MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

DECEMBER 8, 1931, to JANUARY 4, 1932

RICHARD W. COOPER
STATE REPORTER

VOL. 256

FIRST EDITION

CHICAGO
CALLAGHAN AND COMPANY
1932

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DEC 15 1932

SUPREME COURT.

Chief Justices.

	Term expires
HENRY M. BUTZEL,[1] Detroit,	Dec. 31, 1931
GEORGE M. CLARK,[2] Bad Axe,	Dec. 31, 1933

Associate Justices.

GEORGE M. CLARK, Bad Axe,	Dec. 31, 1933
JOHN S. McDONALD, Grand Rapids,	Dec. 31, 1933
WILLIAM W. POTTER, Hastings,	Dec. 31, 1935
NELSON SHARPE, West Branch,	Dec. 31, 1935
WALTER H. NORTH, Battle Creek,	Dec. 31, 1937
LOUIS H. FEAD, Newberry,	Dec. 31, 1937
HOWARD WIEST, Lansing,	Dec. 31, 1939
HENRY M. BUTZEL, Detroit,	Dec. 31, 1939

Clerk—JAY MERTZ, Lansing.
Crier—DON M. CHILDS, Lansing.

Attorney General—PAUL W. VOORHIES, Detroit.

[1] To December 31, 1931.
[2] From January 1, 1932.

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15.	THEODORE T. JACOBS,	STURGIS.
16.	NEIL E. REID, JAMES E. SPIER,	MT. CLEMENS.

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37.	BLAINE W. HATCH,	MARSHALL.
38.	JESSE H. ROOT,	MONROE.
39.	GEORGE A. RATHBUN,	TECUMSEH.
40.	HENRY H. SMITH,	CARO.

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

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OCTOBER TERM, 1931.*

BLUST *v.* SISTERS OF MERCY.

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

   Workmen's compensation act, to be applicable to given case, requires relation of employer and employee under contract of hire.

2. SAME—NOVITIATE IN SISTERS OF MERCY NOT EMPLOYEE.

   A novitiate in the Sisters of Mercy, a Roman Catholic charitable organization, who had devoted her life to charitable purposes without hope of pecuniary reward, is not an employee of the order within the meaning of the workmen's compensation act, and therefore is not entitled to compensation for injuries received while working in the order's laundry; there being no contract of hire.

   BUTZEL, C. J., and POTTER, J., dissenting.

Appeal from Department of Labor and Industry. Submitted June 4, 1931. (Docket No. 80, Calendar No. 35,744.) Decided December 8, 1931.

Loretta Cecelia Blust presented her claim against Sisters of Mercy, employer, and Hartford Accident & Indemnity Company, insurer, for accidental injuries received while in defendant's employ. Compensation denied. Plaintiff appeals. Affirmed.

Shields, Silsbee, Ballard & Jennings, for plaintiff.

Amos F. Paley, for defendants.

POTTER, J. (*dissenting*). Plaintiff presented a claim for compensation against the Sisters of Mercy,

* Continued from Vol. 255.

As to who are "employees" within the meaning of the compensation statutes, see annotation in L. R. A. 1916A, 115, 246; L. R. A. 1917D, 145; L. R. A. 1918F, 201.

Grand Rapids, Michigan, and the Hartford Accident & Indemnity Company. From an order denying compensation she appeals. August 26, 1927, plaintiff made application to become a member of the Sisters of Mercy, of Mt. Mercy College and Academy, at Grand Rapids, Michigan. She was tentatively accepted and began a probationary period, divided into three stages: postulate stage; novitiate stage; and white sister stage. From August 26, 1927, to April 24, 1928, petitioner was a postulate, and from April 24, 1928, to April 24, 1930, a novitiate. The period which prospective members must spend in the various stages is arbitrary. Applicants are never finally accepted on application. There is a six-month period during which they remain postulate and a two-year period during which they remain novitiate. This is followed by a three-year period between the time they take their first and preliminary vow upon graduating from the novitiate stage until they take their final vows and become sisters in the order. When the applicant is a postulate or a novitiate, she is on probation. During the period when applicant is a novice she has the privilege of withdrawing from the order and the order has the privilege of refusing to accept her into membership. November 16, 1929, while plaintiff was a novitiate, she was engaged in domestic work of the Mt. Mercy Academy, and while cleaning the drum of a mangle in the laundry she got both hands in the mangle, her arms were pulled in and she was injured. She was taken to St. Mary's hospital, an institution controlled by the Sisters of Mercy in Grand Rapids, but entirely separate from Mt. Mercy Academy, where she remained until February 14, 1930. Following her discharge from the hospital, she suffered total disability until September 5, 1930. After plaintiff's

injury, defendant Sisters of Mercy filed a report of a compensable accident.

Mt. Mercy Academy is a normal training school, approved by the State, complying with the statutes requiring normal training of all teachers who teach in the public or parochial schools of the State. Plaintiff had a high school education before applying for admission to the order, and, at the time of her injury, was taking the normal training course to fit herself for teaching, expecting to become a teacher qualified to teach in the Catholic parochial schools of the State.

The necessary clothing and money to defray the expense of reception into the order had been furnished. Plaintiff performed, in the kitchen, laundry, chapel and halls of the institution, services classified as menial at common law under direction of the Sisters of Mercy, and was supplied by them with the necessities of food, clothing, shelter, and medical attention. At the time of her injury plaintiff's legal status was not different than that of any one else who is given food, clothing, shelter, and an opportunity to attend school in consideration for services rendered. The defendant Sisters of Mercy is an order of the Roman Catholic Church. They accepted the provisions of the workmen's compensation law (2 Comp. Laws 1929, § 8407 *et seq.*), May 2, 1929, and took out a workmen's compensation insurance policy in defendant Hartford Accident & Indemnity Company. The matter came on for hearing before a deputy commissioner at Grand Rapids, February 5, 1931, who, after hearing the testimony, entered an award in favor of petitioner, granting her compensation in the sum of $9.10 a week for a period of 41 weeks and 5 days, being from November 16, 1929, to September 5, 1930, and also the sum of $1,601.75 for

medical, hospital, and nursing expenses incurred within the 90-day period following the accidental injury. The defendant Hartford Accident & Indemnity Company appealed from the award of the deputy commissioner to the department of labor and industry, and, upon final hearing, the award of the deputy commissioner was reversed and plaintiff denied compensation on the ground the relationship of employer and employee did not exist between defendant Sisters of Mercy and plaintiff.

It is contended by the insurance company the allowance and payment of plaintiff's claim would be sacrilegious. Not having raised this question when the premium money was coming in, it ought not to urge it when the money is going out. There was ample evidence to sustain the award of the deputy commissioner, if plaintiff was an employee.

The sole question involved is whether the plaintiff was an employee, within the meaning of the compensation law, of the Sisters of Mercy, November 16, 1929, the date of the accident. If so, she has a right to compensation; if not, she has no right to recover.

Section 7, part 1, of the compensation act (2 Comp. Laws 1929, § 8413) provides:

"The term 'employe' as used in this act shall be construed to mean * * * every person in the service of another, under any contract of hire, express or implied."

Defendant contends that under the compensation law an injury to be compensable must arise out of and in the course of an employment (*Van Sweden* v. *Van Sweden,* 250 Mich. 238), which requires the relation of employer and employee, and necessarily involves a contract, and that the only basis of the relation of employer and employee is a contract of

hire, express or implied. *Ganga* v. *Ford Motor Co.*, 250 Mich. 247.

In *Atchison, Topeka & Santa Fe R. Co.* v. *Fronk*, 74 Kan. 519 (87 Pac. 698, 11 Ann. Cas. 174), the question arose whether a student brakeman was a railway employee. Applicant, to learn the business of a railroad brakeman, signed an application as follows:

"Application to Learn Work of Freight Brakeman or Fireman, and Release.

"Whereas, I, the undersigned, Elmer Tindall, residing at Hoisington, in the State of Kansas, and being 25 years of age, desiring to learn the work necessary to fit myself for the occupation of a brakeman on freight trains, have applied to the Atchison, Topeka & Santa Fe Railway Company for an opportunity of learning said work, and to that end have requested the privilege of working on and about the locomotives, trains and cars of said railway company without expectation or promise of receiving wages or any pay whatever for work so done during such time, and without being considered as an employee of said company during said time; and

"Whereas, the railway company is willing to grant me the privilege above applied for on the representation and statement above made, but on account of the dangers to which I may be exposed also requires that the railway company, its officers and agents, shall be relieved from all liability for damage, injury or death sustained by me while so working, or while riding, walking or standing on or about such locomotives, trains or cars, or while on or about the property or premises of the railway company;

"Now, therefore, in consideration of said company granting me the privileges hereinbefore mentioned, I do hereby agree to and do hereby assume all dangers of such work and risks of injuries which may be sustained by me in or about such work,

whether the same may be caused by or arise from the negligence of the railway company or of the officers, agents or servants thereof, or otherwise, or which I may receive from any cause whatever during the term of my connection with said company in learning the work aforesaid; and I hereby release and forever discharge said Atchison, Topeka & Santa Fe company, and the officers and agents thereof, from any and all claims, demands, suits or liabilities of any kind for death or for any injury that I may sustain, whether the same may be caused by or arise from the negligence of the said railway company, or of the officers, agents or employees thereof, or otherwise, during the term of my connection with said company in learning the work aforesaid, while upon or about such locomotives, trains or cars, or while walking or standing on or about the same, or while on or about any such property or the premises of said railway company; and I further agree that I will not claim any wages or compensation for any work that I may do during such time, nor claim to be in the employ of said company nor an employee thereof during such time.

"Witness my hand and seal, at Dodge City, State of Kansas, this 4th day of August, 1904.

(Seal) "ELMER TINDALL.

"Signed in presence of H. C. DUNCAN, witness."

The railroad company defended upon the ground this contract was valid and binding and plaintiff was not a railway employee. It is said:

"The contract is adroitly drawn. Its apparent purpose is to relieve the company from liability to Tindall for injuries sustained while working for the company in consequence of the negligence of the company's agents, servants or employees. In expressing the duties to be performed by Tindall the language is permissive only, but the services which the agreement contemplates that Tindall should per-

form for the company are sufficient to justify the conclusion that while performing such services he was an employee of the company. The railway company was not conducting a free school for the education of freight brakemen, nor was Tindall riding gratuitously on the defendant's train at the time he was killed, but was working for the company, assisting in the operation of the train. Notwithstanding the agreement to the contrary, the elemental facts created the relation of master and servant. The compensation of the company for the privileges granted to Tindall was the work to be performed by him as freight brakeman."

In *Employers Indemnity Co.* v. *Kelly Coal Co.*, 149 Ky. 712 (149 S. W. 992, 41 L. R. A. [N. S.] 963), it is said:

"Speaking generally, the relation may be said to exist whenever the employer retains the right to direct not only what shall be done, but how it shall be done. *Robinson* v. *Webb*, 11 Bush (74 Ky.), 464; *Central Coal & Iron Co.* v. *Grider's Adm'r*, 115 Ky. 745, 755 (74 S. W. 1058, 65 L. R. A. 455); *Jahn's Adm'r* v. *W. H. McKnight & Co.*, 117 Ky. 655, 661 (78 S. W. 862). The significant element in the relation of an employee and his employer is personal service.

"In Wood on Master and Servant, § 317, it is said:

" 'The real test by which to determine whether a person is acting as a servant of another is, to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct.'

"In other words, an 'employee' is one who works for and under the control of his employer. The mode of payment is a circumstance in solving the question whether the relation of master and servant exists, but it is not decisive of that question."

In *Commonwealth* v. *Griffith,* 204 Mass. 18 (90 N. E. 394, 25 L. R. A. [N. S.] 957, 134 Am. St. Rep. 645), defendant was prosecuted for a violation of the Massachusetts child labor law. The question arose whether the children for whose employment he was prosecuted were employed. It is said:

"Another question is whether the jury could find that the defendant employed these children. Here again, if we go to the lexicographer, we have as a meaning of 'employ,' 'To use as a servant, agent or representative.' These children were engaged in a regular service for the defendant in Boston, for two weeks. He depended upon them to do what was a necessary part of that which he was presenting every evening for the entertainment of theatre-goers. Without them his business could not go on; at least, it could not go on in the way that he desired to have it go. The facts find that he 'procured the boy to appear in the play as aforesaid.' He allowed a compensation for the service of the girl. He gave to the boy an opportunity for valuable training, and for constant companionship with his father, who was an actor in the company. The service was rendered regularly, under an engagement relied on by both parties, for such benefits as might result from it. The payment of compensation, as such, is not a necessary element of employment. If one is procured to work regularly under an engagement, rendering valuable service for a specified time, it may be found that he is employed, although he receives nothing as an agreed compensation. He is used and relied upon to accomplish the purpose of his employer."

In *Mousseau* v. *City of Sioux City,* 113 Iowa, 246 (84 N. W. 1027), the question of the city's liability to pay policemen employed by it arose. It is said:

"From the word 'employ,' as here used, the obligation to pay for the services to be rendered cannot

be implied. According to Webster, the word means 'to use; to have in service; to cause to be engaged in doing something; to have or keep at work; to give employment or occupation to; to intrust with some duty or behest.' It means no more than the council shall intrust these duties to, and require their performance by, certain persons. The idea of hiring, in which a request and agreement to pay is implied, is never included in the meaning of 'employ' save when applied to a servant or hired laborer."

In *Bernstein* v. *Beth Israel Hospital,* 236 N. Y. 268 (140 N. E. 694, 30 A. L. R. 598), claimant served as an interne or junior house physician in defendant hospital. He performed an autopsy and was sewing up the corpse when the needle slipped, puncturing his finger and blood poisoning followed. He made a claim for compensation. He agreed to serve the hospital two years without pay other than board, lodging and hospital uniforms. He performed the usual service of an interne. The question arose as to whether claimant was an employee. It is said:

"Liability in this case is to be determined by the contract, express or implied, between hospital and physician. We think the relation *inter se* is to be characterized as a relation of employment. A distinction is to be drawn for that purpose between the position of a visiting or consulting physician, and that of an interne, who has placed his time and service at the call of a superior. * * * This claimant was under a duty to spend his days and nights at the hospital, and to render any service, administrative or medical, exacted by the hospital through its administrative agents, within the range prescribed by propriety and custom. He was a servant or employee by every test of permanence of duty, of intimacy of contact, and of fulness of subjection.

"The fact that internes in this hospital (unlike those in many others) receive no money for their

services, but only lodging, board and uniforms, does not defeat their right to an award under the statute. * * * The hospital does not carry on its business for pecuniary gain. It elected, however, to insure. The carrier, having accepted its premium, is bound to the same extent as if gain rather than benevolence had inspired its activities."

The Sisters of Mercy had a right to discharge plaintiff and terminate the relations existing between plaintiff and the order at any time. She was subject to their order and control. She was liable to be discharged at any time for misconduct.

In 20 Halsbury's Laws of England, p. 66, it is said:

"If a person has only the right to direct another what work he is to do, the relation is that of principal and agent; but if he has the further right to direct how the work is to be done, the relation is not that of principal and agent, but master and servant."

The insured not only had the right to direct plaintiff what work she was to do but the further right to direct how the work was to be done. We should hold the relation of master and servant existed. The award of the department of labor and industry should be reversed, with costs, and the cause remanded for disposition in accordance with this opinion.

BUTZEL, C. J., concurred with POTTER, J.

WIEST, J. I cannot concur in the opinion of Mr. Justice POTTER.

August 26, 1927, plaintiff joined the Sisters of Mercy, a Roman Catholic charitable organization, as

a probationer, intending to qualify for admission to membership in the sisterhood, and as "dowry" provided herself with clothing and contributed money for "reception expenses." At the expiration of six months she became a "novitiate," wore the habit, and was called "Sister" by members of the order. Her relation as a novitiate was that of free will devotion of efforts and talents to the religious and charitable purposes of the order. She received instruction calculated to qualify her for such service when she should reach full membership, and was provided with suitable care, food, clothing, and shelter, but was to receive no pay, nor was she to be to any expense. The relation was far removed from pecuniary considerations for it contemplated a life in which self should be subordinated to charitable efforts.

November 16, 1929, while about domestic duties of a novitiate, she was injured. The Sisters of Mercy cared for her, met all expenses, as in duty bound to do, and there was no interruption of her relation to the order but a continuation to full membership. The department of labor and industry held there was no relation of employer and employee, under contract of hire, and refused an award of compensation. With that holding I agree.

Notwithstanding the cases cited by my Brother, I think the case at bar one of first impression. I find no analogy between instances of work without pay in industrial and professional pursuits, in order to qualify for work with pay, and an instance of entering a charitable and religious order as a novitiate with intent to qualify for membership and a life devoid of pecuniary purpose. In the one instance there is the relation of master and servant and a semblance of hiring, though without wage, but with commercial

earmarks, while in the other there is no relation of master and servant, no hiring, and no commercialism, but a devotion to charitable purpose without hope of pecuniary reward.

The Sisters of Mercy had employees for hire and elected to come under the workmen's compensation act (2 Comp. Laws 1929, § 8407 *et seq.*) and carried compensation insurance, but members and novitiates were not such, neither did the insurance indemnify the society for the expense of caring for injured members or novitiates. The workmen's compensation act requires the relation of employer and employee under a contract of hire. Plaintiff was not hired at all. It would be unfortunate to hold that the Sisters of Mercy hire persons to submit to training for membership in the sisterhood. The work of the Sisters of Mercy, in the care of indigent and other sick and infirm persons, and in no manner, directly or indirectly, for private profit, constitutes a public charity. The compensation law allows nothing for pain and suffering.

Plaintiff testified that any award made herein would not come to her but would belong to the order, and this by virtue of her relation to the order. Neither at common law nor under the compensation act can plaintiff have remedy against the Sisters of Mercy. It would be a strange situation, indeed, to permit the Sisters of Mercy, one defendant herein, to reimburse itself for expenses incurred in caring for a novitiate, in the manner here attempted. Plaintiff has no interest in any recovery of an award. She recognizes that her interest in an award is only that of the Sisters of Mercy.

If a novitiate is held to be an employee, and the Sisters of Mercy an employer, then what is the con-

tract of hire? It cannot be stated for there is none. The determination of the department of labor and industry is affirmed.

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

ATTORNEY GENERAL, *ex rel.* WHITCOMB, *v.* LAU.

1. STATUTES—INTERPRETATION—CONSTRUCTION—INTENT.
   In interpreting and construing statutes, primary rule is to ascertain and give effect to intention of legislature.

2. SAME—FILLING VACANCIES IN COUNTY OFFICES—GENERAL LEGISLATION.
   Provisions of Revised Statutes 1846, tit. 3, chaps. 12–15, inclusive, relating to general subject of resignations, vacancies, and removals of State and county officers, are part of general plan of legislation, and, so far as embodied in later compilations of statutes, provisions applying to separate county offices are also general rather than special legislative enactments.

3. SAME—LATER GENERAL ACT REPEALS INCONSISTENT EARLIER GENERAL ACT.
   Act No. 199, Pub. Acts 1923 (1 Comp. Laws 1929, § 3369), relating to filling vacancies in appointive and elective public offices, is general act supplanting earlier general acts covering same subject-matter.

4. SAME—REPEAL BY IMPLICATION—FILLING VACANCY IN OFFICE OF COUNTY TREASURER.
   Act No. 199, Pub. Acts 1923 (1 Comp. Laws 1929, § 3369), providing that vacancy in office of county treasurer shall be

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As to legislative intention in construing statutes, see annotation in 5 L. R. A. 342.

filled by judge of probate, county clerk, and prosecuting attorney, being later general enactment, by necessary implication repeals inconsistent provision of earlier general enactment (1 Comp. Laws 1929, § 1264), that vacancy in said office shall be filled by board of supervisors.

Quo warranto proceedings by Paul W. Voorhies, Attorney General, upon the relation of Arthur C. Whitcomb, against Herman R. Lau to try the title to the office of county treasurer of Wayne county. Submitted October 22, 1931. (Docket No. 193, Calendar No. 35,935.) Writ dismissed December 8, 1931.

Paul W. Voorhies, Attorney General (*Arthur J. Lacy,* of counsel), for plaintiff.

Schmalzriedt, Frye, Granse & Frye, for defendant.

NORTH, J. In January, 1931, the county treasurer of Wayne county, Godfrey Freiwald, died. The term he was then serving as county treasurer expired June 30, 1931. He was also county treasurer elect for the two-year term beginning July 1, 1931. At the time of Mr. Freiwald's death the respondent herein, Herman R. Lau, was the duly appointed deputy county treasurer. He performed the duties of county treasurer during Mr. Freiwald's illness and has continued to do so to the present time. With the purpose of filling the vacancy in the office of county treasurer for the term beginning July 1, 1931, the probate judge and prosecuting attorney of Wayne county, assuming and believing they together with the county clerk were vested by statute with the power so to do, appointed Herman R. Lau to fill the vacancy. The appointee qualified, assumed the duties of office, and has continued therein. Conflict-

ing action was taken by the Wayne county board of supervisors, which, assuming and believing it had power by statute to fill the vacancy, convened and appointed A. C. Whitcomb. He likewise qualified and demanded possession of the office of Mr. Lau. Possession was denied, and Mr. Whitcomb instituted this proceeding in *quo warranto* for the purpose of determining which of the two is entitled to the office. Decision will be controlled by determination of which of the two appointing bodies has the power to fill the vacancy. Mr. Lau's appointment was made by the probate judge, county clerk, and prosecuting attorney under the provisions of Act No. 199, Pub. Acts 1923, § 5; being 1 Comp. Laws 1929, § 3369:

"When a vacancy shall occur in an elective or appointive county office, it shall be filled in the following manner:

"1. (Provision for appointing county clerk or prosecuting attorney, not here material).

"2. If the vacancy shall be in any other county office, either elective or appointive, *the judge of probate, the county clerk and the prosecuting attorney* shall appoint some suitable person to fill such vacancy and the person so appointed shall hold such office for the remainder of the unexpired term."

Relator's appointment was made by the board of supervisors under 1 Comp. Laws 1929, § 1264:

"In case the office of county treasurer shall become vacant, or in case the treasurer, from any cause, shall be incapable of discharging the duties of his office, *the board of supervisors* may, if in their opinion the interests of the county require it, by writing under their hands, select a suitable person to perform the duties of the treasurer; and such person so selected, upon giving such bond for the faithful performance of the duties of the office as the said

board shall direct, may perform such duties until such vacancy shall be filled, or such disability be removed."

The section last above quoted has been a part of the statutory law of this State since enactment of the Revised Statutes of 1846. See chapter 14, § 38, Rev. Stat. 1846. It has not been expressly repealed; and relator, relying upon *Attorney General, ex rel. Owen,* v. *Joyce,* 233 Mich. 619, contends that the earlier act was not repealed by the later act by necessary implication. On the other hand, respondent takes these positions: First, that the two statutes can be construed in harmony by holding that the appointment by the board of supervisors under the earlier statute which provides that the appointee "may perform such duties until such vacancy shall be filled" continues only until an appointment is made by the judge of probate, county clerk, and prosecuting attorney under the later act, which provides that "the person so appointed shall hold such office for the remainder of the unexpired term." Second, that if there is irreconcilable conflict between two enactments, the later by necessary implication repeals the earlier.

Respondent's first contention is not tenable. Because of our decision herein later expressed we forego detailed discussion of this position taken by respondent except to note that we can see no purpose in a statute construed as meaning that the board of supervisors might make an appointment which would hold only until the probate judge, county clerk, and prosecuting attorney might name the real successor to the former treasurer. An appointment by the board of supervisors under such circumstances would be a rather idle ceremony. In inter-

preting and construing statutes, the primary rule is to ascertain and give effect to the intention of the legislature. 25 R. C. L. p. 960. We cannot find in this act the legislative intention suggested by respondent, especially in view of the fact that the statute authorizing an appointment by the judge of probate, county clerk, and prosecuting attorney was enacted many years later than the statute vesting that power in the board of supervisors.

We think the real issue here presented is thus properly stated in relator's brief:

"The principal question to be settled by the court in this case is which of two apparently inconsistent statutes dealing with the filling of vacancies in county offices confers the power to fill vacancies in the office of county treasurer."

Consideration of this question necessitates somewhat of a review of the statutory enactments. No purpose would be served by an investigation antedating the Revised Statutes of 1846, because at that time there was a general re-enactment of the statutory law of the State. Reference to the 1846 Revised Statutes discloses that under title 3, composed of chapters 12 to 15 inclusive, the general subject of resignations, vacancies, and removals of State and county officers is covered. That is, these phases of the State's legislation were included in a general act. The various provisions relating to filling vacancies in county offices will be found in chapters 14 and 15. As noted above, the 1846 provision as to the office of county treasurer is verbatim that now embodied in 1 Comp. Laws 1929, § 1264. Likewise the provisions for filling vacancies or designating a successor in office in the Revised Statutes of 1846 are substantially the same as those in the Compiled

Laws of 1929 relating to the office of sheriff and register of deeds. See Rev. Stat. 1846, tit. 3, chap. 14, and 1 Comp. Laws 1929, §§ 1327, 1376, and 1377. The provisions in the Revised Statutes of 1846 covering successors in county offices and filling vacancies are a part of a general plan of legislation under one general heading; and we think that, as embodied in the later compilations of the statutes, these provisions applying to the separate county offices must also be held to be general rather than special legislative enactments. These general acts unquestionably controlled as to filling vacancies prior to Act No. 199, Pub. Acts 1923. The 1923 legislature framed and passed this statute as "An act to provide for the filling of vacancies in appointive and elective public offices." Consideration of its provisions necessitates the conclusion that the legislature intended this act should be a general act which would supplant earlier general acts covering the same subject-matters and that it would simplify, unify, and expedite filling vacancies. As in the Revised Statutes of 1846 so in this 1923 act the legislature grouped together provisions for filling vacancies in both State and county offices. Section 5 of Act No. 199, Pub. Acts 1923, covers all vacancies occurring in legislative or appointive county offices. As to county clerk and prosecuting attorney, the constitutional provision (article 7, § 11) is made a part of the statute in subd. 1, § 5, and by subd. 2 of the same section power to fill vacancies in any other county office, either elective or appointive, is vested in the judge of probate, county clerk, and prosecuting attorney. Thus, as to filling a vacancy in the office of county treasurer, we have a provision in direct and irreconcilable conflict with the earlier statute which placed the appointing power in the board of supervisors. The conclusion

must follow that Act No. 199, Pub. Acts 1923 (1 Comp. Laws 1929, § 3369), by necessary implication repeals the former provision as to filling a vacancy in the office of county treasurer.

As above noted, relator relies largely upon the decision of this court in *Attorney General, ex rel. Owen,* v. *Joyce, supra.* He contends that in the instant case the provision for filling the vacancy in the office of county treasurer is in the nature of particular and special legislation, and therefore the later general act does not repeal it by necessary implication. The error in this position is indicated by our foregoing holding that the legislation controlling the manner of filling vacancies in this and other county offices is general legislation. That the *Joyce Case* does not come within the field of the instant case was emphasized and clearly pointed out by Justice MCDONALD in his holding that the statute there involved was special legislation covering particularly and specifically a portion of the highway law. Writing for the court he said:

"This act (Act No. 283, Pub. Acts 1909 [1 Comp. Laws 1929, § 3916 *et seq.*]) contains a complete and comprehensive system of laws relating to highways. It touches no other subject of legislation. * * * The act created county road commissioners to be appointed by the supervisors in the first instance, and thereafter whenever vacancies occurred. Can this special legislation be repealed by inference alone, by the subsequent enactment of a statute that does not pertain to highways, and contains no express language indicating its intention to repeal any part of the highway law? * * * If it had intended to repeal any part of such an important law as the highway law, it is reasonable to suppose that its intention to do so would have been expressly stated and not left to inference and conjecture. The intention of

the legislature to the contrary not clearly appearing, we hold that the provisions of the highway act authorizing the board of supervisors to make appointments to fill vacancies is still in force and effect notwithstanding Act No. 199, Pub. Acts 1923 (1 Comp. Laws 1929, § 3365 *et seq.*). * * * In this view of the matter the two acts can be harmonized: the first as the law for filling vacancies to a particular office; and the second as the law for filling vacancies to elective and appointive offices generally."

The clause last above quoted rather pointedly foreshadowed the decision herein made. The respondent, Herman R. Lau, was legally appointed to fill the office of county treasurer of Wayne county; and relator's information in the nature of *quo warranto* is dismissed, with costs to be taxed.

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

ALLGEYER *v.* CHICAGO & NORTH WESTERN RAILWAY CO.

CONTRACTS—BREACH—EQUITY—SUFFICIENCY OF PROOF.

In suit for money decree for damages for breach of alleged promises by defendant's agents in connection with written contract which had been fully performed by both parties, decree dismissing bill on ground that plaintiffs had failed to make case is affirmed, on appeal.

Appeal from Menominee; Driscoll (George O.), J., presiding. Submitted June 10, 1931. (Docket No. 2, Calendar No. 35,587.) Decided December 8, 1931.

Bill by Paul Allgeyer and another, copartners, against Chicago & North Western Railway Company, a corporation, for money decree. Bill dismissed. Plaintiffs appeal. Affirmed.

Meredith P. Sawyer and *George Barstow,* for plaintiffs.

Ryall & Frost, for defendant.

CLARK, J. After negotiations continuing throughout the summer, the parties entered into a written contract on September 1, 1926, pursuant to which plaintiffs moved a sawmill from Wallace to Ladoga and cut for defendant a large number of logs and ties. The contract was fully performed on both sides.

Defendant owned much standing timber in that vicinity. It was the hope and perhaps the expectation of the parties that succeeding annual contracts for sawing might be made from year to year for several years, although it was recognized and understood on both sides that the venture was experimental. Negotiations were attempted and continued toward a succeeding contract but none was made.

The bill of complaint seeks a money decree for damages for breach of alleged promises of agents for defendant. There are also some allegations tending to charge fraud in the inducement to the contract. Although the bill prays no reformation of the contract, the matter is urged by appellants. The theory of joint adventure is also advanced. The bill was dismissed. Plaintiffs have appealed.

No question of law need be discussed.

Assuming plaintiffs' various contentions to be before the court, the record supports none of them in fact. We agree with the trial court that plaintiffs did not make a case. It will profit no one to state more of the evidence.

The decree must be and it is affirmed, with costs.

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

LESLIE *v.* SCHOOL DISTRICT NO. 1, MASON TOWNSHIP.

1. SCHOOLS AND SCHOOL DISTRICTS—AUTHORITY TO PURCHASE BUS MUST BE GRANTED BOARD BY ELECTORS.

   Under 2 Comp. Laws 1929, § 7104, authority of school board to purchase bus for transportation of pupils must be traced to grant thereof by school electors at valid special or annual meeting.

2. SAME—SPECIAL MEETING—EVIDENCE OF COMPLIANCE WITH STATUTE NECESSARY.

   Action taken by electors at special meeting of school district authorizing school board to purchase school bus (2 Comp. Laws 1929, § 7104) is *held*, ineffective, in absence of evidence of compliance with statute in calling said special meeting (2 Comp. Laws 1929, §§ 7362, 7363).

3. SAME—GRANTING AUTHORITY TO BOARD TO PURCHASE BUS.

   Where electors at annual school district meeting voted that it be left to school board to purchase bus to transport pupils, power was granted to board to determine need and make purchase.

4. SAME—BOARD'S GIVING ORDER FOR BUS DETERMINED NEED.

   Where power was given to school board to determine need for bus to transport pupils, giving order for bus by majority of board determined need.

5. SAME—NOT NECESSARY THAT BOARD HAVE MONEY TO PAY FOR BUS.

That there was no money on hand to pay for school bus did not render contract for its purchase by school board void, where board could vote tax for such purpose.

6. APPEAL AND ERROR—CASE REMANDED FOR JUDGMENT ON REVERSAL, WHERE AMOUNT CONCEDED.

Where, on trial, it was conceded that if recovery was had by plaintiff it should be for full contract price, on reversal of judgment for defendant, case is remanded, and judgment ordered entered for plaintiff.

Error to Arenac; Smith (Guy E.), J. Submitted June 4, 1931. (Docket No. 96, Calendar No. 35,236.) Decided December 8, 1931. Rehearing denied March 3, 1932.

Assumpsit by Orville Leslie against School District No. 1, Mason township, Arenac county, for the purchase price of a school bus. Directed verdict for plaintiff. Judgment *non obstante veredicto* for defendant. Plaintiff brings error. Reversed, and judgment ordered entered for plaintiff.

John A. Stewart and *B. J. Henderson,* for plaintiff.

William T. Yeo, for defendant.

WIEST, J. This is an action to recover the price of a school bus, claimed to have been sold and delivered to defendant school district, under a conditional sale contract, executed by a majority of the school board. The circuit judge directed a verdict for plaintiff and later entered judgment for defendant.

Section 7104, 2 Comp. Laws 1929, provides:

"At an annual or special meeting the district * * * may vote to direct the school board to make

provision to send the children of the seventh and eighth grades to another school or schools. When such action has been taken the school board shall have authority to use any funds, except library funds, in the hands of the treasurer to provide and equip a vehicle, to pay the tuition and transportation of all such children, and if necessary to vote a tax for such purposes."

The power of the school board to purchase the bus must be traced to grant thereof by the school electors at a valid special or at the annual meeting. The annual meeting is fixed by law in July, and special meetings of the school electors require a notice of purpose and time (2 Comp. Laws 1929, §§ 7361, 7362).

Plaintiff claims that at a special meeting of the school electors held May 8, 1929, authority was given to the district board to purchase the bus. In the absence of evidence of a call for such meeting by the district board (2 Comp. Laws 1929, § 7362), and the time and place and statement of all questions to be submitted to the electors at such special meeting (2 Comp. Laws 1929, § 7363), the action taken was ineffective. *Central School Supply House* v. *School District*, 99 Mich. 402. At the annual school meeting, held July 8, 1929, it was determined, "that it be left to the board to buy the bus to transport the 7th and 8th to Turner if there is more than allowed by law on the list carried."

In behalf of defendant it is claimed that plaintiff was present at that meeting and stated:

"If the district ordered the bus from him and did not want it, they could have 30 days to cancel the order."

July 23, 1929, two of the three members of the school board signed the order for the school bus at

the price of $1,150, of which $250 was to be paid upon delivery of the bus, and time extended for the balance with title retained by the seller.

Defendant claimed rescission at subsequent special meetings of the electors held on July 30, 1929, and by adjournment on August 2, 1929.

Again the record fails to show the validity of such special meetings, and, for the reasons above stated, any action thereat was ineffective. At the annual school meeting authority was conferred upon the school board to purchase a bus. This authority was exercised by a majority of the board on July 23d, and the contract sued upon entered into.

Under the record before us, the annual meeting was the only valid one and action had at that meeting authorized the school board to provide the bus if found to be needed. This granted power to the school board, or a majority of the members thereof, to determine the need and make the purchase. In giving the order for the bus, the board determined the need. The fact that there was not money on hand to pay for the bus did not render the contract to purchase a nullity because the board could order a tax to be levied for the purpose.

At the trial it was conceded that if recovery was had by plaintiff it should be for the full contract price.

The judgment is reversed, with costs, and the case remanded to the circuit court with direction to enter judgment in favor of plaintiff.

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

ZAKRZEWSKI *v.* AMERICAN BOX BOARD CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CANCELING INSURANCE—NOTICE.

   Provision of workmen's compensation act (2 Comp. Laws 1929, § 8460) that insurance company carrying risk for employer must file notice of termination or cancellation with department of labor and industry at least ten days before taking effect is not applicable where employer actually changes carrier of risk, so notifies department, and new carrier files its certificate of coverage.

2. SAME—INSURANCE—AUTHORITY TO CARRY EMPLOYER'S RISK.

   Authority of insurance company to carry risk for employer is determined by commissioner of insurance.

3. SAME—CANCELLATION OF INSURANCE—REINSURANCE—NOTICE TO DEPARTMENT.

   Where employer canceled its insurance policy, so notified department, and procured new policy with another company, which filed certificate of coverage with department 11 days before effective date, it is liable for accidental death occurring after effective date, although former insurer did not file notice of cancellation until after accident occurred, since, under circumstances, filing of said notice is not required.

Appeal from Department of Labor and Industry. Submitted October 7, 1931. (Docket No. 39, Calendar No. 35,741.) Decided December 8, 1931.

Mary Zakrzewski presented her claim against American Box Board Company, employer, and Metals Mutual Insurance Company and Michigan Mutual Liability Company, insurers, for compensation for the death of her husband, Frank Zakrzewski, while in defendant's employ. Compensation awarded. Defendants employer and Metals Mutual Insurance Company appeal. Affirmed.

Francis D. Campau, for appellants.

L. J. Carey, for defendant Michigan Mutual Liability Company.

WIEST, J. On October 3, 1930, the American Box Board Company, an employer operating under the workmen's compensation act (2 Comp. Laws 1929, § 8407 *et seq.*), canceled, to be effective October 15, 1930, its insurance policy with the Michigan Mutual Liability Company, which had been for some time carrying its risk, so notified the department of labor and industry, and procured a policy in the Metals Mutual Insurance Company, to be effective October 15, 1930, and paid the premium. The Metals Mutual Insurance Company issued its policy and filed its certificate of coverage with the department October 4, 1930. The employer advised the department to such effect October 6, 1930. The secretary of the department sent identical letters to the employer and both insurance companies to the effect that the certificate of the Metals Mutual Insurance Company could not be approved until a notice of termination or cancellation was filed by the Michigan Mutual Liability Company. November 1, 1930, such notice was given the department by the Michigan Mutual Liability Company, effective as of October 15, 1930. A death loss occurred on October 17, 1930, and the question is which insurance company should pay the loss. The Metals Mutual Insurance Company was held liable by the department and prosecutes this review.

The contest arises out of the mistaken view of the secretary of the department, as expressed in his letter. The statute, 2 Comp. Laws 1929, § 8460, provides that the insurance company carrying the risk

must file a notice of termination or cancellation with the department at least 10 days before taking effect. This is for the protection of employees and to enable the employer to obtain other insurance, but is wholly unnecessary when the employer actually changes the carrier of the risk, so notifies the department, and the new carrier files its certificate of coverage. The authority of the insurance company to assume such coverage is determined by the commissioner of insurance.

The point of law presented, under the facts found by the department, is ruled by *Gratopp* v. *Carde Stamping & Tool Co.*, 216 Mich. 355, and not by *Koopmans* v. *Parsons*, 250 Mich. 464.

The holding of the department is affirmed, with costs.

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

RAYKOV *v.* CRITTALL CASEMENT WINDOW CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING OF DEPARTMENT SUPPORTED BY EVIDENCE CONCLUSIVE.

Finding of department of labor and industry on disputed question as to whether disability for which original award of compensation was made still continues is conclusive, where sustained by evidence.

2. SAME—QUESTION NOT RAISED BEFORE DEPARTMENT NOT CONSIDERED ON APPEAL—DEPARTMENT'S RULES.

Question as to compliance with department's Rule No. 20, raised at hearing before deputy, but not raised at hearing before department on appeal, is not considered by Supreme Court.

Appeal from Department of Labor and Industry. Submitted October 9, 1931. (Docket No. 68, Calendar No. 35,620.) Decided December 8, 1931.

Joseph Raykov presented his claim against Crittall Casement Window Company, employer, and Ocean Accident & Guarantee Corporation, insurer, for an accidental injury while in defendant's employ. Petition to stop compensation denied. Defendants appeal. Affirmed.

J. W. Calnon (*Denton Jolly,* of counsel), for plaintiff.

Kerr, Lacey & Scroggie, for defendants.

CLARK, J. This is appeal from an order of the department of labor and industry denying petition of defendants to stop compensation.

The testimony of plaintiff and of his physician is to the effect that the disability for which the original award of compensation was made still continues. This testimony is disputed.

The finding of fact by the department, having some evidence to sustain it, is conclusive on this court.

At the hearing before the deputy commissioner, defendants raised the point that plaintiff had not answered their petition to stop compensation, and cited Rule No. 20 of the rules of the department. The record does not show this question to have been

urged before the commission on review. Therefore it will not be considered here. *Aske* v. *W. E. Wood Co.*, 248 Mich. 327.

Affirmed.

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

KING *v.* STEPHENS-ADAMSON MANFG. CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DENYING INTRODUCTION OF ADDITIONAL TESTIMONY—ABUSE OF DISCRETION.

   Denial of employer's motion for permission to introduce additional testimony at hearing on appeal before department was not abuse of discretion, where hearing before deputy was adjourned for 15 days, giving ample time in which to take other testimony before award was made.

2. SAME—INJURED EYE—CONTINUING DISABILITY.

   Where employer's physician treating employee's injured eye testified that he would not recommend employee's resuming work until growth on eye had been removed, order of department continuing compensation, but suggesting that employee should submit to such treatment as employer offered to relieve said disability, is affirmed, on appeal.

Appeal from Department of Labor and Industry. Submitted October 13, 1931. (Docket No. 91, Calendar No. 35,910.) Decided December 8, 1931.

Edward King presented his claim against Stephens-Adamson Manufacturing Company, employer,

and General Accident Assurance Corporation, Limited, insurer, for an accidental injury while in defendant's employ. Award of compensation. Defendants appeal. Affirmed.

Kerr, Lacey & Scroggie, for appellants.

SHARPE, J. The plaintiff, while in the employ of the defendant manufacturing company as a rivet catcher, was injured by being struck in the eye by a hot rivet on August 15, 1930. A report of compensable accident was filed by that company on October 11th. His average weekly wage was stated to be $37.50. No agreement for compensation was entered into. The defendants filed a notice and application for adjustment of claim on December 31, 1930. A hearing was had before deputy commissioner McGregor on March 12, 1931, and adjourned by him to March 27th, when he made an award for compensation at $18 per week for the period of total disability from August 15, 1930. The defendants filed a claim for review before the commission, and for permission to take additional testimony. After a hearing thereon, an order was entered affirming the award on May 25, 1931. Defendants here seek review by appeal.

1. It is their claim that there was an abuse of discretion in the denial of their petition to take additional testimony. Proofs were taken at Manistique on March 12th and the hearing adjourned to March 27th at Marquette, where the testimony of defendants' witness, Dr. Hornbogen, was taken. The board found that the defendants had had ample time in which to take the testimony of other experts before the award was made. We find no abuse of discretion in such holding.

2. Defendants contend that under the proofs submitted compensation should have been stopped on November 22, 1930, or on January 19, 1931, or on March 27, 1931. Plaintiff's eye has been treated by Dr. Hornbogen much of the time since it was injured. He performed one operation on it, and recommended another. The doctor's opinion of his ability to resume work is well stated in his testimony, as follows:

"*Q.* Knowing what you do of this man's case; you have a history and advantage of having treated him. Would you today pass that man on to another employer to do that steel work he was doing?

"*A.* I would advise him to have that growth removed from there first.

"*Q.* In other words, you wouldn't want to pass him on to another employer to go out and do that work?

"*A.* Not with the eye in the condition it is at this time."

In its opinion the commission said:

"If, however, the defendants offer the plaintiff treatment for this disease of his eye, he should submit to such treatment as is offered to relieve him of the disability due to his accident."

The award is affirmed.

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

PEOPLE *v.* MARTIN.

1. CERTIORARI—BASTARDY—APPEAL AND ERROR.
   Judgment in bastardy proceeding is reviewable only by certiorari.

2. SAME—QUESTIONS REVIEWABLE.
   On review by certiorari Supreme Court considers only errors of law.

3. BASTARDY.
   Sole question in bastardy proceeding is whether defendant is guilty.

4. SAME—TRIAL—SPECIAL QUESTIONS.
   Special questions may not be submitted to jury in bastardy proceeding unless they involve facts from which legal conclusions can be drawn.

5. CRIMINAL LAW—RIGHT TO WAIVE JURY TRIAL.
   Under 3 Comp. Laws 1929, § 17131, defendants in criminal cases, whether cognizable by justices of peace or otherwise, have right to waive jury trial.

6. BASTARDY—QUASI-CRIMINAL—JURISDICTION.
   Bastardy proceeding is somewhat anomalous, being of civil nature in many respects, yet coming within *quasi*-criminal jurisdiction of courts.

7. SAME—RIGHT TO WAIVE JURY TRIAL.
   In bastardy proceeding, trial court was in error in denying defendant right to trial without jury, where written waiver was filed (3 Comp. Laws 1929, § 17131).

Certiorari to Wayne; McMahon (Maurice), J. Submitted June 11, 1931. (Docket No. 126, Calendar No. 35,339.) Decided December 8, 1931.

William Martin was convicted of bastardy. Defendant reviews denial of new trial by certiorari. Reversed, and new trial ordered.

Griffin, Heal & Emery, for appellant.

Paul W. Voorhies, Attorney General, *Harry S. Toy,* Prosecuting Attorney, and *William C. Buckingham,* Assistant Prosecuting Attorney, for the people.

BUTZEL, C. J. William Martin, defendant, appeals from a judgment of conviction in a bastardy proceeding. We need only briefly review the testimony. Ramona Segnitz, prosecutrix, claims she was begotten of child by him on or about April 3, 1929. She testified that her menstrual periods were interrupted after March, 1929; that she did not know her condition until the day preceding the birth of her child; that she had improper relations with defendant only once and with no one else at any time; that a number of weeks elapsed after she first met defendant before the act occurred; that a normal nine-months child was born to her on January 6, 1930.

Defendant denied improper relations, and offered proofs tending to show that he first met prosecutrix on April 21, 1929. As she testified that the act did not occur until a number of weeks after she first met him, the question arises whether a normal nine-months child was the result of an act committed about the middle of May, 1929. Both defendant and prosecutrix had always borne excellent reputations.

A judgment in a bastardy proceeding is only reviewable by certiorari. *People* v. *Brannen,* 173 Mich. 411. Upon certiorari we are not permitted to consider any other errors than those of law. We shall only discuss questions that may arise again on a new trial.

Error is claimed because the court refused the submission of two special questions: one, whether a

normal nine-months child was born after a normal period of gestation, and the other, whether defendant met prosecutrix prior to April 21, 1929. The sole question in a bastardy proceeding is whether the defendant is guilty or not. Special questions may not be submitted unless they involve facts from which legal conclusions can be drawn. *People* v. *White,* 53 Mich. 537. The court was correct in refusing to submit the special questions.

Under 3 Comp. Laws 1929, § 17131, defendants in criminal cases, whether cognizable by justices of the peace or otherwise, have the right to waive a jury trial. The court denied defendant the right of trial without a jury notwithstanding the filing of a written waiver. A bastardy proceeding is somewhat anomalous. It is of a civil nature in many respects. Extradition cannot be had (*Frank Cannon's Case,* 47 Mich. 481); defendant need only be found guilty by a preponderance of evidence (*Semon* v. *People,* 42 Mich. 141); detention pending the furnishing of a bond cannot be had in the house of correction as the detention is not criminal (*In re Kaminsky,* 70 Mich. 653); the complaining witness may retain counsel to aid in the prosecution (*Harley* v. *Judge,* 140 Mich. 642). See, also, *People* v. *Harty,* 49 Mich. 490; *People* v. *Gill,* 247 Mich. 479; *People* v. *White, supra.*

On the other hand, 3 Comp. Laws 1929, § 12914, provides that the defendant should be committed to prison until he gives bond in the event that he is found guilty, a complaint is used instead of a declaration, and defendant is arrested (*Pangborn* v. *Smith,* 65 Mich. 1); the defendant can be arrested and jailed even in a situation where he would be entitled to immunity from service in a civil action (*Cady* v. *St. Clair Circuit Judge,* 139 Mich. 618);

the proceedings come within the *quasi*-criminal jurisdiction of the courts (*People* v. *Phalen*, 49 Mich. 492); the Detroit police court has jurisdiction to hear a bastardy complaint and to bind the defendant over to the circuit court (*People* v. *Kaminsky*, 73 Mich. 637).

We can readily see how testimony in a bastardy proceeding may be much more carefully reviewed and analyzed by a judge than by a jury. Frequently in a proceeding of this nature the jury may be somewhat swayed by their emotions and sympathies so as to overlook the important testimony bearing upon the main issue of the case. We believe that 3 Comp. Laws 1929, § 17131, is broad enough so as to include *quasi*-criminal cases, and that defendant was entitled to a trial without a jury. For this reason the judgment of the lower court is reversed, and a new trial ordered.

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

PEOPLE *v.* KAPLAN.

1. CRIMINAL LAW—GRAND JURY—VALIDITY OF INDICTMENT—DE FACTO GRAND JURY.

   Indictments returned by grand jury continuing to exercise its functions beyond term in which it was organized are not void, although they are in connection with matters not under consideration by it before term was concluded.

As to organization of grand jury—time and term, see annotation in 27 L. R. A. 776; 49 L. R. A. (N. S.) 1215.

2. SAME—INDICTMENT AND INFORMATION—AMENDMENT—PERJURY.
Where indictment returned by grand jury was sufficient, under 3 Comp. Laws 1929, §§ 17258, 17287, to charge perjury in connection with testimony given before it, there was no error in permitting amendment thereto by prosecutor specifically charging that alleged perjured testimony was false and material.

3. SAME—WITNESSES—COMPELLING DEFENDANT TO INVOKE PRIVILEGE.
Indorsing name of defendant's former attorney on indictment and calling him to witness stand, placing defendant in position where he was compelled to invoke privilege, constituted reversible error.

4. SAME—PERJURY—ISSUES.
Charging defendant with perjury in testifying before grand jury that he did not know there was house of prostitution in certain city put in issue and necessitated proving existence of house of that character actually kept or operated as such.

5. SAME—HOUSE OF PROSTITUTION—EVIDENCE—REPUTATION.
Keeping or operating house of prostitution should be established by proof of fact, and this cannot be accomplished by proof of reputation alone.

6. SAME—TRIAL—INSTRUCTION.
Where, in prosecution for perjury, existence of house of prostitution in certain city was issue, instruction from which jury might infer that existence of house of that character might be established by reputation alone was error.

7. SAME—EVIDENCE—HEARSAY.
In prosecution for perjury, introduction in evidence of statements written by witness for prosecution and found on his person nearly month before trial was reversible error, where jury were not instructed as to any particular application or limited use to be made of same.

8. SAME—APPEAL AND ERROR—CROSS-EXAMINATION.
In prosecution for perjury, error in permitting introduction in evidence of statements written by witness for prosecution and found on his person nearly month before trial was not alleviated by fact that defendant's counsel had opportunity to cross-examine witness.

Appeal from Recorder's Court of Detroit; Jeffries (Edward J.), J. Submitted October 15, 1931. (Docket No. 211, Calendar No. 35,714.) Decided December 8, 1931.

Jacob Kaplan was convicted of perjury. Reversed, and new trial ordered.

Chawke & Sloan and *Emil Colombo,* for appellant.

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

NORTH, J. Appellant was convicted of perjury in testifying before a Wayne county grand jury. The first question presented is:

"Can a grand jury continue to exercise its functions beyond the term in which it was organized, so as to return indictments in connection with matters not under consideration by it before the term of court is concluded?"

Defendant, being indicted for perjury, stood mute, and, before the jury was impaneled, raised the above question by motion to quash the indictment. He claims the answer should have been in the negative, and that the grand jury was without jurisdiction to conduct the investigation incident to which this charge of perjury is made, and therefore his conviction cannot be sustained. The question presented has been passed upon by this court in *People* v. *Morgan,* 133 Mich. 550. It was there held (syllabi):

"Though the statute contemplates that a grand jury will complete its work during the term to which it is summoned, yet, when it is continued into the

next term, and is recognized by the court as a valid jury in receiving its indictments, it is a *de facto* grand jury, and its indictments are not void.

"An indictment of a *de facto* grand jury, not being void, cannot be set aside on motion to quash or by challenge to the array."

See, also, 12 R. C. L. p. 1015; *State* v. *Noyes*, 87 Wis. 340 (58 N. W. 386, 27 L. R. A. 776, 41 Am. St. Rep. 45).

The second question raised by appellant is thus framed:

"Is an indictment returned by a grand jury subject to amendment by the prosecuting attorney as to matters of substance?"

The indictment returned by the grand jury quoting appellant's testimony which is made the basis of this perjury charge sets forth: "The said Jacob Kaplan * * * knowingly, falsely, wilfully, maliciously, corruptly, and feloniously did so depose and swear, well knowing that said testimony was false and * * * that the matters so sworn to before said grand jury were material matters." By the amendment, of which complaint is made, the prosecution was allowed to specifically charge in the indictment that the alleged perjured testimony was false and material. There was no error in permitting the amendment. The indictment as first framed was sufficient under the provisions of the Michigan Code of Criminal Procedure (3 Comp. Laws 1929, § 17258), which provides that the indictment for perjury may be in the following form:

"A. B. appeared as a witness in a case between C. D. and E. F. being heard before the (set forth the tribunal) and committed perjury by testifying as follows: (set forth the testimony)."

Section 17287, 3 Comp. Laws 1929, further provides:

"An indictment for perjury * * * is sufficient which indicates the offense for which the accused is prosecuted, the nature of the controversy in respect of which the offense was committed and before what court or officer the oath was taken or was to have been taken."

The remaining questions presented for review are thus stated:

"Is it reversible error to indorse upon the information the name of a former attorney of the defendant to testify as to matters that were confidential?

"Can the existence of houses of ill repute be established by reputation testimony alone?

"Can papers found on the person of a witness, reflecting upon the defendant and not being in his (defendant's) handwriting, be admitted in evidence against him?"

The indictment charged defendant with perjury in testifying before the grand jury as follows:

"That he had never paid one Art Willard, a practicing attorney in the city of Hamtramck, in said county, any money for the defense of any women or woman arrested or charged for or with the offense of prostitution, and further, that he had never paid said Art Willard any money for any purpose."

Touching the first of the three questions above quoted, the record disclosed that the prosecuting attorney, Mr. Toy, called as a witness Arthur Willard, an attorney practicing in Wayne county, and in the presence of the jury asked him the following questions:

"*Mr. Toy:* I will ask you whether or not you were ever hired by Jacob Kaplan to represent in

court girls who were charged with prostitution, in the city of Hamtramck?

"*Mr. Chawke:* I will object to it for the reason that if he did, the relationship of attorney and client appear. * * *

"*Mr. Toy:* I think, your honor, that anything said—any communication made or conversation had, that would be privileged between them, that rule might apply, but I think it would have to be shown first that the relationship existed. * * *

"*Mr. Toy:* All right, I will withdraw that question and put it this way, if your honor please.

"*Q.* Did the defendant, Jacob Kaplan, ever pay you any money for the defense—for your defense of girls charged with prostitution in the courts of Hamtramck?"

This was followed by a discussion between the court and counsel, and thereafter, on request of defendant's counsel, the jury retired. The court after consideration sustained defendant's objection and later struck from the record all of the testimony of this witness. Defendant's counsel moved the court to declare a mistrial giving as a reason the following:

"That the action of the prosecuting attorney in indorsing the name of Mr. Willard upon the indictment and calling him to the witness stand has placed the defendant in a position where he was compelled to invoke the privilege, and having invoked it, it must have, of necessity, been considered prejudicial by the court."

The motion was denied and error is alleged. At the close of the proofs and just before the arguments, the jury was advised by the court that all of Mr. Willard's testimony was stricken and that his testimony and the prosecuting attorney's opening statement as to what he expected to prove by

Mr. Willard should be "absolutely obliterated" from the jury's minds. This court has several times had occasion to pass upon a similar course of conduct by prosecuting attorneys and has held it constituted reversible error. We so hold in the instant case.

"It constitutes error to compel the defendant in the presence of the jury to assume the attitude of keeping out testimony, only admissible by virtue of her consent." *People* v. *Werner,* 225 Mich. 18.

"This court has frequently held that confidential communications between attorney and client are not to be revealed at any time." *People* v. *Dahrooge,* 173 Mich. 375, citing numerous cases.

See, also, *People* v. *Trine,* 164 Mich. 1, citing many cases.

Appellant's next question is based upon alleged error in the charge of the court, wherein it is stated:

"Houses of prostitution are proven by reputation, and it is for you to determine, from the testimony you have heard in this case, as to whether at the time the respondent gave his testimony before the grand jury, or a reasonable time prior thereto, there were existing houses of prostitution in Hamtramck."

We think the instruction might well have been accepted by the jury as meaning that proof of reputation alone was sufficient. Without holding that, aside from other error, this would be ground for reversal, we may note that the defendant is charged with perjuring himself by testifying that he did not know there was a house of prostitution in Hamtramck. We think this put in issue and necessitated proving the existence of a house of that character actually kept or operated as such. The keeping or

operating of a house of prostitution should be established by proof of the fact. This cannot be accomplished by proof of reputation alone. This, we think, is in harmony with Justice CAMPBELL'S opinion in *O'Brien* v. *People,* 28 Mich. 213; and with his later opinion in *People* v. *Saunders,* 29 Mich. 269, wherein he said:

"It is true that no one can be convicted upon evil repute, without proof of actual misconduct. Persons and houses may bear an ill name, and yet there may be nothing known against them which would justify the interference of the law, and the respondent could not be lawfully convicted on such testimony, without evidence of some act which comes within the statute.

"There is some conflict of opinion on this point, but the decided weight of authority is to the effect that the general reputation of a house of itself, alone and uncorroborated, is insufficient to prove that it is disorderly." 9 R. C. L. p. 225, citing many cases.

The last question raised by the assignments of error goes to the admissibility in evidence of two typewritten papers found on the person of the witness Sominski nearly a month before the trial. Sominski was a willing witness for the prosecution. He testified these statements (Exhibits 1 and 2), were a summary of the things he wrote down about conditions in Hamtramck. He had been a witness before the grand jury then in session, and the grand jury was inquiring into alleged vice conditions in Hamtramck. Both exhibits were offered by the prosecution and received in evidence but only a part of Exhibit 2 seems to have been read to the jury. Among other things it was stated in the portion thus read that it was a recital of "facts" and information about wholesale corruption and graft in

Hamtramck, that the Hamtramck police department records would "prove" there were 14 houses of prostitution in that city harboring 125 prostitutes; that these houses were run "wide open without fear of the law, paying out money to officials." The ground of admissibility upon which the trial judge admitted Exhibits 1 and 2 is thus stated by him:

"It strikes me that on this Exhibit 2, that ought to be * * * read to the jury as a basis upon which the grand jury formed the action of inquiry so that the court can instruct the jury at least and be able to make a reference, intelligent reference, to the issue involved."

The jurors were not instructed as to any particular application or limited use to be made of this testimony. It went to them as general substantive proof. We think this was the effect of its admission, notwithstanding the trial judge permitted the portion of Exhibit 2 to be read "as a matter which came before the grand jury for inquiry." The defendant was charged with having committed perjury in testifying "that he * * * never knew a prostitute in Hamtramck; * * * that he did not know that there was a house * * * of prostitution in said city of Hamtramck." The inadmissibility of the portion of Exhibit 2 read to the jury is obvious. Under the record in this case it was not competent proof of any issue for the jury's determination. It was prejudicial and its receipt in evidence reversible error. This prejudicial error was not alleviated, as is now claimed by the prosecution, by the fact that defendant's counsel had an opportunity to cross-examine Sominski. The safeguard against the injustice and prejudice of receiving hearsay testimony, which the law affords every person accused of crime, cannot be thus frittered away.

For reasons hereinbefore indicated, the judgment of the circuit court is reversed, and a new trial ordered.

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

PEOPLES WAYNE COUNTY BANK *v.* WESOLOWSKA.

1. HUSBAND AND WIFE—MARRIED WOMAN MAY MORTGAGE HER PROPERTY TO SECURE HUSBAND'S DEBT.

   Married woman may give valid and binding mortgage on her individual property to secure payment of her husband's debt.

2. SAME—NOTICE OF PURPOSE DID NOT AFFECT VALIDITY OF MORTGAGE.

   Validity of mortgage given by wife on her individual property to secure payment of her husband's debt was not impaired by fact that mortgagee knew purpose for which it was given.

3. SAME—VALIDITY OF MORTGAGE—COVERTURE.

   Whether mortgage executed by wife on her individual property was given for her personal debt or that of her husband she cannot escape liability on ground of coverture.

4. MORTGAGES—FORECLOSURE—FRAUD—DURESS.

   In suit to foreclose mortgage given by married woman, her claim that note and mortgage were obtained from her by fraud, misrepresentation, duress, and undue influence, *held*, without merit.

5. ALTERATION OF INSTRUMENTS—MORTGAGES—MATERIAL ALTERATION.

   Insertion in deed, absolute on its face, recital that it was given as security, which was in accord with intent and purpose for which it was given, and conformed to recital in note, was not material alteration and did not affect its validity; no injury resulting to mortgagor.

6. MORTGAGES—FORECLOSURE—RIGHT TO INCLUDE TAXES PAID BY MORTGAGEE.

Mortgagee is entitled to pay defaulted taxes and have amount thereof included in decree on foreclosure, although mortgage does not so provide.

Appeal from Wayne; Sample (George W.), J., presiding. Submitted October 23, 1931. (Docket No. 220, Calendar No. 36,088.) Decided December 8, 1931.

Bill by Peoples Wayne County Bank of Hamtramck, a banking corporation, against Barbara M. Wesolowska to foreclose a mortgage. Cross-bill by defendant against plaintiff to cancel a mortgage. Decree for cross-plaintiff. Plaintiff appeals. Reversed.

Bulkley, Ledyard, Dickinson & Wright (*Glenn D. Curtis,* of counsel), for plaintiff.

Arthur G. Lodewyck (*James E. McDevitt,* of counsel), for defendant.

NORTH, J. The Peoples Wayne County Bank of Hamtramck, as successor to the First State Bank of Hamtramck, filed its bill of complaint herein against Barbara M. Wesolowska, a married woman, to foreclose a mortgage. There was reference to a circuit court commissioner before whom testimony was taken. His findings of fact and law were adopted by the circuit judge. A decree was entered dismissing plaintiff's bill of complaint, and on cross-bill affirmative relief was granted defendant by way of cancellation of the instrument sought to be foreclosed. Plaintiff has appealed.

In March, 1923, Stanley W. Wesolowska, defendant's husband, solicited a loan of $5,000 from the

bank. It was arranged that the loan should be made upon the promissory note of Mrs. Wesolowska incident to which she deposited as collateral $6,000 in liberty bonds. A cashier's check for $5,000 payable to Mrs. Wesolowska was delivered to her. She indorsed it and turned it over to her husband. He indorsed and delivered it to the Delphi Speciality Manufacturing Company, of which he was an officer, and the company deposited it to the credit of its bank account.

Again, in July, 1923, through defendant's husband, she negotiated another loan from plaintiff in the amount of $15,000, for which she gave her unsecured note. At the time of making this loan she gave to plaintiff a financial statement from which it appeared she was possessed of sufficient property to justify the credit extended to her. The proceeds of this second loan were deposited to Mrs. Wesolowska's credit in plaintiff bank; and she in turn by means of checks drawn on her account varying in amounts from $25 to $3,000 passed the whole of this loan to her husband. Plaintiff knew at the time of making each of the above loans that defendant intended to turn the proceeds over to her husband. Within the next two and a half years following July, 1923, defendant borrowed from plaintiff various other amounts which were for her sole use totaling approximately $60,000. In the meantime payments had been made on the first two loans above noted sufficient to reduce them to $16,025. This sum, together with the unpaid portion of the later loans, amounted on December 1, 1925, to $35,000, for which plaintiff held defendant's notes. On the last-mentioned date, defendant gave plaintiff in lieu of the notes it then held her note for $35,000, and at the same time to secure its payment gave to plaintiff a

deed of certain real estate located at the corner of Canfield avenue and Hastings street in Detroit, Michigan. This deed was admittedly a mortgage and will be so denominated herein. It was recorded as a deed March 8, 1926. It was again recorded as a mortgage June 9, 1928. Defendant's note for $35,000 was not paid at its maturity. Renewal notes were given from time to time. The final note of the series was for $36,800 payable in 30 days. It was not paid at maturity, and the bill of foreclosure herein was filed August 9, 1930.

The only portion of defendant's indebtedness to plaintiff represented by her $35,000 note of December 1, 1925, and the renewals thereof, which she questions, is the $16,025 which is the unpaid portion of the two first loans aggregating $20,000. The balance of the indebtedness to the bank is admittedly defendant's obligation. In behalf of Mrs. Wesolowska it is urged as a defense that, being a married woman, her note and mortgage are void in whole or in part on the theory that she was only a surety as to the first two loans aggregating $20,000; and also that this mortgage is invalid by reason of its having been obtained through fraud, misrepresentation, duress, and undue influence.

Clearly we may base consideration of the first question on the self-evident fact that at the time this mortgage was given either Mrs. Wesolowska or her husband was indebted to the bank for this $16,025. If it was defendant's personal debt there is no legal obstacle in the way of her giving a valid mortgage as security therefor. *Hamilton* v. *Parent*, 152 Mich. 587. On the other hand, if this was her husband's debt or past-due obligation it is equally clear under the decisions of this State that defendant, though a married woman, could give a valid and

binding mortgage on her individual property to secure its payment.

"In this State there can be no doubt of the right and power of a married woman to convey her property in payment of, or security for, her husband's debt, and that such conveyance has a sufficient consideration." *Lewis* v. *Doyle,* 182 Mich. 141, 152, citing *Kieldsen* v. *Blodgett,* 113 Mich. 655.

See, also, *Watson* v. *Thurber,* 11 Mich. 457; *Just* v. *State Savings Bank,* 132 Mich. 600, wherein it is said:

"While a married woman may not become a surety for her husband, and thereby incur a personal obligation, she may pledge her property to secure his debt."

The validity of the mortgage given by defendant, a married woman, to secure the payment of her husband's debt, was not impaired by the fact that the mortgagee knew it was given for that purpose. *Frickee* v. *Donner,* 35 Mich. 151. Regardless of whether the mortgage was given for defendant's personal debt or that of her husband, she cannot escape liability on the ground of coverture.

Was defendant induced by fraud, misrepresentation, duress, or undue influence to give her note for $35,000 secured by the mortgage? As noted above, prior to December 1, 1925, defendant had given her notes to the bank in amounts which then totaled $35,000. Her liability on these notes in excess of $16,025 is admitted. The president of the bank telephoned defendant that the bank wanted security for her obligations. The following day defendant called at the bank, signed the $35,000 note, and executed and delivered to plaintiff the deed-mortgage

as security. The alleged fraud is thus stated in her counsel's brief:

"The president at the time informed her that she was legally liable for the total obligation, including the unpaid balance of the $5,000 and the $15,000 loans, to wit, $35,000, and that she would have to execute the deed immediately or she would be sued."

We think this falls far short of constituting fraud, misrepresentation, duress, or undue influence such as would invalidate defendant's note and the security given. Defendant's admitted personal liability at that time to the bank was nearly $19,000. Incident to giving the mortgage lien, the $6,000 of liberty bonds which defendant had deposited as collateral to her $5,000 note were returned to her. The only possible portion of the above-quoted statement of the bank's president that could have constituted a misrepresentation or fraud is that defendant "was legally liable for the total obligation." Assuming the statement was made as quoted, there is nothing in this record which even suggests that the bank official was not perfectly honest in expressing as his opinion that the defendant was liable to the full amount of the loan. At most it was only a statement of his opinion. It may be noted that in the intervening two and a half years since this part of the indebtedness accrued to the bank, payments had been made from time to time, and renewal notes given, as well as other notes for subsequent loans to defendant. If payments made were applied first on the oldest portion of the indebtedness, it may well be questioned if the assertion that defendant was liable for the full amount of the unpaid indebtedness was not true both in fact and in law. And it might well be held that defendant, though a married woman, was liable for the repay-

ment of money loaned and paid to her by the bank or deposited to her credit in the bank notwithstanding she subsequently turned over to her husband the money so obtained. Further, it appears in the brief filed for Mrs. Wesolowska that, at the very time of the alleged fraud, "she denied liability for the $5,000 and $15,000 loan." If so, evidently she was not wholly without knowledge of her alleged legal rights. Also, it appears from this record that defendant gave other notes in renewal of the $35,000 note dated December 1, 1925. The last of these notes, the one here in suit, bears date June 7, 1930; it is for $36,800 payable in 30 days, and bears the notation "deed recorded as mortgage to Canfield avenue and Hastings street property." Defendant testified she wrote this phrase in the note with her own hand. She testified "I copied it from something else, other notes; I always copied it." Thus it may fairly be inferred that defendant's prior notes given during the intervening years bore the same notation in her own handwriting. From this and other circumstances disclosed by the record, we are convinced that there is no merit to defendant's claim that her note and mortgage which plaintiff now seeks to foreclose were obtained from her either by fraud, misrepresentation, duress, or undue influence.

Plaintiff's right to foreclose the instrument here in suit is further challenged on the ground that it has been altered by plaintiff. As noted, it was first recorded as a deed March 8, 1926, and again recorded as a mortgage June 9, 1928. Between these two dates some of plaintiff's agents or employees inserted in typewriting immediately following the description:

"This deed is given to secure a note of $37,000 to First State Bank of Hamtramck or its renewals thereof."

Defendant stresses the claim that at the time this deed-mortgage was given to the bank her indebtedness was only $35,000, and the recital inserted in the instrument raises the amount secured to $37,000, hence it is urged the alteration was presumably fraudulent. However, the record discloses that at no time during the period within which this alteration occurred was defendant's indebtedness materially less than $37,000. While the proof is not as clear as might be desired, we think it fair to conclude, as above noted, that defendant's former notes contained the same provision as the last of this series, which recited:

"Hereby transferring and delivering to the holder of this note as collateral security, *for the payment of this and of any other liabilities of the undersigned to said payee,* holder or assigns, due or to become due, *or that may hereafter be contracted,* the following property, the value of which is ——— dollars. Deed recorded as mortgage to Canfield avenue and Hastings street property."

It is a fair inference from the record that the recital of which defendant complains was inserted in this instrument incident to its being recorded as a mortgage and for the purpose of fixing the amount of the mortgage tax to be paid. Defendant knew of her deed being recorded as a mortgage, and subsequently reimbursed the bank for the amount of the mortgage tax it had paid. The record contains no testimony tending to establish either an attempt or an intent to defraud by inserting the quoted recital in the deed. We think it was placed therein for a legitimate purpose. It conformed to the recital in defendant's notes; and did not constitute a material alteration. Instead, the statement inserted in the deed was in accord with the intent and purpose

for which it was given; and no injury resulted to defendant.

"It is well settled that, where the alteration is not such as to change the effect of the instrument, it is an immaterial alteration, and does not preclude recovery." *Prudden* v. *Nester,* 103 Mich. 540, citing cases.

See, also, 1 Jones on Mortgages (8th Ed.), pp. 129, 130. On page 129 the author states as "the more equitable rule that the instrument is not rendered void if the alteration was made by mistake, or without fraudulent intent."

Under the record in this case, the defense urged on the ground of alteration of the instrument cannot be sustained.

If, as we hold, the mortgage which plaintiff seeks to foreclose is valid, there is no merit in defendant's contention that the amount paid by the mortgagee for past-due taxes on the mortgaged property should not be included in the decree. It is not necessary that a mortgage should contain a specific provision authorizing the mortgagee to pay defaulted taxes to enable him to do so and have an additional lien therefor upon the mortgaged property. *G. F. Sanborn Co.* v. *Alston,* 153 Mich. 456.

The decree entered in the circuit court is set aside, and a decree of foreclosure will be entered in this court for the amount found to be due from defendant to plaintiff at the time of settling the decree. Appellant will have costs of both courts.

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

PEOPLE *v.* MULLANE.

1. CRIMINAL LAW—SEPARATE TRIAL—DISCRETION OF COURT.
   Question of separate trials, where there is more than one defendant, rests in discretion of court (3 Comp. Laws 1929, § 17298).

2. SAME—ABUSE OF DISCRETION.
   Where motion for separate trial was not supported by affidavit stating facts from which court might determine whether defenses relied on were inconsistent and joint trial might result in prejudice, its denial was not abuse of discretion.

3. JURY—RIGHT TO JURY TRIAL—CONSTITUTIONAL LAW.
   Persons accused of crime have right to trial by impartial jury (Const. art. 2, § 19) and to exercise challenges, either for cause or peremptory, at any time before jury is sworn.

4. SAME—EXCUSING DISQUALIFIED JURORS AFTER ACCEPTANCE—PEREMPTORY CHALLENGES.
   Where, after jury had been finally accepted, court excused two jurors for disqualification and called two who were qualified, accused, who had right to inquire of them as to their qualification, was not deprived of any right although his peremptory challenges were exhausted.

5. CRIMINAL LAW—TRIAL—INSTRUCTIONS—REMARKS OF PROSECUTOR.
   Omission of court to instruct jury to disregard statement of prosecuting attorney that defense attorney had asked question solely to prejudice witness in eyes of jury, *held*, not reversible error.

6. SAME—INSTRUCTIONS AS TO ALIBI.
   Charge of court that *alibi* is easy to prove and very hard to disprove, *held*, not reversible error, in view of charge as whole relating to said subject.

7. SAME—REMARKS OF PROSECUTOR AND COURT.
   Where, in ruling against admission of statement of one defendant as not binding on others, prosecuting attorney said "The declaration of a co-conspirator, your honor," and court responded "That is true," incident *held*, not prejudicial to defendants; no objection having been taken thereto.

8. SAME—REQUESTS TO CHARGE.
Where rights of accused were fully protected and requests to charge, so far as applicable to facts, were covered in charge as given, there was no error in refusing said requests.

9. SAME—RIGHT TO NEW TRIAL—DISCRETION OF COURT.
Right to new trial is conferred by statute and motion therefor is appeal to sound discretion of court (3 Comp. Laws 1929, § 17355).

10. SAME—BASIS OF MOTION FOR NEW TRIAL.
In criminal case, motion for new trial is based on claim that defendant has not had that fair and impartial trial guaranteed to him by Constitution, or that verdict is against great weight of evidence.

11. SAME—DENIAL OF NEW TRIAL NOT ABUSE OF DISCRETION.
Where evidence in criminal case strongly supports verdict, there was no abuse of discretion in denial of motion for new trial based on affidavits relating to alleged communications with jury during trial.

Error to Recorder's Court of Detroit; Boyne (John A.), J. Submitted October 15, 1931. (Docket No. 210, Calendar No. 35,713.) Decided December 8, 1931.

Jerry Mullane, Harry Hallisey, Roy Cornelius, and Louis Ross were convicted of kidnapping. Defendants Mullane, Hallisey, and Cornelius bring error. Affirmed.

Louis W. McClear, for appellant Mullane.

George K. Williams, for appellants Hallisey and Cornelius.

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

SHARPE, J. The defendants, except Ross, seek review of their conviction and sentence on a charge of kidnapping one Charles Mattler. The errors will

be considered in the order discussed by defendants' counsel in their brief.

1. After arraignment, and before trial, counsel for Mullane moved for a separate trial for his client, for the reason that he "has a good and meritorious defense and believes that his said defense would be prejudiced if he is compelled to go to trial with the other defendants."

It is claimed that similar motions were made on behalf of the other defendants, but they do not appear in the files. No affidavit, stating facts on which the court might determine whether the defenses relied on were inconsistent with each other and a joint trial might result in prejudice to one or more of them, was presented. Under the provisions of our code of criminal procedure (3 Comp. Laws 1929, § 17298), the question of severance rests in the discretion of the court, and it was not abused in the denial of the motion.

2. The record discloses that after a panel of 14 jurors had been "finally accepted by counsel for all parties, upon inquiry by the court it then developed that juror No. 2 and juror No. 9 had recently served on a condemnation jury."

After a conference in the judge's chambers, he announced that he would "be liberal in any reasonable objection to any juror which will be taken as a challenge for cause," but would allow no more peremptory challenges. (It appears that the defendants had theretofore exhausted all such challenges.) Quoting from the record:

"(Thereupon, two jurors were called in lieu of the two excused, and after examination by all counsel, the jury as completed was accepted and sworn.)"

The examination of these jurors does not appear in the record, nor do counsel claim that they were not in every way qualified to sit.

The defendants had the right to a trial "by an impartial jury." Const., art. 2, § 19. They had the right to exercise challenges, either for cause or peremptory, at any time before the jury were sworn to try the case. It appears that two entire days were consumed in the selection of this jury. While no name should appear upon the panel except that of a person qualified to sit, it is a well-known fact that, especially in the large cities, such names will occasionally be placed thereon. Counsel engaged in the trial, either on behalf of the prosecution or defense, when permitted to examine the jury as they here were, may inquire of each juror as to his or her qualification to sit as such. Fourteen persons were impaneled at the time attention was called to the disqualification of the two jurors. The defense had exercised all of the peremptory challenges to which they were entitled. Instead of the court's excusing them of his own motion, the prosecuting attorney might very properly have challenged them for cause, and, had he done so, the challenges would have been sustained. In what way can it then be said that the defendants were deprived of the right of further peremptory challenge by the course pursued? If defendants' counsel chose to exercise all of their peremptory challenges before the jury were ordered to arise and be sworn, they took the chance that after they had done so it might be discovered that a person not qualified to sit was among the number in the jury box and that he or she might be removed therefrom by order of the court.

3. During the cross-examination of one of the people's witnesses, he was asked if the officers did not tell him that "they were going to send you back to Ohio on the Max Plummer case," whereupon the assistant prosecuting attorney objected, and, in stating his objection, said: "The question asked by

Mr. McClear has been asked for solely one purpose, to prejudice this witness in the eyes of the jury," to which counsel took objection. The court permitted the question to be answered, but did not caution the jury to disregard the statement made. In our opinion his omission to do so does not constitute reversible error. The remark had better been left unsaid, but jurors are presumed to be intelligent and to have an opinion themselves as to counsel's reason for asking a question.

4. The defendants did not take the stand, but several witnesses called by them testified that they were at another place when the offense was committed. The court in its charge, when referring to the testimony of Laman that the defendant Mullane was in one of the cars with him the night the offense was committed, said:

"That is a matter which you must determine. He has presented an *alibi* here. An *alibi* is, as I will define later, something that is easy to prove and very hard to disprove. If you find that *alibi* established or it raises a doubt, of course, that is a matter you must take into consideration."

He afterwards referred to this defense at length, defining it clearly, and concluded relative to it by saying:

"Members of the jury, an *alibi* is an effort to prove by testimony that the defendant was at some other place than that where the act occurred at the time of the taking place of that act. Therefore, you should scrutinize the testimony on that point very carefully. But if that defense, members of the jury, has raised in your minds a reasonable doubt, if after carefully scrutinizing all *alibis* and all of the other testimony in this case, if there is still a reasonable doubt as to the guilt of the defendant, of course you must acquit him."

We find no reversible error in the entire instruction relating to this subject.

5. A witness named Andrews testified that the defendant Cornelius told him the names of the several persons engaged in the kidnapping and stated who they were. On objection that such statement was not binding on the other defendants, the court so ruled, whereupon the assistant prosecutor said, "The declaration of a co-conspirator, your honor," to which the court responded, "That is true." No objection was taken to this remark of the court or prosecutor, and in our opinion no prejudice to either of the defendants resulted therefrom.

6. Errors are assigned upon the instructions to the jury and to the refusal to give certain requests. We have examined the charge with care, and are satisfied that the rights of the defendants were fully protected thereby and that the requests preferred, so far as applicable to the facts disclosed by the evidence, were fairly covered therein.

7. A motion for a new trial was made and denied. Certain affidavits were filed in support thereof. The attorney for the defendant Hallisey deposed that while the jury were deliberating he saw some of the officers assembled around a cold air register in a corridor and that they were "talking about the above-mentioned defendants;" that after the verdict had been rendered, he discovered that what was there said could have been heard in the jury room; that on one occasion, when the jury were at luncheon in the basement of the building in which the trial was had, two of the jurors sat at a separate table, and, while sitting there, "people in the basement came up to them and shook hands with them and talked with them;" that, on the attention of the officers in charge of the jury being called to it, they brought them to the table where the other jurors sat; that he talked

with one of the two extra jurors after he had been excused, and was told by him that the jurors had made up their minds and would quickly return a verdict of guilty.

Minnie Hair deposed that Mrs. Charles Boss, the wife of one of the jurors, told her that she had talked with her husband over the telephone while the case was pending.

Joseph Cluckey deposed that he saw one of the officers standing on an inverted cuspidor at the door leading into the jury room "with his ear to the crack," but did not know that he had any communication with the jury.

The statement that the officers in the corridor were talking about the defendants, even if heard by the jury, does not lead to an inference that anything disrespectful concerning them was said, nor does it appear that the cold air register in the jury room was not closed. If counsel were impressed that the defendants' rights were affected by what occurred in the lunch room during the trial, the attention of the court should have been called to it.

A motion for a new trial is an appeal to the sound discretion of the court. The right thereto is conferred by statute (3 Comp. Laws 1929, § 17355). In a criminal case it is based upon the claim that the defendant has not had that fair and impartial trial guaranteed to him by the Constitution, or that the verdict is against the great weight of the evidence. The evidence in this case strongly supports the verdict rendered, and we find no abuse of discretion on the part of the trial court in denying the motion.

The judgment is affirmed.

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

In re WEBER'S ESTATE.

MONTEROSSO *v.* SCHULTE.

1. EXECUTORS AND ADMINISTRATORS—PRESUMPTION THAT SERVICES WERE GRATUITOUS MAY BE REBUTTED.
   Presumption that, because of relation of parties, services rendered to deceased by plaintiff were gratuitous, may be rebutted by facts and circumstances attending performance of services.

2. SAME—EXTENT AND CHARACTER OF SERVICES IMPORTANT.
   Extent and character of services and circumstances under which they were rendered are important in determining whether services were gratuitous.

3. SAME—THAT PARTIES WERE NOT MEMBERS OF SAME HOUSEHOLD WEAKENS PRESUMPTION THAT SERVICES WERE GRATUITOUS.
   That parties were not members of same household weakens presumption that, because of relation of parties, services rendered were gratuitous, and gives support to other evidence tending to overcome presumption.

4. SAME—NECESSARIES—PROMISE IMPLIED BY LAW—LOCO PARENTIS.
   Where services rendered to incompetent person by plaintiff were at instance or order of attending physician, were extraordinary and arduous, and were rendered in plaintiff's own home to one able to pay, plaintiff is entitled to recover therefor, as for necessaries furnished on promise implied by law, although furnished to one who stood in *loco parentis* to her.

Error to Wayne; Moll (Lester S.), J. Submitted June 9, 1931. (Docket No. 10, Calendar No. 35,494.) Decided December 8, 1931. Rehearing denied March 3, 1932.

Leona Monterosso presented her claim against the estate of Caroline Weber, deceased, for nursing and care. Upon allowance by commissioners on

claims, Joseph A. Schulte, administrator, appealed to the circuit court. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

John C. Winter, for plaintiff.

Felix A. Doetsch, for defendant.

CLARK, J. The claim of plaintiff, Leona Monterosso, against the estate of Caroline Weber, who died in 1929, was allowed by commissioners on claims in the sum of $705, and, on appeal, the jury added interest and returned verdict for $780.75, on which judgment was entered. The administrator has appealed.

The claim is simply for nursing and care, 47 weeks at $15 per week, over a period ending in July, 1927.

Plaintiff was reared by deceased, a great aunt, and lived in her home from early infancy until her marriage in 1918, and, with her husband and later her children, continued to live with deceased until 1925, when she and her husband and children removed to a home of their own. In 1926, deceased was very ill, unconscious, and in need of care, and, at the suggestion or order of a physician, was taken to plaintiff's home. The uncontradicted testimony of the attending physician is that during the period of time covered by the claim deceased was mentally incompetent. Caroline Weber owned considerable property. Plaintiff, wife of a working man, did her own housework, it seems, and cared for her children. She herself nursed Miss Weber, getting such assistance as she needed in that regard from women of the neighborhood.

No error is assigned on the instruction of the court that Caroline Weber, deceased, stood in *loco parentis* to the plaintiff. No point is made that

Caroline Weber, unconscious when taken to plaintiff's home and mentally incompetent during the whole period, could not make an agreement in fact to pay plaintiff. *Heller Aller Co.* v. *Ries,* 164 Mich. 501.

As might be expected from what has been said, there is no evidence of any word uttered or statement made by deceased or by anyone relative to promise, express or implied, to pay for the services. The trial of the claim was not on the theory of recovery for care and nursing as necessaries furnished, a contract implied by law, but on the theory of a contract by and between plaintiff and deceased, a contract implied in fact.

We quote from the charge:

"If the facts and circumstances showing the performance of the work and in its acceptance are sufficient to rebut the presumption that the services were gratuitous and to authorize the inference that both parties acted under the understanding that they were to be paid for, the parent or one standing in '*loco parentis*' is liable."

The case ought not to have gone to the jury on the theory of a contract in fact or on the theory, express or implied, of a meeting of minds, when Caroline Weber had no mind, was mentally incompetent to contract, but no error is assigned on this feature of the case.

The nursing and care furnished were necessaries, beyond doubt. The reasonableness of the claim allowed is not questioned.

Appellant's question is:

"Where plaintiff presented a claim against the estate of a deceased person for services alleged to have been rendered deceased in her lifetime, and the trial court charged the jury as a matter of law, from

the testimony, that the relation of parent and child existed between plaintiff and the deceased, and that therefore the services were presumed to be gratuitous, and where there were no facts or circumstances to rebut this presumption, should not the court have granted defendant administrator's motion for a directed verdict in favor of the estate?''

Conceding, on this record, that, because of the relation of the persons, the presumption is that the services were rendered gratuitously (*Harris* v. *Smith,* 79 Mich. 54 [6 L. R. A. 702]), such presumption may be rebutted by facts and circumstances attending the performance of the services. *In re Abel's Estate,* 173 Mich. 93.

Naturally, there is not and could not be evidence (common to these cases against estates of deceased persons) of statements or declarations against interest by the deceased, here mentally incompetent.

The extent and character of the services and the circumstances under which they were rendered are important in determining whether the services were gratuitous. *In re Hoffman's Estate,* 200 Mich. 464. The services here were extraordinary and arduous. They were rendered at the instance or order of the attending physician. The persons were not members of the same household, which fact alone weakens the presumption of gratuity and gives support to other evidence tending to overcome the presumption. *In re Knox's Estate,* 220 Mich. 469. And it may be noted that plaintiff, wife of a working man, rendered these services in her own home, in addition to her other numerous cares, to one who was able to pay. *Sanders* v. *Rutland,* 1 McCord (S. Car. Law), 143.

The record justifies the finding of the jury.

Plaintiff, therefore, was entitled to recover for the services rendered the incompetent person as for

necessaries furnished on promise implied by law, although deceased, on this record, stood in *loco parentis* to plaintiff. *Reando* v. *Misplay*, 90 Mo. 251 (2 S. W. 405, 59 Am. Rep. 13); *Fruitt* v. *Anderson*, 12 Ill. App. 421.

As against error assigned, plaintiff is entitled to judgment.

We find no reversible error.

Affirmed.

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

NELSON & WITT *v.* TEXAS CO.

1. APPEAL AND ERROR—INCONSISTENT FINDINGS OF LAW.
   Where, in case tried without jury, findings of fact are certain, but findings of law are contradictory, judgment is to be taken as consistent with correct finding, and inconsistent conclusion of law is disregarded.

2. SAME—ERRORS AGAINST NONAPPEALING PARTY NOT CONSIDERED.
   Appellate court is not concerned with errors which may have been committed against nonappealing party.

3. SALES—PASSING TITLE—CONTRACTS.
   Under written agreement that defendant oil company would buy oil from plaintiff, that another oil company unable to fulfill its contract with defendant would deliver the oil free and receive credit for it as furnished on its contract, that defendant was to make payment to plaintiff through designated bank, and that plaintiff was to retain title to oil until delivery to defendant, company delivering oil to defendant never had title thereto.

4. CONVERSION—BREACH OF CONTRACT.
Where defendant repudiated written agreement under which it purchased oil from plaintiff, and, after delivery to it, assumed that it belonged to another, and refused to pay for it, its action in selling it and converting it into money amounted to conversion.

5. SAME—CONVERSION DEFINED.
Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.

6. SAME—DAMAGES—MARKET PRICE.
One whose personal property has been converted by another is entitled to recover market price at time of conversion.

7. SAME—WAIVING TORT—ASSUMPSIT—COMMON LAW.
At common law one might waive tort and sue in assumpsit in case tort arose out of contract relations between parties, or tort consisted of conversion of plaintiff's property into money or money's worth.

8. SAME—ASSUMPSIT—COMMON COUNTS.
Where defendant converted plaintiff's oil into money, recovery therefor under the common counts, as for money had and received, was proper.

Error to Muskegon; Vanderwerp (John), J. Submitted June 10, 1931. (Docket No. 82, Calendar No. 35,550.) Decided December 8, 1931.

Case by Nelson & Witt, Inc., a Michigan corporation, against the Texas Company, a Delaware corporation, and others for the conversion of a quantity of crude oil. Judgment for plaintiff. Defendant Texas Company brings error. Affirmed.

Alexis J. Rogoski, for plaintiff.

Bulkley, Ledyard, Dickinson & Wright (*Harold R. Smith* and *William B. Cudlip,* of counsel), for defendant.

CLARK, J. Plaintiff, Nelson & Witt, Incorporated, a corporation, sued United Petroleum Company, a Michigan corporation, Simrall Pipe Line Corporation, a Delaware corporation, and The Texas Company, a Delaware corporation, for the price of 18,617 barrels of oil delivered over a period beginning on August 7, 1929, and ending on August 16, 1929, and had judgment in a trial without a jury against the United Petroleum Company and The Texas Company for what the court found to be the market price of the oil as of the time in question, with interest, $24,492.54. The Texas Company brings error.

We state the facts substantially and as correctly found.

Appellant had a contract with United Petroleum Company (hereafter called the United Company) by which the latter company was to deliver to it a large quantity of oil at approximately regular intervals, or nearly equal daily quantities over a period beginning about August 1, 1929. Deliveries not being made, Guy B. Bogart, superintendent of the Lockport plant of appellant, and for which plant the oil was required, came to Muskegon. It was apparent that the United Company could not carry out its contract, although certain of its officers were hopeful, and they suggested that plaintiff had oil. There was, on August 6th, meeting, conversation, negotiation between Crell and Hutchins, proper officers of the United Company, Nelson and Witt, like officers of plaintiff, and Bogart, resulting in an agreement that plaintiff's oil be delivered to appellant, title to remain in plaintiff until such delivery, that the United Company would deliver the oil without charge and would have credit for the oil as furnished on its contract with appellant. The appellant

was not to pay the United Company but was to pay the price for plaintiff into plaintiff's bank, National Lumberman's Bank of Muskegon.

A writing was prepared and signed in form of letter by United Company to Texas Company, reciting, so far as here important, that plaintiff was to be paid through the bank, on which paper was indorsed an acceptance by Texas Company with the words, "will make payment to National Lumberman's Bank."

Other writings were discussed and agreed upon, but, it being night and attorney not available, they were made the following day, after Bogart had left town. One, in form a letter by United Company to plaintiff, recites that title to the oil was to remain in plaintiff until delivery to Texas Company, and that payment was to be made to the bank for plaintiff.

The other, also in form a letter by the United Company to the bank, expressly directs payment through the bank to plaintiff. On this letter is indorsed acceptance by the bank and by plaintiff.

Simrall Pipe Line Corporation merely ran the oil, was dropped as a defendant during the trial, and is out of the case.

While the oil was being run, Moore, an attorney of appellant, Bogart, and Cottingham, another representative of appellant, came to Muskegon. Moore, professing uncertainty that the bank would accept money, went to the bank, and, without plaintiff's knowledge, obtained from an officer of the bank signature to a writing, in form a letter by the bank to Texas Company, which describes the bank as agent of the United Company with respect to payment for the oil.

The appellant received the oil, which it refined and sold. It has not paid for it. It remitted nothing

to the bank. It takes the position that it bought from the United Company and would, it seems, set off the amount against its claimed damages for the United Company's breach of contract with it. Plaintiff's demand for return of the oil was refused.

The first count of the declaration avers a conspiracy, and the second is the common counts, with bill of particulars.

The findings of fact in this case, tried without a jury, are certain enough, but the conclusions of law are somewhat contradictory. One conclusion of law is that there was not a joint conversion of the oil. In another conclusion of law it is held that the oil was jointly received by appellant and the United Company, and they "were jointly liable to return the same," and this is on the apparent theory of joint conversion. As the judgment is against both the defendants, it is taken to be in keeping with the latter conclusion of law by the trial court and the former inconsistent conclusion of law will be disregarded.

From the judgment against it the United Company has not appealed, so that feature of the case calls for no discussion, this appellate court not being concerned with errors which may have been committed against a nonappealing party. *Lowe* v. *Schuyler,* 187 Mich. 526; *Bowsher* v. *Railway Co.,* 174 Mich. 339.

The contention that appellant's representatives who took part in this matter are not shown to have had requisite authority is without merit and is therefore passed.

Appellant agreed to buy the oil from plaintiff and to pay the plaintiff therefor, through plaintiff's designated bank, the bank to receive for plaintiff. Plaintiff retained title to the oil until delivery to appellant. The United Company never had title.

The United Company was considered to be liable in damages to appellant for breach of contract. The thought that if the United Company could be treated as having the oil with right to receive payment for the same, appellant might retain the price and have some satisfaction for its damages and the United Company corresponding relief, seems early to have become design, for while the oil was being delivered, appellant, in furtherance of the design, procured from an officer of the bank the quoted letter of August 15th, wherein the bank is described as the agent of the United Company to receive payment for the oil, when in truth and fact it was the agent of the plaintiff. This was followed by wilful disregard of plaintiff's title to the oil, the assumption that it was oil of United Company, repudiation of the agreement under which the oil was purchased, and conversion of the oil into money.

This is conversion, which is defined in *Aylesbury Mercantile Co.* v. *Fitch,* 22 Okla. 475 (99 Pac. 1089, 23 L. R. A. [N. S.] 573):

"Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." (Syllabus.)

See, also, *U. S. Cities Corp.* v. *Sautbine,* 126 Okla. 172 (259 Pac. 253, 54 A. L. R. 1152); *Kean* v. *Nat'l City Bank* (C. C. A.), 294 Fed. 214; *Southern Oil Corp.* v. *Waggoner* (C. C. A.), 276 Fed. 487.

Plaintiff was entitled to recover the market price at the time of the conversion, and the finding of the trial court thereon is sufficiently supported by the record.

The court struck out evidence of conspiracy respecting recovery on the first count of the declaration. Recovery here is permitted under the second count, the common counts.

At common law one might waive tort and sue in assumpsit in case the tort arose out of contract relations between the parties or the tort consisted of a conversion of plaintiff's property into money or money's worth. *Plefka* v. *Railway,* 147 Mich. 641.

Passing the matter of contract relations, it is clear that plaintiff's property was converted into money. Recovery therefore is proper under the common counts, the count for money had and received. See *Nelson* v. *Kilbride,* 113 Mich. 637, where the question is fully considered. Also *Aldine Manfg. Co.* v. *Barnard,* 84 Mich. 632.

The evidence is considered only as it bears upon conversion, the basis of recovery, so questions relating to recovery as upon express contract are not important.

Before trial appellant made and filed a motion asserting that there was a separable controversy between it and plaintiff, and that they were citizens of different States, and praying removal of the cause into the Federal court. 28 USCA § 71. The motion was denied. No error is assigned on such denial; in fact, error is expressly disclaimed.

At the conclusion of plaintiff's case and again at the close of all the proofs, appellant made motions, chiefly to nonsuit and to dismiss on the ground of variance and on other grounds, and, as plaintiff declined to dismiss as to either of the defendants and declined to amend the declaration, appellant sought to compel, without success, amendment of the declaration to state a separable controversy as against it. There is in the record no motion for removal and denial thereof on which error is assigned.

The argument comes to this: That the evidence showed a removable case for diversity of citizenship when plaintiff rested and at the conclusion of all the proof; and that, although appellant did not then

ask removal, it may do so later and after judgment on merits, making ground therefor by motion for a new trial by which it seeks to establish error in the rulings of the trial court, by which rulings, it is urged, appellant was deprived of right to make motion for removal. We need not consider the question (see *Great Northern Ry. Co.* v. *Alexander,* 246 U. S. 276 [38 Sup. Ct. 237]; *Golden* v. *Railway Co.,* 39 Mont. 435 [104 Pac. 549, 34 L. R. A. (N. S.) 1154, 18 Ann. Cas. 886]; *Alexander* v. *Railway Co.,* 51 Mont. 565 [154 Pac. 914, L. R. A. 1918 E, 852]; 54 C. J. p. 223), having the opinion that the rulings reviewed under our own practice present no reversible error.

In view of what has been said, many assignments require no discussion. Others, considered, do not call for reversal.

Affirmed.

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

PEOPLE *v.* WESSEL.

1. CRIMINAL LAW—PRIVILEGE—IMPROPER ARGUMENT—CONSTITUTIONAL LAW.

In prosecution for negligent homicide, it was improper for prosecutor to ask if defendant was to be witness in his own behalf, nor was answer of defendant's counsel that defendant would be witness justification or excuse for prosecutor's comment on defendant's failure to testify (Const. art. 2, § 16; 3 Comp. Laws 1929, § 14218).

2. SAME.

In prosecution for negligent homicide, it was reversible error for prosecutor to state to jury that defendant hadn't denied that he was under the influence of liquor, and, on objection by defendant's counsel, to state that he was not commenting on fact that defendant did not take witness stand (Const. art. 2, § 16; 3 Comp. Laws 1929, § 14218).

3. SAME—APPEAL AND ERROR—CURING ERROR.

Error of prosecutor in commenting, in his argument to jury, on defendant's failure to take stand in his own behalf, was not cured by court's instruction to jury to be careful to disregard said remark entirely.

Appeal from Gogebic; Driscoll (George O.), J. Submitted June 11, 1931. (Docket No. 131, Calendar No. 35,703.) Decided December 8, 1931.

Louis Wessel was convicted of negligent homicide. Reversed, and new trial granted.

Thomas J. Landers, for appellant.

Paul W. Voorhies, Attorney General, and *William F. Pellow,* Prosecuting Attorney, for the people.

CLARK, J. Defendant, Louis Wessel, was convicted of negligent homicide. His appeal presents several questions, one of which will be discussed—prejudicial argument of the prosecuting attorney.

Defendant did not take the stand as a witness. The argument:

"*Mr. Pellow:* * * * I stated in my opening statement that I would prove that Louis Wessel was under the influence of liquor, and he hasn't denied it.

"*Mr. Landers:* Now I object to that argument and take exception to it, and ask the court to instruct the jury to disregard it.

"*Mr. Pellow:* I am not commenting on the fact that he didn't take the stand, but I am—

"*The Court:* Now, now, now, Mr. Pellow, that remark is entirely improper.

"*Mr. Pellow:* I am sorry if I went a little too far. It was not my intention, and I will be very careful not to do it again.

"*The Court:* The jury will be very careful to disregard that remark entirely."

The prosecutor called attention to defendant's failure to take the witness stand when he spoke of intoxication, saying, "And he hasn't denied it." And he referred to it explicitly in the remark immediately following, quoted above.

Early in the trial the prosecutor asked if defendant was to be a witness in his own behalf. This was improper. The answer of defendant's counsel that defendant would be a witness is urged as justification or excuse for the argument. It has no connection with it and no tendency to justify it.

The constitutional provision (Constitution, art. 2, § 16) that one cannot be compelled in a criminal case to be a witness against himself is rendered of little or no force if, by adverse criticism or argument, the exercise of the right is treated as a circumstance against him. The only practical way to avoid the burden of such criticism and argument, if permitted, is for defendant to take the stand, and thus he would be deprived of his constitutional right.

Such frustration of the constitutional right was long ago recognized by the legislature, 3 Comp. Laws 1929, § 14218:

"That a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall

the court permit any reference or comment to be made to or upon such neglect."

In *People* v. *Lay,* 193 Mich. 17 (L. R. A. 1917B, 608), such remarks are held to be reversible error, and many cases are there cited where such remarks are condemned.

It is said in 16 C. J. p. 901:

"In most jurisdictions, however, the statutes provide that accused's failure to testify shall not create any presumption against him, and generally forbid the prosecution from commenting upon such failure. Under such statutes it is improper and erroneous for the prosecuting attorney to comment upon, or to make any reference in his argument to, accused's neglect or failure to take the stand and testify, either directly or so pertinently as to direct the jury's attention to such fact."

That the error was not cured by instruction of the court, see *People* v. *Lay, supra,* and *People* v. *Evans,* 72 Mich. 367.

Reversed. Defendant remanded to custody of sheriff. New trial granted.

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

PARTRIDGE *v.* MICHIGAN MUTUAL WINDSTORM INSURANCE CO.

1. INSURANCE—MUTUAL INSURANCE COMPANIES—AMENDMENTS TO BY-LAWS.

Generally, policy holder in mutual insurance company is bound by subsequent changes or amendments of by-laws where he has consented thereto, such as where he has agreed expressly in contract to be so bound.

2. SAME—IMPAIRMENT OF CONTRACTS.

Policy holders in mutual insurance company who did not expressly agree to be bound by amendments of by-laws subsequently adopted are not bound thereby, notwithstanding charter gives board of directors power to amend by-laws, and insured agreed to be governed in all cases by charter and by-laws.

BUTZEL, C. J., and NORTH, J., dissenting.

Error to Genesee; Gadola (Paul V.), J. Submitted June 12, 1931. (Docket No. 112, Calendar No. 35,442.) Decided December 8, 1931. Rehearing granted March 3, 1932. See 259 Mich. 387.

Assumpsit by Frank Partridge and another, as Partridge Bros., against Michigan Mutual Windstorm Insurance Company, a Michigan corporation, on an insurance policy. Judgment for plaintiffs. Defendant brings error. Affirmed.

Cline & George, for plaintiffs.

Kim Sigler, for defendant.

CLARK, J. On July 12, 1922, defendant, a mutual insurance company, a Michigan corporation, doing business indicated by its name, issued a policy of in-

surance to plaintiffs, covering, among other things, a silo at $300. The policy recites that plaintiffs became members according to the charter and by-laws.

The charter and the by-laws are printed on the policy. The charter gives the board of directors power to make, alter, amend, and repeal by-laws in any manner not inconsistent with law and the articles of association.

A by-law provides that the company may insure certain described property "and any other property subject to the terms and conditions of the articles of association and the by-laws of the company as they now exist and as they may hereafter be amended." In the application, plaintiffs requested insurance in accordance with the charter and by-laws and they agreed "to be governed in all cases by the charter and by-laws." On January 18, 1928, the board of directors amended a by-law to read as follows:

"Section 4—Limitation on Liability.

* * * "And on any wood-stave silo not to exceed two-thirds of the actual damage or cost of repair; and in no case shall the company be liable for loss or damage to any wood-stave silo that was empty and not filled the fall preceding the loss," etc.

On January 16, 1929, this was approved at the annual meeting of members. On August 13, 1929, plaintiffs' silo blew down. It was a wood-stave silo, empty and not filled the fall preceding the loss. If the company is liable, the agreed amount is two-thirds of $225. Plaintiffs prevailed in a trial without a jury. Defendant has appealed.

There is no question of waiver or estoppel. The sole question is whether plaintiffs are bound by the amendment to the by-law adopted after the making of the policy contract.

Our cases generally hold a policy holder bound by subsequent changes or amendments of by-laws where he has consented thereto, such as where he has agreed expressly in the contract to be so bound. *Livingston* v. *Cypher,* 243 Mich. 500; *De Graw* v. *Supreme Court, I. O. F.,* 182 Mich. 366; *Williams* v. *Supreme Council C. M. B. A.,* 152 Mich. 1; *Brown* v. *Great Camp K. O. T. M. M.,* 167 Mich. 123; *Wineland* v. *Maccabees,* 148 Mich. 608.

The charter and by-laws as then existing and in force are read into the contract. There was power in the board of directors to make amendments of by-laws. But plaintiffs did not expressly agree to be bound by amendments subsequently adopted. In *Becker* v. *Insurance Co.,* 48 Mich. 610, after the policy was issued a by-law was adopted whereby the policy was to cease in case of vacancy. The court held:

"The effect of this by-law, if applicable, is to add a new cause of forfeiture, and to that extent to work a radical change in the contract.

"It would hardly be claimed that it would be competent for any legislative body to change so completely the terms of an existing contract where there is no agreement that it shall be subject to change. But it is insisted the policy itself is declared to be subject to the charter and by-laws, and to the laws of the State. But if the contract was valid when made there was no power in the corporation to avoid its own agreement by one means any more than by another. Existing by-laws are in such cases of mutual insurance very properly regarded as entering into the contract and binding the members and open therefore to inquiry. But a contract once made with a member cannot differ in its essence from one made with any one else, and he cannot without his consent be brought into changed responsibilities, which im-

port new terms into the agreement itself. Whatever force new by-laws may possibly have in regard to other matters, they cannot be allowed to destroy express contracts. This principle has been repeatedly recognized as applied not only to by-laws, but to other action of a similar character."

The *Becker Case* was approved in *Borgards* v. *Insurance Co.*, 79 Mich. 440, where the court, in holding that a policy holder had consented to the by-law, said:

"This is not in conflict with the principle established in *Becker* v. *Insurance Co.*, 48 Mich. 610. In that case there was no agreement in the policy that it should be subject to change. There the policy was declared to be subject to the charter and by-laws, which meant, of course, the charter and by-laws as they then existed."

Again, in *Starling* v. *Royal Templars*, 108 Mich. 440 (62 Am. St. Rep. 709), it was held, quoting syllabus:

"A mutual benefit society which issues a certificate to a member providing for payment in case of total disability resulting from a specified cause cannot, without his express consent, change his contract by the adoption of a by-law excluding such cause of disability, although the member has agreed in his certificate to observe 'all the laws, rules, and regulations of the society.'"

And syllabus from *Covenant Mutual Life Ass'n* v. *Kentner*, 188 Ill. 431 (58 N. E. 966):

"Even if a benefit certificate states that the by-laws are a part of the contract and that they are subject to amendment, subsequent by-laws will be construed to apply only to contracts made after their adoption, unless there is an express agreement that a member shall be bound by future by-laws."

And syllabus from *Farmers Mutual, etc., Ass'n* v. *Slattery,* 115 Iowa, 410 (88 N. W. 949):

"Where the by-laws of a mutual hail insurance association at the time of the issuance of insured's policy made no provision for the suspension of policies for the failure to meet assessments, insured was not bound by a subsequent amendment thereof providing for such suspension though he agreed to be governed by the articles of incorporation and by-laws, the former of which expressly conferred power to enact by-laws on the directors."

And text from 32 C. J. p. 1164:

"While the charter of the company may be modified under legislative authority, and the by-laws may be amended or new by-laws adopted, the rights of insured under his contract cannot be affected, destroyed, or enlarged by a subsequent change in the articles of incorporation or association, or in the by-laws, rules, or regulations, either by amendment or by the adoption of new provisions, unless he assents thereto, or unless it is provided in the contract that he shall be bound by amendments or provisions subsequently adopted."

In 2 Cooley's Briefs on Insurance (2d Ed.), p. 1116, it is said:

"The rule undoubtedly is that in the absence of any express stipulation giving the right, or the subsequent assent of the member, the company cannot, by the passage of a by-law impairing his contract, bind the member."

And p. 1117:

"The mere reservation of power to enact by-laws does not alter the general rule."

In the absence of a provision in the contract that the plaintiffs, insureds, shall be bound by amend-

ments or provisions subsequently and lawfully adopted, or some like or equivalent stipulation, they are not bound by the by-law in question. Therefore they may recover.

Judgment affirmed.

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

NORTH, J. (*dissenting*). Plaintiffs' rights and defendant's liability are fixed by the terms of their contract, so the controlling consideration is determination of the contract provisions. Justice CLARK interprets their contractual relation as one which does not provide that their respective rights and liabilities are subject to subsequent changes in defendant's by-laws. In this I cannot agree. This policy expressly provides that plaintiffs became members of the mutual defendant company "according to the charter and by-laws." The charter and by-laws are printed as a part of the policy. Article 12 of the charter empowers the directors "to make, alter, amend and repeal" the by-laws not inconsistent with the law or articles of association. When plaintiffs became members of this mutual company, article 1, § 1, of its by-laws read as follows:

"Corporate Powers"

"This company may insure against direct loss or damage by tornado, cyclone or windstorm the following described classes of property owned by members and situate within the State of Michigan, namely, dwelling houses, stores, and all other kinds of buildings, household furniture, goods, wares and merchandise, and any other property subject to the terms and conditions of the articles of association

and by-laws of the company as they now exist *and as they may hereafter be amended.*"

Plaintiffs' application was for insurance "in accordance with its (defendant's) charter and by-laws;" and in their application they agreed "to be governed in all cases by the charter and by-laws," which were made a part of plaintiffs' policy by being printed therein; and thus plaintiffs' policy provided that the insurance contract was subject to the articles of association and by-laws "as they now exist and as they may hereafter be amended." From the foregoing it seems clear to me by the very terms of plaintiffs' policy they agreed that this mutual company of which they became members had power to modify the risks it carried, because such risks (including plaintiffs') were subject to the terms of the by-laws "as they now exist and as they may hereafter be amended." The quoted provision of the by-laws certainly must be given some meaning and application. I think it puts the instant case on all fours with *Livingston* v. *Cypher,* 243 Mich. 500, where the insured was held to be bound by the provisions in his policy that he should be subject to "the charter and by-laws now in force or that may hereafter be in force." To that proposition Justice FELLOWS, writing for the court, cited *Wineland* v. *Maccabees,* 148 Mich. 608; *Brown* v. *Great Camp K. O. T. M. M.,* 167 Mich. 123; *DeGraw* v. *Supreme Court, I. O. F.,* 182 Mich. 366; *Williams* v. *Supreme Council C. M. B. A.,* 152 Mich. 1.

We think it may well be said in this case, as was said in *Borgards* v. *Insurance Co.,* 79 Mich. 440:

"This policy was issued and received upon the express agreement that it was subject to all changes that should be thereafter made in the charter and by-laws. Such contract is valid. The defendant was a

mutual insurance company. The plaintiff, as a member, had an equal voice with the others in the management of its affairs. The by-law was regularly adopted. Under the charter, he could have had his policy canceled and withdrawn. By his conduct, he assented to the by-law, and the change in the terms of his policy caused thereby. This is not in conflict with the principle established in *Becker* v. *Insurance Co.*, 48 Mich. 610. In that case there was no agreement in the policy that it should be subject to change. There the policy was declared to be subject to the charter and by-laws, which meant, of course, the charter and by-laws as they then existed."

It is true that in the *Borgards Case* there was an agreement in the application for the insurance that the insured would be bound by subsequent changes in the charter or by-laws. But, as noted, in the case before us plaintiffs' application was made by express reference in accordance with the then existing by-laws and these contained the provision that the insurance contracts to be issued would also be subject to the by-laws "as they may hereafter be amended." A case identical in this respect is reported in *Hutchinson* v. *Supreme Tent,* 68 Hun, 355 (22 N. Y. Supp. 801), where the member in his application expressly agreed that the constitution of the insurance order should be a part of his contract, and the constitution provided that it might be amended, a subsequent amendment was held to be binding upon such member.

The case of *Becker* v. *Insurance Co., supra,* is clearly distinguishable from the instant case, because by the Becker policy his insurance was controlled only by the then existing charter and by-laws. Nowhere in the opinion is there any intimation to the contrary. Examination of the briefs and record filed in the *Becker Case* discloses that the insured

planted his right to recover on that ground; and on page seven of his brief he said "but by its (application's) terms, it clearly does not refer to future by-laws but to 'the by-laws made,' that is by-laws already made." Decision in the case was based on this ground. That being true, it is clear the defendant company could not change the terms of its contract with Becker, and he rightly recovered. In the *Becker Case,* as noted, there is not a word in the opinion of the court, and so far as we can find there was no provision in the application for insurance, in the policy issued, or in the existing charter or by-laws of the insurance company from which it could be inferred that Becker's policy was subject to alteration by subsequent modifications of the by-laws. In fact, Justice CAMPBELL planted his decision squarely on the ground that Becker's contract of insurance was one "where there is no agreement that it shall be subject to change."

In the instant case the subsequently adopted by-law was neither unreasonable nor illegal. It did not destroy or nullify any vested rights. Instead the new by-law only modified the insurance contract exactly in the manner provided by the terms of the contract. The importance of vesting mutual companies with power to thus modify their insurance contract is emphasized by consideration of the self-evident fact that the directors or managers of such companies are in duty bound to save the members from continuing to carry risks of a character that are sure to lead to disaster. Any other course invites receivership. The right to exercise this power has been considered and approved by us in numerous cases. *Wineland* v. *Maccabees, supra; Brown* v. *Great Camp K. O. T. M. M., supra; DeGraw* v. *Supreme Court, I. O. F., supra.*

The judgment entered in the circuit court should be set aside and the case remanded, with direction to enter judgment in favor of defendant. Costs to appellant.

BUTZEL, C. J., concurred with NORTH, J. POTTER, J., did not sit.

MIECHIKOSKI *v.* CHICAGO & NORTH WESTERN RAILWAY CO.

1. TRIAL—IMPROPER ARGUMENT—MASTER AND SERVANT—EXCESSIVE VERDICT—NEW TRIAL.

   In action under Federal employers' liability act against railroad company by employee for injuries received in fall from switch lamp, where plaintiff's counsel was guilty of improper argument in appealing to passion and prejudice of jurors, which was probably reflected in verdict, which was not only excessive but against clear weight of evidence, judgment is reversed.

2. APPEAL AND ERROR—NEW TRIAL—RECORD.

   Where improper argument of counsel was stated as one reason for motion for new trial and was considered by trial court in denying said motion, it may be considered by Supreme Court, although it does not appear in transcript.

   POTTER, SHARPE, and MCDONALD, JJ., dissenting.

Error to Gogebic; Driscoll (George O.), J. Submitted April 7, 1931. (Docket No. 123, Calendar No. 35,519.) Decided December 8, 1931.

Case by Joseph Miechikoski against Chicago & North Western Railway Company, a corporation, under the Federal employers' liability act, for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Reversed, and new trial granted.

Frank E. Hook, for plaintiff.

Ryall & Frost (*Waples & Waples,* of counsel), for defendant.

MCDONALD, J. (*dissenting*). This action was brought under the Federal employers' liability act (45 USCA § 51 *et seq.*) to recover damages for personal injuries sustained by the plaintiff in falling from a switch lamp while working for the defendant. On the trial there was a verdict and judgment for the plaintiff in the sum of $8,159.75, which defendant reviews on error.

The record presents the following questions, all of which were raised on motions for a directed verdict and a new trial:

1. Was there any evidence of defendant's negligence?

At the time of the accident, the plaintiff was engaged in cleaning, filling, and lighting lamps fastened on the top of switch stands. These stands were six feet high. The lower part was fastened to the railroad ties. About two or three feet up there was a small platform just large enough for the plaintiff to rest his feet on as he reached for the lamp at the top. Five inches below the lamp the rod or standard to which it was attached was spliced and held in position by three rivets. The plaintiff charges that the defendant negligently permitted this portion of the switch to become out of repair and dangerous,

in that it was not kept securely riveted; that two of the rivets had come out before the accident and were not replaced, so when he took hold of it as he customarily did before stepping from the platform, it moved and tipped towards him, causing him to fall on the ground and seriously injuring him.

There was evidence that two of the rivets were gone; that one rivet was not sufficient to hold the rod and lamp in place, but that it would tip as plaintiff says it did at the time of the accident. A witness, John Krinak, testifying for the plaintiff, said:

"I am acquainted with this Reno switch. I saw it before and after the accident. Before the accident there was a splice about six inches long and it was lapped and there was a rivet in it, and the thing used to wobble from one side to the other, and at certain places it used to catch about in the center, and then it used to fall over one way and then the other way. There was just one rivet in there. * * * One rivet would hold it but it wouldn't hold it tight. The notches might prevent it from falling over on itself. * * * It tipped east and west. * * * At times I have seen it standing straight up. The only way I figured it that those notches wouldn't let it go past and it stopped. It would go so far and stop there.

"*Q.* You were right there and saw this thing nearly every day; did it stand straight most of the time or was it leaning over most of the time?

"*A.* Sometimes leaning, sometimes straight."

George Abraham was a witness for the defendant, by whom he had been employed for 20 years. He was foreman of the Ironwood yards in which this switch is located. A part of his duties is to inspect the switch lamps. He testified:

"By a mere casual glance you can tell whether two of the rivets are gone, because the lamp would

absolutely tip right over. These two U-bolts there and one rivet would not keep that lamp in position."

The plaintiff testified that the tipping of the lamp toward him caused the fall. Defendant's witness George Abraham testified that if two rivets were gone the lamp would tip. Witness Krinak testified that two rivets were gone. This testimony if believed by the jury was sufficient to justify the conclusion that defendant was negligent in failing to keep the spliced portion of the rod properly riveted and that such negligence was the proximate cause of the plaintiff's injuries. The court did not err in submitting this question to the jury.

2. Did the plaintiff assume the risk of the injury complained of so as to preclude recovery as a matter of law?

In *Director General of Railroads* v. *Templin* (C. C. A.), 268 Fed. 483, cited with approval in *Howe* v. *Railroad Co.*, 236 Mich. 577, it was said:

"It is recognized that under the Federal employers' liability act an employee assumes the risks normally and necessarily incident to his employment, and also the extraordinary risks, or risks caused by his master's negligence; yet, he assumes the latter only when they are obvious or fully known by him and are such as would under the circumstances be seen and appreciated by an ordinarily prudent person."

In the instant case, it is not claimed that the plaintiff was injured in consequence of a risk ordinarily incident to his employment. If he was injured in the manner claimed by him, it was an extraordinary risk in using a defective switch attributable to his employer's negligence. Under the rule adopted by this court, he assumed this risk and is barred from recovery if the defect in the switch was fully known

by him or was so obvious that he should have known it and appreciated the danger from its use in that condition. It was not the duty of the plaintiff to examine the spliced portion of the bar to see that the rivets were in place. That was the daily duty of the foreman. According to the plaintiff's testimony, the lamp was not tipped when he went to fill it at the time of the accident, which indicated that the rivets were in place. After he had fallen, he noticed the lamp was tipped toward him, indicating that the rivets were not in place. Mr. Krinak, in his testimony, explains how the lamp at times could be straight in its position on the switch when two of the rivets were gone. In these circumstances, the plaintiff well might argue that the defect was not so obvious that an ordinarily prudent man should have seen it. The evidence was such that, whether it was fully known by the plaintiff or should have been known and appreciated by him, became a question for the jury. The court did not err in submitting it.

3. Should the trial court have set aside the verdict on the ground that it was excessive and against the clear weight of the evidence?

The verdict and judgment was for $8,159.75. As an element of the plaintiff's damages, the court allowed him to recover for future pain and suffering and diminished earning capacity. In view of the very doubtful testimony as to the extent of the plaintiff's permanent injuries, and considering his age, his state of health prior to the accident, and his then limited earning capacity, we think a verdict of $8,159.75 is excessive.

"To entitle a plaintiff to recover damages for apprehended future consequences of an injury, there must be a degree of probability of such consequences as to amount to a reasonable certainty that they will

result from the original injury." (Syllabus.) *Brininstool* v. *Railways Co.*, 157 Mich. 172.

At the time of the accident the plaintiff was about 60 years old. He was then afflicted with myocarditis, bronchial asthma, arterial and cerebral sclerosis, and other maladies of long standing. It was claimed by the plaintiff that the injury permanently aggravated these maladies. It is not necessary to indulge in any profitless discussion of the testimony on this question. It is sufficient to say that the great weight of medical opinion was to the effect that the plaintiff had not sustained any permanent injury from the accident. As to other elements of damages and as to defendant's liability for negligence, we agree with the trial court that the verdict is not against the great weight of the evidence. We have read carefully all of the testimony, and it is our opinion that a verdict of five thousand dollars would be within the evidence. Therefore unless the plaintiff shall within 30 days from the filing of this opinion remit all damages in excess of $5,000, the judgment should stand reversed and a new trial should be granted. If the excess is remitted, the judgment should stand affirmed. The defendant should have costs of this court.

