procedure of section 7 may, indeed, for reasons not anticipated by those responsible for its formulation and adoption (some of whom have heretofore been quoted), prove unworkable in practice in this State. If so it may well be that lessons learned from its attempted employment will point up the need for wiser measures looking towards

* An Appraisal of English Procedure, 11 ABAJ 773, 778.

a better solution of the public's (and our) problem. The provisions of section 7, on their face, and in the light of the experience therewith where tried, both in Federal and State courts, would seem to warrant at least a tentative utilization. This Court, in the exercise of its constitutional duties of rule-making and supervision, may be persuaded by the appropriate committees of the bar and of the judicial conference to eliminate section 6 and its statutory base (CL 1948, § 618.39 [Stat Ann § 27.1019]) and, hence, the requirement of general instructions and a general verdict in favor of the discretionarily employable section 7. But let no one delude himself that a mere change in rules will effectuate a change in practice. Unless and until the bench and bar are convinced that only a modernization of ancient practices will halt the flight to lay boards and commissions which has already taken place in great areas of the law the mere adoption of a rule will do nothing. Harris put the matter in "The Rule-Making Power," 2 FRD 67, 72, 73, in these words:

"It is obvious that the court-rule method does not of itself guarantee a flexible and changeable procedure. In fact that method may be one of the best devices to solidify the existing practice. Observe the procedure in Michigan since 1850 and in Colorado for over 25 years after 1913. Procedural changes depend more on the 'will to change' which is held by large numbers of the bench and bar rather than on any particular method of change. In fact experience teaches that formal changes will be of little effect unless accepted with a spirit of change. This requires a clear recognition of the real basis of legal procedure. Primarily it is not found in rules or statutes but in the habits and attitudes of the legal group. Legal procedure is merely the way lawyers and judges do their work. Written rules are an attempt to make those practices articulate. Recognizing this, it is pure fantasy to assume that

a rule of court or statute will by some magical process develop a new system. Any change, whether by court rule or by statute, must come through the willingness of the legal group to adopt new ways of doing things and new attitudes toward those practices."

So much for the procedure sought to be utilized in this case. Appellant's allegations of error, however, do not stop here. His proposed instruction No. 2, which the trial court refused to give to the jury, read, in part, as follows:

"I charge you in this case that if you find that the defendant, Jack Bierd, drove out into the intersection in the path of the vehicle occupied by Kenneth Sahr, then and in that case and under the facts of this case, you will find the defendant, Jack Bierd, guilty of negligence as a matter of law, since such conduct would mean as a matter of law that the defendant's conduct was at least one of the causes of this accident and the plaintiff's injuries. I further charge you that the defendant, in pulling out into such an intersection, has the duty to maintain a look-out and to see and detect any vehicle entering the intersection from the east on Hess road. Under such circumstances, the defendant would be guilty of negligence as a matter of law if you find that he drove into the intersection in the path of the vehicle occupied by plaintiff, and you would then turn to the question of damages since I instruct you as a matter of law that a driving into the intersection by the defendant under the facts of this case, in the path of the vehicle occupied by the plaintiff, would be at least 1 of the causes of the plaintiff's injuries."

An analysis of the factual situation before the court amply justifies the instruction prayed. Defendant admitted that when he had brought his car to a final stop at the intersection, he saw the plaintiff's Chrysler approaching at a distance of from 250 to 300 feet. "I had been driving about 23 years,

and I would estimate its speed at about 80 miles an hour," he testified. It was zigzagging, "going back and forth across the road." There can be no doubt that "under the facts of this case" (as the requested instructions read) "if the defendant, Jack Bierd, drove out into the intersection in the path of" the oncoming driver, who would have covered the intervening distance (if at 300 feet) in approximately 2-1/2 seconds, he would have been guilty of negligence as a matter of law. No reasonable man could conclude otherwise. It is to be doubted, in fact, if a car traveling at 80 miles per hour can be brought to a stop within 300 feet. A widely published figure for stopping at 60 miles per hour (the tables do not go as high as 80 miles per hour) is 336 feet.* We do not, however, place decision on the factor of the testified speed alone. The zigzagging of the car, even at a low rate of speed, should indicate to a reasonably prudent observer that proper control of the oncoming car is for some reason lacking and that entry into its path is fraught with peril. Plaintiff was entitled to the requested instruction.

The defendant cross-appeals on the theory that the court should have granted his motion for a directed verdict made at the close of plaintiff's proofs. At the close of plaintiff's proofs the jury had before it testimony that the car in which plaintiff was riding was traveling from 70 to 80 miles per hour on a bumpy tarvia road, on the wrong side thereof, that he "passed over to the north side of the road," that subsequent thereto "he put on his brakes," witness Arnst stating that "I could hear the noise of the wheels on the pavement. * * * I heard the squeal all the way until the crash." The same witness testified that the Chrysler slewed sideways as it approached the intersection, with the back wheels on

* See Driver Education Textbook of American Automobile Association, "Sportsmanlike Driving" (2d ed), p 72.

the (north) edge of the pavement, the front of the car "slightly over the crown of the road or the middle of the road," and that the Ford, at the moment of collision "would be in the same position that the Chrysler was." We need not get into the testimony respecting skid marks, damage to the cars, and other evidence. All of this, viewed as it must be on the motion, in the light most favorable to plaintiff, warrants submission of plaintiff's case to the jury. There was no error in the denial of the motion.

No other error of reversible nature appears. Reversed and remanded for new trial. Costs to appellant.

BLACK, VOELKER, and KAVANAGH, JJ., concurred with SMITH, J.

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

EDWARDS, J. (*concurring in part*). I concur in reversal for new trial on the last ground stated by Mr. Justice SMITH referring to the court's failure to submit appellant's requested instruction No. 2.

SUMERACKI *v.* COUNTY OF WAYNE.

KAMINSKI *v.* SAME.

BRADLEY *v.* SAME.

KRONK *v.* SAME.

GALLAGHER *v.* SAME.

1. COUNTIES—CIVIL SERVICE—SUSPENSION—INDICTMENT FOR FELONY—LOST PAY PRIOR TO RE-EMPLOYMENT.

   County employees who were also members of the legislature and indicted for felony of accepting bribes to influence legislation were not entitled to pay lost prior to re-employment by county, where they failed to protest or appeal their suspensions by appropriate action before county civil service commission, where it clearly appears that each plaintiff had actual notice of the reason for his suspension but had made no timely appeal therefrom in accordance with commission rules and statute (CL 1948, § 46.72; Wayne County Civil Service Commission Law, Rules and Regulations [1955], No 16, §§ 1, 2, 5, 7, 8).

2. SAME—CIVIL SERVICE—NOTICE OF SUSPENSION—INDICTMENT FOR FELONY.

   Service of notice of order of suspension of county civil service employee upon such employee in accordance with county civil service commission statute, rules and regulations *held,* unnecessary, where the employee, also a member of the legislature, was indicted and convicted of accepting a bribe for influencing legislation, since the employee had actual notice of the reason for suspension (CL 1948, § 46.72; Wayne County Civil Service Commission Law, Rules and Regulations [1955], No 16, §§ 1, 2, 5, 7, 8).

REFERENCES FOR POINTS IN HEADNOTES

[1] 10 Am Jur, Civil Service § 17.1.
Acquiescence or delay as affecting rights of public employee illegally discharged, suspended, or transferred. 145 ALR 767.
[2] 10 Am Jur, Civil Service § 11.
[3, 4] 43 Am Jur, Public Officers § 200.

3. SAME—CIVIL SERVICE—INDICTMENT FOR FELONY—NOLLE PROSEQUI.
The suspension of county employees who were under the county civil service and also State legislators upon their indictment for accepting bribes to influence legislation was not rendered illegal by virtue of subsequent events resulting in a *nolle prosequi* of the charges against them in another county, since a *nolle prosequi* is not tantamount to acquittal.

4. SAME—CIVIL SERVICE—ACCUSATION OF FELONY.
Public policy may exclude not only a convicted felon from county civil service employment, but also one accused of a felony.

Appeal from Wayne; Maher (Thomas F.), J. Submitted April 9, 1958. (Docket Nos. 17–21, Calendar Nos. 47,377–47,381.) Decided October 13, 1958.

Claim by Adam Sumeracki against the County of Wayne, the board of county auditors and the employing county department for back wages as result of a claimed illegal suspension under rules of the county civil service commission. Similar claims by Mabel J. Kaminski, administratrix of the estate of Joseph L. Kaminski, deceased, William M. Bradley, Martin A. Kronk and Earl C. Gallagher. Cases heard together. Judgments for defendants. Plaintiffs appeal. Affirmed.

Harold M. Shapero (*Albert A. Berger,* of counsel), for plaintiffs.

Samuel H. Olsen, Prosecuting Attorney, *Hobart Taylor, Jr.,* and *Aloysius J. Suchy,* Assistant Prosecuting Attorneys, for defendants.

VOELKER, J. Plaintiffs-appellants, while in the employ of the county of Wayne, were also members of the State legislature. On January 12 and 22, 1944, they were indicted by a one-man grand jury sitting in Ingham county for accepting bribes to influence legislation, following which they did not appear for work

and because of which they were suspended or removed as county employees. The record shows that all of the appellants (except Sumeracki, who was on a military leave of absence, and Kaminski, with respect to whom the record is not clear) were served with written notice of their order of suspension and the reasons therefor. The civil service commission received a copy of all notices served.

Appellants were subsequently tried in Ingham county and convicted, which convictions were sustained by this Court, except in the Kronk conviction, wherein a new trial was ordered. Subsequently the trial court granted new trials upon the allegation of newly-discovered evidence, following which orders of *nolle prosequi* were entered on September 14, 1951. All plaintiffs (except one who died in the interim) were ultimately re-employed by the county.

At the time of their re-employment plaintiffs made no claim of back salary. Subsequently they filed separate claims with the Wayne county board of auditors for salaries allegedly due them from the date of their dismissals in 1944 until their re-employment 6 to 8 years later. From a denial of their claims they appealed to the Wayne circuit court in accordance with the provisions of the statute (CL 1948, § 46.72 [Stat Ann § 5.522]).

The circuit court denied the several appeals, as noted, and the present appeals have resulted. Appellants allege error in several respects, but we think that the essential question in this case may be boiled down as follows: may a civil service employee recover damages for the loss of his employment over a 6- to 8-year period, when such employment was terminated by reason of his indictment on a felony charge, regardless of whether proper notice of the reasons for such suspension and the order for suspension were served upon the employee in view of his

actual knowledge of such reasons and regardless of the ultimate fate of the criminal action against him?

Appellants allege that the rules and regulations of the Michigan and Wayne county civil service commissions were not followed with respect to suspension or discharge of employees and notice to the commission and the employee of the reasons therefor.

The portions of those rules that are relevant in this case provide that employees may be suspended for good cause, either for a definite period of time or indefinitely, and that a written order of such suspension shall be filed with the commission and another served on the employee at his last known address; that cause for removal or suspension of an employee shall arise when he is charged with the commission of a felony or a misdemeanor involving moral turpitude; and that if the employee is suspended or discharged for such cause he shall have the right of appeal to the commission for hearing. Adjournment or postponement of the appeal is provided for at the request of the employee if he is then before the criminal courts facing trial on the charge in question. In such latter event, the postponement shall be upon the condition that he waive his right to any compensation during the period of the adjournment.*

It is clear that the prescribed procedures regarding notice were not followed with technical exactness in the case of all appellants, although in the cases of some, as noted, the record supports the conclusion that service of notice on the commission and employee of the order of suspension was made in proper manner. It is equally apparent, however,

* Wayne County Civil Service Commission, Civil Service Law; Rules and Regulations (1955), Rule No 16, §§ 1, 2, 5, 7, and 8, pp 114 *et seq.* See, in respect to postponement and compensation, Rule No 16, § 8, subd (a), p 119.—REPORTER.

that grounds for the suspensions clearly appeared from the fact of the criminal proceedings, which charged not only a felony but one involving undeniably grave moral turpitude.

It is significant that no appeals were taken by any of the appellants to the civil service commission from the suspensions, even in the cases of those who had formal written notice thereof. On these grounds alone the instant case can be distinguished from our previous decision in *Grix* v. *Liquor Control Commission,* 304 Mich 269, where we awarded back pay, less amounts earned in the interim, to an illegally discharged employee. In that case the employee wrote to the civil service commission on the very day of his discharge, protesting the illegal discharge and demanding a hearing. See, also, *Sullivan* v. *State Board of Tax Administration,* 290 Mich 664; *Philbrick* v. *Dust,* 178 Mich 605; and *McComb* v. *Lansing City Council,* 264 Mich 609. Conversely we have held that acquiescence in an illegal discharge for an unreasonable length of time bars any right to compensation. See *Jones* v. *Doonan,* 265 Mich 384, 388, 389; *Wayne County Prosecuting Attorney, ex rel. Taxpayers,* v. *City of Highland Park,* 308 Mich 425. That Michigan is not alone in this position see *Phillips* v. *City of Boston,* 150 Mass 491 (23 NE 202); *Peruzzin* v. *Test,* 282 App Div 550 (125 NYS2d 353); 145 ALR 767, at 813; and 43 Am Jur, Public Officers, § 381, p 163.

In this case we think appellants have each failed seasonably and diligently to lay the foundation for success in the instant appeal by their initial failure to protest or appeal their suspensions by appropriate action before the civil service commission.

We have already noted that the rules of the civil service commission provide for adjournment of the hearing of an appeal to the commission in cases involving suspension proceedings until the termina-

tion of the court proceedings, upon the proviso that the employee shall waive his right to compensation during the period of adjournment. If, therefore, appellants had prosecuted an appeal from the suspension orders by timely proceedings, the suit before us probably would have been entirely avoided; they would almost certainly have waived the compensation which is the subject matter of this suit. In effect they are now claiming that by their failure to make timely attack upon the suspension order, with the probable adjournment of such proceedings until disposition of the criminal case, they have thereby bettered their position because they thereby avoided such waiver. With this we cannot agree.

Two of the appellants stress the fact that no formal written copy of the order of suspension was served upon them and, as noted, one claims that he received no notice of any kind. While we do not imply that the notice requirements may ever be lightly ignored, there can be no question but that actual notice was had by all of the appellants. The charges against them were a matter of State-wide notoriety; the cases attracted immense newspaper publicity: and none of the appellants could possibly have assumed that their employment by the county could continue in the face of such a sensational indictment. In this case, therefore, we hold that the service of such notice of the order of suspension upon each individual appellant was unnecessary and would have been carrying coals to Newcastle. Appellants' argument possesses an especially hollow ring when it is observed that none made any attempt to appear for work following the indictments.

These suits are also grounded, in part, upon the theory that suspension having been ordered because the appellants had been charged with the commission of a felony, the suspension is illegal when subsequent events resulted in a *nolle prosequi* of the charges

against them. This theory we reject. The criminal proceedings in Ingham county were not in any manner initiated or controlled by the county of Wayne and that county could have had no inkling of or control over the final outcome. The reason why the cases were ultimately thrown out was because a major witness against appellants was held to be unreliable in the considered opinion of the judge who signed the orders of *nolle prosequi*. This cannot affect the validity or propriety of the initial suspension from employment. To hold otherwise would be to require, not merely an indictment or information on a felony charge as provided in the civil service commission rules, but an undisturbed final conviction on such charges. However harsh the present rule may be, all were cognizant of it when they started work. In any case such rules reflect an awareness that public policy may exclude not only a convicted felon from civil service employment, but also one accused of a felony. That the mere filing of an ultimate *nolle prosequi* need not automatically result in a certificate of innocence or grounds for reinstatement let us suppose that such a *nolle* was necessarily filed because a key witness had died. *Nolle prosequi* is not tantamount to an acquittal. We do not imply that the reinstatement in employment in the instant cases was improper; we merely say that a *nolle prosequi* is not necessarily a moral whitewash. The judgment of the circuit court must be affirmed, with costs to appellees.

DETHMERS, C. J., and KELLY, SMITH, BLACK, EDWARDS, and KAVANAGH, JJ., concurred.

CARR, J., did not sit.

KELLY *v.* FINE.

1. TRESPASS—DAMAGES—MENTAL ANGUISH—LOSS OF USE OF PROPERTY.

   Recovery of damages for mental anguish and for loss of use and enjoyment of portion of property from which defendant had removed soil were not proper elements of damages in action of trespass for removal of topsoil wherein recovery of treble damages was sought (CL 1948, § 692.541).

2. SAME—TREBLE DAMAGES—INTENT.

   Provisions of treble damage statute are applicable in action of trespass, where the trespass was intentional and with knowledge that it was without right, it being unnecessary to show malice or desire to injure to warrant imposition of punitive damages (CL 1948, § 692.541).

3. SAME—TREBLE DAMAGES—EVIDENCE.

   Liability for treble damages was properly submitted to jury and its verdict for plaintiffs on such issue was justified, where there was evidence that defendant had removed topsoil from plaintiffs' lot after his company had sold it to plaintiffs regardless of plaintiffs' protest, notwithstanding contract had previously been entered into between the company and the Federal housing administration for grading entire block including plaintiffs' lot, a contract of which plaintiffs had no knowledge at time of purchase (CL 1948, § 692.541).

4. SAME—TREBLE DAMAGES—EVIDENCE—REMITTITUR.

   Judgment for $6,000 is reversed and case is remanded for new trial, unless plaintiff files a remittitur of $2,250, where evidence adduced in trespass action in which treble damages were sought

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 52 Am Jur, Trespass § 49.
[2–4] 52 Am Jur, Trespass §§ 58, 59.
Applicability of statutes providing for multiple damages or penalty for wrongful trespass as affected by defendant's purpose or intent. 111 ALR 79.
[5] 14 Am Jur, Costs § 92.

failed to support a verdict in excess of $1,250 (CL 1948, § 692.541).

5. COSTS—REMITTITUR.

No costs are allowed on appeal from judgment in action of trespass, where remittitur is required as a condition for affirmance.

Appeal from Ingham; Coash (Louis E.), J. Submitted June 4, 1958. (Docket No. 18, Calendar No. 47,481.) Decided October 16, 1958.

Trespass by Lorne E. Kelly and Christine R. Kelly against Francis Fine for treble damages for removal of topsoil. Verdict and judgment for plaintiffs. Defendant appeals. Affirmed conditionally.

H. Donald Bruce, for plaintiffs.

Barnard Pierce (*Milton M. Maddin,* of counsel), for defendant.

DETHMERS, C. J. Suit is for damages for removal of topsoil from plaintiffs' lot. Defendant appeals from judgment for plaintiffs entered on jury verdict.

Defendant was manager of a construction company which had developed a new subdivision for housing. Plaintiffs purchased one of the lots from the company which contracted to construct a house on it for them at a price of $13,600 for the house and lot. The subdivision had been accepted for financing by the Federal housing administration which had included among its requirements a "block" grading plan. Plaintiffs did not finance through the Federal housing administration and it does not appear that they had knowledge of the company's commitment to that administration with respect to the grading plan.

When the house was completed plaintiffs moved in and paid the full price, except for $350 which

was placed in escrow to guarantee the company's completion of the outside work, including sidewalks, driveway, porch steps and grading up the lawn. Thereafter, defendant caused earth-moving machinery to enter upon plaintiffs' property and to remove, as plaintiffs claim, 544 cubic yards of earth and to place it on other lots in the subdivision. When this operation began, plaintiffs objected and protested to defendant and did so again before it was completed. Despite their objections, the removal continued.

In his opening statement counsel for plaintiffs said that their testimony would show, as one of plaintiffs and their expert witness, a landscaper, subsequently did testify, that it would cost $1,250 to replace the soil and restore the lot to its former condition. There was no other testimony or proof of damages. Although plaintiffs, in their declaration and their counsel's opening statement, claimed the right to recover for mental anguish and for loss of use and enjoyment of a portion of their property, at trial plaintiffs' counsel, upon objection thereto on the ground that these did not constitute proper elements of damage, withdrew his question to one of plaintiffs with respect to such damages and conceded that the objection thereto was proper.

The court instructed the jury that they might return 1 of 3 verdicts, namely, verdict for plaintiffs based upon a finding of willful and wanton trespass, verdict for plaintiffs based upon a finding of casual and involuntary trespass, or verdict of no cause for action in favor of defendant. The jury returned a verdict for plaintiffs in the amount of $2,000, finding expressly that the defendant had been guilty of willful and wanton trespass. Applying the treble damages provisions of CL 1948, § 692.451 (Stat Ann § 27.2161), the court entered judgment for $6,000 plus costs.

On appeal defendant contends that the provisions of the mentioned statute for trebling damages are not applicable here because there was no evidence which would permit the jury to find, as it did, a willful and wanton trespass and that such punitive damages may be included in the judgment only when it is established that defendant's trespass was committed with willfulness, malice or evil design and intent to cause damage. In this connection, Michigan trespass cases cited are *Allison* v. *Chandler,* 11 Mich 542; *Russell* v. *Myers,* 32 Mich 522; *Winchester* v. *Craig,* 33 Mich 205; and *Kilgannon* v. *Jenkinson,* 57 Mich 325. In these cases it was held that a trespass committed by a defendant who acted in good faith and under an honest belief that he had a legal right to do the act complained of, or who had probable cause for supposing so, does not warrant the addition of punitive damages. They do not support the position that there must be a showing of malice or desire to injure before the statute may be invoked, but it is enough if it be shown that the trespass was intentional and with knowledge that it was without right. The language of the statute itself requires no such showing as contended for by defendant.* In the instant case, the court, following *Miller* v. *Wykoff,* 346 Mich 24, left to the jury, in clear terms, the question whether the trespass, if any, was casual and involuntary or willful and wanton. The jury

* CL 1948, § 692.451 (Stat Ann § 27.2161):

"Any person who shall cut down or carry off, any wood, underwood, trees or timber, or shall girdle or otherwise despoil or injure any trees on the land of any other person, or shall dig up or carry away any stone, ore, gravel, clay, sand, turf, or mould from such land, or any roots, fruit or plant there being, or cut down or carry away any grass, hay, or any kind of grain standing, growing or being on such land, without the leave of the owner thereof, or on the lands or commons of any city, township, village or other corporations without license therefor given, shall be liable to the owner of such land, or to such corporation, in 3 times the amount of damages which shall be assessed therefor in an action of trespass, by a jury, or by a justice of the peace in the cases provided by law."

found the latter. There was ample proof to support the finding. Even though it be conceded that the company had entered into an agreement with the Federal housing administration with respect to a "block" grading plan, it does not appear that it had advised the plaintiffs thereof before selling the lot to them. Defendant knew, or should have known, that plaintiffs were not bound by such agreement and that he had no right whatsoever to remove soil from the lot bought, paid for and owned by them. Despite all this, defendant caused the soil removal to proceed over plaintiffs' protests. The court did not err in applying the statute.

Defendant relies on *Miller* v. *Wykoff, supra,* as authority for the proposition that the measure of damages in a case such as this must be the difference in value of the freehold before and after the trespass. Because there was no testimony concerning the value of the property either before or after the trespass, defendant insists that there was no basis for determining the amount of the loss of value of the freehold and that, accordingly, the verdict could not properly have been for more than nominal damages. We think it consistent with *Miller* v. *Wykoff*, however, to hold that proofs that it would cost $1,250 to restore the lot to its condition before the trespass constituted evidence from which the jury might make a determination of the loss to the freehold.

Defendant says that the verdict for $2,000 was against the great weight of the evidence and that there was no evidence or proof to support a verdict in excess of the sum of $1,250. The record bears out this contention. Accordingly, the judgment must be reversed and new trial granted unless plaintiff shall, within 30 days after filing of this opinion, file a remittitur of $2,250; but, upon filing of such remit-

titur, judgment for plaintiff will stand affirmed in the amount of $3,750. No costs.

CARR, KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

ORTISI *v.* ODERFER.

1. AUTOMOBILES — PEDESTRIANS — CONTRIBUTORY NEGLIGENCE — FINDING OF TRIAL COURT—NONJURY CASE—PREPONDERANCE OF EVIDENCE.

   Trial court's finding of fact that plaintiff pedestrian was guilty of contributory negligence in nonjury action for personal injuries sustained while he was approaching far curb on left side of street when hit by defendant's car which had approached from plaintiff's right *held*, not against preponderance of evidence; the provisions of an ordinance according preferential treatment to a pedestrian who has started across a street with the traffic light in his favor not serving to cause the evidence to clearly preponderate against the finding of the trial court.

2. APPEAL AND ERROR—COMMON PLEAS COURT—FINDING OF FACT—EVIDENCE.

   The question on appeal from decision of a judge of the common pleas court in a nonjury case on a question of fact is whether there is competent evidence to support the determination made, not whether the circuit court or the Supreme Court would have made the same finding.

Appeal from Wayne; Targonski (Victor), J. Submitted June 5, 1958. (Docket No. 29 Calendar No. 47,289.) Decided December 2, 1958.

Case by Dominic Ortisi against John Herman Oderfer for personal injuries sustained when struck

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 5A Am Jur, Automobiles and Highway Traffic § 761.
Right-of-way at street or highway intersections. 21 ALR 974, 37 ALR 493, 47 ALR 595.
Liability for accident at street or highway intersection as affected by reliance on or disregard of traffic sign, signal, or marking. 164 ALR 8.

by defendant's automobile. Trial in common pleas court for the City of Detroit resulted in judgment of no cause of action. Circuit judge ordered judgment entered for plaintiff in full amount of lower court's jurisdiction. Defendant appeals. Reversed.

Joseph W. McDonnell, for plaintiff.

Ward, Plunkett & Cooney, for defendant.

DETHMERS, C. J. This case was previously before this Court, our opinion being reported at 341 Mich 254. That appeal was from an order of the circuit court reversing judgment for defendant in the common pleas court for the city of Detroit and remanding to that court for new trial. The order was affirmed here by an equally divided Court. On retrial, accordingly, the judge of the common pleas court, sitting without a jury, again found for defendant. On appeal to circuit court the latter reversed the judgment below and ordered the case remanded for entry of judgment for the plaintiff in the full jurisdictional amount for which the lower court may enter judgment. Defendant again appeals here.

Considerably more testimony was introduced at the second trial than at the first concerning the conduct of the 2 parties. The record shows that plaintiff proceeded under protection of a green traffic light to cross a street at a crosswalk 120 feet in length along his left side of an intersection. When he had reached a point near the far curb he was struck by defendant's automobile, which had just passed through the intersection, approaching plaintiff from his right. There was testimony that the traffic light continued green in plaintiff's favor during the entire period, or nearly all of it, while he was crossing the street. There was also testimony

from which it might be concluded that the light had changed from green when the plaintiff was crossing car tracks at the center of the street. Plaintiff testified that he walked across the street at a normal gait. Other proofs were to the effect that he started to run at about the center of the street. Plaintiff testified that he made observations to right and left before entering upon the street, that he next looked to his right as he crossed the tracks but did not again look to his right and that thereafter he twice observed the light still green in his favor. He testified that he did not see defendant's automobile before it struck him. Defendant admitted that he failed to see plaintiff until it was too late to avoid the accident.

The question presented on this appeal is not whether plaintiff was guilty of contributory negligence as a matter of law. Neither does plaintiff contend, nor did the circuit court hold, that plaintiff was, as a matter of law, free from contributory negligence. Rather, the question presented by the holding of the circuit judge and briefed by the parties is whether the finding of the trial judge, sitting as a trier of the facts, was against the clear preponderance of the evidence. The record discloses a conflict of proofs touching the matter of plaintiff's conduct. A question of fact was presented concerning his contributory negligence. It was for the trial judge to determine which testimony should be believed, to draw conclusions therefrom, and then to determine what were the facts of the case. It cannot be said that the evidence clearly preponderates against a finding of fact that, under all the circumstances of the case, plaintiff's crossing the street in the manner in which the court might well have found from the proofs that he did and his failure to see defendant's approaching automobile and take steps to avoid the accident constituted contributory negligence. The

question is not whether the circuit court or this Court would have made the same finding of fact, but, rather, whether there was competent evidence to support it. *Kellar* v. *United Metal Products Co.*, 338 Mich 651.

Cases considering the relative rights and duties of plaintiff pedestrians and defendant operators of motor vehicles coming together at street intersections, cited by plaintiff, are: *Bartlett* v. *Melzo*, 351 Mich 177; *Douglas* v. *Holcomb*, 340 Mich 43; *Day* v. *Troyer*, 341 Mich 189; *Wisnaski* v. *Afman*, 341 Mich 453; *Bennett* v. *Hill*, 342 Mich 754. These are cases in which it was held that defendant was not entitled to a directed verdict on the grounds that plaintiff was guilty, as a matter of law, of contributory negligence. In each it was held that the question of plaintiff's contributory negligence was one of fact for the trier of the facts. None involved a holding that a finding of fact in favor of defendant was against the great weight or the clear preponderance of the evidence. It might be suggested that the existence of an ordinance in the case at bar, similar in effect to that in the case of *Bartlett* v. *Melzo*, *supra*, according preferential treatment to a pedestrian within a crosswalk and requiring vehicles to yield him the right-of-way, requires a result opposite to that reached by the trial court. The *Bartlett Case* did not hold, however, that because of the pedestrian's preferred position under the ordinance he must be deemed as a matter of law to have been free from contributory negligence, but only that the question of his contributory negligence was one of fact for the jury. It is so here. Provisions of the ordinance do not serve to cause the evidence to clearly preponderate against the finding of the trial court.

Order of the circuit court reversed and judgment of the common pleas court affirmed, with costs to defendant.

CARR, KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

SCHNEPF *v.* THOMAS L. McNAMARA, INC.

1. CONTRACTS—FINDING OF JURY—MODIFICATION—EVIDENCE.
   Finding of jury that plaintiff and defendant had agreed not to terminate written contract of plaintiff to supply sufficient trucks to remove excavated dirt from sewer trench and haul sand backfill after it became necessary to haul the sand from a greater distance and to modify it later as to payments and had not entered into a new oral agreement replacing the former written agreement *held*, not contrary to the great weight of the evidence.

2. SAME—BREACH—WAIVER OF RIGHT TO TERMINATE.
   Plaintiff trucker who continued to haul sand backfill from new location without protest and without claiming breach of written contract or asserting its termination lost his right, if any, to terminate the contract and declare it forfeited for such breach.

3. SAME—BREACH—WAIVER—CONTINUANCE OF PERFORMANCE.
   A plaintiff who was injured by a material breach of written contract but nevertheless continued to perform thereunder was not thereafter excused from ceasing performance without responding in damages for such cessation, the continuance of performance after substantial breach amounting to a waiver.

REFERENCES FOR POINTS IN HEADNOTES

[2, 3] 12 Am Jur, Contracts § 390.

Appeal from Saginaw; Huff (Eugene Snow), J. Submitted October 7, 1958. (Docket No. 7, Calendar No. 47,566.) Decided December 2, 1958.

Action by John Schnepf against Thomas L. McNamara, Inc., a Michigan corporation, for breach of contract to employ trucks on construction job. Cross declaration for damages resulting from plaintiff's failure to furnish required trucks and services. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Charles A. Hills, for plaintiff.

Joseph W. Planck, for defendant.

DETHMERS, C. J. Plaintiff declared on a written contract for sums due thereunder, for further sums due under an oral contract allegedly entered into on termination of the former, and for damages for breach of the latter. Defendant filed a cross declaration for damages resulting from plaintiff's alleged breach of the written contract. A jury returned a verdict of $10,000 for defendant. Plaintiff appeals.

Defendant had contracted to construct a sewer for the city of Saginaw at a stipulated price, to complete it by a certain date and to pay a penalty for each day's delay beyond that date. Defendant made a subcontract with plaintiff, under which plaintiff was to haul away all dirt excavated on the job and to haul back sand from a specified location to be used as backfill. The subcontract was as follows:

"March 11, 1954. Agreement between Thos. L. McNamara, Incorporated and J. Trucking Co. [plaintiff]. J. Trucking Co. agrees to haul all necessary sand backfill from Ojibway island to Rust street job and to haul away to dumps designated

by city all excavation from sewer trenches for the sum of $22,000. At all times there shall be sufficient trucks on job as not to hinder production. Thos. L. McNamara, Inc. agrees to pay J. Trucking Co. according to estimates received from City.

Signed /s/ THOMAS L. MCNAMARA,
Thomas L. McNamara, Inc.
/s/ JOHN M. SCHNEPF per JHS,
J. Trucking Co."

Operations commenced under the subcontract on March 22, 1954, and continued until April 13, 1954. On the latter date it became necessary for defendant to procure backfill sand from a different source because the sand taken from Ojibway island, as mentioned in the subcontract, was rejected as unsuitable by the highway department. The location of the new source was at a slightly greater distance from the sewer construction job. For a number of days the backfill sand was hauled from the new location by plaintiff, who at that time made no claim of breach or termination of the written contract. During that period, after the location change, defendant paid plaintiff $2,640 in instalments on the written contract. Defendant's president testified that he had recognized, however, that plaintiff was entitled to have the subcontract price increased somewhat to fairly compensate him for the additional hauling occasioned by the change of location of the source of backfill sand and that, accordingly, the parties met on April 21st to discuss an adjustment of the $22,000 contract price. No agreement was reached with respect to the amount of such increase or adjustment. What was agreed upon at that meeting is the subject of sharp dispute in this case. Plaintiff claims that the written contract had been breached and renounced by the defendant's changing the location of the sand loading operations, and that plaintiff was thereby relieved of his contract obligation

of having a sufficient number of trucks on the job at all times so as not to hinder production. Plaintiff claims that, under such circumstances, the parties on April 21st entered into a new oral agreement terminating the written agreement and providing that defendant was to hire 7 of plaintiff's trucks at a specified hourly rate with no undertaking by plaintiff to furnish more than that number of trucks. Defendant, on the other hand, denies that the written contract was terminated by agreement or otherwise, and claims that, although defendant had expressed a willingness to increase the total contract price, no definite amount was agreed upon, but defendant did agree that meanwhile, and until such price agreement was reached, it would pay instalments on the contract price on the basis of an hourly rate for each truck with the provision that when the total contract price was finally agreed upon instalment payments thereafter would be adjusted to compensate for overpayment or underpayment in past instalments, as the case might be, as determined by the amount of the contract price ultimately agreed upon. The payment of such instalments apparently was in line with the provision of the written contract that defendant was to make payments to plaintiff on the basis of estimates received from the city as to the proportion of the total job completed from time to time. Defendant's claim is, therefore, that plaintiff's obligation under the written contract to keep a sufficient number of trucks on the job continued, that plaintiff failed to do so, thereby breaching the contract and causing defendant great damage, and that, for that reason, defendant finally terminated the contract at the end of April.

The controlling question is what was agreed upon orally on April 21st. The jury clearly accepted defendant's version. We cannot say that this was contrary to the great weight of the evidence.

Against that background we consider plaintiff's contentions on appeal.

Did defendant's change of the location for sand loading operations constitute a breach of contract relieving plaintiff from the obligation to supply a sufficient number of trucks at all times? Plaintiff continued operations under the written contract for a number of days after such change of location and up to the April 21st meeting without protest and without claiming breach of contract or asserting its termination. The record does not indicate that he made such claim at any time prior to suit. By continuing thus to perform and to accept payments under it, as above noted, he lost his right, if any, to terminate the contract and declare it forfeited. *Robinson* v. *Lake Shore & M. S. R. Co.,* 103 Mich 607.

"It was appellant's duty, when it discovered the apparent breach of the contract, if it intended to insist upon a forfeiture, to do so at once. By permitting appellees to proceed with the performance of the contract, it waived a breach." *Grayson-McLeod Lumber Co.* v. *Slack,* 102 Ark 79, 83 (143 SW 581).

" 'Where there has been a material breach which does not indicate an intention to repudiate the remainder of the contract, the injured party has a genuine election either of continuing performance or of ceasing to perform. Any act indicating an intent to continue will operate as a conclusive election, *not indeed of depriving him of a right of action for the breach which has already taken place,* but depriving him of any excuse for ceasing performance on his part. Anything which draws on the other party to execute the agreement after the default in respect of time or which shows that it is deemed a subsisting agreement after such default will amount to a waiver.' (Italics ours.) 12 Am Jur, Contracts, § 390, p 968." *Sinclair Refining Co.* v. *Costin* (Tex Civ App), 116 SW2d 894, 898.

There having been testimony, evidently accepted as true by the jury, that the written contract continued in effect after the location change and after the April 21st meeting, obligating plaintiff to continue to furnish a sufficient number of trucks at all times, it was proper for the court to permit the jury to consider whether plaintiff had breached his agreement in that regard, to submit to the jury a special question as to whether plaintiff had at all times provided sufficient trucks on the job, and to permit defendant to introduce proofs of damages to it resulting from such claimed breach by plaintiff.

Affirmed, with costs to defendant.

CARR, KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

LISOWEK *v.* BAGOZZI.

1. FRAUD—RESCISSION—AFFIRMANCE OF CONTRACT—DAMAGES—RETENTION OF PROPERTY—LACHES.

One who affirms a contract, induced by fraudulent representations, and seeks to recover the difference between the actual value of the property and the amount paid therefor which it would have been worth if as represented by the seller, may bring an action for the difference at any time within the period fixed by the statute of limitations, retention of the property by the purchaser not being a bar to his bringing such an action and laches short of the statute of limitations no defense (CLS 1956, § 609.13).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 24 Am Jur, Fraud and Deceit §§ 207, 227.
"Out of pocket" or "benefit of bargain" as proper rule of damages for fraudulent representations inducing contract. 124 ALR 37.

2. SAME—ACTION FOR DIFFERENCE BETWEEN ACTUAL AND REPRESENTED VALUE.

Purchaser of route of coin-operated shuffleboards for $13,500 who discovered that they would not net $1,000 per month as represented, after he had paid $5,000 down payment, but completed payment upon further representation by defendant seller and agent that plaintiff could not rescind such transaction and must complete payment, sell the property and sue for the difference and that such was the legal advice they had received *held,* entitled to sue within period permitted by statute of limitations for difference between actual value and value it would have had had it been as represented (CLS 1956, § 609.13).

Appeal from Wayne; Neuenfelt (Lila M.), J. Submitted October 8, 1958. (Docket No. 18, Calendar No. 47,367.) Decided December 2, 1958.

Case by Frank Lisowek against Benjamin Bagozzi and Frank Stein for damages sustained by reason of fraud inducing contract of purchase. Declaration dismissed on motion. Plaintiff appeals. Reversed and remanded.

J. Connor Austin (*Hugh K. Davidson* and *Joseph A. Lang,* of counsel), for plaintiff.

Tilden M. Gallagher, for defendants.

DETHMERS, C. J. Defendant Stein owned a number of coin-operated shuffleboards located in various taverns, making up a so-called shuffleboard route. Acting through his agent, defendant Bagozzi, he offered the same for sale to plaintiff, representing that it produced a net monthly income of $1,000. Plaintiff's declaration alleges that defendants sold him the machines and route for $13,500, receiving $5,000 as a down payment, the balance of $8,500 to be paid upon it being demonstrated that the route would net $1,000 per month. The declaration fur-

ther alleges that plaintiff later learned, from accompanying defendant Stein's employee on 2 occasions while making collections from the machines, that the proceeds from the route fell far short of totalling $1,000 per month; that plaintiff thereupon demanded return of his $5,000 down payment; that defendants refused to return the deposit, telling plaintiff that their agent had consulted with lawyers, stated the facts of the case to them, and been advised by such lawyers that under the law plaintiff could not rescind and recover his down payment, but that his only remedy would be to pay defendants the $8,500 balance, mitigate his damages by selling the route for its true value, and then seek to recover the difference from defendants; that, believing and acting in reliance on such representations and advice, plaintiff paid defendants the $8,500 balance; that subsequent collections disclosed that monthly proceeds from the route totalled only $600 instead of $1,000 as represented. Three days before the statutory 3-year limitation on actions* had run plaintiff brought this suit to recover $5,400, alleging that to be the difference between the true value of the property and the amount plaintiff paid therefor, the latter being what the value of the property would have been had its revenues been as represented by defendants. On defendants' motion, the court dismissed plaintiff's declaration for failure to state a cause of action. Plaintiff appeals.

In ordering dismissal, the court stressed plaintiff's making the $8,500 balance payment and retaining the property for 3 years after his discovery that the representations concerning the route revenues were false and fraudulent, and, also, his failure to offer and inability to restore the route to defendants in the same condition as when taken by him.

* See CLS 1956, § 609.13 (Stat Ann 1957 Cum Supp § 27.605).—REPORTER.

In this connection, the court cited a line of decisions rendered in rescission cases holding that a plaintiff-buyer must promptly, upon discovering the fraud, rescind and offer return of the purchased property to the defendant-seller. The cases are inapplicable because this is not a rescission case, but one in which plaintiff has affirmed the contract and seeks to recover the damages occasioned by the fraud, in the amount of the difference between the actual value of the property and the amount paid therefor by plaintiff which it would have been worth if as represented by defendants. In such case, the plaintiff may act and bring suit at any time within the period fixed by the statute of limitations. *Alfred J. Brown Seed Co.* v. *Brown,* 240 Mich 569. Retention of the property by plaintiff-purchaser is not a bar to his bringing an action such as this, *Poloms* v. *Peterson,* 249 Mich 306, and laches short of the statute of limitations is no defense. *Barnhardt* v. *Hamel,* 207 Mich 232; *Haukland* v. *Muirhead,* 233 Mich 390.

Defendants rely, however, on such cases as *Monroe* v. *Hoffman,* 276 Mich 281; *Foster Machine Co.* v. *Covel Manfg. Co.,* 219 Mich 455; and *McKinney* v. *Gillmore,* 307 Mich 155, for the proposition that even though this be an action, upon affirmance of the contract by plaintiff, for damages resulting from the fraud, performance by the defrauded party after his discovery of the fraud amounts to affirmance of the fraud; that one discovering that he has been defrauded may either promptly rescind or elect to affirm the contract and hold the opposite party for damages, but, if he elects the latter course, he must "stop short" in performance of an executory contract upon discovery of the fraud, because further performance by him works a waiver of the fraud. To this, plaintiff responds by urging that his payment of the $8,500 balance after discovery of the fraud was not a waiver of the fraud because he was

induced so to do by the further fraudulent misrepresentation by defendants concerning their alleged consultation with and receipt of advice from attorneys concerning the respective rights and duties of the parties in the case as above mentioned. Defendants answer that this involves, at most, a misrepresentation, not of facts, but as to matters of law upon which, under authorities cited by them, fraud cannot be predicated. Plaintiff contends, however, that this misrepresentation was not only as to matters of law, but also of fact, namely that defendants had consulted with lawyers, fairly stated the facts to them and received from them the opinion as represented to plaintiff. Plaintiff also relies on authorities to the effect that even misrepresentations as to matters of law may afford grounds for an action for fraud when the person making such misrepresentations is guilty of other wrongful conduct, such as defendants' pretending to plaintiff here that they had received the legal opinion in question from attorneys, which induces the opposite party to rely and act thereon. *Rosenberg* v. *Cyrowski,* 227 Mich 508; 23 Am Jur, Fraud and Deceit, § 48. We think plaintiff's contentions well-founded.

Reversed and remanded for further pleadings and trial. Costs to plaintiff.

CARR, KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

SPELKER *v.* KNOBLOCH.

1. JURY—VOIR DIRE—DISCRETION OF COURT.
   The scope of *voir dire* examination of prospective jurors is largely in the discretion of the trial court.

2. SAME—VOIR DIRE—INSTRUCTIONS—DAMAGES RECOVERABLE.
   It was not error in action under civil damage act for trial court to refuse plaintiff's counsel, on *voir dire* examination, permission to mention a specific sum as damages upon finding a verdict for plaintiff, since the jury would be instructed by the judge as to the damages recoverable upon submission of the case to them (CLS 1956, § 436.22).

3. SAME—VOIR DIRE—DISCRETION OF COURT—INSURANCE.
   It was not an abuse of discretion on the part of the trial court to decline to permit plaintiff's counsel to ask prospective jurors whether or not any were stockholders or members or relatives of any stockholders or members of a mutual insurance association or company, where counsel had stipulated that no mutual insurance company was involved and no substitute question was presented, it being the opinion of the trial court that the purpose of the question, under the circumstances, was to convey, rather than to elicit, information as to insurance coverage.

4. INTOXICATING LIQUORS—CIVIL DAMAGE ACT—WORKMEN'S COMPENSATION INSURANCE—PREJUDICE.
   Questions asked by defendant's counsel and answered, and comments of such counsel, directed to the existence of workmen's compensation insurance coverage and trial court's instructions

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 31 Am Jur, Jury § 138.
[3] 31 Am Jur, Jury §§ 208, 209.
Admissibility of evidence, and propriety and effect of questions, statements, comments, et cetera, tending to show that defendant in personal injury or death action carries liability insurance. 4 ALR2d 761.

to jury as to such matter in third-party action authorized by the workmen's compensation act and brought under civil damage act *held,* not to have constituted prejudicial error, where plaintiff raised no objections at the trial, plaintiff stipulated, in open court, as to payment of such compensation to plaintiff and instruction given was of same general purport as plaintiff's request to charge (CLS 1956, §§ 413.15, 436.22).

Appeal from Saginaw; Beers (Henry L.), J., presiding. Submitted October 10, 1958. (Docket No. 36, Calendar No. 47,433.) Decided December 2, 1958.

Case by John David Spelker against John Knobloch and Antoinette Knobloch, copartners doing business as Carrollton Bar, and Anna Beinhorn, doing business as Lowenhof Cafe, under the civil damage act for personal injuries caused by intoxicated driver of motor vehicle. Verdict and judgment for defendants. Plaintiff appeals. Affirmed.

van Benschoten & van Benschoten, for plaintiff.

Stanton & MacKenzie (*H. Monroe Stanton,* of counsel), for defendants Knobloch.

Heilman & Purcell (*John Purcell,* of counsel), for defendant Beinhorn.

DETHMERS, C. J. Plaintiff was injured in an automobile accident allegedly caused by the negligence of a drunken driver. He was receiving workmen's compensation benefits for the resulting disability when this suit was commenced and tried. This is a third-party action authorized by CLS 1956, § 413.15 (Stat Ann 1957 Cum Supp § 17.189). It is brought against defendants, licensed liquor retailers, under CLS 1956, § 436.22 (Stat Ann 1957 Rev § 18.993), which requires such retailers to furnish

a bond and renders the principal and sureties thereon liable with the retailer for injuries caused by an intoxicated person by reason of the retailer's unlawful sale of liquor to him. The *ad damnum* clause of plaintiff's declaration claims damages in the amount of $250,000. From jury verdict of no cause for action, plaintiff appeals.

No claim is made that the verdict is against the great weight of the evidence. Error is assigned on the court's refusal to permit plaintiff's counsel, on *voir dire* examination, to ask the following questions:

(1) "If the defendants Anna Beinhorn, doing business as Lowenhof Cafe, and John Knobloch and Antoinette Knobloch doing business as Carrollton Bar, or either of them, are proved to be liable to the plaintiff, John David Spelker, and if Mr. Spelker then also proves that he has suffered damages in the amount of $250,000, is there any one of you jurors who feel that he or she could not award him $250,000, regardless of these proofs? In other words, is there any juror here or potential juror who feels that $250,000 is just too much money, no matter what the proofs show so far as damages are concerned?"

(2) "Is any member of this jury a stockholder or member of any mutual insurance association or company, or is any member of this jury an officer, agent, employee or relative of any stockholder or member or any agent or employee of any such company?"

The scope of *voir dire* examination of prospective jurors is largely in the discretion of the trial court. *Ford* v. *Cheever,* 113 Mich 440; *Snyder* v. *Mathison,* 196 Mich 378; *Church* v. *Stoldt,* 215 Mich 469; *People* v. *Lockhart,* 342 Mich 595. In sustaining an objection to the first question, the trial court stated that mention of a specific sum of damages at that stage, thus seeking to pledge the jurors to it, was im-

proper. After such ruling, counsel for plaintiff made no offer or attempt to rephrase or resubmit the question so as to elicit information, without mention of a specific sum, as to whether the prospective jurors would, upon finding for plaintiff, award such damages in full as the proofs would establish that plaintiff had suffered. On the contrary, he continued to insist on the right to inject the $250,000 figure into the prospective jurors' thinking at that time. From the statement then made by the trial court, as well as its later written opinion denying new trial, it is evident that such question, without mention of a specific sum, would have been permitted by the court. It would have given plaintiff all the information to which he was entitled in the premises. It would have been in line with one asked of a juror and held not prejudicial in *Ballance* v. *Dunnington,* 246 Mich 37, 42, 43, where this Court said:

"2. *Examination of the Jury.* The following question was asked of a juror:

" 'If you are chosen as a juror, and if you determine from the evidence in this case that the plaintiff did suffer the loss of his leg or right foot and suffered the pain which I have described, and you are satisfied by a preponderance of the evidence that the testimony is true in that respect, will you render such a verdict as in your judgment will compensate this plaintiff for the injuries he received by reason of the negligence of the defendant?'

"Over objection the juror answered: 'If the evidence showed it.'

"The latitude allowed in the examination of jurors, when examined by counsel, is largely within the discretion of the trial court. No apparent prejudice could have resulted. It would seem, however, to be the better practice not to permit the time of the court to be taken up by asking questions which involve matters upon which it is the duty of the court

to instruct the jury when the case is submitted to them for decision."

We find no abuse of discretion in the court's declining to permit mention of a specific sum in the question.

While plaintiff's brief urges the right to inquire of prospective jurors as to their interest in the insurance industry generally, the precise question offered related to their interest in a mutual insurance company. The court declined to permit this question, pointing out that it did so because counsel had stipulated that no mutual insurance company was involved, after which plaintiff's counsel offered no substitute question with respect to interest in the insurance industry in general. These circumstances lend weight to the opinion of the trial court that counsel's purpose, with respect to both questions, was not to obtain information from the prospective jurors but, rather, to convey it to them and that the latter was an effort to get into the minds of the jury the fact of insurance or bonding company coverage. The court was guilty of no abuse of discretion in declining to permit it.

Finally, plaintiff assigns as error questions asked by defense counsel and answered, and comments of such counsel, directed to the existence of workmen's compensation insurance coverage in the case and the court's instructions to the jury in that regard. At trial, not only were no objections made to the questions, answers or comments, but, instead, plaintiff's counsel offered to and did stipulate, in open court, as to the payment of such compensation to plaintiff. Insofar as the instruction complained of is concerned, it is of the same general purport as a request to charge submitted by plaintiff for the purpose of informing the jury that the avails of any judgment obtained by plaintiff must

first be applied to repayment of the compensation insurance carrier. Under the circumstances it cannot be said that prejudicial error occurred in this connection.

Affirmed.

CARR, KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

CRELLER *v.* BAER.

1. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—OPPOSITE PARTIES—WAIVER.

   Exclusion of testimony by defendants relative to delivery of deed to them by plaintiff and his deceased wife, mother of defendant wife, *held*, proper, where record does not substantiate defendants' claim that plaintiff had waived the provisions of statute barring testimony of an opposite party as to matters equally within the knowledge of a deceased party (CL 1948, § 617.65).

2. DEEDS—DELIVERY—PRESUMPTIONS—POSSESSION—EVIDENCE.

   Delivery of a deed will be presumed where the grantee is in possession thereof, in the absence of testimony to prove there was no delivery, but such presumption is rebuttable.

3. ATTORNEY AND CLIENT—INSTRUMENT DRAFTED BY ATTORNEY IN OWN FAVOR.

   An instrument drafted by an attorney in his own favor is looked upon with suspicion.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Witnesses § 355.
Examination of witness as waiver of his incompetency to testify as to transactions or conversations of decedent. 159 ALR 411.
[2] 16 Am Jur, Deeds §§ 382, 397.
[3] 5 Am Jur, Attorney and Client §§ 50, 51.
[4] 16 Am Jur, Deeds §§ 392, 398, 402.

4. DEEDS—DELIVERY—EVIDENCE.

Trial court's finding that deed by elderly couple to wife's daughter and her husband, defendants, should be set aside for lack of delivery and that there was testimony overcoming presumption of delivery is not disturbed, it appearing that defendant husband, an attorney, had drafted the deed, that there was little, if any, consideration therefor, and that plaintiff was not mentally keen at time deed was executed.

Appeal from Saginaw; Campbell (Howard L.), J., presiding. Submitted October 14, 1958. (Docket No. 46, Calendar No. 47,249.) Decided December 2, 1958.

Bill by William A. Creller against John W. Baer and Azalea A. Baer to set aside deed. Decree for plaintiff. Defendants appeal. Affirmed.

Maurice Black, for plaintiff.

Stanton, MacKenzie, Cartwright & Walker (*H. Monroe Stanton,* of counsel), for defendants.

DETHMERS, C. J. Defendants appeal from decree setting aside a deed purporting to convey to them title to real estate owned by plaintiff and wife by the entireties.

Defendant John W. Baer is an attorney who had been handling business affairs for plaintiff and wife. Defendant Azalea A. Baer, John's wife, was the daughter of plaintiff's wife by a previous marriage. The deed, drafted by defendant John W. Baer, was dated and purportedly executed by plaintiff and wife shortly before the latter's death, at a time when she was 73 years of age and physically and mentally infirm. Plaintiff was then 70 years of age. His testimony satisfies us that he was not mentally keen. There is no claim that defendants made any promises or gave other consideration for the deed.

A few days after the death of plaintiff's wife, defendant John W. Baer had the deed recorded and it was in his possession at time of trial.

Plaintiff testified that he had never discussed deeding the property to defendants either with them or his wife; that he had no recollection of signing the deed; that defendant John W. Baer was always "sticking stuff" in front of him to sign; that although the signatures on the deed were those of himself and his wife, he had not known that he was signing a deed and that he would not have signed it if he had known what it was and what it provided; that he had no knowledge of the whereabouts of the deed during the week apparently intervening between the dates when it was drawn and signed; that he and his wife had consulted no other attorney or person in this connection about giving defendants a deed; that all the valuable papers of plaintiff and wife were always kept by them in a metal box on a closet shelf; that a few days before the death of plaintiff's wife, when she was unable to know what was occurring and while she was being carried out of her home to be taken to a hospital, defendant John W. Baer took the metal box, telling plaintiff that he needed its contents to help him in making out plaintiff's income tax return; that after his wife's death defendants ransacked plaintiff's home from attic to basement, looking into drawers, et cetera, and taking many things; that he, the plaintiff never delivered the deed to defendants and had no knowledge of his wife ever having done so; that immediately upon her death defendant John W. Baer persuaded plaintiff to change his $7,000 bank account so as to make him joint owner with plaintiff and, also, to change beneficiaries of his life insurance policies, making them payable to his estate. At about the time defendant John W. Baer drafted the deed he also drew a joint will, by the terms of which Azalea A. Baer

was to become the chief beneficiary of the estates of plaintiff and wife. Plaintiff testified that, although the will bore his and his wife's signatures, he could not remember signing it, that he did not know he had made a will of such purport, and that he certainly had no such intention; that upon the death of plaintiff's wife defendant took money from plaintiff's home and his wife's purse and paid bills and generally took over control of the affairs of plaintiff and wife, without plaintiff's consent, at a time when he was too grief stricken to make effective protest.

For plaintiff, it is contended that the deed was never delivered to defendants and it is suggested that possession of it could only have been acquired by them through defendant John W. Baer's taking of the metal box during the wife's ebbing lifetime or, after her death, when defendants ransacked the house. Testimony of defendants to establish delivery of the deed by plaintiff and wife to them, contained in a separate record, was excluded as relating to matters equally within the knowledge of the deceased. Defendants contend that the exclusion was in error on the ground that plaintiff had waived the provisions of the statute. CL 1948, § 617.65 (Stat Ann § 27.914). Defendants fail to point out the particulars of such alleged waiver and our examination of the record does not so persuade us. The exclusion was proper.

Defendants rely on *In re Herbert's Estate,* 311 Mich 608, 613, in which this Court said:

"It is equally well settled that in the absence of testimony to prove there was no delivery, the law will presume a delivery from the possession of the instrument by the grantee or donee. *Dawson* v. *Hall,* 2 Mich 390; *Wilbur* v. *Grover,* 140 Mich 187."

They say that there is no testimony of nondelivery in this case and that their possession of the deed and its recording establish a presumption of delivery which stands on the record unrebutted. That the presumption is rebuttable is settled, as was recognized by express language in the *Herbert Case*. See cases therein cited which so hold.

An instrument drafted by an attorney in his own favor is looked upon with suspicion. *Abrey* v. *Duffield,* 149 Mich 248. When elderly, infirm persons, for grossly inadequate or no consideration whatsoever and without independent advice or counsel divest themselves of their property in favor of one in a position of confidential relationship to them, "equity will not stand by with folded arms." *Clement* v. *Smith,* 293 Mich 393, 396; *Seeley* v. *Price,* 14 Mich 541; *Beattie* v. *Bower,* 290 Mich 517. With these principles in mind and upon examination of plaintiff's testimony, we are not disposed to say that, had we been in the position of the trial court, we would have held contrary to his holding that the presumption of delivery was overcome, that there was no delivery of the deed or intention to deliver it, and that equity and good conscience require that it be set aside.

Affirmed, with costs to plaintiff.

CARR, KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

DON McCULLAGH, INC., *v.* DEPARTMENT OF REVENUE.

1. TAXATION—LEASED AUTOMOBILES—USE OUT OF STATE.
   This State is not entitled to a tax on the use in another State of automobiles leased therein whether or not such other State has provided for a use tax thereon.

2. SAME—INTERSTATE COMMERCE—DISCRIMINATION.
   A State may not impose a tax on interstate commerce nor may it enforce legislation resulting in unjust discrimination in taxation.

3. SAME—SALES TAX ACT—USE TAX ACT.
   The sales tax act and use tax act are related and complementary, the latter exempting from the imposition of a tax thereunder, property which is subjected to the sales tax, thereby demonstrating an intent not to impose both taxes on the same business transaction (PA 1933, No 167, as amended; PA 1937, No 94, as amended).

4. SAME—INTERSTATE COMMERCE—DISCRIMINATION.
   Prohibited discriminatory burdens on interstate commerce from taxation are not to be determined by abstractions but by the particular facts of specific cases.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 47 Am Jur, Sales and Use Taxes §§ 44–46; 51 Am Jur, Taxation § 213.

[3] 47 Am Jur, Sales and Use Taxes § 42.
Constitutionality, construction, and application of general use tax or other compensating tax designed to complement State sales tax. 129 ALR 222, 153 ALR 609.

[4] 51 Am Jur, Taxation § 213.

[5] 51 Am Jur, Taxation §§ 173, 175.

[6] 47 Am Jur, Sales and Use Taxes §§ 6, 10.
Validity of so-called "sales tax." 117 ALR 846, 128 ALR 893.

[7] 47 Am Jur, Sales and Use Taxes § 22.

[8] 47 Am Jur, Sales and Use Taxes § 4.

5. SAME—DISCRIMINATION—PREJUDICE.

A State legislature has a range of discrimination which it may exercise in classifying subjects for taxation provided such exercise be not in a spirit of prejudice and favoritism.

6. SAME—SALES TAX—AUTOMOBILES USED OUT OF STATE—DISCRIMINATION.

The fact that the sales tax paid on retail sales of cars to corporation for use under its lease of the cars to another corporation in another State was in excess of what the use tax would have been had it been payable in Michigan *held*, not to have effected an unjust discrimination nor a tax on interstate commerce rendering the imposition of the sales tax invalid (PA 1933, No 167, § 1, as amended; PA 1937, No 94, as amended).

7. SAME—LEGAL INCIDENCE OF SALES TAX—RETAILERS.

The legal incidence of the sales tax falls on the retailer of personal property (PA 1933, No 167, as amended).

8. SAME—SALES TAX—CLAIM OF INVALIDITY.

The retailer, the taxpayer under the sales tax act, is the only one who can claim to have been prejudiced by the imposition of the tax upon a particular subject, hence, is entitled to a determination on the merits of claimed invalidity of the tax imposed (PA 1933, No 167, as amended).

Appeal from Wayne; Culehan (Miles N.), J. Submitted October 7, 1958. (Docket No. 9, Calendar No. 47,698.) Decided December 2, 1958. Rehearing denied January 12, 1959. Appeal denied by Supreme Court of the United States April 27, 1959.

Action by Don McCullagh, Inc., a Michigan corporation, against the State of Michigan, Department of Revenue, for refund of sales tax claimed illegally levied on sale of automobiles to be leased and used outside the State. Judgment for plaintiff. Defendant appeals. Reversed and remanded for entry of judgment for defendant.

Anthony A. Vermeulen, for plaintiff.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *T. Carl Holbrook* and

William D. Dexter, Assistants Attorney General, for defendant.

CARR, J. The parties to this case have entered into a stipulation as to the material facts. It appears therefrom that the plaintiff, a Michigan corporation with its offices in the city of Detroit, was at the time of the occurrences out of which the case has arisen engaged in the sale of automobiles at retail, possessing a sales tax license issued by the State. During the period from January 14, 1954, to and including June 28th of the same year, it sold to General Car Leasing, Inc., 154 automobiles for a total consideration of $256,519.10. Prior to such purchases and under date of January 12, 1954, the purchaser had entered into a contract for the leasing of automobiles to Couture Motor Corporation, a Florida corporation engaged in renting automobiles and having its principal place of business at Miami in that State. The lease as originally made provided for the furnishing by General Car Leasing, Inc., of 50 new automobiles. Thereafter it was modified to include additional cars to the total number above indicated. The automobiles were taken to Florida by persons hired for that purpose, the drivers receiving the vehicles at plaintiff's place of business.

The leasing contract in question was for a period of 1 year with a right to lease the vehicles from year to year unless the agreement was terminated by written notice. The rental was payable monthly, the aggregate amount so paid being $102,189.10. All of the vehicles leased were licensed and titled in the State of Florida in the name of General Car Leasing, Inc. The department of revenue of the State took the position that plaintiff was liable for the payment of a tax on the sale of the cars to General Car Leasing, Inc., in the sum of $7,694.97. Said

amount, together with interest in the sum of $860.78, was paid by plaintiff on December 19, 1956. Thereafter the present action was instituted in the circuit court of Wayne county to recover the sum so paid, with interest thereon.

In its declaration plaintiff alleged that the assessing and collecting of said tax operated to place an undue burden upon interstate commerce, such claim being based on the fact that a provision of the sales tax act of this State, in force at the time of the transactions in question, required the payment of the tax on the sale of tangible personal property to one leasing for 7 days or more in a State other than Michigan, while exempting therefrom a sale made for leasing intrastate if rentals under the lease were subject to the Michigan use tax act, hereafter cited. Defendant by answer denied the right of plaintiff to recover, impliedly challenging the correctness of plaintiff's conclusions of law by averring that its claim was without merit. The trial judge, hearing the matter on plaintiff's motion for summary judgment, agreed with plaintiff's claim that the provision of the statute relating to a tax on sales made for leasing and consequent use of the tangible personal property sold, outside of the State, placed an undue burden on interstate commerce in view of the fact that such sales made for leasing in Michigan under circumstances requiring the payment of the use tax to this State were exempt from the sales tax. Judgment was entered accordingly, and defendant has appealed.

Section 1 of the Michigan sales tax act,* as amended by PA 1953, No 204 (CLS 1954, § 205.51 [Stat Ann 1953 Cum Supp § 7.521]), in effect at the time of the transactions involved in this case, set

* PA 1933, No 167, as amended (CL 1948, § 205.51 *et seq.*, as amended [Stat Ann 1950 Rev and Stat Ann 1957 Cum Supp § 7.521 *et seq.*]).

forth the provision, claimed by plaintiff to be invalid, as follows:

"(b) The term 'sale at retail' means any transaction by which is transferred for consideration the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any other purpose than for resale, or for lease when the rental receipts are taxable under Act No 94 of the Public Acts of 1937, as amended, in the form of tangible personal property to a person licensed under this act."

The enactment referred to in the language quoted is commonly cited as the Michigan use tax act.* Said act exempts from the payment of the tax provided for thereby the use, storage or consumption, of tangible personal property sold in the State if a sales tax has been paid on the transaction. A like exemption is provided for in instances in which the State is prohibited from taxing under the State Constitution or the Constitution or laws of the United States, and, also, if the sale or use of the property involved has been subjected in another jurisdiction to a sales tax or use tax equal to or in excess of the Michigan tax, such exemption being subject to a reciprocity clause.

For obvious reasons this State was not entitled to a tax on the use in Florida of the leased automobiles. It does not appear that at the time of such use the latter State had by statute provided for such a tax. It does appear that the transaction out of which this case has arisen did not actually involve the payment of sales tax and also a use tax. On behalf of plaintiff, however, it is contended that because the State of Florida may impose such an exaction interstate

* PA 1937, No 94, as amended (CL 1948, § 205.91 *et seq.*, as amended [Stat Ann 1950 Rev and Stat Ann 1957 Cum Supp § 7.555 (1) *et seq.*]).

commerce is exposed to multiple burdens in violation of the pertinent provision of the Federal Constitution. The circuit judge agreed with such claim, also pointing out that in the instant case the amount of the sales tax was materially higher than would have been imposed under the use tax act had the sale by plaintiff been made for leasing the automobiles for use in Michigan.

The basic question involved in the case is whether the provision of the sales tax act of Michigan, above quoted, discriminates in the obnoxious sense of the term against interstate commerce. As noted, plaintiff's claim in this respect is based on the exemption from the payment of the tax if the sale is made for leasing and use in Michigan so that the rental receipts are taxable under the use tax act. Concededly a State may not impose a tax on interstate commerce, nor may it enforce legislation resulting in unjust discrimination. In determining whether such discrimination obtains by virtue of the legislative enactment here in question consideration may properly be given to the fact that the sales tax act and the use tax act are closely related, to such an extent that each may be said to be complementary to the other. Each is designed to raise revenue from taxation of the privilege of engaging in certain business transactions. That the legislature in the enactment of said statutes, and subsequent amendments thereto, had in mind the practical situation presented is obvious. The provision of the sales tax act here involved is an expression of such recognition, indicating that the general policy of the State was not to impose a double burden on the bases of the taxes provided for by said acts.

This Court has previously recognized that the sales tax act and the use tax act are related and complementary. In *Banner Laundering Co.* v. *State Board of Tax Administration,* 297 Mich 419, in which

the validity of the use tax act was sustained, it was said (pp 430, 431):

"In support of their contention that the use tax act 'is discriminatory in terms,' appellants advert to the fact that the act in section 4 provides numerous exemptions, including the following: (1) Property merged into the common mass which was not acquired *at retail sale* in the State of purchase, (2) property upon which a retail sales tax was paid in the State of purchase, (3) a great mass of property which, after merger, is devoted to industrial processing, to agricultural producing, or to be resold. But nowhere in appellants' brief is it persuasively pointed out that the exemptions contained in the statute are not justifiable exemptions, or that in consequence of the exemptions the act is rendered unconstitutional in that it does not operate uniformly or that it deprives appellants or others like situated of due process or equal protection of the law. Instead we think it is plain, at least the contrary is not demonstrated by appellants, that certain of the exemptions contained in the statute are justified by an obvious attempt on the part of the legislature to produce uniformity in the taxation imposed by the use tax act when considered in connection with the closely related sales tax act. Other exemptions contained in section 4 of the act are of a type frequently embodied in taxation statutes, such as property sold to governmental units for public use, property sold to religious organizations, benevolent, charitable, scientific institutions and the like. But exemptions which render the operation of a taxation measure more just and uniform, or save institutions of the character above noted from the burden of the particular tax, do not render the act invalid for lack of uniformity or deprive persons subject to the tax of due process or equal protection of law, and this is true both of a specific tax and of a direct property tax."

Citing the above case, among other prior decisions of the Court, it was said in *Western Electric Co.* v. *Department of Revenue,* 312 Mich 582, 596:

"The essential elements of the use tax and the underlying principles of taxation on which it is based distinguish it from the tax imposed by PA 1899, No 179. The use tax was enacted for the purpose of levying and collecting a specific tax for the privilege of using, storing or consuming tangible personal property. *Goebel Brewing Co.* v. *State Board of Tax Administration,* 306 Mich 222. It is complementrary to the sales tax (PA 1933, No 167, as amended [CLS 1940, § 3663-1 *et seq.,* Stat Ann § 7.521 *et seq.,*]). Property, the sale of which is subjected to the sales tax, is exempted from payment of the use tax (PA 1937, No 94, § 4 [CLS 1940, § 3663-44, Stat Ann 1944 Cum Supp § 7.555 (4)])."

In *Kress* v. *Department of Revenue,* 322 Mich 590, a like conclusion was reached as to the relation between the 2 acts in question and the fact that they are complementary. It is also recognized in other States having such statutes that this is the situation. In *Nelson* v. *Sears, Roebuck & Co.,* 312 US 359 (61 S Ct 586, 85 L ed 888, 132 ALR 475), the relation between the Iowa statutes providing for sales taxes and use taxes was so characterized. In sustaining the State statute against the claim that its operation resulted in certain discriminations against interstate commerce, it was said (p 366):

"Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence, a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem."

With reference to the power of a State legislature to make reasonable classifications, the decision of the United States supreme court in *Citizens' Telephone Company of Grand Rapids* v. *Fuller,* 229 US 322 (33 S Ct 833, 57 L ed 1206), is significant. In sustaining the statute of Michigan providing for taxation of telephone companies and making certain classifications therein, it was said, in part, after citing a number of prior decisions (p 331):

"To these cases may be added others. They illustrate the power of the legislature of the State over the subjects of taxation and the range of discrimination which may be exercised in classifying those subjects when not obviously exercised in a spirit of prejudice and favoritism. *Cook* v. *Marshall County,* 196 US 261, 274 (25 S Ct 233, 49 L ed 471); *Missouri* v. *Dockery,* 191 US 165 (24 S Ct 53, 48 L ed 133, 63 LRA 571). The cases decided subsequent to the decision in *Bell's Gap Railroad Co.* v. *Pennsylvania,* 134 US 232 (10 S Ct 533, 33 L ed 892), have applied its principle to many varying instances. Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. *Keeney* v. *New York,* 222 US 525, 536 (32 S Ct 105, 56 L ed 299). The State is not bound by any rigid equality. This is the rule; —its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.' See *Quong Wing* v. *Kirkendall,* 223 US 59, 62, 63 (32 S Ct 192, 56 L ed 350). Thus defined and thus limited, it is a vital principle, giving to the government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those 'discriminations which the best interests of society require.'"

The courts throughout the country, including the United States supreme court, have been called on

repeatedly to determine controversies involving claims of discrimination in taxation. The above-cited decisions suggest the general principles applicable in such cases. The same principles are involved when it is asserted that the carrying out of State statutes results in undue discrimination against interstate commerce. In *General American Tank Car Corporation* v. *Day,* 270 US 367 (46 S Ct 234, 70 L ed 635), the plaintiffs brought suit to enjoin the defendant, a tax collector for one of the State parishes, from seizing property to satisfy a tax assessed on rolling stock owned by plaintiffs and operating over railroads in Louisiana. Plaintiffs were corporations organized in States other than Louisiana and not domiciled or licensed to do business therein. They used tank cars within the State for the transportation of oil in interstate commerce. The statute of the State authorized an assessment of 25 mills on the dollar of assessed valuation of rolling stock of nonresident corporations operated therein. It was the claim of the plaintiffs that said tax, which was designed to impose a burden on property of nonresidents in lieu of local taxes assessed in the several parishes of the State on property of persons or corporations domiciled therein, was invalid because discriminatory. It appeared that in some parishes local taxes exceeded the amount of the tax of which the plaintiffs complained, and in other parishes local taxes were less. Commenting on the situation the court, in upholding the State statute, said, in part (p 373):

"Such a classification is not necessarily discriminatory. *Travellers' Insurance Co.* v. *Connecticut,* 185 US 364 (22 S Ct 673, 46 L ed 949). Where the statute imposing a tax which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely be-

cause equality in its operation as compared with local taxation has not been attained with mathematical exactness. In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary. *Travellers' Insurance Co.* v. *Connecticut, supra*; and see *State Railroad Tax Cases,* 92 US 575, 612 (23 L ed 663); *Shaffer* v. *Carter,* 252 US 37, 56 (40 S Ct 221, 64 L ed 445)."

The above case was cited in *Gregg Dyeing Co.* v. *Query,* 286 US 472 (52 S Ct 631, 76 L ed 1232, 84 ALR 831). There the plaintiffs challenged the constitutionality of a statute of South Carolina imposing a tax on gasoline brought into the State in interstate commerce and stored therein for use. In upholding the statute, it was said (pp 481, 482):

"Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries. *Shaffer* v. *Carter,* 252 US 37, 55 (40 S Ct 221, 64 L ed 445). Appellants' attack upon the tax comes to this, in the last analysis, that the tax in their case is laid with respect to the gasoline they have bought outside the State and keep in storage for use and consumption in their business, whereas others are taxed, not with respect to the gasoline they keep in store for use and consumption, but for the gasoline they use and consume. But appellants have admitted, as the State court has said, that 'the only kind of storage affected' is that for the purpose of use and consumption. In this view the State court found no distinction of substance with respect to the practical operation of the taxing statutes *in pari materia,* as all in like case, appellants and others who use gasoline in their business enterprises, pay the same amount on the gaso-

line they consume. Appellants had the burden of showing an injurious discrimination against them because they bought their gasoline outside the State. This burden they have not sustained. They have failed to show that whatever distinction there existed in form, there was any substantial discrimination in fact."

Of like import are *Henneford* v. *Silas Mason Co.*, 300 US 577 (57 S Ct 524, 81 L ed 814), and *Southern Pacific Co.* v. *Gallagher*, 306 US 167 (59 S Ct 389, 83 L ed 586). See, also, *General Trading Co.* v. *State Tax Commission*, 322 US 335 (64 S Ct 1028, 88 L ed 1309).

In the case at bar it is apparent that the legislature in the enactment of the sales tax act and use tax act, and numerous amendments thereto, has sought to avoid the burden of both taxes being imposed on the same business transaction. The exemptions in each of said statutes clearly indicate such purpose. An intent is manifest to reach an equitable basis for the assessment and collection of taxes essential in the raising of revenue for public purposes. As before noted, the State of Florida did not, at the time of the transactions involved in this case, impose a use tax on property brought into the State from beyond its borders. Many States having use tax statutes like Michigan exempt therefrom the use of property on the sale of which a tax has been collected in another State. What the policy of Florida might be in such regard is beside the question here involved. Neither are we concerned whether such a tax, if imposed, would be open to the objection that it discriminated against interstate commerce.

The question before us is whether the provision of the Michigan sales tax act here involved is open to the objection that it necessitates discrimination against interstate commerce in the objectional sense

of the term, and is therefore invalid. We think that such question must be resolved in favor of the validity of such provision. It may not be said that the legislature of the State has exercised its authority in such manner as to establish clear and hostile discrimination against interstate commerce, or those engaged therein. The sales tax act and the use tax act are complementary. Their relation is such as to require recognition in each of the provisions and operation of the other. As before suggested, the Michigan legislature has acted accordingly in the attempt to work out a fair and just system. Mechanically a perfect result may not be obtained in all instances. In the case at bar the amount of the sales tax paid by plaintiff exceeds what the use tax would have been had it been payable in Michigan. It is conceivable, however, that under the same sort of transaction as is here involved such condition might well be reversed. It is questionable if any tax law could be devised that would result in absolute equality under all circumstances. Under general principles applicable to a case of this nature it must be said that plaintiff has failed to establish the alleged discriminatory character of the tax paid by it, or that it has been unfairly aggrieved thereby. The exemption from the tax as to intrastate sales for leasing use in this State involving payment of the use tax on rentals is not arbitrary or capricious in character. The provision of the sales tax act involved is not invalid on the ground that it imposes an unfair burden on interstate commerce.

Appellant has questioned the right of plaintiff to challenge the validity of the statutory provision in question on the ground that it is not engaged in interstate commerce. However, the basic proposition at issue is the matter of discrimination, and the legal incidence of the sales tax falls on the retailer of personal property. *Federal Reserve Bank of*

Chicago v. *Department of Revenue,* 339 Mich 587; *National Bank of Detroit* v. *Department of Revenue,* 340 Mich 573; *United States* v. *City of Detroit,* 345 Mich 601. Plaintiff paid the tax of which it now complains, and should be permitted to urge in court the invalidity of the statute requiring such payment. It is entitled to a determination on the merits. It does not appear that any person or corporation other than plaintiff can claim to have been prejudiced by the collection of said tax.