We have considered all other assignments and have found no reversible error.

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

WIEST, J. I think the verdict not only excessive, but, as well, contrary to the clear weight of evidence.

The verdict quite likely reflects the following appeal of counsel for plaintiff to passion and prejudice:

"There has been some insinuation on the part of counsel for the defense and they have raised the question of manufacturing evidence. I wish to state to you, gentlemen of the jury, that some of you are acquainted with this old gentleman who voluntarily took the witness stand, old crippled John, that this silver-tongued slippery attorney for the North Western—

"*Mr. Ryall:* I think I ought to take an exception to that, if the court please, in view of the fact—

"*The Court:* That is improper. The expression 'slippery attorney' is entirely improper and you should not have used it. Do not repeat it. The jury will disregard it. * * *

"Counsel insinuated that there was a manufacturing of evidence. I believe that most of you gentlemen know John Krinak. Counsel said it was an insult to the intelligence of you gentlemen to bring a case of this nature into court. It is the same old line, gentlemen, that the attorneys for the railroad company have developed over years of defense practice. I don't blame him; he just naturally falls into that rut. It is the same old line. When an attorney will stoop to such a level and stray away from the facts and get down to the level of practically trying to brand this poor old man as a perjurer, then he certainly must have a slim case.

"We are not asking you to violate your oaths as jurors. You have never been asked by an attorney for the plaintiff in any case to violate your oaths as jurors. We want you to cling to your oaths as jurors, and when you do, gentlemen of the jury, you will bring in a verdict in favor of this old gentleman who for 30 years was in the employ of the Chicago and North Western Railway Company and was discharged and dismissed because he wouldn't sign a waiver of pension after he was injured."

In *Minneapolis, etc., R. Co.* v. *Moquin,* 283 U. S. 520 (51 Sup. Ct. 501), the court reviewed the failure

of a State court to grant a new trial in a case under the Federal employers' liability act, where the verdict was obtained by appeals to passion and prejudice. The court stated:

"Nor need we inquire into the rules applicable in trials under State law. Whether under the State's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial.

"In actions under the Federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

The judgment was reversed.

It is said, however, in the brief for plaintiff, that the argument complained of does not appear in the transcript. The defendant moved for a new trial and the argument quoted was stated as one reason and considered by the court in denying the motion.

After the accident the switch stand was removed and stored by defendant and brought into court, showed three rivets holding the splice and disclosed that the standard was rigid.

Plaintiff's case depended upon acceptance by the jury of the testimony of John Krinak, and, when he was confronted with the switch, he claimed that the switch from which plaintiff fell was higher than the one in court. If the switch in court was the one from which plaintiff claims he fell there was no case made against defendant.

The great weight of evidence established the fact that the switch in court was the one from which plaintiff claims he fell and that there had been no change made in it.

The verdict is reversed, and a new trial granted, with costs to defendant.

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

TORBERT *v.* SMITH'S ESTATE.

1. EXECUTORS AND ADMINISTRATORS—ATTORNEYS' FEES—ORAL CONTRACTS—EVIDENCE—SUFFICIENCY.

   In claim against estate of deceased wife, based on her oral contract to pay plaintiffs, as attorneys, 40 per cent. of any saving effected in reduction of Federal taxes claimed by the government, one-half of which was payable by her and the other one-half by her deceased husband's estate, of which she was sole beneficiary, evidence *held*, sufficient to establish said contract.

2. SAME—CONTRACTS—CONSIDERATION—ATTORNEYS' FEES.

   Under such circumstances, wife could bind herself to pay the whole charge for such services, there was ample consideration, and claim is allowed in full amount against her estate.

   WIEST, POTTER, and MCDONALD, JJ., concur in part; favoring allowance of only one-half of said claim against wife's estate.

Appeal from Wayne; George (Fred W.), J., presiding. Submitted June 2, 1931. (Docket No. 6, Calendar No. 35,654.) Decided December 8, 1931.

Hugh L. Torbert and Hugh G. Allerton, copartners as Torbert & Allerton, presented their claim against the estate of Hattie B. Smith, deceased, for professional legal services under an oral contract. From disallowance of the claim, plaintiffs appealed to the circuit court. Judgment for defendant. Plaintiffs appeal. Reversed.

Henry C. Bogle, for plaintiffs.

Lightner, Oxtoby, Hanley, Crawford & Dodd, for defendant.

MCDONALD, J. This is an appeal from a judgment of the circuit court disallowing a claim for legal services made by the plaintiffs against the estate of Hattie B. Smith, deceased.

Hattie B. Smith was the wife of James W. Smith. Together they owned and operated a trucking business in the city of Detroit known as the Smith Trucking Company, a copartnership. James W. Smith died October 17, 1926. Hugh L. Torbert, one of the plaintiffs, was named executor of the estate. Sometime in 1927, before Mrs. Smith died, notice was received that the U. S. government claimed a deficiency in the income taxes assessed against the Smith Trucking Company for the years 1923, 1924, 1925, and 1926. It is claimed by the plaintiffs that Mrs. Smith, who was considerably disturbed over the demands of the government, made an oral agreement with them by which they were employed to secure, if possible, a reduction in the taxes; that if they were successful she would pay them for their services 40 per cent. of the net amount of the reduction; that they fully performed their part of the contract and effected a total reduction in the taxes of $16,231.24.

In the meantime, Mrs. Smith died and plaintiffs filed their claim against her estate for $6,492.30. It was denied by the commissioners. The hearing on appeal was before the circuit judge without a jury. It was decided that the evidence did not establish the agreement claimed; that the agreement if established would be without consideration and therefore not valid or enforceable, and that Mr. Torbert as executor had petitioned for and received extra compensation for the same services from the estate of James W. Smith, deceased. On these findings, judgment was entered denying the claim.

We will discuss these findings in the order presented by the briefs.

1. Was the agreement established by the evidence?

Death has sealed the lips of Mrs. Smith and the statute relative to testimony as to matters equally within the knowledge of the deceased prohibits Mr. Torbert from testifying concerning his contract with her (3 Comp. Laws 1929, § 14219). In similar circumstances we have said it is not to be expected that the contract will be as definitely established as it would be if the parties to it could testify. But in this case we think there is sufficient evidence from parties competent to testify showing an agreement as claimed by the plaintiffs. We refer to the testimony of Mr. Moore and Mrs. Fader.

Mr. Moore, a long-time acquaintance and friend of Mrs. Smith, testified to a conversation with her concerning the contract. He said:

"We were talking about Mr. Torbert making the savings on the income tax. She figured that he would save around anywhere from $60,000 to $100,000. I said 'That would be fine,' and she said, 'Well, I will have to pay 50 per cent. of it,' and I

said, 'Well even at that it is a good bet.' That is all there was to it.''

He further testified to a conversation between Mrs. Smith and Mr. Torbert at the latter's office:

''Mrs. Smith said, 'Mr. Torbert, I think paying you 50 per cent. of the savings on the income tax is too much,' and Mr. Torbert said, 'Mrs. Smith, what do you figure you should pay me,' and she says, 'I think if I pay you 40 per cent. Mr. Torbert, it would be plenty,' and he said, 'It is satisfactory to me if it is satisfactory to you.' ''

Helen Fader, a niece of Mrs. Smith, the executrix of her estate and the chief beneficiary in her will, called by the plaintiffs as an adverse witness, testified that Mrs. Smith told her:

''That she had consented or agreed to an arrangement whereby Mr. Torbert was to get 40 per cent. of the savings.''

There being nothing to the contrary, this evidence is amply sufficient to establish the agreement.

2. Is the agreement valid and enforceable against the estate of Hattie B. Smith?

In discussing this question, the trial judge said:

''It is undisputed that at the time of making the alleged contract, Hugh L. Torbert was the qualified and acting executor of James W. Smith, and is still so acting. It is likewise undisputed on the record that all of the income taxes in question had been assessed against James W. Smith, and that his estate and his estate alone was liable for the payment of such taxes. It seems clear that any reduction that could be had could only be accomplished through action taken by the executor or personal representative of James W. Smith. Since Hugh L. Torbert was executor at the time of the alleged contract, and

since it would seem clearly his duty as executor to protect such rights as the estate might have in relation to securing tax refunds, I am of the opinion that no consideration existed to support a promise on the part of Hattie B. Smith personally to pay for such services. The rule is elementary that no consideration is furnished where one does or agrees to do only that which he is legally required or obligated to do. To say that a different result should be reached because Hattie B. Smith is the beneficiary under the will of James W. Smith and is therefore beneficially interested in the result, does not follow."

The court would be right in his conclusion if the only interest Hattie B. Smith had was as beneficiary in the will or if the estate of James W. Smith alone were liable for the taxes. But as we read the record he is mistaken as to the facts. Only one-half of the trucking business and the property was administered by the executor as belonging to the estate of James W. Smith. The other half belonged to Mrs. Smith. So, apart from her interest as beneficiary under the will, she had an absolute interest in her own right in one-half of all the property against which the tax was assessed. The estate of James W. Smith could rightfully insist that she should pay one-half of the tax. In making final settlement of the taxes, the government divided the income equally between the two estates. It is true that while her husband was living Mrs. Smith never filed a separate return for her half of the income. The returns were joint returns of husband and wife and included the income taxable to each of them. Such returns are permitted under the income tax law, although they could be made separately (26 USCA § 964). It must be conceded that Mrs. Smith was liable for one-half of the taxes, and if not paid they would become

a lien against property held by her independently. Mr. Torbert, as executor of Mr. Smith's estate, owed her no duty in respect to her taxes. She did not represent his estate in any capacity, but was free to contract with his executor in reference to her separate business. Her liability for one-half of the taxes was sufficient consideration for such a contract. As to her, it was valid and enforceable. The benefits she received individually were one-half of the reduction in taxes effected by the plaintiffs. To that extent her estate is liable.

3. Does the fact that Mr. Torbert, as executor, petitioned for and was allowed extra compensation from the estate of James W. Smith for services in relation to the same taxes bar plaintiffs' recovery under their agreement with Hattie B. Smith?

The record shows that no claim of the plaintiffs for legal services in relation to these taxes has been allowed or is pending in the estate of James W. Smith. There was an allowance made by the probate court to the executor for extra compensation, but, as that did not include payment for legal services, it has no bearing on the issue here involved. The probate court has authority to allow an executor reasonable compensation including necessary attorney fees for services in administering an estate. But any claim which the plaintiffs may have in the James W. Smith estate is separate and distinct from the claim here. Of course they cannot realize twice on the same claim and are not attempting to do so. Hattie B. Smith, by reason of her contract, became personally bound for the payment to the plaintiffs of 40 per cent. of one-half of the reduction effected in the additional taxes claimed by the government. To that extent the plaintiffs' claim against her estate should be allowed. The cause should be remanded

to the circuit court for the entry of a judgment in their favor in the sum of $3,246.15 with interest at five per cent. from the date the claim matured. The plaintiffs will have costs.

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

NORTH, J. I concur with Mr. Justice MCDONALD in holding that the testimony establishes the "agreement as claimed by the plaintiffs;" but I am also of the opinion it necessarily follows that plaintiffs should recover their full compensation from Mrs. Smith instead of one-half of it. This is the only fair conclusion that can be drawn from the declarations of Mrs. Smith quoted in Mr. Justice MCDONALD's opinion. In making her final bargain for plaintiffs' services Mrs. Smith said to one of them: "I think if I pay you 40 per cent., Mr. Torbert, it would be plenty." Her proposition was accepted by plaintiffs. One-half of the income tax to be paid to the government was a direct obligation of and charged against Mrs. Smith; the other half was against Mr. Smith's estate, of which Mrs. Smith was the sole beneficiary. Mr. Smith had died before Mrs. Smith made her contract with plaintiffs. Subject to payment of debts and expenses of administration, she was then the sole beneficial owner of the property that constituted Mr. Smith's estate, although technically title to the personalty had not yet vested in her. Plaintiffs effected a saving of $16,231.24, all of which inured directly to Mrs. Smith's benefit. Under such circumstances, she could and did bind herself to pay the whole charge for plaintiffs' services. There was ample consideration for this agreement on her part. Plaintiffs'

claim against Mrs. Smith's estate should be allowed for the full amount, $6,492.50, with interest at five per cent. from the date their claim was filed. The circuit court will so order. Costs to appellants.

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

POMEROY *v.* DYKEMA.

1. APPEAL AND ERROR—DIRECTED VERDICT.
   On appeal from judgment on directed verdict, record must be construed in light most favorable to appellant.

2. MOTOR VEHICLES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.
   Where, in action for death of plaintiff's decedent resulting from collision with automobile, question of decedent's contributory negligence was brought into case, burden of establishing his freedom from contributory negligence was on plaintiff.

3. SAME—ABSENCE OF PROOF—DIRECTED VERDICT.
   Where plaintiff failed to offer any testimony that her decedent was free from contributory negligence, although that question was in case, judgment for defendant was properly directed.

4. SAME—EYEWITNESSES—PRESUMPTION OF FREEDOM FROM NEGLIGENCE—INFERENCES.
   Where there was testimony of eyewitnesses as to facts and circumstances immediately surrounding accident causing death of plaintiff's decedent, from which reasonable inferences may be drawn as to whether he was exercising reasonable care, presumption that he was not guilty of contributory negligence vanishes, although no one saw the impact.

On burden of proof as to contributory negligence, in action for death, see annotation in 33 L. R. A. (N. S.) 1230.

5. SAME—PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.
   Pedestrian about to cross street from west side is bound to be mindful that lawful course of south-bound vehicles is on westerly side.

6. SAME—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.
   Pedestrian who walked into side of automobile and was killed as automobile was proceeding south on right-hand side of street after coming around truck parked on west side, was guilty of negligence which caused or at least contributed to accident, justifying directed verdict in favor of driver.

Appeal from Muskegon; Vanderwerp (John), J. Submitted October 16, 1931. (Docket No. 125, Calendar No. 36,002.) Decided December 8, 1931.

Case by Alice Pomeroy, administratrix of the estate of June Pomeroy, deceased, against Cornelius O. Dykema for personal injuries resulting in the death of plaintiff's decedent. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Galpin, Smedley & Dunn, for plaintiff.

Amos F. Paley, for defendant.

NORTH, J. At the close of plaintiff's proofs in this automobile accident case, the court directed a verdict in defendant's favor. Plaintiff has appealed. The sole question presented is whether direction of the verdict was error. Under such circumstances, the record must be construed in the light most favorable to appellant.

About 5:30 in the afternoon of April 19, 1929, defendant was driving his Studebaker coupe in a southerly direction on U. S. 31 in the city of North Muskegon in the block next south of Ruddiman avenue. The paved highway was 20 feet in width exclusive of

the gutters at the side, the total width being substantially 32 feet. A truck delivering merchandise to a store on the westerly side was backed against the curb and extended in a northeasterly direction practically to the center line of the street. As defendant approached the truck he was compelled to drive on the easterly side of the center line of the street. After passing the truck he turned his car back towards the westerly side of the street and just at this point he struck plaintiff's decedent, June Pomeroy, who obviously was attempting to cross from the westerly curb to his place of business on the opposite side of the street. He received fatal injuries. Defendant was driving about 25 miles per hour and going down something of a grade. He was not sworn as a witness, but it appears from the testimony of plaintiff's witnesses that defendant said he did not know that his automobile had struck anybody until he was told so shortly thereafter by a priest who seems to have been riding with him. Defendant thereupon stopped his automobile and returned to the point of accident. So far as the record discloses no one saw the impact between defendant's car and plaintiff's decedent; but there is testimony from plaintiff's witnesses that two days after the accident defendant showed them the side of the car "where he, Pomeroy, hit the handle of the door and cracked it." The door handle was cracked. There was a mark across the side of the car almost the full length of the door in line with the handle. One of these witnesses at the time was on the easterly side of the street directly opposite the point of accident. He was engaged in servicing a car at a filling station. Only an instant before he had seen plaintiff's decedent at the curb line on the opposite side of the street. This witness testified: "I didn't actually

see the car and June as they came together; the car was between me and him. When I saw the car going down the hill it was on the right-hand side of U. S. 31." At that time plaintiff's decedent was lying on the cement roadway near the westerly curb.

Defendant's motion for a directed verdict was based both upon the ground that there was no testimony tending to establish actionable negligence on the part of defendant, and that plaintiff failed to offer any testimony tending to show her decedent was free from contributory negligence. The court granted the motion upon the latter ground. In this we think the court was correct. The question of contributory negligence having been brought into the case, the burden of establishing that her decedent was free from contributory negligence was upon plaintiff. It is the claim of plaintiff that, since there were no eyewitnesses to the actual impact between decedent and defendant's car, he is presumed not to have been guilty of contributory negligence. We think plaintiff cannot claim the benefit of such a presumption under the record made in this case. There is proof by eyewitnesses of the facts and circumstances immediately surrounding the accident, and from such proof fair and reasonable inferences may be drawn as to whether or not plaintiff's decedent did exercise reasonable care in attempting to cross this street. Under such circumstances the presumption in his favor ceases. *Richardson* v. *Williams,* 249 Mich. 350; *Elrich* v. *Schwaderer,* 251 Mich. 33. This accident happened in daylight hours. It was raining at the time. Careful consideration of the record convinces us that plaintiff's decedent attempted to cross the street and in passing opposite the parked truck he walked or ran into the side of

defendant's car and in so doing he was guilty of contributory negligence.

In support of her contention that the record presents an issue of fact for the jury, appellant in her reply brief states: "The facts are that the deceased was hit on the leg by the running board as the car swerved toward him, the front of the car just missing him. The force of the running board striking him such a blow threw his head forward so he struck the car door handle." This theory of appellant is not tenable under the record, because there is no evidence that defendant's car "swerved towards" plaintiff's decedent. At the point of accident defendant, after having passed the parked truck, was approaching the westerly side of the highway. It was his right and duty to drive on the westerly side; and plaintiff's decedent in attempting to cross was bound to be mindful that such was the lawful course of passing vehicles. It conclusively appears that when the accident happened defendant was driving on his right-hand side of the thoroughfare, and that plaintiff's decedent was guilty of negligence which caused or at least contributed to his injury. The judgment of the circuit court is affirmed, with costs to appellee.

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

LALLEY *v.* TULLER HOTEL CO.

1. RECEIVERS—ALLOWANCE OF ADMINISTRATIVE EXPENSES.
   "Surplus" decreed by court to be paid to trustee by receiver of hotel property is construed to mean surplus left in his hands after payment of administrative expenses.

2. SAME—FINAL ACCOUNT—COURT ORDER PROTECTION TO RECEIVER—ATTORNEYS' FEES.
   Order of court for payment of appraisers' and attorneys' fees, made after hearing and before payment, is complete protection to receiver, and amounts so paid were properly allowed in receiver's final account.

3. APPEAL AND ERROR—RECEIVERS—FINAL ACCOUNT—QUESTIONS REVIEWABLE.
   Reasonableness of appraisers' and attorneys' fees, paid by receiver on order of court after hearing thereon, is not open to review on appeal from allowance of receiver's final account.

4. RECEIVERS—COMPENSATION—FINAL ACCOUNT.
   Receiver's compensation was proper subject for attack on hearing on allowance of his final account.

5. SAME—RECEIVER'S COMPENSATION—APPEAL AND ERROR.
   Where receiver introduced proof as to value of his services, and there was no proof that amount charged by him was unreasonable, its allowance is not disturbed, on appeal.

Appeal from Wayne; Moll (Lester S.), J. Submitted June 12, 1931. (Docket No. 57, Calendar No. 35,688.) Decided December 8, 1931.

William H. Lalley presented his final report as receiver of the Tuller Hotel Company. Detroit Trust Company, trustee under trust mortgage, filed objections thereto. From an order confirming said final report, Detroit Trust Company appeals. Affirmed.

Wiley, Streeter, Smith & Ford, for appellant.

Bulkley, Ledyard, Dickinson & Wright (*Charles H. L'Hommedieu* and *Edgar C. Howbert,* of counsel), for appellee.

McDONALD, J. This is an appeal from the judgment of the circuit court for Wayne county, allowing the final account of William H. Lalley, receiver of the Tuller Hotel Company.

Mr. Lalley was appointed receiver by a consent decree entered in the Supreme Court on May 20, 1930. He operated the hotel until his resignation on December 6, 1930. His final account was presented to the circuit court for allowance. The Detroit Trust Company, trust mortgagee, filed objections to the items charged for the receiver's compensation, and asked that he be surcharged with the amounts paid by him to attorneys and appraisers. On the hearing, the court allowed the account in full and discharged the receiver. The Detroit Trust Company, trustee, has appealed.

The appellant's interest in this proceeding and its right to contest the allowance of the account is by virtue of the following provision of the consent decree:

"The trustee under the trust mortgage now standing against the Hotel Tuller property shall have prior right to receive from the receiver, for application upon mortgage indebtedness in accordance with the provisions of the mortgage, all surplus moneys derived by the receiver from the operation of the Hotel Tuller and not disbursed by the receiver in accordance with this decree; and the monthly surplus shall be paid by the receiver to such trustee within ten days next succeeding the calendar month in which such surplus has accrued."

The trustee interprets this provision to mean that the entire surplus shall be paid to it without regard to the receiver's administrative expenses. The language will not admit of such an interpretation. It says: "All surplus moneys * * * not disbursed by the receiver in accordance with this decree." The decree contains considerable detail as to the operation of the hotel. It does not expressly provide compensation for the receiver, but it was not intended that he was to work for nothing. We think a reasonable construction of the plain language of the decree is that the "surplus" to be paid the trustee was the amount remaining in the receiver's hands after payment of the administrative expenses.

As to the disbursements to appraisers and attorneys which the trustee contends should be surcharged to the receiver, the question is ruled by the case of *In re Angell,* 131 Mich. 345. In that case as in this, payments of attorneys' fees were made on orders of the circuit court. It was said:

"A receiver is an officer of court, and amenable to it for a proper discharge of the trust confided to him. When he is in doubt as to what he ought to do, he should take the advice of the court. In this case, before paying the counsel's fee, the receiver presented it to the court, which passed upon it favorably before it was paid by the receiver. Under such circumstances, the receiver ought not to be charged back with funds paid out by him."

In the instant case, before the receiver paid any of the fees, he formally petitioned the circuit court for permission to do so. After a hearing, on which the court seems to have been fully advised, he made an order for their payment. The order is a complete protection to the receiver. It may be, if we were called on to consider these charges, that we

would agree with the appellant that they were excessive and in large part unnecessary; but they are not here for review.

The receiver's compensation was a proper subject for attack by the appellant on the hearing of his final account; but no evidence was offered to show that the amount charged was unreasonable. The receiver introduced proof as to the value of his services. It was not contradicted. If a party expects us to substitute our judgment for that of the trial court, he should furnish some evidence to justify it. *Horvath* v. *Vasvary,* 246 Mich. 231.

Other questions of a more or less technical nature presented by the briefs have been considered but we do not deem it necessary to discuss them.

The judgment is affirmed, with costs to be paid by the appellant.

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

GENERAL MOTORS ACCEPTANCE CORP. *v.* LEE.

1. CHATTEL MORTGAGES—RELATION OF PARTIES IS THAT OF DEBTOR AND CREDITOR.

Although at common law a chattel mortgage was considered an instrument of sale, conveying title to the mortgagee, in this State it is held that the true relation of the parties is that of debtor on one side and creditor secured by lien on property on the other.

2. SAME—LIABILITY OF MORTGAGEE FOR PURCHASE PRICE.

Under written instrument executed by purchaser mortgaging automobile to secure payment of purchase price, and promising to pay any deficiency arising on foreclosure, purchaser is liable in action for balance due after automobile has been rendered practically worthless by collision, although there is no express promise to pay in said mortgage, and no note or other evidence of indebtedness is secured thereby.

Appeal from Muskegon; Vanderwerp (John), J. Submitted July 30, 1931. (Docket No. 151, Calendar No. 35,557.) Decided December 8, 1931.

Assumpsit by General Motors Acceptance Corporation, a corporation, assignee of chattel mortgage, against John Lee for the balance of the purchase price of an automobile. Judgment for defendant. Plaintiff appeals. Reversed, and judgment ordered entered for plaintiff.

Lou L. Landman, for plaintiff.

SHARPE, J. On June 4, 1929, the defendant executed a written instrument, from which we quote:

"The undersigned mortgagor hereby purchases from the undersigned mortgagee, subject to the terms and conditions hereinafter set forth, the following property, complete with standard attachments and equipment, delivery and acceptance of which is hereby acknowledged by mortgagor, viz.:

"One—New or used, new. Year, model, 1929. Make, trade name, Chevrolet. Type of body (if truck, give tonnage), coupe. Model letter or number, Int. Motor No., 787848. Manufacturer's Serial No., 1AC65891.

"For a total time price of $729.20, payable as follows: $235 on or before delivery, leaving a deferred balance of $494.20 payable at the office of

General Motors Acceptance Corporation to be hereafter designated by it, in installments of $42. * * *

"To secure payment of the purchase price, the mortgagor does hereby grant, bargain, sell and mortgage unto said mortgagee, the above described personal property to have and to hold unto said mortgagee, his personal representatives, successors and assigns forever."

It contained the usual provision that in the event of default, etc., "the full amount shall be immediately due and payable," which was followed by an authorization on the part of the mortgagor that in such event a judgment by confession might be entered against him. The usual provision for foreclosure by sale of the mortgaged property followed, and "in case of deficiency the mortgagor shall pay the same with interest."

It was also executed by the Forberg-Paulson Company as seller—mortgagee. On June 7th the mortgagee duly assigned all its rights under this instrument to the plaintiff. The defendant made two payments thereon, amounting to $74, leaving a balance unpaid thereon of $420.20.

The automobile was damaged in a collision at Urbana, Ohio, so as to render it practically worthless. After some ineffectual efforts at adjustment, the plaintiff brought this action to recover the balance due it under the mortgage and assignment. The amount thereof is not in dispute. The issue was tried before the court without a jury. He held that there was no promise to pay in the mortgage and that all the mortgagee "obtained by the instrument" was "a mortgage upon the car for the payment of the money secured thereby," and entered a judgment for the defendant, of which plaintiff seeks review by appeal.

No note or other evidence of indebtedness was secured by the mortgage. At common law a chattel mortgage was considered an instrument of sale, conveying the title to the mortgagee. In this State it has uniformly been held that—

"The true relation of the parties is that of debtor on the one side, and creditor secured by lien on property upon the other." *Lucking* v. *Wesson,* 25 Mich. 443, 445.

See, also, *Hannah & Hogg* v. *Richter Brewing Co.,* 149 Mich. 220 (12 L. R. A. [N. S.] 178, 119 Am. St. Rep. 674, 12 Ann. Cas. 344).

While there is no express promise to pay in the mortgage, it clearly appears that it was executed to secure the payment of the balance due upon the car and contains an unqualified promise on the part of the defendant to pay any deficiency arising upon foreclosure.

The defendant has not appeared or filed any brief in this court. We cannot but conclude on the record before us that the court was in error in entering a judgment for the defendant, and an order will be entered setting it aside, with costs to plaintiff, and the cause remanded, with directions to enter a judgment for the amount due plaintiff.

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

GOETHE *v.* GMELIN.

1. MORTGAGES—CONSIDERATION—GIFT OF MORTGAGE VALID.
   Although mortgage on land was executed to secure payment of note which was gift, it is valid, since mortgage may be made by way of gift when rights of creditors are not thereby interfered with.

2. CANCELLATION OF INSTRUMENTS—MORTGAGES—GIFT OF MORTGAGE VALID.
   In suit to set aside mortgage on land, on ground that it was void because given without consideration, decree in favor of plaintiff is reversed, on appeal, where it appears that mortgage was gift, and plaintiff acquired title to land as devisee of mortgagor.

Appeal from Ingham; Carr (Leland W.), J. Submitted June 9, 1931. (Docket No. 74, Calendar No. 35,572.) Decided December 8, 1931. Rehearing denied March 3, 1932.

Bill by Celia Goethe against Arthur Gmelin, administrator of the estate of Christena Gmelin, deceased, to set aside a mortgage. Decree for plaintiff. Defendant appeals. Reversed.

Cummins & Cummins, for plaintiff.

Whiting, Kleinstiver & Aubrey, for defendant.

SHARPE, J. John Johnson, a widower 70 years of age, married Amelia Keinath, a widow 68 years old, at Lansing, in January, 1918. Each had children by a former marriage. He at that time owned two adjacent lots in Lansing, on one of which a house then stood. In the summer of that year, a bungalow

As to definition of estate by entireties, see annotations in 30 L. R. A. 306; 33 L. R. A. (N. S.) 166.

was built on the vacant lot, and they moved into it and it was thereafter their home. On September 24th of that year, Mr. and Mrs. Johnson conveyed this property to Harry A. Young and Daisy Young, and they deeded back to the Johnsons, "husband and wife, jointly," thereby creating an estate in them by the entireties. These deeds were duly recorded.

On November 26, 1927, Mr. and Mrs. Johnson executed a mortgage upon this property to her daughter, Christena Gmelin, for the sum of $2,000, payable in five years, with interest at six per cent., payable annually. This mortgage recited that it was payable "according to a certain promissory note bearing even date herewith." This mortgage was duly recorded.

Mrs. Johnson passed away in March, 1928. In June of that year Johnson executed a will, devising the lot in question to his daughter, the plaintiff. He died in April, 1930. Mrs. Gmelin has also become deceased, and her husband, the defendant, has been appointed administrator of her estate, and as such has possession of said note and mortgage.

The bill of complaint herein was filed to secure a decree that said note and mortgage were void, because executed without consideration, and the record relieved from the apparent lien created thereby. Plaintiff had decree, from which defendant has appealed.

The trial court found that the mortgage was given to secure a note executed by the mortgagors without consideration therefor. This finding is supported by the evidence. Based upon the holding of this court in *Graham* v. *Alexander*, 123 Mich. 168, he held that the note was but a promise to make a gift

in the future, and, such gift not having been executed during the lifetime of the donor, it is not valid as a contract to be executed. See, also, *Snyder* v. *Snyder,* 131 Mich. 658. Were the claim here made against the estate of the mortgagors based upon the note, the rule as stated would apply. We find no authority extending this rule to a mortgage, although it be security for the payment of a note.

In *Brigham* v. *Brown,* 44 Mich. 59, 62, it was said:

"Nevertheless a man may give a voluntary mortgage if he chooses, and it is fraudulent only as to those who are or would be defrauded by it. *Gale* v. *Gould,* 40 Mich. 515. And no one would be defrauded, in contemplation of law, who was merely a subsequent mortgagee with notice, actual or constructive, of the voluntary instrument."

The rule thus stated has been accepted by textbook writers.

"A mortgage may be made by way of gift, when the rights of creditors are not thereby interfered with." Aldrich, Michigan Mortgages, § 180.

"A mortgage may be made by way of gift, when the rights of creditors are not thereby interfered with. When executed and delivered it is as valid as if it were based upon a full consideration. It is not open to the objection that it is a voluntary executory agreement, but may be enforced according to its terms as an executed conveyance." 2 Jones on Mortgages (8th Ed.), § 756.

In *Campbell* v. *Tompkins,* 32 N. J. Eq. 170, 172, it was said:

"It cannot be doubted that even now a valid mortgage may be given where no valuable consideration exists. Otherwise, the absolute control of the owner over his property is taken away, for he would not be

permitted to give it away in his life-time by deed. The mere fact that there was no consideration would not now render the mortgage invalid. A mortgage may be sustained as against all except creditors whose claims existed at the time of giving it, although it was intended merely as a gift; and, when executed and delivered, it is as valid as if it were based upon a full consideration, and it is not open to the objection that it is a voluntary executory agreement, but it may be enforced according to its terms as an executed, conditional transfer of the real estate mortgaged. *Brooks* v. *Dalrymple,* 12 Allen (94 Mass.), 102; *Bucklin* v. *Bucklin,* 1 Abb. App. Dec. 242 (1 Keyes [N. Y.], 141); Jones on Mortgages § 614."

If the interests of creditors are involved, the consideration may be inquired into. Plaintiff's title rests upon a devise in the will of the survivor of the mortgagors. In our opinion it should be held that she takes subject to the rights of the defendant under the mortgage.

It follows that a decree may be here entered dismissing the bill of complaint, with costs of both courts to the defendant.

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

PITTELKOW HEATING & ENGINEERING CO. *v.* DETROIT ESTATES CORPORATION.

1. EQUITY—MORTGAGE BONDS—MECHANICS' LIENS—RECEIVERS—PARTIES.

   Bondholder who intervened in suit to foreclose mechanic's lien on apartment house, incident to which receiver was appointed, has no legal or equitable grounds on which to base objection to action of circuit court in discharging receiver, where intervener's bonds have been called in for cancellation by trustee under bond issue, on payment of stipulated price, as provided for therein.

2. SAME—PARTIES—UNDISCLOSED PARTIES.

   Bondholder intervening in suit claiming to be acting not only on his own behalf but on behalf of other undisclosed bondholders is treated as acting on his own behalf only.

3. SAME—APPEARANCE—RELIEF.

   Bondholders who did not enter appearance in suit and whose identity is undisclosed may not be granted relief, where no relief was granted to another bondholder appearing in his own behalf and claiming to also appear for them.

Appeal from Wayne; Merriam (DeWitt H.), J. Submitted October 7, 1931. (Docket No. 24, Calendar No. 34,978.) Decided December 8, 1931.

Bill by Pittelkow Heating & Engineering Company, a Michigan corporation, against Detroit Estates Corporation, a Michigan corporation, and others to foreclose a mechanic's lien. Cross-bills were filed by other lien claimants. Lewis M. Dickens, trust mortgage bondholder, intervened. From order discharging receiver, intervener appeals. Affirmed.

Walter M. Nelson, for appellant.

Yerkes, Goddard, McClintock & Shreve, for Fidelity Trust Company, receiver.

Bulkley, Ledyard, Dickinson & Wright, for Union Trust Company, trustee mortgagee.

Sempliner, Dewey, Stanton & Bushnell, for the Milton Strauss Corporation, Empire Construction Company, and C. M. H. Holding Company.

Monaghan, Crowley, Reilley & Kellogg (*Edward T. Kelley,* of counsel), for Banbrook-Gowan Company, Richmond Fireproof Door Company, and C. H. Patterson Company, lien claimants.

NORTH, J. Incident to plaintiff's bill for the foreclosure of a mechanic's lien against an apartment building in the city of Detroit in process of construction, title to which was in the Detroit Estates Corporation, the defendant Fidelity Trust Company was appointed receiver. The defendant Union Trust Company was serving as trustee under a first mortgage bond issue in the sum of $650,000 given in December, 1926, covering this apartment property. The Milton Strauss Corporation was the underwriter and acting broker of the proposed bond issue. Substantially $350,000 of the bond issue was sold to the public. The Michigan State securities commission authorized the sale of these bonds upon the representation that the proceeds were to be used in the construction of a theatre, store, and apartment building at a cost of $850,000. A construction contract was entered into with the Empire Construction Company in April, 1927. Except as otherwise hereinafter indicated, the other defendants are subcontractors seeking by way of cross-bills to foreclose mechanics' liens.

By the time the building was substantially 50 per cent. completed, the affairs of the Detroit Estates Corporation had become badly entangled, and inability to market the balance of the bond issue resulted in suspension of construction operations. For months efforts were made by those interested in one way or another to refinance the project. This finally resulted in a tentative arrangement by which many of the bondholders agreed to surrender their holdings and in lieu thereof take stock in the Andrew C. Sisman Company, a corporation, which undertook to complete the construction of the building on condition that it should have power to obtain the necessary funds therefor and that this amount should be a first lien upon the property.

Appellant, being the owner of two of the first mortgage bonds, amounting to $200, issued by the Detroit Estates Corporation, petitioned to intervene in the cause in December, 1928. Permission was granted, and by cross-bill he attacked practically all of the transactions to which reference has been made hereinbefore, alleging that each of them was conceived and executed, so far as they were executed, with the intent and purpose of defrauding the bondholders. Perpetration of this fraud is not only charged to those who originally incorporated the Detroit Estates Corporation, to the trustee under the bond mortgage, to the Milton Strauss Corporation, to the Andrew C. Sisman Company, but also to the contractor and subcontractors having part in the construction of the apartment. By way of relief, the intervener asked that the Union Trust Company be removed as trustee, that a receiver be appointed of the Detroit Estates Corporation and directed to sell its property and assets, that receivers be appointed of various other defendants, that the subcontractors,

laborers, and materialmen and all others be prohibited from proceeding with the construction of the building upon a plan calling for construction at an alleged cost of $550,000 instead of $850,000, and for sundry other relief.

It fairly appears from the record that early in October, 1929, the parties who had undertaken to refinance this enterprise had completed the arrangement of the details. As a part of this plan it was necessary that the receiver should be discharged. On October 10, 1929, a petition was filed by the plaintiff in the principal case wherein the receiver was appointed and also by the receiver for a hearing on the final account and a discharge of the receiver. Upon application to the circuit court, hearing was set for October 12, 1929, and at that time the receiver was discharged. Thereupon the Detroit Estates Corporation quitclaimed title in this property to the Andrew C. Sisman Company, and the Union Trust Company discharged the trust mortgage. Intervener's counsel, with the knowledge of the trial court, was absent from the jurisdiction of the court at the time the application for a discharge of the receiver was made and until after the order discharging him was entered. Appellant, claiming that the order of October 12, 1929, discharging the receiver, was consummated in fraud of his rights, moved the circuit court to set it aside. This motion was denied on January 25, 1930. For reasons not here important, this order of January 25th was set aside and re-entered February 13, 1930. Appellant's appeal followed.

By the terms of the bond purchased by appellant it is subject to call at $1.02 and accrued interest. The funds with which to redeem it and other outstanding bonds of like character are in the hands of

the trustee, and on the 7th day of December, 1929, a call for the surrender of these bonds under the terms hereof was published in the Detroit Free Press. It appears from the record that both appellant and his attorney have been advised that the money to which appellant is entitled under the terms of his bonds is waiting in the hands of the trustee to be paid to him upon surrender of such bonds. It is too clear for argument that the trustee has the right, as a matter of law, to have appellant's bonds surrendered and canceled in the manner above indicated. This being done, appellant will no longer be interested in the subject-matter of the suit in which he has intervened and incident to the prosecution of which the receiver was discharged. Therefore appellant has neither legal nor equitable grounds upon which to base an objection to the action of the circuit court in discharging the receiver.

While appellant alleges that in this proceeding he not only acts in his own behalf but in behalf of holders of other bonds amounting to $1,700, it does not appear who such other bondholders may be, nor is the authority for such action on the part of appellant made apparent. In any event, such other bondholders, not having entered an appearance, cannot be granted relief in the event none is obtained by appellant. On the record, appellant's intervention must be treated as one in his own behalf only. The orders of the circuit court from which this appeal was taken are affirmed, with costs to appellees.

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

HALL *v.* DETROIT ESTATES CORPORATION.

1. CANCELLATION OF INSTRUMENTS—MORTGAGE BONDS—EQUITY—DISMISSAL.

   Suit for cancellation of instruments executed in furtherance of plan for refinancing construction of building, involving exchange of bonds for stock in company taking over property, and also mortgages executed by latter for purpose of completing building, was properly dismissed for want of equity, where it appears that plaintiff, who exchanged his bonds for stock, had only $2,000 of $350,000 worth of bonds issued, and that most of the bondholders have exchanged their bonds for stock and are not here complaining.

2. EQUITY—ADEQUATE REMEDY AT LAW—DISMISSAL.

   Where plaintiff was not entitled to any equitable relief prayed for, and only relief possible under general prayer of bill is damages, which are recoverable, if at all, in action at law, and plaintiff declined offer to transfer cause to law side of court, bill was properly dismissed.

Appeal from Wayne; Moll (Lester S.), J. Submitted October 7, 1931. (Docket No. 26, Calendar No. 35,257.) Decided December 8, 1931.

Bill by Arden Hall, trust mortgage bondholder, against Detroit Estates Corporation, a Michigan corporation, and others to set aside certain conveyances and transactions. Bill dismissed. Plaintiff appeals. Affirmed.

Walter M. Nelson, for plaintiff.

Bulkley, Ledyard, Dickinson & Wright, for defendant Union Guardian Trust Company.

Warren, Hill & Hamblen, for defendant National Bank of Commerce of Detroit.

Yerkes, Goddard, McClintock & Shreve, for defendants Fidelity Bank & Trust Company and Andrew C. Sisman Company.

NORTH, J. In part, the facts and issues here involved are the same as those in *Pittelkow Heating & Engineering Co.* v. *Detroit Estates Corporation, ante,* 116. Plaintiff herein was the owner of $2,000 in bonds issued on the Detroit apartment property by the Detroit Estates Corporation as outlined in the *Pittlekow Case.* Incident to refinancing the Detroit Estates Corporation's affairs, plaintiff, like most of its other bondholders, exchanged his bonds for stock in the Andrew C. Sisman Company, receiving 20 shares of preferred stock and 10 of common. It appears in this bill of complaint that, in refinancing the Detroit Estates Corporation and after title to its property had passed to the Andrew C. Sisman Company, it mortgaged the premises to the National Bank of Commerce of Detroit for $525,000 and it also gave a deed of trust to the Fidelity Trust Company to secure a bond issue of $500,000. From funds thus obtained the apartment building was completed by the Sisman company; and it is alleged in plaintiff's bill of complaint that "mostly all" of the bondholders exchanged their bonds for stock in the Sisman company.

Plaintiff alleges and relies for relief not only on the frauds noted in the *Pittelkow Case,* but further alleges that the Union Trust Company in violation of its trust and the other defendants denied the bondholders information to which they were entitled and concealed from them the true facts as to the value

of their bonds. Plaintiff further alleges at that time the bonds were worth two per cent. above par and accrued interest, and that defendants conspiring together deceived, cheated, and defrauded plaintiff and most of the bondholders by inducing them to exchange their bonds for alleged worthless stock in the Sisman company. The relief sought by plaintiff is that the exchange of his bonds for stock be canceled; that the conveyance of the Union Trust Company by which it divested itself of the trustee's title, under which plaintiff and other bondholders held, be also canceled; that the conveyance to the Sisman company and its instruments of incumbrance to the National Bank of Commerce and the Fidelity Trust Company be set aside; and further, that the defendants be enjoined from disposing of or incumbering the apartment property and from proceeding further with the exchange of bonds of the Detroit Estates Corporation for the stock of the Sisman company. Upon filing of the bill a temporary injunction was issued. On motion of the Fidelity Trust Company, after hearing, the temporary injunction was dissolved and the bill of complaint dismissed. Plaintiff has appealed.

The motion to dismiss was based on the following grounds: (1) Want of equity, (2) adequate remedy at law, (3) laches, and (4) estoppel. A review of the record convinces us that the order dismissing plaintiff's bill of complaint was justified both on the ground of want of equity and because he has an adequate remedy at law.

From the face of the bill it appears that "mostly all" of the holders of the $350,000 bonds issued by the Detroit Estates Corporation exchanged their bonds for stock in the Sisman company, that this

exchange enabled the Sisman company to obtain title to the apartment property and thereafter it mortgaged the premises to the National Bank of Commerce for $525,000 and also gave a trust deed to secure a bond issue in the sum of $500,000 to the Fidelity Trust Company. As above noted, from funds thus obtained it completed the apartment building. Plaintiff, the holder of only $2,000 of the $350,000 of the Detroit Estates Corporation's bonds seeks to have the whole refinancing proposition nullified, notwithstanding it is fair to infer from his bill that "mostly all" of the other bondholders have been parties to it and so far as we are advised are not complaining. Obviously such a result would be highly inequitable; and plaintiff surely should not be granted such relief if he has a remedy at law. If, as we think it must be found from this record, plaintiff is not entitled to any of the equitable relief specifically prayed, the only relief possible under the general prayer of his bill is damages which are recoverable, if at all, in an action at law. The following is from the opinion of the circuit judge:

"I feel that the injunctive relief, under the circumstances, is unconscionable, if such a phrase can be used. For the most part, all the defendants that any decree of this court could reach are financially responsible. There is no allegation in the bill, or no showing that such institutions as the Andrew C. Sisman Company, the Fidelity Trust Company, the Union Trust Company, the National Bank of Commerce, and possibly other of the defendants are not financially responsible, to the extent that any judgment or decree that might be entered could not be enforced against any or all of the defendants. * * * I cannot agree with counsel for plaintiff that the relief sought is anything or represents anything but a money demand. * * * Feeling that this represents

a demand for money judgment, nothing else, I will take the position that equity has no jurisdiction over matters alleged in the bill, and gives the court but one of two alternatives; either to dismiss the bill without prejudice and allow counsel to institute proceedings on the law side of the court, or transfer this bill to the law side of the court."

Counsel for plaintiff declined to transfer the cause to the law side of the court, and his bill was dismissed. We agree with the circuit judge's statement contained in the above-quoted portion of his opinion; and affirm his disposition of the case. Costs to appellees.

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

SKELCEY *v.* DETROIT ESTATES CORPORATION.

This case is controlled by *Hall* v. *Detroit Estates Corp., ante,* 121.

Appeal from Wayne; Rathbun (G. Arthur), J., presiding. Submitted October 7, 1931. (Docket No. 28, Calendar No. 35,552.) Decided December 8, 1931.

Bill by Estella Skelcey, trust mortgage bondholder, against Detroit Estates Corporation, a Mich-

igan corporation, and others to set aside certain conveyances and transactions. From order denying dismissal of bill, defendants appeal. Reversed, and remanded.

Walter M. Nelson, for plaintiff.

Bulkley, Ledyard, Dickinson & Wright, for defendant Union Guardian Trust Company.

Warren, Hill & Hamblen, for defendant National Bank of Commerce of Detroit.

Yerkes, Goddard & McClintock, for defendant Fidelity Bank & Trust Company and Andrew C. Sisman Company.

Sempliner, Dewey, Stanton & Bushnell, for defendant Milton Strauss Corporation.

CLARK, J. Dismissal of amended bill of complaint was declined. Defendants have appealed. Facts are stated in companion case of *Hall* v. *Detroit Estates Corporation, ante,* 121, decision of which is here controlling.

Reversed. Costs to appellants. Cause remanded with direction to permit transfer to the law side within 20 days, and on failure so to transfer, to dismiss the bill.

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

DICKENS *v.* DETROIT ESTATES CORPORATION.

CANCELLATION OF INSTRUMENTS—EQUITY—RELIEF—MORTGAGE BONDS.

Bondholder whose bonds on apartment house have been called and he offered all relief to which he is entitled under his contract on purchasing said bonds, is not entitled to maintain suit to set aside transactions involving exchange of bonds for stock in company taking over building, and execution of mortgages by latter which made possible completion of said building.

Appeal from Wayne; McMahon (Maurice H.), J. Submitted October 7, 1931. (Docket No. 25, Calendar No. 34,979.) Decided December 8, 1931.

Bill by Lewis M. Dickens individually and as representing others against Detroit Estates Corporation and others to set aside certain conveyances and for other relief. Bill dismissed. Plaintiff appeals. Affirmed.

Walter M. Nelson, for plaintiff.

Sempliner, Dewey, Stanton & Bushnell, for defendants Milton Strauss Corporation, Empire Construction Company, C. M. H. Holding Corporation, and Milton Strauss.

Bulkley, Ledyard, Dickinson & Wright, for defendant Union Guardian Trust Company.

Warren, Hill & Hamblen, for defendant National Bank of Commerce of Detroit.

Yerkes, Goddard, McClintock & Shreve, for defendants Fidelity Bank & Trust Company and Andrew C. Sisman Company.

FEAD, J. This is a companion case to *Pittelkow Heating & Engineering Co.* v. *Detroit Estates Corporation, ante,* 116, and *Hall* v. *Detroit Estates Corporation, ante,* 121, in which the essential facts are stated. The relief here sought by plaintiff is, in general, the setting aside of the present situation and the reinstatement of the former condition, including revival of the original trust mortgage, that the Sisman stockholders be declared bondholders, and defendants be required to pay the money and do the acts necessary to reproduce the situation contemplated and represented at the time plaintiff became a bondholder. The bill recites the call of his bonds, and, as he is thereby offered all the relief to which he is entitled, and the relief is in accordance with his contract on purchasing the bonds, he has not alleged a cause for further remedy.

Decree dismissing bill is affirmed, with costs.

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

BRANDIMORE *v.* DICKENS.

1. ATTORNEY AND CLIENT.
   Attorneys are officers of court.

2. SAME—ATTORNEY MAY WITH PROPRIETY INFORM JUDGE OF ERROR.
   Where judge had been led into error in improvidently appointing receiver, invading rights of interested parties, their attorneys with propriety appeared in court and informed judge of said error.

3. COURTS—RECEIVERS—SUMMARY REVOCATION OF APPOINTMENT—COURT RULES—APPEARANCE.

Where judge, led into error in improvidently appointing receiver, was informed of error by attorneys for interested parties, he had power to summarily revoke said appointment, notwithstanding objection to any action until attorneys had formally entered appearance and given notice of their purpose of appearing.

4. SAME—POWER TO CORRECT WRONG.

Judge may on his own motion correct palpable wrong, and his hand is not stayed by invoked formality tending to prolong duration of wrong.

Appeal from Wayne; Richter (Theodore J.), J. Submitted October 7, 1931. (Docket No. 27, Calendar No. 35,334.) Decided December 8, 1931.

Bill by Alfred J. Brandimore against Lewis M. Dickens to foreclose a mortgage. From an order vacating appointment of a receiver, plaintiff appeals. Affirmed.

Walter M. Nelson, for plaintiff.

Yerkes, Goddard, McClintock & Shreve, for Andrew C. Sisman Company and Fidelity Trust Company.

Bulkley, Ledyard, Dickinson & Wright, for Union Guardian Trust Company.

WIEST, J. In the course of protracted litigation involving real estate, Lewis M. Dickens, who claimed to be interested, under a trust mortgage, and without title, executed a mortgage on the property to Alfred J. Brandimore for $650,000. Brandimore filed the bill herein to foreclose the mortgage and have a receiver appointed. Dickens filed consent to the appointment of a receiver. Upon the bill and such

consent, without notice to persons in possession or interest, a receiver was appointed under a bond of $100, and at once assumed possession. The next morning, attorneys representing parties dispossessed by the receiver appeared in court and informed the judge of the invaded rights of their clients and the impropriety of the appointment of the receiver. The judge sent for the plaintiff's attorney, and he appeared and objected to any action without formal appearance by such attorneys in the case and notice to him of their purpose in appearing before the court. The court summarily heard the matter, and, finding he had improvidently appointed the receiver, set aside the appointment.

Plaintiff asks us to direct the circuit judge to vacate the order discharging the receiver.

The appointment of the receiver was highly improvident, and, had the judge been informed of the situation, the appointment would not have been made. Attorneys are officers of the court, and there was propriety in the attorneys informing the judge of the error he had been led to commit.

The rule of notice, invoked by plaintiff, did not prevent the judge from summarily revoking the improvident appointment. The judge, in such an instance, may act on his own motion and correct a palpable wrong, and his hand is not stayed by invoked formality tending to prolong duration of the wrong. The receiver was inadvertently appointed, and the appointment was rightly revoked.

The order vacating the appointment of the receiver is affirmed, with costs.

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

PEOPLE *v.* RAIDER.

1. CRIMINAL LAW—CONTINUANCE WITHIN DISCRETION OF COURT.
   Continuance of criminal case is within sound discretion of trial court.

2. SAME—BURDEN OF PROOF.
   Party claiming abuse of discretion in denial of motion for continuance has burden of proving it.

3. SAME—WHEN ABUSE OF DISCRETION SHOWN IN DENYING CONTINUANCE.
   To warrant finding of abuse of discretion in denial of defendant's motion for continuance, prejudice to him must be apparent or proved to have been at least probable.

4. SAME—WITNESSES—CONTINUANCE—TRIAL OF WITNESSES CHARGED WITH PERJURY.
   Arrest of witnesses charged with perjury in trial of defendant's companion in crime, who was tried separately, and resulting publicity given thereto in newspapers, would not necessarily result in prejudice to defendant, and, in absence of showing that it came to attention of jurors, there was no abuse of discretion in denying defendant's motion for continuance until perjury cases were tried.

5. SAME—DUTY OF PROSECUTOR TO INDORSE NAMES OF EYEWITNESSES ON INFORMATION—EXCEPTIONS TO RULE.
   It is duty of prosecutor, with certain exceptions, to indorse on information and call as witnesses all eyewitnesses to crime of violence who are available, except when they are numerous and those not called obviously would be merely cumulative.

6. SAME—FAILURE TO INDORSE WITNESSES CLAIMING TO BE EYEWITNESSES.
   Where witnesses had testified under oath in trial of defendant's companion in crime that they witnessed crime, prosecutor would not be excused from calling them in defendant's trial on ground that prosecutor did not know that they were witnesses.

7. SAME—PURPOSE OF REQUIRING PROSECUTOR TO INDORSE NAMES OF EYEWITNESSES.

Purposes of rule requiring prosecutor to indorse on information and call as witnesses all eyewitnesses to crime are to insure disclosure of whole of *res gestæ*, to protect accused against suppression of testimony favorable to him, and to give him benefit of cross-examination.

8. SAME—WHEN PROSECUTOR EXCUSED FROM INDORSING NAMES OF EYEWITNESSES.

Prosecutor acting in good faith and on reasonable grounds may be excused from indorsing on information and calling as witnesses those who from community of interest in crime or relationship to accused might be inclined to perjure themselves, if they deemed it necessary in his behalf, since it would be incongruous to require prosecutor to make such witnesses his own.

9. SAME—WHEN PROSECUTOR EXCUSED FROM INDORSING NAMES OF WITNESSES CHARGED WITH PERJURY—DISCRETION OF COURT.

Prosecutor may be excused from indorsing on information names of claimed eyewitnesses to crime against whom formal charges of perjury have been laid in connection therewith, when, in sound discretion of court, said charges have been laid in good faith and upon reasonable grounds, and accused nevertheless is protected against suppression of testimony by people and is not prejudiced in his right of cross-examination or to fair trial.

10. SAME—DENYING INDORSEMENT NOT ABUSE OF DISCRETION.

Where prosecutor did not support charges of perjury against claimed eyewitnesses of crime, by showing reasons therefor on oath, court would have been justified in requiring indorsement of their names on information or trial of perjury case before that of defendant, but, under circumstances, denying indorsement *held*, not abuse of discretion.

11. SAME—EVIDENCE—ABSENCE OF DEFENDANT.

Nothing in nature of testimony may be taken in absence of defendant.

12. SAME—NEW TRIAL—ABUSE OF DISCRETION.

Denial of defendant's motion for new trial because of action of officer, in claimed absence of defendant, in pointing out to jury, who viewed premises, certain scales referred to in testimony, *held*, not abuse of discretion, where testimony in regard

to scales was not important factor in case but came only by way of impeachment of witness, it is apparent incident was not prejudicial to defendant, and his counsel was witness to incident and made no objection before verdict, evidently considering it not of sufficient importance to call to court's attention.

Appeal from Recorder's Court of Detroit; Brennan (John V.), J. Submitted October 15, 1931. (Docket No. 212, Calendar No. 35,716.) Decided December 8, 1931. Rehearing denied March 3, 1932.

Morris Raider was convicted of manslaughter. Affirmed.

Edward H. Kennedy, Jr., for appellant.

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

FEAD, J. Defendant was convicted of manslaughter in connection with the killing of Arthur Mixon, a colored boy, as he came out of a drug store at the corner of Hendrie and Hastings streets in the city of Detroit on July 22, 1930. A few minutes before, Mixon and some other colored boys were driving along a near-by alley peddling ice. Mixon got off the wagon and looked under the door of a building used by defendant, Philip Keywell, and two others as a liquor "cutting" plant. The people claim that Keywell, accompanied by defendant and some other white men, took Mixon to task for looking under the door, a short verbal altercation ensued, defendant exclaimed to Keywell, "Put him on the spot," and Keywell shot and killed Mixon. Trial commenced November 12th.

Keywell was tried, the jury disagreed, and at a second trial, on October 16, 1930, he was convicted of murder in the first degree. Immediately thereafter, four witnesses for the defense, who had testified that they had witnessed the crime, were arrested for perjury, on order of the prosecuting attorney, for testifying that Keywell was not present and did not kill Mixon. The three leading newspapers of Detroit carried news articles of the arrest of these witnesses and some mentioned that defendant was to be tried soon. Defendant moved for continuance until the perjury cases were tried, on the ground of prejudice from the arrests and publicity. The motion was denied and defendant alleges error.

Continuance was within the sound discretion of the court. The burden is on the party claiming abuse of discretion to show it. Prejudice to defendant must be apparent or proved to have been at least probable. The news articles were not inflammatory. Prejudice to defendant would not necessarily proceed from the arrest and publicity. The *voir dire* examination of the jury is not in the record. There was no showing that the arrests and charges came to the attention of the panel. Upon the record we cannot say that the court abused its discretion.

Defendant moved that the people be required to indorse on the information as *res gestæ* witnesses the names of the four men so arrested for perjury. Error is assigned on the denial of the motion.

The rule that the prosecution must indorse and call all the eyewitnesses to a crime of violence who are available, except when they are numerous, and those not called obviously would be merely cumulative, although rejected or materially modified in most or all other American jurisdictions (16 Ann. Cas. 918, note; 16 C. J. p. 846; 2 Michie on Homicide,

p. 1362), is too well established in this State to need the citation of authorities. While the prosecution attempts to excuse the nonproduction of the witnesses upon the ground that he did not know they were eyewitnesses (*Wellar* v. *People,* 30 Mich. 16, 22), they had so testified under oath, and, in view of the fact that the identity of the assailants was the vital issue, the rule was applicable (*People* v. *Blazenzitz,* 212 Mich. 675), unless the perjury proceedings gave rise to an exception. Whether it did presents a unique question, upon which no decisions, analogous or in point, have been found. A somewhat similar situation arose in *State* v. *Harras,* 22 Wash. 57 (60 Pac. 58), but the point here was not there involved.

The purposes of the rule are to insure the disclosure of the whole of the *res gestæ,* to protect the accused against the suppression of testimony favorable to him, and to give him the benefit of cross-examination. The rule is not without exceptions. The wife of an accused need not be called by the prosecution although her name is indorsed on the information and he demands the right to cross-examine her (*People* v. *Wolcott,* 51 Mich. 612); nor need she be indorsed as a witness (*People* v. *Hossler,* 135 Mich. 384); one charged as an accessory need not be called by the people (*People* v. *McCullough,* 81 Mich. 25; *People* v. *Resh,* 107 Mich. 251); and a sister of the accused was required to be called only because she was the fiance of the victim (*People* v. *Germaine,* 101 Mich. 485). In none of the cases establishing an exception was authority or reason given for it, except that in *People* v. *Resh* the court curtly announced the exception on the basis of reason and common sense. Obviously the exceptions were founded upon the recognized inclination or inducement of those close to the accused, by com-

munity of interest in the crime or relationship, to perjure themselves, if they deem it necessary, in his behalf, and the incongruity of requiring the prosecution to make such witnesses its own.

When a prosecuting attorney, in his *quasi*-judicial capacity, has taken the serious and solemn official action of formally charging a witness with perjury, an unbending rule of law would be an anomaly which would require the court to compel the prosecutor to present the witness on behalf of the State to give testimony upon the transaction out of which the charge of perjury arose. Virtually, it would amount to requiring the court to order a repetition of the perjury, if the testimony be false and the witness adhere to it. No consideration of the protection of an accused or his right to a fair trial could demand such a rule. On the other hand, an exception which would permit the prosecutor to select his witnesses, by means of laying charges of perjury against those adverse to him, would endanger the legal rights of the accused and also be unjustifiable. From necessity, the situation demands that no hard and fast rule be adopted, but that the power rest in the court to preserve the rights of the accused and protect the court against perjury.

The exception as to accessories offers the basis of a reasonable rule for the situation at bar. The prosecutor is not permitted to charge an adverse witness as an accessory and thus be excused from calling him; but he must act with "sound discretion" (*People* v. *McCullough, supra*), which means in good faith and upon reasonable grounds; and, where the interests of justice so demand it, the court may require the prosecutor to produce the accessory as a witness or try him in advance (*People* v. *McCullough, supra*).

We hold that the people may be excused from indorsing on the information the name of a claimed eyewitness to the crime against whom formal charges of perjury have been laid in connection with the same transaction, when, in the sound judgment and discretion of the court, the charges have been laid in good faith and upon reasonable grounds and the accused nevertheless is protected against suppression of testimony by the people and is not prejudiced in his right of cross-examination or to a fair trial.

In this case, the prosecutor did not support his action in charging the witnesses with perjury by showing of reasons on oath, and the court would have been justified in requiring the indorsement of the names or trial of the perjury cases before that of defendant. But, in reviewing the action of the court, we cannot say he abused his discretion in denying indorsement. The presence of the four witnesses at the scene of the crime was not affirmed by any other witness, not even by each other. It is not clear that the court was not warranted in holding that their testimony in the *Keywell Case,* a transcript of which was made part of the motion, did not constitute a reasonable showing of their presence at the crime. Three of them testified in the instant case. Two juries refused to believe them. Defendant lost no right of cross-examination because such examination was not necessary. It did not appear that the prosecuting attorney acted in bad faith in laying the charges nor that there was suppression of testimony by the people nor that defendant was deprived of a fair trial by the failure to indorse, and there was no reversible error in this respect.

The jury had view of the premises. On request of a juror, an officer who accompanied them pointed out

the location of scales mentioned in the testimony. On motion for new trial, defendant's counsel filed an affidavit reciting the incident, stating he had witnessed it, and that it was in the absence of defendant. The officer made affidavit that it was in the presence of defendant and he gave the information only after the attorneys, both for the State and defendant, had told him it was proper to do so. The court did not pass upon the issue of fact raised by the affidavits but held there was no reversible error on the ground that the matter was trivial.

It is the rule that nothing in the nature of testimony may be taken in the absence of defendant. 3 Comp. Laws 1929, § 17296; *People* v. *Hull,* 86 Mich. 449; *People* v. *Auerbach,* 176 Mich. 23 (Ann. Cas. 1915 B, 557); *People* v. *Winney,* 196 Mich. 347. Had information been given to the jury by the officer without knowledge of the defendant or his counsel before verdict, or had complaint been made to the court at the trial, the question would be different. *Hill* v. *People,* 16 Mich. 351. But as the testimony regarding the scales came in only by way of impeachment of a witness, was not an important factor in the case, and it is apparent the incident was not prejudicial to defendant (3 Comp. Laws 1929, § 17354; 16 C. J. p. 1162), defendant's counsel was a witness to it and made no objection before verdict (16 C. J. p. 1123; *People* v. *Johnson,* 110 N. Y. 134 [17 N. E. 684]; *State* v. *High,* 116 La. 79 [40 South. 538]), and evidently did not consider it of sufficient importance to call it to the attention of the court (*People* v. *Kasem,* 230 Mich. 278), refusal of the court to grant a new trial upon this basis was not an abuse of discretion.

Defendant alleges further errors in the reception of testimony, the charge of the court, and contends

that the verdict is against the great weight of the evidence. We have given them careful consideration and find no reversible error.

Judgment affirmed.

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

PEOPLE v. KEYWELL.

1. HOMICIDE—EVIDENCE—GREAT WEIGHT OF EVIDENCE.
   In prosecution for murder, verdict of guilty, which was well within evidence, cannot be said to be contrary to great weight thereof, although testimony was contradictory.

2. CRIMINAL LAW—DUTY OF PROSECUTOR TO INDORSE ALL RES GESTÆ WITNESSES.
   It is duty of prosecutor to indorse on information names of all known *res gestæ* witnesses.

3. SAME—INDORSING NAME ON INFORMATION—NEW TRIAL.
   New trial was properly denied on ground that name of witness should have been indorsed on information, where said witness had already testified in another trial involving same offense that he did not see it committed.

4. SAME—CONTRADICTORY STATEMENTS OF WITNESS—REQUESTED INSTRUCTION.
   Where, in prosecution for murder, witness who saw killing testified that defendant was not killer, and, when asked as to contrary statements, denied making them, trial court should have given instruction, requested at time of taking testimony, that contradictory statements, if any, would not constitute substantive evidence; but defendant was not harmed thereby at that time, because denial relegated prosecution to its proof in contradiction.

5. SAME—PROSECUTION ALLOWED TO QUESTION CREDIBILITY OF RES GESTÆ WITNESSES.

Where witness who saw killing testified that defendant was not killer, prosecutor was properly allowed to question him as to contrary statements for purpose of affecting his credibility, since he was witness prosecutor was required to call.

6. SAME—CREDIBILITY OF RES GESTÆ WITNESS NOT VOUCHED FOR BY PROSECUTION.

Prosecution does not vouch for credibility of witness it is required to call.

7. SAME—EVIDENCE.

In prosecution for murder, where victim was killed because he tried to look into building where bootleggers had their plant, officer who afterward entered said building was properly allowed to describe what he saw there.

8. SAME—EVIDENCE—CREDIBILITY OF RES GESTÆ WITNESSES.

In prosecution for murder, where *res gestæ* witness testified that he saw murderer fire shot, that it was not defendant, and that he had not told officer that he couldn't or wouldn't identify any of them, there was no error in permitting officer to testify that witness did not identify any one, and that he said he was afraid to identify anybody.

Error to Recorder's Court of Detroit; Cotter (Thomas M.), J. Submitted October 15, 1931. (Docket No. 214, Calendar No. 35,757.) Decided December 8, 1931.

Philip Keywell was convicted of murder in the first degree. Affirmed.

Chawke & Sloan and *Edward H. Kennedy, Jr.*, for appellant.

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

WIEST, J. An illicit liquor cutting plant was in a barn or garage located on an alley in the city of Detroit. One or more of several boys, passing

through the alley, tried to peep into the building. They were evidently observed, for six men rounded them at the nearest street corner, asked why they were peeking under the door, and one of the men shot and killed Arthur Mixon, one of the boys. Defendant was convicted of the murder, his motion for a new trial was denied, and we now review on his appeal.

We cannot hold the verdict contrary to the great weight of the evidence. The verdict was well within the evidence accepted by the jury, and we cannot hold it contrary to the great weight thereof.

Murder was committed. Some eyewitnesses identified defendant as the murderer, while others testified that defendant was not the person. This presented a question of fact; the jury culled the substance from chaff, and, without view of the witnesses, we cannot winnow otherwise.

In the motion for a new trial, it was alleged that Joe Ford, a nine-year-old colored boy, witnessed the murder and his name should have been indorsed on the information. No such request was made at the trial. It is the duty of the prosecuting attorney to indorse on an information the names of all known *res gestæ* witnesses. Was Joe Ford such a witness? This is answered by Joe Ford's testimony, given at the subsequent trial of Morris Raider and before the motion for a new trial herein, where the court directed that Joe Ford's name be indorsed on the information and his name was indorsed as a witness. He testified that he did not witness the killing or see the killer.

Robert Miller witnessed the killing, saw the murderer, was called by the prosecution, and testified that defendant was not the killer. He was asked about alleged statements to the contrary, and denied making them. It is contended that the court erred

in not instructing the jury, at the time of taking the testimony, that contradictory statements, if any, would not constitute substantive evidence. This the court should have done, because there was such a request. Was defendant harmed by the failure of the court to so instruct the jury? Certainly not at that time, for the denial by the witness relegated the prosecution to its proof in contradiction. The request was not renewed when impeaching testimony was introduced or in a request to charge the jury on the subject. The questions were proper for the purpose of affecting the credibility of the witness the prosecution was required to call. In such case the prosecution does not vouch for the credibility of the witness.

It is evident that Arthur Mixon was killed because he had tried to look into a building where bootleggers had their plant. An officer, after the killing, entered the building and was permitted to describe what he found there. This is urged as error, it being contended that no testimony connected defendant with such plant. If defendant killed Arthur Mixon he did so because Mixon had exhibited too much curiosity about the plant. That reason may appear trivial, but it was the subject of altercation leading to the killing. The testimony was admissible.

Hescie Miller was a *res gestæ* witness and testified that he saw the murderer fire the shot and it was not defendant, that he had not told the officer that he "couldn't or wouldn't identify any of them." The officer testified that Hescie Miller did not identify any one and said "he was afraid to, afraid to identify anybody." There was no error in this.

We find no reversible error. Affirmed.

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

QUINN *v.* PERE MARQUETTE RAILWAY CO.

1. RAILROADS—USE OF RIGHT OF WAY—STATUTES.

   Michigan statutes do not single out railroad rights of way for special treatment in regard to conveyance and use, but they provide a uniform rule for acquisition of lands and other property "for the construction, maintenance and accommodation of its railroads," bridges, buildings, etc. (2 Comp. Laws 1929, § 11121 *et seq.*).

2. SAME—MANNER OF ACQUIRING TITLE TO LAND BY RAILROAD COMPANIES.

   Title may be acquired to lands by railroad companies by voluntary grant, purchase, condemnation (2 Comp. Laws 1929, § 11121 *et seq.*), or prescription, but not by dedication.

3. SAME—PROPERTY DONATED FOR SPECIAL PURPOSE IS RESTORED TO DONOR ON ABANDONMENT.

   Where property is taken by railroad company through voluntary grant and donation, it "shall be held and used for the purpose of such grant only" (2 Comp. Laws 1929, § 11121), and, upon abandonment of the road, title to property so donated is restored to donor or his representatives or assigns.

4. SAME—REVERTER NOT APPLICABLE TO LANDS PURCHASED—STATUTES—INTENT.

   Failure of statute to attach to lands purchased by railroad company conditions of tenancy, use, and reverter provided for donated property is persuasive of intention of legislature that they are not to be applied to limit title so taken.

5. SAME—TITLE ACQUIRED BY CONDEMNATION.

   On condemnation of land by railroad company, owner "shall be divested and barred of all right, estate, and interest in such real estate, franchise, or other property until such right or title shall be again legally vested in such owner" (2 Comp. Laws 1929, § 11135).

6. SAME—LANDS PURCHASED NOT SUBJECT TO LIMITATIONS—EASEMENTS.

   Michigan statutes furnish no ground for holding, by analogy to condemnation, donation, or otherwise, that a title taken

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As to meaning of railroad "right of way," see annotation in 1 L. R. A. 214; 4 L. R. A. 275; 66 L. R. A. 37.

by railroad company by purchase is merely an easement or that it is subject to limitations of tenure not expressed in deed.

7. SAME—TITLE OF RIGHT OF WAY MAY BE ABSOLUTE FEE OR OTHERWISE.

Railroad company may acquire in strip of land for right of way, as well as in other real estate, title in fee absolute, determinable fee, easement, lease, or license, as may another corporation or individual.

8. SAME—CHARACTER OF ESTATE DETERMINED BY GRANT.

Where property is taken by railroad company by purchase, character of estate is determined by terms of grant, as in other cases.

9. SAME—MEANING OF "RIGHT OF WAY"—EASEMENTS.

"Right of way" has two meanings in railroad parlance: strip of land upon which track is laid, and legal right to use such strip; and in latter sense it may mean easement, but character of title taken to strip depends upon language of conveyance.

10. SAME—WHEN EASEMENT ONLY IS CONVEYED.

Where grant to railroad company is not of land, but is merely of use or of right of way, or, in some cases, of the land specifically for right of way, easement only is conveyed.

11. SAME—WHEN CONVEYANCE IS IN FEE.

Where land itself is conveyed, although for railroad purposes only, without specific designation of right of way, conveyance is in fee and not of easement.

12. SAME—DEBASING FEE NOT FAVORED BY LAW.

Debasing of fee in grant to railroad company is not favored by law, but provisions tending thereto are to be construed against grantor.

13. SAME—USE—REVERTER—WHEN GRANT NOT LIMITED.

Where there is no reverter clause in grant of land to railroad company, statement of use is merely declaration of purpose of conveyance, without effect to limit grant.

14. SAME—REVERTER—DETERMINABLE FEE UPON CONDITION SUBSEQUENT.

Where grant to railroad company contains reverter clause, title is determinable fee upon condition subsequent.

15. SAME—POSSIBILITY OF REVERTER NOT ASSIGNABLE BEFORE BREACH OF CONDITION SUBSEQUENT.

If grant to railroad company created fee upon condition subsequent, purchaser of grantor's rights before breach could not enforce reverter, because possibility of reverter may not be assigned before breach of condition.

16. COVENANTS—NO COVENANT IMPLIED EXCEPT IN OIL AND GAS LEASES.

Under 3 Comp. Laws 1929, § 13281, no covenant may be implied in any conveyance of real estate except oil and gas leases.

17. EQUITY—WILL NOT ENFORCE RESTRICTION TO WORK INJUSTICE.

Court of equity will not construe or enforce restriction on use of real estate to work injustice.

18. RAILROADS—GRANT FOR RAILROAD PURPOSES WITHOUT RESERVATION TO GRANTORS PASSES TITLE TO OIL AND GAS.

Where grant of land to railroad company was for railroad purposes only, but deed contained no reservation to grantors, grantee took title to gas and oil in place.

19. SAME—INJUNCTION—DRILLING OIL AND GAS WELL ON RIGHT OF WAY—EQUITY.

Court of equity will not intervene, at instance of adjoining landowner, to prevent drilling of oil well by railroad company on its right of way, where it does not appear that mere operation of drilling will injure plaintiff's land; but equitable procedure would be to accord to both parties free and equal chance to develop their own lands.

20. SAME—COVENANT OF USE.

Grant of land to railroad company "to be used for railroad purposes only" is not covenant of use.

21. SAME—GRANT TO RAILROAD—CONSIDERATION.

Where land was granted to railroad company to be used for railroad purposes only, and principal consideration was benefit to adjoining land through construction and operation of railroad, so long as railroad continues in operation, purpose of grant is subserved and consideration fully paid.

22. SAME—EASEMENTS—TITLE IN FEE—RIGHT TO DRILL FOR OIL AND GAS.

Railroad company taking merely easement in land may not drill for gas and oil, but where it takes title in fee by deed without conditions it may drill for gas and oil.

23. SAME—PRIVATE INDIVIDUAL MAY NOT QUESTION RIGHT OF RAILROAD TO DRILL FOR OIL AND GAS.

If drilling for gas and oil on its right of way by railroad company is *ultra vires* under 2 Comp. Laws 1929, § 11135, State may by proper proceeding compel it to return to its proper sphere, but private person who has no restrictive estate or interest in land owned by it may not question its use in any manner which would be lawful if owned by individual.

Appeal from Clare; Hart (Ray), J. Submitted October 21, 1931. (Docket No. 157, Calendar No. 35,967.) Decided December 8, 1931.

Bill by John Quinn against Pere Marquette Railway Company and another to restrain drilling for oil and gas on certain land. Decree for plaintiff. Defendants appeal. Reversed, and bill dismissed.

John Quinn, in pro. per.

John C. Shields and *A. W. Penny,* for defendants.

Haswell W. Grant, amicus curiæ.

FEAD, J. This is a bill to restrain defendants from drilling for oil and gas on certain land. The facts were stipulated.

(1) September 7, 1881, Aaron T. Bliss and Lyman W. Bliss, by warranty deed, sold and conveyed to the Saginaw & Clare County Railroad Company, "to be used for railroad purposes only:"

"A parcel of land one hundred feet in width, lying fifty feet on each side of the center line of the Saginaw & Clare County Railroad, as located and established upon and across the lands of said parties of the first part, (describing a 40-acre parcel) * * * and all the estate, right, title, claim and demand whatsoever of the parties of the first part, both legal and equitable, in and to the said premises: To have

and to hold the above granted premises to the said party of the second part, its successors and assigns forever, for the uses above expressed."

(2) The grantee constructed tracks and other appurtenances for general railroad purposes and the land has been used for such purposes continuously since.

(3) Plaintiff has acquired the title of Aaron T. and Lyman Bliss to the 40-acre parcel and whatever right or title they retained in the 100-foot strip after their conveyance.

(4) The transaction was a purchase. The consideration for the conveyance was $1, and also the benefit, advantage, and enhanced value of grantors' adjacent land by reason of the construction of a railroad. Defendant is a purchaser in good faith and for valuable consideration of the title of the grantee.

(5) Defendant company claims title to the strip in fee simple absolute, has granted defendant Sovereign the right to drill for oil and gas thereon but without interfering with the railroad business and with the condition that oil found shall be shipped over defendant's road.

(6) Plaintiff claims he is owner of the fee of the strip of land except as it is burdened by an easement of use for railroad purposes, and that the gas and oil under the surface belong to him.

In entering decree for plaintiff, the court felt the case was controlled by our statutes and by *New York Central, etc., R. Co.* v. *Aldridge,* 135 N. Y. 83, 95 (32 N. E. 50, 17 L. R. A. 516), and *Abercrombie* v. *Simmons,* 71 Kan. 538 (81 Pac. 208, 1 L. R. A. [N. S.] 806, 114 Am. St. Rep. 509, 6 Ann. Cas. 239).

In the New York case, it was held, by virtue of statute, that where a railroad company acquires a

right of way on the shore of navigable water, although it may take in fee, the upland owner retains all riparian rights which he had before the conveyance. This doctrine was disapproved in *Attorney General* v. *Smith,* 109 Wis. 532 (85 N. W. 512). In New York, it seems to be confined to riparian rights, as a railroad company may take title in fee absolute, with full rights of enjoyment and alienation, as between itself and the grantor. *Buffalo Pipe Line Co.* v. *Railroad Co.,* 10 Abb. New Cases, 107; *Yates* v. *Van DeBogert,* 56 N. Y. 526; *Atlantic Mills, Inc.,* v. *Railroad Co.,* 126 Misc. Rep. 349 (214 N. Y. Supp. 123).

In the Kansas case, the court read into the deed the language that the land was taken as and for a right of way, cited cases holding that such provision created an easement, and also suggested that, by analogy, the title to a right of way taken by purchase should be no greater than that taken under condemnation proceedings, which is an easement (Revised Statutes of Kansas 1923, 66–904; *Harvey* v. *Railroad Co.,* 111 Kan. 371 [207 Pac. 761, 50 A. L. R. 300]), although under the former statute it could have taken a fee. *Challiss* v. *Railroad Co.,* 16 Kan. 117. The court did not decide whether the estate was an easement or a determinable fee; and, as it decreed reverter for total failure to use and for complete abandonment of right of way for railroad purposes, the result would have been the same whether the estate had been held to be an easement or a fee on condition precedent or subsequent.

To the contrary of the discussion in the Kansas case, it is held that where the conveyance is not limited by its terms to a right of way purpose and the deed has no conditions, title in fee passes (*Spierling* v. *Ohl,* 232 Ill. 581 [83 N. E. 1068, 13

Ann. Cas. 430]; *Kynerd* v. *Hulen* [C. C. A.], 5 Fed. [2d] 160 [Okla.]); and that, although a railroad company acquires only an easement in a right of way by condemnation, it may acquire a fee by purchase. *Right of Way Oil Co.* v. *Gladys City Oil, etc., Co.*, 106 Tex. 94 (157 S. W. 737, 51 L. R. A. [N. S.] 268).

Unlike some others, our statutes do not single out rights of way for special treatment, but they provide a uniform rule for the acquisition of lands and other property "for the construction, maintenance and accommodation of its railroad," bridges, buildings, etc. (2 Comp. Laws 1929, § 11121).

Title may be acquired by voluntary grant, purchase, condemnation (2 Comp. Laws 1929, § 11121 *et seq.*), or prescription (*Felton* v. *Wedthoff*, 185 Mich. 72; *Munroe* v. *Railway Co.*, 226 Mich. 158), although not by dedication (*Minneapolis, etc., R. Co.* v. *Marble*, 112 Mich. 4). Where property is taken through voluntary grant and donation, it "shall be held and used for the purpose of such grant only," 2 Comp. Laws 1929, § 11121; and, upon abandonment of the road, the title to property so donated is restored to the donor or his representatives or assigns. 2 Comp. Laws 1929, § 11353; *Flint & P. M. R. Co.* v. *Rich*, 91 Mich. 293. Lands may be acquired also by purchase, 2 Comp. Laws 1929, § 11121; and the failure of the statute to attach to such purchase the conditions of tenancy, use, and reverter provided for donated property is persuasive of the intention of the legislature that they are not to be applied to limit a title so taken. On condemnation, the owner—

"shall be divested and barred of all right, estate, and interest in such real estate, franchise, or other property, until such right or title shall be again

legally vested in such owner." 2 Comp. Laws 1929, § 11135.

So our statutes furnish no ground for holding, by analogy to condemnation, donation, or otherwise, that a title taken by purchase is merely an easement or that it is subject to limitations of tenure not expressed in the deed. A railroad company may acquire in a strip of land for right of way, as well as in other real estate, title in fee absolute, determinable fee, an easement, lease, or license, as may another corporation or an individual. Where the property is taken by purchase, the character of the estate is determined by the terms of grant, as in other cases.

"Right of way" has two meanings in railroad parlance: the strip of land upon which the track is laid, and the legal right to use such strip. In the latter sense it may mean an easement. But in this State and others the character of the title taken to the strip depends upon the language of the conveyance.

Where the grant is not of the land but is merely of the use or of the right of way, or, in some cases, of the land specifically for a right of way, it is held to convey an easement only. *Hickox* v. *Railway Co.*, 78 Mich. 615; *Mahar* v. *Railway Co.*, 174 Mich. 138; *Putnam* v. *Railway Co.*, 174 Mich. 246; *Matthews* v. *Railway Co.*, 110 Mich. 170 (64 Am. St. Rep. 336); *Jones* v. *Van Bochove*, 103 Mich. 98; *Blakely* v. *Railway Co.*, 46 Neb. 272 (64 N. W. 972); *Louisville & Nashville R. Co.* v. *Covington*, 65 Ky. 526; *East Alabama R. Co.* v. *Doe*, 114 U. S. 340 (5 Sup. Ct. 869); *Lockwood* v. *Railroad Co.*, 43 C. C. A. 202 (103 Fed. 243).

Where the land itself is conveyed, although for railroad purposes only, without specific designation

of a right of way, the conveyance is in fee and not of an easement. The distinction was pointed out by Mr. Justice SHARPE in *Epworth Assembly* v. *Railway,* 236 Mich. 565, 573:

"On the face of these deeds it would appear that a determinable fee had been created. In neither deed is the land conveyed for a right of way, although an inference would doubtless be drawn that it was, from the description used. The first deed provides that the land shall 'be used for railroad purposes only,' and the second that if the land shall 'cease to be used for railroad purposes' for 'one year or longer' it shall revert to the grantor. Had not these provisions been inserted, it seems clear that an unqualified title in fee would have passed to the grantees."

See, also, *Weber* v. *Ford Motor Co.,* 245 Mich. 213; *Ballard* v. *Railroad Co.,* 9 Ky. L. R. 523 (5 S. W. 484); *Coburn* v. *Coxeter,* 51 N. H. 158; *Gilbert* v. *Railway Co.* (C. C. A.), 185 Fed. 102 (Okla.); *Sherman* v. *Sherman,* 23 S. D. 486 (122 N. W. 439); *Rice* v. *Clear Spring Coal Co.,* 186 Pa. 49 (40 Atl. 149).

What was the character of the fee? The rule is that the debasing of a fee is not favored by the law, but provisions tending thereto are to be construed against the grantor. Ann. Cas. 1916B, 606.

It seems to be the weight of authority that, where there is no reverter clause, a statement of use is merely a declaration of the purpose of conveyance, without effect to limit the grant. The reasoning is that, as a railroad company may take real estate only for railroad purposes, the declaration that it is to be so used is merely an expression of the intention of the parties that the deed is for a lawful purpose. 5 A. L. R. 1498, note; 18 C. J. p. 336; *Phillips Gas & Oil Co.* v. *Lingenfelter,* 262 Pa. 500 (105 Atl.

888, 5 A. L. R. 1495); 44 L. R. A. (N. S.) 1220, note; *Greene* v. *O'Connor,* 18 R. I. 56 (25 Atl. 692, 19 L. R. A. 262); *Kilpatrick* v. *City of Baltimore,* 81 Md. 179 (31 Atl. 805, 27 L. R. A. 643, 48 Am. St. Rep. 509); *Long* v. *Moore,* 19 Tex. Civ. App. 363 (48 S. W. 43); *Gilbert* v. *Railroad Co., supra; Sherman* v. *Sherman, supra; Trustees of Hawesville* v. *Hawes's Heirs,* 69 Ky. 232; *Des Moines* v. *Hall,* 24 Iowa, 234; *Keatley* v. *County Court,* 70 W. Va. 267 (73 S. E. 706, Ann. Cas. 1913E, 523); *Sumner* v. *Darnell,* 128 Ind. 38 (27 N. E. 162, 13 L. R. A. 173); *Garfield Township* v. *Herman,* 66 Kan. 256 (71 Pac. 517); *Adams* v. *First Baptist Church,* 148 Mich. 140 (11 L. R. A. [N. S.] 509, 12 Ann. Cas. 224).

Had the grant contained a reverter clause the title would have been a determinable fee upon condition subsequent. *Epworth Assembly* v. *Railway Co., supra; County of Oakland* v. *Mack,* 243 Mich. 279; *Stevens* v. *Railway Co.* (Com. of App. Tex.), 212 S. W. 639; *Williams* v. *McKenzie,* 203 Ky. 376 (262 S. W. 598).

In some cases, however, the estate taken has been held to be a determinable fee although the deed contains no reverter clause. *Slegel* v. *Lauer,* 148 Pa. 236 (23 Atl. 996, 15 L. R. A. 547); *Buffalo Pipe Line Co.* v. *Railroad Co., supra.*

If the estate was a fee upon condition subsequent, plaintiff could not enforce the reverter, because the possibility of reverter cannot be assigned before breach of condition. *Halpin* v. *Rural Agricultural School District,* 224 Mich. 308.

In some of the books, however, there is an intimation that a clause like the one at bar may be held to be an implied covenant on use. 8 R. C. L. p. 1103. As an alternative it is so contended on behalf of plaintiff. By statute, 3 Comp. Laws 1929, § 13281,

no covenant can be implied in any conveyance of real estate except oil and gas leases. But, assuming the clause is a restriction on use, would plaintiff be entitled to the relief sought?

It is fundamental that a court of equity will not construe or enforce a restriction on the use of real estate to work an injustice.

The deed contains no reservation to grantors. The grantee took title to the gas and oil in place. If there is a pool common to the lands of both parties, then, if defendant may not drill, plaintiff, by tapping the pool, may take oil belonging to defendant. Such a result could not be sanctioned, and if it were imperative to restrain defendant from drilling, equity necessarily would attempt to require an accounting by plaintiff for defendant's oil taken by him. However, an accounting would be impracticable, because a common pool cannot be measured and divided by decree. As it does not appear that the mere operation of drilling by defendant could injure plaintiff's land, there is no reason for the intervention of the court. The equitable procedure would be to accord to both plaintiff and defendant the free and equal chance to develop their own lands, leaving to the diligent or the lucky the advantages which are unavoidable fortunes of the business.

But we do not think the clause under consideration was a covenant of use. The primary purpose and principal consideration of the deed were the benefit to the adjoining land through the construction and operation of a railroad. If words are to be read into the deed to effectuate the obvious intention of the parties, they would be appropriate to declaring a forfeiture of title unless the railroad were built and operated. So long as it continues in operation, the purpose of the grant is subserved and the consideration fully paid.

The cases directly involving the right to drill for gas and oil are in accord with the propositions and authorities above discussed.

Where a railroad company takes merely an easement in the land, it cannot drill for gas and oil. *Consumers Gas Trust Co.* v. *American Plate Glass Co.*, 162 Ind. 393 (68 N. E. 1020); *Uhl* v. *Railroad Co.*, 51 W. Va. 106 (41 S. E. 340); *Right of Way Oil Co.* v. *Gladys City Oil, etc., Co., supra; Southern Pacific R. Co.* v. *San Francisco Savings Union,* 146 Cal. 290 (79 Pac. 961, 70 L. R. A. 221, 106 Am. St. Rep. 36, 2 Ann. Cas. 962); *Midland Valley R. Co.* v. *Jarvis* (C. C. A.), 29 Fed. (2d), 539 (61 A. L. R. 1064).

In *Herald* v. *Board of Education,* 65 W. Va. 765 (65 S. E. 102, 31 L. R. A. [N. S.] 588), the deed was given "for the purpose of building a schoolhouse on the same for the benefit of free schools." At suit of taxpayers, the district was restrained from developing the property for oil and gas, although it took title in fee, but on the ground that its functions were purely public and it could not engage in private financial undertakings.

However, it is held that a school district takes title in fee and may lease part of its premises for the production of oil and gas where it continues to conduct the school, although the grant was "for school purposes" (*Taylor* v. *School Trustees* [Tex. Civ. App.], 229 S. W. 670); or "for school purposes only" (*Phillips Gas & Oil Co.* v. *Lingenfelter, supra*); or where a reverter clause operates "when no longer used for common school purposes" (*Williams* v. *McKenzie, supra*).

Where a railroad company takes title in fee by deed without conditions, it may drill for gas and oil (*Nelson* v. *Railway Co.*, 152 La. 117 [92 South. 754]; *Kynerd* v. *Hulen, supra*); or when the land

was granted "for railroad purposes only" (*Gilbert* v. *Railroad Co., supra*).

The statute, 2 Comp. Laws 1929, § 11135, provides that:

"All real estate, or property whatsoever, acquired by any company under and in pursuance of this act, for the purpose of its incorporation, shall be deemed to be acquired for public use."

It is urged that a railroad company cannot do other than railroad business, that drilling for gas and oil is not railroad business, and, therefore, it is *ultra vires* of the company. If that be so, the State may, by proper proceedings, compel the company to return to its proper sphere. But a private person, who has no restrictive estate or interest in the land owned by the company, cannot question its use in any manner which would be lawful if held by an individual. *Bartee Tie Co.* v. *Jackson,* 281 Ill. 452 (117 N. E. 1007); *Nelson* v. *Railroad Co., supra; Stevens* v. *Railway Co., supra.*

Decree will be reversed, and one entered dismissing the bill.

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

MYERS *v.* POST.

1. MUNICIPAL CORPORATIONS—BOARDS OF SUPERVISORS HAVE FIDUCIARY RELATION TO ENTIRE COUNTY.

   Board of supervisors of Kent county has fiduciary relationship to entire county and not to city of Grand Rapids alone, notwithstanding approximately 80 per cent. of taxable property of county lies in city.

2. SAME—CONSTRUCTIVE FRAUD.

   Board of supervisors of Kent county, in refusing to renew lease of property owned by it in city of Grand Rapids to responsible person at $3,000 per year and leasing it to city for $501 per year, was guilty of constructive fraud on rights of taxpayers of county, even if there was no wilful dishonesty.

3. SAME—PERSONAL INTEREST OF MEMBERS—FIDUCIARY RELATION.

   Where all city members of board of supervisors voted to lease to city property owned by county at about one-sixth of its rental value, and all members of board from townships voted against it, action of city members in so voting is analogous to that of directors of corporation who vote for their personal interest rather than that of corporation.

4. SAME—INJUNCTION—CONSTRUCTIVE FRAUD.

   Board of supervisors was properly restrained, at suit of taxpayers, from leasing property to city for about one-sixth of its rental value, where it is apparent that city was being favored at expense of county, and said action amounted to constructive fraud on taxpayers of county.

Appeal from Kent; Perkins (Willis B.), J. Submitted October 6, 1931. (Docket No. 12, Calendar No. 35,794.) Decided December 8, 1931.

Bill by William H. Myers and others, as taxpayers, against Maurice Post, chairman of the board of supervisors of Kent county, and others to restrain

the leasing of certain county property to the city of Grand Rapids. The city of Grand Rapids intervened. Decree for plaintiffs. Intervener appeals. Affirmed.

Linsey, Shivel & Phelps (*John H. Vander Wal,* of counsel), for plaintiffs.

Ganson S. Taggart and *Robert S. Tubbs,* for intervener.

BUTZEL, C. J. The county of Kent consists of the cities of Grand Rapids and East Grand Rapids, and a large number of outlying townships. It owns a lot with a building on it of the value of $45,000 in the city of Grand Rapids. Notwithstanding the fact that the property was rented to a financially responsible party at a rental of $3,000 per year under a lease, which the lessee offered to renew on like terms for an additional term of five years, the board of supervisors of the county authorized the leasing of the property to the city of Grand Rapids for a period of three years at an annual rental of only $501. Of the 51 members of the board of supervisors who attended the meeting, 24 represented the city of Grand Rapids, 3 East Grand Rapids, and 24 the townships. The fire marshal of Grand Rapids stated at the meeting that it was essential that the city acquire the property in order to promote the efficiency of the fire department by the use of a portion of the property as a drill field and fire tower. The city also intended to use the building on the premises to store property belonging to the city police department. The city has contracts for furnishing fire protection to some of the outlying townships and receives pay for this service. There is no showing that the townships receive any police pro-

tection from the city. At a prior meeting of the board it was contended that the rental of $3,000 per year was inadequate. However, at the meeting at which the action was taken to rent the property to the city for $501 per year, it was openly charged that the members of the board who voted in favor of this action were acting in the interest of the city and not of the county, whose interests it was their duty to protect. The 24 members from Grand Rapids, together with the 3 from East Grand Rapids, voted in favor of leasing the property to the city. The 24 members from the townships voted against it. After a hearing on a bill filed by plaintiffs, some, as supervisors, and all as taxpayers, residing in the townships, the court rendered a decree restraining the entering into the lease on the ground that the action of the board was confiscatory in disposing of property at an inadequate price unless the general public benefit of the county at large be considered, and that under the evidence such imaginary consideration did not enter as an element in the transaction.

The board has a fiduciary relationship to the entire county and not to the city alone, notwithstanding the fact that approximately 80 per cent. of the taxable property of the county lies in the city. Defendants urged strongly that the city pays the larger part of the taxes, but they did not state, however, that in turn the city would indirectly receive the benefit of a larger part of the income from the property. It would require strong proof under the present circumstances to show that the indirect benefit to the entire county was the moving consideration in refusing to continue a lease from a responsible person at $3,000 a year instead of leasing it to the city for $501 a year. Even if there were such a

showing, there is no claim whatsoever made that the townships at large received any benefit whatsoever from the city's police department which was to have the use of the building for storage purposes. The division of the vote indicates that supervisors from the city of Grand Rapids, aided by those from the city of East Grand Rapids, were acting wholly in the interest of the city and not of the county at large. The trial judge denounced the entire transaction as a fraud on the county. Even though there may be no wilful dishonesty in the transaction, it is a constructive fraud on the rights of the taxpayers of the county. It is analogous to an action by a board of directors who by their vote evidenced their personal interest instead of that of the corporation. *Turner* v. *Calumet & Hecla Mining Co.*, 187 Mich. 238; *McKey* v. *Swenson*, 232 Mich. 505.

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

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

RICHARDS *v.* F. C. MATTHEWS & CO.

1. INDEMNITY—CONSTRUCTION—AGREEMENT TO SUSTAIN FROM LOSS IN BUSINESS.

   Agreement to sustain one from loss in business means net loss, if any, that remains after deducting those items that may properly be deemed profits from those of expenses, etc., that may be properly classified as losses.

As to right to judgment *non obstante veredicto* because of failure of proof, see annotation in 12 L. R. A. (N. S.) 1021; L. R. A. 1916E, 828.

2. TRIAL—NEW TRIAL—DAMAGES—CONJECTURE—JUDGMENT NON OBSTANTE VEREDICTO.

On disputed question of fact, where there is sufficient evidence to justify jury's verdict for plaintiff, trial court should not set verdict aside; but where testimony is so incomplete, uncertain, and indefinite that jury's verdict can only be result of conjecture, trial court should enter judgment *non obstante veredicto* for defendant.

3. INDEMNITY—BURDEN OF PROOF.

In action on oral contract to sustain plaintiff from loss in business, burden of proof to establish loss is on him.

4. SAME—DAMAGES—JUDGMENT NON OBSTANTE VEREDICTO.

Where, in action on oral contract to sustain plaintiff from loss in business, there was verdict for plaintiff although testimony showed that no loss was sustained, judgment *non obstante veredicto* was properly entered for defendant.

Error to Kalamazoo; Weimer (George V.), J. Submitted October 7, 1931. (Docket No. 37, Calendar No. 35,498.) Decided December 8, 1931.

Assumpsit by Howard Richards against F. C. Matthews & Company, a Michigan corporation, on an oral contract to save plaintiff from loss under a refrigerator dealer's agreement. Judgment *non obstante veredicto* for defendant. Plaintiff brings error. Affirmed.

Harry C. Howard, for plaintiff.

Knappen, Uhl, Bryant & Snow and *Mason & Sharpe,* for defendant.

BUTZEL, C. J. On June 3, 1929, Howard Richards, plaintiff, entered into a dealer's agreement with F. C. Matthews & Company, a Michigan corporation, defendant, the distributor of "Frigidaire" iceless refrigerators for southwestern Michigan. The con-

tract gave plaintiff the exclusive right to sell "Frigidaires" and parts in Kalamazoo county. It set forth the discounts off the list price plaintiff would be entitled to, obligated him to look after the service of the "Frigidaires" of both former and prospective customers, and detailed the rights and obligations of the respective parties. The contract was in no sense one of agency. Plaintiff agreed to purchase Frigidaire units and parts on regular terms from defendant, and to maintain an independent business at his own risk and expense. The contract was for no definite term, each party reserving the right to cancel or terminate it at any time, with or without cause, by written notice to the other party. In that event, defendant had the right to repurchase at dealer's cost all unsold merchandise purchased by plaintiff from defendant.

Plaintiff claims he invested $4,000 in the business; that on August 12, 1929, he went to see F. C. Matthews, president of defendant company, and told him that the venture was unprofitable and that he desired to terminate the contract so as to avoid further loss; that thereupon Matthews persuaded him to continue, and he did so, upon Matthews' express verbal promise that defendant "would sustain plaintiff from all losses, so long as the written contract was in force." The present suit is based upon this alleged verbal promise.

On October 10, 1929, defendant gave plaintiff notice of termination, and five days later appointed another dealer who took over the dealership. Plaintiff claims in his declaration, as supplemented by his bill of particulars, that he sustained losses amounting to over $4,500 through being obliged to give free service to former customers, expend large amounts for service men, rent, agents, advertising, etc. Ac-

cording to his bill of particulars and testimony, part of this loss is made up of $1,274.49 drawn by him for living expenses, and $460 due to "salesmen underselling." These two items were excluded by the trial judge. Plaintiff's testimony in regard to some of the other items set forth in his bill of particulars is vague and uncertain. Defendant, on the other hand, claims that plaintiff realized a profit and sustained no loss whatsoever. It moved for a directed verdict, but the court reserved its decision. The jury rendered a verdict of $617.50 in plaintiff's favor. Upon a motion for a judgment *non obstante veredicto,* the court set the verdict aside, and entered a judgment in defendant's favor. In the motion for a directed verdict and judgment *non obstante veredicto,* the two main questions involved on appeal were presented. We need only consider one of them.

Even assuming that the verbal contract of indemnity claimed by plaintiff was a legal one, supported by a valid consideration, and not void for indefiniteness or lack of mutuality, we do not believe that plaintiff offered sufficient evidence of loss to support a verdict in his favor. In coming to this conclusion, we are reviewing the testimony in a light most favorable to plaintiff. An agreement to sustain one from loss in a business means the net loss, if any, that remains after deducting those items that may properly be deemed profits from those of expenses, etc., that may be properly classified as losses. The expenses testified to by plaintiff amounted to $4,002.26. He offered his "bookkeeping system" in evidence. It only shows a loss of $1,603.03 for the period of over four months during which the contract was in force. It shows profits from the sale of ten units in the month of June, 1929, but not any for the following three and one-half months. Plaintiff

does not explain why these profits were omitted. The contract provided for a profit or discount of 27 per cent. on each unit. Plaintiff admits that there were 38 or 39 units sold at an average price of $300 per unit. If the profit or discount of $2,349, or 27 per cent. on the sale price of 28 or 29 units omitted from plaintiff's bookkeeping system is included, it is obvious that there was a profit realized and not a loss. Plaintiff failed to prove his total receipts from sales, installation, and service charges. According to his testimony, there could not have been a loss. In an effort to reconcile plaintiff's figures, his counsel in his brief refers to the bill of particulars, which shows a loss of $4,751.44, and deducts therefrom the amounts withdrawn by plaintiff for living expenses, also the item for underselling by agents, and also a profit of 27 per cent. on 33 Frigidaire units. This would reduce the loss to $607.44, which, with interest, would be a trifle more than the amount of the verdict. In so doing, the profit on five or six units is omitted, as well as amounts charged for service accounts. In the bill of particulars, plaintiff claims a loss of $1,059.86 for the salaries of men employed in the service department. He also charges the sums of $375 and $149.61 as items of loss under the heading of "service accounts." An itemized statement of these accounts shows that they consist almost entirely of charges for labor furnished for service. Plaintiff admitted that there was some duplication in these accounts. Were these items taken into consideration, the amount claimed by plaintiff's counsel as a loss would be more than entirely offset. The account further does not take into consideration any sums received for service, nor does it show if there are any profits from the sale of parts. On a disputed question of fact, where there is sufficient evi-

dence to justify the verdict of the jury in a plaintiff's favor, a trial court will not set aside the verdict. However, where the testimony is so incomplete, uncertain, and indefinite so that a jury's verdict can only be the result of conjecture, and a proper analysis of such testimony shows that the verdict should have been in defendant's favor instead of plaintiff's, the trial court should enter a judgment *non obstante veredicto* in defendant's favor. It was incumbent upon the plaintiff to give sufficient data, facts, and circumstances from which the jury might find the actual loss, if there was one. The burden of proof to establish the loss was upon plaintiff. This he did not sustain. *Meyers* v. *McQueen,* 85 Mich. 156; *Dolomite Limestone Products Co.* v. *Kennedy-Van Saun Manfg. & Eng. Corp.,* 241 Mich. 279; *Mount Ida School for Girls* v. *Rood,* 253 Mich. 482 (74 A. L. R. 1325). On the contrary, the testimony shows that there was no loss sustained, and the judgment *non obstante veredicto* was properly entered.

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

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

In re STATE HIGHWAY COMMISSIONER.

1. EMINENT DOMAIN—OWNER LOSES ALL PRIVATE RIGHTS IN LAND TAKEN.

   When land is taken by eminent domain it becomes absolutely the property of the State or other public authority that has condemned it, and former owner retains no such rights in it as to prevent it from being used for general public purposes.

2. SAME—MUNICIPAL CORPORATIONS—RIGHT OF VILLAGE TO REGULATE HIGHWAY.

   Where State condemned land in village for purpose of widening State highway, village has right to use it for public improvements and to adopt ordinances regulating traffic thereon and forbidding its use by curb gasoline stations; former owner losing all legal right to use it as private property.

3. SAME—COMPENSATION WHEN ONLY PART OF PARCEL TAKEN.

   Where only part of parcel of land is taken in condemnation proceedings, award should compensate for actual portion taken plus cost of altering building and all consequential damages on account of alteration.

4. SAME—DAMAGES—INSUFFICIENT AWARD.

   Where land used as outer drive by gasoline station owner was taken by State by condemnation, necessitating removal back of oil station building, and award by commissioners was only slightly more than value of land taken, and apparently did not take into account cost of moving building and consequential damages, award is set aside and remanded for reassessment of damages.

Appeal from Kent; Brown (William B.), J. Submitted October 14, 1931. (Docket No. 100, Calendar No. 35,710.) Decided December 8, 1931.

Condemnation proceedings by Grover C. Dillman, State highway commissioner, to obtain land for the purpose of widening a State trunk line highway in the village of Grandville, Wyoming township, Kent

county. From an order confirming award made, White Star Refining Company, owner of a parcel of condemned land, appeals. Reversed, and remanded for reassessment of damages.

Travis, Merrick, Johnson & McCobb, for appellant.

Paul W. Voorhies, Attorney General, *Walter A. Rice* and *W. K. Galbraith,* Assistants Attorney General, for appellee.

BUTZEL, C. J. Grover C. Dillman, State highway commissioner, filed a petition in the circuit court for the county of Kent to condemn property for the widening of highway M–21 in the village of Grandville, Wyoming township, Kent county. A determination of necessity had been made to condemn sufficient land so as to widen the entire highway easement to 100 feet, with a concrete pavement in the center 40 feet in width. It was found necessary to take from appellant's property a strip of land 131.75 feet in length, 14.56 feet in width at the west end, and 12.4 feet in width at the east end, abutting the south side of the highway. It constituted the outer driveway of a gasoline station consisting of a building, pumping apparatus, tanks, etc., and a double driveway. The latter is made up of an inner and outer driveway between which there is a narrow space referred to as a "pump island," containing pumps from which gasoline is supplied to automobiles. After taking this strip, which was wholly used as the outer driveway, there remains only the inner driveway, which will border on M–21 when the widening is completed. A corner of the canopy extending over the pump island projects over the

strip condemned. The building and physical property will not be otherwise materially damaged, except that the outer driveway will be wholly, absolutely, and unqualifiedly taken by the State. Upon the hearing, it was shown without contradiction that a gasoline filling station, in order to more readily attract customers and be efficient and profitable, requires two adjoining driveways, so that a double row of cars can be accommodated at the same time; that it would be uneconomical and impractical to substitute a driveway in the rear of the building for the one in front taken by the State; that, in order to restore a double driveway after the condemnation, it would be necessary to rearrange the entire property and to move back and rebuild the entire building. Appellant also owns property in the rear of the gasoline station.

The sole question involved on appeal is whether the commissioners can, by the application of an incorrect rule of law, reduce the compensation an owner is legally entitled to. Appellant appeals from an award of $1,120, which was arrived at by determining the damages to be $1,350 and deducting therefrom the benefits found to be of the value of $230. Appellant claims that the commissioners awarded an inadequate amount because they were impressed by the attorney for petitioner with the claim that, notwithstanding the taking of the outer driveway, appellant would continue to have the legal right to use it after its conversion into a highway, in like manner as it did previous to the condemnation. It was shown that the cost of rebuilding and rearranging the station would be $2,819, exclusive of the value of the land. The contractor's estimate for reconstructing the building was $2,050. The $1,350 damages which appellant was found to be entitled to

was only $395 more than the testimony on the part of the State showed that the land itself was worth. It is evident that little, if anything, was allowed appellant for the other damages it would suffer on account of the cost of moving the station and equipment further to the rear of the property, and reconstructing the building. The record shows that the commissioners were led to believe that appellant would have a lawful right to use the public highway easement in lieu of the outer driveway.

When land is taken by eminent domain it becomes absolutely the property of the State or other public authority that has condemned it. The former owner retains no such rights in it so as to prevent it from being used for general public purposes. In *Warren* v. *City of Grand Haven,* 30 Mich. 24, 28, in an opinion written by Mr. Justice COOLEY, this court stated:

"The dedication of land to the purposes of a village or city street must be understood as made and accepted with the expectation that it may be required for other public purposes than those of passage and travel merely, and that under the direction and control of the public authorities it is subject to be appropriated to all the uses to which village and city streets are usually devoted, as the wants or convenience of the people may render necessary or important: *Kelsey* v. *King,* 32 Barb. (N. Y.) 410; *West* v. *Bancroft,* 32 Vt. 367; Dillon, Municipal Corporations (1st Ed.), §§ 544, 545."

See, also, *Village of Grosse Pointe Shores* v. *Ayres,* 254 Mich. 58. It may become necessary to build sewers, conduits, electric light poles, sidewalks, etc. The property is already in a village which may order such improvements. The right may be asserted by the public authorities to adopt ordinances and other traffic regulations forbidding the impeding of traffic

by curb gasoline stations. The property is taken for all time without restrictions, and appellant loses all legal right to use it as private property. The jury, however, was impressed with the contrary rule. In the examination of the State's main witness, although he stated that consequential damages had been considered, nevertheless on cross-examination he testified that the moving of the station was not considered and he doubted whether it would be moved. The attorney for the petitioner on cross-examining the witness for appellant, in asserting that appellant would have the legal right to continue to use the highway as theretofore, framed his question as follows:

"Assuming that that is the law—I might state that is the law—and that the owner has the use of it, then what, in your opinion, would be the value of this property?"

Again he asked:

"After this taking on of their outer drive-in, they will be on property over which the State has an easement; assuming that they will have the same use of it they have had in the past—over which the State has an easement?"

One of the commissioners in discussing the necessity of rebuilding by appellant, said:

"What the commission understands is that the purpose to do that is problematical; there is no certainty that they will do it—it is an estimate of what the cost will be—under certain contingencies."

A reading of the record leads us to the conclusion that the commissioners took into consideration an unenforceable and an indefinite promise made by the State that the appellant might continue to use the

driveway when converted into a street. The size of the award confirms this conclusion. Where only a part of a parcel is taken, the award should compensate for the actual portion of the land taken, plus also the cost of altering the building and all consequential damages on account of the alteration. *City of Detroit* v. *Loula,* 227 Mich. 189; *In re Widening Bagley Avenue,* 248 Mich. 1; *In re Widening of Allen Road,* 250 Mich. 690.

The order confirming the award of the commissioners is set aside, and the assessment of damages is remanded to the present commissioners or to such others as may be appointed by the court, if necessary, in accordance with the statute, for reassessment of damages.

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

PEOPLE *v.* WARD.

1. CRIMINAL LAW—TRIAL—INFORMAL TRIAL.
   In trial of person accused of felony, it is highly improper that case be tried in informal manner and that court resolve itself into one of conciliation, although in civil case, where parties consent, such procedure would be unobjectionable.

2. SAME—TRIAL WITHOUT JURY—PRESUMPTION OF INNOCENCE.
   Irrespective of whether criminal case is tried with or without jury, accused is entitled to presumption of innocence until it is overcome by evidence that satisfies court beyond reasonable doubt of his guilt.

As to presumption of innocence as evidence, see annotations in 34 A. L. R. 945 *et seq.;* 47 A. L. R. 968.

3. SAME—EMBEZZLEMENT—GREAT WEIGHT OF EVIDENCE.

Where, in prosecution for embezzlement tried without jury, trial court, by remarks, indicated that presumption of guilt instead of presumption of innocence was being indulged, conviction is set aside as against great weight of evidence.

Error to Recorder's Court of Detroit; Jeffries (Edward J.), J. Submitted October 15, 1931. (Docket No. 205, Calendar No. 35,187.) Decided December 8, 1931.

Clarence R. Ward was convicted of embezzlement. Reversed, and new trial granted.

Charles H. Culver, for appellant.

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

BUTZEL, C. J. Clarence R. Ward was convicted of embezzlement. The case was tried without a jury. He had been manager of the Londke Motor Sales, a copartnership consisting of Anna, Fred, Phil, and John Londke. He was charged with embezzling the sum of $171.15, paid to him by customers. Upon the discontinuance of a bookkeeping system on account of lack of business, according to the claim of prosecution, duplicate statements of each transaction were made out, one being given to the customer and the other retained by the firm. A number of payments, aggregating approximately $100, were shown to have been made to defendant, and, it is claimed, were converted by him to his own use. He denies misappropriating the moneys, and claims that he placed all money received in a cash drawer; that he later deposited all cash on hand in the bank; that the statements given to customers only showed the amount of the charges; that some of the partners also col-

lected and kept moneys for work done; that he gave Mrs. Londke money but received no receipt from her.

The case was tried in a very informal manner, While in a civil case where, with the consent of the parties, the court has resolved itself into one of conciliation, such a procedure would be unobjectionable, it is highly improper in the trial of a person accused of a felony. It is claimed that various errors arose on this account. We need not discuss them, for even if they constitute reversible error, they will not arise on a retrial.

One claim of error, however, we cannot overlook. A reading of the record leads us to the conclusion that it is extremely doubtful whether there was sufficient evidence to prove the *corpus delicti* or defendant's guilt beyond a reasonable doubt. In coming to this conclusion, we are not unmindful of the fact that the trial judge had the advantage of seeing the witnesses, but, on the other hand, a presumption of guilt instead of innocence seems to have attended the defendant during the trial of the case. Irrespective of whether the cause is tried with or without a jury, he is entitled to the presumption of innocence until it is overcome by evidence that satisfies the court beyond a reasonable doubt of his guilt. The court in no unequivocal terms indicated that the circumstances under which defendant worked were such that an ordinary man could not have resisted the temptation to steal. This would raise a presumption of guilt, and not of innocence, that defendant was called upon to overcome. Upon weighing the evidence and taking into consideration the remarks of the trial judge, we are constrained to set aside the judgment and order a new trial.

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

SCARBOROUGH *v.* DETROIT OPERATING CO.

1. MOTOR VEHICLES—"OWNER"—TRANSFER OF TITLE.
   Purchaser having exclusive use of automobile under conditional sales contract is "owner," within meaning of 1 Comp. Laws 1929, § 4658, requiring seller to transfer to purchaser certificate of title, although purchaser agreed to keep car in seller's garage.

2. SAME—FAILURE TO TRANSFER TITLE VOIDS SALE.
   Conditional contract for sale of automobile, giving to purchaser exclusive use thereof, is void under 1 Comp. Laws 1929, § 4658, where seller neglected to transfer certificate of title to purchaser.

3. SAME—VOID SALE—RIGHT TO RECOVER PAYMENTS.
   Where contract for sale of automobile is void, and seller has repossessed car, purchaser is entitled to recover payments made thereon.

4. COSTS—FAILURE TO FILE BRIEF.
   Costs are not awarded to appellee who failed to file brief, although judgment of court below is affirmed, on appeal.

Error to Wayne; Black (Edward D.), J., presiding. Submitted October 28, 1931. (Docket No. 98, Calendar No. 35,829.) Decided December 8, 1931.

Assumpsit in common pleas court by Joseph L. Scarborough against Detroit Operating Company, a Michigan corporation, and another to recover money paid under alleged void conditional sales contract for the sale of an automobile. Judgment for defendants. Plaintiff appealed to circuit court. Judgment for plaintiff. Defendants appeal. Affirmed.

Harold H. McLean, for plaintiff.

Edward N. Barnard, for defendants.

BUTZEL, C. J. Joseph L. Scarborough, plaintiff and appellee, purchased on a conditional sale contract an automobile from the Detroit Cab Company, which assigned its interest to the Detroit Operating Company. The two companies are defendants and appellants. The purchase price was $1,323.96, of which $195 was paid in cash and the balance, payable in monthly installments of $94.08, was evidenced by notes. The contract contained an agreement by vendee that the automobile would be kept at the cab company's garage, and also other covenants vouchsafing the proper conduct of the vendee, the careful use of the car, etc., all tending to make the vendor more secure. A contemporaneous license agreement between the plaintiff and the cab company related to the garaging and servicing of the car, the use of the company's name, the participation by the vendee in the company's taxicab business, the observance of the rules in regard thereto, the payments for this service, and other obligations on the part of the respective parties. Under section (g), paragraph 2, of the license agreement, plaintiff as second party agreed with the cab company as first party as follows:

"To assign to first party or its nominee the certificate of title issued by the State of Michigan for said taxicabs, which assignment shall authorize the first party to take said taxicab wherever the same may be upon the breach by the second party of any of the terms of this license agreement or the nonpayment of the purchase price of said taxicab to the seller thereof, and to obliterate from it the name 'Detroit Cab Company' and to hold the said taxicab as security for any amounts due first party under the

terms of this agreement and for the full performance by the second party of the terms hereof."

After making payments aggregating $500 or thereabouts, plaintiff defaulted and defendant operating company peacefully repossessed the car. Plaintiff claims that, inasmuch as the certificate of title had not been transferred to him, the transaction was void under the Michigan registration of title act (Act No. 46, Pub. Acts 1921, now 1 Comp. Laws 1929, § 4658 *et seq.*), and, therefore, he is entitled to the return of the moneys paid by him. The defendants do not deny that, if the transaction is within the provisions of the act, the contract is void on account of the failure to transfer the certificate of title. *Endres* v. *Mara-Rickenbacker Co.*, 243 Mich. 5; *Ittleson* v. *Hagan*, 245 Mich. 56; *Bos* v. *Holleman De Weerd Auto Co.*, 246 Mich. 578.

The sole question presented in the instant case is whether, when a motor vehicle is sold on a conditional sales contract, the transaction is void under the Michigan registration of title act if the vendor does not, at the time of the transaction, transfer the certificate of title to the vendee. One of the purposes of the act, as stated in the title, is "to regulate purchase and sale or other transfer of ownership." Section 1 (c) of this act provides:

"The term 'owner' shall also include any person, firm, association or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days" (1 Comp. Laws 1929, § 4658).

Defendants contend that plaintiff did not have exclusive use of the car under a lease or otherwise for a period greater than 30 days, because he had

contracted to operate the car as a taxicab, painted with the name and color of the Detroit Cab Company, and he also was required to keep the car at the vendor's garage. The license agreement was for the benefit of each party. It added another taxicab to the fleet operated by the taxicab company, and gave plaintiff certain advantages for which in turn the cab company was to receive payment. The additional fact that plaintiff agreed to keep the car at defendant's garage did not deprive plaintiff of the use of the car. The testimony shows that the car was not kept at defendant's garage. Under both the contract and the license agreement, plaintiff had the sole and exclusive right to use the car. The words "having the exclusive use thereof, under a lease or otherwise, for a period greater than 30 days," appearing in section 1 (c) of the act, are sufficiently broad to embrace conditional sales where the vendee has the exclusive use for a period of 30 days or more.

These questions were fully considered in the lower court where plaintiff recovered a judgment for $500. Judgment is affirmed, but without costs, as appellee has failed to file a brief up to the time of the writing of the opinion.

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

WALSH *v.* PORTER.

TAXATION—SUFFICIENCY OF DESCRIPTION—OMITTING NAME OF SUBDIVISION.

Where for 60 years in assessing certain lots included in recorded plat they were described as being in certain subdivision, description in assessment which omitted name of said subdivision was insufficient, rendering void tax proceedings and sale for delinquent taxes (1 Comp. Laws 1929, § 3413).

Appeal from St. Clair; Robertson (William), J. Submitted October 21, 1931. (Docket No. 158, Calendar No. 35,848.) Decided December 8, 1931.

Bill by Joseph Walsh against G. M. Porter and Auditor General of the State of Michigan to set aside a tax deed for misdescription. Decree for plaintiff. Defendants appeal. Affirmed.

Walsh, Walsh & O'Sullivan, for plaintiff.

Arthur W. Penny, for defendant Porter.

Paul W. Voorhies, Attorney General, and *Hugh E. Wilson,* Assistant Attorney General, for defendant Auditor General.

BUTZEL, C. J. In 1849, Fortune C. White platted a large portion of what was then known as the village of Port Huron, St. Clair county, Michigan. Although the plat contains lines marking off what appear to be lots in block 100, they are neither identified by number or letters. In 1859, a map of the city of Port Huron was recorded. It shows block 100 containing seven lots consecutively numbered.

In 1863, W. H. B. Dowling recorded a plat of a subdivision that was captioned "map showing subdivision of that part of block 100 of White's plat of a part of the city of Port Huron, conveyed to William H. B. Dowling by L. M. Mason and wife, deed recorded June 24, A. D. 1851, in liber S of Deeds, page 566, in the recorder's office, St. Clair county, Michigan." Above the signature to the dedication on this map or plat, Dowling directs the register of deeds to record the map "as my said subdivision of said property, according to the laws of the State of Michigan." In this map, part of the seven lots formerly appearing without numbers or letters in the subdivision of block 100, and subsequently identified by lot numbers 1, 2, 7, and part of 6 in the plat of the city of Port Huron of 1859, are resubdivided into nine lots consecutively numbered. Lot 1 and parts of lots 2 and 8 of Dowling's subdivision are involved in the present case. From and after 1863, these lots were described in many instruments of conveyances, mortgages, and other public records showing change in title, as being in Dowling's subdivision. They were not described in any other manner. In the tax assessments continuously up to and including the year 1924, the lots were described as being in Dowling's subdivision. The lots became and were continuously known as being in Dowling's subdivision for a period of over 60 years. In December, 1929, Joseph Walsh, plaintiff herein, purchased from the executor of the estate of the former owner lot 1 and the east 39 feet of the north 120 feet of lot 2, and the north 20 feet of lot 8, in Dowling's subdivision of block 100, White's plat. In 1926, instead of the property being described as on the assessment rolls, as it continuously had been up to 1924, the description was changed to read: "lots 1, etc., subdivision of

part of block 100, White's plat." The taxes in 1926 were unpaid and the property was advertised and sold under the latter description, and the tax deed, dated July 30, 1930, was given by the auditor general of the State of Michigan, defendant, to G. M. Porter, trustee, codefendant in the instant case. Upon receiving notice to redeem from Porter, plaintiff filed his bill of complaint. He seeks to avoid the tax sale on account of misdescription of the property, and asks that the deed to Porter be decreed a cloud on the title, and set aside. A decree was entered in his favor.