An order will enter remanding the case to the trial court with directions to set aside the judgment in plaintiff's favor and to enter judgment for defendant.

DETHMERS, C. J., and KELLY, SMITH, BLACK, EDWARDS, and VOELKER, JJ., concurred.

KAVANAGH, J., did not sit.

LEBEL *v.* SWINCICKI.

1. AUTOMOBILES—INTERSECTIONS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—EVIDENCE.

   Issue of freedom from contributory negligence of plaintiff's decedent, a motorist, killed at night at an intersection, *held*, properly submitted to jury for determination from testimony submitted as well as the physical facts disclosed by the proofs.

2. SAME—NEGLIGENCE—INTERSECTIONS—EVIDENCE.

   Negligence of defendant southbound motorist, required to stop before entering intersection, *held*, to clearly appear from record presented in action under death act (CL 1948, § 691.581 *et seq.*).

3. SAME—INTERSECTIONS.

   A motorist on through highway is not required to anticipate that a motorist on an intersecting highway would enter an intersection in disregard of highway traffic signs and at a high rate of speed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5A Am Jur, Automobiles and Highway Traffic § 712.
[2] 5A Am Jur, Automobiles and Highway Traffic § 1013.
[3] 5A Am Jur, Automobiles and Highway Traffic § 204.
Liability for accident at street or highway intersection as affected by reliance on or disregard of traffic sign, signal, or marking. 164 ALR 8.
[4] 16 Am Jur, Death § 223.
Recovery for wrongful death as affected by receipt of money on insurance policy. 18 ALR 686, 95 ALR 579.
[5] 16 Am Jur, Death § 361 *et seq.*
[6] 39 Am Jur, New Trial § 159.
[7] 41 Am Jur, Privacy § 32 (Supp).
Blood grouping tests as violation of right of privacy. 46 ALR2d 1011, 1016.
[8] 41 Am Jur, Privacy §§ 15, 16.
Right of privacy. 138 ALR 22, 168 ALR 446, 14 ALR2d 750.
[9] 16 Am Jur, Death § 328.

4. DEATH—DAMAGES—INSURANCE.

Payments made under insurance policies on the life of plaintiff's intestate decedent may not affect the recovery of damages under the death act, especially where the insurance payments were not intended to operate for the benefit of a tort-feasor who caused the death of the insured and were not subject to apportionment among the children of deceased in the manner provided by the death act with reference to damages recoverable thereunder (CL 1948, § 691.581 *et seq.*).

5. SAME—DAMAGES—INSTRUCTION—STATUTES—PREJUDICE.

Charge to jury in action against defendant motorist with reference to manner of computing damages under death act *held*, not prejudicial to defendant (CL 1948, § 691.581 *et seq.*).

6. SAME—NEW TRIAL—DAMAGES—NEWLY-DISCOVERED EVIDENCE—SOCIAL SECURITY PAYMENTS.

Denial of new trial on ground of newly-discovered evidence in action under death act *held*, not error, where fact that social security benefit payments to children, claimed to affect pecuniary loss, were discoverable before trial and were made solely for the benefit of the recipients and not for the benefit of a tort-feasor who caused the death of the children's father (CL 1948, § 691.581 *et seq.*).

7. EVIDENCE—INVASION OF PRIVACY—BLOOD SAMPLE FROM UNCONSCIOUS PERSON.

The obtaining of testimony through extraction of a blood sample from unconscious defendant for use in civil action under the death act while he was in a hospital but a sample which was not taken for the purpose of treatment or involving the physician-patient relation amounted to an unconstitutional invasion of his personal rights (Const 1908, art 2, § 10, as amended in 1952).

8. CONSTITUTIONAL LAW—RIGHT OF PRIVACY—DEATH.

The right of privacy is a personal one which ends with the death of the person to whom it is of value (Const 1908, art 2, § 10, as amended in 1952).

9. NEGLIGENCE—EVIDENCE—BLOOD SAMPLE FROM UNCONSCIOUS PERSON.

It was error for trial court to overrule objections by counsel for defendant in action under the death act to admission of testimony as to alcoholic content of his blood at time of accident, where analysis of his blood, taken

from him while he was unconscious, not for purpose of treatment of injuries received, but to establish negligence on his part, however, such error was not reversible, where negligence was otherwise conclusively established, in part, by defendant's own testimony (CL 1948, § 691.581 *et seq.*).

Appeal from Osceola; Neal (Max E.), J. Submitted October 9, 1958. (Docket No. 28, Calendar No. 47,119.) Decided December 2, 1958.

Case by Edward R. Lebel, administrator of the estate of John Lebel, deceased, against Albert Swincicki under the death act for damages resulting from automobile collision. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

James C. Herrinton, for plaintiff.

Miltner & Miltner, for defendant.

CARR, J. This is an action for damages based on the alleged negligent killing of plaintiff administrator's decedent. The declaration filed in the case alleged that on the 27th of August, 1955, at about 10 o'clock in the evening, defendant was driving an automobile in a southerly direction on trunk-line highway M–66, that at the intersection of said highway with M–115 in Osceola county he operated his automobile in such a careless and negligent manner as to run into a car proceeding in a westerly direction on M–115 and driven by plaintiff's intestate John M. Lebel, and that as a result of said collision John M. Lebel, his wife, and 2 children were killed. Plaintiff sought the recovery of damages in accordance with the provisions of the so-called death act* of the State of Michigan. The declaration also averred

* PA 1848, No 38, as amended by PA 1939, No 297 (CL 1948, § 691.581 *et seq.* [Stat Ann and Stat Ann 1957 Cum Supp § 27.711 *et seq.*]).

freedom from contributory negligence on the part of John M. Lebel and set forth in some particularity the various respects in which negligence on the part of defendant was claimed. It alleged that decedent left surviving him 3 minor children who had sustained pecuniary loss because of the death of their father.

Defendant's answer to the declaration admitted that plaintiff's decedent had left 3 children as his survivors but denied the claim of pecuniary loss and damages sustained thereby, and further denied all claims of negligence on his part. The case was tried before a jury. At the conclusion of plaintiff's proofs defendant moved for a directed verdict on the ground that freedom from contributory negligence on the part of John Lebel had not been established. Decision was reserved by the trial judge* and like action was taken on renewal of the motion following the introduction of testimony by defendant. The jury returned a verdict of $10,000. Defendant's motions for judgment notwithstanding the verdict and for a new trial were denied, and defendant has appealed from the judgment entered against him.

As appears from the joint appendix filed in this Court by counsel representing the respective parties, it is stipulated that the accident occurred at the time and place alleged in the declaration, and that the night was clear and dry. It is further agreed that M–66 runs north and south at its intersection with M–115, and that the latter highway runs from southeast to northwest. The main traveled portion of each highway is approximately 22 feet in width. North of the intersection M–66 drops slightly and then rises. It also rises gradually to the south. The parties further stipulated as to the location of cer-

* See CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1957 Cum Supp § 27.1461 *et seq.*).—REPORTER.

tain buildings at or near the intersection, a restaurant being located on the northeast corner, and a gasoline station on the southeast corner. Following the impact defendant's car came to a stop on its wheels, on the southwest embankment and facing the southwest. The Lebel car was resting on its top approximately 75 to 150 feet to the west. It is also agreed that M–115 is a through highway and that stop signs were placed on M–66 on either side of M–115, in proper locations. Also on M–66 and farther from the intersection than were the "Stop" signs there was situated, on each side of the intersection, a 6x8-foot lattice-wood sign on which appeared at the time of the accident "Stop Ahead".

On behalf of appellant it is claimed that there was no competent evidence justifying submitting to the jury the question of John Lebel's freedom from contributory negligence. It is contended that there was no direct proof establishing that decedent's car was being driven on M–115, and by way of argument it is said that he may have been driving on M–66 as he approached the intersection. In submitting the case to the jury the trial judge stated in some detail the claims of both parties, leaving it to the jury to determine the issue as a matter of fact. The verdict indicates that it was based on a finding that plaintiff's claim as to the material facts was correct. In denying the motion for a new trial the circuit judge expressed the opinion that the question as to decedent's freedom from contributory negligence was properly submitted to the jury to be determined from the testimony in the case as well as from the physical facts disclosed by the proofs. We think that such conclusion was correct.

Defendant Swincicki was called by plaintiff for cross-examination.* He stated that at the time of

* See CL 1948, § 617.66 (Stat Ann § 27.915).—REPORTER.

the accident he was driving 55 miles per hour, and that he did not see the signs on M–66 or at least could not recall that he did so. He also stated that immediately before the impact he saw a flash of light come from the left. Such testimony would indicate that the Lebel car was proceeding on M–115. Later in his testimony defendant declared that he did not know from what direction the light was approaching, but admitted that it was: "Probably coming from the left." He also admitted that during the day, August 27th, he had had "probably 4 bottles of beer," the last one between 9 and 10 o'clock in the evening. Defendant's testimony is of such nature as to justify submitting to the jury the question of freedom from contributory negligence on the part of plaintiff's decedent. The negligence of defendant clearly appears.

If the Lebel car was proceeding on M–115, as claimed by plaintiff, the driver was not required to anticipate that a motorist approaching on M–66 would enter the intersection in disregard of the traffic signs and at a high rate of speed. *Staunton* v. *City of Detroit,* 329 Mich 516; *Hicks* v. *Gillespie,* 346 Mich 593. It is a fair inference also from defendant's testimony, considered in its entirety, that John Lebel was not driving in a northerly direction on M–66 immediately prior to the collision. Defendant persisted in his claim that he saw only a flash of light immediately before the impact. Had the Lebel car been approaching from the south he could scarcely have failed to observe its headlights which under the physical facts would have been directly in front of him. Obviously he did not see any headlights, a fact that tends to clearly indicate that the suggestion made by way of argument as to the highway on which the Lebel car approached the intersection is not well-founded.

The manner in which the accident occurred and the position of the automobiles at the time of the accident is further indicated by the physical facts, that is, by the nature of the damage sustained by each vehicle and by the positions of the cars following the collision. The trial court was not in error in leaving the question of John Lebel's freedom from contributory negligence to the jury to be determined as a matter of fact on the basis of the proofs.

It is further insisted on behalf of the defendant that the verdict returned by the jury, on which judgment was entered, was excessive. Such claim appears to be predicated principally on the fact that under insurance policies on the life of their father the 3 children who are survivors of plaintiff's decedent received a total of $5,400, and that such sum should have been deducted from the amount of the financial loss, as indicated by the proofs, that was sustained by said children as a result of their father's death. It is argued that had such deduction been made, the verdict, under the proofs, must necessarily have been less than $10,000. In making this argument counsel for defendant direct attention to the fact that John Lebel was divorced from the mother of the children in question, and that the decree entered in the case referred to the insurance policies and in terms directed that they should be kept in force and effect until the youngest of the 3 children reached the age of 21. The decree further required that the father pay the sum of $20 per week toward the support of the 3 children until the youngest reached the age of 17. Obviously the provision with reference to the insurance was not designed to be in lieu of the support payments in the event of inability for any reason to make such payments. It is likewise apparent that the purpose to be served by the insurance was not intended to operate to the benefit of anyone negligently or otherwise wrongfully caus-

ing the death of John Lebel. We are not in accord with defendant's claim that the payments made under the insurance policies can affect the recovery of damages to which decedent's children are entitled. It may be noted further in this connection that the insurance payments were not subject to apportionment among the children in the manner provided by the statute with reference to damages recovered for the benefit of persons suffering pecuniary loss as a result of a death caused by negligence or otherwise wrongful conduct, and entitled to recover therefor.

Complaint is made that the trial judge did not properly instruct the jury with reference to the manner of computing damages. An examination of the charge as given brings us to the conclusion that defendant may not claim that he was unduly prejudiced thereby. Neither was there error in denying the motion for a new trial on the ground of newly-discovered evidence relating to the matter of pecuniary loss. It is the claim of defendant that following the death of their father the 3 children sustaining such loss because of his death have been paid social security benefits, and that such payments should be considered in determining the amount of recovery. It does not clearly appear, however, that the facts with reference to such payments might not have been discovered before trial. The trial judge was correct in so holding. It may be suggested also that such payments were made solely for the benefit of the recipients. In this respect they are analogous to the payments made under the insurance policies, above discussed.

This brings us to a consideration of a matter involving the competency of evidence offered and received on the trial. Following the accident defendant was removed from the scene to a hospital at Cadillac. There a sample of his blood was taken

by a nurse who testified that she did so at the direction of a physician. Said sample was placed in a vial and was delivered to a member of the Michigan State police, by whom it was taken to the State police post at Cadillac. From there it was sent to the State health department at Lansing, where it was analyzed by a specialist in toxicology who was in charge of the State crime detection laboratory. The specialist was a witness on the trial and over objection was permitted to testify that the blood contained by weight .15% of clear alcohol, and that such percentage indicated intoxication.

On behalf of appellant it was contended that he was unconscious at the time the blood was taken from him, that he knew nothing about it and at no time gave consent thereto, and that the taking was in violation of the right of security of his person. Reliance was placed on article 2, § 10, of the Michigan Constitution (1908), which reads as follows:

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation: Provided, however, That the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, any narcotic drug or drugs, any firearm, rifle, pistol, revolver, automatic pistol, machine gun, bomb, bomb shell, explosive, blackjack, slungshot, billy, metallic knuckles, gas-ejecting device, or any other dangerous weapon or thing, seized by any peace officer outside the curtilage of any dwelling house in this State."*

That defendant was unconscious at the time the blood sample was taken from him is not in dispute.

* As amended in 1952.—REPORTER.

The testimony of a witness produced by plaintiff, a State trooper, indicates that defendant had a fractured skull and that his face was badly cut. On behalf of plaintiff it is contended, however, that the taking of the blood sample under the circumstances did not render incompetent the proof relating to the test. There is no testimony in the record indicating that it was taken in connection with the treatment of defendant's injuries. The manner in which the sample was handled seems to negative any possible claim of that nature. We are not, in consequence, concerned with the privilege of a patient with respect to testimony of his physician. Whether he was in any way treated by the doctor who directed the taking of the sample does not appear. Said doctor was not a witness in the case.

Analogous questions have arisen in a number of cases, most of which have involved criminal prosecutions. In *People* v. *Corder,* 244 Mich 274, it was held that a physical examination of a defendant in a criminal case without his consent violated his rights as guaranteed by article 2, § 16, of the State Constitution (1908), and that testimony based on such examination was incompetent. It was recognized that an accused may consent to such an examination, but the majority of the Court concluded that he had not done so and, in consequence, the conviction was reversed.

In *Breithaupt* v. *Abram,* 58 NM 385 (271 P2d 827), blood was taken from an unconscious person involved in an automobile accident, and introduced in evidence in a subsequent prosecution for manslaughter. The supreme court of New Mexico, in a habeas corpus proceeding, held that the Constitution of that State was not thereby violated, and that there was no denial of due process of law under the Federal Constitution. In *Breithaupt* v. *Abram,* 352 US 432 (77 S Ct 408, 1 L ed2d 448), the supreme court

of the United States, 3 justices dissenting, upheld the order of the State court. It was stated in the majority opinion that the evidence against Breithaupt, having been obtained in violation of the 4th Amendment to the Federal Constitution, would be subject to exclusion in a criminal prosecution in a Federal court. However, the majority declined to hold that the conviction in the State court should be held improper under the due process clause of the 14th Amendment. The claim by petitioner that the violation of the 4th Amendment entitled him to rely on the 14th was rejected on the authority of *Wolf* v. *Colorado,* 338 US 25 (69 S Ct 1359, 93 L ed 1782), in which it was held that in a prosecution in a State court for a criminal offense under State law the 14th Amendment did not forbid the admission of relevant evidence even though obtained by an unreasonable search and seizure. In expressing such conclusion the court cited the decision in *Weeks* v. *United States,* 232 US 383 (34 S Ct 341, 58 L ed 652, LRA 1915B, 834, Ann Cas 1915C, 1177), holding that evidence secured in violation of the 4th Amendment to the Federal Constitution was inadmissible in Federal court, was not applicable, by virtue of the 14th Amendment, to proceedings in State courts.

It is significant to note that the provisions of article 2, § 10, of the State Constitution, relied on in the instant case, are identical in substance with those of the 4th Amendment to the Federal Constitution. The conclusion would therefore seem to follow that in accord with the opinion in the *Breithaupt Case* testimony taken in a criminal case in Michigan in disregard of the above-quoted provision of the State Constitution should be held inadmissible.

In the case at bar a criminal prosecution is not involved. The question is presented, in consequence, whether the obtaining of testimony in violation of the constitutional provision in question (art 2, § 10)

renders it inadmissible in a civil action. That the blood sample was taken in the case at bar in violation of defendant's right of security of his person is apparent. He was unconscious at the time but that fact did not permit others to invade his personal rights. We see no difference in principle between obtaining a blood sample under the circumstances here involved and taking it from a conscious person by force.

The application of article 2, § 10, of the State Constitution was discussed at some length in *People* v. *Marxhausen,* 204 Mich 559 (3 ALR 1505). In connection therewith the 4th and 5th Amendments to the Federal Constitution were also considered by way of analogy. It was held that evidence secured as the result of an illegal search and seizure, in violation of the defendant's constitutional rights, was improperly obtained, and that the order of the trial court directing the return of the articles so taken from defendant was not erroneous.

In *Metropolitan Life Ins. Co.* v. *Evans,* 183 Miss 859 (184 So 426), plaintiff brought an action on an insurance policy, claiming the right to recover under a permanent disability provision thereof. On cross-examination he was asked to permit a physician to make a physical examination as he sat in the witness chair, such examination to have particular reference to certain portions of his person. The request was refused, and counsel for the insurance company then asked the court to compel the plaintiff to submit to such an examination. The trial court declined to make such an order, and such denial was assigned as error on the appeal. The supreme court of the State sustained the action of the trial judge on the ground that plaintiff had not in any way (p 870) waived "the inviolability of his person" and that the examination could not have been made as requested without exposure of some portions of the person.

In *Haynes* v. *Haynes,* 43 NYS2d 315, the plaintiff husband in a divorce action sought an order from the court for a physical examination of the defendant. The request was denied, the court sustaining the objection of defendant to such a physical examination on the ground that her constitutional rights would thereby be violated.

Counsel for appellee have called attention to *Cluett* v. *Rosenthal,* 100 Mich 193 (43 Am St Rep 446). That case, however, did not involve the right of security of the person. It appears that certain books of account and other papers kept in the course of business transactions were offered in evidence and objected to on the ground that they had been improperly obtained. It does not appear that any motion for the suppression or return of said books and papers had been made in advance of trial. On appeal it was held that the admission of the evidence was not error, the Court saying (p 198):

"It is not the policy of the courts, nor is it practicable, to pause in the trial of a cause, and open up a collateral inquiry upon the question of whether a wrong has been committed in obtaining the information which a witness possesses."

The decision is not of controlling importance in the case at bar for the reason that, in order to lay the foundation for the offer of the evidence of the blood test, plaintiff brought out clearly the circumstances under which the blood was taken from the person of the defendant. The invasion of the right of security of the person, guaranteed by our State Constitution, clearly appears, and further inquiry in extension of the testimony offered was not required.

The trial judge in concluding that the testimony was competent relied on *Fretz* v. *Anderson,* 5 Utah2d 290 (300 P2d 642). In that case the removal of blood was from the body of one who had been killed

as a result of an automobile accident. The Utah court, in reaching its conclusion that the result of the test was competent to be shown in evidence as bearing on the question of intoxication, pointed out that the right of privacy is a personal one which ends with the death of the person to whom it is of value, and that it may not be claimed by his estate or by his next of kin. Such is not the situation presented in the case at bar.

In *Kuroske* v. *Aetna Life Insurance Co.*, 234 Wis 394 (291 NW 384, 127 ALR 1505), a sample of blood was taken from a person injured in a traffic accident, and testimony as to the alcoholic content thereof was introduced in evidence in subsequent litigation. The court, on appeal, held the proof competent. It appears that after the accident the injured man walked to an ambulance with some assistance and sat on the seat with the driver until the hospital was reached. It does not appear from the opinion of the court that the blood sample was taken without his consent, or while he was unconscious. In *Hamilton* v. *Becker* (1957), 249 Iowa 516 (86 NW2d 142), blood was removed from the body of one who had been killed in an automobile accident. The court determined that the results of the test were not competent because taken pursuant to statute requiring a written report of accidents to the State department of public safety and declaring such reports inadmissible in any civil case. No violation of the right of security of the person was involved.

While there is a lack of authority bearing directly on the proposition, we think that under a constitutional provision worded as is article 2, § 10, of the Constitution of Michigan, the taking of blood for purposes of analysis from the person of one who is unconscious at the time constitutes a violation of his rights, and that testimony based on the analysis of such blood should not be admitted in evidence.

In the instant case the trial judge was in error in overruling the objections made by counsel for defendant. It does not follow, however, that a reversal of the case is required because of such error. Obviously the purpose of the testimony with reference to the blood test was to establish negligence on the part of the defendant. Without reference to such blood test the proofs were conclusive on that issue. Defendant's testimony established that he was proceeding without keeping a reasonable and proper outlook for other traffic on the highway, that he disregarded the highway signs which required him to stop before crossing M–115, and that under the circumstances he failed to exercise reasonable care in the operation of his automobile. He admitted also that he had been drinking an intoxicating beverage, the last such drink being taken perhaps an hour or less before the accident occurred. The State trooper who talked with defendant following the accident concluded from his observations that defendant was then under the influence of liquor. While defendant denied that he was intoxicated, nonetheless the issue as to his drinking was in the case, in part by his own admissions. In any event, there was no chance for question as to his negligence, and the results of the blood test could scarcely be given the effect of tending to show a fact that had not already been established beyond question.

We find no reversible error in the case and the judgment is affirmed, with costs to appellee.

DETHMERS, C. J., and KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

DORWIN *v.* FORD.

1. AUTOMOBILES—INTERSECTIONS—PROXIMATE CAUSE—EVIDENCE.

Evidence supported trial judge's conclusion that negligence of driver of car in which plaintiff was a guest passenger was sole proximate cause of accident and that defendant's 16-year-old driver was not at fault where such southbound car was driven somewhat on the easterly portion of country road 18 feet wide and collided with defendant's car as it entered junction of noncrossing road from southeast upon which a driver was unable to see cars from north if latter were on east side of road.

2. SAME — INTERSECTIONS — WRONG SIDE OF ROAD — SPEED — ROAD SURFACE.

The driver of a car on a country road is not bound to anticipate that driver on intersecting road would approach the same intersection on the wrong side of the highway and at a speed that would not permit its course to be directed by the driver because of the condition of the road and the failure of the car to respond to the steering wheel.

Appeal from Newaygo; Pugsley (Earl C.), J. Submitted October 10, 1958. (Docket No. 37, Calendar No. 47,584.) Decided December 2, 1958.

Case by Loren A. Dorwin against Leon Ford for personal injuries sustained in automobile collision. Judgment for defendant. Plaintiff appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5A Am Jur, Automobiles and Highway Traffic § 1017.
[2] 5A Am Jur, Automobiles and Highway Traffic § 204.

Mitts, Smith & Haughey (*A. Brooks Smith, Jr.,* of counsel), for plaintiff.

Reber & Reber (*Harry D. Reber, Jr.,* of counsel), for defendant.

CARR, J. Plaintiff brought this action to recover damages for injuries sustained in a traffic accident which occurred on Thanksgiving Day, November 22, 1956, in Newaygo county. About noon of said day plaintiff was riding in an automobile driven by Theodore Pierson. The testimony in the case indicates that plaintiff was a guest passenger. At the time of the accident Pierson was driving south on a county highway referred to as Pettibone road. At the intersection of said road with Sisson street, also a county road, the Pierson car struck an automobile owned by the defendant and driven by his 16-year-old son. Sisson does not cross Pettibone road but intersects it from the southeast on an angle estimated by one witness as approximately 45 degrees, and by another, a member of the State police, at an angle between 30 degrees and 45 degrees. It is conceded that the view to the north at said intersection was, at the time of the collision, obscured by a bank, brush or weeds, and snow.

The case was heard in circuit court by the trial judge without a jury. Following the introduction of proofs the judge, with the approval of the parties to the case, drove to the scene of the accident and viewed the premises. Thereafter he indicated his findings in an opinion in which he discussed the nature of the intersection and the facts incident to the collision as determined from the proofs. It was his conclusion that the driver of defendant's car was not negligent and that the sole proximate cause of the accident was negligence on the part of Pierson, the driver of the car in which plaintiff was riding.

Judgment was entered accordingly, and plaintiff has appealed.

The question at issue is whether the testimony introduced on the trial supports the conclusion that defendant's driver was not guilty of negligence contributing to the accident. Many of the facts involved in the case are not in dispute. Pierson, who testified as plaintiff's witness, stated that he was driving at a speed of 30 or 35 miles an hour, that the road was covered with snow, that it was somewhat higher in the middle than toward the sides, and that as he proceeded he was watching the road in front of him. His testimony further indicated that he was driving, in part at least, on the east side of the center line. He claimed further that as he approached the intersection he saw defendant's car and attempted to turn to his right to avoid striking it, but that the wheels did not respond, the vehicle proceeding in a straight line to the point of impact. He indicated further that he had had no difficulty in turning at corners when driving slow enough to do so. The following testimony is significant:

"*The Court:* Did your speed prevent you from turning?

"*A.* Yes, sir, I would say it did.

"*The Court:* You think it did. In other words, your version is that if you had been going slow enough you could have turned out of the road?

"*A.* I may have been able to, yes, sir.

"*The Court:* But going at your rate of speed, you couldn't turn out?

"*A.* No, sir, the wheels wouldn't respond. It was just that slippery there. Driving the wheel tracks of other cars, they had the snow packed down."

Shortly after the accident an investigation was conducted by a member of the Michigan State police from the Reed City post. He testified that the traveled portion of Pettibone road was approximate-

ly 18 feet in width, that on the day of the accident it was covered with snow, rendering it slippery, and that the tracks of the Pierson car indicated that it had been driven on the crown of the road and somewhat to the east side. Further testimony indicated that the 2 cars came together practically head on, the left front of each being damaged. Defendant's car was driven back as a result of the impact for approximately a car length.

The officer concluded from his observations that the front of defendant's car was in the intersection not more than 4 feet at the time of the collision. Other witnesses testified as to the location of car tracks and the position of the vehicles following the impact, and to the effect that the Pierson car was entirely on the east side of Pettibone road as it approached and entered the intersection. The trial judge so found, and the record fully supports his conclusion.

The proofs further disclose that from the viewpoint of the driver of defendant's car as it approached the intersection it was impossible to see a vehicle coming from the north on the east side of the road, before reaching a point within a few feet of Pettibone road. Defendant's son testified that he was proceeding very slowly and that the front of his car was barely beyond the east edge of Pettibone as he entered that thoroughfare in a northerly direction and was struck by the Pierson car. The testimony clearly indicates that the accident occurred on the east side of Pettibone road, justifying the conclusion that had the Pierson car been on its proper side of the highway the collision would not have occurred.

The driver of defendant's automobile was not required to anticipate that a car would approach the intersection on the wrong side of the highway, and at a rate of speed that would not permit its course to

be directed by the driver because of the condition of the road and the failure of the car to respond to the steering wheel. As held in *Hicks* v. *Gillespie,* 346 Mich 593:

"One motorist is not required as a matter of law to anticipate reckless or unlawful acts, such as excessive speed or driving on wrong side of road, on part of another motorist approaching the same intersection." (Syllabus 4.)

Among other decisions recognizing the principle are: *Winckowski* v. *Dodge,* 183 Mich 303; *Suarez* v. *Katon,* 299 Mich 38; *Leete* v. *Gould,* 308 Mich 345; *Staunton* v. *City of Detroit,* 329 Mich 516.

In the instant case it may not be said that the evidence preponderates against the conclusions of the trial judge, reached after listening to the witnesses, weighing the testimony of each, and viewing the site of the accident, to the effect that negligence on the part of the driver of defendant's car was not established and that the sole proximate cause of the accident was the negligence of the driver of the car in which plaintiff was riding. Stated somewhat differently, the record fully supports the conclusion reached.

The judgment is affirmed, with costs to appellee.

DETHMERS, C. J., and KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

DOHM *v.* TOWNSHIP OF ACME.

1. TOWNSHIPS—FUNCTION IN A PRIVATE CAPACITY.

   The determination of whether or not township was acting in a governmental or proprietary capacity is largely dependent upon the object and purpose of the legislature in conferral of powers involved and if the grant is for public purposes exclusively, they belong to the township but if the grant of power was for purposes of private advantage and emolument, though the public derive a common benefit therefrom, the township stands on the same footing as any private individual or corporation upon whom a special franchise has been conferred and the doctrine of strict construction is not applied.

2. SAME—TOWNSHIP HALL—UNLIGHTED DEFECTIVE STAIRWAY—GOVERNMENTAL FUNCTION—PROPRIETARY ACTIVITY.

   Plaintiff, nonresident of defendant township, who was injured by reason of a fall on unlighted defective stairway at rear of township hall *held,* entitled to recover damages therefor from defendant, where function attended was a wedding anniversary celebration for which the hall had been leased, since such activity was not in the exercise of a governmental function but was a proprietary activity.

3. APPEAL AND ERROR—QUESTIONS REVIEWABLE—TOWNSHIPS—PROPRIETARY OPERATION.

   It is unnecessary to determine whether or not trial court was in error in submitting to jury issue as to nature of function in which defendant township was engaged at time plaintiff sustained her injuries when she fell during the nighttime on unlighted defective stairway while attending a wedding anniversary celebration, since the township in leasing use of the township hall for such purpose was, as a matter of law, functioning in a proprietary capacity.

Appeal from Grand Traverse; Brown (Charles L.), J. Submitted October 14, 1958. (Docket Nos. 47, 48, Calendar Nos. 47,615, 47,616.) Decided December 2, 1958.

Case by Alta Marie Dohm against the Township of Acme, a municipal corporation, for personal in-

REFERENCES FOR POINTS IN HEADNOTES

[1] 52 Am Jur, Towns and Townships § 3.
[2] 52 Am Jur, Towns and Townships § 42.

juries sustained in fall on defective stairs. Similar action by Tony Dohm for expenses. Cases combined for trial and appeal. Verdicts and judgments for plaintiffs. Defendant appeals. Affirmed.

James R. Zerafa, for plaintiffs.

Running & Wise, for defendant.

CARR, J. At the time of the occurrence resulting in these actions for damages the defendant maintained a 2-story frame building in the village of Acme, primarily for use as a township hall. The second story was rented to a fraternal organization, and the township customarily granted to persons applying therefor the right to use the first floor for private purposes. The township clerk was granted authority by the township board to make a charge for such use, the minimum being fixed at $3 with the right to increase that amount in the discretion of the clerk. Apparently the only limitation imposed was that the hall might not be used for any private purpose involving financial benefit.

Plaintiff Alta Marie Dohm, acting at the request of friends, made application for the use of the first floor of the hall for the evening of October 30, 1954, the purpose being the holding of a wedding anniversary celebration. Plaintiffs here were guests at the party. While not of material importance, the persons for whom the reservation was made had not paid the rental for the use of the hall prior to the time of trial, but the question of liability therefor is not in dispute. During the course of the party Mrs. Dohm undertook to leave the hall by a rear entrance for the purpose of going to an outhouse maintained by defendant township at the rear of said hall. It was dark at the time. While descending the steps and, as she claimed, endeavoring to assist another guest, she fell and was injured. She brought action for damages against the township on

the theory of negligence in not properly maintaining the steps where the accident occurred, and in not causing them to be properly lighted. Her husband sued to recover his incidental damages resulting from Mrs. Dohm's injuries.

The cases were consolidated for trial. It was the claim of each plaintiff in circuit court that the steps were in a defective condition as a result of decay and protruding nails. It further appears that a light bulb placed above the rear entrance to the hall had been broken, thus creating a situation making it difficult for one using the steps to discover the defects. Plaintiffs further claimed that the condition had existed for such length of time as to fairly charge the defendant township and its officers with notice thereof.

In advance of trial defendant moved for dismissals on the ground of governmental immunity. The motion was denied and the trial proceeded. Motions for directed verdicts were made at the conclusion of plaintiffs' proofs and renewed prior to submission to the jury, said motions being taken under advisement by the trial judge.* Verdict of $3,250 was returned in favor of Mrs. Dohm and of $1,000 in favor of the other plaintiff. Motions for judgments notwithstanding the verdicts and for a new trial were made and denied. Defendant has appealed, asserting as the basis for its claim of nonliability that it was in the exercise of a governmental as distinguished from a proprietary function, and immune from tort liability for failing to properly maintain the town hall.

The legal question presented is one that has been repeatedly considered by courts in this State and elsewhere. Generally speaking, the nature of the function involved and the particular facts attending its exercise have been deemed of controlling signifi-

* See CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1957 Cum Supp § 27.1461 *et seq.*).—REPORTER.

cance. Thus in *Stevens* v. *City of Muskegon,* 111 Mich 72, 78, 79 (36 LRA 777), it was said:

"The authorities recognize that municipalities act in 2 capacities, the one governmental and the other *quasi*-private. When acting in the latter capacity, they are subject to the same rules that govern private corporations or individuals in their transactions with others. In the latter case the doctrine of strict construction is not applied, and courts do not look for express authority for the exercise of the power. The power is inherent in them to make contracts for lighting streets and public buildings, to secure water for fire and other purposes, and to construct sewers in order to protect the health of the inhabitants. It may be, and often is, difficult to determine in which capacity a municipality is acting in a given case, but the distinction is well settled. Chief Justice Nelson, in *Bailey* v. *Mayor of New York,* 3 Hill (NY) 531, 539 (38 Am Dec 669), thus states it:

" 'The distinction is quite clear and well settled, and the process of separation practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred.' "

In *Hodgins* v. *Bay City,* 156 Mich 687 (132 Am St Rep 546), plaintiff's intestate was electrocuted as the result of the defective condition of a wire carrying electric current as a part of the commercial lighting system maintained by the defendant city. Discussing prior decisions of this Court as well as cases from other States, it was held (p 692): "that the

municipality, in furnishing electric light, is discharged from liability for the negligence of its officers, agents, and employees when furnishing the service for lighting its public streets, public places, and buildings, and that it is liable for such negligence in furnishing light to its inhabitants for remuneration."

Other decisions of this Court have also recognized that functions vested by law in municipalities and governmental agencies may be, in certain phases thereof, of a governmental character, and otherwise involve the exercise of a governmental proprietary business activity. Among the cases presenting situations of this character are: *Rowland* v. *Kalamazoo Superintendents of Poor,* 49 Mich 553; *Foss* v. *City of Lansing,* 237 Mich 633 (52 ALR 185); *Matthews* v. *City of Detroit,* 291 Mich 161. The decision of the supreme court of Arizona in *Sawaya* v. *Tucson High School District No. 1 of Pima County,* 78 Ariz 389 (281 P2d 105), is of interest in this respect. There the defendant school district owned a stadium which it rented to certain other schools for the purpose of conducting an athletic contest. Plaintiff was injured because of the alleged defective condition of said stadium. In reversing an order granting a motion to dismiss the case on the ground of defendant's immunity from liability for tort, it was recognized that the great weight of authority is to the effect that a school district, being a *quasi*-public corporation and a governmental agency for the sole purpose of furnishing educational facilities, is not liable for the negligence of its officers, agents, and employees. It was held, however, that under the facts alleged in plaintiff's complaint a situation was presented not within the general rule. In this respect it was said (p 393):

"We hold that in leasing the stadium and receiving compensation therefor that the school district was in the exercise of a proprietary function and that in the exercise thereof it was and is liable for

injuries sustained as a result of its negligence in the maintenance of said stadium."

In support of the conclusions reached, the Arizona court cited with approval *Jacoby* v. *Chouteau County,* 112 Mont 70 (112 P2d 1068). In that case the defendant constructed and maintained a ferry for public use in crossing the Missouri river. In the summer a boat was operated, and in the winter season an aerial carrier was employed in conjunction with a cable. Plaintiff was injured due to the collapse of a structure erected and maintained by defendant in connection with its said operations. The action for damages was predicated on the claim that defendant's officers were guilty of negligence in not properly maintaining the appurtenances to the ferry. In sustaining a judgment in plaintiff's favor, the court recognized the general rule with respect to the liability of counties engaged in the performance of governmental functions. It was held, however, that the defendant in the operation of the ferry had acted "in its proprietary and not in its governmental capacity." The following statement from 20 CJS, Counties, § 215, p 1068, was cited (pp 73, 74) with approval:

"On the other hand, a county, if amenable to suit, is liable for its torts when it is acting, not as a governmental agent, but as a private corporation, or in a proprietary capacity, or is performing special duties imposed on it with its consent, or voluntarily assumed by it, or when the tort amounts to an appropriation of property."

General principles applicable to counties may properly be invoked in determining liability on the part of townships in situations of the character here involved.

In accord with the general rule is the decision of the supreme court of Massachusetts in *Little* v. *City of Holyoke,* 177 Mass 114 (58 NE 170, 52 LRA 417).

In that case the defendant rented the use of a hall in its public building to the Women's Relief Corps for an entertainment to be given thereby. It appeared from the proofs that the defendant occasionally rented said hall for similar purposes. It was claimed that certain stairs leading to the gallery of the hall were not properly lighted, that defendant was negligent in such respect, and that such negligence was the proximate cause of an injury sustained by the plaintiff who fell while attempting to descend said stairs. The court concluded that the defendant had engaged in a private enterprise and affirmed the action of the jury in imposing liability thereon. It further appeared in the case that testimony offered by defendant to show that rentals received were not sufficient to pay the expense of maintaining the hall was excluded. It was held (p 117) that such ruling was proper and that "It was of no consequence whether the business was profitable." In support of the conclusion in this respect the court cited the previous decision in *Collins* v. *Greenfield,* 172 Mass 78, 81 (51 NE 454). Of like import to the holding of the Massachusetts case on the question of liability are *Bell* v. *Pittsburgh,* 297 Pa 185 (146 A 567, 64 ALR 1542), and *Buchanan* v. *Town of Barre,* 66 Vt 129 (28 A 878, 23 LRA 488, 44 Am St Rep 829).

In the case at bar it may be assumed that the town hall was erected primarily in connection with the exercise of governmental functions of the township. The proofs in the case disclose that approximately 6 meetings of the township board are held there each year, and that elections are also conducted on the first floor of the building. Obviously the use of the hall for the holding of an anniversary party of the character here involved had no connection with the exercise of any governmental function. It was a purely private transaction and of

the character that the owner of a building adapted to the holding of such gatherings might enter.

The fee charged in the instant case was small and the testimony indicates that the premises, other than the second floor, are rented not more than 12 or 15 times per year. It further appears that the township does not have a janitor. The privilege of its use on payment of the fee fixed by the township clerk is not limited to residents of the township, and in this case the parties concerned were not such residents. Money received by way of rental is placed in the general fund of the township, and thence transferred to the contingent fund from which the hall is maintained, no tax being levied for that purpose. Defendant submitted no specific proof as to the cost of maintaining the town hall. The township supervisor, testifying as a witness for defendant, referred to the fact that no janitor was employed and indicated that ordinarily parties renting the place cleaned it up afterwards, or else others engaging for its use later did so. On occasions a township official might perform the task. The testimony justified the inference that the money received from rentals is sufficient to maintain the place for the proper carrying on of governmental functions therein as well as for private parties. The amount of rental charged is not of controlling significance. The determining factor is the nature and purpose of the use on the occasion of the injury suffered by Mrs. Dohm. Such use was not in any way a part of, or connected with, the exercise of a governmental function.

We conclude as to the transaction here in question that the township was engaged in a proprietary activity and subject to liability on the ground of negligence in failing to maintain the hall in a proper condition for use by the plaintiff Alta Marie Dohm at the time of her injury. Such conclusion renders

it unnecessary to consider whether the trial court was in error in submitting to the jury the issue as to the nature of the function in which defendant was engaged at the time of the accident. Defendant was not prejudiced by the charge of the trial judge in this respect.

The judgments are affirmed, with costs to plaintiffs.

DETHMERS, C. J., and KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

CROSS *v.* FRUEHAUF TRAILER COMPANY.

1. JUDGMENT—DEED IN FRAUD OF CREDITORS—HOMESTEAD EXEMPTION.

   Finding of court that deed given by plaintiff, a judgment debtor, to his widowed mother of home which she had theretofore deeded to him in return for his promise to provide a home for her therein for her lifetime was in fraud of his creditors and void, did not determine that such plaintiff was not thereafter entitled to homestead exemption therein from sale on execution (Const 1908, art 14, § 2, as amended in 1943).

2. HOMESTEAD—OWNERSHIP AND OCCUPANCY.

   Occupancy of premises by mother who had deeded the place to her son but reserved a life use thereof with simultaneous agreement on his part to maintain and support her gave her the exclusive possession so long as she lived and did not

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 24 Am Jur, Fraudulent Conveyances §§ 229, 230.
[2] 26 Am Jur, Homestead §§ 75, 79.
[3, 4, 6] 26 Am Jur, Homestead § 61.
Estate or interest in real property to which homestead claim may attach. 89 ALR 511.
[5] 26 Am Jur, Homestead § 13.
[9] 44 Am Jur, Quieting Title and Determination of Adverse Claims § 54.

entitle him to possession or a sharing of possession as a legal right, hence, the premises were *not* "owned and occupied" by him as the term is used in homestead exemption provision of Constitution (Const 1908, art 14, § 2, as amended in 1943).

3. SAME—FUTURE INTERESTS.

A claim of homestead may not attach to either vested or contingent future estates or interests in land, since it is not susceptible of immediate occupancy (Const 1908, art 14, § 2, as amended in 1943).

4. SAME—REMAINDERMAN—OCCUPANCY WITH PERMISSION.

A homestead may not be claimed in premises by a remainderman, even one who occupies the premises during the life of the life tenant by the latter's permission (Const 1908, art 14, § 2, as amended in 1943).

5. SAME—EXEMPTION FROM EXECUTION—TIME.

Whether real estate is exempt as a homestead *from* sale on execution must be determined as of the time of the levy rather than at the time of the sale (Const 1908, art 14, § 2, as amended in 1943).

6. SAME—EXEMPTION—REMAINDERMAN.

Plaintiff, judgment debtor, was *not* entitled to protection of statutory provisions relating to execution sales of homestead rights, where at time of levy he was merely a remainderman and had not even commenced to occupy premises involved, even with the permission of his mother who had reserved a life use thereof and was in occupancy thereof (CL 1948, §§ 623.83, 623.90, 623.95).

7. SAME—ONE HOMESTEAD AT A TIME.

One may not claim 2 homesteads at the same time.

8. EXECUTION—HOMESTEAD—IRREGULARITIES—NOTICE.

Claimed irregularities in proceedings following levy and resulting in sheriff's deed of premises in which judgment debtor claimed homestead exemption, in that notice of levy was not properly recorded, not served on plaintiff, notice of levy was not properly posted, and no appraisers appointed, *held*, not to have prejudiced plaintiff nor to have prevented him from insisting on recognition of his homestead rights, if he had such, where it appears he was aware of the levy and subsequent steps (CL 1948, §§ 623.83, 623.90, 623.95).

9. QUIETING TITLE—EXECUTION SALE—IRREGULARITIES.

Title is quieted in the judgment creditor, the purchaser at execution sale, where it does not appear to have had knowledge of

irregularities in proceedings relative to recording, service and posting of notices and failure to appoint appraisers, and plaintiff, the judgment debtor, was not prejudiced by such irregularities, the statutes relative to sale on execution being designed primarily for the protection of third parties who deal in good faith without notice or knowledge of any irregularity or omission (CL 1948, §§ 623.83, 623.90, 623.95).

Appeal from Muskegon; Beers (Henry L.), J. Submitted October 15, 1958. (Docket No. 75, Calendar No. 47,521.) Decided December 2, 1958.

Bill by George H. Cross, trustee in bankruptcy of Frank John Ristau, and Frank John Ristau against Fruehauf Trailer Company, a Michigan corporation, to quiet title to property which was the subject of levy of execution and sale. Cross bill asking similar relief. Decree for plaintiffs. Defendant appeals. Reversed and decree ordered entered quieting title in defendant.

Smedley & Spaniola, for plaintiff Cross, trustee.

Hathaway, Latimer, Clink & Robb, for plaintiff Ristau.

Warner, Norcross & Judd, for defendant.

CARR, J. This case involves the validity of a sheriff's sale, under writ of execution taken out to enforce a judgment, of real estate in the city of Muskegon. The facts are not materially in dispute. In 1940 and prior thereto Bertha Ristau, mother of plaintiff Frank Ristau, was the owner of said property, which is described as lots 11 and 12 of Sauter and Roberts Addition to the city of Muskegon. Mrs. Ristau, who was a widow, lived on the premises in question. Under date of October 31, 1940, she conveyed the property to her son by quit-

claim deed which contained a clause reserving to her "the possession and use, rents and profits of said land for and during the term of her natural life." On the same day that the deed was executed the parties thereto entered into a written agreement referring to the conveyance and imposing on the grantee therein the obligation to maintain and support his mother, such duty being in terms modified by the phrase "so long as it is agreeable to both parties to live in the same home."

In November, 1952, the defendant Fruehauf Trailer Company obtained a judgment in the circuit court for Kent county against Frank Ristau in the sum of $2,750. On January 14th following, writ of execution on the judgment was issued, directed to the sheriff of Muskegon county and requiring levy to be made on the described premises. It is the claim of defendant that such levy was made and the execution returned and filed in the office of the register of deeds of the county. Subsequently notation was made on the abstract of title indicating a judgment lien. In August, 1953, notices of sale were posted and published indicating that a sale would be had, in accordance with the claimed levy, on September 30th following. Subsequently the date in the posted notices was altered to provide for sale on October 19, 1953. It is conceded that one of said notices was properly posted within the city of Muskegon, and that the others were in public places outside the limits of said city.

At the time the judgment against him was entered Ristau was living with his family in the city of Holland where he was engaged in a trucking business. He became involved in financial difficulties which resulted in his home in Holland being offered for sale, and the consummation of such sale some time during the summer of 1953. Ristau vacated the Holland home on or about Labor Day, 1953, and with his

2 sons moved into the home of his mother in Muskegon. On the 1st of October following he executed to his mother a deed purporting to convey to her his interest in the premises as received by him under her prior deed. The execution sale was held on October 19th, approximately 3 weeks after the execution and delivery of said deed by plaintiff Ristau, defendant being the purchaser. Pursuant to the statute the sheriff of the county caused a certificate of sale on levy of execution to be filed in the office of the register of deeds of the county, setting forth that the levy was made on February 5, 1953. The sheriff's deed in the usual form was executed and delivered May 17, 1956.

Plaintiff Ristau's mother died on January 25, 1954. Thereafter the administrator of her estate filed suit in equity in the Muskegon circuit court against Fruehauf Trailer Company and another to set aside the sheriff's sale of the property under the writ of execution issued to enforce the judgment. The action was based primarily on the conveyance by Frank Ristau to his mother under date of October 1, 1953, it being claimed that said deed was executed because of the failure of Ristau to properly support and maintain his mother in accordance with the agreement between them. On appeal from a decree in favor of the plaintiff administrator this Court concluded, as appears from the opinion in *Farmer* v. *Fruehauf Trailer Company,* 345 Mich 592, that the deed given by Ristau to his mother was in fraud of creditors and, therefore, void. A decree was entered dismissing the bill of complaint on the ground that Mrs. Ristau did not acquire her son's interest and that her estate did not own the property. The opinion of the Court further indicated that other questions raised in the pleadings and argument by counsel in their briefs did not require consideration.

Shortly after the death of his mother in January,

1954, Frank Ristau filed a petition in bankruptcy, and the usual order was entered in the proceedings. He and the duly appointed trustee of his estate instituted the present suit in equity to quiet title to the property in question, alleging as the bases for their action that a proper levy had not been made on the property, that the notices of sale and the posting did not comply with the statute, that the postponement of sale was not properly made, and that at the time of sale Ristau was occupying the premises as his home and claiming homestead rights therein. Defendant filed motion to dismiss, alleging that the bill of complaint did not state facts sufficient to constitute a cause of action in equity, and that the questions raised had been adjudicated in the case of *Farmer* v. *Fruehauf Trailer Company, supra*. The motion was denied.

Defendant filed its answer denying the material averments of the bill of complaint and the right of plaintiffs to equitable relief, and further asking by its cross bill that a decree enter in its favor on the ground that it was the owner of the premises by virtue of the levy of the writ of execution, the sale thereunder, and the sheriff's deed executed and delivered pursuant to the statute relating to such sales. Following a hearing the trial court concluded that plaintiff Ristau had homestead rights in the property, that the proceedings taken under the writ of execution and in connection with the subsequent sale of the property by the sheriff did not recognize such rights, and that, in consequence, the sale was void. A decree was entered accordingly, and defendant and cross plaintiff has appealed.

It is contended by counsel for appellant that the decree entered in *Farmer* v. *Fruehauf Trailer Company, supra,* is *res judicata* of the material matters raised in plaintiffs' bill of complaint. As appears from the opinion of the Court in said case the deci-

sion turned on the finding that the deed dated October 1, 1953, from Frank Ristau to his mother was in fraud of creditors and void. The claim that, by necessary implication, the existence of homestead rights on the part of either Mrs. Ristau or her son was denied is not without merit. However, neither of the plaintiffs in the present case were parties of record in the suit brought by the administrator of the estate of Mrs. Ristau. The trustee in bankruptcy, relying in this case on the alleged rights of his coplaintiff, represents creditors entitled to the allowance of claims in that proceeding. 8 CJS, Bankruptcy, § 295, p 1018; *Union Guardian Trust Co.* v. *Detroit Creamery Co.*, 265 Mich 636; *Pratt* v. *Valliquette,* 338 Mich 397. See, also, *Leib* v. *Bostwick,* 256 Mich 277; and *Bacon* v. *City of Detroit,* 282 Mich 150, in each of which certain general principles relating to *res judicata* were indicated. In view of the factual situation in the instant case we are not prepared to say that the claim of plaintiff Ristau that he was entitled to the homestead exemption from sale on execution in the property in question was necessarily determined as against him in *Farmer* v. *Fruehauf Trailer Company, supra.*

On behalf of appellees it is argued that as of the time of the sale of the property by the sheriff Ristau had established a homestead in the property and was, in consequence, entitled to the legal exemption on execution sale. By virtue of the reservation in the deed of conveyance given by Mrs. Ristau to her son in 1940, she occupied the premises in question as her home. That she was entitled to the exclusive possession thereof so long as she lived is not open to question. The deed is conclusive on this point and the collateral agreement between the parties with reference to Ristau's obligation to support his mother did not change the situation in any way. It did not in terms give to the son the right

to live in the home with his mother. The statement above quoted, seeming to imply that the obligation might be contingent, in part at least, on its being agreeable to both parties to live in the same home, did not vest in him the right to insist that it was his mother's duty to allow him and his sons to share her home. His living in the premises, therefore, rested on her consent to his so doing. In other words, he had no legal right entitling him to the possession of the premises, or to share such possession with his mother.

Article 14, § 2, of the Constitution of Michigan (1908), as amended at the April election, 1943, in creating the homestead exemption, refers to property "owned and occupied" by a resident of the State. The nature of the possessory interest that one must have to support a claim of homestead exemption is discussed in 40 CJS, Homesteads, § 80, p 520. In *Rentchler* v. *Lawton,* 113 Mich 14, there was involved a contract providing for the erection of a dwelling house and the conveyance of certain lots to defendant Lawton. In a suit brought by plaintiff Rentchler to enforce a mechanic's lien, defendant Lawton claimed that the property was his homestead and that the contract for the construction of the building not having been in writing and signed by his wife the lien claimed was not enforceable. In discussing the matter, it was said (p 16):

"This contention cannot be sustained. The Lawtons never had any such interest in the property that a homestead interest could be based upon it. The contract made with Schafer was an agreement simply that, when certain conditions were performed, a contract would be made upon terms to be agreed upon. No further discussion is necessary."

Title to the property in question as vested in plaintiff Ristau by his mother's prior conveyance to him

was subject to the reservation in her favor. Such title gave him no right of possession and his living with her was permissive only. In an annotation in 89 ALR 511, 523, it is said:

"With but few exceptions it has been held that a claim of homestead may not attach to either vested or contingent future estates or interests in land. For the reason that land held in remainder is not susceptible of that immediate occupancy which is contemplated by law in order to support a claim of homestead, a homestead may not be claimed therein by the remainderman; and the same rule applies where the remainderman occupies the premises during the life of the life tenant by the latter's permission."

Whether real estate is exempt as a homestead from sale on execution must be determined as of the time of the levy rather than at the time of the sale. In this connection it is of interest to note that in plaintiffs' bill of complaint it is averred that Ristau was occupying the premises as his home "at the time of sale." There is no evidence that he was doing so at the time the levy asserted by defendant was made. In *Bowles* v. *Hoard,* 71 Mich 150, it was held:

"Land not occupied as a homestead is prima facie subject to levy and sale on execution, and its exempt character must be determined upon the facts as they existed when such levy was made." (Syllabus 3.)

In *Malec* v. *Oleszko,* 316 Mich 310, 314, 315, the rule of the *Bowles Case* was recognized, the Court saying:

"We accept and apply the rule as stated in the headnote in *Bowles* v. *Hoard, supra,* and hold that the exempt character of lands sought to be sold in satisfaction of a levy must be determined upon the facts as they existed when such levy was made. Any

other determination would place a premium upon fraud."

See, also, *Noble* v. *McKeith,* 127 Mich 163, 165.

It appears from the record that at the time Ristau filed his petition in bankruptcy, in January, 1954, he did not assert therein any claim of homestead rights in the property in question which he had listed in the schedule of assets. Approximately 6 months later, however, he filed an amendment to his petition, raising the question. At the time of the proceedings in 1953, and for several months after the sale had been held, he did not assert homestead rights, although he had personal knowledge of the purported levy and the notices of the sale. It appears from testimony on the trial of the case that he and his family lived in a home in Holland which was being purchased by him. During the first part of 1953 he continued to live in Holland, his property there being sold at some time during the summer of that year. The following excerpt from his testimony fairly indicates the situation:

"*Q.* As to whether or not you gradually moved your personal belongings and some household equipment to Muskegon during the summer of 1953?

"*A.* Yes. When I finally moved in over Labor Day there was just a small amount of furniture left. Just enough for me to stay there and make a meal, when I would come there overnight.

"*Q.* Did that moving process continue from about the time that your son finished school in Holland in June?

"*A.* Yes.

"*Q.* Have you since lived with your sons in the Muskegon house?

"*A.* Yes, we have lived there continuously."

It further appears from Ristau's testimony that during the spring and summer months of 1953 he was working as a truck driver, staying at his home

in Holland during the week and going to his mother's home week ends. It also appears that during said time his mother came to Holland to look after his home and children there for the greater part of each week. The conclusion cannot be avoided that he did not change his place of residence from Holland to Muskegon for several months after the claimed levy of the writ of execution. On the basis of the evidence in the case, the conclusion cannot be avoided that his homestead rights, if he had such, were in his property in Holland where he lived at the time of such levy. He did not move into the home of his mother for months thereafter. One may not claim 2 homesteads at the same time. *Kleinert* v. *Lefkowitz,* 271 Mich 79. Statutory provisions relating to the protection on execution sales of homestead rights were not applicable in this case insofar as plaintiff Ristau is concerned because he did not have such rights.

This brings us to the question whether there were such defects and irregularities in connection with the levy and subsequent sale as to render the proceedings void and the sheriff's deed to defendant a nullity. It is not questioned that the writ of execution was properly issued from the circuit court of Kent county and was placed in the hands of the sheriff of Muskegon county for levy on the property described therein. On February 5, 1953, approximately 3 weeks after the issuance of said writ, it was filed by a deputy sheriff of Muskegon county in the office of the register of deeds of said county. It is the claim of the plaintiffs that a notice of levy was not recorded, that no return of levy was indorsed on the writ and filed with the Kent county clerk, and that no notice of levy was ever served on Ristau. It is further pointed out, and not denied, that 2 of the 3 notices of sale were posted in Muskegon township rather than in the city of Muskegon. Com-

plaint is further made of the failure to appoint appraisers and to have the homestead rights of Frank Ristau protected. For the reasons above set forth, however, such procedure was not required. It also clearly appears from the record before us, including particularly the testimony of Ristau as a witness on the hearing in circuit court, that he was aware of the making of the levy and of the subsequent steps taken, including the giving of notice of sale and the sale itself. While there were certain omissions and irregularities, it does not appear that Ristau was in any way prejudiced thereby, nor was he prevented from insisting on recognition of his homestead rights, if he had such.

It is obvious that provisions of the statute, on which plaintiffs apparently rely, prescribing requirements to be observed in making levy under a writ of execution to enforce a judgment, and in subsequent proceedings, are designed for the protection of third parties who may deal with the property in good faith without notice or knowledge of any irregularity or omission. Thus CL 1948, § 623.90 (Stat Ann § 27.1589), provides that:

"The omission of any officer to give the notice of sale required in this chapter, or the taking down or defacing any such notice when put up, shall not affect the validity of any sale made to a purchaser in good faith, without notice of such omission, taking down or defacing."

CL 1948, § 623.83 (Stat Ann § 27.1582), declares that a levy by execution on real estate shall not be valid against *bona fide conveyances* made subsequent to the levy until a notice thereof shall be filed by the officer making the levy in the office of the register of deeds of the county where the premises are situated. Significant, also, is CL 1948, § 623.95 (Stat Ann § 27.1594), which declares that the certificate

of sale "shall be prima facie evidence of the facts therein set forth, and of the regularity of the sale and all proceedings in the cause anterior thereto."

In *Kelso* v. *Coburn,* 334 Mich 43, certain irregularities existed with reference to a sale ordered by the court in a receivership proceeding. There, as in the case at bar, the posting of notices did not comply with the statute (CL 1948, § 623.85 [Stat Ann § 27.1584]) which required same to be posted in 3 public places in the township in which the premises were situated. It was also contended that the decree of the court was prematurely enrolled, and that because of the said irregularities the sale was fatally defective. Commenting thereon, it was said (p 55):

"With reference to such objections it may be noted that under CL 1948, § 623.90 (Stat Ann § 27.1589), the omission by an officer to give the notice of sale required does not affect the validity of such sale if made to a purchaser in good faith and without notice of the omission. In the instant case there is no showing that the purchaser of the property at the receiver's sale had notice of the omission to post notices in 3 public places in the township where the premises were situated, nor may such knowledge be assumed. Furthermore, there is no claim that plaintiff was in any way injured or aggrieved by the proceeding that he now undertakes to attack. If he has been prejudiced in any way this record fails to show it. Under the circumstances we do not think that he is in position to seek relief in this equitable proceeding. *Solomon* v. *Neubrecht,* 300 Mich 177."

Under the proofs in the instant case it does not appear that the plaintiffs were prejudiced because of the irregularities and omissions of which they complain. Plaintiff Ristau knew of the levy, knew also that notices of the sale had been posted, and was advised of the change in the date of sale. He

accounted for his failure to be present on the adjourned date by saying that he was working at that time. It does not appear that defendant at the time of its purchase at the sale had knowledge of the alleged defects and irregularities of which plaintiffs now complain.

Under the facts as disclosed by the record we conclude that plaintiffs are not entitled to the equitable relief sought by them. It is unnecessary to discuss other questions argued by counsel in their briefs. Defendant became the owner of the property by virtue of the levy, the subsequent sale to it, and the sheriff's deed reciting the jurisdictional facts. A decree will enter in this Court granting to defendant and cross plaintiff the relief sought by it, quieting title to the property in question. Appellant may have costs.

DETHMERS, C. J., and KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

PEOPLE *v.* HEARN.

1. HOMICIDE—INSTRUCTIONS—TEMPORARY INSANITY.

Defendant in prosecution for first-degree murder, committed while he and 3 companions robbed a gasoline station, in which the defense of temporary insanity, due to consumption of alcohol and marijuana, was interposed, *held*, to have been fully protected by complete and proper charge to jury.

REFERENCES FOR POINTS IN HEADNOTES

[1] 26 Am Jur, Homicide § 546.
[2, 4] 26 Am Jur, Homicide § 554.
[3] 53 Am Jur, Trial § 639.

2. SAME—FIRST-DEGREE MURDER—INCLUDED OFFENSES—INSTRUCTION.
A defendant in prosecution for murder in the first degree, committed while perpetrating a robbery, was not entitled to have instruction given that would permit jury to find him guilty of lesser offenses of second-degree murder or manslaughter, where there was no evidence from which a reasonable inference of any other degree of murder could be drawn (CL 1948, § 750.316).

3. CRIMINAL LAW—INSTRUCTIONS—REQUEST TO CHARGE.
The Supreme Court can and should reverse when the charge to the jury in a prosecution for crime omits a legally essential ingredient, even though no request or only an oral request to charge was made.

4. HOMICIDE—INSTRUCTIONS—INCLUDED OFFENSES.
There was no reversible error committed by trial court in prosecution for first-degree murder, committed in the perpetration of robbery, in failing to charge as to included offenses, where there was a total absence of evidence to support the theory that defendant was guilty of the included offenses rather than murder in the first degree (CL 1948, § 750.316).

Appeal from Oakland; Doty (Frank L.), J. Submitted June 12, 1958. (Docket No. 46, Calendar No. 46,957.) Decided December 2, 1958.

Robert Hearn was convicted of first-degree murder. Affirmed.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *Frederick C. Ziem,* Prosecuting Attorney, *George F. Taylor* and *Jack Hanna,* Assistant Prosecuting Attorneys, for the people.

Edward N. Barnard and *Crossley, Robbins & Bailey,* for defendant.

KELLY, J. While perpetrating a robbery at a Ferndale gasoline station defendant Hearn beat, stabbed and mortally wounded the station attendant. A jury found defendant, and 3 others who partici-

pated in the robbery, guilty of first-degree murder.* This is defendant Hearn's separate appeal, and the other defendants are not appealing.

The information contained one count, alleging that defendant feloniously, wilfully and with malice aforethought did kill and murder one Alfred Jones (the gasoline station attendant). Only one question is presented in this appeal: "Did not the court err in refusing to charge as to included offenses, as orally requested, and in excluding consideration of the lesser offenses from the jury?"

Defendant did not deny that his acts of beating and stabbing caused the attendant's death, but relied upon the defense of temporary insanity, claiming he did not know what he was doing because of his consumption of alcohol and marijuana. Conflicting testimony on this question included medical testimony.

An examination of the court's charge to the jury discloses that the jury was completely and properly instructed and defendant fully protected, as shown by the following instruction:

"Now, the defense in this case is marijuana and alcohol, either one or both, or a combination. The defense claims that because of its use that the respondents in this case did not know what they were doing or why they were doing it and consequently could not form an intent to rob and didn't know the difference between right and wrong. Now, these are questions for you to decide upon after you reach the jury room. * * *

"If their mental faculties were so far overcome by the use of marijuana and liquor that they were not conscious of what they were doing, or if they knew what they were doing but did not know why they were doing it, or that their actions and the means they were using were naturally adapted to

* See CL 1948, § 750.316 (Stat Ann 1954 Rev § 28.548).—REPORTER.

produce death, then they had not the capacity to entertain the intent and, in such case, intent could not be inferred from their actions. * * * This question of intent and common purpose to rob a gasoline station is a question of fact for you to determine after considering the acts before the commission of the crime and afterwards, and bearing upon the question of whether or not they knew what they were doing. Take into consideration all the testimony bearing upon that question. * * *

"You cannot convict unless you find intent to commit the crime of robbery. You don't have to find intent to kill, but you do have to find intent to commit the crime of robbery. If you don't find that intent, of course the respondents are not guilty. If you do find it, then there is another question for you to pass on. You must find intent to commit the crime of robbery, felonious intent, before you can convict of first-degree murder."

Appellant claims the jurors should have had the right to select between first- and second-degree murder and manslaughter.

This Court passed upon a similar claim in *People* v. *Utter,* 217 Mich 74, where the defendant was charged with statutory murder committed in the perpetration of a robbery and where defendant claimed the trial judge erred in instructing the jury that their verdict should be murder in the first degree or not guilty. At pages 87, 88, the Court stated:

"In *State* v. *Zeller,* 77 NJL 619 (73 A 498) defendant was charged with murder while perpetrating robbery under a like statute with ours. A statute of that State also provided as here that if the jury found the accused guilty of murder they should ascertain the degree. In a well-reasoned opinion it was held that the latter provision did not give a defendant the right to have the court leave it to the jury to find him guilty of a lesser degree

if there was no reasonable ground for such verdict in the evidence, saying in part (p 621):

" 'Our statute declares that murder committed in the perpetration or attempt to perpetrate a robbery is murder in the first degree. All the evidence that tended to implicate Zeller in the murder of William Read (including Zeller's own confession) tended to show that the murder was committed in the perpetration of a robbery. All the circumstances of the homicide bore a similar import as to the character of the crime. If under the evidence, Zeller was guilty at all, he was guilty of a murder committed in the perpetration of a robbery. The charge of the trial judge upon this question was therefore entirely proper.'

"In *People* v. *Schleiman,* 197 NY 383 (90 NE 950, 27 LRA NS 1075, 18 Ann Cas 588), defendant was convicted, under a similar statute, of murder while perpetrating burglary. The court there held (p 390) that under such a statutory charge, with the proofs limited to it,—

" 'There was no room for the exercise of a power to find the defendant guilty of a lesser degree of felonious homicide depending upon the existence or nonexistence of deliberation and premeditation. Hence, the learned trial judge committed no error in refusing to charge in reference to the various degrees of crime in this case or in instructing the jury that they must find the defendant guilty of murder in the first degree, or not guilty.'

"In *Essery* v. *State,* 72 Tex Crim 414, 418 (163 SW 17), the proposition is tritely stated as follows:

" 'When the code said that murder committed in a certain way was murder of the first degree, the law so makes it, and the jury by their verdict could not find otherwise.'

"While the authorities in other jurisdictions are not entirely harmonious upon this question we think sound reasoning supports the foregoing views, to which this court is in effect committed. Defendant was charged with statutory murder, committed by

acts and under circumstances declared by statutory definition to constitute murder in the first degree, to which the testimony was confined with no evidence from which a reasonable inference of any other degree could be drawn. He was entitled to acquittal if the charged murder in the first degree was not proven to the satisfaction of the jury. Under the testimony in this case the court committed no error in instructing the jury that their verdict should be murder in the first degree, or not guilty."

In *People* v. *Andrus,* 331 Mich 535, 542, 547, this Court said:

"On behalf of defendants it is contended that the court erred in permitting the jury to return a verdict of guilty of manslaughter, on the theory that the proofs indicated that the homicide was, under the statute, murder in the first degree because committed in the perpetration or attempt to perpetrate a robbery. It is argued, in substance, that the jury should have been instructed to return a verdict of either murder in the first degree or not guilty. * * * On the factual situation presented it cannot be said that the verdict of the jury was rendered without a proper basis therefor. See *People* v. *Droste,* 160 Mich 66. Appellants' claim that the verdict and sentences should be vacated for such reason is without merit."

In *People* v. *Droste,* 160 Mich 66, this Court held that the trial court properly refused to charge that the respondent must be found guilty of murder or was innocent, when the evidence supported the theory that the crime may have been committed in the heat of passion while respondent was under the influence of liquor, and constituted manslaughter.

We are in accord with appellant's contention that this Court can and should reverse when the charge to the jury omits a legally essential ingredient, even though no request to charge was made by defendant. See *People* v. *Guillett,* 342 Mich 1.

The fact that defendant's request to instruct was orally made and not in writing is not of any controlling importance to this Court in this appeal.

Appellant claims that because the court declined to charge on a very important issue in the case "an injustice may very well have resulted." Appellant cannot charge that an injustice resulted, because it is apparent that the jury which found defendant guilty of first-degree murder could also have refused to reduce the crime to second-degree or manslaughter, even though the court had granted that privilege to the jury. The record does not sustain appellant's contention that "there was ample ground for the jury to find the defendant guilty on one of the included offenses."

There were no reasonable grounds for the jury to find defendant guilty of a lesser degree, and there was a total absence of evidence to support the theory that defendant was guilty of the included offenses rather than murder in the first degree.

Affirmed.

DETHMERS, C. J., and CARR, SMITH, BLACK, and VOELKER, JJ., concurred.

EDWARDS and KAVANAGH, JJ., did not sit.

HILL v. HILL.

1. MARRIAGE—ANNULMENT—RESIDENCE.
   Divorce residence requirements are not applicable to annulment proceedings, since such requirements were designed to discourage hasty divorces, a reason inapplicable to the continuance of a marriage which was void from its beginning (CL 1948, §§ 552.9, 552.9e, as amended and added by PA 1957, No 257).

2. SAME—ANNULMENT—VENUE—STATUTES.
   Statute specifying that a bill of complaint to annul a marriage could be filed in the county where the parties, or 1 of them, resided, eliminated residential requirements set forth in the divorce section of the statute (CL 1948, § 552.3).

Appeal from Wayne; Targonski (Victor), J. Submitted October 7, 1958. (Docket No. 11, Calendar No. 47,732.) Decided December 2, 1958.

Bill by Ronald Irwin Hill against Elizabeth McBride Hill for annulment of marriage. Defendant's motion to dismiss denied. Defendant appeals. Affirmed.

Keidan & Keidan (*Baer Keidan,* of counsel), for plaintiff.

Bunin & Grandon (*Seymour B. Goldman,* of counsel), for defendant.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 35 Am Jur, Marriage § 63.
Jurisdiction, as between different States, of suit to annul marriage. 128 ALR 61.

KELLY, J. Plaintiff, a resident of Windsor, Ontario, Canada, filed a bill of complaint for annulment in the Wayne circuit court, stating that he was married in Detroit to defendant who was a resident of Detroit; that said marriage was part of a trick, scheme and fraud whereby defendant obtained from him a sum in excess of $35,000, and that the marriage was never consummated. Personal service was obtained upon defendant.

Defendant's motion to dismiss the bill of complaint was denied. The only question presented in this appeal is whether the statutory residence requirements regulating divorce actions are applicable to actions for annulment.

CL 1948, § 552.3 (Stat Ann 1957 Rev § 25.83), provides:

"When a marriage is supposed to be void, or the validity thereof is doubted, for any of the causes mentioned in the 2 preceding sections;* either party, excepting in the cases where a contrary provision is hereinafter made, may file a petition or bill in the circuit court of the county, where the parties or 1 or them, reside, or in the court of chancery for annulling the same and such petition or bill shall be filed and proceedings shall be had thereon as in the case of a petition or bill filed in said court for a divorce; and upon due proof of the nullity of the marriage, it shall be declared void by a decree or sentence of nullity."

CL 1948, § 552.9, as amended by PA 1957, No 257 (Stat Ann 1957 Cum Supp § 25.89), provides:

"No decree of divorce shall be granted by any court in this State in any case unless:

"(1) The party applying therefor shall have resided in this State for 1 year immediately preceding

* CL 1948, § 552.2 (Stat Ann 1957 Rev § 25.82) includes the cause of fraud.—REPORTER.

the time of filing the praecipe for summons therefor; or

"(2) The marriage which it is sought to dissolve was solemnized in this State, and the party applying for such divorce shall have resided in this State from the time of such marriage until the time of bringing such suit for divorce.

"(3) The complainant or defendant, or both of them, shall have resided in the county in which the praecipe for summons for divorce is filed for 10 days immediately preceding the filing of the praecipe for summons therefor."

CL 1948, § 552.9e, as added by PA 1957, No 257 (Stat Ann 1947 Cum Supp § 25.89[5]), reads:

"Whenever the cause for divorce charged in the bill or petition has occurred out of this State, no decree of divorce shall be granted unless the complainant or defendant shall have resided in this State 1 year immediately preceding the filing of the praecipe for summons for the divorce. Absence from this State for not to exceed 90 days shall not be construed as to interfere with the fulfillment of the 1-year residence requirement provided in the case of causes for divorce occurring without this State."

The question herein presented has not previously been before this Court.

Authorities from other States are divided as to whether statutory requirements of a term of residence as a condition to the maintenance of a proceeding for divorce are applicable to actions for annulment.

The weight of authority supports the conclusion that divorce residence requirements are not applicable to annulment proceedings because such requirements were designed to discourage hasty divorces and this reason would not apply to the continuance of a marriage which was void from its beginning.

The legislature in providing that a bill of complaint for annulment could be filed in the county where the parties, or 1 of them, resided, eliminated the residential requirements set forth in the divorce section of the statute.

The circuit court did not err in denying defendant's motion to dismiss.

Affirmed. Costs to appellee.

DETHMERS, C. J., and CARR, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

GENERAL ACCIDENT FIRE & ASSURANCE CORPORATION, LTD., *v.* SIRCEY.

1. ACTION—SPLITTING CAUSE OF ACTION.
   Rule against splitting of causes of action is strictly enforced in this State to prevent vexation and expense to a defendant and it is a rule of justice that one shall present his whole cause of action in one suit.

2. JUDGMENT—SPLITTING CAUSE OF ACTION—WAIVER.
   As the point of split cause of action could not accrue until judgment, defendant is not sooner called upon to elect its course and inaction could not work a waiver.

3. ACTION—SPLITTING CAUSE OF ACTION—WAIVER.
   Claim of waiver of splitting of cause of action, made by assignee insurer of party injured in accident wherein defendant was involved and who had been unsuccessfully sued for injuries to

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 1 Am Jur, Actions § 96.
[2, 3] 1 Am Jur, Actions § 101.
[4] 29 Am Jur, Insurance § 1456; 55 Am Jur, Usages and Customs § 56.

plaintiff's insured *held,* not sustained by record presented in subsequent action on assigned claim for damages to car operated by plaintiff's insured.

4. SAME — SPLITTING CAUSE OF ACTION — WAIVER — CUSTOMS AND USAGES.

A claimed custom among insurance companies where both parties to an accident are insured and one of them has a severe personal injury claim and desires to institute an action therefor and has assigned his insurer a part of his cause of action that the defendant's insurer requests the subrogee insurer to withhold any action thereon until disposition of the insured's claim and waive the technical defenses of splitting causes of action, *res judicata,* statutes of limitation, and nonjoinder or misjoinder of party plaintiffs, which custom was alleged but not proved, was not sufficient to prevent enforcement of rule against splitting cause of action, especially where statute provides for intervention by assignee of a part of a cause of action in tort (CL 1948. § 612.2).

Appeal from Wayne; McCree (Wade H.), J. Submitted October 21, 1958. (Docket No. 21, Calendar No. 47,427.) Decided December 2, 1958.

Case by General Accident Fire & Life Assurance Corporation, Ltd., a foreign corporation, assignee of Dean Oxford Tanner, against Lloyd A. Sircey for property damage loss arising from automobile collision. Defendant moved to dismiss because of split cause of action and *res judicata.* Plaintiff moved to transfer cause to chancery side of court and add Auto-Owners Insurance Company, a Michigan corporation, as a party defendant, claiming a waiver of technical defenses. Plaintiff's motion denied and case dismissed. Plaintiff appeals. Affirmed.

Platt & Platt (*Henry A. Platt,* of counsel), for plaintiff.

Cary, BeGole & Martin (*William A. Joselyn,* of counsel), for defendant.

KELLY, J. On November 13, 1953, an automobile accident occurred on Ford road near Newburgh road, Nankin township, Wayne county, involving 2 automobiles. One automobile was owned and driven by Dean Oxford Tanner; the other car was owned and driven by Lloyd A. Sircey.

Each car was insured for public liability, property damage and collision: General Accident Fire & Life Assurance Corporation, Limited (hereinafter referred to as General Accident), insuring Dean Oxford Tanner and his automobile, and Auto-Owners Insurance Company (hereinafter referred to as Auto-Owners), insuring Lloyd A. Sircey and his automobile.

On November 20, 1953, a week after the accident, General Accident settled the collision loss on Tanner's automobile as a total loss in the sum of $1,700. Tanner had a $50 deductible policy, making the net payment to him of $1,650, General Accident taking the salvage, for which it received $215, making its net subrogation loss $1,435. General Accident received a written assignment thereof and paid Dean Oxford Tanner by check in the sum of $1,650.

On December 22, 1953, Dean Oxford Tanner, through his own attorneys, commenced an action wherein he was sole plaintiff, against Lloyd A. Sircey, for personal injuries arising out of the accident aforesaid. The General Accident claim of $1,435 was not included therein. The defense of said action was turned over by defendant Sircey to his insurer, Auto-Owners, who in turn delivered the defense to its legal counsel.

Between December 29, 1953, and July 8, 1955, General Accident wrote several letters to Auto-Owners in regard to the subrogation claim of $1,435.

The Tanner *v.* Sircey case resulted in a jury verdict on June 15, 1955, against plaintiff Tanner of no cause of action. On July 14, 1955, Auto-Owners'

denial of liability was communicated to General Accident.

December 14, 1955, General Accident commenced the present law action against Lloyd A. Sircey, and the defendant filed answer containing a general denial and an affirmative defense, stating that the plaintiff had split its cause of action by permitting the assignor, Dean Oxford Tanner, to institute suit and litigate his cause of action for his personal injuries without including cause of action in favor of the plaintiff.

April 25, 1957, plaintiff filed a motion to transfer this cause to the equity side of the court and to add Auto-Owners as a party defendant. Plaintiff appeals from an order of June 7, 1957, dismissing the cause and denying plaintiff's motion to transfer to equity and to add Auto-Owners as a party defendant.

Appellant claims the court erred in not holding that defendant Sircey and his insurer, Auto-Owners, waived the defense of splitting a cause of action and, therefore, should be estopped from offering the defense of *res judicata*. Appellant's claim of waiver is based upon the correspondence between plaintiff and Auto-Owners Insurance Company and, also, upon a claimed agreed "custom among insurance companies" throughout the Detroit area.

Appellant could have intervened under the provisions of CL 1948, § 612.2 (Stat Ann § 27.654), which provides, in part:

"Provided further, That where an assignment of a part of a cause of action in tort has been made by an insured to an insurer, both assignor and assignee may join in an action on such claim, and a joint judgment shall be rendered for all the damages to which either or both may be entitled."

In *Washtenaw Mutual Fire Insurance Co.* v. *Budd*, 208 Mich 483, 488, 489, this Court said:

"Stress is laid by plaintiff's counsel upon the absence of the insurer from the litigation against the railroad company. We think that the evidence shows that the company had knowledge of such litigation. We understand the rule to be that the insured is not required to invite the insurer to take part in an action against a wrongdoer, nor to take any special steps to protect the insurer; but it is the insurer's privilege to intervene and protect his own rights, if he sees fit to do so. Our statute now fully provides for such intervention; but it provides that 'intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.' "*

Szostak v. *Chevrolet Motor Company,* 279 Mich 603, involved plaintiffs' claimed damages to buildings located on 2 adjoining lots which were located 1 block from defendant's forge plant. Plaintiffs filed 2 identical declarations as to allegations of nuisance and defendant's negligence. The trial involving damages to the building on the first lot resulted in judgment for the defendant and no appeal was taken. At the trial for damages in regard to the building on the second lot, the court granted defendant's motion to dismiss on the ground that plaintiffs had split their cause of action. This Court held (pp 607, 606):

"In this State the rule against splitting of causes of action is strictly enforced to prevent vexation and expense to a defendant. *Brewster Loud Lumber Co.* v. *General Builders' Supply Co.,* 233 Mich 633; *Corey* v. *Jaroch,* 229 Mich 313; *Continental Ins. Co.* v. *H. M. Loud & Sons Lumber Co.,* 93 Mich 139 (32 Am St Rep 494). It is a rule of justice that one shall present his whole cause of action in one suit. *Dutton* v. *Shaw,* 35 Mich 431."

"Plaintiffs complain that defendant's tactics were unfair because if it had raised the point before trial

* See CL 1948, § 612.11 (Stat Ann § 27.663).—REPORTER.

of the other action plaintiffs could have consolidated the suits by amendment or otherwise. Until judgment in the case first tried, defendant could not have pleaded in bar nor prevailed in a motion to dismiss the present action. A party is not obliged to take an ineffective position, to his adversary's advantage, on penalty of waiver of rights. Because plaintiffs might have amended their pleadings on leave of court even after the testimony was taken, in the suit first tried, the point of split cause of action could not accrue until judgment therein, defendant was not sooner called upon to elect its course, and inaction could not work a waiver."

Auto-Owners, throughout the correspondence, made its position clear to General Accident, stating:

"Until some disposition has been made of the injury claims, we can make no commitment as to your subrogation claim.

"When the injury claims are out of the way, we shall be pleased to discuss this matter with you further."

Appellant did not request a waiver of the defense of split cause of action, and neither appellee nor Auto-Owners agreed to a waiver. Appellee did not request appellant to delay in partaking its subrogation claim. Appellant's claim of waiver because of correspondence is not sustained by the record.

Appellant's claim of "custom among insurance companies" as an excuse for its failure to intervene is confined to the following statement in appellant's proposed bill of complaint:

"Your plaintiff shows that it was and is the custom among insurance companies where both parties to an accident are insured and one of such parties has a severe personal injury claim and desires to institute suit therefor and has assigned to his insurance company part of his cause of action, that under such

circumstances the defending insurance company requests the insurance company holding the subrogation claim to withhold any action thereof until final disposition of the individual assured's cause of action, and upon final disposition of such personal injury claim, the insurance companies involved would settle and/or litigate the subrogation claim and that the defense of splitting cause of action, *res judicata,* statutes of limitations, nonjoinder or misjoinder of party plaintiffs or other technical defenses thereto are not insisted upon and are waived."

Appellee states:

"There is no showing of such a custom other than the mere allegations set forth in appellant's proposed bill of complaint. These allegations are subject to the test of proof and counterproof in an adversary proceeding. Furthermore, no request was ever made of the appellant insurance company to forego any action on its part to protect its subrogation interest. If a custom did in fact exist among insurance companies throughout the Detroit area, it was that the subrogated insurance company would request and obtain a specific waiver of any technical defenses, or upon its failure to so obtain such a waiver, the subrogated insurance company would then take immediate steps to protect its subrogation claim by way of intervention."

The record does not sustain appellant's request that it be excused from failure to intervene because of a "custom" existing between insurance companies in the Detroit area. Custom between insurance companies will not change the finding of this Court in *Szostak* v. *Chevrolet Motor Company, supra,* 607, namely, that: "In this State the rule against splitting of causes of action is strictly enforced."

Apellant's claim that the Court erred in not transferring the cause to equity has not only been answered by this opinion but, also, by previous deci-

sions of this Court and further discussion on this point would be an imposition on bench and bar.

Affirmed. Costs to appellee.

DETHMERS, C. J. and CARR, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

FREEDMAN *v.* MARK.

1. CONTRACTS—CONSIDERATION—CANCELLATION OF DEBT—RE-EMPLOYMENT.

   Finding of circuit judge in suit commenced by judgment creditor's bill that judgment and debt represented thereby in favor of plaintiff partners, engaged as wholesale distributor of siding, was canceled when defendant, after an absence of some 2–1/2 years and after having made a statutory assignment for the benefit of creditors, became re-employed as a salesman for corporation, completely owned by the partners but engaged in retailing such siding, and was paid some $34,000 in commissions without demand for payment having been made, is not disturbed, the claim that the agreement to cancel the debt was without consideration being without merit (CL 1948, § 642.1 *et seq.*).

2. COSTS—BRIEFS.

   No costs are allowed appellees who filed no briefs on appeal.

Appeal from Wayne; Ferguson (Frank B.), J. Submitted October 15, 1958. (Docket No. 38, Calendar No. 47,721.) Decided December 2, 1958.

Judgment creditor's bill by Robert M. Freedman and Reuben M. Schulman, copartners doing business as Alsar of Michigan, against Gilbert Mark and Isa-

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 12 Am Jur, Contracts § 81.

belle Mark, jointly and severally, to reach assets claimed concealed and transferred by husband while insolvent. Bill dismissed. Plaintiffs appeal. Affirmed.

Joel G. Jacob, for plaintiff.

KELLY, J. Gilbert Mark and his wife are named as defendants. This opinion will refer to Gilbert Mark, solely, as defendant. On January 30, 1951, plaintiffs recovered a $2,115.96 judgment against defendant.

February 1, 1951, defendant executed a statutory assignment for the benefit of creditors.* The assignee realized $23,546.74, and plaintiffs received their proportionate share thereof.

Plaintiffs' writ of execution was issued on March 8, 1956, and returned unsatisfied.

July 12, 1956, plaintiffs filed their bill of complaint "to reach real estate, owned by defendants, husband and wife, as land contract purchasers as tenants by the entireties and to subject defendants' interest in said property to levy and sale in order to collect and satisfy a balance of $1,810.64."

The real estate refers to a home purchased by defendant and his wife on land contract 6 months previous to plaintiffs' judgment of January 30, 1951.

The trial chancellor dismissed plaintiffs' bill of complaint, concluding that the evidence sustained defendant's claim that the debt was cancelled.

Plaintiffs confine proof to the testimony of Gilbert Mark, who was called for cross-examination under the statute,† and the testimony of plaintiff Robert Freedman. No further testimony was offered by defendant.

---

* See CL 1948, § 642.1 *et seq.* (Stat Ann 1943 Rev § 27.2417 *et seq.*).—REPORTER.

† See CL 1948, § 617.66 (Stat Ann § 27.915).—REPORTER.

Defendant's testimony established that he first went to work for plaintiffs as a salesman of aluminum siding and that he worked and associated with plaintiffs for several years; that he finally was appointed president of plaintiffs' out-State branches, and that prior to the judgment he had become a dealer in his own behalf in Lansing and was obtaining aluminum from plaintiffs. The only explanation disclosing what transaction resulted in the judgment was a statement made by plaintiffs' attorney, as follows:

"*The Court:* What is the name—you're talking about Alsar Company and Alsar of Michigan?

"*Mr. Jacob:* Alsar Michigan was a wholesale distributor of siding. Alsar Company was and is a retail contractor for siding, buying, among other customers, from Alsar of Michigan.

"*The Court:* Now, the judgment is in the name of —?

"*Mr. Jacob:* That partnership.

"*The Court:* This partnership here, Alsar of Michigan?

"*Mr. Jacob:* That's correct.

"*The Court:* Now, who is Alsar Company?

"*Mr. Jacob:* A Michigan corporation, if your Honor please.

"*The Court:* Now, let's start all over again. Freedman & Schulman, copartners, doing business as Alsar of Michigan?

"*Mr. Jacob:* That's correct.

"*The Court:* And they obtained this judgment?

"*Mr. Jacob:* Correct, for merchandise sold and delivered, if that will help your Honor out. He testified he was a dealer in Lansing.

"*The Court:* While he was a dealer?

"*Mr. Jacob:* Yes, sold them merchandise and opened an account and then we sued him for it.

"*The Court:* All right, then it was after that that he went to work for someone?

"*Mr. Jacob:* Alsar Company.

"*The Court:* He said he went back to work for Alsar. Now, Alsar Company, you say?

"*Mr. Jacob:* That's correct.

"*The Court:* Now, who is Alsar Company?

"*Mr. Jacob:* That is a corporation of Michigan.

"*The Court:* And who are the principal stockholders?

"*Mr. Jacob:* Stockholders are the same people who were the partners, or who are the partners of Alsar of Michigan, but it is an entirely different setup. Never in the retail business.

"*The Court:* Was the copartnership dissolved?

"*Mr. Jacob:* No, your Honor.

"*The Court:* It was a going concern at the same time that the corporation was functioning?

"*Mr. Jacob:* That's correct."

Defendant testified that his friendship with plaintiff Freedman continued throughout the period he was working for plaintiffs and the years that followed the judgment when defendant moved to Detroit and worked for other employers.

Defendant testified that during his employment in Detroit by others he had lunch at the Wonder Bar with plaintiff Freedman and when Freedman suggested that he again associate with plaintiffs, he (defendant) stated:

" 'Well, what's the deal like?' And he explained it to me, and then I said definitely this, and I think Bob will bear me out on it. I said, 'If I come back there, and we start fresh.' 'In other words, there is nothing that I owe you or you owe me,' and that was the deal.

"I came back to work there and during that interim I was paid the sum of, I guess you all know it, approximately $34,000 for the period of time that I was there. * * *

"*Q.* You were with them, you allege in your answer from the 13th of August, 1953 to some time in November of 1954?

"*A.* That's correct. * * *

"*Q.* And during any time while you were with them during this period, was there any demand made upon you to pay this judgment in question?

"*A.* No, sir."

The answer as to why plaintiffs paid defendant $34,000 without mentioning defendant's payment to them of the $1,810.64 judgment is confined to plaintiff Freedman's testimony, as follows:

"*The Court:* Why didn't you get your money out of that $34,000, when you knew he was earning it?

"*A.* As a matter of fact, we felt that we had a reserve. As it turned out to be, we not only didn't have a reserve, but there was more money owing the Alsar Company than what we—rather, there's more money—the Alsar Company gave him more money than what his commissions sheet proved out to be, rather than having a reserve for it."

Defendant's statement, quoted above, is not denied, as is disclosed by the following testimony of Freedman:

"*Q.* State whether or not Mr. Mark told you at the Wonder Bar when you were having lunch one day that if he did—in 1953, prior to August—that if he did come back to work for your company that it would only be on the condition that the slate of the past were wiped clean?

"*A.* I do not recall any such conversation."

Plaintiff Freedman admits that when his partner, after termination of defendant and plaintiffs' working agreement, brought up the question of the payment of the judgment, defendant was surprised that plaintiffs were claiming that defendant owed them moneys on the judgment. The record sustains defendant's contention that he re-entered plaintiffs' employment with the agreement that the debt and judgment were cancelled.

Plaintiffs were the sole partners in the company

and the sole stockholders in the corporation, and we see no merit in plaintiffs' contention that, admitting the agreement, the contract should not be considered because of a lack of consideration.

Affirmed. No costs to appellees, who filed no brief.

DETHMERS, C. J., and CARR, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

SCHANKIN *v.* BUSKIRK.

1. TRESPASS—TREBLE DAMAGES—VERDICTS—EVIDENCE.
   Verdict for plaintiffs in action of trespass to recover treble damages from defendant sawmill operator for cutting of 6 large trees on plaintiffs' residential lots *held*, not against the overwhelming weight of the evidence (CL 1948, § 692.451).

2. SAME—TREBLE DAMAGES.
   Damages in an action of trespass that are trebled under the treble damage statute represent not merely the value of the timber cut but damages to the freehold as well (CL 1948, § 692.451).

3. SAME—MEASURE OF DAMAGES.
   Generally, damages in trespass to land are measured by the difference between the value of the land before the harm and the value after the harm, but there is no fixed, inflexible rule for determining, with mathematical certainty, what sum will compensate for the invasion of the interests of the owner.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 15 Am Jur, Damages § 332; 52 Am Jur, Trespass § 58.
[3–5] 52 Am Jur, Trespass § 49; 15 Am Jur, Damages §§ 118, 119.
Measure of damage for destruction of, or injury to, trees and shrubbery. 161 ALR 549.
[6] 15 Am Jur, Damages § 333 *et seq.*
[7] 52 Am Jur, Trespass § 58.
[8] 53 Am Jur, Trial § 143.

4. SAME—ORNAMENTAL TREES—VALUE.

The test of value before injury and value after injury to the freehold is not necessarily the sole test in determining the amount of damage suffered by lot owners from removal of large ornamental or shade trees by trespassing defendant, it being permissible to consider the value of the trees themselves to the contemplated or existing uses of the land, including cost of replacement or restoration, where the property destroyed has a unique value of its own.

5. SAME—VALUE OF A TREE.

The value of a growing tree to a particular piece of residential property is not susceptible to precise measurement in an action of trespass for its tortious removal.

6. DAMAGES—EVIDENCE.

All facts and circumstances having any tendency to show damages or their probable amount may be placed before a jury, where the nature of the case is such that the amount of damages cannot be estimated with certainty.

7. TRESPASS—EVIDENCE—DAMAGES.

Verdict of $900 by jury in action of trespass under treble damage statute *held,* not in error, where evidence shows defendant cut 6 large trees on plaintiffs' 2 lots, and that the land was worth $900 less after the cutting (CL 1948, § 692.451).

8. TRIAL—ARGUMENT TO JURY—WAIVER OF RIGHT TO OBJECT.

The right to object to improper statements in argument to the jury is waived unless the attention of the trial court is called to such statements.

Appeal from Wayne; Weideman (Carl M.), J. Submitted April 11, 1958. (Docket No. 46, Calendar No. 47,405.) Decided December 2, 1958.

Trespass by Joseph F. Schankin and Marion F. Schankin against Clarence E. Buskirk, doing business as Buskirk Lumber Company, Alger Homes, Inc., a Michigan corporation, and Clayton M. Gouine for treble damages for cutting trees on residential building lots. Verdict and judgment for plaintiffs against defendant Buskirk and verdict and judgment for other defendants in common pleas court sus-

tained in circuit court. Defendant Buskirk appeals. Affirmed.

Arthur E. Somers and *Alexander, Cholette, Buchanan, Perkins & Conklin* (*Donald E. Miller,* of counsel), for plaintiffs.

John von Batchelder, for defendant Buskirk.

SMITH, J. Plaintiffs seek treble damages under the statute,* for a trespass in the course of which several trees on their land were cut down. At the time that plaintiffs, a young man and his wife, purchased the parcel of land in question, there were few houses in the neighborhood, the street that ran by had not yet been paved, and their land and the land adjoining, as well, were thickly wooded. They intended to build there and they had chosen the parcel, which is part of a suburban land development near Detroit, for the beauty of its large trees. They pictured these as surrounding their future home.

Within a year, building on a large scale started in the neighborhood. (Negotiations to purchase, May, 1952, delivery of deed, August, 1952, harm occurred, June 13, 1953.) The owner of the land adjoining plaintiffs', defendant Alger Homes, Inc., engaged the services of defendant Gouine, whose work was to clear land of trees and shrubs, and to prepare building sites. Trees to be cut were indicated by an agent of Alger Homes, Inc., but the work was not supervised. In turn, Gouine arranged with defendant Buskirk, the owner of a sawmill, for the sale of timber. Some trees were to be cut down by Buskirk's employees according to the arrangement. While it is admitted that they cut down 6 large trees on plaintiffs' land, the circumstances under which they did so are disputed.

* CL 1948, § 692.451 (Stat Ann § 27.2161.)

Gouine and his employees testified that stakes had been placed to mark lot lines, that brush had been cleared from the land owned by Alger Homes, Inc., up to the line separating its lots from plaintiffs', that this line could be seen without difficulty, that it had been pointed out to Buskirk's employees when they arrived in the early morning, and that they had been told to keep off the land beyond it. Gouine further testified that, in the middle of the day, he noticed them cutting just over the line and cautioned them again, that he left, and that, when he returned in the evening to pay his men, one of them told him that Buskirk's employees had gone ahead and taken all the large trees from plaintiffs' land. This his employees confirmed, adding that one of Buskirk's men had said something jokingly at the time they did the cutting about "free logs, extra money." Buskirk's employees testified that they had not seen any stakes, except perhaps some at rear of the lots, that these had not been pointed out as marking the limits within which they might cut, and that the cutting of trees on plaintiff's land was done in the morning, in Gouine's presence and under his direction.

The trial court, the court of common pleas for the city of Detroit, directed a verdict of no cause of action in favor of Alger Homes, Inc., but left to the jury the question of the liability of the other 2 defendants. The jury returned a verdict of no cause of action against Gouine, and a verdict of guilty against Buskirk. In answer to a series of special questions, the jury said that they found that the trees on plaintiffs' land had not been cut down in Gouine's presence, nor under his direction, that Buskirk's employees had been guilty of "wilfulness, wantonness, or evil design" in cutting the trees, and that the value of plaintiffs' land before the trespass had been $3,700, and after the trespass $2,800. A motion by Buskirk for judgment *non obstante veredicto,* or, in the alterna-

tive, for a new trial, was denied and judgment was entered against him for treble damages, in the amount of $2,700. The circuit court for Wayne county affirmed. Buskirk takes this appeal.

In urging that a finding of wilful trespass is "contrary to the great weight of the evidence," reliance is placed on a statement made by Gouine after this suit had been started, but before Gouine had been served with process. Buskirk, mentioning that he was involved in a suit, asked Gouine if his (Buskirk's) employees had cut any timber that Gouine had not directed them to cut. Gouine replied that they "were a good bunch of boys and they didn't cut anything that I didn't say." We cannot say that the jury was not justified in accepting Gouine's explanation of this statement, namely, that it referred to some other work. Viewing the testimony in its entirety, we cannot say that the verdict was so against the "overwhelming weight of the evidence," *Schneider* v. *Pomerville,* 348 Mich 49, that it must be set aside upon such ground.

As to the damages involved, it is settled that the damages that are to be trebled under the statute represent not merely the value of the timber cut but damages to the freehold as well. *Miller* v. *Wykoff,* 346 Mich 24. Generally speaking, damages in trespass to land are measured by the difference between the value of the land before the harm and the value after the harm, but there is no fixed, inflexible rule for determining, with mathematical certainty, what sum shall compensate for the invasion of the interests of the owner. Whatever approach is most appropriate to compensate him for his loss in the particular case should be adopted. *Allison* v. *Chandler,* 11 Mich 542; *Natural Soda Products Co.* v. *City of Los Angeles,* 23 Cal2d 193 (143 P2d 12); *Basin Oil Company* v. *Baash-Ross Tool Company,* 125 Cal App2d 578 (271 P2d 122). Thus, the dam-

ages awarded in *Miller* v. *Wykoff, supra,* reflected, in part, the value of the timber taken and, in part, the cost of restoring the land to a condition of usefulness—by filling up stump holes and cleaning up the toppings and other debris left behind by the trespassers. See, also, *Burtraw* v. *Clark,* 103 Mich 383; 2 Restatement, Torts, § 929.

On the matter of damages, it is urged to us that the destruction of the trees did not not lessen the market value of the land, and may, in truth, have increased it. Further, that the evidence supports an award of damages only for stumpage, the value of the wood taken, which is estimated at $25.50. The president of defendant Alger Homes, Inc., testified that he had purchased 30 lots in the neighborhood of the local school district at auction, within a month of the cutting, and at a price of $1,155 per lot. Plaintiffs owned a corner lot and the lot adjacent, an area approximately twice the size of one of these lots. The president further testified that in his opinion plaintiffs' property was worth, at the time of the cutting, approximately what they had paid, $1,800, but $100 more with the trees cleared away, and that it was less desirable than the other lots. We need not summarize the testimony of other witnessess so minded. They agreed, in substance, that the trees added nothing to the value of the lots and, hence, their removal did plaintiffs no hurt.

On the other hand, plaintiffs placed testimony of a tree surgeon before the jury to the effect that trees of comparable size could be purchased for about $100 each, adding to which sum labor costs in removing and replanting on plaintiffs' site, profit, and a "guarantee that it is going to live," which would bring

replacement cost* to approximately $1,500 per tree. Included in this figure was testimony as to transportation costs, since, in order to obtain trees, "we have to look to the rural sections, because people in the cities and so on, they have such a value on the tree that we couldn't even buy it." The jury had before them, at the close of proofs, a full description of the property, its costs, photographs showing the condition of the land and the character of the neighborhood, testimony as to the prices at which lots had been sold in the neighborhood, and the purchase price and replacement cost of trees similar to those destroyed. We are not, with respect to ornamental or shade trees, restricted solely to a value-before and value-after test for injury to the freehold. These are proper elements for the jury's consideration but it may consider, as well, the value of the trees themselves to the contemplated or existing uses of the land, including the cost of replacement or restoration, in those cases where, as here, the property destroyed has a unique value of its own. The doctrine was well put in *Stephenville, N. & S. T. R. Co.* v. *Baker* (Tex Civ App), 203 SW 385, 386, wherein it was held with respect to the destruction of fruit and shade trees:

"It may be true, as contended on behalf of appellant, that as a general rule trees and other things growing upon land constitute part of the realty, and that in general the correct measure of damages for injury or destruction of trees or other growths is the difference between the value of the land immediately before and immediately after the injury. But that is not an inflexible rule necessarily applicable to all conditions and to every case. In fact,

* See *Kelly* v. *Fine*, 354 Mich 384, wherein we held, in a case involving the removal of topsoil, that "proofs that it would cost $1,250 to restore the lot to its condition before the trespass constituted evidence from which the jury might make a determination of the loss to the freehold."

the only inflexible rule as to the measure of actual damages is the rule of compensation. * * *

"Testimony was admissible to show the value of the trees as they stood before they were injured, and the extent of their injury, and that the sum of money necessary to compensate the plaintiff for being deprived of them for the uses intended will come nearer affording actual compensation for the injuries sustained than the opinion of witnesses as to the difference in the value of the land upon which they stood immediately before and immediately after the injury."

See, also, *City of New Orleans* v. *Shreveport Oil Co.,* 170 La 431, 435 (128 So 35), where the court pointed out that

"The cases cited by the defendant relate to ordinary trespass on lands and the cutting of timber in the forests, and are clearly inapplicable to a case of wanton, not to say malicious, destruction of an ornamental or shade tree along the sidewalk and streets of a city."

The principle is similarly expressed in *Lucas* v. *Morrison* (Tex Civ App), 286 SW2d 190, involving the destruction of a shade tree upon a farm, *Gilman* v. *Brown,* 115 Wis 1 (91 NW 227), involving shade and fruit trees, *Watson* v. *Jones,* 160 Fla 819 (36 So2d 788). Admittedly, the value of a growing tree to a particular piece of residential property is not susceptible of precise measurement, but as we said in *Ruediger* v. *Klink,* 346 Mich 357, 373, 374, quoting *Allison* v. *Chandler,* 11 Mich 542, 555, 556:

"The law does not require impossibilities; and can not, therefore, require a higher degree of certainty than the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages, than in respect to any other branch of the cause. Juries

are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages can not be so estimated with certainty, or only a part of them can be estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, and as may tend to prevent the allowance of such as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury.

"In the adoption of this course it will seldom happen that the court, hearing the evidence, will not thereby possess the means of forming a satisfactory judgment whether the damages are unreasonable, or exorbitant; and, if satisfied they are so, the court have always the power to set aside the verdict and grant a new trial."

Upon the evidence before the jury, and in the light of these principles, we cannot say that the verdict of the jury, that the land was worth $900 less after the cutting, was in error.

The remaining errors claimed have been considered and are without merit. The court's instruction, viewed in its entirety, presents no reversible error. *Zebell* v. *Krall,* 348 Mich 482. We regard counsel's general reference in the closing argument to the special questions as improper, but not so extremely prejudicial as to be impossible of waiver by opposing counsel's failure to make seasonable and proper objection thereto. We have repeatedly held that counsel waive their right to object to improper statements in argument unless the attention

of the court is called to such statements. *Taliaferro* v. *Pere Marquette R. Co.*, 249 Mich 281.

Affirmed. Costs to appellee.

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

WILCOX *v.* MOORE.

1. USURY—PURPOSE OF STATUTE.
   The purpose of the law of usury is to protect the necessitous borrower from extortion (CL 1948, § 438.52).

2. SAME—EXAMINATION OF TRANSACTION.
   The court looks at the real nature of a transaction, claimed to be usurious, not its form or color, but to the nature and substance.

3. SAME—TRANSACTION IN FORM OF PURCHASE AND SALE—LOAN WITH ILLEGAL BONUS.
   Transaction whereby plaintiff actually loaned money to defendants to enable latter to complete purchase of a home, at a substantial and illegal bonus, *held*, usurious, it being immaterial that device of purchase and sale was employed (CL 1948, § 438.52).

Appeal from Oakland; Hartrick (George B.), J. Submitted June 10, 1958. (Docket No. 52, Calendar No. 47,512). Decided December 2, 1958.

REFERENCES FOR POINTS IN HEADNOTES

[1] 55 Am Jur, Usury § 3.
[2, 3] 55 Am Jur, Usury § 14.
Usury by charge of bonus incident to loan of money. 21 ALR 797, 53 ALR 743, 63 ALR 823, 105 ALR 795.

Bill by Libbie E. Wilcox against Young John Moore and Elfriede Ann Moore to foreclose land contract for entire unpaid balance. Defendant Young John Moore asks that contract be declared a usurious loan and that court determine amount owing thereon. Decree of foreclosure for plaintiff. Defendant appeals. Reversed and remanded.

Donald P. Schuur and *Patrick J. Keating,* for plaintiff.

Donald W. Grant, for defendant Young John Moore.

SMITH, J. The question before us is whether the described transaction is a sale of property, or a loan of money (at a usurious rate of interest), secured by what we are asked to hold is a mortgage.

Defendant Moore, and then wife Elfriede, were desirous of buying a home. One John Stoppert owned the house and lot they wanted. Through White Brothers, brokers, the Moores enterd into a written agreement for the purchase. The sale price in the preliminary agreement was $21,200. It was later "adjusted" to $20,608.39. Of this sum $100 was given by Mr. Moore to the broker as a down payment at the office when the agreement was executed. Defendant received at this time a preliminary purchase agreement. Additional payments totalling some $5,600 were eventually made by defendant. It was apparent early in the transaction, however, that financial help would ultimately be needed. After attempting to borrow from various sources defendant was recommended to Mr. Theodore Feldkamp, a contract broker. At this point the versions of the participants diverge. We will, in due course, make some comparisons between the versions submitted. Suffice, for present purposes, to state that defendant's

mission to Mr. Feldkamp succeeded. He got the money. The final form taken by the transaction was a sale by the Stopperts to the plaintiff, Mrs. Wilcox, who had been introduced to the deal by Mr. Feldkamp. As we have stated, the adjusted sale price from the grantors was $20,608.39. Of this sum approximately $5,608 was paid by defendant Moore, the balance of $15,000 being supplied by Mrs. Wilcox. The title thus acquired, Mrs. Wilcox immediately sold on land contract to defendant Moore (and wife) for the sum of $21,001, the contract providing for the payment of $1 down and the balance in monthly instalments of $225 with interest at 6% per annum. Defendant's position (upon plaintiff's attempted foreclosure of the land contract) is that the transaction is shot through with usury, that the transaction was not a bona fide sale to him but a loan, with plaintiff taking the title merely as security, and that for the loan of $15,000 required by defendant Moore to complete his purchase, Mrs. Wilcox was to get $21,001, plus 6% interest.

Plaintiff, on the other hand, insists that she purchased the property in good faith without actual knowledge of any asserted interest on the part of the Moores. As to Feldkamp's alleged knowledge, plaintiff says he was not her agent, except for "a special and limited agency," limited to the collection of payments made on the land contract "and having no relation to the negotiations for the purchase of the property." Moreover, it is said, and the trial court agreed, "it was no more than 'doubtful conjecture'" that even Feldkamp knew of any interest the Moores may have had in the property.

On the full record, however, this last point (Feldkamp's knowledge) requires no extended discussion. He himself admits, time and again, that he knew the Moores had paid money on the property. The

following are only portions of the pertinent testimony:

"*Q.* You knew then at the time Mr. Moore was at your office, or sometime later, that he had paid some money on that property?

"*A.* Yes. * * *

"*Q.* You told us you knew Mr. Moore had paid some money on the property?

"*A.* Yes.

"*Q.* He told you he was unable to go through with the transaction?

"*A.* Yes."

Moreover, it was Feldkamp himself who took to the White Brothers, when the deed was delivered, not only Mrs. Wilcox's check for $15,000, but one received from defendant Moore for $2,500. (Moore had previously, testified Willis Cushman, Salesman for White Brothers, paid $3,100 on the property.) Mr. Feldkamp's reply "I cannot recall" to the question "Did Mr. Moore tell you what he was giving you the $2,500 for which you took out to White Brothers?" verges on the incredible. But it is not the least incredible of the Feldkamp positions, for he represents to us that, although he knew Moore had put money into the property, he never found out exactly how much, that although he knew there was "supposed to be a receipt" therefor, he never examined it, and that although he knew it was customary for a purchaser to get a preliminary agreement upon paying a deposit, he never saw the one Moore swears he showed him, nor, apparently, did he make any effort to see the seller's or broker's copy thereof. The ignorance so carefully hoarded does not, however, protect him. It is not necessary that he know the precise extent of the Moore interest. It suffices, for equity, that he know of its existence.

The matter of Feldkamp's agency is hardly more involved. It is plaintiff's claim, as above noted,

that "the only time he [Feldkamp] acted as plaintiff's agent was when he collected the land-contract payments." Again, this does not comport with the record. Mrs. Wilcox testified that he approached her for the purpose of buying the property and had told her (apparently in spite of his ignorance) that it was a good deal. Following such approach, she continued, he acted for her in all details of the transaction. The following is her testimony:

"*Q.* Now, you have also told us that the further negotiations in connection with this property, the paying of your money, being present at the closing and taking the deed, was done for you by Mr. Feldkamp, is that correct?

"*A.* Yes."

Plaintiff's personal connections with the whole transaction were slight indeed. She and a friend once drove by the house. She visited the property once with Mr. Feldkamp, at which time (the second week in January) the Moores were there. They were not, she says, living there, although Mr. Cushman, salesman for White Brothers, testified that they moved in about December 27, 1955. Be that as may, Mrs. Wilcox was in the house but once. She had no idea of what it was worth. She never met the grantors ("Mr. Feldkamp took care of that for me"). She had no conversations whatever respecting finances with defendant Moore. Who engineered this transaction? Who weighed the possible risk against the possible gain? Did it simply spring into existence, full grown, without human intervention? We are all familiar with successful combinations of unique talents, the arts of the diagnostician combining with the skills of the surgeon to effectuate the successful cure, the forensic prowess of the trial lawyer complemented and enhanced by the analytical skill of his research associate, but here is a com-

bination of talents more singular: an agent who knows next to nothing of a transaction pools his ignorance with that of his principal, who knows even less, the fortuitous merger of ignorances resulting in "a good deal" for her and a good fee for him.

But, in point of fact, someone was acting for Mrs. Wilcox and that someone, by her own admission, was Feldkamp. It was he who, after approaching her "for the purpose of buying property" and putting "forth the usual inducements to buy" (the words quoted are the trial court's) conducted the further negotiations with respect to the property, represented her at the closing, got paid for all of this a fee, and has since collected for her the payments made on the so-called land contract. The agency is established.

There is no need, at this late date in the law of usury (see Leviticus 25: 35–37; Deuteronomy 23: 19, 20; Saint Chrysostom's Fifth Homily on the Gospel of St. Matthew;* CL 1948, § 438.52 [Stat Ann § 19.12]) to discuss its rationale. Suffice to say that its purpose is to protect the necessitous borrower from extortion. In the accomplishment of this purpose a court must look squarely at the real nature of the transaction, thus avoiding, so far as lies within its power, the betrayal of justice by the cloak of words, the contrivances of form, or the paper tigers of the crafty. We are interested not in form or color but in nature and substance.

It is insisted on the part of appellee that all we have here is a good-faith purchase of property for $15,000 and a subsequent good-faith sale thereof for $21,000, "an outright sale on land contract." It is not to be denied that there are numerous common characteristics existing between the contract of sale

* In 10 A Select Library of the Nicene and Post-Nicene Fathers of the Christian Church (Schaff ed, 1888), pp 31, 35.

and purchase on the one hand, and that of loan and mortgage on the other. But as has so often been pointed out by discerning courts there is one situation (possibly above all others) in which "an atmosphere of doubt at once arises." (Judge Denison in *Stark* v. *Bauer Cooperage Co.* (CCA), 3 F2d 214, 216, certiorari denied, 267 US 604 [45 S Ct 464, 69 L ed 809].) This is where we find, again in the words of Judge Denison, that "one recently the indebted owner has shifted his position and become merely an executory purchaser." The court continues (p 216):

"If there is an absolute promise to pay the same amount that he was formerly owing, and to do so as a condition of getting back the title with which he had just parted, the inference that there is nothing but a debt with security for its repayment becomes a strong one; but the debt which creates this atmosphere of doubt is not the new debt, it is the old one.

"So far as we can find, every case in which the existence of an absolute promise by an ostensible vendee to pay the sum involved has been thought to indicate that the transaction was merely a loan instead of having the character in which it was made to appear, is a case where the contract vendee had parted with his recent title and was arranging to get it back again."

The cases on this topic are collected in a valuable annotation in 154 ALR 1063, under the title "Transaction in form a sale, but accompanied by an agreement or option for repurchase by the vendor or a third person previously interested, as a loan, as regards usury law." It is there concluded (p 1079) that:

"Where one who desires to raise money for the purchase of property not owned by him induces another person to purchase the property, agreeing

at the same time to repurchase it from the latter at an advanced price, it seems that, in determining whether, for the purpose of the usury law, the transaction, as between these persons, is to be considered as a loan or a sale and resale, it is an important factor whether or not the final purchaser ever owned a legal or equitable interest in the property prior to the time when the transaction was initiated and consummated."

See, also, *Freedman* v. *Hendershott,* 77 Idaho 213 (290 P2d 738). Likewise in point is *Tillar* v. *Cleveland,* 47 Ark 287 (1 SW 516). Here:

"It appears from the pleadings and proofs in this case that Cleveland, a clerk in a store of which Tillar was one of the proprietors, had made a parol bargain with the owner for the purchase of a lot in Pine Bluff, upon which stood an unfinished dwelling-house. The price of the lot was $150, and it was estimated that $120 would be required to complete the house. And Cleveland applied to Tillar to borrow these several sums, offering security and the payment of the highest rate of legal interest. Tillar replied that his money was worth more than 10% per annum, but proposed to advance the necessary sum, provided the legal title was conveyed directly to himself, and Cleveland would agree to pay rent for 12 months at the rate of $30 a month; after which he would reconvey to Cleveland or his wife. These terms Cleveland was forced by his necessities to accept."

The court held, in part, as follows (p 291):

"The most material inquiry is a question of fact: Were the alleged contracts of purchase and of resale a mere cover for a loan? Our constitutional provision and statute against usury were never designed to interfere with the ordinary transactions of buying and selling, nor to regulate the amount of profit which might be legitimately made in the course of trading either upon lands or chattels. But they

do avoid all agreements for a greater profit in the nature of interest than is allowed by law for the loan of money or forbearance of a debt. This is illustrated by the case of *Ford* v. *Hancock,* 36 Ark 248, where one who had agreed to lend another money at usurious interest to buy corn, afterwards sold him instead, corn on a credit at a price sufficiently above its cash value to cover the agreed interest.

"There is a decided preponderance of testimony to support the conclusion arrived at by the court below. A treaty for a loan had been pending between the parties. Tillar had never seen the lot, although it was situate in the same town in which he was carrying on business. He had no acquaintance with the owner, and it is doubtful whether he ever had an interview with him, although he thinks he held a conversation with him about the state of the title just prior to the consummation of the trade. But his memory about the whole affair is quite indistinct. In fact, he recollects nothing positively except that he was to make a profit of $90 by the transaction. A profit upon what? Evidently for the use of his money."

See, also, *Batchelor* v. *Mandigo,* 95 Cal App2d 816, 823 (213 P2d 762), wherein it is held, quoting the opinion of the trial court:

" 'The rule set forth in 55 Am Jur, Usury, § 24, p 342, does indicate to the court a reasonable line of demarcation between a legitimate business venture with the parties unequal in the extent of their risk but equally eager in their anticipation of profit, and a situation in which a necessitous borrower is victimized by a designing usurious lender. It is there suggested that a transaction is likely to be a loan where the recipient of the money parts with title to *property of his own* as security. On the other hand, the transaction is more likely to be a business venture where the money is used entirely for the purchase of *property not theretofore owned by either* of the persons.' " (Italics are the court's.)

Here it is abundantly clear that what Mrs. Wilcox actually did, knowing (through her agent) of Moore's interest in the property and his necessities, was merely to lend to him the money to complete his purchase, at a substantial (and illegal) bonus, taking the property as security therefor. It is immaterial that the device of purchase and sale was employed. It was actually a loan at usurious interest with mortgage back.

Reversed and remanded for proceedings not inconsistent herewith. Costs to appellants.

BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred with SMITH, J.

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

GREENOUGH *v.* GREENOUGH.

1. DIVORCE—DIVISION OF PROPERTY—DISCRETION OF COURT—EVIDENCE.

Plaintiff wife's claim of lack of effort and mismanagement on part of defendant husband in the development and construction of shopping center through funds or property supplied by her, incident to her claim of abuse of discretion of trial court in making a substantially equal division of property at conclusion of marriage lasting less than 10 years *held*, not substantiated by record presented on appeal.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 17A Am Jur, Divorce and Separation § 931.
[3] 3 Am Jur, Appeal and Error § 770.
[4, 5] 17A Am Jur, Divorce and Separation § 931.

2. SAME—VALUE OF PROPERTY—FINDINGS OF COURT—EVIDENCE.
The findings of the trial court as to value of property involved in suit for divorce are upheld, where within the extreme estimates of the parties and evidence is not such as to show a different result should be reached.

3. APPEAL AND ERROR—APPENDIX—COURT RULES.
An appellant who fails to include in the appendix to the brief on appeal the testimony of an opposing expert witness on issue of valuation, a principal issue raised on appeal, falls short of the requirements of the court rules that such brief contain "parts of the record material to the questions presented" in order to make a "fair presentation of the issues presented" (Court Rule No 67, § 6; No 70, § 5, as effective January 2, 1957).

4. DIVORCE—DIVISION OF PROPERTY—EQUITY—CONTRIBUTION.
Division of property made by trial court in suit for divorce, including division made of household furnishings and effects, together with the equity in the residence *held,* not to have shown error on part of trial court, it being necessary that the division be equitable and that consideration be given to the contribution made by both parties.

5. SAME—DIVISION OF PROPERTY—CORPORATIONS—STIPULATIONS.
Division of property made by trial court in suit for divorce between parties who, with wife's daughter, owned all of the stock of a corporation whose assets were dealt with and inextricably mixed by the parties as their own, so as to award some of the corporate assets and discontinue, with prejudice, an action at law against it by the husband for reimbursement for special services rendered and asserting other claims *held,* not error, in view of the consent given the court to dispose of both cases and fact that the corporation has not seen fit to question the comprehensive decree.

6. APPEAL AND ERROR—DIVORCE—DIVISION OF PROPERTY—VEXATIOUS APPEAL.
Appeal from trial court's division of property in suit for divorce, involving questions of valuation and fair distribution *held,* not so lacking in merit as to sustain claim that the appeal was vexatious (Court Rule No 70, § 5, as effective January 2, 1957).

7. SAME—APPENDIX—PUNITIVE DAMAGES—REMAND.
Determination, as to whether punitive damages should be imposed upon appellant in suit for divorce for extensive omissions in her appendix and the amount of such damages, is not

made by Supreme Court, since it constitutes an action for money damages of considerable complexity within the framework of a case on appeal, but is remanded to circuit court from which appeal was taken, for determination of issues and recommendation to the Supreme Court (Court Rule No 70, § 5, as effective January 2, 1957).

Appeal from Oakland; Holland (H. Russel), J. Submitted June 12, 1958. (Docket No. 56, Calendar No. 47,563.) Decided December 2, 1958.

Bill by Grace I. Greenough against Clarence R. Greenough for divorce. Decree for plaintiff. Plaintiff appeals claiming error in division of property. Affirmed.

In respect to adequacy of presentation on appeal and whether penalty for inadequate record should be assessed, case remanded for determination of issues and recommendation.

Abraham C. Rosen and *Jeanne R. Twiss,* for plaintiff.

William Cohen and *Maurice Morse,* for defendant.

SMITH, J. There is little of law in this case and much of fact. It is a divorce action. The wife sued for divorce and got it. Neither party is complaining about that. The controversy rages over the property. The litigation has been protracted, some 8 law firms having participated therein. Plaintiff has enjoyed the services of 4, and defendant of an equal number. The trial chancellor observed, after "many hours of study of the exhibits herein (between 40 and 50, which include deeds, audits, leases, checks, et cetera) and the review of the days of testimony" that "to do complete justice in this case would require a chancellor of extraordinary perception plus

the combined efforts of skilled accountants and a real-estate specialist who could foresee the future." We agree.

The parties were married on May 29, 1947. There are no children of this marriage. Both had been married before. The plaintiff, the wife, brought property worth some $67,000 to the marriage. Part of this was real estate consisting of 12 lots on the north side of 12-Mile road in the city of Berkley, Michigan, and the McMehen building on the south side of 12-Mile road. The defendant, the husband, in the words of the trial chancellor, "brought little to the marriage in terms of money or property." He was, however, in the real-estate business (in fact, he and plaintiff first met on a business matter) and he brought to the marriage a business acumen and skill in this field, amply evidenced in the record before us. Even prior to the marriage, defendant managed plaintiff's property and assisted her in financial dealings involving the estate of Dr. Charles McMehen, her deceased former husband. Subsequently, defendant worked diligently to convert undeveloped property on 12-Mile road into a shopping center. The Greenough Corporation was formed in December of 1947, to hold the latter in corporate form in order to "buy, sell, mortgage, promote, build and lease real estate." At the time of entry of the decree of divorce, there were 3 stockholders in the corporation, namely, plaintiff, holding 9,913 shares, defendant holding, 9,912 shares, and plaintiff acting as guardian for her minor daughter, Margaret Ann McMehen, holding 10,575 shares. This corporation built and now owns the shopping center described in the litigation. The trial chancellor summarized defendant's activities in the creation of the shopping center in the following portion of his opinion:

"The former husband of the plaintiff (Dr. McMehen) as early as 1941 had made plans for a shopping center on the site of the present one owned by the Greenough Corporation. However, the land which came from Dr. McMehen's estate was not sufficient in size for the present operation. *More lots had to be acquired, an alley vacated, parking had to be provided and many changes made due to the changes in the concept of business centers.* The deeds for the needed land for the center were obtained December 31, 1946. In the spring of 1947 defendant commenced work on getting leases for the center. In December of 1947 the Greenough Corporation, a Michigan corporation, was formed, the stock in which is owned by the plaintiff, her daughter and the defendant. Said corporation did build and now owns a modern shopping center which is well described by words, pictures and drawing contained in exhibit 11, to which reference is made. The center was completed in the spring of 1949.

"After stressing the fact that plaintiff brought to the marriage money and property of the value of $67,358.53 some of which was used either directly or indirectly in bringing about the present financial status of the parties, attention is directed to some of the things done by the defendant:

"1. (a) Arranged for a mortgage on McMehen building of $32,000.

"(b) Upgraded tenants and rent in said building.

"2. Necessary additional lots (6) were acquired for the proposed center.

"3. Procured (with outside assistance) the 3 basic leases, and then lesser ones.

"4. Negotiated setback of alley (relocation of poles of phone company, Edison and Consumers Power).

"5. Attended to rezoning.

"6. Procured a promise of a $437,000, 4% mortgage from the Northwest Mutual Life Insurance Co. in February of 1948.

"7. Procured plans and specifications and got estimates for the center.

"8. Let contracts in March of 1948.

"9. Northwest Mutual mortgage reneged on loan and then defendant procured a commitment of $400,000 from Massachusetts Mutual.

"10. Procured a required completion bond from St. Paul Mercury Co.

"11. Massachusetts Mutual money ($400,000) was $85,000 short of what was needed—which created problem to be met.

"12. Litigation and liens contended with.

"13. Rents were assigned to Massachusetts Mutual who collected rents until June of 1953.

"14. Induced St. Paul Indemnity to take second mortgage which has been retired, et cetera.

"15. Procured final Prudential mortgage which took up existing mortgages and returned the management and collection of rentals to the parties hereto or to the officers of the corporation.

"It is not difficult to believe that during these days the defendant put in from 16 to 18 hours per day in the interest of the corporation. The plaintiff recognized, as was only fair and reasonable, the contributions of the defendant and so he was paid for his efforts, by being alloted by the issuance of stock, a 1/3 interest in said corporation." (Italics the court's.)

Having concluded that divorce was warranted upon the evidence, it was so decreed. As to property, the trial chancellor made a nearly equal division thereof between husband and wife. This is attacked by plaintiff as an "abuse of discretion" in various particulars, upon those of which meriting our attention we shall comment.

First, the mortgage referred to by the court as having been arranged by defendant is said to have been "procured by C. Harmon Company." We are referred to page 103a of the appendix as supporting this statement. The portions of page 103a referring to the matter are as follows:

"*Q.* Let's come down to the mortgage that you obtained, you say from the Provident Mutual Life Insurance Company on the McMehen building some years ago, was not Mr. Herman the man who made arrangements for the mortgage?

"*A.* His father was alive then and his name was Claud Harmon and Austin C. Harmon.

"*Q.* Did the mortgage, that is to say the Provident Mutual people, did they have an appraisal made of the building?

"*A.* The C. M. Harmon Company were and were the—

"*The Court:* You aren't answering the question.

"*Q.* Did they have an appraisal made, if you know, you can answer it yes or no?

"*A.* They must have had, they wouldn't make a loan without making an appraisal."

We fail here to find the support claimed.

Second, as to the acquisition of 6 additional lots for the shopping center, the plaintiff says "the defendant was employed by plaintiff prior to the marriage for such purpose although consummated with plaintiff's money after marriage." There is no impeachment of the court's conclusion in the statement.

Third, it is complained that "the basic leases referred to in item (3) were procured by Archie Morse, a real-estate broker, who received $5,600 for commissions." The record, however, merely shows that Mr. Morse assisted the defendant with respect to some of the leases.

Fourth, "the zoning and alley setback (4) (5) were matters of application to the city commission of Berkley and its common council." This is borne out by the record but its utility to the wife as a claim of error on appeal is not clear. The advisability of taking such action must be clearly shown to municipal bodies and this normally requires initiation, explanation, and negotiation. Such was the situation here. There was testimony, for example,

that the matter of the alley setback required "considerable negotiations" with the city council and city officials. It was an accomplishment properly considered by the chancellor.

The next claim of error is phrased in the following terms:

"The $437,000 mortgage referred to (6) was only a promise—and was an inducing factor to the builder of the shopping center to start building believing it was a definite commitment which resulted later in liens being filed and litigation with the architect and builder and mechanics when the mortgage money was not forthcoming; certainly as to (13) wherein the rents of the center were assigned as security for a new mortgage were not a credit to the defendant whose misstatement to the builder had created the litigatious situations resulting thereafter in the rents of the building being assigned for 4 years from 1949 to 1953 to the mortgage company referred to in (13)."

We are unable to find support in the record at the cited pages for the assertions made. The reference to "only a promise" is on page 124a. It reads, with respect to the mortgage, as follows:

"*Q.* Referring to your definition of a mortgage commitment, when you signed the McKinstrie contract, you had the promise of a loan of money?

"*A.* I certainly did, definitely, I had a letter from the vice-president of the Northwestern Mutual Life Insurance Company.

"*Q.* Did you tell Mr. McKinstrie you had a commitment for a $357,000 mortgage?

"*A.* I told him I had a firm commitment from the Northwestern Mutual Life Insurance Company.

"*Q.* For $375,000?

"*A.* I don't know as I told him the amount.

"*Q.* Did you tell him—

"*A.* What the amount was did not concern him.

"*Q.* Did you tell him that before you signed the contract with him?

"*A.* Yes, I certainly did, he wanted to know where the money was coming from to pay for it, I says, 'It is coming from a mortgage.' "

As to the belief in "a definite commitment" as a source of difficulty, to which we are referred to page 125a, we find nothing in the record so cited to justify the claim made. Apparently the effort here on the part of appellant is to establish mismanagement by the defendant. With respect to the liens and the need for additional capital, we find revealing testimony of the plaintiff herself:

"There was an original commitment from the Northwestern for $375,000 on a mortgage which did not go through.

"We later obtained a mortgage from Massachusetts Mutual and they proceeded with $400,000, and they proceeded with the building. In order to proceed with the building it was necessary to purchase 6 other lots which were purchased in the joint names of Clarence and Grace Greenough.

"Before the building was completed, we had trouble with the contractor. He needed more money than he originally estimated when we had started. There were a large number of mechanic liens placed on this property and litigation resulted from these mechanic's liens. It was necessary to formulate some policy and get further money from outside sources. Before this was done, however, Mr. Greenough obtained from the St. Paul Mercury a second mortgage and the St. Paul people put up a completion bond.

"Mr. Greenough took care of and did all the work necessary to obtain the company that did finally furnish a completion bond on that large amount and after they got the completion bond and these liens were filed and everything else, he persuaded the same company they better take a second mort-

gage on it to give enough money to finish the building. From the time of the second mortgage until some time in 1953 for about a year and a half, one of the terms was that the mortgage company were to collect the income and rental from the property. In order to get the rents from the property and income back into the Greenough Corporation where we could handle it, Mr. Greenough had to go out and get a final mortgage and he persuaded another mortgage company to give sufficient money to pay off the first mortgage and the second mortgage and to turn the property over so we would manage it once again.

"He obtained a mortgage of $410,000 at a low interest rate.

"*The Court:* Can't we specify the interest rate?

"*Mr. Cohen:* 4-1/2%.

"This happened in 1953. They turned over the management of the property and it finally rested in my hands and Mr. Greenough."

We have set forth these matters concerning the alleged mismanagement of the defendant in some detail in view of the fact that they form an essential part of plaintiff's charge that the trial chancellor abused his discretion in dividing the property as he did. We are not convinced of such abuse. None of the testimony quoted immediately above, we note, is contained in the appendix of the plaintiff in support of the questions she raises on appeal.

Plaintiff objects also to the finding of the trial chancellor that the net value of the corporate stock was $175,510, on the ground that exhibit 11, to which the court makes a reference, and the testimony of Mr. Sexauer, plaintiff's expert, indicates a net value of only $100,934. The trial chancellor, however, had before him also the testimony of defendant's expert, Mr. Schott, whose testimony would justify the higher value found. Plaintiff's failure to discuss this testimony, or, indeed, to refer to it, or print any portion of it in her appendix, falls short of the

requirement of Court Rule No 67, § 6,* that those "parts of the record material to the questions presented" be contained in an appendix to appellant's brief. See, also, Court Rule No 70, § 5.* There can be no "fair presentation of the issues" to the court when, on an issue of valuation, the testimony of an opposing expert witness is omitted.

Our observations in *Mitchell* v. *Mitchell,* 333 Mich 441, 445, are here equally in point:

"The testimony of witnesses varied widely as to these values. The trial judge arrived at amounts between the extreme estimates. In the absence of a showing that a different result would be reached in the light of this conflicting testimony, the findings of the trial court should be upheld."

We are not persuaded of error in the trial chancellor's valuation of the joint stock of the parties, nor in his award to plaintiff of all household furnishings and effects, together with the equity in the residence (valued at $20,000) upon her payment to the defendant of the sum of $10,000. The court's justification therefor is both well stated and well supported by the record:

"Said furniture was at one time appraised at $38,000, although the court feels that a more realistic figure would be $15,000. Some of said furniture belonged to the plaintiff prior to this marriage. The court has in mind that much of the $26,000, received by plaintiff from her Canadian island home went into the new home on Cedar Lake drive, some went for a car and some went into the joint account. Much money from the corporation, however, went into the furniture and furnishings in the new home and other places that inured to the benefit of plaintiff's property as opposed to corporate interest."

* Added October 30, 1956, effective January 2, 1957. 347 Mich xxii, xxx.—REPORTER.

It is unnecessary to burden this record further with additional matters of valuation of properties, and contributions of the parties thereto. As a matter of fact, the study we have given this record and the exhibits impress us not with error or abuse of discretion on the part of the trial chancellor, but with his patience and care. As we said in *Manigold* v. *Manigold,* 304 Mich 310, 314: "There is no rigid rule for division of property in divorce cases. Each case depends upon the particular facts involved." The division must be equitable and the contribution of both parties must be considered. *Whittaker* v. *Whittaker,* 343 Mich 267. Upon such principles we cannot say the trial chancellor was in error.

An additional claim of error remains to be considered. We have described the formation of the Greenough Corporation and listed the stockholdings therein, comprising the interests of the parties to the instant suit and plaintiff's daughter. This corporation was made defendant in an action at law by defendant herein under date of October 18, 1956, the declaration setting up defendant's alleged illegal removal as an officer, claiming reimbursement for special services rendered, and asserting other claims. The answer thereto, and cross declaration made certain denials and asserted cross charges, involving among other items, improper accountings, which would result, it was said, in tax deficiencies to be asserted by the Federal government. We mention these facts in partial explanation of paragraph 4 of the decree, providing as follows:

"It is further ordered, adjudged and decreed that the defendant, Clarence R. Greenough, forthwith dismiss and discontinue law action No. 40,936 in the Oakland county circuit court entitled 'Clarence R. Greenough *v.* Greenough Corporation, a Michigan corporation, with prejudice and without costs.' "

(This provision seems to be based on a stipulation of counsel relative to certain procedure. The stipulation is not before us and we are not informed as to its contents.)

It is now urged upon us that the decree disposes of corporate property in "disregard of the corporate being." Reference is made, among other items, to a Cadillac car, said to be owned by the corporation but awarded to defendant. (Plaintiff got the Oldsmobile.) Reference is made also to the statement of the court, in the valuation portions of its opinions, appraising and making allowance for certain of the tax liabilities of the parties and of the corporation. "The awards before set forth," asserts plaintiff, "constitute inroads into the capital structure of the Greenough Corporation." There is no need that we explore these alleged corporate inroads or decide whether or not the corporate veil of the corporation was improperly pierced by the trial chancellor. We feel constrained to observe, however, that the parties themselves dealt with corporate assets as their own and inextricably mixed their corporate and personal affairs, to the degree, in fact, that appellant (who now asserts error arising out of disregard of the corporate entity) prayed the trial chancellor as follows as "an equitable formula for dividing the property of the parties."

"Defendant to be awarded a judgment against the corporation in a sum to be determined by the court upon consideration of the factors set forth in paragraph 5 (1), (2) and (3), above."

We do not rule upon these matters, because of the positions taken by all parties in the trial court. We turn to appellant herself for summary thereof:

"The defendant, Clarence Greenough, had filed a lawsuit against Greenough Corporation, a Michigan corporation, alleging an indebtedness to him for

salaries, commission, management services and as set forth therein; the corporation had filed its answer to the declaration and had filed a cross declaration against the defendant asserting various acts of misappropriations as therein set forth. When the divorce case came on for trial, there appears to have been a consent that the court dispose of both cases. The decree of divorce provides that keeping with the stipulation of the parties, defendant shall dismiss his law action No. 40,936 against the Greenough Corporation, a Michigan corporation, with prejudice and without costs."

The trial chancellor, with this "consent that the court dispose of both cases," involving, it is observed, both the plaintiff's suit and the corporation's countersuit, did just that in one comprehensive decree which the corporation itself has not seen fit to question in any manner, if, indeed, it is in any position so to do upon this record. We are not persuaded that there was error in the distributions made.

The decree is affirmed, with costs to appellee.

Our adjudicative process is now at an end and we are asked, pursuant to the new rules,* to assume the penalizing function.

It comes about in this way: Under the old rules we were transmitted a certified record upon which decision was rendered. It contained the substance of the controversy "such parts of the testimony and proceedings * * * as may be necessary." (Old Court Rule No 66, § 7 [1945].) It was certified by the trial judge, who had a right (frequently exercised) to insist that it contain all material necessary adequately to present the issues for review. (See Honigman, Michigan Court Rules Annotated, comments to Rule No 66, § 12, p 638.) In other words, the person best qualified to know the issues, the trial judge, was charged, as well as the parties, with the

* See 347 Mich xiv *et seq.*—REPORTER.

responsibility of seeing that the record as to such issues came properly before us.

Under the new rules, however, such is no longer the case. The parties bring up only such parts of the record as they choose to bring up. If our Court wishes to get the complete account of the proceedings it must refer to the transcript, of which there is only one copy for all members of the Court. The clear intent of the new rules, of course, is the transmission to the Court as before, of all pertinent and material parts of the record. The omissions are to be only those portions of the record which have no bearing upon the issues presented to the trial court. (See Honigman, Court Rules Amended, 35 MSBJ, No 11, pp 36, 38 [1956].) Should one of the parties, however, either by ignorance or design, choose to submit a patchwork of disconnected testimony, corrective measures must be applied. We might possibly entertain a motion by appellee for an order directing the appellant to print the necessary portions of the record. It would then become our responsibility to rule upon what should be contained in the appendix and what might be excluded therefrom. This determination would require a painstaking study of the entire transcript, necessarily (to avoid "one-man" opinions) by each member of the court in rotation, since there is only one copy of the transcript. A very little of this and the appellate process stops.

There is at least one other alternative: The opposing party prints in his own appendix the parts omitted in gross disregard of the "requirements of a fair presentation of the issues to the Court" and then moves this Court for punitive damages (Court Rule No 70, § 5) for his wrongfully-caused labor and expense. This, also, throws the matter of what should be in the record squarely up to this Court. Again, the trial transcript must be reviewed page by page in the light of the issues presented. Was the

testimony of witness A necessary to the first issue? All of it? How much was cumulative? How directly related to the issue must it be? Will we penalize counsel for an honest mistake of judgment as to any of this? We now proceed with the same determinations for issue under number 2, then issue number 3, and so forth. This accomplished, we examine the exhibits one by one. Our appellate processes with respect to docketed cases from the entire State, of course, come to a halt while we determine what should have been contained in the record of one individual appellant against his appellee.

We have commented upon these matters in some detail in order that the profession may realize the importance (if the new rules are to survive) of adherence to the principle of fair presentation. In retrospect, indeed, the procedure under the old rules, whereby we were furnished a narrative record of the trial, seems easily understood, simple, and expeditious. Should it often be necessary to order a trial on the appendix-damage issue (hereinafter discussed), the procedure under the new rules will be more time-consuming and expensive than that under the old. See, also, *Miller* v. *Allen,* 352 Mich 95, and the supplement attached to our opinion in *Wilks* v. *Kempf,* 352 Mich 445, 451–453; *McGuire* v. *Rabaut,* 354 Mich 230.

The second alternative above referred to was here adopted. We now have before us, as a part of the instant proceedings, the following from the appendix of appellee:

"This counter appendix was made necessary because the appellant has failed to include in her appendix such other parts of the record indispensable for a consideration of the questions presented. Appellant's appendix is grossly lacking in the requirements of propriety and flagrantly disregards the court's mandate for a fair presentation of the issues

to the court, as provided by Michigan Supreme Court Rule No 67, § 6, and Rule No 70, § 5.*

"The principal and substantial issue in this cause is the fairness of the court's apportionment of the property to each of the parties to this cause. The matter of cruelty charged by each party against the other is not the controlling issue. Neither side is contesting the divorce decree on that point. The appendix is unnecessarily prolix as to the matter of cruelty, which is not involved in this appeal, but is patently inadequate as to the principal matter in issue, namely, the propriety of the division of the property made by the court. The appendix as prepared by the appellant as it will obviously appear, is distorted, and does not give a fair presentation of the issue, namely, the award made by the court in the decree.

"In support of our charges, we need only point out some instances of the gross disregard of the requirements of propriety and fairness in the presentation of matters essential for the Judges of the Court to read in order to decide this issue, the omissions by the appellant from her appendix of the following testimony vital to an appraisal of the trial court's fairness:

"A. Cross-examination of appellant.

"B. Cross-examination of Walter Karal (appellant's witness who was the C.P.A. for the appellant and the corporation owning properties involved in case).

"C. Considerable of the direct testimony of Walter Karal.

"D. Cross-examination of George Sexauer, appellant's only real-estate expert.

"E. Direct examination and cross-examination of Sidney Schott, real-estate expert for appellee.

"F. Parts of direct and redirect testimony of appellant relating to important issues and required for the Court to read.

"G. Most of the direct testimony of appellee and the parts of the cross-examination.

* See 347 Mich xxii, xxx.—REPORTER.

"H. Parts of the cross-examination of Nathaniel McKinstrie, appellant's own witness who was contractor for the erection of the shopping center involved in the property settlement.

"Considerable of this omitted testimony was damaging to appellant's theory on appeal.

"The record in this cause discloses that there was delay after delay on the part of appellant, not only in the trial of this cause, but even some delay in the appellate steps taken in this cause, the evident purpose of the appellant is to cause continuing hardships to befall the appellee and to deprive him of his just rights.

"The conduct of the appellant is not only against the expressed rules of this Court but in violation of its spirit. Mr. Jason Honigman has justly said that this Court (1957 Pocket Part of Michigan Court Rules Annotated, pages 164, 165, and 170):

" 'May moreover exercise its disciplinary powers as hereinafter described, where either appellant or appellee have grossly neglected their obligation to print in the appendix those matters which are necessary for a fair presentation of the issues on appeal.' Rule No 70, § 5. [35 MSBJ, No 11, p 38.]

"The appellant should not print:

" 'All portions of the testimony or record which have no bearing on the issues presented to the appellate court.'

"Mr. Honigman states:

" 'This Court asserts its intent to take disciplinary action where there has been a gross disregard of the requirements of propriety or fairness in the presentation of matters to the Court. By the adoption of this section the Court has given notice that it intends to exercise the inherent power which it always had to enforce disciplinary action in cases of misuses of the processes of the Court.' [35 MSBJ, No 11, p 40.]

"and,

" 'The gross abuse of the appellate processes.'

"Mr. Honigman further states, that:

"'By this rule the Court may assess punitive damages, including reasonable attorney's fees, and the award of an additional amount not to exceed 10% of any judgment for money damages. In addition, the court may take such other disciplinary action as it may see fit.' [35 MSBJ No 11, p 40.]

"It is very apparent that the appellant has lifted out of the context of this record only such narrowed and limited testimony to slant and accommodate the desires of the appellant with utter disregard of the rules of this Court and the insistence of this Court for a fair presentation of the matters in issue.

"This appellee has no moneys required for the printing of the appendix or brief filed in his behalf, but because of the importance of avoiding any further time elapsing in securing the decision of the Court on this appeal, it may be inferred others are paying for the printing of the enlarged appendix and the brief, and will await the final decision of the Court on the appeal as to the matter of costs.

"If there were ever a case that called for disciplinary action by this Court, and the assessment of the additional 10% of the award made by the decree of the trial court in favor of the appellee, this is one."

Court Rule No 70, § 5,* above referred to, reads in its entirety as follows:

"5. The court may, upon its own motion, or the motion of any party, dismiss an appeal, assess punitive damages or take other disciplinary action when it has been determined that an appeal or any of the proceedings therein was vexatious by reason:

"(a) That the appeal was taken for the purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or

"(b) That any motion, argument, petition, brief or appendix filed in the cause was grossly lacking in the requirement of propriety or grossly disregarded

* See 347 Mich xxx.—REPORTER.

the requirements of a fair presentation of the issues to the court.

"Punitive damages as herein provided shall not exceed an amount equivalent to actual damages and expense incurred by the opposing party, including reasonable attorney's fees, and an added amount not exceeding 10% of any judgment for money damages awarded in the lower court or tribunal."

With respect to subsection (a), we are not prepared to hold on the record made to us that the appeal was so clearly taken for purpose of delay, or without reasonable basis for belief in its merits, that it should be penalized. On the latter issue the case is a close one, going to the very verge of permissible action in the light of the showings made, but questions of valuation and fair distribution are difficult to assess and we are not persuaded of such utter lack of merit as to warrant action under subsection (a).

The issues presented under subparagraph (b) remain for determination. That there were extensive omissions in appellant's appendix is obvious. But not every omission, even though extensive, will justify the imposition of punitive damages. Where appellee prevails, as here, his costs of printing his appendix may be recovered as taxable costs. For punitive damages we require, in addition to the omission itself, the existence of wilful or reckless disregard of the rules, or violations so widespread as to impeach other reasonable explanation. We are in the realm of the *bona fides,* of good faith or bad. Should such violation be found, a money award is to be made, the elements of which are set forth in Court Rule No 70, § 5. What we actually are confronted with is an action for money damages of considerable complexity within the framework of a case on appeal. This Court will not conduct the trial of such case, take the testimony, or weigh the evidence. The matter is remanded to the circuit court for the county

of Oakland, from whence it came, for a determination of the issues and a recommendation to us with respect thereto. We will then make the decision prayed under Court Rule No 70.

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

GOLDMAN *v.* CENTURY INSURANCE COMPANY.

SAME *v.* SCOTTISH UNION & NATIONAL INSURANCE COMPANY.

1. INSURANCE—FIRE PROTECTION—BUILDINGS—FIXTURES—COALYARD.
   Insurance protection of described buildings, as defined in fire insurance policy, extended to "permanent fixtures, stationary scales and elevators" belonging to and constituting "a permanent part of said building" and did not extend to outside fixtures and apparatus used in coalyard.

2. REFORMATION OF INSTRUMENTS — INSURANCE — MISTAKE — EVIDENCE.
   Contracts of insurance may be reformed on the ground of mutual mistake of fact but proofs of mistake must be of substantial and material fact, shared by and common to both parties, and established beyond cavil by clear and satisfactory evidence.

3. SAME—FIRE INSURANCE POLICY—EVIDENCE.
   Evidence presented in suit to reform a fire insurance policy after fire loss so as to extend coverage to outbuildings, fixtures and contents used in conduct of retail coal business on ground of mutual mistake *held*, insufficient to establish mistake as to extent of coverage.

REFERENCES FOR POINTS IN HEADNOTES

[2, 3] 29 Am Jur, Insurance §§ 241, 257; 45 Am Jur, Reformation of Instruments §§ 47–49, 116–119.
[4] 29 Am Jur, Insurance § 157.
[6, 7] 20 Am Jur, Evidence § 253 *et seq.*

4. INSURANCE—FIRE PROTECTION—EVIDENCE—INTENT—MEETING OF THE MINDS.

The intent of the parties with respect to extent of coverage of a contract of fire insurance is evidenced by the resulting policy, hence, it is clearly admissible as evidence of the meeting of the minds, a matter that is judged by objective standards and not by the unexpressed thoughts and understanding of one of the parties.

5. SAME—COVERAGE—EVIDENCE.

Insurance policies, purchased by plaintiff insureds after fire loss, were admissible in suit to determine insureds' intent as to their coverage under defendants' policies, herein sought to be reformed after fire.

6. EVIDENCE—INFERENCES.

All facts are admissible in evidence which afford reasonable inferences or throw any light upon the matter contested.

7. SAME—ADMISSIBILITY—DISCRETION OF COURT.

The question of whether evidence offered is too remote from the transaction to be admissible is one for the trial court to determine, and will not ordinarily be disturbed on appeal.

Appeal from Wayne; O'Hara (Chester P.), J. Submitted October 8, 1958. (Docket Nos. 12, 13, Calendar Nos. 47,025, 47,026.) Decided December 2, 1958.

Bill by Bernie Goldman and Leon Goldman against the Century Insurance Company, Limited, a foreign corporation, to determine certain property covered by insurance policy and, if necessary, to reform policy so as to include it under fire loss. Similar action against Scottish Union & National Insurance Company, a foreign corporation. Cases consolidated for trial and appeal. Bills dismissed. Plaintiffs appeal. Affirmed.

Dann, Rosenbaum & Bloom and *William Weiss,* for plaintiffs.

Davies & Moesta, for defendants.

SMITH, J. This case* involves a fire insurance policy. The first question is one of interpretation, whether or not certain protection was afforded under the policy. If not, the second question arises, whether or not the policy should be reformed to include such protection. The plaintiffs, Goldman brothers, are the insured. The defendants are the insurers.

The Goldman brothers (hereafter referred to as the Goldmans) conducted a coal business on Garfield avenue in the city of Detroit. The questions presented with respect to the policy require that the premises be described in some detail. Two street addresses are involved. At 1817–1819 Garfield was located a 1-story, composition roof, brick building occupied principally for manufacturing purposes, and at 1823–1845 Garfield a 2-story, fireproof building used principally for mercantile and dwelling purposes. It was from this latter building that the Goldmans operated a retail coal business.

Behind the buildings so located was a coalyard. It consisted of wooden bins for storage, fences, driveways, electrical loading machinery, and other appurtenances. In this area, on August 4, 1951, occurred a fire which damaged the bins, fences, gates, and the roofs of outbuildings. All the damage was thus in the coalyard itself. There was no damage either to the 1-story building at 1817 Garfield or the 2-story building at 1845 Garfield.

The first question relates to the coverage under the policy as written. We quote from the Goldmans' summary thereof:

* Actually we have here 2 policies and 2 cases, each against a different insurance company (the risk being divided), consolidated for trial and, by stipulation, "deemed expedient" to be "presented to the Supreme Court upon a single record." For convenience we will refer both to the cases and to the policies in the singular.

"The policies of insurance in question describe the insured premises as follows:

"1. Five thousand ($5,000) dollars on the 1-story composition roof, brick building, occupied as principally for manufacturing purposes situated at 1817 Garfield avenue, Detroit, Mich.

"2. Ten thousand ($10,000) dollars on the 2-story roof fireproof building, occupied as principally for mercantile and dwelling purposes, situated at 1823–45 Garfield ave., Detroit, Michigan."

Obviously the word "building" is the critical word in the above. We find it defined with particularity in the following language in the policy:

" 'Building'—On building, including foundations (except as excluded below), plumbing, electric wiring, electric sound, communication, stationary heating, lighting, ventilating, refrigerating, air-conditioning and vacuum cleaning apparatus and fixtures, boilers, machinery used for the service of the building only, all only while contained therein; ovens, kilns, furnaces, retorts, lehrs, forges, cupolas and driers, of brick construction or brick encased, resting on independent foundations built from ground, all only while contained therein; awnings, signs and metal smokestacks (except as provided below), screens, storm doors and windows if the property of the owner of the building and belonging to the described building, while attached thereto or stored therein or in other buildings on the premises; also all permanent fixtures, stationary scales and elevators, belonging to and constituting a permanent part of said building. * * *

" 'Liability is also assumed under this item for loss to such personal property, including materials belonging to the insured and not otherwise covered, as pertains only to the sole use or service of the building, all while contained then or attached thereto, but said liability for loss to such personal property and materials shall not exceed 1% of the amount of the item covering on building.' "

The Goldmans assert that the damage in the coal-yard is covered by the policy on the buildings. In support thereof the Goldmans argue that "such descriptions include fixtures used in conjunction with the mercantile purposes described in the policy." And, also, that "the buildings described by their addresses and by their purposes should include fixtures and attached fences which belong to and are used in conjunction with the mercantile purposes at the described address and without which the then existing use of premises could not be continued." What is overlooked in this is that it is not enough, for coverage, that property serve the "mercantile purposes" at the described addresses. So far as insurance protection is concerned the policy requires that the appurtenances of the business, *e.g.*, "permanent fixtures, stationary scales and elevators" must belong to and constitute "a permanent part of said building." Such was not here the situation and the cases cited by the Goldmans in support of their argument differ both in the language of the policies involved, and the factual situations presented to the degree that they are either not persuasive or valueless as precedent.

But, continue the Goldmans, even should the policy be so construed it does not end the matter, for, they assert, "it was intended and contemplated" by both parties that the policy should cover the "above-described outbuildings, appurtenances, wiring, coal-bins, et cetera," and, hence, that the policy should be reformed to express such intention. No fraud has been charged. The grounds for reformation are asserted to be in the mutual mistake of the parties.

We do not hestitate, it is true, to reform contracts, including contracts of insurance, where there has been a mutual mistake of fact. *Health Delivery Service* v. *Michigan Mutual Liability Co.*, 257 Mich 482. But we are keenly aware that, after a loss suf-

fered, regret and remorse may readily convert what may have been at best an unexpressed contemplation into an express (and ignored) command. Thus it is that the proofs of mistake must be of substantial and material fact, shared by and common to both parties, and, above all, established beyond cavil by clear and satisfactory evidence. *Emery* v. *Clark,* 303 Mich 461; see *Urick* v. *Burge,* 350 Mich 165 (reformation of lease). *Cf., Consumers Power Co.* v. *County of Muskegon,* 346 Mich 243.

Turning, then, to the proofs offered on this point, we find the Goldmans, at times, unequivocal in their insistence that everything inflammable (*i.e.,* "that which is burnable") on the premises was intended by them to be covered, and if such was not the coverage in the policy it was due to mistake, partially attributable to inexperience on the part of the agent involved. They assert, also, that the insurer knew ("or should have known from the situation") what coverage the Goldmans contemplated, and that evidence of the Goldmans' thoughts and understandings should have been admitted to establish their intent.

The testimony proffered by the Goldmans themselves is not altogether consistent with their asserted intention to insure everything inflammable on the premises. Thus, with reference to the concrete building, one of the "outbuildings" to which reference has been made, the roof of which was damaged, Bernie Goldman, himself, testified as follows:

"In 1948, when Mr. Kramer was out to see me, the frame and concrete building was being used as a garage and also for storage of steel tanks by our tenant. The day I took Mr. Kramer out in the yard that building was almost full of those metal tank heads.