The question presented on appeal is whether there was a fatal misdescription of the property. The property was known both by the owners and the tax authorities as being in Dowling's subdivision. In *Jackson* v. *Sloman,* 117 Mich. 126, the assessment was held to be erroneous because the word "Park" was omitted in the description of the "F. & P. M. Park" subdivision. It is contended that subdivision 6 of section 25, Act No. 206, Pub. Acts 1893 (1 Comp. Laws 1929, § 3413), referred to in *Jackson* v. *Sloman, supra,* has been repealed. The opinion, however, calls attention to subdivision 4 of section 25 of the act of 1893 (now 1 Comp. Laws 1929, § 3413), which provides that the description should refer to the plat and the number of lots and blocks thereof.

In the instant case, the description failed to refer to Dowling's subdivision, the known and recognized name of the plat. In the advertisement of sale, the lots were listed under the captions of the subdivision, and these were set forth in alphabetical order. One owning property in Dowling's subdivision, as the property was known and recognized, would have failed to find it set forth under the letters "D" or "W." The description did not conform with the

original White plat which contained no lot numbers nor to the plat of 1859. Lots 1 and 2 of block 100 in the latter plat differ from those in Dowling's subdivision. Lot 8 does not exist at all in the plat of 1859. Had the property always been assessed as it was after 1924 there would be much force in defendants' claim that the description was sufficiently correct, even though it did not conform with the wording of the Dowling plat. However, if after the name of "Dowling" as designated by him, and used by the owners, tax authorities, and all others interested in the property had been used as descriptive of the plat for a period of over 60 years, the description was to be changed, then the new one should have more fully conformed with the original wording of the caption to the Dowling plat. A purchaser of property has the right to be properly informed of the nonpayment of taxes, and if there were no sales of delinquent taxes of the lots listed under the name of "Dowling's subdivision" one might easily be misled into believing that the taxes on the nine lots contained in this plat had been paid. In *Watters* v. *Kieruj,* 242 Mich. 537, we held that the description, though sufficiently accurate for a private conveyance, was insufficient to give notice to redeem from a tax sale unless it was correct in every detail. Under the peculiar circumstances of this case, we believe that there was a misdescription in the tax proceedings.

The decree of the lower court setting aside the sale is herewith affirmed.

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

In re PETITION OF UPJOHN.

1. MUNICIPAL CORPORATIONS — VACATING PORTION OF PLAT — EVIDENCE—HIGHWAYS AND STREETS.

   In proceedings under 3 Comp. Laws 1929, § 13198 *et seq.*, to vacate portion of plat in township, objectors, who claim rights in driveways sought to be closed, may claim no rights under deeds running to others who are not objecting.

2. EVIDENCE—FAILURE TO PRODUCE EVIDENCE WITHIN PARTY'S CONTROL—PRESUMPTIONS.

   Failure to produce evidence within party's control raises presumption that, if produced, it would operate against him; every intendment being in favor of opposite party.

3. MUNICIPAL CORPORATIONS—VACATING PORTION OF PLAT—STATUTES.

   Petition to vacate portion of plat in township was properly granted, where proceedings were regular and in conformity with 3 Comp. Laws 1929, § 13198 *et seq.*, and objectors thereto failed to show any reasonable objection.

Appeal from Kalamazoo; Weimer (George V.), J. Submitted October 14, 1931. (Docket No. 116, Calendar No. 35,712.) Decided December 8, 1931.

Petition by James T. Upjohn and others to vacate a portion of a plat in a township. Objections were made by William L. Crabill and another. Decree for plaintiffs. Defendants appeal. Affirmed.

G. L. Stewart and *N. A. Cobb,* for appellants.

Jackson, Fitzgerald & Dalm (*H. C. Howard,* of counsel), for appellees.

BUTZEL, C. J. In 1894, Dr. James T. Upjohn, petitioner, subdivided and platted property on the shore of Gull lake, Kalamazoo county, under the name of "Plat of Idlewild." Appellants William L. Crabill and Earl S. Elliott purchased and own lots in this subdivision. At the time the property was platted, Dr. Upjohn did not own any of the adjoining land, but subsequently acquired adjacent property on both the east and west sides of Idlewild. In 1900, he platted the "First addition to the plat of Idlewild," and in 1905, the "Second addition to the plat of Idlewild." Dr. Upjohn and a number of other owners of lots in the "Second addition to the plat of Idlewild" petitioned the circuit court for the county of Kalamazoo for a vacation of a portion of the plat of the second addition. The proceedings appear regular in form and conform with Act No. 172, Pub. Acts 1929 (3 Comp. Laws 1929, § 13198 *et seq.*). The petition contains the indorsement and approval of the owners of over 70 per cent. of all of the lots in the second addition to Idlewild and of the owners of all lots abutting the driveways sought to be closed. One hundred fifty-two of the 174 owners of lots in Idlewild and the two additions thereto either signed or consented in writing to the original petition. Notice of the proceedings was duly served upon the supervisor, he being the presiding officer of the township in which the property is located.

Appellants have appealed from the decree of vacation. They claim rights in the driveways sought to be closed in the "Second addition to the plat of Idlewild." To substantiate their claims, they introduced a deed to property not owned by them but running to a party not appearing as an objector. In this deed, the grantee of a lot in the original Idlewild subdivision is given rights to the use of drive-

ways over Idlewild and additions thereto as shown in present or future recorded plats thereof. Appellants did not see fit to introduce the deeds to their own lots, and as it was shown that all deeds did not contain grants to rights of driveways in additional subdivisions, appellants can claim no such rights to themselves under deeds running to other owners.

"Failure to produce evidence within a party's control raises the presumption that, if produced, it would operate against him; and every intendment will be in favor of the opposite party." *Brandt* v. *C. F. Smith & Co.*, 242 Mich. 217, 222.

Crabill limited his objections to the closing of South street, a driveway that at no time has been opened, is difficult to locate, and has been, and still is, used as part of the fairway of the golf club. He was willing to waive his objection provided other property in the original plat of Idlewild was vacated. Elliott based his objections on some hearsay evidence which made him fearful that his present means of ingress and egress through driveways that have been used for years might be later shut off, and in that event he would be deprived of the use of the driveway sought to be closed. It was shown that his apprehension was not justified. The appellants failed to show any reasonable objections to the vacation. They claimed that in *Re Petition of Hendricks,* 248 Mich. 124, Act No. 6, Pub. Acts 1926, is unconstitutional. The act to which Act No. 6, *supra,* is amendatory was expressly repealed by Act No. 172, Pub. Acts 1929 (3 Comp. Laws 1929, § 13277), under which the present proceedings are brought. *In re Petition of Hendricks, supra,* was again affirmed in 251 Mich. 336, but it was held that where a petition to vacate was not filed with the village or city authority, an original proceeding to vacate may be

begun by petition in the circuit court. The validity of a somewhat similar proceeding was upheld in *Re Oakes,* 249 Mich. 494.

The order of vacation is affirmed, with costs to appellees.

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

SCHNEIDER *v.* LEVY.

1. JUDGMENT—SUMMARY JUDGMENT—AFFIDAVIT OF MERITS.
   Where allegations in defendant's affidavit of merits do not constitute sufficient defense, summary judgment should be entered for plaintiffs.

2. VENDOR AND PURCHASER—RIGHT OF VENDOR TO INSIST ON PAYMENT NOTWITHSTANDING OPTION TO FORFEIT.
   Where there was absolute promise to make payments on part of vendees, vendors could insist on payments due thereunder, although they had option, in event of vendees' default, to declare contract ended and retain moneys paid thereon as stipulated damages.

3. SAME—NAKED ORAL PROMISE INVALID—CONSIDERATION.
   Mere naked promise of vendor to extend time of payment due under land contract, resting in parol and without any consideration, is invalid.

4. CONTRACTS—UNCERTAINTY OF PERFORMANCE—VALIDITY.
   Where time of performance is so uncertain that it may or may not arrive in distant future, contract is void for uncertainty.

5. VENDOR AND PURCHASER—ORAL PROMISE TO EXTEND TIME OF PAYMENT—UNCERTAINTY—VALIDITY.
   Oral agreement to extend time of payment due under land contract until land was platted and sufficient lots sold to make

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As to necessity of consideration for a subsequent agreement extending time of payment, see annotations in 52 L. R. A. (N. S.) 333; L. R. A. 1915B, 26.

such payment is void for uncertainty, even if consideration therefor may be inferred.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted October 8, 1931. (Docket No. 50, Calendar No. 35,676.) Decided December 8, 1931.

Assumpsit by John G. Schneider and another against Jacob J. Levy and others for payments due on a land contract. Summary judgment for plaintiffs. Defendants appeal. Affirmed.

Hollis C. Martin, for plaintiffs.

George V. Lux, for defendants.

BUTZEL, C. J. On May 1, 1925, plaintiffs John G. Schneider and wife, as vendors, entered into a land contract with defendants Jacob J. Levy *et al.,* as vendees, for the sale of 109 acres of land in the township of Troy, Oakland county, Michigan. The consideration was the sum of $10,000 paid at the time contract was entered into, and the further sum of $93,550, which vendees agreed to pay in installments of not less than $2,500, together with interest at the rate of 6 per cent., payable on November 1, 1925, and semi-annually thereafter, the entire sum to be fully paid within 10 years from the date of the contract.

Vendees further agreed to join with the vendors, provided they were not in default on the contract, in platting the premises, dedicating all requisite streets and alleys, and to release any lots in the plat on the payment of an amount certain per lot, such amounts to apply on the reduction of the principal but not upon the semi-annual payments provided for in the contract. The vendees agreed to make the payments. The contract also contained a general provision that,

in the event of default, the vendors immediately would have a right to declare the contract void and to retain whatever had been paid thereon together with any improvements as stipulated damages, and might consider and treat the parties of the second part as tenants holding over without permission and repossess themselves of the premises and remove defendants. Other clauses in the contract are not pertinent to the issue.

The vendees defaulted in serial payments after May 1, 1929. They, however, paid interest due from May 1 to November 1, 1929. On June 30, 1930, plaintiffs brought suit against defendants for the sum of $11,490.03, declaring on the contract and the common counts. Copy of contract was attached to the declaration. Defendants pleaded the general issue, claimed that provision for liquidated damages in the contract operated as a release in the event of default, and that there had been a waiver of performance of the contract by plaintiffs. Other defenses stated in the appeal appear to have been waived, as they are not included in the statement of questions involved and will not be considered.

Plaintiffs, on motion for summary judgment, claimed the amount of the payments that were past due on the contract together with interest, and asserted that defendants had no valid defense. The motion was accompanied by an affidavit of John G. Schneider, setting forth the facts alleged in the declaration, and further stating that an offer had been made to defendants that if they would pay $1,500 upon the principal amount which became due May 1, 1930, and all accrued interest to date, together with taxes, that plaintiffs would not insist upon immediate payment of the principal due May 1, 1929. Defendants Levy and Lux filed affidavits of merits, in which they claimed that the stipulated damages

clause in the contract released them from all further obligations to make payments, and also that plaintiffs had agreed that if defendants would cause the property to be surveyed, developed, and placed upon the market for sale, plaintiffs would postpone payments of the principal until such time as the lots in the subdivision were sold and the money for payments upon the principal would be sufficient to take care of the amounts due plaintiffs; that, relying upon such agreement, defendants proceeded to lay out money for the purpose of subdividing and developing this property, and caused certain portions of streets to be graded and graveled; that on May 1, 1930, payment of the interest had been tendered plaintiffs, who demanded payment of all the unpaid principal payments then due under the terms of the original contract.

Upon the hearing of the motion, the contract was introduced and testimony taken showing the amount due at that time. Summary judgment was entered in favor of plaintiffs against defendants in the sum of $11,340.52. The latter appeal, and claim that the affidavits of merits, and amendments thereto set up a meritorious defense, and that plaintiffs are not entitled to a summary judgment under the circumstances.

If the allegations in the defendants' affidavits of merits do not constitute a sufficient defense, it would be proper for the court to enter a summary judgment for plaintiffs. *Jones* v. *Wayne Circuit Judge,* 253 Mich. 515. It was optional on the part of vendors in the event of a default to declare the contract at an end and retain the moneys paid thereon as stipulated damages, or to treat the contract as being in full force and insist upon the payments that the vendees specifically agreed to make. There was an absolute promise to make the payments on the part

of the vendees. The vendors were not obliged to terminate the contract. They could insist upon the payments due thereunder, but if they terminated the contract on account of defendants' default, then they could retain the amounts paid in and the improvements on the property as stipulated damages.

The claim that vendees were promised an extension of time for the payment of the balance of the principal until the lots were sold in consideration of the surveying, platting, and improving of the property is also untenable. The mere naked promise of the vendor in the land contract to extend the time of payment resting in parol and without any consideration is invalid. *Bartlett* v. *Smith,* 146 Mich. 188 (117 Am. St. Rep. 625). There is no claim that there was any written agreement of any kind to extend the time of payment. Under the contract the vendors agreed to join in the platting of the property. It was for the sole benefit of the vendees and not of the vendors that the property was to be subdivided and improved. Even, however, if a consideration can be inferred, the alleged agreement would be void for uncertainty. Where the time of performance is so uncertain that it may or may not arrive in the distant future, the contract is void for uncertainty. *Hall* v. *First National Bank,* 173 Mass. 16 (53 N. E. 154, 44 L. R. A. 319, 73 Am. St. Rep. 255); *Thompson* v. *Gortner,* 73 Md. 474 (21 Atl. 371); *Erwin & Williams* v. *Erwin,* 25 Ala. 236. In *Davie* v. *Lumberman's Mining Co.,* 93 Mich. 491 (24 L. R. A. 357), we held that a promise to work a mine as long as it could be made to pay was not enforceable because of uncertainty.

The judgment is affirmed, with costs to plaintiff.

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

MORAN *v.* LEBLANC'S ESTATE.

1. HUSBAND AND WIFE—COMMON-LAW LIABILITY OF HUSBAND FOR WIFE'S FUNERAL EXPENSES.

   Under common law, husband was liable for his wife's necessaries, including expenses of her funeral and burial, over which he had sole control.

2. SAME—EXECUTORS AND ADMINISTRATORS—WILLS—LIABILITY FOR WIFE'S FUNERAL EXPENSES.

   Where wife's will, duly probated, directs that her funeral expenses be paid in full, her estate is liable therefor, regardless of whether her husband would otherwise be liable.

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted October 29, 1931. (Docket No. 109, Calendar No. 35,995.) Decided December 8, 1931.

Arthur O. Moran presented his claim for funeral expenses against the estate of Julia LeBlanc, deceased. From disallowance by commissioners on claims, plaintiff appealed to circuit court. Judgment for defendant. Plaintiff appeals. Reversed, and judgment ordered entered for plaintiff.

Kurth, Kurth & Cline, for plaintiff.

Walter M. Nelson, for defendant.

BUTZEL, C. J. Arthur O. Moran, a funeral director in Detroit, and plaintiff and appellant herein, presented his claim of $1,107.45 to the estate of Julia LeBlanc, for her funeral expenses. It was disallowed by the commissioners on claims, and, on appeal, by the circuit court for the county of Wayne,

As to husband's liability for necessaries furnished wife, see 65 L. R. A. 529; 47 L. R. A. (N. S.) 279, 283.

from whose judgment plaintiff appeals. He first made out his statement of account to George LeBlanc, the surviving husband, as debtor, but subsequently to the estate. He has not been paid.

In *Galloway* v. *Estate of Janet McPherson,* 67 Mich. 546 (11 Am. St. Rep. 596), 76 Mich. 318, stressed by appellee, it was held that a husband could not recover from his wife's estate the amount paid by him for her funeral expenses. Neither in that case nor in the instant one is the portion of the statute, now known as 3 Comp. Laws 1929, § 15726, subd. 7, referred to. It provides for the distribution of the personal property of a *femme covert* after the payment of her debts, *funeral charges,* and expenses of administration. Under the common law, the husband was liable for his wife's necessaries, including the expenses of her funeral and burial, over which he had the sole control. There is much conflict in the authorities as to whether this rule still prevails when the wife leaves a separate estate. See annotations to *Hall* v. *Stewart,* 135 Va. 384 (116 S. E. 469), in 31 A. L. R. 1499, where the decisions in regard to funeral expenses of married women are compiled. We need not consider any dispute between the husband and the wife's estate, for the last will of deceased, duly admitted to probate, expressly directs that all of her "just debts and funeral expenses be paid in full." It further provides for an almost nominal bequest to her husband, and, "after the payment of the above debts, funeral expenses, and legacies," the residue is left to a son by a former marriage. We cannot regard these provisions as idle words or meaningless, or "recitational" as defendant contends. It is clear that the testatrix intended and directed that her estate pay her funeral expenses; it is liable for them.

The judgment is reversed, with costs to appellant, and the case remanded to the lower court to enter a judgment in favor of plaintiff for the amount due him.

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

PEOPLE v. ARMSTRONG.

1. CRIMINAL LAW—EMBEZZLEMENT—EVIDENCE—TESTIMONY AS TO OTHER SIMILAR ACTS—INTENT.

   In prosecution for embezzlement, where defendant was charged solely with embezzlement of specific sum, representing one transaction, testimony tending to show that he misappropriated other sums relating to transactions of like character at about same time was properly admitted for its bearing on question of intent (3 Comp. Laws 1929, § 17320).

2. EMBEZZLEMENT—SUFFICIENCY OF EVIDENCE.

   In prosecution for embezzlement, defendant's claim that evidence was insufficient to take to jury question of his guilt, *held*, without merit.

3. CRIMINAL LAW—PRESUMPTION OF INNOCENCE—TRIAL—INSTRUCTION.

   In criminal case, best practice for trial judge is to state in positive and unequivocal language that presumption of innocence in favor of accused prevails unless and until it is overcome by convincing evidence.

4. SAME—EMBEZZLEMENT.

   In prosecution for embezzlement, charge of trial court as to presumption of innocence in favor of accused, *held*, sufficient to protect his rights, although more positive and unequivocal language might have been used.

Error to Ingham; Carr (Leland W.), J. Submitted October 15, 1931. (Docket No. 213, Calendar No. 35,740.) Decided December 8, 1931.

Claude C. Armstrong was convicted of embezzlement. Affirmed.

Dwight L. Wilson, for appellant.

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

BUTZEL, C. J. Claude C. Armstrong appeals from a judgment of conviction of embezzlement. While in the employ of Franklin DeKleine Company, of Lansing, he sold an adding machine for $98 to the Citizens Mutual Insurance Company of Howell. He received in payment a check made out to the Typewriter Inspection Company, the name under which he previously did business, and which he claims was continued by him with the knowledge of the DeKleine company after he had entered its employ. He indorsed and cashed the check, and, it is claimed, kept the proceeds. Although charged solely with the embezzlement of this specific sum of $98, testimony was introduced tending to show he misappropriated other sums. Error is claimed on this account. The other misappropriations related to transactions of like character while in the employ of the DeKleine company and within approximately short periods from the time he collected the $98 in question. Prior to his arrest, defendant was interrogated in regard to a number of these transactions appearing on the books of the company and for which, it is claimed, he had not accounted. They were set forth on typewritten sheets. A witness for the prosecution testified that defendant admitted "taking" the $98 in

question. The testimony, while it referred also to the embezzlement of other sums for which defendant was not prosecuted, nevertheless tended to show an intent to take the money. There was no error in admitting this testimony. *People* v. *Rice,* 206 Mich. 644; *People* v. *Petropoulapos,* 217 Mich. 198, where many citations to like effect are set forth. Section 17320, 3 Comp. Laws 1929, provides:

"In any criminal case where the defendant's * * * intent * * * is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved; * * * notwithstanding that such proof may show or tend to show the commission of another * * * crime by the defendant."

There is no merit in defendant's claim that there was not sufficient evidence so as to submit the question of his guilt to the jury. The verdict is supported by the testimony.

It is further claimed that the judge did not properly charge the jury as to the presumption of innocence being in defendant's favor. While the record does not disclose that the jury had sat in other criminal cases, the opening sentence of the charge would indicate that the jurors, through their previous experience, were familiar with the rule that the presumption of innocence prevails in defendant's favor throughout the entire trial. The following is an excerpt from the first part of the charge:

"Members of the jury, this is the first embezzlement case that you have been called on to decide. * * * The same presumption of innocence that always attends one who is accused of violating the law attends this respondent. That presumption goes

with the respondent throughout the trial of this case and it may be overcome only by evidence that convinces you and each of you beyond a reasonable doubt of his guilt of the offense charged.

"Counsel in their argument have referred to the rule or doctrine of reasonable doubt. The expression means what the words themselves fairly imply—a doubt that is based on reason, a doubt for which a reason satisfactory to the mind of the person having such a doubt may be given. It is not an idle doubt but rather an honest doubt arising from the evidence or lack of evidence in the case.

"If after considering all the evidence here before you, you have a reasonable doubt as to the respondent's guilt, then it will be your duty to give him the benefit of that doubt and to return a verdict of not guilty."

While the best practice for a trial judge is to state in positive and unequivocal language that the presumption of innocence in favor of the accused prevails unless and until it is overcome by convincing evidence, we believe that the rights of the defendant were fully protected by the charge as given. The judgment of conviction is affirmed.

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

GEMSA *v.* DORNER.

1. DISCOVERY—PRODUCTION OF BOOKS OF ACCOUNT—WHEN ALLOWABLE—EXCEPTIONS.
   Order permitting discovery of defendant's books of account for purpose of preparing for trial will not be granted unless it is affirmatively shown and proven to satisfaction of court that the information sought cannot be obtained at trial of case by subpœna *duces tecum*, in absence of trust or *quasi*-trust relationship between parties, or where contract provides for inspection of books and records by adverse party.

2. SAME—ORDER PROPERLY DENIED IN ABSENCE OF PROPER SHOWING.
   In action for amounts claimed to be due under contract engaging plaintiff to assist defendant in selling and licensing manufacturers the right to use certain patents, order for discovery in advance of trial was properly denied, in absence of showing that information sought could not be obtained at trial by subpœna *duces tecum*.

Appeal from Wayne; Toms (Robert M.), J. Submitted October 20, 1931. (Calendar No. 35,619.) Decided December 8, 1931.

Three separate actions of assumpsit by Joseph Gemsa against Hermann Dorner under a contract for selling certain patent rights. From orders denying plaintiff's petitions for discovery, he appeals. Cases consolidated on appeal. Affirmed.

Hobart B. Hoyt (*Edward H. Rakow*, of counsel), for plaintiff.

Pliny W. Marsh, for defendant.

BUTZEL, C. J. Defendant, Hermann Dorner, the owner of certain patents relating to an oil engine, referred to as the Dorner oil engine, employed plaintiff, Joseph Gemsa, to assist him in selling and licensing manufacturers the right to use the patents. He entered into the following written agreement:

"Detroit, Michigan,
"December 8, 1925.

"Mr. JOSEPH GEMSA,
499 Winona Avenue,
"Pasadena, California.

"*Dear Sir:*

"In consideration of the services rendered to me in demonstrating the Dorner oil engine and bringing me in contact with certain people, I hereby agree that if I succeed in selling or leasing any of my rights and interests of my patents covering said engine, in the United States of America, you are to receive five (5) per cent. of all cash and two and one half (2½) per cent. interest of all royalties which I may receive.

"Very truly yours,
"HERMANN DORNER,
"Hanover, Germany,
"Hindenburg Str. 25."

Three separate suits were begun for the amounts claimed to be due under this contract. Plaintiff filed a petition for discovery in each case, in which he asked to inspect the books of account, cash books, bank books, and memoranda of defendant and his agents, and all original or copies of agreements entered into by said defendant with the several manufacturers named in the respective cases for the sale or leasing of the rights and interests of defendant's patents relating to the Dorner oil engine. Plaintiff claimed that it was necessary to examine these various documents in order to prepare the bill of

particulars demanded by defendant in each case and also to prepare for trial. Defendant withdrew his demand for bill of particulars. Defendant in his answers in the several cases denies that he had entered into any agreement for the sale or licensing of his patents with any manufacturers with the exception of two of them; that he had disclosed and tendered payment of all moneys due by virtue of licensing agreements with these two manufacturers, with whom he had also entered into a second licensing and optional sales agreement, but had agreed with one of them that he would not disclose the provisions of the contract. Plaintiff appeals from an order of the trial judge denying the petitions, which are here considered as if the cases were consolidated.

An order permitting discovery for purpose of preparing for trial will not be granted unless it is affirmatively shown and proven to the satisfaction of the court that the information cannot be obtained at the trial of the case by a subpœna *duces tecum*. This rule was announced in what has become known as the *Cummer Case* (*Cummer* v. *Kent Circuit Judge*, 38 Mich. 351), and has been approved of frequently by this court, and but recently in *Tropical Paint & Oil Co.* v. *Hall*, 225 Mich. 293.[1] An exception to the rule has been made where a trust or *quasi*-trust relationship exists between the parties or where the contract provides for the inspection of the books and records by the adverse party. As was said in the *Cummer Case*:

"The power of a court of law to order discovery is not only an important power, but is one of great delicacy. It is exceptional and does not belong to the ordinary course of the court, and the instances

[1] See Michigan Court Rule No. 40.

in which it may be exercised, now that parties are made competent, must be exceedingly rare. The practice is exposed to great injustice and mischief, and the jurisdiction is at the best little less than invidious."

When books and records are produced in court under subpœna *duces tecum,* the rights of parties can be properly safeguarded by the trial judge. Ample opportunity can be given the plaintiff to elicit all necessary information from the books and records, and on the other hand, defendant can be protected from being obliged to disclose private information unrelated to the issue. The right to privacy is an important one and should be safeguarded. In the *Cummer Case,* it was also sought to recover commissions. There is no trust relationship involved in the instant case, nor is there any showing that the information sought cannot be obtained through a subpœna *duces tecum.* The petition asserts that it is necessary to examine the contracts in advance of the trial in order to determine whether they are royalty or sales agreements, but that can be determined at the trial. It undoubtedly would be more convenient to plaintiff to have the knowledge sought for in advance, but that is an insufficient reason for granting the petition under the facts presented in the instant case.

The order denying a petition is affirmed, with costs to defendant.

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

BOHM *v.* ROGOFF.

1. COVENANTS—BUILDING RESTRICTIONS—MINIATURE GOLF COURSE.
   Construction and operation of miniature golf course in residential district is violation of building restriction limiting use of lots in subdivision to residential purposes.

2. APPEAL AND ERROR.
   Part of decree not appealed from is affirmed, on appeal.

3. INJUNCTION—COVENANTS—BUILDING RESTRICTIONS—ABANDONMENT OF PROHIBITED USE.
   In suit to enjoin construction and operation of miniature golf course in violation of building restrictions, statement in defendant's brief, on appeal, that course has been abandoned does not prevent decree prohibiting such use.

Appeal from Wayne; Moll (Lester S.), J. Submitted October 27, 1931. (Docket No. 104, Calendar No. 35,945.) Decided December 8, 1931. Rehearing denied March 3, 1932.

Bill by George E. Bohm and others against Alfred Rogoff and others to enjoin violation of building restrictions by the construction and operation of a miniature golf course. Bill dismissed. Plaintiffs appeal. Reversed and decree entered.

Louis Rosenzweig, for plaintiffs.

Monaghan, Crowley, Reilley & Kellogg, for defendants.

WIEST, J. Plaintiffs prosecute this appeal from a decree holding that a miniature golf course is no violation of a restriction reading: "Nothing but one single dwelling house, of two or more stories

On multiple residence structures as violation of restrictive covenants, see annotation in 45 L. R. A. (N. S.) 726; L. R. A. 1918C, 873.

and the necessary outbuildings, shall be erected on each lot."

The restriction is upon lots in a subdivision. Plaintiffs own neighboring lots in the subdivision, have obeyed the restriction and seek reciprocal obedience by defendants. A miniature golf course is a violation of the restriction; it is not using the premises for residence purposes, but for public use for private gain, subjects such use to public regulation under the police power (*Jaffarian* v. *Building Com'r of Somerville,* 275 Mass. 267 [175 N. E. 641, 74 A. L. R. 403]), destroys the quiet and privacy of the residence district, and should be restrained.

In *Jaffarian* v. *Building Com'r of Somerville, supra,* it was said:

"We are of opinion that the miniature golf course proposed to be constructed and used as indicated in the auditor's report constitutes a public amusement within the meaning of this section. While it has aspects of athletic interest, it has the attributes of a public amusement. Its construction and arrangement appear to be designed to attract the attention of travelers as well as of others. The conduct of the game is public. The action of the players is open to general observation. The plan of the petitioners is a manifest effort to attract people to the game in order to make financial profit to themselves. For participation in the game payment of money is required. It is as much within the purview of the statute as if an admission fee were charged for the observers as well as for the players. It is a plain attempt to make money out of the amusement. Supervision by public officials of the numbers of people likely to gather is or may be as necessary as it is in the conventional and long established kinds of amusement. Although there is present the possible element of instruction to those who desire it, that

does not differentiate the proposed establishment from classification as a public amusement.''

What was there said upon the question of regulation under the police power applies directly to the question of restriction under a covenant running with the land.

In the circuit court defendants contended that change had lifted the restriction. The court found to the contrary. No appeal was taken by defendants.

It avails defendants nothing to contend that the restriction applies only to the kind of buildings to be erected and not to the use of the property. This contention runs counter to the manifest intent of the restriction and would fritter away its benefit.

Drennen v. *Mason,* 222 Ala. 652 (133 South. 689), cited in behalf of defendants, is of no help. In that case the court held a miniature golf course in a residence district was not a nuisance. If we made a like holding it would have no bearing upon the issue here involved.

It is stated in the brief for defendants that the miniature golf course has been abandoned. This does not prevent a decree prohibiting such use. A decree will be entered in this court to such effect and affirming the decree in the circuit, so far as not appealed from.

Plaintiffs will recover costs.

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

NORTHWESTERN LOAN & DISCOUNT CORP. *v.* SCULLY.

1. MORTGAGES—FORECLOSURE—SALE IN PARCELS.
   Where parts of mortgaged premises were subsequently sold on land contracts, sale on foreclosure should have been in separate parcels as required by 3 Comp. Laws 1929, § 14431, instead of collectively, since purchasers under land contracts had at least constructive occupancy of their respective parcels and their rights should have been recognized.

2. SAME—VOID SALE—FORECLOSURE IN EQUITY—RESALE.
   Where mortgage foreclosure by advertisement was void for failure to sell in parcels as required by 3 Comp. Laws 1929, § 14431, and no redemption was had, permission to foreclose in equity is granted on condition that sale be for amount not less than that bid at former sale.

Appeal from Lapeer; Smith (Henry H.), J. Submitted October 20, 1931. (Docket No. 147, Calendar No. 35,775.) Decided December 8, 1931. Rehearing denied March 3, 1932.

Bill by Northwestern Loan & Discount Corporation, a Michigan corporation, as assignee, against Charles B. Scully and others to foreclose a mortgage. Bill dismissed. Plaintiff appeals. Reversed.

Elmer Shumar (*Theo. D. Halpin,* of counsel), for plaintiff.

Shields, Silsbee, Ballard & Jennings (*Harris E. Thomas,* of counsel), for defendants.

WIEST, J. A mortgage covered a parcel of real estate described by metes and bounds. Subsequently parts thereof, also described by metes and bounds,

were sold by the mortgagor under land contracts, and some so sold were released by the mortgagee. The remainder, inclusive of parcels so sold but not released, was sold as a single parcel under foreclosure by advertisement and bid in by the mortgagee for the amount due. After the period of redemption had expired the mortgagee filed the bill herein to have foreclosure in equity on the ground that the previous foreclosure was void because the tract, inclusive of parcels not released from the mortgage, had been sold as one parcel and the foreclosure sale should have been by parcels in the inverse order of alienation as required by law. The bill was dismissed, it being held that plaintiff did not show occupancy of the land otherwise than as a single parcel.

The statute, 3 Comp. Laws 1929, § 14431, requires mortgaged premises, consisting of distinct tracts or lots, not occupied as one parcel, to be sold separately. The purchasers under land contracts had at least constructive occupancy of their several parcels at the time of sale and their rights should have been recognized. The title acquired by plaintiff is questionable, and the question is not solved by laches or the attitude of the mortgagor. The sale is vacated. This restores the mortgage. *Stackpole* v. *Robbins,* 47 Barb. (N. Y.) 212.

At an early date, and in a case like the one at bar, the relief herein sought was granted. *Atwater* v. *Kinman,* Harr. Ch. 243. Subsequent holdings have recognized the right. *Vary* v. *Chatterton,* 50 Mich. 541; *Morse* v. *Byam,* 55 Mich. 594; *O'Connor* v. *Keenan,* 132 Mich. 646; *Woodruff* v. *Coffman,* 139 Mich. 634. For inferential bearing see *Walker* v. *Schultz,* 175 Mich. 280; *Jerome* v. *Coffin,* 243 Mich. 324.

The decree is reversed, and a decree granting foreclosure will be entered in this court, conditioned, however, that no sale for an amount less than bid at the former sale will be confirmed.

Plaintiff will recover costs of this court only.

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

FELDPAUSCH *v.* HENDERSHOT.

1. PAYMENT—CONTRACTS—JOINT OBLIGATION—NOTE GIVEN BY JOINT DEBTOR.

   In action against joint defendants on written contract, where obligation to pay full consideration was joint, contract controls, and claim that note given by one joint debtor, which has not been paid was personal obligation and accepted by plaintiffs as payment, is without merit.

2. SAME—ACCEPTANCE OF NOTE OF JOINT OBLIGOR NOT PAYMENT.

   In absence of express agreement to contrary by creditor, acceptance of note of one or more joint obligors bound for a pre-existing debt is not payment thereof, and does not release other joint obligors who did not sign note.

3. SAME—JOINT OBLIGATION.

   Where defendants jointly agreed to convey certain pieces of property to plaintiffs with right to rents after certain date, and to install furnace in one of said properties, defendants are jointly liable for rents collected on said property by one defendant after said date, who gave his note therefor but failed to pay it, and also for price of furnace which defendants installed but which plaintiffs had to pay for in order to retain it.

On effect of taking note of joint debtor, see annotation in 35 L. R. A. (N. S.) 61.

Appeal from Superior Court of Grand Rapids; Verdier (Leonard D.), J. Submitted October 16, 1931. (Docket No. 131, Calendar No. 35,947.) Decided December 8, 1931.

Assumpsit by Albert Feldpausch and others against George Hendershot and others for sums due under a contract for the sale of a business. Judgment for plaintiffs. Defendants Hendershot appeal. Affirmed.

McAllister & McAllister, for plaintiffs.

Cornelius Hoffius and *Dorr Kuizema,* for defendants Hendershot.

WIEST, J. Plaintiffs owned the premises and conducted a wholesale sausage and meat market business on Diamond street, S. E., in the city of Grand Rapids. Defendants wanted to purchase the property, fixtures, and business. February 1, 1927, the parties entered into a written contract, under which plaintiffs sold and defendants, jointly, agreed to purchase the property and business at the sum of $45,000, and an additional sum for merchandise, to be determined by an inventory. As part of the purchase price of $45,000, defendants agreed to convey certain real estate in the city of South Bend, Indiana, and to convey certain property in the city of Grand Rapids and install a furnace therein. The conveyances were executed by the parties. The mentioned inventory was taken and the amount to be paid by defendants determined to be the sum of $7,778.55; $5,000 was paid by defendant George Hendershot, leaving the balance of $2,778.55, for which a note was signed by defendant Voss, payable to Leo Feldpausch and Albert Feldpausch, secured by chattel

mortgage on the inventoried property. A furnace was installed but not paid for and plaintiffs, in order to keep it, had to assume the debt and paid $159.05. After execution of the contract defendant George Hendershot collected $600, as advance rent on the South Bend property, and later gave his note for that amount, payable to Feldpausch brothers.

Plaintiffs brought this suit to recover the balance due under the inventory, the $600 rent collected in advance, and the amount paid to retain the furnace, and had judgment therefor.

Upon appeal it is claimed in behalf of defendants that it was understood at the time of the contract that defendants were not jointly interested. It is contended that the note and chattel mortgage, given by Voss, was by mutual arrangement his personal obligation and so accepted by plaintiffs.

The written contract controls, and the obligation to pay the full consideration was joint. The note and chattel mortgage have not been paid and the proof fails to show that the same were given and accepted by plaintiffs in payment.

"The taking of a note of one joint debtor is generally held not to be a payment of the joint debt, unless there is an agreement to that effect, the presumption being, it seems, that it was intended as collateral security only." 21 R. C. L. p. 76.

See *Gibbs* v. *Christensen,* 47 Idaho, 658 (277 Pac. 814).

"In the absence of an express agreement to the contrary by the creditor, the acceptance of the note of one or more joint obligors bound for a pre-existing debt is not a payment thereof, and does not release other joint obligors, who did not sign such note." *Watson* v. *First State Bank of Dallas* (Tex. Com. of App.), 237 S. W. 1106.

See, also, *Valade* v. *Masson,* 135 Mich. 41. There was no such agreement.

Plaintiffs were to have the South Bend property, with right to rents after the first day of February, 1927. They got the property but not the rents. The obligation of defendants was joint in this respect and not changed by the note of George Hendershot. That note has not been paid. The obligation to install a furnace was joint and defendants are jointly liable for the money paid by plaintiffs for the furnace.

The judgment is affirmed, with costs.

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

PECK *v.* ADOMAITIS.

1. FIRES—BONFIRES—ORDINANCES—APPLICATION.
   City ordinance against fires, including bonfires, under police power, has reference to acts with possible effects reaching beyond limits of situs of fire, but has no application to persons who interfere with fire or intrude or enter premises as licensees.

2. NUISANCE—BONFIRE NOT NUISANCE PER SE—ORDINANCES.
   Bonfire on one's own premises is not nuisance *per se,* even if it is in violation of city ordinance.

3. LICENSES—INFANTS ON PRIVATE PROPERTY WITHOUT LEGAL RIGHT.
   Boy who with other children was in habit of using path across private lot had no legal right thereon, and at most was licensee.

As to attractive nuisances, see annotation in 19 L. R. A. (N. S.) 1094.

On duty of property owner to trespassing child, see annotation in 32 L. R. A. (N. S.) 559.

Duty to guard against injury to trespassing children by fire, see annotation in 39 L. R. A. (N. S.) 1058; L. R. A. 1917F, 1036.

4. NEGLIGENCE—FIRES—INFANTS—ATTRACTIVE NUISANCE.
   Leaving bonfire unattended on one's private premises at place where children are wont to go is not in violation of any duty imposed by common law or statute.

5. SAME—INFANTS—NO OBLIGATION TO KEEP PREMISES SAFE FOR INFANT TRESPASSERS.
   Owner of private property is under no obligation to trespassers or licensees to keep premises safe for use of children as playground.

6. SAME—FIRES—INFANTS—LICENSES.
   Owner of private lot who started bonfire thereon and left it unattended is not liable for injuries caused by said fire to boy 3 years and 9 months of age, who was mere licensee thereon, although owner knew that children were in habit of crossing said lot.

Appeal from Superior Court of Grand Rapids; Verdier (Leonard D.), J. Submitted October 14, 1931. (Docket No. 102, Calendar No. 35,982.) Decided December 8, 1931.

Case by Berdan Peck, a minor, by Paulina Peck as his guardian and also as assignee, against Mary Adomaitis for personal injuries sustained from fire alleged to have been negligently left unguarded. Directed verdict and judgment for defendant. Plaintiffs appeal. Affirmed.

William K. Clute, for plaintiffs.

Michael Garvey, for defendant.

WIEST, J. October 4, 1929, defendant operated a grocery store on Quimby street in the city of Grand Rapids. The lot upon which the store was located ran back to Matthews court, and a path from the court to the back of the store and to Quimby street had for some time been used by customers and children. That morning defendant burned some rubbish

in the back yard, within three or four feet of the path, and while in the store waiting on a customer, it is claimed that Berdan Peck, a boy then three years and nine months of age, came upon the lot, went near the fire, his clothing caught fire and he was severely burned. This suit was brought to recover damages and resulted in a directed verdict for defendant.

Negligence of defendant is claimed on two grounds: (1) Negligence in setting fire in violation of a city ordinance; (2) negligence in leaving the fire unguarded and exposing children who might be frequenting the lot or passing along the path to danger.

Counsel for plaintiffs does not claim any aid from the so-called turntable doctrine, not accepted in this jurisdiction (*Ryan* v. *Towar,* 128 Mich. 463 [55 L. R. A. 310, 92 Am. St. Rep. 481]), but does claim that the use of the path and of the lot by children imposed an obligation on defendant not to create a danger in proximity to the path which would lure little children to harm or destruction should they venture too close to the fire or meddle with it. This last claim is, in effect, invocation of the attractive nuisance doctrine, which is so closely related to the turntable doctrine as to lead some courts to recognize no distinction.

The city ordinance against fires, including bonfires, is the usual preventative measure, under the police power, with reference to acts with possible effects reaching beyond the limits of the situs of the fire and in no sense applicable to persons who interfere with a fire or intrude or enter the premises as licensees.

The boy had no legal right to go upon defendant's premises. At the most he was a licensee. A bonfire upon one's own premises is not a nuisance *per se.*

Violation, if any, of the ordinance was not negligence *per se*. *Cook* v. *Johnston*, 58 Mich. 437 (55 Am. Rep. 703). The bonfire did not constitute a wrongful interference with any legal rights of the child, nor was it a nuisance in the sense of a wrongful act bringing injury to him while in the course of enjoyment of legal rights.

The accident here involved was in the fall of the year, and it appears that general permission had been given to burn leaves in the street. This brings us to the question of whether defendant was guilty of breach of duty toward the child in leaving the fire unattended. The child was not present when defendant left the fire. The duty then, if there was one, was owing to a possible infant intruder and meddler with the fire.

It is contended that defendant was guilty of actionable negligence in leaving the bonfire unattended at a place where children were wont to go upon the premises. No such duty is imposed by the common law or statute. Such duty has been imposed. *Carr* v. *Southern Pa. Traction Co.*, 253 Pa. 274 (98 Atl. 554). But upon this question there is irreconcilable conflict of decisions, mentioned by Mr. Justice FEAD in *LeDuc* v. *Detroit Edison Co.*, 254 Mich. 86.

Defendant was under no obligation to trespassers or licensees to keep her premises safe for use of children as a playground.

Must the owner keep his land free from a bonfire which might attract discretionless and unattended children, or so guard his premises as to exclude such children or attend to their protection after entry? The boy was not an invitee.

"Neither silence, acquiescence, nor permission, however, standing alone, is sufficient to establish an

invitation. A license may thus be created, but not an invitation. The infancy of the party injured does not change the situation. He enters as a trespasser, licensee, or invited person according to the same circumstances which control in the case of an adult. When the question of his contributory negligence arises, his age, intelligence and want of experience are to be considered. And when the owner's duty toward him is established, these factors must be taken account of in determining whether the owner's conduct measures up to the legal standard." *Bottum's Admr.* v. *Hawks,* 84 Vt. 370, 384 (79 Atl. 858, 35 L. R. A. [N. S.] 440, Ann. Cas. 1913A, 1025).

We quote the following apt statement from *Thompson* v. *Railroad Co.,* 218 Pa. 444 (67 Atl. 768, 19 L. R. A. [N. S.] 1162, 120 Am. St. Rep. 897, 11 Ann. Cas. 894):

"It cannot be said that he invites or allures children because no such intention in fact exists, nor that he sets a trap for the innocent and unwary. The law does not impose a duty upon the landowner to take special precautions for a class of persons, a doctrine which, if carried to its logical conclusion, would, as was said in *Gillespie* v. *McGowan,* 100 Pa. 144, 'charge the duty of the protection of children upon every member of the community except their parents.' "

In *Paolino* v. *McKendall,* 24 R. I. 432 (53 Atl. 268, 60 L. R. A. 133, 96 Am. St. Rep. 736), a boy five years of age was burned by an unguarded bonfire, and it was there claimed:

"That an occupier of land, having thereon dangerous agencies, to which children of tender years, too untrained and inexperienced to appreciate the dangers and resist the temptations placed before them, are likely to be allured or attracted, is under

the duty of exercising the care which an ordinary person would exercise in the premises to prevent injury therefrom, to such children either by guarding or inclosing the dangerous agency, or by giving warning to parents of the existence of the danger."

The court held, quoting the syllabus:

"There can be no recovery against an occupier of premises in favor of an infant of tender years, who has been allured to the premises by means of a fire kindled thereon, and been injured thereby while at play, on the ground of an implied invitation from the owner's knowledge that the lot was used as a playground for children without objection, or of a duty on the part of the occupier to exercise care to prevent injury therefrom to such children."

We hold that there was no legal duty on the part of defendant to guard the child against the danger of coming into contact with the fire. According to the testimony in behalf of plaintiffs the most favorable consideration leaves the case short of establishing legal negligence on the part of defendant.

The judgment is affirmed, with costs.

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

ROGERS *v.* YOUNGS.

INSURANCE—AUTOMOBILE INSURANCE—GARNISHMENT—LIABILITY OF INSURER ON UNPAID JUDGMENT AGAINST INSURED.

Where automobile insurance policy provided that insurer would pay insured any loss covered by policy within 90 days from time amount of loss was determined, and it unsuccessfully defended negligence action against insured, it is liable as garnishee defendant on said undischarged judgment; its claim that insured has sustained no loss because he has not paid judgment being without merit (following *Kipkey* v. *Casualty Ass'n of America,* 255 Mich. 408).

Appeal from Allegan; Miles (Fred T.), J. Submitted October 23, 1931. (Docket No. 202, Calendar No. 36,068.) Decided December 8, 1931.

Garnishment proceedings by Amelia Rogers against Central Mutual Auto Insurance Company, a Michigan corporation, garnishee defendant, under a judgment against Ralph Youngs, principal defendant. Judgment for plaintiff. Garnishee defendant appeals. Affirmed.

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

Mason, Alexander, McCaslin, Cholette & Mitts, for garnishee defendant.

WIEST, J. Upon a judgment, affirmed by this court (*Rogers* v. *Youngs,* 252 Mich. 420), plaintiff sued out a writ of garnishment against the Central Mutual Auto Insurance Company, defendant Youngs' insurance carrier.

The insurance company denied liability, asserting that it indemnified defendant Youngs against loss only and he has suffered no loss because he has not paid the judgment. In other words, the insurance company contends that, under the terms of the policy, it owes defendant Youngs nothing and will not owe him anything unless and until he pays the judgment.

Judgment to the contrary was entered, and defendant insurance company prosecutes this appeal.

The policy in the instant case was an undertaking to "Indemnify the assured against loss by reason of legal liability to others for bodily injuries." It required immediate written notice of an accident and of any suit and promised to defend and stand the expense, inclusive of court costs and interest accruing after judgment.

It promised to pay the assured any loss covered by the policy "within 90 days from the time the amount of such loss shall have been determined."

It defined the word "indemnify" to mean to reimburse, and it provided that:

"No action shall lie against the company to recover under any claim or for any loss defined herein unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by judgment against the assured, after trial, or by agreement between the assured and claimant, with the written consent of the company."

And:

"The company may investigate all accidents covered by this policy and defend in the name and on behalf of the assured."

Mr. Youngs notified the insurance company of the accident and of the suit against him, and the com-

pany employed counsel, defended the suit in the circuit court, and prosecuted review in this court.

After judgment in the circuit court we decided a like issue and contention in *Kipkey* v. *Casualty Association of America,* 255 Mich. 408. The opinion in that case is readily accessible, considers every point in this case involved, and we reaffirm what we there said. Under that holding, the garnishee defendant herein is liable.

The judgment is affirmed, with costs.

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

EASTMAN *v.* KENDALL.

1. BROKERS—RIGHTS OF BROKER WHERE CLIENT REJECTS STOCK PURCHASED FOR HIM.

   Broker purchasing stock for client has right to have payment before delivery, and unless client unequivocally rejects stock, broker is bound to stand ready to perform, and, in meantime, as pledgee, to conserve client's rights as owner.

2. SAME—WHEN BROKER CREDITOR AND WHEN PLEDGEE.

   Broker, in paying for stock purchased for client, becomes creditor, and, in retaining stock as security for money advanced, becomes pledgee.

3. SAME—BROKER AS PLEDGEE HAS RIGHT TO CONSERVE CLIENT'S INTEREST—EXCHANGE FOR STOCK IN MERGED CORPORATION.

   Where client did not unequivocally reject corporate stock purchased for him by broker, latter was not required to give

client notice and sell stock in open market, but he had right to hold it, and, while so holding, to conserve client's interest by exchanging it for stock in consolidated corporation with which original corporation had merged.

4. SAME—RIGHT OF CLIENT TO PARTICULAR SHARES.
Client has no fixed right to particular shares purchased for him by broker.

5. SAME—TENDER—SUFFICIENCY.
Where broker, purchasing corporate stock for client who failed to accept it, tendered stock of original corporation and also like amount of stock in consolidated corporation with which original corporation had merged, tender was sufficient.

Appeal from St. Clair; George (Fred W.), J. Submitted October 21, 1931. (Docket No. 149, Calendar No. 35,828.) Decided December 8, 1931.

Assumpsit by Thomas C. Eastman and others, copartners doing business as Eastman, Dillon & Company, against Harry H. Kendall to recover sums expended for purchase of shares of stock on his behalf. Verdict and judgment for plaintiffs. Defendant appeals. Affirmed.

Walsh, Walsh & O'Sullivan (*Beaumont, Smith & Harris,* of counsel), for plaintiffs.

Cady & Pepper, for defendant.

WIEST, J. At the oral request of defendant, plaintiffs, copartners, on September 10, 1929, purchased for him 10 shares of stock of the Union Commerce Corporation, paid $3,250 therefor, and $20 commission to a broker, and the next day forwarded the same, with draft attached, to defendant. Defendant did not accept, and the stock and draft were re-

turned to plaintiffs. Subsequent efforts proved unavailing, although defendant recognized that it was his purchase. Shortly thereafter the Union Commerce Corporation merged with the Guardian Detroit Union Group, and, on or about December 31, 1929, plaintiffs exchanged the stock, share for share, for stock in the Guardian Detroit Union Group, without notice to defendant. Plaintiffs tendered into court the 10 shares of the Guardian Detroit Union stock, also 10 shares of Union Commerce Corporation stock, and had judgment against defendant for the money they had expended for and on his behalf at his request.

The rule for the measurement of damages is the question presented.

Counsel for defendant contend that the facts remove this case from the general rule, permitting recovery of the amount paid upon tender of the certificates, and urge that it was the duty of plaintiffs to sell the stock in the open market and thus mitigate the damages. Upon purchase for defendant, the plaintiffs held the stock for him, subject to right to have payment before delivery, and, unless defendant unequivocally rejected the stock, plaintiffs were bound to stand ready to perform, and, in the meantime, as pledgees, to conserve the rights of defendant as owner. In paying for the stock, plaintiffs became creditors, and in retaining the stock as security for the money advanced, they were pledgees.

That the stock is pledged by the customer for due payment is the rule in this State. *Austin* v. *Hayden,* 171 Mich. 38 (Ann. Cas. 1915B, 894). The customer has no fixed right to particular shares purchased by the broker. See *Richardson* v. *Shaw,* 209 U. S. 365

(28 Sup. Ct. 512, 14 Ann. Cas. 981), where it was pointed out that:

"The certificate of shares of stock is not the property itself, it is but the evidence of property in the shares. * * * It is a misconception of the nature of the certificate to say that a return of a different certificate or the right to substitute one certificate for another is a material change in the property right held by the broker for the customer."

Defendant did not unequivocally reject the stock. He was evidently unable to pay for it at the time.

Plaintiffs were not required to give defendant notice and sell the stock in the open market, but had a right, in the absence of an unequivocal refusal to take the stock, to hold it for defendant, and, while so holding, to conserve his interest in the manner mentioned so as to obtain dividends thereon. The tender was sufficient.

The judgment is affirmed, with costs to plaintiffs.

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

FEAD, J. (*concurring*). Because plaintiffs' tender included stock in both original and merged corporations, I concur; but without expressing opinion upon the right of a broker, without notice to the customer, to agree to a merger.

MCDONALD, SHARPE, and NORTH, JJ., concurred with FEAD, J.

SAK *v.* WALDECKER.

1. APPEAL AND ERROR—DIRECTED VERDICT.
   On appeal from judgment entered for defendant on directed verdict, testimony on behalf of plaintiff must be considered favorably.

2. MOTOR VEHICLES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — RIGHT SIDE OF ROAD—ASSUMPTIONS.
   Person crossing highway has right to assume that, when he has reached side of highway where he has right to be, automobile driver using highway will observe traffic laws and keep on his side of highway.

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
   Whether driver of horse and buggy who, when 17 feet from crossing, looked and saw defendant's automobile approaching 60 rods away, was guilty of contributory negligence in crossing without again looking until he reached middle of road was question for jury, especially where he had reached other side and was where he had right to be when struck by defendant's car.

Appeal from Wayne; Webster (Clyde I.), J. Submitted October 7, 1931. (Docket No. 35, Calendar No. 35,795.) Decided December 8, 1931.

Case by Louis Sak, administrator of the estate of Bernice Sak, deceased, against Joseph F. Waldecker under survival act for death of plaintiff's decedent from injuries received in a crossing accident. Directed verdict and judgment for defendant. Plaintiff appeals. Reversed, and new trial ordered.

Maxwell I. Silverstein and *Samuel H. Crowl,* for plaintiff.

On contributory negligence of driver of horse encountering automobile on highway, see annotation in 50 L. R. A. (N. S.) 566.

BUTZEL, C. J. Louis Sak, administrator of the estate of Bernice Sak, his wife, brought suit under the survival act (3 Comp. Laws 1929, § 14040), against Joseph F. Waldecker, defendant, for causing injuries that resulted in the death of decedent. At about 5:30 p. m. on January 17, 1926, plaintiff and his wife were driving in a two-seated buggy drawn by a farm horse along the town line road, an unpaved road, in a northerly direction towards their home in the township of Romulus, Wayne county, Michigan. They were nearing the Ecorse road, a main thoroughfare, 66 feet in width, running in an easterly and westerly direction. The 20 feet in the center of the Ecorse road are paved with concrete and 23 feet on each side of it are unpaved. When plaintiff reached a point 17 feet from the south property line of the Ecorse road, and 40 feet from the concrete pavement, he stopped and looked up and down the Ecorse road before proceeding. There appear to be no obstructions to the view in either direction, as the intersection is located in the open country. Plaintiff waited for a car to pass and saw no other one near by, but did see one that proved to be defendant's coming from the west some 60 rods away.

Plaintiff is a foreigner and testified in the English language with considerable difficulty, but notwithstanding his seeming confusion in regard to the meaning of the word "rods," he demonstrated, as the trial judge stated, that he knew the length of a rod. As there was a direction of a verdict in favor of defendant at the conclusion of the testimony on behalf of plaintiff, we must place the most favorable construction upon the latter's testimony. As defendant's car was still approximately 60 rods distant when plaintiff saw it, when he was only 17 feet

from the property line of the road, the reasonable inference would be that he could have crossed the Ecorse road with safety had defendant not been guilty of negligence. Plaintiff after making observations proceeded, and passed the middle of the road when he saw defendant's automobile approaching him from a westerly direction. Thereupon plaintiff loosened the reins so as to speed up the horse, which had theretofore traveled only as fast as a man could walk. There is testimony that defendant's car was being driven at a rate of 40 to 45 miles an hour. The horse and front part of plaintiff's buggy had passed across the concrete pavement and reached the unpaved portion of the road when defendant's car struck the buggy's rear wheel, which was still on the concrete. Defendant was driving on the left or north side of the road where under ordinary circumstances he would not have a right to be and where plaintiff had a lawful right to be. Both Sak and his wife were thrown out of the buggy. Mrs. Sak sustained severe injuries from which she died the following day.

The trial judge in directing a verdict in favor of defendant held that while the negligence of defendant was unquestionably established by plaintiff's testimony, nevertheless, plaintiff was guilty of contributory negligence in not looking again after he drove 17 feet further and reached the Ecorse road. Had defendant driven on the right or south side of the road, as was his lawful duty under ordinary circumstances, he would have had ample room to pass the horse and buggy. Plaintiff had a right to assume that, when he reached the side of the road where he had a right to be, defendant would observe the traffic laws. The question of contributory negligence under the circumstances became a question for

the jury. It was their province to determine whether a reasonably prudent person, who when 17 feet from the road stops and looks and observes an automobile 900 feet distant, and whose calculations were correct in that he had plenty of time to reach the north side of the road, and who did reach that side, is guilty of contributory negligence in again not making observations after he had traveled 17 feet further and then not observing again whether it was still safe for him to cross the road.

In the intersection cases in this State where we have held plaintiff to be guilty of contributory negligence, he failed to look at all before crossing the road. Some of the cases cited are distinguished in *Grodi* v. *Mierow,* 244 Mich. 511, where we said in an opinion written by Mr. Justice FEAD:

"He was not bound by law to anticipate that defendant would invade that part of the intersection where he had a right to be and defendant had not, nor did the testimony conclusively establish that a reasonably prudent person would have anticipated it. Whether, under the circumstances, plaintiff should have foreseen such invasion, or other violations of traffic law of which defendant was guilty, was for the jury."

The driver for the plaintiff in *Lefevre* v. *Roberts,* 250 Mich. 675, stopped on the road about 10 feet from the cement approach leading to the pavement of a trunk highway and observed the defendant's automobile on the highway approaching the intersection. Noting that the defendant was 400 or more feet away from the intersection, he started to cross and was struck by defendant's car. The driver, after starting his car across, made no further ob-

servations of the approaching automobile. We held in an opinion written by Mr. Justice WIEST:

"The question is close, little help is afforded by cases, with their varying facts, and the doubt should be solved by verdict of a jury."

The question of plaintiff's contributory negligence should have been submitted to the jury.

The judgment of the lower court is reversed, with costs to plaintiff, and new trial ordered.

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

YOUNG *v.* YOUNG.

DIVORCE—ALIMONY.

In wife's suit for divorce, decree awarding her half interest in two-family flat, valued at $4,000, is modified, on appeal, under circumstances of case, and she is awarded $500 as alimony in gross and in lieu of dower.

Appeal from Wayne; Moll (Lester S.), J. Submitted October 8, 1931. (Docket No. 54, Calendar No. 35,665.) Decided December 8, 1931.

Bill by Kate Young against Steve Young for divorce. Cross-bill for divorce by defendant. Decree for plaintiff. Defendant appeals. Modified and affirmed.

Stephen Tittenhofer, for plaintiff.

John H. Flancher, for defendant.

As to amount of permanent alimony on absolute divorce, see annotation in 44 L. R. A. (N. S.) 998.

CLARK, J. The bill and the cross-bill each pray divorce on the ground of cruelty. Plaintiff had decree. Defendant has appealed.

The parties were married June 27, 1929, and separated September 5th, following. She was 51 years old, he, a widower, 61. She had been married twice before, and was divorced on June 12, 1929. There is enough testimony to sustain decree as to divorce, and, as there is no serious contest in that regard, we pass to the award of alimony in gross.

Defendant owned a two-flat house on Freer avenue, cash value near $4,000, and another two-flat house, cash value $3,800. He had nearly $1,000 in the bank. Soon after the marriage, title to one of the houses, called Freer avenue property, was changed to create an entirety estate in the parties. There are no incumbrances, except possibly taxes. Defendant is a cripple, has not been able to work for a number of years. He lives in one of the flats and rents the others when he can. The gross monthly income from the three flats, when all are rented, is $103, net income not given. Plaintiff contributed nothing toward defendant's accumulation of property. There is no claim that plaintiff, ten years younger than defendant, is not in good health. The trial judge said of her:

"It may, therefore, be concluded that plaintiff was somewhat of the adventuress type, who was actuated in marrying the defendant by a desire to acquire an interest in his property."

The award to plaintiff, except as to costs, was to permit her to have half interest in the Freer avenue property as tenant in common.

Considerations which obtain in determining an award of alimony are set forth in *Bialy* v. *Bialy,* 167

Mich. 559 (Ann. Cas. 1913A, 800), and need not be repeated.

Considering the conduct of the parties, their age, the very short duration of the marriage, and their comparative health, and other facts stated, we think the decree should be modified to vest title to all the property in defendant, that he pay plaintiff $500 within a short time to be fixed by decree, which is an award of alimony in gross and in lieu of dower and to be a lien on Freer avenue property. *Allen* v. *Allen,* 196 Mich. 292. *Shered* v. *Shered,* 172 Mich. 222.

Except as modified, the decree is in all things affirmed, without costs.

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

BERGERON *v.* BELISLE.

1. SALES—DIRECTED VERDICT.

In buyer's action for trade-in value of his old automobile on defendant's failure to deliver new car, plaintiff's testimony *held,* to establish that he dealt with corporation and not defendant personally, and that verdict should have been directed in defendant's favor.

2. CORPORATIONS—EFFECT OF FAILURE TO FILE REPORT.

Claim of automobile buyer that he dealt with defendant personally, and that latter was not agent of corporation because it had failed to file its annual report and had thereby forfeited its charter, *held,* without merit.

On forfeiture of charter as not self-executing, see 8 L. R. A. 499.

3. SAME—FORFEITURE LAW NOT SELF-EXECUTING.

Law respecting forfeiture of charter through corporation's failure to file report and pay fees is not self-executing, but requires judicial proceeding to declare and enforce such forfeiture.

Appeal from Wayne; Stone (John G.), J., presiding. Submitted October 13, 1931. (Docket No. 86, Calendar No. 35,700.) Decided December 8, 1931.

Assumpsit by Raymond Bergeron against Henry W. Belisle under the common counts and under a contract for the purchase of an automobile. Judgment for defendant *non obstante veredicto*. Plaintiff appeals. Affirmed.

Fred M. Breen, for plaintiff.

Joseph E. Rau, for defendant.

BUTZEL, C. J. In 1925, Raymond Bergeron, plaintiff, purchased a Chrysler automobile from Belisle & Noonan Sales Company, a corporation engaged in the automobile business at a building at 10293 W. Jefferson avenue, River Rouge, Michigan, where its name was prominently displayed. Both Belisle and Noonan were officers of the corporation engaged in the sale of cars. In 1926, Belisle also conducted a service garage where he conditioned cars belonging to the corporation. This was a private enterprise of his own. The garage was on a less important street and two blocks from the corporation's place of business. Plaintiff at times took his car to defendant's garage in order to use its facilities.

On August 15, 1926, defendant resigned as president of the corporation. He sold his stock to Noonan and another party. Defendant, however, continued

to do service work at his garage, and to act as salesman for the corporation. On October 14, 1926, plaintiff on a visit to defendant's garage was attracted by a new Chrysler car and became interested in trading his old car for a new one. He met defendant and Noonan at the salesroom of the corporation, where, after Noonan appraised the value of the old car, a contract of purchase was entered into. Plaintiff was allowed the sum of $1,250 as part payment on the new car, and immediately delivered the old car and his certificate of title to the corporation. He was not to receive his new car until the following March. He claims that the assignment of the certificate of title was signed in blank, though it runs to the corporation. Noonan acted as notary on the assignment. The order for the new car distinctly states that it would not be binding on the "company" unless accepted by an officer or an authorized representative. The indorsement on the order was "accepted by the company" by "Salesman H. W. B." The wording of the order given by plaintiff shows that it was given to the corporation and not to defendant personally. The corporation did not pay the fee for filing its annual report for the year ending December 31, 1925, until September 11, 1926. It was not accepted by the secretary of State until October, 1930, when the fee was paid.

In March, 1927, defendant failed to turn over the new car in accordance with the agreement. The corporation was adjudicated a bankrupt. Plaintiff demanded payment for the old car, and Noonan gave him his personal note for $1,250. Defendant, when requested, refused to indorse the note. Plaintiff kept the note and produced it at the trial. It has never been paid. Plaintiff sued the defendant for the value of the old automobile turned over to the

corporation. He claims that his dealings were with defendant personally and not with the corporation. In an additional count to the declaration, he charges that the corporation had suspended operations through failure to file the annual report and that defendant was therefore liable on the theory that he acted for a principal who no longer existed. He further charges that defendant knew of the insolvency of the corporation in October, 1926, and was guilty of fraud in withholding this knowledge from plaintiff. There were two trials of the case. On the first trial, plaintiff recovered a judgment which was set aside and a new trial granted. On the second trial, being the instant case, defendant moved for a directed verdict which was reserved under the statute. Defendant made a motion to enter judgment *non obstante veredicto,* immediately after the jury brought in a verdict for plaintiff. The motion for a judgment *non obstante veredicto* was properly granted. Plaintiff tried to show that his contract was with defendant, but, by the great weight of the evidence, he established the fact that it was with the corporation. A verdict in defendant's favor should have been directed at the conclusion of the testimony of plaintiff. There is no merit in plaintiff's second claim that defendant was not an agent of the corporation because it had failed to file its annual report and thereby forfeited its charter. The corporation had not suspended operations at the time of the transaction. The provisions of the law respecting the forfeiture of charter through a corporation's failure to file a report and pay the fees are not self-executing. The law then in force required a judicial proceeding to declare and enforce such forfeiture by the State. *Turner* v. *Western Hydro-Electric Co.,* 241 Mich. 6. There was no testimony

to show that defendant knew of the alleged insolvency of the corporation in October, 1926, nor was the insolvency shown.

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

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

PEOPLE v. LICAVOLI.

1. CRIMINAL LAW—SUFFICIENCY OF COMPLAINT—APPEAL AND ERROR.
   In prosecution for murder, objection that complaint, although made positively, was in fact made on information and belief, comes too late, where not raised until after examination had been had and returned and after jury had been sworn.

2. SAME—HOMICIDE—EXAMINATION—PROBABLE CAUSE—MOTION TO QUASH.
   Where, on examination, there was evidence that victim had been shot and testimony of eyewitness that defendant did shooting, motion to quash information for murder, on ground that examination showed no probable cause for charging defendant with offense, was properly denied.

3. SAME—EXHIBITS—EVIDENCE.
   In prosecution for murder, placing certain exhibits on table in courtroom after jury had been accepted, but before final acceptance, was not prejudicial, where they were later received in evidence without objection.

4. SAME—PRINCIPAL—ACCESSORY.
   Under 3 Comp. Laws 1929, § 17253, one aiding and abetting commission of crime is principal.

5. SAME—PROSECUTOR'S OPENING STATEMENT.

Where prosecutor's opening statement, in prosecution for murder, was that defendant did shooting, his departure therefrom to urge conviction whether defendant did shooting or was accessory (there being evidence to sustain both theories) was not error, in absence of showing that defendant, who offered no evidence in his own behalf, was misled to his prejudice.

6. HOMICIDE—GREAT WEIGHT OF EVIDENCE.

In prosecution for murder, verdict of guilty in first degree *held*, not against great weight of evidence, although testimony was sharply conflicting.

7. CRIMINAL LAW—TRIAL—COERCION OF JURY.

Where, in prosecution for murder, jury had been out for many hours, court's calling them into court, admonishing them relative to their duties, and directing them to continue their deliberations, *held*, not coercion.

Error to Recorder's Court of Detroit; Boyne (John A.), J. Submitted October 15, 1931. (Docket No. 207, Calendar No. 35,411.) Decided December 8, 1931.

Pete Licavoli was convicted of murder in the first degree. Affirmed.

Rodney Baxter, for appellant.

Paul W. Voorhies, Attorney General, *Harry S. Toy*, Prosecuting Attorney, *Duncan C. McCrea* and *Edmund E. Shepherd*, Assistants Prosecuting Attorney, for the people.

CLARK, J. On the afternoon of July 14, 1930, Henry Typancey was sitting in his automobile parked on Field avenue, near Jefferson, in Detroit, when a man approached, shot and killed him. Defendant was charged with the murder, tried, convicted, and sentenced. He has appealed.

1. The complaint was made by a peace officer. After examination had been had and returned and after the jury had been sworn, defendant for the first time sought to challenge the sufficiency of the complaint by showing that it, although made positively, was in fact made upon information and belief. The objection came too late. See *People* v. *Hare,* 57 Mich. 505; *People* v. *Dowd,* 44 Mich. 488.

2. Motion to quash on the ground that the examination showed no probable cause for charging defendant with the offense committed was made and properly denied. The evidence at the examination was that Typancey had been shot and killed, and there was testimony of an eyewitness that defendant did the shooting. Clearly, this is sufficient.

3. After the jury had been accepted by both sides but before final acceptance, as it later proved, certain pistols and cartridges (and other exhibits) to be used in the case were taken by officers from a package and placed on a table in the courtroom. Defendant moved for mistrial for this reason and complains of denial of his motion. The pistols and cartridges were later received in evidence without objection, and, therefore, we see no prejudice in this incident.

4. The prosecuting attorney's opening statement, which was brief and in mere outline, was that defendant himself had done the shooting. There was some testimony that defendant was an accessory acting with another in committing the crime. There was also testimony of other witnesses that defendant himself did the shooting. The prosecuting attorney argued for conviction on either theory of the evidence, and the case was submitted on both theories. If defendant aided and abetted in committing this crime he would, nevertheless, be a principal.

3 Comp. Laws 1929, § 17253; *People* v. *Collins*, 216 Mich. 541.

Defendant's complaint is not of the instructions of the court in this regard, but of the prosecuting attorney's departing from his opening statement. This would not be error, unless, perhaps, defendant was thereby misled to his prejudice. The testimony tending to characterize defendant as an accessory came in without objection, and, being in, could be used. Moreover, defendant offered no evidence in his behalf. It does not appear that defendant was misled to his prejudice, hence, the departure complained of is not reversible error.

5. A case was made for the jury, and, although the testimony is sharply conflicting, chiefly as to identity of the murderer, we must conclude from a review of all the evidence, as did the trial judge, that the verdict is not against the great weight of the evidence.

6. After the jury had been out for many hours, they were called into court and asked by the judge if they had agreed upon a verdict. They replied that they had not agreed upon the facts. The court admonished them relative to their duty as jurors and directed them to continue their deliberations. This is urged as coercion. In view of our holding in *People* v. *Digione*, 250 Mich. 206, where the jury was similarly admonished under like circumstances, we must hold the remarks not coercive.

7. We find no prejudicial error in the closing argument of the prosecuting attorney, and the matter calls for no discussion.

Affirmed.

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

MUNN *v.* LENTZ.

1. SCHOOLS AND SCHOOL DISTRICTS—DISTRICT CREATED BY SPECIAL ACT COULD BE ALTERED ONLY BY LEGISLATURE.

   Fractional primary school district created by special act of legislature (Act No. 283, Local Acts 1901) as an entity could be altered or destroyed only by legislature itself, or by some agent exercising properly delegated powers for that purpose.

2. SAME—TOWNSHIP BOARD WITHOUT POWER TO ALTER DISTRICT CREATED BY SPECIAL ACT.

   Township board, having power under general school law to alter boundaries of primary school districts (Act No. 31, Pub. Acts 1909), is nevertheless without power to change boundaries or destroy entity of fractional primary school district created by special act of legislature (Act No. 283, Local Acts 1901) which stands unrepealed.

3. SAME—LOCAL ACT NOT REPEALED BY SCHOOL CODE.

   Act No. 283, Local Acts 1901, creating fractional primary school district, was not repealed by school code (Act No. 319, Pub. Acts 1927); not having been included in repealing section (chapter 37, § 1).

4. SAME—TOWNSHIP ELECTORS WITHOUT POWER TO DESTROY IDENTITY OF DISTRICT CREATED BY SPECIAL ACT.

   It is beyond power of electors of township acting pursuant to Act No. 319, Pub. Acts 1927, to destroy legal identity of fractional primary school district created by special act of legislature, which stands unrepealed, by voting to organize township into single school district.

5. SAME—CONSENT OF GRADED DISTRICT NECESSARY TO BE INCLUDED IN TOWNSHIP DISTRICT—REASONABLE TIME.

   Consent of electors of graded school district, necessary to its being included in township school district (Act No. 319, Pub. Acts 1927, pt. 1, chap. 4, § 2), should be given within reasonable time.

6. SAME—REMOTENESS.

Consent of electors of graded school district necessary to its being included in township school district, which was given two years before vote was taken on organizing township school district, was too remote.

Appeal from Barry; McPeek (Russell R.), J. Submitted October 29, 1931. (Docket No. 152, Calendar No. 35,831.) Decided December 8, 1931.

Separate *quo warranto* proceedings by H. F. Munn and other taxpayers, and school district officers of six school districts against Frank C. Lentz and others as officers of an alleged unlawfully organized township school district. Cases consolidated for trial. Judgments for plaintiffs. Defendants appeal. Affirmed.

James H. Mustard and *Robert A. Waterman,* for plaintiffs.

Kim Sigler, for defendants.

CLARK, J. Pursuant to provisions of part 1, chap. 4, Act No. 319, Pub. Acts of 1927, 2 Comp. Laws 1929, § 7131 *et seq.,* on January 2, 1931, the following question was submitted to the electors of Castleton township in Barry county: "Shall Castleton township be organized into a single school district?" A majority voted "Yes," and thereafter a board of education was elected. There were 10 school districts affected, six of which refused to turn over to the board of the township school district money, property, etc., but, on the contrary, each of said districts, as plaintiffs, and joined with its respective officers and certain taxpayers, as plaintiffs, instituted six proceedings in *quo warranto* against the

township, the township school district, and the members of its board of education as defendants to test the validity of the organization and the existence of the township school district and the title of its officers. The suits were consolidated, tried together, and are so presented here.

Plaintiffs had judgments. Defendants have appealed.

One plaintiff district, Fractional Number 2 of the townships of Hastings and Castleton, was created by Local Act No. 283, Local Acts 1901, and to and including the time in question, so remained. The local act provides:

"The same to be organized in the same manner as school districts under the general law, whose boundaries are determined by the board of school inspectors."

This is equivalent to saying that it became a primary school district (Act No. 164, Pub. Acts 1881, 2 Comp. Laws 1897, § 4646, as amended by Act No. 37, Pub. Acts 1901, and Act No. 31, Pub. Acts 1909, 2 Comp. Laws 1915, § 5648), and, as the reference is to "general law," that it was to function under general law as it might be from time to time. *Cole* v. *Wayne Circuit Judge,* 106 Mich. 692; Lewis' Sutherland, Stat. Const. (2d Ed.), § 405; *Public Schools of Battle Creek* v. *Kennedy,* 245 Mich. 585.

Might the then township board of school inspectors (later township board, Acts Nos. 31 and 66, Pub. Acts 1909), having power under general law to alter boundaries of primary school districts, on the day following the special legislative creation of this district, or on any later day, have taken the district apart and restored the parts to the other districts from which they had been taken? Might such board

have destroyed this special legislative creation or revoked its special charter? It is apparent that it might not. The district as an entity could be altered or destroyed only by the legislature itself, or by some agent exercising properly delegated power for that purpose.

The trial judge so held, and he prepared a well-reasoned and helpful opinion, from which we quote:

"In *School District* v. *Dean,* 17 Mich. 223, it appeared that the legislature by special act of 1867 established a new school district out of parts of three old ones in the same township. The new district was duly organized on the 1st of March, 1867, and on April 2d, the same year, the township board of school inspectors 'assumed to set back to the old districts the territory carved out of them by the special act, and to dissolve the new district.' * * * The court said:

" 'It must be admitted that there is no middle ground. Either the district must be independent of change by the inspectors, or it must be as much under their sway as other districts. As a corporation, brought into existence by the direct act of the legislature, it could not be dependent upon any general act, or upon the inspectors, for its continuance; nor could it exist if its organic act should be repealed. It would, therefore, stand by itself as an independent corporate existence, and deriving no vital support from the law under which inspectors form districts; and it is difficult to see how it could be essentially altered without an alteration of the act, which stands, in some respects, in the place of a charter. * * *

" 'There would necessarily be a period, then, when the corporation created by the act in question would be exempt from local interference. The legislature have not declared by this act, nor can it be implied from any other, when this period of exemption should terminate. It is a fair inference, then, that it was meant to be perpetual. The district in question was created by direct legislation, and a continuing independent power to dissolve it, vested in another body, would be anomalous. It would suppose two powers in operation at the same time, one of which would have the right to create, and the other, at the same instant, the right to destroy, while one of these conflicting authorities could only exist by the sufferance of the other.'

"If it be urged in the instant case that the language of Local Act No. 283, 1901, provides, in terms,

that Fractional District No. 2 'be organized in the same manner as school districts under the general law, whose boundaries are determined by the board of school inspectors,' from which (it be urged) it should be deduced that special reference to and dependence upon the general law were obvious, it may in reply be noted that in the *Dean Case,* according to the opinion, 'the second section (of the local act) required that the same course should be taken for the organization of the new district as already prescribed by law in the case of districts formed by township inspectors.' Comparing this with the language of Act No. 283, it will be observed that the context is similar, and the purport identical, clearly indicating that the Supreme Court regarded such a provision as no bar to the conclusions above quoted."

See, also, *Township of Harrison* v. *Schoolcraft Supervisors,* 117 Mich. 215; *Attorney General* v. *Marr,* 55 Mich. 445; *Board of Education* v. *Straub,* 182 Mich. 665.

The local act was not repealed by Act No. 319, Pub. Acts 1927, called the School Code (2 Comp. Laws 1929, § 7094 *et seq.*). The latter act containing a general repealing clause, section 1, chap. 37 (2 Comp. Laws 1929, § 7697), and repealing by enumeration a large number of public acts is silent in the concluding repealing section as to local acts.

The following from *Rodgers* v. *United States,* 185 U. S. 83 (22 Sup. Ct. 582):

"'The general principle to be applied,' said Bovill, C. J., in *Thorpe* v. *Adams* (L. R. 6 C. P. 125, 135,) 'to the construction of acts of parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason

is,' said Wood, V. C., in *Fitzgerald* v. *Champenys,* (30 L. J. R. N. S. Eq. 777, 782; 2 Johns. & Hem. 31, 54 [70 Eng. Repr. 958]), 'that the legislature having had its attention directed to a special subject, and observed all the circumstances of the case and provided for them, does not intend, by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do' "—and citing *Crane* v. *Reeder,* 22 Mich. 322.

It is significant that section 57, chap. 8, pt. 1, of the act (2 Comp. Laws 1929, § 7322), providing of districts of the first class, repealed "all general or special acts not herein re-enacted which apply solely to school districts of the first class," and it is significant that in section 16 of chap. 27, pt. 2 (2 Comp. Laws 1929, § 7621), rights conferred by certain special acts to license teachers are expressly repealed, and also significant that these are the only instances in Act No. 319 that we have found where reference is made to local acts.

It shows the legislature had local acts in mind, and, by repealing them or any of them in such very limited degree, they evidenced an intention not to repeal them or any of them in any other degree.

Moreover there is practical construction in this regard. The legislature, by Act No. 9, Local Acts 1931, expressly repealed the local act in question.

We conclude that, at the time of the attempted creation of the defendant township school district, Local Act No. 283 being then in force, it was beyond the power of the voters of the township, and they had no such delegated power, to destroy the legal entity, Fractional School District Number 2, of the townships of Hastings and Castleton, so created by special act of the legislature. This necessitates affirmance of the judgments, but, as the matter is likely to arise again, we speak of another question.

One district, Fractional District Number 1 of Castleton and Maple Grove townships, is a graded district of ten grades or more and whose schoolhouse is more than two miles from the center of the township. The consent of the electors of the graded district was necessary to its being included in a township school district. Section 2, chap. 4, pt. 1, Act No. 319, Pub. Acts 1927 (2 Comp. Laws 1929, § 7132). The statute here fixes no time within which such consent shall be given. It should be within a reasonable time. Where, as here, the consent was more than two years before the vote on the question of organizing a township school district, and where, during that period, there was submitted to the voters of the graded district a proposal to bond for a schoolhouse, which indicates abandonment of the consent, the consent should be treated as too remote. *Peth* v. *Martin,* 31 Wash. 1 (71 Pac. 549).

Affirmed. Single costs to appellees.

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

REVES *v.* HILLMER.

1. PROCESS—OPEN TO DIRECT ATTACK.

In suit to set aside judgment in justice's court for want of jurisdiction of person, officer's return of service may be attacked; said attack being direct and not collateral.

2. JUDGMENT—PROCESS—JURISDICTION—SETTING ASIDE JUDGMENT.
Where, in suit to set aside judgment in justice's court for want of jurisdiction of person, testimony that officer served process on wrong person was convincing and not disputed, judgment was properly set aside.

Appeal from Wayne; Searl (Kelly S.), J., presiding. Submitted October 13, 1931. (Docket No. 88, Calendar No. 35,790.) Decided December 8, 1931. Rehearing denied March 3, 1932.

Bill by Earl J. Reves against John B. Hillmer to set aside a judgment for want of service. Decree for plaintiff. Defendant appeals. Affirmed.

William L. Thorp, for plaintiff.

Arthur E. Koch (*Charles C. Stewart,* of counsel), for defendant.

CLARK, J. The bill was filed to set aside a judgment as void for want of jurisdiction of the person, no service of process, and to enjoin execution thereon. Plaintiff had decree. Defendant has appealed.

The law action was in justice's court. The officer's return of service is that he served the summons personally on the defendant Reves, plaintiff here.

In the trial of the case before us, plaintiff testified that he was not served with the summons. Another witness named Harris testified that the officer served the summons on him under the mistaken belief or assertion that he was Reves. Defendant stood on the officer's return and offered no testimony.

Cases cited by appellant to the effect that the return of the officer is not open to collateral attack are not in point. This is a direct attack.

Granting that more convincing proof must be submitted by one attacking the validity of a judgment

by impeaching the officer's return than is ordinarily required in civil cases (*Garey* v. *Morley Brothers*, 234 Mich. 675), the evidence here is not disputed, and it is convincing.

The decree must be affirmed, with costs to plaintiff.

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

ARONS *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

RAILROADS—NEGLIGENCE—FAILURE TO PLANK IN V-SHAPED SPACE IN CROSSWALK—STATUTES.

Railroad company is not guilty of negligence as matter of law, under 2 Comp. Laws 1929, § 11121, in not planking in V-shaped space in crosswalk near where rails of side track and main track are merged; statute being permissive merely.

Appeal from Wayne; Collins (Joseph H.), J., presiding. Submitted October 20, 1931. (Docket No. 148, Calendar No. 35,978.) Decided December 8, 1931.

Case by Richard Arons against Detroit, Grand Haven & Milwaukee Railway Company for personal injuries received while crossing tracks alleged to be defective. Judgment for defendant. Plaintiff appeals. Affirmed.

Lorne R. Randall and *Leo F. Covey,* for plaintiff.

Frederic T. Harward and *William W. MacPherson,* for defendant.

CLARK, J. Plaintiff sued for damages for personal injuries averred to be due to negligence of defendant in failing to maintain properly a crosswalk. Defendant had judgment in a trial without a jury. Plaintiff has appealed.

The question is under 2 Comp. Laws 1929, § 11121: Was defendant guilty of negligence as a matter of law in not planking in a V-shaped space formed in a crosswalk at a place where a rail of a side track approached a rail of a main track and near where the rails were merged?

Defendant has testimony that it was impracticable to plank the V-shaped space, which it filled with stone or cinders, the rest of the crosswalk being plank.

The portion of the cited statute is:

"Provided, That when any pavement or sidewalk is laid upon or across any such crossing or intersection, plank may be used between the rails and for one foot on either side of such rails."

This statute by its very terms is permissive, not mandatory.

This answers the contention made.

We find no reversible error.

Affirmed.

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

BUSHMAN *v.* ESTLEMAN.

1. WATERS AND WATERCOURSES—ARTIFICIAL DRAINAGE DITCH—NAVIGABLE WATERS.

   In suit to enjoin trespass on plaintiffs' private lake, finding of trial court that artificial drainage ditch through which defendants passed in order to reach said lake is not navigable in fact, *held*, supported by testimony.

2. INJUNCTION—PRIVATE LAKE—ARTIFICIAL DRAINAGE DITCH.

   Where small, unmeandered lake is wholly within plaintiffs' land, they are entitled to enjoin defendants from going upon it through unnavigable artificial drainage ditch connecting lake with pond on defendants' land.

Appeal from Washtenaw; Sample (George W.), J. Submitted October 14, 1931. (Docket No. 103, Calendar No. 35,567.) Decided December 8, 1931.

Bill by F. E. Bushman and others against Charles F. Estleman and others to enjoin trespassing on plaintiffs' land. Cross-bill by defendants against plaintiffs to enjoin interference with enjoyment of certain alleged rights of navigation. Decree for plaintiffs. Defendants appeal. Affirmed.

Dwyer & Dwyer, for plaintiffs.

Carl H. Stuhrberg, for defendants.

CLARK, J. Located wholly within plaintiffs' land is a small lake known as Independence lake. The lake was not meandered. Plaintiffs have title to all the land surrounding and underlying the lake. Defendant Charles F. Estleman owns and, with other

defendants, occupies land west of plaintiffs' land. At its closest point, defendants' land is 389 feet from the lake. An artificial drainage ditch connects the lake with a pond on defendants' land. Defendants asserted the right to go from their land, pulling or poling small boats through the drainage ditch, to and upon the lake, and continued to do it against plaintiffs' protests and against their efforts to prevent it. This bill was filed for injunction. Plaintiffs had decree. Defendants have appealed.

Passing the question that there is no evidence that the lake is a navigable body of water (*Giddings* v. *Rogalewski*, 192 Mich. 319), and the further question that this drainage ditch, constructed and used as such, whether public ditch or private drain, is not a public highway (*Moore* v. *Sanborne*, 2 Mich. 519 [59 Am. Dec. 209]), we agree with the trial court that the ditch is not navigable in fact; the finding being well supported by the testimony. We need not discuss again the test of navigability, there being already great abundance of discussion in the cases cited and in *Collins* v. *Gerhardt*, 237 Mich. 38; *Putnam* v. *Kinney*, 248 Mich. 410, and cases there cited.

The case is as if there were no ditch and defendants were trespassing upon plaintiffs' land to reach the unmeandered lake wholly within plaintiffs' title and description. *Giddings* v. *Rogalewski*, *supra*. That the court may and should enjoin these repeated and continued trespasses there is no doubt.

Affirmed, with costs to plaintiffs.

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

THOMPSON *v.* AMERICAN STATE BANK.

1. EQUITY—MOTION TO DISMISS.
   On motion to dismiss, material allegations of bill are taken as true.

2. BANKS AND BANKING—RIGHT TO RESCIND PURCHASE OF BANK STOCK—RIGHTS OF CREDITORS INVOLVED.
   Purchaser of bank stock which has become worthless and liability to stockholder (3 Comp. Laws 1929, § 11945) is not entitled to rescind purchase on ground of fraud unless he shows that there are no creditors who became such during the time that he was registered stockholder.

3. SAME—MOTION TO DISMISS BILL TO RESCIND PURCHASE OF BANK STOCK—SUFFICIENCY OF BILL.
   Motion to dismiss bill for rescission of purchase of bank stock was properly granted, where bill alleged stock to be "absolutely worthless and a liability," which is equivalent to saying that rights of creditors are involved under statutory liability of stockholders (3 Comp. Laws 1929, § 11945), and bill failed to allege that there are no creditors who became such during the more than two years that plaintiff was registered stockholder.

4. CORPORATIONS—RESCISSION OF PURCHASE OF STOCK—SUFFICIENCY OF BILL—PRIVITY OF CONTRACT.
   Objection that bill by purchaser to rescind purchase of corporate stock does not allege purchase from defendant—contract between the parties which might be rescinded—is without merit, where effect of mass of allegation is that purchase was from defendant, although there was no express allegation to that effect.

5. SAME—WORDS AND PHRASES.
   Allegation in bill to rescind purchase of corporate stock that stock is "practically worthless" means actually, not theoretically, worthless.

6. SAME—TENDER OF WORTHLESS STOCK NOT NECESSARY TO RESCISSION.

Return or offer to return corporate stock, which is alleged to be worthless, is not necessary prerequisite to maintaining suit to rescind its purchase on ground of fraud.

Appeal from Wayne; Webster (Clyde I.), J. Submitted October 16, 1931. (Docket No. 132, Calendar No. 35,925.) Decided December 8, 1931.

Bill by Henry S. Thompson against American State Bank and Guaranty Trust Company of Detroit, Michigan corporations, to rescind contracts of purchase of stock. Bill dismissed as to both defendants. Plaintiff appeals. Affirmed as to defendant bank. Reversed as to defendant trust company.

Manchester, Zirkalose & Smith (*Charles F. Gates,* of counsel), for plaintiff.

Henry F. Massnick, for defendant bank.

Martin, Hunt & Field, for defendant trust company.

CLARK, J. In December, 1928, plaintiff purchased 100 shares of capital stock of Guaranty State Bank, a banking corporation, at a price of $13,595, and 100 shares of the capital stock of the Guaranty Trust Company, also alleged to be a banking corporation, at the price of $27,500. Plaintiff arranged to have the Guaranty Trust Company stock carried by the Guaranty State Bank, and he accordingly paid to the bank $7,500 and borrowed $20,000 from the bank for which he gave his promissory note and he deposited as collateral the certificate for 100 shares of Guaranty Trust stock. By a like arrangement, he borrowed $13,595 from the Guaranty Trust Com-

pany to pay for the bank stock and gave his promissory note therefor and as collateral he deposited the certificate for 100 shares of bank stock and a certificate for 10 shares of other stock. He renewed the notes from time to time, accepted dividends, and consented to the Guaranty State Bank's being succeeded by American State Bank of Detroit.

In March, 1931, he filed this bill for rescission of both purchases, joining both American State Bank and Guaranty Trust Company as defendants, alleging that the purchases had been brought about by fraud. Defendants, having different counsel, filed separate motions to dismiss. The bill was dismissed. Plaintiff has appealed.

On the motion to dismiss, the material allegations of the bill are taken as true.

No point is made of misjoinder.

American State Bank. The bill alleges the stock to be "absolutely worthless and a liability." This is equivalent to saying that rights of creditors are involved under statutory liability of stockholders in banks. 3 Comp. Laws 1929, § 11945. A rule, not as between parties to the contract sought to be rescinded, but as regards creditors, is stated in *Newton National Bank* v. *Newbegin,* 20 C. C. A. 339 (74 Fed. 135, 33 L. R. A. 727), and quoted in *Farmers' State Bank* v. *Empey,* 35 S. D. 107 (150 N. W. 936):

"There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no facts exist upon which corporate creditors can reasonably predicate an

estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered; and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent.''

See, also, *Bissell* v. *Heath,* 98 Mich. 472.

Plaintiff, to prevail, must show the equities in his favor, and, among such equities, the fact that there are no creditors who became such while he was a registered stockholder. There are no allegations in the bill relative to the matter, but it is obvious that this large bank in active business in Detroit incurred some new and different obligations, to depositors at least, over the period of more than two years that plaintiff was a registered stockholder. Plaintiff, therefore, cannot repudiate liability to creditors and avoid his status as a stockholder by a bill for rescission of his purchase of the stock. It is unnecessary to consider plaintiff's lack of diligence in this regard, nor to discuss waiver. As to this defendant, the bill was properly dismissed.

Guaranty Trust Company. It is urged the bill does not allege a purchase of stock from the defendant, a contract between the parties which might be

rescinded. There is no express allegation to that effect, but that is the theory and tenor of the bill. The effect of the mass of allegation is that the purchase was from defendant. It is contended that plaintiff neither returns nor offers to return the stock which he purchased, and that he cannot return it as it is pledged to a third party, the said bank, as security for a loan, and that he therefore cannot rescind, as he cannot place the defendant *in statu quo*. *Joslin* v. *Noret,* 224 Mich. 240.

The bill alleges the stock to be "practically worthless;" this means actually, not theoretically, worthless. We must take the allegation to be true, and it appears that defendant will suffer no prejudice if the worthless stock be not returned. Hence the contention is without merit. *Joslin* v. *Noret, supra; Anderson* v. *Frischkorn Real Estate Co.,* 253 Mich. 668.

As against objections made, the bill states a case against the defendant.

As to American State Bank, the decree is affirmed, with costs to appellee.

As to Guaranty Trust Company, the decree is reversed, with costs to appellant, and defendant may answer within rule time.

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

PEOPLE *v.* LAHEY.

1. INDICTMENT AND INFORMATION—WHEN NO ELECTION MAY BE REQUIRED.

   Where information contains two or more counts charging distinct crimes which were committed by same acts, at same time, and same evidence must be relied on for conviction under either count, no election may be required.

2. SAME—WHEN ELECTION SHOULD BE REQUIRED.

   Where information in one count charged negligent homicide (3 Comp. Laws 1929, § 16743), and in another failure to stop after automobile accident involving injury or death to person (1 Comp. Laws 1929, § 4722), it was error to refuse to require prosecution to elect between said counts, since it is apparent that said offenses do not grow out of same facts.

3. CRIMINAL LAW—FAILURE TO REQUIRE ELECTION OF COUNT.

   Error in refusing to require prosecution to elect between inconsistent counts cannot be said to be without prejudice because defendant was acquitted of first offense charged, where evidence admitted in support thereof was not admissible in support of second offense, of which he was convicted, and may have produced conviction.

4. JURY—EXAMINATION OF JURORS BY JUDGE.

   Trial judge properly undertook examination of jurors on *voir dire*.

5. EVIDENCE—OPINION EVIDENCE AS AGAINST POSITIVE TESTIMONY RAISES NO ISSUE.

   Opinion evidence from medical witnesses that injured boy, having broken leg, could not make outcry, has no tendency to make issue as against positive and undisputed testimony of number of witnesses that he did scream and call lustily.

6. CRIMINAL LAW—EVIDENCE—OPINION EVIDENCE PROPERLY EXCLUDED WHERE OPPOSED TO POSITIVE TESTIMONY.

   In prosecution for failure to stop after automobile accident involving injury or death to person (1 Comp. Laws 1929, § 4722), where there was positive and undisputed testimony that in-

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As to *voir dire* examination generally, see 16 R. C. L. 246; R. C. L. Perm. Supp. p. 4068; R. C. L. Pocket Part, title Jury, § 63.

jured person screamed and called lustily, opinion evidence from medical witnesses that, because of broken leg, he could not make outcry, was properly excluded.

Appeal from Muskegon; Vanderwerp (John), J. Submitted October 15, 1931. (Docket No. 215, Calendar No. 35,867.) Decided December 8, 1931.

William P. Lahey was convicted of failing to stop in event of an accident involving injury or death to a person. Reversed, and new trial granted.

Cross, Foote & Sessions, Alexis J. Rogoski, and *R. Glen Dunn,* for appellant.

Paul W. Voorhies, Attorney General, and *George H. Cross,* Assistant Prosecuting Attorney, for the people.

CLARK, J. Defendant was tried upon an information charging in two counts two statutory offenses, negligent homicide, 3 Comp. Laws 1929, § 16743, and failing to stop in event of accident involving injury or death to a person, section 30, Act No. 318, Pub. Acts 1927 (1 Comp. Laws 1929, § 4722), uniform motor vehicle act. The court refused to require an election of counts. Defendant was convicted under the second count and acquitted under the first. From the judgment entered he has appealed.

In the evening of January 30, 1931, defendant drove his automobile along a street in Muskegon. It collided with an automobile parked on the side of the street and drove it against another parked automobile, fatally injuring a boy, Robert Gee, who was standing between the parked cars, and also injuring another boy, William Gee. Defendant did not stop. He claims he did not then know anyone had been injured.

Evidence was adduced in support of both counts of the information. The motion to require the prosecution to elect between counts was made before any witness was sworn and renewed at the close of the people's case. It was not granted. The case was submitted under both counts.

As sustaining his contention that no election was here necessary, the prosecuting attorney cites a number of cases from California. They are not in point. Section 954 of the Penal Code of California provides that an indictment or information may charge two or more different offenses "connected together in their commission." We find no similar statute in our State, except as respects larceny. 3 Comp. Laws 1929, § 17283. The rule in this State is that no election can be required when an information contains two or more counts charging distinct crimes which were committed by the same acts, at the same time, and the same evidence must be relied on for conviction under either count. *People* v. *Mathews,* 207 Mich. 526; *People* v. *Warner,* 201 Mich. 547; *People* v. *Sachse,* 252 Mich. 275; *People* v. *Sweeney,* 55 Mich. 586.

In the case at bar the first count could not be used to convict the defendant of the offense charged in the second. Evidence warranting conviction under the second count would not sustain a conviction under the first. Under the second count defendant's prior negligence is not important, and he might be wholly innocent in respect of the accident itself and yet be guilty of the offense charged. The offense under the first count was complete with the homicide. It is apparent these offenses do not grow out of the same facts.

In *People* v. *Aikin,* 66 Mich. 460 (11 Am. St. Rep. 512), the charge was manslaughter caused by alleged abortion. The first count charged manslaugh-

ter in usual form. The second charged manslaughter by the use of medicine and drugs. The third count charged manslaughter by use of an instrument. The fourth count charged manslaughter by reason of criminal neglect as a man midwife to whom the care of the deceased had been committed. It was held that the fourth count charged an offense of same degree as that charged in the other counts, but growing out of different facts, circumstances, and conditions, and it was said:

"That where several offenses are charged, distinct in point of law, and the trial of these several offenses would involve the proof of substantially different transactions, and thereby tend to confuse the defendant in his defense, or deprive him of any substantial right, the court should either quash or compel the prosecutor to elect which offense he will ask a conviction upon."

And it was held, quoting syllabus:

"The true and only just rule governing the joinder of counts in an information or indictment seems to be, if the different counts are drawn and used with a view to one and the same transaction, so that one of them, upon the trial, may be found to meet the evidence, the court will not interfere with the proceeding, as such an object is a legitimate one. But when the object and purpose is apparent to prosecute the respondent, and such is the logical effect, for separate felonies by means of one information or indictment, the court will not permit it to be done, as the injustice and prejudice to the accused overbalance all possible benefits to be derived to the public from such a practice."

It may be noted that the language of *People* v. *McKinney,* 10 Mich. 54, 94, 95, relied on by the prosecution, relating to offenses springing out of "substantially the same transaction" in *People* v. *Aikin,*

supra, is treated as meaning growing out of the same facts.

In *People* v. *Mears,* 251 Mich. 359, defendant was charged with procuring a note and mortgage by false pretenses, etc., and with obtaining money on it from a third party. It was held, quoting syllabus:

"Where fact that information in one count charged two offenses was called to court's attention by motion to quash for duplicity, court should have ordered count made single by severance * * * or by striking out second charge as surplusage."

The following from 14 R. C. L. p. 199:

"In the case of the joinder of counts charging distinct offenses, the court should exercise its discretion to compel the prosecution to elect, since such a joinder tends to embarrass the prisoner, and confound him in his defense."

The prosecution should have been required to elect.

The prosecution made a very strong case under the charge of negligent homicide, but for some reason the jury acquitted the defendant of the offense. That feature of the case is gone; defendant's innocence thereof is established and evidence applicable to that charge alone cannot be considered in respect of the other charge. The matter before us is the conviction on the second charge under Act No. 318, as to which the evidence is sharply in conflict. It cannot be said the error was without prejudice, as evidence admitted under the first count and not admissible under the second count may have produced conviction.

This disposes of the case, but, as it must go back for a new trial, we speak briefly of two other questions:

The trial judge undertook, rightly, examination of jurors on *voir dire* (*People* v. *Hayek,* 243 Mich. 546),

and although defendant criticizes the failure of the judge to make certain proffered interrogations, he has failed to show, affirmatively, prejudice thereby.

Opinion evidence from medical witnesses that the boy, William Gee, having a broken leg, could not make an outcry, had no tendency to make an issue as against positive and undisputed testimony of a number of witnesses that the boy did scream and call lustily, and was properly excluded.

Other questions are not likely to arise again.

Reversed. New trial ordered. Defendant remanded to custody of sheriff.

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

R. C. MAHON CO. *v.* FORD MOTOR CO.

1. MECHANICS' LIENS—SEPARATE CONTRACTS MAY NOT BE TACKED TO EXTEND STATUTORY TIME FOR FILING.

Contract with contractor and separate contract with owner may not be tacked together so as to extend statutory time for filing mechanic's lien for labor and material furnished (3 Comp. Laws 1929, § 13105).

2. SAME—BURDEN OF PROOF.

In suit to enforce mechanic's lien, plaintiffs have burden of proof to establish compliance with statutory requirements, and where burden was not sustained, suit was properly dismissed.

Appeal from Wayne; Sample (George W.), J., presiding. Submitted October 30, 1931. (Docket

No. 225, Calendar No. 35,815.) Decided December 8, 1931.

Bill by R. C. Mahon Company, a Michigan corporation, against Ford Motor Company, a Delaware corporation, to foreclose a mechanic's lien. Cross-bills by Detroit Steel Products Company and Fenestra Construction Company, Michigan corporations, against defendant to foreclose mechanics' liens. Cross-bills dismissed. Cross-plaintiffs appeal. Affirmed.

Stevenson, Butzel, Eaman & Long, for cross-plaintiffs.

Longley, Bogle & Middleton, for defendant.

CLARK, J. Detroit Steel Products Company, a Michigan corporation, and Fenestra Construction Company, a Michigan corporation, subsidiary of and owned by the first-named corporation, have appealed from decree dismissing their bills to enforce mechanics' liens.

Blair contracted with defendant owner to erect for it a steel mill building, and, in connection therewith and part thereof, a soaking pit building.

The statement of lien of the first-named plaintiff, claiming $37,154.80, is for labor and materials furnished for such building in pursuance of a contract with Blair; and the statement of lien of the second-named plaintiff, claiming $16,356.50, is for labor furnished for such building in pursuance of a contract with Blair.

The last of labor and material under the first statement is alleged to have been furnished on September 18, 1926, and the last of labor performed under second statement is alleged to have been performed on September 23, 1926.

To sustain either of these liens as having been filed within the statutory limit of 60 days from date on which the last of materials was furnished or labor performed (3 Comp. Laws 1929, § 13105), the furnishing of materials and performing of labor alleged as of September, 1926, must be found in fact to have been done in pursuance of the contracts with Blair. We cannot so find. The record shows the work done and material furnished at that time were not upon or under Blair's contract with the owner, which had been terminated, but it was a repair job on the building done in pursuance of a contract with the owner itself through its architect and agent, Albert Kahn, Inc.

Plaintiffs' separate contract with Blair, principal contractor, and their separate contract with the owner cannot be thus tacked together so as to enlarge the time of filing a lien for what was done or furnished under either contract. 40 C. J. p. 200; *Noye Manfg. Co.* v. *Thread Flouring-Mills Co.,* 110 Mich. 161.

Plaintiffs have the burden of proof to establish compliance with statutory requirements to give them right of lien. *Roberts* v. *Miller,* 32 Mich. 289. They have not sustained the burden.

No lien is claimed except for work done and material furnished under the contracts with Blair. This is not a case of successive or continual furnishing to a contractor, or to an owner, which in the aggregate might be held to be but one contract, but it is a case of separate contracts.

The liens were not filed in time.

Other questions are passed as unnecessary to decision.

Affirmed. Costs to defendant.

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

WATSON-HIGGINS MILLING CO. *v.* ST. PAUL MILLING CO.

1. CORPORATIONS—WHEN FOREIGN CORPORATIONS AMENABLE TO PROCESS.

   Foreign corporation is amenable to process to enforce personal liability, in absence of consent, only if it is doing business within State in such manner and to such extent as to warrant inference that it is present there, and even if it is doing business within State process will be valid only if served on some authorized agent.

2. SAME—EACH CASE DEPENDENT ON FACTS.

   Whether foreign corporation is amenable to process depends on facts of each case; no general rule being applicable.

3. COMMERCE—REGULATION—INTERSTATE COMMERCE.

   Regulation of commerce between States having been committed to Congress, States are inhibited from levying direct burden on interstate commerce.

4. CORPORATIONS—FOREIGN CORPORATIONS—DOING BUSINESS WITHIN STATE—PROCESS.

   Foreign corporation not admitted to do business in State, and maintaining no office, warehouse, or stock of goods therein, and selling flour either directly or through broker handling flour of other manufacturers, was not doing business within State in such manner as to warrant inference that it was present, and therefore it was not amenable to process served on broker.

Appeal from Kent; Brown (William B.), J. Submitted October 20, 1931. (Calendar No. 35,930.) Decided December 8, 1931.

Action by Watson-Higgins Milling Company, a Michigan corporation, against St. Paul Milling Company, a Minnesota corporation. Motion by defendant to set aside service of process denied. Defendant appeals. Reversed.

As to what constitutes "doing business," see annotation in 24 L. R. A. 295; 57 L. R. A. 88; 10 L. R. A. (N. S.) 693.

Linsey, Shivel & Phelps, for plaintiff.

William J. Landman, for defendant.

CLARK, J. This is appeal in the nature of certiorari to review an order denying defendant's motion to set aside service of a writ of summons for want of jurisdiction of the person of defendant, a Minnesota corporation.

It is said in *Philadelphia & Reading R. Co.* v. *McKibbin,* 243 U. S. 264 (37 Sup. Ct. 280):

"A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the State the process will be valid only if served upon some authorized agent."

A review of the cases presents no better statement of the rule. It is recognized that no exact test can be prescribed but each case must stand on its own facts. *Farmers' & Merchants' Bank* v. *Federal Reserve Bank,* 286 Fed. 566.

The regulation of commerce between the States has been committed to Congress. The States are inhibited from levying a direct burden upon interstate commerce.

The defendant has not been admitted to do business in this State. It maintains neither office nor warehouse and keeps no stock of goods within this State. Defendant's flour was sold to the trade in this State either directly or by and through a flour broker handling flour of a number of manufacturers. He received from defendant a commission, nothing more. He called on the trade and solicited orders. An order was received by defendant directly from

plaintiff near April 3, 1930, and the flour shipped and received.

Defendant's broker in this territory was T. E. Vogler of Toledo, Ohio. He reported that plaintiff had complained of having trouble with the flour, and defendant, on October 9, 1930, by letter, requested plaintiff to send a sample for testing. Nothing more was done until February 6, 1931, when plaintiff sent a letter to defendant at St. Paul requesting that "your traveling representative * * * call on us as soon as possible." Defendant requested Vogler to call on plaintiff, which he did. He, without being so directed by defendant, went to Edmore, obtained samples of the flour complained of, returned to plaintiff's office where the samples were prepared for mailing, and mailed the same to defendant.

The summons was served on Vogler. Defendant, on this state of facts, was not doing business within the State in such a manner and to such extent as to warrant the inference that it was present here. If it be assumed that Vogler's call and what he did respecting the samples was fully authorized by defendant, it was merely and necessarily incident to its interstate business and a part of it.

In *Rath Packing Co.* v. *Cold Storage Co.*, 222 Mich. 315, the following from 14A C. J. p. 1276 was quoted with approval:

"The courts are in agreement that the transaction in a State by a foreign corporation of acts of business, whether commercial or otherwise, which are merely incidental to the business in which such corporation is ordinarily engaged, does not constitute the doing or carrying on of business within the meaning of statutes imposing conditions, restrictions, regulations, etc., on the right of foreign corporations to do business."

See, also, *Furst* v. *Brewster,* 282 U. S. 493 (51 Sup. Ct. 295).

This case and *Harvey's Sons Manfg. Co.* v. *Sterling Materials Co.,* 247 Mich. 317, are not similar in fact and hence not in decision.

Order reversed, with costs, and remanded with direction to dismiss.

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

LEESBURG STATE BANK *v.* PINNER.

PARTNERSHIP—INDORSEMENT BY PARTNER—RATIFICATION—BILLS AND NOTES—LIABILITY OF PARTNERSHIP.

Partnership, by receiving proceeds of note indorsed before delivery in name of partnership by one partner, ratified said indorsement, and therefore both partners are liable in action on note regardless of whether partner had authority to indorse firm name.

Appeal from Wayne; Webster (Arthur), J. Submitted October 27, 1931. (Docket No. 67, Calendar No. 35,965.) Decided December 8, 1931.

Assumpsit by Leesburg State Bank, a Florida banking corporation, against Ralph F. Pinner and Raymond H. Wilcox, doing business as Pinner & Wilcox, on a promissory note. Judgment for plaintiff. Defendants appeal. Affirmed.

Anderson, Wilcox, Lacy & Lawson (*Earl L. Shimer,* of counsel), for plaintiff.

George B. Murphy, for defendants.

McDONALD, J. This is a suit against the indorsers on a promissory note for $1,776.96, given by C. M. Love and Eaves Allison bearing the indorsement before delivery of "Pinner and Wilcox by Ralph F. Pinner." The note represents a loan to Love and Allison which they secured from the bank to pay an existing obligation to Pinner and Wilcox. The bank was told the purpose of the loan and gave it on condition that Pinner and Wilcox would indorse the note before delivery. When such a note was presented to the bank the amount of the loan was paid to Pinner and Wilcox. On the trial judgment was entered for the plaintiff. The defendants appealed.

Pinner and Wilcox is a firm of landscape architects in the city of Detroit. It is contended that the indorsement of the firm name by Pinner was not made in the ordinary course of the partnership business; that it is not a trading or commercial partnership; that Mr. Pinner's authority to bind the other member of the firm cannot be implied; that the indorsement was made for the accommodation of Love and Allison; that the bank, having knowledge of the character of the indorsement, was bound in law to ascertain if Pinner had authority to indorse the firm name; that on the trial the bank had the burden of proving such authority and did not do so. No evidence was offered by either party on that question. It is contended that the judgment should be reversed as to the defendant Wilcox, because it was not shown that he consented to the indorsement or that Pinner had authority to sign the firm name. On the part of defendant Pinner, it is contended that if Wilcox is

discharged from liability he also must be discharged because they were joint accommodation indorsers, and the discharge of one discharges the other.

Much space is devoted in defendants' brief in an effort to convince the court that this was an accommodation indorsement. It is not necessary to decide that question in determining defendants' liability. Without disturbing the judgment, it may be conceded that it was an accommodation indorsement; that there was no implied authority on the part of Mr. Pinner to indorse the firm name, and no express authority appears in the evidence. This is because the undisputed evidence shows a ratification by the firm. The partnership received the entire amount of the loan. The president of the bank testified that he paid the money to Pinner and Wilcox. By accepting the benefits, the firm must be held to have ratified the indorsement. It is not necessary to further discuss the issue. Both parties were bound by the indorsement.

The judgment is affirmed, with costs to the plaintiff.

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

TRAVIS *v.* EISENLORD.

MOTOR VEHICLES—CONTRIBUTORY NEGLIGENCE—AUTOMOBILE DRIVER MAY ASSUME THAT DRIVER OF OTHER VEHICLE APPROACHING INTERSECTION WILL OBEY LIGHT SIGNAL.

Automobile driver approaching intersection with green light in his favor is not guilty of contributory negligence as matter of law in proceeding to cross without looking to see whether truck driver approaching from right on intersecting street is going to obey law by stopping before red light and waiting until it changed, since he had right to assume that truck driver would obey law.

Appeal from Oakland; Doty (Frank L.), J. Submitted October 8, 1931. (Docket No. 59, Calendar No. 35,109.) Decided December 8, 1931.

Separate actions of case by Frank, Clyde C., and Lois S. Travis against Howard G. Eisenlord and others for personal injuries received in an automobile accident at a highway intersection. Cases were consolidated for trial. Directed verdict and judgment for defendants. Plaintiffs appeal. Reversed, and new trial granted.

Howard D. Brown (*George H. Cary,* of counsel), for plaintiffs.

Earl K. Gullen, for defendants.

McDONALD, J. The three causes named in the title are separate suits brought to recover damages for injuries received in an automobile collision which occurred at the intersection of Plymouth and Middlebelt roads in the county of Wayne, Michigan. The

On rights and duties at intersection of highways, see annotation in 58 A. L. R. 1197.

suits were consolidated in one trial and will be disposed of in one opinion.

The plaintiffs were riding in an automobile driven by Clyde Travis in an easterly direction on Plymouth road. When 400 or 500 feet from the intersection, the driver saw the defendants' truck about 1,000 feet away approaching from the south on Middlebelt road. There was a modern signal traffic light suspended above the intersection. As the parties approached the light it changed from red to green in favor of traffic on Plymouth road and from green to red against traffic on Middlebelt road. The plaintiffs' driver, as was his right, proceeded to cross. The defendant, ignoring the signal, drove into the intersection at a high rate of speed and collided with the other car. Plaintiffs were injured and brought this suit to recover damages. On the trial, at the close of the plaintiffs' case, the trial court directed a verdict in favor of the defendant on the ground that the plaintiffs were guilty of contributory negligence as a matter of law because of their failure to look for the defendant before attempting to cross the intersection. From the judgment entered the plaintiffs have appealed.

The court was wrong in holding that the plaintiffs were guilty of contributory negligence as a matter of law. If he were correct in so holding, it would mean that the driver of the plaintiffs' car must at his peril assume that the defendant would disobey the law and rush the red light. The contrary is true. He had a right to assume that the defendant understood the red signal and that he would not undertake to make the crossing until it had changed to green. If he had looked, as the court says he should have done, it is true that he would have seen the defendant approaching, but he would have had a

right to rest on the assumption that defendant would stop before the red light and wait until it had changed. It was the duty of plaintiffs' driver to look for the green light and to see that the intersection was clear before attempting to cross, but he was not required to look to the right for the defendant, because he had good reason to believe that he was protected from danger in that direction by the red light. From the remarks of the trial court in deciding the question, it appears that he reached a wrong conclusion by confusing the rule relative to the duties of drivers at intersections where the traffic is controlled by the modern light signal system with that at county highway crossings where drivers are compelled to rely on their own observations. The distinction is obvious.

The judgment is reversed, and a new trial granted. Plaintiffs will have costs.

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

BOEREMA *v.* COOK.

1. MOTOR VEHICLES—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT. Automobile driver who, when 60 feet from intersection, saw defendant approaching from right 160 feet away at speed of 50 or 60 miles an hour, was guilty of contributory negligence as matter of law in proceeding to cross without again looking to right.

As to rights and duties at intersection of highways, see annotation in 58 A. L. R. 1197.

2. NEGLIGENCE—SUBSEQUENT NEGLIGENCE.

Where drivers of automobiles in collision at intersection were both guilty of negligence in failing to look and see each other until it was too late to avoid accident, doctrine of subsequent negligence is not applicable.

Appeal from Kent; Dunham (Major L.), J. Submitted October 6, 1931. (Docket No. 3, Calendar No. 35,797.) Decided December 8, 1931.

Case by Ralph Boerema against Adelbert Cook for injuries received in an automobile collision at a highway intersection. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Francis L. Williams, for plaintiff.

Rodgers & Dunn, for defendant.

MCDONALD, J. The plaintiff reviews by appeal a judgment of the circuit court for the county of Kent in an action brought to recover damages for injuries received in an automobile collision at a highway intersection.

Eastern avenue is a county highway south of the city of Grand Rapids. It extends north and south and at the place of the accident intersects with the Allen road. The plaintiff was driving north on Eastern avenue. The defendant was driving west on the Allen road. They collided at about the center of the intersection. The plaintiff was injured and brought this suit. On the trial the court held plaintiff guilty of contributory negligence as a matter of law and directed a verdict in favor of the defendant. The plaintiff claims that he was free from negligence, but, if he were not, his action was not barred, because the defendant was guilty of subsequent neg-

ligence. These are the two questions involved in the suit.

As to the question of contributory negligence, the testimony shows that when the plaintiff was about 60 feet from the intersection he observed the defendant approaching 160 feet away driving at a speed of 50 or 60 miles an hour; that he concluded he had ample time to cross "without hastening;" that he proceeded ahead at a speed of 20 or 25 miles an hour without again looking in the direction from which the defendant was approaching; that, as he proceeded, he looked straight ahead only and did not see the defendant again after his first view of him until the cars were about coming together. In view of the position of the two cars and the speed at which defendant was driving, it may have been an error in judgment for the plaintiff to attempt to cross until the defendant, who was on his right, had passed over the intersection; but it was not negligence. His negligence consisted in failing to keep a lookout as he was crossing to see if he could continue on in safety. The requirement that one must use reasonable care for his own protection was not satisfied with the single observation which plaintiff made before entering the intersection. The situation was such as to call for further observation. Throughout the distance which he traveled before the collision his view was unobstructed. If he had looked again he would have seen the defendant nearby bearing down on him at a high rate of speed. If he had looked he would have realized his danger in time to have avoided the collision either by accelerating his speed or reducing it. In view of the circumstances, with which he was familiar, it must be held that he did not use ordinary care for his own safety and cannot recover unless the defendant was guilty of subsequent negligence.

The undisputed facts leave no room for application of that doctrine. The plaintiff's negligence continued up to the time of the accident. There is no doubt of defendant's negligence. He drove up to and into the intersection without looking for other traffic. If he had looked he would have seen the plaintiff and could have avoided the collision by turning in behind him where there was ample room to pass. The controlling fact in this case is that neither of these parties saw the other until it was too late to avoid injury. Both were negligent and the negligence of each continued up to the moment of the accident. The trial court correctly disposed of the issue.

The judgment is affirmed, with costs to the defendant.

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

HOOLEY *v.* ALPENA NATIONAL BANK.

1. BROKERS—COMMISSIONS—APPROVAL OF SALE.
   Owner, who approved sale of land to broker's clients, became liable for commission unless sale failed because of unwillingness or inability of broker's clients to complete it.

2. SAME—SALE TO ANOTHER PARTY.
   Where broker with valid contract for sale of land procured buyers who were ready, willing, and able to buy on owner's terms, owner is liable for commission, although, after approving sale by broker, it sold to another party.

As to broker entitled to commission on finding purchaser, see annotation in 10 L. R. A. 103; 44 L. R. A. 321, 616, 623; 3 L. R. A. (N. S.) 577.

Error to Alpena; Dehnke (Herman), J., presiding. Submitted October 7, 1931. (Docket No. 29, Calendar No. 35,807.) Decided December 8, 1931.

Assumpsit by T. Frank Hooley against the Alpena National Bank for real estate broker's commissions. Judgment for plaintiff. Defendant brings error. Affirmed.

Lynch & Hinks, for plaintiff.

Carl R. Henry, for defendant.

McDONALD, J. This is an action to recover a commission for the sale of real estate. The case was tried by the court without a jury. Findings of fact and conclusions of law were filed, on which judgment was rendered for the plaintiff in the sum of $868.93. The defendant has appealed.

The plaintiff's testimony tends to show that he had a valid written contract with the defendant to sell 1,960 acres of cut-over lands in Alpena county, designated in the record as the "Lutes land;" that he procured Lester D. Mills and Arthur O. Worroll, who were ready, willing, and able to purchase 360 acres on defendant's terms, and William C. Beaufore who was ready, willing, and able to purchase the balance of the tract; that he procured from them written offers which he submitted to the defendant and which the defendant accepted in writing; but that the sale was not consummated because the defendant subsequently sold to another party. The defendant denies that the plaintiff procured purchasers ready, willing, and able to purchase. It admits having sold the land to Walter P. Haass through Mr. Beaufore, but claims that plaintiff was not the procuring cause of the sale.

It is undisputed that the plaintiff procured purchasers acceptable to the defendant. Their written offers were delivered to Mr. Markham and he submitted them to the defendant's board of directors. The board approved them and authorized the sale. This appears by a letter from Mr. Markham to the plaintiff, the applicable part of which reads as follows:

"Our directors yesterday approved of the sale of the so-called 'Lutes lands,' at the price of $4 per acre less your commission of 10 per cent., with the 25 per cent. down payment and balance in eight equal annual payments with interest on all unpaid sums at 6 per cent. per annum. Upon your client's acceptance of the title as shown by the abstracts we can make out contracts, etc."

Having approved of the sale, the defendant became liable for the commission unless it failed of consummation because of the unwillingness or inability of plaintiff's purchasers to complete it. The failure to close the deal for any other reason would not defeat the plaintiff's right to a commission. As to Mills and Worroll, it is conceded that they were ready, willing, and able to go through with the purchase. Beaufore was buying for resale, but his written offer was made in his own name. The evidence shows that he was more than ready, willing, and able to buy. He was anxious. He wanted to make a money deposit with his written offer, but was told by Mr. Markham that such a deposit was not necessary because he was dealing with a bank. The only reason apparent in the record why the deal was not closed with him in accordance with his written offer is that Mr. Markham side-tracked the plaintiff and made a different agreement with Beaufore by which a sale was made of the entire tract direct to his pur-

chaser at $5 per acre, which was $1 an acre above the price listed with the plaintiff. The defendant could not thus relieve itself of liability for plaintiff's commission. It clearly appears from the record that the plaintiff had a valid contract with the defendant for the sale of this land; that he procured purchasers ready, willing, and able to purchase on defendant's terms; and that the defendant's directors approved the sale to them. The circuit judge correctly held that the plaintiff had earned his commission.

The judgment is affirmed, with costs to the plaintiff.

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

HANSCHKE *v.* MERCHANTS CREDIT BUREAU.

1. LIBEL AND SLANDER—PRIVILEGE—MEMBERS OF CREDIT BUREAU.
   If privilege relation exists between merchants credit bureau and its subscribers, it may not be extended to outsiders.

2. SAME—FALSE STATEMENT IN BULLETIN PUBLISHED BY CREDIT BUREAU NOT PRIVILEGED.
   False statement in effect proclaiming plaintiff to be criminal, published by merchants credit bureau in bulletin voluntarily circulated among its members and furnished gratuitously to others, was not privileged.

On report of mercantile agency as a privileged communication, see annotation in 36 L. R. A. (N. S.) 452.

Privilege of reports of mercantile agencies as affected by extent of publication, see annotation in 20 L. R. A. (N. S.) 366.

3. SAME—INJURY TO FEELINGS—EXCESSIVE VERDICT.

Verdict of $3,500 for injury to plaintiff's feelings in falsely charging him, in publication given wide circulation in community where he lived and worked, with attempting to commit crime, *held,* not excessive.

Appeal from Wayne; Sample (George W.), J., presiding. Submitted October 6, 1931. (Docket No. 20, Calendar No. 35,843.) Decided December 8, 1931.

Case by Louis Hanschke against Merchants Credit Bureau, a Michigan corporation, and another, for libel. Judgment for plaintiff. Defendants appeal. Affirmed.

Alean B. Clutts (*I. Ernest Sachs* and *S. Amer Cox,* of counsel), for plaintiff.

Edgar C. Braun, for defendant Merchants Credit Bureau.

Leon Dreifuss, for defendant Boyer.

MCDONALD, J. This is an action to recover damages for libel. In December, 1926, the plaintiff was employed in the city of Detroit as auditor and salesman for the Chelsea Rubber Co. The defendant Merchants Credit Bureau is a corporation organized for the benefit and protection of merchants in the city of Detroit. Its secretary testified:

"Our corporation is engaged in the business of procuring and preserving information regarding persons and corporations, partnerships and companies, for the purpose of protecting our subscribers and our membership, and furnishing them with such information upon request."

The defendant Boyer is a member of the Merchants Credit Bureau. On information furnished by him, the bureau published the following matter of and concerning the plaintiff:

"Hanschke, L. F.

"It has been reported that the above party, representing the Chelsea Rubber Company, Chelsea, Michigan, presented a check for merchandise in the amount of $47.65 to a local member, and while they were seeking information on the telephone, he disappeared. The check was drawn on the Grand Rapids National bank. If this party comes to your attention, notify this office."

It is conceded that the publication was false. On demand, defendant published a retraction. This suit was brought. The plaintiff was given a judgment for $3,500 in a trial by the court without a jury. The defendants appealed.

The defendants' plea of qualified privilege presents the principal question in the case. The Merchants Credit Bureau is a corporation organized for profit. Its articles of association announce the purpose of the corporation to be as follows:

"Collecting, compiling, preserving of reports and information concerning the financial standing, reputation and responsibility of individuals, firms and corporations, and for the purpose of furnishing and selling such reports to members of and subscribers to this corporation, and to other persons, firms and corporations; and for the further purpose of collecting accounts, claims and demands of any individual, firm or corporation desiring said service."

In carrying out the purpose of its organization, it contracts with subscribers and members to furnish such information on request, and provides that all information furnished shall be for the sole use and

benefit of the subscribers and shall be held by them in strict confidence. One feature of the service not required by the contract is the publication and circulation of a weekly bulletin which:

"Gives a summary of all the cautionary notices received during the week, such as fraudulent checks passed, illegal buying, forgery, stolen checks, and post office money orders, names upon whom the bureau has received important information, lost and found addresses, and any other items of general interest to the membership."

In one of such bulletins the libel declared upon in this suit was published. It was sent to the 700 paid members in Detroit and gratuitously to others outside of the city, including the Border Cities Credit Bureau of Windsor, Ontario, the credit bureau of Flint, Michigan, the credit bureau of Pontiac and of Saginaw and Port Huron.

If it may be said that a privilege relation existed between the defendant bureau and its subscribers, it certainly cannot be extended to outsiders.

"A communication from a mercantile agency is privileged only when made to one having an interest in the particular matter and not when it is published in a report for general circulation among subscribers." 36 C. J. p. 1267, § 253, citing *Pollasky* v. *Minchener,* 81 Mich. 280 (9 L. R. A. 102, 21 Am. St. Rep. 516).

The information contained in the publication in question was not requested by any of the subscribers. Their contract did not call for it. The added feature of the bureau service in conveying information by bulletin was voluntary. It was given a wide circulation not only in the city of Detroit but elsewhere. It carried the defamatory matter not only

to subscribers but to others. It was not privileged. *Pollasky* v. *Minchener, supra,* is controlling.

The only other question which we think requires discussion relates to the amount of the judgment. The court allowed $3,500 for injury to feelings. Defendants say it is excessive.

After the publication of the libelous article, it was called to the attention of plaintiff's employer by Mr. Wagner, one of the credit bureau's subscribers. Mr. Wagner said to the plaintiff, "It looks like you are a thief." The plaintiff was shocked and hurt. He grew despondent, and in his despondency said to his wife, "I have been branded as a thief throughout the city of Detroit, and possibly the whole State of Michigan for all I know, by the Merchants Credit Bureau." He had theretofore borne a good name. A good name is more highly prized by a good man than great riches. When robbed of it by being publicly and falsely proclaimed a criminal, it is difficult to estimate the extent of the shame and humiliation that comes to him. Compensation for such injuries cannot be determined by any fixed rule. It can only be properly measured by a consideration of the plaintiff's previous good reputation, his character and standing in the community where he lived and worked, the nature of the defamatory matter, the fact that it charged him with attempting to commit a crime, and the wide publicity given to it. When the plaintiff's injuries are so considered, we think the compensation allowed by the circuit judge is quite reasonable.

The judgment is affirmed, with costs to the plaintiff.

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

LEIB *v.* BOSTWICK.

1. ATTACHMENT—APPEARANCE—ESTOPPEL.
   Entering general appearance and filing answer to declaration in attachment suit did not estop defendant from applying for dissolution of attachment.

2. JUDGMENT—RES JUDICATA.
   Doctrine of *res judicata* does not apply to decision which was not rendered on merits of questions involved.

3. ATTACHMENT—JUDGMENT—RES JUDICATA.
   Denial of motion to dissolve attachment was not *res judicata,* where question of fraud, which was issue involved, was not decided.

4. FRAUD—NONPERFORMANCE OF PROMISE.
   Nonperformance of promise is neither fraud nor evidence of fraud.

5. ATTACHMENT—FRAUD.
   Attachment was properly dissolved where there was no evidence of fraud, which was basis of attachment.

Appeal from Wayne; Chenot (James E.), J. Submitted October 7, 1931. (Docket No. 43, Calendar No. 35,718.) Decided December 8, 1931.

Attachment proceedings by Samuel W. Leib, as assignee, against Read Bostwick. From order dissolving attachment, plaintiff appeals. Affirmed.

S. Brooks Barron and *Samuel W. Leib* (*Samuel H. Himelstein,* of counsel), for plaintiff.

Duane H. Mosier (*Fred Dye,* of counsel), for defendant.

McDONALD, J. This is an appeal from an order dissolving a writ of attachment by virtue of which the plaintiff seized a quantity of muskrat hides belonging to the defendant. After the denial of a petition to dissolve the attachment, the defendant entered a general appearance and filed his answer to the declaration. A few days later he made a second application to dissolve the attachment and to vacate the former order of denial. This motion was granted. The attachment was dissolved and an appeal taken by the plaintiff to this court.

The debt, in respect to which the attachment suit was brought, was incurred, as the plaintiff claims, in the purchase by the defendant of a quantity of skunk pelts from plaintiff's assignor, the Wolverine Hide Company of Grand Rapids. It is the plaintiff's claim that the debt, amounting to $1,500, was fraudulently contracted by the defendant, and on that ground there was legal cause for the attachment.

Testimony was taken on the hearing to dissolve the attachment. The only question to be determined was whether defendant fraudulently contracted the debt. That question was not decided on the hearing of the first motion. On the hearing of the second motion, the court held that fraud had not been shown, and that if it had an action for fraud could not be assigned, as was done in this case.

1. It is first contended by the plaintiff that the defendant was estopped from applying for a dissolution of the attachment after entering his general appearance and filing an answer to the declaration. This contention is without merit. *Hyde* v. *Nelson,* 11 Mich. 353; *John D. Gruber Co.* v. *Montcalm Circuit Judge,* 183 Mich. 477, 479.

2. It is also contended that the first order which denied dissolution of the attachment rendered that question *res judicata* and that therefore it was error for the court to reconsider it on a subsequent application.

All proceedings relative to the dissolution were heard and disposed of before the main case. On both hearings the question in issue was the same, *viz.*, whether the debt was fraudulently contracted. There was no other ground claimed for upholding the attachment. The question was not decided on the hearing of the first motion. We quote from the court's decision as follows:

"Inasmuch as there is a *prima facie* showing under oath alleging fraud, although it is true that on the oral testimony offered here there is a dispute about it, I don't think that I have any right to dissolve the attachment."

The doctrine of *res judicata* does not apply to a decision which was not rendered on the merits of the questions involved. There was no decision on the merits in disposing of the first motion. The defendant was entitled to have the issue decided. As he did not get it on his first motion he was not precluded from trying again.

3. The only remaining question to be considered is whether the trial court was right in finding that the debt was not fraudulently contracted.

It seems to be undisputed that the defendant purchased the hides as agent of Mr. Woodhouse of Newberry, Indiana. Whether he disclosed his agency to the Wolverine Hide Company, from whom he made the purchase, is disputed. But it is not disputed that he ordered the hides shipped to Woodhouse and presented in payment for them a draft of Mr. Wood-

house signed by himself as agent. Mr. Wolf, a member of the Wolverine Hide Company, testified that he accepted the draft only because Mr. Bostwick assured him that,

"If this draft is not taken care of I am responsible for it. * * * If these skunks are not paid for I will take care of it. * * * You don't have to be afraid of your money, I am responsible for it."

The fraud claimed by the plaintiff is, that when the defendant made these promises to pay, he did not intend to keep them and concealed his intention from the vendors. The defendant denies that he made any such promises, but, assuming that he did, there is no evidence they were accompanied by a fraudulent intent. The nonperformance of a promise is not fraud nor is it any evidence of fraud. According to the testimony of Mr. Wolf, the defendant told him Woodhouse would pay and that he would pay if Woodhouse did not. It is quite certain that when he bought the hides he did not intend to pay for them. He expected Woodhouse would do that. And he had good reason for believing he would do so. Woodhouse was an extensive buyer of furs. He had been in business for 18 years and had a reputation for paying his debts. The defendant had bought for him for five years, and his confidence in his solvency at the time he purchased the hides is seen in the fact that, when Woodhouse went into bankruptcy a few weeks later, defendant was his creditor for $1,500. We can discover no evidence of fraud. As there was no other cause for the attachment, it was rightly dissolved.

The judgment is affirmed, with costs to the defendant.

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

In re STOTT'S ESTATE.

JUDGMENT—SUMMARY JUDGMENT—STATUTE INAPPLICABLE.

Motion by trustee for summary judgment for costs in proceeding involving trustee's compensation, which is payable out of trust estate on order of probate court, was properly denied; summary judgments statute being inapplicable.

Appeal from Wayne; Moll (Lester S.), J. Submitted October 29, 1931. (Docket No. 55, Calendar No. 35,830.) Decided December 8, 1931. Rehearing denied March 3, 1932.

David E. Stott, trustee, moved for summary judgment for costs awarded him in an action brought by the beneficiary. From order denying summary judgment, plaintiff appeals. Affirmed.

Thomas A. E. Weadock, for appellant.

Edward N. Barnard, for appellee.

MCDONALD, J. David E. Stott was one of three trustees for Arthur F. Stott under the will of their father, David Stott, deceased. He resigned the trusteeship and filed his account. On the hearing it was determined that he was indebted to the estate, above his compensation, for money which he had appropriated to his own use. The circuit court sustained this judgment. On appeal to the Supreme Court it was reversed, and a new trial granted, on the ground that the charge of conversion was not sustained by the evidence (233 Mich. 494).

Costs were taxed against the beneficiary, Arthur F. Stott, in the sum of $462.17 and an order ob-

tained by the trustee from the circuit judge staying further proceedings on the part of the beneficiary until the costs were paid. This order was made May 3, 1926. The costs were not paid. No further action was taken by the trustee for five years. He then got in a hurry and filed a motion for a summary judgment which the circuit judge denied. From a denial of the motion, the trustee has appealed.

We agree with the circuit judge. Summary judgment is not a proper proceeding in a case of this kind. This is not a suit against the beneficiary personally. It is not a case of plaintiff and defendant. It is a proceeding to have the trustee's compensation determined, and, when determined, it is paid out of the trust estate on order of the probate court. The statute relative to summary judgments (3 Comp. Laws 1929, § 14260 *et seq.*) does not apply.

The judgment is affirmed, with costs against David E. Stott.

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

REID *v.* BRADSTREET CO.

1. MASTER AND SERVANT—WRITTEN CONTRACT OF EMPLOYMENT—MODIFICATION BY PAROL AGREEMENT.

   Finding of court below that written contract of employment was changed by subsequent parol agreement, *held*, sustained by preponderance of evidence.

As to the effect of the statute of frauds upon the right to modify, by subsequent parol agreement, a written contract required by the statute to be in writing, see L. R. A. 1917B, 144.

2. CONTRACTS—WRITTEN CONTRACT MAY BE MODIFIED BY SUBSEQUENT PAROL AGREEMENT—EVIDENCE.

Written contract may be varied by subsequent parol agreement unless forbidden by statute of frauds, although parties stipulate therein that it is not to be changed except in writing.

Appeal from Wayne; Moll (Lester S.), J. Submitted October 9, 1931. (Docket No. 69, Calendar No. 35,964.) Decided December 8, 1931.

Bill by George F. W. Reid against the Bradstreet Company, a Connecticut corporation, to restrain an action at law and for an accounting. Decree for plaintiff. Defendant appeals. Affirmed.

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

Miller, Canfield, Paddock & Stone, for defendant.

McDONALD, J. The defendant, Bradstreet Company, began suit against plaintiff, Reid, in the court of common pleas of the city of Detroit on an alleged indebtedness of $469.64. Claiming that he had a set-off which could only be determined by an accounting in equity, Mr. Reid filed this bill for that purpose, and obtained an injunction restraining further prosecution of the action at law. On the hearing, the trial court decided that the defendant was indebted to Mr. Reid in the sum of $3,250, and entered a decree accordingly. The defendant has appealed.

Prior to his resignation in March, 1929, Mr. Reid had been employed by the defendant in various capacities for a continuous period of 34 years. On May 1, 1919, he was given charge of its Detroit office as superintendent. On June 23, 1920, they entered into a written contract of employment in which his

salary was fixed at $350 per month and one-third of the profits of the Detroit office. He was also allowed a drawing account of $150 a month, which subsequently was increased to a much larger amount. This contract, except as changed by an alleged oral agreement in regard to compensation, continued in force until Mr. Reid's resignation in 1929. Shortly, subsequent to the contract of 1920, his duties were enlarged. In addition to his work as superintendent, he was made "division manager" of the Michigan division of the Bradstreet service in territory outside of the city of Detroit. There was no written agreement covering this employment. The plaintiff says his compensation for that service was adjusted by mutual consent at the close of each fiscal year. The defendant says he was compensated by the allowance of a bonus, the amount of which varied, depending on the profits of the business. At the close of the fiscal year of May, 1927, the defendant sent Reid a statement showing his compensation for that year to be $10,355.52. Soon thereafter, when he made his annual visit to the defendant's home office in New York, he protested that the compensation was insufficient. He discussed the matter with Mr. Clark, president of the Bradstreet Company, and it is his claim that an oral agreement was then made by which his future compensation was to be not less than $13,500 per year. The controversy over this agreement, which is strenuously denied by the defendant, gave rise to this suit.

The main issue is one of fact. The trial judge determined it in favor of the plaintiff. For the following reasons we think he was right: It is admitted by Mr. Clark that at the meeting in the New York office, at which time Mr. Reid claims the oral agreement was made, the matter of his future com-

pensation was thoroughly discussed. Reid insisted that if he was to continue in the company's service it must be at an increased compensation. Mr. Clark called in his auditor, who figured over the compensation for the preceding five years, which showed a yearly average of $13,500. Thereupon Mr. Clark directed the auditor to give plaintiff a check for $3,144.48 to bring his compensation for the past year up to $13,500. Thus far there is no dispute in the testimony. The only conflict is as to the time the increased compensation was to continue. Mr. Clark says it was for the year 1927 only, while Mr. Reid claims it was to continue as long as he was employed. The record is clear that the main subject of the discussion was future compensation. Mr. Clark summed it up as follows:

"I simply told him if he was going to be paid $13,500, he would have to earn that amount, and he said he could."

Because of Mr. Reid's urgent insistence for greater compensation and Mr. Clark's desire to retain his services, it would seem unlikely that the matter of future earnings was left unsettled. Moreover, Reid's testimony as to the agreement then made is strongly corroborated by the fact that at the conclusion of the discussion he was given a check of $3,144.48 to bring his compensation for 1927 up to $13,500; that the settlement with him in the following year was made on the same basis; and that their relations continued friendly with no denial of the agreement until after his resignation in 1929. We think the trial court was right in holding the agreement established by a preponderance of the evidence.

But it is contended by the defendant that, in view of a provision in the original contract requiring any

subsequent change therein to be in writing, it was not competent to show the alleged supplemental agreement by parol; and that the court erred in receiving Mr. Reid's testimony on that question.

We cannot agree with this contention. It is well established that a written contract may be varied by a subsequent parol agreement unless forbidden by the statute of frauds; and that this rule obtains though the parties to the original contract stipulate therein that it is not to be changed except by agreement in writing.

In discussing the subject of varying written instruments by parol, Prof. Williston says:

"Nor does it make any difference that the original written contract provided that it should not subsequently be varied except by writing. This stipulation itself may be rescinded by parol and any oral variation of the writing which may be agreed upon and which is supported by sufficient consideration is by necessary implication a rescission to that extent." Williston, Contracts, § 1828.

The theory of the rule is that:

"Whenever two men contract, no limitation self-imposed can destroy their power to contract again." *Beatty* v. *Guggenheim Exploration Co.*, 225 N. Y. 380 (122 N. E. 378).

In *Westchester Fire Insurance Co.* v. *Earle*, 33 Mich. 143, this court said:

"And the case seems to settle down to the simple question whether a person who has agreed that he will only contract by writing in a certain way, precludes himself from making a parol bargain to change it. The answer is manifest. A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there

can be no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it."

In the instant case, the original agreement was not required to be in writing. It was competent to change its provisions by subsequent parol agreement though by its terms such change is required to be in writing.

Having determined that the supplemental agreement was established by competent evidence, the trial court considered the accounting and correctly fixed the compensation due Mr. Reid at the sum of $3,250.

The decree is affirmed, with costs to the plaintiff.

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

RICE v. RICE.

1. DIVORCE—CONSIDERATIONS IN AWARDING PERMANENT ALIMONY.
In awarding permanent alimony court should take into consideration past relations and conduct of both parties, health and age of each, whether either is responsible for support of others, amount and source of husband's property, their station in life and manner of living, and, especially in view of all the testimony in case, what sum will leave financial condition of wife during her life not inferior to what it would be if husband's conduct had been correct and marriage undissolved.

As to amount of permanent alimony on absolute divorce, see annotation in 44 L. R. A. (N. S.) 998.

2. SAME—PERMANENT ALIMONY—MODIFICATION OF AWARD.

In granting divorce to wife for husband's misconduct, award of half interest in $10,000 equity in home incumbered for $10,000, and $25 a week for three years as permanent alimony, *held*, not just and reasonable, in view of fact that he is awarded business from which he derives yearly income of $10,000 to $12,000, and decree is modified to award her entire equity in home and $30 per week for five years. CLARK and POTTER, JJ., dissenting; WIEST, J., dissenting in part.

Appeal from Jackson; Simpson (John), J. Submitted October 9, 1931. (Docket No. 79, Calendar No. 35,894.) Decided December 8, 1931.

Bill by Hazel R. Rice against Edward E. Rice for divorce. From decree rendered, plaintiff appeals. Modified and affirmed.

Kirkby & Kirkby, for plaintiff.

James J. Noon, for defendant.

McDONALD, J. A decree of divorce was granted to the plaintiff on February 13, 1931. She has appealed on the ground that the amount of property and alimony awarded by the decree is insufficient. No other question is involved. The parties lived together for about 14 years. They have no children. At the time of their marriage, in June, 1914, neither of them was endowed with any considerable amount of worldly goods. The defendant was thrifty. He acquired a drug business in the city of Jackson, which, for the year 1929, produced gross receipts amounting to $65,000, and from which he derived a yearly income of $10,000 or $12,000. They owned a home by the entireties in which their equity as estimated by the defendant was about $10,000. The decree gave the plaintiff the household goods, a half

interest in the home, and an allowance of $25 per week for a period of three years.

There is no fixed rule to guide a court in the award of permanent alimony, but we have said:

"The court should take into consideration the past relations and conduct of both parties, the health and age of each, whether or not either is responsible for the support of others, the amount and source of the husband's property, their station in life and manner of living, and especially, in view of all the testimony in the case, what sum will leave the financial condition of the wife during her life not inferior to what it would be if the husband's conduct had been correct and the marriage undissolved." *Bialy* v. *Bialy,* 167 Mich. 559 (Ann. Cas. 1913 A, 800).

As to the past relations of the parties, it is undisputed that they lived happily and in harmony for many years. The break came when defendant began to associate with another woman. There was no other cause for their separation. The plaintiff's conduct has been blameless. So here we have a situation where the marriage has been dissolved solely because of the misconduct of the husband. If able, he should be compelled to pay such alimony as will—

"leave the financial condition of the wife during her life not inferior to what it would be if the husband's conduct had been correct and the marriage undissolved."

During the 14 years that they lived together, the defendant provided for the plaintiff as well as their station in life demanded. He has a valuable business, from which he derives a good income and is still able to provide for her support and mainte-

nance. His obligations under the marriage contract demand it. He is 46 years of age. She is 44. She has never failed in her wifely duties. Devotedly, she has given him the best years of her life. Her earning power is gone. By his misconduct, she has lost the financial benefits of her marriage. In view of these circumstances, Is the provision made for her by the decree of the circuit court "reasonable and just?" We think not.

She is given one-half of the proceeds from the sale of their home, which would have amounted to $5,000 if the property could have been sold for $20,000 at the time of the decree. In his brief, counsel for the defendant says that, because of the long-continued business depression, they have been unable to sell it. That it is worth $20,000 is only an estimate of the defendant, apparently based on its cost. The best evidence of value was not shown. It is well known that real estate values have greatly depreciated. This property is heavily incumbered, and, because of its depreciation and the uncertainty of a sale, the amount of plaintiff's interest under the decree is very doubtful. In view of the fact that the defendant was given the business, from which he derives a yearly income of $10,000 or $12,000, we think it would have been just and reasonable to have allowed the plaintiff the entire equity in the home. In this respect the decree is modified. The defendant will pay the taxes and any amount that may be due on the mortgage to date.

During the pending of this suit, the defendant has been paying temporary alimony of $40 per week. He is amply able to pay and should pay $30 a week for a period of five years.

With these modifications, the decree of the circuit court is affirmed. The plaintiff will have costs.

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

CLARK, J. I think the decree of the trial court is equitable, and that it should be affirmed.

POTTER, J., concurred with CLARK, J.

WIEST, J. (*concurring in part*). I think the decree in the circuit court should be modified so as to require defendant to pay plaintiff $30 per week for the period of five years, and in all other respects affirmed.

The equity in the home is worth $10,000, and the decree constitutes the parties tenants in common, permits private sale by them, and reserves right to order sale if necessary. Defendant, by bill of sale, gave plaintiff the household furniture, the value of which, however, is not disclosed. Plaintiff is also awarded an automobile.

HEATH *v.* GLOSTER.

1. CIRCUIT COURT COMMISSIONERS—APPEAL—GENERAL APPEARANCE WAIVED IRREGULARITIES IN APPEAL.

   General appearance by plaintiff in circuit court waived any irregularities in appeal by defendant from judgment rendered by circuit court commissioner.

2. COSTS—VEXATIOUS APPEAL.

   Where, after dismissal of defendant's appeal to circuit court from judgment rendered by circuit court commissioner, plaintiff confessed error and offered to reinstate appeal, which defendant refused, and appealed to Supreme Court, said appeal being vexatious, defendant is required to pay taxable costs and additional fee of $100.

Appeal from Wayne; Jayne (Ira W.), J. Submitted October 14, 1931. (Docket No. 119, Calendar No. 35,858.) Decided December 8, 1931.

Summary proceedings before circuit court commissioner by Charles C. Heath against Joanna Gloster to recover possession of land. Judgment for plaintiff. Defendant appealed to circuit court. From order dismissing appeal, defendant appeals. Reversed, with costs to plaintiff.

George B. Murphy, for plaintiff.

J. Gilbert Quail, for defendant.

MCDONALD, J. The defendant purchased certain property on land contract from Joseph P. Manning. Subsequently Manning assigned his interest therein to Charles C. Heath, the plaintiff in this suit. Defendant defaulted in her payments. The plaintiff declared a forfeiture and began summary proceedings before the circuit court commissioner. He had judgment. Defendant appealed. The plaintiff entered his general appearance, after which he filed a motion to dismiss the appeal because of a variance between the notice of appeal filed with the circuit court commissioner and that filed with proof of service. From the order of dismissal the defendant has appealed.

The court erred in dismissing the appeal. Having entered a general appearance, the plaintiff waived any irregularity in the notice. *Gotfredson Land Co.* v. *Shevitz,* 251 Mich. 75.

Though the defendant is entitled to a reversal of the judgment, it will be with costs to the plaintiff. There was no excuse for the appeal to this court.

After judgment in the circuit court, the plaintiff conceded error and offered a written stipulation to set aside the order of dismissal and to reinstate the appeal. The defendant refused. The appeal was vexatious and seems to have been pursued for delay. The defendant will be required to pay the taxable costs in this court with an additional fee of $100.

The judgment is reversed, with costs to the plaintiff.

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

SHAW v. CRAMTON.

1. VENDOR AND PURCHASER—FORFEITURE—WAIVER—ESTOPPEL.
   Vendors, who had declared forfeiture of land contract, are not entitled to enforce same, where they accepted insurance money paid into court, which was applied on contract.

2. SAME—INSURANCE—RIGHT OF VENDEE TO INSURANCE MONEY TO REPLACE BUILDINGS.
   Vendee is not entitled to have insurance money applied to replace buildings destroyed by fire, in absence of stipulation in contract to that effect.

3. SAME—EQUITY—APPLYING INSURANCE MONEY ON CONTRACT.
   Where contract provided that fire insurance money, in case of loss, should be payable to vendors as their interest might appear, decree applying insurance money in reduction of purchase price was equitable, since both parties were thereby benefited.

Appeal from Wayne; Campbell (Allan), J. Submitted October 13, 1931. (Docket No. 89, Calendar No. 35,899.) Decided December 8, 1931.

Bill by William M. Shaw, personally and as assignee, against Adelbert E. Cramton and another to establish right to portion of insurance money for rebuilding burned property. Cross-bill by defendants against plaintiff to give effect to a forfeiture of a land contract. From decree rendered, both parties appeal. Affirmed.

James H. Bayne (*Fritz L. Radford,* of counsel), for plaintiff.

Brown, Stoneman, Lorenzo & Springstun, for defendants.

McDONALD, J. The plaintiff is a vendee in a land contract for the purchase of a farm of 160 acres in Tuscola county, Michigan. The defendants are the vendors. On July 7, 1928, the barn and silo on the farm were destroyed by fire. They were insured in a policy taken out by the defendants before the sale to the plaintiff. The loss was adjusted at $3,800. The parties engaged in a controversy as to the application of the insurance money to their respective interests in the contract. The plaintiff filed this bill alleging his right to have a part of the money used to replace the buildings destroyed by the fire and the balance credited to him on the contract. The defendants, answering, denied the right of the plaintiff to have the money so applied, and, in a cross-bill for affirmative relief, asked that the court give full effect to a forfeiture which they had de-

clared on August 1, 1929, and decree that the plaintiff had no interest in the contract.

On the hearing, the court entered a decree directing that the forfeiture be set aside; that $1,654.32 of the insurance money be applied on two mortgages covering the property on which the defendants had defaulted; and that the balance, as well as the amount paid on the mortgages, be credited to the plaintiff on the contract. From this decree both parties have appealed. The plaintiff claims that the decree makes an inequitable application of the insurance money, and the defendants complain because the forfeiture was set aside.

The defendants accepted the decree by withdrawing the insurance money which had been paid into court by the company, and applying it as payments on the contract. In view of their acceptance of these payments they are not entitled to enforce the forfeiture. They have no good reason to complain of the decree.

As to the plaintiff, the decree gives him the benefit of the insurance; for the entire amount was to be applied on the balance of the purchase price, which is much in excess of the money received from the insurance. He was not entitled to have the insurance used to replace the buildings. There was no stipulation in the contract that it should be so used, and, after the fire, there was no oral agreement to that effect. In the absence of such an agreement, the vendee had no right to direct its application to that purpose. *Kudner* v. *Miller,* 244 Mich. 49.

There is no reason for complaint on the part of the plaintiff that the money was applied on the purchase price. He had paid only a small amount in reduction of the purchase price, and, at the time

of the hearing, was in default in the sum of approximately $2,200. The land contract provided that he should keep the buildings insured "the loss if any payable to the vendors as their interest may appear." He neglected to do this. The vendors had taken out a policy long before the sale to the plaintiff. It was in force and effect at the time of the fire. If it be held that this policy stands in the place of the one that the plaintiff should have taken out, the loss was payable to the vendors "as their interest may appear." Their interests were in the purchase price. When the money was applied on the purchase price their security therefor was increased to the extent that it had been reduced by the fire. And by such application the plaintiff was correspondingly benefited by a reduction of his indebtedness in like amount. By the decree both parties received the full benefits from the insurance. We think the court made a legal and equitable disposition of the controversy. Annotation in L. R. A. 1918D, p. 938.

The decree is affirmed. As both parties appeal, no costs are allowed.

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

PALIAT *v.* JACOBS.

BILLS AND NOTES—FRAUD—CONSIDERATION.

In action on note given to plaintiff by defendant to pay his share of margin requirement on stock bought on margin in their joint names, defense of fraud and want of consideration, *held,* not established.

Appeal from Wayne; Ferguson (Homer), J. Submitted October 22, 1931. (Docket No. 189, Calendar No. 35,975.) Decided December 8, 1931.

Assumpsit by Barnett Paliat against Harry A. Jacobs on a promissory note. Judgment for plaintiff. Defendant appeals. Affirmed.

George E. Eckert, for plaintiff.

Seymour A. Jacobs (*Sternberg & Sternberg* and *Joseph A. Arbanas,* of counsel), for defendant.

MCDONALD, J. This is a suit on a promissory note. The defense was lack of consideration and fraud in procuring the note. From a judgment for the plaintiff the defendant has appealed.

The particulars of defendant's claim are fully set forth in his special notice accompanying the plea of the general issue, as follows:

"1. That the note mentioned in plaintiff's declaration was procured by plaintiff from this defendant by fraud and false representations, stating that he was to use the said note for the purchase of stock on the Detroit Stock Exchange in the names of both parties, for the benefit of both parties, and that he

failed, neglected and refused so to do, purchasing the said stock, if any, in the name of the plaintiff only, to the great loss of the defendant.

"2. That said representations were then known by the plaintiff to be false and were made by him with intent to deceive and defraud this defendant.

"3. That the said defendant relied upon them, and, believing them to be true, executed the said note and received no consideration therefor.

"4. That the said note was given by the defendant solely for and on account of the purchase of said stock and without any other consideration therefor."

There is no evidence in the record to establish the above allegations of fraud. It is undisputed that all of the stock in which the defendant was jointly interested was purchased by the plaintiff on a 40 per cent. margin before the note was given, and that the price of the stock declined, making an additional margin payment necessary. In lieu of the cash, which defendant was unable to furnish, he gave the plaintiff the note in question. The brokers would not accept the note, and the plaintiff was compelled to meet the margin requirement with his own funds. The note was not paid. The stock continued to decline, and was finally sold by the plaintiff at a loss of over $3,000. There was no agreement that defendant was to get any stock. His only interest was in the profits.

"*Q.* Were you to get one-half of this stock?

"*A.* To turn over the stock he says that will not be necessary, but he will give me half of the profits.

* * *

"I was a partner to the profits."

The defendant knew that the stock was bought on margin; he knew the price had declined, and that

he was giving his note to pay his share of the additional margin requirement. In view of these facts, his claim that the note was given to purchase stock in their joint names is wholly without merit. The validity of the note is unquestioned by any evidence.

The judgment is affirmed, with costs to the plaintiff.

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

HOLLINGSHEAD *v.* GUNDERMAN.

1. MOTOR VEHICLES—NEGLIGENCE.
   Automobile driver, with knowledge that narrow gravel road on which he was driving in fog was being used by gravel trucks, had duty to be watchful, to drive slowly, and to keep his car under constant control.

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
   In action by automobile driver for injuries received in collision with truck, negligence of truck driver and contributory negligence of plaintiff, *held*, questions for jury, under evidence.

3. SAME—RIGHT TO USE ROAD.
   Defendant's claim that plaintiff was negligent because he was driving in fog on narrow road in one of the ruts used by gravel trucks, *held*, without merit, where he was on right-hand side of road.

4. SAME—REFERENCE TO INSURANCE IMPROPER.
   In action based on automobile collision, reference to insurance is improper, and, where intentional, amounts to reversible error.

5. APPEAL AND ERROR—IMPROPER ARGUMENT—ASSUMPTION.
   Supreme Court may assume that jury heeded admonition to disregard counsel's improper argument, where it is not reflected in verdict.

6. SAME—MOTOR VEHICLES—TRIAL—IMPROPER ARGUMENT—HARMLESS ERROR.
   Inadvertent reference to insurance, in action involving automobile collision, while improper, *held,* harmless, where court promptly instructed jury to disregard it, and verdict is not excessive.

Appeal from St. Clair; Robertson (William), J. Submitted October 21, 1931. (Docket No. 156, Calendar No. 36,018.) Decided December 8, 1931.

Case by Charles Hollingshead against Charles Gunderman and another to recover damages resulting from an automobile collision on a highway. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Walsh, Walsh & O'Sullivan, for plaintiff.

Cady & Pepper, for defendants.

MCDONALD, J. This action was brought to recover damages for injuries received in a collision between the plaintiff's automobile and a truck owned by defendant Gunderman. At the time of the accident, the plaintiff was driving his automobile, and defendant Eaton was driving the truck. They were traveling in opposite directions on a county highway which had recently been covered with loose gravel. On each side of the middle was a rut or track made by trucks passing over with gravel to a point farther north. Plaintiff was driving with his left wheels in one of these ruts close to his side of the road. The

defendant was driving in the middle of the road using both ruts. The time was shortly before seven o'clock in the morning. There was a fog which to a considerable extent interfered with visibility. The plaintiff says he was driving with his lights full on at a speed of 15 miles an hour when he saw defendant's truck suddenly emerge out of the fog about 40 or 50 feet away; that he immediately applied his brakes; that the truck had no lights; that it was traveling about 30 miles an hour and did not slacken its speed until the collision. Therefore, the plaintiff charges that defendants were negligent in the following particulars: First, driving at too great a speed in view of the conditions of the weather and the roads; second, having no lights on the truck; and, third, driving on the wrong side of the road. On their part the defendants offered testimony which showed that, at the time of the accident, the lights of the truck were burning; that it was being driven carefully at a speed of 5 or 10 miles an hour and was stopped immediately when the driver saw the plaintiff's automobile emerge from the fog directly in front of him. Therefore, the defendants charge the plaintiff with contributory negligence in traveling in the same ruts the trucks were using, and in driving at such speed that he was unable to bring his car to a stop within his assured clear distance. These conflicting claims were submitted to the jury. The verdict was for the plaintiff in the sum of $6,250. At the close of the plaintiff's case, and again when the testimony was all in, the defendants moved for a directed verdict, which the court reserved and disposed of adversely to them in refusing to enter a judgment notwithstanding the verdict. From the judgment entered on the verdict, the defendants have appealed.

The first question to be considered is whether the plaintiff was guilty of contributory negligence as a matter of law.

He was driving where he had a right to drive. He lived on the road in question. It was his only means of ingress and egress. It was a gravel road not completely constructed, but no work was being done on that portion over which the plaintiff was traveling at the time of the accident. It was covered by four or five inches of loose gravel on a hard foundation and was reasonably safe for travel. However, the condition of the road and of the weather and the knowledge that he would likely meet trucks going to the north with loads of gravel made it incumbent on the plaintiff to be constantly watchful, to drive slowly, and to keep his automobile under such control that he could stop it within his assured clear distance. His testimony shows that he kept to his own side of the road; that he drove as near to the edge as he could without going into the ditch; that he was driving 15 miles an hour and could stop within a distance of 10 feet; that his assured clear distance was 40 or 50 feet; that he saw defendants' truck when it was that far away and immediately applied his brakes. In view of this testimony, the court could not say, as a matter of law, that he did not have his car under proper control. The claim that he was negligent in driving in one of the ruts used by trucks is without merit. The trucks had no monopoly of the road. The plaintiff had a right to use it with such care as the situation demanded. The court did not err in refusing to direct a verdict on the ground of contributory negligence.

Was the evidence as to defendants' negligence sufficient to warrant the submission of that question to the jury?

The defendants say that their testimony showing the truck was traveling not to exceed 5 or 10 miles an hour is uncontradicted. The plaintiff did not undertake to estimate the speed of the truck, but, if the accident happened as he says it did, it could fairly be inferred that the speed was much greater than the defendants claim. In determining the speed, it was proper for the jury to consider the position of the two cars and the manner of the accident. In their argument on this question, the defendants overlook the plaintiff's testimony. He testified that he first saw the truck 40 or 50 feet away, and that he immediately applied his brakes and stopped in about 10 feet. Assuming his testimony to be true, the driver of the truck had at least 30 feet in which to stop after he saw or should have seen the plaintiff. From the fact that he did not do so it is a fair inference that he did not have the truck under control and was driving so fast that he could not stop within his assured clear distance or that he was inattentive to his duty in failing to see the plaintiff in time to avoid the collision. In either event he would be negligent. The evidence on the question was conflicting. The court was right in leaving it to the jury.

The defendants' contention that, in view of the existing conditions, the plaintiff assumed the risk of injury in using the road requires no discussion. It is without merit.

Finally, it is claimed that the trial court should have declared a mistrial because counsel for the plaintiff injected a reference to the insurance company.

In his closing argument to the jury, counsel said:

"He is glad to tender him the opinion of Dr. McKenzie, called in here for a 15-minute examina-

tion during this trial so as to present the case in the best light for the insurance company. * * *

"*Mr. Pepper:* What was that statement?

(The statement was read.)

"*Mr. Walsh:* I did not mean that. That was absolutely a slip. I did not mean that at all, if your honor please. I meant Mr. Gunderman.

"*The Court:* I will say to the jury at this time that there should be no such reference whatever in the case and absolutely you will disregard it.

"*Mr. Walsh:* That was absolutely a slip, your honor. I had no—

"*The Court:* I think so.

"*Mr. Walsh* (continuing):—thought of saying it at all. I will ask the jury to disregard it. I am not talking about anyone but Mr. Gunderman."

Reference to the insurance company was improper. We have frequently criticized such conduct on the part of counsel, and, in some cases, especially where the reference was intentional, we have held it to be reversible error. In the instant case it does not seem to have been so. Counsel joined the court in promptly doing everything that could be done to correct the error. We cannot assume that the jury failed in its duty to heed their admonitions. We may assume they did so because, if the improper reference to the insurance company had any prejudicial effect, it would appear in the verdict. There is no claim that it is excessive. The testimony shows the plaintiff's injuries to be severe and permanent. So, in view of the character of the injuries sustained and the reasonableness of the damages allowed, it is quite certain that the error is not reflected in the verdict. We are convinced that it was harmless. The judgment is affirmed, with costs to the plaintiff.

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

In re LLOYD'S ESTATE.

1. WILLS—BILL OF SALE—INTENT.
   Whether instrument is bill of sale or will depends on whether it intended to transfer present interest in property or to pass interest only on death of maker, and intention, if expressed on face of instrument in plain and unmistakable language, must govern.

2. SAME—EVIDENCE—INTENT.
   Where there was no ambiguity in language used in instrument in form of bill of sale, which purported to convey present interest in personal property, extrinsic evidence was not admissible to show that it was intended as will because it failed as bill of sale through nondelivery of property conveyed.

Appeal from Sanilac; Boomhower (Xenophon A.), J. Submitted October 20, 1931. (Docket No. 151, Calendar No. 35,852.) Decided December 8, 1931.

Sherman Lloyd presented an instrument alleged to be the last will and testament of Elias Lloyd. From admission to probate, Joseph Lloyd and others, contestants, appealed to the circuit court. Judgment for contestants. Plaintiff appeals. Affirmed.

C. F. Gates (*Manchester, Zirkalose & Smith,* of counsel), for plaintiff.

Dennis P. Sullivan (*Cornelius J. Sullivan,* of counsel), for contestants.

MCDONALD, J. A written instrument in the form of a bill of sale was admitted to probate in the probate court of Sanilac county as the last will and testament of Elias Lloyd, deceased. On appeal to the circuit court, the decision of the probate court

was reversed, and an order entered disallowing the instrument as a will. From this order the proponent has appealed.

The instrument reads as follows:

"Know all men by these presents, that I, Elias Lloyd of the township of Minden in the county of Sanilac and State of Michigan, of the first part, for and in consideration of the sum of one dollar and other valuable considerations dollars, lawful money of the United States, to me paid by Sherman Lloyd of same place of the second part, the receipt whereof is hereby acknowledged, has bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators or assigns, all the livestock, fowl, grain, seed, farm implements, fuel, fruit, wearing apparel, bedding, furniture, kitchen utensils, food, fixtures, all moneys, accounts, certificates of deposit, notes, in fact everything I possess of whatever name or nature belonging to me and now in my possession at my farm home or elsewhere.

"To have and to hold the same unto the said party of the second part, his executors, administrators and assigns, forever. And the said party of the first part for his heirs, executors and administrators, do covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of said property, goods and chattels hereby made, unto the said party of the second part, his executors, administrators and assigns, against all and every person or persons whatsoever.

"In witness whereof, I have hereunto set my hand and seal this 25th day of October, one thousand nine hundred and nineteen.

"ELIAS LLOYD.

"Signed, sealed and delivered in presence of:

"D. LEACH,

"GUY M. LEACH."

In determining whether the instrument is a bill of sale or a will, the test is, Was it intended to transfer a present interest in property or to pass the interest only on the death of the maker? The intention if expressed on the face of the instrument in plain and unmistakable language must govern. If of doubtful meaning, it may be interpreted with the aid of extrinsic evidence showing the facts and circumstances attending the making of the instrument. *Clay* v. *Layton,* 134 Mich. 317; *Dodson* v. *Dodson,* 142 Mich. 586.

In the instant case, there is no ambiguity in the language used. In form the instrument is a simple bill of sale. The language is that which is ordinarily used in such writings to convey a present interest in personal property; and no one can question that it would have conveyed such an interest if there had been a delivery. But though not effective as a bill of sale, it cannot be held to be a will, because nowhere in the writing is there any indication of an intention to make the transfer of the maker's interest in the property contingent on his death. The plain and unambiguous language of the instrument shows that it was intended to be presently operative. It is not a will. The circuit judge was right in so holding. His judgment is affirmed, with costs against the proponent.

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

MICKS *v.* NORTON.

1. MOTOR VEHICLES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INFANTS.

Child five years and eleven months old, struck by automobile, is incapable of being guilty of contributory negligence.

2. SAME—QUESTION FOR JURY.

Question of negligence of driver of automobile striking child on street in business district was properly submitted to jury, under evidence (1 Comp. Laws 1929, § 4693).

3. DEATH—SURVIVAL ACT—TEST AS TO WHICH ACT APPLIES.

Whether cause of action arises under death act (3 Comp. Laws 1929, §§ 14061, 14062) rather than under survival act (section 14040), depends on whether active cause of death continued to operate directly upon injured person until life was extinct.

4. SAME—QUESTION FOR JURY.

Whether death of child struck by automobile was instantaneous was properly submitted to jury, where witness who arrived before doctor testified that child was alive when she arrived, although doctor testified that child was dead when he arrived, and, in answer to hypothetical question, said death was instantaneous.

Appeal from Delta; Bell (Frank A.), J. Submitted October 30, 1931. (Docket No. 128, Calendar No. 35,989.) Decided December 8, 1931.

Case by Bernard J. Micks, administrator of the estate of Junior Berton, deceased, against Herbert J. Norton under survival act for personal injuries resulting in the death of plaintiff's decedent. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

As to contributory negligence of child running in front of automobile, see annotation in 26 L. R. A. (N. S.) 435; 14 A. L. R. 1191; 65 A. L. R. 211; 67 A. L. R. 329.

On instantaneous death as test of right of action or amount of recovery, see annotation in L. R. A. 1916C, 973.

N. C. Spencer, for plaintiff.

John J. O'Hara (*James E. Coleman,* of counsel), for defendant.

POTTER, J. Plaintiff brought suit against defendant to recover damages for personal injuries suffered by plaintiff's intestate, resulting from his being hit by an automobile alleged to have been negligently driven by one John Skoglund employed by defendant in his garage where the automobile in question had been placed for repairs; it being operated by Skoglund in testing it at the time of the accident. Plaintiff's intestate died as a result of his injuries. The negligence charged against defendant, legally responsible for the acts of Skoglund, was: Driving the automobile in the business district of Kipling at a speed greater than allowed by law; failing to keep a lookout for children on the highway; failing to keep a lookout for plaintiff's intestate while on the highway; driving the automobile at a speed greater than reasonable and proper, having regard to the traffic, surface, and width of the highway; driving without due caution and circumspection, at a speed, and in a manner, likely to endanger the person of plaintiff's intestate; and driving the automobile at a greater speed than would permit him to stop it within the assured clear distance ahead. There was testimony that the accident occurred within the business district, as defined by section 4693, 1 Comp. Laws 1929, of Kipling, a small village in Delta county.

Plaintiff's intestate was five years and 11 months old at the time of his injury. A child of his age cannot be guilty of contributory negligence. *Johnson* v. *City of Bay City,* 164 Mich. 251 (Ann. Cas.

1912B, 866); *Love* v. *Railroad Co.*, 170 Mich. 1; *Beno* v. *Kloka*, 211 Mich. 116; *Easton* v. *Medema*, 246 Mich. 130.

Skoglund was acting within the scope of his employment. He was driving the automobile in question through the business district of the village of Kipling at a speed variously estimated at from 20 to 35 miles an hour. Plaintiff's intestate was out of school, on the street. Skoglund, the driver of the car, testified he noticed the boy 150 or 200 feet from him. The automobile traveled 75 feet from the point of the impact before it was stopped. There was testimony the child, when hit by the automobile, was thrown in the air. There was sufficient evidence to take the case to the jury upon the question of the negligence of the driver of the automobile, and no error in the manner in which the question of Skoglund's negligence was submitted to the jury.

Defendant contends there can be no recovery under the survival act (3 Comp. Laws 1929, § 14040), upon which the declaration was based, but if there is any liability it is under the death act (3 Comp. Laws 1929, §§ 14061, 14062). Sofia Rajala, grandmother of plaintiff's intestate, went to the store into which plaintiff's intestate had been carried, after the injury. She testified the child was living when she reached the store, that she felt of his chest and could feel his heart going. Subsequently one Doctor Bjorkman came. He testified, in response to a hypothetical question, death was instantaneous. He says the child was dead when he arrived. He was coroner.

"There is no occasion for saying that one dies instantly because such survival is accompanied by a comatose condition, or unconsciousness." *Olivier* v.

Railway Co., 134 Mich. 367 (104 Am. St. Rep. 607, 3 Ann. Cas. 53).

"The recognized test in this State, distinguishing between the two causes of action, survival and instantaneous death, is whether the active cause of death continued to operate directly upon the injured person until life was extinct." *Swaczyk* v. *Detroit Edison Co.*, 207 Mich. 494.

The rule above stated was recognized and applied in *Budnick* v. *Peterson*, 215 Mich. 678, and *Nelson* v. *Glover*, 231 Mich. 229. Whether death was instantaneous or plaintiff's intestate survived was, under the proof, a question of fact. It was properly submitted to the jury. We find no error. Judgment affirmed, with costs to plaintiff.

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

GRAND RAPIDS ELECTROTYPE CO. *v.* POWERS-TYSON CORP.

1. JUDGMENT—RES JUDICATA—JURISDICTION—RECEIVERS.
   Decision of Supreme Court that title of receiver to goods sold to it was good as against unrecorded chattel mortgage necessarily presupposed valid receivership, and therefore is conclusive of question of jurisdiction of court to appoint receiver.

2. RECEIVERS—ESTOPPEL—INTERVENERS.
   Recognition of receivership and effort to obtain benefits thereunder by intervener estops it from attacking validity of receivership and jurisdiction of court to appoint receiver.

3. SAME—SOLICITORS' FEES FOR SERVICES RENDERED BEFORE RECEIVER'S APPOINTMENT DISALLOWED.

Receiver's claim for solicitors' fees for services rendered before receiver's appointment is disallowed; receiver having no authority to employ counsel previous to appointment.

FEAD, J., concurred in part.

Appeal from Kent; Dunham (Major L.), J. Submitted October 9, 1931. (Docket No. 71, Calendar No. 35,756.) Decided December 8, 1931.

Bill by Grand Rapids Electrotype Company against the Powers-Tyson Corporation for the appointment of a receiver and the sale of certain machinery. The Ostrander-Seymour Company intervened, claiming title to said machinery. Intervener appeals from allowance of receiver's final account. Modified and affirmed.

Wicks, Fuller & Starr, for plaintiff.

Gallagher, Shulman & Abrams (*Meyer Abrams* and *Vincent G. Gallagher,* of counsel), for intervener.

Corwin, Norcross & Cook, for receiver.

POTTER, J. The parties hereto were before this court in *Grand Rapids Electrotype Co.* v. *Powers-Tyson Corp.,* 245 Mich. 669. This case comes before us on objections to the allowance of the receiver's final account. Appellant raises four questions. It contends that the opinion of the court in *Grand Rapids Electrotype Co.* v. *Powers-Tyson Corp., supra,* properly construed, holds the trial court had no jurisdiction to appoint a receiver; that, independent of the holding of the court in the above entitled cause, there was in fact and in law no jurisdiction vested in the trial court to appoint a receiver; that the receiver appointed for a Delaware corporation may not seize the chattels of a Michigan corporation sold by it and secured by an unrecorded chattel

mortgage and sell them without notice to the mortgagee and use the proceeds of its own wrongful sale in the payment of the receiver's and solicitors' fees; and that the parties and their solicitors may not fraudulently and collusively prearrange a receivership and charge the estate of the party for whom a receiver is appointed fees therefor.

When this case was before this court in the case above cited, the question was decided whether appellant had a right under an unrecorded chattel mortgage to the possession of property as against a receiver appointed by the circuit court of Kent county. It was held that by reason of such chattel mortgage not being recorded the appellant could not recover. In making such holding the court necessarily held there was a receiver of the company to which the appellant had sold its property, which had given the chattel mortgage in question; and the title of such receiver was good as against appellant. This necessarily presupposed there was a valid receivership and jurisdiction in the court to appoint such receiver. This holding definitely and finally concluded the parties upon the question of the jurisdiction of the trial court to appoint a receiver, and this question may not now be inquired into.

The prior case held the receiver's title was good as against appellant's who intervened in the receivership proceedings and litigated its claim and is bound by the result of such litigation. The recognition of the receivership and effort to obtain benefits thereunder estops the party so conducting itself from attacking the validity of the receivership. *Manhattan Trust Co.* v. *Seattle Coal & Iron Co.*, 16 Wash. 499 (48 Pac. 333, 737). Appellant herein by its conduct is so estopped.

Objection is made to the solicitors' fees charged to the receiver. Until a receiver was appointed he

could not employ counsel and could not become liable to attorneys or counsel subsequently employed by him. All solicitors' fees for services rendered to the receiver, prior to the appointment of a receiver, are improperly charged and the decree herein will be modified as to such fees, which are disallowed, and, as so modified, will be affirmed, without costs.

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

FEAD, J. (*concurring*). I concur, but with the understanding that the opinion in the former case is not to be taken as authority that the receivership was valid. Plaintiff intervened in subordination of the main proceeding, and could not attack its validity.

DRYDEN STATE BANK *v.* FISHER.

1. MORTGAGES—FORECLOSURE—REDEMPTION.

It is not necessary that amount requisite to redeem from foreclosure sale be paid to register of deeds, as provided in 3 Comp. Laws 1929, § 14433, but redemption may be had by mortgagor or any person claiming under him by paying to purchaser at foreclosure sale amount of bid, interest, and costs (section 14435).

2. SAME—ASSIGNMENT OF MORTGAGE AFTER FORECLOSURE SALE—REDEMPTION.

Where purchaser of fee took assignment of mortgage from second mortgagee after latter had purchased at foreclosure sale but before expiration of redemption period, paying there-

for amount covenanted to be due, transaction amounted to redemption from mortgage sale, so that thereafter neither second mortgagee nor any one else claiming under him could assert any title to mortgaged property.

Appeal from Lapeer; Smith (Henry H.), J. Submitted October 14, 1931. (Docket No. 120, Calendar No. 35,948.) Decided December 8, 1931.

Bill by Dryden State Bank against Heber Fisher, administrator of the estate of Donald A. Donaldson, and others for writ of assistance to gain possession of real estate. Decree for plaintiff. Defendants appeal. Affirmed.

George W. Des Jardins, for plaintiff.

Herbert W. Smith and *Kenneth H. Smith,* for defendants.

POTTER, J. Petition for a writ of assistance to place plaintiff in possession of real estate it claims to have acquired by purchase upon a foreclosure sale. From an order granting the writ defendants appeal. February 9, 1923, Murray E. Hull and wife mortgaged a house and lot in the village of Dryden to plaintiff. Afterwards Hull and wife gave a second mortgage thereon to one Donald Donaldson. Default having been made in the terms and conditions of the second mortgage, foreclosure proceedings were had, and at the foreclosure sale the property was purchased by Donaldson. Prior to the expiration of the equity of redemption, Hull and wife, the mortgagors, deeded the fee of the property mortgaged to Alex Sinclair, and Donaldson assigned, after sale and purchase by him, the real estate mortgage which he had foreclosed, to Sinclair, by written assignment, in which it is covenanted and agreed

"that there is now due upon the said note and mortgage the sum of $1,500 and interest from April 22, 1925, and foreclosure expense and that he has good right, and lawful authority to grant, bargain, and sell the same in manner aforesaid." Plaintiff then discharged its first mortgage upon the property and took a new mortgage from Sinclair covering the same amount. It was this mortgage which it foreclosed, and under the deed on foreclosure of which it seeks to recover possession. Donaldson has since died. His administrator and widow resist the proceedings here and claim the real estate mortgage which was owned by Donaldson constituted a lien upon the property in question coupled with the power of sale, and upon the exercise of the power of sale it ceased to exist and Donaldson became the equitable owner of the premises.

In *Gage* v. *Sanborn*, 106 Mich. 269, 276, where a mortgage was assigned after foreclosure proceedings instituted by the mortgagee and before sale, it was said:

"Assignment before sale invalidates the pending proceedings to foreclose by advertisement, the reason is that the power and the interest cannot be separated. After the sale has been made, and the sheriff's deed made and filed, the power has been exercised, and ceases. The purchaser's equitable interest has accrued, and he may deal with it as with any other equitable interest."

Donaldson, purchaser at the mortgage sale, became the owner of an equitable interest in the real estate which he could have conveyed by quitclaim deed. The owner of the fee, Sinclair, had a right to redeem from the mortgage sale. He purchased the mortgage and paid to Donaldson an amount satisfactory to him, Donaldson covenanting that the

amount due was $1,500 interest and foreclosure expenses. Sinclair, the owner of the premises, took an assignment of the mortgage. Donaldson was paid. Whether we treat the assignment of the mortgage as a transfer of Donaldson's interest, his receipt of the consideration for the mortgage and his interest in the premises sold, or as an equitable redemption from the mortgage sale, the purchase of the mortgage after sale and its assignment by Donaldson, who was the purchaser at the sale, amounted to a redemption from the mortgage sale. 3 Comp. Laws 1929, § 14435. It was not necessary that the amount due upon the mortgage, necessary to redeem therefrom, be paid to the register of deeds as provided in section 14433, 3 Comp. Laws 1929. Redemption may be had by the mortgagor or by any person claiming under the mortgagor by paying to the purchaser at the mortgage sale the amount of the bid, interest, and costs. 3 Comp. Laws 1929, § 14435. In this case, where the mortgagee was also the purchaser at the mortgage sale, and where he sold and assigned the mortgage after sale and covenanted that the amount due was the principal, interest, and foreclosure expenses, the acts of the parties amount to a redemption from the mortgage sale, and neither Donaldson nor anyone claiming rights under him may, under the facts in this case, assert title to the property after having received payment for his interest therein. Decree affirmed, with costs.

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

SHERWOOD *v.* EVENING NEWS ASSN.

1. LIBEL AND SLANDER—FAIR REPORTS OF COURT PROCEEDINGS PRIVILEGED.

   Faithful and fair report of proceedings in courts of justice are privileged, even though reputations of individuals suffer from publication, and publishers are neither civilly nor criminally liable for their publication.

2. SAME—PUBLICATIONS QUALIFIEDLY PRIVILEGED.

   Fair and impartial reports of judicial, executive, legislative, or other public official proceedings are qualifiedly privileged.

3. SAME—ACTUAL MALICE.

   If alleged libelous article is qualifiedly privileged, it is incumbent upon plaintiff to allege and prove express or actual malice in order to recover.

4. SAME—DIRECTED VERDICT.

   If article is qualifiedly privileged, and record rebuts idea of malice, there is no case for jury.

5. SAME—PUBLICATION BASED ON OFFICERS' CONVERSATION NOT PRIVILEGED.

   Publication of libelous article charging plaintiff with commission of crime, based on alleged conversation with officers, is not report of judicial investigation, and therefore is not privileged.

6. SAME—TRIAL—INSTRUCTION—APPEAL AND ERROR.

   In action against newspaper publisher for libel, instruction that, if defendant fairly and without malice reported and published information given to it or its reporters by sheriff or his deputies, articles so published are qualifiedly privileged, and defendant would not be liable, *held,* more favorable than defendant was entitled to.

7. APPEAL AND ERROR—LIBEL AND SLANDER—IMPROPER ARGUMENT—EXCESSIVE VERDICT.

   In action for libel, improper argument of plaintiff's counsel, resulting in excessive verdict of $10,000, is reversible error, notwithstanding action of trial court in reducing said amount to $3,500.

As to what proceedings in court privilege of publication attaches, see annotation in 16 L. R. A. (N. S.) 953.

Appeal from Lapeer; Smith (Henry H.), J. Submitted October 29, 1931. (Docket No. 95, Calendar No. 35,823.) Decided December 8, 1931. Rehearing denied March 3, 1932.

Case by Edward Sherwood against the Evening News Association, a Michigan corporation, and another for libel. Verdict and judgment for plaintiff. Defendants appeal. Reversed, and new trial granted.

Neithercut & Neithercut (*George W. Des Jardins*, of counsel), for plaintiff.

Stevenson, Butzel, Eaman & Long (*Leo W. Kuhn*, of counsel), for defendants.

POTTER, J. Plaintiff brought suit against defendants to recover damages alleged to have been suffered by reason of publication in the Detroit News of an article alleging in substance that he had participated as a bandit in a gun battle with the police in the village of Peck, been wounded, stolen a car to escape, been apprehended, and placed in jail. Plaintiff was not the bandit, did not participate in the gun battle, was not shot, did not steal a car, was not arrested, or sent to jail. Upon the trial plaintiff recovered a verdict of $10,000. This was reduced to $3,500 by the trial court, and judgment entered thereon. Defendants appeal.

Appellants say two questions are raised: *First,* In a libel action is defendant, in the absence of malice, privileged in publishing a true, a fair, and accurate statement of information received from the sheriff and his deputies concerning the official acts of such public officers? *Second,* Can argument of counsel, which is so prejudicial it tends to inflame the minds of the jury in giving a verdict which they

otherwise would not give, be cured by the court by granting a remittitur?

There is no doubt but that just prior to the time the article was published there was a gun battle in the village of Peck between officers and bandits, that a bandit was shot in the jaw and was subsequently apprehended and taken to jail in Port Huron, where he gave his name as Ed Sherwood, and his name was so entered upon the jail register. A State police officer asked him if he was Ed Sherwood who used to live at Clifford. The bandit said "No." Deputy sheriff French, whose duty it was to register the prisoners brought to the jail at Port Huron, thereafter told defendant's reporter that Sherwood had been identified by trooper Milligan as Ed Sherwood he used to know in Clifford. In the article published by the Detroit News, Ed Sherwood who used to be in Clifford was spoken of as a bandit who had participated in the gun battle, been wounded, stolen a car in attempting to escape, been arrested, jailed, and had been identified by trooper Milligan. The important question is whether these facts as communicated by the officer, French, to defendants' reporter, together with the jail register showing the name of the prisoner to be Ed Sherwood, amounts to a privilege.

It is well settled that a faithful and fair report of the proceedings in courts of justice are privileged, even though the reputation of individuals incidentally suffer from their publication, and for the publication of faithful, true, and fair reports of judicial proceedings publishers are neither civilly nor criminally liable. *Wason* v. *Walter,* L. R. 4 Q. B. 73; *Bromage* v. *Prosser,* 4 B. & C. 247, 255 (107 Eng. Repr. 1051); *Taylor* v. *Hawkins,* 16 Q. B. 308, 321 (117 Eng. Repr. 897); *Davison* v. *Duncan,* 7 E. & B. 229 (119 Eng. Repr. 1233). The foundation of this

privilege was said by Justice Wightman in the case last cited, to be the superior benefit of the publicity of judicial proceedings which must counterbalance the injuries to individuals which at times may be great.

Fair and impartial reports of judicial, executive, legislative, or other public official proceedings are considered as qualifiedly privileged. 36 C. J. p. 1276. In *McClure* v. *Review Pub. Co.*, 38 Wash. 160 (80 Pac. 303), defendant published an article detailing plaintiff's pursuit, arrest, trial, and acquittal of the offense of receiving stolen property. It was said:

"The articles are undoubtedly qualifiedly privileged. That being true, they are not libelous *per se*, and, no express malice being alleged, and there being nothing in the articles themselves, or in the circumstances surrounding their publication, to indicate malice—the desire evidently being only to publish sensational news in a sensational and somewhat flamboyant and embellished style, the publishers are not legally responsible in damages."

In *People's United States Bank* v. *Goodwin*, 148 Mo. App. 364 (128 S. W. 220), it was said of the acts of the postmaster general:

"We simply say that in our judgment a fair publication, made as a matter of news or public concern and without actual malice, of what such an officer does officially and the reasons he gives for his acts, should be privileged, and we hold it is upon persuasive authorities."

In *Conner* v. *Standard Publishing Co.*, 183 Mass. 474 (67 N. E. 596), it was held that the record of the findings of a State fire marshal being public records, their publication was privileged.

"It is within the qualified privilege of a newspaper to publish in good faith as current news all

such matters as involve open violation of law or public misconduct such as justifies police interference, and matters in connection with and in aid of the prosecution of inquiries regarding the commission of a crime, even though the publication may reflect on the actors and tend to bring them into public disgrace or contempt.'' *Kilgore* v. *Koen,* 133 Ore. 1 (288 Pac. 192).

See, also, *Meteye* v. *Times-Democrat Pub. Co.,* 47 La. Ann. 824 (17 South. 314).

If the alleged libelous article is qualifiedly privileged, it is incumbent upon plaintiff to allege and prove express or actual malice. Odgers on Libel and Slander (6th Ed.), p. 265. If the article is qualifiedly privileged and the record rebuts the idea of malice, there is no case for the jury. *Tilles* v. *Pulitzer Pub. Co.,* 241 Mo. 609 (145 S. W. 1143). These cases state the general rule. They are all based upon the consideration of records in judicial proceedings or matters of public record. Questions more analogous to those involved in the case at bar were before this court in *Davis* v. *Marxhausen,* 86 Mich. 281; *Davis* v. *Marxhausen,* 103 Mich. 315; *Jastrzembski* v. *Marxhausen,* 120 Mich. 677; *Clair* v. *Battle Creek Journal Co.,* 168 Mich. 467.

In *Davis* v. *Marxhausen,* 86 Mich. 281, plaintiff sued defendant, publisher of the Detroit Abend-Post, for libel in publishing an article charging he had been arrested for theft.

''A man by the name of Michael Davis had been arrested for the theft, but he did not live at the place designated in the article, which was the residence of the plaintiff. It is unnecessary to state here how the mistake occurred.''

Subsequently the Detroit Abend-Post published an article stating the Michael Davis arrested for

theft did not live at 311 E. Columbia Street, the place of residence of plaintiff, and later published another article stating the mistake and that Michael Davis living at 311 E. Columbia street was an honest man in all respects and through mistake he had suffered an unintentional wrong. The libel consisted in referring to plaintiff as the person arrested when in fact he was not. It was held under the facts in that case plaintiff was entitled to nominal damages though no actual damages had been proven.

In *Davis* v. *Marxhausen,* 103 Mich. 315, the same case was again before the court. It was said:

"It was competent for the defendant to offer testimony to show the want of actual malice, as that the publication was made through mistake, and that all proper precautions were observed, by which the damages would be reduced to such a sum as would compensate for the injury which must inevitably have resulted."

In *Jastrzembski* v. *Marxhausen, supra,* plaintiff sued defendant, publisher of the Detroit Abend-Post, for libel. Plaintiff and his wife had some trouble and she went to police headquarters and related what she alleged to be her troubles. She had with her a picture of a girl and her husband taken together. The wife charged her husband with criminal conduct with the girl and the police officers advised her to go to the police justice's office. She went to the police justice and made similar statements. She made a complaint for nonsupport under the disorderly act and a warrant was issued for the arrest of plaintiff. The newspaper published an article in which it was alleged plaintiff had left his wife and run away with another woman. It is said:

"The publication was not privileged. The conversation between the officer and plaintiff's wife was

not a judicial investigation. Reports made to police officers charging persons with crime are not privileged communications, and those who publish such reports do so at their peril. * * * There were no court proceedings upon which to base the question of privilege. The authorities cited by counsel, based upon the publication of court proceedings, do not apply. The statements published were not gathered from any proceedings in court, but the information was obtained from parties entirely outside of any court. The only defense, therefore, that could be made to the publication, was its truthfulness."

In *Clair* v. *Battle Creek Journal Co., supra,* where a similar question was before the court, it is said:

"Without proof of injury from the words, the plaintiff was entitled to recover the actual damages to her reputation and feelings which the law presumes will flow from the commission of the act. And good faith in the publication of a libelous charge in no way affects the defendant's liability to compensate the plaintiff for her actual damages to reputation or feelings."

The trial court charged the jury:

"The testimony undisputed is that even the reporter, no one connected with the newspaper office so far as the testimony shows, knew anything about the plaintiff here, knew where he lived, never had any dealings with him and had the slightest malice toward him, and so as I say to you in this case there is no proof of malice. The article in question is one purporting to publish the report of the officers in pursuit of alleged bandits, and this is the law as I conceive it to be as applied to this case. So long as the newspaper fairly and without malice reports and publishes the information given it, or its reporters, by the sheriff and his deputies, the articles so published are qualifiedly privileged, and the de-

fendant is not liable in damages, and so if you find that to be a fact that the newspaper, this newspaper, fairly and without malice reported and published information given it, or its reporters, by the sheriff of Port Huron, and his deputies, or by any of them connected with, duly connected with, the sheriff's office, the articles so published are qualifiedly privileged, and the defendant is not liable in damages. * * *

"When a newspaper fairly and without malice or intent to harm, publishes the progress being made in a criminal matter upon the information received from peace officers in charge of the examination involving crime, the articles so published are qualifiedly privileged, and the newspaper would not be liable in damages."

This charge was more favorable than defendant was entitled to.

Defendant assigns error on account of the improper argument of counsel for plaintiff. In addressing the jury, Mr. Neithercut said:

"I say that the jury should put fear into this newspaper. * * * That is what I want you to do. * * * They are after money. They have wronged him deliberately to get money. * * * We say, members of the jury, that this man has been damaged, he has been damaged, in his business, in his reputation, he has been damaged in his feelings, he has been humiliated, he has been disgraced, he has been hung up as an object of ridicule by this defendant, and for the purpose of putting dollars and cents into the coffers of this defendant. It wasn't a mistake made with no intent for gain, if it were a mistake made, but all they want is to put dollars and cents in the coffers of this defendant. * * * Now I ask you to take out of the coffers of this corporation some of that money that they got when they sold 411,000 and some odd of those news-

papers at ten cents a piece making 40,000 and some hundred dollars, and give to this man. This corporation has no right to keep it all."

And Mr. Des Jardins said:

"But they are a big corporation, capable attorneys that can come here, and the individual that combats them usually is in ordinary circumstances or hasn't a great amount to spare. They take their chances. They say to get the news. Get it and we will take a chance on the outcome. They took this chance and I don't know why they are here weeping about it. * * * Gentlemen, Trooper Milligan is the most courageous one that has taken that witness stand in this case. Why? He sat up there and he said to the Detroit News, powerful as it is, I will tell the truth and you can do to me what you want to do, and they call him a coward. Let's analyse the story. Let's see who was telling the truth? Whether their powerful influence with that powerful influence of the press which caused those deputies to give the paper the break against this stranger unknown to them, or whether Trooper Milligan was stating the truth. * * * Is there any reason why they should keep that blood money in their treasury? * * * The Detroit News grossly, without reason, or without thought but for their own benefit, for the benefit of their own pocketbook, saw fit to libel Edward Sherwood. We are only here asking that we receive compensation for the damages that we have suffered, and we want you to remember this in computing that amount, they did not voluntarily give us every dollar we get, we had to come here and fight for it, and it is expensive to fight."

This court has considered the question of improper argument many times. Many cases are cited in *Atherton* v. *Defreeze,* 129 Mich. 364; *Morrison* v. *Carpenter,* 179 Mich. 207 (Ann. Cas. 1915D,

319); *Daly* v. *Railroad Co.*, 197 Mich. 340; and *Johnson* v. *Mutual Savings Association*, 242 Mich. 558. For this reason judgment is reversed, and new trial ordered.

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

ZUIDEMA *v.* BEKKERING.

1. EVIDENCE—WITNESS SHOULD NOT MAKE DEDUCTIONS.
   Where court or jury can make their own deductions, they should not be made by witness.

2. SAME—CONCLUSIONS—APPEAL AND ERROR.
   In action for damages caused by automobile collision at intersection, it was not reversible error to permit defendant to testify, in answer to question by his counsel, that there was nothing he could do to avert accident, where he had already testified to facts on which his conclusion was based.

3. NEGLIGENCE—IMPUTABLE TO PASSENGER.
   Contributory negligence of husband driving automobile is imputable to wife who was injured in collision while riding with him.

4. MOTOR VEHICLES—CONTRIBUTORY NEGLIGENCE.
   Where automobile driver, with knowledge of car approaching on intersecting road, drove on in front of it, resulting in collision, he was guilty of contributory negligence.

5. SAME—FAILURE TO LOOK AGAIN AFTER STOPPING.
   Automobile driver who stopped and looked down intersecting road to left and saw car approaching, and then drove on across intersection without again looking to left, resulting in collision, was guilty of contributory negligence.

As to whether husband's negligence is imputable to wife injured while riding with husband, see annotations in 14 L. R. A. 733; L. R. A. 1915A, 764.

On rights and duties of drivers of automobiles at street intersections, see annotation in 58 A. L. R. 1197.

6. SAME—DRIVER HELD TO HAVE SEEN WHAT HE SHOULD HAVE SEEN.
Automobile driver who failed to see car approaching on intersecting highway when there was nothing to prevent his seeing it, and drove across, resulting in collision, is guilty of contributory negligence, although he stopped and looked, since he must be held to have seen what he should have seen.

7. APPEAL AND ERROR—REFUSAL TO GIVE REQUESTS COVERED BY CHARGE.
Refusal to give requests to charge was not error, where they were either given or covered by charge as given.

8. SAME—INAPPLICABLE REMARKS NOT ERROR WHERE NOT PREJUDICIAL.
Philosophic ruminations of trial judge in charge, not resulting in prejudice, *held*, not reversible error, although not applicable to case.

Appeal from Kent; Brown (William B.), J. Submitted October 28, 1931. (Docket No. 160, Calendar No. 36,023.) Decided December 8, 1931. Rehearing denied March 3, 1932.

Case by Alice Zuidema against Gerrit Bekkering for personal injuries received in an automobile collision at a highway intersection. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Dunham, Taylor & Allaben, for plaintiff.

Linsey, Shivel & Phelps and *Knappen, Uhl, Bryant & Snow,* for defendant.

POTTER, J. Plaintiff sued defendant to recover damages alleged to have resulted from personal injuries, caused by defendant's negligence. From a judgment for defendant, plaintiff appeals. Plaintiff, riding in an automobile driven by her husband, was injured by its collision with defendant's automobile at the intersection of the so-called Byron Center road with the so-called Fisher road in Kent

county, August 7, 1930, at about 4:30 o'clock in the afternoon. The Byron Center road is a paved highway running north and south. The Fisher road is a country highway running east and west and crossing the Byron Center highway at right angles. Defendant was going north on the Byron Center highway and plaintiff was riding with her husband going west on the Fisher highway toward its intersection with the Byron Center road. The weather was clear. The collision occurred in broad daylight. Plaintiff claims her husband stopped the automobile driven by him before attempting to cross the paved highway. There was testimony disputing this claim and testimony tending to show the occupants of the car admitted at the time it had not been stopped by plaintiff's husband.

Defendant was called, under the statute (3 Comp. Laws 1929, § 14220), and examined as a witness for plaintiff, and, upon cross-examination by his own counsel, he was asked, "Was there anything you could have done, that you did not do, to avert this accident after you discovered the machine?" This question was objected to, and after some comment by the court, he was permitted to answer, "No, there was not." It is claimed by plaintiff that the ruling of the trial court in permitting the defendant to answer this question allowed the witness to invade the province of the jury, that the question was improper and called for a conclusion and not for facts, and for this error the judgment should be reversed. Previous to this time the defendant had been asked whether or not he applied his brakes, whether he had an opportunity to drive behind the car which was crossing the highway in front of him; whether he had an opportunity to drive in front of the car, and he testified he put on his brakes as quick as

he could. Neither car was overturned. In *Langworthy* v. *Township of Green,* 88 Mich. 207, plaintiff was permitted to testify he was driving as carefully as he could. A motion was made to strike out this testimony, which motion was overruled. This court said:

"The rule is that, where the court or jury can make their own deductions, they shall not be made by those testifying; but where the witness gives fully and succinctly, as in this instance, the facts upon which he bases that conclusion, there is no presumption of prejudice."

The rule above stated is still the rule in this State. If plaintiff's husband was guilty of contributory negligence, such contributory negligence is imputable to plaintiff. Plaintiff's husband, the driver of the automobile on the Fisher road, when he reached a point thereon near the pavement on the Byron Center road, had an unobstructed view to the left down the Byron Center road, for a distance of 500 feet and a practically clear view for approximately 1,100 feet. If plaintiff's husband looked down the highway to the left and saw defendant's automobile approaching and drove on to the pavement in front of defendant's automobile with knowledge of its approach, he was guilty of contributory negligence. If plaintiff's husband, though he may have stopped his automobile near the intersection and before attempting to cross the pavement, did not look to the left, but drove onto the pavement without looking and by reason thereof was struck by the defendant's automobile, he was guilty of contributory negligence. It will not do to say that plaintiff's husband looked down the Byron Center road to the left before attempting to cross the pave-

ment and did not see the automobile of defendant approaching. He must be held to have seen what he should have seen, which there was nothing to prevent him from seeing, and if, as contended by plaintiff, he stopped his automobile, looked to the left, and did not see what was plainly to be seen, the approach of defendant's automobile, he was guilty of contributory negligence which would bar plaintiff's recovery.

It is claimed the court erred in denying the plaintiff's requests to charge. We have examined all the requests preferred by plaintiff, and the charge of the court, and all of these requests were given or substantially covered by the charge as given. Complaint is made of the charge of the court. There are in the charge some things not applicable to the case. We cannot say plaintiff was prejudiced by these philosophic ruminations of the trial judge. All of the material facts claimed by plaintiff were disputed by defendant, who was corroborated by disinterested witnesses, and there was impeaching testimony in the case. We find no reversible error in the manner in which the claims of the respective parties in relation to these disputed questions of fact were submitted to the jury. Judgment affirmed, with costs.

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

SCHAEFER *v.* WOODMERE CEMETERY ASSN.

MUNICIPAL CORPORATIONS—TAXATION—ACTION MAY NOT BE BROUGHT FOR TAXES ON REAL ESTATE—JURISDICTION—STATUTES.

Municipal corporation may not maintain action to recover taxes and special assessments levied against real estate; there being no statutory authority, court is without jurisdiction in such case (1 Comp. Laws 1929, § 3431, 3438).

Appeal from Wayne; Merriam (DeWitt H.), J. Submitted October 20, 1931. (Docket No. 153, Calendar No. 35,838.) Decided December 8, 1931. Rehearing denied March 3, 1932.

Assumpsit by Edwin A. Schaefer, treasurer of the city of Fordson, against Woodmere Cemetery Association, a Michigan corporation, for taxes and special assessments. Judgment for defendant. Plaintiff appeals. Affirmed.

James E. Greene, Corporation Counsel, and *Austin & Newman,* Special Counsel, for plaintiff.

Trowbridge, Lewis & Watkins (*Edwin C. Lewis* and *Milton F. Mallender,* of counsel), for defendant.

POTTER, J. Plaintiff sued defendant in the circuit court on the common counts in assumpsit to recover from it general city taxes for the years 1926 and 1927 and parts 1 and 2 of a special assessment levied against the property for paving Riverside drive, together with interest. Defendant pleaded the general issue and gave notice the property of defendant was exempt from taxation. There was judgment for defendant. Plaintiff appeals. We

are met by the question of the right of plaintiff to maintain this suit.

"The only case provided for by statute wherein suit may be brought for unpaid taxes by the township is where taxes on personalty have been returned unpaid for want of property on which to levy. 1 Comp. Laws 1871, § 1014. In such case the treasurer may sue in the name of the township. Taxes on real estate may be collected by distress on goods and chattels (1 Comp. Laws 1871, § 1003), but if not so collected the tax is returned unpaid and the land sold to make it." *Staley* v. *Township of Columbus,* 36 Mich. 38.[1]

This is still the rule. It follows the suit in question will not lie. This question was raised on the argument and it goes to the jurisdiction of the court. Judgment affirmed, with costs.

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

LAMHOFF *v.* DANIEL.

SPECIFIC PERFORMANCE—AGREEMENT TO LEASE—FRAUD—EQUITY.

Specific performance of agreement to lease, induced by misrepresentations of plaintiff's agent, was properly denied.

Appeal from Jackson; Simpson (John), J. Submitted October 9, 1931. (Docket No. 81, Calendar No. 35,680.) Decided December 8, 1931.

[1] See 1 Comp. Laws 1929, §§ 3431, 3438.

On effect of mistake of fact by defendant on right to specific performance of a contract induced thereby, see annotation in 15 L. R. A. (N. S.) 81.

Bill by Michael Lamhoff against Thomas I. Daniel and another for specific performance of an agreement to lease real estate. Decree for defendants. Plaintiff appeals. Affirmed.

Rosenburg & Lawrence (*Frank C. Painter,* of counsel), for plaintiff.

Reuben H. Rossman, for defendants.

POTTER, J. Plaintiff filed a bill for specific performance of an alleged agreement to lease made with defendants December 13, 1929. Defendants were the owners of real estate in Jackson, Michigan. The premises were leased by defendants to a tenant, Chris Tannis. Plaintiff had been a partner of Tannis, but had sold out his interest to Tannis. Plaintiff desired to get a lease of the premises. Defendants had lost their copy of the Tannis lease. Plaintiff's agent represented to defendants the Tannis lease expired August 1, 1930. In fact it expired August 1, 1931. Defendants relied upon the representations made by plaintiff's agent, in making the agreement sought to be enforced. They were mistaken as to the date of the expiration of the outstanding lease. This mistake was brought about by the misrepresentations of plaintiff's agent. Defendants were deceived thereby. Plaintiff cannot ask specific performance of a contract entered into by defendants by mistake, which mistake was induced by the false representations of plaintiff's agent. The trial court so held. Decree affirmed, with costs.

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

SMITH *v.* BAUBIE.

1. BILLS AND NOTES—CONSIDERATION.
Where plaintiffs were induced to exchange their property by broker's agreement to accept note of party with whom they were dealing in full for his commission, notes given to broker by plaintiffs, who had little experience in legal matters, to replace note accepted by him, which was not paid, was void for want of consideration.

2. EVIDENCE—RECEIPT—PAROL EVIDENCE—BILLS AND NOTES.
Although receipt in full of account does not establish agreement on part of creditor to accept as absolute payment at his own risk note of third person for debt, parol evidence is admissible to show that note was accepted in absolute payment.

Appeal from Wayne; George (Fred W.), J., presiding. Submitted October 9, 1931. (Docket No. 76, Calendar No. 35,937.) Decided December 8, 1931.

Bill by Walter J. Smith and another against Raymond P. Baubie and another to enjoin actions at law on promissory notes and for cancellation of said notes. Cross-bill by defendant Baubie for money decree. Decree for defendant Baubie. Plaintiffs appeal. Reversed.

William S. McNair, for plaintiffs.

Baubie & Baubie, for defendants.

WIEST, J. Plaintiffs exchanged real estate with Martino and Maria Termini, under terms requiring the Terminis to also pay $1,150. Defendant Martin was plaintiffs' broker and agreed that, if plaintiffs

accepted the note of the Terminis for that amount, he would take it for his commission. The note was executed by the Terminis, and plaintiffs, as payees, assigned it by the following writing thereon to Mr. Martin:

"Oct. 2, 1928.

"In consideration of $1 and other valuable considerations, we undersigned hereby jointly do sell, assign, and transfer all our right and title to George O. Martin of the city of H. Park, for his commission which he has earned for his faithful services in selling our 171-acre farm land in secs. 8–9, Manchester Twp., Washtenaw county, Mich."

The same date Mr. Martin signed and delivered to plaintiffs a receipt reading:

"1150 Oct. 2, 1928.

"Received of Walter J. Smith and Minnie Smith, his wife, one thousand one hundred fifty no/100 dollars in a form of a promissory note signed by Martino Termini and Maria Termini, his wife, as my commission on their 171-acre farm deal in Manchester Twp., Washtenaw county."

The Terminis paid $400 to Martin, and at the maturity of the note Martin had it protested for nonpayment, and demanded that plaintiffs take the note and give him their notes for $769, the balance due for his commission. Plaintiffs went to a bank where the note had been left for protest, executed two new notes, payable to Martin, one for $400 and the other for $369.35, but claim they did so because Martin said that "he couldn't collect that note from Termini * * * because it was illegal. * * * Termini promised to pay you but not me." Martin indorsed the two new notes to defendant Baubie after maturity, and Baubie commenced two suits thereon against plaintiffs herein in the common pleas court.

Plaintiffs thereupon filed this bill to restrain prosecution of such actions and have the notes canceled because obtained without consideration and by fraud. Defendant Baubie discontinued the actions at law, and, by answer in the nature of a cross-bill, asked for decree awarding him the sum due on the notes. The court dismissed plaintiffs' bill and granted defendant Baubie a decree for the amount due on the notes.

We are not persuaded that fraud was perpetrated in procuring plaintiffs to execute the new notes. Evidently plaintiffs had little experience in legal matters, and probably misunderstood the purport of the claim made by Martin. Under the assignment Martin was not without remedy against the makers of the note.

The important question in the case is that of want of consideration for the new notes. If Martin agreed to take and did take the Termini note in absolute payment of his commission, then there was no consideration for the new notes. This involves a question of fact. Plaintiffs testified to such an agreement and are, to some extent, supported by the terms of the assignment and the receipt. We recognize the rule that "A receipt in full of an account does not establish an agreement on the part of the creditor to accept as absolute payment at his own risk the note of a third person for the debt." 21 R. C. L. p. 84.

Mr. Martin testified:

"I agreed to take the Martinis' (Terminis') note as my commission. * * * When I took the note I gave the receipt.

"*Q.* And you took that note for the full commission on the farm?

"*A.* Yes, sir, I received the note and gave them a receipt for the note.

"*Q.* And you took that for your full commission on the farm?

"*A.* I did. The receipt is in my own handwriting and in that receipt I acknowledge the receipt of the note.

"*Q.* As the full amount of your commission on the farm deal, did you not?

"*A.* I received a note for $1,150 as my commission and I gave him a receipt for the note. * * *

"At the time of closing the deal, in pursuance of those papers I took the promissory note, that Termini promissory note, and I did not release the Smiths unless the note was paid in full, the note was not paid and the Smiths went to the bank and picked up the note and gave me their note back and I then gave Exhibit 1 (the Termini note) back to the Smiths."

We are impressed by the testimony of plaintiffs that they were induced to make the exchange by reason of Mr. Martin's agreement, that if they would accept the promissory note of the Terminis for $1,150, he would take it in full payment of his commission.

Mr. Smith testified:

"Well, I told him (Martin) that I didn't feel that I should accept Termini's note. I said, 'I don't know him.' 'Oh,' he said, 'That is all right, I know that man well; I know him perfectly well, I'll take his note for the commission so that will relieve you.'"

Parol evidence was admissible to show that the note was accepted in absolute payment.

Defendant Baubie asserts no claim superior to that of Mr. Martin. All parties submitted to the jurisdiction of the court of equity.

The decree is reversed, and one will be entered in this court, canceling the notes sued upon and

requiring plaintiffs to deliver the Termini note to defendant Martin.

Plaintiffs will recover costs.

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

LODGE NO. 1, TRIBE OF GOOD TIMERS, v. MARVIN.

1. BENEFICIAL ASSOCIATIONS—RIGHT TO PROPERTY—BURDEN OF PROOF.

   Fraternal association bringing suit against former officers for possession of its property, records, and funds has burden of proving that officers claiming to represent it are in fact its officers.

2. SAME—MUST ACT THROUGH NATURAL PERSONS.

   Beneficial association, whether corporate or unincorporated, must act through natural persons.

3. SAME—WHEN LAWFULLY ASSEMBLED MAY TRANSACT BUSINESS.

   Members of lodge, when lawfully assembled and presided over by its duly elected officers, may transact any business within purview of purpose for which it is organized.

4. SAME—WHEN TEMPORARY OFFICERS MAY BE SELECTED.

   In absence of regular officers, lodge members present, when lawfully assembled, may select temporary officers, unless constitution or by-laws otherwise provide.

5. SAME—WHEN LAWFULLY ASSEMBLED.

   Lodge members are lawfully assembled only when they meet at regular or specially designated place of meeting and at time fixed by by-laws.

On membership in association as condition of right to transact particular kind of business, see annotation in 6 L. R. A. (N. S.) 433.

6. SAME—PROCEEDINGS AT UNLAWFUL ASSEMBLY VOID.
Where certain members of lodge, on regular meeting night, went to regular meeting place, found doors of hall locked, and, after waiting for regular time of meeting, in absence of regular officers, held meeting in corridor, elected temporary officers, adjourned to another meeting place, and there purported to elect permanent officers for ensuing year, meeting was illegal and proceedings void.

7. SAME—MAJORITY MAY ACT WHEN LAWFULLY ASSEMBLED.
Majority of lodge members have full control over its proceedings when it is in regular session, subject only to rights conferred on its officers under its constitution and by-laws; but they are powerless to act unless lawfully assembled.

8. SAME—EQUITY SHOULD NOT INTERFERE IN DISPUTE OVER OFFICERS.
Court of equity should not interfere in dispute between lodge members as to which of two sets of officers is entitled to hold offices.

Appeal from St. Clair; Robertson (William), J. Submitted October 8, 1931. (Docket No. 46, Calendar No. 35,827.) Decided December 8, 1931. Rehearing denied March 3, 1932.

Bill by Lodge No. 1, Tribe of Good Timers, against Lucetta Marvin and others for possession of certain lodge property, for an accounting, and other relief. Bill dismissed. Plaintiff appeals. Affirmed.

James A. Muir, for plaintiff.

John B. McIlwain, for defendant.

SHARPE, J. The bill of complaint alleges that the plaintiff is a subordinate lodge of the Tribe of Good Timers, a fraternal association incorporated under the laws of this State; that its conduct and affairs are regulated by a constitution and by-laws, which provide, among other things, for the election and installation of certain designated officers; that it is

possessed of certain funds to the amount of about $1,700; that its by-laws provide for an annual election of its officers at its first meeting in December in each year; that at such meeting, held on December 13, 1929, a set of officers were elected, and, pursuant to said by-laws, installed on January 10, 1930; that the honorable recording secretary and honorable treasurer made demand upon their predecessors in office, Lucetta Marvin and Estella Frost, two of the defendants, for delivery to them of the records, property, and funds in their hands belonging to the lodge, and such request was refused. An injunction, restraining these officers and certain others named as confederates from "diverting, spending or changing" the moneys or property of the lodge, and for an accounting by them, was sought and also an order requiring them to turn over such moneys and property to the proper officers of the plaintiff, and that they be enjoined from holding meetings in the name of the plaintiff.

The defendants answered, denying that officers of the lodge were elected or installed as alleged, and set forth that at a meeting of the lodge duly held on December 13th other officers were elected, among them the defendants above named as secretary and treasurer, and that they are entitled to the possession of the moneys and property of the lodge. After a hearing a decree was entered dismissing the bill, of which the plaintiff seeks review by appeal.

Counsel for the plaintiff insists—

"That this action is brought by the plaintiff as an association. * * * This is not an action between factions. The plaintiff is demanding and praying for its own name and property. If it does not exist, that is the end of the matter. If it does, then it is entitled to its own. * * * The question as to who

are its officers is also immaterial, for the lodge exists if its officers resign or if it has no officers and chooses them at each meeting."

It appears that certain of the members of the lodge met in two different places, both outside the regular meeting place, on December 13th, and elected officers to serve during the ensuing year, and that both sets of officers were installed in Sturmer Hall, the regular place of meeting, on January 10th following. A meeting of certain of the members was held at Sturmer Hall on January 24th, at which the officers elected at Edison Hall presided, and at which a resolution was adopted empowering and instructing Peter P. Keyser, the honorable lieutenant governor, and the honorable treasurer and honorable secretary—

"In the name of this lodge to engage counsel and file suit or suits in law or (and) chancery and to litigate and to make or cause to be made any demand or demands as are necessary for a proper foundation for such litigation and as they are best advised for the purpose of bringing into the hands of the proper officers of this lodge all books, records, papers, property and moneys which belong to it, and to demand an accounting from and by said past officers and to do any and all things in such connection and for such purpose in the name of this lodge or in conjunction with others or in their own names or any of them as they may deem necessary and proper and be best advised."

Pursuant thereto, counsel was obtained and the bill of complaint herein was filed. It is verified by Mr. Keyser and Blanche McCormick and Matilda Wollen, as honorable treasurer and honorable recording secretary, respectively. If the officers who presided at that meeting were not in fact the officers of the lodge, then the persons there assembled did

not constitute the lodge, and there was then no meeting thereof, and those delegated to bring suit acted without authority of the lodge and the suit was properly dismissed.

In our opinion the question presented is whether the meeting held at Edison Hall on December 13th was a regular meeting of the lodge so that the persons there elected and afterwards installed were the officers of the lodge when the resolution was adopted.

One of the by-laws provided that regular meetings should be held on the second and fourth Friday evening of each month, commencing not before 7 o'clock and not later than 8 o'clock. Plaintiff produced proof that a number of the members went to Sturmer Hall that evening at 7 o'clock and found the door closed; that they waited until nearly 8 o'clock, and then a member called them to order and they elected a *pro tempore* governor and secretary, and, on motion duly carried, adjourned to Edison Hall, where the meeting was continued and the officers elected for the ensuing year.

There is proof that Sturmer Hall was at that time being redecorated, and that, on the attention of the honorable governor being called to that fact, she and the honorable recording secretary caused a notice to be posted about 7:30 in the evening on the door leading into the hall, stating that the meeting would be held at 406 Quay street, and that a number of the members there met, the officers being present, and elected the officers for the ensuing year. We are not here concerned with the dispute as to whether such notice was posted or the regularity of the meeting so held, as the burden is upon the plaintiff to establish the fact that the officers claiming to represent it are in fact the officers of the lodge.

An association, like all other bodies, whether corporate or unincorporated, must act through natural

persons. The members of a lodge, when lawfully assembled and presided over by its duly elected officers, may transact any business within the purview of the purpose for which it is organized. In the absence of such officers, the members present may select others to temporarily fill their places unless the constitution or by-laws otherwise provide. But they are "lawfully assembled" only when they meet at the regular or a specially designated place of meeting and at a time fixed by the by-laws. The regular place of meeting for this lodge was at Sturmer Hall. When a number of the members assembled in the corridor leading to this hall on December 13th, the date of a regular meeting, and remained there for some time after the hour fixed for the meeting and the doors of the hall were not opened, nor any of the officers of the lodge present, we are constrained to hold that the proceedings then had and followed by the meeting in Edison Hall were unauthorized and of no validity, and conferred no rights upon the officers there elected. To hold otherwise might lead to much confusion in the conduct of the business of such lodges, as it has here. The majority of the members of such a lodge have full control over its proceedings when the lodge is in regular session, subject only to the rights conferred upon its officers under its constitution and by-laws. But, unless lawfully assembled, they are powerless to act.

The Michigan cases cited by plaintiff (*Schiller Commandery* v. *Jaennichen,* 116 Mich. 129; *Sommers* v. *Reynolds,* 103 Mich. 307, and *Mason* v. *Finch,* 28 Mich. 282) are not applicable to the question presented, as we view it. A court of equity should not interfere in this dispute as to which of the sets of officers claimed to have been elected on December 13th, and installed on January 10th, is entitled to hold the offices in this lodge. In *St. Patrick's Alli-*

ance v. *Byrne,* 59 N. J. Eq. 26 (44 Atl. 716), it was held (syllabus):

"Equity will not decide which of two sets of officers claiming to be the officers *de jure* of a beneficial society are entitled to the offices, unless some other equitable matter is involved in and requires the decision of such question.

"The fact that one of the rival claimants to an office of a beneficial association holds funds which he refuses to pay over to one claiming to be his successor does not give a court of equity jurisdiction to determine their rights to the office."

See, also, *Commonwealth* v. *Heilman,* 241 Pa. 374 (88 Atl. 666); Bacon, Life and Accident Insurance (4th Ed.), § 134.

The decree dismissing the bill of complaint is affirmed, with costs to appellees.

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

KEWANEE PRIVATE UTILITIES CO. *v.* RUNZEL.

1. BILLS AND NOTES—COLLATERAL FOR ANTECEDENT DEBT—HOLDER IN DUE COURSE.
   Under negotiable instruments law, holder of notes taken as collateral for antecedent debt is holder in due course (2 Comp. Laws 1929, §§ 9274, 9276).

2. SAME—MEMORANDUM ON NOTE—NEGOTIABLE INSTRUMENTS.
   Memorandum at bottom of note given in payment of membership in golf club, referring to membership number, in no way affected its negotiability.

As to effect of marginal notations upon a bill or note, relating to time of payment, see L. R. A. 1918C, 347.

3. SAME—MATERIAL ALTERATION—DETACHMENT—APPEAL AND ERROR. Where notes attached to application for membership in golf club were detachable, so that payee, who was other than golf club, could discount them, and question of material alteration by detaching was not passed on by trial judge, Supreme Court assumes, in view of record, that application was detached before delivery of notes to payee.

Appeal from Muskegon; Vanderwerp (John), J. Submitted October 27, 1931. (Docket No. 108, Calendar No. 35,963.) Decided December 8, 1931.

Assumpsit by Kewanee Private Utilities Company, an Illinois corporation, against Roy H. Runzel on promissory notes. Judgment for plaintiff. Defendant appeals. Affirmed.

Harold H. Smedley (*R. Glenn Dunn,* of counsel), for plaintiff.

Alexis J. Rogoski, for defendant.

SHARPE, J. The articles of incorporation of the Lincoln Golf Club were filed on September 10, 1926. It was organized for profit by a number of the business men of the city of Muskegon. On September 15th the defendant signed an application for a "Founders Life Membership" therein, in which he agreed to pay therefor the sum of $500, payable $100 in cash and $100 on February 15th in 1927, 1928, 1929, and 1930, "as set forth on attached notes." Below his signature thereto appeared, "Make all checks and notes payable to the Miller Landscape Service, Muskegon, Mich." The paper below the signature was perforated, and followed by four promissory notes in the usual form, each being separated from the one preceding it by perforations. These notes were all made payable "to the order of The Miller Landscape Service, at their office, Muskegon, Michigan," and bore interest at the rate of six

per cent. per annum, payable semi-annually, and seven per cent. after maturity until paid. LaVern A. Miller was doing business under the name "Miller Landscape Service." At the bottom of each note was printed, "L. G. C. Membership No. ....."

The defendant testified:

"The purpose of signing the notes payable to Miller was that he was to discount the notes and turn the money over to the Lincoln Golf Club. He represented that he had financial connections that would enable him to thus discount the notes."

It appears that Miller received the application and these notes from the defendant, and turned them over to Mr. Bodine, the treasurer of the company, and that he gave them back to Miller for the purpose of negotiating them to obtain funds for the company.

The plaintiff's first business relation with Miller was in 1925, at which time it furnished him with a water system for a golf club at Charlevoix. It extended credit to him under the name of the "Miller Landscape Service." On September 1, 1926, he was indebted to it in the sum of $1,164.80. This account was placed in the hands of a collection agency. Miller offered to turn over to it some notes he claimed to have received in payment for work done on a country club at Muskegon. The plaintiff agreed to accept them as collateral to Miller's personal note for the amount. Defendant's notes were left with plaintiff's president on December 30, 1926, indorsed "Miller Landscape Service Lavern A. Miller," and later Miller sent plaintiff his note, dated September 1, 1926, for the amount, payable in one year, which stated on its face that $1,200 collateral notes were given. Miller's note was not paid when due, and this action is brought to recover on defendant's notes. Only three of them were due when this action

was begun, but it was stipulated in the record that, as the fourth note was due at the time of trial, the judgment, if in plaintiff's favor, should include this note also.

The case was tried before the court without a jury, and resulted in a judgment for plaintiff for $516. The defendant has appealed.

1. It is urged that "The notes having been taken as collateral for an antecedent debt, plaintiff is not a *bona fide* holder thereof for value."

The trial court held that decision of this question was controlled by the following provisions of our negotiable instruments law (2 Comp. Laws 1929, § 9248 *et seq.*):

SEC. 9274. "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time."

SEC. 9276. "Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien."

This act was a codification of the law then existing relating to such instruments, although some changes were made therein. The sections above quoted were copied without change from the "Negotiable instruments law" enacted in 1905 (Act No. 265, §§ 27 and 29). In *Graham* v. *Smith,* 155 Mich. 65, it was held that these sections changed the rule theretofore prevailing in this State, and that the holder of a negotiable instrument, given as collateral security for an existing debt, would be deemed a holder for value to the extent of the amount due him. The decision in that case has been cited with approval in *Marshall & Ilsley Bank* v. *Mooney,* 205 Mich. 513, and in *The Molsons Bank* v. *Wolf,* 224 Mich. 526, and must be accepted as the settled law of this State.

2. The memorandum at the bottom of the note, "L. G. C. Membership No. .....," in no way affected its negotiability. *Preston* v. *Whitney,* 23 Mich. 260; *Wright* v. *Traver,* 73 Mich. 493 (3 L. R. A. 50); 3 R. C. L. p. 915.

3. It is urged that Miller detached these notes from the application for membership, and that such action on his part "was a material alteration of that instrument," and rendered the notes "inoperative, null and void." The record is not clear as to when the notes were detached from the application. Neither the treasurer of the club, who delivered the notes to Miller, nor Miller himself were called as witnesses. The purpose of making the notes payable to him under the name in which he did business was clearly stated by the defendant as above quoted. This purpose could be effected only by detaching them from the application for membership at the time of their delivery to him, as he might, under the arrangement made for disposing of them, have discounted each of them with a different party. He had no concern with the application, and its place was in the files of the officials of the corporation. Henry Frost, who was at that time its secretary, testified that Mr. Bodine, the treasurer, "released" the notes to Miller. This question was not passed on by the trial judge in the opinion filed by him, and on this record we think it should be assumed that the application was detached before the delivery of the notes to Miller.

In our opinion, the finding of the trial court that the plaintiff was a holder of these notes in due course, and for a valuable consideration, was warranted.

The judgment is affirmed.

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

BOARD OF EDUCATION OF CITY OF DETROIT *v.* CAMPBELL.

1. SCHOOLS AND SCHOOL DISTRICTS—AGENCY OF STATE WITH LIMITED POWERS—STATUTES.

   While school district of first class is body corporate, it is to be regarded as agency of State government with limited powers exclusively restricted to purposes of education (2 Comp. Laws 1929, §§ 7266–7329).

2. SAME—NOT MUNICIPALITIES IN FULL SENSE.

   School districts, although invested with certain corporate characteristics, are not municipalities nor public corporations in full sense, but, because of their restricted powers, are distinguished and recognized as *quasi* corporations.

3. SAME—PREFERENCE OF SOLDIERS FOR PUBLIC EMPLOYMENT—STATUTES.

   Statute preferring honorably discharged soldiers for public employments, and prohibiting their discharge without hearing, is not applicable to school districts; they not being among political subdivisions enumerated in act (1 Comp. Laws 1929, §§ 900, 901, as amended by Acts Nos. 66, 67, Pub. Acts 1931).

4. SAME—INTENT—ASSUMPTIONS—CONSTRUCTION OF STATUTES.

   Where legislature repeatedly amending statute preferring honorably discharged soldiers for public employments omitted employees of school districts from its provisions, it must be assumed that said omission was intentional (1 Comp. Laws 1929, §§ 900, 901, as amended by Acts Nos. 66, 67, Pub. Acts 1931).

Appeal from Wayne; Toms (Robert M.), J. Submitted October 16, 1931. (Docket No. 124, Calendar No. 36,013.) Decided December 8, 1931.

Bill by the Board of Education of the City of Detroit against Joseph A. Campbell for a declaration of rights under 3 Comp. Laws 1929, § 13903

et seq., as to power to discharge honorably discharged war veteran. Decree for plaintiff. Defendant appeals. Affirmed.

Clarence E. Page, for plaintiff.

Payne & Payne (*Thomas W. Payne,* of counsel), for defendant.

SHARPE, J. Pursuant to the authority conferred on it by section 12, chap. 8, pt. 1, Act No. 319, Pub. Acts 1927 (2 Comp. Laws 1929, § 7277), the plaintiff adopted by-laws, two articles of which read as follows:

"All non-contract employees affected by the provision of this by-law are automatically retired at 70 years of age, effective August 15, 1931; provided that officers of the board of education and non-contract heads of administrative departments should be retired by the provision of article 24 of these by-laws.

"All contract employees who have reached the age of 70 shall be automatically retired at the end of the school year following their seventieth birthday; provided, that persons affected by this rule as of June, 1931, may be retained for one more school year if they can pass a satisfactory physical examination."

The defendant, an honorably discharged soldier, is a foreman in the electrical division of said board. Pursuant to the provisions of the by-laws above quoted, he was given notice of his retirement, effective as of August 15, 1931, with a pension of approximately $47.50 per month thereafter, for the reason that he had then reached the age of 70 years. Upon receipt of such notice, he filed a protest with the board against such action. It appears that many other employees of the plaintiff are affected by the same provisions.

The plaintiff thereupon, pursuant to the provisions of Act No. 36, Pub. Acts 1929 (3 Comp. Laws 1929, § 13903 *et seq.*), filed its petition herein for a declaration of the rights of the parties under the law applicable thereto.

Act No. 205, Pub. Acts 1897 (1 Comp. Laws 1929, §§ 900–903), was entitled "An act to prefer ex-soldiers for public employments." It applied only to "honorably discharged Union soldiers, sailors and marines of the late rebellion." It provided that removal or suspension should be had only after a hearing before, and written order made by, the mayor of the city or common council of the town. It was amended in 1899 (Act No. 85) to include "soldiers, sailors and marines of the late Spanish-American war." Amendment was again had in 1907 (Act No. 329) to provide for a hearing before the governor as well as the officials above named, and in 1919 (Act No. 224) by providing that the hearing should be had before the circuit court. Amendment was again made in 1923 (Act No. 88), and in 1931 by Acts Nos. 66 and 67. These latter acts were approved on May 4 and 5, 1931, respectively, and ordered to take immediate effect. So far as applicable to the question presented, the first two sections now read:

"SECTION 1. In every public department and upon the public works of the State and of every county and municipal corporation thereof honorably discharged Union soldiers, sailors and marines of the civil war, and honorably discharged soldiers, sailors and marines of the Spanish-American war, Philippine insurrection, China relief expedition, World war, and of every other war in which the United States of America has been a participant, shall be preferred for appointment and employment. * * *

"SEC. 2. No veteran or other soldier, sailor or marine as indicated in the preceding section holding an office or employment in any public department or public works of the State or any county, city or township or village of the State except heads of departments, members of commissions, and boards and heads of institutions appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for official misconduct, habitual, serious or wilful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency; and such veteran shall not be removed, transferred or suspended for any cause above enumerated from any office or employment, except after a full hearing before the governor of the State if a State employee, or before the prosecuting attorney if a county employee, or before the mayor of any city or village, or before the commission of any such city or village operating under a commission form of government, if an employee of a city or village, or before the township board if a township employee, and at such hearing the veteran shall have the right to be present and be represented by counsel and defend himself against such charges."

The question presented is whether the employment of the defendant by the board of education entitles him to the benefits and privileges of the act.

The first sentence of section 12, chap. 8, pt. 1 of the 1927 act (2 Comp. Laws 1929, § 7277), above referred to, provides:

"The said board of education shall be a body corporate under the name and title of 'The board of education of the City of ————.'"

The act of which this chapter forms a part provides for a system of public instruction in the schools of this State, and this chapter is made applicable to districts having a population of more than 500,000, which are denominated "districts of the first class." While the plaintiff is a body corporate, it is to be regarded as an agency of the State government with limited powers exclusively restricted to purposes of education.

"Although invested with certain corporate characteristics to more efficiently serve the purpose for which they are created, school districts are not municipalities, nor public corporations in the full sense, but because of their very restricted powers are distinguished and recognized as *quasi* corporations." *Daniels* v. *Board of Education,* 191 Mich. 339, 347 (L. R. A. 1916 F, 468).

The status of a school district within the confines of a township was considered at length by Mr. Justice POTTER in the late case of *Ruppert* v. *Township School District,* 252 Mich. 482, and what was there said applies with equal force to the plaintiff district under the act by which it was created. The officers of townships, counties, and cities have no control over the officers of school districts.

Section 24 of this chapter reads:

"The board shall have full power over its teachers and all other employees, may specify the duties to be performed by them and fix the qualifications necessary for any position *notwithstanding any general or special law to the contrary.*" 2 Comp. Laws 1929, § 7289.

And section 53:

"School districts of the first class may exercise any of the powers enumerated in this chapter, and

shall have such rights as are herein given, and shall be governed hereby in respect to things herein stated, *notwithstanding the provision of any general law or special act to the contrary.*" 2 Comp. Laws 1929, § 7318.

(The italics are ours.)

Section 38 (2 Comp. Laws 1929, § 7303) provides for the retirement of employees other than teachers, and for the payment of a pension to them.

It will be noted that these provisions were incorporated into the law in 1927, subsequent to the enactment of Act No. 205, Pub. Acts 1897, as amended, above referred to. It is not claimed by the board of education that the provisions of Act No. 205, as amended, are repealed thereby, but it is insisted that they clearly indicate that school districts are not among the political subdivisions enumerated in the act.

We are satisfied that a school district is not within the terms of the statute. It is not a "public department," nor are its employees engaged "upon the public works of the State." Neither can it be said to be a "municipal corporation" of the county.

The second section at first provided for a hearing before the mayor or common council. Change was then made for such hearing before the circuit court. Under the 1931 amendment, the hearing is to be had before certain designated officials of the State, county, city, village, or township. School districts are not mentioned in either section. It must be assumed that the legislature well knew that such districts had many employees, and, in their consideration of the proposed legislation on so many occasions, intentionally omitted such employees from the provisions of the act.

We are in accord with the conclusion reached by the trial court:

"That it was not the intention of the legislature, as gathered from the provisions of the act in its entirety, that it should apply to school districts." (Act No. 205, Pub. Acts 1897, being 1 Comp. Laws 1929, §§ 900–903, as last amended by Acts Nos. 66 and 67, Pub. Acts 1931.)

The declaration of the rights of the parties as made by it is affirmed.

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

PANASEWICH *v.* PANASEWICH.

1. DIVORCE—CUSTODY OF CHILDREN.
   Where record shows that wife is not proper person to have custody of children, divorce decree awarding their custody to her is reversed, on appeal, and custody awarded to husband.

2. SAME—DIVISION OF PROPERTY.
   Where divorce decree awarding custody of minor children to wife is reversed, on appeal, and custody awarded to husband, allowance to him, on division of their property which is in wife's name, is increased accordingly.

Appeal from Wayne; McMahon (Maurice H.), J. Submitted October 7, 1931. (Docket No. 33, Calendar No. 35,825.) Decided December 8, 1931.

Bill by Stephen Panasewich against Mary Panasewich for divorce. From decree rendered, plaintiff appeals. Reversed.

John J. Adamski, for plaintiff.

SHARPE, J. Plaintiff and defendant were married in Poland in 1904. They have lived in Detroit since 1915, apparently quite happily together until the advent into their home of one Philip Boltek as a roomer in October, 1926. The evidence clearly establishes that the defendant committed adultery with him, and, on plaintiff's discovering them in the act, he was assaulted by them and forced to leave his home, to which he has not since been permitted to return. They have three children under the age of 16, Annie, aged 14, George 8, and William 5.

In his bill for divorce filed herein, plaintiff alleged extreme cruelty and infidelity on the part of the defendant. She filed answer, denying these allegations, and made similar charges on the part of the plaintiff. Plaintiff was granted a decree of divorce, in which defendant was given the custody of the children. From this provision therein and that appertaining to their property interests, hereafter referred to, he seeks review by appeal.

Edward Pokorny, friend of the court, made a very careful investigation of the case. His report concluded as follows:

"It appears from the investigation that the defendant wife is not a proper person to have custody of the minor children of these parties. It further appears that the home in which the children are now residing is not a suitable one.

"It is, therefore, recommended that the minor children of these parties be placed in the home of the oldest son, Nicholas, and the custody of said minor children be awarded to plaintiff until such time as the defendant can prove that she is a suitable person to have custody of these children and can provide a proper home for them."

He also reported that the home of the plaintiff's son, in which he was then living, "would be a proper and suitable one for the upbringing of these children." It is apparent that the defendant, their mother, is not a suitable person to be intrusted with their custody, and that they are not properly cared for by her.

A decree may be here entered awarding their custody to the plaintiff, subject, however, to modification by the trial court, should the defendant be hereafter able to satisfy the court that she can and will properly care for them.

The plaintiff was employed by the Ford Motor Company for eight years prior to their separation. He is now partially blind and able to earn but little, if anything. His earnings were in most part turned over to the defendant, and with them and certain moneys received by her in taking in boarders and roomers she made investments, usually in her own name, so that she now owns property, or has money, of the value of over $15,000, and he has none. The court in its decree awarded the plaintiff a one-half interest in the premises in her name, known as 2748 Dearing street, in Detroit, which, over and above the mortgage thereon, is worth about $4,500. As the plaintiff is now awarded the custody of the children and must support them, this allowance to him should be much increased. The decree may provide for her conveyance to him of this property, and that she pay to him the further sum of $2,000, for which he may have execution and a lien upon any of the other property owned by her, described in the bill of complaint, together with the costs in this and the circuit court.

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

RIDGLEY *v.* RIDGLEY.

DEPOSITS IN COURT—HUSBAND AND WIFE.

Where invalid husband and his brother, without wife's knowledge, withdrew money deposited in bank in joint names of husband and wife, brother, after husband's death, was properly required, at suit of wife, to pay money into court.

Appeal from Allegan; Miles (Fred T.), J. Submitted October 23, 1931. (Docket No. 58, Calendar No. 35,849.) Decided December 8, 1931.

Bill by Rosa Ridgley against George and Walter Ridgley for an accounting. Decree for plaintiff. Defendant Walter Ridgley appeals. Decree entered.

W. J. Barnard, for appellant.

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

SHARPE, J. On October 9, 1930, the plaintiff and her husband, George Ridgley, had on deposit in a savings account in the Old Merchants National Bank & Trust Company of Battle Creek the sum of $3,500, with accrued interest of $70.35. On the first page of the pass book there was written in ink, "In account with Geo. or Rosa Ridgley," and stamped thereon the words, "Joint owners of the entirety payable to either or the survivor." At the same time they had on deposit in a savings account in the Central National Bank in that city a similar sum of money and accrued interest. On the first page of this pass book was written in ink, "In account with Rosa Ridgley or Geo. Ridgley."

George and Rosa were residents of Allegan county. He had been in ill health for some time. On October 8, 1930, the plaintiff and her husband went to the home of his brother Walter in that county, and George remained there for the night. The next day Walter drove George to Battle Creek, and the moneys above referred to were withdrawn by him from the banks. This fact was not communicated to plaintiff. George continued ill, and was taken to a hospital. Plaintiff, on learning of the withdrawal of the moneys from the banks, filed the bill of complaint herein on November 6, 1930, alleging that George and Walter had acted wrongfully and fraudulently in making such withdrawal, that they refused to disclose where the money then was, and that her husband was then ill and "about to die," and that she was "without remedy in the premises, except in a court of equity." She prayed for a decree enjoining them from disposing of the moneys, for a disclosure of where the money then was, and that they be required to pay the same into court to await such order as might "be agreeable to equity and good conscience."

George passed away on November 17, 1930, and the cause was dismissed as to him. It appears, however, that the plaintiff was appointed administratrix of his estate. After the proofs were submitted, the trial court filed an opinion, in which he found that George was "mentally incompetent to do any business" when the money was withdrawn; that the money was "placed in Walter's possession" when withdrawn from the banks, and that he should pay it forthwith to the clerk of the court "for the use and benefit of the plaintiff." A decree was entered accordingly, from which Walter has taken an appeal.

The paying teller of the Central National Bank testified that both George and Walter were present when the money was withdrawn; that Walter asked him for payment in bills of large denominations; that he paid it—"$2,000 in $100 bills, paying him $1,500 out of my own cash in fifties, also giving him three twenties and a ten and some change;" that he passed the money to George, who did not check it, but "slid it across" to Walter, who checked it and had it in his possession when he left the window.

Walter, called as a witness in his own behalf, testified that George got up about 4 o'clock on the morning of October 9th, and awakened him; that they left for Battle Creek about 7 o'clock; that he went with George to the banks and saw the money paid and counted it and gave it back to George; that on the way home they stopped at Kalamazoo; that George there got out of the car and was gone about 40 minutes; that he did not know where he went; that they then drove to Allegan, where they separated and stopped for some time, and then drove on to Walter's home, and that he later took George to his home. He denied that he had ever had the money in his possession after he gave it to George in the bank, and testified that he did not thereafter at any time know where the money was.

Rose Stroud, a nurse in the hospital, testified that, on an occasion when Walter came there to see George, Walter asked him "if Rose knew that he had the money, and George Ridgley says: 'Yes, but I told her I did not give the money to you.' He says, 'That's perfectly all right.' "

Elisha Ampey, a neighbor of Walter, testified:

"I asked Walter about the money. I said, 'Whose money was it?' He said, 'Every dime of it was George's.' We talked on about it and I said if it

was all George's, Rose would hold one-third any way. 'Yes,' he says, 'we are willing to give her and Willie that and I will take the rest.' No, Willie Ridgley is his brother; he got a son named Willie and a brother named Willie. He said the day of the trial that everybody would know where this money was—We would all know the day of the trial where this money was."

There was other competent testimony tending to show that Walter had the money in his possession, or under his control, and the order of the trial court that he should forthwith pay it to the clerk of the court is affirmed.

Counsel devote much space in their briefs in discussing the question as to whom this money shall belong when paid into court. Is the plaintiff entitled to all of it, and, if not, to what part? That issue was not raised by the pleadings. We have heretofore alluded to the allegations in the bill and the prayer for relief. The answer was simply a denial of the material allegations therein. George is now dead, and the plaintiff has been appointed administratrix of his estate.

When the money has been paid into the hands of the clerk of the court, the plaintiff may, under her prayer for other and further relief, petition that it be paid to her. Either individually or as administratrix, she is entitled to it. On this record there need be no determination as to the capacity in which she receives it. That question may be determined in the probate court, to which she must account as administratrix, and in which the personal representatives and creditors, if there be any, of the deceased may be heard. To protect the estate, a suitable bond should be required at the time of payment, unless that filed by her as administratrix shall be deemed sufficient.

A decree may be here entered in conformity to the views we have expressed, with costs to the plaintiff. As the question of the mental incompetency of the deceased is unnecessary to a decision, there will be no reference to it in the decree. It may, of course, be raised in the probate court and there contested by the parties in interest.

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

BARNUM *v.* BERK.

1. TRIAL—EVIDENCE—MOTOR VEHICLES.
   In action for death of plaintiff's decedent, resulting from automobile collision, it was not reversible error to strike unresponsive answer of witness that person at scene of accident said she told driver of defendant's car "not to turn" in front of plaintiff's car, where it did not appear at that time that said person was occupant of defendant's car, although it was shown later.

2. SAME—FAILURE TO PASS ON MOTION TO STRIKE—EVIDENCE.
   Failure of court to pass on motion to strike out, "because of its inaccuracies," map showing distances at scene of accident involved, was not error, where counsel also said that he had no objection to its remaining as merely crude illustration of situation.