"*Q.* And you told Mr. Kramer at that time, why should you insure that building; it is all concrete, and

there is nothing in it but metal and it can't burn; didn't you tell him that?

"*A.* That is right."

On this matter the testimony of Mr. Kramer, the insurance agent, is as follows:

"There was a building in the back that I pointed out to Bernie and we walked back there to see what it was and he pointed out to me that that building in the back was entirely of brick, or whatever you call it there, concrete and that there was nothing there that would burn, and that the contents of the building, I remember had these empty new oil drums stored there. I pointed out to him that the roof could burn and he said he wasn't concerned about that because there was nothing there that could burn under the roof. The contents weren't of a nature that would burn and neither would the building burn and beyond that we didn't discuss anything. We did not discuss the wooden bins or the wooden fence."

We note, also, the finding of the chancellor that this building was excluded from coverage in the new policies issued in 1951. Additional light upon the intent of the Goldmans as to insurance coverage may be gained from the fact that the previous policies upon the property were "in like amount to that now involved" and employed "the same phraseology as to the property insured as the policy upon which suit is brought." Moreover, testified Mr. Leon Goldman on cross-examination, "I did not read the policy when it came. I knew what insurance coverage we had under the old policies before Mr. Kramer came out to see me and was satisfied with the old insurance and wanted the same thing with the new insurance."

We agree with the trial chancellor that such testimony is far from the clear and convincing proof of the mutual mistake required for reformation. It falls short, indeed, of a clear and convincing showing of a unilateral mistake.

We agree, also, that evidence of the unexpressed thoughts and understanding of the Goldmans was inadmissible to establish their intent. The Goldmans assert that such denial "shatters the whole concept of a 'meeting of the minds.'" They read the figure of speech too literally. To say, as we do, that a contract requires a "meeting of the minds" is only a figurative way of saying there must be mutual assent. This we judge by an objective standard, looking to the expressed words of the parties and their visible acts. In looking at such words and acts the insurance policies purchased by the Goldmans after the fire were clearly admissible as bearing upon the Goldmans' intent respecting their insurance coverage. As we said in *Detroit Iron & Steel Co.* v. *Detroit Gray Iron Foundry Co.*, 240 Mich 677, 680.

"'By relevancy is meant the logical relation between proposed evidence and a fact to be established. All facts are admissible in evidence which afford reasonable inferences or throw any light upon the matter contested. * * * The question whether evidence offered is too remote from the transaction to be admissible is one for the trial court to determine, and will not ordinarily be revised on appeal.'"

The additional errors asserted are controlled by what has been held heretofore. There is no error and the trial chancellor is affirmed. Costs to appellees in each case.

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

SHEETS *v.* HUBEN.

1. MORTGAGES—CONSTRUCTION OF DEED ABSOLUTE IN FORM—EVIDENCE—INTENT.

Whether an instrument, in form a deed, should be construed as a mortgage will be determined from an investigation of the instrument itself, the acts of the parties and all surrounding circumstances to see whether the true intent was that the property stand as security for the loan, as the intent of the parties is the determining factor and no form of words employed in the written instrument is conclusive of the intent.

2. SAME—DEED ABSOLUTE IN FORM—CONSTRUCTION—BURDEN OF PROOF.

The burden rests on parties asserting rights on the theory of a mortgage to establish their claim by clear and satisfactory proof, where the instrument is in form an absolute deed.

3. SAME—DEED ABSOLUTE IN FORM—CONSTRUCTION—CONSIDERATION.

Deed, absolute in form, is construed as a mortgage, where it appears plaintiff had disposed of a $2,400 purchaser's interest in a land contract, subject to a mortgage, for $1,106 and agreed to pay the balance due on the mortgage, keeping only a life interest in herself.

4. SAME—DEED ABSOLUTE IN FORM—INADEQUACY OF CONSIDERATION.

Inadequacy of consideration is not an infallible test in determining whether an instrument, in form an absolute deed, is in fact a mortgage, but it is an indication that the parties did not consider the conveyance to be absolute, especially where the bargaining positions of the parties are markedly unequal.

Appeal from the Superior Court of Grand Rapids; Taylor (Thaddeus B.), J. Submitted October 7,

---

REFERENCES FOR POINTS IN HEADNOTES

[1–4] 36 Am Jur, Mortgages §§ 5, 125 *et seq.*; 16 Am Jur, Deeds §§ 5, 6.

1958. (Docket No. 74, Calendar No. 46,864.) Decided December 2, 1958.

Bill by Dorothy Sheets against Joseph Huben and Victoria Huben to have deed declared a mortgage. Decree for plaintiff. Defendants appeal. Affirmed.

Floyd H. Skinner and *Alphonse Lewis, Jr.,* for plaintiff.

Earl T. Glocheski (*Seraphin S. Orlik,* of counsel), for defendants.

SMITH, J. The question in this case is whether a certain instrument in the form of a deed of conveyance was intended as a deed or as a mortgage. The circumstances leading to the execution of the instrument are these: Mrs. Dorothy Sheets, the plaintiff, was purchasing certain property on land contract, subject to a mortgage. She had previously invested at least $1,500 in the property. She had made a down payment of $1,300, had made monthly payments, upon principal, totalling $478, and, in addition, had made substantial improvements. Financial difficulties, however, had come upon her because of an industrial accident. Her income had shriveled and she fell behind in her payments. During this difficult period she was befriended by her neighbors, Mr. and Mrs. Huben, the defendants before us.

Conversations were had with the Hubens in an effort to ameliorate her financial difficulties. (Mr. Huben was an accountant with the Federal housing administration.) An attorney was consulted and the instrument before us drafted. It was a warranty deed, with reservation of life interest, Mrs. Sheets assuming and to continue the mortgage payments. (The land contract balance was liquidated simultaneously therewith.) Mrs. Sheets insists that the trans-

action was a loan of money to help her in her temporary difficulties, the property merely standing as security for repayment thereof. She alleges that she was ill and "was willing to have defendant secure their money out of the house." She insists that "this paper I signed was to protect all of us in case of my death so they wouldn't lose their money and I wouldn't lose my home and I had money to pay Mr. Huben." She admits that she signed a paper in the lawyer's office. It was read to her, her injury having affected her sight. "I wrote my name," she testified, "on exhibit 1 fairly straight by following the pen with my hand and fingers." Some question arises in our minds as to the efficacy of the reading since she was hard of hearing to the degree that, "to somewhat conserve time" her testimony at the trial of the case before us was taken by deposition but this factor need not be explored as it does not control decision. In short, as she puts it "The lawyer wanted to know what I wanted; I told him I wanted a paper that would protect Mr. Huben and Mr. Huben's mother in case of my death and I wanted something that would protect me equally, that I could get my home back, and as long as I did owe them money it would protect them." The Hubens are equally emphatic that the transaction was not a loan, with security, but an absolute conveyance. It was plaintiff's idea, Mr. Huben said, "That we had helped her in various ways and means and that she had arrived on an agreement upon which I could purchase the house, and she could reserve her life estate on it." It is somewhat revealing of the true nature of what the parties intended that a second mortgage was contemplated, and the idea discarded. "I don't like second mortgages anyway," testified the attorney who drew the instrument. "They cause too much trouble."

Following the discussions referred to, Mrs. Sheets signed the aforementioned warranty deed to the Hubens, with reservation in the following terms:

" 'Reserving and excepting unto the said grantor, Dorothy L. Sheets a life estate with the power and complete use and enjoyment of the said premises, with the said grantor to assume and make payments of $41.74 on that certain mortgage on the said premises held by General American Life Insurance Company, St. Louis, Missouri, during her lifetime, and at her death, if there be any indebtedness owed on the said mortgage, then the payments on the same are to be assumed and paid by the grantees.' "

In return, Mr. Huben paid the amount due on the land contract of $750.06, together with other items, $1,106.97 in all.

Subsequent to the execution of the instrument, Mrs. Sheets left for Chicago, confiding to Mr. Huben the collection of rental from the premises and the making of necessary disbursements with respect thereto. Unfortunately, difficulties ensued between the parties. One night, in his home, the rent money was stolen out of Mr. Huben's pants pocket, and he charged the loss to Mrs. Sheets. She did not acquiesce in sustaining the loss. "I thought he was responsible for it," she said. Moreover, Mrs. Sheets had, on or about this time, received a substantial amount of money from her workmen's compensation award. The relations between the parties not being what they were, Mrs. Sheets asked defendant Huben:

"how much money I would need to close out with him entirely; to give him what money he had put in and what interest he wanted for loaning me the money. I said although he had told me he didn't want anything to loan me their money but at the same time I thought he was entitled to it. I said anything that was right for the money for the time

I had it. He said I couldn't buy it back, that they owned the house, they owned it and bought it."

The relief sought by plaintiff in her bill of complaint, a judicial determination that the instrument in question should have the legal effect of a mortgage, was granted by the trial chancellor.

Cases comparable to the instant case have come before our Court with some regularity and the principles governing them are well established. The intent of the parties is the determining factor and no form of words employed in the written instrument is conclusive of that intent. Where we have determined from an investigation of the instrument itself, the acts of the parties, and all the surrounding circumstances, that the true intent is that the property stand as security for the repayment of a loan, we have construed the instrument as a mortgage. See, *e.g., Alber* v. *Bradley,* 321 Mich 255. On the other hand, the burden rests on the parties asserting rights on the theory of a mortgage to establish their claim by clear and satisfactory proof. *Porritt* v. *Stone,* 340 Mich 645. See, also, *Rehn* v. *Booth,* 299 Mich 311.

Here we have a person, allegedly one who has made an absolute conveyance, with an equity in a home of at least $2,400 (a figure which represents payment of the balance due on the land contract). This sum includes, as the trial chancellor put it, "only a modest allowance for landscaping and improvements." If the transaction is in truth a sale, as defendants assert, we must conclude that plaintiff was disposing of this equity for the sum of $1,106 and, in addition, agreeing to pay the balance of the mortgage debt. While inadequacy of consideration is not an infallible test, it is an indication that the parties did not consider the conveyance to be absolute, *Simington* v. *Goldstein,* 330 Mich 536; *Schmidt* v. *Barclay,* 161

Mich 1 (20 Ann Cas 1194), particularly where the bargaining positions of the parties are markedly unequal. As the trial chancellor found:

"Plaintiff appears to be somewhat confused as to the details surrounding the transaction in question. The friendly relationship which existed at the time, the fact that plaintiff made arrangements for defendant to collect rents for her, the agreement on her part to pay the mortgage indicate to the court that regardless of what defendants may have expected, the plaintiff did not think she was disposing of her property absolutely. She should be granted the relief asked."

We find no error. The decree is affirmed, with costs to appellee.

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

In re SCHANTZ ESTATE.

FINAL ACCOUNT BY RUEHS.

APPEAL AND ERROR—APPENDIX—COURT RULES.

Appeal is dismissed with costs as on motion to dismiss, where appellant's appendix failed to comply with mandatory provisions of court rule in that parts of the opinion of the court from which the appeal was taken were so printed as to preclude comprehension of the judicial thought and reasoning thereof without resort to the single original record, the rule being intended to assist, rather than hinder, the work of the Supreme Court (Court Rule No 67, § 6, as effective January 2, 1957).

Appeal from Kent; Verdier (Leonard D.), J. Submitted October 15, 1958. (Docket No. 58, Calendar No. 47,755.) Decided December 2, 1958. Rehearing denied February 19, 1959.

Ernest Ruehs filed his final account as guardian of Addison Schantz, mentally incompetent, in contemplation of restoration to soundness of mind. Account approved in probate court and appeal to circuit court dismissed. Schantz appeals. Appeal dismissed.

Edward Kenney, for appellant.

Rom & Newton Dilley, for guardian.

PER CURIAM. We said, in *Miller* v. *Allen,* 352 Mich 95, 96:

"Counsel must be advised that additional burdens have been voluntarily assumed by this Court through promulgation of the recently adopted appellate rules (effective January 2, 1957; 347 Mich xiv through xxxii). A comprehensive and fully informative appendix, supplied according to the optional provisions of said Rule No 67, is imperatively required under the new appellate practice."

Here again the appellant's brief and appendix disregards in substantial entirety the needful and later considered (see *Wilks* v. *Kempf,* 352 Mich 445, 451, 452) requirements of new Rule No 67. In particular we cannot countenance the practice of printing, in an appendix, isolated portions only of the opinion or opinions of the court below. In this case it appears from the original record that Judge Verdier rendered 2 opinions which, in the orderly course of appellate procedure, should have been printed verbatim in the appellant's appendix (see section 6 of new

Rule No 67). Each opinion, so far as appellant's appendix is concerned, consists of minute context-lifted observations of Judge Verdier, totally disconnected from each other and printed in such way that no reader would be able to comprehend the judicial thought or reasoning without resort to the single original record.

Counsel should understand that the mandatory requirements of said Rule No 67—and certainly the duty to print (in the appellant's appendix) "any opinion of the court * * * below" is such a requirement—must be complied with in order that the new appellate rules may assist rather than hinder the work of his Court. Emphasizing what was said in *Miller* v. *Allen* and *Wilks* v. *Kempf, supra,* it is ordered that appellant's appeal be dismissed, with costs to appellee as on granted motion to dismiss.

DETHMERS, C. J., and CARR, KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

FRANKLIN *v.* FRANKLIN.

1. DEEDS—GRANTEES AS TENANTS BY THE ENTIRETIES—QUIETING TITLE.

That designation in deed of grantees, a man and woman, as husband and wife created in them a tenancy by the entireties is not open to question by heir of man who claims an interest through the man after the man's death under pleadings presented in survivor's suit to quiet title.

REFERENCES FOR POINTS IN HEADNOTES

[1] 26 Am Jur, Husband and Wife § 66 *et seq.*

2. FRAUD—PLEADING—DEEDS—DESIGNATION OF GRANTEES AS HUSBAND AND WIFE.

Defendant's allegation of the mere fact that plaintiff, survivor of herself and defendant's father, knew at time deed naming herself and the father as grantees and referring to her as his wife, that she was not the other grantee's wife, would not constitute a sufficient allegation of actionable fraud under pleadings in survivor's suit to quiet title.

Appeal from Wayne; Fitzgerald (Neal E.), J. Submitted September 25, 1958. (Docket No. 63, Calendar No. 47,872.) Decided December 3, 1958.

Bill by Lucy Franklin against Jesse Franklin and Marian Swan, administratrix of the estate of Alexander Franklin, deceased, to quiet title. Cross bill by Jesse Franklin to have deed construed as creating a tenancy in common, rather than tenancy by the entireties, and for other relief. Decree for plaintiff on pleadings. Defendant Jesse Franklin appeals. Affirmed.

Herbert L. Dudley (*Roxborough & Roxborough,* of counsel), for plaintiff.

Arthur B. Davidson, for defendant.

The decree in this case was entered on the pleadings of the parties. Questions of law only are brought up on defendants' appeal therefrom.

The ultimate question is whether plaintiff Lucy Franklin is outright holder and owner of title to portions of certain platted lots in Detroit. Lucy claims, and the chancellor agreed, that she acquired such title by means of a duly delivered conveyance dated July 30, 1951, identifying the grantees as "Alexander Franklin and Lucy Franklin, his wife," followed by death of said Alexander Franklin 6 years later. Defendant Jesse Franklin, sole heir of Alexander, insists by his answer and cross bill

that the relationship of husband and wife at no time existed between Alexander and Lucy and that the deed in consequence created a tenancy in common. Plaintiff rejoins in her pleading that she was Alexander's wife on the date of the conveyance and that the relationship continued until Alexander's decease. She pleads further that the deed on its face created a tenancy by entirety and that defendants cannot question the apparent effect thereof. Remaining facts essential to understanding of the case appear below.

BLACK, J. (*after stating the facts*). The chancellor was right, for reasons considered at length in *Porter* v. *Landis,* 329 Mich 76, in holding that the deed created an entirety tenancy and that its designation of the grantees as husband and wife is not under these pleadings open to contradiction.

The principal cases on which defendants rely are readily distinguishable. *Wright* v. *Kaynor,* 150 Mich 7, presented the instance of a deed which did not describe or designate the 2 grantees as husband and wife. In *McNitt* v. *McNitt,* 230 Mich 303, no written instrument was produced or involved; the claim being one of oral agreement (p 304) "that the property should be conveyed to plaintiff and her husband jointly." In *Scott* v. *Grow,* 301 Mich 226 (141 ALR 819), the deed in scrutiny did not identify the 2 grantees as husband and wife. Rather, they were designated as "tenants by entireties and not as joint tenants." In *Collins* v. *Norris,* 314 Mich 145, the evidentiary question on which *Porter* turns was not raised or considered. In *Cristia* v. *Cristia,* 317 Mich 66, language appears which doubtless tends to sustain defendants' position. However, the suit was for divorce, in which case the chancellor is empowered

without regard for the question now considered to settle and determine property rights as between the contending husband and wife. For these reasons we conclude that the authorities on which defendants rely are inapplicable to the case before us.

The point most earnestly stressed by defendants is that they have a right to formal trial of what they specify as allegations of fraud. Such allegations are limited to the following:

"3. That at the inception or time of the execution of said deed to parties as grantees, as husband and wife, the plaintiff had full knowledge that she was not the wife of Alexander Franklin, but she was the wife of one Scott Webb.

"4. That the plaintiff's conduct and her knowledge, at the time of taking title to said real estate, that she was not the wife of Alexander Franklin, constituted fraud and deceit upon Alexander Franklin and his heirs."

We perceive that these allegations make no issue of fraud. Since the defendant heir—likewise the defendant fiduciary—stands, at best, in the shoes of his father, he became obligated if desirous of success to plead a case of actionable fraud upon his father. This he has not done. His cross bill is not supported by pleaded conclusions of fact on which it may be said that fraud or deceit in the preparation, delivery and recording of the deed was in some manner perpetrated by Lucy upon and against Alexander. That Lucy knew, on the occasion, that she was not in fact the wife of Alexander, of itself would constitute no fraud on Alexander. For aught these pleadings show, Alexander also may have known that Lucy was not his wife. Indeed, with such knowledge he may have caused the deed in question to be prepared in its present form and promptly recorded. If so

Alexander, and his heir in turn, would be unable to plead and prove actionable deceit.

Affirmed. Costs to plaintiff.

DETHMERS, C. J., and CARR, KELLY, SMITH, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

PENCE *v.* DEATON.

1. AUTOMOBILES—PASSENGERS—QUESTION FOR JURY—PAYMENT FOR TRANSPORTATION.

   Whether or not plaintiff, a passenger in defendant's car when injured due to defendant's negligence, was a passenger for hire *held*, a question for the jury, where evidence shows plaintiff had paid defendant $5 per week for driving to and from work and had paid $2.50 for 24-mile trip on mission personal to plaintiff and at latter's request, since defendant received a pecuniary benefit from the plaintiff (CLS 1956, § 257.401).

2. SAME—GUEST PASSENGERS—PASSENGER FOR HIRE.

   Whether the relationship between the parties in an automobile is that of a guest passenger or passenger for hire depends upon the facts of each case, a guest relationship existing if the arrangements are so indefinite and casual that sociability is the dominant element and a passenger-for-hire relationship existing whenever the transportation is for the pecuniary benefit of the defendant (CLS 1956, § 257.401).

3. SAME—PASSENGER FOR HIRE.

   A passenger for hire in an automobile is entitled to at least the exercise of ordinary care for his safety by the driver.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 5A Am Jur, Automobiles and Highway Traffic § 517.
Payments or contributions by or on behalf of automobile rider as affecting his status as guest. 10 ALR2d 1351.
[3] 5A Am Jur, Automobiles and Highway Traffic § 496.

Appeal from Oakland; Hartrick (George B.), J. Submitted October 7, 1958. (Docket No. 2, Calendar No. 47,808.) Decided December 3, 1958.

Case by Henry Pence against Green B. Deaton for personal injuries sustained while a passenger in defendant's automobile. Directed verdict and judgment for defendant. Plaintiff appeals. Reversed and remanded.

Clarence L. Smith and *Philip Pratt,* for plaintiff.

Wilson, Ingraham & Kavanagh, for defendant.

BLACK, J. This negligence case, brought by the plaintiff passenger against the defendant motorist, presents but 1 question, whether any proof was submitted below on which the jury might with legal propriety have found that plaintiff was a passenger for hire at the time his declared injury was sustained. Negligence of the defendant motorist, actionable by the common law at suit of the plaintiff passenger, is conceded. Plaintiff claims the proofs shows he was being transported by defendant in consideration of "payment for such transportation." Defendant insists that plaintiff has failed to sustain the burden of proving that he, plaintiff, was not a guest passenger within meaning of the statute.* The trial judge, agreeing with defendant, directed

* The pertinent proviso, which was added by amendment in 1929 and is now incorporated as section 401 of the motor vehicle code, PA 1949, No 300 (CLS 1956, § 257.401, Stat Ann 1952 Rev § 9.2101), reads as follows:

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

a verdict against plaintiff and entered judgment for defendant. Plaintiff appeals.

Both parties reside near Walled Lake, in Oakland county. Plaintiff had no car of his own. "For 2 or 3 weeks, about a month prior to the accident herein," he had ridden to and from work with the defendant, paying the latter $5 per week for such driving service. The trip we consider, however, was not a part of such to-and-from-work driving arrangement.

May 20, 1950, plaintiff desired to go from Walled Lake to Keego Harbor (a distance of approximately 12 miles). It is stipulated that the purpose of plaintiff's intended trip was that of "gaining information regarding his mother's illness from a friend who had recently gone to plaintiff's home town in Kentucky and was expected back on that day."

In the early evening of the given date, plaintiff obtained transportation from others into Walled Lake. On arrival, and as he was standing with friends in a street, he saw defendant's car approach. Defendant was driving. Plaintiff signaled and defendant stopped. Plaintiff walked to the car and told defendant that he "would fill his car with gas if he would take me to Keego or pay him and he said O. K." (quotation from stipulated facts). Plaintiff thereupon entered the car. Defendant, having first driven around a local park, proceeded to a gasoline station in Walled Lake for the agreed purpose. The gas tank of defendant's car was filled and plaintiff handed defendant a $5 bill. Using the bill, defendant paid the filling station operator $2.50. The change from the bill was handed by defendant to plaintiff and the car was started on the trip toward Keego Harbor, defendant driving. On the way defendant's car came into collision with another motor vehicle and plaintiff was injured.

We hold that the question whether plaintiff was a passenger for hire should have been submitted to the jury. For the agreed transportation the defendant driver received a "pecuniary benefit" from the plaintiff rider. The fuel paid for by the plaintiff rider would not, excepting as to a minimal portion thereof, have been utilized in making the intended 24 mile trip.* In *Collins* v. *Rydman,* 344 Mich 588, 592, handed down after this case of Pence was tried in the court below, this Court unanimously agreed:

"The rule to be followed to determine whether plaintiff was a guest passenger or a passenger for hire is announced in *Bond* v. *Sharp,* 325 Mich 460, 464, where we said:

" 'Whether the relationship between parties is that of a guest passenger or a passenger for hire depends upon the facts in each case. It has been held that where the arrangements between the parties are so indefinite and casual that sociability is the dominant element, then a guest relationship exists. See *In re Harper's Estate,* 294 Mich 453; *Guiney* v. *Osborn,* 295 Mich 559; *Brody* v. *Harris,* 308 Mich 234 (155 ALR 573).

" 'It is the general rule that whenever transportation is for the pecuniary benefit of the defendant, the transaction is not gratuitous and a passenger-for-hire relationship may exist. See *Foley* v. *McDonald,* 283 Mass 96 (185 NE 926); *Bushouse* v. *Brom,* 297 Mich 616; *Everett* v. *Burg,* 301 Mich 734 (146 ALR 639); *Miller* v. *Fairley,* 141 Ohio St 327 (48 NE2d 217).' "

The last paragraph quoted from *Collins,* consistent as it is with the considered tenor of authority elsewhere, definitely applies here. In the modern annotation appearing in 10 ALR2d 1351 and headed "Pay-

* This does not mean that payment by a passenger of an amount less than the approximate out-of-pocket cost of the agreed trip would necessarily result in a holding that the relationship is that of guest and host. Such a case is not before us.

ments or contributions by or on behalf of automobile rider as affecting his status as guest," cases dealing with the subject of "cash payment" are assembled and the following rule is announced (p 1355):

"Where, in pursuance of a contract between the parties, the occupant of an automobile makes a cash payment to the owner or operator, in consideration of which he is transported, it seems clear that he is a passenger for hire rather than a guest, under the terms of the guest statutes, so that he is entitled to at least the exercise of ordinary care for his safety. It has been so held under the statutes which use the term 'payment' in defining the status of a passenger for hire."

We declare adherence to the quoted portion of such annotation and rule that the question of this plaintiff's status, under the so-called guest-passenger act, was not a proper one for determination on motion for instructed verdict. It follows that the judgment of the circuit court must be reversed with remand of the case for new trial.

Reversed and remanded accordingly. Costs to plaintiff.

DETHMERS, C. J., and CARR, KELLY, SMITH, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

MYER *v.* FRANKLIN HOTEL COMPANY, INC.

1. INJUNCTION—CONTINUING TRESPASS—DELAY.
   One who delays attempting to secure equitable relief of injunction against a claimed continuing trespass until the dominant user or tenure had grown to a valuable prescriptive estate would not be granted an injunction against the continuance of the trespass.

2. SAME—CONTINUING TRESPASS—STATUTE OF LIMITATIONS.
   Owner of land who failed to seek injunction against overhanging fire escapes on defendants' hotel property until long after statute of limitations had run against him was not entitled to injunction against the continuing trespass (CL 1948, § 609.1).

3. SAME—ALTERATION OF OVERHANGING FIRE ESCAPE—LACHES.
   Owner of land over which defendant hotel's fire escape overhung was guilty of laches precluding granting of injunctive relief, where he was present at time fire escape was reconstructed and extended 4 feet from wall instead of 3 feet as formerly and extended over space parallel with the wall but raised no complaint until some 11 years following the alteration.

4. EASEMENTS—OVERHANGING FIRE ESCAPE—PRESCRIPTIVE USE.
   Defendant hotel company whose fire escape overhung plaintiff's land *held,* to have pleaded and proven a fully-ripened prescriptive right to maintain the present escape structure.

Appeal from Saginaw; Quinn (Timothy C.), J., presiding. Submitted October 10, 1958. (Docket No. 41, Calendar No. 46,432.) Decided December 3, 1958.

REFERENCES FOR POINTS IN HEADNOTES

[1-3] 28 Am Jur, Injunctions § 67; 19 Am Jur, Equity § 494.

Bill by Alfred F. Myer against Franklin Hotel Company, Inc., and Saginaw Hotel Corporation, both Michigan Corporations, for declaration of rights, quieting title and mandatory injunctive relief as to overhanging fire escape. Cross bill by defendant Franklin Hotel Company, Inc., praying for determination of valid easement and prescriptive right to maintain same. Decree for defendants. Plaintiff appeals. Affirmed.

Alfred F. Myer, in propria persona, and *Willard J. Nash,* for plaintiff.

Crane, Crane, Kessel & Deibel, for defendant Franklin Hotel Company, Inc.

BLACK, J. Plaintiff owns certain business property in Saginaw, a portion of which is adjacent to the rear wall of what is known in the record as the Franklin Hotel. The Franklin Hotel is 6 stories high. The structure, formerly known as the McCormick Building, was rebuilt in 1916* by adding 2 or 3 stories (the witnesses are uncertain as to the exact number added) to make up the present 6. At that time, and as far back as 1908 according to the memory of 1 witness, a steel ladder fastened to the rear wall formed the means of emergency exit from the upper floors. During such rebuilding the ladder was replaced by a more elaborate escape structure, consisting of railed steel balconies at each floor, measuring 3 by 5 feet horizontally, through which a new steel ladder projected vertically.

It appears without dispute that the rear wall of the McCormick Building—now Franklin Hotel—was built to or within a few inches of the lot line separating Mr. Myer's premises from those of defend-

* The year of such rebuilding, according to plaintiff's testimony, was 1916. Other testimony gave the year as 1919.

ants (Franklin Hotel Company and Saginaw Hotel Corporation). It appears also that a conventional steel fire escape, consisting of railed platforms and stairways built one above the other, has now replaced that which was provided in 1916. The replacement job was done in 1941, on demand of the municipal fire department. All such construction and reconstruction was done by and at expense of defendants and their predecessors. Mr. Myer and those who preceded him as owners of the adjacent premises were not consulted with regard thereto at any time. However, Mr. Myer was on hand and knew about the work done in 1941.

The present fire escape, constructed, as noted, in 1941, differs from the 1916 structure in that it projects—outward from the building—4 feet instead of 3 feet. It also takes up more space, parallel to the wall of the building, than the previous structure.

Plaintiff's bill, in form a petition for declaration of rights, calls for a mandatory injunction requiring defendants "to remove said fire escapes projecting over and beyond said property;" for an adjudication of damages occasioned, as plaintiff alleges, by defendants' unlawful use of the surface of the ground immediately beneath same, and for a decree quieting title in his favor as against the defendants. Defendants' answer and cross bill prays for a decree adjudging that they have "a valid easement and prescriptive right to maintain the fire escape."

The case came to due hearing on pleadings and proofs, followed by an opinion of the chancellor holding generally in favor of defendants. Decree for defendants having entered, plaintiff appeals.

The decisive question brought here is stated and counterstated by the parties as follows:

By the plaintiff:

"Did plaintiff's undisputed testimony of permission granted, together with the original Franklin Hotel Company offering to buy the space occupied by the fire escape, and the record barren of any adverse action, claim or deed by defendant or its predecessor thereafter show that permission was originally granted in 1916 to erect the first fire escape on the defendant's 7 story* hotel building?"

By the defendants:

"Does the defendant have a prescriptive appurtenant easement to maintain a fire escape on the rear of its hotel building with ingress and egress over and above the land of the plaintiff?"

Plaintiff's briefs are built upon and around contention that construction and maintenance of the successive and projecting fire escapes was, through the years, permissive and not prescriptive, and that defendants have acquired no rights on account of such construction and maintenance. The chancellor, however, was persuaded otherwise. We agree with his conclusion.

The stated and counterstated question is illuminated, to some extent but not decisively, by correspondence—in 1926— plaintiff produced at the hearing below. Plaintiff's father at the time was owner of the burdened estate. Plaintiff then spoke for and represented his father. Writing to the then owner of the hotel (Benjamin Franklin Hotel Co.) plaintiff declared (the letter bears date of March 18, 1926):

"If I remember correctly, some years ago the then management of your hotel obtained permission from Frank J. Myer, my father, of this city to erect certain iron ladders and fire escapes on the rear of your hotel property, which iron ladders and fire escapes project over on the property owned by my

* This is an error. The testimony shows that the hotel is 6 stories high.

father known as number 110 South Washington avenue which properties adjoin each other, abutting on the rear.

"I have inclosed herewith a short agreement in writing setting forth the facts of the situation, and my father requests you to sign by your proper officers, if you will, so that there will be no question in the future in case additions were built upon his property.

"I trust that the agreement is satisfactory to you and, if you have any objections to the form of it or otherwise, I will be glad to take the question up with you."

The addressee promptly acknowledged plaintiff's letter saying:

"Your letter of March 18th addressed to the Benjamin Franklin Hotel Company has been referred to the writer as secretary of that company.

"In reading over the instrument it has occurred to the writer that it might be possible that you could sell without hurting your frontage, or damaging any buildings thereon, such portion of your lot, probably 4′, or 6 or 8′ in width, abutting the rear of the Franklin Hotel property as would permit the erection of a building upon your lot and still permit light and air to enter the rear windows.

"The writer would be very glad to hear from you on this suggestion."

Plaintiff thereupon wrote back that "my father does not desire to dispose of any portion of his property." The letter concludes:

"I might add that I did not wish to convey the impression that there would be any building upon my father's property at the present time, and have no immediate prospects of building in the future. If, at any time in the future, building operations should be started, possibly this matter can be taken up.

"I trust that the instrument submitted to you was satisfactory in form and that I may receive the same at your earliest convenience."

Some 2 weeks later the secretary of the Benjamin Franklin Hotel Company wrote plaintiff stating that the proposed instrument would shortly be submitted to the company's board of directors. The letter concludes "We presume that authorization for the signing of the instrument will be given to the officers at that time." At this point, and so far as the record discloses, a hiatus of sorts developed. Negotiations appear as having been dropped. At least there is no proof that they were even attemptedly resumed until many more years had expired.

The effect of this correspondence of 1926 is clouded by the fact that no party, at the trial, produced a copy of the unsigned instrument each was considering.* It may have consisted of an agreed declaration of past permissive use and a commitment to continuity thereof at will of plaintiff's father. Or it may have recited a good-faith dispute between the parties and a declared means of resolution thereof. Guessing further, it may have been an agreement that "no prejudice" would result from a continuation of that which formed the basis of plaintiff's complaint.

The correspondence of 1926 proves at best no more than fruitless negotiation toward settlement of a controversy which after the lapse of 32 years, has been brought here. And its evidentiary significance pales before the fact that plaintiff's father, plaintiff's brothers (they succeeded the father in relevant interest), and plaintiff (he succeeded the brothers)

* Whether plaintiff or defendants—either or both—were able to produce such copy is left by the record in a state of confused uncertainty. Plaintiff says he sent all copies with the letter of March 18th. Defendants contend the correspondence was with a former owner of the hotel and that they could not, within reason, be expected to produce.

himself, did nothing thereafter toward legal protection of their asserted rights until lapse of more than a quarter century. This brings us to developments in the next decade—of the nineteen-thirties.

In 1937 (this time as declared representative of his brother owners of the servient estate) plaintiff wrote Bell Hotel Management Corporation, of Chicago, reciting his understanding that Bell was operating the Franklin Hotel "under a leasehold agreement." In the letter plaintiff detailed a number of complaints including the following:

"The hotel also has maintained fire escapes upon the rear of the wall of the hotel which project over upon my clients' property a distance of 4 to 5 feet and have an iron stairway leading from the last step of the fire escape, and which iron stairway rests upon the roof building of this theater building. *All these things have been done without the consent or permission of my clients.*"

Again, and in 1946, plaintiff wrote the then president of defendant Franklin Hotel Company "about removing the fire escapes which project over upon my building." The letter proposes anew "some plan that would be mutually agreeable to possibly let them [the fire escapes] remain under some sort of an agreement if that could be arrived at." It concludes with a threat of suit for "double damages under the statute for the unlawful detainer and trespass* which has been maintained by the projection of these fire escapes." But the threatened suit was not instituted and no appeal to the courts was made until plaintiff filed this bill in 1952.

We must assume that plaintiff, a practicing attorney, knew, when writing in 1937, that he was contradicting his previous assertion that the escape

* If maintenance of the escape structure amounted to a "trespass," the use hardly could be called "permissive."

structure was set up and maintained by permission. And imputable to him, certainly with as much force as the law exacts of a layman in like circumstances, is knowledge of the rule that equity has no time for the owner of a servient estate who delays his application for relief until the dominant user or tenure —enjoinable originally—has grown to the stature of a valuable prescriptive estate. Here the plaintiff must be charged with knowledge that a statute of limitations* was running against the unilateral assertions made by him in 1926 and that a statute-arresting suit was in order when the negotiations—initiated by him and not by the defendants or their predecessors—were dropped or failed. He did not move until too many years went by. This is enough to justify the chancellor's decree.

A final point is made. It is said that, even though owners of the Franklin Hotel did acquire—prior to 1941—the right to maintain the pre-1941 fire escape as described, the new installation of 1941 occupied and now occupies about twice (mostly along the wall rather than outward from the wall) as much area of overhang as did the replaced structure. From this plaintiff reasons that defendant Franklin Hotel Company, having installed a new and increased burden of dominance over the servient estate, is short of years—counting them from 1941 to 1952—on which to build a prescriptive right of continued maintenance of the 1941 structure.

The idea is stale if novel. Plaintiff was present as the reconstruction job of 1941 proceeded and, if justiciably aggrieved at the time by the increased burden of the new structure, doubtless would have made his complaint known in order (if practicable and legally possible at the time) that the new structure take up no more area of overhang than the old,

* See CL 1948, § 609.1 (Stat Ann § 27.593).—REPORTER.

or, failing that, that he obtain what might have been rightful injunctive relief at the time. Instead he made no complaint of increased burden, sought no injunctive relief, and (as we glean from the record) did not raise the issue of added dominance until after defendants' witness Koehler (the contractor employed by defendant Franklin to construct, in 1941, the new fire escape) had testified to the comparative platform areas of the 1916 and 1941 installations.

On this phase of the case we agree with defendants that plaintiff should be held estopped from asserting that defendants, by action in 1941, increased the dominant burden to such extent as to require a new start of statutory travel. Plaintiff does not suggest that we should, by decree, order that the present structure be sheared vertically to pre-1941 measurements (which is well). What he desires is a holding that the 1941 change, unchallenged though it was at the time,* amounted to a loss of the old plus right under his bill to complete abatement of the new. We are not so disposed, and hold that plaintiff's appeal to the doctrine of increased servitude comes too late. What might have been done, had plaintiff seasonably raised the point of expanded burden, cannot be considered now. The doctrine of unexcused laches stands in the way.

We have reviewed the sharply disputed question whether plaintiff bore the burden of proving his allegation of permissive use, or whether defendants bore the burden of proving their counterallegation of prescriptive acquisition (See, to this issue, *Berkey & Gay Furniture Co.* v. *Valley City Milling Co.*, 194 Mich 234). The point need not be settled in view of our finding, on the whole record, that defendants

* See *Moon* v. *Mills*, 119 Mich 298, where plaintiffs failed to object to a change (by the defendant prescriptive claimant) of stairways leading from an alley to the second story of defendant's building.

have proven a fully-ripened prescriptive right to maintain the present escape structure.

Other questions considered in the briefs require no discussion. Decree affirmed. Costs to defendants.

DETHMERS, C. J., and CARR, KELLY, SMITH, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

BOOTH *v.* BOND.

1. AUTOMOBILES—NEGLIGENCE OF DRIVER NOT IMPUTED TO PASSENGERS.

The negligence, if any, of the driver of car in which his wife and daughter were passengers is not chargeable to the latter in actions for injuries to the passengers against owner of other car involved in accident and whose driver was found to have been negligent and there was ample evidence to sustain such finding (CLS 1956, § 257.401 *et seq.*).

2. SAME—NEGLIGENCE OF DRIVER NOT IMPUTED TO PASSENGERS—IRRECONCILABLE VERDICT.

Judgment for defendant, owner of car involved in action by administrator of estate of wife who was a passenger of other car, is reversed, where she was not shown to have been guilty of contributory negligence and verdict for defendant in her case was irreconcilable with verdict against same defendant in favor of her minor daughter in contemporaneous action, since the contributory negligence, if any, of the driver of car in which they were riding was not imputable to them as passengers (CLS 1956, § 257.401 *et seq.*).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 5A Am Jur, Automobiles and Highway Traffic § 817.
Negligence of driver of automobile as imputable to passenger. 90 ALR 630, 123 ALR 1171.
Negligence of one spouse as imputable to other because of the marital relationship itself. 110 ALR 1099.
[3] 5A Am Jur, Automobiles and Highway Traffic § 910.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Plaintiff administrator of estate of decedent who was driving car involved in accident at 10:30 p.m. in February, 1954, then had burden of proof to show that his decedent was free from contributory negligence proximately causing the accident.

4. AUTOMOBILES — CONTRIBUTORY NEGLIGENCE — VERDICT — GREAT WEIGHT OF EVIDENCE.

Verdict for defendant in action by administrator of estate of motorist killed in collision with defendant's car *held*, not clearly against the great weight of the evidence in view of the absence of conclusive evidence as to the point of impact and the testimony showing location of the cars after the accident and photographs of the damaged cars, since it cannot be said, as a matter of law, that plaintiff's decedent did not fail in some degree in his duty to observe and react to approaching danger.

Appeal from Genesee; Roth (Stephen J.), J. Submitted June 5, 1958. (Docket Nos. 25, 26, Calendar Nos. 47,193, 47,194.) Decided December 3, 1958.

Case by Herbert J. Booth, administrator of the estate of William Melvin Lemin, deceased, under the death act for damages resulting from automobile collision. Similar action by Herbert J. Booth, administrator of the estate of Carol Lemin, deceased.

Cases combined for trial, together with a third case for personal injuries to a minor child in which there was an award of damages.

Verdicts and judgments for defendant. Plaintiffs appeal in consolidated cases. Affirmed as to estate of William Melvin Lemin. Case of Booth, administrator of estate of Carol Lemin, reversed and remanded for new trial.

Michael W. Evanoff (*Gault, Davison & Bowers,* of counsel), for plaintiffs.

Milliken & Magee (*Herbert A. Milliken, Jr.,* of counsel), for defendant.

EDWARDS, J. This case involves one of those tragic automobile accidents which couldn't happen—but did. Five people died in it.

On the night of February 7, 1954, at 10:30 p.m., on Lapeer road just west of Davison, Michigan, 2 automobiles collided almost head-on. The driver of one car, Russell Bond, son of defendant owner herein, was killed and his Ford car demolished. In the other automobile—a Buick, which was also completely demolished, the father, the mother, and 2 children of the Lemin family were killed, and the surviving child, Janice, was severely injured.

The Lemin family had spent the evening visiting relatives in Grand Blanc and were en route to their home near Davison, traveling east on Lapeer road. Russell Bond and a friend had dates in Flint in the evening and subsequently planned to meet at a drive-in restaurant near Davison. The facts of the accident, however, appear to indicate that the Bond car at the time in question was traveling west on Lapeer road—away from the drive-in restaurant which was his announced destination when he was last seen alive.

The point of the collision was a stretch of straight black-topped road running generally east and west, with no intersections, obstructions, hills or curves. The pavement was 18 feet wide. The posted speed limit was 45 miles per hour. The night was dark but there was neither rain nor snow falling. A wind was blowing and some previously-fallen snow was being driven by it.

The 2 drivers had good reputations in the community as to habits and steadiness. There was no testimony which indicated any drinking. Yet the 2 deputy sheriffs who responded to an emergency call found 5 persons dead or dying in 2 demolished automobiles, and the ambulance service proved of use only to the 4-year-old child, Janice.

The deputies found the Buick on the south side of the road (the right side as the Lemins were traveling), "headed in kind of a northeasterly direction from the south side of the pavement." The entire left front of the automobile back as far as the driver's door was smashed in. The deputies located impact debris in front of the Buick on the south side of the road.

They also found the Ford 5 to 10 feet farther west and in the ditch on the opposite or north side of the road, turned upside down. They turned it over toward the road to remove Bond. Neither could testify as to whether there was impact debris on the north side of the road beyond saying that they did not recollect whether or not there was any.

From pictures of the cars in the positions last described which were exhibits at the trial, we find that the whole front end of the Ford was smashed in although obviously the main force of the blow hit in the vicinity of the left front wheel.

As far as this record discloses, there were only 2 persons who saw anything of what happened. They were a young man and his fiancee who were traveling east on Lapeer road "half to three quarters of a block" behind the Buick. The young man's story of the accident supplies all of the other relevant facts which we can glean:

"*Q.* Well, where was the Buick prior to the accident, as you were following it?

"*A.* Oh, just ahead of me. I seen the headlights, I mean, the tail lights.

"*Q.* I see; on what side of the road, Lapeer road? That is, north or south, was the Buick?

"*A.* South side. * * *

"*Q.* Will you tell us what happened then as you were proceeding behind this Buick car?

"*A.* Well, just beyond Center road the accident occurred. The first thing we noticed was sparks,

dust, or more or less turmoil there, and I put on the bright lights right away and I still seen some movement. There was a Ford, I don't know just which way it was going over, flipping over or something. It was just settling, and I proceeded up to it. We were approaching it pretty close and slowing down; put it in second gear and made sure there was nobody laying in the road or anything, and my wife and I went to the nearest house where there was a light, and the people there notified the police and an ambulance.

"*Q.* How fast were you going shortly before the accident?

"*A.* Right around 35, and not more than 40.

"*Q.* How fast do you believe the Buick was going at that time?

"*A.* I believe it was going about the same speed in order for me to keep up with it.

"*Q.* Did you appear to be gaining on it in any way?

"*A.* No.

"*Q.* You were traveling about the same?

"*A.* I kept about the same distance away. * * *

"*Q.* Now, on which side of the road, south or north, was the Buick that you saw ahead of you just before you saw this flash and smoke?

"*A.* On the south side.

"*Q.* Were the Buick's tail lights at any time out of your line of vision?

"*A.* No.

"*Q.* You saw them at all times?

"*A.* Yes.

"*Q.* Did that Buick car, or its tail lights, ever swerve off to the left and onto the north side of the road?

"*A.* No.

"*Q.* Was your attention distracted in any way away from the car, or were you looking at that car at all times?

"*A.* I was looking straight ahead at the car and road, about everything in general, straight ahead."

Vigorous cross-examination by counsel for defendant produced such questions and answers as these as to observation at the instant of impact:

"*Q.* All right, as far as your observation, what you saw, the car traveling ahead of you could have been on the left, or north side of the center, or right and south side of the center at the time the cars came together, isn't that right?

"*A.* It could have been, but I don't believe it. * * *

"*Q.* Did you observe this Buick on its own side of the center line just an instant before the crash?

"*A.* I will say, yes. * * *

"*Q.* From your observation, or lack of observation, whichever it may be, you wouldn't want to say, as a matter of fact, which side of the center line this accident happened on, would you?

"*A.* No."

Under the owner liability act (CLS 1956, § 257.401 *et seq.* [Stat Ann 1952 Rev § 9.2101 *et seq.*]), 3 suits were filed as a result of this accident against the owner of the Ford automobile, the mother of the deceased driver, Russell Bond. No question is presented as to the owner's consent to the use of the automobile.

Plaintiffs in the 3 suits, which were consolidated for trial before a jury, were William A. Shaheen, guardian of Janice Lemin, and Herbert J. Booth, the latter in dual capacity as administrator of the estate of both William Lemin, the father, and Carol Lemin, the mother. The Shaheen suit sought damages for Janice's hospital and medical expenses and for injuries suffered in the accident. The Booth suits were for the funeral expenses of the father and mother, and for pecuniary damages suffered by Janice due to loss of support.

The jury rendered a verdict of $7,000 in the Shaheen suit from which no appeal was taken, and no

cause for action in relation to the other 2 cases. The trial judge entered the verdicts, as stated, as the judgments of the court, and subsequently denied motions for new trials in both estate cases. These appeals followed.

The language used in the jury verdict is relevant to the issues on appeal and we quote it verbatim:

"*The Court:* * * * The first case is that of Herbert J. Booth, administrator of the estate of Carol Lemin, against Evelyn Bond, and that is the case of the mother.

"*Deputy Palmer:* For whom do you find?

"*The Foreman:* There were no damages allowed to Carol.

"*The Court:* A verdict of no cause for action?

"*The Foreman:* No cause for action.

"*The Court:* The second case is case 35,098, William A. Saheen, guardian of Janice Marie Lemin, a minor, *v.* Evelyn Bond. That is the case for the little girl.

"*The Foreman:* We award $7,000 damages to Carol,—or Janice Lemin.

"*The Court:* And in the case of Herbert J. Booth, administrator of the estate of William Lemin, deceased, and State Farm Mutual Automobile Insurance Company, subrogee, plaintiff, *v.* Evelyn F. Bond?

"*The Foreman:* Is this Russell Bond?

"*The Court:* No, Evelyn Bond; they are all against Evelyn Bond.

"*The Foreman:* Well, in that case we found there was negligence on the part of Russell Bond.

"*The Court:* Well, he, of course, is a defendant. The defendant's driver, is that what you mean?

"*The Foreman:* Well, maybe I misunderstood you.

"*The Court:* This is the case of the man who was driving the Buick car, *v.* the owner of the Ford car.

"*The Foreman:* Oh, no cause for action on that one, and there were no damages awarded.

"*The Court:* So in the 2 cases you have returned verdicts of no cause for action, is that correct?
"*The Foreman:* Yes."

The trial judge had previously charged the jury as to contributory negligence as a bar to recovery, presumably in relation to the suit filed by the administrator of the estate of the father whom all parties treated as the driver of the Lemin automobile. He then added, correctly we believe:

"In this case I charge you that the negligence, if any, of the plaintiff—yes, the plaintiff, William Lemin, is not chargeable to either Janice Marie Lemin or Carol Lemin."

We believe that the case of Booth, administrator of the estate of Carol Lemin, *v.* Bond should be reversed for new trial. It is plain that the jury found Russell Bond guilty of negligence which contributed as a proximate cause to the happening of this accident. There was, in our view, ample evidence from that which we have quoted to sustain this finding.

We believe the return of no cause for action in the Carol Lemin case was due either to the jury's failing to understand that damages as to her estate, in at least the amount of the funeral bills, were stipulated; or in failing to understand the instruction of the judge that the driver's negligence, if any, could not be charged to her.

See *Bricker* v. *Green,* 313 Mich 218 (163 ALR 697); *Sherman* v. *Korff,* 353 Mich 387; 2 Mich Civil Jur, Automobiles & Motor Vehicles, § 512, n 20, p 580.

Further, we have examined the record with care and find not a scintilla of evidence from which any inference of contributory negligence could be made as to the mother.

We would be inclined to reverse as to the mother's case upon the facts alone for the verdict as to her

appears plainly to be against the great weight of the evidence. Our inclination in this regard is strengthened, however, by the specific finding of negligence as to Russell Bond recorded in the jury's verdict, and by the fact that the verdict in Janice's case is plainly completely irreconcilable with that entered in the mother's case.

(On the effect of irreconcilable verdicts, see *Rosen* v. *Cathcart,* 245 App Div 736 [280 NYS 57]; *Watkins* v. *Myers,* 12 NJ 71 [95 A2d 705, 36 ALR2d 1330]; *Lanning* v. *Trenton & M. County Traction Corp.,* 3 NJ Misc 1006 [130 A 444]; 36 ALR2d 1333, annotation.

See, also, *Jakubiec* v. *Hasty,* 337 Mich 205; *Sadlowski* v. *Meeron,* 240 Mich 306, wherein judicial instructions to correct inconsistent verdicts were approved.)

As to the father's case, a different element is present. It is apparent from the briefs and the judge's charge that this case was tried under the assumption that there was a stipulation that William Lemin was driving the Buick automobile at the time of the accident. No contrary argument is addressed to us on appeal. Plaintiff Booth, as administrator of his estate, therefore, had the burden of proof to show that decedent, William Lemin, was himself free from negligence which contributed as a proximate cause to the happening of this accident.*

The trial judge instructed the jury as to the presumption of due care due both decedents. *Konieczny* v. *Detroit & Mackinac R. Co.,* 164 Mich 66; *Detroit Automobile Inter-Insurance Exchange* v. *Powe,* 348 Mich 548. But, as we have indicated, the jury returned a verdict of no cause for action in the father's case.

* This case was tried before the adoption of Rule No 23, § 3a, effective June 1, 1958 (352 Mich xiv), shifting the burden of proof as to contributory negligence to the defendant.

This Court is reluctant to interfere with the fact-finding function of the jury; and, for it to do so, the case must be very clear. *Detroit & Milwaukee R. Co.* v. *Van Steinburg,* 17 Mich 99; *Kaminski* v. *Grand Trunk Western R. Co.,* 347 Mich 417; *Ware* v. *Nelson,* 351 Mich 390.

Although there was, in our view, considerable evidence to sustain the jury finding of negligence as to Russell Bond, we cannot say that a jury finding of some negligence as to William Lemin which contributed as a proximate cause to the happening of this accident is clearly against the great weight of the evidence.

The jury may have given consideration to the photographic exhibits of the damaged cars, the testimony as to location of the cars after the accident, the absence of conclusive evidence as to the point of impact, and concluded that the Lemin car, as well as the Bond car, crossed the center line to some extent, or that William Lemin failed to some degree in his duty to observe and react to approaching danger.

The judgment of no cause for action entered in the case of Booth, administrator of the estate of Carol Lemin, *v.* Bond is vacated and the case is remanded for new trial, costs to await the final outcome. The judgment of no cause for action in the case of Booth, administrator of the estate of William Lemin, is affirmed, with costs to appellee.

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

LONDON *v.* CITY OF DETROIT.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO HEARING—FINDINGS OF FACT.

   The Supreme Court hears chancery matters *de novo* on the record but gives great weight to the findings of fact of the trial judge who hears the testimony, especially where it is in conflict.

2. MUNICIPAL CORPORATIONS—NONCONFORMING USE ANTEDATING ZONING ORDINANCE—FINDING OF FACT—RECORD.

   Finding of fact by trial court in suit by owner of 2 city lots in area, zoned for residence use, to enjoin city's interference with his use thereof for parking cars of patrons of his nearby bowling alley, that such nonconforming use had been continuous since prior to the adoption of the zoning ordinance, is not disturbed under record presented.

3. SAME—ZONING ORDINANCE—ANTEDATING NONCONFORMING USE.

   A city lot owner's vested rights to the continued use thereof in a manner not conforming to zoning ordinance adopted after commencement of such use and excepted therefrom is not subject to rule that his remedies under the zoning ordinance must first be exhausted before he may resort to the courts for relief, since such rights did not arise under such ordinance.

4. INJUNCTION—CONTINUANCE OF NONCONFORMING USE—ZONING ORDINANCE—ADEQUATE REMEDY AT LAW.

   Lot owner's use of 2 city lots for purpose of parking cars of bowling alley patrons, which use antedated adoption of zoning ordinance and as to which the use was nonconforming, was properly subject to protection by injunction against city for interference with such use, there being no adequate remedy at law.

REFERENCES FOR POINTS IN HEADNOTES

[2] 58 Am Jur, Zoning § 146 *et seq.*
[3, 4] 58 Am Jur, Zoning § 247.

Appeal from Wayne; Brennan (John V.), J. Submitted October 7, 1958. (Docket No. 3, Calendar No. 47,053.) Decided December 3, 1958.

Bill by Jack London, also known as Isreal J. London, against the City of Detroit and its building and engineering commissioner to enjoin interference with use of parking lot in connection with his business. Decree for plaintiff. Defendants appeal. Affirmed.

Wilcox, Lacy, Lawson, Kirby & Hoffman (*Eugene D. Kirby,* of counsel), for plaintiff.

Nathaniel H. Goldstick, Corporation Counsel, and *John F. Hathaway,* Assistant Corporation Counsel, for defendants.

EDWARDS, J. Plaintiff is owner of a bowling alley located on Grand River avenue in Detroit. He also owns 2 lots known as 6817–6823 Vinewood which are located nearby and which he has used, and seeks to continue to use, for parking the cars of bowling patrons.

The city of Detroit in a zoning ordinance, effective December 25, 1940, zoned these 2 lots for R2, a residence classification, requiring a special permit before property thus zoned could be used for a parking lot. No such permit has been obtained by plaintiff, and the city of Detroit, through its department of buildings and safety engineering, filed an ordinance-violation complaint against plaintiff in Detroit's recorder's court, traffic and ordinance division.

Plaintiff, while that complaint was pending, brought this chancery action to enjoin the city of Detroit from interfering with his use of these lots for parking cars. He claimed that the use of these lots

for this purpose antedated the effective date of the zoning ordinance, and that he had a vested right to a nonconforming use of the property in question.

The chancellor who heard the matter took testimony from the owner and the neighbors and found as a fact "such nonconforming use existed at the time of the effective date of the zoning ordinance," and that such use had been "continuous from a date prior to the effective date of the zoning ordinance."

This represented a summary of the testimony of 2 neighbors whose home was directly across the street from the 2 lots and who had lived there all the time, and who had apparently no connection with plaintiff. There was, of course, testimony to the contrary.

While we hear chancery matters *de novo* on the record, we give great weight to the findings of fact of the judge who hears the testimony. *Blough* v. *Steffens,* 349 Mich 365; *Hartka* v. *Hartka,* 346 Mich 453.

From a review of this record we find no reason to reject the findings of fact entered by the circuit judge.

The principal issue of law presented is phrased by appellants as follows:

"Did the trial court err in entertaining equitable jurisdiction of a bill of complaint filed by plaintiff to determine the question of fact as to whether or not he had a vested nonconforming use under the zoning ordinance on his property, where plaintiff had failed and refused to exhaust his administrative remedy of appeal to the board of zoning appeals?"

The zoning ordinance of the city of Detroit deals thus with the matter of nonconforming uses:

"Sec. 3.3. * * *

"(b) Any such nonconforming use may be maintained and continued, provided there is no increase

or enlargement of the area, space or volume occupied by or devoted to such nonconforming use."*

The ordinance does not require any application or permit to continue a nonconforming use. The language quoted plainly excepts such uses from the effect of the zoning ordinance.

Thus, the right to use this land for parking, which plaintiff seeks to enforce, was not created by the zoning ordinance. It existed before the ordinance, and the ordinance merely recognized it by excepting the nonconforming use from its zoning regulations.

Defendants rely upon language in *Certain-teed* to the effect that administrative remedies under a zoning ordinance should be exhausted prior to appeal to the courts. *Certain-teed Products Corporation* v. *Paris Township,* 351 Mich 434, 452.

See, also, *DeCarlo* v. *Town of West Miami* (Fla), 49 So2d 596.

However, equity jurisdiction to hear an attack upon the constitutionality of a zoning ordinance has been frequently upheld regardless of whether or not the administrative machinery of the zoning ordinance has been exhausted. *Long* v. *City of Highland Park,* 329 Mich 146; *Village of Euclid* v. *Ambler Realty Company,* 272 US 365 (47 S Ct 114, 71 L ed 303, 54 ALR 1016); *City of Miami Beach* v. *Perell* (Fla), 52 So2d 906.

The courts have likewise upheld an owner of a nonconforming use in appealing directly to the courts for injunctive relief against infringement of his preexisting rights by a zoning ordinance. *Biscay* v. *City of Burlingame,* 127 Cal App 213 (15 P2d 784); *Oklahoma City* v. *Dolese* (CCA), 48 F2d 734, 117 ALR 1117, 1137.

* Detroit, Official Zoning Ordinance (1953), § 3.3(b), p 9.—REPORTER.

We believe that the circuit judge's findings of fact and decree were correct in enjoining an unlawful application of the zoning ordinance to plaintiff's property. We likewise feel that the circuit judge was correct in finding that plaintiff had no adequate remedy at law.

Affirmed. Costs to appellee.

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

PFAFF *v.* OGEMAW COUNTY ROAD COMMISSIONERS.

1. HIGHWAYS AND STREETS—DEFECTS—STATUTE OF LIMITATIONS—COUNTY ROAD.

   The 2-year limitation prescribed for bringing an action for injuries due to failure to maintain a road in a condition reasonably fit and safe for travel, as added to the general highway law by an amendatory act which added sections to the chapter on recovery of damages against townships, cities and villages, applies also to provision imposing the same liability upon counties in such matters as applies to townships, cities and villages (PA 1909, No 283, ch 4, § 21, ch 22, §§ 1, 3; ch 22, §§ 6–8, as added by PA 1915, No 301).

2. STATUTES—TITLE OF ACT—CONSTITUTIONAL LAW—GENERAL HIGHWAY LAW—LIMITATION OF ACTIONS.

   The failure to mention a statute of limitations as to actions against a governmental unit for failing to keep its highways in a condition reasonably fit and safe for travel in the title of the general highway law does not render such provision as to limitation unconstitutional, where the title does state the

---

REFERENCES FOR POINTS IN HEADNOTES

[2] 50 Am Jur, Statutes, § 165 *et seq.*

purpose of the act in general terms (Const 1908, art 5, § 21; PA 1909, No 283, ch 22, § 8, as added by PA 1915, No 301).

Appeal from Ogemaw; Shaffer (John C.), J. Submitted October 8, 1958. (Docket No. 15, Calendar No. 47,375.) Decided December 3, 1958.

Case by Wayne Pfaff against Board of County Road Commissioners of Ogemaw County for personal injuries sustained in automobile collision. Dismissed on motion. Plaintiff appeals. Affirmed.

Peter C. Cicinelli and *van Benschoten & van Benschoten* (*Eugene D. Mossner*, of counsel), for plaintiff.

Smith & Brooker (*James K. Brooker*, of counsel) and *Randall B. Clemence*, for defendant.

EDWARDS, J. In his declaration dated October 31, 1956, plaintiff in this case sets forth that he suffered extremely serious injuries on November 6, 1953, when his automobile was struck head-on by another automobile traveling on the wrong side of the road as a result of defendant's failure to maintain the county road in question in a condition reasonably fit and safe for travel.

Subsequent to filing of declaration and answer, defendant filed a motion to dismiss the suit on the grounds that it was filed more than 2 years after the accident and, hence, was barred by the 2-year limitation contained in section 8 of chapter 22 of the general highway law.

The circuit judge granted the motion and plaintiff appeals to this Court, claiming the application of the 2-year limit, rather than the general 3-year statutory limit on tort actions (CLS 1956, § 609.13 [Stat Ann 1957 Cum Supp § 27.605]) was in error.

The provision relied upon by appellee and the circuit judge is contained in a section dealing with liability of townships, villages and cities for injuries due to failure to keep streets and highways, et cetera, under their jurisdiction reasonably safe and fit for travel, and providing for timely notice of claim as to these bodies. The last sentence of the section reads:

"All actions in court under this act must be brought within 2 years from the time said injury was sustained." CL 1948, § 242.8 (Stat Ann § 9.598).

Plaintiff founds his action, however, upon section 21 of chapter 4 of the general highway law (CLS 1952, § 224.21 [Stat Ann 1953 Cum Supp § 9.121]), the applicable portions of which follow:

"It is hereby made the duty of the counties to keep in reasonable repair, so that they shall be reasonably safe and convenient for public travel, all county roads, bridges and culverts that are within their jurisdiction and under their care and control and which are open to public travel. The provisions of law respecting the liability of townships, cities, villages and corporations for damages for injuries resulting from a failure in the performance of the same duty respecting roads under their control, shall apply to counties adopting such county road system."

This Court has previously held that the reference in the second of the sentences quoted above is to the liability section, section 1 of chapter 22 (CLS 1956, § 242.1 [Stat Ann 1957 Cum Supp § 9.591]), and through it to the duty section, section 3 of chapter 22 (CL 1948, § 242.3 [Stat Ann § 9.593]):

"This liability of townships, cities, villages, and corporations referred to in the portion of section 21 last quoted is created by section 1 of chapter 22 of this act, which 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, * * * 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 just damages, to be recovered in an action * * * on the case before any court of competent jurisdiction.'

"The duty mentioned in the section just quoted is imposed by section 3 of the same chapter, as follows:

" 'It is hereby made the duty of townships, villages, cities, or corporations to keep in reasonable repair, so that they shall be reasonably safe and convenient for public travel, all public highways, streets, bridges, sidewalks, crosswalks, and culverts that are within their jurisdiction and under their care and control, and which are open to public travel.' " *Ferguson* v. *County of Muskegon,* 181 Mich 335, 340, 341.

The pertinent language of section 21 of chapter 4, *supra,* and sections 1 and 3 of chapter 22, *supra,* was last enacted in PA 1909, No 283.* This act was a lengthy revision and consolidation of statutory provisions relating, among other things, so the title provided, to "the establishment * * * maintenance and use of the public highways." Chapter 4 of this act is entitled "County road law," and chapter 22 is entitled "Recovery of damages."

In 1915 this act was amended by the passage of PA 1915, No 301. The title of Act No 301 referred to adding "three new sections to chapter 22 of said act to be known as sections 6, 7 and 8."† The 2-year

* Note amendment in 1951 not relevant to this case (CLS 1956, § 242.1 [Stat Ann 1957 Cum Supp § 9.591]).

† CL 1948, §§ 242.6–242.8 (Stat Ann §§ 9.596–9.598).—REPORTER.

limitation was contained in the last of these sections.

As we have noted, the 2-year limitation is applicable to "all actions in court under this act." Appellant contends the words "this act" refer only to sections 6, 7 and 8, as added by amendatory Act No 301, PA 1915.

The fact that PA 1915, No 301, was an amendment to the preceding PA 1909, No 283, helps to preclude any such interpretation. So does our consideration of the 3 sections added, sections 6, 7 and 8, which are plainly interrelated with the whole of chapter 22. We believe that the legislature intended the limitation adopted in 1915 to apply both to sections 1 and 3 of chapter 22 establishing the general duty and liability of townships, villages, cities and corporations, and to actions against counties founded upon section 21 of chapter 4, in view of the plain reference in this last section to section 1 of chapter 22.

Appellant also asserts that the limitation is unconstitutional under the Michigan Constitution (1908), art 5, § 21, since such limitation is not specifically referred to in the title of the act. The title of the act states its purpose in general terms, and its constitutionality has been previously upheld as to this type of objection. *Housten* v. *Jewett,* 248 Mich 587; *Schnepper* v. *Thompson,* 264 Mich 691.

Affirmed. Costs to appellee.

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

AETNA INSURANCE COMPANY *v.* DETROIT & TOLEDO SHORE LINE RAILROAD COMPANY.

1. APPEAL AND ERROR—NONJURY CASE—COMMON PLEAS COURT.
   The decision of the common pleas court judge on a question of fact in a nonjury case should not be disturbed on appeal to circuit court, where testimonially supported.

2. RAILROADS—NEGLIGENCE—QUESTION FOR TRIER OF FACTS—AUTOMOBILES—CROSSINGS.
   Whether or not engineer and fireman were negligent in failing to stop train before reaching crossing on which plaintiff's subrogor's car had become stalled *held*, a question of fact for determination by trial court in nonjury case, where it appears train was traveling 20 to 25 miles per hour in city and engineer first saw the stalled car while some 1,400 to 1,500 feet away but did nothing about stopping until about half that distance when it was too late to avoid collision.

3. SAME—AUTOMOBILES—CONTRIBUTORY NEGLIGENCE.
   Motorist whose new car stalled at railroad crossing was not guilty of contributory negligence as a matter of law for failing to signal to the train of his danger while it was still possible for it to stop, under evidence showing that preoccupation of train crew with other matters would have precluded observation of the signal, that he did not know the stopping distance of the train, its speed or distance away or that he would be unsuccessful in his efforts to move the car.

4. SAME—OBSERVATION OF AUTOMOBILE AT CROSSING—NEGLIGENCE.
   The negligence of a train crew which fails to keep observing automobile setting on the tracks after having observed it in time to stop the train would be a question for the trier of the facts in an action arising out of the ensuing collision.

Appeal from Wayne; Neuenfelt (Lila M.), J. Submitted April 8, 1958. (Docket No. 3, Calendar No. 47,245.) Decided December 3, 1958.

REFERENCES FOR POINTS IN HEADNOTES

[2] 44 Am Jur, Railroads § 539.
Doctrine of last clear chance. 92 ALR 47, 119 ALR 1041.
[3] 44 Am Jur, Railroads § 570.

Case by Aetna Insurance Company, a foreign corporation, subrogee of Dan Stoyanovich, against the Detroit & Toledo Shore Line Railroad Company, a Michigan corporation, for property damage resulting from grade-crossing collision. Judgment for plaintiff in common pleas court. Judgment for defendant in circuit court. Plaintiff appeals. Reversed and remanded for entry of judgment for plaintiff.

Reginald S. Johnson, for plaintiff.

F. B. Henderson and *E. C. Opperthauser,* for defendant.

VOELKER, J. Appellant insurance company appeals from a judgment of the circuit court of the county of Wayne reversing a decision of the common pleas court for the city of Detroit, sitting without a jury, which granted judgment in its favor for property damage suffered by plaintiff's subrogor.

Plaintiff's proofs on its main case disclose that about 7:30 on the morning of October 4, 1955, the plaintiff's subrogor was driving his new 1956 Ford automobile east on Third street in Monroe, Michigan. When the car approached the tracks of defendant-appellee its motor stalled and died. The driver shifted the car into first gear and attempted to start the engine, whereupon the automobile moved onto the tracks, where once again it stalled. The driver then repeatedly attempted to start the motor, without success, although the engine did start momentarily one other time.

While the car was thus stalled on the tracks with its dead motor and the driver was continuing his efforts to get it to function, he observed the train of defendant-appellee approaching from his left from the north. When the driver first saw the train it was

at or somewhere north of Front street, which street runs parallel to and 2 blocks to the north of the street on which the driver was traveling. By deposition of the train crew obtained and introduced by plaintiff we learn that the train was then going 20 to 25 miles per hour. The engineer first saw the car of plaintiff's subrogor when it was "setting on the tracks" ahead of him and the engine was still some 1,400 to 1,500 feet away from the Third street crossing and before it had reached intervening Front street. The engineer testified he did not keep watching the car after he first saw it because it was common for auto drivers to stop or hesitate on or near the tracks, and moreover he and the fireman were then obliged to check certain block signal lights and the train order board. The crossing at which plaintiff's subrogor's auto was stalled had 4 sets of tracks.

The driver of the stalled auto did not signal the train at any time, but with the assistance of a passer-by continued his efforts to move his car off the tracks. This kept on until the engine had approached First street, described as one street north of and parallel with Third street, about 730 feet distant, when he leapt out of his car and ran for it. But it was then too late for a collision to be averted, the train traveling some 200 to 300 feet beyond the crossing and the point of impact.

Our record is not too clear just what the engineer and fireman were observing, if anything, just prior to these events, but it seems a fair inference from their testimony that both observed the motorist's danger at approximately the same time (when the driver fled his car), the fireman testifying that when he "hollered" to the engineer to put on the emergency brakes he then saw that they were on. It is clear that the fireman did not see the plight of the car and motorist till he shouted to the engineer; and it appears that both the engineer and fireman were pre-

occupied with other duties past a point where they could have avoided the collision.

Numerous grounds and issues are raised by the parties in their briefs, but the primary questions boil down to whether the auto driver may be said to have been guilty of contributory negligence as a matter of law and whether the testimony properly presented a question of fact on the issue of the railroad's negligence. The circuit court by its decision of reversal by necessary implication resolved one or both of these issues in defendant's favor. We shall accordingly discuss both.

With respect to the railroad's negligence we regard as significant that neither the engineer nor fireman took alarm or did anything until they saw the driver run from the car, at which time the train was at or near the First street crossing, upwards of 730 feet north of the point of impact. This inattention was explained, as noted, by the need to attend to other duties, as well as because of the fact that it was common for the train crew to observe autos standing at or near crossings. Did this present a situation from which the trial judge could have reasonably concluded that the defendant was negligent? We think it did. While it may be common to see a car standing at or near railroad tracks, we think it is considerably less common that the same car would have remained there unendangered for the length of time which elapsed since this car was first observed.

We also find untenable the claim of appellee that as a matter of law the driver of the automobile was guilty of contributory negligence for failing to signal to the train of his danger while it was still possible for the train timely to stop. Viewing the testimony in the light most favorable to plaintiff, it appears that even had the driver signalled, the admitted preoccupation of the train crew with other matters would have prevented any signal from being

observed. In short, even conceding arguendo, the possible negligence of the car driver, what he did or neglected to do appears not to have mattered, and therefore was not a contributing or proximate cause of this accident. At least this seems to be a reasonable inference from the testimony of the train crew.

Faced with what he was faced with the car driver had rapidly to make 3 choices: he could desert his car and run for it; he could stand by and try to signal the train; he could try to save his new car. He tried the latter course and failed. Not knowing the stopping distance of the train, the speed at which it was travelling, its exact distance down the track when it was first observed, that the crew had not discovered his plight, and, also, not knowing that he would be unsuccessful in moving his car, we do not think that it can be held that his actions amounted to contributory negligence as a matter of law. In our view it became instead a testimonially supported question of fact, and therefore we think the decision of the trial court sitting without a jury should not have been disturbed on appeal to circuit court.

Appellee cites as persuasive of its due care *Frost* v. *Milwaukee & N. R. Co.*, 96 Mich 470, but there it appears that the engineer did take alarm and apply the brakes as soon as he could reasonably be held to have suspected danger whereas in the instant case the train crew failed to take alarm until the train was within 730 feet of the same stalled auto it had seen much earlier, and when it was too late to stop. In the instant case the locomotive crew observed the stalled auto while the train was a considerable distance from the crossing, and when it could have timely stopped, but because both crew members diverted their attention to other matters and both failed to make a continuing observation of the stalled auto, the train had passed the point of ef-

fective stopping when they saw its driver run for safety.

If the engineer, after performing his other duties, saw the same auto he had observed earlier still "setting on the tracks" at a point where he could still effectively stop, and still did nothing, that would seem to present a clear question of fact on the issue of the defendant's negligence; if, as appears more likely from his testimony, he did not again look at the "setting" automobile until it was too late, that likewise would seem to present a question of fact on the issue of its negligence.

We are aware that train crews must occasionally make observations of necessary railroad signals as well as of persons and vehicles at crossings. But their failure in this case to take any precautions whatsoever for the safety of the driver of the auto and the auto itself after first observing it stopped on or near the Third street tracks in our opinion raised a question of fact for the determination of the trial judge as to the train crew's negligence. It follows that the circuit court, sitting as an appellate court, erred when, as a matter of law, it apparently found the railroad free of any negligence. Defendant's negligence may be predicated among other things on the failure of at least one member of the locomotive crew to keep a weather eye on the car after they first saw it in a place of apparent or probable danger. This is not to say or hold that train crews must apply their emergency brakes every time they see a car stopped at or near the tracks ahead of them; what we do hold is that failure here to pay any further heed to such a car until it was too late to avoid hitting it raised a question of fact on the issue of the railroad's negligence. In any event we cannot bring ourselves to join the learned circuit court in saying, in effect, that as a matter of law its conduct amounted to an exercise of reasonable care.

The judgment of the circuit court is therefore reversed and the cause remanded for restoration of the judgment for plaintiff in the common pleas court, with costs to appellee.

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

CUTLIFF *v.* DENSMORE.

1. BOUNDARIES—SHORE LINE OF WATER-FRONT PROPERTY—GOVERNMENT MEANDER LINE.

   The shore line of inland water-front property, as represented on government plats by a meander line, is the boundary of the property, notwithstanding its subsequent advancement or recession.

2. WATERS AND WATERCOURSES—INLAND LAKES—CHANGING SHORE LINE—GOVERNMENT MEANDER LINE.

   Owners of adjacent inland lake-front property are entitled to the just proportion of shore line based on meander line of government plats as shore line advances or recedes.

3. PLEADING—REPLY—NEW THEORY—COURT RULES.

   Intent of court rule providing that plaintiffs' reply should be used to answer new matter alleged in defendants' answer was intended to permit a reply to new matter in avoidance of plaintiff's claim, not merely in contradiction of it but does not permit plaintiff to set up a new theory to support their cause (Court Rule No 24 [1945]).

REFERENCES FOR POINTS IN HEADNOTES

[1] 56 Am Jur, Waters § 477 *et seq.*; 8 Am Jur, Boundaries § 30.
Status of title of land bordering on Great Lakes [and State inland lakes], between meander line and shore line, originally bare or subsequently made bare by reliction or other natural gradual process. 71 ALR 1256.
[2] 56 Am Jur, Waters § 495.
[3, 4] 41 Am Jur, Pleading § 178.
[5, 6] 18 Am Jur, Ejectment §§ 101, 102.

4. SAME—REPLY—EJECTMENT—COURT RULES.
   Plaintiffs' reply to defendants' answer in action of ejectment was properly stricken upon defendants' motion therefor, where declaration was based on deed to disputed land and reply set up a claim of title in the accreted lands by adverse possession, since the matter in the reply could not properly be considered (Court Rule No 24 [1945]).

5. EJECTMENT—AMENDMENT OF DECLARATION NUNC PRO TUNC—DISCRETION OF COURT.
   The grant or denial of a motion to amend a declaration in ejectment *nunc pro tunc* so as to include claim of title by adverse possession was discretionary with trial court.

6. SAME—AMENDMENT OF DECLARATION NUNC PRO TUNC—DISCRETION OF COURT.
   Denial of motion to amend declaration in action of ejectment *nunc pro tunc held,* not an abuse of discretion on part of trial judge, where motion was made over 4 years after declaration was filed and would have caused undue surprise or hardship to defendants, the declaration having been based on a deed claimed to have conveyed the accreted land and the amendment setting up claim of adverse possession.

7. ADVERSE POSSESSION—TACKING POSSESSION—DEEDS.
   Claim of adverse possession of accreted lands, which had been conveyed to plaintiffs before commencement of ejectment action, *held,* not substantiated, where plaintiffs rested their claim upon 6 years of personal possession but failed to show that deed from grantor whose possession they sought to tack made an express reference to or description of the disputed property.