3. MOTOR VEHICLES—CONSENT OF OWNER—QUESTION FOR JURY.
   In action for death of plaintiff's decedent due to collision with defendant's automobile, there was no error in submitting to jury question of whether car was being driven with defendant's consent, either express or implied, under circumstances.

4. NEW TRIAL—GREAT WEIGHT OF EVIDENCE

Motion for new trial, on ground that verdict for defendant was against great weight of evidence, *held*, properly denied.

Appeal from St. Clair; George (Fred W.), J. Submitted October 16, 1931. (Docket No. 138, Calendar No. 35,771.) Decided December 8, 1931.

Case by Lue R. Barnum, administratrix of the estate of Helen Noble, deceased, against Carl Berk, for personal injuries resulting in death of plaintiff's decedent received in an automobile collision. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Isabel D. Lamoreaux (*Herbert W. Smith,* of counsel), for plaintiff.

Theo. D. Halpin (*Stewart & Black,* of counsel), for defendant.

SHARPE, J. In the evening of July 18, 1928, a Ford car, driven by Donald Vanderlip, came into collision with a Whippet car, owned by the defendant and driven by his nephew, Ventre Berk, on the highway east of Lapeer, and as a result thereof plaintiff's decedent, Helen Noble, who was riding in the Ford car, sustained injuries resulting in her death a few hours later, and a boy named Wilcox, who was riding in the Whippet car, was instantly killed.

The accident occurred at a point on the highway where an intersecting road leads to the south to a resort known as Palmer's landing. The Ford car was being driven to the east, and the Whippet car to the west. The driver of the latter desired to turn to the south at the intersection, and, to do so, he had to cross in front of the Ford car, and it is

plaintiff's claim that, under the circumstances, it was negligent for him to do so. It is the claim of the defendant that the Ford car was being driven at an excessive rate of speed, and that the collision was due thereto.

The jury rendered a verdict in favor of the defendant, on which judgment was entered. Plaintiff's motion for a new trial was denied. She here seeks review by appeal.

The errors will be considered in the order in which they are discussed by plaintiff's counsel in their brief.

1. Carrie Malsbury, a witness called by plaintiff, was camping near the place of the accident, heard the crash, and rushed to the place where it occurred. She testified that when she arrived she saw the sister of the deceased boy holding his head upon her lap. She also saw plaintiff's decedent lying on the ground. She was then asked: "Did they both appear to be unconscious?" and answered: "Oh, no. The girl was—she kind of had this man on her lap. She was saying, 'Oh, I told him not to turn; I told him not to turn; I told him not to turn.' "

On motion of defendant's counsel, the latter part of the answer was stricken out because "not responsive to the question." It did not appear at that time that Gladys Wilcox, the girl holding the boy, had been an occupant of the Whippet car. Counsel stated to the court that he would have proof to that effect, and sought to further interrogate the witness relative thereto. On objection of counsel, the court held that the examination must proceed in the regular way, and declined to permit Ventre Berk to be then called to testify to that fact. Gladys Wilcox was then called as a witness by plaintiff, and testified that she had been an occupant of the Whippet car at the time of the accident. Carrie Malsbury

was not thereafter called. Without passing upon the admissibility of the statements claimed to have been made by Gladys Wilcox, we find no reversible error in the ruling of the court relative thereto.

2. The defendant called a civil engineer who had made some measurement of the highway at the place of the accident, and a map indicating the distances and surroundings as made by him was introduced. After cross-examining him, plaintiff's counsel moved to strike it out "because of its inaccuracies." He also said, "I have no objection, however, to its remaining as merely a crude illustration of the situation." The motion to strike was not passed upon by the court. We find no error in what then occurred.

3. The court submitted to the jury the question as to whether or not Ventre Berk was driving the Whippet car with the consent, either express or implied, of the defendant. Counsel for the plaintiff now call attention to the testimony of Ventre, in which he at one time said that he was driving the car with the consent of defendant's wife. He had theretofore testified that she had, in the afternoon, consented to his driving the car to the village of Attica to make a purchase, and that, when he afterwards took it, he said nothing to her about it. It is apparent from this record that no attention was paid to his statement on cross-examination that defendant's wife consented to his driving the car. No request was preferred, as would doubtless have been done had plaintiff's counsel attached importance to it. Under the circumstances, we find no error in the submission of this question to the jury. It surely was not a controlling one in their deliberations or in the result reached by them.

4. It is urged that the verdict was against the great weight of the evidence, and that the court erred in its refusal to grant a new trial for that reason. In his opinion denying the motion, the trial court said:

"As usual in cases of this type, a sharp conflict in the proof existed on material issues. Donald Vanderlip, driver of the car in which plaintiff's decedent was riding, testified that he was going between 20 and 25 miles per hour at the time of the impact. He testified also that the Berk car was 10 or 15 feet from his car when it started to turn in front of him. He testified also that the collision occurred near the center of the roadway rather than near its south side. On the other hand, Ventre Berk testified that the Vanderlip car was between 125 and 150 feet from his car when he started to turn and that the collision occurred when the Berk car, excepting its rear wheels, was entirely off the traveled portion of M-21. These facts, disputed as they are, bear heavily on what to my mind is always the pivotal question in these cases, viz.: Is the oncoming car such a distance away as to justify the judgment of the driver about to turn or cross in front of it that the turn or crossing can be made in safety to all concerned?

"That a collision does happen does not of itself establish negligence on the part of the driver who is turning. He has a right to assume that the driver of the oncoming car, if it is a reasonably safe distance away, will see him commence to turn or cross and slow up or stop, if necessary.

"If the jury believed Ventre Berk's testimony, and it had a right to, the Vanderlip car had ample opportunity to slow up and avoid the collision if traveling at anywhere near reasonable and proper speed under the circumstances. The physical facts in the case certainly tend to support Ventre Berk's

view of this collision. Without detailing them, they are consistently persuasive that the Vanderlip car was traveling at a highly excessive rate of speed under the circumstances. No car of the size and weight of a Ford coupe could, in my opinion, accomplish the results that the Vanderlip car indisputably did without a terrific momentum."

We are in accord with the conclusion reached by him. The judgment is affirmed.

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

BACKUS *v.* KIRSCH.

EQUITY—PLEADING—AMENDMENTS—NEW ISSUE.

Motion to amend bill seeking rescission, on ground of fraud, of contract for sale of plaintiff's corporate stock, was properly denied, where amendment sought to bring into case entirely new issue, involving accounting on behalf of plaintiff and others who were stockholders of corporation eight years previously.

Appeal from Wayne; Hunt (Ormond F.), J. Submitted October 20, 1931. (Calendar No. 35,553.) Decided December 8, 1931.

Bill by Henry N. Backus against Charles W. Kirsch to rescind the sale of certain corporate

shares of stock. From an order denying plaintiff leave to amend bill, he appeals. Affirmed.

Lucking, Van Auken & Sprague (*Roy H. Hagerman,* of counsel), for plaintiff.

J. Paul Wait and *Harry C. Howard,* for defendant.

SHARPE, J. The bill of complaint herein was filed on December 5, 1928. In it plaintiff alleged that in June of that year he was induced to sell certain shares of the capital stock of the Kirsch Manufacturing Company to the defendant by reason of false and fraudulent representations then made to him; that, on learning of their falsity, he had elected to rescind such sale, and had tendered to the defendant the money received by him thereon, and demanded a return of his stock, which was refused. In his prayer for relief he asked that the sale be decreed to be void and the stock ordered returned to him, and that defendant account to him for all profits and dividends received by him on account thereof.

After motions to dismiss the bill and to dissolve the temporary injunction which had been issued had been denied, the defendant answered, denying all the material allegations in the bill.

On December 16, 1930, plaintiff moved to amend the bill in several particulars. Those which referred to the claimed misrepresentations were permitted.

It was also alleged in the proposed amendment, on information and belief, that an audit of the books of the company revealed the fact that in the month of March, 1922, the defendant had "caused the apparent adoption of a resolution by the directors or some of them" authorizing defendant as president of the company to negotiate with himself

as an individual for the purchase from him by the company of certain letters patent issued by the United States, and that such purchase was effected, for which the defendant received $3,100 in cash and $46,900 in par value of the unissued stock of the company, and that defendant in that year had committed other acts for which he should account to the corporation for moneys and profits retained by him.

In the opinion filed by the trial court, in which he concluded that this amendment should not be permitted, he said:

"Among other things the plaintiffs ask that the bill of complaint may be amended relative to a certain fraud, alleged fraud by the defendant against the corporation in 1922, or thereabouts. In his brief the plaintiff, among other things, says as follows:

" 'After the acquisition of said stock defendant received dividends of 161 per cent. thereon. Plaintiffs now claim that all these transactions are voidable and that the defendant is liable to the corporation for the surrender of said stock and an accounting for the dividends.'

"No one but Kirsch is made defendant in this case. There is a whole world of meaning in this statement of counsel that he is liable to the corporation. If he is liable to any one that subsequently acquired stock, he is liable also to those that were then having possession and control of stock and title to stock. The court excludes from this motion all matters relating to this what occurred in 1922. I exclude it. I will not permit that kind of an amendment at this time."

In this we think he was clearly right. In the bill as filed plaintiff seeks rescission of his contract for the sale of his stock to the defendant. No other stockholder has any interest therein. In the amendment proposed he seeks an accounting on behalf of himself and the others who were stockholders in

the year 1922. If permitted, it would inject another and an entirely different issue into that now pending before the court. Aside from the question of laches and the statute of limitations, which defendant insists upon, we find no abuse of discretion in the action of the trial court in denial of the right to amend.

The order appealed from is affirmed, with costs to appellee.

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

BACKUS *v.* KIRSCH.

This case is controlled by *Backus* v. *Kirsch, ante,* 368.

Appeal from Wayne; Hunt (Ormond F.), J. Submitted October 20, 1931. (Calendar No. 35,554.) Decided December 8, 1931.

Bill by Ada T. Backus against Charles W. Kirsch to rescind the sale of certain corporate shares of stock. From an order denying plaintiff leave to amend bill, she appeals. Affirmed.

Lucking, Van Auken & Sprague (*Roy H. Hagerman,* of counsel), for plaintiff.

J. Paul Wait and *Harry C. Howard,* for defendant.

NORTH, J. The facts and issues involved herein are in all essential particulars the same as in *Backus* v. *Kirsch, ante,* 368. Decision there is controlling here. Affirmed, with costs to appellee.

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

EVENSON *v.* STATE MUTUAL RODDED FIRE INSURANCE COMPANY OF MICHIGAN.

1. EVIDENCE—PROBATIVE VALUE—INTOXICATING LIQUOR.
   That insured had intoxicating liquor in house in which he was living at time of trial would have no probative force in establishing that he had liquor in insured building at time it was burned, about two months previously.
2. INSURANCE—ARBITRATION AND AWARD—AWARD VACATED WHERE BASED ON MISTAKE OF LAW.
   Award of arbitrators denying liability of insurer for loss of building was properly set aside, where it is apparent that their decision was based on mistake of law.

Appeal from Lapeer; Smith (Henry H.), J. Submitted October 14, 1931. (Docket No. 121, Calendar No. 35,473.) Decided December 8, 1931.

Bill by Bert Evenson against State Mutual Rodded Fire Insurance Company of Michigan to set aside arbitrators' award and for money decree. Decree for plaintiff. Defendant appeals. Affirmed.

George W. Des Jardins, for plaintiff.

Kinnane & Leibrand, for defendant.

SHARPE, J. On November 28, 1927, plaintiff made application to defendant for insurance on a dwelling house then under construction, and on December 3, 1927, a policy was issued by it in conformity therewith in the sum of $1,000. Annexed to the application was a statement by an agent of the defendant that he had "personally inspected this property and recommended the above application for insurance as a good risk both as to physical and moral hazard." Plaintiff lived in a house about 100 feet from that insured.

The building insured was destroyed by fire on March 30, 1929. Proof of loss was filed with the defendant on or about April 2d. On June 6th the defendant wrote the plaintiff:

"We are in receipt of your proof of loss for loss of dwelling house, which occurred Mar. 30, 1929, insured under our policy No. 43491.

"You are hereby notified that the State Mutual Rodded Fire Insurance Company, of Michigan, deny all liability for said loss for the reason that the house in question was being used for illegal purposes, to-wit: for the purpose of manufacturing, storing, transporting, selling or giving away of intoxicating liquor by reason of which said fire occurred and this company was injured.

"If you are not satisfied with the above adjustment of your claim you should appeal to the board of arbitration provided for in article 5 of the charter, printed on your policy."

An arbitration proceeding was thereafter had, pursuant to the terms of the policy, resulting in a

finding on July 18th that the company was not liable for the loss.

On September 27, 1929, the insured filed the bill of complaint herein, setting up the issuance and terms of the policy, the loss by fire, the denial of liability by the defendant, the arbitration proceedings, the interest of the arbitrators, and alleging that no evidence was produced before them on which their decision could be based, and asking that it be decreed to be null and void and that plaintiff have decree for the amount due him under the policy. Plaintiff had decree. Defendant appeals.

The meritorious question here presented is stated by counsel for the appellant as follows:

"Was there evidence before the arbitrators from which they could infer that the illegal liquor manufacturing and traffic contributed to the loss?"

This is but a restatement of the reason assigned by the secretary for denial of liability in his letter of June 6th. When examined as a witness before the arbitrators, the secretary testified that it was "the only question in dispute."

After formal proof before the arbitrators of the issuance of the policy, the fire, and the proof of loss, the sheriff of the county was called as a witness by the defendant. He testified that on August 11, 1928, he went to the building insured, armed with a search warrant, and found therein a considerable quantity of whisky, home brew, and mash, and that there was a boiler and a gasoline or oil stove therein. While the record is not clear, it may be presumed that he took possession of the incriminating evidence. The sheriff, however, testified that the plaintiff was not convicted.

The defendant then questioned the sheriff concerning a visit made by him to the house in which the plaintiff lived, being again armed with a search warrant, in the month of May, 1929, and, over objection, he testified that he found therein—

"a small amount of gin and he dumped some beer on us that time and broke the bottles of liquor in the room and had the door locked. We found a quantity of mash for the making of home brew and some gin, small amount of gin—it was less than a pint."

The plaintiff, when called as a witness in his own behalf, denied any knowledge of liquor having been kept or stored in the building insured when raided by the sheriff in August, 1928. Counsel for the defendant then sought to question him about the liquor found by the sheriff in his home in May, 1929, but, acting on the advice of his counsel, he refused to answer, on the ground that he might thereby be compelled to incriminate himself as the charge therefor was then pending in the court. Counsel for the defendant insist that his refusal to answer these questions "estopped" him "from maintaining this suit."

A part of section 9 of the by-laws of the defendant provides that in the event of the loss by fire the insured "shall immediately furnish any and all material evidence requested, and if there be any fraud or evasion in writing or otherwise in connection with said examination or in the furnishing of material evidence, * * * the insured shall forfeit all claim against the company."

The issue before the arbitrators was the liability of the defendant for the loss of the building destroyed on March 30, 1929. It seems clear to us that the use made by the plaintiff of the house in

which he was living in the month of May thereafter could have no probative force in establishing the fact that liquor was in the building insured at the time of the fire. It also clearly appears that his refusal to answer the questions above referred to could not be construed into an admission that he was conducting an illicit business in the building insured when it was burned. It is apparent that the action of the arbitrators was based on such refusal. In *Early* v. *Tussing,* 182 Mich. 314, 329, 330, it was said:

"The conclusion and award of the arbitrators * * * was a gross and palpable mistake of law, and cannot be sustained. The award must therefore be vacated and set aside."

In our opinion, the trial court was justified in so concluding under the facts in this case, and the decree is affirmed, with costs to appellee.

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

DETROIT TRUST CO. *v.* SMITH.

1. PLEADING—PURPOSE OF PLEADING.
   Purpose of rule relating to pleading is to eliminate all immaterial matters and frame issues either of fact or law to be tried by court or jury.

2. EVIDENCE—ADMISSIONS IN OPEN COURT OR IN PLEADINGS BINDING.
   Since admission in open court is binding on party making it, and court may act on it without other proof relating thereto, such admission is equally binding and may be acted on when made in pleadings which rules require to be filed.

3. JUDGMENT—MAY BE ENTERED ON UNCONDITIONAL ADMISSION IN PLEADINGS.

Court may enter judgment on pleadings where they disclose unconditional admission of liability for amount for which judgment is entered.

Appeal from Wayne; Boomhower (Xenophon), J., presiding. Submitted October 21, 1931. (Docket No. 164, Calendar No. 35,977.) Decided December 8, 1931.

Assumpsit by Detroit Trust Company, as receiver of Guaranty Investment Company, against Frederick P. Smith on promissory notes. Judgment for plaintiff. Defendant appeals. Affirmed.

Martin, Hunt & Field, for plaintiff.

A. D. Ruegsegger, for defendant.

SHARPE, J. The declaration filed herein alleged that on August 10, 1927, defendant executed eight promissory notes in the sum of $5,000 each and one in the sum of $4,000, payable to the order of the Guaranty Trust Company of Detroit, trustee, all payable one year after date, with interest at the rate of six per cent. until maturity, payable semi-annually, and thereafter at the rate of seven per cent. until paid; that these notes were duly assigned to the Guaranty Investment Company; that the defendant had paid the interest thereon to February 10, 1928, and that there was then due thereon the principal sum of $44,000, with interest from that date. Copies of the notes, which were secured by a real estate mortgage, were annexed thereto.

In a plea filed by defendant's attorney he admitted the truth of the above allegations except as to the

amount of the indebtedness claimed. In a notice of special defense attached thereto, he admitted a loan of $40,000, and averred that the sum of $4,000 was a charge made by the payee over and above the interest rate for making the loan, and that such fact was known to the plaintiff at the time of the transfer.

This plea and notice were filed on May 23, 1931. On May 25th, the plaintiff filed a reply thereto, saying:

"that for the purpose of this suit this plaintiff will not deny the allegations set forth in support of said special defenses and therefore claims a judgment against said defendant for the sum of $40,000 without interest, and costs."

On June 9th following, the plaintiff entered a motion for judgment for this amount, based upon the pleadings, and pursuant thereto a judgment was entered for plaintiff on June 15, 1931, of which defendant seeks review by appeal.

The record also discloses that the Detroit Trust Company was appointed receiver of the Guaranty Investment Company on July 14, 1931, and entered its appearance to the notice of appeal filed.

The question presented is whether a court may enter a judgment upon the pleadings where, as here, they disclose an unconditional admission of liability for the amount for which the judgment is entered. Defendant contends that there is no statute in this State or rule of this court providing therefor. He calls attention to Michigan Court Rule No. 30, providing for summary judgments.

The declaration as filed alleged an indebtedness of $44,000. The answer filed thereto admitted an indebtedness of $40,000 on the notes sued upon. Plaintiff filed an admission that it would be content with a judgment for that amount. The purpose of

the rule relating to pleadings is to eliminate all immaterial matters and frame issues either of fact or law to be tried by the court or a jury. A consideration of these pleadings left no issue to be determined. Had the case proceeded to a trial, and on its opening had the defendant admitted an indebtedness of $40,000, and had the plaintiff expressed its willingness to accept a judgment for that amount, surely the court could have then entered it without additional proof. An admission in open court is binding upon a party making it, and the court may act upon it without other proof relating thereto. And if so, such an admission is equally binding and may be acted upon when made in the pleadings which the rules require to be filed.

In the early case of *Crouse* v. *Derbyshire,* 10 Mich. 479 (82 Am. Dec. 51), the defendant was sued in justice's court upon a promissory note. Plaintiff declared on the note, and the defendant admitted its execution. The justice thereupon entered a judgment against him for the amount. In affirming the judgment in this court, it was said:

"As the law now stands, parties may be witnesses in their own behalf, as well as for their adversary. How absurd would it be to refuse the confession of a defendant made in the progress of a trial, unless he should make it upon oath. If the admission of a party or his attorney made in the progress of a trial is binding, why should it not be equally so when made in open court, at the forming of the issue, to prevent expense and litigation."

In 34 C. J. p. 143, it is said:

"Where defendant in his pleadings admits liability on the cause of action set up against him, plaintiff is entitled to have judgment entered in accordance with such admission, provided the admission is distinct, unequivocal, and unconditional,

and it is clear that no issue of fact is to be tried, and no serious question of law is to be argued. Such judgment may be entered on motion, without a trial on the merits, and without evidence in support of the admission; nor can defendant introduce evidence contradicting the admissions in his answer."

Many cases are cited in the footnote in support of the rule as stated. See, also, *Lakin-Allen Electric Co.* v. *Wayne Circuit Judge*, 247 Mich. 590, and *Grand Dress, Inc.*, v. *Detroit Dress Co.*, 248 Mich. 447.

The judgment is affirmed.

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

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE *v.* GEORGE.

JUSTICES OF PEACE—COLLATERAL ATTACK ON JUDGMENT.

Where proceedings before justice of peace and his docket entries show that he acquired jurisdiction of subject-matter and of person of defendant, judgment entered may not be collaterally attacked.

Appeal from Oakland; Doty (Frank L.), J. Submitted October 22, 1931. (Docket No. 177, Calendar No. 35,706.) Decided December 8, 1931.

Case in justice's court by Detroit Automobile Inter-Insurance Exchange and another against Daniel George. Judgment for plaintiffs and body

execution thereunder. *Habeas corpus* by defendant. Writ granted. Plaintiffs appeal. Reversed, and defendant remanded to custody.

Howard D. Brown (*Robert G. Jamieson,* of counsel), for plaintiffs.

SHARPE, J. Plaintiffs brought an action in trespass on the case against the defendant before a justice of the peace of the city of Royal Oak. A judgment was recovered, on which a body execution was issued and the defendant taken into custody by the sheriff of Oakland county. Thereupon defendant filed a petition in the circuit court of that county, praying for a writ of *habeas corpus* to inquire into the cause of his detention. In it he averred that he had been served with a summons in a civil suit begun by the plaintiffs before a justice of the peace of the city of Royal Oak; that he appeared in said court on several occasions in reference thereto; that adjournments were had against his protest, and that the judgment was rendered on an adjourned day in his absence, due to his having been informed by plaintiffs' attorney that he need not attend on that day.

The docket entries disclose that defendant was present and pleaded on October 29, 1929, and that the case was adjourned to November 6th, at 2 o'clock p. m., at which time, the plaintiffs being in court by attorney and the defendant not present, the case was held open for one hour, and, the defendant not then appearing, plaintiffs' proofs were submitted and judgment entered in their favor and against the defendant for "Damages $87.35, costs $7.50, total $94.85." The defendant then sought to show, and apparently did satisfy the court, that he was not

present on October 29th for the reason stated in his affidavit. The justice had jurisdiction of the person of the defendant and of the subject-matter. His docket entries disclose a valid and enforceable judgment. A delayed appeal therefrom might have been sought, or perhaps a review of it had in a chancery proceeding. *Garey* v. *Morley Brothers,* 234 Mich. 675. But it cannot be attacked collaterally.

Judicial power is vested in justices of the peace by our State Constitution. Article 7, § 1. By statute, 3 Comp. Laws 1929, § 15981:

"Justices' courts are hereby vested with all such powers, for the purpose of exercising jurisdiction conferred by this chapter, as are usual in courts of record, except the power of setting aside a verdict and arresting judgment thereon."

This court has many times held that, where the proceedings before the justice and his docket entries show that he acquired jurisdiction of the subject-matter and of the person of the defendant, the judgment entered may not be collaterally attacked. In concluding the opinion in *Miller* v. *Smith,* 115 Mich. 427, 433 (69 Am. St. Rep. 583), it was said:

"I think, not only is the weight of authority in favor of the doctrine that a judgment of this character cannot, in a collateral proceeding, be impeached by parol, but that it is in accordance with good sense and common honesty."

The holding in this case has been cited with approval in *Troy* v. *Rodgers,* 162 Mich. 28; *Rohrabacher* v. *Walsh,* 170 Mich. 59; *Hoben* v. *Citizens' Telephone Co.,* 176 Mich. 596; *Clabaugh* v. *Wayne Circuit Judge,* 228 Mich. 207, and *Garey* v. *Morley Brothers, supra.*

At the hearing, plaintiffs' counsel insisted that, in any event, attack could not be made by *habeas*

corpus, and cited *In re Joseph,* 206 Mich. 659. In view of what has been said, it is unnecessary to pass upon this question.

An order may be here entered vacating and setting aside that entered by the trial court discharging the defendant, with costs to the plaintiffs against the defendant, and remanding the defendant to the custody of the sheriff of the county of Oakland.

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

HOFFMAN *v.* SECURITY TRUST CO. OF DETROIT.

1. APPEAL AND ERROR—WHEN APPEAL PERFECTED—JURISDICTIONAL ACTS—SPECIAL LEAVE.

   Appeal is perfected when notice of appeal is filed within required time; both act and time of filing being jurisdictional, and default in either destroys right to appeal and leaves appellant remediless by way of appeal except on special leave of appellate court (Mich. Court Rules Nos. 56, 57, § 2).

2. SAME—MANDATORY ACTS OTHER THAN JURISDICTIONAL ONES—SPECIAL LEAVE TO COMPLETE APPEAL.

   Acts necessary to complete appeal other than timely filing of notice of appeal are not jurisdictional, but their timely performance is mandatory, in that they are requisites of appeal, and may be performed after prescribed time only on special leave of court (Mich. Court Rules Nos. 56, 58, § 2).

3. SAME—PRIMA FACIE RIGHT TO DISMISSAL—SPECIAL LEAVE TO COMPLETE APPEAL.

   Appellant's failure to do acts other than timely filing notice of appeal, necessary to complete appeal, *prima facie* entitles appellee to dismissal of appeal on motion, but court has discretion to permit appellant, on sufficient showing, to do such acts (Mich. Court Rule No. 58, § 2).

4. SAME—JUSTIFICATION FOR PRELIMINARY NOTICE.
It is appellant's desire to examine testimony and proceedings for errors based thereon, not his possession of transcript, which justifies preliminary notice of appeal (Mich. Court Rule No. 59, § 2).

5. SAME.
Where evidence is to be incorporated in record, either preliminary or full notice of appeal may be filed in first instance.

6. SAME—WHEN JURISDICTION OF APPELLATE COURT ATTACHES.
When appeal is perfected by seasonable filing of notice of appeal, jurisdiction of appellate court attaches, and trial court has no authority to dismiss appeal.

7. SAME—JURISDICTION MAY NOT BE CONFERRED BY STIPULATION.
Jurisdiction of circuit court to dismiss appeal after jurisdiction of appellate court attaches may not be conferred by stipulation.

8. SAME—CIRCUIT COURT MAY NOT DISMISS PERFECTED APPEAL.
Where appeal was perfected by timely filing notice of appeal, circuit court was without jurisdiction to dismiss appeal notwithstanding subsequent proceedings to complete appeal were without force, and therefore its order dismissing appeal is set aside, on review, without prejudice to parties to take such steps as they may be advised (Mich. Court Rule No. 58, § 2).

Appeal in nature of mandamus by Gustav W. Zanger and another, cross-plaintiffs and defendants, against Frank Hoffman and another, plaintiffs and cross-defendants, and Security Trust Company of Detroit and others, defendants and cross-defendants, to vacate order dismissing appeal from decree rendered in foreclosure proceedings. Submitted December 1, 1931. (Calendar No. 35,770.) Reversed, and order vacated December 10, 1931.

Atkinson, O'Brien & Ortman (*M. Hubert O'Brien,* of counsel), for appellants.

Shapero & Shapero, for appellees.

FEAD, J. Decree was entered February 14, 1931, and copy served on appellants' counsel. March 6th,

the 20th day after decree, preliminary notice of appeal was filed but service of a copy of it was not made on appellees until March 11th, in violation of Michigan Court Rule No. 61. Appellees refused to take service because it was not seasonably made, and, on March 11th, in circuit court, moved to dismiss the appeal. Order granting the motion was entered March 16th. On March 26th, appellants moved to vacate the order of March 16th, and March 31st the motion was denied. This is appeal, in the nature of mandamus, from the latter order.

The case involves both practice and jurisdiction on appeal.

An appeal is perfected when notice of appeal is filed within the required time. Michigan Court Rules Nos. 56 and 57. Both the act and time of filing are jurisdictional. Default in either destroys the right to appeal and leaves appellant remediless by way of appeal except upon special leave of the appellate court. Michigan Court Rule No. 57, § 2.

The other acts necessary to complete an appeal are not jurisdictional. Michigan Court Rule No. 56. But they and the time for their performance are mandatory, in that they are requisites of an appeal and the acts may be performed after the prescribed time only on special leave of court and upon such just terms as it may impose (Michigan Court Rule No. 58, § 2), except, of course, as to such acts as appellee may and shall waive.

Appellants' failure to do such other acts necessary to complete an appeal *prima facie* entitles appellee to dismissal of appeal on motion. However, the court has discretion to permit appellant to do such acts, on motion of appellant or on hearing of motion to dismiss. Michigan Court Rule No. 58, § 2. Appellant has the burden of showing such excuse for default as will move judicial discretion in his behalf.

Appellants had transcript of testimony before decree, but they filed preliminary notice of appeal. Appellees contend full notice of appeal was required under Michigan Court Rule No. 59, § 2. It is appellant's desire to examine the testimony and proceedings for errors based thereon, not his possession of a transcript, which justifies a preliminary notice of appeal. Where the evidence is to be incorporated in the record, either preliminary or full notice of appeal may be filed in the first instance.

When the appeal is perfected by seasonable filing of the notice of appeal, the jurisdiction of the appellate court attaches and the trial court has no authority to dismiss the appeal. *Lake Shore & Michigan Southern R. Co.* v. *Chambers,* 89 Mich. 5; 4 C. J. p. 562. In the instant case, it appears that jurisdiction of the circuit court was conceded at the hearing on motion to dismiss, but such jurisdiction can not be conferred by stipulation.

As the case stands, appellants have perfected an appeal by filing notice thereof, but all proceedings subsequent thereto are without force. To perform the other necessary acts, appellants must have leave of court. Michigan Court Rule No. 58, § 2.

In view of the uncertainty which prevails in the profession as to the procedure, we pass all technical questions of the scope of the present review and set aside the order dismissing appeal and subsequent order, without prejudice to the parties to take such steps as they may be advised, and without costs.

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

LOUWAERT *v.* D. GRAFF & SONS.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FURTHER COMPENSATION—FINDING OF DEPARTMENT.

Where injured employee's proofs showed renewed disability after discontinuance of compensation, but proof as to time of commencement of disability was vague and uncertain, department of labor and industry was at liberty to find that compensation should be allowed from date of filing petition, although employee claimed that it began one year and five months prior thereto, and gave uncorroborated testimony in support thereof.

Appeal from Department of Labor and Industry. Submitted October 13, 1931. (Docket No. 85, Calendar No. 35,909.) Decided January 4, 1932.

Katherine Louwaert presented her claim against D. Graff & Sons, employer, and General Accident Assurance Corporation, insurer, for an accidental injury. Plaintiff appeals from award made on application for further compensation. Affirmed.

Jackson, Fitzgerald & Dalm, for plaintiff.

Kerr, Lacey & Scroggie, for defendants.

FEAD, J. October 23, 1926, plaintiff, while in the employ of D. Graff & Sons, sustained an acid burn on the foot which produced an ulcer not yet healed. Compensation was paid under agreement to October 1, 1927, when final settlement receipt was filed. Plaintiff then returned to work for defendant and continued to about October 1, 1929, when she was discharged. March 5, 1931, she filed claim for fur-

On conclusiveness of review of industrial board's finding, see annotation in L. R. A. 1916A, 266 *et seq.;* L. R. A. 1917D, 186.

ther compensation. The deputy commissioner made allowance for total disability from October 1, 1929, and, on appeal of defendants, the award was modified by the board to allow compensation from March 5, 1931, the date of filing claim. Plaintiff appeals.

Plaintiff, her mother and her attending physician were the only witnesses at the hearing and their testimony was undisputed. Plaintiff claimed she was unable to work even before she was discharged and has been disabled continuously since. The doctor and the mother stated no time prior to hearing when she was so disabled. Plaintiff's own testimony was vague, uncertain, unsatisfactory, and needed corroboration, particularly in view of the facts that she had given the employer no notice of renewed disability and made no claim for compensation for a long time. The board, as trier of the facts, was at liberty to find that, while disability was shown, its commencement was not fairly proved, and that compensation should be allowed from the date of filing the petition for want of proper showing of a different date. While ordinarily undisputed evidence must be taken as true, the board is not required to accept it when, viewed reasonably, it would require the board to speculate as to a fact. The finding is conclusive and judgment is affirmed, with costs.

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

SLESSOR *v.* BOARD OF EDUCATION OF KALAMAZOO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXERCISING CONTROL—INDEPENDENT CONTRACTOR.

   That contractor installing apparatus in school gymnasium was directed by employee of school board where certain equipment should be placed was not exercising control over him so as to establish relation of master and servant, but was rather in nature of aid in performance of his work.

2. SAME—INDEPENDENT CONTRACTOR—SCHOOLS AND SCHOOL DISTRICTS.

   Where dealer not under workmen's compensation act sold gymnasium equipment to school board and engaged employer operating under said act to install it, said employer, who was not subject to control of either school board or dealer, was not employee, but independent contractor.

3. SAME—ACT FOR BENEFIT OF EMPLOYEES.

   Employees and not employers have benefit of workmen's compensation act.

4. SAME—TEST AS TO RELATIONSHIP.

   Power to control one engaged to do work, and not actual control, is test whether he is employee or independent contractor.

5. SAME—INDEPENDENT CONTRACTOR.

   Injured independent contractor does not come within provisions of workmen's compensation act.

6. SAME—EMPLOYER NOT WITHIN PROVISIONS OF ACT—SCHOOLS AND SCHOOL DISTRICTS.

   Employer operating under workmen's compensation act, who was accidentally killed while working with his men installing equipment in school gymnasium, was not within provisions of said act, although dealer contracting with him to install same was not under act, and, therefore, his dependents are not entitled to compensation from school board.

On power to control, as test determining whether one is independent contractor or employee, see annotation in L. R. A. 1916A, 118, 247; L. R. A. 1918F, 206.

Appeal from Department of Labor and Industry. Submitted October 13, 1931. (Docket No. 87, Calendar No. 35,878.) Decided January 4, 1932.

Margaret Slessor presented her claim against the Board of Education of the City of Kalamazoo, employer, and Employers Liability Assurance Corporation, insurer, for the accidental death of her husband, Alexander Slessor, while in defendants' employ. Award for plaintiff. Defendants appeal. Reversed.

Jackson, Fitzgerald & Dalm, for plaintiff.

Marvin J. Schaberg, for defendants.

WIEST, J. Defendant board of education purchased from Mower & Rose, dealers, certain gymnasium equipment, to be installed by the seller in a school building. Mower & Rose were not operating under the workmen's compensation act (2 Comp. Laws 1929, § 8407 *et seq.*), and employed Alexander Slessor, who was an employer operating under the act, to make the installation. Mr. Slessor was a general contractor, and for seven or eight years had installed gymnasium equipment for Mower & Rose, collected pay for doing so, and paid his employees. While about the work of installation Mr. Slessor was killed and the department of labor and industry held the defendant board of education liable to pay compensation to his widow.

The principal question is whether Mr. Slessor was an employee of the school board, by reason of the fact that Mower & Rose were not operating under the compensation act, or an independent contractor. Mr. Slessor employed men, and for that reason elected to come under the act. At the time of his death Mr. Slessor was working with his men. He undertook to carry to completion a definite piece of

work in his own line of business. He was an employer, paid his employees with his own checks, furnished his own tools, and was free to render, at will, service to others. He was not on any pay roll. He was an independent contractor.

There was evidence that an employee of the defendant board directed where certain of the equipment should be placed. This was not control of Mr. Slessor but an aid in the performance of his work.

Plaintiff invokes the following provision of the statute:

"That one employed by a contractor who has contracted with a county, city, township, incorporated village, school district or the State, through its representatives, shall not be considered an employee of the State, county, city, township, incorporated village or school district which made the contract, when such contractor is subject to this act." 2 Comp. Laws 1929, § 8413.

Mower & Rose contracted with the school board. Mr. Slessor was not an employee of Mower & Rose, but an independent contractor, operating under the compensation act. Unless it be found that Mr. Slessor was an employee of the school board, then the claim was barred because not made within six months after the accident (2 Comp. Laws 1929, § 8431).

Suppose we consider the contract for installation one between the school board and Mr. Slessor, then there would exist a contract with an employer who was operating under the compensation act, and, had one of his employees been the injured person, liability therefor would not reach the school board. Employees, and not employers, have the benefit of the act. Mr. Slessor was an independent contractor operating under the compensation act.

Mr. Slessor was not at all subject to the control of the school board. If he declined to submit to suggestions of an employee of the school board that board had no power to discharge him for disobedience. It is the power to control and not the fact of control which is the test. Mr. Slessor was exercising an independent employment, contracting to perform particular pieces of work for others, according to his own methods, with his own employees, and without subjection to control of his employer, except as to the result called for by his undertaking. His employees worked for him, looked to him for their pay, he collected compensation due him for their labor and his own, and, from his contract earnings, paid his help. He was not required to do the work himself, and, in fact, at the time of accident, was using the labor of others in his employ, and he alone could have discharged any one of his employees.

An injured independent contractor does not come within any provision of the workmen's compensation act. (See 2 Comp. Laws 1929, § 8416.) The compensation act is for the benefit of injured employees and not injured employers. See *Jacobson* v. *Weidman Lumber Co.*, 246 Mich. 189.

Mr. Slessor contracted to produce a result, the means being left to his selection and control. The fact that Mr. Slessor was working on the job he had contracted to perform did not at all change his relation from that of an independent contractor to that of an employee.

For the reasons pointed out 2 Comp. Laws 1929, §§ 8413 and 8416, are inapplicable.

The department of labor and industry erroneously awarded compensation. The award is vacated, with costs.

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

SCHULTZ *v.* CHEVROLET MOTOR CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ASSAULT BY FELLOW EMPLOYEE.

   Assault by one employee on another for personal reasons, not growing out of relation as fellow employees or out of acts in performance of their work, may not be held to arise out of employment.

2. SAME—COURSE OF EMPLOYMENT.

   Where plaintiff and fellow employee were engaged in unloading "pedal bundles" from truck, when latter, angry because he was hit by bundle tossed by plaintiff, struck him over head with stake, fracturing his skull, injuries resulting from assault arose out of and in course of employment within meaning of workmen's compensation act.

Appeal from the Department of Labor and Industry. Submitted December 19, 1931. (Docket No. 230, Calendar No. 36,069.) Decided January 4, 1932.

Joseph Schultz presented his claim against Chevrolet Motor Company, Division of General Motors Corporation, for an injury sustained during the course of employment. Award to plaintiff. Defendant appeals. Affirmed.

Louis C. Miriani, for plaintiff.

J. G. Stevenson, for defendant.

WIEST, J. Plaintiff and another employee of defendant company were engaged in unloading "pedal bundles" from a truck. Plaintiff tossed a bundle and it struck his fellow employee. The fellow employee was angered thereby, seized a stake, and

On injury from assault arising out of or in course of employment, see annotation in 15 A. L. R. 589; 21 A. L. R. 758; 29 A. L. R. 438; 40 A. L. R. 1123; 72 A. L. R. 110.

struck plaintiff, fracturing his skull. Defendant reported the accident but disclaimed that it arose out of the employment. This is an appeal by defendant from an award of compensation to plaintiff, and presents the question of whether the accident arose out of the employment. It is conceded that the accident arose in the course of the employment.

Defendant cites *Marshall* v. *Baker-Vawter Co.*, 206 Mich. 466, and plaintiff cites *Little* v. *Atlas Drop Forge Co.*, 221 Mich. 604. These cases are in harmony and recognize and quote the general rule stated in *Jacquemin* v. *Turner & Seymour Manfg. Co.*, 92 Conn. 382 (103 Atl. 115, L. R. A. 1918E, 496). We again state that rule:

"If one employee assaults another employee solely to gratify his feeling of anger or hatred, the injury results from the voluntary act of the assailant and cannot be said to arise either directly out of the employment or as an incident of it. But when the employee is assaulted while he is defending his employer or his employer's property, or his employer's interests, or when the assault was incidental to some duty of his employment, the injuries he suffers in consequence of the assault will, as a rule, arise out of the employment. He will then be serving his employer's ends and not his own."

In the *Marshall Case* the court was bound by the following conclusion of the board:

" 'It would seem that there might have been some reason for the shooting, but we are absolutely unable to discover what it was.' "

The *Little Case* is in point with the case at bar. Practically all authority holds that an assault by one employee upon another for personal reasons, not growing out of the relation as fellow employees, or

out of acts in the performance of their work, cannot be held to arise out of the employment.

In the instant case there was causal relation between the employment and the assault. It was an act in the course of the work that provoked the assault, and the record is clear that the injuries inflicted were occasioned by anger over an act at that very time committed in the conduct of the work.

In *Stasmos* v. *State Industrial Commission,* 80 Okla. 221 (195 Pac. 762, 15 A. L. R. 576), compensation was allowed in an instance much like the one at bar. There one employee became angered at a remark of a fellow employee and seized a scantling and fractured his skull. It was held that the injuries inflicted arose, not only in the course of the employment but, as well, out of the employment. Cases of like import are *Verschleiser* v. *Joseph Stern Son, Inc.,* 229 N. Y. 192 (128 N. E. 126); *Carbone* v. *Loft,* 219 N. Y. 579 (114 N. E. 1062).

In *Pekin Cooperage Co.* v. *Industrial Commission,* 285 Ill. 31 (120 N. E. 530), it was stated:

"Where men are working together at the same work disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's work in which two men are engaged and as a result of it one injures the other, it may be inferred that the injury arose out of the employment."

The award is affirmed, with costs.

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

HOLBROOK *v.* BLICK.

1. EQUITY—JURISDICTION—FRAUD—RESCISSION—LIENS.
   Court of equity has jurisdiction in cases of fraud where property interests are involved, and where, on rescission, it is sought to impress lien against *res* in question on account of said fraud.

2. JOINT ADVENTURES—PARTNERSHIP—INTEREST IN LAND.
   Contract whereby plaintiffs purchased one-half of vendee's interest in contract on apartment house did not constitute partnership, but at most transaction was joint venture.

3. FRAUD—LACHES—WAIVER—INTENT.
   Where plaintiffs, on discovering that they had been defrauded in purchasing one-half of vendee's interest in land contract, promptly notified defendants, brief delay caused by plaintiffs' attempts at settlement, which in no way injured defendants, did not amount to waiver of right to rescind, in absence of acts on plaintiffs' part indicating intent to waive.

4. VENDOR AND PURCHASER—FRAUD—VENDORS LIABLE FOR FRAUDULENT CREDIT ON CONTRACT—INTENT.
   Where vendors in land contract represented entire consideration to be about $120,000, when in fact it was only about $82,000, and gave vendee credit for about $44,500, when in fact he had paid only about $6,000, making it possible for vendee to perpetrate fraud on plaintiffs, vendors are liable for consequences thereof, although they had no wrongful intent.

Appeal from Wayne; Jayne (Ira W.), J. Submitted October 30, 1931. (Docket No. 224, Calendar No. 36,132.) Decided January 4, 1932.

Bill by Frank Holbrook and another against Edward S. Blick and others to rescind, on ground of fraud, the purchase of an interest in real estate, and

for lien for amount paid by them. Decree for plaintiffs. Defendants appeal. Affirmed.

G. Sweetman Smith, for plaintiffs.

Lawhead & Kenney (*Lightner, Oxtoby, Hanley, Crawford & Dodd,* of counsel), for defendants.

BUTZEL, J. Frank Holbrook conducted a nursery from the yard and garage in the rear of his home, and also did some landscape gardening. He had previously worked in an automobile factory and had but little experience in financial and real estate transactions. He and his wife are plaintiffs herein. They had come to rely wholly on the business advice of one Edward S. Blick, defendant herein, and believed him to be honest and able, and one of their very best friends. Blick was the branch manager of a large bank in Detroit, and represented to plaintiffs that the president of the bank was a close friend of his, and had told him in confidence about the piece of property involved in the present litigation. Blick, in turn, therefore, requested plaintiffs not to mention it to anyone. Defendant Mulkey & Company, and its manager, John C. Mulkey, are defendants herein. They were engaged in buying and selling land contracts. They had purchased the vendor's interest in a contract for the sale of the Elmhurst Apartments in Highland Park, Michigan. Both the vendor's and vendee's interests had been traded in and transferred a number of times before defendants became interested. The vendee's interest had finally become vested in one Schrader, who later defaulted in his payments. The vendor's interest had been sold and payment of sums to become due thereon guaranteed by the Mulkeys, to William P.

Emery, trustee, defendant herein. Emery took no part in the transaction with plaintiffs, and he transferred his interest back to the Mulkey Company. He was properly absolved from all liability by the decree.

In 1928, Blick, learning that Schrader was in default, negotiated with him for the purchase of his interest, but found it more advantageous to wait until Schrader's interest should be extinguished by the foreclosure proceedings, and then deal with Mulkey & Company. After the Schrader foreclosure and repossession by Mulkey & Company, a new contract was entered into by Mulkey & Company with Blick as vendee, in which the purchase price of the property was stated to be $120,000, and the receipt of a down payment of $44,553.40 was acknowledged. As a matter of fact, only $6,400 or thereabouts was paid in on the contract. It should be noted, however, that the actual amount paid, when added to all amounts represented to have been paid by previous vendees on the former contract, amounted to $44,553.40, and that while the real purchase price was $82,000 or thereabouts, the original price in 1925 was $120,000. Had the old contract remained in force and been assigned to Blick, the amounts of the consideration and payments, as stated in the new contract, would have been correct.

While Blick was closing the deal with Mulkey & Company, he falsely represented the transaction to be in accordance with the new contract. By using what is commonly termed "intense salesmanship," he succeeded in persuading plaintiffs to purchase a one-half interest in the contract. He told them that $44,553.40 had been paid on it and plaintiffs agreed to acquire the one-half interest from Blick for $22,000.

In order to pay Blick, they drew $4,300 from the savings bank, practically wiping out their bank account; they discounted a note for $500; they placed a mortgage on their home for $3,400; and they surrendered a note for $2,500 representing a loan they had previously made to Blick. The balance they were to pay later. Blick represented that the rentals from the property were sufficient to make all further payments on the contract. He enjoined secrecy on the part of plaintiffs, and warned them not to appear in the apartment house and thus disclose their interest. They, therefore, made only a casual inspection of the building. Later in the year Blick came to them in great distress and stated that he was in most serious financial difficulties and might be subject to criminal prosecution unless he secured money immediately. Plaintiffs thereupon raised $1,000, which they turned over to him and he, in turn, gave them an assignment of the entire vendee's interest in the land contract. Blick was discharged by the bank for misconduct. The record shows Blick's duplicity in the entire transaction. Plaintiffs claimed that the assignment of the full interest was given to them at first as security, but Blick states that he gave an absolute assignment because he felt sorry for them. They permitted Blick to continue to collect the rents. In December, finding that Blick had collected a month's rent and converted it to his own use instead of applying it on the payments due Mulkey & Company, Holbrook went to see Mulkey & Company and found out for the first time that he had been deceived; that instead of paying $44,000, or thereabouts, for the vendee's interest, Blick had only paid $6,400, or thereabouts, although he had in the first instance received

amounts aggregating $10,697 from plaintiffs. Plaintiffs immediately protested, and over two weeks elapsed during which negotiations were carried on with Mulkey & Company in regard to a settlement, by which plaintiffs would keep the property and an allowance be made to them. During that time, plaintiffs collected a small amount of rent but promptly turned it over to the receiver who was appointed shortly thereafter in the present proceedings. Being unable to arrive at a settlement, they gave notice of rescission, and brought the present suit and asked for a decree against all of the defendants, and that the amount due them be declared a lien against the property.

There is much conflict in the testimony. Holbrook claims that Mulkey told him that it was customary in real estate deals to "pad" a land contract so that it could be sold to the unwary. The testimony was taken before a circuit court commissioner who made his findings of fact and law. They were reviewed by the circuit judge, who entered a decree in accordance therewith, finding the sum of $13,104.71 due plaintiffs and impressing a lien for that amount with interest against the property. Defendants Mulkey & Company and John C. Mulkey in their appeal raise a number of questions, which we shall discuss *seriatim.*

It is claimed that the court of equity had no jurisdiction. Defendant Emery appeared in the case, answered the bill, and asked that a receiver be appointed for the property. A court of equity has jurisdiction in cases of fraud, where property interests are involved, and where on rescission it is sought to impress a lien against the *res* in question on account of such fraud. *Wright* v. *Hake,* 38 Mich.

525; *Boyd* v. *Post,* 227 Mich. 328. The equity court properly acquired and kept jurisdiction.

It is claimed that Blick and the plaintiffs were copartners, and plaintiffs cannot complain on account of the action of their partner. At most, the transaction was a joint venture and not a copartnership. *Beecher* v. *Bush,* 45 Mich. 188 (40 Am. Rep. 465). See, also, *Brown* v. *Harris,* 139 Mich. 372.

It is claimed that plaintiffs by their participation in attempts at settlement waived their right to rescind. Plaintiffs promptly notified defendants of the fraud, and properly conserved the property as well as they could during the brief period pending attempts at settlement. We do not believe that their actions showed any intention to waive their rights, or that defendants in any way were injured by the short delay. See *Beloskursky* v. *Jozwiak,* 221 Mich. 316. A settlement to avoid litigation is always encouraged, and if no one is injured thereby during a short interval of negotiations, even if they come to naught, that is no waiver, provided, as in the present instance, there have been no acts indicating a waiver.

It is further claimed that defendants Mulkey should not be held liable. The circuit court commissioner, who heard the testimony, had the advantage of seeing the witnesses. Irrespective of this, however, when defendants Mulkey acknowledged in a contract the receipt of $44,553.40 when, as a matter of fact, only $6,000 had been paid to them, and they represented the entire consideration to be $120,000, when, as a matter of fact, it was only $82,000, or thereabouts, they became liable for any consequences resulting from their written misstatements. The case resembles that of *Hall-Doyle*

Equity Co. v. *Crook,* 245 Mich. 24. In that case, Mr. Justice SHARPE stated for the court as follows:

"It cannot well be said that if this fact be found plaintiff is not entitled to relief. While parties dealing with each other may indulge in 'seller's talk' as to the value of their respective properties, a false representation of a fact bearing thereon, relied upon by the purchaser, and which becomes an inducing cause of the contract made, is actionable on the ground of fraud. *Pratt* v. *Allegan Circuit Judge,* 177 Mich. 558. The holding in that case was cited with approval in the recent case of *German Bundesheim Society* v. *Schmidt,* 242 Mich. 139, and also in *Merlau* v. *Kalamazoo Circuit Judge,* 180 Mich. 393. In the latter case, one of the false representations relied on, and held to be actionable, was the statement of the defendant that he had sold the property on a land contract for $4,000 and received a payment of $1,500 thereon. Clearly, the plaintiff was entitled to relief against the estate of Mr. Blake and against Mrs. Blake.

"While there probably was no intent to defraud on the part of Mr. Crook, his unwarranted action made it possible for Blake to perpetrate the fraud upon the plaintiff. He could but have understood that Blake wanted this contract for the purpose of satisfying the plaintiff that the oral statement theretofore made by him was true. In *Stoney Creek Woolen Co.* v. *Smalley,* 111 Mich. 321, 324, it was said:

" 'Where one deliberately gives another a false statement in writing, knowing the purpose for which it is to be used, which that other uses to deceive a third party, he is a joint wrong-doer, and must be held responsible for the consequences which follow.'

"That Crook received no benefit from the fraud is no defense."

While we do not hold that defendants John C. Mulkey and Mulkey & Company had any wrongful

intent in placing misleading figures in the new contract, nevertheless, in so doing they became responsible for the unfortunate circumstances that followed and made themselves liable.

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

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

SPERO *v.* HEAGANY & DRAPER CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSABLE ACCIDENT.
   Generally, accidents to employee while going to or from his work and not in immediate vicinity thereof do not arise out of or in course of his employment, unless some service was being rendered to employer at time of accident.
2. SAME—OUT OF AND IN COURSE OF EMPLOYMENT—ASPHYXIATION.
   Where automobile salesman was permitted to keep car he was selling at his home until sold, and was overcome by monoxide gas when he went to get car ready to show to prospective customer in morning, resulting in his death, said accident arose out of and in course of his employment.
3. SAME—BASIS OF AWARD.
   Compensation allowed to dependents of deceased employee was properly based on amount reported by employer to be his weekly wage, in absence of any evidence inconsistent therewith.

On injury while going to or from work, as arising out of and in the course of employment, see annotation in L. R. A. 1916A, 60 *et. seq.*

4. SAME—AWARD TO MINOR DAUGHTER NOT MADE PARTY.

Award of compensation to widow and minor daughter of deceased employee, "share and share alike," was proper, although daughter was not made party plaintiff (2 Comp. Laws 1929, § 8421).

Appeal from Department of Labor and Industry. Submitted October 14, 1931. (Docket No. 105, Calendar No. 35,772.) Decided January 4, 1932.

Mabel Spero presented her claim against Heagany & Draper Company, employer, and Continental Casualty Company, insurer, for the accidental death of her husband, Benjamin C. Spero, while in defendant's employ. Award to plaintiff. Defendants appeal. Affirmed.

Weadock & Weadock, for plaintiff.

Mason, Alexander & McCaslin (*H. Monroe Stanton,* of counsel), for defendants.

MCDONALD, J. This is an appeal from an award of the department of labor and industry allowing compensation to Mabel Spero on account of the death of her husband, Benjamin C. Spero, which she claims was caused by injuries arising out of and in the course of his employment with the defendant Heagany & Draper Company.

Plaintiff's decedent was employed on a commission basis as a used car salesman. He was permitted to take any car that he desired to sell and keep it at his home until it was sold. On the morning of his death, which occurred on June 19, 1930, he had an appointment with a prospective purchaser at eight o'clock. He went to the garage to get the car apparently for the purpose of keeping that appointment. Something had gone wrong with the carburetor, and while repairing it, or attempting to

start the car, it is not certain which, he was overcome by carbon monoxide and was found dead in the garage by a neighbor.

The record presents three questions for our consideration, all of which were decided adversely to the defendants' contention by the commission.

1. Did the injury which resulted in the death of Benjamin C. Spero arise out of and in the course of his employment?

It is held as a general rule that accidents to an employee while going to or from his work and not in the immediate vicinity thereof do not arise out of or in the course of his employment. Exceptions to this rule are found in cases where the facts show some service was being rendered to the employer at the time of the accident. It is immaterial to his right to compensation under the act whether he is going to or from his place of employment if at the time he is accidently injured he is doing something he is authorized to do for his employer's benefit. The test is well stated by Mr. Justice STEERE in *Clifton* v. *Kroger Grocery & Baking Co.*, 217 Mich. 462, as follows:

"Broadly defined, it may be taken as authoritatively settled that 'out of and in the course of his employment' covers those accidents which befall an employee while he is discharging some duty he is authorized or directed to perform for the furtherance, directly or indirectly, of his employer's business."

Adopting this test, the controlling question in the instant case is whether the plaintiff's decedent at the time of the accident was performing some work which he was authorized to perform in the interests of his employer. The question is answered by the undisputed facts and by fair inferences from cir-

cumstances concerning his movements about the time of his injuries and death. It is undisputed that he was getting his employer's car ready for a demonstration to a prospective customer. He was engaged in his employer's business whether adjusting the carburetor, backing the car out of the garage or on his way to keep an appointment with his prospect. The car belonged to his employer who had intrusted it to him for sale. He was permitted to keep it in his own garage. He was permitted to go direct from his home to a customer without reporting to the office. He was directed and expected to remedy any defect in the car which did not require expert treatment. It was his duty to keep the car ready for sale and to take it to a prospective customer for demonstration. He was performing this duty at the time of his injury. It was a duty which he was required to perform under his employment contract. It was authorized by his employer and was in furtherance of its business. The case is similar in principle to *Derleth* v. *Roach & Seeber Co.*, 227 Mich. 258 (36 A. L. R. 472), but much clearer in its applicable facts. To the same effect is *Punches* v. *American Box Board Co.*, 216 Mich. 342. The commission was right in finding that the accident arose out of and in the course of decedent's employment.

2. It is the contention of the defendants that compensation should not have been allowed because the decedent had no daily wage and there was no way of determining his weekly wage.

It was the opinion of the commission that decedent's average weekly wage should be determined by subdivision (c) of section 11 of part 2 of the act, being 2 Comp. Laws 1929, § 8427, which provides

that in cases where it is impossible to ascertain the exact daily wage—

"Such daily earnings shall be taken and held to be for all the purposes of this act such a sum as having regard to the previous daily earnings of the injured employee and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality shall most nearly approximate the daily earnings of the said injured employee at the time he received the accidental injury, in the employment in which he was working at such time."

The defendants say that it is impossible to follow this section in ascertaining decedent's daily wage because there is no evidence of his previous daily earnings or of that of other employees similarly employed in the same locality. In this the defendants are right; but when the defendant Heagany & Draper Company filed its report of compensable accident, it knew of decedent's previous daily earnings and of the earnings of its other employees. It was possible for it to make an approximately correct estimate of his weekly wage. It apparently did so, for it reported it to be $35. While the commission talked of computing the decedent's average weekly wage by subdivision (c), it ultimately accepted the amount as reported by defendant, and fixed the average weekly wage at $35. In the absence of any evidence inconsistent therewith, the commission was justified in treating the report as *prima facie* evidence of decedent's earnings.

3. The defendants further complain of the award because the compensation allowed is to the plaintiff and to a dependent minor child, Lenore Spero, "share and share alike." This objection is based

on the fact that Lenore Spero was not made a party plaintiff, and, as no application was made for compensation for her, she should receive none.

The question is whether a dependent child as well as a surviving wife or husband must make application for compensation. We do not think so. Compensation is not computed on the basis of the number of dependents a decedent leaves. In the instant case, the total compensation awarded is no greater than the wife would have received if there had been no other dependents. But the statute provides that dependents are entitled to share equally in the death benefit (2 Comp. Laws 1929, § 8421), and it is satisfied if the award makes provision for them.

The award is affirmed, with costs to the plaintiff.

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

GROLEAU *v.* FORD MOTOR CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPROPRIATE REMEDY—CONTINUING DISABILITY.

Where agreement by employer to pay injured employee compensation during total disability was approved by department of labor and industry, and settlement receipt was filed but not approved by department, petition for further compensation growing out of same accident, not being proper remedy, should have been denied.

Appeal from Department of Labor and Industry. Submitted October 8, 1931. (Docket No. 61, Calendar No. 35,883.) Decided January 4, 1932.

As to review of weekly payments to injured employee, see annotation in L. R. A. 1916A, 163; L. R. A. 1917D, 186.

Fred Groleau presented his claim against Ford Motor Company, for an accidental injury while in its employ. From award made on petition for further compensation, both parties appeal. Reversed, and order set aside.

Derham & Derham, for plaintiff.

E. C. Starkey, for defendant.

SHARPE, J. On January 20, 1922, the plaintiff, while in the employ of the Michigan Iron, Land & Timber Company, defendant's predecessor, as a top loader, was injured by having his foot crushed. A report of compensable accident was made by the company, followed by an agreement to pay $14 per week during total disability. This agreement was approved by the commission on February 17, 1922, and payments to the amount of $522.67 made thereunder. Settlement receipts were thereafter filed, but not approved.

On December 14, 1925, it became necessary to amputate two of his toes, and an agreement was entered into on February 17, 1926, for the payment of $14 per week for 40 weeks, approved by the commission on February 26th of that year. A receipt for such payment to the amount of $560 was subsequently filed, but not approved.

On October 13, 1926, amputation of the foot became necessary, and an agreement was entered into on November 10th for the payment of $14 a week for 85 weeks, and approved by the commission on December 23d of that year. A receipt therefor, acknowledging payment in the amount of $1,190 to May 30, 1928, was filed, but not approved. The total amount thus paid on account of said accident was the sum of $2,272.67. It appears that the defendant also furnished him an artificial foot.

On July 31, 1930, the plaintiff filed a petition for further compensation, in which he stated that he was injured on January 20, 1922, and was paid compensation therefor for about three months; that since that date "he has been disabled in the employment in which he was engaged at the time of the said injury and is entitled to further compensation;" that "his condition gradually grew worse until it was necessary to amputate said foot (toes) on or about December 14, 1925," and prayed "that he be granted such relief as he is entitled to under the workmen's compensation law of Michigan" (2 Comp. Laws 1929, § 8407 *et seq.*).

The deputy commissioner made an award of $14 per week for 203 weeks (from January 20, 1922, to December 14, 1925) and 3½ weeks (from September 18, 1926, to October 13, 1926), less the sum of $522.67 received by him, in all, $2,368.33. On review before the commission, it applied the statute of limitations to all sums collectible under the settlement agreement approved by it on February 17, 1922, before the hearing of the application for further compensation, and made an award in the sum of $455. Plaintiff appeals.

The agreement first entered into and approved by the commission on February 17, 1922, provided for payment during total disability. The petition for further compensation alleged disablement since the date of his injury on January 20, 1922. Under our recent holding in *Morgan* v. *Chevrolet Motor Co.*, 255 Mich. 602, it should have been denied. As the defendant has also taken an appeal, the award made by the commission is reversed and set aside.

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

PENNSYLVANIA RAILROAD CO. *v.* MARCELLETTI.

1. CARRIERS—RATES—INTERSTATE COMMERCE.
   Interstate carriers are subject to and compelled to make fixed freight charges or rates, which are stated in tariff filed with interstate commerce commission.

2. SAME—DISCRIMINATION PROHIBITED.
   Discrimination between shippers being prohibited by statute (49 USCA, § 6[7]), as matter of public policy, interstate carriers are required not only to make but to collect for like services uniform charges from shippers.

3. SAME—CONTRACT MAY PROVIDE THAT CONSIGNOR ASSUMES NO LIABILITY FOR FREIGHT.
   Contract for interstate carriage may embody provision that consignor assumes no liability for payment of freight charges, and that carrier is to look for payment to consignee alone.

4. SAME—DELIVERY IN VIOLATION OF BILL OF LADING—CONSIGNOR'S LIABILITY FOR FREIGHT.
   Delivery by interstate carrier in violation of provision in bill of lading that delivery is to be made on payment of charges by consignee will not relieve shipper of obligation to pay freight, in view of statute (49 USCA, § 6[7]) prohibiting discrimination between shippers.

5. SAME—CONSIGNOR LIABLE FOR FREIGHT IN ABSENCE OF "NO RECOURSE" PROVISION.
   Where shipper's written order to carrier to deliver, without bill of lading, interstate shipment to consignee upon payment of all freight and refrigeration charges did not recite that it was without recourse on him, he was not released from liability for freight charges which, through mistake, carrier failed to collect on delivery.

6. SAME—CONSIGNOR CHARGEABLE WITH NOTICE OF PUBLISHED RATE AND OF HIS LIABILITY.
   As matter of law, shipper is chargeable with notice of published rate for interstate shipments and that primary liability of payment thereof is on him.

7. SAME—PRINCIPAL AND AGENT—CONSIGNOR'S LIABILITY FOR FREIGHT.

Failure of consignee, who was consignor's agent in paying freight charges, to pay full amount thereof through mistake of interstate carrier, did not relieve consignor of his primary obligation to pay for service which he caused carrier to render, and therefore he is liable for balance due.

Appeal from Van Buren; Miles (Fred T.), J., presiding. Submitted October 8, 1931. (Docket No. 62, Calendar No. 35,855.) Decided January 4, 1932.

Assumpsit by Pennsylvania Railroad Company, a foreign corporation, against James Marcelletti for balance due for freight charges. Judgment for defendant in justice's court. Plaintiff appealed to circuit court. Judgment for defendant. Plaintiff appeals. Reversed, and new trial granted.

Howard, Kimball & Howard, for plaintiff.

Earl L. Burhans (*David Anderson,* of counsel), for defendant.

NORTH, J. Plaintiff transported by freight for defendant an interstate shipment of grapes from Paw Paw, Michigan, to the buyer, Highland Fruit Company, at Highland, Illinois. Defendant consigned the shipment to himself, but with direction to "Advise Highland Fruit Company, Highland, Illinois;" also "Deliver on the written order of the consignee without bill of lading." Defendant attached to the draft on purchaser the following written order:

"Paw Paw, Mich. 10-5/27.

"Freight Agent,
"Pennsylvania Railroad,
"Highland, Illinois.

"Please deliver on this order, without bill of lading, car FGE 43569, containing 1150 twelve-quarts

and 200 four quarts to Highland Fruit Company upon payment of all freight and refrigeration charges.

"JAMES MARCELLETTI."

Upon presentation of the foregoing order and payment of charges amounting to $145.09 to plaintiff the shipment was delivered to the purchaser. Nearly two months later plaintiff discovered that by mistake it had undercharged for this shipment to the amount of $61.43. In the meantime the purchaser had become a bankrupt. Plaintiff demanded of defendant payment of this deficiency in freight charges. Payment was refused, defendant claiming that under the terms of this shipment the purchaser only was liable. Suit was instituted in justice's court, where defendant had judgment. The same result followed on appeal to the circuit court, and plaintiff has appealed.

The question of law presented is the right of plaintiff to recover from defendant the amount of the undercharge on this freight shipment. Interstate carriers are subject to and compelled to make fixed freight charges or rates, which are stated in the tariff filed with the interstate commerce commission. Discrimination between shippers is prohibited by statute (49 USCA, § 6 [7]). Hence, as a matter of public policy, interstate carriers are required not only to make but to collect for like services uniform charges from shippers. 4 R. C. L. p. 857. In carrying out this policy it has been held:

"It is well settled * * * that though the goods are only to be delivered upon payment by the consignee of the freight charges, the shipper is not relieved on account of a delivery by the carrier of the goods to the consignee without collecting the charges, though credit is voluntarily extended to the con-

signee. This right to collect from the consignor can only be barred by limitations or contract. Bankruptcy of the consignee does not relieve the shipper." *Moss Lumber Co.* v. *Railroad Co.*, 219 Ala. 593 (123 South. 90), citing many cases.

"310. To Whom Carrier May Look for Payment.—Ordinarily a carrier has a right to look for his compensation to the person who required him to perform the service by causing the goods to be delivered to him for transportation, and that person is generally of course the shipper named in the bill of lading, or the consignor. The fact that the latter does not own the goods has been held immaterial, on the ground that the carrier's contract and right to recover his freight cannot be made to depend on what may prove to be the legal effect of the negotiations between the consignor and the consignee on the title to the property which is the subject of transportation. Furthermore, even though there is a stipulation in a bill of lading providing that the consignee shall pay the freight, that does not of itself relieve the consignor, and a carrier is not bound at his peril to enforce the payment of freight from the consignees. The usual clause in bills of lading, that a cargo is to be delivered to the person named, or his assignees, 'he or they paying freight,' is only inserted as a recognition or assertion of the right of the master of a ship to retain the goods carried until his lien is satisfied by payment of the freight; it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains." 4 R. C. L. p. 857, and cases cited.

Undoubtedly the contract for carriage may embody a provision that the consignor assumes no liability for payment of freight charges, and that the carrier is to look for payment to the consignee alone.

Such was the contract in *King* v. *Van Slack*, 193 Mich. 105. See *Moss Lumber Co.* v. *Railroad Co., supra.* But the bill of lading in the instant case contains the following provision:

"If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

"The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of conditions.) (Signature of Consignor.)"

This statement was not signed by defendant. Notwithstanding this, he claims that since the carrier knew that delivery was to be made only upon presentation of the written order above noted, which recited that delivery was to be upon payment of all freight and refrigeration charges, defendant was relieved of his obligation to pay the freight the same as though he had signed the above-quoted statement contained in the bill of lading. In this we cannot agree. Instead, the conditions under which this shipment was made were practically the same as though there had been indorsed upon the bill of lading a notation that the charges were to be paid by consignee. As held by the authorities hereinbefore cited and many others, in view of the provision in the interstate commerce act, delivery by the carrier in violation of such a provision will not relieve the shipper from the obligation to pay the freight. There was nothing in the consignor's notice accompanying this shipment reciting that it was "without recourse" to him, as there would have been had he signed the portion of the bill of lading provided for in such cases. As a matter of law he was chargeable with notice of the published rate for such shipments and that the primary liability of payment was upon him. As was said in *Louis-*

ville & N. R. Co. v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217 (syllabus) (46 Sup. Ct. 73):

"The burden of the published rate rested on the consignor under the bill of lading; the consignee, in paying the freight, acted solely as the consignor's agent."

The failure of the consignor's agent to pay the full amount of freight charges does not relieve the consignor of his primary obligation to pay for the service which he caused the carrier to render.

Judgment for defendant in the circuit court was rendered on the theory that plaintiff's delivery of this shipment without collecting the full amount of freight from consignee was a breach of its contract with defendant, that damage resulting from such breach constituted a counterclaim which exactly offset plaintiff's claim. To so hold would be contrary to the holding of the authorities hereinbefore cited and in contravention of the provision against discrimination embodied in the interstate commerce act. Defendant in asserting his counterclaim relies upon *Chicago & North Western R. Co.* v. *Lindell*, 281 U. S. 14 (50 Sup. Ct. 200). We think that case is not applicable to the issue here presented, which involves nothing more or less than the right of the carrier to collect the full amount of its charge for the shipment; whereas in the case last above cited the shipper had an independent claim against the carrier for damage of goods in transit. The propriety and justice of permitting a counterclaim of such an independent cause of action is obvious and in no way violates the interstate commerce act.

Judgment of the circuit court is reversed, the case remanded, and a new trial ordered. Costs to appellant.

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

MOTYKA *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

MIECZNIK *v.* SAME.

KULESZA *v.* SAME.

ON REHEARING.

1. RAILROADS—CONTRIBUTORY NEGLIGENCE—PROTECTED CROSSING.
   Rule that one about to cross railroad track must take all reasonable precaution and be assured that it is safe to cross, and that failure to do so is contributory negligence as matter of law, precluding recovery, is applicable to so-called open crossings, but not to those protected by flagman, since some reliance may be placed on protection afforded at crossing.

2. SAME—QUESTION FOR JURY.
   Whether pedestrians killed at protected railroad crossing were guilty of contributory negligence was question for jury, where evidence shows that, when they approached crossing, flagman was in view and train was passing, but, when they attempted to cross, after train had passed, flagman had disappeared, and they were struck by locomotive backing down on them, which they could have seen had they taken precaution to look.
   NORTH, WIEST, and BUTZEL, JJ., dissenting.

Error to Wayne; Brennan (Vincent M.), J. Submitted January 6, 1931. (Docket Nos. 3, 4, 5, Calendar Nos. 35,082, 35,083, 35,084.) Decided April 7, 1931. Resubmitted June 12, 1931. Decided January 4, 1932.

Separate actions of case by Thomas Motyka, administrator of the estate of John Motyka, deceased, Mary Miecznik, administratrix of the estate of Casimir Krzewinski, deceased, and Maryanna

On right of traveler to rely on automatic signals at crossings, see annotation in L. R. A. 1916D, 788.

As to care required of driver of automobile at railroad crossing, see annotation in 21 L. R. A. (N. S.) 794; 29 L. R. A. (N. S.) 924; 46 L. R. A. (N. S.) 702.

Kulesza, administratrix of the estate of Stanislaw Kulesza, deceased, against the Detroit, Grand Haven & Milwaukee Railway Company, a Michigan corporation, and another for personal injuries received in the same accident at a railroad crossing and resulting in the death of plaintiffs' decedents, were tried jointly. Judgments for defendants *non obstante veredicto*. Plaintiffs bring error. Reversed, and judgments ordered entered on verdicts. Former opinion affirmed on rehearing (253 Mich. 647).

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

Frederic T. Harward and *Frederick V. Slocum,* for defendants.

ON REHEARING.

CLARK, C. J. Since this court in *Davis* v. *Railway Co.,* 241 Mich. 166, adopted the standard of conduct laid down in *Baltimore & Ohio R. Co.* v. *Goodman,* 275 U. S. 66 (48 Sup. Ct. 24, 56 A. L. R. 645), it has been held, quite consistently, that one about to cross a railroad track must take all reasonable precaution and be assured that it is safe to cross, and that failure so to do is contributory negligence, precluding recovery. This holding generally has been applied to so-called open crossings. But this case ought not to be treated as an open crossing case. Nor can it be said to be a case where the flagman was not on duty when plaintiffs attempted to cross, nor one where no act or conduct of the flagman could be construed as an invitation to cross or an assurance of safety. When plaintiffs' decedents came to the crossing the watchman was on the crossing. It was then a protected crossing. It is settled law, and it is common sense, that one may place some reliance on the protection afforded at the crossing. That being true, is it not wrong to hold that one about to cross

a protected crossing must on his own account take all the precautions and have all the assurances of safety required as to open or unprotected crossings? Does not such a holding ignore completely the settled law that one may rely to some extent at least on the protection afforded at the crossing? If one may place no reliance on gates and flagman, why have them?

In these cases, taking the facts, as we must, in the light favorable to plaintiffs, it appears that the boys came to the crossing protected by a flagman. They stopped and looked. The flagman's shanty was there. The crossing was obstructed by a moving train. The flagman was on the crossing. The train passed. The crossing cleared. The flagman left the crossing. The boys started across and were killed by a train which they might have seen, and, had this been an open crossing, it would be held that they should have seen it. The flagman should have protected this crossing as against such train, and, according to some of the evidence, he did not. The boys ought not to be held guilty of contributory negligence as a matter of law in not looking more carefully before crossing the track in view of the conduct of the watchman. It was for the jury to say whether, in view of the facts, their failure to look more carefully was contributory negligence.

Adhering to former opinion, the judgments are reversed, and causes remanded for judgments on the verdicts, with costs.

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

WIEST, J. (*dissenting*). The facts are not in dispute. No presumption of care can be indulged, for plaintiffs called the sole eyewitness and his testi-

mony must be accepted as true. Defendant's negligence must be conceded.

The statute required a flagman at the crossing when ordered by public authority (1 Comp. Laws 1929, § 1950, 2 Comp. Laws 1929, §§ 11051, 11170). One was ordered and was absent from his place of duty at the time of the accident. The statute, under penalty, also requires warning signals for the protection of crossings and all such safety measures are on a parity, but no one ever heard of recovery had by one who failed to look before crossing because he heard no signal. Plaintiffs do not claim any signal was given the young men to cross the tracks. The negligence alleged was failure to warn the young men of danger. The point of law involved is the same as if the railroad company had failed to give warning by bell or whistle at a crossing.

As said in *Duncan* v. *Railway Co.*, 46 Mo. App. 198, 207:

"And so here this watchman's duty was to give notice of approaching trains. It is of the same nature—performing the same office—as ringing the bell or sounding the whistle. The same rule will apply whether the signal should come from a ringing bell, a sounding whistle or the words of caution from the flagman or the watchman."

The young men were not invited to cross the tracks, for no flagman was in sight. Seeing no flagman, the young men walked upon the track without looking in the direction cars were approaching, and were struck and killed. Had they looked, while in a safety zone, as they might, they would have seen the cars and not have stepped upon the track.

It is not the law that a traveler is bound to exercise only such care as would protect him from injury if the railroad company be not at fault. It is not a harsh rule that a man should turn his head to look

for a train that may be in plain sight and injure or kill him if he steps upon the track. This degree of care rests upon him and want of care by others does not relieve him.

As stated in 2 Wood on Railroads (Minor's Ed.), p. 1518:

"No man has a right to depend entirely upon the care and prudence of others; he is bound himself to exercise due care to prevent injury to himself from the lack of proper caution in others."

Did the absence of the flagman relieve the young men of the duty to look where they were going? Upon this we quote the following from 2 White, Personal Injuries on Railroads, § 1001:

"But of course the absence of a flagman, like any other act of negligence on the part of a railroad company, will not relieve the traveler of the duty to look out for himself, as no one has a right to rely wholly upon the care and prudence of others for his own protection from danger. And if the train could have been seen approaching or if the traveler could have heard it and failed to look or listen, then the mere fact that the flagman was absent or failed to signal him, will not excuse his otherwise negligent conduct."

And again from Wood, p. 1522:

"While he has a right to expect that the company will discharge its duties, it does not release him from his obligation to exercise ordinary care to protect himself against a possible breach of its duty on the part of the company."

It cannot be said, as matter of law, that one signaled by a flagman to cross the track is thereafter required to stop, look, or listen for trains (*Lake Erie & Western R. Co.* v. *Sanders,* 72 Ind. App. 283 [125 N. E. 793]), but it can be said, as matter of law, that, where a crossing is supplied with a flagman and

the flagman is absent and does not invite a crossing, one is guilty of contributory negligence in crossing without looking and listening. *Cadwallader* v. *Railway Co.*, 128 Ind. 518 (27 N. E. 161).

"But absence, or negligence of a flagman, will not excuse a traveler about to cross the track from looking both ways and listening." (Syllabus) *Berry* v. *Railroad Co.*, 48 N. J. Law, 141 (4 Atl. 303).

Again quoting:

" 'To prove that a party is excused, where he has been careless, because the other party has failed to give the accustomed signals, or for any other act of negligence on his part, strikes at the principle upon which such actions are based. Such a rule is not sustained by any of the adjudged cases.' " *Wilcox* v. *Railroad Co.*, 39 N. Y. 358 (100 Am. Dec. 440), quoted with approval in *Ormsbee* v. *Railroad Corp.*, 14 R. I. 102, 107 (51 Am. Rep. 354):

"Failure on the part of those in charge of the locomotive to ring a bell or sound a whistle as a warning for the street crossing did not relieve the deceased, operating his car, from taking ordinary precautions for his safety. He was bound to use his senses in listening and looking, and using reasonable care to observe the warning signs along the way, pointing out that he was about to cross railroad tracks." *Wilson* v. *Railroad Co.* (C. C. A.), 38 Fed. (2d) 59.

While a traveler has a right to expect the performance of the statutory duties by the railroad with reference to warning, this expectation does not excuse him from exercising reasonable care to ascertain, by sight as well as hearing, whether there is a train coming immediately upon him as he attempts to cross the track.

"The same remark is true as to the absence of a flagman. If it is customary to have one at a crossing, and he is absent, a traveler has a right to rely

to some extent on this fact; but this does not excuse his not looking at all to see if a train is coming, when there are no obstacles to prevent his seeing if he looks." *Tyler* v. *Railroad Co.,* 157 Mass. 336 (32 N. E. 227).

In *Railroad Co.* v. *Houston,* 95 U. S. 697, quoted with approval in *Schofield* v. *Railway Co.,* 114 U. S. 615 (5 Sup. Ct. 1125), the rule was stated as follows:

"'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others.'"

There is no distinction between warnings by a flagman and other warnings provided by statute. All are intended to protect crossings.

I think the opinion of my Brother falls within the error pointed out in *Toledo, Wabash & Western R. Co.* v. *Shuckman,* 50 Ind. 42, where it was held error to instruct the jury that it was the duty of the deceased:

"To make such use of his eyes and ears, and all his faculties, as would enable him to avoid danger, provided the managers of the railroad train were doing their duty; if he did that he was free from blame."

The court held, quoting syllabus:

"It is the duty of a person about to cross a railroad track to use his faculties to his utmost ability, in proportion to the danger impending, whether the managers of the railroad train are doing their duty or otherwise."

The court also made the following quotation:

"In the case of *Ernst* v. *Railroad Co.,* 39 N. Y. 61 (100 Am. Dec. 405), the court says: 'Negligence in the railroad company in the giving of signals or in omitting precautions of any kind, will not excuse his' (in this case the decedent's) 'omission to be diligent in such use of his own means of avoiding danger. And where, by such use of his senses, the traveller might avoid danger, notwithstanding the neglect to give signals or warning, his omission is concurring negligence, and should be so peremptorily declared by the court.'"

In *Sala* v. *Railway Co.,* 85 Iowa, 678 (52 N. W. 664), it was stated:

"A railway crossing is apt to be a place of danger, and the persons using it should not omit the precaution of looking for an approaching train before going onto the track, when they may do so without inconvenience, even though a watchman should be present to give notice if a train is approaching. The absence of the watchman should not be regarded as an invitation to cross without looking for danger. Such a case is distinguishable from one where the watchman is present, and by a signal to cross, or by a failure to give any signal when he sees a crossing attempted, gives assurance, either express or implied, that it can be made without danger."

See, also, *Shaw* v. *Jewett, Rec'r,* 86 N. Y. 616; *Cincinnati, Hamilton & Indianapolis R. Co.* v. *Butler,* 103 Ind. 31 (2 N. E. 138).

In *Beagle* v. *Railroad Co.,* 184 Mich. 17, this court stated:

"It is said that the plaintiff had the right to rely upon the custom of the defendant to ring the bell. The exact effect of the defendant's negligence upon the duty of the plaintiff in the premises is well pointed out in *Ellis* v. *Railroad Co.,* 169 Mass. 600 (48 N. E. 839), where it is said:

" 'While the raising of the gates justified the plaintiff in attempting to cross when he did, and while that fact, and the facts that no whistle was sounded and no bell was rung, are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from looking and listening and taking thought for his own safety. He cannot rely wholly upon them, and cannot recover without showing more, as to his own conduct, than that he so relied. * * * We are of opinion that, as matter of law, there was no evidence from which it could be found that the plaintiff himself exercised due care, and the verdict for defendant was rightly ordered.' "

My Brother would reject from this case the rule stated in *Baltimore & Ohio R. Co.* v. *Goodman,* 275 U. S. 66 (48 Sup. Ct. 24, 56 A. L. R. 645), and adopted by this court in *Davis* v. *Railway Co.,* 241 Mich. 166; *DeJager* v. *Andringa,* 241 Mich. 474 (an opinion written by Justice CLARK); *Rosencranz* v. *Railroad Co.,* 244 Mich. 137; *Laurain* v. *Railroad Co.,* 249 Mich. 630, but neglects to state a standard of care as a substitute, and, apparently, would leave it to the humanitarian instincts of a jury.

The New York court of appeals, in *Schrader* v. *Railroad Co.,* 254 N. Y. 148 (172 N. E. 272), stated that the rule of the *Goodman Case* had never been adopted by that court, and gave the New York rule as follows:

"One who approaches any crossing, at any time, or under any circumstances, without taking any precautions for his safety, is guilty of contributory negligence as matter of law."

The rule in the *Goodman Case* is not a new one, and, as we have pointed out, has for ages been applied to so-called protected crossings.

In *Serfas* v. *Railroad Co.*, 270 Pa. 306 (113 Atl. 370, 14 A. L. R. 791), the rule to stop, look, and listen was held to apply when crossing gates are up.

There was no invitation to the young men, express or implied, to cross under the guidance of the flagman. Safety of pedestrians, as well as of persons traveling on trains, commands adherence to the rule of look and listen at railroad crossings.

We think plaintiffs' decedents were guilty of contributory negligence as matter of law, and it was the peremptory duty of the trial judge to so hold.

Under the authorities cited in this and our previous opinion, the judgment should be affirmed, with costs.

BUTZEL, J., concurred with WIEST, J.

NORTH, J. (*dissenting*). I concur with Justice WIEST because there is no testimony in this record tending to show that any invitation or misleading signal was given by the crossing tender which induced plaintiffs' decedents to attempt to cross. In such a case one who, at a highway crossing in broad daylight and in the absence of any distracting circumstance, walks in front of an approaching locomotive which would have been observed by exercise of the slightest degree of care, is guilty of contributory negligence, barring recovery for injuries sustained.

PEOPLE v. TODARO.

ON REHEARING.

1. CRIMINAL LAW—EVIDENCE—HEARSAY ADMISSIBLE AS PART OF RES GESTÆ.

In prosecution for robbery armed, testimony by officer making arrest that, when he brought defendant from his hiding place, someone in room said, referring to defendant as one of robbers, "That is one of them," was properly admitted as part of *res gestæ*, although it was hearsay, and person making remark was not identified.

2. SAME—STATEMENTS MADE IN PRESENCE OF ACCUSED ADMISSIBLE WHERE NOT DENIED—ACQUIESCENCE.

Statement made to arresting officer by unidentified person in presence of defendant "That is one of them," meaning that defendant was one of robbers engaged in hold-up, was properly admitted in evidence at his trial, where he made no denial at time it was made, since his acquiescence therein may be inferred therefrom.

WIEST and BUTZEL, JJ., dissenting.

Error to Wayne; Miller (Guy E.), J. Submitted October 16, 1930. (Docket No. 161, Calendar No. 35,048.) Decided February 27, 1931. Submitted on rehearing June 12, 1931. Decided January 4, 1932.

Joseph Todaro was convicted of robbery armed. Affirmed on rehearing.

Chawke & Sloan, for appellant.

Paul W. Voorhies, Attorney General, *Harry S. Toy,* Prosecuting Attorney, and *Oscar A. Kaufman,* Assistant Prosecuting Attorney, for the people.

ON REHEARING.

POTTER, J. This case was before the court in *People* v. *Todaro,* 253 Mich. 367, where defend-

Does the fact that one was not a participant or actor in an accident or affray render his statements or exclamations inadmissible as *res gestæ?* See annotation in 25 L. R. A. (N. S.) 550; 36 L. R. A. (N. S.) 530; L. R. A. 1915D, 215.

ant's conviction was affirmed. There was division of opinion among the members of the court at the time upon the admissibility of the statement made at the time of defendant's arrest by someone identifying Todaro as "one of them," when the police discerned him secreted behind the door and brought him out. The record is quoted in the opinion cited. Rehearing was had. The case is here for reconsideration. The important question stressed upon the argument is the admissibility of the testimony referred to. It was testimony of what someone else said. The person who said it was not present in court, not sworn, did not confront defendant, was not examined nor cross-examined. It is contended by defendant this testimony was hearsay, erroneously received, the jury improperly were permitted to consider it, defendant is entitled to a reversal of conviction and a new trial of the charge against him. It is claimed a similar question was before the court in *Detroit & Milwaukee R. Co.* v. *Van Steinburg,* 17 Mich. 99, where it is said:

"When the witness, S. H. Coon, was on the stand, he was asked the question, which I think entirely proper: 'Was your attention at the time called to the fact, whether or not the train came in without sounding the bell or whistle?' To which his reply was: 'It was talked of at the time, that the train came in without ringing the bell.' And, in reply to a similar question, George W. Coon says: 'My attention was called to it; I heard some one say it was not rung.' Each of these replies was objected to, and in each case it is evident that the witness, instead of confining himself to a proper answer to the question, was allowed to bring before the jury the statements of persons, who were not only not sworn, but whose names, even, were not known. It was impossible that such statements should be without influence upon the jury, especially as what these unknown persons are reported to have said had a tendency to

support a portion of the sworn testimony against another portion upon a disputed point. And, as this testimony from the Coons was incompetent and inadmissible for any purpose, I do not think the error committed in admitting it was cured by the instruction of the judge to the jury, that they ought not to consider it as proof of a substantive fact, as it was only proper as showing that the attention of witnesses was called to the ringing, or not ringing, of the bell."

Inasmuch as upon this question the rule of evidence in criminal cases is the same as in civil cases, it is claimed the court was in error in admitting this testimony and permitting its consideration by the jury. On the other hand, attention is called by the people to numerous authorities outside of Michigan holding testimony of exclamations by strangers admissible. 4 Chamberlayne on Evidence, § 2597; 3 Wigmore on Evidence (2d Ed.), §§ 1745–1747; Underhill, Criminal Evidence (2d Ed.), § 208; 1 Wharton, Criminal Evidence (10th Ed.), § 262; 1 Greenleaf, Evidence (16th Ed.), § 108; 2 Bishop, New Criminal Practice (2d Ed.), §§ 1085, 1086.

The people admit the general scope of the so-called "hearsay rule," but contend the testimony here involved falls within two well-recognized exceptions thereto. Terminology is not so important as the rule of law. It is immaterial whether the rules applicable are treated as exceptions to a more comprehensive rule or as separate rules in and of themselves. The practical question is whether as a matter of law this testimony was legally admissible. The people claim it was upon two well-settled grounds: *First,* as a part of the *res gestæ;* and, *second,* as a statement made in the presence and hearing of the accused under such circumstances that his failure to say anything in denial of the identification and accusation constituted evidence of

defendant's acquiescence, equivalent to an admission of its truth.

In *People* v. *Foley,* 64 Mich. 148, defendant was arrested and convicted of murdering two infant children in the nighttime. The people claimed defendant arose from bed and strangled the children. Their death was discovered next morning. One Mrs. Rice was permitted to testify as to what defendant's wife said, after discovering, the next morning, the children were dead. This was alleged as error. The court said:

"The testimony referred to respondent's conduct and statement immediately after the discovery of the death of the children, and at the house where it occurred. It was the statements of the wife, in the presence of the respondent, in regard to the manner of the children's death, and appears to have been necessary to a full understanding of what was said by the respondent; and in such case the rule sought to be applied, that the wife cannot testify against the husband, who is the respondent, is not encroached. The wife was not sworn in the case, and the facts queried after were a part of the *res gestæ.*"

In *People* v. *McArron,* 121 Mich. 1, defendant was convicted of manslaughter. It was held (quoting from the syllabus), "Evidence that respondent's mother said to him, immediately after the assault, 'Now, see what you have done,' was properly received as part of the *res gestæ.*"

In *People* v. *Hossler,* 135 Mich. 384, defendant was convicted of manslaughter. The parties had been drinking, got into an argument which resulted in a fight in which defendant so injured another that he died. It is said:

"The evidence shows that, after the fight at the barn, the defendant returned to Hodor's place, and said they had been fighting; and Andrew Payne, Jr.,

Hodor, and the defendant went to defendant's place. On the way, defendant said that he would have killed the old man if it had not been for his wife and children, and that they cried and begged him not to touch him any more. On their arrival, Mrs. Hossler said, in the presence of the defendant, to Hodor, 'Joe, don't let George go at the old man any more.' Error is assigned upon the admission of this remark by Mrs. Hossler upon the ground that it contains an implication that she was of the opinion that defendant had done more than he should have done, and that her admissions were not admissible against him without his consent, any more than her testimony would have been. The remark was made in the presence of her husband, and was, in our opinion, admissible. Upon the latter point, see *People* v. *Foley,* 64 Mich. 148, 158."

The testimony admitted in these cases was in relation to statements made by others than defendant in his presence. In one case, long after the offense had been committed, and in the others soon afterward. In all of them the testimony was held admissible as a part of the *res gestæ.* If the testimony objected to and held admissible in these cases was proper, clearly that held admissible in this case was within the *res gestæ* rule.

"*Res gestæ* are events speaking for themselves, through the instinctive words and acts of participants, but are not the words and acts of participants when narrating the events. What is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is *res gestæ;* it is part of the transaction itself." 1 Wharton Criminal Evidence (10th Ed.), § 262.

It is contended this testimony falls within the rule of admissions by acquiescence. Professor Greenleaf, at an early date in the development of the American jurisprudence, so clearly stated the rule that his language has been followed as a correct statement of the law by our court. *Dawson* v. *Hall,* 2 Mich. 390; *People* v. *Courtney,* 178 Mich. 137. Many authorities are collected, classified, and commented upon in the annotations in 4 Ann. Cas. 1039, to *Merriweather* v. *Commonwealth,* 118 Ky. 870 (82 S. W. 592), cited in *People* v. *Courtney, supra.*

"The statements of another are purely hearsay, unless made under such circumstances, in the presence and hearing of the accused, that his acquiescence in such statements can be plainly inferred from his demeanor or conduct." *People* v. *O'Brien,* 68 Mich. 468.

"Such evidence is most dangerous and should be received with great caution, and not admitted unless of statements or acts which naturally call for contradiction, or unless it consists of some assertion with respect to his rights in which, by silence, the party plainly acquiesces." *People* v. *Smith,* 172 N. Y. 210, 232 (64 N. E. 814).

After the holdup and robbery the police came and arrested part of the participants and recovered from them articles which had been stolen. The police were looking for the rest of the robbers. Defendant had secreted himself behind a door. Testimony that he did so was admissible for the same reason testimony of flight is admissible. When defendant was discovered and brought from his hiding place by police in the presence of the other robbers present, the robbed and perhaps others, someone said, "That is one of them." Defendant was thus identified to the police as a robber. He was about to be arrested. He was being accused of an offense, conviction of

which might deprive him of his liberty. He made no denial of his identity or his guilt. He apparently acquiesced in the identification and accusation. As stated in *People* v. *Todaro, supra:*

"It was for the jury to say whether the statement was made in the presence and hearing of the accused under such circumstances that his acquiescence therein could be inferred from his conduct and demeanor and failure to reply or respond thereto. When statements are made in the presence or hearing of a party to be affected thereby under circumstances from which his acquiescence in their truth may be fairly inferred, though not expressed, they are admissible in evidence and entitled to little or much consideration by the jury in accordance with what they find to be the facts."

A reconsideration of this case does not satisfy us there was error in defendant's conviction, which is affirmed.

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

WIEST, J. *(dissenting).* Upon rehearing, two questions are to be reconsidered: (1) Was the testimony of the police officer, relating to a statement of an unknown party, hearsay? (2) If so, did defendant's silence constitute acquiescence?

The relation by the witness of what an unknown third party said was clearly hearsay.

In Potter's Michigan Evidence, p. 2, the learned author succinctly stated:

"Hearsay evidence is a statement which a witness professes to have heard given by a third person as to some particular transaction or thing. Literally, what the witness says he heard another person say."

While this is elementary and needs no justifying citation, we do quote the following observation by the Supreme Court of the United States in *Donnelly* v. *United States,* 228 U. S. 243, 273 (33 Sup. Ct. 449, Ann. Cas. 1913E, 710), relative to the rule of exclusion:

"The chief grounds of its exclusion are, that the reported declaration (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination, these being most important safeguards of the truth, where a witness testifies in person, and as of his own knowledge; and, moreover, he who swears in court to the extra-judicial declaration does so (especially where the alleged declarant is dead) free from the embarrassment of present contradiction and with little or no danger of successful prosecution for perjury. It is commonly recognized that this double relaxation of the ordinary safeguards must very greatly multiply the probabilities of error, and that hearsay evidence is an unsafe reliance in a court of justice."

In the case at bar the declarant was unknown, and there was no way open to check up on the testimony of the police officer.

I cannot yield to the view expressed by Mr. Justice POTTER. I accept the view of Chief Justice Marshall, as found in *Mima Queen and Child* v. *Hepburn,* 7 Cranch (U. S.), 290:

"The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule."

An apt statement of application of the rule to this case is found in the same work of Potter, Michigan Evidence, p. 314. We quote:

"Testimony of what another told witness as to who committed an offense is hearsay."

Defendant's silence did not make the hearsay testimony admissible for the purpose of identifying him as one of the robbers. He was in a house of prostitution, and not in the position of an intruder, called upon to explain the reason for his presence there. The hearsay statement was addressed to the officer to be acted upon at his peril. The rule of acquiescence, by reason of failure to deny an accusation, is fraught with many exceptions, and at its best brings about the weakest assumption known to the law.

History is replete with instances of denial of accusations by the guilty. In the dark ages of English law an accused who refused to plead to an accusation was adjudged guilty. Since then the law has made progress, and, in this enlightened age, an accused may stand mute and the law requires the entry of a plea of not guilty.

The arrest in the case at bar was made upon a verbal accusation, and, so far as the record discloses, the accuser has not been sought. It would seem that the officer, upon hearing the accusation leading him to make the arrest, would, at least, have inquired the name of the accuser.

We do not pass upon the question of defendant's guilt, but, if he is guilty, the law demands better evidence than what an unknown person in a house of prostitution said to a police officer.

Submission to arrest and keeping silent to an accusation is not an admission of guilt on a par with flight from justice, and never enough to convict

an accused and send him to prison for a long term of years.

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

BUTZEL, J., concurred with WIEST, J.

BENSON *v.* WAYNE CIRCUIT JUDGE.

1. JUSTICES OF PEACE—APPEAL—DEFECTIVE RETURN—AMENDED RETURN—DISMISSAL OF APPEAL—ABUSE OF DISCRETION.

   Where, on appeal from justice's court, justice failed to return any pleadings, as required by 3 Comp. Laws 1929, § 16233, and, although appellant knew of said omission, he failed to procure amended return under sections 16236, 16237, there was no abuse of discretion in refusing permission to file pleadings four days before case was to be heard, and dismissing appeal.

2. MANDAMUS—DISMISSAL OF APPEAL—DELAY.

   Mandamus will not issue to compel circuit court to set aside order dismissing appeal from justice's court because of justice's defective return, where petition for mandamus was not filed until eight months after appeal had been dismissed, and hearing thereon was not brought on until two years after order to show cause was issued.

Mandamus by Edward H. Benson to compel DeWitt H. Merriam, Wayne circuit judge, to vacate an order dismissing appeal from justice's court. Submitted October 20, 1931. (Calendar No. 34,685.) Writ denied January 4, 1932.

Henry R. MacGillis, for plaintiff.

Frank P. Darin (*Harold Goodman,* of counsel), for defendant.

FEAD, J. In his return on appeal to circuit court, a justice of the peace failed to state or return any pleadings, oral or written, as required by 3 Comp. Laws 1929, § 16233. Plaintiff here, appellant there, knew at once of the omission, took no steps to procure an amended return under 3 Comp. Laws 1929, §§ 16236, 16237, but a month later, four days before the case was to be heard, moved the circuit court to permit pleadings to be filed. There was a dispute whether there had been any pleadings in justice's court. On motion of the appellee, the court entered judgment dismissing the appeal for want of a proper return. Eight months later, plaintiff filed petition for writ of mandamus to compel the court to set aside the judgment. The order to show cause was issued two years ago and is now brought on for hearing.

Plaintiff neglected to invoke the clear and definite remedy provided by statute by way of amended return. He has not been diligent in pursuing his action. There was no abuse of discretion, and no outstanding considerations of justice require issue of the discretionary writ of mandamus.

Writ denied, with costs.

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

LOCKE *v.* ÆTNA CASUALTY & SURETY CO.

1. RECEIVERS—ALLOWANCE OF ACCOUNT—BURDEN OF PROOF ON RECEIVER.

   On allowance of receiver's final account, he has burden of accounting for his acts and for property which came into his hands, and he may not hide behind lack of testimony which it is his duty to produce.

2. SAME—OUTLAWED COLLECTIBLE ACCOUNTS CHARGEABLE TO RECEIVER.

   On allowance of receiver's final account, collectible accounts which he allowed to outlaw without attempting to collect them are proper charges against him.

3. SAME—CONTINUING BUSINESS—LOSS OF PROFITS OUTSIDE BUSINESS NOT CHARGEABLE TO RECEIVER.

   Where receiver had been ordered by court to continue business, but instead of doing so he sublet premises at profit, which practice was later discontinued because of his alleged failure to pay rent, loss of profits from subletting was not properly chargeable to him, as he had no authority for subletting.

4. SAME—COMPENSATION—SERVICES.

   Allowance of compensation to receiver for services should have stopped at time liability for profits on subletting stopped, where he performed no other service.

Appeal from Wayne; Driscoll (George O.), J., presiding. Submitted October 21, 1931. (Docket No. 166, Calendar No. 35,824.) Decided January 4, 1932.

Petition by Charles A. Locke, receiver of the Brunswick Garage, a Michigan corporation, against Marcell S. Dolenga, former receiver, for an accounting. Ætna Casualty & Surety Company, a Connecticut corporation, surety on Dolenga's bond as receiver, intervened. From decree rendered, intervener appeals. Modified and affirmed.

Edward R. Kehoe, for plaintiff.

Stevenson, Butzel, Eaman & Long (*A. Hilliard Williams,* of counsel), for intervener.

FEAD, J. This is appeal by the surety on the bond of M. S. Dolenga, former receiver of Brunswick Garage, from allowance of Dolenga's account as receiver, ordered on petition of plaintiff, the present receiver. Dolenga was appointed in April, 1923, and removed for cause in February, 1930. He failed to take care of the property and permitted it to be lost, kept practically no books or records, disregarded advice of counsel and orders of the court, made no accounting, allowed collectible bills to be outlawed, and, in addition, the court thought he was not a reliable witness.

A multitude of items are involved. We are not satisfied that a just account can be made because some of plaintiff's claims of value seem too high and Dolenga has made no such showing of fair worth as will permit reduction. But Dolenga had the burden of accounting for his acts and for the property which came into his hands and he cannot hide behind a lack of testimony which it was his duty to produce.

The court allowed $5,523.25 as value of property lost through Dolenga's carelessness. We find that items aggregating $1,402.90 are not proper charges, for lack of proof of the item or the amount. We also find that additional credits of $435.79 should be allowed. No good will be served by detailing the items in an opinion, but a list of them will be handed counsel.

Dolenga permitted good book accounts of $483.14 to outlaw without attempting to collect, and there is no showing of present collectibility. They are proper charges against him.

When Dolenga became receiver, the city had condemned the real estate in which the garage was

conducted. It afterward paid him for loss of lease. However, it did not dispossess him at once. He had been ordered by the court to continue the business. Instead of so doing, he discontinued operations, rented the building from the city at $150 per month, and sublet it at $250 and $275 per month for a time. In the spring of 1924 the city refused to further rent to Dolenga with privilege to sublet at a profit. It is claimed the privilege was renewed, but that Dolenga neglected to pay the rent. The premises were let by the city to other tenants in the spring of 1924 and thereafter. Dolenga was charged with $8,875 as loss of profits from March, 1924, until his discharge, for failure to continue the rental arrangement.

We do not think this item is chargeable. The rental arrangement was not a continuance of the business ordered by the court. The receiver was not ordered to engage in it nor to continue it nor was it a duty imposed upon him by law.

Without petition therefor, the court allowed compensation to Dolenga at $125 per month for six months and $50 per month for the remainder of his incumbency on the ground that it would be unfair to charge him with loss of profits without compensating him for services he would have rendered in obtaining them. As his liability to account for rentals stops with his last actual collection of them, the allowance of compensation upon such basis necessarily stops at the same time. With the adjustments above, we find the account as follows:

Debits	
Cash received	$5,704.89
Collectible book accounts	483.14
Property lost	4,120.35
Total	$10,308.38

Credits	
Cash disbursements	$4,579.07
Additional disbursements	435.79
Receiver's fee, 6 mo. as allowed	750.00
Receiver's fee, 3 mo. as allowed	150.00
Total	$5,914.86

Decree will be modified to charge Dolenga with the balance of $4,393.52. Appellant will have costs of this court.

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

SAGINAW FINANCING CORP. *v.* DETROIT LUBRICATOR CO.

1. ASSIGNMENTS—DEFENSES AVAILABLE AGAINST ASSIGNEE ARE THOSE EXISTING AT TIME OF ASSIGNMENT.

   Rule that assignee of nonnegotiable chose takes subject to defenses means defenses existing at time of assignment.

2. SAME—ASSIGNOR LOSES CONTROL OVER CHOSE—ESTOPPEL.

   After assignment, assignor loses all control over chose and cannot bind assignee by estoppel or otherwise.

3. SAME—LATENT EQUITIES NOT KNOWN TO ASSIGNEE NOT BINDING ON HIM.

   Prior acts of assignor, which have not ripened into rights in others at time of assignment, are not binding on assignee without notice; assignment not being subject to latent equities not known to assignee.

4. CHATTEL MORTGAGES—RECORDING—CONSTRUCTIVE NOTICE.

   Where finance corporation, purchasing chattel mortgage on automobile, recorded it and assignment thereof, subsequent purchasers of automobile from mortgagor were chargeable with notice of said mortgage and took subject thereto, notwithstanding mortgagor, by mistake, was allowed to retain memorandum showing payment in full, given to him prior to execution of mortgage on understanding that he was to pay cash.

Appeal from Wayne; Campbell (Allan), J. Submitted October 14, 1931. (Docket No. 115, Calendar No. 35,992.) Decided January 4, 1932.

Replevin by Saginaw Financing Corporation, a Delaware corporation, against Detroit Lubricator Company, a Michigan corporation, for an automobile. Judgment for plaintiff. Defendant appeals. Affirmed.

Oxtoby, Robison & Hull, for plaintiff.

Monaghan, Crowley, Reilley & Kellogg (*Stanley E. Beattie,* of counsel), for defendant.

FEAD, J. July 18, 1927, Gremel & Liken sold to Vet Brown a Dodge sedan, in payment for which Brown gave a check for $695 and a postdated check for $1,000, and received a paper writing, misdated, as follows:

"Sebewaing, Mich., July 21, 1927.

"Sold to: VET BROWN,
North Branch

"Dodge Sedan $1695
Motor No. S10957
Serial No. 1S13006
Cash 1695

"Settled in full

"GREMEL & LIKEN,
"R. LIKEN, Sec."

July 21st, Brown returned it, said he could not pay the $1,000 check, and a chattel mortgage, in the form of title-retaining contract of sale on deferred payments, was executed and the car then delivered

to Brown. The sellers did not think to take the original memorandum back from him. On the same day the mortgage was sold and assigned to plaintiff, and, with the assignment, was filed with the clerk of the township of Brown's residence on July 25th. August 24th, Brown sold the car to Thos. J. Doyle, Inc., which afterward sold it to defendant. Doyle did not investigate the records for mortgages. While there is good argument to the contrary, we will assume that the proof was sufficient that Doyle purchased in reliance on the memorandum as evidencing a sale for cash. Brown having defaulted in payments, plaintiff brought replevin to recover the car under the mortgage, and had judgment.

Defendant invokes the principles that when an owner of chattels clothes another with apparent title by delivering possession and muniments of ownership to him, he is estopped from claiming ownership as against a *bona fide* purchaser, without notice, who buys in reliance on such apparent title, 21 C. J. p. 1156; 10 R. C. L. p. 777, and that the assignee of a nonnegotiable chose takes subject to all defenses against the assignor. From these principles, it argues that, because Gremel & Liken gave Brown the memorandum of sale for cash, they and their assignee are estopped from claiming under a purchase price mortgage.

The rule that an assignee of a nonnegotiable chose takes subject to defenses means, of course, defenses existing at the time of the assignment. After assignment, the assignor loses all control over the chose and cannot bind the assignee, by estoppel or otherwise. 5 C. J. p. 966. Nor can prior acts of the assignor, which have not ripened into rights in others at the time of the assignment, bind an as-

signee without notice. An assignment is not subject to latent equities not known to the assignee. 11 C. J. p. 669; 5 C. J. p. 974; *Bloomer* v. *Henderson,* 8 Mich. 395 (77 Am. Dec. 453). When plaintiff bought the mortgage there were no defenses to it. Defendant and its vendor had no interest or equity in the car, actual or prospective, open or latent. Plaintiff, therefore, took good title.

By filing the mortgage and assignment, plaintiff gave notice to the world of its lien, binding on subsequent, even though good-faith, purchasers. Doyle and defendant were subsequent purchasers, charged by the record with notice of plaintiff's mortgage, and took subject to it.

Judgment affirmed, with costs.

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

RICHARDSON *v.* MICHIGAN BELL TELEPHONE CO.

1. CONTINUANCE—ACCEPTANCE OF CONDITION—ESTOPPEL.
   Where plaintiff accepted continuance on condition that, if he failed to pay defendant's costs within 10 days, judgment of nonsuit would be entered, plaintiff thereby lost right to attack condition imposed as abuse of discretion.

2. SAME—ABUSE OF DISCRETION.
   Where cause had been at issue for a year and a half, and defendant's counsel was urging trial and plaintiff's was avoiding it, it was not abuse of discretion to require, as condition for granting continuance on plaintiff's motion, that, if he failed to pay defendant's costs within 10 days, judgment of non-

suit would be entered, especially where defendant had paid plaintiff, through his attorney, substantial sum in settlement of suit.

Appeal from Macomb; Spier (James E.), J. Submitted October 8, 1931. (Docket No. 64, Calendar No. 35,836.) Decided January 4, 1932.

Case by Samuel S. Richardson against Michigan Bell Telephone Company for personal injuries received in an automobile collision. Judgment of nonsuit. Plaintiff appeals. Affirmed.

Jacob A. Tolonen, for plaintiff.

Beaumont, Smith & Harris and *Lungerhausen, Weeks, Lungerhausen & Neale,* for defendant.

FEAD, J. This is appeal from judgment of nonsuit and subsequent order. Plaintiff sued for damages for negligent injuries. Defendant pleaded the general issue and settlement and release. Plaintiff gave notice of claim that the release had been procured by fraud and duress.

December 15, 1930, plaintiff was granted a continuance to a time satisfactory to his counsel, evidently on claim that plaintiff was ill, defendant was allowed $65 taxed costs, and trial was ordered for January 5, 1931. January 2d, plaintiff again moved for continuance on the grounds that one of his counsel would be engaged in court elsewhere on January 5th, and that plaintiff's state of health prevented his undergoing the strain of a trial for at least two weeks. The court granted continuance on condition that, if defendant's costs of $65 were not paid within 10 days, judgment of nonsuit would be entered. Payment was not made, and the judgment was entered January 16th. January 15th, plaintiff filed

motion to set aside the order requiring payment of costs on penalty of nonsuit, on the ground that he was destitute and could not pay. The motion was noticed for January 19th, and denied.

Plaintiff contends the court abused its discretion in imposing terms upon continuance which plaintiff, because of poverty, could not meet. Defendant's right to costs, if continuance were granted, was clear. Plaintiff had the option of refusing continuance on the terms ordered or of accepting it. If he was not content with the conditions, he should have made his showing in opposition, refused to accept the continuance, and put his refusal and reasons upon the record for the purpose of review. The record does not indicate that he objected to the terms on any ground or that he refused the continuance. By accepting the continuance, he accepted its terms, and thereby lost his right to attack them as an abuse of discretion. 13 C. J. p. 194; *Barney* v. *Love,* 101 Mich. 543.

To avoid misunderstanding, it further should be said that the record does not show an abuse of discretion in the terms imposed. The cause had been at issue for a year and a half, defendant was urging trial, plaintiff's counsel were avoiding it, and the court properly refused to further extend the grace of continuance to plaintiff without just reimbursement of defendant, which already had paid plaintiff, through his attorney, a substantial sum in settlement of the suit.

Attention of the court is called to the fact that three important orders in the case do not appear upon the journal.

Judgment is affirmed, with costs.

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

THOMSON SPOT WELDER CO. *v.* OLDBERG MANFG. CO.

1. JUDGMENT—RES JUDICATA—PATENTS—ROYALTIES DUE.
   In action for royalties accruing subsequent to former decision of Supreme Court holding defendant liable for royalties due at that time under contract for use of patented machines, plaintiff's claim that former judgment is *res judicata* of all defenses is not tenable as to defendant's claim that by subsequent judgment of United States Supreme Court holding said patent invalid it has been evicted from its contract, since said issue was not involved in former decision.

2. PATENTS—CONTRACTS—CONSIDERATION—EVICTION BY COURT DECISION.
   When licensee is actually evicted from his contract use of patent by decision of court of its invalidity, contract falls as to liability for further royalties, through failure of consideration.

3. SAME—CONFLICT OF JUDICIAL DECREES—CONSIDERATION.
   Where one United States circuit court of appeals held patent valid, and another circuit court of appeals held it invalid, hazard of use without license remained until final decision of conflict by United States Supreme Court, and therefore there was continuing consideration for contract licensing its use until said final decision determining its invalidity.

4. SAME—CONTRACTS FOR USE—NOTICE OF TERMINATION.
   Where contract licensing use of patented machines provided for termination by notice, discontinuance of use, and agreement not to use them thereafter without further license, plea in former case that contract was void as without consideration did not have effect of notice of termination.

5. DAMAGES—INTEREST RECOVERABLE ALTHOUGH EXCEEDING AD DAMNUM CLAUSE—AMENDMENT.
   Where, through delay in bringing case to trial, amount due with interest exceeded *ad damnum* clause of declaration, plaintiff is entitled to recover interest to date as matter of right, although amendment of said clause was properly denied because of said delay.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted October 30, 1931. (Docket No. 16, Calendar No. 35,832.) Decided January 4, 1932. Rehearing denied April 4, 1932.

Assumpsit by Thomson Spot Welder Company, a Massachusetts corporation, against Oldberg Manufacturing Company for royalties for use of a patented machine. Judgment for plaintiff. Both parties appeal. Affirmed as to liability; remanded for entry of judgment.

Stevenson, Butzel, Eaman & Long (*Leo W. Kuhn,* of counsel), for plaintiff.

Edmund M. Sloman (*Arthur H. Ratner,* of counsel), for defendant.

FEAD, J. This is an action to recover royalties for the use of patented machines, accruing after a former judgment, affirmed by this court in 234 Mich. 317.

The contract was made in 1917. The patent had been declared valid by the United States circuit court of appeals, first circuit, in 1915. It was held invalid by the United States district court, eastern district of Michigan, October 5, 1920, affirmed by the circuit court of appeals, sixth circuit, June 28, 1922, and by the Supreme Court of the United States, June 2, 1924, in the suit of this plaintiff v. *Ford Motor Co.,* 265 U. S. 445 (44 Sup. Ct. 533). The Supreme Court took jurisdiction because of the conflict between the circuit courts of appeal and its opinion was substantially a review of both decisions. In the present suit, royalties are claimed to the time of decision of the circuit court of appeals, sixth circuit.

Plaintiff relied on the former judgment of this court as *res judicata* of all defenses. The contention is plainly untenable as to defendant's claim of eviction by judgment of court. The former case involved royalties accruing before the decision of the district court. The effect of its decree, therefore, on subsequent royalties was not in issue.

When a licensee is actually evicted from his contract use of a patent by decision of court of its invalidity, the contract falls as to liability for further royalties, through failure of consideration. But there must be something corresponding to actual eviction. *McKay* v. *Smith,* 39 Fed. 556; *Victory Bottle Capping Mach. Co.* v. *O. & J. Mach. Co.* (C. C. A.), 280 Fed. 753; *Barber Asphalt Pav. Co.* v. *Headley Good Roads Co.,* 284 Fed. 177; *Marston* v. *Swett,* 66 N. Y. 206 (23 Am. Rep. 43), 82 N. Y. 526.

In *Ross* v. *Fuller & Warren Co.,* 105 Fed. 510, relied on by defendant, there was no conflict of judicial decision, the contract was for exclusive use within stated territory, and it was held that the practical result of the decision of the circuit court, later affirmed by the circuit court of appeals, was to destroy the exclusive right and constitute an eviction.

At bar, the contract was for use, not exclusive use, and was not restricted territorially. The decision of the district court *ipso facto* destroyed nothing of such right of use. Because of the conflict of judicial decrees, a hazard of use without license remained which furnished a continuing consideration for the contract, at least until the conflict had been resolved by the court of last resort.

There are other grounds for sustaining the judgment, but as counsel did not brief them they will not be discussed other than to suggest that counsel seem

to have overlooked *Thomson Spot Welder Co.* v. *Fairbanks Co.*, 37 Ga. App. 774 (141 S. E. 923), involving this plaintiff, an identical contract, and the Federal decrees at bar, in which liability was sustained.

The contract provided termination of the license upon three months' notice in writing, the discontinuance of use of the machines, and an agreement not to use them thereafter without further license. Defendant contends that its plea in the former case, that the contract was void as without consideration, had the effect of notice of termination. The plea did not contain the agreements necessary to termination. If defendant desired to terminate under the contract, it was required to fulfil the contract conditions thereof.

Plaintiff took cross-appeal as to the amount of judgment. Through delay in bringing the case to trial the amount due with interest to date was found to exceed the *ad damnum* clause of declaration. Amendment of the clause was properly denied because of the delay, but plaintiff has the relief as a matter of right. He did not call to the attention of the trial court nor of this court the case of *Hollingsworth* v. *Liberty Life Ins. Co.*, 241 Mich. 675.

The judgment will be affirmed as to liability of defendant, but reversed as to amount, and remanded for entry of new judgment for the royalties, with interest to date of entry, with costs to plaintiff.

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

MORTGAGE & CONTRACT CO. *v.* FIRST MORTGAGE BOND CO.

1. MORTGAGES—FORECLOSURE EXTINGUISHES MORTGAGE.
   Foreclosure of mortgage extinguishes it.

2. SAME—DISCHARGE EXTINGUISHES LIEN—TAXES.
   Where mortgagee in second mortgage paid taxes, and, on foreclosure by advertisement, bid in property, from which no redemption was had, discharge of said mortgage discharged lien for taxes, so that it could not be revived and become lien superior to first mortgage.

3. SAME—APPLICATION OF PURCHASE PRICE TO PAYMENT OF TAXES—LIENS.
   Where purchase price bid on foreclosure of second mortgage by mortgagee was applied to full payment of taxes, effect was same, in respect to mortgagee's lien for taxes, as though stranger had bought property on foreclosure, and taxes had been paid mortgagee out of purchase money.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted October 6, 1931. (Docket No. 11, Calendar No. 35,761.) Decided January 4, 1932.

Bill by the Mortgage & Contract Company, a Michigan corporation, against First Mortgage Bond Company, a Virginia corporation, to have amount paid for taxes as purchaser at foreclosure sale under second mortgage declared a first lien on the premises. Bill dismissed. Plaintiff appeals. Affirmed.

Goodenough, Voorhies, Long & Ryan, for plaintiff.

Corliss, Leete & Moody, for defendant.

FEAD, J. Plaintiff held a second mortgage on real estate, expressly made subject to the first mortgage,

and containing the usual provision that if the mortgagor did not pay taxes, the mortgagee might pay them and the amount, with interest at 7 per cent., should "constitute a further lien upon said premises under this mortgage." Plaintiff paid taxes, foreclosed the mortgage by advertisement, bid in the property, and the sale price was applied upon principal, interest, expenses, and taxes, covering the latter item in full with interest at 7 per cent. There was no redemption.

Before the redemption period had expired, the first mortgage, running to defendant and one Stoker as trustees, was foreclosed by advertisement and the premises purchased by defendant personally. There has been no redemption and the period therefor has expired.

This suit is to decree the taxes paid by plaintiff, with interest at 5 per cent., a first lien upon the premises and to foreclose the lien upon the theory that it is superior to the first mortgage, under *Noeker* v. *Howry,* 119 Mich. 626.

Foreclosure of a mortgage extinguishes it. *Dunitz* v. *Woodford Apartments Co.,* 236 Mich. 45. Plaintiff's lien for taxes existed in connection with and because of the mortgage, and discharge of the mortgage discharged the lien. *Vincent* v. *Moore,* 51 Mich. 618; *Wood* v. *Button,* 205 Mich. 692. The lien, having been discharged, could not be revived. The case presents the added fact that the purchase price on foreclosure of the second mortgage was applied to full payment of the taxes. The effect was the same as though a stranger had bought the property on foreclosure and the taxes had been paid plaintiff out of the purchase money.

Decree dismissing bill affirmed, with costs.

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

PAINE *v.* SWIFT.

1. APPEAL AND ERROR—TRIAL WITHOUT JURY—QUESTIONS OPEN TO REVIEW IN ABSENCE OF FINDINGS OR EXCEPTIONS.
   Where, in case tried without jury, there were no formal findings or exceptions, only question open for review is whether there was any evidence to sustain judgment.

2. SAME—SUFFICIENCY OF EVIDENCE.
   In action on postdated check and for balance due under contract of sale, testimony by defendant that check was postdated to enable him to investigate before contract should become effective, that he had investigated and refused to consummate sale, *held,* sufficient to sustain judgment for defendant.

Appeal from Wayne; Spier (James E.), J., presiding. Submitted October 7, 1931. (Docket No. 36, Calendar No. 35,593.) Decided January 4, 1932.

Assumpsit by Edith A. Paine against Frederick John Swift and another on a contract for certain sales rights. Judgment for defendants. Plaintiff appeals. Affirmed.

George K. Williams (*John H. Flancher,* of counsel), for plaintiff.

Samuel L. Weller, for defendants.

FEAD, J. In writing, plaintiff sold to defendants the right to sell hot tamales and tamale steamers in Wayne county for one year for $900. Swift gave her a check for $600, postdated four days. The check was not paid when due, and Swift notified plaintiff he would not proceed with the transaction.