Appeal from Cheboygan; Fenlon (Edward H.), J. Submitted October 7, 1958. (Docket No. 5, Calendar No. 47,450.) Decided December 3, 1958.

Ejectment by Neal Cutliff and Lola Cutliff against U. Harry Densmore and Wauneta Densmore in respect to lands on shore line altered by accretion. Judgment for defendants. Plaintiffs appeal. Affirmed.

John R. Monaghan, for plaintiffs.

Jennings, Fraser, Parsons & Trebilcock (*Eugene F. Townsend, Jr.,* of counsel), for defendants.

VOELKER, J. This case involves accretion* somewhat complicated by "decretion." In the original government plat, made in 1855, the 4 lots in question abutted each other roughly in the shape of a block capital letter L. Lot 1, the northernmost of the 4 lots, was at the top of the vertical portion of the L. Lot 2 abutted lot 1 immediately to the south to form roughly the center of the vertical portion of the L. Lot 3 abutted lot 2 immediately to the south to form the base of the vertical portion of the L. Lot 4 abutted lot 3 immediately to the east to form the sole horizontal portion of the L.

In 1855 there was a small bay in Burt lake lying roughly adjacent to the inner angle of the L formed by the 4 lots in question. Because of the scalloped shore line of the bay each lot, including lot 3, had some varying portion of the shore line of Burt lake as one of its boundary lines. Since the original plat was made the contour of the bay has been changed by the century-long shifting of sand, augmented by wind and waves, causing an accretion of land between the present shore line and lots 3 and 4, and, also, a measure of what we shall call decretion as to the others. As the shore line now stands, instead of following roughly the shape of an L as it did origi-

* In order to present this fairly complicated fact situation as simply and concisely as possible we have used the term accretion in its broad general meaning (rather than the more precise terms of alluvion, reliction or dereliction) to explain how the land in question was created. See Accretion, Black's Law Dictionary (4th ed), p 36. To understand this opinion we think it is sufficient to know that new land was created by the gradual and natural change in the contour of the original shore line of a lake. Notwithstanding the precise causes of the change, the legal principles involved are the same.

nally, the shore line now cuts almost straight across diagonally from the northern tip of the L to the easternmost end of the base of the L. If we have successfully projected this pictorial description, it will be noted that the shore line has receded largely from the inner angle of the L and sharply reduced the total shore line in so doing. In fact at its greatest point the shore line receded approximately 750 feet from such inner angle.

The present controvery began when appellees Harry and Wauneta Densmore the present owners of the north 1/2 of lot 3, had a surveyor stake out their portion of the accreted land. He did so by surveying the present shore line and then dividing it exactly among the 4 lots in the same proportion that each lot bore to the original shore line as depicted by the meander line on the original government plat. In order to give each lot its correct share of the existing shore line the surveyor drew 2 lines running obliquely in a northeasterly direction from the 2 outer points of the original shore line of lot 3 to the present shore line. He then staked out the land according to his survey and appellees took possession.

Plaintiff-appellants, the present owners of lot 4, brought this action in ejectment December 4, 1950, claiming title to the premises through a deed dated October 19, 1945. It is their theory that the surveyor should have extended the western boundary line of lot 4 straight north to the lake, giving them, as owners of lot 4, all the land lying east of it; and that he should further have continued the north-south and northerly east-west boundary lines of lot 3 until they intersected in the accreted land. To have done so would have left lot 3 with but an extremely small proportion of the accreted lands and moreover would have left both land and the owners thereof high and dry with no access whatever to the lake.

An answer was filed on behalf of the defendants on March 22, 1951. Substitution of attorneys occurred for both parties, and the case was not finally heard by the trial court until September 14, 1955. On August 2, 1955, shortly before the trial, plaintiffs' new attorney filed a reply to the answer filed by the defendants' original attorney back in 1951. This reply for the first time sought to set up a claim of title in the accreted lands by adverse possession. Upon the trial defendants' counsel moved to strike the reply as not being timely filed and, also, because it set up a new cause of action. Plaintiffs countered by moving to amend their declaration *nunc pro tunc* to embrace this new claim of title. The court reserved judgment on the motions and on September 21, 1955, handed down an opinion upholding the motion of defendants' counsel to strike the reply and denying the motion of plaintiffs' counsel to amend the declaration. Subsequently (on December 21, 1956) the trial court entered judgment holding that the defendants were the owners of the property in dispute.

The first issue presented is whether the trial court erred in holding, as it did, that the defendant-appellees acquired title to the disputed property by accretion. In Michigan the law is clear that where property abuts a shore line, that shore line (as represented on government plats by a meander line) is the boundary of the property notwithstanding its subsequent advancement or recession. Thus in this case where the shore line receded approximately 750 feet the defendants acquired by accretion their just proportion of all of the land between the old and the new shore lines. For an exhaustive discussion and review of this subject, see the leading case of *Hilt* v. *Weber,* 252 Mich 198 (71 ALR 1238).

Let us test the plaintiffs' claim to the property by reversing the situation. We think it would be just

as logical for the defendant-owners of lot 3 to have extended their boundaries straight east to the lake as it was for the plaintiff-owners of lot 4 to seek to extend their boundaries straight north to the lake. In either case the result would be the same: one side would have the bulk of the accreted property, the other little or nothing. An acceptance of appellants' theory would result in a wild race for accreted lands, with victory going to the fleetest; the first property owner who thus boldly undertook to extend his lot line and filed a declaration in ejectment against the others would get everything and those less diligent (or possibly less self-seeking) might be left with no access to the water whatever, as here. Manifestly such a race should not be encouraged by the courts, for many reasons, and presumably our learned predecessors had precisely this in mind when they originated the rule of just proportion so clearly expressed in *Hilt* v. *Weber, supra.*

The second issue in this case is: Did the trial judge err in granting defendant-appellees' motion to strike the reply and at the same time denying plaintiffs' motion to amend their declaration *nunc pro tunc*? Michigan Court Rule No 24 (1945) says that a reply should be used to answer new matter alleged in the answer. The intent of that rule was spelled out in *Dramis* v. *Dunbar,* 280 Mich 300, 304, 305, which says:

"The court rule was intended to simplify, not to complicate the practice, to define the issue, not to confuse it by requiring court and counsel to balance each allegation against each other allegation in the pleadings on apothecary's scales. The rule requires 'new matter' to be answered, not every new allegation of fact. When a plaintiff sets up the circumstances of a transaction, defendant's statement of a different set of circumstances calls for no reply by plaintiff unless defendant's answer alleges facts

which would defeat plaintiff's cause of action even though he proved all the allegations of his declaration. *In substance, 'new matter' means matter in avoidance of plaintiff's claim, not merely in contradiction of it."* (Italics added.)

The answer in this case did not contain new matter; rather it simply denied the allegations in plaintiffs' declaration and alleged facts to support those denials. Plaintiffs' subsequent claim of title by adverse possession therefore was not properly a replication to the answer but rather a new theory to support their cause and thus should have been included in the declaration. It follows that the matter in the reply could not properly be considered and the court was correct in granting defendants' motion to strike.

The grant or denial of plaintiffs' motion to amend their declaration *nunc pro tunc* so as to include their claim of title by adverse possession was discretionary with the trial court. The trial judge thought that granting the motion at the time it was made (over 4 years after the declaration was filed) would have caused undue surprise or hardship to the defendants. There was ample evidence in the record to support that conclusion, and we find no abuse of discretion by the trial judge in denying the motion to amend. See, generally, *Jackson City Bank & Trust Co.* v. *Blair,* 333 Mich 399 (32 ALR2d 920), and cases therein cited.

We may nevertheless add that plaintiffs, who had the opportunity to give their evidence below, rested their claim of adverse possession upon 6 years of personal possession, plus the prior possession of their grantor, without showing an express reference to the disputed property in their deed from their grantor. In Michigan the law is clear that where one seeks to tack the prior adverse possession of his grantor he must show an express

reference to or description of the disputed property in the grantor's deed. *Jeffries* v. *Sheehan,* 242 Mich 167. Having failed to do so the plaintiffs in any event failed to prove their claim of title by adverse possession, thus rendering any possible error of the trial court without prejudice and of no consequence.

The judgment of the trial court is affirmed. Costs to appellees.

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

TROFF *v.* BOEVE.

1. REFORMATION OF INSTRUMENTS—MISTAKE—EVIDENCE.
   Reformation of a deed will not be granted upon the ground of a mistake in drafting the instrument unless the mistake is proven by clear and satisfactory evidence and it is one that is mutual and common to both parties to the contract.
2. SAME—EVIDENCE—DRIVEWAY—EASEMENTS.
   Evidence adduced in suit to reform deeds for purpose of confirming existence of driveway on property not included within description but immediately adjoining alongside tract conveyed to plaintiffs and hitherto used by plaintiffs *held,* insufficient to disturb decree of trial court, the phrase "driveway on north to be used as long as available," contained in a preliminary agreement for sale to plaintiffs' predecessor in title even indicating there was no easement but a permissive and terminable use of such driveway.
3. FRAUDS, STATUTE OF—CONVEYANCES OF REAL ESTATE.
   Statutory requirement that conveyances of real estate must be in writing bars passage of an easement to a dominant estate unless a right to thus use it has been made appurtenant to the granted premises, or is expressly mentioned in the conveyance (CL 1948, § 566.106).

REFERENCES FOR POINTS IN HEADNOTES

[1] 16 Am Jur, Deeds §§ 43–46; 45 Am Jur, Reformation of Instruments § 45 *et seq.*

[3] 49 Am Jur, Statute of Frauds § 149 *et seq.*

4. REFORMATION OF INSTRUMENTS—DRIVEWAY—NEGLIGENCE.

Reformation of deed to plaintiffs to include part of driveway alongside their lot on land belonging to defendants who acquired their property upon a clear abstract of title which contained no mention of any easement will not be decreed, where plaintiffs themselves had negligently accepted a deed containing no references to an easement although their transferor's agent had orally represented the driveway to be a joint one.

5. DAMAGES—EVIDENCE.

Evidence presented in suit for reformation of deeds to confirm existence of driveway *held,* insufficient to support plaintiff's alternative claim for damages in case reformation were denied, the proper measure being the difference between the value of the property as is and the value if it had been as represented.

Appeal from Kalamazoo; Davis (Morris K.), J., presiding. Submitted October 8, 1958. (Docket No. 16, Calendar No. 47,797.) Decided December 3, 1958.

Bill by Garrett J. Troff, Marjorie S. Troff, Bert M. Blow and Thelma M. Blow against John Boeve, Gertrude S. Boeve, Jacob Mannes, Mildred C. Mannes, Joseph Bennison, Belle E. Bennison and First Federal Savings & Loan Association of Kalamazoo to reform deeds for purpose of confirming the existence of a driveway. Bill dismissed. Plaintiffs appeal. Affirmed.

James Thomas Sloan, Jr., for plaintiffs.

Williams & Williams (*Lewis R. Williams, Jr.,* of counsel), for defendants Boeve.

Schaberg & Schaberg (*John C. Schaberg,* of counsel), for defendants Mannes.

Richard H. Morris, for defendants Bennison.

Farrell, Folz, Paulson, Bennett & Palmer, for defendant First Federal Savings & Loan Association of Kalamazoo.

VOELKER, J. Prior to December 1, 1948, defendants Jacob Mannes and Mildred C. Mannes owned property situated on the west side of south Westnedge avenue in the city of Kalamazoo and described as lot 1 and the north 1/2 of lot 3 of Potts Addition to the village of Kalamazoo. On that date they divided the property into parcels A and B and sold parcel B to Joseph and Belle Bennison on land contract. Subsequently they (Jacob and Mildred Mannes) conveyed their vendors' interest in parcel B to the First Federal Savings & Loan Association of Kalamazoo by warranty deed, at which time the Bennisons signed an agreement that they accepted the premises in their present condition and that there were no defects with respect thereto.

On April 26, 1951, Jacob and Mildred C. Mannes sold parcel A and turned over possession thereof to the defendants John and Gertrude S. Boeve on land contract, which contract is now in full force and effect.

On November 24, 1952, Joseph and Belle Bennison assigned their purchasers' interest in their land contract for parcel B to the plaintiffs and on July 7, 1953, the plaintiffs received a warranty deed to said parcel B from the First Federal Savings & Loan Association.

The present litigation grows out of the fact that a driveway exists along the southerly portion of parcel A, and lies north of parcel B, which driveway is presently used by the parties in possession of parcels A and B in going to and from the rear portion of their respective premises. On August 28, 1948, at the time of the Mannes' sale to the Bennisons of parcel B, the preliminary agreement for the sale thereof provided, among other things, as follows: "Driveway on north to be used as long as available."

On May 19, 1953, the defendants John and Gertrude Boeve caused to be served upon the plaintiffs a written notice that in the near future the defendants, John and Gertrude Boeve, planned to extend their store premises to cover the land now occupied by the driveway and informing the plaintiff, Garrett Troff, that he should make arrangements for other means of getting in and out of the rear portion of the house owned by the plaintiffs, and further suggesting that he should not add onto the building on his premises to the extent that he could not get in and out of the same on the north side thereof. In response to this communication, the defendants Boeve, through their attorneys, received a letter from the plaintiff, Garrett J. Troff, dated May 22, 1953, informing the defendants that it was the plaintiffs' understanding that this particular driveway had become a public thoroughfare. At a subsequent conference the plaintiffs made other claims of right in and to said driveway, of which more presently.

No settlement appearing likely the plaintiffs filed a bill of complaint praying that the deeds in the chain of title to this property be reformed so that the northerly boundary thereof would run to the center of the driveway and in the alternative that they might be awarded damages. To support this prayer the plaintiffs claimed mistake on the part of the Bennisons and both mistake and fraud on the part of the Mannes.

After taking proofs the chancellor found that the material facts charged in the bill of complaint were not proven and that the plaintiffs were not entitled to the relief prayed. This appeal has resulted.

We find that reformation of a deed or land contract will not be granted in this State upon the ground of a mistake in drafting unless the mistake is proven by clear and satisfactory evidence and it is one

that is mutual and common to both parties to the contract. See *Robertson* v. *Smith,* 191 Mich 660 (Ann Cas 1918D, 145). In their brief and appendix the appellants have pointed to certain evidence (testimony by Joseph Bennison that Mannes' agent allegedly stated orally that the driveway was joint and that he [Bennison] purchased the property in reliance thereon). The agent did not testify. Plaintiffs claim this shows that a mistake had been made or fraud committed in the sale of the land from defendants Mannes to defendants Bennison. We are not persuaded that this evidence is alone sufficient to upset the decree of the learned chancellor below, who was in a better position than we are now to draw inferences and conclusions from this and other evidence.

We further think that the words in the Mannes-Bennison preliminary sales agreement, already quoted, far from helping the plaintiffs' cause, should have put the Bennisons and anyone seeking to depend thereon on notice that there was no easement or joint ownership, but rather that the user of the driveway was temporary and permissive only and might be terminated whenever the driveway was no longer "available." Words of similar import are commonly employed to negative and prevent the development and growth of easements or other prescriptive rights.

Appellants also claim mistake in the contract between themselves and defendants Bennison. Without so deciding we will accept that Bennisons' agent told plaintiffs that the driveway was joint and that they in turn relied thereon. We are still left with the question of whether or not plaintiffs were warranted in relying upon the alleged oral statements of Bennisons' agent, and if not, whether they are thereby barred from the relief sought.

The Michigan statute of frauds,* with which the plaintiffs—one of them an attorney—must be held cognizant, says that all conveyances of realty must be in writing. In that regard we said in *Burling* v. *Leiter,* 272 Mich 448, 454 (100 ALR 1312):

"Under the statute of frauds, conveyances of real estate must be in writing. CL 1929, § 13411.* Nothing will, therefore, pass as an easement to a dominant estate unless a right to thus use it has been made appurtenant to the granted premises, or is expressly mentioned in the deed conveying the same as intended to be conveyed thereby."

It is further urged that notwithstanding the knowledge of the several plaintiffs that the easement over the driveway must be in writing, their reliance upon the oral statement of defendants' agent could result in reformation of the deed in some cases. Possibly, but in this case there is also involved the property and rights of an innocent third party—the Boeves. If reformation of the deed is granted here the easement must be constructed over the property of defendants Boeve, who acquired such in good faith reliance upon a clear abstract of title which contained no mention of any easement. It is at this point that appellants' actions (accepting a deed that contained no reference to the alleged easement) becomes vital. We think this was negligent of them and that in the light of that negligence the trial court was correct in denying the relief prayed. That one of the plaintiffs was a lawyer does nothing to change our view.

Regarding appellants' alternative claim of damages we believe the decision of the chancellor was correct in saying:

"There was no proper proof of damages. If the plaintiffs were entitled to recover * * * the prop-

* CL 1948, § 566.106 (Stat Ann 1953 Rev § 26.906).—REPORTER.

er measure of damages is the difference in the value of the property as is and the value if it had been as represented."

For further discussion of this subject see: *Wolbrink* v. *Sorr,* 341 Mich 512; *Paquin* v. *Van Houtum,* 343 Mich 111.

The decree of the trial court is affirmed. Costs to appellee.

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

WORLEY *v.* McCARTY.

1. VENDOR AND PURCHASER—TITLE INSURANCE—TIME.
   Preliminary sales agreement providing that the vendors should furnish purchaser as soon as possible an abstract of title or a title insurance policy contemplated that a reasonable time would be allowed the vendors in which to obtain title insurance.
2. SAME—RESCISSION—TITLE INSURANCE.
   Vendors of hotel property who procured title insurance policy within approximately a month of time purchasers found fault with the title as disclosed by the abstract and requested title insurance policy *held,* to have been ready to furnish such policy within reasonable time contemplated by preliminary sales agreement, hence, purchasers were not entitled to rescind such agreement and recover deposit money.
3. SAME—FORFEITURE OF DEPOSIT—STIPULATED DAMAGES.
   Provision of preliminary sales agreement relative to disposition of deposit in event the purchaser failed to complete the deal

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 55 Am Jur, Vendor and Purchaser § 165.
[2] 55 Am Jur, Vendor and Purchaser § 585 *et seq.*
[3, 5] 55 Am Jur, Vendor and Purchaser § 525; 15 Am Jur, Damages § 248.
Measure of damages for purchaser's breach of contract to buy real property. 52 ALR 1511.
[6, 7] 15 Am Jur, Damages § 240 *et seq.*

is construed to be stipulated damages notwithstanding declaration that deposit is "forfeited," where from the whole contract, the subject matter and the situation of the parties, such appears to have been their intention so to stipulate and there is present some difficulty in ascertaining the actual damage.

4. DAMAGES—BREACH OF CONTRACT—FORFEITURE.

The proportional strength of the presumption that parties to a contract intended to provide for liquidated damages for breach of contract rather than forfeiture of deposit made is based upon the measure of difficulty in ascertaining the actual damage by proof.

5. VENDOR AND PURCHASER—FORFEITURE OF DEPOSIT—UNJUST ENRICHMENT.

Forfeiture of deposit of $4,000 on hotel property for purchasers' failure to complete contract when vendors complied therewith by procuring title insurance policy *held,* stipulated damages and not to have resulted in unjust enrichment of the vendors who sold the property for $2,000 less and were obligated to pay balance of deposit to brokers.

6. CONTRACTS—STIPULATION AS TO DAMAGES FOR BREACH.

The parties to a contract can stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement, such stipulation being enforceable if the damages from a breach are uncertain and difficult to ascertain at the time the contract is executed and the amount stipulated is reasonable with relation to the possible injury suffered.

7. SAME—LIQUIDATED DAMAGES.

A provision for liquidated damages for breach of contract will be regarded as enforceable, and not as a penalty, where it embraces the principle of just compensation for the loss or injury actually sustained.

Appeal from Hillsdale; Arch (Charles O.), J. Submitted October 9, 1958. (Docket No. 25, Calendar No. 47,653.) Decided December 3, 1958.

Bill by Alvin D. Worley and Loretta Worley against Richard E. McCarty, Patricia M. McCarty, J. D. Klires Realty, Inc., a Michigan corporation, J. D. Klires and Nina Hubbard for accounting and repayment of deposit on offer to purchase real estate. Bill dismissed. Plaintiff appeals. Affirmed.

Arthur G. Lyon, for plaintiffs.

Prettie & McIntyre (*Kenneth G. Prettie,* of counsel), for defendants.

VOELKER, J. Plaintiff-appellants in this case seek the return of a $4,000 deposit which they gave the 2 defendant real-estate brokers on September 17, 1955, in connection with a preliminary sales agreement to purchase a certain hotel property in the village of Jonesville, Hillsdale county, Michigan, and described therein simply as the "Jonesville Inn," no legal description being given. The agreement provided that:

"As evidence of title, seller agrees to furnish purchaser as soon as possible, a complete abstract of title and tax history. * * * In lieu thereof, a policy of title insurance * * * guaranteeing the title in the condition required for performance of this order, will be accepted."

The agreement further provided:

"If a marketable title can be conveyed, the sale shall be consummated within 5 days after delivery of such abstract or policy. If an abstract is furnished and an objection is made to title, and notwithstanding, a Burton Abstract and Title Company policy of title insurance, insuring the title in the condition required by this offer, can be obtained, the sale shall be consummated within 5 days after delivery of such policy."

It was further provided that the 2 real-estate brokers negotiating the deal were to share a commission of $4,000 and that "If the deposit money is forfeited for nonperformance by purchaser, the seller agrees that 1/2 of such deposit shall be paid to the broker * * * for services rendered."

It was further agreed that the purchasers would timely complete the purchase "or forfeit to the seller the deposit made as liquidated damages."

The abstract was furnished and plaintiffs subsequently attempted to rescind the agreement by claiming that the title was not marketable because a portion of the building (2 rooms on the second floor) extended over and was physically a part of the store property of a third person, and that title insurance was not available. Upon the defendants' failure to consent to the attempted rescission and return the deposit, the plaintiffs commenced this action by filing a bill of complaint on April 9, 1956, praying for an injunction to restrain any attempted forfeiture of the deposit money by the defendants, for an accounting, and for judgment against the defendants for said money. After an extensive hearing the trial court decreed that the plaintiffs' bill of complaint should be dismissed, and that its own temporary injunction of the above-mentioned forfeiture which had been issued pursuant to the prayer of the bill should be dissolved. From that decree the plaintiffs appeal. Further facts will be disclosed as this opinion proceeds.

The case involves 2 main issues: 1. Were the plaintiffs warranted in rescinding the agreement to purchase? 2. Was the provision for forfeiture a penalty and were the seller-defendants unjustly enriched thereby?

As noted, the plaintiffs agreed to complete the purchase upon delivery of an abstract showing a marketable title or in lieu thereof a policy of title insurance covering the property in question. An abstract of title was submitted to plaintiffs which they claimed showed the property was not marketable. Subsequently on November 17, 1955, they requested a policy of title insurance to cover the property. After considerable effort and negotiations on

December 19, 1955, the defendant-sellers notified plaintiffs that they had procured an unequivocal commitment of title insurance on the property from the company named in the agreement "that would fully insure the title" and requested completion of the purchase within 15 days.

We think that the agreement contemplated that a reasonable time would be allowed to the sellers in which to obtain title insurance, when requested by the buyers. It is our further opinion that in the circumstances the title insurance commitment was procured within such a reasonable time and, therefore, the plaintiff-appellants had no valid cause to rescind the contract to purchase. We further think that the interim actions of the plaintiffs—of which more presently—obviated the necessity for delivery to them by sellers of the actual policy, as provided in the agreement.

We note that during the time of their attempted rescission the plaintiffs were already negotiating for the purchase of another hotel, which they subsequently purchased. We further note that after requesting title insurance the plaintiffs made a down payment on this other property without notifying defendants or waiting for the defendant-sellers to complete their good-faith negotiations for the requested policy on the Jonesville Inn. We also note that the plaintiff Alvin Worley had earlier visited the Jonesville Inn on 2 occasions and examined it carefully. We further note that the long and rather detailed mortgage and other history of this venerable hotel property discloses no prior question raised as to marketability. In any case the defendant-sellers appear to have stood ready to furnish all that the purchase agreement called for, and possibly more.

In his findings and opinion the learned chancellor aptly summed up the situation as follows:

"The court cannot escape the feeling but what plaintiffs are sick of their bargain for one reason or other and are attempting to void it by excuses which have no creditable basis either in fact or in law. In the first place, the agreement provided that either an abstract of title, duly certified to date, and showing merchantable or marketable title would be acceptable on that score; or, in lieu thereof, title insurance * * * would likewise be acceptable. It now appears, after a full review of the evidence, that both were available. Then plaintiffs come up with the idea that 2 rooms are set out to the east of a store below, and that there was a question as to whether or not they were included in the conveyance, and whether or not there was any assurance that they would get title to them along with the inn and the furnishings therein. Upon being assured that such was the case, they still declined to accept and it can only be reasonably inferred that they were no longer interested in going through with the transaction and were hoping, by decree of this court, to get all or a part of their deposit refunded. The court is not inclined to that proposition and finds it entirely without merit for the reasons herein given."

Having decided that the commitment of title insurance satisfied the condition of the purchase agreement we do not think it is necessary for us to engage in any further discussion of the subject of marketability. We turn now to the question of forfeiture.

We think it well to preface our discussion of the question of forfeiture of the $4,000 deposit by quoting the remarks of Justice CHRISTIANCY in the leading case of *Jaquith* v. *Hudson,* 5 Mich 123 at 138:

"Thus, though the word 'penalty' be used * * * or 'forfeit' * * * or 'forfeit and pay' * * * it will still be held to be stipulated damages, if, from the whole contract, the subject matter, and situation of the parties, it can be gathered that such was their

intention. And in proportion as the difficulty of ascertaining the actual damage by proof is greater or less, where this difficulty grows out of the nature of such damages, in the like proportion is the presumption more or less strong that the parties intended to fix the amount."

In this case the parties stood in a relatively equal bargaining position when they entered into the contract. Thus when they determined and provided that the $4,000 deposit should be forfeited as liquidated damages in the event that the contract of sale was not completed we think it must be assumed that they considered that to be a fair amount. With this in mind, coupled with the actual situation appearing in the record (ultimate sale of the hotel property at $2,000 less, the provision for the 2 brokers who had already done their work, and the necessary legal expenses incurred in this litigation), we agree with the trial court that the deposit was not a penalty and that the forfeiture thereof rather manifestly did not result in any unjust enrichment to the defendants as alleged in the bill of complaint.

Headnotes 5 and 6 of Mr Justice KAVANAGH's opinion in *Curran* v. *Williams,* 352 Mich 278, state the matter succinctly:

"The parties to a contract can stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement, such stipulation being enforceable if the damages from a breach are uncertain and difficult to ascertain at the time the contract is executed and the amount stipulated is reasonable with relation to the possible injury suffered."

And

"A provision for liquidated damages for breach of contract will be regarded as enforceable, and not as a penalty, where it embraces the principle of

just compensation for the loss or injury actually sustained."

The decree of the trial court is affirmed. Costs to appellees.

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

FLAJOLE *v.* GALLAHER.

1. ESTATES—ALIENABILITY.
   The law favors the free alienability of land.
2. SAME—ALIENABILITY—RESTRICTIONS.
   Restrictions on the alienability of land are not generally favored and will not readily be enlarged or extended by construction, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen at time restriction was written.
3. DEEDS—INTENT.
   The intent of the parties to a deed must, where possible, be drawn from the 4 corners of the instrument.
4. SAME—CONDITIONS SUBSEQUENT—AMBIGUITY—PAROL EVIDENCE.
   Provision of deed to defendant's predecessor in title that the land was "to be used for the erection of a kiln for drying chicory roots, and if not used for said purpose, then the title to said land shall revert to" the grantor *held*, not so ambiguous as to permit the introduction of parol evidence.
5. SAME—CONDITION SUBSEQUENT—CHICKORY KILN—RIGHT TO RE-ENTRY.
   Provision of deed that the land was "to be used for the erection of a kiln for drying chicory roots, and if not used for said purpose, then the title to said land shall revert to" the grantor contained a single, plain condition that such a kiln should be erected on the land but was not subject to the construction that such a kiln would have to be used for such purpose into the indefinite future, hence, where kiln erected was destroyed some 35 years later, and not replaced, grantor's sole heir was not entitled to re-enter for condition broken.

REFERENCES FOR POINTS IN HEADNOTES

[4, 5] 19 Am Jur, Estates §§ 80, 83; 33 Am Jur, Life Estates, Remainders, and Reversions § 207 *et seq.*

Appeal from Bay; Louis (David R.), J. Submitted October 10, 1958. (Docket No. 34, Calendar No. 47,623.) Decided December 3, 1958.

Ejectment by Ellen Flajole against James L. Gallaher and Richard Bachelder, copartners doing business as Gallaher and Bachelder, and Consumers Power Company, a Maine corporation, to secure possession of premises deeded upon a condition. Case dismissed on motion. Plaintiff appeals. Affirmed.

Milton E. Higgs and *Karl K. Leibrand,* for plaintiff.

Smith & Brooker (*H. P. Graves* and *B. E. Hagen,* of counsel), for defendant Consumers Power Company.

Bartlett, King & Learman for defendants Gallaher and Bachelder.

VOELKER, J. Back in 1911 one John McGuiness sold the property in question to the National Chicory Company, the deed to which contained the following provision:

"It is understood that the land herein described is to be used for the erection of a kiln for drying chicory roots, and if not used for said purpose, then the title to said land shall revert to said first party."

Shortly after purchasing the land the National Chicory Company built such a kiln, which was operated until 1945 when it was accidentally destroyed by fire. Since that time the kiln has not been rebuilt and the defendants, who are the present owners of the property, concededly have no intention of building or operating any kiln on the premises. As a result the plaintiff-appellant (the sole heir of John Mc-

Guiness) brought this suit in ejectment, claiming that there had been a violation of the provision quoted above, and that, hence, the title to the property had reverted to her and she was entitled to possession thereof.

Defendants filed a motion to dismiss plaintiff's declaration on the ground, among others, that it failed to state a cause of action. The trial judge granted defendants' motion to dismiss and the plaintiff has appealed his decision.

Plaintiff-appellant claims that the case should not have been dismissed on the pleadings because the above-quoted provision on its face created an ambiguity concerning the intent of the parties, thus giving her the right to present extraneous evidence to show their true intent. Accordingly, the single issue to be discussed in this opinion narrows itself to whether the above-quoted provision is sufficiently unclear concerning the intent of the parties to allow the plaintiff to press her suit and present evidence from outside the deed to support her claim.

It should be noted, as a preface to this discussion, that the law favors the free alienability of land. Restrictions thereon are not generally favored and will not readily be enlarged or extended by construction. See *Putnam* v. *Ernst,* 232 Mich 682.

As phrased in 26 CJS, Deeds, § 163, pp 1102, 1103:

"The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written."

In the case before us the original parties clearly said that *a* kiln should be erected. That one was erected and operated for a substantial period of time

is admitted. Had such a kiln not been built the grantor would doubtless have had a right of re-entry for condition broken. The plaintiff-appellant now claims that the instrument is so ambiguous that a second condition could and should be read into it, that is, that the kiln had continuously to be operated and that upon any cessation of such operation the property would revert to the grantor or his heirs. We fail to see any such ambiguity in the deed before us requiring such an interpretation.

We do not hold that there is no possibility of semantic ambiguity in the above-quoted provision. There is, and the unhappy fact is that the possibility of such an ambiguity lurks in almost every written instrument devised by man; it is indeed one of the dilemmas of language; but to hold that this ambiguity is actionable and is thus sufficient to open the door to parol evidence to determine the intent of the parties would be in effect to dissolve the salutary rule that where possible the intent of the parties must be drawn from the 4 corners of the instrument. This we do not intend to do.

The issue in cases of this nature is not whether there is any possible ambiguity, but whether any ambiguity which arguably may exist is, on its face, so palpable and so grave that recourse must be had to explanation lying without the instrument. Stated another way, if one seeks admission of parol evidence to prove the existence of a condition subsequent we think he must point to an ambiguity in the deed that is obvious, not merely a semantic possibility. We hestitate to subscribe to any doctrine that might otherwise leave the title to real property dependent upon the hair-splitting and esoteric distinctions of disputing grammarians occurring many conveyances and years after the fact.

Certainly one of the plain and unambiguous conditions of the deed before us was that a kiln should

be erected on the land. As noted appellant seeks to impose a second and further condition, namely, that, once erected, the kiln had to be used into the indefinite future for the purpose of drying chicory roots—in other words, that there were 2 uses for the land and 2 purposes to be served instead of one. We cannot accept this interpretation and instead think that the use of the words "for drying chicory roots" was merely descriptive of the *kind* of kiln that was to be erected on the land, as distinguished from a charcoal kiln or a brick kiln, say, and further that the fact that one of the key words "purpose" is in the singular rather than plural—as it properly should have been had more than one purpose been intended—lends substance to our conclusion that only one condition was intended.

Had the grantor intended a continuous operation of the kiln as a condition to the grantee's retention of title, we think that in the absence of fraud or overreaching of some kind it is not too much to expect of him that such a condition should clearly have been stated. And those claiming under him gain no larger rights. Yet the grantor did not even bother to mention words of heirship, or any possible assignees, or any other words which might suggest that the parties contemplated a long range continuous operation of the kiln far into the future. All this suggests, perhaps negatively, that the reasonably prompt erection of a kiln for drying chicory roots was the sole condition then envisaged by the parties.

Having found no actionable ambiguity in the quoted provision it is not necessary for us to discuss the other interesting matters presented by the parties, including possible laches or the doctrine of substantial compliance with a condition subsequent.

The decision of the trial court is affirmed. Costs to appellees.

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

PORTELL v. FELDMAN.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—PLEADINGS—TRIAL.
Questions not raised in the pleadings or argued at the trial level in a case are not properly before the Supreme Court on appeal from decree rendered in fifth action of one kind or another between parties to land contract, as case will not be reviewed in Supreme Court on a theory different from that on which it was tried below.

2. SAME—QUESTIONS REVIEWABLE—VENDOR AND PURCHASER—DEFAULT.
Defendant purchasers under land contract, sought to be foreclosed in chancery, and which was sold to plaintiff at auction on foreclosure sale for total amount due, were not entitled to consideration of questions which might have evolved from previous litigation between the parties but were not raised either by the pleadings or at the trial below, such as liability of purchasers for deficiency and tender of deed as a condition precedent to action for balance due or damages; and sole question raised in instant action was whether or not there was any default.

3. WITNESSES—COMPETENCY.
A trial court must and should hear and weigh the noncumulative testimony of any competent witness having knowledge of the relevant facts.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 820.
[5] 55 Am Jur, Vendor and Purchaser § 460.
Vendor's remedy by foreclosure of contract for sale of real property. 77 ALR 270.

4. VENDOR AND PURCHASER—FORECLOSURE OF LAND CONTRACT—DEFAULT—EVIDENCE—WITNESSES.

It was not improper to admit testimony of a witness in chancery foreclosure of a land contract as to facts relevant to sole issue of default by purchasers, where such witness was an agent of the purchasers and had an intimate knowledge of the facts, but was not a party to the contract as ultimately executed.

5. SAME—FORECLOSURE—DEFICIENCY—SALES—PREJUDICE.

Error, if any, of trial court in entering a deficiency decree in chancery foreclosure proceedings after waiver thereof by plaintiff's counsel in open court was rendered nonprejudicial by plaintiff bidding in the property at the foreclosure sale for the full amount due on the contract.

Appeal from Wayne; Culehan (Miles N.), J. Submitted October 16, 1958. (Docket No. 73, Calendar No. 47,816.) Decided December 3, 1958.

Bill by Joseph G. Portell against Becky Feldman, also known as Becky Schlussel, Minnie Feldman and Ben Feldman for foreclosure of land contract. Decree for plaintiff. Defendants appeal. Affirmed.

Joseph P. Uvick (*Wilbur M. Brucker, Jr.*, of counsel), for plaintiff.

O'Brien & Nertney (*Isaac M. Smullin,* of counsel), for defendants.

VOELKER, J. This case involves the chancery foreclosure of a land contract. The plaintiff Joseph G. Portell and one of the defendants, Ben Feldman, entered into a preliminary agreement on July 25, 1952, wherein plaintiff agreed to sell and Ben Feldman agreed to buy the property in question for $20,000. The sale was to be consummated by the execution of a land contract calling for the payment of $5,500 in cash and the balance in monthly instalments of not less than $150. On September 2, 1952, de-

fendants Becky Feldman and Minnie Feldman were substituted as purchasers at the request of Ben Feldman and with the consent of the plaintiff. Subsequently a land contract embracing these terms was signed by plaintiff as seller and Becky and Minnie Feldman as purchasers pursuant to the amended preliminary agreement.

Shortly after signing the contract the 2 contracting defendants defaulted on their monthly payments and forfeiture proceedings appear to have been commenced against them by the plaintiff, which were ultimately dismissed. Since that time the parties seem to have engaged in a continuous round of litigation, this apparently being the fifth action of one kind or another initiated by one side or the other. In our present case the plaintiff in his bill alleged default on the part of the defendants on the land contract, who in turn denied any default, thus forming the sole issue litigated below.

After hearing, the chancellor found that the defendants were in default and decreed that the property should be sold at foreclosure sale, that the proceeds therefrom should be paid over to the plaintiff, and that in the event the proceeds were insufficient to pay the amount found to be due, a deficiency decree would be entered for the balance. The property was sold at auction to the plaintiff, who bid the total amount due, thus eliminating the possibility of any deficiency.

Appellants' first 3 questions on appeal are:

"1. If a vendor exercised his option to declare the contract at an end, may he change his position and thereafter hold the purchaser liable to complete the purchase or pay any part of unpaid purchase price?"

"2. Is the tendering of a deed a condition precedent to an action on land contract for balance of purchase price?"

"3. In action to recover balance of purchase price due under a land contract where no deed is tendered before the action is brought and where no proofs were offered as to the value of the land, did the vendor establish a basis for recovery of damages?"

We assume that the first of these questions grows out of some of the previous legal actions between the parties, as above indicated. In any case we find that none of the questions concern subjects which were raised in the pleadings or argued at the trial level in this case and thus are not properly before us for review. The pleadings and record on appeal indicate that the sole contested question presented and argued at the hearing below was whether or not there was any default. Mr. Freed, one of the defendants' lawyers, there said:

"The only issue before this court is whether or not there is a default in this particular land contract as of the date of the allegation pertinent."

In *Gustin* v. *Ziem,* 289 Mich 219, 224, we said:

"We have repeatedly held that a case in the Supreme Court will not be reviewed on a theory different from that on which it was tried below."

These questions, not having been presented below, will accordingly receive no further consideration here.

Appellants' fourth contention is that the admission of the testimony of Ben Feldman was improper because he was not a party to the contract. To accept this argument would be to hold that in a foreclosure suit on a land contract the chancellor must disallow and disregard any and all offers of testimony from witnesses who are not formal parties to the contract. This is not the law and we will not impose such a rule. Obviously the trial court must and should hear and weigh the noncumulative testimony

of any competent witness having knowledge of the relevant facts. We believe that Ben Feldman was such a witness. That he had intimate knowledge of the facts is not disputed—Becky Feldman was his wife and Minnie was his mother and he was their agent. Appellants' contention is, therefore, without merit.

Appellants' final allegation of error is that the trial judge should not have entered a deficiency decree after such had been waived by plaintiff's counsel in open court. This error, if any, was rendered nonprejudicial by the plaintiff bidding in at the foreclosure sale for the full amount due on the contract. Defendants should not be heard to complain that they got off easier than they might have.

Finding no reversible error, we must affirm the decree of the trial court, with costs to the appellee.

DETHMERS, C. J., and CARR, SMITH, BLACK, EDWARDS, and KAVANAGH, JJ., concurred.

KELLY, J., did not sit.

BALL *v.* SWEENEY.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO HEARING—CREDIBILITY OF WITNESSES.

The Supreme Court hears chancery cases *de novo* but will ordinarily not reverse the lower court, where there is evidence and testimony to support its findings, unless justice demands it, or it can be said that the evidence clearly preponderates the other way, since the trial judge is in a better position to test the credibility of witnesses by observing them in court and hearing them testify than is an appellate court which has no such opportunity.

2. FRAUD—LAND CONTRACT—RESORT PROPERTY—RESCISSION—EVIDENCE.

Finding of trial court that defendant vendors of resort property had fraudulently concealed sewage difficulties between themselves and neighbors to the south and with the State department of health justifying rescission of the contract of purchase and return of plaintiffs' money *held*, proper, under evidence presented.

Appeal from Sanilac; Bach (Arthur M.), J. Submitted October 8, 1958. (Docket No. 17, Calendar No. 47,456.) Decided December 3, 1958.

Bill by Raymond R. Ball and Lillian M. Ball against L. Comer Sweeney and Marie A. Sweeney to rescind and cancel as fraudulent a contract for the purchase of resort property. Decree for plaintiffs. Defendants appeal. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 913.
[2] 55 Am Jur, Vendor and Purchaser § 593.

Leonard J. Paterson, for plaintiffs.

Atkins & Drillock, for defendants.

KAVANAGH, J. Defendants-appellants for several years owned and operated a resort north of Lexington on Lake Huron. The resort consisted of a tract of land bordered on the west by highway US–25, and on the eastern side by Lake Huron frontage. On the highway side there was a store which sold groceries, beer and wine to take out, gasoline, and oil. East of the store was a residence for the owners, a storage shed, 3 cement block cabins, 2 frame cottages, containing 2 bedrooms each, and a lake-shore cottage. In addition to the owner's residence there were 8 units for rent. The units were furnished and equipped for general housekeeping.

In early 1954, appellants listed the resort for sale with a real-estate agency. In the latter part of March, 1954, plaintiffs-appellees, having read the advertisement and visited the premises, agreed on a purchase price and paid $50 to bind the transaction. From that time on appellees had possession of the premises at their pleasure.

In June, 1954, a land contract was drawn and executed. Under this contract plaintiffs-appellees were to pay $16,500 for the resort, $5,000 down, the remainder to be paid at the rate of $100 the first of each month, beginning with the 1st of July, 1954.

Plaintiffs opened for business on June 18, 1954. Prior to July 1, 1954, they went to defendant Mr. Sweeney and demanded their money back, claiming insufficient water and lack of business, as well as other misrepresentations of the premises.

On July 19, 1954, plaintiffs filed their bill of complaint, alleging some 7 counts of fraud and misrepresentation, none of which referred to any sewage problem.

On November 16, 1954, plaintiffs filed an amendment to their bill of complaint, alleging, in addition to the other allegations of fraud, appellants' failure to inform plaintiffs of the fact that they had had difficulty with the neighbors over disposal of sewage, culminating in an injunction being issued to restrain defendants-appellants from depositing the effluent from their septic tank on their neighbor's property. Plaintiffs also claim that the defendants failed to inform them that for several years the State health department had been attempting to compel defendants to make changes in their sewage setup based on State health department recommendations. Plaintiffs contend that this failure to disclose material facts to plaintiffs constituted fraud for which they are entitled to receive their money back.

The trial court, in a written opinion, found as a matter of fact that there existed no fraud by the appellants as to the original several allegations of fraud. He, however, found that the failure of appellants to disclose the problem with the Michigan health department, and the difficulty and lawsuit with the neighbors to the south, was the withholding of a material fact, constituting fraud, and entitling the plaintiffs to rescind their contract and recover their money.

Defendants made a motion for new trial. The circuit judge, in a written opinion, granted a partial new trial, and plaintiffs were given the opportunity to clear up to the satisfaction of the court the question of when they began to rescind their contract, whether it was before July 4, 1954, when they first learned of the sewer problem, and whether plaintiffs had waived the right to rescind on the sewage proposal by not alleging it in their original bill of complaint.

Testimony was taken on these points, and, at the conclusion of the partial new trial, on May 24, 1957,

the circuit judge, in a written opinion, once again found the appellants had committed a fraud as to the sewage matter. Decree for rescission and return of plaintiffs' money was entered.

Defendants appeal to this Court, claiming that since the circuit court eliminated issues of fraud as charged in the original bill of complaint, the record does not disclose that appellants defrauded plaintiffs on the drainage issues.

Mrs. Lillian M. Ball testified:

"*Q.* Where did that pipe run?

"*A.* It runs in an open ditch between our property and the property to the north.

"*Q.* You mean when you tripped that sump pump it would go out in the open air?

"*A.* Yes.

"*Q.* Did it smell?

"*A.* Yes, when you go down the lane you can smell it and if its really hot you can smell it."

Mr. Raymond R. Ball testified:

"*Q.* Is there any field there for seepage bed?

"*A.* Not to my knowledge. The end of the drain is in an open drainage."

Mr. Glenn Alfred Ball, a 30-year-old son who lived on the premises and assisted in the operation of the business, testified:

"*Q.* And the pipe to hook it on to, did they hook the sump pump to this pipe? Did that shoot the septic tank juice out on the other property?

"*A.* There was a straight pipe into the ditch and then you pumped it across on to the land.

"*Q.* Was there any seepage bed or field there to pump it onto?

"*A.* No, none."

Mr. Albert DePew, a witness for the plaintiffs, testified that he had rented cabins for several years from the Sweeneys and was present over the 4th of

July week end in 1954. On direct examination he was asked the following questions and he made the following answers:

"*Q.* While you were up there previous to 1953 did you ever know of Mr. Sweeney having difficulty with his getting rid of sewage?

"*A.* No, and I didn't pay much attention to it.

"*Q.* Did you pay any attention to it since that time?

"*A.* In 1954 I was up there and remember a pipe that went through there supposed to go across the road and didn't go across, it was broke off and was was broke off, in 1953 it was broke.

"*Q.* You mean a pipe went across the road?

"*A.* Yes.

"*Q.* From where?

"*A.* From a sump to pull off the septic tank, and it was showing right on the ground and until we repaired the pipe.

"*Q.* When did you do that?

"*A.* About the last of July sometime.

"*Q.* What year?

"*A.* 1954.

"*Q.* And you fixed the pipe and found it?

"*A.* Yes.

"*Q.* Where did it go?

"*A.* Into the ditch.

"*Q.* On the north side?

"*A.* Yes.

"*Q.* Before that time it was just going out on the ground?

"*A.* Yes, on the ground right behind one of the cottages.

"*Q.* Did it make a smell?

"*A.* It did.

"*Q.* Did it continue to smell after you pumped it over on the north side?

"*A.* No, not so bad.

"*Q.* Do you know of anyone complaining about the cottages not having facilities, any of the customers?

"*A.* When they had trouble with the water they would have to give them their money back because there was no water.
"*Q.* When did they do that?
"*A.* Along the first part of July.
"*Q.* Of 1954?
"*A.* Yes"

Mr. L. Comer Sweeney testified on direct examination in response to a question asked by Mr. Atkins, his attorney:

"*Q.* And what did you do about this pump that pumps this sewage to the north?
"*A.* I bought a new sump pump that would set up on the platform and I ran a pipe across our lot and into our ditch where it would run down into the field tile that were already there."

Again, he subsequently testified:

"*Q.* You pumped it through the pipe from this tank over on the north side on to the surface?
"*A.* Yes."

On the rehearing Mr. Sweeney testified that the complaint was first made to him by Mrs. Ball after the 4th of July week end. Mrs. Ball testified: "Well it was after the 4th of July. I wouldn't be positive of the date but it was after the 4th, after we had the trouble that week end." A series of letters were also introduced as exhibits representing correspondence by the Michigan health department and Mr. Sweeney over a several year period covering the subject matter of depositing effluent from the septic tank on top of the ground surface.

Mr. LaRue L. Miller of the Michigan health department testified:

"*Q.* Now, from 1948 until your last inspection that you had of this place has Mr. Sweeney ever complied with the requirements of your health department?

"*A.* No, as far as I know because in this file 1954 and the last inspection there on this inspection it says 'sewage running on top of the ground, by front cottage sump pump empties into open ditch.' That's dated 8–12–54.

"*Q.* State whether or not that creates a health problem there?

"*A.* Yes, anytime sewage is on the ground surface we feel that creates a potential health hazard.

"*Q.* And where this property is being used for resort purposes is it more urgent that that situation be corrected?

"*A.* We feel that resorts are visited by many different people during the year and that constitutes a public place and its more to our concern to see that conditions are corrected and made as safe as possible from a health standpoint."

We cannot say, on examination of the entire record, that, had we been in the position of the trial judge, we would have found otherwise than he did with respect to the concealment of the sewage difficulties between defendants and the neighbors to the south and the Michigan department of health. The trial judge heard the witnesses, observed their demeanor, and was in the best position to determine their credibility and to conclude what the facts in the case really were. Although this Court on appeal hears chancery cases *de novo,* it ordinarily will not reverse the lower court where there is evidence and testimony to support the finding of the lower court unless justice demands it, or it can be said that the evidence clearly preponderates the other way, the trial judge being 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. *Grace Harbor Lumber Co.* v. *Ortman,* 190 Mich 429, 438; *Van Allen* v. *Sprague,* 206 Mich 116, 120; *Higbie* v. *Chase,* 306 Mich 577; *Dodge* v. *Blood,* 307 Mich 169; *Bennett*

v. *Bennett,* 336 Mich 133; *Kren* v. *Rubin,* 338 Mich 288; *Kirby Terminal Co.* v. *City of Detroit,* 339 Mich 155; *Dudley* v. *Rapanos,* 353 Mich 237. Nothing in the record of this case persuades us that the trial court erred.

The decree of the trial court is affirmed. Appellees may tax costs.

DETHMERS, C. J., and CARR, KELLY, SMITH, BLACK, EDWARDS, and VOELKER, JJ., concurred.

BRIN *v.* SPRUANCE.

1. EQUITY—REHEARING—COURT RULES.
   Motion for rehearing was properly denied in chancery suit, where neither such motion nor a motion to amend the decree was filed within the time allotted by court rule (Court Rule No 48 [1945]).

2. SPECIFIC PERFORMANCE—DEPOSIT OF PURCHASE MONEYS—REHEARING—COURT RULES.
   Purchase money payments paid into court by purchaser under land contract, calling for conveyance of 5 lots at a specified price, and who had obtained decree of specific performance of such contract as to 4 lots with $2,000 less price, are ordered turned over to defendant vendors, where no rehearing or amendment of decree was sought within time permitted by court rule (Court Rule No 48 [1945]).

Appeal from Wayne; Targonski (Victor), J. Submitted October 9, 1958. (Docket No. 26, Calendar No. 47,644.) Decided December 3, 1958.

Bill by Jack Brin against Delmos Spruance and Opal D. Spruance resulted in decree for plaintiff

which was affirmed on appeal. Defendants moved for release to them of funds on deposit with county clerk under court order. Motion denied. Defendants appeal. Reversed and remanded.

Donald Wm. Sargent, for defendants.

KAVANAGH, J. This matter was originally heard in the Wayne circuit court by the Honorable George Edwards, circuit judge, now Justice of the Supreme Court, on a bill for specific performance and thereafter reviewed by this Court in *Brin* v. *Spruance,* 348 Mich 29, wherein this Court upheld the decree of Judge Edwards.

Plaintiff entered into a contract to purchase lots 266, 267, 268, 269, and 270 of a subdivision in the city of Detroit from defendants Delmos M. Spruance and Opal D. Spruance, his wife. A gasoline station business is situated on lots 269 and 270. Two 1,000-gallon gasoline tanks are located on lot 268 and are used in the business. This lot is owned by Herbert Spruance and Marie Spruance.

Defendants Herbert Spruance and Marie Spruance did not sign the preliminary agreement. Delmos M. Spruance and Opal D. Spruance refused to close the transaction because they did not have title to lot 268. A bill of complaint for specific performance was brought against Delmos M. and Opal D. Spruance. Before trial Herbert and Marie Spruance were added as defendants.

The matter came on for trial on March 22, 1956. The stipulations and discussions entered into before the court indicate that plaintiff knew not only that the 2 gasoline tanks were located on lot 268, but was aware that the title was not in the present defendants. The court on hearing dismissed the action against the owners of lot 268, namely, Herbert and Marie Spruance.

During the trial the court qualified the plaintiff as an expert on the value of the gasoline station business. Plaintiff then testified that the value of the business would be decreased by $2,000 if lot 268 were not conveyed to him. The following colloquy was carried on between the trial court and plaintiff Jack Brin:

"*The Court:* Do you have an opinion, Mr. Brin, as to how much the value of this property will be decreased if that middle lot is not conveyed to you?

"*A.* The value of the property will definitely be decreased.

"*The Court:* I asked you whether you had an opinion as to how much it would be decreased.

"*A.* As to how much? It would be decreased at least by $2,000."

At the close of the trial the plaintiff brought up the question of the 2 gasoline tanks on lot 268. The original transcript discloses the court said:

"The court is well aware that it would not be possible for the court to enforce this order as to the fifth lot against these 2 defendants alone. Hence in the alternative, on their failure to tender title to lot 268, the purchase price of this *entire business* may be reduced by $2,000, as damages to the purchaser for sellers' failure to convey that which they undertook to convey and warranted they would convey." (Emphasis ours.)

Mr. Sher, attorney for plaintiff, raised the question of 3 gasoline tanks, and the following colloquy took place between Mr. Sher and the court:

"*Mr. Sher:* It is part of the inventory here. The inventory calls for three 100-gallon [1,000?] tanks. We are only going to get 1, and the plaintiff will have to, at his expense, buy 2 tanks and locate them on his property.

"*The Court:* I am not going to go any farther now and reopen this matter. The case has been presented."

Decree was entered on April 13, 1956, and a supplemental decree was entered on April 27, 1956. A motion for new trial made by defendants was denied on May 18, 1956, and thereafter appeal was made to the Supreme Court. The lower court's decree was upheld in *Brin* v. *Spruance,* 348 Mich 29.

Pending the appeal, plaintiff made payments on the land contract to the Wayne county clerk. The Wayne county clerk has in his possession all moneys paid by plaintiff as down payment on this property and, also, the monthly payments, and to date the defendants have not received any moneys whatsoever from the sale of their property although plaintiff has been in possession since August 8, 1956. Since that time he has used the gasoline tanks buried under lot 268 and is continuing to use them.

After the Supreme Court affirmed the decree for specific performance, the defendants brought a motion for an order directing the county clerk to pay over the down payment and the accumulated moneys on deposit.

Plaintiff, answering this motion on May 22, 1957, claimed, among a large number of other things, that defendants had not performed the conditions of the preliminary agreement of sale in that they had failed to deliver or convey the title to 2 gasoline tanks buried under lot 268. Plaintiff further claimed that he did not know the location of these tanks until August 8, 1956, when he went into possession.

The motion was heard on June 4, 1957, and the court filed an opinion on July 23, 1957, finding that defendants were unable to convey title to 2 gasoline storage tanks, which are a part of the personal prop-

erty to be conveyed to plaintiff, and that defendants had not furnished plaintiff with a sales tax clearance.

At the time the court entered this order dismissing defendants' motion there was over $7,000 on deposit with the county clerk and the defendants still have received nothing for their land or for their business.

Defendants filed a motion for a rehearing, attaching a copy of the sales tax clearance dated January 29, 1957, and a copy of the bill of sale as exhibits thereto. This motion was denied on November 18, 1957.

Defendants appeal to this Court from the denial of their motion to pay over moneys held by the Wayne county clerk.

It is undisputed on the record that plaintiff knew of the location of these tanks prior to trial; that the matter was brought up by plaintiff's attorney at the close of the trial and the court refused to go into the matter. It is further noteworthy that plaintiff testified that the property would be decreased by $2,000 if lot 268 were not conveyed to him.

A reading of the record indicates that Judge Edwards decreased the purchase price by $2,000 to cover the inability of the defendants to deliver lot 268 and the tanks involved. Plaintiff did not ask for a rehearing or bring up this matter for more than 1 year later.

Court Rule No 48 (1945) provides as follows:

"Sec. 1. On proper cause shown, a rehearing of an equitable action may be had. No application for such rehearing shall be heard unless filed within 2 months from the entry of the final decree, except where application is made on the ground of newly-discovered evidence, in which case the application must be filed within 4 months."

The same rule also provides that bills of review are abolished.

No claim for rehearing having been filed, and no motion to amend the decree having been made within the time allotted by the court rule, the defendants' motion should have been granted. *Hughes* v. *Wayne Circuit Judge,* 239 Mich 110; *Central Trust Co.* v. *Breitenwischer,* 259 Mich 532; *Weber* v. *Enoch C. Roberts Iron Ore Co.,* 270 Mich 38; *Stabley* v. *Reliable Lumber & Wrecking Corp.,* 286 Mich 558; *Campbell* v. *Campbell,* 292 Mich 547; *Havens* v. *Havens-Anthony,* 335 Mich 445; *Miles* v. *Harkins,* 335 Mich 453; *Taylor* v. *Lint,* 338 Mich 673; *Domzalski* v. *Domzalski,* 346 Mich 399.

The order denying defendants' motion is reversed and the matter is remanded to the circuit court for entry of an order directing the county clerk of Wayne county to pay over to defendants all of the moneys on deposit with him in this cause. Defendants shall have costs.

DETHMERS, C. J., and CARR, KELLY, SMITH, BLACK, and VOELKER, JJ., concurred.

EDWARDS, J., did not sit.

GRAHAM *v.* THORMAN.

1. MASTER AND SERVANT—QUESTION FOR JURY—EVIDENCE.
   It was not error for trial court to submit to jury the question of whether plaintiff was an employee of defendant at time of injury, where the competent testimony on such issue was in conflict.

2. TRIAL—QUESTION FOR JURY—CONFLICTING TESTIMONY.
   A determination of material facts is for the jury, where testimony with respect thereto is in conflict.

3. PLEADING—ANSWER—AMENDMENT—DISCRETION OF COURT.
   Whether or not a defendant may amend his answer after proofs generally rests solely in the discretion of the trial court and the Supreme Court will not interfere unless such discretion is abused.

4. SAME—AMENDMENT OF ANSWER—INSTRUCTIONS.
   Denial of defendant's motion to amend answer to accord with proofs in action by plaintiff for broken leg, sustained when he fell from defendant's truck as he was attempting to operate defective brakes, to provide that plaintiff's acceptance of workmen's compensation from a third party for whom defendant had furnished truck was a bar to action against defendant *held,* not reversible error, where court instructed jury that if they found defendant was a subcontractor of the third party and that plaintiff had received workmen's compensation from such third party, there should be a verdict of no cause for action, since defendant actually received the benefit of his motion.

REFERENCES FOR POINTS IN HEADNOTES

[1] 35 Am Jur, Master and Servant § 3.
[2] 53 Am Jur, Trial § 156 *et seq.*
[3, 4] 41 Am Jur, Pleading §§ 309, 310.

Appeal from Macomb; Carroll (Howard R.), J. Submitted October 10, 1958. (Docket No. 35, Calendar No. 47,649.) Decided December 3, 1958.

Case by Floyd Roy Graham against Marvin Thorman, his employer, for injuries sustained by reason of defective brakes on motor vehicle. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Riseman, Lemke & Piotrowski, for plaintiff.

Charles A. Lorenzo and *Herbert J. Pevos,* for defendant.

KAVANAGH, J. Plaintiff instituted an action of trespass on the case, alleging that on July 22, 1954, he was an employee of the defendant and, as such, was operating a truck owned by the defendant.

At the time of the accident plaintiff alleges that he was in the process of having the truck loaded with gravel at a pit located in the county of Macomb. Plaintiff further alleges the truck, which was pulled up beside a crane and parked on an incline, was being loaded by Foltz Brothers' crane and operator. When the truck was about 2/3 loaded it commenced to roll ahead. Plaintiff attempted to stop the truck from continuing, but because of defective brakes was unable to do so. He then attempted to use the emergency brake, but this brake was also defective. In attempting to reach the emergency brake he fell from the truck, breaking his right leg.

Plaintiff brought this action to recover for both medical and hospital attention and pain and suffering, claiming defendant employer was negligent in furnishing plaintiff defective equipment, and that this negligence was the proximate cause of the accident.

Defendant answered plaintiff's declaration as follows:

"And for further answer to plaintiff's declaration defendant avers that on to-wit the date first mentioned in the declaration defendant leased a truck to Foltz Brothers for the purpose of transporting aggregates from points in or near the village of Romeo, Macomb county, where being produced, to their customers at other points in that and other adjoining counties for the purpose of operating which truck said Foltz Brothers engaged plaintiff as driver and over which truck and driver the said Foltz Brothers had full control and dominion and obligated to pay plaintiff for such services."

Defendant further alleged that if plaintiff received an injury at the time and place charged, he, at the time, was an employee of Foltz Brothers. Defendant alleged on information and belief that plaintiff filed a claim against Foltz Brothers for compensation under the Michigan workmen's compensation act* and received benefits which accrued under said act.

The testimony developed that after plaintiff was injured he was removed to St. Joseph's Hospital where he was visited by Maurice Foltz, one of the Foltz Brothers, and upon ascertaining that defendant Thorman did not carry workmen's compensation insurance, plaintiff was advised by Foltz that he would be considered as one of their employees and plaintiff should make application as such under Foltz Brothers' workmen's compensation insurance. It is further admitted that such application was made and compensation paid.

At the close of the proofs defendant moved for a directed verdict on the ground that plaintiff's action was barred by CL 1948, § 411.10 (Stat Ann

* CL 1948, § 411.1 *et seq.*, as last amended by PA 1953, Nos 53, 198 (Stat Ann 1950 Rev and Stat Ann 1953 Cum Supp § 17.191 *et seq.*).—REPORTER.

§ 17.150) of the workmen's compensation act,* since it was defendant's contention that the proofs show that regardless of whether or not plaintiff was in the direct employ of defendant Thorman, he was, in any event on that day, the employee of Foltz Brothers under the workmen's compensation act because of the fact that defendant Thorman as subcontractor, not subject to the act, was delivering the gravel for Foltz Brothers as principal and for the job undertaken by the principal.

The court reserved defendant's motion† and submitted the relationship of plaintiff to defendant Thorman and Foltz Brothers as an open question of fact for the jury's determination.

At close of proofs defendant made a motion for directed verdict on the ground that defendant Thor-

* "(a) Where any employer subject to the provisions of this act (in this section referred to as the principal), contracts with any other person (in this section referred to as the contractor), who is not subject to this act or who has not complied with the provisions of section 1 of part 4 and who does not become subject to this act or comply with the provisions of section 1 of part 4 prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed: Provided, That the term 'contractor' shall be deemed to include subcontractors in all cases where the principal gives permission that the work or any part thereof be performed under subcontract;

"(b) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor or subcontractor as the case may be, but the employee shall not be entitled to recover at common law against the contractor or any other person for any damages arising from such injury if he takes compensation from such principal. The principal, in case he pays compensation to the employee of such contractor, may recover the amount so paid in an action against such contractor."

† See CL 1948, § 691.691 *et seq.* (Stat Ann and Stat Ann 1957 Cum Supp § 27.1461 *et seq.*).—REPORTER.

man was a subcontractor of Foltz Brothers, and plaintiff's acceptance of compensation was a bar to this action. Prior to submission defendant sought leave to amend his answer in accordance with the proofs in this case by adding this defense. This amendment was denied by the court.

The jury found in favor of the plaintiff. Defendant then moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. From a denial of defendant's motion and the entry of judgment, defendant appeals claiming: (1) the court erred in submitting the question of the relationship of plaintiff and defendant and of plaintiff and Foltz Brothers to the jury; (2) the court erred in denying defendant's motion for judgment notwithstanding the verdict in view of the fact that no question of fact was raised with respect to the contractual relationship between Thorman and Foltz Brothers.

The sole question in this case is whether or not plaintiff was an employee of defendant Thorman or by reason of a contract between Thorman and Foltz Brothers became an employee of Foltz Brothers. Plaintiff in his declaration alleged that he was such an employee. Defendant in his answer denied it. The original transcript discloses plaintiff's testimony as to his employment was as follows:

"*Q.* Now, on the 22d of July, 1954, where were you employed?

"*A.* Marvin Thorman. * * *

"*Q.* The latter part of April; and was that employment continuous to July 22, 1954?

"*A.* Yes. * * *

"*Q.* What kind of work did you do?

"*A.* Driving truck. * * *

"*Q.* But, who paid you?

"*A.* Thorman. * * *

"*Q.* Now, who gave you the instructions as to when you were to pick (up) this load of stone?

"*A.* Next morning, you mean?
"*Q.* Any day?
"*A.* Mr. Thorman.
"*Q.* When did he give you these instructions?
"*A.* Well, he was the only one that gave them to me.
"*Q.* I know, now would he give you the instructions when you returned back with the truck?
"*A.* Well, yes, he would give me instructions on that. * * *
"*Q.* And had you ever worked for Foltz Brothers at any time?
"*A.* No."

This testimony was, in part, supported by Mr. Maurice Foltz of Foltz Brothers. Mr. Foltz testified that there was no definite arrangement worked out between him and Thorman and that Thorman was his employee:

"*Q.* So there was no method of compensation worked out between you and Marvin Thorman?
"*A.* No. * * *
"*Q.* Now, Mr. Thorman worked for you that day too, didn't he?
"*A.* Yes.
"*Q.* What did he get paid?
"*A.* Well, we paid lots of drivers, I have no idea.
"*Q.* Well, was he designated as one of your employees for that day?
"*A.* I guess he would be, I am not positive.
"*Q.* What did you pay him?
"*A.* I do not know.
"*Q.* Were you to pay him a sum of money to cover both Thorman and Graham?
"*A.* Was I?
"*Q.* Yes?
"*A.* Yes.
"*Q.* Yes?
"*A.* I don't know."

Mr. Thorman insisted that he was not the employer of plaintiff at the time of the accident. His testimony with reference to the contract arrangement between him and Foltz Brothers was likewise indefinite:

"*A.* I had arrangements with Foltz that they could have my trucks whenever they were available and if I didn't have a driver, they could furnish their driver; and if I had a driver they could hire my driver, and— * * *

"*Q.* Now witness, you don't claim that Mr. Foltz was Mr. Graham's employer on July 22, 1954?

"*A.* Yes. * * *

"*Q.* Now, you say you made arrangements with Foltz Brothers for Mr. Graham, when was that arrangement made?

"*A.* I did not make any arrangements with Foltz Brothers for Mr. Graham.

"*Q.* You did not make any arrangements with Foltz Brothers for Mr. Graham?

"*A.* No.

"*Q.* So that Graham never worked for Foltz Brothers, did he?

"*A.* I don't know. * * *

"*Q.* Were you working for Foltz Brothers?

"*A.* Yes.

"*Q.* Were you their employee?

"*A.* No.

"*Q.* How much will they pay you, for your truck?

"*A.* We got paid by the yard.

"*Q.* How much were you getting by the yard?

"*A.* I don't recall.

"*Q.* Did Mr. Graham know how much he was being paid by the yard?

"*A.* I don't know."

A clear question of fact was presented for submission to the jury. The court did not err in submitting the question nor in denying defendant's motion. A jury question exists when competent

testimony is conflicting and presents a question upon which reasonable minds might differ. *Tavener* v. *Elk Rapids Rural Agricultural School District,* 341 Mich 244. This Court has held numerous times in the last few years that a determination of material facts is for a jury where testimony contains a conflict as to material facts. *Grover* v. *Simons,* 342 Mich 480; *Davis* v. *New York Central R. Co.,* 348 Mich 262; *Bishop* v. *New York Central R. Co.,* 348 Mich 345.

In his charge to the jury the court told the jury that if they found that the defendant was a subcontractor of Foltz Brothers at the time of the accident, and if they found that the plaintiff received compensation for injuries sustained, they should bring in a verdict of no cause of action.

In view of the conflicting statements of witnesses, including the answer filed by defendant, and in view of the indefinite testimony of both Thorman and Foltz with respect to their contract relationship, a question of fact existed as to whether a contractual relationship existed between Thorman and Foltz Brothers which would preclude plaintiff's recovery, and a question of fact existed as to whether plaintiff was actually an employee of Thorman. These conflicts of facts were properly submitted to the jury, and apparently resolved in favor of plaintiff's theory since the jury brought in a verdict for plaintiff in the sum of $2,550.

The only other question in the case is whether or not defendant should have been permitted to amend his answer after proofs. Generally, permission, or refusal of permission, to amend rests solely in the discretion of the trial court, and unless this discretion is abused the Supreme Court will not interfere. *Jackson City Bank & Trust Co.* v. *Blair,* 333 Mich 399 (32 ALR2d 920); *Cook* v. *Wolverine Stockyards Co.,* 344 Mich 207; *Rosenbrock* v. *School District No. 3,*

344 Mich 335; *Howard* v. *Burton,* 338 Mich 178; *Singewald* v. *Local Union No. 7, UAW-CIO,* 339 Mich 503.

In view of the charge to the jury, in which the court instructed the jury that if they found that the defendant was a subcontractor of Foltz Brothers at the time of the accident, and if they found that the plaintiff received compensation for injuries sustained, they should bring in a verdict of no cause of action, defendant certainly could not complain with reference to the denial of his motion because he actually received the benefit of it in the instructions from the court.

The order denying motion for new trial and entry of judgment in favor of plaintiff against defendant is upheld. Plaintiff may tax costs.

DETHMERS, C. J., and CARR, KELLY, SMITH, BLACK, EDWARDS, and VOELKER, JJ., concurred.

NEW YORK CENTRAL RAILROAD COMPANY *v.* CITY OF DETROIT.

HIGHWAYS AND STREETS—SPECIAL ASSESSMENTS—RAILROADS—PAYMENT UNDER PROTEST—EQUALLY DIVIDED COURT.

Judgments for defendant home-rule city in railroad company's action to recover payments of special assessments for development of heavy duty highway adjacent to railroad right-of-way, paid under protest, is affirmed by an equally divided court (CL 1948, §§ 117.4d, 211.53; Detroit City Charter, title 6, ch 3, § 2).

Appeal from Wayne; Maher (Thomas F.), J. Submitted April 11, 1958. (Docket Nos. 50, 51, Calendar Nos. 47,241, 47,242.) Decided December 3, 1958. Rehearing denied January 12, 1959. Claim of appeal denied by the Supreme Court of the United States May 18, 1959.

Two actions by the New York Central Railroad Company, a Michigan corporation, for itself and as lessee, assignee and subrogee of the Michigan Central Railroad Company, and the Michigan Central Railroad Company, a Michigan corporation, against the City of Detroit to recover payments, made under protest, of special assessments for development of heavy-duty highway adjacent to railroad right-of-way. Cases consolidated for trial and appeal. Judgments for defendant. Plaintiffs appeal. Affirmed by an equally divided court.

Jack I. Alspector and *Grey K. Nelson* (*George H. Wyatt,* of counsel), for plaintiffs.

Nathaniel H. Goldstick, Corporation Counsel, *Bert R. Sogge, Stephen J. Carey* and *Julius C. Pliskow,* Assistants Corporation Counsel, for defendant.

KAVANAGH, J. (*for affirmance*). Two actions were instituted by the New York Central Railroad Company as lessee, assignee and subrogee of the Michigan Central Railroad Company, and the Michigan Central Railroad Company against the city of Detroit to recover the amounts paid for assessments against railroad property for the paving of 2 portions of John Kronk avenue, formerly known as Southern avenue, in the city of Detroit.

The first segment paved extended from the westerly city limits of Detroit (bordering the city of Dearborn) easterly to Lonyo road. The property of plaintiffs bordered John Kronk on the south side and was assessed for $19,606.20. Appellants paid

this sum with interest, and sued to recover with interest. It was stipulated that plaintiffs' failure to institute suit on the first instalment was barred by a 30-day statute of limitation, and that the refund covering this portion of the street would be limited to $15,289.60.

The second segment paved extended from Lonyo road east to Central avenue. Appellants' property on the south side of John Kronk was assessed for $14,952.12, and some property on the north side of John Kronk was assessed for $432.16, making a total assessment for this segment of $15,384.28.

Both segments were ordered paved by the common council of the city of Detroit pursuant to title 4, ch 8, § 11 of the charter of the city of Detroit, as amended,* which provides for forced paving of streets and alleys, rather than upon the petition of abutting property owners.

The second portion was paved in the year 1955 following the acquisition of land by condemnation for the opening and widening of John Kronk between Lonyo road and Central avenue.

Appellants brought these actions below pursuant to section 53 of the general property tax law (CL 1948, § 211.53 [Stat Ann 1950 Rev § 7.97]) which provides a remedy for the recovery of a tax or special assessment paid under protest, within 30 days after such payment and protest, providing the tax or special assessment is shown to be illegal for the reason alleged in such protest.

It is important to a decision of this case that the language of the protests be set out in full. The reasons for protest with reference to the first assessment, mailed to the treasurer of the city of Detroit on May 22, 1953, were as follows:

* Detroit Municipal Code (1954), charter section, p 60.—REPORTER.

"This payment is made under protest because the so-called special assessment is illegal and void for the following reasons, among others:

"1. That the cost of said paving has not been equitably assessed against the lots or parcels of real estate to be benefited by such paving as required by the provisions of amended sections 2, 3 and 4 of chapter 3, title 6, of the charter of the city of Detroit,* adopted April 4, 1949, in effect April 5, 1949.

"2. That the property of the Michigan Central Railroad Company abutting that portion of Southern avenue which has been paved, as covered by said assessment roll, has by law been devoted permamently to the use to which it is now put, namely, as a site for an integral part of its common carrier railroad, devoted to the transportation, by railroad trains, of passengers and property in both intrastate and interstate commerce. That the fitness of its said property for such common carrier use is in nowise increased, nor is said property enhanced in value, by the said paving. That said paving was not laid to serve abutting property owners, but rather to take the heavy truck traffic off from other streets. It is to be used as a bridge for the movement of such heavy truck traffic destined between other points in the city and points located beyond, and operated by motor carriers which compete with the railroad company. That no part of the cost of said paving should be assessed against the property of the said railroad company.

"3. That the proposed assessment against the property of the Michigan Central Railroad Company violates the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

"4. That, as is shown on the street paving plan for Southern avenue, prepared in the city engineer's office, and contained in said assessment roll, said Southern avenue, between the city line and W.P.L.†

* Detroit Municipal Code (1954), charter section, p 173.—REPORTER.

† West property line (?).—REPORTER.

of Lonyo, was in fact paved, not as an ordinary street or highway, to serve the abutting property owners, but as a through superhighway, to be used as a bridge, for the handling of heavy truck traffic, destined between other parts of the city and points located beyond. Assessing your protestant for the sole benefit of its competitors constitutes a violation of the Fourteenth Amendment of the Constitution of the United States with respect to due process and equal protection and the due process provision of the Constitution of the State of Michigan.

"Said New York Central Railroad Company reserves the right to contest the decision in any manner which may be available for such purposes.

"This payment is made under protest, involuntarily and under duress to save the company and its properties from liens, distress, seizure and forfeiture, interest, and from such other fines and penalties as may be imposed and exacted."

The language of the second protest dated December 21, 1955, directed to the city treasurer, was as follows:

"The New York Central Railroad Company and its lessor, the Michigan Central Railroad Company, hereby protest payment of this so-called special assessment for the following reasons, among others:

"1. The paving of John Kronk avenue is not required as a local or general improvement of the city of Detroit and is therefore beyond the power of said city to undertake under the provisions of its charter and laws.

"2. The paving of John Kronk avenue between Lonyo and Central, will not benefit the property of the Michigan Central Railroad Company abutting on the north and south of said highway, which property has by law been devoted permanently to the use to which it is now put, namely, as a site for an integral part of its common carrier railroad, devoted to the transportation by rail of passengers and property in both intrastate and interstate com-

merce. The fitness of said property for such railroad use is in no way increased, nor is said property enhanced in value, by the paving of John Kronk avenue. The said paving will not benefit the abutting property owners, but rather will benefit the city of Detroit and its west side residents exclusively, whose other streets will be thereby relieved of the annoyance and hazards of heavy industrial traffic. The said paving will in fact be a detriment to the railroad company in that, when completed, it will form part of a 'bridge highway' for the use and benefit of motor carrier competitors of said railroad. The assessment therefore violates amended sections 1, 2, 3, and 4 of chapter 3, title 6 of the charter of the city of Detroit.*

"3. The assessment violates the due process clause of section 16 of article 2 of the Michigan State Constitution (1908) and the equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States.

"4. The assessment is excessive, unreasonable, arbitrary, fraudulent, inequitable, unfair and capricious, in violation of the charter and laws of the city of Detroit and the Constitutions of the State of Michigan and of the United States, in that it requires the railroad to subsidize its trucking competitors, to its detriment and without any gain or return to it or its property.