Plaintiff brought this suit to recover on the check and the additional $300 under the contract. The case was tried before the court without a jury. There were no formal findings or exceptions, under the then prevailing practice, and the only question here is whether there was any evidence to sustain the judgment.

The import of Swift's testimony, taken without objection, is that the check was postdated to enable him to investigate before the contract should become effective. On investigation, he failed to find business where plaintiff claimed it was, and refused to consummate the sale. This testimony sustains the judgment for defendants, and it is affirmed, with costs.

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

BUDZEN *v.* MICHIGAN CENTRAL RAILROAD CO.

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

In action under Federal employers' liability act for personal injuries alleged to have been caused by defendant's negligence, judgment for defendant, on court's finding that it was not guilty of negligence, *held*, supported by preponderance of evidence.

Appeal from Wayne; Dingeman (Harry J.), J. Submitted October 22, 1931. (Docket No. 182, Calendar No. 36,024.) Decided January 4, 1932.

Case under the Federal employers' liability act by Frank Budzen against Michigan Central Railroad Company, a Michigan corporation, for personal injuries alleged to be due to defendant's negligence. Judgment for defendant. Plaintiff appeals. Affirmed.

Harry C. Milligan (*Leo J. Carrigan,* of counsel), for plaintiff.

John J. Danhof (*Harold H. McLean,* of counsel), for defendant.

FEAD, J. Plaintiff, a trucksmith employed by defendant, while going from the engine house toward the blacksmith shop at night, came to a tire rack at which locomotive tires, weighing from 700 to 1,000 pounds each, were stacked on edge and inclining at an angle. Three of the tires fell on his foot. He claims the accident occurred by his stumbling over a two-by-four block of wood six inches long, which was stuck under the tires, and so releasing them. Defendant denied that such block of wood was, or could be, used in stacking the tires or that it was there when the tire men left the job at the end of the day, and that immediately after the accident plaintiff stated to the men who removed the tires from his foot that the accident had occurred because he was straightening the tires. He had no duty to perform in connection with them.

The action is under the Federal employers' liability act (45 USCA, §§ 51–59). The trial was before the court without a jury, and defendant had judgment. The court filed findings of fact and conclusions of law and answers to special questions.

The court held that the accident did not occur as claimed by plaintiff, and defendant was not guilty

of negligence. The finding is amply supported by a preponderance of the testimony, and renders it unnecessary to discuss other questions.

Judgment affirmed, with costs.

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

SIEG *v.* SENDELBACH.

1. SPECIFIC PERFORMANCE—ORAL CONTRACT TO CONVEY LAND—PROOF.

   In suit for specific performance of alleged oral contract to convey land, burden of proof is on plaintiff, and must be such as satisfies mind and conscience of court that contract was made as claimed.

2. EVIDENCE—ORAL CONTRACTS—STATEMENTS OF INTENTION.

   Statements of foster mother that she intended to leave part of her property to plaintiff was properly held to be merely expressions of intention and not to evidence making of contract to that effect.

3. SPECIFIC PERFORMANCE—ORAL CONTRACT—SUFFICIENCY OF EVIDENCE.

   In suit for specific performance of alleged oral contract by foster mother to convey to plaintiff one-half of home property, evidence, *held*, insufficient to establish said contract.

Appeal from Wayne; Root (Jesse H.), J., presiding. Submitted October 29, 1931. (Docket No. 180, Calendar No. 36,015.) Decided January 4, 1932.

Bill by Gertrude Sieg against John Sendelbach, personally and as executor of the last will of Gertrude Sendelbach, deceased, for specific performance of an alleged oral contract for conveyance of land. Bill dismissed. Plaintiff appeals. Affirmed.

Woodruff & Woodruff and *Atkinson, Ortman & Shock,* for plaintiff.

Charles F. Delbridge and *W. Leo Cahalan,* for defendant.

FEAD, J. When a few days old, plaintiff was taken into the family of Gertrude Sendelbach, her aunt, and thereafter was regarded as a daughter, although not legally adopted. Mr. Sendelbach died in 1912. In 1916, plaintiff married and left home. Defendant and wife then went to live with the mother and continued until May, 1917, when they left because of difficulty between the mother and daughter-in-law. Thereafter defendant gave his mother from $2 to $5 per week as long as she lived. In June, 1917, plaintiff and her husband returned to the mother's home and lived with her continuously until January, 1930, when the mother, being 72 years old and ill, and plaintiff being unable to take care of her because of her own sickness, was moved to defendant's home, where she died in March.

While living with plaintiff and her husband, and on October 29, 1929, Mrs. Sendelbach made a will devising the home real estate to defendant, the household goods, furniture, and jewelry to plaintiff, and the residue to plaintiff and defendant equally. The will was made at her home while she was living with plaintiff and they were on good terms, and no question is raised of influence or incompetency.

This suit is for specific performance of an alleged contract, claimed to have been made when plaintiff returned to her mother's home in 1917, that the mother would devise her a half interest in the home property in consideration of plaintiff's taking care of her during her lifetime.

While plaintiff and her husband lived with the mother, they apparently took good care of her, made some repairs upon the property, and claimed to have paid taxes, although the circuit judge was not satisfied with the proof in the latter respect and it could have been more clearly established if true. Upon the whole testimony, plaintiff made a strong showing of equitable claim to compensation for her services, but the case does not rest upon equities. The question is whether she made a contract.

In this class of cases, the burden is on plaintiff to present proof which "must be such as satisfies the mind and conscience of the court that the contract was made as claimed." *Hiles* v. *First National Bank,* 237 Mich. 278.

Plaintiff's case rests upon the testimony of her husband:

"She says if we would live with her 'the daughter,' what she called her, was to get equal half in the property that she had and we were to run the table and that's all that was said."

There was other testimony that the mother often had expressed herself as intending to leave her property equally to her children, and also testimony that, in accordance with her husband's wish, defendant should have the home. We think the court was right in holding that these statements, if made, were merely expressions of the mother's intention from time to time and did not evidence the making of a contract.

We are not informed of the value of the property when Mrs. Sendelbach died, and, therefore, do not know that there was not an equal division of the whole which would satisfy the contract if it had been made. As stated in the testimony, the claimed agreement did not specify that plaintiff should receive half the real estate.

However, we think the attending circumstances sustain the ruling of the circuit court that plaintiff did not establish a contract by a preponderance of the testimony. Plaintiff's husband was an interested witness, and the transaction as stated by him was not so unequivocally a contract as to exclude the idea that it was merely an expression of the mother's future intention. It does not appear that either of the parties unmistakably recognized their relationship as contractual. During the time the mother was at the son's house in 1930 plaintiff and her husband paid her $35 rent. After her death, they negotiated with defendant and agreed to pay him $25 per month rent, but they did not do so. They made no claim of contract until after defendant sought to evict them, when they began this suit. The natural inference is that no contract had been made and that the present claim was an afterthought. This inference is supported by the fact that the mother executed the will while she was living with plaintiff and was on good terms with her, no reason was indicated for her breaching an agreement if one had been made, and the disposition of the property was upon the basis of equitable division, as conceived by the mother, rather than upon payment of a debt.

Decree affirmed, with costs.

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

MARKS *v.* CORLISS' ESTATE.

1. HUSBAND AND WIFE—ESTATES BY ENTIRETIES—LANDLORD AND TENANT—LEASE SIGNED BY HUSBAND ALONE.

   Lease of land owned by husband and wife by entireties, signed by husband alone, is valid during his lifetime, but it terminates at his death.

2. LANDLORD AND TENANT—HOLDING OVER—NATURE OF TENANCY.

   Where one has lease for years with annual rent reserved, and holds over after expiration of term with acquiescence of landlord, tenancy is from year to year on conditions of lease, although rent is payable in monthly instalments; but where rent reserved is monthly, holding over is from month to month unless lease otherwise provides.

3. SAME—TENANCY BY SUFFERANCE.

   Where lease terminates by substitution of landlord not bound by lease, tenant continues in possession by sufferance.

4. SAME—TENANCY AT WILL—NOTICE—TERMINATION.

   Unless parties make different agreement, payment and acceptance of rent does no more than change tenancy by sufferance to one at will or from month to month, and if rent is payable monthly it may be terminated on month's notice (3 Comp. Laws 1929, § 13492).

5. SAME—TERMINATION—SUBSTITUTION OF LANDLORD—HOLDING OVER.

   Where lease of land owned by entireties was terminated by death of husband because signed by him alone, and no agreement between wife and tenant was made, latter's tenancy was from month to month, and was subject to termination by month's notice (3 Comp. Laws 1929, § 13492).

6. SAME—TERMINATION BY NOTICE—EXECUTORS AND ADMINISTRATORS.

   Where tenancy was terminated by notice, claim against tenant's estate for rent for period subsequent to time termination became effective was properly disallowed.

Appeal from Wayne; Houghton (Samuel J.), J., presiding. Submitted October 28, 1931. (Docket No. 53, Calendar No. 35,816.) Decided January 4, 1932.

Sadie S. Marks presented her claim against the estate of John B. Corliss in the probate court for rent under a lease. Claim disallowed by commissioners on claims. Plaintiff appealed to the circuit court. Judgment for defendant. Plaintiff appeals. Affirmed.

William T. Kelly and *Monaghan, Crowley, Reilley & Kellogg* (*Edward T. Kelley,* of counsel), for plaintiff.

Corliss, Leete & Moody, for defendant.

FEAD, J. Plaintiff and her husband had title by the entireties to a parcel of land in Detroit, on which was a warehouse. Mr. Marks, without his wife signing, executed to Reliable Stores Corporation a five-year lease, expiring September 30, 1930, at monthly rental payable on the first day of each month in advance. The lease was transferred to and assumed by John B. Corliss, who died December 24, 1929.

Mr. Marks died November 1, 1929. November 9th, Corliss sent a check for the November rent, due November 1st, drawn to Mr. Marks. Plaintiff indorsed her husband's name on the check and cashed it. There was no evidence that Corliss knew Marks was dead.

December 6th, Corliss gave plaintiff a check to cover December rent to that day, handed her the keys and a letter stating that he terminated the lease because the city had condemned the building and the lease provided for termination in such case. As a

matter of fact, the city had merely ordered the building repaired, a different thing from condemnation.

Plaintiff had the repairs made and gave notice to Corliss' attorneys March 27th. She presented a claim to his estate for rent to the expiration date of the lease, later amending it to exclude the repair period from December 6th to March 17th. The claim was disallowed in both probate and circuit courts.

Plaintiff's contention is that Corliss held over as a tenant from year to year. There was no agreement between plaintiff and Corliss that the lease should continue. At most, the testimony shows only that each thought it was in force but, at least until March 27th, neither gave evidence that he was bound for any definite term.

Counsel agree that the lease by Mr. Marks was valid during his lifetime (*Way* v. *Root,* 174 Mich. 418), and that it terminated at his death (*Torrey* v. *Torrey,* 14 N. Y. 430).

Where one has a lease for years, with annual rent reserved, and holds over after the expiration of the term with the acquiescence of the landlord, the tenancy is from year to year on the conditions of the lease, although the annual rent is payable in monthly instalments (*Laughran* v. *Smith,* 75 N. Y. 205; *Faraci* v. *Fassulo,* 212 Mich. 216), but where the rent reserved is monthly, the holding over is from month to month unless the lease otherwise provides (*Barlum* v. *Berger,* 125 Mich. 504).

Where the lease terminates by the substitution of a landlord not bound by the lease, the tenant continues in possession by sufferance. *Harrington* v. *Sheldon,* 196 Mich. 388; *Felt* v. *Methodist Educational Advance,* 251 Mich. 512. Unless the parties make a different agreement, the payment and acceptance of rent does no more than change the ten-

ancy to one at will or from month to month (*Huyser* v. *Chase,* 13 Mich. 98, distinguished in *Schneider* v. *Lord,* 62 Mich. 141); and if the rent is payable monthly it may be terminated upon a month's notice (3 Comp. Laws 1929, § 13492).

It is immaterial whether this lease be considered as a holding over from month to month or a tenancy by sufferance, or at will, because it was terminated by the notice of December 6th, and plaintiff's claim does not include rent for the period until after the termination became effective. This renders it unnecessary to determine whether Corliss would have been justified in terminating the tenancy under the conditions of the lease.

Judgment affirmed, with costs.

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

BLAIR *v.* LUX.

1. LANDLORD AND TENANT—AGREEMENT FOR LEASE.
   Agreement for lease to be executed later is no demise, and does not create relation of lessor and lessee.

2. SAME—ENTRY UNDER AGREEMENT FOR LEASE—LICENSE.
   Where plaintiffs as prospective lessees entered into agreement with defendant for lease to be executed later, plaintiff's entry for purpose of moving small building did not convert agreement for lease into tenancy, but said act was in nature of license.

3. SAME—MERE AGREEMENT FOR LEASE DOES NOT CREATE TENANCY.
   Mere agreement for lease does not create tenancy, or give to party with whom it is made right to possession.

4. SAME.

Where owner failed to execute lease for three-year term to plaintiffs as he agreed to do, no tenancy for any term was created, although plaintiffs, in anticipation of lease, entered premises and removed small building.

5. SAME—RECOVERY OF MONEY PAID ON FAILURE TO EXECUTE LEASE.

Money paid on agreement for execution of lease is recoverable in action at law, where owner failed to execute it.

Appeal from Wayne; Hunt (Ormond F.), J. Submitted October 28, 1931. (Docket No. 111, Calendar No. 35,576.) Decided January 4, 1932.

Assumpsit in common pleas court by Ted L. Blair and another against George V. Lux to recover amount paid under agreement for lease which was never executed. Judgment for plaintiff. Defendant appealed to circuit court. Judgment for plaintiff. Defendant appeals. Affirmed.

Bryant, Lincoln, Miller & Bevan, for plaintiff.

Myron Schiffman, for defendant.

WIEST, J. Defendant agreed to lease certain property to plaintiffs for the term of three years. A memorandum of agreement for a lease, to be later executed, was initialed by the parties. The lease was to be prepared by defendant within 10 days. It was not so prepared and no lease was executed. At the time of the agreement for the lease plaintiffs paid $350. Plaintiffs brought this suit to recover the $350, paid at the time of the agreement for the lease, and also the expense of moving a small building that was on the premises. Defendant moved the building back, sought recovery of the expense in doing so, claimed that plaintiffs took possession, thereby rendering the lease valid for one year, and

asked for rent, under the terms of the agreement for a lease, until defendant leased the premises to others. An issue of fact was raised upon whether the agreement for a lease was later modified by verbal agreement, but the jury found against defendant on that. Plaintiffs had verdict and judgment for $300.

Defendant, upon review by appeal, contends that entry by plaintiffs in moving the small building dispensed with the written lease and created a tenancy for three years, or for a year, or, at least, from month to month.

An agreement for a lease, to be executed later, is no demise, and does not create the relation of lessor and lessee.

In *Caplis* v. *Monroe,* 228 Mich. 586, we quoted from 2 Reed, Statute of Frauds, § 818:

" 'It may, however, be stated as generally true that an agreement for a lease will be treated as a present demise when it does not involve the execution of any formal lease, and possession is taken under it. If, however, the agreement contemplates the execution of some further instrument in order to carry into effect the intention of the parties, it cannot operate as a present demise until such instrument is executed.' "

In the case at bar, the agreement for a lease negatived operation of the agreement as a lease, for it required the execution of a lease. The entry of plaintiffs for the purpose of moving the small building was not such occupancy as to convert the agreement for a lease into a tenancy.

It has been repeatedly held that "a mere agreement for a lease does not create a tenancy, or give to the party with whom it is made a right to possession." Plaintiffs had no right to possession. While

their act, in moving the small building, was probably not a trespass but rather in the nature of a license, it clearly was not under right as lessees.

The failure of defendant to comply with the agreement for a lease did not create a tenancy for three years or for any lesser period. The parties were dealing for a three-year term and have not by their acts created that term in fact or any other term by operation of law.

Judgment is affirmed, with costs.

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

FRYE *v.* CITY OF DETROIT.

1. DEATH—PROXIMATE CAUSE.

In action for death, in order to recover, it is necessary for plaintiff to show that defendant's negligence was proximate cause of death.

2. SAME—STREET RAILWAYS—INTERVENING ACT—PROXIMATE CAUSE.

In action for death, where decedent was struck by automobile shortly before being struck by street car, it is necessary, in order to recover for negligence of motorman, that proof be submitted from which jury may draw reasonable inference that death would not have occurred but for negligence of motorman.

3. SAME—INDEPENDENT TORTFEASORS NOT CONCURRENT WRONGDOERS.

Under circumstances, automobile driver and motorman were independent tortfeasors rather than joint tortfeasors, and their acts did not constitute them concurrent wrongdoers.

4. SAME—INTERVENING ACT—PROXIMATE CAUSE.
   Where one party is negligent, second party also guilty of intervening negligent act is not liable for death unless intervening act caused it.

5. SAME—NO JOINT LIABILITY WHERE NO COMMUNITY OF WRONGDOING.
   Parties may not be held jointly liable where there is no community of wrongdoing.

6. SAME—QUESTION FOR JURY.
   In action for death, it is duty of trial court to determine whether evidence presents question of fact for jury.

7. APPEAL AND ERROR—DIRECTED VERDICT—ASSUMPTIONS—NEGLIGENCE.
   Where, in action for death, trial court directed verdict for defendant on ground that cause of death was mere conjecture, Supreme Court accords plaintiff's testimony favorable consideration, and, for purposes of decision, assumes that defendant was negligent.

8. DEATH—DIRECTED VERDICT PROPER WHERE EVIDENCE RAISES MERE CONJECTURE.
   Where plaintiff's decedent was struck by automobile, and shortly after was struck by street car, so that cause of death was matter of conjecture, owner of street car could not be held liable, and trial court properly directed verdict in its favor.

Appeal from Wayne; Toms (Robert M.), J. Submitted October 14, 1931. (Docket No. 117, Calendar No. 35,974.) Decided January 4, 1932.

Case by Floyd Frye, administrator of the estate of Domenic Tata, against City of Detroit, a municipal corporation, for personal injuries resulting in the death of plaintiff's decedent. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Colombo, Colombo & Colombo, for plaintiff.

Raymond J. Kelly and *James S. Shields,* for defendant.

WIEST, J. The night of October 17, 1927, Domenic Tata, plaintiff's decedent, was standing in a safety zone in Hamilton avenue in the city of Detroit, waiting for a street car. An automobile struck and threw him upon the street car track where he lay unconscious, with blood flowing from cuts in his head. While so lying on the track, the fender of a street car picked him up, carried him some distance before the car stopped, and, when released, it was found that he had sustained a compound fracture of the left leg just above the ankle and his head and face were crushed. He moved his left leg and lips and moaned but died within a few minutes from traumatic cerebral hemorrhage caused by the crushing injuries to his head.

Suit was brought against the auto owner, his driver, and the city of Detroit, owner and operator of the street railway system. No service of summons was had upon the auto owner or driver. At the close of plaintiff's proof the court directed a verdict for defendant city. Plaintiff seeks reversal.

The court was of opinion that it was impossible to determine whether the injuries, causing death, were inflicted by the automobile or by the street car and declined to let the jury guess or conjecture upon the subject. The evidence established the fact that either the automobile or the street car, or both, inflicted the mortal injuries. But the evidence did not go beyond that, or furnish facts from which, by reasonable inference, it could be said, apart from mere guess or conjecture, that the street car, rather than the automobile, inflicted the injuries causing death.

It is evident that the traumatic injuries to the head had origin, in whole or in part, prior to contact with the street car. Where the body lay upon the track there was a pool of blood. This indicated that Mr. Tata had some head or face wound, inflicted by being thrown upon the track by the automobile, for the fracture of his leg did not bleed, and he had no other cuts. The thud of the automobile against his body was heard by persons 200 feet away. He was struck by the automobile with great force, thrown upon the pavement, and there lay huddled up while the street car approached from a distance of eight blocks. Were such injuries mortal? No one can tell.

It is a well-established rule that, in order for plaintiff to recover against the city, it was necessary to show the negligence of defendant city and the proximate cause of death. Upon the second issue plaintiff did not, and could not, inform the jury of the injuries inflicted by the street car or those inflicted previously by the automobile. It was necessary for plaintiff to submit proof, from which the jury could draw the reasonable inference that the death of plaintiff's decedent would not have occurred but for the negligence of defendant city. The plaintiff must go beyond showing that such might have been the case.

The rule, in negligence cases, is well stated in *Ramberg* v. *Morgan*, 209 Iowa, 474 (218 N. W. 492):

"True, it was not necessary for plaintiff to prove the causal connection by direct evidence, but substantial evidence must be furnished upon which a reasonable basis for inference may be made. The proof must establish causal connection beyond the point of conjecture. It must show more than a possibility. Verdicts must rest upon reasonable cer-

tainty of proof. Where the proof discloses that a given result may have occurred by reason of more than one proximate cause, and the jury can do no more than guess or speculate as to which was, in fact, the efficient cause, the submission of such choice to the jury has been consistently condemned by this court and by other courts."

See, also, *Bruggeman* v. *City of York*, 254 Pa. 430 (98 Atl. 970), where it was said:

"It is not enough for plaintiffs to show the injury complained of was due to one of two or more possible causes if defendant was responsible for but one of them."

It may be that the owner of the automobile is liable for all consequences flowing from his tort (a question we do not decide), but the defendant city cannot be held to have its negligence relate back and encompass the precedent negligence of, and injuries inflicted by, an independent tort feasor. Defendant city had no part in the wrong committed by the automobile owner, and there is no showing that its independent and subsequent wrong diverted the natural results of the antecedent wrong of the automobile owner to a new and different end.

Plaintiff contends that where death results from concurrent wrongful acts of two persons they are liable jointly and severally. The term "concurrent," with reference to wrongful acts, cannot constitute independent tortfeasors joint wrongdoers. There may be concurrence in wrongful acts, producing an injury and entailing joint liability, but such is not this case.

Plaintiff also contends that, where one party is grossly negligent, and a second party is guilty of an intervening act of gross negligence causing death to another, the second party is severally liable. An

affirmative answer would not help plaintiff, for the rule invoked relates to an intervening act and death caused by the last wrongdoer. The automobile owner and the city were not joint tortfeasors. Nor did their acts constitute them concurrent wrongdoers.

In *Dickson* v. *Yates,* 194 Iowa, 910 (188 N. W. 948, 27 A. L. R. 533), it was said:

"It is not sufficient, as some decisions express it, that 'where concurrent acts result in a single injury the parties may be sued jointly.' This is not a correct statement of principle. It is not based on reason. It begs the question and confuses the term 'concurrent' with the term 'joint.' * * *

"It is not the injury, but the wrongful act, which creates the liability. If the acts of the different persons are different and separate when done, they may not be called joint acts because they happen to occur at the same time or at different times and affect the same person, neither party having any design in the matter or any control or influence over the acts of the other. * * *

"Parties cannot be held jointly liable where there is no community of wrongdoing."

It was the duty of the court to determine whether the evidence presented a question of fact for determination by the jury. A verdict having been directed, we accord plaintiff's testimony favorable consideration, and, for the purposes of decision, assume negligence on the part of the city. The court was not in error in directing the verdict.

The judgment is affirmed, with costs.

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

FRIELINK *v.* FRIELINK.

1. DIVORCE—PETTY GAMBLING NOT CAUSE FOR DIVORCE.
   Husband's petty gambling, which is not of recent origin and which does not seriously affect family's pecuniary resources, although it may be reprehensible, is not in and of itself cause for divorce.

2. SAME—TAKING SON FISHING ON SUNDAY.
   It is not extreme cruelty for father to go fishing and take his 13-year old son along, even on Sundays and school days.

3. SAME—EXTREME CRUELTY—DISMISSAL.
   Decree dismissing wife's suit for divorce on ground of extreme cruelty is affirmed, on appeal.

Appeal from Kent; Dunham (Major L.), J. Submitted October 22, 1931. (Docket No. 186, Calendar No. 35,851.) Decided January 4, 1932.

Bill by Myrtle Frielink against Henry Frielink for divorce. Bill dismissed. Plaintiff appeals. Affirmed.

Peter J. Danhof, for plaintiff.

John J. Smolenski, for defendant.

WIEST, J. This is an appeal by plaintiff from a decree dismissing her bill for divorce.

There was at first a hearing, apparently without contest, but the terms of an announced decree evidently were not satisfactory to plaintiff, and a rehearing, with contest, resulted in denial of a divorce.

After 29 years of married life and the rearing of a daughter, now 23 years of age, and a son of 13, plaintiff applied for a divorce on the grounds of

nonsupport and extreme cruelty. Defendant is a tailor, with shop at his home, and there carries a small stock of men's furnishings. He is handicapped by deafness and his earnings have been small. Plaintiff is now, and for five years has been employed in the office of the treasurer of the city of Grand Rapids. The evidence fails to show nonsupport. The extreme cruelty alleged consisted of acts of personal violence, use of vile and profane epithets, petty gambling, and taking the boy fishing on Sundays and school days.

Acts of personal violence, intoxication, and use of abusive epithets were denied by defendant, and the circuit judge, with view of the parties and witnesses, was not impressed sufficiently to make a finding for divorce on those charges.

Defendant's petty gambling for checks calling for nickels and dimes, redeemable in cash or merchandise, was not a late departure, and does not appear to have straitened the pecuniary resources of the family. It may, because of law on the subject, be considered reprehensible, but is not in and of itself a cause for divorce.

Financial independence of plaintiff has evidently led her to feel superior to her husband, for she testified that for a number of years she looked upon him as "an inferior part of the family," and has lost all love and regard for him. Just before filing the bill she took much of the furniture from the home, and, with the daughter and son, established a new home. When the father prepared some clothing for the boy, and sent word to such effect, she would not permit the boy to go into the shop, but made the father bring the clothing to an automobile where she was waiting with the boy. It is apparent that if she had the say the father would not see his boy at all.

It is not extreme cruelty for a father to go fishing and take his 13-year old son along. The true lover of the "gentle art," immortalized by old Izaak Walton, may not be discreet in selecting the time for going, and may never have heard the adage that, "a day spent in the chase is not lost," and yet find solace even while experiencing "fisherman's luck."

The circuit judge viewed the witnesses, had opportunity to note display of hatred, and could apply a test in considering the testimony not afforded us by mere printed relation.

The decree is affirmed. No costs.

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

INDUSTRIAL CO. *v.* WINTER.

1. GARNISHMENT—CERTIFICATES OF STOCK SUBJECT TO GARNISHMENT.
   Certificates of stock in corporation in hands of third party are subject to garnishment.

2. SAME—DISCLOSURE OF CLAIM BY THIRD PARTY.
   Disclosure by garnishee defendant that fund in his hands is claimed by third party does not in and of itself defeat jurisdiction.

3. SAME—PROCESS—NONRESIDENTS.
   Where affidavit for writ of garnishment alleges that principal defendant is nonresident, it is permissible to file summons the day it issues (3 Comp. Laws 1929, § 14885).

On stockholder's interest in corporation as subject to garnishment, see annotation in 18 L. R. A. (N. S.) 1158.

4. SAME—"DUMMY" CORPORATION—ESTOPPEL.

Corporation which was created by principal defendant in order to color his personal transactions with corporate protection is estopped from claiming, in garnishment proceedings, that stock transferred to it by him and pledged as collateral to his personal loan belongs to it.

Appeal from Kent; Brown (William B.), J. Submitted October 23, 1931. (Docket No. 196, Calendar No. 35,887.) Decided January 4, 1932.

Garnishment proceedings by the Industrial Company, a Michigan corporation, against H. A. Winter, nonresident principal defendant, and William H. Gilbert and another, garnishee defendants. H. A. Winter, Inc., was interpleaded as a third party claimant. From orders denying motions to quash by principal defendant and third party claimant, they appeal. Affirmed.

Knappen, Uhl, Bryant & Snow, for plaintiff.

Smith, Searl & Strawhecker, for principal defendant.

Wicks, Fuller & Starr, for third party claimant.

WIEST, J. November 1, 1926, the Avon Investment Company, a Florida corporation, issued first mortgage six per cent. serial gold bonds, secured by a trust mortgage to the Michigan Trust Company of Grand Rapids. Defendant H. A. Winter, with others, by a writing, guaranteed payment of the bonds in the hands of holders, and, as evidence of his financial worth, listed among his assets shares of stock held by him in the Grand Rapids Bookcase & Chair Company to the value of $20,000. Plaintiff company purchased the issue of bonds from the trustee and brought this suit against Mr. Winter on

his guaranty. The suit was brought in the Kent circuit by summons, issued and filed the same day, under 3 Comp. Laws 1929, § 14885, Mr. Winter being a resident of the State of Florida. A writ of garnishment was issued, and the garnishee defendant disclosed that he held certificates of shares of stock in the Grand Rapids Bookcase & Chair Company, pledged as collateral to Mr. Winter's personal note, held by his client. An amended disclosure set up a sale of the stock, with payment of the note held by his client out of the proceeds, and a fund remaining in his hands but claimed by H. A. Winter, Inc., a Florida corporation. Thereupon H. A. Winter, Inc., was interpleaded and an issue framed as to its right to the fund. This issue was tried by the court, and it was determined that H. A. Winter, Inc., had no right to the fund. Attorneys representing the principal defendant appeared specially and moved to dismiss the suit on the ground that no jurisdiction had been acquired inasmuch as the writ of garnishment did not reach property or money of defendant, also that certificates of stock in the hands of a third person are not subject to garnishment.

This motion was denied, and review thereof is prosecuted by defendant H. A. Winter. Substituted service, under the statute (3 Comp. Laws 1929, § 14109), was made upon Mr. Winter. Certificates of stock in a corporation in the hands of a third party are subject to garnishment. *Old Second National Bank of Bay City* v. *Williams,* 112 Mich. 564. The disclosure by the garnishee of the claim made by H. A. Winter, Inc., did not in and of itself defeat jurisdiction. It was permissible to file the summons the day it issued. *Widrig* v. *Ernest Kouwen Hoven,* 248 Mich. 167.

The denial of the motion to quash is affirmed, with costs.

The claimant of the fund, held by the garnishee defendant, moved to quash the garnishment proceeding on the ground that the principal defendant had no interest in the shares of stock, and that the same belonged to the claimant. This motion was denied. We find no error in the denial.

Thereupon the H. A. Winter, Inc., third party claimant, filed a motion for an order framing an issue upon the question of ownership of the property and money mentioned in the disclosure of the garnishee defendant. Such an issue was framed, findings made by the court, and exceptions thereto filed by the third party claimant.

As before stated, the court found against the third party claimant, and that party prosecutes review by appeal.

Shares of stock in the bookcase company were originally issued to H. A. Winter, and it is now claimed that they were purchased with money belonging to Mrs. Winter, and taken in the name of Mr. Winter in order to benefit him in his business relations with the bookcase company. Later the certificates were surrendered and new certificates issued to H. A. Winter, Inc. H. A. Winter, Inc., appears to have been organized to enable Mr. Winter to carry on his personal business in its name; it consists of three members, Mr. Winter, Mrs. Winter, and Mr. Winter's attorney. The attorney is secretary and holds one share of stock.

One thousand shares of stock in the bookcase company were issued to Mr. Winter in 1911, 1913, 1915, and 1916, and in 1922, 2,000 shares, in lieu of the original stock, were issued to Mr. Winter. In September, 1927, Mr. Winter offered H. A. Winter, Inc., 2,000 shares of stock in the bookcase company, together with other property, in exchange for 245 shares of stock in the H. A. Winter, Inc. This was

accepted, and shares issued to H. A. Winter and his wife.

In March, 1929, Mr. Winter sent the note of H. A. Winter, Inc., payable to the order of the Industrial Bank at Grand Rapids, to that city and asked for a loan of $4,000. The bank declined the note, stating that it would accept the personal note of Mr. Winter, secured by 1,000 shares of the bookcase company stock, as collateral. Such a note was executed by Mr. Winter, and sent to the Industrial Bank at Grand Rapids, together with 1,000 shares of stock in the bookcase company, issued to H. A. Winter, Inc., and indorsed in blank, H. A. Winter, Inc., by H. A. Winter, Pres. The note, together with the collateral, was indorsed by the bank, without recourse to William H. Gilbert, for whom the garnishee defendant held the certificates at the time of the service of the writ of garnishment.

It is claimed by H. A. Winter, Inc., that the $4,000 borrowed from the Industrial Bank was for the corporation, and the money was received by the corporation, and that Mr. Winter's act in giving his personal note and pledging the certificates was in behalf of the corporation.

Mrs. Winter was but a figurehead in H. A. Winter, Inc., and the attorney who held one share of stock and was secretary was not much better.

It was claimed at the hearing that Mrs. Winter attended corporate meetings, but of this she had no memory. It was claimed that her memory was bad, but she stated that if she had attended a meeting she thought she would have remembered the fact.

The circuit judge considered H. A. Winter, Inc., a fiction created by H. A. Winter in order to color his personal transactions with corporate protection. A reading of the record leads to the conclusion that

H. A. Winter, Inc., is no more in fact than H. A. Winter.

We think H. A. Winter, Inc., claimant, is estopped as against plaintiff from claiming the certificates pledged by Mr. Winter as collateral to his note.

Upon a review of the evidence we affirm the judgment of the court relative to the claim of H. A. Winter, Inc.

Plaintiff will recover costs.

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

WILDER NATIONAL TAVERN SYSTEM *v.* JILLSON.

LICENSES—BLUE SKY LAW—SUBSCRIPTION OF PROMOTER.

Where subscriber to stock of Illinois corporation was interested in its organization and agreed to subscribe for stock when it was organized, his subscription is not in violation of Illinois blue sky law (Cahill Rev. Stat. Illinois, chap. 32, ¶ 258, subd. [2]; Smith-Hurd Rev. Stat. Illinois, chap. 121½, § 100[2]).

Appeal from Wayne; Campbell (Allan), J. Submitted October 29, 1931. (Docket No. 218, Calendar No. 36,056.) Decided January 4, 1932.

Assumpsit by Wilder National Tavern System, an Illinois corporation, against Oren B. Jillson on a stock subscription. Judgment for plaintiff. Defendant appeals. Affirmed.

Max Kahn (*Leonard V. Pylkas,* of counsel), for plaintiff.

Younglove & Chockley, for defendant.

WIEST, J. Plaintiff is an Illinois corporation, organized February 23, 1926. Defendant was interested in its formation and organization and tendered a subscription to its capital stock. This tender was not effective because of change in the proposed capitalization. April 3, 1926, defendant, in Michigan, signed a subscription for stock to the amount of $1,050, and mailed it, with his check for $100, to an officer of the company at St. Louis, Missouri. The check was taken to Columbia, Illinois, where the home office of plaintiff was located, and there cashed and stock certificates executed in favor of defendant and kept by the company under the terms of the subscription. This suit was brought to recover the balance due on the subscription and defendant prosecutes this appeal from a judgment awarded plaintiff.

The decisive question presented is whether the subscription violated the so-called blue sky law of Illinois, where it was accepted and shares of stock executed.

If defendant was interested in promoting the organization of the corporation and agreed to subscribe for shares of stock therein when it was organized, then there was no violation of the blue sky law of Illinois.

At the date of organization of the corporation defendant was in Germany and sent a radiogram, asking reservation of stock for him in the new company. The later subscription is explained by change in the capitalization.

The case does not present an instance of sale of corporate stock to a purchaser, upon solicitation

after incorporation, but a subscription by one interested in the creation of the corporation, and defendant's subscription falls within the issue of stock to organizers of the corporation.

The Illinois blue sky law exempts from its provisions distribution of capital stock to stockholders without incurring any expenses or liability therefor, such as commissions. Cahill Rev. Stat. Illinois, chap. 32, ¶ 258, subd. (2); Smith-Hurd Rev. Stat. Illinois, chap. 121½, § 100(2).

The judgment is affirmed, with costs to plaintiff.

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

SHIMP *v.* STURGIS NATIONAL BANK.

MORTGAGES—DISCHARGE—ACCOUNTING.

In suit for accounting and discharge of mortgage on ground that mortgagee had accepted land contract and agreed to give credit therefor on mortgage, decree dismissing bill, *held*, justified by record.

Appeal from St. Joseph; Reid (Neil E.), J., presiding. Submitted October 9, 1931. (Docket No. 66, Calendar No. 35,461.) Decided January 4, 1932. Rehearing denied March 3, 1932.

Bill by Edward W. Shimp and another against Sturgis National Bank for an accounting. Decree for defendant. Plaintiffs appeal. Affirmed.

William E. Ware, for plaintiffs.

Raymond H. Dresser, for defendant.

WIEST, J. Plaintiffs are husband and wife and formerly conducted a grocery business in a rented building in the city of Sturgis. They denied a community of interest in such business, but the proofs established the contrary. They wanted a store building of their own and purchased a lot and mortgaged the same to George W. Schaeffer for $3,000. Needing more money, they mortgaged the same property to the defendant bank for $6,000. It was the intention to employ $3,000 of this mortgage in taking up the Schaeffer mortgage, and the bank issued its certificate of deposit for that sum, payable to Mr. Schaeffer. Mr. Schaeffer refused to accept it and was not obliged to do so because his mortgage had several years to run. The certificate of deposit was then credited to Mr. Shimp's account at the bank, and the whole $6,000 used by plaintiffs in constructing their new building and in the conduct of their grocery business. The new building cost more than plaintiffs anticipated, and, to pay materialmen, they executed to the bank a chattel mortgage for $4,600 on their stock of groceries and fixtures. This sum was paid out by the bank to materialmen and also to Mr. Shimp in his conduct of the grocery business.

Later on, plaintiffs conveyed to Fred E. English and Carrie E. English a dwelling located on East Chicago street, in Sturgis, subject to a mortgage thereon of $2,000, and received as consideration property owned by Mr. and Mrs. English, and by them sold on land contracts to third parties, and Mr. and Mrs. English assigned their vendors' interests to plaintiffs. The land contracts were deposited with the bank as collateral security to loans made Mr. Shimp. The interest of plaintiffs in the Chicago street property was estimated to be of the

value of $4,000, and the land contracts assigned to them were taken at a value of $3,758.27, and Mr. English gave his check for $241.73 to make up the $4,000.

Plaintiffs claimed that the deal with Mr. and Mrs. English was brought about by the bank under an agreement that the bank would take the land contracts and credit plaintiffs with $4,000 on the mortgage. Mr. Shimp claimed that he was not the mover in the matter, did not examine the property, and left the whole matter to the bank under the alleged agreement. In this he was mistaken. He had placed the East Chicago street property in the hands of a real estate broker, and that broker found the purchaser, and the transaction was handled by Mr. Shimp, with the aid of the bank cashier, and Mr. Shimp was the one who wanted the exchange to be made and consented that the land contracts be held by the bank as collateral security.

The bill herein was filed upon the claim that the mortgage held by the bank was satisfied by the alleged agreement; the bank having accepted the land contracts and the check at a value of $4,000. Plaintiffs asked for an accounting and discharge of the mortgage. The circuit judge found there was $4,000, together with interest, due on the mortgage, and dismissed the bill. Defendant asked for no affirmative relief.

The testimony took a wide range, and we have before us a record of 521 pages, but in the last analysis, the issue was as stated by Mr. Shimp:

"My contention is that I should have been credited with $4,000 at the time of the sale of the East Chicago street property."

The record has been read with care, and we agree with the holding of the circuit judge. Further re-

view of the testimony would but lengthen this opinion and be of no benefit to the profession.

The decree is affirmed, with costs to defendant.

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

STATE BANK OF AMERICA *v.* SKRZYCKI.

BILLS AND NOTES—FRAUD—MISTAKE.

In suit to reinstate personal note of defendant on ground that acceptance of corporate note given to take up said personal note was accomplished by fraud and mistake, evidence *held*, insufficient to establish either fraud or mistake.

Appeal from Wayne; Bell (Frank A.), J., presiding. Submitted October 30, 1931. (Docket No. 192, Calendar No. 35,901.) Decided January 4, 1932.

Bill by State Bank of America against William T. Skrzycki and Skrzycki Baking Company and Storck Baking Company, Michigan corporations, to reinstate a promissory note given by defendant Skrzycki and canceled by renewal note of defendant Skrzycki Baking Company indorsed by defendant Storck Baking Company. Decree for plaintiff as to defendant corporations. Bill dismissed as to defendant Skrzycki. Plaintiff appeals. Affirmed.

John A. Hamilton (*Neill E. Graham*, of counsel), for plaintiff.

Welsh, Bebout, Hill & Lee, for defendants Skrzycki and Skrzycki Baking Company.

WIEST, J. July 1, 1929, defendant William T. Skrzycki executed a promissory note to the Storck Baking Company for $5,000. The Storck Baking Company indorsed the note to plaintiff bank. At maturity it was not paid, and, upon Mr. Skrzycki having his attention called to the matter by the bank, he sent to the bank the note of the Skrzycki Baking Company for the sum of $4,750, payable to the Storck Baking Company, and indorsed by the payee, together with $250 as payment on the old note and $50 interest, and received the old note stamped "paid by renewal." When the latter note came due plaintiff claims to have discovered, for the first, that the note of the Skrzycki Baking Company had been substituted in renewal for the note of the defendant Skrzycki, and filed the bill herein to have the first note reinstated, or that the Skrzycki Baking Company and the Storck Baking Company be decreed to owe the last note, alleging fraud and mistake.

The circuit judge found no mistake or fraud. Thereupon counsel for plaintiff asked, and was granted, a decree awarding the plaintiff the sum of $5,094.38, against the Skrzycki Baking Company and the Storck Baking Company, jointly and severally. Plaintiff reviews by appeal.

We note that when plaintiff could not obtain restoration of the liability of defendant William T. Skrzycki it asked for and was granted recovery upon the second and renewal note.

The point of whether such remedy sought and granted, after denial of restoration of the old note, constituted an election to affirm its holding of the last note and a waiver of mistake and fraud thereto-

fore alleged is not presented by counsel, and, therefore, we do not turn the case off on such ground. The first note was given in aid of a corporation in course of formation and with the understanding that, when incorporation of such company was perfected, it could and would take up the note and give the note of the corporation in renewal, and such, we think, was so understood by Mr. Kolowich, president of plaintiff bank. At the time the first and second notes were executed George J. Kolowich was a director and president of plaintiff bank and an officer and principal stockholder of the Storck Baking Company, and knew of the planned organization of the Skrzycki Baking Company, and it is apparent that the first note, indorsed over to his bank, was to enable the accomplishment of the organization of the Skrzycki Baking Company and a sale of the Storck Baking Company assets to such new corporation.

Mr. Kolowich claimed that the renewal note, when first presented to him, was like the first note, except in amount, and signed by Mr. Skrzycki individually, and the theory is advanced that afterward the note was changed by inserting, above Mr. Skrzycki's signature, the name of the corporation and adding, after his name, the title "President." We cannot so find.

The cashier of plaintiff bank was instructed by Mr. Kolowich, president, to accept a new note, and claims that, when the note was presented, he did not examine it, and had no knowledge that it was the note of the corporation rather than the individual note of Mr. Skrzycki. It was understood by the president of the bank that the Skrzycki Baking Company, a corporation, was to be organized to take over the assets of the Storck Baking Company. Such corporation was organized, and, at a meeting of the stock-

holders of the Storck Baking Company, Mr. Kolowich moved that the Storck Baking Company sell all of the assets of the company to William T. Skrzycki or the Skrzycki Baking Company, a corporation to be organized under the laws of the State of Michigan. An offer had been previously made, in behalf of the contemplated corporation, and in the mentioned motion it was further stated that the Storck Baking Company accept the offer of William T. Skrzycki and the Skrzycki Baking Company. This motion was carried by vote of Mr. Kolowich, who represented a great majority of the shares of the stock.

The circuit judge stated:

"I do not find any evidence of mutual mistake, and it appears to me that Mr. Skrzycki was following a consistent course from the beginning, from the time he made the first offer down to the time, after the company was organized, that he presented this note to the bank. * * *

"I think the testimony tends strongly to support the conclusion that Mr. Kolowich knew rather generally that Mr. Skrzycki, at least, was aiming all the while to make this obligation a bakery company obligation instead of a personal one."

At the time the first note was given, the Skrzycki Baking Company was contemplated, but not yet organized, and, in order to secure the assets of the Storck Baking Company for the new corporation, it was a proper thing for Mr. Skrzycki to give his personal obligation. The plaintiff bank, through its president, had knowledge that the first note was given in behalf of the contemplated corporation, and that, when organized, that corporation would assume the obligation, and such result was accomplished by the second note.

Plaintiff failed to establish the alleged fraud and mutual mistake, and we must leave the parties where they have placed themselves.

The decree is affirmed, with costs.

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

MEAD *v.* REHM.

1. BROKERS—COMMISSIONS—SUFFICIENCY OF DESCRIPTION IN LISTING AGREEMENT—FRAUDS, STATUTE OF.

   In action for broker's commission, listing agreement describing land to be sold as "Putnam resort property" sufficiently identified it.

2. SAME—ORAL AUTHORIZATION TO SIGN FOR OWNER INSUFFICIENT.

   Liability for broker's commission on sale of interest in land may not be based on oral authorization of another by owner to sign listing agreement for him (3 Comp. Laws 1929, § 13417).

3. SAME—RIGHT TO RECOVER COMMISSION ON QUANTUM MERUIT.

   Oral agreement to pay commission on sale of land being void under statute, no recovery on *quantum meruit* may be had, even though service is rendered and accepted (3 Comp. Laws 1929, § 13417).

4. SAME—COMPUTING COMMISSION.

   Liability of vendee for commission on exchange of equity for equity in other property is to be computed on value of contract interest, and not on value of entire property.

Error to Lenawee; Sampson (Jacob N.), J. Submitted October 6, 1931. (Docket No. 18, Calendar No. 34,879.) Decided January 4, 1932.

On necessity that authority of agent to purchase or sell real property be in writing to enable him to recover compensation for services, see annotation in 9 L. R. A. (N. S.) 933.

Assumpsit by Richard T. Mead against John Rehm and others for real estate broker's commission under an option to sell and the common counts. Judgment for plaintiff against defendants John and George Rehm. Defendant John Rehm appeals. Reversed as to defendant John Rehm; remanded as to defendant George Rehm.

F. B. Wood, for plaintiff.

Henry A. Behrendt, for defendant John Rehm.

WIEST, J. Under land contract John, George, and Grace Rehm held comparatively small vendees' interests in certain resort property at Sand Lake, Lenawee county. They exchanged their interests for equities in other properties. Plaintiff, a real estate broker, brought about the exchange, and in this suit seeks to recover his commission.

The statute, 3 Comp. Laws 1929, § 13417, slightly transposed, provides that:

"Every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate * * * shall be void, unless such agreement, contract or promise, or some note or memorandum thereof be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized."

George Rehm gave plaintiff the following agreement:

"I hereby agree to pay R. T. Mead a commission of five per cent. on the sale price of the Putnam resort property. Signed, George H. Rehm, Putnam, Sand Lake, Michigan."

George Rehm testified that he was verbally authorized by John Rehm to list the property with plain-

tiff. Plaintiff had judgment against George and John Rehm for the sum of $6,600. This result was reached by computing the commission at five per cent. on the full value of the resort property.

Defendants John and Grace Rehm denied authorizing George Rehm to make the agreement sued upon. They also claimed that the agreement did not sufficiently identify any property. The last-mentioned point is without merit. The listing sufficiently identified the property. Option cases have no application. The other point has merit.

While the statute does not expressly state that one assuming to execute the contract for another must have written authority to do so, yet it does state that he must be lawfully authorized to sign the name of another. This agreement was not signed by John and Grace Rehm, neither did George Rehm sign their names thereto. If John Rehm may be held liable under the claimed verbal authority, then the evil the statute was intended to prevent will be present, and one who cannot be held liable on a verbal promise to pay a commission would be worse off than before the statute, for his liability would depend upon the promise of one asserting verbal authorization. A verbal agreement to pay the commission is rendered absolutely void by the statute, and there can be no recovery on *quantum meruit*, even though the service was rendered and accepted. George Rehm is liable, for he signed the agreement, but his liability is not to be measured upon a consideration of the value of the whole property.

The Rehms held no title, for title was in another. Their vendor consented to a transfer of their interests to another. The liability of George Rehm is to be computed upon the value of the contract interests of the Rehms in the resort property. Upon this

record we cannot compute the amount of the liability of George Rehm.

The judgment is reversed, with costs to defendant John Rehm, and the case remanded to the circuit court, with leave to proceed against George Rehm.

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

E. H. PUDRITH CO. *v.* WHITE.

PARTNERSHIP—HOLDING ONESELF OUT AS PARTNER.

In action against defendant on theory that he was partner in concern purchasing goods from plaintiff on credit, finding of trial court that defendant was not partner in fact, and that he had not held himself out to be partner, *held*, justified by evidence.

Appeal from Lenawee; Rathbun (G. Arthur), J. Submitted October 8, 1931. (Docket No. 51, Calendar No. 35,934.) Decided January 4, 1932.

Assumpsit by E. H. Pudrith Company, a Michigan corporation, against Ray White and Stanley W. Fabian on the common counts for merchandise sold. Judgment for defendants. Plaintiff appeals. Affirmed.

Lewis Daniels, for plaintiff.

Baldwin & Alexander, for defendant White.

WIEST, J. Plaintiff company sold jewelry on credit to the Adrian Jewelry Manufacturing Company, a copartnership composed of Stanley W. Fabian and Bert J. Hetherington. The copartnership existed but a short time. Mr. Hetherington contributed certain equipment and jeweler's tools and sold the same to defendant Ray White, retired from the firm, and notified plaintiff that White had purchased his interest. There is no showing that this statement by Hetherington was ever brought to the attention of Mr. White. Mr. White was engaged in another business in the city of Adrian. Shortly after Hetherington informed plaintiff company that he had sold to White, representatives of the company visited the city of Adrian, and claimed they went there to retake the jewelry, unless satisfied of White's pecuniary responsibility. While in the city of Adrian, they called upon Mr. White at his place of business, and mention was made of the fact that Mr. White had purchased the equipment from Mr. Hetherington, and Mr. White informed them that he had purchased the equipment and had loaned it to Mr. Fabian. Plaintiff's representatives then made mention of notes held by the company, and Mr. White stated:

"Since Mr. Fabian has paid his bills there is nothing to worry about and nothing to squawk about till such time as Mr. Fabian doesn't pay his bills."

Plaintiff claims that Mr. White stated:

"We have taken care of everything up to now and * * * when we fail to do so, then's the time to squawk."

We are inclined to accept Mr. White's version, because it is in line with all his other endeavors to help his friend. The jewelry was not retaken, probably because there was nothing due plaintiff at that

time. Later other jewelry was furnished the Adrian Jewelry Manufacturing Company.

This suit was brought against defendants Fabian and White on the claim that they were partners in fact, or, at least, Mr. White held himself out to be a partner.

At the trial, before the court without a jury, Fabian was discharged because of bankruptcy, and the court held that White was not a partner in fact, nor was there evidence that he held himself out to be a partner.

It seems strange that when the representatives of plaintiff visited Adrian they did not ask Mr. White whether he was a partner. If they had done so, an answer either way would have saved all this trouble.

The record discloses that Mr. White was not a partner in fact. He did buy Mr. Hetherington's equipment and left it for the use of Fabian. He also aided Mr. Fabian financially, and, in order to do so, consulted an attorney, and was advised that it would be proper for him to sign checks with Fabian. The testimony of the bank cashier and of the attorney fully supports the testimony of Mr. White that he did this merely as a matter of friendship for Mr. Fabian.

We find no evidence that Mr. White held himself out to be a partner, or allowed himself to be so held out. Mr. White was not an ostensible partner, as far as third persons were concerned, by assertions, admissions, and acts tending to show that he was such.

The finding of the trial court was in accord with the evidence, and the judgment is affirmed, with costs.

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

FILDEW *v.* STOCKARD.

1. CORPORATIONS—RECEIVERS.
   Receiver takes corporation's property subject to all prior liens.

2. SAME—DUTY OF RECEIVER TO ATTACK DEFECTIVE LIENS.
   If corporation is insolvent, it is receiver's duty to attack all liens that are fatally defective.

3. APPEARANCE—WAIVER OF DEFECTS IN PLEADINGS.
   Defect in *præcipe*, summons, affidavits, and writs of garnishment in misnaming State in which defendant corporation was incorporated, was waived by filing its general appearance.

4. PLEADING—PARTIES—MISNOMER—AMENDMENT.
   While due diligence is required in pleadings of plaintiff in description of parties, yet, where no one has been misled in any manner by misnomer, amendment should be permitted (3 Comp. Laws 1929, § 14144).

5. SAME—AMENDMENT IN FURTHERANCE OF JUSTICE.
   Under statute of amendments (3 Comp. Laws 1929, § 14144), court has power to amend any process, pleading, or proceeding in action or proceeding, either in form or substance, for furtherance of justice and may disregard any error or defect therein which does not affect substantial rights of parties.

6. SAME—CORPORATIONS—AMENDMENT.
   Court properly permitted amendment of pleadings erroneously describing defendant corporation as Michigan corporation, where no one had been misled by error (3 Comp. Laws 1929, § 14144).

Appeal from Wayne; Campbell (Allan), J. Submitted December 1, 1931. (Calendar No. 35,919.) Decided January 4, 1932.

Garnishment proceedings by John H. Fildew against Joel Stockard and Joel Stockard & Company, principal defendants, and Peoples Wayne

County Bank and others, garnishee defendants. From order permitting amendment of process as to character of corporate principal defendant, its receiver appeals. Affirmed.

Stanley L. Fildew and *Edward G. DeGree,* for plaintiff.

Yerkes, Goddard & McClintock (*Frank W. Donovan,* of counsel), for receiver of defendant Joel Stockard & Company.

BUTZEL, J. John H. Fildew brought suit by summons against Joel Stockard and "Joel Stockard & Company, a Michigan corporation," jointly and severally. He filed affidavits for writs of garnishment, and they were issued and served on several banking corporations. One of the garnishees disclosed assets held as collateral of a value in excess of the indebtedness due it. Subsequently, a receiver was appointed for Joel Stockard & Company, and the receiver caused its appearance to be entered in the instant case. Later the receiver entered a default of plaintiff for failure to file a declaration, and secured an order discontinuing the garnishment proceedings, but both the default and order were set aside because no notice had been served on plaintiff. Plaintiff, on filing his declaration, also moved to amend the *præcipe,* summons, and affidavits and writs of garnishment, so as to substitute the name of "Joel Stockard & Company, a corporation," instead of "Joel Stockard & Company, a Michigan corporation," wherever the latter designation appeared. The receiver objected, and showed that Joel Stockard & Company is a Delaware corporation; that the rights of the receiver as a representative of creditors had intervened since the issuance of the

original writs, and that the equities favored the receiver, who was looking after the equal protection of all creditors, while plaintiff was seeking a preference. The circuit judge permitted the amendment, and the receiver appeals.

The record fails to disclose the reasons for the appointment of a receiver. In an affidavit in opposition to the motion to amend, appellant's attorney states, on information and belief, that creditors will not be paid in full. Another affidavit shows that the receivership was precipitated by plaintiff's garnishment proceedings.

A receiver takes a corporation's property subject to all prior liens, but if the corporation is insolvent, it is his duty to attack all liens that are fatally defective. *Detroit Trust Co.* v. *Goodrich,* 175 Mich. 168 (Ann. Cas. 1915A, 821). However, in the instant case, any objections it might have raised to the misdescription in naming the State under which defendant company was incorporated it waived by filing its general appearance. See *Welch* v. *Hull,* 73 Mich. 47; *Tuller* v. *Ginsburg,* 99 Mich. 137. In *Weber* v. *Wayne Circuit Judge,* 217 Mich. 561, based on the earlier case of *Ettelsohn* v. *Insurance Co.,* 64 Mich. 331, it was stated that a general appearance by the principal defendant in the main case did not clear defects in the auxiliary garnishment proceedings. In that case, the name not only failed to reveal the State in which the corporation had been organized and existed, but also that there was a corporation at all.

In the later case of *Phillips* v. *Belt Automobile Indemnity Ass'n,* 241 Mich. 420, the rule was very much relaxed, the court saying:

"In *Weber* v. *Wayne Circuit Judge,* 217 Mich. 561, it was held that no jurisdiction was acquired where

the bare name of the corporation was stated in the affidavit and process, and that it was necessary to state that it was a corporation in order to confer jurisdiction. I think it should be noted that in that case the word 'company' or its equivalent was not a part of the corporate name. The language of the opinion in *First National Bank of Hanford* v. *Morganthaler,* 219 Mich. 300, quite materially modifies the holding in the *Weber Case,* and it was pointed out by Mr. Justice BIRD that *Ettelsohn* v. *Insurance Co.,* 64 Mich. 331, upon which the *Weber Case* was largely based, was decided before foreign corporations were answerable in garnishment proceedings and that it was quite likely that this furnished a reason for the holding in the *Ettelsohn Case.* It should also be noted that but one Justice concurred in all that was said by Mr. Justice SHERWOOD in the *Ettelsohn Case.*

"Unquestionably proper pleading requires that there should be a recital that the party is a corporation. But if the affidavit, process, or pleading omits such recital it is in my judgment amendable. In *People* v. *Meyer,* 204 Mich. 331, the information alleged that Herpolsheimer Company whose property was stolen was a corporation. This court sustained the right to amend by alleging that the company was a partnership. I am persuaded that the rigor of the holding in the *Weber Case* should be relaxed and it should be held that where the name of the party imports a corporation or an association, the court acquires jurisdiction even though the fact that it is a corporation or association is not affirmatively stated."

In *Daly* v. *Blair,* 183 Mich. 351, 353, it was said:

" 'Where the right corporation has been sued by the wrong name, and service has been made upon the right party, although by a wrong name, an amendment substituting the true name of the corporation may be permitted.' 31 Cyc. p. 488."

In *First National Bank of Hanford* v. *Morganthaler,* 219 Mich. 300, 305, the principal defendant appeared specially to move for dismissal, on the ground that the State of incorporation was not averred. The court said:

"Since domestic corporations may sue and be sued in our courts in their corporate names, and since foreign corporations may have the same right and are subject to the same process in garnishee cases, we think there is no longer any basis for making it appear in garnishee process that the defendant is a corporation amenable to our laws. If the affidavit and writ show that the garnishee defendant is a corporation or if the name imports a corporation, we think it is a sufficient compliance with the law."

In the instant case, no one has been misled. The principal defendant, described as a Michigan corporation, duly appeared, as did its receiver. The garnishee defendants were duly served, and in their disclosures show that there has been no misapprehension on their part as to who Joel Stockard & Company is, even though described as a Michigan corporation. While due diligence is required in pleadings of the plaintiff in the description of the parties, and pleadings still serve a necessary purpose, nevertheless, where no one has been misled in any manner by a misnomer, the amendment should be permitted. Under the statute of amendments, 3 Comp. Laws 1929, § 14144, the court has the power to amend any process, pleading, or proceeding in an action or proceeding, either in form or in substance, for the furtherance of justice, and may disregard any error or defect in the proceedings which does not affect the substantial rights of the parties. Under the facts of the present case, we believe that the

circuit judge was correct in permitting the amendment. The order is affirmed, with costs to plaintiff.

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

OXENGER v. WARD.

1. NEGLIGENCE—GROSS NEGLIGENCE—"GUEST" STATUTE—MOTOR VEHICLES—WILFUL MISCONDUCT.

   Term "gross negligence," as used in "guest" statute (1 Comp. Laws 1929, § 4648), is not limited to subsequent negligence, discovered negligence or peril, humanitarian doctrine, last clear chance doctrine, etc., but it means such degree of recklessness as approaches wanton and wilful misconduct.

2. SAME—PURPOSE OF "GUEST" STATUTE—WILFUL MISCONDUCT.

   Purpose of "guest" statute is to absolve owner or driver of motor vehicle from liability for negligence unless he is guilty of wanton and wilful misconduct.

3. MOTOR VEHICLES—GROSS NEGLIGENCE—"GUEST" STATUTE.

   Automobile driver who drove across through highway without obeying "stop" sign, resulting in collision and injury to guest passenger in his car, while guilty of ordinary negligence, was not guilty of gross negligence within meaning of "guest" statute (1 Comp. Laws 1929, § 4648), and therefore is not liable for said injuries.

Appeal from Hillsdale; Chester (Guy M.), J. Submitted October 29, 1931. (Docket No. 203, Calendar No. 36,079.) Decided January 4, 1932. Rehearing denied March 3, 1932.

Case by Duane Oxenger, by next friend, against Glenn J. G. Ward for personal injuries received in an automobile collision while a guest in defendant's car. Judgment for plaintiff. Defendant appeals. Reversed, and judgment ordered entered for defendant.

Paul W. Chase and *Wilbur D. Grommon,* for plaintiff.

William C. Searl and *Merton Fitzpatrick,* for defendant.

BUTZEL, J. Duane Oxenger was three years of age on July 1, 1930. He has brought suit by his father, Ora Oxenger, as next friend, against his uncle, Glenn J. G. Ward, defendant herein. Duane's mother is Ward's sister. On June 29, 1930, Duane, together with his parents and their three other young children, were the guest passengers of defendant. The latter was also accompanied by his wife and their two small children, so that there were ten persons in defendant's Ford car. They left their home in the morning with the intention of visiting a relative in Ohio. Defendant drove the car along the territorial road which runs east and west. He was nearing Hagaman's corners, where the territorial road is intersected by another road running south from Hillsdale. This latter road, herein referred to as the Hillsdale road, had been designated as a through traffic highway and stop signs had been placed on the territorial road 70 feet from the center of the Hillsdale road. Both roads are county roads 24 feet in width. The territorial road is graveled a width of 16 feet and the Hillsdale road 9 feet. There is not much traffic on either road. The road commissioner estimated that the average traffic on the

Hillsdale road was about 300 vehicles a day, or less than one vehicle every two minutes. As defendant's car approached the intersection, he saw a car pass by on the Hillsdale road at a very rapid rate of speed, and remarked: "I'd hate to have that car hit me." The immediate events that followed and defendant's conduct we shall describe in the words of Ora Oxenger who was the main witness for plaintiff:

"Well, what he done, he slowed up somewhat as he approached the stop sign, but he didn't stop, and when he got just about to the corners, why—about ready to go out into the road—he apparently gave it just a little more gas, and I looked and saw a car coming, and I says 'Look out, there comes a car.' Well, of course, the car struck us, we couldn't help but be struck."

When asked at what rate of speed defendant was traveling between the stop sign and intersection, he replied:

"Well, that would be rather hard to tell exactly, but probably was slipping along 20 miles an hour, close to it."

In a signed statement made at the time of the accident, Oxenger stated that defendant was a good, cautious driver and was driving his car with care. He repeated this statement at the trial, but also said that he had changed his mind since the accident. The car going south struck defendant's car as he was driving across the Hillsdale road. The record does not show the injuries to defendant's car. However, Duane's right eye was so badly cut by broken glass that its vision has been permanently destroyed. At the trial, defendant did not take the witness stand nor was any testimony introduced in his behalf. It

was shown without objection that an insurance company was in some manner interested in the case. Judgment upon findings of the trial court of $6,000 was rendered in favor of plaintiff.

The only question involved in the case is whether defendant was guilty of gross negligence. What is known as the "guest" statute was amended by Act No. 19, Pub. Acts 1929 (1 Comp. Laws 1929, § 4648), which limits the liability of the owner or operator of a car to a guest passenger to cases where the owner or operator of the motor vehicle is guilty of gross negligence or wilful and wanton misconduct that contributes to the injury or death or loss which the accident may cause. In the instant case, there is no testimony showing wilful or wanton misconduct on the part of defendant. The question, therefore, is whether he was guilty of "gross negligence," within the meaning of the statute.

In Michigan, some confusion in terminology has arisen from the manner in which the term "gross negligence" has been used in many cases. We shall refer to some of them. In *Bouwmeester* v. *Railroad Co.*, 63 Mich. 557, the defendant was held liable, on the last clear chance doctrine, and it was held that plaintiff's contributory negligence did not preclude his recovery where the action of defendant is wanton, wilful, or reckless, and injury results therefrom. Accord: *Matta* v. *Railway Co.*, 69 Mich. 109 (12 Am. Neg. Cas. 91). In *Battishill* v. *Humphreys*, 64 Mich. 514, and also in *Freeman* v. *Railway Co.*, 74 Mich. 86, 98 (3 L. R. A. 594), the expression "reckless negligence" is used. In *Hughes* v. *Railway Co.*, 78 Mich. 399 (4 Am. Neg. Cas. 79), the term "gross negligence" is used as synonymous with "recklessness."

In *Denman* v. *Johnston*, 85 Mich. 387, 396, the term "gross negligence" was held to mean "an in-

tentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. It also implies a thoughtless disregard of consequences, without the exertion of any effort to avoid them." This case has been cited and approved of in *Knickerbocker* v. *Railway Co.*, 167 Mich. 596, 602; *Good Roads Construction Co.* v. *Railway Co.*, 173 Mich. 1, 13; *Berry* v. *Railway Co.*, 173 Mich. 181, 187; *Vought* v. *Michigan United Traction Co.*, 194 Mich. 343; *Simon* v. *Railway*, 196 Mich. 586. In *Schindler* v. *Railway Co.*, 87 Mich. 400, the defendant was held guilty of gross negligence, in a case where it was found that defendant's servants were regardless of consequences in shunting the cars in the manner they did, and that these servants and employees of the defendant did not care whether they ran the plaintiff down or not. Accord: *Putt* v. *Railway Co.*, 171 Mich. 216.

In *Buckley* v. *Railroad Co.*, 119 Mich. 583, the term "gross negligence" was applied to defendant's misconduct in a last clear chance situation. In *Labarge* v. *Railway Co.*, 134 Mich. 139, 141 (14 Am. Neg. Rep. 575), the court said:

"It may be conceded that, where one wilfully injures another, the doctrine of contributory negligence is not involved, because the injury is not *negligent*, but *intentional*. Again, where one is seen in danger, though placed there through his own negligence, one who, thus seeing him, omits ordinary care to avert an injury to him, is not alone negligent, but is *wanton*, and, as wantonness of this kind is akin to wilfulness, there is an opportunity for applying the same rule, and defendants have been held liable under such circumstances. And again, we can conceive of a degree of recklessness, which, by reason of its coincidence with *probable disaster*, is closely allied to the foregoing, and should perhaps be gov-

erned by the same rule. * * * In our opinion, the term 'gross,' as applied to negligence, has no such broad legal effect as is contended for in this case; but whenever the defendant sees a plaintiff in danger, or by exercising only ordinary care in the discharge of his duty should discover such danger, in time to avert an injury, and either fails, after discovering it, to take steps to avert it, or fails to discover the danger, the fact that the plaintiff's danger arose, in the first place, through his own negligence, does not prevent his recovery for an injury sustained."

It was also said that gross negligence is not merely extraordinary negligence. This case was quoted with approval in *Calvert* v. *Railway,* 202 Mich. 311. In *Strong* v. *Railway Co.,* 156 Mich. 66, 74, the term "gross negligence" was held to be "something more than a mere epithet characterizing the degree of negligence of which a defendant may have been guilty." In *Buxton* v. *Ainsworth,* 138 Mich. 532 (5 Ann. Cas. 146); *Strong* v. *Railway Co., supra; Fike* v. *Railroad Co.,* 174 Mich. 167; *Kelley* v. *Keller,* 211 Mich. 404, 408 (20 N. C. C. A. 228); and *Krouse* v. *Railway Co.,* 215 Mich. 139, 147, gross negligence was the term applied to the last clear chance situation or to negligence subsequent to the discovery of plaintiff's peril. In *Walter* v. *Railway Co.,* 191 Mich. 181, the court said (quoting *Fike* v. *Railroad Co., supra*):

"It is gross negligence where the wrongdoer, by the exercise of the most ordinary care, should have known of the precedent negligence of the plaintiff and of his peril, and subsequently does him an injury. * * * Gross negligence, therefore, may be: (a) A deliberately wilful act; (b) an act so reckless as to be akin to wilful, and therefore presumed in law to be wilful; (c) a failure to exercise ordinary care to prevent injury to another, after his

peril is, or should have been, discovered in the exercise of ordinary care. Such failure to exercise ordinary care to prevent injury is so reckless that the law presumes it to be wilful; wilfulness or deliberate intent may be inferred from all of the circumstances."

Owing to the confusion that arose in the terminology used in these cases, as well as others which we have not cited, Mr. Justice CLARK, in *Gibbard* v. *Cursan,* 225 Mich. 311, correlated the earlier decisions of the court as far as it was possible, and clearly defined the term "gross negligence." Speaking for the court, he said:

"When will gross negligence of a defendant excuse contributory negligence of a plaintiff? In a case where the defendant, who knows, or ought, by the exercise of ordinary care, to know, of the *precedent negligence* of the plaintiff, by his *subsequent negligence* does plaintiff an injury. Strictly, this is the basis of recovery in all cases of gross negligence. 20 R. C. L. p. 145. Such gross negligence is also sometimes called discovered negligence, subsequent negligence, wanton or wilful or reckless negligence, discovered peril, last clear chance doctrine, and the humanitarian rule. Other misconduct, different in kind, is also generally and incorrectly known as gross negligence, as we shall see later. *Richter* v. *Harper,* 95 Mich. 221; *Kelley* v. *Keller,* 211 Mich. 404 (20 N. C. C. A. 228); *Fike* v. *Railroad Co.,* 174 Mich. 167; *Knickerbocker* v. *Railway Co.,* 167 Mich. 596; *Buxton* v. *Ainsworth,* 138 Mich. 532 (5 Ann. Cas. 146)."

In *Union Trust Co.* v. *Railway Co.,* 239 Mich. 97, 100 (66 A. L. R. 1515), it was said that subsequent negligence is frequently called gross negligence. In *Essenberg* v. *Achterhof,* 255 Mich. 55, it was said that gross negligence may more properly be termed subsequent negligence.

It is obvious that the term "gross negligence" as used in the guest statute was not limited to subsequent negligence, discovered negligence or peril, humanitarian doctrine, last clear chance doctrine, etc., for they would not be ordinarily involved in cases brought by a guest against the owner or a driver of the car in which he was riding. The very purpose of the guest act was to absolve an owner or driver from liability for negligence except where he is guilty of wanton and wilful misconduct or gross negligence. Upon examination of the meaning of the term "gross negligence," as judicially defined prior to the enactment of the guest act, and upon consideration of the very purpose for which this statute was enacted, and a careful reading of the statute and the correlation therein of the term with that of "wanton and wilful misconduct," we must conclude that the term "gross negligence" means such a degree of recklessness as approaches wanton and wilful misconduct. We do not believe that defendant was guilty of gross negligence under the circumstances of this case. There is no doubt of his being guilty of negligence. Had he driven into a busy arterial highway or a city street without stopping when commanded to do so by an appropriate sign, his liability would have been a question for the jury to determine. Under the facts presented in the instant case, we are constrained to reverse the judgment, with costs to defendant, and remand the case to the trial court with instructions to enter a judgment in favor of defendant.

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

COLLINS *v.* HULL.

1. NEGLIGENCE—EMERGENCY—DEGREE OF CARE.
   One placed in emergency through no fault of his own is not bound to exercise same degree of care as if emergency did not exist.

2. MOTOR VEHICLES—NEGLIGENCE.
   Automobile driver who drove at rate of 40 to 45 miles per hour over rough road cut up with ruts, with loose gravel in middle, resulting in car's swerving and striking car going in opposite direction, was properly found guilty of negligence.

3. HUSBAND AND WIFE—HUSBAND ENTITLED TO WIFE'S SERVICES AS HOUSEKEEPER—DEATH.
   Husband is entitled to wife's services as housekeeper, and therefore he alone may recover for loss thereof through wrongful killing of wife.

4. DEATH—SURVIVAL ACT—WIFE'S SERVICES AS HOUSEKEEPER—DAMAGES.
   In administrator's action under survival act for wrongful death of wife, testimony as to value of her services as housekeeper should not have been considered in assessing damages, since husband alone may recover therefor.

5. APPEAL AND ERROR—LAW ACTION TRIED WITHOUT JURY CONSIDERED DE NOVO—DAMAGES.
   While Supreme Court, under Michigan Court Rule No. 75, may consider action for damages tried without jury *de novo*, it is unwilling to determine correctness of amount of damages without some indication by trial judge as to what amount should be.

6. DEATH—DAMAGES—PAIN AND SUFFERING.
   In action under survival act, judgment for $4,000 for death of married woman 60 years of age, was justified, where she lived for four days after accident, during which time she was conscious and suffered very great pain.

As to care required in sudden emergency not to injure another person, see annotation in 37 L. R. A. (N. S.) 60.

Appeal from Kent; Brown (William B.), J. Submitted October 23, 1931. (Docket No. 222, Calendar No. 36,014.) Decided January 4, 1932.

Case by William H. Collins, administrator of the estate of Alma Collins, deceased, under the survival act, against Ivan E. Hull for personal injuries resulting in the death of plaintiff's decedent. Judgment for plaintiff. Defendant appeals. Affirmed.

William J. Branstrom, for plaintiff.

Rodgers & Dunn, for defendant.

BUTZEL, J. Plaintiff, William H. Collins, sues as administrator of the estate of Alma Collins, his wife, whose death resulted from injuries sustained by her in a collision between a Buick car driven by defendant, Ivan E. Hull, and a Whippet car driven by Collins, and in which decedent was riding. At about 2:30 on July 13, 1930, Collins, accompanied by decedent and others, was driving carefully in a westerly direction along the north side of M-44, a very rough and pitted road with loose gravel scraped together by gravel trucks, in the center. Defendant was driving in an easterly direction along the south side of the road at a rate of about 40 to 50 miles per hour, but keeping towards the center. Defendant claims that when about 200 feet from the Collins car, and while driving down from a knoll, he lost control of the steering gear of his car, which turned slightly towards the north side of the road. Defendant failed to apply his brakes or slacken his speed, and his car hit the left front wheel and fender and scraped the side of the Collins car with such force that the Collins car was turned over on its right side and the Hull car, after proceeding a rod further, went into a ditch. Decedent was thrown out of the

car and sustained severe and painful injuries, from which she died four days later.

Defendant attributes the accident to the fact that there were ruts in the road and a pile of loose gravel in the center, and that notwithstanding his efforts to avoid a rut, he struck one while slightly turning his wheel. He claims that as a result, the car turned to the northeast, and that when he reached for the brake and clutch, his right knee struck against the ignition lever and the key locking the steering apparatus, with such force, so as to injure and cut his knee in two places; that in some inexplicable manner the ignition lever broke off and fell to the floor, and the key was half turned and bent, locking the steering rod so that he could not turn the wheel or steer the car. He further claims that, owing to his confusion in the emergency that arose, he failed to apply his brakes although they were in good condition; he admits that it was probably true, as stated by another witness, that he could have stopped the car within a distance of 50 feet from the Collins car. Had he applied his brakes and stopped the car, or even reduced its speed, the force of the impact would have been very much lessened. The mechanic who examined defendant's car after the accident testified that he found the ignition lever broken off and the key turned in the lock. The local Buick dealer testified that it was physically impossible for the lever to be broken, the key turned, and defendant's knee hurt in the manner described, and that the collision itself caused all the damage. We are impressed on reading the record, including the testimony of defendant's own witness, that the damage was caused by the collision. The trial judge, however, found liability because defendant made no effort to apply his brakes and bring the car to a standstill. One placed in an emergency through no fault of his own is not

bound to exercise the same degree of care as if the emergency did not exist. *Myler* v. *Bentley,* 226 Mich. 384 (23 N. C. C. A. 859). When, however, one drives at a rate of 40 to 45 miles per hour over a rough and pitted road cut up with ruts, and with loose gravel in the center, and strikes some uneven rut that causes his car to swerve, he is not without fault, nor is he driving in the manner that a careful and prudent driver would under like conditions. Defendant's negligence in this regard was the first link in the causal chain that led to the accident. The record overwhelmingly supports the finding of the trial court that the defendant was guilty of negligence. The court assessed the damages at $4,000.

Testimony was admitted showing that decedent was a housewife, living with her husband; that she was 60 years of age, and that the prevailing wage of housekeepers was from $7 to $10 a week. The suit was brought under the survival act (3 Comp. Laws 1929, § 14040 *et seq.*). Decedent's husband was entitled to her services as a housekeeper, and he alone can recover for them. *McCauley* v. *Railway,* 167 Mich. 297. The testimony in regard to decedent's services as housekeeper should not have been taken into consideration in assessing damages in the present case. However, the trial judge, who tried the case without a jury, stated in rendering judgment:

"I think myself that the question of earnings in this case would be highly speculative and problematical."

He should have said that it would not be considered at all. In rendering judgment, he further said:

"Without further comment on the subject, I will simply say that under all the circumstances in the

case, including pain and suffering, and whatever earnings have been in contemplation, I will render a judgment for the plaintiff in the sum of $4,000."

The amount of the judgment reflects the fact that the trial judge gave but little, if any, consideration to the earnings in contemplation, but, if he did, a judgment for $4,000 exclusively for pain and suffering, was fully justified. While, under Michigan Court Rule No. 75, we may consider the case *de novo*, we are unwilling to determine the correctness of the amount of damages without some indication by the trial judge who has heard all of the testimony and seen the witnesses, of what the amount should be. We are impressed by the record, however, that $4,000 is a fair amount in the present case. Decedent lived four days, during which she was conscious and suffered very great pain. While the monetary compensation can not be measured with any degree of certainty, nevertheless, plaintiff is entitled to a substantial amount for the pain and suffering endured by decedent. *Oakes* v. *Van Zomeren*, 255 Mich. 372. We have affirmed judgments for larger amounts in cases of infants who only survived a few hours after receiving fatal injuries. *Swaczyk* v. *Detroit Edison Co.*, 207 Mich. 494; *Ignaszak* v. *McRay Refrigerator Co.*, 221 Mich. 10; *Love* v. *Railroad Co.*, 170 Mich. 1, 8; *Mulvihill* v. *Railway*, 231 Mich. 123. In *Stone* v. *Sinclair Refining Co.*, 230 Mich. 472, we affirmed a judgment for $4,000 exclusively for pain and suffering in the case of a married woman who lived only four hours after the accident.

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

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

BERNSTEIN *v.* BRODY.

1. NEGLIGENCE—IMPUTABLE NEGLIGENCE—MOTOR VEHICLES.
   Negligence of automobile driver is imputable to passenger in his car.

2. MOTOR VEHICLES—DUTY OF DRIVER MAKING LEFT TURN.
   Automobile driver making left turn is not bound to anticipate that approaching automobile is exceeding lawful speed limit (1 Comp. Laws 1929, § 4697).

3. SAME—EXCESSIVE SPEED—CAUSAL RELATION TO ACCIDENT.
   That plaintiff's automobile was exceeding speed limit at time of collision will not bar recovery for damages unless speed has causal relation to accident.

4. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
   Passenger in automobile injured in collision at street intersection is precluded from recovering damages therefor, where collision would not have occurred had automobile not been exceeding lawful speed limit, although driver of car with which it collided was also guilty of negligence in making left turn in front of it.

Appeal from Wayne; Searl (Kelly S.), J., presiding. Submitted October 14, 1931. (Docket No. 118, Calendar No. 35,940.) Decided January 4, 1932.

Case by Mollie Bernstein against Leo Brody for personal injuries received in an automobile collision at an intersection. Judgment for plaintiff. Defendant appeals. Reversed.

Bernstein & Bernstein, for plaintiff.

Howard D. Brown (*George H. Cary,* of counsel), for defendant.

On speed of automobile as negligence, see annotation in 25 L. R. A. (N. S.) 40; 38 L. R. A. (N. S.) 488; 51 L. R. A. (N. S.) 993.

As to effect of speed and application of speed regulations on liability for collisions between automobiles or automobile and another vehicle at or near corner of streets or highways, see annotation in L. R. A. 1916A, 747.

On contributory negligence as proximate cause of injury, see annotation in 7 L. R. A. 130; 8 L. R. A. 82; 13 L. R. A. 733.

CLARK, C. J. Plaintiff was injured in a collision of automobiles at the intersection of Twelfth street and Euclid avenue in Detroit. She was a passenger, and it is conceded that negligence of her driver is imputed to her. The trial was without jury. Plaintiff had judgment. Defendant has appealed.

The questions are defendant's negligence, contributory negligence imputed to plaintiff, and that the court's decision on these questions is against the preponderance of the evidence.

Schneyer drove the car in which plaintiff rode. Defendant drove south on Twelfth street intending to make a left turn into Euclid. He testified he slowed to 10 miles per hour, and, observing the Schneyer car coming north on Twelfth about 100 feet from the intersection, made the turn. Just as defendant's car entered Euclid, leaving Twelfth, it was hit near its right rear wheel by the right front of the Schneyer car. The record shows defendant cut the corner to some extent at least in making the turn. A police officer, on the corner at the time, testified defendant's speed in making the turn was 4 or 5 miles an hour, and that when he started to turn, the Schneyer car was 80 or 100 feet south of the intersection. Schneyer's testimony is that he was entering the intersection when defendant attempted to pass in front of him and that he applied brakes but could not avoid collision. The weight of evidence is that the Schneyer car was nearly 100 feet from the intersection when defendant started to turn.

It is established that the speed of the Schneyer car until brakes were applied was in excess of the limit fixed by statute for this business street, section 5, tit. 3, Act No. 90, Pub. Acts 1929 (1 Comp. Laws 1929, § 4697), and in excess of the limit fixed by the

city ordinance. The testimony of speed is: Schneyer, 15 to 18 miles; the police officer, 22 to 25 miles; another witness, 30 to 35 miles. Defendant was not bound to anticipate that Schneyer would exceed the lawful speed limit. The speed will not prevent recovery unless it has causal relation to the accident. *McConnell* v. *Elliott,* 242 Mich. 145.

The trial court states the accident might have been avoided if defendant had made the turn more rapidly. That is true, as an instant, a second more of time, would have saved collision. Likewise, if Schneyer had driven less rapidly the collision would have been avoided.

The statute and ordinance limiting speed are chiefly to guard against accidents such as this where cars, pedestrians, or other traffic objects suddenly confront a driver. There is a causal relation between the speed of the Schneyer car and the accident. Assuming negligence of defendant, it follows, from what has been said, that Schneyer was contributively negligent, which, imputed to plaintiff, precludes recovery. Other questions, therefore, require no discussion.

Reversed without new trial. Costs to appellant.

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

SCHOOL DISTRICT NO. 7, KEELER TWP., *v.* FARMERS MUTUAL FIRE INSURANCE CO. OF DOWAGIAC.

1. APPEAL AND ERROR—INSURANCE—FIRE INSURANCE—NOTICE OF ASSESSMENT.

   In action against mutual fire insurance company on policy, finding of jury that notice of assessment had been given, supported by evidence, is conclusive, on review.

2. SAME—NOTICE OF ASSESSMENT—QUESTION FOR JURY.

   Where insured's counsel conceded at trial that question of whether notice of assessment had been given insured was issue of fact, its contention, on review, that there was no issue of fact on said question, is not entertained.

3. INSURANCE—CONSTRUCTION OF POLICY IN FAVOR OF INSURED.

   If there be language in fire insurance policy calling for construction, it should be construed in favor of insured.

4. SAME—FORFEITURE—FAILURE TO PAY ASSESSMENT.

   If mutual fire insurance policy contains no provision for forfeiture for insured's failure to pay assessments, failure to pay same on day named therein will not constitute forfeiture of policy.

5. SAME—PROVISION FOR FORFEITURE ON NONPAYMENT OF ASSESSMENT VALID.

   Clause in mutual fire insurance policy stating that assessment shall be paid within stipulated time or policy will be forfeited is valid, and operates of itself to work forfeiture, where there is no provision for suspension, and assessment is not so paid.

6. SAME—MUTUAL INSURANCE COMPANIES—SUSPENDED MEMBERS—STATUTES.

   3 Comp. Laws 1929, § 12604, limiting time for carrying suspended members by mutual fire insurance companies, does not change contract of insurance, provide period of grace, or prolong insurer's liability beyond period provided in contract, but its purpose is to correct abuse of carrying suspended members indefinitely.

As to construction of policy in favor of insured, see annotation in 11 L. R. A. 341; 13 L. R. A. 263.

Appeal from Van Buren; Warner (Glenn E.), J. Submitted October 28, 1931. (Docket No. 77, Calendar No. 35,981.) Decided January 4, 1932.

Assumpsit by School District No. 7, Keeler township, Van Buren county, against Farmers Mutual Fire Insurance Company of Dowagiac, Michigan, on a policy of fire insurance. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Earl L. Burhans and *David Anderson,* for plaintiff.

Hendryx & Mosier, for defendant.

CLARK, C. J. Plaintiff's schoolhouse and contents insured with defendant were destroyed by fire on January 15, 1930. Defendant denied liability and declined to pay. Plaintiff sued on the policy. Defendant had verdict and judgment. Plaintiff has appealed.

The question is that the policy lapsed for nonpayment of assessment. The charter and by-laws are a part of the contract. Pursuant to charter, an assessment was ordered due November 1, 1929, and payable on or before December 31, 1929. Plaintiff did not pay the assessment.

We quote from the charter:

"The secretary may transmit by mail a notice to each member, to his address appearing on the company's books, of the amount of his assessment to pay said losses and expenses and such transmitting if by mail shall be evidenced by proof of the depositing of such notice in the post office post paid."

And from a by-law:

"Each member shall understand and take notice that his assessment is due the 1st day of November

in each and every year, and unless such assessment is paid on or before December 31st thereafter that such failure bars him from any privileges in this company after January 1st following, no matter whether or not he has received notice of his assessment."

Every member of plaintiff's school board testified he had received no notice of the assessment. There was testimony that one member at least had admitted receiving the notice. Defendant had testimony that notices of the assessment were mailed to all policy holders or members of defendant company on October 31, 1929, and that the notices were in the mail on November 1, 1929. Both sides requested directed verdict. The court was of the opinion there was a question of fact as to whether the notice of assessment had been mailed, which appellant admitted to be a question of fact, but contended was of no importance. After colloquy between court and counsel, there being no dispute of the amount of the loss, the sole question of fact submitted to the jury was that above stated.

Whether notice of assessment was required under the quoted sections from the charter and by-laws, or otherwise, we need not determine. The jury found notice had been given. The finding is well supported and will stand.

The instructions to the jury are criticized as tending to confuse as to when notice of assessment was given or might have been given. No notice except that of October 31st or November 1st was claimed. Defendant either gave that notice or it gave none. We see no possibility of confusion on that question.

Appellant also contends there was no issue of fact as to mailing the notice. As counsel for appellant expressly conceded in the trial that the matter sub-

mitted to the jury was an issue of fact, the contention will not be entertained.

There is no provision for suspension. Does the contract provide for lapse or forfeiture for failure to pay assessment? Having due regard for the rule that if there be language in the policy calling for construction it should be construed in favor of insured, we think the question well answered by the trial judge, quoting from his opinion:

"If a policy contains no provision for a forfeiture thereof by reason of a failure of the assured to pay assessments, failure to pay the same on the day named therein will not constitute a forfeiture of such policy. 3 Cooley's Briefs on Insurance (2d Ed.), pp. 2907–2909; 14 R. C. L. p. 975, § 148.

"A clause stating that an assessment shall be paid within a stipulated time or policy will be forfeited is valid and such a provision operates of itself to work a forfeiture. 3 Couch on Insurance, § 627; 3 Joyce on Insurance (2d Ed.), § 1261.

"So the question gets around to this: Is the condition of the by-laws, 'unless such assessment is paid on or before December 31st thereafter, such failure bars him from any privileges in this company after January 1st following,' to be construed as a provision for forfeiture?

"Privileges are special rights belonging to the individual or class and not to the mass. It is a right not enjoyed by all. As a member of defendant company, plaintiff had the right to recover for the loss if the assessment was paid on or before December 31, 1929. Plaintiff failed to pay; such failure worked a forfeiture of the policy and barred the plaintiff from the right or privilege to collect. 6 Words and Phrases (1st Series), pp. 5583, 5584; 3 Words and Phrases (2d Series), pp. 1206, 1207; 6 Words and Phrases (3d Series), p. 131."

Appellant contends, nevertheless, that it is saved by a statute, section 13, chap. 4, pt. 4, Act No. 154, Pub. Acts 1929 (3 Comp. Laws 1929, § 12604):

"If default be made in the payment of an assessment by a member of any such company, the company shall cancel the policy of such member ninety days from the final due date of such assessment, and such member shall not be liable for losses or expenses of the company incurred after the date of such cancellation, but such member shall be liable for a *pro rata* share of all indebtedness of the company to date of such cancellation."

Formerly this statute was in this form, quoting section 13, Act No. 325, Pub. Acts 1925:

"If default be made in payment of an assessment by a member of any such company, the company shall cancel the policy of such member ninety days from the due date of such assessment, and such member shall not be liable for losses or expenses of the company incurred after the date of such cancellation."

It will be observed that Act No. 154, Pub. Acts 1929, changes "due date" to "final due date," and also adds clause relative to liability for indebtedness. The legislature did not attempt to change contracts of insurance, to add a period of grace, nor to prolong the period of insurer's liability beyond that provided by the contract. It did intend to correct an abuse (again quoting from the opinion of the trial judge):

"To prevent mutual fire insurance companies carrying suspended members indefinitely and to provide a maximum and definite period for which a member in default in the payment of the assessment could be held liable for losses and expenses."

The contract here, by its self-executing provision, having effected a complete lapse or forfeiture on January 1, 1930, for nonpayment of assessment, plaintiff is not liable for any share of company indebtedness incurred after that date. Argument that plaintiff is so liable and therefore should have benefit of the policy is without merit.

Defendant, evidently unaware of Act No. 154, Pub. Acts 1929 (3 Comp. Laws 1929, § 12604), and attempting to observe Act No. 325, Pub. Acts 1925, under which the due date of the policy was November 1st, on February 1, 1930, wrote on its register of the policy "Canceled February 1." This was idle and calls for no discussion. There is no question of waiver or estoppel.

We find no reversible error.

Affirmed.

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

MAXSON *v.* KOHLER.

1. APPEAL AND ERROR—DIRECTED VERDICT.

On question of decision in favor of defendant of reserved motion to direct verdict, evidence must be viewed in light favorable to plaintiff, on appeal.

2. EVIDENCE—PRESUMPTIONS.

That defendant had knowledge, on April 12th, that water heater was not paid for, would not raise presumption that he knew, on May 20th, that it was not paid for, especially in view of plaintiff's express representation, on latter date, that property in which heater was installed was free from all liens and incumbrances.

3. MALICIOUS PROSECUTION—ADVICE OF COUNSEL—DIRECTED VERDICT. In action for damages for malicious prosecution, based on plaintiff's arrest on charge of false pretenses, defense of advice of counsel, *held*, made out as matter of law, under evidence.

Appeal from Ingham; Collingwood (Charles B.), J. Submitted October 22, 1931. (Docket No. 188, Calendar No. 36,004.) Decided January 4, 1932.

Case by Rolla F. Maxson against George J. Kohler for malicious prosecution. Judgment *non obstante verdicto* for defendant. Plaintiff appeals. Affirmed.

Bishop, Blackney & Church (*Joseph H. Dunnebacke,* of counsel), for plaintiff.

Pierce & Planck, for defendant.

CLARK, C. J. This is an action for damages for malicious prosecution based upon plaintiff's arrest on a charge of false pretenses, wherein it is claimed that he, assigning his vendee's interest under a land contract in consideration of $600, had falsely represented that the property was free and clear of all liens and incumbrances, when, in truth, it was incumbered by a certain contract of purchase from Consumers Power Company of Lansing. Plaintiff had verdict. Judgment for defendant was entered on decision of a reserved motion to direct. Plaintiff has appealed.

On April 12, 1930, plaintiff purchased from the power company on conditional sale a hot water heater which, on April 14th, was installed in the dwelling on the premises in question by proper connections into the plumbing system. On May 20, 1930, he surrendered and assigned his interest to defendant, who had succeeded to the vendor's interest in the contract and who held the title.

Plaintiff expressly represented that his equity was free and clear from any incumbrances or claim, and "there were no incumbrances on the property." After the deal had been closed, plaintiff wrote defendant that he had forgotten to tell him about the hot water tank or heater. Correspondence followed. Finally, on June 9, 1930, plaintiff wrote to the power company that he would pay for the heater according to the terms of the sale agreement, but he did not so notify defendant, and there is no evidence that defendant knew of the letter. Complaint was made on June 18, 1930, and arrest followed promptly. On order of the prosecuting attorney, the cause was dismissed promptly.

No question is raised that the conditional sale agreement was an incumbrance, and it is passed. The defense is advice of counsel. Except, perhaps, in one particular, hereinafter mentioned, defendant disclosed to his own attorney, and to the prosecuting attorney, to whom his own attorney advised him to go, fully and fairly all the material facts within his knowledge. The prosecuting attorney caused the complaint to be drawn and directed defendant to sign it, which he did.

The sole matter of evidence urged by appellant as making an issue for the jury of the defense of advice of counsel, and as indicating that defendant did not make full and fair disclosure of facts within his knowledge, is testimony of plaintiff that, on April 12, 1930, he told defendant he had purchased the hot water heater on approval or on trial, and that the tenant would pay for it by additions to his gas bills. Defendant denied any such conversation, but, as the evidence on the question of decision in favor of defendant of the reserved motion to direct must be viewed in the light favorable to plaintiff, it is considered that plaintiff did so inform defend-

ant. Defendant's interest then was as vendor, as a holder of the title. No transfer or surrender of the vendee's interest to him was then contemplated. Defendant was not advised of the purchase price of the heater, nor the period over which it was to be paid for.

Under the circumstances, the fact that the heater was not fully paid for on April 12th will not raise a presumption that it was not fully paid for on May 20th, especially in view of plaintiff's express representation on May 20th that the property was free from all liens and incumbrances. Defendant, on May 20th, cannot be charged with knowledge that the heater was not fully paid for. He had a right to rely on plaintiff's representation, and it is apparent he did rely on it.

The defense of advice of counsel was made out as a matter of law, and the court did not err in ordering judgment for defendant.

We quote from *Crawford* v. *Huber,* 215 Mich. 564 (39 A. L. R. 1392):

"The court correctly held that defendant, having in good faith fully and fairly stated all the material facts within his knowledge to the prosecuting attorney, and having acted solely on his advice, could not be held for his act in instituting the proceedings under either count for malicious prosecution or false imprisonment. *Murphy* v. *Walters,* 34 Mich. 180; *Smith* v. *Tolan,* 158 Mich. 89; *Rogers* v. *Olds,* 117 Mich. 368; *Wakely* v. *Johnson,* 115 Mich. 285; *Huntington* v. *Gault,* 81 Mich. 144; *Thomas* v. *Bush,* 200 Mich. 224."

No other matter calls for discussion.

Affirmed.

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

KARSTEN *v.* LA HUIS.

1. APPEAL AND ERROR—TIME OF FILING OBJECTIONS TO FINDINGS.
Where neither parties nor counsel were in court when findings of fact, conclusions of law, and judgment were entered, and record does not show that notice was given as required by 3 Comp. Laws 1929, § 14265, Supreme Court is unable to say that exceptions to findings filed seven days later were not filed seasonably (former Circuit Court Rule No. 45).

2. CONTRACTS—PROMISE TO PAY.
In action for money paid to defendant to buy stocks on margin for plaintiff, where defendant paid all of money to broker and evidence fails to show promise, express or implied, on part of defendant to pay, finding of court in favor of plaintiff is not sustained.

3. APPEAL AND ERROR—RECORD.
On appeal, Supreme Court is confined to record.

Appeal from Ottawa; Miles (Fred T.), J. Submitted October 9, 1931. (Docket No. 78, Calendar No. 35,631.) Decided January 4, 1932.

Assumpsit by Leonard Karsten, individually and as assignee, against Chester J. La Huis for money paid to purchase certain stocks. Judgment for plaintiff. Defendant appeals. Reversed.

Jarrett N. Clark, for plaintiff.

Corwin, Norcross & Cook, for defendant.

CLARK, C. J. Defendant has appealed from a judgment against him in a cause tried without a jury.

The trial was on October 1, 1930. The findings of fact and conclusions of law were filed and judgment was entered on October 11, 1930. Defendant's exceptions to the findings were not filed until October 18, 1930. Former Circuit Court Rule No. 45 required exceptions to be filed within four days.

Appellee contends, with citation of decisions under former statute and rules, that the exceptions came too late, and may not be considered.

It seems conceded that neither parties nor counsel were in court when the decision was made and findings filed. The record does not show notice was given as required by section 14, chap. 18, Act No. 276, Pub. Acts 1929 (amending 3 Comp. Laws 1915, § 12586; 3 Comp. Laws 1929, § 14265. We therefore cannot hold that exceptions were not filed seasonably.

A decisive question is that there is no promise to pay, express, or implied.

Plaintiff and his nephew Russell were in business in Zeeland. Defendant also resided there. They were friends of a lifetime, and were frequently together. Defendant was on his own account having marginal transactions in certain stock through a broker, L. Van Heest, trading as L. Van Heest & Co., in Grand Rapids, and he had put up a sum of money on his marginal account and had made considerable gain. He told this to the Karstens. They decided to try it. They put up $1,400. Defendant paid all of it to Van Heest, and had marginal accounts opened in the names of the Karstens. Van Heest dealt with other brokers carrying his marginal account. He responded to calls of his brokers in large amount, but the last and larger call he was unable to meet, and he was closed out.

The Karstens recognized Van Heest as their debtor, and accepted his notes for the amounts due them.

Later there was a plan, evidently that creditors of Van Heest might be saved loss, by which a corporation was formed in which each of the creditors took stock in the amount of 10 per cent. of their respective claims. The Karstens subscribed as creditors of Van Heest, took the stock, paid for it, and in their subscriptions stated "the amount of my claim against L. Van Heest," which is the claim here sued upon; Russell Karsten having assigned to plaintiff. Defendant's testimony, corroborated by Van Heest, is that he incurred no obligation to the Karstens. The testimony of the Karstens tends somewhat, within the narrow limits made by documentary evidence, to show a promise on the part of defendant. The clear weight of the evidence is that there is no promise, express or implied, on the part of defendant to pay plaintiff the amount claimed. The finding of the trial court to the contrary is not sustained.

The brief of appellee and the opinion of the trial judge refer to and discuss matter not in this record but seemingly growing out of other litigation not before us. We, of course, are confined to the record here.

Reversed, without new trial. Costs to appellant.

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

VAN BLAIRCUM *v.* CAMPBELL.

1. MOTOR VEHICLES—DEATH—RATE OF SPEED—CAUSAL RELATION.
   In action for death of guest passenger in defendant's automobile, where death was caused by collision with rear end of trailer which defendant failed to see, rate of speed at which he was driving is not important, in absence of showing that it had causal relation to accident.

2. SAME—NEGLIGENCE—GROSS NEGLIGENCE—WILFULNESS—WANTONNESS—GUEST PASSENGER ACT.
   If driving at speed of 45 miles an hour at night when collision occurred resulting in death of guest passenger is negligence, it is not gross negligence, nor is it wilfulness or wantonness (1 Comp. Laws 1929, § 4648).

3. SAME—PROXIMATE CAUSE—LIABILITY UNDER GUEST PASSENGER ACT.
   Failure of automobile driver to see trailer in front of him, which was proximate cause of collision resulting in death of guest passenger, is at most ordinary negligence, for which driver is not liable under guest passenger act (1 Comp. Laws 1929, § 4648).

Appeal from Livingston; Collins (Joseph H.), J. Submitted October 29, 1931. (Docket No. 141, Calendar No. 35,972.) Decided January 4, 1932.

Case by Anna Van Blaircum, administratrix of the estate of William E. Van Blaircum, deceased, against Andrew Campbell for personal injuries received in an automobile collision resulting in the death of plaintiff's decedent. Directed verdict and judgment for defendant. Plaintiff brings error. Affirmed.

John F. Berry, for plaintiff.

As to liability of owner or operator for injury to guest, see annotation in 50 L. R. A. (N. S.) 1100; L. R. A. 1916E, 1193; L. R. A. 1918C, 276; 20 A. L. R. 1014; 26 A. L. R. 1425; 40 A. L. R. 1338; 47 A. L. R. 327; 51 A. L. R. 581; 61 A. L. R. 1252; 65 A. L. R. 952.

Don W. Van Winkle and *Shields & Smith,* for defendant.

CLARK, C. J. Plaintiff appeals from judgment on verdict directed for defendant. Plaintiff's decedent was gratuitous passenger in an automobile owned and driven by defendant. It collided in the night on a public highway with the rear of a trailer. Defendant did not see the trailer. Perhaps he was not as watchful as he should have been. If defendant had seen the trailer and had been unable to stop in time, or if some question of lack of control were involved, the rate of speed might be important, but, as he did not see the trailer, how the speed has causal relation to the accident is not pointed out. But if speed of 45 miles per hour be conceded to be negligence it would not be gross negligence nor would it be wilfulness or wantonness.

The proximate cause of the accident was defendant's failure to see the trailer. This mere failure, or inadvertence, or lack of care is, at most, ordinary negligence, so called. There is no room on this record to find gross negligence, nor to find wilfulness or wantonness. See *Gibbard* v. *Cursan,* 225 Mich. 311, where the matter is discussed.

Act No. 19, Pub. Acts 1929 (1 Comp. Laws 1929, § 4648), then effective, provides:

"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 or wanton miscon-

duct contributed to the injury, death or loss for which the action is brought.''

See *Naudzius* v. *Lahr,* 253 Mich. 216 (74 A. L. R. 1189, 30 N. C. C. A. 179).

Verdict was directed for defendant on this statute and on another ground. On the facts stated and under the statute the court did not err. Other ground for direction of verdict is unnecessary to decision.

Affirmed.

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

GREEN v. MARTIN'S ESTATE.

EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIM IN FOREIGN STATE—EVIDENCE.

Order of allowance or judgment on claim against executors in foreign State is no evidence of debt against ancillary administrator in this State.

Appeal from Clinton; Collingwood (Charles B.), J., presiding. Submitted October 27, 1931. (Docket No. 17, Calendar No. 35,841.) Decided January 4, 1932.

Elizabeth Green presented her claim against the estate of Roland S. Martin, deceased. From order

of disallowance, she appealed to circuit court. Judgment for defendant. Plaintiff appeals. Affirmed.

Fehling & Parmenter, for plaintiff.

Smith, Hunter & Spaulding (*Lilley & Wilson* and *Charles W. Austin,* of counsel), for defendant.

CLARK, C. J. Roland S. Martin died testate domiciled in Pennsylvania. The will was duly admitted to probate there. Ancillary administrator with will annexed was appointed in Clinton county, Michigan. Plaintiff made claim against the estate in Pennsylvania and it was allowed and paid in part, the estate not having sufficient funds to pay creditors in full. She then made claim against the estate in Michigan. It was disallowed in probate court and also on appeal in circuit court. Plaintiff has appealed.

The only proof of claim made in the trial court was a certified copy of order of allowance and proceedings thereon in the orphans' court of Sullivan county, Pennsylvania. This was an utter failure of proof. There is no privity between the executors in Pennsylvania and the administrator here. The order of allowance or judgment on the claim against the executors in Pennsylvania is no evidence of a debt against the ancillary administrator here. The reason is well stated in *Johnson* v. *Powers,* 139 U. S. 156 (11 Sup. Ct. 525):

"It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment

of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem,* and not *in personam,* or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger. * * * The laws and courts of a State can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta.* It cannot be even *prima facie* evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel. (*Stacy* v. *Thrasher*) 6 How. 44, 60, 61."

See, also, *Hill* v. *Tucker,* 13 How. (U. S.) 458; *Brown* v. *Fletcher's Estate,* 210 U. S. 82 (28 Sup. Ct. 702), affirming *Brown* v. *Fletcher's Estate,* 146 Mich. 401 (15 L. R. A. [N. S.] 632, 123 Am. St. Rep. 233); 24 C. J. p. 1117; 11 R. C. L. p. 431.

Affirmed.

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

WELLER *v.* MANUFACTURER'S LIFE INS. CO.

1. INSURANCE—PREMIUMS—TIME OF PAYMENT—POSTPONEMENT.
   Where life insurance policy dated August 23d provided that premium was due and payable on delivery of policy, and thereafter on each succeeding 23d day of August until premiums were paid in full, delay in delivery of policy did not have effect of postponing due date of subsequent annual premiums.

2. SAME—UNCONDITIONAL ACCEPTANCE OF PREMIUM.
   In action on life insurance policy, finding of trial court that insurer accepted unconditionally payment of premium after expiration of grace period, *held*, sustained by record, notwithstanding insurer later mailed blank application for reinstatement.

3. SAME—WAIVER BY ACCEPTANCE—ESTOPPEL.
   Waiver by acceptance of premium after due date is not based on contract, but on theory that insurer is estopped to insist on conditions of contract inconsistent with unconditional acceptance of premium.

4. ESTOPPEL—WAIVER DEFINED.
   Waiver is intentional relinquishment of known right.

5. INSURANCE—UNCONDITIONAL ACCEPTANCE OF PREMIUM—WAIVER—NOTICE OF INSURED'S ILLNESS.
   By unconditionally accepting premium after expiration of grace period, insurer waived conditions of policy requiring reinstatement and showing of insurability, although at time it had no knowledge of insured's illness.

Appeal from St. Clair; Robertson (William), J. Submitted October 21, 1931. (Docket No. 150, Calendar No. 36,007.) Decided January 4, 1932.

Assumpsit by Vera E. Weller against the Manufacturer's Life Insurance Company, a foreign corporation, as beneficiary under a policy of life insurance. Judgment for plaintiff. Defendant appeals. Affirmed.

John B. McIlwain, for plaintiff.

Walsh, Walsh & O'Sullivan, for defendant.

CLARK, C. J. Defendant issued to Enoch C. Weller a policy of life insurance in which plaintiff, the wife, is beneficiary. She sued on the policy and prevailed. Defendant has appealed.

The policy is dated August 23, 1929, and it provides:

"Premium payable and due date: $24.40 on delivery of this policy and a like amount thereafter on each succeeding 23d day of August until premiums for 20 full years have been paid.

"Policy year: Computed as from the 23d day of August, 1929."

The policy was delivered and first premium paid December 16, 1929, and it is argued that this had the effect of changing the policy year and the premium due date to December 16th. The contract is otherwise. So is the law.

In *Jewett* v. *Northwestern National Life Insurance Co.,* 149 Mich. 79, it was held, quoting syllabus:

"That a life-insurance policy dated August 1st, and providing for payment of premiums on the 1st day of certain months, was not issued until August 18th, does not postpone the time of payment of the subsequent premiums to the 18th of the several months."

In *McCampbell* v. *New York Life Insurance Co.* (C. C. A.), 288 Fed. 465, it was held, quoting syllabus:

"The date stated in a life policy as the anniversary and the date of payment of premiums controls, and the policy will lapse, unless premiums are paid on that date, or within the grace period thereafter, notwithstanding a provision in the policy that it does not become of effect until payment of the first premium, in which case it relates back to the date of application, and the fact that insured was not protected between the date of application and the date of payment of first premium is immaterial."

The premium due August 23, 1930, was not paid when due, nor during the period of grace. On October 16, 1930, Mr. Weller was fatally sick. Plaintiff on that day called defendant's Lansing office by telephone and asked if she could send in her husband's premium. The answer was "Yes." That the husband was sick was not revealed, nor did defendant's agent say anything of application for reinstatement, which application in form common to life insurance practice with letter directing its execution was mailed to Mr. Weller later that day. It arrived after his death. On the same day, October 16th, plaintiff remitted by telegraph the amount of the premium. It was received and accepted by defendant.

On October 17th, plaintiff again called by telephone and inquired if the remittance had been received. The answer was, "All right," or "All O.K." Mr. Weller died on the morning of October 18th.

Defendant tendered back the amount of the premium. Under the policy reinstatement could be effected, (*a*) on written application made by the in-

sured within three years from date of lapse; (*b*) on production of evidence of insurability satisfactory to the company; and, (*c*) on payment of all overdue premiums and any other indebtedness to the company upon the policy. There was compliance with last requirement only.

Defendant contends that payment of the premium was but one step in the matter of reinstatement, that it was its duty to receive the money, and that other requirements of the contract were not waived and it stresses the fact that the letter of October 16th to insured, referring to "our telephone conversation of this afternoon" and enclosing form of application for reinstatement, shows no waiver, shows the money was not received unconditionally. If Mr. Weller had lived and received such letter and form of application, defendant contends he would not be heard to say the premium had been received unconditionally and his beneficiary is in no better position.

On the question of unconditional acceptance, the letter is a matter of fact to be considered. The testimony of oral conversations between plaintiff and defendant, which is not disputed, shows defendant authorized remittance without condition, that plaintiff remitted in reliance thereon, and that defendant accepted unconditionally. The finding of the trial court that "defendant accepted the payment unconditionally" is sustained. See *Rasmusen* v. *New York Life Insurance Co.*, 91 Wis. 81 (64 N. W. 301); *Shields* v. *Supreme Council R. A.*, 123 Ohio St. 31 (173 N. E. 731).

If insured had walked into insurer's office and had asked, "May I pay my premium?" and had been answered, "Yes," and he had paid it, and it had been accepted without condition, the insurer could not avoid the effect of what had been done by send-

ing, later, an application for reinstatement with direction that it be executed. We see no difference in principle in the fancied case and the one before us.

Waiver by acceptance is not based upon contract. It is that the company is estopped to insist on conditions of the contract inconsistent with unconditional acceptance of the premium.

Defendant had no knowledge of insured's fatal illness on October 16th and 17th. It is contended that acceptance, though unconditional, without knowledge of the illness, is not a waiver of the default. Waiver is the intentional relinquishment of a known right. The right here involved was to insist on forfeiture or to decline revival of the policy except by reinstatement in accordance with its terms. Defendant knew its right. It had full knowledge of the facts avoiding or forfeiting the insurance. It waived reinstatement and showing of insurability. It waived forfeiture. It accepted the premium unconditionally. Such acceptance was rightly held by the trial court to be an intentional relinquishment of the known right, a waiver. The policy was thereby revived. *Hoyle* v. *Grange Life Assurance Ass'n,* 214 Mich. 603; 3 Joyce on Insurance (2d Ed.), § 1369; 3 Couch, Cyclopedia of Insurance, § 687.

Appellant relies on cases, chiefly (*United Order, etc.,* v. *Hooser,* 160 Ala. 334 [49 South. 354, 355]), which seem to hold that for the waiver to be valid the insurer must know not only the facts avoiding or forfeiting the insurance, but also must know the consequences of a waiver. The validity of the waiver then would depend not only on knowledge of the right to be waived and the facts avoiding or forfeiting the insurance, but also on whether insured is then a good risk, there being waiver if the

insured is in good health and no waiver if the insured is not in good health. This is beside the doctrine of waiver. It would produce here a paradox that insurer waived matter of health or insurability and yet did not waive it.

We quote syllabus from *Bingler* v. *Mutual Benefit Life Ins. Co.*, 10 Kan. App. 6 (61 Pac. 673):

"The assured was, at the time he received the request for payment and complied therewith, prostrated with a sickness from which he subsequently died. It was not necessary that plaintiff prove notice of this fact to the company, to sustain the reply of a waiver of the forfeiture."

The payment of the premium here was not as upon reinstatement but in legal effect as made and accepted in accordance with the terms of the policy and as made in due time. We quote from a well-reasoned case, *O'Connor* v. *Knights and Ladies of Security,* 178 Iowa, 383 (158 N. W. 761, L. R. A. 1917B, 897):

"It is argued, however, that, as the company did not know that he was sick at the time it received these payments, it cannot be said to be estopped or to have waived the forfeiture. It did know of the provisions of its policy, and that a failure to pay within the month suspended the member, and forfeited all his rights under the policy, and this would be true even if he were not sick, and it was then that it could have insisted upon the terms of its contract and treated the plaintiff as suspended and the contract forfeited. It elected not to do this—not to treat the plaintiff as suspended, or his contract forfeited for a mere failure to pay within the time. It continued his contract in force, notwithstanding this fact and knowledge of this fact, and received further assessments and dues. It there-

fore waived any forfeiture based upon the failure to pay within the time.

"A different question would arise if the forfeiture had been insisted upon and the assured had undertaken to be reinstated under the terms of the policy. Then it would be incumbent upon the assured to make a showing as to his health, and any fraud practiced by him touching this matter would have avoided a reinstatement, or any concealment on his part of a fact that would prevent reinstatement would have been fatal to his right. We must keep always in mind the thought that the suspension and forfeiture relied upon here are related to and are involved in the one act, and that is, the failure to pay the February dues during the month of February. The right to be reinstated, if forfeiture had been insisted upon, is a different matter. Then the question of the health of the assured would be a matter for consideration.

"It is insisted, further, that as the society did not know of his sickness at the time it received these dues, it cannot be held to have waived the forfeiture, because, as it is assumed, if it had had this knowledge, it would not have done these acts which now are alleged to constitute the waiver. But the record discloses that it made no inquiry touching his health at the time it received these dues; that the dues were not accepted subject to any showing as to his health; that the dues were received and accepted as a compliance with the requirements of the original contract. The company owed some duty, if it desired to insist upon the forfeiture, and if it desired to accept the fees subject to a showing as to health, to so indicate to the assured; or, at least, to have made some inquiry touching the matter before accepting the fees as a full performance of the original contract."

See, also, *Bailey* v. *Sovereign Camp, W. O. W.*, 116 Tex. 160 (286 S. W. 456, 288 S. W. 115, 47 A. L.

R. 876); *Equitable Life Assur. Soc.* v. *Brewer,* 225 Ky. 472 (9 S. W. [2d] 206); *Globe Mutual Life Insurance Co.* v. *Wolff,* 95 U. S. 326; *Clark* v. *Manufacturers' Ins. Co.,* 8 How. (U. S.) 235; 14 R. C. L. p. 1190; 37 C. J. p. 536.

Affirmed.

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

BASMAJIAN *v.* CITY OF DETROIT.

1. COURTS—ENFORCEMENT OF COURT RULE—JURY.
   Publication of notice by court that on and after certain date circuit court rule requiring demand for jury trial would be strictly enforced was reasonable method of correcting delinquency in its enforcement (former Circuit Court Rule No. 39).

2. JURY—DEMAND FOR JURY—DISCRETION OF COURT.
   Permitting jury trial, although no demand therefor had been made, as required by former Circuit Court Rule No. 39, was within discretion of court.

3. SAME—REFUSAL OF JURY—ABUSE OF DISCRETION.
   Refusal of jury trial because no demand therefor had been made as required by former Circuit Court Rule No. 39, *held,* not abuse of discretion, under circumstances.

4. STREET RAILWAYS—NEGLIGENCE.
   In action for death of four-year old child run over by street car, finding of trial court that there was no actionable negligence on part of defendant, *held,* justified, under evidence.

Appeal from Wayne; Murphy (Alfred J.), J. Submitted October 6, 1931. (Docket No. 1, Calendar No. 35,749.) Decided January 4, 1932. Rehearing denied March 3, 1932.

Separate actions of case by Richard Basmajian, administrator of the estate of Beatrice Basmajian, against City of Detroit under the death act for personal injuries resulting in death of plaintiff's decedent, Rose Basmajian against same defendant for personal injuries, and by Richard Basmajian against same defendant for loss of services of wife and child. Cases consolidated for trial. Judgments for defendant. Plaintiffs appeal. Affirmed.

Ernest N. Papps, for plaintiffs.

Raymond J. Kelly and *A. Albert Bonczak,* for defendant.

CLARK, C. J. Beatrice Basmajian, a child of four years, propelled her little wagon into the street and was run over and killed by a street car of defendant. Suit was instituted by administrator to recover under the death act (3 Comp. Laws 1929, §§ 14061, 14062). Her mother, who rushed into the street to save or aid the child, also averring injuries by the street car, brought suit. The husband and father also sued to recover burial expenses of the child and cost of medical treatment, loss of services, etc., of the wife. The three suits were consolidated and tried together, and are likewise presented for review.

In a trial without a jury, findings of fact and law were made, and judgment for defendant entered thereon. Plaintiffs have appealed.

A preliminary question is refusal of jury trial. Suits were commenced May 3, 1926. Plea followed promptly. On December 5, 1929, demand for trial

by jury was filed and later was refused. We quote article 2, § 13, State Constitution:

"The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law."

And former Circuit Court Rule No. 39:

"A party desirous of a trial by jury shall make his demand for a jury in writing and file such demand with the clerk within ten days after the issue is joined in the cause, otherwise he shall be deemed to have waived his right to a jury. But the court may in its discretion transfer any case to the jury calendar, although the demand for a jury was not filed as herein provided."

The circuit court rule had not been enforced in the county for considerable time, and, recognizing that the court, having determined to enforce it, ought not to change attitude suddenly to the inconvenience of parties and counsel, the Wayne circuit court caused to be published in the Detroit Legal News, daily from October 15, 1929, to November 30, 1929, the following:

"On and after December 1, 1929, the circuit court rule requiring filing of notice for demand for jury trial will be strictly enforced. Until that time notices of demand for jury trial in pending cases will be received.

"IRA W. JAYNE,
"Executive Judge.

"Dated October 14, 1929."

It will be observed that here the demand for trial by jury was filed after December 1, 1929.

We think correction of delinquency under Circuit Court Rule No. 39 was made reasonably. No other

different or better method has been suggested, nor is it claimed the notice was not sufficient. Attempt is made to show that it escaped attention of plaintiffs' then counsel, but it did not impress the trial court, and avails nothing here. Permitting jury trial was within the discretion of the court and we find no abuse of that discretion in refusing it under the circumstances.

The trial judge found defendant guilty of no actionable negligence. We reach the same conclusion, and adopt a part of his opinion in the suit by the administrator:

"The eyewitnesses to the unfortunate killing of the child, Beatrice, are but three in number, the mother, who is the plaintiff in the case under immediate consideration, and the surviving motorman, and the conductor of the street car. Other witnesses in behalf of each of the parties relate circumstances immediately following the happening of the accident.

"I am convinced that the child, Beatrice, while propelling her little wagon from the sidewalk, with one foot in the wagon and one upon the sidewalk, precipitated it in front of a parked automobile on the north side of Baker street out into the highway. It should be remembered that the distance between the northerly rail and the curbstone is only ten feet, seven inches. Thus, having passed the parked automobile, which it is fair to assume occupied approximately a space upon the highway five feet in width, the child entered into the free space of the highway, which could have been but little more than six feet until she would strike the northerly rail of the street car track. Having entered that space, she was then for the first time visible and was promptly discovered, not only by the motorman, Mr. Thurman, in charge, but by his associate, the student motorman, who was then receiving instructions by Mr. Thurman. I say that the student motorman must have

also discovered the presence of the child upon the highway for this reason: Mr. Thurman promptly applied the reverse to the motor. He testifies that when he did this the current had been stopped, thus permitting the reverse immediately to come in action. This shows that the student motorman in control of the motor had already shut off the power. It was, however, too late to avoid striking the child.

"Here was a situation suddenly precipitated upon the motorman. I am satisfied their car was going at a very moderate rate of speed. It had been slowed down as it approached 18th street because of the passage across its path by a truck. Any acceleration of power in the block west of 18th street up to the time of the collision must have been a very moderate one. I find that the motorman did all that was humanly possible to do to avert the collision. This emergency was not one of their own making. It was thrust upon them, and in the exercise of the means then available to them the accident was unavoidable.

"In reaching these conclusions, it has been important to ascertain, at least with a fair degree of certainty, the place at which the accident occurred. The street car, according to all versions, was stopped a little to the west of the easterly line of 19th street. If the plaintiffs' version is to be accepted as to when and how the accident occurred, it must then follow that the body of the little child had been dragged in and along Baker street for a distance of 200 feet or more. This obviously did not happen. It is made clear that it did not happen by the direct testimony of credible witnesses. Two passengers on the street car, two disinterested women, who, I am persuaded, were telling truthfully what they observed, are clear and definite in their statements, that the situation arose at some point between the easterly line of the plaintiff's house and 19th street. This is corroborated by the motorman and by the conductor of the street car. These two men have tried to tell the truth about the matter. It

makes no difference to them what the outcome of this case is. Their manner disclosed their fairness, their truthfulness."