"Said New York Central Railroad Company for itself and as lessee of the Michigan Central Railroad Company, and the Michigan Central Railroad Company, reserve the right to contest the determination of the Detroit common council in this matter in any manner which may be available for such purpose.

"Payment of said special assessment is made under protest, involuntarily and under duress, to save the said railroad companies and their properties from liens, distress, seizure and forfeiture, interest, and other fines and penalties as may be imposed and exacted."

* See footnote, *ante*, 640.—REPORTER.

The 2 actions were consolidated for trial, and a stipulation was entered into agreeing upon a number of facts with respect to the action, but providing for the introduction of evidence in addition thereto on the part of either party.

The lower court found that the plaintiffs were unable to show that no practical benefits whatsoever inured to their right-of-way now or in the foreseeable future; that the defendant in the making of this assessment followed the law and the city charter provision; that the assessments as they stand are perfectly proper and within the authority of the defendant city of Detroit. The lower court in its opinion found that that which benefits the local community and especially develops and improves the locality brings benefit to the railroad as the principal business institution thereabouts. The court further found as a matter of fact that the burden of proof rests with the plaintiffs of proving their allegations upon which their claim is based, particularly where it is sought to have a tax declared invalid. The court found that plaintiffs had failed to carry their burden of proof in this regard, and that, therefore, plaintiffs were not entitled to any relief in either case, and that a judgment in favor of defendant should be entered.

Plaintiffs appeal to this Court, claiming error on 13 points, all of which, we believe, are included in defendant appellee's following statement of questions involved:

1. "Was appellant's railroad right-of-way benefited by or susceptible of benefit from the paving of John Kronk avenue so as to support assessments placed thereon by appellee?"

2. "Were proceedings which resulted in these assessments against appellant's right-of-way in conformance with applicable statutory and charter provisions?"

3. "Did appellant sustain the burden of proof of illegality of these assessments for reasons specified in the respective written protests filed at the time of payment?"

It is the position of the plaintiffs that the railroad right-of-way has been operated as a switch yard for upwards of 100 years; that their right-of-way could not possibly benefit from the paving of John Kronk avenue; that the purpose of such paving was to establish a through route from the area of the Edsel Ford expressway in Dearborn to Livernois avenue in Detroit so as to be able to develop a heavy duty trucking "bridge-highway" to implement the through movement of heavy-truck traffic from other points in the metropolitan area to and from the area involved, and for the benefit of trucking competitors of appellants, particularly those operating terminals in the vicinity of the area paved, and to generally relieve the traffic congestion of heavy cargo-carrying motor vehicles in this area.

Plaintiffs urge that since the improvement was created for this purpose and for the benefit of the entire metropolitan area, the paving of John Kronk avenue was not a local improvement for which a special assessment could be levied under the charter of the city of Detroit, and particularly the provisions thereof which require assessment of the costs to properties which receive benefits from the paving. It is appellants' contention that their property does not benefit from the road, but that by reason of the additional traffic the paving is actually a detriment, in that it affords more competition by improving the road for their trucking competitors, and delays the operation of their trains and switch engines over the spur lines crossing John Kronk avenue. Appellants further allege that the assessment under these circumstances constitutes an arbitrary, inequitable, capricious, and unreasonable assessment on

its property and thereby deprives appellants of their property without due process of law and without just compensation contrary to the State and Federal Constitutions, in that other properties of the same class as plaintiffs' property have not been assessed on a like basis with railroad property.

Defendant city of Detroit denies that plaintiffs' railroad property was not benefited by the paving of John Kronk avenue, and alleges that the amounts assessed were the result of a special assessment duly and legally placed against the railroad premises in accordance with the statutes of the State of Michigan and the provisions of the charter and ordinances of the city of Detroit.

The first question to be decided by this Court is whether or not lands of a railroad company used solely for a right-of-way are subject to special assessments for street improvements.

It is the contention of plaintiffs that the paving of John Kronk avenue did not especially benefit the property of plaintiffs.

The general property tax act of the State of Michigan (PA 1893, No 206, as amended [CL 1948, § 211.1 *et seq.,* as amended; Stat Ann 1950 Rev § 7.1 *et seq.,* as amended]), in section 7, subparagraph 8 thereof, as amended by PA 1952, No 54 (CLS 1952, § 211.7 [Stat Ann 1953 Cum Supp § 7.7]), exempts therefrom real property used in its operation, except that the same shall be subject to assessments for local improvements in cities and villages.

Section 4d of the home-rule act (CL 1948, §117.4d [Stat Ann 1949 Rev § 5.2077]) authorizes a home-rule city to provide in its charter "for assessing and re-assessing the costs or any portion thereof, of any public improvement to a special district."

Title 6, chapter 3, § 2, of the Detroit charter* requires the common council to cause such portion of such street paving costs "as it may deem just to be equitably assessed against the lots or parcels of real estate to be benefited by such local improvement in proportion to the probable benefit to be derived therefrom."

In *Detroit, G. H. & M. R. Co.* v. *City of Grand Rapids,* 106 Mich 13 (28 LRA 793, 58 Am St Rep 466), it was held by a divided Court:

"A section of the right-of-way of a railroad company, occupied by its tracks and used for no other purpose, cannot be assessed for the expense of improving a street which crosses it, under a city charter requiring such assessments to be made according to benefits received." (Syllabus 2.)

The arguments used by plaintiffs in the instant case are the same arguments used by the railroad company to establish the rule of law above quoted.

This Court in the case of *Grand Rapids* v. *Grand Trunk Railway System,* 214 Mich 1, in an opinion written by Justice CLARK, reviewed the law of Michigan with respect to railroad properties and quoted extensively from the case of *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.,* 197 US 430 (25 S Ct 466, 49 L ed 819), in which the question of benefits insofar as the present use of railroad property was discussed at length. The Court there said (p 7):

" 'That, apart from the specific use to which this land is devoted, land in a good-sized city generally will get a benefit from having the streets about it paved. * * * On the question of benefit or no benefit the land shall be considered simply in its general relations and apart from its particular use.' "

* Detroit Municipal Code (1954), charter section, p 173.—REPORTER.

Justice CLARK, continuing, said (p 11):

"The weight of authority is, and we so hold, that the court may not say, as a matter of law, that the track, roadbed, or right-of-way of a railroad may not be benefited or susceptible of benefit by a local improvement."

We think the holding in *Detroit, G. H. & M. R. Co.* v. *Grand Rapids, supra,* must be overruled.

Under the authority of the above-mentioned cases there can be no question about the right of the city of Detroit to assess the special assessment in the event benefit does actually accrue.

The present use under the authority of *Grand Rapids* v. *Grand Trunk Railway System, supra,* and supported by the case of *Powers* v. *City of Grand Rapids,* 98 Mich 393, does not answer the question. The use to which the owner may choose to put such land, or whether he may see fit to put it to any use, is not the test but, rather, the possible use that the land might have to the present owner or his successor in title.

In the case of *Gingrich & Sons* v. *City of Grand Rapids,* 256 Mich 661, 667, 668, it is said:

" 'It is not the present use of property which determines the benefit it receives from a street improvement; it is, rather, its available use. Benefits are not to be measured by present actual uses but by potential uses.' " (Quoting from trial court's opinion.)

We cannot say that the improvement does not benefit plaintiffs' property.

There can be no dispute about the fact that land in the city of Detroit located at this particular spot could have uses from which an owner would derive benefit from having a paved avenue along its 2–1/2 mile length. In addition to the special benefits, there is no question that by this paving benefits

accrued to the city at large. This is recognized by the fact that the common council directed the assessment of 50% of the cost of the paving to the city at large, included in which was the additional cost for the unusually wide pavement on John Kronk avenue and the extraordinary thickness of the pavement so as to handle the heavy traffic to which it was to be subjected.

Under the charter of the city of Detroit it was the responsibility of the common council to determine the territory benefited by the improvement, to determine the lands to be included in the assessment district, and the portion of the benefits especially derived by those lands from such improvement. This duty they carried out in accordance with the terms of the charter, and plaintiffs were afforded an opportunity to object—successfully in one instance—to the assessment of benefits.

We find nothing in the record to justify the statement that the assessments were arbitrarily, unreasonably, and capriciously made so as to constitute a fraud upon appellants which deprived them of their property without due process of law. On the other hand, the evidence discloses that consideration was given to the objections made through reduction of the amount to be paid by the abutting property owners and the amount to be paid by the city at large.

Since plaintiffs' land is properly in the district and receives special benefits from the paving, the question to what extent the value of their property was enhanced by the paving of the street is a question on which men may widely and honestly differ. It is a matter of judgment which the law and charter leaves to the common council and board of assessors and not to the courts. In the absence of fraud or bad faith or the following of a plan incapable of producing reasonable equality, their

judgment must be held to be conclusive. *Marks* v. *City of Detroit,* 246 Mich 517. It is not for the courts to say that this parcel of land is assessed too much or too little. The assessments were to be made according to benefits to each parcel of property, and there is nothing in the record showing that the common council did not assess the appellants' land in accordance with their best judgment.

The lower court found as a matter of fact that the record discloses no fraud, illegality or bad faith on the part of the defendant city of Detroit. In the absence of such a showing, this Court will not disturb the assessment. *Brown* v. *City of Grand Rapids,* 83 Mich 101; *Shimmons* v. *City of Saginaw,* 104 Mich 511; *Nelson* v. *City of Saginaw,* 106 Mich 659; *Power* v. *City of Detroit,* 139 Mich 30 (5 Ann Cas 645); *Berston* v. *City of Flint,* 176 Mich 266, 271; *Graham* v. *City of Grand Rapids,* 179 Mich 378 (Ann Cas 1915D, 380).

The burden of proof rests with plaintiffs of proving their allegations upon which their claim is based, particularly where it is sought to have a tax declared invalid. *Kelsey* v. *Township of Burns,* 223 Mich 173; *Rubatt* v. *Township of Wakefield,* 239 Mich 536.

Plaintiffs in this case have not sustained the burden of showing that the special assessments were not levied in proportion to the benefits derived, or that the common council abused its discretion. The common council is presumed to have acted in good faith, and to have exercised correctly the discretion reposed in them. *Powers* v. *City of Grand Rapids,* 98 Mich 393; *Shimmons* v. *City of Saginaw, supra; Graham* v. *City of Saginaw,* 317 Mich 427.

Appellants rely to a great extent on out-of-State authorities on the question of special benefits to the railroad property. We do not believe it is necessary to answer these cases in view of the decisions of the Michigan Court on this subject matter.

Appellants further rely upon *Dix-Ferndale Taxpayers' Association* v. *City of Detroit,* 258 Mich 390. This case is distinguishable from the present one. The Court therein said (p 395):

"The scheme of a wide cross-city thoroughfare has been partly carried out, but up to date stops short of the property of any plaintiff. The widening accomplished induces through traffic and creates a congested condition * * * only to be relieved by future extended widening, and the benefits then accruing will be assessed."

In the instant case the benefits accrue because of the possible use that could be made of the property at the present time.

The trial court heard the witnesses testify, observed their demeanor on the stand, and was in a far better position to determine the weight that should be given the evidence than is this Court.

The trial court found as a matter of fact that the plaintiffs had not carried the burden of proof, and they were, therefore, not entitled to a judgment. This Court, after carefully reviewing the record, is not persuaded that his conclusion was contrary to the preponderance of the evidence.

The judgment of the court below is affirmed, with costs to defendant.

DETHMERS, C. J., and CARR and EDWARDS, JJ., concurred with KAVANAGH, J.

BLACK, J. (*for reversal*). These suits were brought by plaintiffs* against the defendant city to recover the paid sum of special assessments made by the city against 4,300 feet of plaintiff's "right-

* Since New York Central and Michigan Central are legally united for present suit purposes, we shall in this opinion refer to them as "plaintiff" and "plaintiff railroad company."

of-way."* Such right-of-way, including the adjacent Detroit classification yard of the plaintiff railroad company, is a part of the NYC "main line" between Detroit and Chicago. The assessments were levied for "probable benefits" (quotation from the charter of the defendant city, under which the levy was made). Allegedly these benefits have accrued and will accrue to plaintiff and its assessed property on account of the paving by defendant of that portion of John Kronk avenue (formerly Southern avenue), in Detroit, lying adjacent and parallel to such property.

The respective amounts sued for having been paid under statutory protest (in all they aggregate $35,575.43), and plaintiff having declared accordingly in the Wayne circuit, the 2 suits came to due issue and nonjury trial. Judgment applicable to both cases entered for defendant. Plaintiff appeals.

The vanguard question is whether the special assessment—for benefits that are said to accrue from a specific municipal improvement—of railroad trackage property by municipal authority, the assessment having been made and confirmed by the municipality according to requisite forms of law, is final (see dissent of HOOKER, J., in *Detroit, G. H. & M. R. Co.* v. *City of Grand Rapids,* 106 Mich 13, 16–18 [28 LRA 793, 58 Am St Rep 466]) and nonreviewable by the courts.† It is answered by our disposition of the presently considered constitutional question.

---

* At the respective points of special assessment plaintiff's right-of-way includes the property on which its classification tracks are used and maintained. This property is said to be the largest railroad classification yard in Michigan. The first segment of special assessment, for the trackside paving of John Kronk avenue, extends 2,600 feet easterly, from the west city limits of Detroit, to Lonyo road. The second segment of corresponding assessment extends an additional 1,700 feet easterly, from Lonyo to Central avenue.

† See *Grand Rapids* v. *Grand Trunk Railway System,* 214 Mich 1, in which the mentioned dissenting opinion of Justice HOOKER was followed and the majority opinion (in 106 Mich 13) was overruled.

Finding as we do that plaintiff has proved beyond assail, first, that neither the railroad nor its specially assessed property will in fact receive practical distinguished from fanciful benefit from the 2 segments of street improvement now scrutinized, and second, that such improvement was effectively designed, in part at least, to facilitate the business of plaintiff's chief carrier-competitors,* plaintiffs raised and saved Federal question (whether these assessments are "invalid, unlawful and void for the reason that it [they] violate the Fourteenth Amendment to the Constitution of the United States") comes to standing attention. Such question calls for examination of applicable decisions of the courts of the United States. The detail of facts will come later.

First: An excellent outline of principles, by which the asserted constitutional question can and should be tested, was written in 1947 by the court of appeals of the 10th circuit. We refer to the following connected passage, taken from the opinion in

* The motor truck was with us but a short time before the Federal supreme court was called upon to consider, in a "benefit" assessment case, the adverse impact—on the business of a railroad—of the improvement of a highway paralleling its tracks (*Road Improvement District No. 1* v. *Missouri P. R. Co.*, 274 US 188 [47 S Ct 563, 71 L ed 992]). Holding, as did the courts below, that the highway improvement assessment against the railroad "was plainly arbitrary and unreasonbly discriminatory," the supreme court in the cited case founded its decision on the following conclusions (p 194):

"From all the testimony we think there is ample ground for believing that the improved road will lead to an increase in the traffic and revenue of the railroad, as respects freight moving in carload lots and passengers travelling considerable distances, but that the benefit from this will be cut down by a substantial loss in local freight and passenger traffic attracted to motor-driven vehicles moving over the improved road. That such a loss in local traffic usually ensues when hard-surface roads adapted to use by motor-driven vehicles are constructed practically parallel to railroads is not only shown by the testimony but is common knowledge. It received distinct recognition in the President's message of December 8, 1922, to Congress."

Morton Salt Co. v. *City of South Hutchinson* (CCA), 159 F2d 897, 901:*

"But, however great the legislative power of taxation, it is not wholly without constitutional limitations. The due process and equal protection clauses of the Constitution do provide some measure of protection against the abusive exaction of a tax. The test of due process, say the courts, is whether the taxing power exerted by the State bears fiscal relation to protection, opportunities and benefits given by the State. In other words, the query is, what has the State given for which it may ask return. *Wisconsin* v. *J. C. Penney Co.*, 311 US 435 (61 S Ct 246, 85 L ed 267). If the tax imposed clearly results in such a flagrant and palpable inequality between the burden imposed and the benefit received that it amounts to an arbitrary taking of property without compensation, it is said to violate the due process guaranty under the Fourteenth Amendment. All of the cases which have affirmed the broad powers of taxation have recognized these limitations, *i. e.*, see *Dane* v. *Jackson*, 256 US 589 (41 S Ct 566, 65 L ed 1107). *Henderson Bridge Co.* v. *Henderson City*, 173 US 592, 614 (19 S Ct 553, 43 L ed 823); *Houck* v. *Little River Drainage District*, 239 US 254 (36 S Ct 58, 60 L ed 266), 1 Cooley, Taxation (4th ed), § 144."

Proceeding farther, and on page 902 of report of *Morton*, due emphasis was placed on Mr. Justice COOLEY'S oft-quoted "constitutional test."† The court said:

* Two opinions of *Morton* were handed down by the 10th circuit court. The first, from which these quotations have been taken, was given on appeal from denial of a temporary injunction. The second, reported in 177 F2d 889, was handed down following trial of the merits and appeal from judgment of the district court. It does not appear that certiorari to review either decision was applied for.

† See employment thereof in *Wisconsin* v. *J. C. Penney Co.*, 311 US 435, 444, in these words: "The simple but controlling question is whether the State has given anything for which it can ask return."

"Whether the exaction is in the form of a special assessment for a special improvement, or a general tax for the general welfare, the constitutional test is always whether anything is given or offered for that which is taken. Indeed, the underlying purpose for the creation of special taxing districts is to attain a constitutional balance in relationship to benefits conferred for burdens imposed. 1 Cooley, Taxation (4th ed), § 320."

From these general principles we move to consideration of defendant's contention that *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.*, 197 US 430 (25 S Ct 466, 49 L ed 819) (followed in *Grand Rapids* v. *Grand Trunk Railway System, supra*), requires denial of plaintiff's appeal to the Fourteenth Amendment. Admittedly, on its apparent face, *Louisville* tends to support conclusion that special assessments of present nature do "not go beyond the bounds set by the Fourteenth Amendment of the Constitution of the United States." *Louisville,* however, was later restricted in scope by the same court and the same writer (Mr. Justice Holmes). As was noted in the ensuing case of *Martin* v. *District of Columbia* (cited and quoted below), "Constitutional rights like others are matters of degree." By force of such "degree" standard, *Louisville* must be read in the light of later decisions of the supreme court.

In *Martin* v. *District of Columbia,* 205 US 135 (27 S Ct 440, 51 L ed 743), the court was called upon to consider another like case, that of validity of special assessments to defray the cost of widening an alley in Washington. The alley extended through a "square," corresponding with what is commonly known as a city block. Having referred to the act of Congress under which the assessments were authorized, and having determined to quash the assessments in question, the court said (per Holmes, J., pp 138, 139):

"The charges in all cases are to be apportioned within the limited taxing district of a square, and therefore it well may happen, it is argued, that they exceed the benefit conferred, in some case of which Congress never thought and upon which it could not have passed. The present is said to be a flagrant instance of that sort. If this be true perhaps the objection to the act would not be disposed of by the decision in *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.,* 197 US 430. That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the Fourteenth Amendment, a system of delusive exactness and merely logical form.

"But when the chance of the cost exceeding the benefit grows large and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit 5 feet would require compensation and a taking by eminent domain."

In *Phillip Wagner, Incorporated,* v. *Leser* (*Baltimore City*), 239 US 207 (36 S Ct 66, 60 L ed 230) the general rule of *Louisville* and like cases came to

consideration and application, followed by this language (pp 219, 220):

"We do not understand this to mean that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of landowners, because of arbitrary and wholly unwarranted legislative action. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such State action, whether under the guise of legislative authority or otherwise."

In *Gast Realty and Investment Co.* v. *Schneider Granite Co.,* 240 US 55 (36 S Ct 254, 60 L ed 523) Mr. Justice Holmes, speaking again for the court, said this (pp 58, 59):

"The legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse. *Houck* v. *Little River Drainage District,* 239 US 254, 262 (36 S Ct 58, 60 L ed 266). The front-foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely that the cost will exceed the benefit, and the law does not attempt an imaginary exactness or go beyond, the reasonable probabilities. *French* v. *Barber Asphalt Co.,* 181 US 324 (21 S Ct 625, 45 L ed 879); *Cass Farm Co.* v. *Detroit,* 181 US 396, 397 (21 S Ct 644, 45 L ed 914). So in the case of a square bounded by principal streets the land might be assessed halfway back from the improvement to the next street. *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.,* 197 US 430 (25 S Ct 466, 49 L ed 819). But as is implied by *Houck* v. *Little River Drainage District,* if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the

probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact. *Martin* v. *District of Columbia,* 205 US 135, 139 (27 S Ct 440, 51 L ed 743)."

In *Branson* v. *Bush,* 251 US 182, 189, 190 (40 S Ct 113, 64 L ed 215), appears this reference to the earlier cases mentioned above:

"The subject was carefully re-examined and the law restated in cases so recent as *Phillip Wagner, Incorporated,* v. *Leser* (*Baltimore City*), 239 US 207 (36 S Ct 66, 60 L ed 230), and *Houck* v. *Little River Drainage District,* 239 US 254 (36 S Ct 58, 60 L ed 266) with the result that the rule as we have stated it was approved, with the qualification, which was before implied, that the legislative determination can be assailed under the Fourteenth Amendment only where the legislative action is 'arbitrary and wholly unwarranted,' 'a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property.' And see *Withnell* v. *Ruecking Construction Co.,* 249 US 63, 69 (39 S Ct 200, 63 L ed 479); *Hancock* v. *City of Muskogee,* 250 US 454, 457 (39 S Ct 528, 63 L ed 1081); *Embree* v. *Kansas City Road District,* 240 US 242, 250 (36 S Ct 317, 60 L ed 624)."

In *Kansas City Southern R. Co.* v. *Road Improvement District No. 6,* 256 US 658 (41 S Ct 604, 65 L ed 1151), *Gast, Houck, Louisville* and *Branson* were reviewed and the following declarations were made (p 661):

"Obviously, the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results. To say that 9.7 miles of railroad in

a purely farming section, treated as an aliquot part of the whole system, will receive benefits amounting to $67,900 from the construction of 11.2 miles of gravel road seems wholly improbable, if not impossible. Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. *Royster Guano Co.* v. *Virginia,* 253 US 412, 415 (40 S Ct 560, 64 L ed 989). It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

In *Thomas* v. *Kansas City Southern R. Co.,* 261 US 481 (43 S Ct 440, 67 L ed 758), the issue being validity of assessments for drain benefits against the appellee railroad companies (they were assessed to the tune of 57% of the burden), rules of the *Houck, Branson* and *Kansas City Southern Cases* were considered and these conclusions reached (p 485):

"The tax laid imposes upon the railroad, which can receive no direct or immediate benefit, a very heavy burden; and the lands which will receive a large direct (and possibly immediate) benefit, are required to bear only a very small part of the burden. The market value of the 12,000 acres may increase largely before any additional land is cultivated, or even before the improvement is made. The railroad can derive the indirect benefit, through increased traffic, only after the drainage of the wild lands has been effected and the reclaimed lands are being cultivated. The work of reclamation had not even begun.

Obviously there could not be any increase in traffic receipts during the year 1918, in which the tax is laid. Appellants argue that the assessed valuation of the lands would probably be greatly raised in later years; that the assessment upon the railroad property would probably not be raised; that the proportion of the annual burden imposed upon the railroad would diminish from year to year; and that, in course of time, the aggregate of the taxes levied upon each piece of property would be thus adjusted so as to correspond to the benefits received. This argument is relied upon to save the scheme of apportionment. But it rests wholly upon prophecy. The fact is that the tax levied is grossly discriminatory. The best that can be said of the scheme of taxation (so far as it concerns the railroad) is that the burdens imposed will grow less, as its ability to bear them grows greater."

Finally, and in *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 US 405 (55 S Ct 486, 79 L ed 949), we find that the supreme court was asked to examine, under the Fourteenth Amendment, a Tennessee statute requiring that half the total cost of each railhighway grade separation as ordered by a State commission—be paid by the railroad. The court, speaking through Mr. Justice Brandeis, announced the principal question this way (p 413):

"The main contention is that to impose upon the railway, under these circumstances, 1/2 of the cost is action so arbitrary and unreasonable as to deprive it of property without due process of law in violation of the Fourteenth Amendment;"

and then added these words of present significance (pp 426, 429, 430):

"The new highway, paralleling lines of the railway and intended for rapid moving motor vehicles, will, through competition for both freight and passenger traffic, seriously decrease rail traffic and deplete the

railway's revenue and net earnings. Practically all vehicles moving upon it will directly or indirectly compete for traffic with the railway. Buses will operate over the new highway in regular scheduled movements in the same way as passenger trains. Trucks, some of them 70 feet in length and many weighing with load as much as 50,000 pounds, operated by common carriers, by contract carrier and by private concerns, will compete for the most profitable classes of freight. The competition besides reducing the volume of traffic will compel reduction of rates. * * *

"While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment (citing cases); so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. (Citing cases including *Gast* and *Kansas City Southern R. Co.* v. *Road Improvement District.*)"

Following its report, *Nashville* was the subject of searching thought as shown by 3 law review articles from which we quote:

"Mr. Justice Brandeis's opinion marshalls the special facts relating to 'changed economic and transportation conditions' in an impressive review, in which he draws generously on extra-legal material, such as the Reports of the Chief of Federal Bureau of Public Roads, other Federal and administrative reports, insurance bulletins on accident statistics and presidential messages. The opinion indicates that those facts involve a major question relevant to the constitutionality of the statute: the question of the railway's responsibility for, or interest in, the elimination of the danger and the improvement of traffic conditions necessitating the underpass. The decision compelling a consideration of the facts emphasizes also the legal significance attached by the majority in this case to the 'changed economic and

transportation conditions' of the present day." (23 California L Rev 633.)

"While the court held that competition between motor vehicles and the railroads had reached proportions significant enough to merit consideration in determining whether a particular assessment on a railroad is constitutional, it found it difficult to reconcile the result arrived at with well settled principles. For in previous cases in this field, which hold without dissent that a State may require a railroad to contribute up to the full cost where an underpass is found necessary for the public safety and where the cost of its construction is reasonable, the factor of motor competition and the other arguments raised by the railroad in the instant case were expressly and consistently held to have no bearing on the constitutional issue. While the holding of the court is reached by excepting this case from prior decisions on the basis of its special facts, its effect is to widen the scope of inquiry into the reasonableness of grade-crossing elimination orders by including all the factors relevant to the determination of that broad issue." (44 Yale LJ, pp 1261, 1262.)

"That the law of railroads—and perhaps of other common carriers—is entering upon a period of metamorphosis does not seem to be an extravagant prediction. Rather does it appear to be an almost inevitable conclusion. An unmistakable warning of that change is implicit throughout the opinion of the supreme court of the United States in the case of *Nashville, C. & St. L. R. Co.* v. *Walters.* It is not the actual decision in the case which prompts the above prediction; it is the discussion of Mr. Justice Brandeis." (13 North Carolina L Rev 491.)

Atchison, Topeka & S. F. R. Co. v. *Public Utilities Commission of California,* 346 US 346 (74 S Ct 92, 98 L ed 51), is not opposed to applicability here of foregoing standards. In that case *Nashville* was carefully distinguished below this significant preface (p 352):

"These [in *Atchison*] were not improvements whose purpose and end result is to enhance the value of the property involved by reason of the added facilities, such as street, sewer or drainage projects, where the costs assessed must bear some relationship to the benefits received." (Citing *Gast* and *Kansas City Southern, supra.*)

The ground rules are before us. Next come the facts.

Second: It is testimonially established that the pavement of John Kronk, for the construction of which plaintiff's right-of-way has been specially assessed for benefits, was poured of extra thickness of concrete to withstand continuous use by heavy trucks and, for the same reason, that the pavement was constructed of 44-foot width rather than the customary 30-foot paved width of a street. Necessarily, such construction contributed materially to increased cost of the project.

It is similarly established that more than a mile of the area opposite plaintiff's specially assessed right-of-way, which area extends along the north side of John Kronk from the west city limits (of Detroit) to Martin avenue, is zoned by defendant as "heavy industrial." Such area is principally devoted to industrial operations and use (for truck "terminals") by a substantial number of national and local carriers of freight by motor truck. That the 2 paving projects were designed to provide needed relief, for nearby streets of Detroit, from heavy commercial traffic—likewise to provide a direct motor connection between the area and the presently described expressway,—was attested in a letter written by the clerk of the common council of Detroit, in 1953, to plaintiff's general counsel, having to do with the assessments in question. Consistent as it was with other record facts, some stipulated, some disputed, and some overwhelmingly established, the letter is

significant. The concluding paragraph reads as follows:

"After receiving your appeal, an attempt was made to induce Wayne county to assume a portion of the expense of this project because, as planned, Southern avenue will become a through highway connecting with the expressway system and should relieve certain State, county and city thoroughfares of considerable commercial traffic. The county has declined to assume any portion of the expense of this project, and therefore the common council must deny your appeal."

The steady passage of high-speed trains along the main line, adjacent as it is to the south side of John Kronk, and the exclusive utilization by the railroad of the nearby classification yard for handling of freight by rail, join in negation of utility of John Kronk in connection with the business of the railroad. No passenger depot is situated in the vicinity of the assessment. The NYC freight station is nearly 4 miles away. There are no exit or entrance driveways to John Kronk from the right-of-way, likewise the yard, between the city limits and Lonyo and between Lonyo and Central avenue.* The railroad in these circumstances does not, and obviously cannot, make beneficial or other practical use of the improvement. And its property receives and will receive no "probable" or "potential" benefit therefrom. Defendant's suggestion to the contrary must, we think, be branded as resting "wholly upon prophecy." (See quotation from *Thomas, supra.*) As was said of the same contention in *Northern Pacific R.*

* It was stipulated in the court below:
"The city proposes to extend the highway from Lonyo east to Livernois, and since the institution of this suit the city of Dearborn has extended Southern avenue from the city limits to Wyoming. The railroad has no private roadways or driveways leading from Southern avenue to any portion of its yard or other facilities."

Co. v. *City of Grand Forks*, — ND — (73 NW2d 348, 353):

"We think this argument is of little weight when applied to property which has been committed to a definite use by a substantial investment. Before the use of such property can be changed the investment therein may have to be sacrificed and a new investment made. Certainly that is true in the case of the lots under consideration. These lots have been occupied by railroad tracks for 60 years. It is highly speculative to assume that the railway company will now tear them up and build business buildings on the land. See *Rood* v. *City of Ames*, 244 Iowa 1138 (60 NW2d 227). To adopt the theory contended for would be to say that in order to prevent a future wholly speculative injustice, we must approve one which is both immediate and certain."

Against this factual background the defendant city, over timely and due protest of the plaintiff railroad, has proceeded to specially assess plaintiff's described right-of-way (first project) in the total sum of $19,606.20. This is more than 50% of the total amount specially assessed in the special assessment district. Likewise, referring now to the second project, the defendant city over similar protest has proceeded to specially assess plaintiff's right-of-way in the total sum of $15,384.28. Here again the total amount assessed is more than half the total amount specially assessed for the project. All this, we conclude, suggests firm ruling that the city has given nothing of special benefit to the railroad for that which it proposes to take. There is more to be said, however.

The western city limits of Detroit at this point are the east city limits of Dearborn. Next, going west, come a succession of steadily burgeoning villages and cities bidding fair, ere long, to make of Wayne and Washtenaw counties a continuous series of mu-

nicipalities lying athwart plaintiff's 100-year-old Detroit-Chicago right-of-way. Proceeding westward along that right-of-way, with lesser yet similar augury, we find the row of developing municipalities that are located in Jackson, Calhoun and Kalamazoo counties. And paralleling the right-of-way, never far distant therefrom, is the planned and partially completed "Detroit-Chicago industrial expressway."

Should we affirm the judgment of the circuit court, will not Detroit and Dearborn stand free to correspondingly assess plaintiff's said right-of-way for more "benefits" arising from the planned improvement (of extended and opened John Kronk)? Such improvement already is due to extend east and west an additional 1–1/2 to 2 miles. Will not each of the other cities and villages, on and on toward the setting sun, be enabled at will to "beneficially" assess plaintiff's right-of-way to meet half or more the cost of paving present and future trackside streets or highways? At this specially levied cost-rate of at least $50,000 per rail mile, even the greatest railroad of the United States might, in event of such affirmance, be forced out of the rail carrier business in Michigan. The portents of the judgment below thus become sobering if not alarming, assuming in each future instance that the facts showing absence of benefit remain constant.

This Court, equally with the courts of the United States, is obliged to guard and enforce rights secured by the national Constitution whenever those rights are properly asserted in any suit or proceeding before it (*United States* v. *Bank of New York & Trust Co.*, 296 US 463, 479 [56 S Ct 343, 80 L ed 331]). Here the plaintiff railroad company has duly asserted, and has overwhelmingly supported, a right guaranteed by the Fourteenth Amendment—that of immunity from discriminatory and confiscatory local taxation. We must, in the order of things, uphold

that right regardless of offense, if any, to our own decisions.

The defendant city places, we think, undue reliance on *Louisville* and its utilization by this Court in *Detroit, G. H. & M. R. Co.* v. *City of Grand Rapids, supra.* In *Louisville* a "lot" only of the railroad was specially assessed. The assessment was comparably small in amount. Some evidence of indirect benefit to the lot, by virtue of the improvement, appeared to the satisfaction of a court which, in the year 1905, was considering the question of benefits accruing to the property of a railroad when competing motor trucks were not utilizing trackside paved improvements and were in fact unknown. The legislative judgment thus withstood the constitutional attack. Here more than three quarters of a mile of property, exclusively devoted to rail traffic, has been assessed for benefits when there is no benefit. Here punitive and arbitrary assessments amounting to more than $35,000 are involved, with more of the apparent same to come. We conclude in these circumstances that the rules last-quoted above (from *Nashville*) are decisive and that *Louisville* is not.

On foregoing premises we hold that the assessments in question arbitrarily discriminate against the plaintiff railroad in violation of rights secured to it by the Fourteenth Amendment. The judgment of the circuit court in these circumstances should be reversed with remand for entry of judgment, applicable to both causes, in favor of plaintiff. Plaintiff should recover costs.

SMITH and VOELKER, JJ., concurred with BLACK, J.

KELLY, J. (*for reversal*). From its protest to the council, throughout the trial, plaintiff has claimed that:

"The assessment is excessive, unreasonable, arbitrary, fraudulent, inequitable, unfair and capricious, in violation of the charter and laws of the city of Detroit and the Constitutions of the State of Michigan and of the United States, in that it requires the railroad to subsidize its trucking competitors, to its detriment and without any gain or return to it or its property."

Justice BLACK, agreeing with plaintiff, has stated:

"Plaintiff has proved beyond assail, first, that neither the railroad nor its specially assessed property will in fact receive practical distinguished from fanciful benefit from the 2 segments of street improvements now scrutinized, and second, that such improvement was effectively designed, in part at least, to facilitate the business of plaintiff's chief carrier-competitors. * * * The railroad in these circumstances does not, and obviously cannot, make beneficial or other practical use of the improvement. And its property receives and will receive no 'probable' or 'potential' benefit therefrom. Defendant's suggestion to the contrary must, we think, be branded as resting 'wholly upon prophecy.'"

I agree with Justice BLACK's conclusion. His opinion considers plaintiff's rights under the 14th Amendment. This opinion considers plaintiff's rights under the charter of the city of Detroit and under the Constitution and laws of this State.

Chapter 3, title 6, of the charter of Detroit,* confines the council's right to impose special assessments to an amount the council "may deem just to be equitably assessed against the lots or parcels of real estate to be benefited thereby in proportion to the probable benefits to be derived therefrom."

Plaintiff introduced proofs showing that it would not receive "probable benefits." The city did not in-

* Detroit Municipal Code (1954), charter section, p 173.—REPORTER.

troduce proof that plaintiff would receive "probable benefits," and confined its arguments to a possibility that (1) if plaintiff would some time in the future decide to construct offices or a mercantile type of building over the tracks then the paved highway would justify the assessment against plaintiff; (2) that there might develop in the future some type of carrier service known as a "piggy back" operation, which is the movement of loaded freight by truck trailer and rail flatcar.

The opinions of the trial court and Justice KAVANAGH do not state that plaintiff would receive "probable benefits." The trial court sustained the assessment because "that which benefits the local community and especially develops and improves the locality brings benefit to the railroad as the principal business institution thereabouts" and "the court is of the opinion that the benefits do not have to accrue immmediately, but could possibly accrue in the future."

Justice KAVANAGH's test as to propriety of the tax is as follows: "The possible use that the land might have to the present owner or his successor in title. * * * This particular spot could have uses from which an owner would derive benefit from having a paved avenue along its 2–1/2 mile length. * * * We cannot say that the improvement does not benefit plaintiffs' property."

Plaintiff's main track, linking Detroit with Chicago, is only 21 feet from the Kronk highway and there is no access for plaintiff from its property to said highway, and plaintiff does not want, nor does it seek, such access. Besides maintaining the main track between Detroit and Chicago, the property being assessed consists of the largest railroad yard in Michigan—a nerve center for freight classification. Plaintiff has used the property for railroad purposes

for over 100 years and has no intention to use it for any other purpose.

In a recent case (1956), *New York Central Railroad Co.* v. *Town of Glasgow,* 142 W Va 291 (95 SE2d 420, 425, 426), the supreme court of appeals of West Virginia considered a special assessment for paving a street paralleling the railroad's right-of-way, and stated:

" 'To justify an assessment of the kind here in question, the benefits accruing to the land by the improvement must be direct, immediate, appreciable, and certain, and not contingent, remote, and uncertain.' *Naugatuck R. Co.* v. *City of Waterbury,* 78 Conn 193, 196 (61 A 474, 475). * * *

"The defendant contends that such benefits are to be determined with reference to the general uses to which the property is susceptible and with reference to its natural and unaltered physical condition rather than with reference to the use to which it is now devoted. * * *

"The testimony is further to the effect that this land will not in all probability be abandoned by the plaintiff as a railroad or relocated within the next 100 years and certainly not within the time the improvements to these streets are in existence. In such circumstances, are we to determine the value of this land for these improvements as it was originally, as farm land, for its possible use as a subdivision, or as presently used after the expenditure of much money for construction and maintenance for the purpose to which the owner has devoted it. The trial court, in its opinion quoted *Sterling National Bank & Trust Co. of New York* v. *Charleston Transit Co.,* 126 W Va 42, 48 (27 SE2d 256), that 'Of course, determination of the question of benefits is not to be confined to the present use of the property involved.' This may be true, but at the same time the present use to which it is devoted cannot be excluded from consideration and some other possible but highly improbable use substituted in lieu thereof. * * *

We are of the opinion that the land must be considered as of the time of the levy and its present use, that being its most advantageous present use, and when so considered, in consideration of the evidence in this case, the assessment certainly is not based on any benefit."

The trial court erroneously stated: "It must be borne in mind that no charge of fraud, or illegality, or bad faith is made by plaintiff against the defendant city of Detroit." When this case was called for trial, appellant's attorney stated he would request leave to amend if there was any doubt that plaintiff was claiming constructive fraud, and was advised by the court, in the presence and without objection of appellee's attorney, that appellant's contention in this regard was understood by both the court and appellee.

We have established by decisions of this Court that charter provisions control and a special assessment may only be sustained upon the theory that the property receives special benefits, different from the benefits of the general public, and that said benefits should be actual or probable benefits. We have further stated that to be valid an assessment for benefits derived from the improvements of a public highway must be based upon actual or probable benefits and assessments are void if made upon an arbitrary basis, and that if such assessments are arbitrarily and capriciously made an unlawful levy results and it is immaterial that the honesty of the assessing officer is not impugned. See *City of Lansing* v. *Jenison,* 201 Mich 491; *Hatch* v. *Michigan Central R. Co.,* 238 Mich 381; *Dix-Ferndale Taxpayers' Ass'n* v. *City of Detroit,* 258 Mich 390.

The home-rule act (CL 1948, § 117.4d [Stat Ann 1949 Rev § 5.2077]) authorizes Detroit to provide in its charter the applicable assessment provision.

The city stresses, and my associates comment upon, *Grand Rapids* v. *Grand Trunk Railway System,* 214 Mich 1. In this opinion the Court made its position clear that there must be a benefit to property to sustain a special assessment, by stating (p 5):

"It is a legislative policy of this State that railroad properties shall be subject to tax for local improvements. But if the track, roadbed, or right-of-way of a railroad is not susceptible of benefit from a local improvement a taxing of such property for such improvement would be wanting in the due process of law required by the Constitution."

In concluding its opinion, the Court said (p 11):

"The weight of authority is, and we so hold, that the court may not say, as a matter of law, that the track, roadbed, or right-of-way of a railroad may not be benefited or susceptible of benefit by a local improvement. No bad faith is charged and to what extent the property included in the assessment district was benefited and whether benefited or not were questions to be determined in the special proceedings. We cannot review the assessment."

This *Grand Rapids Case, supra,* did not hold, directly or indirectly, that a city charter provision in regard to special assessment should not prevail nor that railroads could be discriminated against.

The question presented in this appeal is not whether a city can assess a railroad or whether a city, having the right to assess, may assess for a greater amount than it should, but, rather, was there proof of probable benefits justifying the assessment against plaintiff.

The test is not the trial judge's test that benefits could "possibly accrue," or that "a possible use that the land might have to the present owner or its successor in title." The test is clearly set forth in the

charter, namely, proof of the presence or absence of probable benefits.

The special assessment of $35,575.43 against plaintiff did not meet the charter requirements and was "not in proportion to the probable benefits to be derived therefrom."

The judgment of the trial court should be reversed and the cause remanded for entry of judgment in favor of plaintiff. Costs to appellant.

JANUARY TERM, 1959.

GRAND TRUNK WESTERN RAILROAD COMPANY *v.* PUBLIC SERVICE COMMISSION.

1. RAILROADS—HIGHWAY CROSSING—COST OF WIDENING.

   The widening of an existing highway crossing of a railroad at grade is an improvement of the crossing, hence, the expense of doing the necessary work is to be met by the parties responsible for the work of maintaining and repairing the crossing as provided by statute, since the result attained is not the construction of a new road but, rather, the improvement of the existing one (CL 1948, § 469.1).

2. SAME—HIGHWAY CROSSING—FLASHING LIGHT SIGNALS AND AUTOMATIC GATE ARMS—RELOCATION EXPENSE—CONTRACTS.

   Written agreement between railroad company and State highway

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 44 Am Jur, Railroads § 311.
[2] 44 Am Jur, Railroads §§ 520, 528.
[3] 14 Am Jur, Costs § 106.

commissioner relative to installation of flashing light signals with automatic gate arms at grade crossing of highway over railroad whereby the installation or relocation thereof upon widening of highway was to be at the expense of the highway department and the operation and maintenance after completion of installation was the sole expense of the railroad company *held,* a valid contract (CL 1948, § 469.1).

3. COSTS—RAILROADS—HIGHWAY CROSSINGS—PROTECTION DEVICES—EXPENSES.

No costs are allowed in suit to review determination of circuit court on appeal from public service commission with respect to apportionment of expense of widening highway crossing at grade over railroad and relocation of flashing light signals and automatic gate arms.

Appeal from Ingham; Salmon (Marvin J.), J. Submitted October 8, 1958. (Docket No. 19, Calendar No. 47,096.) Decided January 12, 1959.

Bill by Grand Trunk Western Railroad Company, a Michigan corporation, against the Michigan Public Service Commission, with the Michigan State Highway Commissioner intervening, to test validity of order allocating expense of relocating safety devices upon improvement of highway-railroad grade crossing. Decree for plaintiff. Defendants appeal. Affirmed.

Jennings, Fraser, Parsons & Trebilcock, H. V. Spike and *Forbes B. Henderson,* for plaintiff.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *Robert A. Derengoski* and *Louis J. Caruso,* Assistants Attorney General, for defendants.

CARR, J. Plaintiff's railroad tracks in the village of Schoolcraft, Kalamazoo county, Michigan, are crossed at grade by State trunk-line highway US-

131. Prior to the month of June, 1937, the crossing was not protected by safety devices. In that month the State highway commissioner and the railroad company entered into a written agreement for the installation of flash light signals with automatic gate arms operating over the traffic side of the highway. The contract provided that the cost of furnishing and installing the safety devices in question should be financed by the highway department, and that plans and specifications should be subject to approval by the proper Federal authorities before construction work was started.

The railroad company undertook to prepare a detailed list of equipment, materials and specifications, together with estimates of cost for the proposed installations. The highway department was charged with responsibility for advertising for bids and awarding contracts. It was further stipulated that the operation and maintenance of the protective signals after completion of installation should be at the sole expense of the railroad company. Paragraph 10 of the contract read as follows:

"That if, due to the widening or other change of said highway, the local relocation of any of the signals so installed becomes necessary, the expense thereof shall be borne by the highway department or county road commission as the case may be."

The agreement in question was carried out, and the safety devices were installed in accordance with plans adopted by the parties. Presumably the approval of Federal authorities was obtained, and the Michigan public utilities commission, predecessor of the defendant, under date of August 23, 1937, approved the contract as made by the parties and the installation of the safety devices thereby contemplated. No specific mention was made in the order with reference to the cost of the work to be done or

the matter of subsequent maintenance. Presumably the agreement of the parties with reference thereto was considered satisfactory.

In May, 1955, the State highway commissioner petitioned the defendant commission for permission to relocate the safety devices installed under the contract of 1937, in connection with a highway project involving the widening of trunk-line US–131, asking that the order provide for the sharing of the cost of the relocation in accordance with CL 1948, § 469.8 (Stat Ann § 22.768). The application was granted by order of the commission dated August 25, 1955, which directed that the cost of relocating the safety devices should be borne in equal shares by the highway department and the railroad company.

From the order of the commission plaintiff appealed to the circuit court of Ingham county, pursuant to the statute. Thereafter the highway commissioner filed a second petition with the defendant commission asking that an order issue authorizing the widening of the crossing. Such authority was granted on January 10, 1956, permitting changing the existing 18-foot pavement to a total width of 52 feet, comprising two 24-foot paved roadways separated by a 4-foot median strip. It was further ordered:

"That the cost and expense of that part of the improvement to the existing crossing shall be borne under the provisions of section 1 of PA 1921, No 270, and that all new crossing construction shall be borne under the provisions of section 2 of PA 1921, No 270."

The first section of the act of 1921 cited in the order, as amended by PA 1931, No 336 (CL 1948, § 469.1 [Stat Ann § 22.761]), directs that the cost of improving an existing crossing, when necessary, shall be borne by the respective parties responsible

for the work of maintaining and repairing as provided in said section. Section 2 of the act (CL 1948, § 469.2 [Stat Ann § 22.762]) has reference to the construction of a new highway over an existing railroad, and conversely, and to the relocation of an existing crossing, or the establishment of a new crossing, if the public highway grade crossing is abandoned. The expense of such new crossing is required to be borne by the party requesting it. It appears from the defendant commission's order that it considered that the application to it contemplated an improvement of the existing crossing together with additional new crossing construction work.

Plaintiff filed a supplemental bill of complaint in the Ingham circuit court, setting up the orders of the commission and seeking review thereof pursuant to the statute. The State highway commissioner intervened in the case as a party defendant. The circuit judge reviewing the proceeding concluded that the widening of the crossing in accordance with the plans for the road project was an improvement and that, in consequence, the expense to be incurred in connection therewith should be borne by the parties concerned in accordance with section 1 of the act of 1921, as amended. The judge further held that the combination light and gate devices installed pursuant to the agreement of the parties were essentially different from the flashing light signals contemplated by section 8 of the act of 1921, as amended (CL 1948, § 469.8 [Stat Ann § 22.768]), and, also, not the type of device authorized by PA 1873, No 198.* It was also held that the 1937 contract between the State highway commissioner and the railroad company did not contravene the provisions of the statute defining the powers and duties of the public service commission, that it was not invalid for such rea-

* See CL 1948, § 466.2 (Stat Ann § 22.261).

son, and that the State highway commissioner had authority to contract with reference to the safety devices contemplated by the agreement as actually made and performed. A decree was entered accordingly and the defendants have appealed. Plaintiff filed a cross appeal, but its counsel in their brief ask that the decree be affirmed, indicating that the cross appeal was taken in order to fully protect the rights of the plaintiff in the event that the contract of 1937 is held to be invalid.

The first question at issue involves the provision of the decree entered in circuit court with reference to liability for the expense incurred in connection with the widening of the crossing. Is such widening to be regarded as an improvement, or as contemplating an improvement in part and a new crossing construction as to the balance of the work, or is it in fact a new crossing? As before noted, the circuit judge held that it was an improvement and that the resulting expense entailed in the work should be met accordingly. We are in accord with such holding. The widening of the crossing is a part of the highway project involving the widening of the trunk-line highway. The result to be attained is not the construction of a new road but, rather, the improvement of the existing one. The crossing partakes of the general nature of the project. It is, in consequence, to be regarded as an improvement within the meaning of the term as used in section 1 of PA 1921, No 270, as amended, above cited, and the expense in doing the necessary work is to be met in the manner contemplated by said section.

This brings us to the issue raised by the parties with reference to the cost of moving the combination light and gate safety devices installed in accordance with the contract of 1937. As the circuit judge observed in his opinion, such device is not merely a gate, nor is it a flashing light only. It was consid-

ered by the parties at the time they made their contract as essential to the proper protection of the crossing. Apparently defendant commission's predecessor agreed with such view and approved the arrangement as made.

Section 8 of the act of 1921, as amended, above cited, grants authority to the defendant commission to require the installation and maintenance of flashing lights designed for crossing protection, stating that:

"The cost of all flashing light installations and alterations or relocations of same shall be borne equally by the railway and highway authorities, and thereafter they shall be maintained by the railway authorities at their own expense except that the highway authorities shall pay $10 per month to the railroad authorities for each crossing protected by flash light signals."

It does not appear, however, that the legislature has spoken with reference to the cost of relocating gates when such action becomes necessary. The act of 1873, above cited, authorizes defendant commission to require the installation of gates, as this Court held in *Washtenaw County Road Commissioners* v. *Public Service Commission,* 349 Mich 663, but the provisions of said act still in force and effect are silent as to the cost of relocating gates, installed pursuant to an order of the commission, in the event of widening of a crossing.

The parties were within their rights in the contract of 1937 in covering the matter of cost of relocation of the safety devices, installed under the contract, by specific agreement. In *Chesapeake & Ohio R. Co.* v. *Public Service Commission,* 347 Mich 234, in which the authority of the State highway commissioner to enter into agreements with railroad companies with reference to highway-railroad crossings was consid-

ered and discussed, the Court concluded that the agreement involved, which had been executed, was binding upon the parties thereto. As above noted, section 8 of PA 1921, No 270, as amended, vests the defendant commission with authority to order flashing light installations. When so ordered the costs are required to be borne equally by railroad and highway authorities. Like provision is made with reference to alterations or relocations. In the instant proceeding the combination safety devices were installed pursuant to agreement between the parties and maintained in accordance therewith. Defendant commission's predecessor was not asked to apportion the cost, nor did it undertake to do so. In other words, the matter of costs was governed wholly by the contract and a type of device was installed that was deemed by the parties to be proper and requisite for the protection of the public.

As pointed out in *Chesapeake & Ohio R. Co.* v. *Public Service Commission, supra,* agreements in this general field have been recognized as valid. In the instant case the contract in question was so considered and was relied on accordingly. Bearing in mind the nature of the agreement and construing it in the light of the statutory provisions to which our attention is directed, we conclude that it was, and is, valid, and that the circuit judge was right in so holding.

The decree is affirmed. In view of the nature of the controversy, no costs are allowed.

DETHMERS, C. J., and KELLY, SMITH, BLACK, EDWARDS, and VOELKER, JJ., concurred.

KAVANAGH, J., did not sit.

A & M LAND DEVELOPMENT CO. *v.* MILLER.

1. FRAUD—PRESUMPTIONS.

   Fraud is not to be presumed.

2. SAME—BURDEN OF PROOF—EVIDENCE.

   The party asserting a cause of action based on fraud has the burden of establishing it by clear and satisfactory proof.

3. APPEAL AND ERROR—CHANCERY CASES—FINDINGS OF TRIAL COURT —EVIDENCE.

   The Supreme Court accords much weight to the findings of a trial court in an equity case involving the oral testimony of witnesses, since the trial court has the advantage of seeing the witnesses in court and listening to their testimony and of determining the weight to be given it whereas the Supreme Court determines the issues involved from the appendices of counsel and the transcript of testimony filed.

4. FRAUD — EVIDENCE — RESIDENTIAL USE OF SUBDIVISION LOTS — OPINION.

   Evidence of fraud arising from claimed misrepresentation of defendant and his agents as to 91 lots in 140-lot subdivision he had then recently purchased, especially with reference as to their suitability for residential use, arising from claimed extensive

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 24 Am Jur, Fraud and Deceit § 256.
[2] 24 Am Jur, Fraud and Deceit §§ 255, 278.
[3] 3 Am Jur, Appeal and Error § 912.
[4, 5] 23 Am Jur, Fraud and Deceit § 27.
[6] 24 Am Jur, Fraud and Deceit § 288.
[7] 55 Am Jur, Vendor and Purchaser §§ 23, 24.
[9] 55 Am Jur, Vendor and Purchaser §§ 593, 595.
[10] 55 Am Jur, Vendor and Purchaser § 589.
Partial rescission of contract. 148 ALR 417.

mass grading operations subsequent to report by engineers as to percolation tests conducted thereon, *held,* insufficient to establish more than a mere expression of an opinion, hence, insufficient to substantiate a finding of fraud as to parties dealing at arm's length, especially where the basis for the opinion is shown.

5. SAME—CONTRACT—OPINION.

A mere expression of opinion does not constitute representation of an existing fact when the parties to contract, sought to be cancelled for fraud, are dealing at arm's length, especially when the basis for the opinion is shown.

6. SAME—EVIDENCE.

Finding of trial court that plaintiff had not proved that it had entered into land contract for purchase of 91 lots of 140-lot subdivision as result of any fraudulent inducement or misrepresentation by defendant or that it was misled to its prejudice by engineers' report as to percolation tests which report was furnished by defendant and related to the subdivision as a whole *held,* supported by record presented.

7. VENDOR AND PURCHASER—LAND CONTRACT—FAILURE OF CONSIDERATION—SUITABILITY OF SUBDIVISION LOTS FOR BUILDING OPERATIONS.

Plaintiff, a residential building developer, which had purchased 91 lots of a 140-lot subdivision, *held,* not to have substantiated its claim of failure of consideration for the contract in that the premises were unsuitable for building operations, where plaintiff desires to keep 44 lots that have been deeded to it, asks for specific performance as to 5 lots and rescission as to remaining 42 lots and it does not appear that plaintiff will necessarily be precluded from building operations in the future.

8. CANCELLATION OF INSTRUMENTS—EQUITY.

The cancellation of an executed contract is the exertion of the most extraordinary power of a court of equity.

9. VENDOR AND PURCHASER—LAND CONTRACT—RESCISSION—FRAUD.

The fact that plaintiff building developer's investment in 91 lots sold to it by defendant did not turn out as well as its officers had hoped and expected does not afford ground for equitable relief by way of rescission, where plaintiff is not shown to have been defrauded or induced to make the land contract in question by misrepresentations on the part of defendant or his agents, as to material facts.

10. SAME—LAND CONTRACT—PARTIAL RESCISSION—FAILURE OF CONSIDERATION—VALUE—MISTAKE—FRAUD.

Partial rescission of land contract for purchase of 91 subdivision lots by which plaintiff seeks to return 42 lots *held,* not justified under record presented either on the ground of failure of consideration or mistake, where plaintiff received the entire quantity of land for which it contracted to purchase, and while perhaps not as valuable as it had expected, it is not without value, and fraud is not established.

Appeal from Wayne; Gilmore (Horace W.), J. Submitted October 15, 1958. (Docket No. 56, Calendar No. 47,442.) Decided January 12, 1959.

Bill by A & M Land Development Co., a Michigan corporation, against Samuel A. Miller and Bernice Miller for partial rescission of land contract, for specific performance of part thereof, and for accounting and damages arising from alleged fraud and misrepresentation. Bill dismissed. Plaintiff appeals. Affirmed.

Joel G. Jacob and *Meyer R. Rubin* (*Henry M. Butzel,* of counsel), for plaintiff.

James E. Haggerty and *Joseph J. Beck* (*Irwin I. Cohn* and *John Sklar,* of counsel), for defendants.

CARR, J. Plaintiff brought this suit in equity seeking the recovery of damages, partial rescission of a land contract for the sale and purchase of real property, an accounting, and other equitable relief. The bill of complaint filed alleges, as bases for the cause of action, fraud, misrepresentation, failure of consideration, and mistake. The subject matter of the land contract in question consists of 91 lots located in Bloomfield Knolls subdivision, West Bloomfield township, Oakland county, Michigan. Defendant Samuel A. Miller (hereinafter referred to as the de-

fendant) purchased said lots in the late summer of 1955. He was at the time engaged in the business of buying and selling land, and shortly after acquiring said lots he listed them with real-estate brokers who caused to be published in a Detroit newspaper an advertisement indicating the location of the property with the addition of the statement, "Ready to build now."

The plaintiff corporation was engaged at the time in the construction of residences. Its officers saw the advertisement published by the brokers, contacted them, and were shown the property. It was their claim on the trial of the cause that the real-estate salesman, acting in defendant's behalf, advised them that there was neither water nor sewage facilities on the property, and that it would be necessary to install septic tanks. The correctness of such statements is not questioned, but it is claimed on behalf of plaintiff that further statements were made by the salesman, and subsequently by defendant, that the soil was suitable for such installations and that such fact could be established by documents.

In accordance with the oral conversation defendant caused to be furnished to plaintiff's officers acting in its behalf in the matter a report, copy of which was attached to the bill of complaint as exhibit A, as prepared by 2 engineers of Oakland county under date of November 4, 1954. Said report dealt with the matter of sewage disposal and indicated that the sponsor therefor was the company from whom defendant later purchased a part of the lots in the subdivision. It indicated that on the tract of land, comprising 44 acres, a total of 31 percolation tests had been made, the results disclosing the presence of sand and gravel, and in some instances yellow clay, in varying proportions. Apparently the form used

was prescribed by the Federal housing administration office, the information being sought in connection with applications for building loans. No information was contained in the report with reference to water-table elevations.

The report as prepared by the engineers doing the work was submitted to the Oakland county health department which through its director of the sanitation division added the following comment under date of April 11, 1955:

"We have examined the above results of the percolation tests and other information developed in connection with this subdivision. It is our opinion that the tract as a whole is:

"[X] Suitable for the use of individual septic-tank systems provided:

"1. The subdivision is laid out so as to provide on each building plot a gross area of 500 sq. ft. per bedroom suitable for constructing a subsurface disposal field.

"2. The tract, or portions of the tract designated, conforms to the following conditions: * * *

"It is understood that the conclusions rendered on this report do not cover the installation of the individual septic-tank systems. The design, construction, and installation of each system should be based upon specific conditions affecting each building plot."

Plaintiff's claims of fraud and misrepresentation on the trial of the case in circuit court were predicated on the advertisement of the lots by the broker, the statements of defendant and his agent, and the report, copy of which, it is claimed, was submitted to plaintiff's officers by way of confirmation of the oral representations. Defendant and the salesman in question denied making the representations as

claimed on behalf of plaintiff. Following trial the circuit judge concluded that plaintiff had not established its right to the relief sought by it, and entered a decree dismissing the bill of complaint. Plaintiff has appealed, claiming, in substance, that the conclusions of the trial judge, as set forth in a written opinion filed in the cause, were not in accord with the proofs.

The principal question at issue in the case is whether plaintiff established by competent proof that there was fraud or misrepresentation on the part of the defendant, on which plaintiff relied in executing the land contract. The rule is well established in Michigan and elsewhere that fraud is not to be presumed, and the party asserting a cause of action based thereon has the burden of establishing it by clear and satisfactory proof. *Candler* v. *Heigho,* 208 Mich 115; *Marshall* v. *Ullmann,* 335 Mich 66; *Columbus Pipe & Equipment Co.* v. *Sefansky,* 352 Mich 539. We have in mind, also, that the trial judge had the advantage of seeing the witnesses in court and listening to their testimony. In consequence he was, at the conclusion of the proofs, in better position to determine the weight to be given to the testimony of each witness than are the members of this Court who must determine the issues involved on the basis of the appendices of counsel and the transcript of testimony filed here.

Bloomfield Knolls subdivision as platted comprised 140 lots aggregating approximately 44 acres. The owner of the property from whom defendant purchased 91 of the lots in the late summer of 1955 built residences on 49 of the lots. Whether all of such residences had been completed before the remaining lots were sold to defendant does not appear. It is evident, however, that the lots in the subdivision were considered from the practical standpoint as

being ready for building operations. The advertisement in the newspaper by which plaintiff's attention was first directed to the property was not false or fraudulent. The sanitation code of the county had not then been adopted, and did not become effective until September 1, 1956. At the time of the publication of the advertisement, and the subsequent events involved in this case, the permit provided for by said code was not required. Neither does it appear that the officers of plaintiff corporation relied on the advertisement in entering into the contract for the purchase of the lots from defendant. They consulted the brokers who had the listing of the property for sale and talked with defendant himself, with particular reference, as they claimed, to the suitability of the soil for the installation and operation of septic tanks.

It is a fair inference from the testimony offered on behalf of plaintiff that its officers were not satisfied with the statements made by the salesman and by defendant, and desired confirmation thereof. It is significant that no claim is made that either defendant or his agent represented that he had made percolation tests on any of the lots in question, or that either had personal knowledge concerning such tests. As men having some familiarity with building operations it may be assumed that plaintiff's officers realized that the character of the soil beneath the surface to the required depth for the installation of septic tanks may be determined only by tests. The record clearly indicates that such is the fact, and further justifies the conclusion that the officers who executed the land contract in plaintiff's behalf were familiar with building operations generally, and their testimony as to their seeking information from defendant and his agent as to the character of the soil in the

subdivision suggests that they appreciated the importance of the matter.

This brings us to a consideration of the report, made in November, 1954, by the engineers above mentioned, on the basis of which the Oakland county health department, through the director of its sanitation division, made the statement above quoted. It appears from said statement that the department merely expressed an opinion on the basis of the 31 tests that the report indicated had been made in the 44-acre subdivision. It is significant, also, that attention was called directly to the fact that the conclusions drawn from the report did not cover the installation of individual septic-tank systems, and that the construction and installation of each such system should be based upon conditions affecting the building plot. The results of the 31 tests, specifically detailed in the report, were such as to clearly indicate that the character of the soil varied greatly throughout the subdivision. The average time required for 1 inch of water to seep away varied from 5 seconds to 40 minutes.

No claim is made that the tests were not accurately conducted by the engineers, nor is the verity of the report assailed. On behalf of plaintiff it is argued, in substance, that conditions in the subdivision, and particularly with reference to the lots involved in this case, were changed following the making of the report and the expression of opinion thereon by the county health department through the director of its sanitation division. It is said that grading operations were conducted, amounting to "mass grading." The proof does not disclose the actual extent of such operations or their location. There is testimony in the record that if there was any extensive grading it occurred during the late spring and summer of 1955. At that time the roads running through the

subdivision had been laid out and graveled. It is not claimed that grading operations were so extensive as to interfere with those roads. Whether top soil was removed from or added to the lots in question here is a matter of conjecture. It is a matter of inference, however, that if any such extensive grading operations as would have affected materially the report of the engineers as made in November, 1954, were actually carried on plaintiff's representatives could scarcely have failed to observe the resulting situation when they viewed the premises in September, 1955.

The report may not be regarded as a representation by defendant of the exact situation existing at the time he entered into the contract with plaintiff. Such report spoke for itself, and it may not be said on the record before us that there was any material change in the lots here involved thereafter and prior to September of the following year. We are not concerned with what may have occurred elsewhere in the subdivision. Doubtless in connection with construction work being conducted on the 49 lots retained by defendant's grantor there may have been a certain amount of surface grading.

It may also be noted that accompanying the report of the engineers, and attached thereto, was a topographical map indicating a variation in elevation ranging from 980 feet on the southeast portion of the subdivision to approximately 940 feet on the northeast corner thereof. Such a difference might well suggest a variation in the character of the soil. It further appears from testimony that in some places the water table was so near the surface of the ground as to interfere with the installation and operation of septic tanks. No claim is made that there was any misrepresentation with reference to the water table.

The percolation tests made by the engineers in preparing for their report of November, 1954, indicate the variable character of the soil. It may be noted also in this connection that 2 of plaintiff's witnesses testified that variations may occur within a lot 85 x 125 feet, indicating that if a number of tests are conducted on such a lot different results may be obtained therein. As before pointed out, no statement was made by either the salesman or by defendant as to personal knowledge of any percolation tests. Assuming that the conversations occurred as claimed on behalf of plaintiff, it appears that defendant and his agent referred to the report of the engineers as the basis for their statements. That report was considered by the director of the sanitation division of the county health department as justifying the expression of an opinion that the subdivision as a whole was suitable for the use of septic tanks, such opinion being qualified by the further statement that the conclusion expressed did not cover the installation of individual septic-tank systems. It must be assumed that with knowledge of what the percolation tests listed in the report actually indicated, that is, a material variation in soil conditions throughout the subdivision, the opinion therein expressed was accepted. A mere expression of opinion is not, however, a representation of an actual existing fact when the parties to a contract are dealing at "arm's length," especially so when the basis for the opinion is shown. The report itself cannot be extended by construction beyond its plain language, and defendant and agent in furnishing said document as the basis on which they relied were in fact indicating the acceptance of the opinion therein stated.

In *Mayo* v. *Latham,* 159 Mich 136, suit was brought to recover the price of goods sold under contract. The defendant claimed that the order was obtained by fraud. In rejecting said claim, it was said (p 137):

"The fraud claimed is that the agent who sold the goods said that the price charged was as cheap or cheaper than they could be bought for elsewhere. We think the record discloses only an expression of opinion on the part of the agent, and, even though it should appear that similar goods could have been secured elsewhere at a less price, it would be no ground for annulling the contract. *Collins* v. *Jackson,* 54 Mich 186; *Moon* v. *McKinstry,* 107 Mich 668, 673."

See, also, *Hammer* v. *Martin,* 205 Mich 359.

We are in accord with the conclusion of the trial court that plaintiff failed to establish by the requisite degree of proof that it was induced to enter into the land contract by fraud or misrepresentation. There is no showing of any intentional misstatement of material facts with intent to injure plaintiff. In the final analysis plaintiff's claim is that it was misled to its prejudice by the report furnished to it by defendant, but plaintiff's representatives must have been apprised thereby that the opinion expressed on the basis of the percolation tests made by the engineers was merely an opinion with reference to the subdivision as a whole, and did not relate to all lots in the subdivision or to any particular lots. Plaintiff's officers could scarcely have failed to understand that the statements made by defendant and his salesman were to be construed in the light of the report and the opinion expressed therein. There is no basis for any possible claim that said opinion was not given in good faith and in fact no question is

raised in this regard. It is apparent also that plaintiff's representatives were unwilling to rely on the statements or opinions of either defendant or the salesman, and sought the production of the basis therefor. As we have seen, there was nothing false or fraudulent in the report. Neither it nor the oral statements made in connection therewith afford a proper basis for the granting of the relief which plaintiff seeks.

Plaintiff also seeks relief on the ground of failure of consideration, such claim being based on the premise that the lots covered by the land contract, which it seeks to have returned to defendant, are unsuitable for building purposes. The proofs do not establish that such is the case with all of said lots, nor does it appear that plaintiff will necessarily be precluded from continuing building operations in the future. At the time of the trial it had constructed or had in the process of construction residences on 44 of the 91 lots. As to these it does not seek rescission. It further appears that it has constructed a water system covering partially, or wholly, 5 of the lots title to which has not as yet been conveyed by defendant. As to these 5 lots plaintiff asks that defendant be required to specifically perform and to execute deeds. In other words, we have an unusual situation in which the plaintiff desires to keep the 44 lots that have been deeded to it, asks for specific performance as to the 5 lots, and seeks rescission as to the remaining 42 lots.

Emphasis is placed on the fact that permits for the construction of residences on some of these lots were denied. Whether such action was justified is perhaps a matter of opinion. The proofs disclose that the sanitarian of the county health department had stated that if the systems installed on the lots on which plaintiff has built residences prove satisfac-

tory he would again issue septic-tank permits. It may not be assumed that the lots which plaintiff would have the court order returned to defendant are without value. Problems may be presented in the use of some of them for residence purposes, but we may not speculate in this regard.

It is quite possible that for various reasons plaintiff's investment did not turn out as well as its officers had hoped and expected. If such is the situation equitable relief by way of rescission may not be granted unless plaintiff was defrauded, or was induced to make the contract in question by misrepresentations, on the part of defendant or his agent, as to material facts. *Shultz* v. *McCarty,* 253 Mich 445. In *Atlantic Delaine Company* v. *James,* 94 US 207, 214 (24 L ed 112), it was declared that:

"Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

Under the facts in the case at bar plaintiff is not entitled to the relief sought by it on the ground of failure of consideration. The same situation obtains with reference to the claim that there was a mistake, either mutual or on the part of plaintiff, of such character as to justify a court of equity in granting partial rescission and damages. There was here no mistake as to the form or substance of the contract between the parties, or the description of the property constituting the subject matter. The situation involved is not at all analogous to that presented in

Scott v. *Grow,* 301 Mich 226 (141 ALR 819). There the plaintiff sought relief by way of reformation of a deed on the ground that the instrument of conveyance had not been drawn in accordance with the intention and agreement of the parties. It was held that the bill of complaint stated a case for the granting of equitable relief by way of reformation. In the case at bar plaintiff received the property for which it contracted. The fact that it may be of less value than the purchaser expected at the time of the transaction is not a sufficient basis for the granting of equitable relief, neither fraud nor reliance on misrepresentation of material facts having been established.

We are in accord with the conclusions of the trial judge and the decree entered is affirmed, with costs to defendants.

DETHMERS, C. J., and KELLY, SMITH, BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred.

TATA *v.* MUSKOVITZ.

WORKMEN'S COMPENSATION—DITCH DIGGER—EMPLOYMENT RELATION —EVIDENCE.

Finding of workmen's compensation appeal board that ditch digger was an employee of defendant and not an independent contractor *held*, supported by competent evidence, where it appears that ditch digger was engaged by defendant plumber to install a new sewer when it was ascertained existing sewer could not be unclogged, and while so engaged ditch digger was killed by a cave-in of the trench then dug, defendant had the undertaking completed under his personal direction and at least partially paid for it without any reference to the estate of the deceased.

Appeal from Workmen's Compensation Appeal Board. Submitted October 14, 1958. (Docket No. 50, Calendar No. 47,576.) Decided January 12, 1959.

Angeline Tata presented her claim against Benjamin Muskovitz, doing business as Benjamin Muskovitz Plumbing & Heating, as an employer, and State Accident Fund, insurer, for compensation benefits because of the death of her husband, Gerardo Tata. Award to plaintiff. Defendants appeal. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

58 Am Jur, Workmen's Compensation § 138.

Charfoos, Gussin, Weinstein & Kroll (*Samuel Charfoos,* of counsel), for plaintiff.

Harry F. Briggs (*Richard C. Rogers,* of counsel), for defendants.

The defendant employer and the defendant insurer review an award to plaintiff under the workmen's compensation law. The reviewable question is stated and counterstated by the respective contenders as follows:

By the defendant-appellants:

"Is one engaged for a single special purpose, for a definite price, who provides his own help, mechanical apparatus, and is held responsible only for the end result, a contractor?"

By the plaintiff-appellee:

"Was there any valid evidence whatsoever to substantiate the appeal board's decision that the deceedent, Gerardo Tata, was an employee at the time of his death?"

With adequate evidentiary support the pertinent facts were found by the referee. The appeal board, on review, adopted the referee's findings of fact together with the referee's conclusions of law. Since the referee's findings of fact—distinguished from his conclusions upon the law—are not criticized by defendants-appellants, we in turn adopt the essential portions thereof as follows:

"The facts are these: Defendant Muskovitz was engaged in the business of general plumbing and heating installation and repair. He regularly had from 6 to 12 plumbers and steamfitters on his payroll. The plumbers did some digging, but when a job required substantial digging, defendant either put extra men on his payroll or 'sublet' the digging

job. A job might be 'sublet' for 2 reasons: (1) to save money and (2) to better service defendant's customers.

"In March, 1956, defendant was contacted by the owner of a property at 9150 Russell to clear out a blocked sewer. Defendant undertook the job for $75. He then called deceased who agreed to physically do the job for $50. Deceased began working on the job, and had 2 men working with him. He was unable to clear the sewer and so advised defendant. Defendant then contacted the owner of the premises and informed him that he would have to have a new sewer put in. He thereafter contracted with the owner to put in the new sewer on a time-material basis. Deceased was hired by defendant to dig a trench from the building to a manhole in the alley behind the building. The trench was to be 10 feet deep and about 200 feet long. Deceased was to be paid $6 per hour for his time and $3.50 per hour for his helper's time. There was no written contract between defendant and deceased. All material was supplied by defendant but deceased hired a power shovel and paid for it and its operator. Deceased was told where to dig the trench, but according to defendant's testimony was not supervised in the details of digging. Defendant obtained permits from the city including a permit to dig in city property from the property line to the manhole in the alley. Deceased was told by defendant that the job was an emergency one because of the flooded condition of the owner's basement, and that deceased had to work continuously until it was completed. While deceased was in the trench working, the side caved in on him, and he was killed. The job was finished under defendant's direct supervision by deceased's helper and the power-shovel operator. Deceased's helper was paid $2 per hour directly by the defendant. The power-shovel operator apparently has not yet been paid. The deceased had done similar work for defendant before, and never had been carried on defendant's payroll. Defendant owns no excavation equipment.

"Defendant testified that the reason for the cave-in was that the trench was dug too narrow. He stated, however, that he did not know this at the time and in answer to a question by plaintiff's attorney he stated, 'If I knew the ditch was going to cave, I certainly would stop it, wouldn't I?'

"He also stated that if the job was not satisfactorily performed, that he could take the deceased off the job. * * *

"In the case before us, we find that the work done by deceased was part and parcel of the complete job covered by the contract between defendant and the owner of the premises. The trench was a necessary part of the work of installing a new sewer. The deceased's work was skilled and he was not subject to supervision with reference to the details of his job. He, however, was told where to dig the trench, and generally was limited in his work to the overall plan which defendant had agreed to with the owner of the premises. The defendant was responsible to the city for the trench as well as for the plumbing since the permit was taken out for the entire job in his name. The deceased was paid an hourly rate which however included the cost of certain equipment which he hired. His helper was paid at a separate hourly rate. The deceased was subject to the ultimate control of defendant in that he could be removed at any time. Subsequent to deceased's death, the work which deceased had undertaken was finished under the direction and immediate supervision of defendant, and was at least partially paid for by defendant without any reference to the estate of deceased."

BLACK, J. (*after stating the facts*). As I read the multitudinous pages and the various opinions one finds under the title of *Sheppard* v. *Michigan National Bank,* 348 Mich 577, our massive chirographic effort in that case arrived at this result; Mr. Justice SMITH'S dissent in *Wieda* v. *American Box Board Company,* 343 Mich 182, 191, became and now re-

mains reliable Michigan law. In another related direction the same metamorphous change took place —that of adopting earlier dissenting opinions, and earlier prevailing opinions, as the law of our State. I refer here to the succession of opinions shown in *Dyer* v. *Sears, Roebuck & Company,* 350 Mich 92; and *Freiborg* v. *Chrysler Corporation,* 350 Mich 104.

It is time now to complete the cycle of departure from and return to *all* of the measures by which, under the clear weight of authority in this country, the relationship of employer and employee is rightfully identified for compensatory purposes. I move, then, with sight aimed at definite settlement of the steadily recurring question the parties—in the light of the quoted and adopted finding of facts—have stated and counterstated, that we now establish Mr. Justice SMITH's dissenting opinion in *Powell* v. *Employment Security Commission,* 345 Mich 455, 462, as proper guide to relevant interpretation of the workmen's compensation law. Tested by such dissent, the appeal board was clearly right in holding that the relationship of employer and employee existed between plaintiff's decedent, and the defendant Muskovitz, at the time of the fatal cave-in of the trench.

I vote to affirm the award.

SMITH, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred with BLACK, J.

DETHMERS, C. J. (*concurring*). The opinion of this Court in *Powell* v. *Employment Security Commission* (1956), 345 Mich 455, reiterated and reapplied the rule constantly adhered to by this Court, as disclosed in the cases therein cited and many others, that the test of the employer and employee relationship is the right to control. The referee's finding of facts, adopted by the appeal board, contained a

specific finding of certain facts, supported by competent evidence, bearing on the question of right to control. Applying, as he said, the test laid down and followed by this Court, that is the right to control test, the referee determined that the right to control existed in this case and that, accordingly, there was an employer-employee relationship between plaintiff's decedent and defendant employer. Because the finding of such facts is supported by competent evidence and application thereto of said test permits of the result reached by the referee and affirmed by the appeal board, we, too, affirm.

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

INDEX.

ABANDONMENT—See INFANTS (1).

ABSTRACT OF TITLE—See REFORMATION OF INSTRUMENTS (9); VENDOR AND PURCHASER (3).

ACCIDENT—See ACTION (2); ARSON (1); AUTOMOBILES (3, 16); NEGLIGENCE (3).

ACCOUNTS—See TRUSTS (11, 13, 16, 17).

ACCOUNTS RECEIVABLE—See ASSIGNMENTS (1–7).

ACCRETION—See ADVERSE POSSESSION; EJECTMENT (2); PLEADING (7).

ACCUSATION—See COUNTIES (4).

ACQUITTAL—See COUNTIES (3).

ACTION.

1. Rule against splitting of causes of action is strictly enforced in this State to prevent vexation and expense to a defendant and it is a rule of justice that one shall present his whole cause of action in one suit. *General Accident Fire & Assurance Corporation, Ltd.*, v. *Sircey*, 478.
2. Claim of waiver of splitting of cause of action, made by assignee insurer of party injured in accident wherein defendant was involved and who had been unsuccessfully sued for injuries to plaintiff's insured *held*, not sustained by record presented in subsequent action on assigned claim for damages to car operated by plaintiff's insured. *Id.*
3. A claimed custom among insurance companies where both parties to an accident are insured and one of them has a severe personal injury claim and desires to institute an action therefor and has assigned his insurer a part of his cause of action that the defendant's insurer requests the subrogee insurer to withhold any action thereon until disposition of the insured's claim and waive the technical defenses of splitting causes of action, *res judicata*, statutes of limitation, and nonjoinder or misjoinder of party plaintiffs, which custom was alleged but not proved, was not sufficient to prevent enforcement of rule against splitting cause of action, especially where statute provides for intervention by assignee of a part of a cause of action in tort (CL 1948, § 612.2). *Id.* 479.

ADEQUATE REMEDY AT LAW—See EQUITY (1); INJUNCTION (5).

ADJOURNMENT—See DIVORCE (3).

ADMISSIBILITY—See EVIDENCE (7, 8).

ADOPTION—See HABEAS CORPUS (3); INFANTS (7); PARENT AND CHILD (2).

ADVERSE POSSESSION.

Claim of adverse possession of accreted lands, which had been conveyed to plaintiffs before commencement of ejectment action, *held,* not substantiated, where plaintiffs rested their claim upon 6 years of personal possession but failed to show that deed from grantor whose possession they sought to tack made an express reference to or description of the disputed property. *Cutliff* v. *Densmore,* 587.

See EJECTMENT; PLEADING (7).

ALIENABILITY—See ESTATES (2, 3).

ALIMONY—See DIVORCE (8).

ALTERATIONS—See INJUNCTION (4).

AMBIGUITY—See CONTRACTS (4); DEEDS (5).

AMENDMENT—See CONSTITUTIONAL LAW (4, 5, 9); EJECTMENT; EQUITY (4); MUNICIPAL CORPORATIONS (7); PLEADING (8, 9); SPECIFIC PERFORMANCE; STATUTES (2); TRUSTS (13).

ANNULMENT—See DIVORCE (6); MARRIAGE.

ANSWER—See PLEADING (8, 9).

ANTECEDENT DEBT—See ASSIGNMENTS (1, 2, 4).

ANTICIPATION OF NEGLIGENCE—See AUTOMOBILES (4).

APPEAL AND ERROR.

1. Evidence is viewed favorably to plaintiff when examined by the Supreme Court on appeal from denial of motions for directed verdict and for judgment notwithstanding the verdict. *Berry* v. *Visser,* 38.
2. Determination of whether or not water authority act provision for payment of water rates by the constituent municipal corporation from revenues not earmarked for other purposes violates the uniformity clause of the Constitution *held,* unnecessary, where provision of same act permitting imposition of taxes "unlimited as to rate or amount" is held unconstitutional (PA 1957, No 4, §§ 16, 18, 19). *Bacon* v. *Kent-Ottawa Metropolitan Water Authority,* 160.
3. Trial court's finding that defendant's $210 job on plaintiff's roof and which satisfactorily met requirements for 2 years was a repair job and that plaintiff had failed to prove defects of material and workmanship *held,* supported by evidence presented in action for alleged breach of an 8-year express guarantee against all defects of material and/or workmanship. *Detroit Conveyor & Steel Corporation* v. *Milbrand,* 222.
4. A fair presentation of issues to the Supreme Court, as required by court rule, is not made, where appendix does not contain

APPEAL AND ERROR—Continued.

testimony of driver of car in which plaintiff was riding when collision occurred with defendant's car at intersection, necessitating resort to single copy of typewritten transcript (Court Rule No 70, § 5 [b], as added October 30, 1956). *McGuire* v. *Rabaut*, 230.

5. The scope of an inquiry on appeal from an order of the probate court is limited to the matters raised by the notice of appeal and reasons assigned in support thereof, the hearing in the circuit court not being a hearing *de novo*. *In re Eddy Estate (Appeals by Cynthia Mills Cleveland)*, 334.

6. The question on appeal from decision of a judge of the common pleas court in a nonjury case on a question of fact is whether there is competent evidence to support the determination made, not whether the circuit court or the Supreme Court would have made the same finding. *Ortisi* v. *Oderfer*, 389.

7. It is unnecessary to determine whether or not trial court was in error in submitting to jury issue as to nature of function in which defendant township was engaged at time plaintiff sustained her injuries when she fell during the nighttime on unlighted defective stairway while attending a wedding anniversary celebration, since the township in leasing use of the township hall for such purpose was, as a matter of law, functioning in a proprietary capacity. *Dohm* v. *Township of Acme*, 447.

8. An appellant who fails to include in the appendix to the brief on appeal the testimony of an opposing expert witness on issue of valuation, a principal issue raised on appeal, falls short of the requirements of the court rules that such brief contain "parts of the record material to the questions presented" in order to make a "fair presentation of the issues presented" (Court Rule No 67, § 6; No 70, § 5, as effective January 2, 1957). *Greenough* v. *Greenough*, 509.

9. Appeal from trial court's division of property in suit for divorce, involving questions of valuation and fair distribution *held*, not so lacking in merit as to sustain claim that the appeal was vexatious (Court Rule No 70, § 5, as effective January 2, 1957). *Id.*

10. Determination, as to whether punitive damages should be imposed upon appellant in suit for divorce for extensive omissions in her appendix and the amount of such damages, is not made by Supreme Court, since it constitutes an action for money damages of considerable complexity within the framework of a case on appeal, but is remanded to circuit court from which appeal was taken, for determination of issues and recommendation to the Supreme Court (Court Rule No 70, § 5, as effective January 2, 1957). *Id.*

11. Appeal is dismissed with costs as on motion to dismiss, where appellant's appendix failed to comply with mandatory provisions of court rule in that parts of the opinion of the court from which the appeal was taken were so printed as to preclude comprehension of the judicial thought and reasoning thereof without resort to the single original record, the rule being intended to assist, rather than hinder, the work of the

APPEAL AND ERROR—Continued.

Supreme Court (Court Rule No 67, § 6, as effective January 2, 1957). *In re Schantz Estate (Final Account By Ruehs)*, 541.

12. The Supreme Court hears chancery matters *de novo* on the record but gives great weight to the findings of fact of the trial judge who hears the testimony, especially where it is in conflict. *London* v. *City of Detroit*, 571.

13. The decision of the common pleas court judge on a question of fact in a nonjury case should not be disturbed on appeal to circuit court, where testimonially supported. *Aetna Insurance Company* v. *Detroit & Toledo Shore Line Railroad Company*, 580.

14. Questions not raised in the pleadings or argued at the trial level in a case are not properly before the Supreme Court on appeal from decree rendered in fifth action of one kind or another between parties to land contract, as case will not be reviewed in Supreme Court on a theory different from that on which it was tried below. *Portell* v. *Feldman*, 611.

15. Defendant purchasers under land contract, sought to be foreclosed in chancery, and which was sold to plaintiff at auction on foreclosure sale for total amount due, were not entitled to consideration of questions which might have evolved from previous litigation between the parties but were not raised either by the pleadings or at the trial below, such as liability of purchasers for deficiency and tender of deed as a condition precedent to action for balance due or damages; and sole question raised in instant action was whether or not there was any default. *Id.*

16. The Supreme Court hears chancery cases *de novo* but will ordinarily not reverse the lower court, where there is evidence and testimony to support its findings, unless justice demands it, or it can be said that the evidence clearly preponderates the other way, since the trial judge is in a better position to test the credibility of witnesses by observing them in court and hearing them testify than is an appellate court which has no such opportunity. *Ball* v. *Sweeney*, 616.

17. The Supreme Court accords much weight to the findings of a trial court in an equity case involving the oral testimony of witnesses, since the trial court has the advantage of seeing the witnesses in court and listening to their testimony and of determining the weight to be given it whereas the Supreme Court determines the issues involved from the appendices of counsel and the transcript of testimony filed. *A & M Land Development Co.* v. *Miller*, 681.

See COSTS (7, 8); COUNTIES (1); WILLS (3).

APPEARANCE.

A party who filed a special appearance and then asked the court to hold the matter is *res judicata*, that no cause of action has been stated and that the merits are such that plaintiff did not come into court with clean hands, did not thereby deny jurisdiction of the court but invoked it and thereby effected a general appearance. *Sovereign* v. *Sovereign*, 65.

APPENDIX—See APPEAL AND ERROR (4, 8, 10, 11, 17).

APPRAISERS—See EXECUTION.

APPROVAL—See EXECUTORS AND ADMINISTRATORS; JUDGMENT (10); WILLS (2).

ARBITRATION AND AWARD.

1. An award of an arbitrator must conform to the submission and may cover no matters outside the submission to arbitration as the arbitrator derives his power solely from the agreement between the parties. *Carr* v. *Kalamazoo Vegetable Parchment Company*, 327.
2. An arbitrator is not a chancellor and possesses no equitable powers except as the agreement of submission may expressly grant such. *Id.*
3. An arbitrator has no right to dictate specific types of relief outside the scope of the submitted issue or issues, once he has decided the latter. *Id.*
4. The authority of an arbitrator was exhausted when he determined the question as to whether plaintiff had been unjustly discharged, the collective bargaining agreement as distinguished from the agreement to arbitrate, having provided as to reinstatement, restoration of seniority rights and back pay in the event an employee's discharge was found to be unwarranted, hence, the arbitrator's denial of back pay was without his authority. *Id.*

See MASTER AND SERVANT (1).

ARGUMENT TO JURY—See TRIAL (3).

ARKANSAS—See INFANTS (7).

ARSON.

1. The mere fact that a fire has occurred affords no proper basis for an inference that it was wrongfully set, as, under such circumstances, it may be assumed that it was the result of accident or some natural cause. *People* v. *Dorrikas*, 303.
2. Evidence presented in prosecution for arson, which tended to eliminate the possibility of defective wiring and also spontaneous combustion and that the fire damaging defendant's restaurant did not result from any natural or providential causes, together with fact that he had recently trebled insurance coverage while income was declining, *held*, sufficient to submit cause to jury and to support its verdict of guilty. *Id.*

See CRIMINAL LAW (6); WITNESSES (1).

ASSIGNMENT FOR BENEFIT OF CREDITORS—See CONTRACTS (10).

ASSIGNMENTS.

1. The payment of an antecedent debt of the assignor to the assignee of accounts receivable under an unfiled assignment prior to the time when assignor became indebted to plaintiff in no way prejudiced plaintiff, whether the payment was made pursuant to or independent of the assignment, since at the

ASSIGNMENTS—Continued.

time of such payment plaintiff had no claim or right against the assignor (CL 1948, §§ 691.902, 691.906). *Berger Furnace Company* v. *Collins*, 289.

2. Money paid to assignee by assignor's debtors became the property of the assignee, where applied to payment of an antecedent debt even though the assignment of the assignor's accounts receivable had not been filed, and was not held in trust by the assignee for assignor's creditors who did not become such until some 15 months after extinguishment of the antecedent debt (CL 1948, §§ 691.902, 691.906). *Id.*

3. Filing in the office of the register of deeds of an assignment of accounts receivable is not an essential step to perfecting such an assignment when given as security for payment of future advances, such assignment being perfected upon its delivery (CL 1948, §§ 691.902, 691.906). *Id.*

4. Moneys collected by garnishee defendant from the principal defendant's debtors after an unfiled assignment of accounts receivable was executed and delivered were not held in trust by the assignee, where first collections were in payment of an antecedent debt of the assignor and payment thereof was completed before defendant incurred any obligation to plaintiff and later collections were in payment of future advances which were made after obligation to plaintiff was incurred but as to which the assignment was not required to be filed (CL 1948, §§ 628.32, 691.902, 691.906). *Id.* 290.

5. The fact that garnishee defendant held an assignment of defendant's accounts receivable, even if invalid and not perfected because not filed, did not operate to render invalid the otherwise valid payment to it (CL 1948, §§ 628.32, 691.902, 691.906). *Id.*

6. The failure to file an assignment of accounts receivable goes only to the validity and effectiveness to convey title to an account remaining unpaid but is in nowise controlling of the validity of the payment of the account by the debtor to the assignee or the availability of the proceeds to the assignor's other creditors in garnishment (CL 1948, §§ 628.32, 691.902, 691.906). *Id.*

7. The assignment of accounts receivable act does not make payment of the debt to the assignee under an unperfected assignment void as to the assignor's creditors (CL 1948, §§ 628.32, 691.902, 691.906). *Id.*

See ACTION (3).

ASSISTANT ATTORNEY GENERAL—See HIGHWAYS AND STREETS (2).

ASSOCIATED WORDS—See WORDS AND PHRASES (3).

ATTACHMENTS—See WORDS AND PHRASES (1).

ATTORNEY AND CLIENT.

An instrument drafted by an attorney in his own favor is looked upon with suspicion. *Creller* v. *Baer*, 408.

See DEEDS (2); DIVORCE (3); INFANTS (2); JUDGES.

ATTORNEY FEES—See COSTS (8); DIVORCE (12); TRUSTS (14–16, 18, 19).

AUCTION—See APPEAL AND ERROR (15).

AUTHORITY—See ARBITRATION AND AWARD (4).

AUTOMATIC GATE ARMS—See COSTS (11); RAILROADS (8).

AUTOMOBILES.

1. Evidence showing defendants' cattle truck had been parked in easterly lane of north and south 4-lane super highway at dusk in mid-January previous to when it was struck by right front portion of car in which plaintiff was a guest passenger presented a question for jury as to whether defendant driver was violating the statute as to illegal parking and as to whether such violation was negligence constituting a proximate cause of the accident (CLS 1956, § 257.612). *Berry* v. *Visser*, 38.
2. Parking or stopping an automobile on the pavement on a super highway is not justifiable except in the case of practicable necessity (CLS 1956, § 257.612). *Id.* 39.
3. Defendant driver of cattle truck who parked it in easterly northbound lane of 4-lane super highway at dusk in mid-January was bound to anticipate or foresee injuries to passengers of other northbound vehicles on the same highway, where he had been parked in violation of statute, hence, requests to charge were properly denied where they would have absolved defendants from liability if jury found negligence of driver of car which collided with rear end of truck so parked was the sole cause of the accident (CLS 1956, § 257.612). *Id.*
4. The driver on a through highway is entitled to assume that drivers on subordinate streets will yield him the right-of-way and he is not bound to anticipate unlawful or negligent acts on their part but he must exercise reasonable care for his own protection. *McGuire* v. *Rabaut*, 230.
5. A driver on a through highway is entitled to assume that his right-of-way would not be contested by a driver upon a subordinate street until it becomes clear that the latter is going to challenge or obstruct the right-of-way and it then becomes the duty of the driver on the through highway to avoid the impending collision. *Id.*
6. Instruction that driver on through street need not look to his right at an intersection, since he is entitled to believe he is protected from danger from that direction by a stop sign, although error, was not reversible, where it could not have affected the result under circumstances presented, showing that the intersecting street was narrower than the distance required to stop a car travelling at a lawful speed. *Id.* 231.
7. The purpose of a through highway, to move a large volume of traffic at relatively high speeds, is incapable of fulfillment if driver thereon be required to drive so that he could stop in case drivers on subordinate intersecting streets were not to yield the right-of-way at each intersection. *Id.*
8. Verdict for defendant is not disturbed notwithstanding erroneous instruction as to defendant driver not being required

AUTOMOBILES—Continued.

to make observation to right at blind intersection, where even if a proper instruction had been given, the result could not have been different. *Id.*

9. Claim that too much emphasis in the instructions was laid upon the contributory negligence of driver of car in which plaintiff was a guest passenger *held,* not to have shown reversible error, where charge as a whole fairly presented the issues and the jury found no negligence on part of defendant. *Id.*

10. The issue of contributory negligence of plaintiff truck driver *held,* properly submitted to jury in action against motorist for injuries sustained in collision at or near intersection of private drive and public highway. *Baker* v. *Gushwa,* 242.

11. Plaintiff, a 10-year-old boy in westbound car, driven by his one-armed father on a through highway in broad daylight after having consumed some beer, *held,* entitled to a new trial, because of trial court's failure to give requested instruction to the effect that if jury found southbound defendant motorist had driven out into the intersection in the path of vehicle occupied by plaintiff, then defendant was guilty of negligence as a matter of law and his conduct at least 1 of the causes of the accident and plaintiff's injuries, where testimony shows defendant observed the westbound car some 250 to 300 feet away approaching the intersection at estimated speed of 80 miles an hour and zigzagging across the road. *Sahr* v. *Bierd,* 353.

12. Trial court's finding of fact that plaintiff pedestrian was guilty of contributory negligence in nonjury action for personal injuries sustained while he was approaching far curb on left side of street when hit by defendant's car which had approached from plaintiff's right *held,* not against preponderance of evidence; the provisions of an ordinance according preferential treatment to a pedestrian who has started across a street with the traffic light in his favor not serving to cause the evidence to clearly preponderate against the finding of the trial court. *Ortisi* v. *Oderfer,* 389.

13. Issue of freedom from contributory negligence of plaintiff's decedent, a motorist, killed at night at an intersection, *held,* properly submitted to jury for determination from testimony submitted as well as the physical facts disclosed by the proofs. *Lebel* v. *Swincicki,* 427.

14. Negligence of defendant southbound motorist, required to stop before entering intersection, *held,* to clearly appear from record presented in action under death act (CL 1948, § 691.581 *et seq.*). *Id.*

15. A motorist on through highway is not required to anticipate that a motorist on an intersecting highway would enter an intersection in disregard of highway traffic signs and at a high rate of speed. *Id.*

16. Evidence supported trial judge's conclusion that negligence of driver of car in which plaintiff was a guest passenger was sole proximate cause of accident and that defendant's 16-year-old driver was not at fault where such southbound

AUTOMOBILES—Continued.

car was driven somewhat on the easterly portion of country road 18 feet wide and collided with defendant's car as it entered junction of noncrossing road from southeast upon which a driver was unable to see cars from north if latter were on east side of road. *Dorwin* v. *Ford*, 442.

17. The driver of a car on a country road is not bound to anticipate that driver on intersecting road would approach the same intersection on the wrong side of the highway and at a speed that would not permit its course to be directed by the driver because of the condition of the road and the failure of the car to respond to the steering wheel. *Id.*

18. Whether or not plaintiff, a passenger in defendant's car when injured due to defendant's negligence, was a passenger for hire *held*, a question for the jury, where evidence shows plaintiff had paid defendant $5 per week for driving to and from work and had paid $2.50 for 24-mile trip on mission personal to plaintiff and at latter's request, since defendant received a pecuniary benefit from the plaintiff (CLS 1956, § 257.401). *Pence* v. *Deaton*, 547.

19. Whether the relationship between the parties in an automobile is that of a guest passenger or passenger for hire depends upon the facts of each case, a guest relationship existing if the arrangements are so indefinite and casual that sociability is the dominant element and a passenger-for-hire relationship existing whenever the transportation is for the pecuniary benefit of the defendant (CLS 1956, § 257.401). *Id.*

20. A passenger for hire in an automobile is entitled to at least the exercise of ordinary care for his safety by the driver. *Id.*

21. The negligence, if any, of the driver of car in which his wife and daughter were passengers is not chargeable to the latter in actions for injuries to the passengers against owner of other car involved in accident and whose driver was found to have been negligent and there was ample evidence to sustain such finding (CLS 1956, § 257.401 *et seq.*). *Booth* v. *Bond*, 561.

22. Judgment for defendant, owner of car involved in action by administrator of estate of wife who was a passenger of other car, is reversed, where she was not shown to have been guilty of contributory negligence and verdict for defendant in her case was irreconcilable with verdict against same defendant in favor of her minor daughter in contemporaneous action, since the contributory negligence, if any, of the driver of car in which they were riding was not imputable to them as passengers (CLS 1956, § 257.401 *et seq.*). *Id.*

23. Verdict for defendant in action by administrator of estate of motorist killed in collision with defendant's car *held*, not clearly against the great weight of the evidence in view of the absence of conclusive evidence as to the point of impact and the testimony showing location of the cars after the accident and photographs of the damaged cars, since it cannot be said, as a matter of law, that plaintiff's decedent did not fail in some degree in his duty to observe and react to approaching danger. *Id.* 562.

AUTOMOBILES—Continued.

See APPEAL AND ERROR (4); EVIDENCE (2); PLEADING (5); RAILROADS (4–6); TAXATION (1, 6); WORDS AND PHRASES (2).

AWARD—See ARBITRATION AND AWARD (1, 4).

BACK INJURY—See DIVORCE (8).

BACK PAY—See ARBITRATION AND AWARD (4); MASTER AND SERVANT (1).

BANK ROBBERY—See CRIMINAL LAW (6).

BENEFICIARIES—See TRUSTS (2).

BLEACHERS—See MUNICIPAL CORPORATIONS (9).

BLIND INTERSECTION—See AUTOMOBILES (8).

BLOOD SAMPLE—See EVIDENCE (6); NEGLIGENCE (2).

BONA FIDE PURCHASERS—See VENDOR AND PURCHASER (1).

BONUS—See USURY (3).

BOUNDARIES.

The shore line of inland water-front property, as represented on government plats by a meander line, is the boundary of the property, notwithstanding its subsequent advancement or recession. *Cutliff* v. *Densmore*, 586.

BOWLING ALLEY—See INJUNCTION (5).

BRAKES—See PLEADING (10).

BREACH OF CONTRACT—See CONTRACTS (8, 9, 11, 12); DAMAGES (3).

BRIBERY—See COUNTIES (1–3).

BRIEFS—See APPEAL AND ERROR (8); COSTS (10).

BROKERS.

Defendant owner of retail liquor business, conducted on leased premises, did not become obligated to plaintiff broker under written contract to pay commission "upon completion of deal" where plaintiff never did complete the deal, the contract did not impose a duty upon defendant to secure from the landlords a lease similar to the one he had with them, and trial court did not make a finding that defendant's actions prevented plaintiff from securing the lease for the purchasers and completing the deal. *Tyson* v. *Herrle*, 298.

BROTHER-IN-LAW—See CONTRACTS (2); ESTATES OF DECEDENTS (2).

BUILDINGS—See INSURANCE (1); VENDOR AND PURCHASER (8).

BURDEN OF PROOF—See FRAUD (7); HABEAS CORPUS (2); JUDGMENT (5); MORTGAGES (2); NEGLIGENCE (3); PARENT AND CHILD (8); TRUSTS (16).

BUSES—See CRIMINAL LAW (1, 2).

BUSINESS—See WITNESSES (1).

CANCELLATION OF DEBT—See CONTRACTS (10).

CANCELLATION OF INSTRUMENTS.
The cancellation of an executed contract is the exertion of the most extraordinary power of a court of equity. *A & M Land Development Co.* v. *Miller*, 682.

CAVE-IN—See WORKMEN'S COMPENSATION.

CERTIORARI—See COSTS (2).

CHANCERY CASES—See APPEAL AND ERROR (12, 15–17); VENDOR AND PURCHASER (6, 7).

CHARACTER—See CRIMINAL LAW (3, 4, 6); EVIDENCE (5).

CHARITABLE TRUSTS—See TRUSTS (1–10).

CHARTER—See HIGHWAYS AND STREETS (4).

CHARTER TOWNSHIPS—See CONSTITUTIONAL LAW (9).

CHICORY KILN—See DEEDS (5, 6).

CIRCUIT COURT—See APPEAL AND ERROR (5, 6); COSTS (4, 11); TRUSTS (15).

CIRCUIT COURT COMMISSIONER—See HIGHWAYS AND STREETS (1); TRUSTS (19).

CIRCUMSTANTIAL EVIDENCE—See PROCESS.

CITIES—See CONSTITUTIONAL LAW (9); MUNICIPAL CORPORATIONS.

CITY COMMISSIONER—See MUNICIPAL CORPORATIONS (3).

CIVIL DAMAGE ACT—See INTOXICATING LIQUORS; JURY (2).

CIVIL SERVICE—See COUNTIES (1–4).

CLAIM AGAINST CITY—See MUNICIPAL CORPORATIONS (9).

CLAIM AGAINST ESTATE—See ESTATES OF DECEDENTS (2).

CLEAN HANDS—See APPEARANCE.

CLERKS OF COURTS—See TRUSTS (19).

COALYARD—See INSURANCE (1).

COLLATERAL ATTACK—See INFANTS (2); JUDGMENT (3–5, 10).

COLLECTIVE BARGAINING AGREEMENT—See ARBITRATION AND AWARD (4); MASTER AND SERVANT (1).

COMMISSIONS—See BROKERS.

COMMON GRANTOR—See REFORMATION OF INSTRUMENTS (1–3); VENDOR AND PURCHASER (1).

COMMON LAW—See WILLS (4).

COMMON PLEAS COURT—See APPEAL AND ERROR (6, 13).

COMPETENCY—See WITNESSES (3).

CONDEMNATION PROCEEDINGS—See COSTS (2); EMINENT DOMAIN (3–5); HIGHWAYS AND STREETS (1, 2).

CONDITIONS—See APPEAL AND ERROR (15); EMINENT DOMAIN (3).

CONDITION SUBSEQUENT—See DEEDS (5, 6).

CONSENT—See DIVORCE (16).

CONSIDERATION—See CONTRACTS (2, 3, 5, 6, 10); DEEDS (2); MORTGAGES (3, 4); MUNICIPAL CORPORATIONS (2); WILLS (4).

CONSOLIDATED CASE—See COSTS (8).

CONSOLIDATION—See MUNICIPAL CORPORATIONS (6).

CONSTITUTIONAL LAW.

1. The good-faith action of a law-making body, acting for the public welfare, may not be questioned by a court. *Gray* v. *Grand Trunk Western Railroad Company*, 2.
2. A fair trial in a fair tribunal is a basic requirement of due process (US Const, Am 14, § 1; Mich Const 1908, art 2, § 16). *Lookholder* v. *State Highway Commissioner*, 28.
3. A fair trial, as required by due process, requires not only an absence of actual bias on the part of the judge, but also that no man be a judge in his own case or try cases where he has an interest in the outcome (US Const, Am 14, § 1; Mich Const 1908, art 2, § 16). *Id.*
4. The 15-mill tax-limitation amendment to the Constitution expresses a limitation of the legislative as well as local power of taxation (Const 1908, art 10, § 21, as added in 1932 and amended in 1948). *Bacon* v. *Kent-Ottawa Metropolitan Water Authority*, 159.
5. The intent of the 15-mill tax-limitation amendment to the Constitution was to impose a general limitation upon the exercise of the State's power to tax property, the evil or abuse sought to be remedied being excessive taxation imposed by governmental agencies without the consent of those burdened (Const 1908, art 10, § 21, as added in 1932 and amended in 1948). *Id.*
6. The legislature may not repeal a duly-voted provision of the Constitution. *Id.*
7. The object of construction, as applied to a written constitution, is to ascertain and give effect to the intent of the people in adopting it. *Id.* 160.
8. The framers of a constitution are presumed to have a knowledge of existing laws and to act in reference to that knowledge. *Id.*
9. "Municipal corporations," as the term was fixed by custom and subsequent judicial decision in excepting clause of 15-mill tax-limitation amendment to the Constitution, includes incorpo-

CONSTITUTIONAL LAW—Continued.

rated villages, fourth-class cities, home-rule cities, charter townships and school districts (Const 1908, art 10, § 21, as added in 1932 and amended in 1948). *Id.*

10. Attempts to evade tax-limitation provisions in Constitution by subterfuge are universally frowned upon even though the motive for doing so is worthy (Const 1908, art 10, § 21, as added in 1932 and amended in 1948). *Id.*

11. The right of privacy is a personal one which ends with the death of the person to whom it is of value (Const 1908, art 2, § 10, as amended in 1952). *Lebel* v. *Swincicki*, 428.

See APPEAL AND ERROR (2); COSTS (5); COURTS (2); EMINENT DOMAIN (3–5); EVIDENCE (1, 6); HIGHWAYS AND STREETS (2); HOMESTEAD (1–4); INFANTS (1, 3–5); JUDGES; JUDGMENT (4, 11); MUNICIPAL CORPORATIONS (7, 8); STATUTES (3).

CONSTRUCTION OF CONSTITUTION—See CONSTITUTIONAL LAW (4, 5, 7, 9).

CONSTRUCTION OF CONTRACTS—See ATTORNEY AND CLIENT (1); CONTRACTS (2, 3); INDEMNITY.

CONSTRUCTION OF DEEDS—See MORTGAGES (1–3).

CONSTRUCTION OF ORDINANCES—See MUNICIPAL CORPORATIONS (1).

CONSTRUCTION OF STATUTES—See EMINENT DOMAIN (5); STATUTES (1).

CONSTRUCTION OF WILLS—See WILLS (1–3).

CONTEMPT—See DIVORCE (8).

CONTINUANCE OF MISCONDUCT—See DIVORCE (7).

CONTINUING TRESPASS—See INJUNCTION (2, 3).

CONTRACTS.

1. Findings of trial court for plaintiff in subcontractor's nonjury action against road construction contractor for gravel furnished and compacted pursuant to contract with defendant *held*, not against the preponderance of the evidence under the proofs submitted. *People, for use and benefit of E. P. Brady & Co.*, v. *Gilliland*, 248.

2. It will not be presumed that written agreement whereby deceased brother-in-law had given up his interest in estate of his childless brother to latter's widow in return for her promise to leave stock in the brothers' family corporation to him upon widow's death was to have been a promise on her part that was personal to the brother-in-law and would die with him. *In re Traub Estate (Bates* v. *National Bank of Detroit)*, 264.

3. It is a presumption of law, in the absence of express words, that the parties to a contract intend to bind not only themselves, but their personal representatives, a presumption extending not only to the obligation of the contractual performance but

CONTRACTS—Continued.

to the corresponding right to receive the consideration therefor, where not personal in nature. *Id.*

4. A court will admit testimony as to antecedent agreements, communications and other factors to aid in construing an ambiguous written agreement, the parole evidence rule to the contrary notwithstanding. *Id.*

5. A promisee's contract right to possession of personalty upon a fixed date does not die with him where he dies before such date, upon the theory that after death he cannot "possess" anything, especially where the promisee has furnished a substantial consideration to the promisor. *Id.*

6. The fact that a form of obligation of childless widow who received life use of all of her late husband's stock in family corporation was her promise to make a will in which she would leave promisee brother-in-law all of the stock at her death would not make it less enforceable as a contract obligation, since the true consideration was the thing promised, not the form of the promise or the fact that merely a promise was made. *Id.*

7. Finding of jury that plaintiff and defendant had agreed not to terminate written contract of plaintiff to supply sufficient trucks to remove excavated dirt from sewer trench and haul sand backfill after it became necessary to haul the sand from a greater distance and to modify it later as to payments and had not entered into a new oral agreement replacing the former written agreement *held*, not contrary to the great weight of the evidence. *Schnepf* v. *Thomas L. McNamara, Inc.*, 393.

8. Plaintiff trucker who continued to haul sand backfill from new location without protest and without claiming breach of written contract or asserting its termination lost his right, if any, to terminate the contract and declare it forfeited for such breach. *Id.*

9. A plaintiff who was injured by a material breach of written contract but nevertheless continued to perform thereunder was not thereafter excused from ceasing performance without responding in damages for such cessation, the continuance of performance after substantial breach amounting to a waiver. *Id.*

10. Finding of circuit judge in suit commenced by judgment creditor's bill that judgment and debt represented thereby in favor of plaintiff partners, engaged as wholesale distributor of siding, was canceled when defendant, after an absence of some 2-1/2 years and after having made a statutory assignment for the benefit of creditors, became re-employed as a salesman for corporation, completely owned by the partners but engaged in retailing such siding, and was paid some $34,000 in commissions without demand for payment having been made, is not disturbed, the claim that the agreement to cancel the debt was without consideration being without merit (CL 1948, § 642.1 *et seq.*). *Freedman* v. *Mark*, 485.

11. The parties to a contract can stipulate in advance as to the amount to be paid in compensation for loss or injury which

CONTRACTS—Continued.

may result in the event of a breach of the agreement, such stipulation being enforceable if the damages from a breach are uncertain and difficult to ascertain at the time the contract is executed and the amount stipulated is reasonable with relation to the possible injury suffered. *Worley* v. *McCarty*, 600.

12. A provision for liquidated damages for breach of contract will be regarded as enforceable, and not as a penalty, where it embraces the principle of just compensation for the loss or injury actually sustained. *Id.*

See BROKERS; CANCELLATION OF INSTRUMENTS; COSTS (6); FRAUD (2, 9, 10); MUNICIPAL CORPORATIONS (2); RAILROADS (8); REFORMATION OF INSTRUMENTS (1); TRESPASS (3).

CONTRIBUTION—See DIVORCE (15).

CONTRIBUTORY NEGLIGENCE—See AUTOMOBILES (9, 10, 12, 13, 23); NEGLIGENCE (1, 3); RAILROADS (5).

CONVEYANCES—See FRAUDS, STATUTE OF.

CORPORATIONS—See CONTRACTS (2, 6, 10); DIVORCE (9, 11, 16); ESTATES OF DECEDENTS (2); PUBLIC UTILITIES; TAXATION (6).

CORROBORATION—See JUDGMENT (5).

COSTS.

1. No costs are allowed in suit to enjoin the establishment of railroad switching yard pursuant to agreement between the railroad and city, where a public question is involved. *Gray* v. *Grand Trunk Western Railroad Company*, 2.
2. No costs are allowed on certiorari by owners of interests in land sought to be taken for highway purposes upon reversal of judgment because proceedings brought were invalid. *Lookholder* v. *State Highway Commissioner*, 30.
3. No costs are allowed in mandamus proceeding to compel the county board of supervisors to hold an election for incorporation as a new city territory presently occupied by 3 cities, all of 3 townships and portions of 5 other townships, a public question being involved (CL 1948, § 117.6, as amended by PA 1957, No 210; CLS 1956, §§ 117.7, 117.9). *Taliaferro* v. *Genesee County Supervisors*, 49.
4. No costs are allowed on appeal in habeas corpus proceedings in circuit court, where order restoring custody of 2 children to natural parents is modified and affirmed. *Fritts* v. *Krugh*, 100.
5. No costs are allowed in suit wherein provisions of water authority act relating to imposition of taxes are held unconstitutional (Const 1908, art 10, § 21, as added in 1932 and amended in 1948; PA 1957, §§ 16, 18). *Bacon* v. *Kent-Ottawa Metropolitan Water Authority*, 161.
6. No costs are allowed in suit to determine validity of contract between county and a city and 4 townships, all located within the county, for purpose of establishing a joint sewage-disposal system (PA 1957, No 185, § 12). *Cohn* v. *County of Oakland*, 180.

COSTS—Continued.

7. No costs are allowed upon affirmance of judgment for plaintiff, where defendant appealed and plaintiff cross-appealed, since neither party has prevailed in full. *People, for use and benefit of E. P. Brady & Co.*, v. *Gilliland*, 248.

8. The question of costs on consolidated appeals of various orders involving a large testamentary estate and trust is deferred until final determination, where opportunity is afforded for supplying testimony as to reasonableness of attorney fees. *In re Eddy Estate (Appeals by Cynthia Mills Cleveland)*, 336.

9. No costs are allowed on appeal from judgment in action of trespass, where remittitur is required as a condition for affirmance. *Kelly* v. *Fine*, 385.

10. No costs are allowed appellees who filed no briefs on appeal. *Freedman* v. *Mark*, 485.

11. No costs are allowed in suit to review determination of circuit court on appeal from public service commission with respect to apportionment of expense of widening highway crossing at grade over railroad and relocation of flashing light signals and automatic gate arms. *Grand Trunk Western Railroad Company* v. *Public Service Commission*, 674.

See APPEAL AND ERROR (11); ESTATES OF DECEDENTS (2).

COUNTIES.

1. County employees who were also members of the legislature and indicted for felony of accepting bribes to influence legislation were not entitled to pay lost prior to re-employment by county, where they failed to protest or appeal their suspensions by appropriate action before county civil service commission, where it clearly appears that each plaintiff had actual notice of the reason for his suspension but had made no timely appeal therefrom in accordance with commission rules and statute (CL 1948, § 46.72; Wayne County Civil Service Commission Law, Rules and Regulations [1955], No 16, §§ 1, 2, 5, 7, 8). *Sumeracki* v. *County of Wayne (Kaminski* v. *Same, Bradley* v. *Same, Kronk* v. *Same, Gallagher* v. *Same)*, 377.

2. Service of notice of order of suspension of county civil service employee upon such employee in accordance with county civil service commission statute, rules and regulations *held*, unnecessary, where the employee, also a member of the legislature, was indicted and convicted of accepting a bribe for influencing legislation, since the employee had actual notice of the reason for suspension (CL 1948, § 46.72; Wayne County Civil Service Commission Law, Rules and Regulations [1955], No 16, §§ 1, 2, 5, 7, 8). *Id.*

3. The suspension of county employees who were under the county civil service and also State legislators upon their indictment for accepting bribes to influence legislation was not rendered illegal by virtue of subsequent events resulting in a *nolle prosequi* of the charges against them in another county, since a *nolle prosequi* is not tantamount to acquittal. *Id.* 378.

COUNTIES—Continued.

4. Public policy may exclude not only a convicted felon from county civil service employment, but also one accused of a felony. *Id.*

See COSTS (6); HIGHWAYS AND STREETS (1); MUNICIPAL CORPORATIONS (8).

COUNTY AGENT'S REPORT—See INFANTS (3).

COURT RULES—See APPEAL AND ERROR (4, 8–11); EQUITY (4); ESTOPPEL; PLEADING (2–4, 6, 7); SPECIFIC PERFORMANCE.

COURTS.

1. The failure to notice an order for hearing might subject the order to being vacated on proper motion but did not deprive the court of jurisdiction to hand down the order or render the order entered void. *McLay* v. *McLay*, 19.
2. The probate court has no inherent powers, its right to take jurisdiction of neglected and dependent children and to govern their lives being based entirely on Constitution and statute (Const 1908, art 7, § 13; CL 1948, §§ 712A.2, 712A.20). *Fritts* v. *Krugh*, 98.
3. The Supreme Court, in the exercise of supervisory control over all litigation, has the right to consider manifest and serious errors although objection was not made by the party who appeals, since the inherent power of the Supreme Court is not limited by what the appellant is entitled to as a matter of right. *People* v. *Dorrikas*, 303.

See CONSTITUTIONAL LAW (1); CRIMINAL LAW (5); EMINENT DOMAIN (4); TRUSTS (17).

COVERAGE—See INSURANCE.

CREDIBILITY—See APPEAL AND ERROR (16); CRIMINAL LAW (3).

CRIMINAL LAW.

1. Evidence of reading of speedwatch was properly admitted in prosecution of city bus driver for driving his vehicle at an excessive speed, where it appears the instrument was properly set up, was checked by the officers before operating it, was periodically checked by experts to determine whether or not it was operating correctly, the operating officer observed the speed of the defendant's vehicle and testified as to his estimate of the speed and all rights of the defendant were protected; defendant's claim that he was unable to cross-examine the speedwatch being without merit. *People* v. *Kenney*, 191.
2. Finding of guilt of driving city bus in excess of permitted speed *held*, justified by evidence adduced, including evidence of reading of speedwatch. *Id.* 192.
3. Generally, a witness testifying to the good reputation or character of a defendant in a criminal prosecution may be interrogated on cross-examination with respect to rumors or reports of particular acts imputed to defendant and as to what the witness has heard of specific charges of misconduct made against the defendant, not to establish such acts but to test

CRIMINAL LAW—Continued.

the credibility of the character witness, by ascertaining his good faith, information and accuracy; such cross-examination being limited as to time and, in some instances, place. *People* v. *Dorrikas,* 304.

4. The wide discretion lodged in a trial court with reference to limiting cross-examination of character witnesses in regard to hearsay testimony in a prosecution for crime is accompanied by the responsibility of the trial court to determine, in the absence of the jury, whether or not criminal acts, referred to by the prosecutor as having been committed by the defendant, actually took place, the time of their commission and relevancy to issue being tried and to instruct the jury carefully as to the reason for admission of testimony of such criminal acts. *Id.*

5. An appellate court has the responsibility to ascertain if a defendant in a prosecution for crime has had a fair and impartial trial, a trial free from prejudicial errors. *Id.*

6. Defendant, on trial for arson and who did not take the witness stand, *held,* to have been denied a fair trial, where during cross-examination of his character witness 6 questions were asked as to whether witness had heard of arrests and convictions of defendant in other States for crimes of disorderly conduct, robbery, vagrancy, violation of liquor laws, bank robbery and rape and, notwithstanding no objection was made by defendant's counsel and trial judge did not ascertain out of presence of jury whether such acts were actually committed and as to the time and place of the acts and failed to instruct the jury as to purpose of such testimony and limitations upon the use they might make of it. *Id.*

7. The Supreme Court can and should reverse when the charge to the jury in a prosecution for crime omits a legally essential ingredient, even though no request or only an oral request to charge was made. *People* v. *Hearn,* 469.

See ARSON; COUNTIES (1–4); HOMICIDE; WITNESSES (1).

CROSS APPEAL—See COSTS (7).

CROSS-EXAMINATION—See CRIMINAL LAW (3, 4, 6).

CROSSINGS—See COSTS (11); RAILROADS (4–8).

CURING ERROR—See REFORMATION OF INSTRUMENTS (4).

CUSTODY OF CHILDREN—See COSTS (4); DIVORCE (1–4); EQUITY (2); HABEAS CORPUS (1–4); INFANTS (1, 2, 4–6); PARENT AND CHILD (7, 8).

CUSTOMS AND USAGES—See ACTION (3).

DAMAGES.

1. All facts and circumstances having any tendency to show damages or their probable amount may be placed before a jury, where the nature of the case is such that the amount of damages cannot be estimated with certainty. *Schankin* v. *Buskirk,* 491.

DAMAGES—Continued.

2. Evidence presented in suit for reformation of deeds to confirm existence of driveway *held,* insufficient to support plaintiff's alternative claim for damages in case reformation were denied, the proper measure being the difference between the value of the property as is and the value if it had been as represented. *Troff* v. *Boeve,* 594.
3. The proportional strength of the presumption that parties to a contract intended to provide for liquidated damages for breach of contract rather than forfeiture of deposit made is based upon the measure of difficulty in ascertaining the actual damage by proof. *Worley* v. *McCarty,* 600.

See APPEAL AND ERROR (10); CONTRACTS (9, 11, 12); DEATH; FRAUD (2, 3); JURY (2); TRESPASS (1, 2, 5–8, 10).

DEATH.

1. Payments made under insurance policies on the life of plaintiff's intestate decedent may not affect the recovery of damages under the death act, especially where the insurance payments were not intended to operate for the benefit of a tort-feasor who caused the death of the insured and were not subject to apportionment among the children of deceased in the manner provided by the death act with reference to damages recoverable thereunder (CL 1948, §§ 691.581 *et seq.*). *Lebel* v. *Swincicki,* 428.
2. Charge to jury in action against defendant motorist with reference to manner of computing damages under death act *held,* not prejudicial to defendant (CL 1948, § 691.581 *et seq.*). *Id.*
3. Denial of new trial on ground of newly-discovered evidence in action under death act *held,* not error, where fact that social security benefit payments to children, claimed to affect pecuniary loss, were discoverable before trial and were made solely for the benefit of the recipients and not for the benefit of a tort-feasor who caused the death of the children's father (CL 1948, § 691.581 *et seq.*). *Id.*

See AUTOMOBILES (14, 22, 23); CONSTITUTIONAL LAW (11); CONTRACTS (2, 5, 6); ESTATES OF DECEDENTS (2); EVIDENCE (6); NEGLIGENCE (3); WILLS (4, 5); WORKMEN'S COMPENSATION.

DEBT—See WILLS (4, 5).

DECLARATION—See EJECTMENT; ESTOPPEL; PLEADING (1, 3–5, 7).

DEEDS.

1. Delivery of a deed will be presumed where the grantee is in possession thereof, in the absence of testimony to prove there was no delivery, but such presumption is rebuttable. *Creller* v. *Baer,* 408.
2. Trial court's finding that deed by elderly couple to wife's daughter and her husband, defendants, should be set aside for lack of delivery and that there was testimony overcoming presumption of delivery is not disturbed, it appearing that defendant husband, an attorney, had drafted the deed, that

DEEDS—Continued.

there was little, if any, consideration therefor, and that plaintiff was not mentally keen at time deed was executed. *Id.* 409.

3. That designation in deed of grantees, a man and woman, as husband and wife created in them a tenancy by the entireties is not open to question by heir of man who claims an interest through the man after the man's death under pleadings presented in survivor's suit to quiet title. *Franklin* v. *Franklin,* 543.
4. The intent of the parties to a deed must, where possible, be drawn from the 4 corners of the instrument. *Flajole* v. *Gallaher,* 606.
5. Provision of deed to defendant's predecessor in title that the land was "to be used for the erection of a kiln for drying chicory roots, and if not used for said purpose, then the title to said land shall revert to" the grantor *held,* not so ambiguous as to permit the introduction of parol evidence. *Id.*
6. Provision of deed that the land was "to be used for the erection of a kiln for drying chicory roots, and if not used for said purpose, then the title to said land shall revert to" the grantor contained a single, plain condition that such a kiln should be erected on the land but was not subject to the construction that such a kiln would have to be used for such purpose into the indefinite future, hence, where kiln erected was destroyed some 35 years later, and not replaced, grantor's sole heir was not entitled to re-enter for condition broken. *Id.*

See ADVERSE POSSESSION; APPEAL AND ERROR (15); DAMAGES (2); EJECTMENT (2); FRAUD (4); JUDGMENT (11); MORTGAGES; PLEADING (7); REFORMATION OF INSTRUMENTS (4, 7–9); WITNESSES (2).

DEFAULT—See APPEAL AND ERROR (15); JUDGMENT (6); VENDOR AND PURCHASER (6).

DEFECTIVE WIRING—See ARSON (2).

DEFECTS—See HIGHWAYS AND STREETS (3).

DEFICIENCY—See APPEAL AND ERROR (15); VENDOR AND PURCHASER (7).

DELAY—See INJUNCTION (2).

DELIVERY—See ASSIGNMENTS (3, 4); DEEDS (1, 2); WITNESSES (2).

DE NOVO HEARING—See APPEAL AND ERROR (12, 16).

DEPENDENT AND NEGLECTED CHILDREN—See COURTS (2); INFANTS (2–5, 8–12); PARENT AND CHILD (4, 5).

DEPOSITS—See DAMAGES (3); SPECIFIC PERFORMANCE; VENDOR AND PURCHASER (3–5).

DEPUTIES AND ASSISTANTS—See HIGHWAYS AND STREETS (2).

DESCENT AND DISTRIBUTION—See DEATH (1); EXECUTORS AND ADMINISTRATORS.

DESCRIPTION—See REFORMATION OF INSTRUMENTS (2, 8).

DESERTION—See PARENT AND CHILD (5).

DETROIT—See HIGHWAYS AND STREETS (4).

DIRECTED VERDICT—See APPEAL AND ERROR (1).

DISCHARGE—See ARBITRATION AND AWARD (4); MASTER AND SERVANT (1).

DISCRETION OF COURT—See CRIMINAL LAW (4); DIVORCE (1, 3, 9, 10, 12, 13); EJECTMENT; ESTATES OF DECEDENTS (3); EVIDENCE (8); INJUNCTION (1); JURY (1, 3); PLEADING (8); TRIAL (2); TRUSTS (15).

DISCRIMINATION—See TAXATION (2, 4–6).

DISMISSAL AND NONSUIT—See DIVORCE (16).

DISORDERLY CONDUCT—See CRIMINAL LAW (6).

DISQUALIFICATION—See HIGHWAYS AND STREETS (1, 2); JUDGES.

DITCH DIGGER—See WORKMEN'S COMPENSATION.

DIVISION OF PROPERTY—See APPEAL AND ERROR (9); DIVORCE (10, 13, 15, 16).

DIVORCE.

1. The Supreme Court is reluctant to overrule the trial court in a suit involving the custody of children of divorced parents in the absence of a clear abuse of discretion. *McLay* v. *McLay*, 19.

2. Order of trial court, prepared instanter by attorney for defendant wife and giving her custody of parties' 2 young children for a probationary period of 6 months, modifying decree of divorce wherein custody had been given to father, is not disturbed, where issue of voidability was not raised in the trial court by motion to vacate or a motion for rehearing. *Id.*

3. It was not an abuse of discretion on the part of the trial court to deny husband's motion for adjournment at hearing on wife's petition for custody of 2 minor children, because husband's attorney was unable to be present, where trial judge was the same one who had granted the original decree of divorce, was familiar with the parties, 1 adjournment had already been had, there were out-of-town witnesses present, the husband was himself an attorney, the absent attorney's presence could not be promised for a considerable time and no showing was made by the husband of any effort to secure or summon witnesses prior to date set for hearing or as to what such witnesses would testify if called. *Id.*

4. Trial court's order modifying decree of divorce so as to give wife custody of 2 children of the parties, born in 1952 and 1955, for a probationary period of 6 months following her recovery from illness *held*, not to have shown that trial court

DIVORCE—Continued.

did not take into account the best interests of the children, in view of the statute favoring custody in the mother of children of tender years (CL 1948, § 722.541). *Id.* 20.

5. The defense of *res judicata* in second suit for divorce was not available, where the plaintiff wife in her sworn bill of complaint relied upon acts subsequent to final decision in the prior case. *Sovereign* v. *Sovereign,* 150.

6. Plaintiff wife who filed a sworn bill of complaint in second suit for divorce and relied upon defendant husband's misconduct since final determination of prior suit for divorce, in that he failed to provide a home for plaintiff and their minor child or to support either of them and had deliberately subjected her to additional expense of annulment proceedings, notwithstanding he was a man of substantial income and ability to support plaintiff and their child, was not barred from relief by the principle of *res judicata* or of estoppel by judgment. *Id.* 151.

7. The continuance of misconduct which prevented the entry of a decree of divorce in a prior suit after such decree could be a defense available to the opposite party in second suit. *Id.*

8. Findings of trial court that defendant husband was in contempt for nonpayment of alimony and child support money and was financially able to purge himself of such contempt, notwithstanding injury to back *held,* supported by record showing defendant had remarried and had purchased a new home. *Roblyer* v. *Roblyer,* 226.

9. Trial court's evaluation of property to be divided in suit for divorce at $1,127,598.60, based upon testimony of husband's accountant as to value of stock and holdings of an unlisted family-owned corporation devoted to the distribution of fermented beverages, rather than over $2,000,000 as claimed by wife, through testimony of expert witness who dealt in stocks and bonds but who was unfamiliar with the particular corporation, its holdings and its stock *held,* not an abuse of discretion. *Young* v. *Young,* 254.

10. Trial court's division of property in divorce suit, valued by him at $1,127,598.60, whereby wife received $292,680.11 and their 2 children $259,427.11, *held,* neither unfair nor an abuse of discretion. *Id.*

11. It was not error for trial judge in suit for divorce to award wife stocks in various corporations other than the family-owned corporation in which she had held stock in her own name and take latter from her so as to prevent her continued and persistent harmful interference with the proper management of the company. *Id.*

12. Allowance of $7,000 to wife's attorney for fees *held,* not inadequate and not an abuse of discretion, notwithstanding the amount involved was somewhat larger than usual. *Id.*

13. Plaintiff wife's claim of lack of effort and mismanagement on part of defendant husband in the development and construction of shopping center through funds or property supplied by her, incident to her claim of abuse of discretion of trial court

DIVORCE—Continued.

in making a substantially equal division of property at conclusion of marriage lasting less than 10 years *held*, not substantiated by record presented on appeal. *Greenough* v. *Greenough*, 508.

14. The findings of the trial court as to value of property involved in suit for divorce are upheld, where within the extreme estimates of the parties and evidence is not such as to show a different result should be reached. *Id.* 509.

15. Division of property made by trial court in suit for divorce, including division made of household furnishings and effects, together with the equity in the residence *held*, not to have shown error on part of trial court, it being necessary that the division be equitable and that consideration be given to the contribution made by both parties. *Id.*

16. Division of property made by trial court in suit for divorce between parties who, with wife's daughter, owned all of the stock of a corporation whose assets were dealt with and inextricably mixed by the parties as their own, so as to award some of the corporate assets and discontinue, with prejudice, an action at law against it by the husband for reimbursement for special services rendered and asserting other claims *held*, not error, in view of the consent given the court to dispose of both cases and fact that the corporation has not seen fit to question the comprehensive decree. *Id.*

See APPEAL AND ERROR (9, 10); EQUITY (2); HUSBAND AND WIFE (2).

DRIVEWAY—See DAMAGES (2); REFORMATION OF INSTRUMENTS (8, 9).

DRUGS—See HOMICIDE (1).

DUE PROCESS—See CONSTITUTIONAL LAW (2, 3); CRIMINAL LAW (5, 6); HIGHWAYS AND STREETS (2); JUDGES.

DUSK—See AUTOMOBILES (1).

EASEMENTS.

Defendant hotel company whose fire escape overhung plaintiff's land *held*, to have pleaded and proven a fully-ripened prescriptive right to maintain the present escape structure. *Myer* v. *Franklin Hotel Company, Inc.*, 552.

See FRAUDS, STATUTE OF; REFORMATION OF INSTRUMENTS (8, 9); WORDS AND PHRASES (1).

ECONOMIC DEPRESSION—See EVIDENCE (1).

EDUCATION—See TRUSTS (1, 5, 9, 10).

EJECTMENT.

1. The grant or denial of a motion to amend a declaration in ejectment *nunc pro tunc* so as to include claim of title by adverse possession was discretionary with trial court. *Cutliff* v. *Densmore*, 587.

EJECTMENT—Continued.

2. Denial of motion to amend declaration in action of ejectment *nunc pro tunc held,* not an abuse of discretion on part of trial judge, where motion was made over 4 years after declaration was filed and would have caused undue surprise or hardship to defendants, the declaration having been based on a deed claimed to have conveyed the accreted land and the amendment setting up claim of adverse possession. *Id.*

See PLEADING (7).

ELECTIONS—See MUNICIPAL CORPORATIONS (6).

ELEVATORS—See INSURANCE (1).

EMINENT DOMAIN.

1. A leasehold, and rights derived from a leasehold, constitute property for the taking of which just compensation must be made or secured. *Lookholder* v. *State Highway Commissioner,* 29.
2. An "interest in land," as that term is used in the highway condemnation act, embraces and includes leasehold interests and rights derived therefrom (CL 1948, § 213.174). *Id.*
3. Lessees of land, sought for State highway purposes, irrespective of the duration or value of their interest, were equally entitled to precedent and good-faith negotiations toward acquisition of their interest, as the lessors; hence, where the State highway commissioner failed to negotiate separately with the lessees, condemnation proceedings to acquire the land were prematurely instituted to the legal detriment of both the lessors and the lessees (Const 1908, art 13, § 2; CL 1948, § 213.174). *Id.*
4. It is the duty of courts, when reviewing condemnation proceedings to acquire land for highway purposes, to see that the requirements of constitutionally authorized law are strictly observed as a condition of validity of such proceedings (Const 1908, art 13, § 2; CL 1948, § 213.174). *Id.*
5. The statute authorizing condemnation of interests in land for highway purposes is to be strictly construed, and its jurisdictional requirements must be established in fact and may not rest upon technical waiver or estoppel (Const 1908, art 13, § 2; CL 1948, § 213.174). *Id.*

See HIGHWAYS AND STREETS (1, 2).

ENGINEERS—See RAILROADS (4).

EQUALLY DIVIDED COURT—See HIGHWAYS AND STREETS (4).

EQUITY.

1. Generally, equity will not entertain jurisdiction where by statute a full and adequate legal remedy has been provided. *Sovereign* v. *Sovereign,* 65.
2. A court of chancery has jurisdiction to determine the custody of a child whose separated parents unsuccessfully sought to obtain a divorce and each dispute the other's right to custody of boy born in 1948, there being no specific statutory remedy available in any court. *Id.*

EQUITY—Continued.

3. The court considers matters well pleaded in the bill of complaint to be true for the purpose of disposition of the motion to dismiss. *Sovereign* v. *Sovereign*, 151.
4. Motion for rehearing was properly denied in chancery suit, where neither such motion nor a motion to amend the decree was filed within the time allotted by court rule (Court Rule No 48 [1945]). *Brin* v. *Spruance*, 623.

See ARBITRATION AND AWARD (2); CANCELLATION OF INSTRUMENTS; DIVORCE (15); HABEAS CORPUS (1, 4); INFANTS (9).

ESTATES.

1. The words to the grantee *and his heirs* are normally construed as words of limitation and not of purchase since they merely delimit the estate given and do not designate those who take by remainder. *In re Traub Estate (Bates* v. *National Bank of Detroit)*, 263.
2. The law favors the free alienability of land. *Flajole* v. *Gallaher*, 606.
3. Restrictions on the alienability of land are not generally favored and will not readily be enlarged or extended by construction. *Id.*

ESTATES OF DECEDENTS.

1. The administration of a decedent's estate is not in the nature of a suit between parties but rather, a proceeding *in rem*, and when the court has once acquired jurisdiction it is empowered to make all orders necessary to the proper administration of the estate. *Cleveland* v. *Second National Bank & Trust Company*, 204.
2. Judgment on claim against estate of deceased childless widow, with interest and costs, as by statute made and provided, is ordered entered, where, in return for life use of brother-in-law's interest in estate of her late husband, she had agreed to leave him her stock in family corporation, but had failed to keep her promise after death of brother-in-law (CL 1948, §§ 708.4, 708.18). *In re Traub Estate (Bates* v. *National Bank of Detroit)*, 265.
3. It was within the discretion of the probate court to impose the burden of the referee's fee upon claimant against the estate of the decedent, where claim against the estate was tardy. *Id.*

See COSTS (8); TRUSTS (11, 14); WILLS (3); WORKMEN'S COMPENSATION.

ESTOPPEL.

The defendant in a law case may not interpose the affirmative defense of estoppel and, on the strength of such defense, move to dismiss the plaintiff's declaration (Court Rule No 18 [1945]). *Carr* v. *Kalamazoo Vegetable Parchment Company*, 328.

See DIVORCE (6); EMINENT DOMAIN (5); JUDGMENT (9); MASTER AND SERVANT (1).

ETHICS—See JUDGES.

EVASION—See CONSTITUTIONAL LAW (10).

EVIDENCE.

1. Judicial notice is taken of the widespread economic depression endured during 1932 when the 15-mill tax-limitation amendment to the Constitution was proposed and adopted (Const 1908, art 10, § 21, as added in 1932 and amended in 1948). *Bacon* v. *Kent-Ottawa Metropolitan Authority*, 159.

2. It is not necessary that a court find that a mechanical device for the measurement of speed of vehicles could not err in order to admit its findings as evidence to be weighed by the trier of the facts along with all other evidence to determine the guilt or innocence of the party. *People* v. *Kenney*, 191.

3. The measurement of amount of gravel delivered from stock pile to road under highway construction subcontract for covering surface where evidence of weight was not available was properly made by subtracting the amount delivered on the road from the amount stock-piled. *People, for use and benefit of E. P. Brady & Co.*, v. *Gilliland*, 247.

4. It is not objectionable to the hearsay rule that the mental state of the actor be established by either word or deed, where his belief, understanding, or intent is material, words being received, not for their own testimonial trustworthiness, but as proof of a state of mind. *In re Traub Estate (Bates* v. *National Bank of Detroit)*, 264.

5. Testimony as to the reputation for citizenship, or for honesty and integrity is based on hearsay. *People* v. *Dorrikas*, 304.

6. The obtaining of testimony through extraction of a blood sample from unconscious defendant for use in civil action under the death act while he was in a hospital but a sample which was not taken for the purpose of treatment or involving the physician-patient relation amounted to an unconstitutional invasion of his personal rights (Const 1908, art 2, § 10, as amended in 1952). *Lebel* v. *Swincicki*, 428.

7. All facts are admissible in evidence which afford reasonable inferences or throw any light upon the matter contested. *Goldman* v. *Century Insurance Company (Same* v. *Scottish Union & National Insurance Company)*, 529.

8. The question of whether evidence offered is too remote from the transaction to be admissible is one for the trial court to determine, and will not ordinarily be disturbed on appeal. *Id.*

See ACTION (3); APPEAL AND ERROR (1, 3, 4, 6, 8, 13, 16, 17); ARSON (2); AUTOMOBILES (12–14, 16, 21, 23); CONTRACTS (1, 4, 7); COSTS (8); CRIMINAL LAW (1, 2, 4, 6); DAMAGES; DEEDS (1, 2, 5); DIVORCE (8, 9, 13, 14); EASEMENTS; FRAUD (5, 7, 8, 10); HOMICIDE (3); INFANTS (10–12); INJUNCTION (1); INSURANCE (2, 3); JUDGMENT (5, 6, 9); MASTER AND SERVANT (2); MORTGAGES (1, 2); NEGLIGENCE (2); PARENT AND CHILD (3, 5); PLEADING (2, 9); PROCESS; RAILROADS (5); REFORMATION OF INSTRUMENTS (3–8); TRESPASS (3–5, 10); TRIAL (4); TRUSTS (12, 19); VENDOR AND PURCHASER (6); WORKMEN'S COMPENSATION.

EXCESSIVE SPEED—See CRIMINAL LAW (1, 2).

EXECUTION.

Claimed irregularities in proceedings following levy and resulting in sheriff's deed of premises in which judgment debtor claimed homestead exemption, in that notice of levy was not properly recorded, not served on plaintiff, notice of levy was not properly posted, and no appraisers appointed, *held*, not to have prejudiced plaintiff nor to have prevented him from insisting on recognition of his homestead rights, if he had such, where it appears he was aware of the levy and subsequent steps (CL 1948, §§ 623.83, 623.90, 623.95). *Cross* v. *Fruehauf Trailer Company*, 456.

See HOMESTEAD (4, 5); QUIETING TITLE.

EXECUTORS AND ADMINISTRATORS.

The failure of an heir of testator to challenge order of probate court approving final account of the executor under will setting up a testamentary trust and assigning residue to the trustee is binding upon the descendant of such heir. *Cleveland* v. *Second National Bank & Trust Company*, 204.

See AUTOMOBILES (22, 23); CONTRACTS (3); JUDGMENT (10); NEGLIGENCE (3); TRUSTS (15); WILLS (3).

EXEMPTIONS—See HOMESTEAD (4, 5); JUDGMENT (11).

EXISTING LAW—See CONSTITUTIONAL LAW (8).

EXPENSES—See COSTS (11); RAILROADS (8).

EXPERT WITNESSES—See APPEAL AND ERROR (8); DIVORCE (9).

EXPRESS WARRANTY—See APPEAL AND ERROR (3); PLEADING (1).

EXTENSION OF STREET—See MUNICIPAL CORPORATIONS (3).

EXTORTION—See USURY (1).

EXTRAORDINARY SERVICE—See TRUSTS (13).

FAILURE OF CONSIDERATION—See VENDOR AND PURCHASER (8, 10).

FAIR TRIAL—See CONSTITUTIONAL LAW (2, 3); CRIMINAL LAW (5, 6).

FEES—See COSTS (8); ESTATES OF DECEDENTS (3); TRUSTS (11, 13–19).

FELONY—See COUNTIES (1–4).

FILING—See ASSIGNMENTS (1–6).

FINAL ACCOUNT—See EXECUTORS AND ADMINISTRATORS; JUDGMENT (10); WILLS (3).

FIRE ESCAPE—See EASEMENTS (1); INJUNCTION (3, 4).

FIRE INSURANCE—See INSURANCE; REFORMATION OF INSTRUMENTS (6).

FIREMEN—See RAILROADS (4).

FIRES—See ARSON.

FIRST-DEGREE MURDER—See HOMICIDE.

FITNESS OF PARENTS—See PARENT AND CHILD (4, 7, 8).

FIXTURES—See INSURANCE (1); REFORMATION OF INSTRUMENTS (6).

FLASHING LIGHT SIGNALS—See COSTS (11); RAILROADS (8).

FORECLOSURE—See APPEAL AND ERROR (15); VENDOR AND PURCHASER (6, 7).

FORESEEABLE CONSEQUENCES—See AUTOMOBILES (3).

FORFEITURE—See DAMAGES (3); VENDOR AND PURCHASER (4, 5).

FRAUD.

1. A fraud is not committed by a debtor who pays or secures the payment of his obligation to one or certain of his creditors in preference to others. *Berger Furnace Company* v. *Collins*, 290.

2. One who affirms a contract, induced by fraudulent representations, and seeks to recover the difference between the actual value of the property and the amount paid therefor which it would have been worth if as represented by the seller, may bring an action for the difference at any time within the period fixed by the statute of limitations, retention of the property by the purchaser not being a bar to his bringing such an action and laches short of the statute of limitations no defense (CLS 1956, § 609.13). *Lisowek* v. *Bagozzi*, 398.

3. Purchaser of route of coin-operated shuffleboards for $13,500 who discovered that they would not net $1,000 per month as represented, after he had paid $5,000 down payment, but completed payment upon further representation by defendant seller and agent that plaintiff could not rescind such transaction and must complete payment, sell the property and sue for the difference and that such was the legal advice they had received *held*, entitled to sue within period permitted by statute of limitations for difference between actual value and value it would have had had it been as represented (CLS 1956, § 609.13). *Id.* 399.

4. Defendant's allegation of the mere fact that plaintiff, survivor of herself and defendant's father, knew at time deed naming herself and the father as grantees and referring to her as his wife, that she was not the other grantee's wife, would not constitute a sufficient allegation of actionable fraud under pleadings in survivor's suit to quiet title. *Franklin* v. *Franklin*, 544.

5. Finding of trial court that defendant vendors of resort property had fraudulently concealed sewage difficulties between themselves and neighbors to the south and with the State department of health justifying rescission of the contract of purchase and return of plaintiffs' money *held*, proper, under evidence presented. *Ball* v. *Sweeney*, 616.

FRAUD—Continued.

6. Fraud is not to be presumed. *A & M Land Development Co.* v. *Miller*, 681.
7. The party asserting a cause of action based on fraud has the burden of establishing it by clear and satisfactory proof. *Id.*
8. Evidence of fraud arising from claimed misrepresentation of defendant and his agents as to 91 lots in 140-lot subdivision he had then recently purchased, especially with reference as to their suitability for residential use, arising from claimed extensive mass grading operations subsequent to report by engineers as to percolation tests conducted thereon, *held*, insufficient to establish more than a mere expression of an opinion, hence, insufficient to substantiate a finding of fraud as to parties dealing at arm's length, especially where the basis for the opinion is shown. *Id.*
9. A mere expression of opinion does not constitute representation of an existing fact when the parties to contract, sought to be cancelled for fraud, are dealing at arm's length, especially when the basis for the opinion is shown. *Id.* 682.
10. Finding of trial court that plaintiff had not proved that it had entered into land contract for purchase of 91 lots of 140-lot subdivision as result of any fraudulent inducement or misrepresentation by defendant or that it was misled to its prejudice by engineers' report as to percolation tests which report was furnished by defendant and related to the subdivision as a whole *held*, supported by record presented. *Id.*

See JUDGMENT (11); TRUSTS (12); VENDOR AND PURCHASER (9, 10).

FRAUDS, STATUTE OF.

Statutory requirement that conveyances of real estate must be in writing bars passage of an easement to a dominant estate unless a right to thus use it has been made appurtenant to the granted premises, or is expressly mentioned in the conveyance (CL 1948, § 566.106). *Troff* v. *Boeve*, 593.

FULL FAITH AND CREDIT—See JUDGMENT (4).

FUTURE ADVANCES—See ASSIGNMENTS (3, 4).

FUTURE INTERESTS—See HOMESTEAD (2).

GARNISHMENT—See ASSIGNMENTS (4–6).

GASOLINE STATION—See HOMICIDE (1).

GATES—See COSTS (11); RAILROADS (8).

GENERAL APPEARANCE—See APPEARANCE.

GIFTS—See WILLS (5).

GOOD FAITH—See CRIMINAL LAW (3); EMINENT DOMAIN (3); QUIETING TITLE.

GOVERNMENTAL FUNCTION—See MUNICIPAL CORPORATIONS (9); TOWNSHIPS.

GOVERNMENT MEANDER LINE—See BOUNDARIES; WATERS AND WATERCOURSES.

GRADE CROSSINGS—See COSTS (11); RAILROADS (7, 8).

GRADING OPERATIONS—See FRAUD (8).

GRAVEL—See CONTRACTS (1); EVIDENCE (3).

GREAT WEIGHT OF EVIDENCE—See AUTOMOBILES (23); CONTRACTS (7).

GUARDIAN AND WARD—See INFANTS (1).

GUEST PASSENGERS—See AUTOMOBILES (1, 9, 16, 19).

HABEAS CORPUS.

1. Habeas corpus is essentially equitable in its nature when it involves the custody of a child. *Harmsen* v. *Fizzell*, 61.
2. Record in father's habeas corpus proceeding to recover custody of his minor children after his release from a mental hospital *held*, to show that his petition should have been dismissed, where it appears essential to the well-being of the children that he make a showing of reasonable continuity of mental stability, of capacity for steady employment, and of the existence of a legally-constituted family and home wherein there is a reasonable possibility of proper care for his children. *Id.*
3. The question of the validity of a probate court order making a child the permanent ward of that court is presented by a writ of habeas corpus sued out by a natural parent seeking recovery of custody of such child which has not been adopted. *Fritts* v. *Krugh*, 97.
4. Habeas corpus proceedings pertaining to the custody of children are essentially equitable in nature. *Id.* 100.
5. The writ of habeas corpus is the precious safeguard of personal liberty. *Id.*
6. Issues decided on writ of habeas corpus would not be with prejudice to rights which the parties may have to call attention of the proper courts of facts, if any, which raise issues not disposed of on habeas corpus. *Id.*

See COSTS (4); JUDGMENT (7); PARENT AND CHILD (7).

HEALTH, STATE DEPARTMENT OF—See FRAUD (5).

HEARING—See COURTS (1); HIGHWAYS AND STREETS (1, 2); INFANTS (3, 4, 8, 9); PARENT AND CHILD (2).

HEARSAY—See CRIMINAL LAW (4); EVIDENCE (4, 5); PARENT AND CHILD (3).

HEIRS—See ESTATES (1).

HIGHWAYS AND STREETS.

1. A circuit court commissioner of the county, or acting in the county, in which is located land sought to be condemned for highway purposes may hear the matter of necessity in the event the statutory highway authority is disqualified to hear and determine such matter (CL 1948, § 213.174a). *Lookholder* v. *State Highway Commissioner*, 28.
2. Conduct of hearing on necessity in condemnation proceedings of land for highway purposes did not result in a denial of due process due to disqualification of person who had been deputized to conduct the hearing by the State highway commissioner because of previous service as an assistant attorney general, where before deputization by the commissioner he had resigned as such assistant (US Const, Am 14, § 1; Mich Const 1908, art 2, § 16). *Id.*
3. The 2-year limitation prescribed for bringing an action for injuries due to failure to maintain a road in a condition reasonably fit and safe for travel, as added to the general highway law by an amendatory act which added sections to the chapter on recovery of damages against townships, cities and villages, applies also to provision imposing the same liability upon counties in such matters as applies to townships, cities and villages (PA 1909, No 283, ch 4, § 21, ch 22, §§ 1, 3; ch 22, §§ 6–8, as added by PA 1915, No 301). *Pfaff* v. *Ogemaw County Road Commissioners*, 575.
4. Judgments for defendant home-rule city in railroad company's action to recover payments of special assessments for development of heavy duty highway adjacent to railroad right-of-way, paid under protest, is affirmed by an equally divided court (CL 1948, §§ 117.4d, 211.53; Detroit City Charter, title 6, ch 3, § 2). *New York Central Railroad Company* v. *City of Detroit*, 637.

See AUTOMOBILES (1–3, 6, 7, 10, 11); COSTS (2, 11); EMINENT DOMAIN (2–5); EVIDENCE (3); MUNICIPAL CORPORATIONS (3); PLEADING (5); RAILROADS (7, 8); STATUTES (3).

HOME—See PARENT AND CHILD (4, 6).

HOME-RULE CITIES—See CONSTITUTIONAL LAW (9).

HOMESTEAD.

1. Occupancy of premises by mother who had deeded the place to her son but reserved a life use thereof with simultaneous agreement on his part to maintain and support her gave her the exclusive possession so long as she lived and did not entitle him to possession or a sharing of possession as a legal right, hence, the premises were not "owned and occupied" by him as the term is used in homestead exemption provision of Constitution (Const 1908, art 14, § 2, as amended in 1943). *Cross* v. *Fruehauf Trailer Company*, 455.
2. A claim of homestead may not attach to either vested or contingent future estates or interests in land, since it is not susceptible of immediate occupancy (Const 1908, art 14, § 2, as amended in 1943). *Id.* 456.

HOMESTEAD—Continued.

3. A homestead may not be claimed in premises by a remainderman, even one who occupies the premises during the life of the life tenant by the latter's permission (Const 1908, art 14, § 2, as amended in 1943). *Id.*

4. Whether real estate is exempt as a homestead from sale on execution must be determined as of the time of the levy, rather than at the time of the sale (Const 1908, art 14, § 2, as amended in 1943). *Id.*

5. Plaintiff, judgment debtor, was not entitled to protection of statutory provisions relating to execution sales of homestead rights, where at time of levy he was merely a remainderman and had not even commenced to occupy premises involved, even with the permission of his mother who had reserved a life use thereof and was in occupancy thereof (CL 1948, §§ 623.83, 623.90, 623.95). *Id.*

6. One may not claim 2 homesteads at the same time. *Id.*

See EXECUTION; JUDGMENT (11).

HOMICIDE.

1. Defendant in prosecution for first-degree murder, committed while he and 3 companions robbed a gasoline station, in which the defense of temporary insanity, due to consumption of alcohol and marijuana, was interposed, *held*, to have been fully protected by complete and proper charge to jury. *People* v. *Hearn*, 468.

2. A defendant in prosecution for murder in the first degree, committed while perpetrating a robbery, was not entitled to have instruction given that would permit jury to find him guilty of lesser offenses of second-degree murder or manslaughter, where there was no evidence from which a reasonable inference of any other degree of murder could be drawn (CL 1948, § 750.316). *Id.* 469.

3. There was no reversible error committed by trial court in prosecution for first-degree murder, committed in the perpetration of robbery, in failing to charge as to included offenses, where there was a total absence of evidence to support the theory that defendant was guilty of the included offenses rather than murder in the first degree (CL 1948, § 750.316). *Id.*

HOSTS—See AUTOMOBILES (9).

HOTELS—See EASEMENTS; INJUNCTION (4); VENDOR AND PURCHASER (5).

HOUSEHOLD FURNISHINGS—See DIVORCE (15).

HUSBAND AND WIFE.