As to the mother's suit, the trial judge properly said:

"Was the plaintiff injured by the street car at a time prior to or contemporaneously with the happening of the accident? I am persuaded that she was not. I do not believe she was at all within striking distance of the street car at the time her child came into contact with it. A probable explanation of the fact of her injury is found in the testimony of the witness who said it was necessary to endeavor to prevent her from trying to remove the body of the child from under the street car. It is not at all improbable that in so doing she sustained the injury, which she unquestionably received to her right wrist.

"These being my findings of fact in the case, it necessarily follows, as a matter of law, that there being no negligence established upon the part of the defendant corporation, it is entitled to a judgment of no cause of action."

There being no actionable negligence to sustain either of the above cases, it follows the father may have nothing in his suit to recover expenses, disbursements, etc.

Other assignments, especially those relating to denial of motion for new trial have been considered. Discussion of them would be without profit. We find no reversible error.

Judgments affirmed.

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

FORTUNATO *v.* DI FLIPPO.

JUDGMENT—CONSENT DECREE—ACCOUNTING.

Where, in suit for accounting between partners, decree was entered by consent of counsel and parties in open court, it is immaterial that it may not have had full evidentiary support, and therefore bill to set it aside was properly dismissed.

Appeal from Wayne; Hunt (Ormond F.), J. Submitted October 6, 1931. (Docket No. 19, Calendar No. 33,985.) Decided January 4, 1932. Rehearing denied March 3, 1932.

Bill by Louis Fortunato against Dominico Di Flippo and another to set aside a consent decree in a suit to dissolve a partnership and for an accounting. Bill dismissed. Plaintiff appeals. Affirmed.

Ira J. Pettiford, for plaintiff.

Anthony Maiullo, for defendants.

CLARK, C. J. Di Flippo and Fortunato entered into a copartnership to erect buildings. Di Flippo filed bill for dissolution and accounting. There was reference to circuit court commissioner for accounting. The cause came on for hearing in the circuit court in May, 1924. Both parties were represented by counsel and were in court. In the course of the trial a consent decree was agreed upon by parties and counsel in open court by continued and open discussion. Part of the understanding was that Fortunato would take certain real estate at an agreed price of $5,500. A decree was entered on November 11, 1924. It is in substance that Fortunato was to have the real estate and pay Di Flippo $4,529.37. It

also provides that if Fortunato shall fail to pay and to take deed, the real estate be sold and proceeds divided between the partners in certain named amounts.

Motion for rehearing was made later and denied. No appeal was taken. The property was sold by circuit court commissioner, and, after report and confirmation, the proceeds were distributed under the decree.

Fortunato filed this bill in 1928 to set aside the decree as "not being the result of a judicial determination," and as being fraudulent, and to set aside sale and deed pursuant thereto and subsequent conveyances. The bill quotes at length the testimony, colloquy, or argument leading up to the consent decree.

On motion the bill was dismissed. Plaintiff has appealed.

Passing the question of laches, of former adjudication, of estoppel by acceptance of distributive share under the decree, we think the bill properly dismissed. It shows no equity on its face. Having been made by consent of counsel and parties in open court, it is immaterial that it may not have full evidentiary support.

Affirmed, with costs to appellee.

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

ROOD v. CITY OF DETROIT.

1. APPEAL AND ERROR—CERTIFIED QUESTIONS—INJUNCTION—MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS.

   In suit by property owner to enjoin planting of trees in street by city, certified question under Michigan Court Rule No. 78 presents no question for determination by Supreme Court, where record shows that planting has already been done.

2. SAME.

   In suit by property owner to enjoin city from maintaining public commercial nursery business, certified question under Michigan Court Rule No. 78 presents no question for determination by Supreme Court, where record wholly refutes allegations of bill.

3. MUNICIPAL CORPORATIONS — NOTICE — LOCAL IMPROVEMENTS — NECESSITY—TAXATION—INJUNCTION.

   Where property owner was given no notice or opportunity to be heard on question of necessity of local improvement, as required by city ordinance, collection of tax therefor was properly enjoined.

Certified questions from Wayne; Jayne (Ira W.), J. Submitted October 13, 1931. (Calendar No. 35,890.) Decided January 4, 1932. Rehearing denied March 3, 1932.

Bill by John R. Rood against City of Detroit to enjoin levy and collection of a tax. Certain questions certified to this court under Michigan Court Rule No. 78 presented no question for this court to determine. Decree for plaintiff. Affirmed.

John R. Rood, amicus curiæ.

Walter E. Vashak, Assistant Corporation Counsel (*Clarence E. Wilcox,* of counsel), for defendant.

CLARK, C. J. Certified questions under Michigan Court Rule No. 78.

Plaintiff filed bill to enjoin levying and collecting taxes assessed against his lands for a local improvement, planting trees in the street, and to enjoin the planting of trees. The bill also brings in a separate matter in which plaintiff alleges that the defendant city is "maintaining a public commercial nursery business," which also he seeks to enjoin.

The record shows the trees planted, the improvement made. This past event cannot be prevented by injunction. And, in this regard, upon the proofs, plaintiff is entitled to no relief under the bill, and no question can be based on this feature of the case, as to decide it would determine nothing.

The allegations of "maintaining a public commercial nursery business" are wholly refuted by the record. Plaintiff is entitled on his bill to no relief in this regard, nor can a question be raised on this feature of the case.

Remaining questions have relation to legality of the tax. The local improvement under the ordinance may be initiated by certain of the property owners or by the city. In either case, as the trial judge held in an opinion filed, and, as recognized by the common council in its preliminary resolution of necessity, the property owners affected must have due notice provided by ordinance and opportunity to be heard upon the question of necessity. It seems not to be disputed that plaintiff was not given the notice and the opportunity, and that, therefore, the trial judge was right in enjoining collection of the tax.

Questions relating to respective rights of the parties in and to the street, as affecting right to plant trees and to tax therefor, are unnecessary to decision of the case, and therefore are not controlling.

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

EATON *v.* CONSUMERS POWER CO.

1. NEGLIGENCE—RES IPSA LOQUITUR.
   Rule of *res ipsa loquitur* is not recognized in this State.

2. SAME—PRESUMPTIONS.
   Want of care may be presumed from established facts and circumstances.

3. SAME—PRIMA FACIE CASE.
   Evidence of facts or circumstances sufficient to raise presumption that accident would not have happened save for want of care on part of defendant makes *prima facie* case for plaintiff.

4. ELECTRICITY—WIRES ACROSS HIGHWAY—STATUTORY HEIGHT—EVIDENCE—INFERENCES.
   In action by truck driver against power company for injuries received when his load was caught by electric wire stretched across highway, negligence of defendant in originally placing wires below statutory height should not have been submitted to jury, where there was no evidence from which said fact could be inferred (1 Comp. Laws 1929, § 4056).

5. SAME—NEGLIGENCE—FASTENING WIRES—INSPECTION.
   Power company would be guilty of actionable negligence if wire causing accident sagged below statutory height because of its carelessness in originally fastening it, or if its fastening became loose and could have been discovered by reasonable inspection in time to avert injury.

6. SAME—RIGHT OF JURY TO INFER NEGLIGENCE.
   As bearing on jury's right to infer that wire would not have sagged below statutory height except for defendant's negligence in fastening it and maintaining it by proper inspection, jury would have right to consider that evidence showed no other possible cause.

7. NEGLIGENCE—PRESUMPTION OF NEGLIGENCE.
   Where thing happens which would not ordinarily have occurred if due care had been used, fact of such happening raises presumption of negligence in someone.

As to applicability of rule *res ipsa loquitur* to accidents on highway, due to disordered electrical appliances, see annotation in 22 L. R. A. (N. S.) 1178; 32 L. R. A. (N. S.) 1043.

8. ELECTRICITY—PRESUMPTION OF NEGLIGENCE—PRIMA FACIE CASE.
Circumstances of instant case *held*, sufficient to raise presumption of negligence on part of defendant, and make *prima facie* case for plaintiff.

9. SAME—CONTRIBUTORY NEGLIGENCE.
Truck driver injured by electric wire stretched across highway was not guilty of contributory negligence in failing to examine wire before passing under, since he had right to assume that defendant would properly erect its wires and maintain them in safe condition at statutory height (1 Comp. Laws 1929, § 4056).

10. SAME—EVIDENCE OF HEIGHT OF WIRE AFTER ACCIDENT INADMISSIBLE.
In said action, admission of testimony by plaintiff that wire replaced by defendant after accident was one foot lower than statutory height was error.

11. NEGLIGENCE.
Question of negligence must be determined from conditions at time of accident.

12. ELECTRICITY—NEGLIGENCE—ERECTION OF WIRES AT STATUTORY HEIGHT—MAINTENANCE.
Failure to erect electric wires stretched across highway at statutory height is negligence, but failure to maintain them at said height may or may not be negligence.

13. SAME—RESPONSIBILITY FOR SAGGING WIRES—INSPECTION.
If electric wires properly erected across highway by power company become lower than height required by statute, company is not negligent unless its acts caused them to become so, or unless it had actual knowledge of their condition or by proper and reasonable inspection could have discovered it in time to avert injury; company not being insurer under statute (1 Comp. Laws 1929, § 4056).

Appeal from Genesee; Gadola (Paul V.), J. Submitted October 28, 1931. (Docket No. 94, Calendar No. 35,957.) Decided January 4, 1932.

Case by W. Howard Eaton against Consumers Power Company, a Maine corporation, for personal

injuries alleged to be due to defendant's negligence. Verdict and judgment for plaintiff. Defendant appeals. Reversed, and new trial granted.

Brownell & Gault, for plaintiff.

Carton, Gault & Parker, for defendant.

MCDONALD, J. This is an appeal from the Genesee circuit court where, in an action to recover damages for personal injuries, judgment was entered for the plaintiff on a verdict for $5,000.

The defendant owns a power line along a highway east of the city of Flint, Michigan. At the point of the accident it stretched three electric wires from a pole on the north side of the highway to a residence on the south side. The plaintiff was driving a truck load of baled hay. As he passed under the wires one of them caught on the top of the load, broke loose, and struck him in the face, causing severe injuries which resulted in the loss of the sight of one of his eyes. He brought suit for damages charging negligence in erecting and maintaining the wires. On the trial the defendant rested at the close of the plaintiff's case after moving for a directed verdict on the ground that the plaintiff was guilty of contributory negligence; and that there was no evidence of negligence on its part. Decision was reserved, and after verdict the court refused a motion to enter judgment *non obstante veredicto.* A judgment was entered on the verdict. The defendant has appealed.

The statute, 1 Comp. Laws 1929, § 4056, provides that "in no case shall any wires, cables or other fixtures be placed or be permitted to remain, at less than fifteen feet above any part of the traveled portion of the road."

The negligence complained of was that the defendant either originally placed these wires too low,

or that, due to its negligence, the wire which produced the injury became too low and was permitted to remain so in violation of the statute.

There is no direct evidence of want of care on the part of the defendant. If negligence is found, it must be on presumption arising from the conditions and circumstances attending the accident. The rule of *res ipsa loquitur* is not recognized in this State; so the mere fact that the accident happened is no evidence of negligence. But the plaintiff is not restricted to direct evidence. A want of care may be presumed from established facts and circumstances. In *Barnowsky* v. *Helson,* 89 Mich. 523 (15 L. R. A. 33), it was said:

"It is true that the mere fact of an injury does not impute negligence on the part of anyone, but where a thing happens which would not ordinarily have occurred if due care had been used, the fact of such happening raises a presumption of negligence in someone."

In the instant case, the question is whether the record shows facts or circumstances of a nature to raise a presumption that the accident would not have happened save for the want of care on the part of the defendant. Such a presumption would make a *prima facie* case for the plaintiff. It is undisputed that the plaintiff's load of hay was within the statutory height, and, if the wire had been 15 feet above the traveled portion of the road, the accident could not have occurred. But there is no evidence, either direct or circumstantial, that the wires were not originally placed at the proper height. Only one of them sagged and fell. The evidence shows that they were all about the same height before the accident, and that the other two were in their original position afterwards. It would have been an easy matter

for the plaintiff to have measured them and have given the jury direct evidence as to their height. This he did not do, and, as there are no circumstances from which it could be inferred that they were not originally placed at the height required by the statute, the question as to whether the defendant was negligent in that respect ought not to have been submitted to the jury. But it is undisputed that one of the wires had sagged to such an extent that it was three feet lower than the other wires at the time of the accident. As this wire caused the accident, there was actionable negligence if it sagged because of defendant's carelessness in originally fastening it, or if its fastening became loose and could have been discovered by reasonable inspection in time to avert the injury. There is no other apparent cause for its condition at the time of the accident. Could the jury fairly infer from all of the circumstances that the wire would not have sagged to such an extent except for the negligence of the defendant in fastening it and maintaining it in that condition by proper inspection? They would have the right to consider that the evidence showed no other possible cause. Other possible causes might be the force of some outside agencies as storms, high winds, snow and sleet, or the interference by persons. The accident happened in June. It was shown that there had been no windstorms; and there could have been no interference by persons with the pole or fastenings because the fastenings were high above the ground, the pole was erect after the accident, and the remaining wires were in their original position. It could not have sagged to such an extent by reason of a latent defect in the wire. Nor could the wear of time and usual weather have produced the result, because the wires had been erected only six months

prior to the accident. In view of these facts, may it not be reasonably presumed that the wire would not have suddenly sagged to such an extent if due care had been used in fastening it and by keeping it fastened by proper inspection? The language of the court in *Barnowsky* v. *Helson, supra,* is applicable:

"Where a thing happens which would not ordinarily have occurred if due care had been used, the fact of such happening raises a presumption of negligence in someone."

And in *McLean* v. *Railroad Co.,* 137 Mich. 482 (17 Am. Neg. Rep. 76):

"There was no other probable theory of the cause of the accident. This is not a case, therefore, for the application of the rule that an accident is not of itself negligence."

And in *Schoepper* v. *Hancock Chemical Co.,* 113 Mich. 582:

"It is true that where an injury occurs that cannot be accounted for, and where the occasion of it rests wholly on conjecture the case may fail for want of proof. But such cases are rare, and that rule should never be so extended as to result in a failure of justice, or in denying an injured person a right of action where there is room for balancing the probabilities, and for drawing reasonable inferences better supported on one side than the other."

Following the rule of these cases, we think the circumstances of the instant case are sufficient to raise a presumption of negligence and make a *prima facie* case for the plaintiff. Also, see *Sewell* v. *Railway,* 158 Mich. 407; *Burghardt* v. *Railway,* 206 Mich. 545 (5 A. L. R. 1333); *Bacon* v. *Snashall,* 238 Mich. 457.

In regard to the question of contributory negligence, there is no merit in defendant's contention that it was the duty of the plaintiff to look and to examine the wires before passing under them. He had a right to rely on the assumption that the defendant company would properly erect its wires and maintain them in a safe condition at the height provided by the statute.

The most serious question in the case arises from the introduction of testimony by the plaintiff that the wire replaced by the defendant after the accident was one foot lower than the statutory requirement. This was error. The question of negligence must be determined from the conditions at the time of the accident. A showing of subsequent negligence in placing the wire could have but one effect on the jury, and that to influence them in finding that it was originally negligently placed. It was introduced for that purpose. And notwithstanding the attempt of the court to correct it in his instructions, we think it must have remained in their minds to the prejudice of the defendant. This might not be said if the court had not erroneously left the jury to determine if the wires had been originally erected at the proper height.

Complaint is made of the following instructions relative to the liability of the defendant for failure to maintain its wires at the proper height:

"In other words, there is a duty upon the defendant in this case to maintain their wires at a height of 15 feet, not less than 15 feet over any traveled portion of the road, that being the Davison highway in this case. Now, that is a statutory requirement, so a violation of that statutory requirement would, in and of itself, be negligence on the part of the defendant in this action. If you should find by a preponderance of the evidence that they did allow that

wire to be, or maintained that wire, whether by placing it there originally or allowing it afterwards to remain a less distance than 15 feet, that would of itself be negligence on their part. * * *

"Its failure to erect and maintain its wires at this height is negligence *per se* on the part of said defendant, and therefore renders the defendant liable if you find that the wire of the defendant was the proximate cause of the accident."

This was a wrong instruction. Failure to erect wires at the proper height is negligence; but failure to maintain them may or may not be negligence. It is not in itself negligence. If wires properly erected become lower than the height required by the statute, the defendant is not negligent unless its acts caused them to become so, or unless it had actual knowledge of their condition or by proper and reasonable inspection could discover it in time to avert injury. In other words, the defendant is not made an insurer under the statute. If negligent in maintaining its wires at a proper height, it must be because of failure to keep informed by reasonable inspection as to their condition or failure to act promptly when it has actual knowledge thereof. The jury may have followed this instruction notwithstanding that in another portion of the charge the court correctly stated the rule relative to defendant's liability.

We do not deem it necessary to discuss other objections to the charge, as the portions complained of will probably not be repeated in another trial. The judgment is reversed, and a new trial granted, with costs to the defendant.

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

BENNETT *v.* JOHNSON.

VENDOR AND PURCHASER—INSURANCE—APPLICATION OF INSURANCE MONEY.

Where fire insurance policy, taken out by assignees of vendees in pursuance of provision therefor in contract, provided that in case of loss payment should be made to vendor and vendees as their respective interests should appear, decree directing payment of amount due on contract, on vendor's furnishing proper deed and abstract, and balance to be paid to assignees, was correct.

Appeal from Genesee; Gadola (Paul V.), J. Submitted December 2, 1931. (Docket No. 201, Calendar No. 36,028.) Decided January 4, 1932.

Bill by Stephen Bennett and another, as assignees of the vendee's interest in a land contract, against Arthur C. Johnson for an accounting of money collected for a loss by fire. Decree for defendant. Plaintiffs appeal. Affirmed.

Cline & George, for plaintiffs.

Neithercut & Neithercut, for defendant.

BUTZEL, J. Defendant Arthur C. Johnson is the vendor, and plaintiffs Stephen S. Bennett and wife are the assignees of the vendee's interest, in an executory contract for sale of property in Vienna township, Genesee county. The contract required the vendees to insure the buildings against loss by fire, in company and amount to be approved by vendor, and with policies properly indorsed, to protect the interest of both parties to the contract. A

policy of insurance taken out accordingly provided for payment of loss to plaintiffs and defendant as their respective interests should appear. After adjustment of a fire loss, a draft for $2,505.20 payable to plaintiffs and defendant was received from the insurer. Subsequent to the fire, plaintiffs sold the property on executory land contract to a third party who constructed a new building thereon at a cost in excess of the amount paid by the insurance company. Plaintiffs ask that the insurance money be turned over to them or that it be placed in the hands of a trustee to insure the payments on the contract. Defendant asks that the insurance be applied to the payment of the balance still due on the land contract, and the surplus be paid to plaintiffs. There is no material dispute on the facts.

On the hearing, it was shown that there was $2,278.76 still due on the contract, and that part of it was past due. The circuit judge decreed that the amount due defendant be paid to him upon his furnishing a proper deed, with abstract showing good title, and that the balance be paid to plaintiffs.

As there are no other agreements in reference to the insurance moneys than those in the contract and insurance policy as hereinbefore set forth, the court was absolutely correct in its decree. The case is ruled by *Kudner* v. *Miller*, 244 Mich. 49, and *Shaw* v. *Cramton*, *ante*, 293.

The decree is affirmed, with costs to defendant.

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

SPITZLEY *v.* HOLMES.

1. MORTGAGES—DEED AS MORTGAGE—VENDOR AND PURCHASER.
When deed given as security for indebtedness is accompanied by contract to repurchase, transaction is regarded as mortgage.

2. ESTOPPEL—TITLE TO LAND—FRAUDS, STATUTE OF.
Although title to real estate may not be created by estoppel, party may estop himself, after arrangements have been fully executed, from asserting that title he by his own acts has created or aided in creating is not true title.

3. SAME—MORTGAGES—USURY.
Where owners gave deed and took back fictitious land contract, so that, when contract was discounted, they obtained more than could have been had through second mortgage, they are estopped from claiming that land contract constitutes second mortgage tainted with usury.

Appeal from Wayne; Collingwood (Charles B.), J., presiding. Submitted October 22, 1931. (Docket No. 183, Calendar No. 36,006.) Decided January 4, 1932.

Bill by Jane R. Spitzley against Harold W. Holmes and another to foreclose a land contract. Cross-bill by defendants against plaintiff to declare the transaction a mortgage and reduce the principal sum due. Decree for plaintiff. Cross-bill dismissed. Defendants appeal. Affirmed.

John H. Yoe (*Lewis Brooke,* of counsel), for plaintiff.

Longley, Bogle & Middleton, for defendants.

BUTZEL, J. Harold W. Holmes, defendant, owned a valuable house and lot occupied by himself and wife as a home, in Balmoral drive, Palmer Woods, Detroit, Michigan. The exact interest of Mrs. Holmes in the property is not shown, but she signed the documents hereinafter referred to, and makes no separate defense or claim. The property was incumbered with a mortgage of $22,710.78. There were unpaid taxes against it amounting to over $1,100. Being in very great need of money, Holmes first sought the assistance of Geist & Company, brokers, and then of others, for the purpose of raising a larger amount on the property. Finding that only $7,500 could be raised by a second mortgage, an amount insufficient for his needs, he returned to Geist & Company, who advised him that it would be difficult to raise the amount he needed by means of a second mortgage. A plan was devised by which a larger first mortgage would be placed upon the property, so that there would be a surplus after paying off all the liens then outstanding. After this was done, as Holmes testified, it was agreed that a land contract would be created by deeding the property to a third party, who in turn would sell it back on land contract to defendant, and that this contract would be sold at a discount to some investor. Holmes testified that he was not concerned whether he had to pay a commission or a discount for this service.

Holmes knew that Geist & Company were not to do the refinancing from their own funds, but were to secure the moneys from others, and that, before defendants could receive the entire amount needed from the transaction, it would be necessary to discount the land contract with a third party.

Defendants accordingly first executed a new mortgage for $25,000 to a trust company, and thus re-

alized a small amount from the surplus after the payment of the former mortgage, taxes, Geist & Company's commission, etc. Immediately thereafter, defendants deeded the property to one James E. Meredith, an employee of Geist & Company, who at once conveyed it to Ida Bruns, cashier and employee of Geist & Company. She, thereupon, as vendor, entered into a land contract with defendants as vendees, who agreed to purchase the property for $68,500. The contract recited a down payment of $30,000, but this is pure fiction, as nothing whatsoever was paid. The contract further provided for the additional payment of $38,500, with interest, in installments of $500, payable monthly, until the amount of the principal was reduced to $25,000, whereupon vendees would be entitled to a deed subject to the $25,000 mortgage which they were to assume.

Dr. William A. Spitzley had previously purchased contracts from Geist & Company, and had full faith in them. In furtherance of the arrangements made with and on behalf of defendants, Geist & Company negotiated with Dr. Spitzley for the sale of the land contract. He bought it for Jane Spitzley, his wife, plaintiff herein, at a discount of $2,400. Geist & Company deducted an additional $1,600 from the purchase price for their commission. In a statement given to defendants, $4,000 (the sum of these two amounts) was charged as discount on the sale of the land contract. Dr. Spitzley showed that he had sole charge of the transaction: (1) That he did not know Ida Bruns; or (2) that she was in the employ of Geist & Company; or (3) that Meredith had figured in the transaction; (4) that he acted in good faith, and depended upon the security and Holmes' financial standing. He did not know that he was

assisting in the refinancing of defendants by Geist & Company, upon whose word he relied in believing that he was investing in a good contract. He thought he was purchasing an existing land contract that had been regularly entered into for the sale of the property by Ida Bruns to defendants.

Defendants made no objection to the charges or the transaction for four months, during which they made regular monthly payments. Thereafter, upon default being made, plaintiff filed a bill to foreclose. Defendants in their answer and cross-bill ask that the land contract be decreed to be a second mortgage, tainted with usury, and that the amount found to be owing be reduced to $9,420, to correspond with the sum that they actually received from the proceeds of the loan after Geist & Company deducted the discount allowed plaintiff, their own commission, and the small sum paid out for tornado insurance. From the decree granting plaintiff's prayer for foreclosure and dismissing the cross-bill of defendants, the latter appeal.

The statements of counsel in their briefs present a large number of questions involved. We need only discuss the question of estoppel, for it is decisive. When a deed given as security for an indebtedness is accompanied by a contract to repurchase, from the grantee to the grantor, the transaction is regarded as a mortgage. *Clark* v. *Landon,* 90 Mich. 83, 89; *Skupinski* v. *Provident Mortgage Co.,* 244 Mich. 309, 315. However, if the owners intentionally and purposely give a deed and take back a land contract fictitious in its inception in order to hold it out and represent it to be a land contract regularly entered into, so that, when sold at a discount, they can obtain a larger sum than could have been had through a second mortgage, they will, after receiving all the

benefits from such a transaction, be estopped from claiming that the land contract constituted a second mortgage.

Defendants sought the assistance of Geist & Company and constituted it their agent. They created a land contract by giving an absolute deed, and then taking back a land contract that recited a fictitious payment and was executed for the sole purpose of selling it as a land contract to the public. They knew it would not be sold as a second mortgage for the amount they required. The record contains no evidence whatsoever that either plaintiff or her husband knew that the deed and contract were merely taken as security. Geist & Company were acting as agents for defendants; they did not do anything that they were not authorized to do. Defendants are now estopped from complaining. Claiming that the legal effect of the transaction is a second mortgage, defendants assert that its nature cannot be changed, for title to real estate cannot be created by estoppel. We have repeatedly held in many cases, some not presenting as strong equities against the defendants as the instant one, that misleading conduct on the part of an owner will estop him from asserting a different title than the instruments purport to convey. *Craig* v. *Crossman,* 209 Mich. 462, 480; *Stevens* v. *Wakeman,* 213 Mich. 559. In *Stevens* v. *DeBar,* 229 Mich. 251, the rule is stated as follows:

"This court has consistently held that title to real estate may not be created by estoppel, but in numerous cases this court has also held that a party may estop himself after the arrangements have been fully executed from asserting that the title he by his own acts has created or aided in creating is not the true title."

See, also, *Johnson* v. *Becker*, 251 Mich. 132; *Colonial Theatrical Enterprises* v. *Sage*, 255 Mich. 160, 171.

The defendants by their own showing are estopped from receiving the equitable relief they ask for.

The decree in favor of plaintiff is affirmed, with costs.

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

GOETZ *v.* BLACK.

1. HABEAS CORPUS—FILING PETITION NECESSARY TO BEGIN "SUIT"—STATUTORY PENALTY.

   It is necessary to file petition for writ of *habeas corpus*, and thus have suit properly begun, as condition precedent to any further proceedings in or on account of suit, such as action to recover statutory penalty for wrongful refusal of writ (3 Comp. Laws 1929, §§ 15208, 15216).

2. SAME—FUNDAMENTAL RIGHT TO LIBERTY.

   The right to writ of *habeas corpus* is fundamental to personal liberty (Const., art. 2, § 11).

3. SAME—PETITION MUST BE IN PROPER FORM.

   While judge may, of his own volition, issue writ of *habeas corpus* without petition, nevertheless when petition is filed it must be in proper legal form (3 Comp. Laws 1929, §§ 15210, 15215).

4. SAME—FILING PETITION BEGINS SUIT—ABANDONMENT.

   Writ of *habeas corpus* proceeding is suit, and only method of bringing such suit is by filing petition for *habeas corpus* with court without any substantial delay after its grant or refusal, and unless petitioner properly begins suit he abandons proceeding.

5. COURTS—ACT JUDICIALLY—PLEADINGS.
Circuit court is court of record, acting through judge or judges only in suits that are properly begun by filing of appropriate pleadings; court only acting judicially.

6. SAME—JUDICIAL POWER DEFINED.
Judicial power is power of court to decide and pronounce its judgment and to carry it into effect between persons and parties who bring case before it for decision.

7. HABEAS CORPUS—ARBITRARY REFUSAL OF WRIT—LIABILITY FOR STATUTORY PENALTY DEPENDS ON RECORD.
If circuit judge arbitrarily refused to examine petition for writ of *habeas corpus*, he is not subject to statutory penalty (3 Comp. Laws 1929, § 15216), unless it appears by record made at time of "suit" that the very paper submitted to him in form and substance commanded issuance of writ (3 Comp. Laws 1929, § 13941).

8. STATUTES—AWARDING PENALTY STRICTLY CONSTRUED.
Statute awarding penalty is to be strictly construed, and before recovery may be had, case must be brought clearly within its terms.

9. HABEAS CORPUS—FILING PETITION—ABANDONMENT—STATUTORY PENALTY.
Petitioner for writ of *habeas corpus* who neglected or refused to file petition, on refusal of circuit judge to issue writ, abandoned proceedings, no "suit" was ever begun, and therefore he may not maintain action against judge for statutory penalty (3 Comp. Laws 1929, § 15216).

Appeal from Genesee; Parker (James S.), J. Submitted October 16, 1931. (Docket No. 127, Calendar Nos. 35,722–35,739.) Decided January 4, 1932.

Separate actions by Alfred Goetz and 17 others against Edward D. Black, Genesee circuit judge, to recover statutory penalty for refusal to issue writ of *habeas corpus*. Judgment for defendant on motion to dismiss. Cases consolidated on appeal of plaintiffs. Affirmed.

Patrick H. O'Brien, Walter M. Nelson, and *Maurice Sugar,* for plaintiffs.

Brownell & Gault, Charles A. Withey, and *George W. Cook,* for defendant.

BUTZEL, J. Alfred Goetz and 17 other plaintiffs have each brought an independent suit against Edward D. Black, defendant, to recover a statutory penalty. For the purpose of appeal only, the 18 cases have been consolidated and considered as one. Each plaintiff claims that after being arrested and illegally detained for several days in the Genesee county jail, he caused, on the 10th day of July, 1930, a petition for *habeas corpus* in legal and proper form to be presented to defendant, one of the circuit judges of Genesee county, and that defendant refused to grant the petition and order the issuance of the writ. The petitions are not before us. They are neither attached to nor set forth in the declarations, nor have they at any time been filed in any court. No suits were ever begun by or on account of the petitions, except the instant ones to collect the penalty. Defendant moved to dismiss on the ground that the petitions were not filed in the office of the clerk of the court, that the application was not made in due form in accordance with the court rules and practice of the court, and that the acts of defendant were judicial and not ministerial. The circuit court entered an order of dismissal.

We shall only discuss the first reason for the dismissal, as it is decisive. It was not necessary for plaintiff to file the petition for the writ of *habeas corpus* with the court prior to its presentation to the circuit judge, but whether granted or denied it became necessary to file it, and thus have a suit properly begun, as a condition precedent to any further proceedings in or on account of the suit.

The right to a writ of *habeas corpus* is fundamental to personal liberty. Its sources in the common law go back to the earliest struggles for freedom, and precede the provision of the Magna Charta that no "freeman shall be taken or imprisoned * * * unless by the lawful judgment of his peers, or by the law of the land" (1 Comp. Laws 1929, p. 5). This pronouncement, however, was insufficient, for certain abuses arose as set forth in case CCCV, reported in 1 Anderson, 297 (123 Eng. Rep. 482 [1591]). It was found that frequently persons lawfully discharged on *habeas corpus* were recommitted to some secret place; officers were imprisoned and terrified to such a degree that they would no longer serve the writ; and there existed a general disregard of the right of *habeas corpus* by the Crown. These abuses are recited in the preamble to the statute of 31 Car. II, c. 2 (5 Statutes at Large, p. 458). This act provided that a return must be made to a writ within three days of its service, prescribed heavy penalties for failure to obey the writ, and prohibited the recommitment of persons discharged on *habeas corpus* except by proper court order. It also extended the authority to grant *habeas corpus* to issuance of the writ during vacation time, and provided for a penalty of 500 pounds to be paid by any authorized court or officer who failed to grant the writ required by the act to be assessed. The privilege of *habeas corpus* was further developed from time to time and established the basic right of freedom from unlawful detention. The earliest colonists brought it to this country as a part of the common law, and it became and ever since remained the law of the land. It was incorporated in the Constitution of the United States (article 1, § 9, subd. 2). It became part of the bill of rights in article 2 of the Ordinance for the Government of the Northwest Territory

(1 Comp. Laws 1929, p. 97), which subsequently became the law of Michigan Territory, and has existed in every Constitution of the State of Michigan. Article 2, § 11, Constitution 1908, provides that:

"The privilege of the writ of *habeas corpus* shall not be suspended unless in case of rebellion or invasion the public safety may require it."

Also, in article 7, § 10, the circuit courts are expressly empowered to grant writs of *habeas corpus*. The constitutional provision relative to *habeas corpus* has been termed "a mandate to the judiciary to see that no man be deprived of his liberty without a hearing." See *Parsons* v. *Russell,* 11 Mich. 113, 129, 135 (83 Am. Dec. 728), in which case, as well as in *Re Jackson,* 15 Mich. 417, the history of the writ is more fully set forth.

In order to insure the issuance of the writ when legally applied for, the legislature has provided that any judge who shall wilfully or corruptly refuse or neglect to consider such application or petition shall be deemed guilty of malfeasance in office (3 Comp. Laws 1929, § 15208); that such writ be granted without delay, unless it shall appear from the petition itself, or from the documents annexed, that the party applying therefor is, by the provisions of the law, prohibited from prosecuting such writ (3 Comp. Laws 1929, § 15211); further, that if any court or officer authorized by the law to authorize such writs shall refuse to grant such writ when legally applied for, every member of such court who shall have assented to such refusal, and every such officer, shall severally be liable to the party aggrieved in $1,000 damages (3 Comp. Laws 1929, § 15216). While a judge may, of his own volition, upon being informed that some one is illegally detained, issue the writ without a petition (3 Comp. Laws 1929, § 15215),

nevertheless when a petition is filed it must be in proper legal form. Section 15210, 3 Comp. Laws 1929, provides in seven subsections what the writ must contain. It must positively state that certain facts and conditions exist; it must negative the existence of others; it must be properly sworn to. If a verified petition sets forth in substance the necessary allegations, as provided by the statute, it becomes the absolute duty of the judge to issue the writ, and in the event of his refusal the petitioner has a number of remedies. He may apply to another judge, if there is more than one for the circuit; he can secure relief by applying to this court by appeal, in the nature of certiorari, or by asking for an original writ which would be issued forthwith, or he may seek the redress prescribed by the statutes as hereinbefore referred to. However, in order to seek any of the remedies, except the presentation of the petition to another judge of the same circuit court or the commencement of an original suit in this court, it is necessary that a suit be previously begun. There is only one method of bringing such suit, and that is by filing the petition with the court without any substantial delay after its grant or refusal. Unless a petitioner properly begins the suit, he abandons the proceeding. A writ of *habeas corpus* proceeding is a suit.

While application for a *habeas corpus* may be addressed to the circuit court or judges (3 Comp. Laws 1929, § 15208), the power to issue the writ is vested in the circuit court by article 7, § 10, of the State Constitution. See, also, section 13941, 3 Comp. Laws 1929. The circuit court is a court of record, acting through a judge or judges only in suits that are properly begun by the filing of appropriate pleadings. The court can only act judicially. Judicial power is the power of the court to decide and

pronounce its judgment and to carry it into effect between persons and parties who bring a case before it for decision. *Muskrat* v. *United States,* 219 U. S. 346 (31 Sup. Ct. 250).

In *Holmes* v. *Jennison,* 14 Pet. (U. S.) 540, though the court was divided as to the main issue, the opinion written by Chief Justice Taney as to the writ of *habeas corpus* being a suit was unchallenged. He stated:

"If a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court, to recover his liberty. In order to be effectual for the purposes for which it is intended, the proceedings must be summary; and the law has accordingly made them so. * * * With this explanation, we proceed to inquire whether the *habeas corpus* was a 'suit.'"

Chief Justice Taney further quoted from the opinion of Chief Justice Marshall in *Weston* v. *City Council of Charleston,* 2 Pet. (U. S.) 449, as follows:

"Is a writ of prohibition a suit?

"The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."

In *State, ex rel. Gardner,* v. *Shrader,* 73 Neb. 618 (103 N. W. 276, 119 Am. St. Rep. 913), the court said:

"The nature of the proceeding (*habeas corpus*) cannot, perhaps, be better described than in the

language of Mr. Chief Justice Waite in *Ex Parte Tom Tong,* 108 U. S. 556 (2 Sup. Ct. 871), as follows:

"'The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. * * * The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime.'"

We quote from the syllabus of *In re Thompson,* 85 N. J. Eq. 221 (96 Atl. 102), as follows:

"*Habeas corpus* is a high prerogative writ issuing out of a court, and whether allowed by, and made returnable before, a court composed of several members, or whether allowed by a single judge and made returnable before him, it is a proceeding in that court in which it, or the single judge, exercises jurisdiction. * * *

"When a prisoner petitions for a writ of *habeas corpus* out of chancery, he thereby commences a suit and prosecutes a cause in that court; and, being aggrieved by the decision, may appeal to the court of errors and appeals."

To like effect are *Click* v. *Click,* 98 W. Va. 419 (127 S. E. 194); *Payne* v. *Graham,* 20 Ala. App. 439 (102 South. 729); *State, ex rel. Reynolds,* v. *Flynn,* 180 Wis. 556 (193 N. W. 651); *State, ex rel. Hellige,* v. *Milwaukee Liedertafel,* 166 Wis. 277 (164 N. W. 1004); *State, ex rel. Beekley,* v. *McDonald,* 123 Minn. 84 (142 N. W. 1051).

The necessity of filing a petition before further proceedings may be taken is set forth in *State, ex*

rel. Distin, v. *Ensign,* 13 Neb. 250 (13 N. W. 216), where, in disallowing an appeal by a petitioner in *habeas corpus* proceedings, the court said:

"There is no copy of the petition for a writ of *habeas corpus* which was presented to the county judge. Whether this omission is intentional or not does not appear. Nor was any copy of the petition taken into the district court. There is therefore nothing before the court upon which it can act. The petition must set forth the facts constituting the illegal detention. It is not sufficient to state that the petitioner is illegally restrained of his liberty, as that is a conclusion, but it must be made to appear in what the illegal restraint consists. *Ex parte Nye,* 8 Kan. 99."

If plaintiff desired to press the refusal of the circuit judge to recovery of the statutory penalty, he should have filed the rejected petition so that there would have been an unquestionable and unimpeachable public record thereof, available to his own inspection as well as all others, and incapable of substitution by anyone.

If the circuit judge arbitrarily refused to examine the petition, he is not subject to the penalty unless and until it is made to appear by record of the "suit" that the very paper submitted to him for judgment thereon in form and substance commanded issuance of the writ, and this must be established by the record made at the time. Plaintiff claims to have possession of the petition he should have filed. The law will not tolerate an assessment of the invoked penalty against a judicial officer under the circumstances here disclosed, for to do so after the long delay would subject the judge to the machinations, chicanery, fraud, and enmity of anyone disposed to so act, and leave the judge without an impartial and incorruptible court record. A statute awarding a

penalty is to be strictly construed, and, before a recovery can be had, the case must be brought clearly within its terms. *Grier* v. *Railway Co.*, 286 Mo. 523 (228 S. W. 454); *Kitts* v. *Kitts*, 136 Tenn. 314 (189 S. W. 375); *United Assurance Ass'n* v. *Frederick*, 130 Ark. 12 (195 S. W. 691); *Anderson* v. *City of Birmingham*, 205 Ala. 604 (88 South. 900).

Plaintiff on his own showing abandoned the proceedings when he neglected or refused to file the petition for the writ. No suit was ever begun. The court was correct in entering an order of dismissal, and the judgments are affirmed, with costs to defendant.

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

FIRST NATIONAL BANK OF UTICA *v.* RAMM.

1. MORTGAGES—MERGER OF ESTATES—INTENT.
   Generally, when holder of real estate mortgage becomes owner of fee, former estate is merged in latter, unless it is to interest of mortgagee to keep mortgage alive and it is his intention to do so.

2. SAME—MERGER CONTROLLED BY INTENT.
   In determining whether there is merger of estates when holder of mortgage becomes owner of fee, intention of mortgagee is controlling.

3. SAME—MERGER NOT PRESUMED UNLESS INTENT TO DO SO EXPRESSED.
   When it is to interest of mortgagee, who has become owner of fee, to keep mortgage alive, his intention to do so will be presumed unless his intention to merge is expressed.

4. SAME—EXPRESSED INTENTION TO MERGE CONTROLLING—PRESUMPTIONS.

Where holder of mortgage, on accepting quitclaim deed, clearly expressed intention of extinguishing mortgage, merger of estates was effected, and no secret intention to keep mortgage alive may be presumed.

5. SAME—EXTINGUISHED MORTGAGE MAY NOT BE REVIVED.

Where mortgage is once extinguished by holder's expressed intention on acceptance of quitclaim deed from grantee assuming mortgage, it may not be revived subsequently against mortgagor.

Appeal from Macomb; Spier (James E.), J. Submitted October 30, 1931. (Docket No. 226, Calendar No. 36,107.) Decided January 4, 1932.

Bill by First National Bank of Utica, Michigan, and others against Max A. Ramm and others to foreclose a mortgage. Decree for plaintiffs. Defendants appeal. Reversed, and bill dismissed.

Varnum J. Bowers, for plaintiffs.

Stone & Matthews (*Corliss, Leete & Moody,* of counsel), for defendants.

McDONALD, J. This is an appeal from a decree for foreclosure of a mortgage on certain land in the county of Macomb, Michigan. The land was owned by the plaintiffs Gustave Schultz and Bertha Schultz, his wife. On March 15, 1926, they conveyed it by warranty deed to defendant Max A. Ramm, and took a mortgage for part of the purchase price. This mortgage and accompanying note were assigned by Schultz and wife to the plaintiff bank to secure an indebtedness. On July 25, 1929, Ramm and wife conveyed the land by warranty deed to Daniel V. Wolf subject to the Schultz mortgage which Wolf

assumed and agreed to pay. He defaulted in his payments, and to save foreclosure the bank accepted a quitclaim deed of his interest. Subsequently, foreclosure suit was begun for the apparent purpose of obtaining a deficiency decree against Ramm. Wolf was not made a party. Ramm defended on the ground that, when Wolf gave the bank a quitclaim deed, there was a merger of the legal title and the equitable title, the effect of which was to extinguish the mortgage. This contention presents the principal question in the case.

"There is no doubt about the general rule that when the holder of a real estate mortgage becomes the owner of the fee, the former estate is merged in the latter. This rule is, however, subject to the exception that when it is to the interest of the mortgagee and is his intention to keep the mortgage alive, there is no merger, unless the rights of the mortgagor or third persons are affected thereby. 19 R. C. L. p. 484." *Anderson* v. *Thompson,* 225 Mich. 155.

The intention is controlling. It is either expressed or is implied from the circumstances of the transaction. If it is to the interest of the mortgagee to keep the mortgage alive, the intention to do so will be implied; for it is presumed that a man intends to do that which is to his advantage. But if the intention to merge the estates is expressed, the fact that it is to his benefit to keep the mortgage alive is immaterial. In the instant case, the intention of the parties is quite clearly expressed in the following letters from the plaintiff bank to Mr. Wolf who held the title to the land and who had assumed payment of the mortgage. The first letter, dated February 6, 1930, reads:

"Dear Sir:

"We have been informed that you are now the owner of property formerly owned by Max A. Ramm and Emmy Ramm, his wife, and on which Gustave Schultz and Bertha Schultz, his wife, had a mortgage. This mortgage was assigned to us and said assignment was recorded the second day of June, 1926. There was a principal payment of $2,000 and interest of $1,195.83 due on the mortgage January 1, 1930, and unless we are favored with your remittance for the above delinquent payments plus interest at the rate of seven per cent. from January 1, 1930, on the delinquent amount, we will turn this over to our attorney for foreclosure 10 days from date. Trusting that you will take care of this immediately to avoid this procedure, I am,

"Yours truly,
"E. F. SHULZ,
"Cashier."

A second letter, dated February 28, 1930, reads as follows:

"Dear Sir:

"About two weeks ago you called on me with reference to the mortgage that was assigned to us by Gustave Schultz and you stated at that time that you would let me know by the first of the following week as to what you was going to do regarding it. You stated that rather than to cause Mr. Schultz additional trouble and worry, if you could not handle the proposition you would quitclaim your interests to avoid further negotiations. I shall be pleased to hear from you by return mail and should you have decided to close the affair as you proposed we shall appreciate it if you will mail us the quitclaim deed together with the abstract and the deed that was given you by Mr. Ramm. Your prompt reply to the above will be appreciated.

"Yours truly,
"E. F. SHULZ,
"Cashier."

In response to this letter, Mr. Wolf delivered to the bank a quitclaim deed of his interest in the property and the deed he received from Ramm. The purpose of the transaction, as shown by the bank's correspondence, was to save the trouble and expense of foreclosing the mortgage. It could not have this effect if the plaintiffs intended to keep the mortgage alive. The cashier testified that he knew the acceptance of the quitclaim deed from Wolf would release him from payment of the mortgage and interest; that he intended it to have that effect. He testified that when he accepted the quitclaim deed:

"I felt that Mr. Wolf was entirely through with the matter."

In view of the intention of the parties, testified to by Mr. Wolf and plainly expressed in the cashier's letters, no secret intention to keep the mortgage alive as to Mr. Ramm can be presumed. We are only concerned with the expressed intention at the time of the transaction, and that, as shown in the bank's correspondence, was to extinguish the mortgage on receipt of conveyance of the fee to the mortgagees. When once extinguished it is gone forever. It could not be revived subsequently against Mr. Ramm, the mortgagor. We think there was a merger of the two estates, the legal effect of which was to extinguish the mortgage.

The record leaves no doubt as to the authority of the cashier to act for the bank and for Mr. and Mrs. Schultz. Those questions require no discussion.

A decree will be entered dismissing the bill of complaint, with costs to the defendants.

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

ZANNIS *v.* FREUD HOTEL CO.

1. FRAUDS, STATUTE OF—ORAL MODIFICATION OF LEASE REQUIRED TO BE IN WRITING—TENANCY FROM YEAR TO YEAR.

   Oral modification of 10-year lease, by allowing lessees to occupy more space than lease calls for, thus releasing lessor from necessity of making expensive alterations in premises, is not void under statute of frauds (3 Comp. Laws 1929, § 13411), but is valid as oral lease from year to year.

2. SAME—ESTOPPEL—ORAL CONTRACT.

   Lessees accepting benefits of oral modification of 10-year lease are estopped from claiming modification was void under statute of frauds (3 Comp. Laws 1929, § 13411).

3. SAME—ORAL MODIFICATION OF LEASE REQUIRED TO BE IN WRITING.

   Oral modification of 10-year lease comes within statute of frauds (3 Comp. Laws 1929, § 13411).

4. SAME—ESTOPPEL—ORAL CONTRACT.

   While agreement required by statute of frauds to be in writing may not be substantially altered by verbal agreement, parties may not accept benefits from such alteration and then claim that transaction is void.

5. PARTNERSHIP—MODIFICATION OF LEASE—SCOPE OF DUTIES.

   Partner active in business was acting within scope of his duties in agreeing to modification of lease whereby partnership secured considerably more space than called for in the lease without payment of additional rent, and lessor was released from making expensive alterations (2 Comp. Laws 1929, § 9846).

6. APPEAL AND ERROR—EVIDENCE—ADMISSIONS.

   Error, if any, in rejecting exhibit showing defendant's losses prior to entering into lease with plaintiffs was not prejudicial, where defendant admitted business had been very unprofitable.

7. SAME—OBJECTIONS—SAVING QUESTION FOR REVIEW.

   Error, if any, in excluding exhibit may not be considered, on appeal, where no objection was made at time of exclusion.

As to effect of statute of frauds upon the right to modify by subsequent parol agreement, a written contract required by the statute to be in writing, see annotation in 17 A. L. R. 10; 29 A. L. R. 1095.

8. LANDLORD AND TENANT—BREACH OF LEASE—DAMAGES.
Lessees, in action for damages for breach of lease, are not entitled to recover for equipment consisting of dishes, glassware, etc., which was removable and remained their property.

9. SAME—COST OF REPAIRS—DAMAGES.
In order for tenant to recover for cost of repairs and alterations, there must be distinct agreement on part of landlord to pay for them.

10. SAME—QUANTUM MERUIT—BREACH OF LEASE—DAMAGES.
Lessees are not entitled to recover on *quantum meruit* for cost of equipment, repairs, and alterations, where lessor did not breach lease, although lease provided that lessor would pay therefor if it terminated lease.

Appeal from Wayne; Jayne (Ira W.), J. Submitted October 22, 1931. (Docket No. 195, Calendar No. 34,184.) Decided January 4, 1932.

Assumpsit by John S. Zannis and William D. Pias, copartners doing business as Wolverine Hotel Restaurant, surviving John S. Zannis, James E. Miller, and William D. Pias, against Freud Hotel Company, a Michigan corporation, for breach of a lease. Verdict and judgment for defendant. Plaintiffs appeal. Affirmed.

Frank C. Sibley and *Oscar A. Kaufman,* for plaintiffs.

Schueler & Freud (*Oscar A. Markus,* of counsel), for defendant.

BUTZEL, J. Defendant, Freud Hotel Company, a Michigan corporation, owned and operated the Wolverine Hotel, located at the northwest corner of E. Elizabeth and Witherell streets in Detroit. It has a wide entrance on Elizabeth street in the center of the building. In December, 1924, the dining room

occupied approximately the easterly one-third of the ground floor. It faced Witherell street, and also that part of the Elizabeth street front east of the entrance. A large room in the rear of the ground floor also opened into the dining room. There were steps leading from this room to the basement below, where the kitchen was located. In addition to the foregoing, there was a large and separate coffee shop fronting on Elizabeth street at the southwest corner of the building. Its entrance was from the hotel lobby. Food was brought to the coffee shop by a dumb waiter from a separate kitchen in the basement. Defendant had run the dining room and coffee shop at a loss.

John S. Zannis, one of the plaintiffs, an experienced restaurateur, met Marcus Freud, president of the defendant corporation, who tried to interest him in taking over the food vending privileges of the hotel. Zannis emphasized the necessity and economy of combining the two kitchens into one, locating it on the ground floor of the building in the rear of the dining room, and moving the coffee shop to a space in front of the dining room, thus very materially curtailing the size of the dining room. Zannis associated himself with William D. Pias and John E. Miller, also experienced in the restaurant business. They formed a copartnership under the firm name of the "Wolverine Hotel Restaurant." Zannis and Pias, as plaintiffs, appear as "survivors" of this copartnership. Evidently they are the successors. The copartnership, as lessee, entered into a 10-year written lease with defendant as lessor. It provided for a fixed minimum rental of $600 per month the first three years, and $700 per month thereafter; also for a percentage of the gross sales each month, the fixed minimum to be deducted from

the amount due for the percentage, if larger. The leased space as shown by the drawing attached to the lease included the entire hotel dining room, the adjoining room, and its kitchen. It did not include the separate space used for the coffee shop. Defendant, however, agreed that the coffee shop space might be used without any additional rental up to January 15, 1925, at which time the lessee was to transfer all of the equipment therein to a coffee shop to be partitioned off from the front of the dining room. Defendant agreed, at its own expense, to erect two partitions and a plate glass window in the dining room looking out into the lobby of the hotel, and to construct two separate entrances to the coffee shop when moved, one directly from Elizabeth street and the other from the entrance to the lobby. An Elizabeth street entrance would necessitate cutting through the outer wall of the building at a considerable expense. The lease further provided for its termination by defendant at any time by a 90-day written notice and on payment to the copartnership of all sums expended by them for "improvements," and the additional sum of $25,000 as liquidated damages if the lease were terminated during the first three years of the term, and reduced amounts thereafter. The lease contained a clause stating that all verbal agreements, representations, etc., were embodied therein.

For a time after the lessee took hold, the business flourished. The entire space of the dining room was required to accommodate patrons. The kitchen was moved from the basement to the rear of the dining room, and defendant built a partition in accordance with the lease. When January 15, 1925, approached, with the obligation on the part of the lessee to move the coffee shop to the front of the dining room space,

Miller requested that the old layout be not disturbed and that the location of the coffee shop remain where it had been. Defendant at first demanded additional rental of $200 per month for the coffee shop space which the copartnership would no longer be entitled to under the lease. Finally an agreement was reached, but not reduced to writing, that the lessee should have the right to use the old coffee shop space without the payment of any additional rental for the balance of the term of the lease. The lessee thus enjoyed the use of the coffee shop space, not included in the lease, together with the entire dining room space. This obviously made it unnecessary to make the alterations that would have been required had the coffee shop been moved. The business continued to prosper for a time.

Miller and Pias were active in the business. Pias decided to make a hurried visit to Greece, but his return was delayed for over a year. Upon his departure, Zannis became more active in the business. It began to decline, and differences arose. Zannis demanded that defendant make the other alterations provided for in the lease, and presented a new plan differing essentially from that set forth in the lease. In April, a letter was sent to Pias in Greece, stating that Zannis was planning to move the coffee shop into the dining room, etc., and was insisting on the changes, and Pias was asked to give his ideas in regard to the changes. He cabled defendant, "Don't do anything until I get back." He testified that his cable meant that the plans set forth in the lease were not to be changed until his return. Miller corroborated defendant's testimony that it was agreed that the coffee shop was not to be moved. Miller further testified that the installation of a steam table, evidently for permanent use, in the old coffee

shop, showed that the copartnership expected to use this space for a long period of time. The testimony in regard to the modification of the lease is conflicting, but was fairly submitted to the jury, who decided in defendant's favor.

The copartnership continued in possession of the coffee shop space until May 13, 1925, when a peremptory demand was made by Zannis, on behalf of the firm, that defendant make the alterations at once. The demand not being complied with, the copartnership abandoned the premises and subsequently brought the instant suit. In the declaration and bill of particulars, plaintiffs demanded $10,388.84, the sum expended for equipment and remodeling of the premises; an additional amount of $1,986.99 for replacements; $125,000 for profits based upon the amount they made at the beginning of the lease before defendant's refusal to make repairs, and the further sum of $25,000, the stipulated damages provided for in the lease in the event of its termination by defendant during the first year of the term. Defendant denied plaintiff's right to recovery. It also claimed a set-off which it later withdrew. The jury brought in a verdict of no cause of action. We shall only discuss the questions involved as set forth in the briefs.

The first question presented is whether the statute of frauds (3 Comp. Laws 1929, § 13411) prevents a subsequent oral modification of a written lease when such modification has been acted upon. In the instant case the consideration for modification received by the copartnership and acted upon consisted of its use and occupation of the coffee shop space from January 15, 1925, until on or about the middle of May, 1925, without payment of any additional rent, and, further, the agreement that the

copartnership might continue to so use it for the balance of the term of the written lease. It is claimed, however, that this agreement not being in writing is a *nudum pactum,* and, therefore, unenforceable. The agreement was valid as an oral lease from year to year. In *Brant* v. *Vincent,* 100 Mich. 426, under a somewhat similar state of facts, the court said:

"It is argued, on behalf of the complainant, that there was no annual rent reserved, and therefore, even under the defendant's evidence, the agreement constituted a tenancy at will. It is true that 'the reservation of an annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year.' * * * But clearly this rule is not applicable to a parol tenancy for years, void under the statute, where the entire rent has been paid in advance. Under the defendant's evidence he had a lease which, if reduced to writing, would have been valid for five years. He entered into possession of the term. We think there is no well-considered authority holding that he was not a tenant from year to year. The fact that no annual rent is reserved is not conclusive of the character of the tenancy. Where the owner of a farm rented a portion of it by parol for four years, the lessee agreeing to inclose the premises with a fence by way of rent, it was held that a tenancy from year to year was established."

To like effect is *Koschnitzky* v. *Hammond Lumber Co.,* 57 Wash. 320 (106 Pac. 900).

We further base our conclusions on the fact that, had defendant claimed such verbal lease to be void under the statute of frauds, it would have been estopped for the same reason that we determine that plaintiffs are estopped from so claiming. The facts of the case, as confirmed by the verdict of the jury,

establish the fact that a consideration was received and acted upon by each of the parties for the modification of the written lease. There is no question but that the modification itself comes within the statute of frauds, it being an oral change of a written lease. *Abell* v. *Munson,* 18 Mich. 306 (100 Am. Dec. 165). While the law of this State has consistently held that an agreement required by the statute of frauds to be in writing may not be substantially altered by a verbal agreement, it has also held that parties may not accept the benefits from such alteration and then claim that the transaction is void. In *Barton* v. *Gray,* 57 Mich. 622, we said:

"There was no valid contract to postpone performance, and the evidence was only relevant to show that such postponement was at the defendant's request, by which he was estopped to deny performance during that time. *Cummings* v. *Arnold,* 3 Met. (44 Mass.) 486 (37 Am. Dec. 155); *Hickman* v. *Haynes,* L. R. 10 C. P. 598. * * * No person can complain of an injury caused by the act or conduct of a party to which he has consented; and no one who causes or sanctions the breach of an agreement can recover damages for its nonperformance. * * * There can be no doubt but that a waiver of performance, or an agreement to extend the time of performance of a condition precedent, is equivalent to a performance thereof at the stipulated time."

In *Smiley* v. *Barker,* 28 C. C. A. 9, 11 (83 Fed. 684, 686), the court said:

"Conceding that parol agreements modifying written contracts that are within the statute of frauds are themselves within that statute, and cannot be enforced (citing cases), * * * we are still of the opinion that the court rightfully received this evidence on another ground. * * *

"The statute of frauds may not be used to perpetrate a fraud. One cannot take advantage of his own wrong. One may not so speak and act as to knowingly induce another to change his position, and then avail himself of that change to his prejudice."

The question has frequently arisen in other States. In *Hecht* v. *Marsh,* 105 Neb. 502 (181 N. W. 135, 17 A. L. R. 1), the court said:

"There is no reason, in our opinion, why a party to a contract within the statute of frauds may not be estopped by his conduct from disputing a subsequent oral modification of it to the same extent as a party to any other contract. It is a principle of equity, superior to any technical or artificial legal rules, which takes effect whenever the assertion of such a rule would result in perpetrating or ratifying a fraud."

In the annotation to *Hecht* v. *Marsh, supra,* in 17 A. L. R. 1, 39, and also to *Lieberman* v. *Templar Motor Co.,* 236 N. Y. 139 (140 N. E. 222), in 29 A. L. R. 1089, 1097, cases bearing on this subject are assembled. Some of them uphold such oral modification on the theory of estoppel, others on account of waiver, and still others on account of the fact that the statute of frauds is for the purpose of preventing a fraud and not perpetrating one, and thereby freeing one from obligations for which he has received a consideration. While the precise question in its identical form has not been passed upon by this court, the theory of estoppel has been frequently recognized and parties have not been permitted to escape their obligations when they have stood by and acquiesced or received a consideration from contracts that they subsequently seek to avoid because they do not conform with the statute of frauds.

Stevens v. *DeBar*, 229 Mich. 251; *Johnson* v. *Becker*, 251 Mich. 132; *Eisenberg* v. *Battenfeld Oil Co.*, 251 Mich. 654; *Colonial Theatrical Enterprises* v. *Sage*, 255 Mich. 160; *Spitzley* v. *Holmes*, *ante*, 559.

Plaintiffs further claim that Miller, on behalf of the copartnership, had no authority to enter into an agreement modifying the original lease. The uniform partnership act (2 Comp. Laws 1929, § 9849) states:

"Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no authority."

Miller, a member of the copartnership, was constantly on the premises, was looking after the business of the firm, and naturally was presumed to act in its behalf. From the facts in the case, it would appear that he was acting within the scope of his duties when in the interests of the firm he secured, without any additional rental, the large amount of space that the business at the time required.

Further error is claimed because plaintiffs were not permitted to introduce an exhibit consisting of a statement of losses of defendant prior to the entering into the lease. Even if there was any merit to this claim, it was nonprejudicial. Defendant admitted that the business had been very unprofitable. Error is claimed because the court excluded another exhibit. No objection was made at the time. It will not be considered now.

Further error is claimed on account of the court's refusal to charge the jury that plaintiffs might recover on a *quantum meruit* for the amount expended by them for repairs and alterations and equipment. They could not recover for equipment consisting of dishes, glassware, tableware, etc., that they bought and which remained their property as far as the record shows. An examination of the lease shows no agreement on the part of the lessor to pay for the alterations or repairs made by lessees. In order for a tenant to recover for the cost of repairs and alterations, there must be a distinct agreement on the part of the landlord to pay for them. *Leslie* v. *Smith,* 32 Mich. 64, 67; *Wolf* v. *Holton,* 92 Mich. 136, 139. This is not a case where a party had furnished labor or materials, or both, under contract which he has been prevented from completing. The lease does provide that if lessor terminates the contract it must pay the lessees for the amount expended for equipment, repairs, and alterations. Plaintiffs sued for this and other amounts in the present case. The verdict of the jury, however, establishes the fact that defendant did not breach the contract, and plaintiffs could not recover on the *quantum meruit* count in their declaration.

The judgment in favor of defendant is affirmed, with costs.

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

MICHIGAN TRUST CO. *v.* HERPOLSHEIMER.

1. TRUSTS—COMMON-LAW TRUSTS.
   Express trusts, recognized at common law, were expressly recognized and saved from abolition by Revised Statutes of 1846 (chapter 63).

2. CORPORATIONS—POWERS OR PRIVILEGES.
   "Powers or privileges of corporations not possessed by individuals or partnerships," within meaning of constitutional provision providing for corporations (article 12, § 2), are, in effect, franchises from State provided to be offered by general law and accepted by individuals organizing corporation by compliance therewith.

3. TRUSTS—COMMON-LAW TRUST—CORPORATIONS.
   Common-law trust is not corporation, having no franchise, but is based on voluntary action of individuals.

4. SAME—VOLUNTARY ASSOCIATIONS.
   Common-law trust is recognized by statutes as voluntary association which may sue and be sued.

5. CORPORATIONS—VALIDITY OF LEASE—ADOPTION.
   Where validity of lease was recognized by corporation succeeding to property and rights of common-law trust and also by lessor's personal representatives, lease was adopted by both parties, thus rendering it valid even if previously void by reason of failure of common-law trust to file annual reports as required by statute (2 Comp. Laws 1929, § 10138).

6. LANDLORD AND TENANT—OPTION TO EXTEND LEASE—ACCEPTANCE.
   Option in lease of extending same for additional term by giving written notice was continuing offer, which, by acceptance, became valid and binding contract.

Case-made from Kent; Perkins (Willis B.), J. Submitted October 28, 1931. (Docket No. 52, Calendar No. 35,946.) Decided January 4, 1932. Rehearing denied April 4, 1932.

Bill by Michigan Trust Company and another, trustees under the will of William G. Herpolsheimer, deceased, against Ralph C. Herpolsheimer and others to determine the validity of lease made by plaintiffs' testator. From decree holding lease valid, defendant Ralph C. Herpolsheimer and certain other defendants appeal. Affirmed.

Travis, Merrick, Johnson & McCobb, for plaintiffs.

Fred P. Geib (*Goodspeed, Pendell & McGuire* and *Julius J. Herscher,* of counsel), for defendants and appellants.

Willard F. Keeney and *Knappen, Uhl, Bryant & Snow,* for defendants and appellees.

POTTER, J. August 12, 1919, William G. Herpolsheimer owned certain real estate in the city of Grand Rapids known as the Herpolsheimer store building, and the old Hazeltine and Perkins building. On that date he made a lease of the real estate above mentioned to the Herpolsheimer Company, an alleged common-law trust, for a period of 10 years at a rental of $24,000 a year, and gave in the lease an option to the lessee for an additional 10-year term on the same conditions at a stipulated rental of $30,000 a year. The Herpolsheimer Company was engaged in the mercantile business in the city of Grand Rapids, and the shares in such common-law trust were held by William G. Herpolsheimer, Henry B. Herpolsheimer, Clara B. Herpolsheimer, and Clara B. Herpolsheimer as guardian for William S. Herpolsheimer and Edward M. Herpolsheimer, minors. William G. Herpolsheimer died February 24, 1920, leaving a will which was duly admitted to probate, which provided his real estate should go

to his son Henry B. Herpolsheimer, his daughter Anna A. Hardy, and the Michigan Trust Company, in trust with full power in their discretion to rent for any period of years any or all of said property, to erect buildings thereon and make alterations of and improvements upon any of said property, it being his intention that said trustees in all respects have the same powers with reference to the property and its disposition as testator might have if living. These trustees were to receive the income from such real estate and to pay to the wife of William G. Herpolsheimer $5,000 a year, and the balance of the income therefrom was to go one-fourth to Henry B. Herpolsheimer, one-fourth to Anna A. Hardy, one-fourth to Ralph C. Herpolsheimer, and one-fourth to William S. Herpolsheimer and Edward M. Herpolsheimer, grandchildren.

Henry B. Herpolsheimer died June 5, 1920. William B. Herpolsheimer, one of the trustees, died before that time. The Michigan Trust Company was appointed one of the trustees for the Herpolsheimer Company, the common-law trust.

December 21, 1923, the Herpolsheimer Company was incorporated, and the property of the common-law trust, above mentioned, was transferred to the Herpolsheimer Company, a corporation, in accordance with the several and respective interests of the parties interested in the trust. The shares of stock in the Herpolsheimer Company were held as follows: Caroline K. Herpolsheimer, 1,500 shares; Caroline K. Herpolsheimer and the Michigan Trust Company, guardians of Caroline B. Herpolsheimer, a minor, 935 shares; Anna A. Hardy, 1,777 shares; Clara B. Herpolsheimer, individually and as guardian for William S. Herpolsheimer and Edward M. Herpolsheimer, minors, 2,165 shares; the Michigan Trust Company as trustee for Ralph G. Herpol-

sheimer under the last will and testament of William G. Herpolsheimer, 1,777 shares; Arthur B. Herpolsheimer, 1,846 shares.

After the incorporation of the Herpolsheimer Company, it continued to operate the mercantile business, to occupy the premises under the lease, and to pay the rentals therefor, until September 28, 1926, when it gave plaintiffs, as trustees, notice of its election to exercise the option contained in the lease for an additional 10-year period. The bill alleges the parties negotiated for an increased rental, but finally agreed upon the basis at $30,000 a year. This 10-year lease has not been executed for the reason it is contended the original lease made by William G. Herpolsheimer to the Herpolsheimer Company was void. This is the important question in the case. It was agreed, on the trial, in open court that the validity of the lease was then the sole question for consideration. It is contended the Herpolsheimer Company, a common-law trust, had no legal existence, that it was a corporation, that it did not make reports to the State, and therefore was prohibited from doing business. It must not be overlooked that the real estate in question belonged to William G. Herpolsheimer. He could do with it as he saw fit. It is not claimed that he as the owner of the real estate and the dominant factor in the common-law trust, as landlord, took advantage of the common-law trust as a tenant and drove an unconscionable bargain with the lessee to which he stood in a fiduciary relation. On the other hand, it is claimed that, under the conditions subsequently developed in relation to his estate, he did not insist upon rent enough—at least those who now represent his estate should insist upon increased rent. Having an absolute right to lease the property, William G. Herpol-

sheimer could lease it on terms agreed upon, to whomsoever he saw fit; but appellants claim this necessarily presupposes a legal entity as a lessee and without such legal entity there can be no valid lease, and, by reason of common-law trusts like the Herpolsheimer Company being prohibited from doing business in Michigan without compliance with the corporation laws, there was no legal entity, and consequently no legal lease between the parties.

For many years there was no general corporation law in Michigan. Corporations were created only by special charter granted by the legislature. Those who desired the advantages of corporate organization were compelled to await legislative action. During this period, it was common practice to transfer property to trustees upon the terms and conditions of an express trust, which gave the trustees power to do the things a corporation usually might do. This was undoubtedly known to Judge Green when he prepared the Revised Statutes of 1846, which manifest no intention to in any way interfere with express trusts, though by chapter 63 of the Revised Statutes of 1846, "uses and trusts, except as authorized and modified by this chapter, are abolished." 3 Comp. Laws 1929, § 12967. "Express trusts may be created * * * for the beneficial interest of any person or persons where such trust is fully expressed and clearly defined upon the face of the instrument creating it." 3 Comp. Laws 1929, § 12977. So that trusts of the kind generally in use in Michigan at the time were expressly recognized and saved by the Revised Statutes of 1846. The trust here involved is an express trust created by an instrument in writing which points out directly and expressly the property, persons, and purposes of the trust, and as such was expressly provided for

by the terms of the Revised Statutes of 1846. Indeed, the persons, property, and purposes of the trust under consideration are so fully expressed and clearly defined that appellants contend it closely and completely followed the requirements of the corporation law of the State in its plan of organization and control in its operation. Such trusts, recognized at common law, were expressly recognized and saved from abolition by the Revised Statutes of 1846.

Article 12 of the Constitution of Michigan relates to corporations. It provides for their formation under general laws, prohibits their incorporation by special act of the legislature, and provides for the amendment, alteration, repeal or abrogation of special charters. Section 1, art. 12. It prescribes the period of their creation and for the extension of their corporate life. Section 3, art. 12. It fixes the liability of stockholders in corporations and joint stock associations. Section 4, art. 12. It prohibits their holding real estate for a longer period than 10 years, except such as is actually occupied by the corporation in the exercise of its franchise. Section 5, art. 12. Prohibits the renewal or extending of the corporate life of special charters. Section 6, art. 12. It provides for the establishment of rates for the transportation of freight and passengers by railroad companies, for fixing charges of express companies, and prohibits discrimination by railroad companies. Section 7, art. 12. Prohibits the consolidation of parallel or competing railroad lines. Section 8, art. 12. Prohibits the modification of the general banking law except upon a two-thirds vote of the members of each house of the legislature. Section 9, art. 12. It says, "the term 'corporations' as used in this article shall be construed to include all associations and joint stock companies having

any of the powers or privileges of corporations not possessed by individuals or partnerships." Section 2, art. 12.

The language, "powers or privileges of corporations not possessed by individuals or partnerships," points out such powers and privileges are something separate and distinct from those possessed by individuals or partnerships. These powers and privileges are in effect a franchise from the State provided to be offered by general law and accepted by the individuals organizing a corporation by compliance therewith. The powers and privileges of a common-law trust are derived from the voluntary association of individuals. The trust receives no corporate franchise. Its members comply with no general corporation law. They receive no act of sovereign approval. They derive whatever power and authority they have from the voluntary action of the individuals forming the trust. The statutes recognize voluntary associations. Such associations may sue and be sued. A common-law trust is not a corporation. It has no franchise. It is based upon the voluntary action of individuals. It is a voluntary association and recognized as such by the statutes which provide that it may sue and be sued.

It is contended, however, that this court has decided that a common-law trust constitutes a corporation within the meaning of the Constitution. *Hemphill* v. *Orloff,* 238 Mich. 508 (58 A. L. R. 507), stripped of surplus verbiage, holds a common-law trust organized outside of Michigan amenable to the statute of Michigan regulating the right of foreign corporations attempting to do business in the State, which statute provides:

"The term 'corporations' as used in this act shall be construed to include all associations, part-

nership associations and joint stock companies having any of the powers or privileges of corporations, not possessed by individuals or partnerships, under whatever term or designation they may be defined and known in the State where organized." 2 Comp. Laws 1915, § 9071 (see Act No. 327, Pub. Acts 1931, § 97).

In *Attorney General* v. *McVichie,* 138 Mich. 387, *quo warranto* was instituted against a partnership association, limited, it being contended it was a corporation. It is said:

"Certain provisions of the Constitution are made applicable to 'all associations and joint stock companies, having any of the powers or privileges of corporations, not possessed by individuals or partnerships.' See Const. (1850), art. 15, § 11. But it does not follow that the term 'corporation,' as thereafter used in legislation, must in every instance be so comprehensively construed. Had the Constitution makers so intended, they could easily have said so, and the fact that the provision was limited to the term as used in the preceding sections indicates a contrary intention."

In *Whitney Realty Co.* v. *Secretary of State,* 220 Mich. 234, the question arose whether plaintiff was entitled, under Act No. 85, Pub. Acts 1921 (2 Comp. Laws 1929, § 10136 *et seq.*), to a blank from the secretary of State on which to make an annual report. In construing this act, the court said:

"It relates to corporations, nothing else. Within itself there is no room for inference that it was intended to apply to partnership associations."

The secretary of State relied upon *Staver & Abbott Manfg. Co.* v. *Blake,* 111 Mich. 282 (38 L. R. A. 798); *Armstrong* v. *Stearns,* 156 Mich. 597, 604; *Union Trust Co.* v. *Detroit Common Council,* 170

Mich. 692; *Rouse, Hazard & Co.* v. *Detroit Cycle Co.*, 111 Mich. 251 (38 L. R. A. 794), and Act No. 84, Pub. Acts 1921 (2 Comp. Laws 1929, § 9943 *et seq.*). The court relied upon *Attorney General* v. *McVichie, supra,* where it was contended a partnership association was a corporation, and quoted with approval the language above quoted and added:

"The holding is controlling on this branch of the case. The cases cited are instructive, distinguishable, and not decisive of the question presented."

In *Nedeau* v. *United Petroleum,* 251 Mich. 673, this court reviewed the constitutional and legislative provisions relating to corporations, and held the Beaver Oil Company was not created by statute but constituted a common-law trust, but was within the provisions of Act No. 233, Pub. Acts 1923, which amended Act No. 85, Pub. Acts 1921, which later statute provided:

"The term 'corporation' as used in this act shall be deemed to include partnership associations, limited, whether domestic or foreign, all joint stock associations having any of the powers of corporations, and *such common-law trusts or trusts created by statute of this or any other State or country exercising common-law powers in the nature of corporations,* in addition to such other corporations as are referred to in this act." 2 Comp. Laws 1929, § 10138.

The language of this decision clearly indicates the distinction between a common-law trust and a corporation, but upholds the legislative power to make the corporation law relative to the filing of annual reports applicable to such common-law trusts. The Herpolsheimer Company, a common-law trust, was not a corporation. Even though the Herpolsheimer Company, a common-law trust, was a corporation

and had failed to make annual reports and was doing business in violation of law and the subject-matter of the lease was in furtherance of that business, in violation of the law and void, this would not necessarily render the lease void at the present time. December 21, 1923, the common-law trust ceased to exist, and its property and rights were transferred to the Herpolsheimer Company, a corporation. The Herpolsheimer Company, a corporation, continued to occupy the premises, to recognize the validity of the lease, to pay the monthly instalments of rent as they fell due, and the lessors' personal representatives continued to receive and receipt for the rental paid. This amounted to an adoption of the lease by the Herpolsheimer Company and the personal representatives of the lessor.

"Adoption should be used to apply to void transactions and ratification should be limited to voidable transactions. In all of the cases referred to, however, the parties were denied relief because they had accepted the benefits of the contracts, whether void or voidable, with full knowledge of the facts and at a time when the party so accepting was under the law fully competent and capable of contracting for himself. It therefore does not matter whether the transaction be referred to as an adoption, ratification, or estoppel, as the effect of these holdings, taken together, is to prevent a party from asserting the invalidity of a contract, when such party has accepted the benefits of the contract with the full knowledge of the facts." *Carlisle* v. *National Oil & Development Co.*, 108 Okla. 18 (234 Pac. 629).

See, also, *Wulfing* v. *Armstrong Cork Co.*, 250 Mo. 723 (157 S. W. 615); *St. Louis Union Trust Co.* v. *Chicot County Cotton-Alfalfa Farm Co.*, 127 Ark. 577 (193 S. W. 69); *Louisville, etc., R. Co.* v. *Carson,*

151 Ill. 444 (38 N. E. 140); *West Side Oil Co.* v. *McDorman* (Tex. Civ. App.), 244 S. W. 167.

If the lease of 1919 was valid, the question is presented whether the parties had a right to extend the period of its operation as provided therein. The 10-year lease signed by William G. Herpolsheimer provided for the occupation of the premises, the payment of taxes and assessments levied against the property, the payment of rent by the lessee, repairs and repossession on default by the lessee. It provided:

"For the considerations aforesaid, party of the second part is hereby granted the option, to be exercised in writing at least six months prior to said 10-year term, of extending this lease for an additional term of 10 years, on the same terms and conditions, excepting that the cash rental to be paid for said additional term shall be $30,000 annually, instead of $24,000 as above."

William G. Herpolsheimer and his personal representatives were bound by this option. It was, upon the part of the lessor and his personal representatives, a continuing offer. When it was accepted by the lessees, as provided in the lease, it became a valid and binding contract of lease for an additional period of 10 years. It was so accepted by the Herpolsheimer Company. The lessees' duty was performed and the obligations of the lease became binding upon it and upon the personal representatives of the lessor upon the exercise of the option contained in the original lease according to its terms. The lease was valid and binding in its inception. It was accepted, adopted, ratified, and approved by the Herpolsheimer Company, a corporation, and became a valid, subsisting lease between the personal representatives of William G. Herpol-

sheimer and the Herpolsheimer Company, a corporation. It was extended in a legal manner, and is now a valid and subsisting lease between the Herpolsheimer Company, a corporation, and the personal representatives of William G. Herpolsheimer. Decree affirmed, with costs to appellees.

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

BARNES *v.* FIRST NATIONAL BANK OF ST. IGNACE.

1. WITNESSES—DEPOSITIONS—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.

   In action against bank, use of deposition of plaintiff, taken after suit was commenced and used after her death, rendered competent testimony of defendant's assistant cashier (3 Comp. Laws 1929, § 14219).

2. BANKS AND BANKING—AUTHORITY TO PAY MONEY TO ANOTHER—QUESTION FOR JURY.

   Whether plaintiff gave written order for bank to pay money to her son, *held*, under evidence, question for jury.

3. APPEAL AND ERROR—VERDICT OF JURY CONCLUSIVE.

   Jury's verdict on question properly submitted to it is conclusive.

Appeal from Mackinac; Sprague (Victor D.), J. Submitted October 8, 1931. (Docket No. 60, Calendar No. 35,804.) Decided January 4, 1932.

Assumpsit by Gustava Ericks against First National Bank of St. Ignace for sums alleged to have been illegally paid from savings account. Upon

death of plaintiff, Leo R. Barnes, executor of her estate, was substituted as plaintiff. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

J. M. Harris, for plaintiff.

Prentiss M. Brown, for defendant.

POTTER, J. November 18, 1929, Gustava Ericks sued defendant to recover damages alleged to have been caused by defendant wrongfully paying out to plaintiff's son money deposited in the savings department of defendant belonging to plaintiff and deposited in her name. Gustava Ericks died during the pendency of the suit. Plaintiff is her executor. Plaintiff appeals from verdict and judgment for defendant. The deposition of Gustava Ericks was taken after suit commenced. It was used on the trial. This rendered competent the testimony of defendant's assistant cashier under 3 Comp. Laws 1929, § 14219.

The important question is whether there was testimony to carry the case to the jury. Plaintiff claimed defendant paid out the money in violation of law and its own rules. Defendant claimed it rightfully paid out the money to Oscar Ericks, son of Gustava Ericks, on her written order. Gustava Ericks testified she trusted her son, to whom the money was paid, and when she wanted money she was willing the bank should pay it to him. She signed and gave to her son a paper directing the bank to pay money to her son. When she subsequently wanted her son to get money for her from the bank and suggested she sign a slip, note, or something to the bank, Oscar, her son, told her it was not necessary, because the slip she had given the first time was there.

Defendant's assistant cashier testified he was positive he had an order signed by Gustava Ericks, authorizing Oscar to draw her money. He thought such order was still around the bank; he had searched for it, but could not find it. This was sufficient to carry the case to the jury. Its verdict is conclusive unless there was error in submitting the question in issue to it. We find none. Judgment affirmed, with costs.

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

HUBAR *v.* HARTMAN FINANCE CORPORATION.

VENDOR AND PURCHASER—FRAUD—RESCISSION.

In action by vendee's assignee against vendee and vendor to rescind land contract on ground of fraud, plaintiff is not entitled to relief against vendor, who was guilty of no fraud, misrepresentation, or deceit, and with whom plaintiff did not deal.

Appeal from Wayne; Sample (George W.), J., presiding. Submitted October 7, 1931. (Docket No. 30, Calendar No. 35,792.) Decided January 4, 1932. Rehearing denied April 4, 1932.

Bill by David I. Hubar against Hartman Finance Corporation and Cardinal-Taylor Corporation, Michigan corporations, to rescind a land contract. From decree for plaintiff against defendant Hart-

man Finance Corporation, it appeals. Reversed, and bill dismissed as to appellant.

Milton M. Maddin, for plaintiff.

Behr & Coolidge, for defendant Hartman Finance Corporation.

POTTER, J. Plaintiff filed a bill of complaint in the circuit court for Wayne county, in chancery, against defendants to rescind a land contract, for accounting, and for other relief. From a decree for plaintiff against Hartman Finance Corporation, it appeals.

Robert Oakman and wife, being the owners of the lands involved herein, August 5, 1924, sold on land contract the property in question to defendant Hartman Finance Corporation, for $7,000; $4,861.13 of which was paid down. The contract of sale restricted the use of the lot to residence purposes only. There were other restrictions as to the kind of dwelling, building, and grade lines, and other things all fully set out therein. February 17, 1925, Hartman Finance Corporation sold the land in question to Cardinal-Taylor Corporation, "subject to any restrictions upon the use of the premises." It is not claimed the Cardinal-Taylor Corporation was deceived or defrauded. Mr. Cardinal of the Cardinal-Taylor Corporation bought the property upon his own judgment, understanding, and belief. December 4, 1925, the Cardinal-Taylor Corporation assigned its contract with the Hartman Finance Corporation to plaintiff, "subject to any restriction upon the use of the same." Plaintiff did not discuss the property, contract, or restrictions with the Hartman Finance Corporation. The Cardinal-Taylor Corporation, at the time it purchased the property, urged the restrictions upon its use to reduce the

price. It bought with full knowledge of all the facts. The Cardinal-Taylor Corporation, in selling the property to plaintiff, assumed it was business property. Plaintiff says he would not have purchased the property had he believed it to be residence property. The Hartman Finance Corporation, under the facts, was guilty of no fraud, misrepresentation, or deceit. It did not deal with plaintiff, and he can have no relief as against it. No decree was taken against the Cardinal-Taylor Corporation. The decree did not rescind the assignment from the Cardinal-Taylor Corporation to plaintiff, but assumed to set aside the contract with the Hartman Finance Corporation, not shown to have participated in any fraud. The decree of the trial court will be reversed, and the bill dismissed, with costs to appellant.

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

YOKUBAUSKY *v.* YOKUBAUSKY.

DIVORCE—SEPARATE MAINTENANCE.

Decree granting separate maintenance to wife, and dismissing husband's cross-bill for absolute divorce, *held*, sustained by record.

Appeal from Kent; Dunham (Major L.), J. Submitted October 13, 1931. (Docket No. 90, Calendar No. 35,782.) Decided January 4, 1932.

Bill for separate maintenance by Maggie Yokubausky against John K. Yokubausky. Cross-bill by defendant against plaintiff for absolute divorce. Decree for plaintiff. Defendant appeals. Affirmed.

Michael Garvey, for plaintiff.

Dilley & Dilley, for defendant.

POTTER, J. Plaintiff filed a bill for separate maintenance against defendant, who answered and denied all the material allegations of her bill of complaint, and, by way of cross-bill, alleged plaintiff's improper conduct entitled him to a decree of divorce. The trial court entered a decree in favor of plaintiff, from which defendant appeals. October 1, 1929, defendant herein filed a bill for divorce as plaintiff against the plaintiff herein as defendant. After trial of that case, plaintiff's bill of complaint was dismissed by the trial court, with costs to defendant. Defendant here contends an absolute divorce should have been granted by the trial court, and that the provisions for plaintiff are grossly unfair, unreasonable, and impossible for defendant to perform. The decree entered by the trial court provided either party could apply for a change or modification of the decree. The case involved disputed questions of fact. A review of the testimony will be of no aid to the profession. We are satisfied from the record the trial court arrived at a correct conclusion. Decree affirmed, with costs.

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

BILLINGSLEY *v.* GULICK.

1. ESTOPPEL—INCONSISTENT POSITIONS.
   One may not take inconsistent positions in trial of case.
2. SAME—ADMISSIONS.
   Where admission is made in first trial, admitting party, on second trial, is estopped from taking position inconsistent therewith.
3. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—WAIVER—ESTOPPEL.
   Plaintiff, by failing to object to competency of defendants to testify as to matters equally within knowledge of deceased (3 Comp. Laws 1929, § 14219) and electing to cross-examine them on first trial in relation thereto, waived her right to object to their testimony on subsequent trial.

Appeal from Allegan; Miles (Fred T.), J. Submitted October 23, 1931. (Docket No. 56, Calendar No. 35,844.) Decided January 4, 1932.

Case under the death act by Mabel Billingsley, administratrix of the estate of Gurnard Billingsley, against Verle Gulick and another for personal injuries resulting in the death of plaintiff's decedent. Verdict and judgment for plaintiff. Defendants appeal. Reversed, and new trial granted.

Howard, Kimball & Howard, for plaintiff.

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

POTTER, J. Plaintiff, administratrix of her husband's estate, sued defendants to recover damages for the alleged negligent killing of plaintiff's intes-

As to waiver of incompetency of witness to testify in subsequent action, see annotation in 64 A. L. R. 1180.

tate. Judgment for plaintiff on the first trial was reversed by this court. *Billingsley* v. *Gulick,* 252 Mich. 235. On retrial, there was judgment for plaintiff, and defendants appeal.

The first question presented is the effect on the second trial of the waiver of defendants' disqualification as witnesses on the first trial, the judgment in which was reversed by this court and the cause remanded for a new trial.

When, upon the first trial, defendants were sworn and placed upon the witness stand as witnesses, plaintiff knew they were disqualified from testifying to matters equally within the knowledge of the deceased. She could object to their being examined at all as to matters equally within the knowledge of the deceased because of their disqualification, or admit their qualification to testify and have the benefit of cross-examination. She could not do both. Defendants were sworn as witnesses and examined on direct examination and fully cross-examined on the first trial. The question is whether the waiver of their disqualification by failing to make timely objection on the first trial has any effect on the second trial. Plaintiff insists that, upon the second trial, the disqualification of defendants as witnesses to testify to matters equally within the knowledge of the deceased may be raised, though it was waived in open court by failure to object to their testimony on the first trial and by plaintiff's affirmative action in cross-examining them after they had given their testimony on direct examination in the case at that time. Defendants claim plaintiff, by failing seasonably to object to the witnesses' testifying to matters equally within the knowledge of the deceased on account of their disqualification on the first trial, waived any objection to their competency as wit-

nesses on the second trial. It is conceded plaintiff could, on the first trial, have excluded defendants' testifying as to matters equally within the knowledge of the deceased, but she elected to admit such testimony without objection, and this election was irrevocable so far as that trial was concerned. Defendants contend the action of the plaintiff amounted to an irrevocable admission of the competency of defendants as witnesses to testify to matters equally within the knowledge of the deceased; that the plaintiff cannot be permitted to play fast and loose; to try the case at one time on the theory defendants were competent witnesses to matters equally within the knowledge of the deceased and submit them to searching cross-examination, and on the second trial exclude their testimony, including that elicited by plaintiff on cross-examination, upon the ground they were incompetent to testify to matters equally within the knowledge of the deceased, as to the very questions upon which they were examined and cross-examined on the first trial.

One cannot take inconsistent positions in the trial of a case. Where an admission is made on one trial, the admitting party, on a second trial, is estopped from taking a position inconsistent with that taken on the first trial. *Connor* v. *Railway Co.,* 168 Mich. 29; *Johnston* v. *Cornelius,* 200 Mich. 209 (L. R. A. 1918D, 880); *Harrington* v. *Accident Ass'n,* 210 Mich. 327; *Hassberger* v. *General Builders' Supply Co.,* 213 Mich. 489, 495.

These principles are of general application. The important question is whether they are applicable to the present case.

"The waiver of objections or the consent to read a deposition continues and is operative at a *second trial* of the same action." 4 Jones, Commentaries

on Evidence (1st Ed.), § 646, citing *Vattier* v. *Hinde,* 7 Pet. (U. S.) 252; *Edmondson* v. *Barrell,* 2 Cranch, C. C. 228 (Fed. Cas. No. 4284).

In *Vattier* v. *Hinde, supra,* the parties, when the case was pending in the circuit, stipulated for the admission of all testimony taken in other cases. Depositions had been taken therein and were read on the trial in the circuit without objection. The decree rendered was reversed and the cause remanded for a new trial. It was then objected that the depositions were not regularly taken and the consent to their admission no longer binding. The court, by Chief Justice Marshall, said:

"The reversal of the original decree cannot annul the written consent of parties for the admission of testimony. That consent was not limited in its terms to the first hearing, but was co-extensive with the cause. The words in the decree of reversal, that the parties may proceed *de novo,* are not equivalent to a dismissal of the bill, without prejudice; nor could the court have understood them as affecting the testimony in the cause, or as setting aside the solemn agreement of the parties. The testimony, therefore, is still admissible, to the extent of that agreement."

In *Green* v. *Crapo,* 181 Mass. 55 (62 N. E. 956), privileged communications between attorney and client were involved. The privilege was waived in the probate court. The court, by Chief Justice Holmes, said:

"Nevertheless the objection was urged when the case came to be tried before the justice of this court, and an exception was taken when he ruled that the privilege having been waived could not be insisted upon before him. We do not think it necessary to remark upon the willingness to hold back this testi-

mony. We content ourselves with saying that the ruling was right. The privacy for the sake of which the privilege was created was gone by the appellant's own consent, and the privilege does not remain under such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice. *McKinney* v. *Railroad,* 104 N. Y. 352 (10 N. E. 544)."

In *Cowles* v. *Cowles' Est.,* 81 Vt. 498 (71 Atl. 191), it is said:

"The waiver of the incompetency of the plaintiff as a witness in proceedings before the commissioners bound the defendant in the hearing on appeal. *Green* v. *Crapo,* 181 Mass. 55 (62 N. E. 956), is authority on this point. There the plaintiff testified without objection in the probate court to a privileged communication between himself and the defendant. In the trial in the superior court objection was raised to the plaintiff's testifying in his own behalf, but the court ruled that the objection had been waived and the testimony was admitted. The Supreme Court sustained the ruling, saying in the opinion: 'The privacy for the sake of which the privilege was created was gone by the appellant's own consent.' "

In *Belch* v. *Roberts,* 191 Mo. App. 243 (177 S. W. 1062), it is said:

"The plaintiff was introduced as a witness, but the objection was made that she was incompetent to testify, since the other party to the contract or cause of action was dead. Thereupon it was shown by uncontradicted evidence that in the trial of the case in the probate court the plaintiff testified and that her incompetency was waived because no objection was made at that time. When this was shown, the court overruled the objection and allowed her to testify. There was no error in so doing. (*Imboden* v. *St. Louis Union Trust Co.,* 111 Mo.

App. 220 [86 S. W. 263]; *Tomlinson* v. *Ellison*, 104 Mo. 105, 114 [16 S. W. 201]; *Ess* v. *Griffith*, 139 Mo. 322, 329 [40 S. W. 930]; *Rice* v. *Waddill*, 168 Mo. 99, 119 [67 S. W. 605]; *Jones* v. *Prudential Ins. Co.*, 173 Mo. App. 1 [155 S. W. 1106].)"

"Where a party representing a deceased person waives the incompetency of an interested witness to testify as to a transaction with the deceased, he must be held to have waived the incompetency of the witness to testify as to those matters in a subsequent suit in which the parties and issue are practically the same." 28 R. C. L. pp. 516, 517.

"An objection by the personal representative to the competency of certain witnesses on the ground that they are disqualified under the statute, which objection is made immediately after each of the witnesses is sworn, is in time and the disqualification of the witnesses is not waived by failure to object to their being sworn. But, as stated above, in the absence of adequate and timely objection, the protection of the statute is waived. And this waiver is not only for the instant and until the next question is asked the witness, but, according to the authorities, unlimited and extending throughout the entire progress of the proceeding, even to subsequent trials if between substantially the same parties and on substantially the same issues." 5 Jones, Commentaries on Evidence (2d Ed.), p. 4420, § 2276.

The question was considered by the supreme court of Vermont in *Comstock's Admr.* v. *Jacobs*, 89 Vt. 133 (94 Atl. 497, Ann. Cas. 1918 A, 465), where it is said:

"Defendant was a witness in his own behalf and, against the objection that he was incompetent to testify to the contract as the other party thereto was dead, was permitted to testify that he made a contract with the Comstocks for their life support

for which he was to have all their property. Plaintiff had introduced no living witness to such a contract and his rebuttal evidence tended to show that no such contract was ever made. Plaintiff had not called defendant as a witness at this trial. When the case was first here it appeared that the plaintiff, in his opening case, called the defendant as a witness and examined him at length relative to the contract made by him with the Comstocks under which he received all their property, and also as to the amount of money and property received by him from plaintiff's intestate in her lifetime. On the facts certified by the judge who presided at the trial, this court then held that the plaintiff, by calling the defendant as a witness and examining him as he did, waived the statutory incompetency and made him competent as a general witness in the case. *Comstock's Admr.* v. *Jacobs,* 84 Vt. 277, 281 (78 Atl. 1017, Ann. Cas. 1913 A, 679). It is now claimed that when plaintiff called the defendant as a witness at the first trial he only inquired of him concerning Mrs. Comstock's bank book, and the judge presiding at the last trial states in the bill of exceptions now before us that it appeared that at a previous trial the defendant had been used as a witness by both parties, but the plaintiff had only used him as a witness concerning the bank book of Eunice Y. Comstock.

"No question is made but that the record when the case was first here showed as stated in that opinion. The decision on the facts then certified up settled the competency of the defendant as a witness in his own behalf and became the law of the case to the extent of fixing his status as a witness in the subsequent trials. *Cowles* v. *Cowles' Estate,* 81 Vt. 498, 503 (71 Atl. 191). The waiver of defendant's incompetency as a witness having thus been established, it could not be impeached at a subsequent trial without falsifying the record of the former

trial. That record must stand as no steps were taken to have it corrected on a rehearing. But the exception could not be sustained if the question were an open one. It is generally held that when an executor or administrator, suing or defending on behalf of a decedent's estate, calls the adverse party and examines him in regard to transactions with the decedent, he thereby waives the statutory incompetency of the witness and makes him competent as a general witness in the case. Note to *Comstock's Admr.* v. *Jacobs* (84 Vt. 277 [78 Atl. 1017]), in Ann. Cas. 1913 A, 679, at p. 682, and cases cited; *Paine* v. *McDowell,* 71 Vt. 28 (41 Atl. 1042); *Ainsworth* v. *Stone,* 73 Vt. 101 (50 Atl. 805); *Dee* v. *King,* 77 Vt. 230 (59 Atl. 839, 68 L. R. A. 860); *Cowles* v. *Cowles' Estate,* 81 Vt. 498 (71 Atl. 191); *Green's Admr.* v. *Mason,* 84 Vt. 289 (79 Atl. 48); *Linsley* v. *Lovely,* 26 Vt. 123, 135.

"The bank book, concerning which plaintiff examined the defendant, was the principal subject-matter of the controversy. The time of the transaction to which this testimony related is not stated; but it must have been during Mrs. Comstock's lifetime, as the bank book had been transferred to the defendant and the deposit collected by him several months before her death. By calling the defendant and examining him as to this matter plaintiff waived the benefit of the statute and the defendant became a competent witness in his own behalf on all relevant matters. The justice of this rule is too apparent to require extended argument. It would be most unjust to require the defendant to admit having received the bank book and its proceeds and deny him the opportunity to explain how he came by them. Upon the defendant's theory of the case the transfer of the bank book was one of several facts making up a whole transaction. Having called the defendant as a witness to one of the constituent facts, plaintiff could not object, on any just ground, to his

testifying to the whole. To sustain his objection would be to countenance his occupying inconsistent positions. For the protection of the estate which the plaintiff represents, the statute denied the defendant the right to testify in his own behalf. The plaintiff was at liberty to insist upon or waive the benefit of the statute as seemed to him best for the interests of the estate. He could keep the door shut, if he chose to do so; but he could not open it, so far or so long as suited his own purposes, and then close it. Once open it remains open until the end of the litigation.

"It may be that plaintiff could have called the defendant as a witness to some fact without waiving his incompetency to testify generally; as to testify to some matter arising since his appointment as administrator (*Merchants' Loan & Trust Co.* v. *Egan,* 222 Ill. 494 [78 N. E. 800]), or in case of necessity to identify letters or other documentary evidence preparatory to offering them in evidence (*Garrus* v. *Davis,* 234 Ill. 326 [84 N. E. 924]; *Stevens* v. *Moulton,* 68 N. H. 254 [38 Atl. 732]). But these and similar cases are to be regarded as exceptions to the general rule that by using a disqualified witness a party waives the right to object to his competency later.

"Plaintiff contends that our decisions on this question have all proceeded on the ground that the party calling the witness has examined him generally on the question in issue. This is a misinterpretation of our holdings. While such was the situation in some cases, and so there was no occasion in the particular case to go further than that, we have no decision holding that, in order to waive the disqualification, it is necessary that the examination of the witness relate to the contract in issue. In some of the cases the rule we now announce was unmistakably forecasted.

"Plaintiff also argues at some length that *Linsley* v. *Lovely, supra,* does not bear upon the present

question; that, as it relates to waiver of incompetency on account of interest, it is not an authority for our decisions based upon it where the question was waiver of incompetency due to the death of the other party. The force of *Limsley* v. *Lovely* as an authority becomes apparent when we consider the successive steps by which the law applicable to the case has developed. At common law no person interested in a cause could be admitted to testify in favor of that interest. *Carr* v. *Cornell,* 4 Vt. 116, 118. Prior to 1852 a party situated like the defendant was denied the right to testify, not because the other party to the transaction was dead, but because of interest. By No. 13, Acts of 1852, all objection arising from interest, whether as party or otherwise, was removed (*Smith* v. *Potter,* 27 Vt. 304, 308 [65 Am. Dec. 198]), and a party was given the right to compel the adverse party to testify in his behalf.

"*Limsley* v. *Lovely* arose before the Act of 1852. The court then held that a party who called a witness who was disqualified because of interest and examined him upon a question to the court touching the interest of another witness could not object to his being examined by the other party upon the merits of the cause to the jury. It was said that by so doing the party calling him waived the right to object to his competency. So long as the statute of 1852 remained in force unamended the fact that one of the parties to a transaction was dead did not affect the right of the living party to testify. To guard estates of deceased persons from the apprehended danger of allowing the survivor when the other party was disabled by death to meet and explain such testimony, the legislature saw fit to restrict the effect of the statute of 1852 by engrafting thereon provisos relating to such cases. *Fitzsimmons* v. *Southwick,* 38 Vt. 509, 514. These provisos first appeared in the revision of 1863 (G. S. ch. 36, § 24), and covered what is now P. S. 1589 to 1591. An exception was thus carved out of the old

disqualification of interest, and, within a limited scope, the discarded rule was restored. See 1 Wigmore on Evidence, § 578. The main object of the statute was to remove and not to create disqualifications; and the provisos operate as a limitation or exception, so that competency is the rule and incompetency the exception. See *Hopkins Tr.* v. *Sargent's Estate,* 88 Vt. 217 (92 Atl. 14); *Lytle* v. *Bond's Estate,* 40 Vt. 622. Within their scope the provisos restore the disqualification that existed at common law. Thus it is seen that *Linsley* v. *Lovely* is full authority for the several decisions in support of which it is cited."

In *Hattersley Brokerage & Comm. Co.* v. *Humes,* 193 Mo. App. 120 (182 S. W. 93), a witness incompetent to testify under a similar statute was sworn in probate court, where it was suggested he was an incompetent witness, and examined. Upon the trial of an appeal from the probate court the question of the competency of this witness under the statute to testify was raised. It is said:

"At the time defendant called Mr. Hattersley as a witness in the probate court, plaintiff's counsel suggested to him that Mr. Hattersley was an incompetent witness under the statute, and if defendant saw fit to use him in the probate court, it would operate as a waiver of such incompetency, and that plaintiff would introduce him in the trial in any further proceedings thereafter. Notwithstanding this warning, defendant's counsel caused the witness to be sworn and examined him to the extent at least of identifying the account sued upon, as above stated. On the trial in the circuit court, after showing these facts, plaintiff introduced Mr. Hattersley as a witness, and he was permitted to testify touching the transaction involved—that is, the merits of the case throughout, in the view that, though incompetent in the first instance, the matter concern-

ing that had been waived by defendant. Defendant objected and excepted and argues here that the court erred in respect of this matter, but we are not so persuaded. It is to be conceded that Mr. Hattersley was an incompetent witness in the first instance, under the statute, for that he personally, representing plaintiff corporation, contracted the sale of the flour to Humes, since deceased. However, it was competent for defendant executrix to call him as a witness in behalf of the estate, if she choose to do so. Indeed, the statute (R. S. 1909, § 6356) so provides. But by calling as a witness an adverse party thus incompetent and examining him touching the merits of the controversy, one waives the right to object thereafter on the grounds of the incompetency of the witness. In other words, such renders the witness competent to speak thereafter throughout the proceedings. The cases all declare the rule to this extent. So it is that, where a party to a suit is disqualified by the statute because of the death of the other party to testify, the taking of his deposition by the adverse party constitutes a waiver as to such incompetency. (See *Tomlinson* v. *Ellison,* 104 Mo. 105 [16 S. W. 201]); see, also, *Stone* v. *Hunt,* 114 Mo. 66 [21 S. W. 454]; *Ess* v. *Griffith,* 139 Mo. 322 [40 S. W. 930]; *In re Soulard's Estate,* 141 Mo. 642 [43 S. W. 617].) The rule is the same if the adverse party sees fit to take the deposition of the incompetent witness and file it in the cause, even though such deposition is not read in evidence at the trial. (See *Borgess Investment Co.* v. *Vette,* 142 Mo. 560 [44 S. W. 754, 64 Am. St. Rep. 567].) So, also, is the matter of the incompetency waived in such circumstances through the taking of the deposition of a witness who would otherwise be excluded from speaking in the case perforce of the statute, even though such deposition so taken is not filed in the case at all. (See *Rice* v. *Waddill,* 168 Mo. 99, 101 [67 S. W. 605].)"

The statute, 3 Comp. Laws 1929, § 14219, recognizes the general rule above stated. It provides:

"That when the testimony or deposition of any witness has once been taken and used (or shall have heretofore been taken and used) upon the trial of any cause, and the same was, when so taken and used, competent and admissible under this section, the subsequent death or incompetency of such witness or of any other person shall not render such testimony incompetent under this section, but such testimony shall be received upon any subsequent trial of such cause."

The testimony of the defendants was taken and used upon the first trial of this cause. When so taken and used it was, by reason of the waiver of the plaintiff of the disqualification of such witnesses, competent and admissible under 3 Comp. Laws 1929, § 14219, and such testimony, under this statute, may be received upon any subsequent trial of such cause.

We hold that plaintiff, by failing to object to the competency of the defendants and electing to cross-examine them on the first trial, waived her right to object to the testimony of such witnesses in a subsequent trial upon the ground of their disqualification or incompetency to testify. The trial court was in error in holding otherwise. There are other errors complained of. They may not arise on a new trial. For the reason above, judgment is reversed, with costs, and new trial ordered.

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

MICHIGAN LAFAYETTE BUILDING CO. *v.* CONTINENTAL BANK.

LANDLORD AND TENANT—CANCELLATION OF LEASE—SURRENDER BY OPERATION OF LAW.

Lessor's allegation in declaration in former action for rent that it had permitted cancellation of lease as of certain date, and had leased to another, constituted surrender of lease by operation of law.

Appeal from Wayne; Moll (Lester S.), J. Submitted October 27, 1931. (Docket No. 130, Calendar No. 35,814.) Decided January 4, 1932. Rehearing denied April 4, 1932.

Assumpsit by Michigan Lafayette Building Company, a Michigan corporation, against Continental Bank for rent alleged to be due under a lease. Summary judgment for plaintiff. Defendant appeals. Reversed, and new trial ordered.

Edmund M. Sloman, for plaintiff.

Anthony Maiullo (*Morris W. Stein,* of counsel), for defendant.

POTTER, J. Plaintiff sued defendant to recover rent alleged to be due on a contract of lease in writing, dated May 29, 1924. Defendant pleaded the general issue and gave notice that plaintiff accepted a surrender of its lease and leased the premises to another company and put it in possession of the same; that plaintiff had on August 12, 1927, com-

menced suit against defendant by declaration; and in and by said declaration plaintiff set forth,

"That, notwithstanding the fact that plaintiff considered and treated the said lease in full force and effect and binding upon said defendant, and made repeated demands upon said defendant for the subsequent installments of rent accruing under said lease, it made numerous efforts to secure a tenant to take over said premises, so as to permit it to cancel said lease with said defendant and to release defendant from further obligation thereunder, but did not, however, succeed in doing so until the 16th day of November, 1926, as of which date pursuant to sundry requests of said defendant, it rented said premises to other parties;"

that judgment was subsequently taken by plaintiff against defendant upon this declaration for $11,435.45, the rent due to the date of cancellation alleged in the declaration above set forth, and that said judgment constituted former adjudication of plaintiff's cause of action set forth in the declaration herein, which judgment estops plaintiff from recovering in this cause. This plea was supported by an affidavit of merits. There was summary judgment for plaintiff and defendant appeals.

The defendant was liable under its lease at the time the first suit was commenced to plaintiff. Plaintiff had an opportunity to lease the premises to someone else. It was willing to do so but it desired to obtain a cancellation of the lease with the defendant. It set forth in its declaration that it did so and leased the premises to another. This constituted a sufficient surrender of defendant's lease by operation of law. In *Drew* v. *Billings-Drew Co.*, 132 Mich. 65, Baldwin leased to plaintiff Drew a building for three years. Subsequently a corpora-

tion was organized. Later the corporation became insolvent and a receiver was appointed. The lessor sought to recover rent under the original lease from the corporation for the occupation of his property. It is said:

"It was not in the power of Mr. Drew to impose his lease upon the corporation without the consent of the directors, but we do not think this was the effect of the transaction. The evidence shows that the fair value of the rental was $75 per month. Drew had gone out of business. Mr. Baldwin's building was required for the purposes of the corporation. Drew informed Mr. Baldwin of the situation. Baldwin declined to accept the corporation as his tenant under the lease, but was willing to lease the building to the corporation at the same rental as Drew had agreed to pay him until he could secure another tenant. The result was that Baldwin released Mr. Drew, and accepted the corporation in his stead as tenant. A surrender resulted by operation of law. *Stewart* v. *McLaughlin's Estate,* 126 Mich. 1; *Donkersley* v. *Levy,* 38 Mich. 54; *Gingrass* v. *Mather,* 128 Mich. 582; *Youell* v. *Kridler,* 105 Mich. 344."

Under the facts disclosed, summary judgment was improperly rendered. Judgment reversed, with costs. New trial ordered.

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

HOFFMAN *v.* PROFESSIONAL UNDERWRITERS.

1. GARNISHMENT—DISCLOSURE DENYING LIABILITY—TRIAL OF ISSUE.
Where garnishee defendant, by disclosure, denies facts contained in affidavit for writ, statutory issue must be framed for trial of question of garnishee's liability.

2. SAME—SUMMARY JUDGMENT.
Garnishment procedure is not modified by statute in relation to summary judgments (3 Comp. Laws 1929, §§ 14867, 14868).

3. SAME.
Where garnishee defendant, by disclosure, denied liability, plaintiff's motion for summary judgment was properly denied.

Appeal from Wayne; Webster (Arthur), J. Submitted November 17, 1931. (Calendar No. 36,045.) Decided January 4, 1932.

Garnishment proceedings by Eleanor Hoffman against Professional Underwriters, a Michigan reciprocal insurance company, garnishee defendant. From order denying motion for summary judgment, plaintiff appeals. Affirmed.

Louis Starfield Cohane and *Regene Freund Cohane* (*Lester S. Smith,* of counsel), for plaintiff.

Rodgers & Dunn and *Douglas, Barbour, Desenberg & Schaeffer,* for garnishee defendant.

POTTER, J. Plaintiff recovered judgment, in an action at law, based upon the negligence of the principal defendant, in the sum of $2,800. She instituted

garnishment proceedings against defendant herein. Disclosure denying liability was filed by the garnishee defendant. Plaintiff moved for summary judgment against the garnishee defendant. This motion was opposed. The trial court denied plaintiff's motion, and refused to enter summary judgment. Plaintiff appeals. The trial court was right.

The statute provides the affidavit for the writ of garnishment shall be held and considered as a declaration by plaintiff against the garnishee defendant. If the garnishee defendant, by disclosure, denies the facts contained in the affidavit, a statutory issue must be framed for the trial of the question of the garnishee's liability. A judgment may be taken against the garnishee defendant where his liability is admitted, and the garnishee defendant may have a trial of the cause as in other civil cases. 3 Comp. Laws 1929, § 14867. Where a judgment has been rendered in the principal action in favor of plaintiff before the commencement of garnishment proceedings or the framing of the statutory issue, such issue shall be brought to trial in the same manner as a personal action. 3 Comp. Laws 1929, § 14868. In case judgment shall not have been so recovered in the principal action, such statutory issue shall stand for trial at the term at which the issue against the principal defendant shall be tried and finally disposed of. 3 Comp. Laws 1929, § 14868. If plaintiff fails to recover in the principal action, the garnishee defendant is entitled to judgment upon the statutory issue. 3 Comp. Laws 1929, § 14868.

These and other provisions of the statute in relation to garnishment provide the procedure to be followed, and this procedure is not modified by the statute in relation to summary judgments. Sum-

mary judgment is provided for in garnishment itself. This statutory procedure must be followed, if it is to be made available. Affirmed, with costs.

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

SAGINAW CITY COUNCIL *v.* SAGINAW BOARD OF ESTIMATES.

1. MUNICIPAL CORPORATIONS—CHARTER PROVISIONS HAVE FORCE OF LAW.

   Provisions of city charter fixing salaries of commissioners or councilmen and mayor have force of law.

2. SAME—SAGINAW CHARTER—POWER OF BOARD OF ESTIMATES TO REDUCE SALARY ITEMS.

   Under charter of city of Saginaw, board of estimates has power to reduce items in estimates of council for salaries of officers and employees employed by council or city departments, notwithstanding provision in charter that said salaries are to be fixed or determined by city council.

3. STATUTES—REPEALS BY IMPLICATION.

   Repeals of statute or charter provision by implication are not favored.

4. SAME—PRESUMPTIONS.

   Where no repealing words are inserted in act or amendment, strong presumption arises that no repeal was intended.

5. SAME—INCOMPATIBLE PROVISIONS—REPEAL.

   Only when two acts or charter provisions are so incompatible that they cannot stand together does later provision repeal former.

On repeal of statute provision by implication not favored, see annotation in 4 L. R. A. 309.

Appeal from Saginaw; Martin (William H.) and Browne (Clarence M.), JJ. Submitted October 13, 1931. (Calendar No. 35,881.) Decided January 4, 1932.

Mandamus by the Council of the City of Saginaw to compel the Board of Estimates of the City of Saginaw to reconvene and approve budget prepared by plaintiff. Writ denied. Plaintiff appeals. Affirmed.

David E. McLaughlin, City Attorney, for plaintiff.

Ferdinand D. Heilman, for defendant.

POTTER, J. This is an appeal by the council of the city of Saginaw, in the nature of certiorari, to review mandamus brought by plaintiff against the board of estimates of the city of Saginaw. The case was heard in the circuit court before Circuit Judges Martin and Browne who rendered a written opinion therein which so clearly states and correctly disposes of the issues involved that we adopt it as our own:

"This is an application by the common council of the city of Saginaw, a municipal corporation of the State of Michigan, for a writ of mandamus to be directed to the board of estimates of the city of Saginaw, a board created by the city charter of said city, the powers and duties of which are prescribed therein, to reconvene and allow and approve of certain moneys contained in the estimates of the council to be raised by taxation in the tax roll of said city for the fiscal year of 1931, said moneys to be used to pay the salaries of all appointive officers and employees of the city, in the amounts or sums hereto-

fore fixed and determined by the common council of said city of Saginaw under the provisions of an amendment to section 15 of article 2 of said charter, which amendment was adopted by the electors of the city of Saginaw, November 5, 1918, and became effective November 15, 1918, and which reads as follows:

"'All appointive officers and employees of the city shall receive such salaries or compensation as the council shall determine.'

"Prior to the adoption of this amendment the section amended expressly specified the salaries to be received by the appointive officers mentioned therein, but this section did not include certain other appointive officers and employees in the employ of the city.

"Section 18 of article 2 of the charter provides that:

"'All other appointments shall be made, and labor shall be hired by the commissioner of the appropriate department, with the consent and approval of the council.'

"Section 34 of article 3 provides that:

"'The council shall, consistent with the provisions of this charter, create any office, position, or employment, that may in its opinion, be necessary or expedient, and fix the salaries and duties thereof. It may at any time abolish the same, whereupon the salary attached thereto shall cease.'

"As the charter stood before the amendment of November 15, 1918, the salaries of the commissioners or councilmen and the mayor were fixed by law, that is, by the charter itself, which has the force of law. The salaries of certain appointive officers, viz.: the city controller, city clerk, city assessor, city attorney, city engineer, chief of police, fire chief, city physician, city health officer, deputy city controller, deputy city clerk, deputy city assessor, deputy city treasurer, and clerk of the city courts were likewise fixed at stated amounts by the provisions of section 15 of article 2 of the charter. All other appointive

officers and employees appointed or employed either under the provisions of section 18 of article 2, or section 34 of article 3 of the charter, and the amount of their salary or compensation was left to the discretion of the council.

"The city of Saginaw is now operating under the provisions of the charter of 1913, and such amendments thereto as were adopted from time to time.

"This charter provides for the creation of a board of estimates and defines its powers and duties. The provision for the appointment of its members, and for its organization are to be found in article 25 of said charter, section 326, which, among other things, provides that:

" 'The board shall have the right to call upon the council, or upon any officers of the corporation, for any information which it may require, or for further reports for the purpose of estimating any amount to be raised, or in reference to any other matter pending before such board.'

"Section 327, of said article 25 of the charter, provides as follows:

" 'It shall be the duty of the commissioners of each of the five departments to prepare on or before the last Monday in January in each year, and to submit to the council an estimate of the amount of money which, in the opinion of the several commissioners, will be required to meet the expense of their respective departments for the ensuing fiscal year, and the council shall annually at their first regular meeting in the month of February, or as soon thereafter as may be, and after revising, altering, and approving the estimates submitted to it by the several commissioners of the said several departments, and on or before the second Monday in April, transmit the same together with the estimate of any other taxes approved by it to be raised for the ensuing year, to the controller of the city, who shall arrange, compile, and tabulate the same, and shall also on or before the first Monday in May transmit the same to the board of estimates for its approval, and all propositions and resolutions of the council for the borrowing of any money on the credit of the city or issuing any bonds, shall also in like manner be submitted to the board of estimates, except as herein provided.'

"Section 328 of article 25 of the charter provides that:

" 'Before any money shall be raised, or taxes levied and collected for the purpose of the several funds mentioned in this char-

ter, * * * the estimates of the council, * * * of the amount of moneys required for such fund or purposes, shall be submitted to the board of estimates for approval. * * * The estimates for general city taxes shall be acted upon by the council, as provided in this charter, and shall be submitted to the board of estimates on the first Monday in May. * * * The said board shall carefully consider all estimates required by this charter to be submitted to it, of moneys to be raised as aforesaid, and shall approve or disapprove of the same. It may decrease the amount to be raised, but shall not increase the same. The said board shall have power, and it shall be its duty, after careful consideration of the various estimates referred to, if it shall deem it advisable so to do, to disallow any item, items, or parts of items in the different funds as well as in the gross amount thereof, as said board may deem advisable. It shall be unlawful for the council of said city to create any indebtedness or expend any moneys as to items specifically disallowed or disapproved by said board of estimates.' * * *

"Section 322 of article 24 of the charter provides for a general fund and other funds out of which the salaries of appointive officers and employees are paid.

"Section 323 of article 24 provides that:

"'For the purpose of defraying the ordinary expenses and liabilities incurred by said city, and paying the same, the council may, with the approval of the board of estimates as in this charter hereafter provided, raise annually, by tax levied upon the real and personal property within the said city, such sums as they may deem necessary for the several funds hereinbefore specified, not exceeding two per centum of the assessed value of all real and personal property in the city, according to the valuation thereof taken from the assessment roll of the year preceding the levy of such tax.'

"Section 324 of article 24 of the charter provides that:

"'The council, after revising, altering, and approving the estimate submitted to it by the several commissioners of the several departments as provided by section 327 (heretofore quoted), shall, on or before the first Monday in May, transmit the same through the controller together with an estimate of any other taxes approved by it, to be raised for the ensuing year for the approval of the board of estimates as provided in this charter, and all propositions and resolutions for the borrowing of any money on the credit of the city, or issuing any bonds, shall also in like manner be submitted to the board of estimates except as herein otherwise provided. It shall be the duty of the council, on or before the third Monday in May of each year, to determine by resolution the amount necessary to be raised by tax for the city pur-

poses within said city for such year, which amount shall not, except as in this charter otherwise provided, exceed the amount theretofore approved by the board of estimates.' * * *

"The question of law here involved is:

"Has the board of estimates the power, under the amendment to section 15 of article 2 of the city charter, to limit or reduce the salary items budget or estimate of the council, when not in excess of the legal taxation limit, after the same has been determined upon and submitted to it by the council of the city of Saginaw. This question has been carefully considered and ably presented by the respective attorneys representing both bodies.

"The court is satisfied that the board of estimates, under the provisions of the charter before the amendment of 1918, had no jurisdiction to reduce the items of the budget or estimates defined by the express provisions of the charter as to the salaries of the mayor or commissioners and those appointive officers mentioned therein and whose salaries were fixed by the provisions of the charter itself. As to the salaries of those officers and employees whose positions were created by the council under the provisions of section 34 of article 3, and by the commissioner under the provisions of section 18 of article 21, there is no doubt as to the power of the board of estimates to reduce the items in the estimates of the council with reference thereto.

"See *Robinson* v. *City of Detroit,* 107 Mich. 168.

"In that case it was in effect held as follows: 'A city council was authorized by the charter to appoint such subordinate officers as might be necessary and to fix their compensation. The charter further provided that, before any taxes should be levied for the purposes of the several funds of the city, the controller should present to the council his estimate of the amount necessary to be raised for the ensuing year for each of said funds; that the council might revise or alter said estimates, and, when

finally adopted, should transmit the same to the board of estimates; and that such board should have the right to call upon the council or any municipal officer for information as to any matter pending before it. By subsequent enactment it was provided that the board of estimates should have the power, after consideration of the various estimates referred to it, to disallow any items in the different funds, and that it should be unlawful for the council to create any expenditure, or expend any moneys as to items specifically disallowed by the board. Held, that, where the board had assumed to deduct the salaries of certain officers from the estimates of the general fund, appointments to said offices thereafter made by the council were illegal and the payment of salaries thereunder would be enjoined, although the estimates certified to the board by the council were not itemized.' (Syllabus.)

"In *Attorney General* v. *City of Detroit*, 113 Mich. 494, it was said by the Supreme Court, that:

"'Under a local act empowering the board of estimates of Detroit to disallow any items or parts of items of the various estimates referred to it, and making it unlawful for the common council to expend any moneys as to items specifically disallowed, the city has no authority to pay an official the salary fixed by the council, after the board of estimates has reduced the amount.' (Syllabus.)

"The court further said that:

"'These officers were created by the common council and that body had no power under the charter to pay the salary of such officers unless there be money for that purpose. Moneys are raised only for the fiscal year and for particular purposes and must be paid out for the purposes for which they are raised, and no other, and, if any balances, such balances are paid into the sinking fund at the close of the year. The money for these salaries could not be raised except by the action of the board of estimates. That board is clothed with power under the act of 1895 to cut out any item, items, or parts of items. In the exercise of that power the board cut out a part of these very items. There is no money in that fund to pay beyond $1,000 and $800 respectively, to these inspectors. The court below very properly held that the city should be enjoined from paying more than these amounts. That decree will be affirmed.'