1. A married man's obligation to support his wife and minor children remains with him until a dissolution of the marital relationship. *Sovereign* v. *Sovereign*, 150.

2. The fact that defendant husband was found not entitled to decree of divorce in previous suit therefor did not relieve

HUSBAND AND WIFE—Continued.

him of his continuing obligation to support his wife and minor children. *Id.* 151.

See DEEDS (3); FRAUD (4); WITNESSES (2).

IMPLIED WARRANTY—See PLEADING (1).

IMPROVEMENT—See RAILROADS (7).

IMPUTED NEGLIGENCE—See AUTOMOBILES (21, 22).

INADEQUACY OF CONSIDERATION—See MORTGAGES (4).

INCLUDED OFFENSES—See HOMICIDE (2, 3).

INCOME—See ARSON (2); DIVORCE (6); TRUSTS (5, 9).

INDEFINITENESS—See TRUSTS (2–4, 8).

INDEMNITY.

An indemnity contract is to be strictly construed against him who claims to be an indemnitee. *In re Traub Estate (Bates v. National Bank of Detroit)*, 263.

INDEPENDENT CONTRACTOR—See WORKMEN'S COMPENSATION.

INDICTMENT AND INFORMATION—See COUNTIES (1–3).

INFANTS.

1. The probate court would be vested with jurisdiction as to minor children whose parents or guardian are alleged to have abandoned them or who were otherwise without proper custody or guardianship (Const 1908, art 7, § 13; CLS 1956, § 712A.2; CL 1948, §§ 712A.11). *Harmsen v. Fizzell*, 60.
2. A waiver of service of process or notice of hearing, signed by attorney for mother in proceedings as to dependent and neglected children, while subject to attack by mother, if unauthorized, would not be subject to collateral attack by father in habeas corpus proceeding to obtain custody of his children following his release from mental hospital (CL 1948, § 712A.12). *Id.*
3. A statutorily-authorized report of the county agent, based upon investigation of facts alleged in petition relative to dependent and neglected children constituted a proper basis for the probate court's acceptance of jurisdiction, where service of notice of hearing on the petition had been made upon the father, then committed to a mental hospital and service upon mother had been waived and there was an absence of dispute over any jurisdictional fact (Const 1908, art 7, § 13; CLS 1956, § 712A.2; CL 1948, §§ 712A.11–712A.13, 712A.17). *Id.*
4. An order of the probate court taking jurisdiction over dependent and neglected children upon petition, as to which notice of hearing had been given, and which sought to give that court temporary custody was a final and appealable order (Const 1908, art 7, § 13; CLS 1956, § 712A.2; CL 1948, §§ 712A.11–712A.13, 712A.17). *Id.* 61.

INFANTS—Continued.

5. An order of the probate court taking jurisdiction over minor children as dependent and neglected children, pursuant to petition to give the court custody, but which order failed to state whether the custody was temporary or permanent as required by statute was, therefore, defective and voidable, but not void, where the facts plainly show the probate court had jurisdiction as to the children and he was authorized by statute to assume jurisdiction (Const 1908, art 7, § 13; CLS 1956, § 712A.2; CL 1948, §§ 712A.11–712A.13, 712A.17). *Id.*

6. The paramount consideration in all cases involving the custody of children is always what is demanded by the child's best interests. *Id.*

7. Mother's petition to probate court to take jurisdiction over her 2 children, then 1–1/2 and 2–1/2 years of age, which recited that her husband had quit his job, said he did not want the children, drank continually, beat her up which frightened the children, said he was leaving for his parents' home in Arkansas, that she had to have financial help to feed the children and wanted to put them up for adoption, *held*, not inadequate to allege jurisdictional facts of neglect (CL 1948, § 712A.20). *Fritts* v. *Krugh*, 98.

8. The probate court had jurisdiction of the persons and the subject matter for purposes of hearing the complaint as to neglect of 2 minor children, where the children resided in the county, the essential parties had notice and the mother's petition sufficiently alleged neglect and dependency of the children (CL 1948, § 712A.20). *Id.*

9. A juvenile court hearing as to neglected and dependent children is not a criminal, but essentially and legally a civil proceeding of a chancery nature and rules of equity procedure and evidence should be followed (CL 1948, §§ 712A.17, 712A.20). *Id.*

10. There must be some testimony of neglect of a child before the probate court has the power to take jurisdiction of the child and enter a valid order of disposition of the child (CLS 1956, § 712A.18). *Id.* 99.

11. The entry of an order by the probate court for permanent custody of a child due to neglect must be based upon testimony of such a nature as to establish or seriously threaten neglect of the child for the long-run future (CL 1948, § 712A.20). *Id.*

12. An order of the probate court which took permanent custody of 2 minor children clearly exceeded the statutory authority of the court and was void, where there was no evidence of neglect, either of long duration in the past, or from which any reasonable prediction of future neglect of permanent duration could be made (CL 1948, § 712A.20). *Id.*

See AUTOMOBILES (11).

INFERENCES—See ARSON (1); EVIDENCE (7); HOMICIDE (2).

INJUNCTION.

1. It was not an abuse of judicial discretion for trial court to deny the intervention, as parties plaintiff, of some 50 persons,

INJUNCTION—Continued.

whose appearance on the opening day of trial in suit to enjoin the establishment of an auxiliary freight switching yard pursuant to an agreement between defendant railroad company and defendant city, where it is conceded that it would not have altered either the pleadings or the proofs. *Gray* v. *Grand Trunk Western Railroad Company*, 2.

2. One who delays attempting to secure equitable relief of injunction against a claimed continuing trespass until the dominant user or tenure had grown to a valuable prescriptive estate would not be granted an injunction against the continuance of the trespass. *Myer* v. *Franklin Hotel Company, Inc.*, 552.

3. Owner of land who failed to seek injunction against overhanging fire escapes on defendants' hotel property until long after statute of limitations had run against him was not entitled to injunction against the continuing trespass (CL 1948, § 609.1). *Id.*

4. Owner of land over which defendant hotel's fire escape overhung was guilty of laches precluding granting of injunctive relief, where he was present at time fire escape was reconstructed and extended 4 feet from wall instead of 3 feet as formerly and extended over space parallel with the wall but raised no complaint until some 11 years following the alteration. *Id.*

5. Lot owner's use of 2 city lots for purpose of parking cars of bowling alley patrons, which use antedated adoption of zoning ordinance and as to which the use was nonconforming, was properly subject to protection by injunction against city for interference with such use, there being no adequate remedy at law. *London* v. *City of Detroit*, 571.

See COSTS (1).

INLAND LAKES—See WATERS AND WATERCOURSES.

IN REM PROCEEDINGS—See ESTATES OF DECEDENTS (1).

INSANE PERSONS—See HOMICIDE (1).

INSTRUCTIONS—See AUTOMOBILES (6, 8, 9); CRIMINAL LAW (4, 6, 7); DEATH (2); HOMICIDE; INTOXICATING LIQUORS; JURY (2); PLEADING (9); TRIAL (1).

INSURANCE.

1. Insurance protection of described buildings, as defined in fire insurance policy, extended to "permanent fixtures, stationary scales and elevators" belonging to and constituting "a permanent part of said building" and did not extend to outside fixtures and apparatus used in coalyard. *Goldman* v. *Century Insurance Company (Same* v. *Scottish Union & National Insurance Company)*, 528.

2. The intent of the parties with respect to extent of coverage of a contract of fire insurance is evidenced by the resulting policy, hence, it is clearly admissible as evidence of the meeting of the minds, a matter that is judged by objective stand-

INSURANCE—Continued.

ards and not by the unexpressed thoughts and understanding of one of the parties. *Id.* 529.

3. Insurance policies, purchased by plaintiff insureds after fire loss, were admissible in suit to determine insureds' intent as to their coverage under defendants' policies, herein sought to be reformed after fire. *Id.*

See ACTION (2, 3); ARSON (2); DEATH (1); INTOXICATING LIQUORS; JURY (3); REFORMATION OF INSTRUMENTS (5, 6); VENDOR AND PURCHASER (2, 3, 5).

INTENT—See CONSTITUTIONAL LAW (5, 7); DEATH (1); DEEDS (4); EVIDENCE (4); INSURANCE (2, 3); MORTGAGES (1); REFORMATION OF INSTRUMENTS (1, 3); TAXATION (3); TRESPASS (2); TRUSTS (2); VENDOR AND PURCHASER (1, 4); WILLS (1, 2).

INTEREST—See ESTATES OF DECEDENTS (2).

INTEREST IN LAND—See COSTS (2); EMINENT DOMAIN (2); WORDS AND PHRASES (1).

INTERSECTIONS—See APPEAL AND ERROR (4); AUTOMOBILES (7, 8, 10, 11, 13–17); PLEADING (5).

INTERSTATE COMMERCE—See TAXATION (2, 4, 6).

INTERVENTION—See ACTION (3); INJUNCTION (1).

INTOXICATING LIQUORS.

Questions asked by defendant's counsel and answered, and comments of such counsel, directed to the existence of workmen's compensation insurance coverage and trial court's instructions to jury as to such matter in third-party action authorized by the workmen's compensation act and brought under civil damage act *held*, not to have constituted prejudicial error, where plaintiff raised no objections at the trial, plaintiff stipulated, in open court, as to payment of such compensation to plaintiff and instruction given was of same general purport as plaintiff's request to charge (CLS 1956, §§ 413.15, 436.22). *Spelker* v. *Knobloch*, 403.

See HOMICIDE (1); INFANTS (7); JURY (2).

IRRECONCILABLE VERDICTS—See AUTOMOBILES (22).

IRREGULARITIES—See *EXECUTION; QUIETING TITLE.*

JOINT DRIVEWAY—See REFORMATION OF INSTRUMENTS (9).

JOINT SEWAGE-DISPOSAL SYSTEM—See COSTS (6); MUNICIPAL CORPORATIONS (8).

JUDGES.

The fact that an attorney has represented a client with respect to identified subject matter in a proceeding which has come to a definite end, does not itself disqualify him from acting judicially at some later date in a new proceeding involving the same subject matter, even though his former client stands before him in the position of an interested litigant, as ethical

JUDGES—Continued.

considerations do not alone determine questions of due process (US Const, Am 14, § 1; Mich Const 1908, art 2, § 16). *Lookholder* v. *State Highway Commissioner*, 28.

See CONSTITUTIONAL LAW (3); DIVORCE (3); PROCESS.

JUDGMENT.

1. Defects in summons in New York action in that no return date and no county designated for trial are shown and certification of the complaint by plaintiff was dated some 2 months after date of the complaint and proof of service of the complaint are not jurisdictional and subject to timely amendment or waiver unless the opposite party has been prejudiced by them. *Delph* v. *Smith*, 12.
2. Defendant in action on New York judgment could not have been prejudiced by defects in summons in New York, where he claims never to have seen such documents. *Id.*
3. A collateral attack upon the service of process in another State, attested by a judicial officer, may be made by party who was shown not to have been personally served, in order to show a lack of jurisdiction. *Id.*
4. The full faith and credit clause of the Constitution of the United States requires recognition of the judgments of sister States but collateral attack may be made in the courts of this State by showing that the judgment sought to be enforced was void for want of jurisdiction in the court which issued it (US Const, art 4, § 1). *Id.*
5. The party being sued in this State on the judgment of a sister State and who subjects such judgment to collateral attack for lack of jurisdiction in the court which rendered it because of lack of service of process has the burden of proof of showing that he was not served with a summons in the sister State by clear and convincing proof and with substantial corroboration as the officer's return of service is presumed to be true. *Id.* 13.
6. Trial judge's finding that New York judgment was invalid for want of service of process on defendant in New York *held*, supported by record showing his lack of knowledge of such default judgment and continuance of his residence in that State for a year and a half after the entry of judgment without attempt to enforce it there or for several years more. *Id.*
7. An order affecting personal liberty which clearly exceeds the probate court's statutory authority may be attacked by habeas corpus, even where the court had jurisdiction of the persons and the subject matter (CL 1948, § 712A.20). *Fritts* v. *Krugh*, 99.
8. The defense of *res judicata* involves the same subject matter and the same parties in order to be successful. *Sovereign* v. *Sovereign*, 150.
9. The doctrine of estoppel by judgment is applied only as to such matters within the scope of the pleadings in the previous litigation as necessarily had to be adjudicated in order for the previous judgment or decree to be rendered, or as to such

JUDGMENT—Continued.

matters within the scope of the pleadings as might or might not have been adjudicated, but which are shown by aliunde proof to have been actually litigated and determined. *Id.* 151.

10. An unappealed order approving the final account of an executor and discharging him upon effecting distribution of the property theretofore in his hands is not subject to attack in a collateral proceeding. *Cleveland* v. *Second National Bank & Trust Company,* 204.

11. Finding of court that deed given by plaintiff, a judgment debtor, to his widowed mother of home which she had theretofore deeded to him in return for his promise to provide a home for her therein for her lifetime was in fraud of his creditors and void, did not determine that such plaintiff was not thereafter entitled to homestead exemption therein from sale on execution (Const 1908, art 14, § 2, as amended in 1943). *Cross* v. *Fruehauf Trailer Company,* 455.

12. As the point of split cause of action could not accrue until judgment, defendant is not sooner called upon to elect its course and inaction could not work a waiver. *General Accident Fire & Assurance Corporation, Ltd.,* v. *Sircey,* 478.

See DIVORCE (5, 6); WILLS (3).

JUDGMENT CREDITORS—See CONTRACTS (10).

JUDGMENT NOTWITHSTANDING VERDICT—See APPEAL AND ERROR (1).

JUDICIAL NOTICE—See EVIDENCE (1).

JURISDICTION—See APPEARANCE; COURTS (1, 2); DIVORCE (2); EMINENT DOMAIN (5); EQUITY (1, 2); ESTATES OF DECEDENTS (1); INFANTS (1, 3–5, 7, 8, 10, 12); JUDGMENT (1, 3–7); MUNICIPAL CORPORATIONS (4); PARENT AND CHILD (2, 3); TRUSTS (11); WILLS (3).

JURY.

1. The scope of *voir dire* examination of prospective jurors is largely in the discretion of the trial court. *Spelker* v. *Knobloch,* 403.

2. It was not error in action under civil damage act for trial court to refuse plaintiff's counsel, on *voir dire* examination, permission to mention a specific sum as damages upon finding a verdict for plaintiff, since the jury would be instructed by the judge as to the damages recoverable upon submission of the case to them (CLS 1956, § 436.22). *Id.*

3. It was not an abuse of discretion on the part of the trial court to decline to permit plaintiff's counsel to ask prospective jurors whether or not any were stockholders or members or relatives of any stockholders or members of a mutual insurance association or company, where counsel had stipulated that no mutual insurance company was involved and no substitute question was presented, it being the opinion of the trial court that the purpose of the question, under the circumstances, was to convey, rather than to elicit, information as to insurance coverage. *Id.*

KILNS—See DEEDS (5, 6).

LACHES—See FRAUD (2); INJUNCTION (4).

LAND CONTRACTS—See APPEAL AND ERROR (14, 15); FRAUD (5, 10); MORTGAGES (3); SPECIFIC PERFORMANCE; VENDOR AND PURCHASER (2–10).

LANDLORD AND TENANT—See BROKERS; EMINENT DOMAIN (3).

LAPSE OF LEGACY—See WILLS (4, 5).

LEASEHOLD—See EMINENT DOMAIN (1, 2).

LEASES—See APPEAL AND ERROR (7); BROKERS; TAXATION (1).

LEGACY—See WILLS (4, 5).

LEG INJURY—See PLEADING (9).

LEGISLATIVE BODY—See CONSTITUTIONAL LAW (1).

LEGISLATIVE POWER—See MUNICIPAL CORPORATIONS (3).

LEGISLATORS—See COUNTIES (1–3).

LEGISLATURE—See CONSTITUTIONAL LAW (4, 6).

LESSER OFFENSES—See HOMICIDE (2, 3).

LIBERTY—See HABEAS CORPUS (5).

LIENS—See WORDS AND PHRASES (1).

LIFE ESTATES—See CONTRACTS (6); ESTATES OF DECEDENTS (2); HOMESTEAD (5); MORTGAGES (3); WORDS AND PHRASES (1).

LIFE TENANT—See HOMESTEAD (3).

LIGHTS—See TOWNSHIPS (2).

LIMITATION OF ACTIONS—See FRAUD (2, 3); HIGHWAYS AND STREETS (3); INJUNCTION (3); STATUTES (3).

LIQUIDATED DAMAGES—See CONTRACTS (11, 12); DAMAGES (3).

LIQUOR LAW VIOLATION—See CRIMINAL LAW (6).

LOSS OF USE OF PROPERTY—See TRESPASS (1).

LOST PAY—See COUNTIES (1).

MAINTENANCE—See RAILROADS (8).

MALICE—See TRESPASS (2).

MANDAMUS—See COSTS (3).

MANSLAUGHTER—See HOMICIDE (2).

MANUFACTURING—See MUNICIPAL CORPORATIONS (1, 2).

MARIJUANA—See HOMICIDE (1).

MARRIAGE.

1. Divorce residence requirements are not applicable to annulment proceedings, since such requirements were designed to discourage hasty divorces, a reason inapplicable to the continuance of a marriage which was void from its beginning (CL 1948, §§ 552.9, 552.9e, as amended and added by PA 1957, No 257). *Hill* v. *Hill*, 475.
2. Statute specifying that a bill of complaint to annul a marriage could be filed in the county where the parties, or 1 of them, resided, eliminated residential requirements set forth in the divorce section of the statute (CL 1948, § 552.3). *Id.*

See HUSBAND AND WIFE (1).

MASTER AND SERVANT.

1. Plaintiff employee who was found by arbitrator to have been unjustly discharged by defendant employer was entitled, under collective bargaining agreement to treat arbitrator's decision as merely a determination of the submitted issue of unjust discharge and was entitled to disregard the arbitrator's denial of back pay, where the matter of back pay in such event had been provided for in the collective bargaining agreement, hence, his acceptance of re-employment did not raise an estoppel to recovery of back pay. *Carr* v. *Kalamazoo Vegetable Parchment Company*, 328.
2. It was not error for trial court to submit to jury the question of whether plaintiff was an employee of defendant at time of injury, where the competent testimony on such issue was in conflict. *Graham* v. *Thorman*, 629.

See CONTRACTS (10); WORKMEN'S COMPENSATION.

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —See WITNESSES (2).

MAXIMS—See MUNICIPAL CORPORATIONS (1).

MEANDER LINE—See BOUNDARIES; WATERS AND WATERCOURSES.

MEETING OF THE MINDS—See INSURANCE (2).

MENTAL ANGUISH—See TRESPASS (1).

MENTAL COMPETENCY—See DEEDS (2).

MINORS—See AUTOMOBILES (11); INFANTS.

MISJOINDER OF PARTIES—See ACTION (3).

MISMANAGEMENT—See DIVORCE (13).

MISTAKE—See REFORMATION OF INSTRUMENTS (2, 3, 5, 7); VENDOR AND PURCHASER (1, 10).

MODIFICATION OF CONTRACT—See CONTRACTS (7).

MODIFICATION OF DECREE—See DIVORCE (2, 4).

MORTGAGES.

1. Whether an instrument, in form a deed, should be construed as a mortgage will be determined from an investigation of the instrument itself, the acts of the parties and all surrounding circumstances to see whether the true intent was that the property stand as security for the loan, as the intent of the parties is the determining factor and no form of words employed in the written instrument is conclusive of the intent. *Sheets* v. *Huben*, 536.
2. The burden rests on parties asserting rights on the theory of a mortgage to establish their claim by clear and satisfactory proof, where the instrument is in form an absolute deed. *Id.*
3. Deed, absolute in form, is construed as a mortgage, where it appears plaintiff had disposed of a $2,400 purchaser's interest in a land contract, subject to a mortgage, for $1,106 and agreed to pay the balance due on the mortgage, keeping only a life interest in herself. *Id.*
4. Inadequacy of consideration is not an infallible test in determining whether an instrument, in form an absolute deed, is in fact a mortgage, but it is an indication that the parties did not consider the conveyance to be absolute, especially where the bargaining positions of the parties are markedly unequal. *Id.*

See WORDS AND PHRASES (1).

MOTIONS AND ORDERS—See COURTS (1); DIVORCE (2); PLEADING (9).

MOTION TO DISMISS—See APPEAL AND ERROR (11); EQUITY (3); ESTOPPEL.

MOTIVE—See ARSON (2).

MUNICIPAL CORPORATIONS.

1. Municipal zoning ordinance in which territory sought to be used by railroad for switching yard was zoned for manufacturing purposes did not bar such proposed use, since it was not included in specifically enumerated prohibited uses, the principle that inclusion by specific mention excludes what is not mentioned being applicable. *Gray* v. *Grand Trunk Western Railroad Company*, 1.
2. Legislative action of city in executing an agreement with a railroad whereby latter acquired, for various enumerated considerations, property upon which it proposed to operate an auxiliary freight switching yard in order to better serve manufacturer shippers in the industrial area *held*, not arbitrary or capricious. *Id.*
3. A city's agreement not to extend a specified street across an auxiliary freight switching yard which defendant railroad proposed to establish in order to serve nearby industrial plants *held*, clearly within the legislative power of city commission. *Id.* 2.
4. There cannot be at the same time, within the same territory, 2 distinct municipal corporations, exercising the same powers,

MUNICIPAL CORPORATIONS—Continued.

jurisdiction, and privileges; hence, a new municipality cannot be formed out of, or embrace territory already included within, the limits of an incorporated city, except under statutes providing that on the establishment of the new corporation the corporate existence of the prior corporation shall cease. *Taliaferro* v. *Genesee County Supervisors*, 49.

5. There is no legal right in a petitioner to an election seeking to incorporate a new city from territory occupied by a duly incorporated city (CLS 1956, § 117.9). *Id.*

6. It would be necessary to follow the legislative method of consolidation in order to incorporate the territory of 3 existing cities in addition to all of certain townships and parts of others, thereby affording the electors of each city and unincorporated area opportunity to express approval or disapproval of consolidation (CL 1948, § 117.6, as amended by PA 1957, No 210; CLS 1956, §§ 117.7, 117.9). *Id.*

7. Water authority, organized pursuant to statute providing method of financing water supply system for area consisting of several incorporated cities and townships as local component units, was not a municipal corporation included within exception of the 15-mill tax-limitation amendment to the Constitution, hence, such portions of the territory as were otherwise subject to the limitation were not removed from its operation by act providing the authority with power to tax property "unlimited as to rate or amount," such quoted provision being unconstitutional (Const 1908, art 10, § 21, as added in 1932 and amended in 1948; PA 1957, No 4, §§ 16, 18). *Bacon* v. *Kent-Ottawa Metropolitan Water Authority*, 160.

8. Decree upholding contract between county and a city and 3 townships located within the county for establishment of a joint sewage-disposal system, to be financed by a bond issue with costs prorated upon such 4 municipalities in accordance with basis stated in the agreement is affirmed by the Supreme Court, DETHMERS, C. J., and KELLY, CARR and EDWARDS, JJ., for affirmance but modifying trial court's decree dismissing bill by deleting portion thereof declaring the provision of the Constitution limiting taxation of property to 15 mills not violated and SMITH, BLACK, VOELKER, and KAVANAGH, JJ., for reversal on the ground that such provision of the Constitution prohibited the levy of a tax by the township to meet the obligations imposed by the contract (Const 1908, art 10, § 21, as amended in 1948; CL 1948, § 601.26; PA 1957, No 185, § 12). *Cohn* v. *County of Oakland*, 180.

9. Declaration in baseball game spectator's action against city for injuries received when bleachers collapsed at city ball park failed to state a cause of action, where there was no averment of performance of a proprietary function, there being at best only a claim against the city resulting from its employees' negligent performance of a governmental function as to which the doctrine of sovereign immunity presently applies. *Penix* v. *City of St. Johns*, 259.

10. Finding of fact by trial court in suit by owner of 2 city lots in area, zoned for residence use, to enjoin city's inter-

MUNICIPAL CORPORATIONS—Continued.

ference with his use thereof for parking cars of patrons of his nearby bowling alley, that such nonconforming use had been continued since prior to the adoption of the zoning ordinance, is not disturbed under record presented. *London* v. *City of Detroit*, 571.

11. A city lot owner's vested rights to the continued use thereof in a manner not conforming to zoning ordinance adopted after commencement of such use and excepted therefrom is not subject to rule that his remedies under the zoning ordinance must first be exhausted before he may resort to the courts for relief, since such rights did not arise under such ordinance. *Id.*

See CONSTITUTIONAL LAW (9); COSTS (1, 3, 6); HIGHWAYS AND STREETS (3, 4); INJUNCTION (1, 5).

MURDER—See HOMICIDE.

NEGLIGENCE.

1. The matter of contributory negligence is tested by what plaintiff should have seen in the exercise of due care, not what he could have seen as a matter of fact. *Baker* v. *Gushwa*, 242.

2. It was error for trial court to overrule objections by counsel for defendant in action under the death act to admission of testimony as to alcoholic content of his blood at the time of accident, where analysis of his blood, taken from him while he was unconscious, not for purpose of treatment of injuries received, but to establish negligence on his part, however, such error was not reversible, where negligence was otherwise conclusively established, in part, by defendant's own testimony (CL 1948, § 691.581 *et seq.*). *Lebel* v. *Swincicki*, 428.

3. Plaintiff administrator of estate of decedent who was driving car involved in accident at 10:30 p.m. in February, 1954, then had burden of proof to show that his decedent was free from contributory negligence proximately causing the accident. *Booth* v. *Bond*, 562.

See AUTOMOBILES (3, 4, 9, 11, 14, 21, 22); RAILROADS (4, 6); REFORMATION OF INSTRUMENTS (9); TRUSTS (12).

NEW CORPORATION—See COSTS (3); MUNICIPAL CORPORATIONS (4, 5).

NEWLY-DISCOVERED EVIDENCE—See DEATH (3).

NEW TRIAL—See AUTOMOBILES (11); DEATH (3); TRESPASS (4).

NEW YORK—See JUDGMENT (1, 2).

NIGHTTIME—See APPEAL AND ERROR (7); AUTOMOBILES (13).

NOISE—See RAILROADS (2).

NOLLE PROSEQUI—See COUNTIES (3).

NONCONFORMING USE—See INJUNCTION (5); MUNICIPAL CORPORATIONS (10, 11).

NONJOINDER OF PARTIES—See ACTION (3).

NONJURY CASE—See APPEAL AND ERROR (6, 13); AUTOMOBILES (12); RAILROADS (4).

NOTICE—See APPEAL AND ERROR (5); COUNTIES (1, 2); COURTS (1); EXECUTION; INFANTS (2–4, 8); PARENT AND CHILD (2); QUIETING TITLE; REFORMATION OF INSTRUMENTS (1); TRESPASS (3).

NUISANCE—See RAILROADS (2, 3).

OBJECTIONS—See COURTS (3); CRIMINAL LAW (6); TRIAL (3).

OBSERVATION—See AUTOMOBILES (8); RAILROADS (6).

OCCUPANCY—See HOMESTEAD (1, 3).

OFFICERS—See PROCESS.

OPINIONS—See APPEAL AND ERROR (11); FRAUD (8, 9).

OPPOSITE PARTIES—See WITNESSES (2).

ORDERS—See TRUSTS (13).

ORDINANCES—See AUTOMOBILES (12); INJUNCTION (5); MUNICIPAL CORPORATIONS (10, 11).

ORNAMENTAL TREES—See TRESPASS (8).

OTHER STATES—See TAXATION (1, 6).

OUTBUILDINGS—See REFORMATION OF INSTRUMENTS (6).

OUT OF STATE—See TAXATION (1, 6).

OVERHANG—See EASEMENTS; *INJUNCTION* (3, 4).

OWNERSHIP—See HOMESTEAD (1).

PARENT AND CHILD.

1. An order of the probate court which makes a child the permanent ward of such court acts to sever all parental rights of the natural parents (CL 1948, § 712A.20). *Fritts* v. *Krugh*, 97.
2. A notice to the natural parents of a child that the hearing on a petition to the probate court to take jurisdiction of the child for the purpose of putting the child up for adoption gave sufficient notice to the parents that their parental rights were at stake in the event the court found the necessary facts to establish its jurisdiction over the children, it being unnecessary for the notice of hearing to contain reference to any particular method of adoption (CL 1948, § 712A.20). *Id.*
3. A final order of permanent custody of minor children, acting to sever all parental rights, must be based on legal evidence and cannot be based on hearsay and report alone, where jurisdictional facts are in dispute, even though the statute author-

PARENT AND CHILD—Continued.

izes informality of hearing (CL 1948, §§ 712A.17, 712A.20). *Id.* 98.

4. The fitness of the natural parents as parents and the question of their neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered the children (CL 1948, § 712A.20). *Id.* 99.

5. There must be real evidence of long-time neglect, or serious threats to the future welfare of the child, to overthrow permanently, as distinguished from temporarily, the natural and legal right of parents of the custody and nurture of their own children, such rights not being subject to termination as a result of a brief marital dispute, or even by a temporary period of desertion by 1 of the parents (CLS 1956, § 703.6). *Id.*

6. A father whose parental rights have not been legally severed should be given society's assistance at every point in his effort to re-establish a proper home for the children for whose care he has the right and duty to provide. *Id.* 100.

7. Parents of 2 minor children, whose parental rights had not been legally severed *held,* entitled to restoration of their custody, where record shows that since mother petitioned the probate court for their custody the parents have been reunited, he has worked steadily and supported his family which now includes 2 more children, and that wife has kept house, since there has not been shown such unfitness as would have required the dismissal of the writ of habeas corpus. *Id.*

8. The burden of disproving a natural parent's fitness to have custody of his or her own child is upon the person challenging it, since there is a presumption that the parent is a fit person and the right of a parent to the custody of a child is paramount or superior to that of any other person. *Id.*

See COSTS (4); DEEDS (2); HABEAS CORPUS (2); INFANTS (1, 2, 7, 8); JUDGMENT (11); WITNESSES (2).

PARKING—See AUTOMOBILES (1–3); INJUNCTION (5); MUNICIPAL CORPORATIONS (10).

PAROL EVIDENCE—See CONTRACTS (4); DEEDS (5).

PARTIES—See ACTION (3); INJUNCTION (1); JUDGMENT (8).

PARTNERSHIP—See CONTRACTS (10).

PASSENGERS—See AUTOMOBILES (1, 3, 11, 16, 18–22).

PAVEMENT—See AUTOMOBILES (2); PLEADING (5).

PAYMENT—See ASSIGNMENTS (1–3, 5–7); AUTOMOBILES (18); FRAUD (1, 3); HIGHWAYS AND STREETS (4); WILLS (4, 5).

PEDESTRIANS—See AUTOMOBILES (12).

PERCOLATION TESTS—See FRAUD (8, 10).

PERFORMANCE—See BROKERS; CONTRACTS (3, 9).

PERMANENT WARD—See INFANTS (11, 12); PARENT AND CHILD (1, 3).

PERMISSION—See HOMESTEAD (3).

PERPETUITIES—See TRUSTS (4).

PERSONAL LIBERTY—See JUDGMENT (7).

PERSONALTY—See CONTRACTS (5).

PETITION—See INFANTS (7, 8); PARENT AND CHILD (2).

PHYSICIAN-PATIENT RELATION—See EVIDENCE (6).

PHYSICIANS AND SURGEONS—See EVIDENCE (6).

PLEADING.

1. No warranty may be implied where declaration is based on an express guarantee. *Detroit Conveyor & Steel Corporation* v. *Milbrand*, 222.

2. Courts must allow a pleader a little looseness of expression so as to make provision for the uncertainty of the proof, provided that no unfair advantage is taken of the opponent thereby (CL 1948, § 614.2; Court Rule No 19, § 1 [1945]). *Baker* v. *Gushwa*, 241.

3. A declaration must contain such specific allegations as will reasonably inform the defendant of the nature of the cause he is called upon to defend (CL 1948, § 614.2; Court Rule No 19, § 1 [1945]). *Id.*

4. A liberal attitude is taken in passing upon the sufficiency of pleadings, the chief object of the declaration being to apprise plainly the opposite party of the cause of action and the claim of plaintiff (CL 1948, § 614.2; Court Rule No 19, § 1 [1945]). *Id.* 242.

5. A variance, if there was any, between declaration and proofs adduced on behalf of plaintiff *held*, not to have misled defendant to his prejudice in action arising from collision at or near intersection of private drive and public highway, where declaration averred that plaintiff "did drive out onto the public highway, going in an easterly direction and at a slow rate of speed, and that just as he did enter upon the public highway, the defendant did come over the crest of the hill * * * and at a high and unlawful rate of speed did drive into plaintiff's truck" and testimony showing collision occurred just as front of plaintiff's truck came to within 6 or 8 inches from hitting edge of pavement and stopped. *Id.*

6. Intent of court rule providing that plaintiffs' reply should be used to answer new matter alleged in defendants' answer was intended to permit a reply to new matter in avoidance of plaintiff's claim, not merely in contradiction of it but does not permit plaintiff to set up a new theory to support their cause (Court Rule No 24 [1945]). *Cutliff* v. *Densmore*, 586.

7. Plaintiffs' reply to defendants' answer in action of ejectment was properly stricken upon defendants' motion therefor, where declaration was based on deed to disputed land and reply set up a claim of title in the accreted lands by adverse pos-

PLEADING—Continued.

session, since the matter in the reply could not properly be considered (Court Rule No 24 [1945]). *Id.* 587.

8. Whether or not a defendant may amend his answer after proofs generally rests solely in the discretion of the trial court and the Supreme Court will not interfere unless such discretion is abused. *Graham* v. *Thorman*, 629.

9. Denial of defendant's motion to amend answer to accord with proofs in action by plaintiff for broken leg, sustained when he fell from defendant's truck as he was attempting to operate defective brakes, to provide that plaintiff's acceptance of workmen's compensation from a third party for whom defendant had furnished truck was a bar to action against defendant *held*, not reversible error, where court instructed jury that if they found defendant was a subcontractor of the third party and that plaintiff had received workmen's compensation from such third party, there should be a verdict of no cause for action, since defendant actually received the benefit of his motion. *Id.*

See ACTION (3); APPEAL AND ERROR (14, 15); EASEMENTS; EJECTMENT (1); EQUITY (3); ESTOPPEL; FRAUD (4); INJUNCTION (1); JUDGMENT (9).

PLUMBER—See WORKMEN'S COMPENSATION.

POSSESSION—See ADVERSE POSSESSION; CONTRACTS (5); DEEDS (1); HOMESTEAD (1).

POSTING—See EXECUTION; QUIETING TITLE.

PREFERENCES—See FRAUD (1).

PREJUDICE—See CRIMINAL LAW (5); DEATH (2); DIVORCE (16); EXECUTION; FRAUD (10); HABEAS CORPUS (6); INTOXICATING LIQUORS; JUDGMENT (1, 2); PLEADING (5); QUIETING TITLE; TAXATION (5, 8); VENDOR AND PURCHASER (7).

PREPONDERANCE OF EVIDENCE—See AUTOMOBILES (12); CONTRACTS (1).

PRESCRIPTIVE USE—See EASEMENTS; INJUNCTION (2).

PRESUMPTIONS—See CONSTITUTIONAL LAW (8); CONTRACTS (2, 3); DAMAGES (3); DEEDS (1, 2); FRAUD (6); JUDGMENT (5); PARENT AND CHILD (8); TRIAL (1).

PREVIOUS SUIT—See DIVORCE (7); HUSBAND AND WIFE (2).

PRINCIPAL AND AGENT—See FRAUD (8); VENDOR AND PURCHASER (1, 6, 9).

PRIVACY—See CONSTITUTIONAL LAW (11); EVIDENCE (6).

PRIVATE CORPORATIONS—See TOWNSHIPS (1).

PRIVATE DRIVE—See AUTOMOBILES (10); PLEADING (5).

PROBATE COURT—See APPEAL AND ERROR (5); COURTS (2); ESTATES OF DECEDENTS (3); EXECUTORS AND ADMINISTRATORS; HABEAS CORPUS (3); INFANTS (1, 3–5, 7, 8, 10–12); JUDGMENT (7, 10); PARENT AND CHILD (1–3); TRUSTS (11, 13, 15).

PROCEDURE—See STATUTES (2).

PROCESS.

Any circumstantial evidence worthy of consideration in support of denial of service, presented by the interested party, will suffice to make the denial of service of process prevail over the officer's return, providing that the trial judge so considers. *Delph* v. *Smith*, 13.

See JUDGMENT (3, 5, 6).

PROPERTY—See APPEAL AND ERROR (9); DIVORCE (9, 10, 13–16); EMINENT DOMAIN (1); FRAUD (2); TRESPASS (1); WORDS AND PHRASES (1).

PROPRIETARY CAPACITY—See APPEAL AND ERROR (7); TOWNSHIPS.

PROTECTION DEVICES—See COSTS (11).

PROTEST—See COUNTIES (1); HIGHWAYS AND STREETS (4).

PROXIMATE CAUSE—See ARSON (1); AUTOMOBILES (1, 3, 11, 16); NEGLIGENCE (3).

PUBLIC POLICY—See TRUSTS (1).

PUBLIC QUESTION—See COSTS (1, 3).

PUBLIC SERVICE COMMISSION—See COSTS (11).

PUBLIC UTILITIES.

All activities of a public service corporation, unless *ultra vires*, must be in furtherance of its corporate function. *Gray* v. *Grand Trunk Western Railroad Company*, 1.

PUNITIVE DAMAGES—See APPEAL AND ERROR (10).

QUALIFICATIONS—See WITNESSES (1).

QUESTION FOR TRIER OF FACTS—See AUTOMOBILES (1, 10, 13, 18); MASTER AND SERVANT (2); RAILROADS (4, 6); TRIAL (4).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (2, 7, 8, 14, 15).

QUIETING TITLE.

Title is quieted in the judgment creditor, the purchaser at execution sale, where it does not appear to have had knowledge of irregularities in proceedings relative to recording, service and posting of notices and failure to appoint appraisers, and plaintiff, the judgment debtor, was not prejudiced by such irregularities, the statutes relative to sale on execution being designed primarily for the protection of third parties who deal in good faith without

QUIETING TITLE—Continued.

notice or knowledge of any irregularity or omission (CL 1948, §§ 623.83, 623.90, 623.95). *Cross* v. *Fruehauf Trailer Company*, 456.

See DEEDS (3); FRAUD (4).

RAILROADS.

1. The operation of a freight switching yard is peculiarly in keeping with the public duties of a railroad and is not designed to serve some mere private need, since the interchange of traffic is an essential part or act in the transportation. *Gray* v. *Grand Trunk Western Railroad Company*, 1.
2. The unavoidable amount of noise and vibration incident to the normal operation of a railroad does not constitute an actionable nuisance. *Id.* 2.
3. It is not to be anticipated that the establishment of an auxiliary freight switching yard by a railroad incident to the service it renders to nearby industries will result in an actionable nuisance. *Id.*
4. Whether or not engineer and fireman were negligent in failing to stop train before reaching crossing on which plaintiff's subrogor's car had become stalled *held*, a question of fact for determination by trial court in nonjury case, where it appears train was traveling 20 to 25 miles per hour in city and engineer first saw the stalled car while some 1,400 to 1,500 feet away but did nothing about stopping until about half that distance when it was too late to avoid collision. *Aetna Insurance Company* v. *Detroit & Toledo Shore Line Railroad Company*, 580.
5. Motorist whose new car stalled at railroad crossing was not guilty of contributory negligence as a matter of law for failing to signal to the train of his danger while it was still possible for it to stop, under evidence showing that preoccupation of train crew with other matters would have precluded observation of the signal, that he did not know the stopping distance of the train, its speed or distance away or that he would be unsuccessful in his efforts to move the car. *Id.*
6. The negligence of a train crew which fails to keep observing automobile setting on the tracks after having observed it in time to stop the train would be a question for the trier of the facts in an action arising out of the ensuing collision. *Id.*
7. The widening of an existing highway crossing of a railroad at grade is an improvement of the crossing, hence, the expense of doing the necessary work is to be met by the parties responsible for the work of maintaining and repairing the crossing as provided by statute, since the result attained is not the construction of a new road but, rather, the improvement of the existing one (CL 1948, § 469.1). *Grand Trunk Western Railroad Company* v. *Public Service Commission*, 673.
8. Written agreement between railroad company and State highway commissioner relative to installation of flashing light

RAILROADS—Continued.

signals with automatic gate arms at grade crossing of highway over railroad whereby the installation or relocation thereof upon widening of highway was to be at the expense of the highway department and the operation and maintenance after completion of installation was the sole expense of the railroad company *held*, a valid contract (CL 1948, § 469.1). *Id.*

See COSTS (1, 11); HIGHWAYS AND STREETS (4); INJUNCTION (1); MUNICIPAL CORPORATIONS (1–3).

RAPE—See CRIMINAL LAW (6).

REAL ESTATE—See FRAUDS, STATUTE OF.

REASONABLENESS—See TRUSTS (19).

REBUTTAL—See DEEDS (1).

RECITALS—See TRUSTS (13).

RECORD—See ACTION (2); APPEAL AND ERROR (8, 17); AUTOMOBILES (14); DIVORCE (8, 13); FRAUD (10); JUDGMENT (6); MUNICIPAL CORPORATIONS (10); PARENT AND CHILD (7); TRUSTS (17, 18); VENDOR AND PURCHASER (10); WITNESSES (2).

RECORDING—See EXECUTION; QUIETING TITLE.

RE-EMPLOYMENT—See CONTRACTS (10); COUNTIES (1); MASTER AND SERVANT (1).

RE-ENTRY—See DEEDS (6).

RE-ESTABLISHMENT OF HOME—See PARENT AND CHILD (6).

REFEREE'S FEE—See ESTATES OF DECEDENTS (3).

REFORMATION OF INSTRUMENTS.

1. It was not essential in suit between purchasers for reformation of deeds by State highway commissioner of excess State land in parcel adjoining city lots, owned by plaintiff and defendant neighbor purchasers thereof, that there have been a binding agreement as to land to be purchased entered into between the purchasers, where each took with notice of what the others intended to buy and thought they were buying, which, in turn, coincided with what the seller intended to sell to each. *Kowatch v. Darnell*, 197.
2. Plaintiffs succeeded to the right of their grantor to have reformation of deed of land to defendants where both plaintiffs and defendants purchased land from the grantor simultaneously and he made a mistake in the descriptions which resulted in the conveyance of more land to the defendants than they had agreed to take and such conveyance resulted in a corresponding diminution of the parcel conveyed to plaintiffs. *Id.* 198.
3. Defendants who purchased land from the same grantor who simultaneously sold to plaintiffs but mistakenly conveyed more to defendants than they had intended to purchase and a corresponding lesser amount to plaintiffs were not entitled,

REFORMATION OF INSTRUMENTS—Continued.

upon decreed reformation of the deeds, to reimbursement from plaintiffs for such additional land under evidence submitted in suit for reformation of deeds, where it was not shown that defendants had paid more for amount they received or that plaintiffs had paid less for amount they received than that intended to have been conveyed. *Id.*

4. Claimed error in admission of testimony in suit for reformation of deeds *held,* without merit, where defects in questions asked were cured by subsequent questions and answers and the substance of the answers was established by other proofs. *Id.*
5. Contracts of insurance may be reformed on the ground of mutual mistake of fact but proofs of mistake must be of substantial and material fact, shared by and common to both parties, and established beyond cavil by clear and satisfactory evidence. *Goldman* v. *Century Insurance Company (Same* v. *Scottish Union & National Insurance Company),* 528.
6. Evidence presented in suit to reform a fire insurance policy after fire loss so as to extend coverage to outbuildings, fixtures and contents used in conduct of retail coal business on ground of mutual mistake *held,* insufficient to establish mistake as to extent of coverage. *Id.*
7. Reformation of a deed will not be granted upon the ground of a mistake in drafting the instrument unless the mistake is proven by clear and satisfactory evidence and it is one that is mutual and common to both parties to the contract. *Troff* v. *Boeve,* 593.
8. Evidence adduced in suit to reform deeds for purpose of confirming existence of driveway on property not included within description but immediately adjoining alongside tract conveyed to plaintiffs and hitherto used by plaintiffs *held,* insufficient to disturb decree of trial court, the phrase "driveway on north to be used as long as available," contained in a preliminary agreement for sale to plaintiffs' predecessor in title even indicating there was no easement but a permissive and terminable use of such driveway. *Id.*
9. Reformation of deed to plaintiffs to include part of driveway alongside their lot on land belonging to defendants who acquired their property upon a clear abstract of title which contained no mention of any easement will not be decreed, where plaintiffs themselves had negligently accepted a deed containing no references to an easement although their transferor's agent had orally represented the driveway to be a joint one. *Id.* 594.

See DAMAGES (2); INSURANCE (3).

REGISTER OF DEEDS—See ASSIGNMENTS (3).

REHEARING—See DIVORCE (2); EQUITY (4); SPECIFIC PERFORMANCE.

REIMBURSEMENT—See REFORMATION OF INSTRUMENTS (3).

RELOCATION—See COSTS (11); RAILROADS (8).

REMAINDERMAN—See ESTATES (1); HOMESTEAD (3, 5); TRUSTS (14).

REMAND—See APPEAL AND ERROR (10).

REMARRIAGE—See DIVORCE (8).

REMITTITUR—See COSTS (9).

REOPENING OF PROOFS—See TRIAL (2).

REPEAL—See CONSTITUTIONAL LAW (6).

REPLACEMENT COST—See TRESPASS (8).

REPLY—See PLEADING (6, 7).

REPORTS—See CRIMINAL LAW (3); FRAUD (8, 10); INFANTS (3); TRUSTS (17).

REPUTATION—See CRIMINAL LAW (3); EVIDENCE (5).

REQUEST TO CHARGE—See AUTOMOBILES (3, 11); CRIMINAL LAW (7); INTOXICATING LIQUORS.

RESCISSION—See FRAUD (2, 3, 5); VENDOR AND PURCHASER (3, 8–10).

RESIDENCE—See DIVORCE (15); FRAUD (8); INFANTS (8); JUDGMENT (6); MARRIAGE (1); MUNICIPAL CORPORATIONS (10).

RES JUDICATA—See ACTION (3); APPEARANCE; DIVORCE (5, 6); EXECUTORS AND ADMINISTRATORS; HABEAS CORPUS (6); JUDGMENT (8); WILLS (2).

RESORT PROPERTY—See FRAUD (5).

RESTAURANT—See ARSON (2); WITNESSES (1).

RESTRICTIONS—See ESTATES (3).

RETAILERS—See TAXATION (6–8).

RETURN—See PROCESS.

RIGHT-OF-WAY—See AUTOMOBILES (4, 5, 7); HIGHWAYS AND STREETS (4).

RIGHT TO RE-ENTER—See DEEDS (6).

ROAD SURFACE—See AUTOMOBILES (17).

ROBBERY—See CRIMINAL LAW (6); HOMICIDE.

ROOF REPAIR—See APPEAL AND ERROR (3).

RULE AGAINST PERPETUITIES—See TRUSTS (4).

RULES AND REGULATIONS—See COUNTIES (1).

RUMORS—See CRIMINAL LAW (3).

SALES—See APPEAL AND ERROR (15); HOMESTEAD (4, 5); QUIETING TITLE; USURY (3); VENDOR AND PURCHASER (7).

SALESMAN—See CONTRACTS (10).

SALES TAX—See TAXATION (3, 6–8).

SAND BACKFILL—See CONTRACTS (7, 8).

SAVING QUESTION FOR REVIEW—See COURTS (3); TRIAL (3).

SCALES—See INSURANCE (1).

SCHOOLS AND SCHOOL DISTRICTS—See CONSTITUTIONAL LAW (9).

SECOND-DEGREE MURDER—See HOMICIDE (2).

SECOND SUIT—See DIVORCE (7).

SECURITY—See ASSIGNMENTS (3).

SENIORITY—See ARBITRATION AND AWARD (4).

SERVICE OF PROCESS—See JUDGMENT (3, 5, 6); PROCESS.

SEWERS—See CONTRACTS (7); COSTS (6); FRAUD (5); MUNICIPAL CORPORATIONS (8); WORKMEN'S COMPENSATION.

SHOPPING CENTER—See DIVORCE (13).

SHORE LINE—See BOUNDARIES; WATERS AND WATERCOURSES.

SHUFFLEBOARDS—See FRAUD (3).

SIDING—See CONTRACTS (10).

SIGNALS—See COSTS (11); RAILROADS (5, 8).

SOCIAL SECURITY PAYMENTS—See DEATH (3).

SOCIAL WELFARE—See TRUSTS (5, 9).

SOIL—See TRESPASS (1, 3).

SOVEREIGN IMMUNITY—See MUNICIPAL CORPORATIONS (9).

SPECIAL APPEARANCE—See APPEARANCE.

SPECIAL ASSESSMENTS—See HIGHWAYS AND STREETS (4).

SPECIFIC PERFORMANCE.

Purchase money payments paid into court by purchaser under land contract, calling for conveyance of 5 lots at a specified price, and who had obtained decree of specific performance of such contract as to 4 lots with $2,000 less price, are ordered turned over to defendant vendors, where no rehearing or amendment of decree was sought within time permitted by court rule (Court Rule No 48 [1945]). *Brin* v. *Spruance,* 623.

See VENDOR AND PURCHASER (8).

SPEED—See AUTOMOBILES (6, 7, 11, 15, 17); CRIMINAL LAW (1, 2); EVIDENCE (2); PLEADING (5); RAILROADS (4, 5); WORDS AND PHRASES (2).

SPEEDWATCH—See CRIMINAL LAW (1, 2); WORDS AND PHRASES (2).

SPLITTING CAUSE OF ACTION—See ACTION; JUDGMENT (12).

SPONTANEOUS COMBUSTION—See ARSON (2).

STAIRWAYS—See APPEAL AND ERROR (7); TOWNSHIPS (2).

STATE HIGHWAY COMMISSIONER—See HIGHWAYS AND STREETS (2); RAILROADS (8); REFORMATION OF INSTRUMENTS (1).

STATES—See CONSTITUTIONAL LAW (5).

STATUTE OF LIMITATIONS—See ACTION (3); FRAUD (2, 3); HIGHWAYS AND STREETS (3); INJUNCTION (3); STATUTES (3).

STATUTES.

1. Statutes will be construed as constitutional wherever possible by reasonable and permissible interpretation. *Fritts* v. *Krugh*, 99.
2. Changes in a statute affecting procedure in litigating a matter apply to existing proceedings theretofore commenced (PA 1939, No 288, ch 4, § 33, as amended by PA 1947, No 50). *In re Eddy Estate (Appeals by Cynthia Mills Cleveland)*, 334.
3. The failure to mention a statute of limitations as to actions against a governmental unit for failing to keep its highways in a condition reasonably fit and safe for travel in the title of the general highway law does not render such provision as to limitation unconstitutional, where the title does state the purpose of the act in general terms (Const 1908, art 5, § 21; PA 1909, No 283, ch 22, § 8, as added by PA 1915, No 301). *Pfaff* v. *Ogemaw County Road Commissioners*, 575.

See ACTION (3); APPEAL AND ERROR (2); ASSIGNMENTS; AUTOMOBILES (1–3, 14, 18, 19, 21, 22); CONTRACTS (10); COSTS (3, 5, 6); COUNTIES (1, 2); COURTS (2); DEATH; DIVORCE (4); EMINENT DOMAIN (2–5); EQUITY (2); ESTATES OF DECEDENTS (2); EXECUTION; FRAUD (2, 3); FRAUDS, STATUTE OF; HIGHWAYS AND STREETS (1, 3, 4); HOMESTEAD (5); HOMICIDE (2, 3); INFANTS (1–5, 7–12); INJUNCTION (3); INTOXICATING LIQUORS; JUDGMENT (7); JURY (2); MARRIAGE; MUNICIPAL CORPORATIONS (4–8); NEGLIGENCE (2); PARENT AND CHILD (1–5); PLEADING (2–4); QUIETING TITLE; RAILROADS (7, 8); TAXATION (3, 6–8); TRESPASS (1–6, 10); TRUSTS (1, 2, 5, 10, 13); USURY (1, 3); WITNESSES (2).

STIPULATED DAMAGES—See VENDOR AND PURCHASER (4).

STIPULATIONS—See CONTRACTS (11); DIVORCE (16); JURY (3).

STOCK AND STOCKHOLDERS—See CONTRACTS (6); DIVORCE (11); ESTATES OF DECEDENTS (2); JURY (3).

STOPPING—See AUTOMOBILES (2, 6, 7, 14); PLEADING (5); RAILROADS (4–6).

SUBCONTRACTOR—See PLEADING (9).

SUBDIVISIONS—See FRAUD (8); VENDOR AND PURCHASER (8–10).

SUBMISSION—See ARBITRATION AND AWARD (1–3); MASTER AND SERVANT (1).

SUBROGATION—See ACTION (3); RAILROADS (4).

SUBTERFUGE—See CONSTITUTIONAL LAW (10).

SUCCESSION—See REFORMATION OF INSTRUMENTS (2).

SUMMONS—See JUDGMENT (1, 2).

SUPER HIGHWAYS—See AUTOMOBILES (1–3).

SUPERVISORS, BOARD OF—See COSTS (3).

SUPERVISORY CONTROL OVER LITIGATION—See COURTS (3).

SUPPORT OF CHILDREN—See DIVORCE (6, 8); HUSBAND AND WIFE (1, 2).

SUPPORT OF WIFE—See DIVORCE (6); HUSBAND AND WIFE (1, 2).

SUPREME COURT—See APPEAL AND ERROR (1, 4, 6, 10–14, 16, 17); COURTS (3); CRIMINAL LAW (7); DIVORCE (1); MUNICIPAL CORPORATIONS (8); PLEADING (8); TRUSTS (15, 19).

SURPRISE—See EJECTMENT (2).

SURVIVORS—See DEEDS (3).

SUSPENSION—See COUNTIES (1, 2).

SUSPICION—See ATTORNEY AND CLIENT.

SWITCHING YARD—See COSTS (1); INJUNCTION (1); MUNICIPAL CORPORATIONS (1–3); RAILROADS (1, 3).

TACKING POSSESSION—See ADVERSE POSSESSION.

TARDY CLAIM—See ESTATES OF DECEDENTS (3).

TAXATION.

1. This State is not entitled to a tax on the use in another State of automobiles leased therein whether or not such other State has provided for a use tax thereon. *Don McCullagh, Inc.*, v. *Department of Revenue*, 413.
2. A State may not impose a tax on interstate commerce nor may it enforce legislation resulting in unjust discrimination in taxation. *Id.*
3. The sales tax act and use tax act are related and complementary, the latter exempting from the imposition of a tax thereunder, property which is subjected to the sales tax, thereby demonstrating an intent not to impose both taxes on the same business transaction (PA 1933, No 167, as amended; PA 1937, No 94, as amended). *Id.*
4. Prohibited discriminatory burdens on interstate commerce from taxation are not to be determined by abstractions but by the particular facts of specific cases. *Id.*
5. A State legislature has a range of discrimination which it may exercise in classifying subjects for taxation provided

TAXATION—Continued.

such exercise be not in a spirit of prejudice and favoritism. *Id.* 414.

6. The fact that the sales tax paid on retail sales of cars to corporation for use under its lease of the cars to another corporation in another State was in excess of what the use tax would have been had it been payable in Michigan *held*, not to have effected an unjust discrimination nor a tax on interstate commerce rendering the imposition of the sales tax invalid (PA 1933, No 167, § 1, as amended; PA 1937, No 94, as amended). *Id.*

7. The legal incidence of the sales tax falls on the retailer of personal property (PA 1933, No 167, as amended). *Id.*

8. The retailer, the taxpayer under the sales tax act, is the only one who can claim to have been prejudiced by the imposition of the tax upon a particular subject, hence, is entitled to a determination on the merits of claimed invalidity of the tax imposed (PA 1933, No 167, as amended). *Id.*

See APPEAL AND ERROR (2); CONSTITUTIONAL LAW (4, 5, 9, 10); COSTS (5); MUNICIPAL CORPORATIONS (7, 8).

TEMPORARY INSANITY—See HOMICIDE (1).

TENANTS BY THE ENTIRETIES—See DEEDS (3).

TENDER—See APPEAL AND ERROR (15).

THROUGH HIGHWAYS—See AUTOMOBILES (4–8, 11, 15).

TIMBER—See TRESPASS (5, 6, 8, 10).

TIME—See CONTRACTS (5); HOMESTEAD (4, 6); VENDOR AND PURCHASER (2, 3).

TITLE—See ASSIGNMENTS (6); WORDS AND PHRASES (1).

TITLE INSURANCE—See VENDOR AND PURCHASER (2, 3, 5).

TITLE OF ACT—See STATUTES (3).

TITLE TO MONEY—See ASSIGNMENTS (2).

TOPSOIL—See TRESPASS (1, 3).

TORTS—See TRESPASS (9).

TOWNSHIP HALL—See APPEAL AND ERROR (7); TOWNSHIPS (2).

TOWNSHIPS.

1. The determination of whether or not township was acting in a governmental or proprietary capacity is largely dependent upon the object and purpose of the legislature in conferral of powers involved and if the grant is for public purposes exclusively, they belong to the township but if the grant of power was for purposes of private advantage and emolument, though the public derive a common benefit therefrom, the township stands on the same footing as any private individual or corporation upon whom a special franchise has been con-

TOWNSHIPS—Continued.

ferred and the doctrine of strict construction is not applied. *Dohm* v. *Township of Acme*, 447.

2. Plaintiff, nonresident of defendant township, who was injured by reason of a fall on unlighted defective stairway at rear of township hall *held*, entitled to recover damages therefor from defendant, where function attended was a wedding anniversary celebration for which the hall had been leased, since such activity was not in the exercise of a governmental function but was a proprietary activity. *Id.*

See APPEAL AND ERROR (7); COSTS (3, 6); MUNICIPAL CORPORATIONS (6, 8).

TRAFFIC LIGHT—See AUTOMOBILES (12).

TRANSCRIPT—See APPEAL AND ERROR (4, 17).

TRANSPORTATION—See AUTOMOBILES (18).

TREBLE DAMAGES—See TRESPASS (1–6, 10).

TREES—See TRESPASS (5, 6, 8–10).

TRENCH—See WORKMEN'S COMPENSATION.

TRESPASS.

1. Recovery of damages for mental anguish and for loss of use and enjoyment of portion of property from which defendant had removed soil were not proper elements of damages in action of trespass for removal of topsoil wherein recovery of treble damages was sought (CL 1948, § 692.541). *Kelly* v. *Fine*, 384.
2. Provisions of treble damage statute are applicable in action of trespass, where the trespass was intentional and with knowledge that it was without right, it being unnecessary to show malice or desire to injure to warrant imposition of punitive damages (CL 1948, § 692.541). *Id.*
3. Liability for treble damages was properly submitted to jury and its verdict for plaintiffs on such issue was justified, where there was evidence that defendant had removed topsoil from plaintiffs' lot after his company had sold it to plaintiffs regardless of plaintiffs' protest, notwithstanding contract had previously been entered into between the company and the Federal housing administration for grading entire block including plaintiffs' lot, a contract of which plaintiffs had no knowledge at time of purchase (CL 1948, § 692.541). *Id.*
4. Judgment for $6,000 is reversed and case is remanded for new trial unless plaintiff files a remittitur of $2,250, where evidence adduced in trespass action in which treble damages were sought failed to support a verdict in excess of $1,250 (CL 1948, § 692.541). *Id.*
5. Verdict for plaintiffs in action of trespass to recover treble damages from defendant sawmill operator for cutting of 6 large trees on plaintiffs' residential lots *held*, not against the overwhelming weight of the evidence (CL 1948, § 692.451). *Schankin* v. *Buskirk*, 490.

TRESPASS—Continued.

6. Damages in an action of trespass that are trebled under the treble damage statute represent not merely the value of the timber cut but damages to the freehold as well (CL 1948, § 692.451). *Id.*

7. Generally, damages in trespass to land are measured by the difference between the value of the land before the harm and the value after the harm, but there is no fixed, inflexible rule for determining, with mathematical certainty, what sum will compensate for the invasion of the interests of the owner. *Id.*

8. The test of value before injury and value after injury to the freehold is not necessarily the sole test in determining the amount of damage suffered by lot owners from removal of large ornamental or shade trees by trespassing defendant, it being permissible to consider the value of the trees themselves to the contemplated or existing uses of the land, including cost of replacement or restoration, where the property destroyed has a unique value of its own. *Id.* 491.

9. The value of a growing tree to a particular piece of residential property is not susceptible to precise measurement in an action of trespass for its tortious removal. *Id.*

10. Verdict of $900 by jury in action of trespass under treble damage statute *held,* not in error, where evidence shows defendant cut 6 large trees on plaintiffs' 2 lots, and that the land was worth $900 less after the cutting (CL 1948, § 692.451). *Id.* 491.

See COSTS (9); INJUNCTION (2, 3).

TRIAL.

1. It is presumed that a jury may have followed an instruction which is erroneous if 2 conflicting instructions are given, one of which is erroneous. *McGuire* v. *Rabaut,* 231.

2. The matter of reopening of proofs upon plaintiff's motion, made after defendant had sought a judgment upon the close of plaintiff's proofs, *held,* within the sound discretion of the trial court which will not be interfered with in the absence of an abuse of discretion. *People, for use and benefit of E. P. Brady & Co.,* v. *Gilliland,* 248.

3. The right to object to improper statements in argument to the jury is waived unless the attention of the trial court is called to such statements. *Schankin* v. *Buskirk,* 491.

4. A determination of material facts is for the jury, where testimony with respect thereto is in conflict. *Graham* v. *Thorman,* 629.

See APPEAL AND ERROR (12).

TRUCKS—See AUTOMOBILES (1, 3, 10); CONTRACTS (7, 8); PLEADING (5, 9).

TRUSTEES—See TRUSTS (11–13, 15–19).

TRUSTS.

1. The public policy of this State regards with favor trusts for religious, educational, charitable and benevolent purposes (CL

TRUSTS—Continued.

1948, § 554.351 *et seq.*; § 554.381 *et seq.*). *Cleveland* v. *Second National Bank & Trust Company*, 202.

2. Provisions of will providing for a trust for charitable or social welfare institutions, movements or purposes *held*, not invalid as uncertain and indefinite with respect to intended beneficiaries (CL 1948, § 554.351 *et seq.*). *Id.*
3. A measure of indefiniteness enters into any public charitable trust as the purposes to be attained, in effect, require judicial recognition thereof. *Id.*
4. Trusts for public charitable purposes are upheld under circumstances under which private trusts would fail, since public charitable trusts are not within the rule against perpetuities and they must be for an indefinite number of persons. *Id.*
5. Testamentary provisions establishing trust for charitable and educational provisions and permitting income to be used for charitable or social welfare institutions or purposes *held*, not open to objection that it was invalid in that testator authorized use of the income from the trust for purposes not necessarily charitable or educational (CL 1948, § 554.351 *et seq.*). *Id.* 203.
6. The permissible purpose or scope of a public charitable trust is as varying as the wants of humanity. *Id.*
7. A public charitable trust may have more than 1 purpose. *Id.*
8. Public charitable trusts, being of necessity, indefinite and uncertain in respect to beneficiaries, are interpreted liberally, since the imposition of a requirement of certainty of object and too great a limitation upon the discretionary powers of trustees more often tends to defeat the dominant charitable purpose of the testator than to effectuate it. *Id.*
9. The fact that the term "social welfare," was applied to organizations and purposes in connection with expenditure of income of testamentary trust set up for charitable and educational purposes, would not permit use of the income for other than charitable or educational purposes, where questioned term was associated, in each instance used, with the word "charitable," first conjunctively and then disjunctively, and the context does not indicate that the form of expression was of controlling significance. *Id.*
10. Will setting up a trust for charitable and educational purposes, primarily for benefit of residents of city and county where testator resided *held*, to have established a valid trust when construed in accordance with rules set forth in pertinent statute (CL 1948, § 554.351 *et seq.*). *Id.*
11. Probate court *held*, to have jurisdiction to hear and allow accounts and fees of testamentary trustee of trust set up in will probated in same court after testamentary estate had been closed therein. *In re Eddy Estate (Appeals by Cynthia Mills Cleveland)*, 334.
12. Claim of fraudulent and negligent conduct on part of testamentary trustee in the administration of the trust *held*, not sustained, under record presented. *Id.*
13. An appellant who failed to question the recitals in probate court order approving a testamentary trustee's account and

TRUSTS—Continued.

fixing his fee, made while statute required recital in detail of the extraordinary services for which the allowance of an extraordinary fee was made and of the reasons for considering the case an unusual one and void if the order did not contain such recitals, waived the deficiencies, especially after statute was amended to remove provision voiding an order not containing the recitals (PA 1939, No 288, ch 4, § 33, as amended by PA 1947, No 50). *Id.* 335.

14. Attorney's fees for trust remainderman appellant's counsel, sought in the amount of $46,000 for services rendered incident to testamentary estate and later trust estate matters in courts other than the one in which the fees were sought to be allowed, were properly denied. *Id.*

15. Only in case of manifest abuse of discretion on the part of a circuit court in reviewing the allowance of attorney, executor and trustee fees by the probate court will the decision of the trial court be overruled by the Supreme Court. *Id.*

16. The failure to periodically render statements in regard to time and service by a testamentary trustee casts doubts on charges and fees, the burden of proof being on the trustee for attorneys' fees by way of showing valuable results even though they be negative. *Id.*

17. Allowance of $35,000 as trustee's fee for administration of trust assets of upwards of a half million dollars for period of 7-1/2 years during which the trust was involved in much litigation in State and Federal trial and appellate courts *held*, supported by record, notwithstanding annual reports had not been filed for the period. *Id.*

18. Attorney fees totalling $15,500 for testamentary trustee are approved, where record supports finding that such fees were reasonable. *Id.*

19. Judgment as to attorney fees in the sum of $22,500 for testamentary trustee is reserved for submission of proofs to circuit court commissioner and forwarding to the clerk of the Supreme Court for purposes of enabling Supreme Court to determine reasonableness. *Id.* 336.

See ASSIGNMENTS (2, 4); COSTS (8); EXECUTORS AND ADMINISTRATORS.

ULTRA VIRES—See PUBLIC UTILITIES.

UNCONSCIOUS PERSON—See EVIDENCE (6); NEGLIGENCE (2).

UNFAIR ADVANTAGE—See PLEADING (2).

UNIFORMITY—See APPEAL AND ERROR (2).

UNJUST ENRICHMENT—See VENDOR AND PURCHASER (5).

USE TAX—See TAXATION (3).

USURY.

1. The purpose of the law of usury is to protect the necessitous borrower from extortion (CL 1948, § 438.52). *Wilcox* v. *Moore*, 499.

USURY—Continued.

2. The court looks at the real nature of a transaction, claimed to be usurious, not its form or color, but to the nature and substance. *Id.*
3. Transaction whereby plaintiff actually loaned money to defendants to enable latter to complete purchase of a home, at a substantial and illegal bonus, *held*, usurious, it being immaterial that device of purchase and sale was employed (CL 1948, § 438.52). *Id.*

VAGRANCY—See CRIMINAL LAW (6).

VALUE—See APPEAL AND ERROR (8, 9); DAMAGES (2); DIVORCE (9, 10, 14); EMINENT DOMAIN (3); FRAUD (3); TRESPASS (7–10); VENDOR AND PURCHASER (10); WITNESSES (1).

VARIANCE—See PLEADING (5).

VENDOR AND PURCHASER.

1. Grantees in deed who received more land than they had intended to buy from grantor who simultaneously and mistakenly conveyed a correspondingly lesser portion of his land to plaintiffs were not bona fide purchasers of the additional land, where the grantees and their son who acted as their agent, knew of the intentions of all of the parties with respect to amount of land conveyed. *Kowatch* v. *Darnell*, 198.
2. Preliminary sales agreement providing that the vendors should furnish purchaser as soon as possible an abstract of title or a title insurance policy contemplated that a reasonable time would be allowed the vendors in which to obtain title insurance. *Worley* v. *McCarty*, 599.
3. Vendors of hotel property who procured title insurance policy within approximately a month of time purchasers found fault with the title as disclosed by the abstract and requested title insurance policy *held*, to have been ready to furnish such policy within reasonable time contemplated by preliminary sales agreement, hence, purchasers were not entitled to rescind such agreement and recover deposit money. *Id.*
4. Provision of preliminary sales agreement relative to disposition of deposit in event the purchaser failed to complete the deal is construed to be stipulated damages notwithstanding declaration that deposit is "forfeited," where from the whole contract, the subject matter and the situation of the parties, such appears to have been their intention so to stipulate and there is present some difficulty in ascertaining the actual damage. *Id.* 600.
5. Forfeiture of deposit of $4,000 on hotel property for purchasers' failure to complete contract when vendors complied therewith by procuring title insurance policy *held*, stipulated damages and not to have resulted in unjust enrichment of the vendors who sold the property for $2,000 less and were obligated to pay balance of deposit to brokers. *Id.*
6. It was not improper to admit testimony of a witness in chancery foreclosure of a land contract as to facts relevant to sole issue of default by purchasers, where such witness was an

VENDOR AND PURCHASER—Continued.

agent of the purchasers and had an intimate knowledge of the facts, but was not a party to the contract as ultimately executed. *Portell* v. *Feldman*, 612.

7. Error, if any, of trial court in entering a deficiency decree in chancery foreclosure proceedings after waiver thereof by plaintiff's counsel in open court was rendered nonprejudicial by plaintiff bidding in the property at the foreclosure sale for the full amount due on the contract. *Id.*

8. Plaintiff, a residential building developer, which had purchased 91 lots of a 140-lot subdivision, *held*, not to have substantiated its claim of failure of consideration for the contract in that the premises were unsuitable for building operations, where plaintiff desires to keep 44 lots that have been deeded to it, asks for specific performance as to 5 lots and rescission as to remaining 42 lots and it does not appear that plaintiff will necessarily be precluded from building operations in the future. *A & M Land Development Co.* v. *Miller*, 682.

9. The fact that plaintiff building developer's investment in 91 lots sold to it by defendant did not turn out as well as its officers had hoped and expected does not afford ground for equitable relief by way of rescission, where plaintiff is not shown to have been defrauded or induced to make the land contract in question by misrepresentations on the part of defendant or his agents, as to material facts. *Id.*

10. Partial rescission of land contract for purchase of 91 subdivision lots by which plaintiff seeks to return 42 lots *held*, not justified under record presented either on the ground of failure of consideration or mistake, where plaintiff received the entire quantity of land for which it contracted to purchase, and while perhaps not as valuable as it had expected, it is not without value, and fraud is not established. *Id.* 683.

See APPEAL AND ERROR (14, 15); FRAUD (10); REFORMATION OF INSTRUMENTS (1, 2); SPECIFIC PERFORMANCE; USURY (3).

VENUE—See MARRIAGE (2).

VERDICTS AND FINDINGS—See APPEAL AND ERROR (3, 6, 12, 13, 16, 17); AUTOMOBILES (12, 21, 23); CONTRACTS (1, 7, 10); CRIMINAL LAW (2); DEEDS (2); DIVORCE (8, 14); EVIDENCE (2); FRAUD (5, 8, 10); JUDGMENT (6); MUNICIPAL CORPORATIONS (10); TRESPASS (5); TRUSTS (18).

VEXATIOUS APPEAL—See APPEAL AND ERROR (9).

VIBRATION—See RAILROADS (2).

VILLAGES—See CONSTITUTIONAL LAW (9).

VIOLATION OF STATUTE—See AUTOMOBILES (1, 3).

VOIR DIRE—See JURY.

WAIVER—See ACTION (2, 3); CONTRACTS (8, 9); EMINENT DOMAIN (5); INFANTS (2, 3); JUDGMENT (1, 12); TRIAL (3); TRUSTS (13); VENDOR AND PURCHASER (7); WITNESSES (2).

WARRANTY—See PLEADING (1).

WATER AUTHORITY—See APPEAL AND ERROR (2); COSTS (5); MUNICIPAL CORPORATIONS (7).

WATERS AND WATERCOURSES.

Owners of adjacent inland lake-front property are entitled to the just proportion of shore line based on meander line of government plats as shore line advances or recedes. *Cutliff* v. *Densmore*, 586.

See BOUNDARIES.

WEDDING ANNIVERSARY CELEBRATION—See APPEAL AND ERROR (7); TOWNSHIPS (2).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (17); AUTOMOBILES (23); CONTRACTS (7); TRESPASS (5).

WIDENING—See COSTS (11); RAILROADS (7, 8).

WIDOWS—See CONTRACTS (6); ESTATES OF DECEDENTS (2).

WILLS.

1. The cardinal principle in the interpretation of wills is to carry out the intention of the testator if it is lawful and can be discovered and the whole will is to be taken together and is to be so construed as to give effect, if it be possible, to the whole. *Cleveland* v. *Second National Bank & Trust Company*, 203.
2. The intent of the testator, as specifically declared at the outset of the will, may not be permitted to be defeated by technical construction of a subsequent term, especially when such construction is not indicated. *Id.* 204.
3. The order of a court having jurisdiction to administer an estate, allowing the executor's final account and making distribution pursuant to a construction of the testator's will, is valid and binding as the construction of the will, if not appealed from. *Id.*
4. A legacy which is given upon a valuable consideration, as in payment of a debt of testator, does not lapse at common law upon the death of the legatee prior to the death of the testator. *In re Traub Estate (Bates* v. *National Bank of Detroit)*, 264.
5. A debt, represented by a legacy or bequest, but for value received, used, and kept remains collectible despite its form, so long as unpaid and is to be distinguished from a legacy or bequest in the gratuitous sense, as the former does not lapse upon the death of the legatee prior to the death of the testator. *Id.* 265.

See CONTRACTS (2, 6); EXECUTORS AND ADMINISTRATORS; TRUSTS (2, 10).

WITNESSES.

1. Testimony of witness as to value of restaurant business *held*, properly excluded in prosecution for arson, where no proper foundation had been laid in that no showing was made that the witness was qualified to testify as to the value of the business. *People* v. *Dorrikas*, 303.

WITNESSES—Continued.

2. Exclusion of testimony by defendants relative to delivery of deed to them by plaintiff and his deceased wife, mother of defendant wife, *held*, proper, where record does not substantiate defendants' claim that plaintiff had waived the provisions of statute barring testimony of an opposite party as to matters equally within the knowledge of a deceased party (CL 1948, § 617.65). *Creller* v. *Baer*, 408.
3. A trial court must and should hear and weigh the noncumulative testimony of any competent witness having knowledge of the relevant facts. *Portell* v. *Feldman*, 611.

See APPEAL AND ERROR (16, 17); CRIMINAL LAW (3, 4, 6); DIVORCE (3); VENDOR AND PURCHASER (6).

WORDS AND PHRASES.

1. "Interest," in common speech in connection with land, includes all varieties of titles and rights, comprehending estates in fee, for life and for years, mortgages, liens, easements, attachments, and every kind of claim to land which can form the basis of a property right. *Lookholder* v. *State Highway Commissioner*, 29.
2. A speedwatch is a mechanical device by means of which speed of motor vehicles is reliably determined within a mile or two per hour. *People* v. *Kenney*, 191.
3. The meaning of a word may be ascertained by reference to the meaning of words associated with it and in its general environment. *Cleveland* v. *Second National Bank & Trust Company*, 203.

See ESTATES (1); TRUSTS (9).

WORDS OF LIMITATION—See ESTATES (1).

WORKMEN'S COMPENSATION.

Finding of workmen's compensation appeal board that ditch digger was an employee of defendant and not an independent contractor *held*, supported by competent evidence, where it appears that ditch digger was engaged by defendant plumber to install a new sewer when it was ascertained existing sewer could not be unclogged, and while so engaged ditch digger was killed by a cave-in of the trench then dug, defendant had the undertaking completed under his personal direction and at least partially paid for it without any reference to the estate of the deceased. *Tata* v. *Muskovitz*, 695.

See INTOXICATING LIQUORS; PLEADING (9).

WORKMEN'S COMPENSATION APPEAL BOARD—See WORKMEN'S COMPENSATION.

WRONG SIDE OF ROAD—See AUTOMOBILES (16, 17).

YIELDING RIGHT-OF-WAY—See AUTOMOBILES (4, 5, 7).

ZIGZAGGING CAR—See AUTOMOBILES (11).

ZONING—See INJUNCTION (5); MUNICIPAL CORPORATIONS (1, 10, 11).