"These two decisions without doubt settle the question that the items for salaries of officers and employees created by, or employed by, the council under the provisions of section 34 of article 3 of our charter, or of the employees hired by the several commissioners in their respective departments, by and with the consent of the council, under the provisions of section 18 of article 2, are subject to review by the board of estimates, who may reduce the several items of the estimates of the council relating to the payment of salaries, unless the board of estimates is now prohibited from so doing by virtue of the amendment of section 15 of article 2, which provides that 'all appointive officers and employees of the city shall receive such salary or compensation as the council shall determine.'

"This amendment of 1918 entirely removes the original section 15 of article 2 from the charter and substitutes in the place thereof the present amendment just quoted. It removes from the charter provisions the salaries specifically mentioned for certain officers, which were in the original provision enumerated, and places all appointive officers and employees in the same class or category, giving to the council the authority to determine the salaries of all appointive officers and employees of the city. It does not, however, restrict the power of the board of estimates, under the provisions of the charter, nor does it deprive them of the powers and duties conferred upon said board by the terms of the charter, of reducing any item, items, or parts of items in the estimates of the council required by the charter to be submitted to said board for its approval, nor as to those items of estimates which are to be expended in the payment of such salaries. It will be remembered that when the amendment of 1916 was adopted, no part of those sections relating to the powers and duties of the board of estimates was amended or repealed, nor was there any provi-

sion, or provisions placed in those sections of the charter relating to the powers and duties of the board of estimates, which either expressly or otherwise prohibited this board from reducing the salary items of the estimates of the council, nor were definite fixed salaries enacted by any ordinance of the city council, as was the case in *Burton* v. *City of Detroit,* 190 Mich. 195. That case is distinguishable from the case at bar in that the amendment to the charter of the city of Detroit expressly provided that the council

> " 'shall not be required to submit to the board of estimates so much of the revised estimates as shall be required to raise money for the payment of debts or liabilities theretofore duly and lawfully contracted, or for moneys which may be required for the payment of salaries fixed by law, or otherwise required by law to be levied.'

"The court there held that the salaries involved were fixed by ordinance and therefore were fixed by law. The council in the present case has never fixed the salaries here involved by ordinance, but have simply included them in their annual estimates to be raised in the same manner as any other current expense of the city. Whether the city would have the power to pass such an ordinance is not before us. The salaries of the officers mentioned in section 17 of article 2 of this charter were, before this amendment of 1918 before quoted, fixed by law, that is, by the charter itself. By this amendment of 1918, they were removed from the charter, and are now fixed by the council, and as such are subject to review by the board of estimates as in the case of other expenditures, and the items in the estimates of the council for such salaries may be reduced by the board of estimates, unless the force of the amendment of 1918 is such as to repeal or nullify the powers and duties of the board of estimates in relation thereto. In passing upon this feature of the case, it will be remembered that the amendment

of 1917 does not itself in express language undertake to repeal or restrict any of the powers and duties of the board of estimates with reference to the salary items arising from the fixing of salaries by the council for appointive officers and employees of the city, nor have these powers and duties been restricted by any amendment to those sections of the charter having reference to the powers and duties of the board of estimates. In other words, there is no express restriction upon the powers and duties of the board of estimates as fixed by the terms of the charter with reference to the items contained in the estimates of the council for the payment of salaries of appointive officers and employees, unless it can be said that the powers and duties of the board of estimates with reference to the subject-matter of salary items have been repealed or restricted by implication.

"Repeals by implication are not favored, as has been well settled by a long line of decisions of the Supreme Court of this State. Where no repealing words are inserted in the act (or amendment) a strong presumption arises that no repeal was intended, or it would have been expressed in the act or amendment. *People* v. *Hanrahan,* 75 Mich. 611 (4 L. R. A. 751).

"Only when two acts (or charter provisions) are so incompatible that they cannot stand together does the later provision repeal the former. *Village of Highland Park* v. *McAlpine,* 117 Mich. 666.

"It cannot be said that this amendment of 1918 to article 2, section 15, and the several sections of the charter prescribing the powers and duties of the board of estimates are incompatible. That the council may fix and determine the salaries to be paid all appointive officers and employees of the city, and the board of estimates have the power to reduce the items or parts of items of the estimates

of the council to be raised for the payment of salaries was decided in the case of *Robinson* v. *City of Detroit,* and *Attorney General* v. *City of Detroit, supra,* and the same doctrine was sustained in the case of *Burton* v. *Detroit* as to officers not named in the amendment, or whose salaries were not fixed by law or by ordinance.

"In accordance with the views heretofore expressed, the application for a writ of mandamus will be denied, but without costs, since only public questions are presented."

The order of the trial court is affirmed, but without costs.

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

McINTYRE *v.* KUNSKY THEATRES CORP.

THEATRES AND SHOWS—NEGLIGENCE—DIRECTED VERDICT.

In action against theatre company for negligence of its employee in closing automobile door on plaintiff's fingers, resulting in serious injury, evidence *held,* to justify directed verdict in favor of defendant.

Appeal from Wayne; Murphy (Alfred J.), J. Submitted October 29, 1931. (Docket No. 129, Calendar No. 35,955.) Decided January 4, 1932.

Separate actions of case by Abby McIntyre and Harold McIntyre against Kunsky Theatres Corporation, a Michigan corporation, for personal injuries sustained by Abby McIntyre alleged to be due to negligence of defendant's employee. Cases were tried together. Directed verdicts and judgments for defendant. Plaintiffs bring error. Affirmed.

Dennis Boyle, for plaintiffs.

Frederick J. Ward, for defendant.

Sharpe, J. Plaintiff Abby McIntyre brought an action to recover damages for an injury sustained to her hand by the closing of the door of an automobile by an employee of the defendant. Her husband, Harold McIntyre, seeks to recover the damage he sustained by reason of his loss of the services of his wife and the expense he has been put to by her injury. By stipulation of counsel, the two cases were tried together. At the conclusion of the proof offered by the plaintiffs, the trial court, on motion of defendant's attorney, directed a verdict in both cases in its favor, and plaintiffs here seek review of the judgments entered thereon by appeal. Mrs. McIntyre will be hereafter referred to as the plaintiff.

Her testimony, corroborated by other witnesses, established the following facts: That when she came out of defendant's theatre about 4 o'clock in the afternoon of January 13, 1928, accompanied by Mrs. Frederick Colman, Mrs. Julia Colman, the daughter-in-law of the latter, drove up to the sidewalk at the entrance to the theatre in a seven-passenger automobile; that, as the plaintiff and Mrs.

Frederick Colman approached the car, Mrs. Fredericks, who was sitting in the front seat with the driver and on the side next to the sidewalk, got out to assist them in entering the car; that plaintiff got into the back seat first, but, on it appearing that she desired to alight on the right-hand side of the car, she concluded to let Mrs. Colman pass her. She then testified:

"I stepped back, I had hold of the robe and I stepped back, and Mrs. Colman is large, the same as I am, and I stepped back to let her pass me in the car.

"*Q.* When you stepped back, what did you do with your hand? Did you have anything in your hand?

"*A.* In this hand, my left hand, I had the corner of the robe holding it up so that Mrs. Colman could pass, and I put my hand back to steady myself, I put my right hand back to steady myself while she was passing me.

"*Q.* About where were you standing in the car in respect to the left side or right side?

"*A.* I had stepped toward the right side a little and back in order to let Mrs. Colman pass to the left-hand seat.

"*Q.* Were you supporting yourself or just standing there naturally?

"*A.* I had my hand over against something solid.

"*Q.* Which hand?

"*A.* My right hand.

"*Q.* What were you doing with your left hand?

"*A.* I was holding the robe.

"*Q.* Did Mrs. Colman enter the car?

"*A.* Yes.

"*Q.* Did she pass in front of you?

"*A.* Yes.

"*Q.* You say that you put your right hand on something solid. Did you notice where you put your hand?

"*A.* I didn't notice because I was turning that way. I put my hand back."

She did not realize that her right hand was in the door jamb until the footman or doorman in the employ of the defendant, whose duty it was "to open and close doors and keep the place clear from traffic," closed the door and her hand was caught and badly crushed. The footman, called by the plaintiff for cross-examination, testified that it was his duty to stay "right in front outside the theatre;" that there is a marquee extending from the building to the edge of the sidewalk, and that he looked before closing the door and saw that those in the back seat were seated.

The action of the trial court in directing a verdict was based upon the decision of this court in *Camp* v. *Spring,* 241 Mich. 700. Counsel attempts to distinguish it, claiming that the facts were different. We have examined the record in that case with care, and find in it no facts which can fairly be said to differentiate it from those here presented. In our opinion, it is controlling of the issue, and justified the action of the trial court in directing the verdicts.

The judgments are affirmed.

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

In re PARKINSON'S ESTATE.

ORTMAN *v.* GUILLOZ.

1. EXECUTORS AND ADMINISTRATORS—BURDEN OF PROOF—CLAIM AGAINST ESTATE.

Burden is on judgment creditor to prove balance due it on judgment against estate, and administrator should not have attempted to do so.

2. SAME—ATTORNEY'S FEES—RECORD.

Probate court properly disallowed $1,250 item in administrator's account for attorney's fees in suit to have certain property decreed to belong to estate, on proof as appears in record.

3. SAME—EXTRAORDINARY SERVICES.

Item allowed in circuit court to administrator for extraordinary services is set aside, on appeal; amount to be determined at hearing to be hereafter had.

4. SAME—HEARING ON APPEAL FROM PROBATE COURT DE NOVO—COURT RULES—INTENT.

There was no intention, on adoption of new rules providing for appeal from probate court (Michigan Court Rule No. 55 *et seq.*), to provide that hearing in such case should be other than *de novo*.

Appeal from Wayne; Toms (Robert M.), J. Submitted October 9, 1931. (Docket No. 72, Calendar No. 35,954.) Decided January 4, 1932.

In the matter of the estate of Charles A. Parkinson, deceased, Frank J. Ortman, administrator *de bonis non* with will annexed presented his account for allowance. On objection of Jessie Guilloz, an heir, an order was entered disallowing certain items and

reducing others. Plaintiff appealed to circuit court. From judgment entered, defendant appeals. Reversed, and remanded.

Atkinson, O'Brien & Ortman, for plaintiff.

Hugh C. Chedester, for defendant.

SHARPE, J. Charles A. Parkinson, at one time a resident of Wayne county, in this State, departed this life in the State of California on April 7, 1921, leaving a last will and testament, in which Ida J. Parkinson was named as residuary legatee. The will was duly admitted to probate in that State. Ancillary administration was afterwards had in the county of Wayne, in which he owned property at the time of his death, and Willis B. Goodenow appointed administrator with the will annexed. Commissioners on claims were duly appointed and notice of the hearing thereof given, but none were filed and he so reported to the court.

In the meantime, a suit was brought in the Wayne circuit court by Ida J. Parkinson against Jessie Guilloz, in which it was sought to have a deed executed by Ida to Jessie set aside and the property described therein decreed to belong to the estate of the deceased. Although begun in 1922, it was not brought on for hearing until May, 1929, when a decree was entered as prayed for in the bill of complaint. Under it, title passed to Ida as residuary legatee. On appeal to this court, the decree was reversed, and the title of Jessie confirmed, except that any indebtedness of the deceased and the expenses of administration were deemed to be a lien thereon. *Parkinson* v. *Guilloz,* 250 Mich. 637. Goodenow, the administrator, intervened in that

suit, but was defaulted for want of an answer. He later resigned, and, on petition of Ida J. Parkinson, Frank J. Ortman was appointed to succeed him. He filed an appearance in the case and an answer and cross-bill by Thomas J. Donahue, his attorney.

On December 10, 1930, Ortman filed his "first account" as administrator in the probate court, and asked for its allowance. In it he acknowledged receipt of $541 on account of "Sale of Larned street property," and claimed disbursements in the sum of $5,338.25. Among the latter items was "J. E. Scripps Corporation, balance of judgment, $1,009.70," and a claim for attorney's fees in the sum of $2,000, and one for $1,500 for extraordinary services rendered by him as administrator. The first two of them were disallowed by the probate court, and the last allowed at $400.

Ortman thereupon took an appeal to the circuit court under Michigan Court Rule No. 55 *et seq.* Counsel for Jessie Guilloz made a motion to dismiss, which was overruled. The stenographic record of the proceedings in the probate court seems to have been presented to the court. There appears to have been uncertainty in the minds of counsel as to whether additional proof could be then taken under the rule, and the cause was finally submitted on the record as made in the probate court. But a part of this seems to be embodied in the printed record. The trial court allowed the item "Balance of Judgment including interest due J. E. Scripps Corp." at $916.89; allowed attorney's fees in the sum of $1,250, and extraordinary fees of administrator in the sum of $750. From the judgment so entered, Jessie Guilloz has appealed to this court.

Mr. Ortman was the only witness sworn at the hearing. It seems apparent that the allowance of

the balance due on the Scripps judgment was not justified by the proofs. This judgment was entered against Charles A. Parkinson on March 1, 1927, almost six years after his decease, and after hearing "the proofs and allegations of the parties." It also appears that an attachment had been issued in that action and levy made upon the interest of the deceased in what is spoken of as the Larned street property, and that, on partition thereof, his interest was found to be worth more than the amount of the judgment, but that a part of the proceeds was paid to Ortman and is included in his receipts, as above stated. It is insisted by counsel for appellant that the order of distribution in that case was entered by consent of Ortman as administrator; that an attorney fee largely in excess of a proper allowance was awarded to Mr. O'Brien, with whom Ortman was then associated in the law business, and who was then acting therein as attorney for Ida J. Parkinson, and that the purpose of Ortman and O'Brien in consenting to the terms of this order and securing its entry was to create an unpaid balance on this judgment. Upon this record, that question may not be determined. The burden was upon the Scripps Corporation to prove the balance due it on the judgment. Ortman, as administrator, should not have attempted to do so.

The allowance of $1,250 for attorney's fees in the *Parkinson* v. *Guilloz* case cannot be sustained upon the proof submitted. Ortman, as administrator, appeared in that case by Thomas J. Donahue as his attorney. The brief in this court was filed by Mr. Donahue, acting for him, and yet he (Ortman) now makes claim for the services as though rendered by him personally as attorney for the administrator. Without explanation or proof other than ap-

pears in this record, the probate court was justified in disallowing it.

The probate court allowed the administrator $400 for extraordinary services as such. The trial court increased this amount to $750. In view of the fact that the probate judge had access to the files in the case and that the record as here presented is incomplete as to the proceedings then had, in our opinion the allowance of this item should be set aside and determined upon the hearing to be hereafter had. The record contains many statements of counsel which were not evidence, and could be understood only by access to the records of the court.

There was no intent on the part of this court, in the adoption of the new rules, to provide that the hearing in such a case on appeal should be other than *de novo*. There is no general statute providing for the employment of a stenographer in hearings in the probate court, and in most of the counties of the State none are employed.

The appeal from the order of the probate court to the circuit court will be treated as properly made and the cause remanded to that court for a trial of the issues presented on that appeal on their merits. The costs upon the trial had in the circuit court and upon the appeal in this court will abide the result of such new trial and be awarded as the judge of that court shall determine to be just and equitable, in view of the judgment to be entered therein.

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

HOEFER MANUFACTURING CO. *v.* FORD MOTOR CO.

1. PRINCIPAL AND AGENT—SALES—BREACH OF CONTRACT.
In action for breach of contract to purchase special machines to be constructed for defendant, finding of trial court that company making contract for said machines was acting as agent for plaintiff, and that defendant is bound thereby, *held*, justified by record.

2. SALES—BREACH OF CONTRACT—DELAY—DAMAGES.
In action for breach of contract to purchase special machines to be constructed for defendant, latter's claim that cancellation was justified by plaintiff's delay, and that there was no sufficient proof of damages, *held*, without merit.

Error to Wayne; Warner (Glenn E.), J., presiding. Submitted October 14, 1931. (Docket No. 112, Calendar No. 35,489.) Decided January 4, 1932.

Assumpsit by Hoefer Manufacturing Company, an Illinois corporation, against Ford Motor Company, a Delaware corporation, for breach of contract for purchase of special machines. Judgment for plaintiff. Defendant appeals. Affirmed.

Anderson, Wilcox, Lacy & Lawson (*Julian G. McIntosh* and *Helen W. Miller,* of counsel), for plaintiff.

Longley & Middleton, for defendant.

SHARPE, J. On June 9, 1920, the defendant gave four purchase orders for special machines at stated prices to the Cadillac Tool Company, delivery to be made in October, and on June 14th it, in turn, issued similar orders to the plaintiff. The price stated

thereon was 15 per cent. less than in the orders from the defendant. On September 29th the defendant notified the Cadillac Tool Company that it canceled the orders, as it was apparent delivery could not be made as agreed, and the cancellation was accepted by that company and plaintiff notified by telegram to that effect. To this the plaintiff replied that it would be "unable to accept cancellation unless the Ford Motor Company will pay us in full for all work to date, and at the same time, return to us the blue prints which they have in their possession." (These prints were afterwards returned.)

Negotiations for an adjustment having proved unsuccessful, plaintiff brought this action to recover its damages due to the alleged breach of contract by the defendant. On trial by the court without a jury, a judgment was rendered in its favor for $4,000. Defendant has appealed therefrom.

The meritorious question presented is: Was the Cadillac Tool Company acting for the plaintiff as its agent in securing the orders from the defendant?

While the orders were given direct to the Cadillac company, it appears that Mr. Hoefer, the secretary and manager of the plaintiff, had been consulted about the manufacture of the machines, and had conferred with the defendant's engineers relative thereto. It cannot be doubted that it was expected and well understood that the orders given were to be turned over to the plaintiff by the Cadillac company. The orders on their face stated that the price to be paid was "Net 30 days. F. O. B. Freeport, Ill.," where plaintiff's plant was located. Mr. Campbell, at that time a salesman for the Cadillac company, testified that Mr. Hoefer "came to us and we obtained this order for him from the Ford Motor Company. * * * The Cadillac company obtained

the order from Ford for Hoefer not I. * * * The intention was, of course, that it would go to Hoefer."

The Cadillac company was not a manufacturer. It acted as sales representative for a number of such companies, and secured a large number of orders that year from the defendant. But, as before stated, it was understood by it, when these orders were given, that the machines were to be manufactured and delivered by the plaintiff company. The defendant had theretofore bought certain equipment direct from the plaintiff, but, after the plaintiff had appointed the Cadillac company its sales representative in Detroit, all orders thereafter would naturally be given to it.

While the orders from the defendant to the Cadillac company were for "special tapping machine," "special 2-way machines," "special machine to drill," and "special machines" to be operated in a particular way, in all of the orders sent by the Cadillac company to the plaintiff they were referred to as "Special Hoefer" machines, and all of them provided that the design of the machines was "to be O. K.'d by Ford engineers before starting work on patterns and machining."

After the orders were given, there was considerable correspondence between the defendant and the plaintiff relative to them. In a letter dated August 4, 1920, defendant wrote plaintiff, "The writer would appreciate a progress report of all our orders by return mail," and on the next day wrote, stating that it would "expect you to give us a progress report every week." In a letter written on August 11th it refers to the Cadillac company as "your representatives in this city," and on October 11th wrote that it had "canceled the orders for these motors."

It also appears that certain motors were sent by the defendant direct, to be used by plaintiff in the

manufacture of the machines ordered, and that these were charged to the plaintiff on the books of the defendant.

The trial court found that the Cadillac Tool Company was acting as the agent or representative of the plaintiff in making the contracts with the defendant, and that the defendant is bound by the terms thereof. In our opinion, the record justifies this finding. *American Enameled Brick & Tile Co.* v. *Brozek*, 251 Mich. 7; *Earl Fruit Co.* v. *Herndon Fruit Co.*, 253 Mich. 329.

Defendant also urges that the cancellations were justified by the delay, and that there was no sufficient proof of plaintiff's damages due thereto. These claims have received consideration, but in our opinion they are without merit.

The judgment is affirmed.

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

LEWIS *v.* PHELPS.

1. SEAMEN—MASTER AND SERVANT—FEDERAL MERCHANT MARINE ACT—NEGLIGENCE—COMMON-LAW RULES.

   In order to recover damages under Federal merchant marine act (46 USCA, § 688) for employee's death, it must appear that death resulted, in whole or in part, from negligence of employer, and negligence must be determined in accordance with common-law rules applicable thereto.

As to duty of master to furnish safe place to work, see annotation in 26 L. R. A. 524; 41 L. R. A. 50; 25 L. R. A. (N. S.) 321; 28 L. R. A. (N. S.) 1267; 46 L. R. A. (N. S.) 769.

2. SAME—REASONABLY SAFE PLACE TO WORK.

It was duty of employer's agent, instructing yacht engineer to put catboat in commission, to see that he had reasonably safe place in which to perform that service.

3. MASTER AND SERVANT—NEGLIGENCE—DUTY OF MASTER TO WARN SERVANT OF HIDDEN DANGERS.

Where inexperienced servant is put to dangerous work, or is sent into dangerous place to work outside scope of his employment, it is master's duty to warn, instruct, and inform servant as to all dangers incident to said work which are not discoverable from ordinary observation by inexperienced person who would have no reason to anticipate danger.

4. SEAMEN—MASTER AND SERVANT—WARNING SERVANT OF DANGER OF FALLING OVERBOARD.

Failure of employer's agent to warn yacht engineer, instructed to put catboat in commission, against danger of falling overboard while performing that service did not render master liable under Federal merchant marine act (46 USCA, § 688) for employee's death by drowning when he fell overboard; employee not being so inexperienced that it was master's duty to warn him of danger of falling overboard, which was as apparent to employee as to employer.

Appeal from Wayne; Brennan (Vincent M.), J. Submitted October 13, 1931. (Docket No. 83, Calendar No. 35,942.) Decided January 4, 1932.

Case by Hattie Lewis, administratrix of the estate of Oscar D. Lewis, against George Harrison Phelps under the Federal merchant marine act of 1920, for damages alleged to be due to defendant's negligence. Verdict and judgment for plaintiff. Defendant appeals. Reversed, and judgment ordered entered for defendant.

Clarence Milligan (*Samuel D. Frankel,* of counsel), for plaintiff.

Dykema, Jones & Wheat, for defendant.

SHARPE, J. Plaintiff's decedent was engaged in cleaning the outside of the cabin of a catboat, anchored at each end in the Detroit river, in the forenoon of May 26, 1928. In the afternoon his body was found in the river. While no one saw the accident, it is apparent that he fell from the deck of the boat into the water and was drowned. This action is brought under the Federal merchant marine act of 1920 (46 USCA, § 688), to recover the damages incident thereto. Plaintiff had verdict and judgment. The defendant has appealed. It is insisted on his behalf that no actionable negligence was proven.

The acts of negligence alleged in the declaration were failure to furnish the deceased with a safe place to work, failure to warn him of the hazardous nature of the work in which he was instructed to engage, and placing him at hazardous and dangerous work outside the scope of his employment.

During the summer of 1927 the deceased was employed by the defendant as an engineer on a power-driven yacht, approximately 100 feet in length, owned by him. This yacht was stored in a boathouse along the river in the fall, which contained an apartment in which deceased and his wife lived during the winter. His duties were to overhaul the motors and look after the yacht. Defendant's son Harrison was given permission by his father to store a catboat, owned by him, in the boathouse. This boat was 21½ feet long, and 9 feet 3 inches wide, and was equipped with a mast and sail and also an auxiliary motor. There was nothing unusual in its construction.

In the spring of 1928, the defendant and his son Harrison were abroad. Harrison, however, had given his brother Erland permission to use his boat, and there is proof that defendant's brother-in-law, William D. Laurie, who had charge of his business

in his absence, instructed the deceased to help Erland get the catboat in commission. After overhauling the motor, it was necessary to remove it from the boathouse to place the mast and sail thereon. This was done on May 25th, and the mast then placed in position. The boat was tied at one end to the dock on the river side of the boathouse by a bowline 4 or 5 feet in length, and at the other by a line about 20 feet long, fastened to the spiles on a government pier. Access to it was gained by pulling in the short line to the dock. The deck had a railing around it about 10 inches in height.

On the morning of the 26th, the plaintiff saw her husband, the deceased, place the sail on the mast and fasten the boom so that it could not swing from side to side. He then put on a pair of rubber boots, and, with water furnished by a hose from the boathouse, proceeded to wash the deck and the outside of the cabin. He was later missed, and his body found as above stated. She testified that when he got on the boat that morning it "waved around a bit," and that as he stepped around on it "It just bobbed around; kind of rocked."

Plaintiff called three experts, men familiar with the river at that place and with the use of catboats, who testified that the work in which the deceased was engaged was dangerous to one not having experience in handling such boats. There was proof that there was an off-shore breeze at the time, with a velocity of about 10 miles per hour; that the current of the river was about 4 miles per hour, and that the boat was tied near the landing dock of the ferry boats, which made frequent trips past it and produced a noticeable swell at that place.

The defendant testified: The crew of the yacht during the summer and fall of 1927 consisted of a

captain, an engineer (the deceased), and five other persons; that he hired the captain, and he the others; that three auxiliary boats were kept on the yacht. One, known as the "starboard launch," was about 20 feet in length and 5 feet in width; it had a four-cylinder motor, and a little shelter cabin, and was used for carrying passengers to and from the shore. The deceased had charge of it when in use, and at times washed the deck and cabin when it was lying in the river. There was another boat with a four-cylinder motor, called the "port launch," and another, an open boat, about 15 feet long, also equipped with a four-cylinder motor, used by the crew in going to and from the shore. This was in daily use, and was handled by the deceased. His testimony is in no way disputed.

While the action is brought under the Federal act above referred to, it is conceded that, in order for the plaintiff to recover, it must appear that the death of Lewis resulted, in whole or in part, from the negligence of the defendant or his agent, Mr. Laurie, and that this question must be determined in accordance with common-law rules applicable thereto. *Watts* v. *Railroad Co.*, 231 Mich. 40, 44 (24 N. C. C. A. 493).

When Lewis was relieved of his duties as engineer of the yacht and instructed to assist in putting the catboat in commission, it was the duty of Laurie, if it be assumed that he was acting as defendant's agent, to see to it that he had a reasonably safe place in which to perform that service. No instruction was given him as to the manner in which the work should be done. The only danger to which he was exposed, when washing the cabin, was in falling off the boat into the water.

The applicable rule of law was stated by Mr. Justice STONE in *Lobenstein* v. *Whitehead, etc., Iron Co.*, 179 Mich. 279, 288, 289, as follows:

"We think that the common-law rule is that, where an inexperienced servant is put to dangerous work, or is sent into a dangerous place to work, outside of the scope of his employment, the master is liable for all injuries resulting to the servant from being exposed to those unusual risks which are not apparent, and which are not understood or appreciated by the servant, and which can only be learned by experience in doing the work; and that, unless the master warns, instructs, and informs the servant as to all the dangers incident to the work which are not discoverable from ordinary observation by an inexperienced person who would have no reason to anticipate danger, the master is liable where injury follows because of the servant's lack of knowledge, and because he was unwarned and uninformed. This principle is supported by many authorities in this State. A master is liable for injuries to his servant resulting from the master's negligence in exposing the servant to risks which the latter is incapable of appreciating. (Citing cases.)

"If decedent was taken from an employment in which he had been engaged, and put by defendant in an unsafe place, without instruction, the defendant might be liable. It was defendant's duty to know, not to infer, that plaintiff's decedent had this knowledge. *Charron* v. *Union Carbide Co.*, 151 Mich. 687."

In 18 R. C. L. p. 547, it is said:

"It is generally conceded to be a philosophic truth that a person's responsibility for his acts depends upon their tendency under the circumstances known to him. And the authorities, although at times somewhat confused, demonstrate the applicability of the principle in determining whether responsibility for an injury to an employee is to be attributed to the employer or to the employee himself. Fault on the part of the employer is to be found in action or non-

action accompanied by knowledge actual or implied of the probable results of his conduct; and, likewise, fault on the part of the employee is to be determined by the same test. Knowledge, then, or opportunity by the exercise of reasonable diligence to acquire knowledge, of the peril which subsequently results in injury to the employee is the foundation of the liability of the employer. Liability exists when the perils of the employment are known to the employer but not to the employee; and no liability is incurred when the employee's knowledge equals or surpasses that of the employer."

And at page 685:

"Ultimately the question becomes one of comparative knowledge; if an employee is in as good a position as his employer for ascertaining and understanding the situation, and equally well knows and appreciates the conditions, he cannot be allowed to complain for injuries sustained by working therein. For example, it is held that a servant cannot hold his master liable for injuries caused by the fact that the working place was unsafe, if he was in as good position to ascertain and understand the situation, and does equally well know and appreciate the existing conditions, as the master."

Applying these rules, which we think correctly state the law as applied to the relation of master and servant, we find no evidence in the record on which to predicate the claim of negligence on the part of the defendant. The only order given deceased was to assist defendant's son Erland to get the catboat in commission for service. It does not appear that he received any instruction from Erland.

If it be conceded that the deceased was ordered to engage in work in a place of danger and outside the scope of his employment, we are confronted by the question as to whether the risk to which he was ex-

posed was not apparent to him. The only instruction given him was to aid Erland in putting the catboat in commission. He was his own master in the performance of that work. While it was necessary to remove the boat from the boathouse to place the mast and sail on it, he himself decided on the place to which it should be anchored to do that work. The boat was not wide. It rocked and teetered as he stepped around on it. While he had had no experience in handling such boats, he was familiar with the water front and the use of small boats upon the river at that place. He had, while alone that morning, attached the sail to the mast. The washing of the deck and cabin would seem to have been a much less dangerous task.

We do not think it can be said that the deceased was so inexperienced in the work he was called upon to perform and was so exposed to risks not apparent to him that it became the duty of the defendant or his agent to warn him concerning them. A warning, if given, would have been to guard against the danger of falling from the boat when it was not resting safely upon the water. If that danger was apparent to him when performing the work, the warning would have been but an idle ceremony.

In our opinion, the motion for judgment notwithstanding the verdict should have been granted. The verdict and judgment are reversed and set aside, and the cause remanded, with directions to enter a judgment for the defendant, with costs of both courts.

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

In re DILLMAN.

1. EMINENT DOMAIN—CERTIORARI—QUESTIONS REVIEWABLE.
   On certiorari to review award in condemnation proceedings, Supreme Court may consider only such errors as are specified in application for writ.

2. SAME—AWARD OF DAMAGES—TREATING ENTIRE TRACT AS ONE PARCEL.
   Where entire tract of land through which proposed right of way sought to be condemned would diagonally pass was owned by one person, there was no error in commissioners' treating it as one parcel, in awarding damages, although counsel for State had presented map showing it divided into parcels numbered separately.

3. SAME—EVIDENCE—WITNESSES.
   In condemnation proceedings, witnesses who testified to facts showing that they were familiar with value of land in vicinity, were properly allowed to testify as to value of land taken.

4. SAME—EXCESSIVE AWARD.
   That judgment of Supreme Court, if called upon to make awards for lands condemned, might differ from awards of commissioners, is no justification for setting aside said awards.

5. SAME—AWARDS WITHIN RANGE OF EVIDENCE CONCLUSIVE.
   Awards in condemnation proceedings, which are within range of evidence and which were confirmed by probate judge over objection that they were excessive, are conclusive, on review, in absence of claim of fraud or prejudice.

6. SAME—AMENDING RECORD—COURT RULES.
   On certiorari to review award in condemnation proceedings, Supreme Court would not be justified, under Michigan Court Rule No. 79, in vacating order of confirmation and remanding case to probate court with directions to permit additional evidence to be there taken and to permit review of court's action after such evidence shall have been submitted to it, on theory that it is permitting amendment of record under said rule.

Certiorari to Oakland probate court; McGaffey (Dan. A.), J. Submitted October 6, 1931. (Docket

No. 23, Calendar No. 35,353.) Decided January 4, 1932.

Petition by Grover C. Dillman, State highway commissioner, for condemnation of lands of Frank H. Dohany and others for a certain highway project. Plaintiff and Grand Trunk Western Railroad Company filed objections to confirmation of awards. Awards made as to certain parcels are reviewed by plaintiff and railroad company by certiorari. Affirmed.

Paul W. Voorhies, Attorney General, and *Hugh E. Lillie,* Assistant Attorney General (*Kit F. Clardy,* of counsel), for plaintiff.

Frederic T. Harward and *John J. Gafill,* for Grand Trunk Western Railroad Company.

Pelton & McGee, for defendant Frank H. Dohany.

George A. Porter, for defendant Charles E. Dohany.

Harold H. McLean, for J. Walter Dohany, deceased.

SHARPE, J. Review by certiorari is here sought of awards made to Frank H. Dohany and others by commissioners appointed by the probate court of Oakland county in a proceeding brought by the State highway commissioner to acquire the fee simple title to lands owned by them under the provisions of Act No. 352, Pub. Acts 1925, as amended by Act No. 92, Pub. Acts 1927 (1 Comp. Laws 1929, § 3884 *et seq.*), and also pursuant to the provisions of Act No. 340, Pub. Acts 1927 (1 Comp. Laws 1929, § 4454 *et seq.*), and a contract entered into between the State of Michigan and the Detroit, Grand Haven & Milwaukee Railway Company.

The commissioners first met on September 30, 1929, and, after viewing the premises and hearing the proofs submitted, awarded to Frank H. Dohany and a number of others who owned the land jointly with him, for what is referred to as parcel 6, the sum of $36,372; to Charles E. Dohany, for parcel 5, the sum of $33,468, and to Frank H. Dohany personally, for what are referred to as parcels 1, 2, and 4, the sum of $68,631. The amount of land actually taken in parcel 6 was 6.46 acres; in parcel 5, 4.834 acres, and in parcels 1, 2 and 4, 7.25 acres.

Objections to the confirmation of the awards were filed by both the State and the railway company, and a motion was also made by them to refer back the cause to the commissioners for the taking of additional and further testimony. This motion was denied, the objections overruled, and an order entered confirming the awards as made.

The relief here sought is by certiorari. We may consider only such errors as are specified in the application for the writ. *In re Detroit & Windsor Ferry Co.*, 227 Mich. 143. No claim is therein made that the commissioners were guilty of partiality, bias, prejudice, unfaithfulness, fraud, or misconduct, or that they acted under undue influence.

In the petition for condemnation filed by the State highway commissioner, he stated that the taking of a certain strip of land, describing it, was necessary for the improvement project. Frank H. Dohany owned a tract of 73 acres, through which the proposed right of way would diagonally pass. When examining his first witness on the question of damages, counsel for the State highway commissioner produced a map showing the lands through which the right of way would pass, and then said:

"Let us number those. By the way, I have a number on each parcel that is shown of the Dohany

property there, so that we can save a lot of time. If it is agreeable to counsel, we will number the 30-acre Frank Dohany parcel as No. 1; the 20.39 acres immediately adjoining it as No. 2; and in order to have all of the Dohanys numbered let us number the corner one No. 3. No. 4 will be the piece marked Mary Dohany, which I believe belongs to you. No. 5 will be the Charles Dohany parcel here involved. No. 6 is the trust property immediately south of the Charles Dohany property."

He then proceeded to question the witness and others produced by him as to the value of the land taken and the decreased value of the parcels as indicated by such numbers. It is now urged that parcel No. 2, as indicated on the map, did not adjoin the proposed right of way, and that the commissioners erred in not treating parcels 1, 2, and 4 as separate parcels. It is conceded that Frank Dohany owned the entire 73-acre tract, and the action of counsel in putting the map in evidence and questioning the witnesses as to the several parcels shown thereon in no way affected Dohany's right to offer proof and have consideration by the commissioners of the depreciation in value of the entire tract. In making their award the commissioners treated parcels 1, 2, and 4 as one parcel. We find no error in their action in this respect.

The testimony offered by the landowners as to the value of the strip taken from each of them for the right of way and the depreciation in value of the land adjoining thereto was admitted over the objection of counsel for the State highway commissioner that the witnesses were not qualified to testify. There were eight such witnesses. Among them was Frank J. Asam. He testified that he was a licensed real estate broker and had been in that busi-

ness in Detroit and vicinity since 1912; that he was experienced in the purchasing of acreage and subdividing it, both for himself and for others, in Detroit and the adjoining townships, including the township of Royal Oak, in Oakland county, which adjoins the township of Troy, in which these lands are situate, and in the village of Birmingham, which almost touches it on the west; that he was familiar with the lands in question, and had knowledge of the recent sales of acreage in the sections of which they form a part.

John Grant, the assessor and a supervisor residing in the village of Pleasant Ridge, within a few miles of these lands, testified that he had been in the real estate business for 20 years; that he had bought and sold lands in the adjoining township of Royal Oak, and was familiar with the acreage values of the lands in the township of Troy. The other six witnesses qualified in a similar manner. This testimony was clearly competent. *McCormick* v. *Bradbury,* 187 Mich. 512; *Gitson* v. *Yale Land Co.,* 212 Mich. 292; *Tatro* v. *Baker-Fisk-Hugill Co.,* 215 Mich. 623; *Commission of Conservation* v. *Hane,* 248 Mich. 473. Their estimates of the decreased value of the residue of each parcel are largely in excess of that awarded by the commissioners.

Counsel insist that the awards are excessive. The rule as to compensation in a similar proceeding brought to acquire land under this same act is thus stated:

"It is the rule that where the whole of land is taken, the compensation to be made is the fair value of the land. Where only part of a parcel is taken, just compensation is not measured by proportionate acreage but by the amount to which the value of the property from which it is taken is diminished.

Grand Rapids, etc., R. Co. v. *Heisel,* 47 Mich. 393. The value of the part actually taken is allowed as direct compensation; but the decreased value of the residue of the parcel, on account of the use made of the land taken, is also allowable as compensation even though it is strictly consequential damage in nature. *Sharp* v. *United States,* 191 U. S. 341 (24 Sup. Ct. 114); 2 Nichols on Eminent Domain (2d Ed.), § 236." *Johnstone* v. *Railway Co.,* 245 Mich. 65, 81 (67 A. L. R. 373).

It appears that these parcels include the only lands through which the right of way passes between Royal Oak and Birmingham which have not been subdivided into lots with restrictions on their use. It was for this reason that the width of the right of way through them was extended to 300 feet in order to afford extra space for siding and other uses. It passes through at an elevation of from 8 to 17 feet.

That our judgments, were we called upon to make the awards, might differ from those made is no justification for setting them aside. The commissioners were residents of the county in which the lands are situate. They personally visited the property, and had an opportunity of judging the extent to which the building and operation of the railroad would be likely to affect the adjoining property. The probate judge who appointed them, and thus vouched for their competency and integrity, confirmed the awards over the objection that they were excessive. They were within the range of the evidence, and, under the facts here presented, must be held to be conclusive. *Commission of Conservation* v. *Hane, supra; In re State Highway Commissioner,* 252 Mich. 116.

The order of confirmation was entered on September 18, 1930. The printed record was filed in this court on July 25, 1931, and it was argued and sub-

mitted on October 6th. The day before its submission, counsel for the railroad company filed a motion to amend the record "by adding thereto additional reasons why the award filed by the court commissioners should not be confirmed by the lower court and also as a reason for the issuance of writ of certiorari."

1. Because the award to Frank H. Dohany included a sum for total depreciation of a parcel of 2.91 acres of his tract cut off from the rest by the right of way, whereas there was no testimony in support thereof.
2. Because the award to Charles E. Dohany included a sum for total depreciation of 0.812 acre, and there was no testimony to support such allowance.

This motion was supported by the affidavits of John F. Gafill, assistant general attorney for the railroad company, and Kit F. Clardy, at that time an assistant attorney general, who had charge of the proceedings on the part of the State. Mr. Gafill deposed that he first learned of such action on the part of the commissioners about September 1, 1931, while Mr. Clardy stated in his affidavit that he was shown the computations made by the commissioners before the hearing on confirmation, and that he then urged such action on their part as a reason for the denial thereof and remand for further proof. In this latter statement, it clearly appears that he is mistaken. A full transcript of the proceedings on the objections to confirmation was made by the stenographer of the probate court, and is annexed to her affidavit filed in opposition to the motion.

As before stated, the review here sought is by certiorari. A question not raised in the application for the writ may not be considered. *In re Detroit &*

Windsor Ferry Co., supra, and authorities there cited.

Counsel urge that, under Michigan Court Rule No. 79, this court may "permit the transcript or record to be amended by correcting errors or adding matters which should have been included." It is not here sought to correct any error in the record before us, or to add any matter which is of record in the probate court and not included therein. It does not appear that the computations by which the commissioners arrived at the several amounts awarded are on file in the probate court. What is sought is the vacation of the order of confirmation and remand to the probate court, with directions to permit additional evidence to be there taken and to permit review by this court of the action of that court taken after such evidence shall have been submitted to it. We find no statute or rule justifying such action on our part in a certiorari proceeding.

The motion is denied. The order confirming the awards is affirmed.

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

I. H. GINGRICH & SONS *v.* CITY OF GRAND RAPIDS.

ASSOCIATED WAREHOUSE, INC., *v.* SAME.

1. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—ESTOPPEL.
Where assessments for expense of street improvement were not levied in accordance with provisions of city charter or in proportion to benefits received, property owners are not estopped from contesting said assessments by the fact that they petitioned for said improvement.

As to present use of property as test of benefits, see annotation in 28 L. R. A. (N. S.) 1177; 40 L. R. A. (N. S.) 936.

2. SAME—STREET IMPROVEMENT—BENEFITS.

It is not present use of property which determines benefit it receives from street improvement, but rather its available uses.

3. SAME—INEQUITABLE ASSESSMENTS—INJUNCTION.

Collection of tax for expense of street improvement was properly enjoined, where assessments therefor were not levied in accordance with provisions of city charter, were lacking in uniformity and equality, and were far removed from plan of levy according to benefits.

Appeal from Superior Court of Grand Rapids; Verdier (Leonard D.), J. Submitted October 6, 1931. (Docket Nos. 7, 8, Calendar Nos. 35,285, 35,286.) Decided January 4, 1932.

Bills by I. H. Gingrich & Sons and Associated Warehouse, Incorporated, Michigan corporations, against the City of Grand Rapids, a municipal corporation, and another, to enjoin the collection of certain special assessments for street improvements. Cases consolidated for trial. Decrees for plaintiffs. Defendants appeal. Affirmed.

Travis, Merrick, Johnson & McCobb, for plaintiff I. H. Gingrich & Sons.

Francis L. Williams, for plaintiff Associated Warehouse, Incorporated.

Ganson Taggart and *Robert S. Tubbs,* for defendants.

SHARPE, J. The opinion of the trial court clearly states the facts presented by the record in these cases. We are fully in accord with the conclusion reached by him as to the rights of the parties. We therefore adopt his opinion as that of this court. It reads:

"The above-named plaintiffs each brought suit to enjoin the collection of three special assessments re-

spectively for the opening, the grading, and the paving of Cherry street for the block between Ellsworth avenue and Market avenue, the principal ground of their complaint being that the cost of the improvement has not been levied upon the several parcels affected 'in proportion as near as may be, to the advantages which each parcel shall be deemed to be benefited by the making of such improvement,' as required by the provisions of section 12 of title 10 of the charter of the city. Due to the similarity of the two cases, it was agreed by the attorneys for the respective parties that their trial be consolidated.

"Cherry street is an east and west thoroughfare commencing at Lake drive at its eastern extremity and thus connecting with the principal State highways to Lansing, Detroit, and other points east. Going westerly it crosses several main railroad tracks, gradually becoming narrower until it reaches Ellsworth avenue, where, prior to the improvement, it practically ran dead, being confronted with a hill which sloped upward from Ellsworth avenue to a height of about 30 feet and then downward to the east line of Market avenue and Finney avenue, where it ended at approximately the grade of those streets. Before the improvement, Cherry street was practically impassable for the block from Ellsworth avenue to Market avenue, on account of this bluff, over which led what was merely a narrow lane. The land in this block on both sides of the street was of about the same height and had the same general contour.

"In August, 1926, the plaintiff Associated Warehouse, Inc., purchased the land lying to the north of what is now Cherry street, running east of Market avenue for a distance of 276.65 feet and north to the south line of Oakes street (which is the first street north of Cherry). It caused the excavation of a part of the hill that has been mentioned, to the grade of Oakes street and Market avenue, and erected a build-

ing thereon facing both of said streets and served by paved driveways to both. This building was completed and occupied by the warehouse company before it had any knowledge of the proposed opening of Cherry street and that part of the hill between its building and what is now the north line of Cherry street, a distance of about 86 feet, was, until later developments, left unexcavated, as the company had no occasion for an outlet to Cherry street.

"In January, 1927, Arthur J. Gingrich purchased the land between the warehouse company's land and Ellsworth avenue with a frontage of 230 feet on what later became Cherry street, and 285 feet on Ellsworth avenue, without any knowledge of a proposed Cherry street opening.

"Some years before, the city had employed a city planning engineer, Bartholomew by name, who had submitted a plan for opening and widening certain streets for zoning, beautification, new bridges, etc. It was a part of this plan that Cherry street be widened and straightened from Division avenue west, that it be opened from Ellsworth avenue to the river, and that a bridge be constructed across the river at this point.

"The Star Transfer Company owned the premises at the northeast corner of Cherry and Ellsworth, and its property encroached upon what, according to the Bartholomew plan, should become a part of Cherry street widened. This company, early in 1927, started to erect a building on this corner. Learning of this plan, the city procured an option from the Star Transfer Company for the purchase, and later did purchase, a strip of land 25 feet wide on the north side of Cherry street and extending 110 feet east of Ellsworth avenue to permit the widening of Cherry street in accordance with the Bartholomew idea. Upon its own initiative and without the request of any property owner, the city commission then, on April 18, 1927, passed a resolution declaring the

widening and opening of Cherry street from Ionia avenue to Market avenue to be a necessary public improvement, and then caused the execution of the project, except that no widening was done east of the 110 ft. strip purchased from the Star Transfer Company.

"In the meantime the city had procured options from Arthur J. Gingrich and the warehouse company for the purchase, and later did purchase, a strip of land at the south end of their respective properties to obtain the required width for the proposed opening of Cherry street from Ellsworth avenue to Market avenue—this, upon the representation of Hugh E. Lynch, an employee of the city planning commission, that Cherry street was going to be opened and extended by a bridge across the river in accordance with the Bartholomew plan.

"As the Gingrich company was about to erect a building on this land (which, less what had been deeded to the city for street purposes, Arthur J. Gingrich had conveyed to the plaintiff company), it was not difficult to secure the signature of Gingrich, who in turn obtained one from the warehouse company, in which he was also a stockholder, to grade and pave the proposed opening, so that the company might know where and at what level it could build. The theory of the city that because plaintiffs petitioned for this improvement they are estopped from contesting the assessment is untenable. Plaintiffs' petition for the improvement asked that the expense thereof be levied in accordance with the provisions of title 10 of the city charter; and, as will be seen later, that has not been done. Plaintiffs are not claiming that they should not pay any of the expense of the improvement; they are only claiming that they are being called upon to pay more than their just share, that the real estate benefited has not been assessed in proportion to the benefits received, and from this they certainly cannot be estopped.

"Later the city commission declared the grading and paving to be necessary public improvements, contracts were let, and the improvement completed. Hearings were held for the purpose of establishing assessment districts for the several improvements and objection made by plaintiffs to the districts proposed. The districts to be assessed were finally fixed over the objection of plaintiffs, the roll spread and confirmed, appeals duly filed by plaintiffs, and denied by the commission.

"In the meantime, the plaintiff Gingrich company had, at a cost of about $15,000, excavated the hill on its premises to the grade of Cherry street, as opened between Ellsworth and Market, and had erected a building covering its full frontage of 230 feet on Cherry street, and with a frontage of 78 1/6 feet on Ellsworth avenue.

"The plaintiff warehouse company, after the grading, also excavated at a cost of about $7,500 that part of the hill south of its building to the line of Cherry street, but erected no building thereon.

"It was only by means of the removal of this hill at their own expense that either of the plaintiffs was enabled to make any use whatever of the Cherry street opening. On the south side of the street, the owners chose not to excavate, and have left their property standing on top of the hill, with the exception of the lot at the southwest corner of Ellsworth and Cherry, which was excavated by the owner, A. Van Eerden, and the 50-foot lot at the southeast corner of Cherry and Finney, which was at the down slope of hill and required practically no excavation to bring it down to the grade of the opening. The fact that the owners on the south side of the street did not excavate, made necessary the building of a retaining wall to shore up their property, and the cost of this wall was made a part of this assessment by adding it to the grading tax.

"The cost of paving was assessed against the abutting owners on each side of the street in the

block between Ellsworth and Market avenues. Instead of employing the method commonly used in Grand Rapids, of assessing the property on each side of the improvement an equal amount per front foot and using an equal depth on each side so as to make rear lots pay for their indirect benefit, a perfectly just and reasonable method, the assessment for this paving was made on a square foot basis.

"On the north side of the street the assessors multiplied the frontage by 247.53 feet (because, forsooth, that was the depth of the Gingrich property) to obtain the area to be taxed; while on the south side, they multiplied the frontage by a depth of 130 feet, with the result that the north frontage is made to pay approximately $13.32 per running foot, while the south frontage pays about $6.66 per running foot. Plaintiffs' paving assessment was $6,350.40 while the total of the properties directly across the street was $3,119.60. In other words, plaintiffs, on the north side of the pavement, are asked to pay more than twice as much as the owners of an equal frontage on the south side. Is this an assessment according to the benefits? It apparently is the theory of the assessors that the owners on the north received more benefit than those on the south. But, before plaintiffs leveled the hill, they were in the same situation as the owners on the south side of the street now are. Are they to be penalized because they at great expense excavated their land so as to make the street available to their use? Furthermore, it is undisputed in this case that the owners on the south could have made their property equally available to the street and equally benefited, by a similar excavation of the hill. Because they have not done so should not operate to relieve them of an equal share of the assessment. 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.

"The cost of the opening and widening and of the grading and retaining wall was spread over four separate districts. The first, which was to pay 40 per cent. of the entire tax at a uniform rate per square foot, embraced all the land between Ellsworth and Market on the north side of Cherry street to a depth of 247.53 feet, thus including all of the plaintiff Gingrich company's property and so much of the plaintiff warehouse company's as lies south of Gingrich north line extended westerly. Going across to the east side of Ellsworth avenue, the 40 per cent. district also included the property of the Star Transfer Company at the northeast corner of Cherry (in front of which the street was also widened), but here the area to be assessed was obtained by multiplying the frontage on Cherry by a depth of 92 feet, not by 247.53 feet, as was done with the property of plaintiffs. It may well be asked, why the distinction? This district then jumps across to the southeast corner, where the frontage on Cherry is multiplied by a depth of 55 feet, to obtain the area to be assessed. Then, crossing Ellsworth to the west, the southwest corner of Cherry, owned by A. Van Eerden, is included in the district with an area obtained by multiplying the frontage on Cherry by a depth of 55 feet. Going west, the frontage on the south side of Cherry is entirely excluded from the 40 per cent. district, and is included in a much larger district bearing 15 per cent. of the entire assessment, until the lot at the southeast corner of Cherry and Finney avenue is reached, where this single lot is included as a part of the 40 per cent. district, its frontage on Cherry being multiplied by a depth of 130 feet to obtain the area to be assessed. The exclusion of the lots on the south side of Cherry from the 40 per cent. district is again based on the erroneous assumption that they were not benefited

in the same degree as the property to the north of Cherry, and that at each end of the block on the south side.

"This 15 per cent. district includes, in addition to the lots abutting the south side of the opening, a strip of land on each side of Market and Ellsworth avenues north of Fulton street and south to Wealthy street and on each side of Cherry east to the alley west of Division avenue; with the exception of the city market property, which fronts on and is directly west of the opening, and which is made a district by itself bearing 30 per cent. of the assessment.

"The fourth district, another 15 per cent. district, includes all the property not in any of the other three districts, bounded by Fulton street on the north, the alley just west of Division avenue on the east, Wealthy street on the south, and the Grand River on the west; a large section of the city.

"This unusual scheme of levying assessments has accomplished some rather strange results, a few of which may be cited as examples:

"For the opening, the two plaintiffs have been assessed a total of $5,640.40, while the owners of an equal amount of frontage directly opposite them have been assessed a total of $681.70, less than one-eighth as much.

"For the grading, plaintiffs together pay $8,552.40; their neighbors opposite, $1,028.40, again less than one-eighth as much. In this connection, assuming for the sake of argument that there was a difference in benefits to the property on the north side of the opening from that on the south side, the assessors, in levying the paving tax, required the north side to pay twice as much as the south side of the street. Why, then, with that ratio of difference established, should they assess the north side more than eight times as much as the south side for the opening and grading?

"A piece of land with 100 feet frontage on the opening, owned by one D. Moses, pays for the opening, $30.80, while the 100 feet opposite, owned by the plaintiffs, pays $1,919, over 62 times as much. Taking the two lots of equal frontage and depth on the south side of the street at the west end of the opening, the one further west pays for the opening $334.40, and for the grading, $504.50, while the adjacent lot to the east pays respectively $15.40 and $23.20.

"Plaintiffs pay 6.32 times as much per square foot as the city market property, although the latter, abutting as it does the western extremity of this improvement, receives as much benefit therefrom as can any of the surrounding property.

"Plaintiffs pay about 55.9 times as much per square foot as property on Ellsworth avenue south of Cherry street and as near to the opening as is the north part of plaintiffs' property.

"Plaintiff Gingrich company sold to the city the land necessary for the opening, for $4,733.40, and in turn is assessed $2,927.90 to help pay for it, so that for its land the company nets $1,805.50. Does not this nearly amount to a confiscation of its property?

"As regards the large 15 per cent. district, bounded by Fulton, the alley west of Division, Wealthy and the river, how can it be said that the property just inside of any of these boundaries is benefited by the improvement and therefore should be taxed, while the property directly across from the boundary is not benefited and therefore should be exempted? It is merely an arbitrary assumption. If a district of this size can be assessed on the theory of benefits, it may well be asked why the district cannot be stretched to include the city at large. The city charter, in fact, requires the city commission in each case to fix the amount, if any, of the cost of each special improvement 'which shall be levied upon the city at large.' It is very likely that openings of this character should be paid for in part by

levying upon the city at large, on the theory that they do benefit all property in the city. The opening and widening of main thoroughfares has become of such importance that the State recognizes them of Statewide benefit by using a part of State automobile tax money to assist in paying for them.

"Almost every special improvement tax results in some injustice, but the scheme of assessment used in this case is so lacking in uniformity and equality, so far removed from any plan of a levy according to benefits, that it cannot be sustained. That does not mean that plaintiffs should be relieved from paying their just share of this assessment; it does mean that the present assessment requires them to pay more than their just share and has not been levied according to benefits. The cost of the entire improvement should be reassessed. Plaintiffs may therefore draw a decree restraining the collection of the assessment made."

The decrees are affirmed, with costs to appellees.

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

In re GUARANTY INDEMNITY CO.

WATERMAN *v.* AUCH.

1. RECEIVERS—MAY NOT BE SUED WITHOUT LEAVE OF COURT.
Receiver may not be sued without leave of court appointing him.

2. SAME—COURT NEED NOT CONSULT RECEIVER IN MAKING ORDERS.
Receiver, being but "an arm of the court" in performance of his duties, need not be consulted by court in making of orders which to it seem just and proper.

3. SAME—NOTICE OF HEARING—COURT RULES.

Order permitting receivers to be sued was not void because granted without notice of motion for hearing thereon having been given to them or their attorneys; Michigan Court Rule No. 10 not being applicable to such order.

Appeal from Wayne; Moll (Lester S.), J. Submitted November 17, 1931. (Calendar No. 35,866.) Decided January 4, 1932.

Petition by George W. Auch for permission to sue Cameron B. Waterman and another, receivers of the Guaranty Indemnity Company. From order denying motion to vacate order granting permission to sue for lack of notice, receivers appeal. Appeal dismissed.

Angell, Turner, Dyer & Meek, for appellants.

William J. Harcourt, for appellee.

SHARPE, J. The circuit court for the county of Wayne, which had entered an order dissolving a corporation and appointing receivers, on petition filed therefor granted permission by order to George W. Auch to sue the receivers, without notice of a motion for the hearing thereof having been given to them or to their attorneys. Leave to appeal therefrom was granted by this court.

Michigan Court Rule No. 10 provides for the filing of special motions and that (section 2):

"Notice of the argument of motions and petitions (except motions for continuance and motions to strike causes from calendar), together with a copy thereof and of the affidavits on which they are based, shall in all cases be served on the opposite attorney at least four days before the time noticed for hearing the same."

Counsel rely upon our holding in *McConnell* v. *Wayne Circuit Judge*, 231 Mich. 184, 186, wherein it was said:

"The motion was a special one, and orders may not be made on such motions without notice, unless specially permitted by statute or rule. Circuit Court Rule No. 15."

This rule was similar to that above referred to.

"A receiver has been defined as an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation, and receive its rents, issues, and profits, and apply or dispose of them at the direction of the court when it does not seem reasonable that either party should hold them. * * *

"Generally speaking a receiver is not an agent, except of the court appointing him; the very term receiver negatives such an idea. He is merely a ministerial officer of the court, or, as he is sometimes called, the hand or arm of the court. He stands in an indifferent attitude, not representing the plaintiff or the defendant, but really representing the court, and acting under its direction, for the benefit of all the parties in interest. He is a *quasi*-trustee, holding the fund for the benefit of whoever may eventually establish title thereto. His acts and possession are the acts and possession of the court. His contracts and liabilities in contemplation of law are the contracts and liabilities of the court." 23 R. C. L. p. 7.

A receiver cannot be sued without leave of the court appointing him. *Burk* v. *Muskegon Machine & Foundry Co.*, 98 Mich. 614. But, while interested in the preservation of the property which shall come into his hands, he has no official concern as to the parties to whom the proceeds thereof shall be distributed. He is but "an arm of the court" in the

performance of his duties, and need not be consulted by it in the making of orders which seem to it just and proper.

After this order was made, the receivers might have moved the court to set it aside and presented any facts which in their opinion would have warranted such action on its part. But, in our opinion, the court was under no obligation to consult them before making it. The rule relied on is not applicable to such an order. See *Brandimore* v. *Dickens*, *ante*, 128.

The appeal is dismissed, with costs to appellee.

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

UNION & PEOPLE'S NATIONAL BANK *v.* ANDERSON-CAMPBELL CO.

1. MUNICIPAL CORPORATIONS—SEWER CONTRACTS—MISTAKE IN BID—RIGHT TO RECOVER DEPOSIT—BONA FIDES.

   Bidder on sewer contract, who notified city before acceptance that its bid was too low because of mistake, is entitled to recover deposit accompanying bid after refusing to enter into contract, where bidder's good faith and fact that mistake was made is not questioned.

2. INTERPLEADER—EQUITY—JURISDICTION—CANCELLATION OF ERRONEOUS BID—RETURN OF DEPOSIT.

   Where bidder on sewer contract, interpleaded with city holding certified check deposited with bid, prayed for cancellation of its bid, which it claimed was too low because of mistake, and city did not challenge jurisdiction of court to pass on said matter, court had jurisdiction to decree return of proceeds of said check to bidder.

Appeal from Jackson; Simpson (John), J. Submitted October 22, 1931. (Docket No. 191, Calendar No. 35,875.) Decided January 4, 1932.

Bill of interpleader by Union & People's National Bank against Anderson-Campbell Company, a Michigan corporation, and City of Lansing, a municipal corporation, to determine right to fund held by plaintiff as deposit on sewer construction bid and to restrain suit therefor by municipality. Both defendants filed cross-bills. Decree for defendant Anderson-Campbell Company. Defendant municipality appeals. Affirmed.

Rosenburg & Painter, for defendant Anderson-Campbell Company.

Richard Raudabaugh, for defendant municipality.

SHARPE, J. On April 8, 1929, the clerk of the city of Lansing advertised for sealed proposals for the construction of a sewer in that city. The right was reserved therein "to reject any or all bids." A number of proposals were submitted, among them one by the defendant Anderson-Campbell Company for the sum of $46,325.75. It was accompanied by a certified check in the sum of $2,300, drawn on the National Union Bank & Trust Company of the city of Jackson. The proposal was on a form furnished by the city of Lansing, and contained the following:

"And the undersigned hereby agrees that if the foregoing proposal shall be accepted by the city he will, within ten days after receiving notice of such acceptance * * * enter into contract * * * for the full and complete construction of the * * * sewer."

All of the bids were opened on the evening of April 29th and referred to the committee on sewers.

The next meeting of the council was held on May 6th. At that meeting the city clerk presented to the council a written communication from the Anderson-Campbell Company which, after reciting the fact that the proposal had been made by it, accompanied by a certified check for $2,300, stated that:

"an honest error and mistake were made in the calculation and figures on which such bid or proposal was based, and as a result thereof the bid or proposal provided that the Anderson-Campbell Company would perform the work for a lower amount than had no error or mistake been made."

This communication was referred to the committee on sewers, but no action was taken thereon. It may be well to here insert the fact that Mr. Anderson, the president of the defendant company, testified that the error in the proposal was in the omission of the charge for "the reinforcing steel that went into the monolithic concrete," amounting to $2,873, and that he explained the nature of the error to Mr. Jacka, the sanitary engineer of the city. Of this there was no denial.

After the reference above stated, the council voted unanimously to accept the bid of the defendant company, it being the lowest bid for the work, and directed the mayor and city clerk to enter into a contract with it. The defendant company refused to enter into the contract, whereupon the certified check, deposited by it with its proposal, was presented to the bank for payment and payment refused, for the reason that the defendant company had notified it to do so. The city then brought an action in the Jackson circuit court to recover on the check, whereupon the plaintiff, successor to the National Union Bank & Trust Company, filed the bill

of complaint herein, praying that such action be enjoined and that the city and the Anderson-Campbell Company be required to interplead and the right to the proceeds of the check, which it had deposited with the clerk of the court, be determined. Both defendants filed answers thereto. The trial court found in favor of the Anderson-Campbell Company, and ordered that the sum so deposited be turned over to it. From the decree entered so providing, the city of Lansing has appealed.

The claim of the city is thus stated by its attorney in his brief:

"It is our claim that the defendant and appellee, Anderson-Campbell Company, not only did not withdraw their bid or proposal, but that the city of Lansing had no power to permit them to withdraw it after it had been submitted and acted upon. It is our further claim that if said defendant and appellee had made a fundamental error or mistake in the amount of their bid or proposal submitted to the city, that they had a remedy in equity to have the bid reformed, canceled, or rescinded if they had brought the action before the contract had been awarded, and that they had abundant time to do so between the time the bid was opened and the date of submitting their withdrawal."

The notice filed with the city clerk by the defendant company, stating that an error had been made by it in fixing the amount of its proposal, was presented to the city council before the resolution of acceptance thereof was adopted. It should have more particularly stated the nature of the mistake made, as revealed in the statement made to the city's sanitary engineer. That the company acted in good faith and was desirous of informing the city at the earliest possible moment that it had made such a

mistake cannot be doubted. Had the city council any doubt as to the *bona fides* of the claim thus made, it should have delayed acceptance pending a report of the committee to whom the communication was referred. It seems apparent to us that it was then of the opinion that it had no power to permit its withdrawal.

The right of a party making such a proposal to appeal to a court of equity for relief in such a case was before this court in *Kutsche* v. *Ford,* 222 Mich. 442, in which the opinion of the trial court was adopted. We quote from the syllabus thereof:

"Where a mistake is of so fundamental a character that the minds of the parties have never, in fact, met, or where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed *in statu quo,* equity will interfere in its discretion, to prevent intolerable injustice."

In that case, in which the authorities are reviewed at length, it appeared that the acceptance was had before the notice of withdrawal, and yet it was held that the bidder was entitled to relief.

While the defendant company did not here file a bill for the cancellation of its proposal, it so prayed in its pleading in this case. The city, by its attorney, made full answer thereto, and in no way challenged the power or jurisdiction of the court to pass upon the matter in dispute, and insisted in its prayer for relief therein that the proposal as accepted was binding upon the defendant company, and that by its failure to comply therewith it had forfeited its right to the money then on deposit in the court. The

issue which would have been presented, had such a bill been filed by the defendant company, was before the court in this case, and the decree made is binding upon the parties.

The injustice of a decision that a bidder, under facts such as are here presented, must lose its deposit is referred to in *Kutsche* v. *Ford, supra,* at page 450, as follows:

"In the instant case it may be thought that the school district cannot be said to be placed *in statu quo* when it is considered that the building cost nearly six thousand dollars more than plaintiff's bid. To place *in statu quo* does not mean that one shall profit out of the mistake of another. It does not appear that plaintiff's mistake has made the school building cost more than it otherwise would have cost. The school district, if placed back where it was before the bid, loses nothing except what it seeks to gain out of plaintiff's mistake. To compel plaintiff to forfeit his deposit, because of his mistake, would permit the school district to lessen the proper cost of the school building at the expense of plaintiff, and that, in equity, is no reason at all for refusing plaintiff relief."

The decree is affirmed, with costs to the Anderson-Campbell Company against the city of Lansing.

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

KURBEL *v.* O'HAIR.

1. CANCELLATION OF INSTRUMENTS — DEEDS — FRAUD — GOOD-FAITH PURCHASERS—NOTICE—EQUITY.

   In suit to cancel deeds on ground of fraud, circuit judge correctly found that defendants were innocent purchasers for value, that they had no notice or knowledge of fraud, and that plaintiffs were not entitled to cancellation.

2. DEEDS—EXECUTION IN BLANK—ESTOPPEL.

   As against innocent purchasers for value, grantors, who received in full agreed purchase price and are still claiming benefit of related contracts, are precluded from claiming that deeds executed by them are void because executed in blank.

3. SAME—NOTICE OF EXECUTION IN BLANK—INNOCENT PURCHASERS.

   Knowledge by one of grantees that deeds were executed in blank, while a circumstance which might well have challenged his attention to scope of authority of grantors' agent, who perpetrated fraud, yet, standing alone, under circumstances of case, did not necessarily foreclose possibility of grantees being innocent purchasers.

Appeal from Wayne; Spier (James E.), J., presiding. Submitted October 30, 1931. (Docket No. 176, Calendar No. 35,990.) Decided January 4, 1932.

Bill by Stephen Kurbel and another against Walter O'Hair and others to cancel deeds and set aside the assignment of a land contract. From decree dismissing bill as to defendants Cliff, plaintiffs appeal. Affirmed.

Arthur J. Hass, for plaintiffs.

Arthur J. Adams, for defendants Cliff.

NORTH, J. This bill was filed to secure on the ground of fraud the cancellation and setting aside of two instruments purporting to be deeds wherein plaintiffs are grantors and the defendants John W. Cliff and wife grantees; also cancellation of plaintiffs' assignment of their vendors' interest in a land contract. The trial court was of the opinion that Mr. and Mrs. Cliff were innocent purchasers for value, and he dismissed the bill of complaint. Plaintiffs have appealed.

The defendant Walter O'Hair was defaulted for failure to answer. He and defendant Cliff were employed as real estate salesmen by the Traders Exchange. This was a Detroit real estate agency owned by a Mr. Murphy. O'Hair seems to have acted as general manager. Plaintiffs owned two pieces of real estate in Detroit. One was a vacant lot, the other improved property under contract of sale to defendants Hanson. Plaintiffs desired to secure a farm. They proposed to trade in both properties, also their vendees' contract interest in another parcel. They engaged the services of O'Hair. He found a farm which the owners offered to sell for $6,000. Notwithstanding this, he falsely represented to plaintiffs that he had found a farm which could be purchased for $16,500, that plaintiffs' Detroit properties would be received as a down payment, and the balance of $5,500 would be payable under the terms of a land contract. Plaintiffs agreed to consummate the deal. They signed and gave to O'Hair two deeds, one for each of the Detroit properties. In each of the instruments the name of the grantee was left blank. They also delivered to O'Hair an assignment in blank of their vendors' interest in the Hanson contract. Without plaintiffs' knowledge and contrary to their under-

standing O'Hair retained the two deeds and the blank assignment instead of using them to pass title to the owners of the farm for which plaintiffs were trading. In lieu of transferring these properties to plaintiffs' vendors, O'Hair made to them a cash payment of $500. He did this with the intent of obtaining a secret profit. The deeds and other papers incident to this transaction were in the Traders Exchange office and through that office defendant John W. Cliff, who had no part in the farm deal, learned of the two Detroit properties. He made an effort to dispose of them to third parties. He did not succeed, and shortly entered into an arrangement whereby he personally purchased both parcels. He gave his check for $500 payable to O'Hair for the vacant lot; and another check payable to cash for the purchase of the improved parcel at a price of $1,800. He deducted $207.22 due him from the Traders Exchange as earned commissions, so his check was given for $1,592.78. O'Hair cashed both checks. Prior to his purchase, Mr. Cliff knew the so-called deeds executed by plaintiffs were in blank as to grantees. Incident to his purchase and with his full knowledge, the names of Mr. and Mrs. Cliff were inserted in the deeds as grantees. It is through these instruments and under such circumstances that they claim to be innocent purchasers for value. Three or four months after the consummation of the transactions above outlined, plaintiffs discovered the fraud perpetrated upon them by O'Hair. Their bill for cancellation followed.

The circuit judge correctly found that neither Mr. or Mrs. Cliff had any knowledge or notice of the fraud perpetrated upon plaintiffs by O'Hair in the original real estate transaction, and that O'Hair was plaintiffs' agent. He concluded that Mr. and

Mrs. Cliff were innocent purchasers for value, and that therefore plaintiffs were not entitled to cancellation. Appellants' position is, first, that the deeds, having been blank as to grantees when executed, were void in the hands of the defendants Cliff, who had knowledge of that fact before delivery to them; and, second, because of full knowledge by the defendants Cliff that the deeds were executed in blank, they cannot urge estoppel against plaintiffs' right to relief.

There are many cases which, under certain established circumstances, hold that an instrument in the form of a deed executed in blank as to one or more of its requisites is void. Appellants' brief cites *Newton* v. *McKay,* 29 Mich. 1; *Lindsley* v. *Lamb,* 34 Mich. 509; *Stebbins* v. *Watson,* 71 Mich. 467; *Maynard* v. *Davis,* 127 Mich. 571; *Barras* v. *Barras,* 191 Mich. 473; and *Stamp* v. *Steele,* 209 Mich. 205. None of these cases seem to go so far as to hold that under no circumstance would a deed executed in blank as to grantee be held valid, notwithstanding the grantor placed it in his agent's hands for delivery, that the grantee paid a valuable consideration to the grantor's agent, and that the grantor received in full the agreed purchase price. In such cases the question of estoppel is usually controlling. This is rather plainly indicated in *Lindsley* v. *Lamb, supra,* wherein Justice CAMPBELL said:

"If such a deed could become operative under our statute, which requires an agent's authority to be in writing, it could only be by estoppel."

Also Justice COOLEY, in speaking for the court, said:

"The blank in this case was filled before delivery; and when the delivery is by the grantor himself or

by his direction, the deed as then completed is adopted by him. No one does or can dispute this. Even if the blank were filled up after delivery, the grantor, if he claimed the benefit of accompanying and related contracts, would thereby make the deed as completed his own, and preclude himself from objecting to the invalidity afterwards." *Lockwood* v. *Bassett,* 49 Mich. 546.

"Where a person executes an instrument containing blanks and entrusts it to a third person with power, express or implied, to fill the blanks in a certain manner, and such third person exceeds his authority in filling them, it is well settled that a *bona fide* holder will be protected, and the instrument is enforceable in his hands. * * * And it is held, not only in jurisdictions which recognize the rule that parol authority is sufficient to authorize the filling of blanks in a sealed instrument, but also in the jurisdictions in which the rule is adopted that such authority must be under seal, that where a grantor or obligor executes a deed containing blanks and delivers it to an agent with authority to fill the blanks and deliver it to the grantee or obligee, and such agent exceeds his authority in filling the blanks and delivers it to the grantee or obligee, who takes it without notice of the wrongful act of the agent, the grantor or obligor is estopped to deny that it is his deed." 1 R. C. L. pp. 1022, 1023; citing many cases.

In the instant case appellants are still claiming the benefit of the "related contracts," including the benefit of the $500 paid by O'Hair to those from whom appellants purchased their farm. They have a Reo truck which O'Hair purchased for them, and they are still claiming the farm under their contract of purchase and on the exact terms to which they agreed. While appellants assumed and expected O'Hair was taking the blank conveyances

for those from whom the farm was purchased, the record is barren of testimony that specific directions of that character were given by appellants to O'Hair or that it was specifically so agreed between them. Mr. Cliff's knowledge that plaintiffs' deeds were executed in blank was a circumstance which might well have challenged his attention to the scope of O'Hair's authority; but standing by itself under the circumstances shown it did not necessarily foreclose the possibility of Mr. and Mrs. Cliff becoming innocent purchasers. He may well have been put off his guard by the fact that it was a common custom under similar circumstances for the Traders Exchange to take and hold papers executed in blank by their clients and to later fill in a purchaser's name as grantee or assignee. We have considered the circumstances that Cliff's checks were payable to O'Hair or to cash instead of the Traders Exchange and that Cliff as well as O'Hair was an employee of the Exchange. The trial judge was also mindful of this phase of the record, and he questioned Cliff relative thereto. The witness testified that there was nothing unusual about the manner in which this transaction was handled in the Traders Exchange office or the execution of the instruments in blank; and that he had no intimation until weeks or months later that there was any irregularity or fraud in the transaction with plaintiffs. The circuit judge seems also to have noted the fact that there was a written agreement between plaintiffs and O'Hair which it is fair to assume would have given light upon the scope of O'Hair's authority, and that plaintiffs neither produced this written instrument nor gave an explanation of their failure to do so. Careful consideration of the record brings the conclusion that the circuit judge rightly

disposed of this controversy. Clearly, plaintiffs have a cause of action against O'Hair; but they are not equitably entitled to the relief sought against the defendants Cliff.

The decree is affirmed, with costs to appellees.

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

HOBART *v.* VANDEN BOSCH.

1. BROKERS—DELIVERY—RETURN TO BROKER FOR TRANSFER.
   Actual delivery of shares of stock to customer by stock broker was not nullified by return of stock to broker for transfer on books of issuing company.

2. SAME—RELATION BETWEEN BROKER AND CUSTOMER—PLEDGES.
   Relationship between broker and customer is usually that of pledgor and pledgee.

3. SAME—TENDER OF BALANCE DUE—WHEN TITLE VESTS IN CUSTOMER—LIENS.
   Where greater part of purchase price of stock is paid to broker, title vests in customer, and he is entitled to delivery on payment or tender of balance due, including legitimate charges, and broker has lien therefor.

4. RECEIVERS—RECEIVER'S TITLE NO BETTER THAN INSOLVENT'S.
   Receiver acquires no better title to property found in insolvent's hands than insolvent had when receiver was appointed.

5. BROKERS—TENDER BY CHECK—SUFFICIENCY.
   Customer's tender by check for balance due on shares of stock prior to broker's insolvency was sufficient, in absence of claim that more perfect tender would have been accepted.

6. RECEIVERS—CONVERSION—UNLAWFUL POSSESSION.
In customer's action against broker's receivers for conversion of shares of stock, defendants' claim that retention of possession was lawful because it was incident to audit of insolvent broker's affairs is without merit, where, at time of trial, 17 months had passed since demand for delivery was made, and they were still claiming lawful possession.

7. EVIDENCE—SELF-SERVING EVIDENCE—BROKERS—RECEIVERS—CONVERSION.
In customer's action against broker's receivers for conversion of shares of stock, broker's securities ledger and subsequent audit of broker's affairs by receivers were not admissible in evidence; being self-serving as to defendants and not binding on plaintiff.

Error to Kent; Dunham (Major L.), J. Submitted October 28, 1931. (Docket No. 122, Calendar No. 35,801.) Decided January 4, 1932.

Case by Ralph Hobart against Martin T. Vanden Bosch and another, receivers of A. G. Ghysels & Co., for conversion of certain bank stock trust shares. Judgment for plaintiff. Defendants bring error. Affirmed.

Irving H. Smith and *Peter J. Danhof,* for plaintiff.

Butterfield, Keeney & Amberg, for defendants.

NORTH, J. This is a suit for damages which plaintiff alleges he sustained by reason of defendants' unlawful conversion of 30 bank stock trust shares C-D3. On trial by the court without a jury, plaintiff had judgment. Defendants have appealed.

Pursuant to plaintiff's order, A. G. Ghysels & Co., acting as broker, on or about May 18, 1929, purchased for plaintiff 30 bank stock trust shares C-D3 at a total cost of $1,065. By exchange of other

securities delivered by plaintiff to his broker $938.30 was paid on plaintiff's purchase. The balance of $126.70 remained unpaid. The stock purchased by plaintiff was to be delivered to him by the broker after being transferred to plaintiff on the books of the issuing company so that dividends would be payable to plaintiff. After plaintiff's purchase, defendants were appointed receivers of A. G. Ghysels & Co. Further essential facts are stated in the quoted portion of the trial judge's findings of facts, which in our judgment are sustained by the proofs. We quote:

"The court further finds that on, to wit, the 24th day of May, 1929, these shares of bank stock were actually in the possession of A. G. Ghysels & Co., and were represented by two certain certificates of stock, one for 25 shares and one for five shares, and that they were then of the value of $1,065 plus the dividends earned thereon. * * * The court finds that late in the afternoon of the said 24th day of May, 1929, A. G. Ghysels & Co. delivered these two particular certificates of stock by their messenger to plaintiff at his office in the city of Grand Rapids, Michigan, that these certificates then being accompanied by the invoice attached thereto addressed plaintiff. That said messenger then handed them to plaintiff and that plaintiff then wrote his check for the balance due to complete the payment in full of said invoice and stock, and then noticed that the stock had not been transferred upon the books of the company in his name, and thereupon requested the messenger to return them to A. G. Ghysels & Co., stating that he would come in the next morning relative thereto.

"This court further finds that upon the following morning at about 10 o'clock in the forenoon plaintiff went to the office of A. G. Ghysels & Co. for the purpose of procuring these same shares of stock

with the intention of himself having them transferred in his name, and that he then had with him the check made out to complete the payment of this stock; that he then and there demanded the delivery of these shares of stock and tendered his check, and that said stock was taken from a desk or portfolio, it being the same two certificates and invoice that had been placed in the hands of plaintiff the afternoon previous, and that it was laid on a counter in plaintiff's presence, but that plaintiff was informed by someone in charge at the offices of A. G. Ghysels & Company, that they would not deliver these certificates of stock to plaintiff as A. G. Ghysels & Co. was going into the hands of a receiver. The court further finds that plaintiff then departed without recovering possession of these certificates after having demanded delivery to him of them and upon tendering his check as full payment of the balance due therefor.

"This court further finds that A. G. Ghysels & Co. was not in receivership on the 25th day of May, and that a receiver was appointed on the 27th day of May, 1929.

"This court further finds that refusal to deliver said shares of stock on May 25, 1929, was made upon the express direction of Abraham G. Ghysels, one of the partners of said A. G. Ghysels & Co.

"The court further finds that after the said 25th day of May, 1929, and on, to wit, the 5th day of June, 1929, plaintiff addressed to defendant Martin T. Vanden Bosch, then a receiver appointed by the circuit court for the county of Kent in chancery, of A. G. Ghysels & Co., a letter outlining the complete transaction between himself and A. G. Ghysels & Co. relative to the sale and purchase of these shares of stock, and demanded forthwith the delivery to him of said stock. The court further finds that before and after the writing of this letter, plaintiff several times orally demanded of defendant Martin T. Vanden Bosch the shares of stock.

"The court further finds that following the delivery of this stock to plaintiff at his office on the 24th day of May, 1929, and plaintiff's return of it to the agent of A. G. Ghysels & Co. for the purpose of having it transferred and registered in his name according to agreement, defendants and each of them at all times refused to deliver this stock to plaintiff although demanded so to do by plaintiff, but converted said stock to their own use."

Appellants urge that the trial judge was in error in holding plaintiff was entitled to recover for the following reasons:

(1) Title to the stock did not pass to plaintiff.
(2) Defendants' original possession was lawful because the stock, not having been paid for in full, was subject to lien for the balance of the purchase price; and the proof does not establish a change from lawful to unlawful possession.
(3) Defendants' detention of the stock pending audit of the affairs of A. G. Ghysels & Co. was reasonable and did not constitute conversion.
(4) There was prejudicial error in the court's refusal to receive in evidence defendants' exhibit B, which was a securities ledger, and their exhibit D, which was an audit made by the receivers of the assets and liabilities of A. G. Ghysels & Co.

The first two reasons above noted in support of defendants' appeal may be considered together. They are controlled by determination of whether defendants have wrongfully in their possession stock which plaintiff purchased through Ghysels & Co., title to which had vested in plaintiff before defendants were appointed receivers. As noted in the circuit judge's finding, two certificates of stock totaling the exact number of shares purchased by plaintiff were actually delivered into the hands of

plaintiff before the receivers were appointed. Apparently the only reason they were not retained by plaintiff was because he wished Ghysels & Co. to render him the further service of having this stock transferred on the books of the issuing company. This did not nullify the legal effect of delivery already made to him. Further, on the following day he tendered the payment of the balance of the purchase price and demanded that Ghysels & Co. surrender to him these identical certificates of stock which the company still had in its possession. Under such circumstances, as between plaintiff and the broker the stock should have been turned over to plaintiff. In dealings between a broker and his customer the rule of law as to who is vested with title is not the same as in ordinary cases between vendors and vendees. The relationship between a broker and his customer is usually that of pledgor and pledgee, and if the greater part of the purchase price is paid, the extent of the broker's interest in the property purchased by his customer is that of a lien thereon for the unpaid portion of the purchase price and other legitimate charges. The title to the property vests in the customer. He is entitled to delivery upon payment or tender of the balance due the broker. The rule of law is thus stated in *Austin* v. *Hayden,* 171 Mich. 38 (Ann. Cas. 1915 B, 894):

"The relation of the parties is pledgor and pledgee; the broker's ultimate rights in the stock being limited to the money he had advanced to purchase the same, with interest, and his commissions for transacting the business, in which he is protected by the partial payment the customer has made and the stock which he holds in pledge"—citing many authorities.

It is elementary that upon taking possession a receiver acquires no better title to property found in the hands of an insolvent than the latter had when the receiver was appointed. Further, appellants' contention that the particular stock or certificates to be delivered to the plaintiff had not been appropriated or identified, and that they did not conform to the stock ordered because transfer on the books of the issuing company had not yet been consummated, is without merit under this record. The proof is to the contrary.

Appellants challenge the sufficiency of plaintiff's tender of payment. It is undisputed that plaintiff at the time he demanded his stock of Ghysels & Co., and, before the receivers were appointed, was ready and willing to pay the balance of the purchase price and in fact tendered his check in payment at the time. There is no claim by appellants that a more technically perfect tender of payment if made would have been accepted at that time or at any subsequent time after the receivers were appointed. That such tender, if made, would not have been accepted is established by this record. Under such circumstances a further tender would have been idle and is not required in law. *Murphy* v. *Frank P. Miller Corp.*, 229 Mich. 162; *O'Toole & Nedeau Co.* v. *Boelkins*, 254 Mich. 44.

There is no merit to appellants' claim that their detention of this stock was lawful because it was held pending an audit of the company's affairs. The fact is that, notwithstanding plaintiff's demand for delivery by the receivers was made in June, 1929, and this suit was not started until July, 1930, and heard in November following, the receivers were still claiming their possession of the stock was lawful. This long-continued retention was not reason-

ably incident to an audit of the company's affairs. Nor is there merit in appellants' contention that the securities ledger of Ghysels & Co. or the subsequent audit of the company's affairs made by the receivers were admissible in evidence as tending to disprove plaintiff's claim. Each of these exhibits was self-serving as to defendants and in no way binding upon plaintiff. The following conclusions of law announced by the trial judge are sustained by the established facts:

"I find from the testimony in the case that by the purchase of this stock by plaintiff on May 18, 1929, and its delivery to him on May 24th, the title thereto passed to plaintiff and vested in him, and it then became his sole and individual property, and that it then was the duty of A. G. Ghysels & Co. to deliver it to plaintiff. And that the delivery of the stock to plaintiff on May the 24th, and his demand for it on May the 25th, together with his tender of check for the balance due, vested absolutely in plaintiff the title to this stock, and it was the legal duty of A. G. Ghysels & Co. to then and there deliver the stock to plaintiff.

"I further find that upon and after the morning of May 25, 1929, defendants wrongfully and unlawfully took possession of this stock, retained it unlawfully and upon demand by plaintiff for delivery of it to him, refused to so deliver it."

The judgment entered in the circuit court is affirmed, with costs to appellee.

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

HATHAWAY *v.* HUDSON.

1. LIMITATION OF ACTIONS—EQUITY—FRAUD—LACHES—RESCISSION.
   Vendees' right to equitable relief by way of rescission for misrepresentation by vendors' agent of location of boundary line is not barred by statute of limitations, where vendees acted promptly after discovering mistake or fraud.

2. FRAUD—DILIGENCE IN DISCOVERING FRAUD—LIMITATION OF ACTIONS.
   Defrauded party is not obligated to party who defrauds him to exercise diligence in discovering fraud.

3. LIMITATION OF ACTIONS—IMMATERIAL WHETHER FRAUD IS ACTIVE OR CONSTRUCTIVE—EQUITY.
   If defrauded party's remedy is essentially equitable one, it is immaterial whether it is based on active or constructive fraud, in regard to applicability of statute (3 Comp. Laws 1929, § 13983) authorizing suit within two years after discovery of concealed fraud.

4. VENDOR AND PURCHASER—EQUITY—RESCISSION—FRAUD.
   Vendees' offer to do equity is condition of their right to equitable relief by way of rescission for misrepresentation by vendors' agent of location of boundary line.

5. SAME—GOOD-FAITH OFFER TO PERFORM—EQUITY.
   Vendors' good-faith offer to convey necessary strip of land to make good their agent's misrepresentation as to location of boundary line was not necessarily nullified by fact that they were not, at that time, actually possessed of legal ability to do so.

6. SAME—OFFER TO PERFORM—EQUITY—RESCISSION.
   Where vendors' agent misrepresented location of boundary line, and mistake was not discovered for over seven years, court should have given them opportunity to make good their offer to secure necessary strip of land and tender deed thereof before granting rescission to vendees.

Appeal from Ingham; Carr (Leland W.), J. Submitted October 20, 1931. (Docket No. 155, Calendar No. 36,021.) Decided January 4, 1932.

On ability of vendor to perform, as condition precedent to his enforcement of right to rescind or declare a forfeiture, see annotation in 3 L. R. A. (N. S.) 103.

Bill by Earl G. Hathaway and another against Ralph S. Hudson and others to rescind a land contract. Decree for plaintiffs. Defendants appeal. Reversed conditionally.

Shields, Silsbee, Ballard & Jennings (*David R. Bishop,* of counsel), for plaintiffs.

Fred L. Warner, for defendants Hudson.

Wm. H. Wise, for defendants Griffith.

NORTH, J. This is a bill for cancellation of a land contract. Plaintiffs had decree in the circuit, and defendants have appealed.

Prior to February 10, 1920, Alex C. Krentel and George Krentel, Jr., were the owners in fee of the land hereinafter described. On that date they entered into a contract to sell the parcel to the defendant Ralph S. Hudson. On the 15th day of May, 1922, Ralph S. Hudson and wife, two of the defendants herein, entered into a contract with the plaintiffs to sell to them the same parcel of land, describing it as a lot in East Lansing, Michigan, and bounded by a line commencing on the east side of M. A. C. avenue as extended 36 rods and 5 feet north of the south line of lot 79 of College Grove plat, thence east 9 rods, thence north along the alley line 38 feet, thence west 9 rods to the east line of M. A. C. avenue as extended, thence south 38 feet to beginning. Plaintiffs have since remained in possession of the property. They continued to make payments under their contract until the latter part of 1930. In October, 1925, Mr. and Mrs. Hudson transferred their interest in this property and assigned their vendors' interest in their contract with plaintiffs to the defendants Claude E. Griffith and Pearl A. Griffith; and plaintiffs' subsequent contract payments were made to defendants Griffith.

At the time plaintiffs were negotiating the purchase of this lot, their vendors' agent pointed out iron stakes as being the monuments which marked three of its corners. In the winter of 1929-30 the city of East Lansing caused a survey and an assessor's plat to be made of the portion of the city where the lot in question is located. It was then discovered for the first time that the parcel described in plaintiffs' contract did not coincide with the parcel designated by the iron stakes. Instead, the north line of the property as described in plaintiffs' contract was 15.2 feet south of the north line as located by the iron stake monuments. As a result of the mistake in plaintiffs' contract, which locates their northerly line 15.2 feet south of the supposed northerly line, their dwelling extends 8.3 feet north of their property, and the northerly wall of their garage is 15.2 feet north of their north line.

Plaintiffs' bill for cancellation is based on the theory that their vendors' agent's misrepresentation as to the true location of the boundary lines upon which plaintiffs relied was a fraud in law entitling them to cancellation and rescission. The undisputed proof discloses that the alleged misrepresentation was made; and it also conclusively appears from the record that the misstatement was innocently made, and that none of the parties to this suit had knowledge thereof until more than seven years after plaintiffs had entered into the contract to purchase this property; and that it was then disclosed by the city's survey of the property incident to making the so-called assessor's plat. Plaintiffs acted promptly after they became aware of the mistake or alleged fraud. They tendered reassignment of their interest in the property covered by their contract to the defendants. Plaintiffs' tender was

declined, and their bill of complaint was filed December 2, 1930.

About a week before the case was heard (March 12, 1931), defendants procured an option on a strip of land 14 feet in width along the northerly side of the parcel described in plaintiffs' contract, and seem to have sought to settle the controversy by conveying this parcel to plaintiffs upon the performance of their contract, although the circumstances are not fully in the record. Plaintiffs declined, possibly for the reason that their garage as located and the fulfillment of their contract called for a strip 15.2 feet in width. Practically at the close of the hearing in the circuit court, the defendant Ralph S. Hudson was recalled to the witness stand and testified that he was ready and willing to transfer "as much property to the north as the original line showed."

On re-cross examination he further testified that he had not prior to that time been in a position to tender plaintiffs conveyance of all the land covered by their contract, and further:

"Prior to today I had an option on 14 feet. I had that option since the first of the week. Prior to this week I have not been in a position to tender to Mr. Hathaway any land to make up the deficiency. I now claim to be in a position, as a result of some negotiation today, to place the lot lines where they are claiming it was prior to last summer."

Before conclusion of the trial, and at the suggestion of the court, there seems to have been an attempt to adjust the litigation along this line. Notwithstanding defendant Hudson asserted ability to fully perform plaintiffs' contract, the trial judge seems to have been of the opinion that he was not then in a position to require plaintiffs to accept the proffered adjustment. He found there was no

actual fraud, but that the misstatement as to the location of the lot lines was a constructive fraud and entitled plaintiffs to rescission. After deducting rental values, the defendants Hudson were decreed to repay to plaintiffs their contract payments, expenditures for taxes, insurance and repairs amounting to $1,464.67, and defendants Griffith $581.87. Such repayment was made a lien upon the respective defendants' interests in the land.

In this court, as in the circuit court, defendants urge (1) that their motion made at the close of the proofs to dismiss plaintiffs' bill of complaint on the ground that their right of action was barred by the statute of limitations should have been granted; and (2) that the circuit judge erred in denying the proffer of defendants made at the time to convey to plaintiffs the strip of land 15.2 feet in width along the northerly side of the lot described in their contract.

(1) We think the trial judge was correct in holding that plaintiffs' right to equitable relief was not barred by the statute of limitations. These defendants are not in a position to charge plaintiffs with lack of diligence in discovering that their vendors' agent had misrepresented to plaintiffs the location of the lot lines. We have often held that a defrauded party is not obligated to the person chargeable to exercise diligence in discovering a fraud. *Smith* v. *Werkheiser,* 152 Mich. 177 (15 L. R. A. [N. S.] 1092, 125 Am. St. Rep. 406); *Lewis* v. *Jacobs,* 153 Mich. 664. Plaintiffs rely upon the statute (3 Comp. Laws 1929, § 13983) which authorizes suit within two years after discovery of a concealed fraud, although otherwise barred by the statute of limitations. Defendants contend that this statutory provision applies to actual or active fraud only, not to constructive fraud. If the injured party's remedy is essentially

an equitable one, we think it is immaterial whether it is based on active or constructive fraud.

"Courts of equity generally apply the statute of limitations by analogy in cases where the remedy in equity is concurrent only, or a substitute for an action at law. * * * Where the law gives a choice of remedy, the one an action of assumpsit and the other a proceeding *in rem,* equity will not permit the statute of limitations to be evaded by resort to the latter remedy." (Syllabi) *People, ex rel. Attorney General,* v. *Railroad Co.,* 145 Mich. 140.

"But where the relief sought is in its nature one of equitable and not of legal cognizance, and the remedy is of a purely equitable nature, equity follows its own rules." *The Michigan Insurance Co.* v. *Brown,* 11 Mich. 265, 272.

"Courts of equity not only act in obedience and in analogy to the statutes of limitations in proper cases, but they also interfere in many cases to prevent the bar of the statutes where it would be inequitable or unjust. Thus for example if a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law, courts of equity will interpose and remove the bar out of the way of the other injured party. * * *

"The question often arises, in cases of fraud and mistake * * * under what circumstances, and at what time, the bar of the statute of limitations begins to run. In general it may be said that the rule of courts of equity is, that the cause of action or suit arises when and as soon as the party has a right to apply to a court of equity for relief. In cases of fraud or mistake it will begin to run from the time of the discovery of such fraud or mistake, and not before." 3 Story's Equity Jurisprudence (4th Ed.), §§ 1974, 1975.

See, also, 2 Pomeroy's Equity Jurisprudence (4th Ed.), § 917, and note.

Here the remedy sought is essentially one of equitable jurisdiction, and plaintiffs' alleged cause of action was not barred by the statute at the time their bill of complaint was filed.

(2) In connection with defendants' offer in the circuit court to convey, and after plaintiffs had consulted with their counsel relative thereto, the circuit judge said:

"I understand from counsel for plaintiffs that they refuse to accept the tentative offer that has been made to convey to them 15.2 feet of land to the north of the property described in the land contract. At the present time, in view of the fact that no formal tender of a deed to such land has heretofore been made, and in view of the fact that no tender of such deed is now made, I scarcely feel that the court has the power to require the plaintiffs to accept any such conveyance in an adjustment of the controversy. Obviously, it would be a practical solution of an unfortunate situation. Nevertheless, in a situation like this, the court does not command unlimited power, but rather the controversy must be disposed of in accordance with the rights of the parties."

It had been made to appear to the trial judge that substantially the same error had been made in conveyances fixing the lot lines of the two lots next north of plaintiffs'. Defendants' delay in making an earlier tender of performance to plaintiffs was evidently caused by the somewhat involved situation necessitating a readjustment of lot lines of the other properties to the north. While the offer to perform was somewhat belated, there is nothing in the record which in any way reflects lack of good faith in the offer. And it may be noted that this offer on the part of defendants was not more dilatory than plaintiffs' offer to do equity, which was clearly a condition of their obtaining equitable relief by way of

rescission. That the one making the offer of conveyance was not at that time actually possessed of legal ability to do so would not necessarily wholly nullify the otherwise good-faith offer. As a matter of business prudence, defendants could ill afford to actually purchase and take a deed of the strip of land in question before being assured either by plaintiffs or a decree of the court that this method of adjusting the pending litigation would be accepted. Plaintiffs had neither paid nor tendered payment in full of their contract to purchase, and therefore were not entitled to a deed from defendants. The most that they could ask was that defendants put themselves in position to perform under plaintiffs' contract when performance was due. We think defendants' offer covered all that could equitably be demanded by plaintiffs, except, possibly, costs of litigation, which the court could have controlled. As noted by the trial court, it would have worked "a practical solution of an unfortunate situation." It would have given plaintiffs everything to which they were entitled under the terms of their contract. It was a tender of full performance, and in all probability would have avoided much litigation likely to arise incident to earlier conveyances using this same description and also incident to the same situation relative to lots north of plaintiffs' property. We think, under all the circumstances of this case, the trial court should have given defendants an opportunity to secure a deed of the strip of land in question, and, upon tendering the same into court within a reasonable time and upon the payment of such terms as to the court seemed equitable, plaintiffs' bill for rescission should have been dismissed.

"The equitable remedy of rescission is not one enforceable as a matter of right, but rests on the sound discretion of the court. * * * Rescission

will not necessarily be denied merely because the contract has been executed, but where the contract is conscionable, and the complaining party has had the full benefit of it, it will not ordinarily be rescinded. * * * Some substantial reason must be shown for setting aside a contract before a court of equity will lend its aid to a party seeking the relief." 5 Thompson on Real Property, §§ 4311, 4312.

"An application to a court of equity for the rescission, cancellation, or delivering up of agreements and securities is not founded on an absolute right, as in case of an action at law on a contract or in tort, but is rather an appeal to the sound discretion of the court, which in granting or refusing the relief prayed acts on its own notions of what is reasonable and just under all the surrounding circumstances." 9 C. J. p. 1161, citing numerous cases.

See, also, 4 R. C. L. p. 487.

Appellants will be given 60 days after the filing of this opinion within which to tender to the clerk of this court a deed vesting the defendants Griffith with title in fee to the strip of land 15.2 feet in width along the northerly side of plaintiffs' lot, accompanied with an agreement that this strip of land is included within the terms of plaintiffs' contract; and thereupon a decree may be taken in this court dismissing plaintiffs' bill of complaint, but with costs of both courts to appellees.

Presumably appellants' failure to earlier secure title to the strip of land has caused appellees to incur a substantial amount of expense over and above taxable costs; but this will be compensated, at least in part, by the value of the additional 15.2 feet to the width of their lot. In the event of appellants' failure to comply with the conditions above specified, the decree of the circuit court will be affirmed, with costs.

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

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ALTERATION OF INSTRUMENTS.

Insertion in deed, absolute on its face, recital that it was given as security, which was in accord with intent and purpose for which it was given, and conformed to recital in note, was not material alteration and did not affect its validity; no injury resulting to mortgagor. *Peoples Wayne Co. Bank* v. *Wesolowska*, 45.

ALTERATIONS—See LANDLORD AND TENANT (12, 13).

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APPEAL AND ERROR.

1. Where, on trial, it was conceded that if recovery was had by plaintiff it should be for full contract price, on reversal of judgment for defendant, case is remanded, and judgment ordered entered for plaintiff. *Leslie* v. *School District No. 1, Mason Twp.*, 23.
2. Where, in case tried without jury, findings of fact are certain, but findings of law are contradictory, judgment is to be taken as consistent with correct finding, and inconsistent conclusion of law is disregarded. *Nelson & Witt* v. *Texas Co.*, 65.

APPEAL AND ERROR—Continued.

3. Appellate court is not concerned with errors which may have been committed against nonappealing party. *Id.*
4. Where improper argument of counsel was stated as one reason for motion for new trial and was considered by trial court in denying said motion, it may be considered by Supreme Court, although it does not appear in transcript. *Miechikoski* v. *Chicago & North Western Ry. Co.*, 85.
5. On appeal from judgment on directed verdict, record must be construed in light most favorable to appellant. *Pomeroy* v. *Dykema*, 100.
6. Reasonableness of appraisers' and attorneys' fees, paid by receiver on order of court after hearing thereon, is not open to review on appeal from allowance of receiver's final account. *Lalley* v. *Tuller Hotel Co.*, 105.
7. Part of decree not appealed from is affirmed, on appeal. *Bohm* v. *Rogoff*, 199.
8. On appeal from judgment entered for defendant on directed verdict, testimony on behalf of plaintiff must be considered favorably. *Sak* v. *Waldecker*, 219.
9. Supreme Court may assume that jury heeded admonition to disregard counsel's improper argument, where it is not reflected in verdict. *Hollingshead* v. *Gunderman*, 300.
10. Inadvertent reference to insurance, in action involving automobile collision, while improper, *held*, harmless, where court promptly instructed jury to disregard it, and verdict is not excessive. *Id.*
11. In action for libel, improper argument of plaintiff's counsel, resulting in excessive verdict of $10,000, is reversible error, notwithstanding action of trial court in reducing said amount to $3,500. *Sherwood* v. *Evening News Assn.*, 318.
12. Refusal to give requests to charge was not error, where they were either given or covered by charge as given. *Zuidema* v. *Bekkering*, 328.
13. Philosophic ruminations of trial judge in charge, not resulting in prejudice, *held*, not reversible error, although not applicable to case. *Id.*
14. Appeal is perfected when notice of appeal is filed within required time; both act and time of filing being jurisdictional, and default in either destroys right to appeal and leaves appellant remediless by way of appeal except on special leave of appellate court (Mich. Court Rules Nos. 56, 57, § 2). *Hoffman* v. *Security Trust Co. of Detroit*, 383.
15. Acts necessary to complete appeal other than timely filing of notice of appeal are not jurisdictional, but their timely performance is mandatory, in that they are requisites of appeal, and may be performed after prescribed time only on special leave of court (Mich. Court Rules Nos. 56, 58, § 2). *Id.*
16. Appellant's failure to do acts other than timely filing notice of appeal, necessary to complete appeal, *prima facie* entitles

APPEAL AND ERROR—Continued.

appellee to dismissal of appeal on motion, but court has discretion to permit appellant, on sufficient showing, to do such acts (Mich. Court Rule No. 58, § 2). *Id.*

17. It is appellant's desire to examine testimony and proceedings for errors based thereon, not his possession of transcript, which justifies preliminary notice of appeal (Mich. Court Rule No. 59, § 2). *Id.* 384.

18. Where evidence is to be incorporated in record, either preliminary or full notice of appeal may be filed in first instance. *Id.*

19. When appeal is perfected by seasonable filing of notice of appeal, jurisdiction of appellate court attaches, and trial court has no authority to dismiss appeal. *Id.*

20. Jurisdiction of circuit court to dismiss appeal after jurisdiction of appellate court attaches may not be conferred by stipulation. *Id.*

21. Where appeal was perfected by timely filing notice of appeal, circuit court was without jurisdiction to dismiss appeal notwithstanding subsequent proceedings to complete appeal were without force, and therefore its order dismissing appeal is set aside, on review, without prejudice to parties to take such steps as they may be advised (Mich. Court Rule No. 58, § 2). *Id.*

22. Where, in case tried without jury, there were no formal findings or exceptions, only question open for review is whether there was any evidence to sustain judgment. *Paine* v. *Swift,* 453.

23. In action on postdated check and for balance due under contract of sale, testimony by defendant that check was postdated to enable him to investigate before contract should become effective, that he had investigated and refused to consummate sale, *held,* sufficient to sustain judgment for defendant. *Id.*

24. Where, in action for death, trial court directed verdict for defendant on ground that cause of death was mere conjecture, Supreme Court accords plaintiff's testimony favorable consideration, and, for purposes of decision, assumes that defendant was negligent. *Frye* v. *City of Detroit,* 467.

25. While Supreme Court, under Michigan Court Rule No. 75, may consider action for damages tried without jury *de novo,* it is unwilling to determine correctness of amount of damages without some indication by trial judge as to what amount should be. *Collins* v. *Hull,* 507.

26. In action against mutual fire insurance company on policy, finding of jury that notice of assessment had been given, supported by evidence, is conclusive, on review. *School Dist. No. 7, Keeler Twp.,* v. *Farmers Mutual Fire Ins. Co. of Dowagiac,* 515.

27. Where insured's counsel conceded at trial that question of whether notice of assessment had been given insured was issue

APPEAL AND ERROR—Continued.

of fact, its contention, on review, that there was no issue of fact on said question, is not entertained. *Id.*

28. On question of decision in favor of defendant of reserved motion to direct verdict, evidence must be viewed in light favorable to plaintiff, on appeal. *Maxson* v. *Kohler,* 520.

29. Where neither parties nor counsel were in court when findings of fact, conclusions of law, and judgment were entered, and record does not show that notice was given as required by 3 Comp. Laws 1929, § 14265, Supreme Court is unable to say that exceptions to findings filed seven days later were not filed seasonably (former Circuit Court Rule No. 45). *Karsten* v. *La Huis,* 524.

30. On appeal, Supreme Court is confined to record. *Id.*

31. In suit by property owner to enjoin planting of trees in street by city, certified question under Michigan Court Rule No. 78 presents no question for determination by Supreme Court, where record shows that planting has already been done. *Rood* v. *City of Detroit,* 547.

32. In suit by property owner to enjoin city from maintaining public commercial nursery business, certified question under Michigan Court Rule No. 78 presents no question for determination by Supreme Court, where record wholly refutes allegations of bill. *Id.*

33. Error, if any, in rejecting exhibit showing defendant's losses prior to entering into lease with plaintiffs was not prejudicial, where defendant admitted business had been very unprofitable. *Zannis* v. *Freud Hotel Co.,* 578.

34. Error, if any, in excluding exhibit may not be considered, on appeal, where no objection was made at time of exclusion. *Id.*

35. Jury's verdict on question properly submitted to it is conclusive. *Barnes* v. *First National Bank of St. Ignace,* 600.

See BILLS AND NOTES (5); CERTIORARI (1); CIRCUIT COURT COMMISSIONERS; COSTS; CRIMINAL LAW (9, 21, 47–49); EVIDENCE (4); JUSTICES OF PEACE (2); LIBEL AND SLANDER (9); MANDAMUS; MOTOR VEHICLES (16); RECEIVERS (4); TRIAL (4).

APPEAL FROM PROBATE COURT DE NOVO—See EXECUTORS AND ADMINISTRATORS (11).

APPEARANCE.

Defect in *præcipe,* summons, affidavits, and writs of garnishment in misnaming State in which defendant corporation was incorporated, was waived by filing its general appearance. *Fildew* v. *Stockard,* 494.

See ATTACHMENT (1); ATTORNEY AND CLIENT (2); COURTS (1); EQUITY (3).

APPLICATION OF INSURANCE MONEY—See VENDOR AND PURCHASER (8).

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ARBITRARY REFUSAL OF WRIT—See HABEAS CORPUS (5).

ARBITRATION AND AWARD—See INSURANCE (4).

ARGUMENT OF COUNSEL—See APPEAL AND ERROR (4); CRIMINAL LAW (19–21); TRIAL (1).

ARTIFICIAL DRAINAGE DITCH—See INJUNCTION (2); WATERS AND WATERCOURSES.

ASPHYXIATION—See MASTER AND SERVANT (21).

ASSAULT—See MASTER AND SERVANT (18, 19).

ASSESSMENTS—See INSURANCE (6, 7).

ASSIGNMENTS.

1. Rule that assignee of nonnegotiable chose takes subject to defenses means defenses existing at time of assignment. *Saginaw Financing Corp.* v. *Detroit Lubricator Co.*, 441.
2. After assignment, assignor loses all control over chose and cannot bind assignee by estoppel or otherwise. *Id.*
3. Prior acts of assignor, which have not ripened into rights in others at time of assignment, are not binding on assignee without notice; assignment not being subject to latent equities not known to assignee. *Id.*

See CHATTEL MORTGAGES (3); MORTGAGES (7).

ASSUMPSIT—See CONVERSION (4, 5).

ASSUMPTIONS—See APPEAL AND ERROR (9, 24); ELECTRICITY (5); MOTOR VEHICLES (9, 11); SCHOOLS AND SCHOOL DISTRICTS (15).

ATTACHMENT.

1. Entering general appearance and filing answer to declaration in attachment suit did not estop defendant from applying for dissolution of attachment. *Leib* v. *Bostwick*, 277.
2. Denial of motion to dissolve attachment was not *res judicata*, where question of fraud, which was issue involved, was not decided. *Id.*
3. Attachment was properly dissolved where there was no evidence of fraud, which was basis of attachment. *Id.*

ATTORNEY AND CLIENT.

1. Attorneys are officers of court. *Brandimore* v. *Dickens*, 128.
2. Where judge had been led into error in improvidently appointing receiver, invading rights of interested parties, their attorneys with propriety appeared in court and informed judge of said error. *Id.*

See CRIMINAL LAW (4).

ATTORNEYS' FEES—See APPEAL AND ERROR (6); EXECUTORS AND ADMINISTRATORS (5, 6, 9); RECEIVERS (2, 6).

ATTRACTIVE NUISANCE—See NEGLIGENCE (1).

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AUTOMOBILE INSURANCE—See APPEAL AND ERROR (10); INSURANCE (3).

AWARDS WITHIN RANGE OF EVIDENCE CONCLUSIVE—See EMINENT DOMAIN (9).

BANK DEPOSITS—See DEPOSITS IN COURT.

BANKS AND BANKING.

1. Purchaser of bank stock which has become worthless and liability to stockholder (3 Comp. Laws 1929, § 11945) is not entitled to rescind purchase on ground of fraud unless he shows that there are no creditors who became such during the time that he was registered stockholder. *Thompson* v. *American State Bank*, 245.
2. Motion to dismiss bill for rescission of purchase of bank stock was properly granted, where bill alleged stock to be "absolutely worthless and a liability," which is equivalent to saying that rights of creditors are involved under statutory liability of stockholders (3 Comp. Laws 1929, § 11945), and bill failed to allege that there are no creditors who became such during the more than two years that plaintiff was registered stockholder. *Id.*
3. Whether plaintiff gave written order for bank to pay money to her son, *held*, under evidence, question for jury. *Barnes* v. *First National Bank of St. Ignace*, 600.

BASE FEE—See RAILROADS (12).

BASIS OF AWARD—See MASTER AND SERVANT (22).

BASTARDY.

1. Sole question in bastardy proceeding is whether defendant is guilty. *People* v. *Martin*, 33.
2. Special questions may not be submitted to jury in bastardy proceeding unless they involve facts from which legal conclusions can be drawn. *Id.*
3. Bastardy proceeding is somewhat anomalous, being of civil nature in many respects, yet coming within *quasi*-criminal jurisdiction of courts. *Id.*
4. In bastardy proceeding, trial court was in error in denying defendant right to trial without jury, where written waiver was filed (3 Comp. Laws 1929, § 17131). *Id.*

See CERTIORARI (1).

BENEFICIAL ASSOCIATIONS.

1. Fraternal association bringing suit against former officers for possession of its property, records, and funds has burden of proving that officers claiming to represent it are in fact its officers. *Lodge No. 1, Tribe of Good Timers,* v. *Marvin,* 339.
2. Beneficial association, whether corporate or unincorporated, must act through natural persons. *Id.*
3. Members of lodge, when lawfully assembled and presided over by its duly elected officers, may transact any business within purview of purpose for which it is organized. *Id.*
4. In absence of regular officers, lodge members present, when lawfully assembled, may select temporary officers, unless constitution or by-laws otherwise provide. *Id.*
5. Lodge members are lawfully assembled only when they meet at regular or specially designated place of meeting and at time fixed by by-laws. *Id.*
6. Where certain members of lodge, on regular meeting night, went to regular meeting place, found doors of hall locked, and, after waiting for regular time of meeting, in absence of regular officers, held meeting in corridor, elected temporary officers, adjourned to another meeting place, and there purported to elect permanent officers for ensuing year, meeting was illegal and proceedings void. *Id.* 340.
7. Majority of lodge members have full control over its proceedings when it is in regular session, subject only to rights conferred on its officers under its constitution and by-laws; but they are powerless to act unless lawfully assembled. *Id.*
8. Court of equity should not interfere in dispute between lodge members as to which of two sets of officers is entitled to hold offices. *Id.*

BENEFITS—See MUNICIPAL CORPORATIONS (12).

BILL OF SALE—See WILLS.

BILLS AND NOTES.

1. In action on note given to plaintiff by defendant to pay his share of margin requirement on stock bought on margin in their joint names, defense of fraud and want of consideration, *held,* not established. *Paliat* v. *Jacobs,* 297.
2. Where plaintiffs were induced to exchange their property by broker's agreement to accept note of party with whom they were dealing in full for his commission, notes given to broker by plaintiffs, who had little experience in legal matters, to replace note accepted by him, which was not paid, was void for want of consideration. *Smith* v. *Baubie,* 335.
3. Under negotiable instruments law, holder of notes taken as collateral for antecedent debt is holder in due course (2 Comp. Laws 1929, §§ 9274, 9276). *Kewanee Private Utilities Co.* v. *Runzel,* 345.
4. Memorandum at bottom of note given in payment of membership in golf club, referring to membership number, in no way affected its negotiability. *Id.*

BILLS AND NOTES—Continued.

5. Where notes attached to application for membership in golf club were detachable, so that payee, who was other than golf club, could discount them, and question of material alteration by detaching was not passed on by trial judge, Supreme Court assumes, in view of record, that application was detached before delivery of notes to payee. *Id.* 346.
6. In suit to reinstate personal note of defendant on ground that acceptance of corporate note given to take up said personal note was accomplished by fraud and mistake, evidence *held*, insufficient to establish either fraud or mistake. *State Bank of America* v. *Skrzycki*, 484.

See EVIDENCE (5); PARTNERSHIP (1).

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BREACH OF CONTRACT—See CONTRACTS (1); CONVERSION (1); PRINCIPAL AND AGENT; SALES (3).

BREACH OF LEASE—See LANDLORD AND TENANT (11, 13).

BRIDGES—See RAILROADS (1).

BRIEF—See COSTS (1).

BROKERS.

1. Broker purchasing stock for client has right to have payment before delivery, and unless client unequivocally rejects stock, broker is bound to stand ready to perform, and, in meantime, as pledgee, to conserve client's rights as owner. *Eastman* v. *Kendall*, 215.
2. Broker, in paying for stock purchased for client, becomes creditor, and, in retaining stock as security for money advanced, becomes pledgee. *Id.*
3. Where client did not unequivocally reject corporate stock purchased for him by broker, latter was not required to give client notice and sell stock in open market, but he had right to hold it, and, while so holding, to conserve client's interest by exchanging it for stock in consolidated corporation with which original corporation had merged. *Id.*

BROKERS—Continued.

4. Client has no fixed right to particular shares purchased for him by broker. *Id.* 216.
5. Where broker, purchasing corporate stock for client who failed to accept it, tendered stock of original corporation and also like amount of stock in consolidated corporation with which original corporation had merged, tender was sufficient. *Id.*
6. Owner, who approved sale of land to broker's clients, became liable for commission unless sale failed because of unwillingness or inability of broker's clients to complete it. *Hooley* v. *Alpena National Bank,* 269.
7. Where broker with valid contract for sale of land procured buyers who were ready, willing, and able to buy on owner's terms, owner is liable for commission, although, after approving sale by broker, it sold to another party. *Id.*
8. In action for broker's commission, listing agreement describing land to be sold as "Putnam resort property" sufficiently identified it. *Mead* v. *Rehm,* 488.
9. Liability for broker's commission on sale of interest in land may not be based on oral authorization of another by owner to sign listing agreement for him (3 Comp. Laws 1929, § 13417). *Id.*
10. Oral agreement to pay commission on sale of land being void under statute, no recovery on *quantum meruit* may be had, even though service is rendered and accepted (3 Comp. Laws 1929, § 13417). *Id.*
11. Liability of vendee for commission on exchange of equity for equity in other property is to be computed on value of contract interest, and not on value of entire property. *Id.*
12. Actual delivery of shares of stock to customer by stock broker was not nullified by return of stock to broker for transfer on books of issuing company. *Hobart* v. *Vanden Bosch,* 686.
13. Relationship between broker and customer is usually that of pledgor and pledgee. *Id.*
14. Where greater part of purchase price of stock is paid to broker, title vests in customer, and he is entitled to delivery on payment or tender of balance due, including legitimate charges, and broker has lien therefor. *Id.*
15. Customer's tender by check for balance due on shares of stock prior to broker's insolvency was sufficient, in absence of claim that more perfect tender would have been accepted. *Id.*

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BUILDING RESTRICTIONS—See COVENANTS (2); INJUNCTION (1).

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CANCELING INSURANCE—See MASTER AND SERVANT (3, 5).

CANCELLATION OF INSTRUMENTS.

1. In suit to set aside mortgage on land, on ground that it was void because given without consideration, decree in favor of plaintiff is reversed, on appeal, where it appears that mortgage was gift, and plaintiff acquired title to land as devisee of mortgagor. *Goethe* v. *Gmelin*, 112.
2. Suit for cancellation of instruments executed in furtherance of plan for refinancing construction of building, involving exchange of bonds for stock in company taking over property, and also mortgages executed by latter for purpose of completing building, was properly dismissed for want of equity, where it appears that plaintiff, who exchanged his bonds for stock, had only $2,000 of $350,000 worth of bonds issued, and that most of the bondholders have exchanged their bonds for stock and are not here complaining. *Hall* v. *Detroit Estates Corp.*, 121; *Skelcey* v. *Detroit Estates Corp.*, 125.
3. Bondholder whose bonds on apartment house have been called and he offered all relief to which he is entitled under his contract on purchasing said bonds, is not entitled to maintain suit to set aside transactions involving exchange of bonds for stock in company taking over building, and execution of mortgages by latter which made possible completion of said building. *Dickens* v. *Detroit Estates Corp.*, 127.
4. In suit to cancel deeds on ground of fraud, circuit judge correctly found that defendants were innocent purchasers for value, that they had no notice or knowledge of fraud, and that plaintiffs were not entitled to cancellation. *Kurbel* v. *O'Hair*, 680.

See INTERPLEADER; LANDLORD AND TENANT (15).

CARRIERS.

1. Interstate carriers are subject to and compelled to make fixed freight charges or rates, which are stated in tariff filed with interstate commerce commission. *Pennsylvania Railroad Co.* v. *Marcelletti*, 411.
2. Discrimination between shippers being prohibited by statute (49 USCA, § 6[7]), as matter of public policy, interstate carriers are required not only to make but to collect for like services uniform charges from shippers. *Id.*
3. Contract for interstate carriage may embody provision that consignor assumes no liability for payment of freight charges, and that carrier is to look for payment to consignee alone. *Id.*
4. Delivery by interstate carrier in violation of provision in bill of lading that delivery is to be made on payment of charges by consignee will not relieve shipper of obligation to pay freight, in view of statute (49 USCA, § 6[7]) prohibiting discrimination between shippers. *Id.*

CARRIERS—Continued.

5. Where shipper's written order to carrier to deliver, without bill of lading, interstate shipment to consignee upon payment of all freight and refrigeration charges did not recite that it was without recourse on him, he was not released from liability for freight charges which, through mistake, carrier failed to collect on delivery. *Id.*
6. As matter of law, shipper is chargeable with notice of published rate for interstate shipments and that primary liability of payment thereof is on him. *Id.*
7. Failure of consignee, who was consignor's agent in paying freight charges, to pay full amount thereof through mistake of interstate carrier, did not relieve consignor of his primary obligation to pay for service which he caused carrier to render, and therefore he is liable for balance due. *Id.* 412.

CASHIER—See WITNESSES (1).

CATBOAT—See SEAMEN (2, 3).

CAUSE OF DEATH—See APPEAL AND ERROR (24); DEATH (1, 3, 9).

CERTIFICATE OF TITLE—See MOTOR VEHICLES (6, 7).

CERTIFIED QUESTIONS—See APPEAL AND ERROR (31, 32).

CERTIORARI.

1. Judgment in bastardy proceeding is reviewable only by certiorari. *People* v. *Martin*, 33.
2. On review by certiorari Supreme Court considers only errors of law. *Id.*

See EMINENT DOMAIN (5, 10).

CHALLENGES—See JURY (1, 2).

CHARITIES—See MASTER AND SERVANT (2).

CHARTER—See CORPORATIONS (1, 2); INSURANCE (2); MUNICIPAL CORPORATIONS (9–11, 13); STATUTES (6, 8).

CHATTEL MORTGAGES.

1. Although at common law a chattel mortgage was considered an instrument of sale, conveying title to the mortgagee, in this State it is held that the true relation of the parties is that of debtor on one side and creditor secured by lien on property on the other. *General Motors Acceptance Corp.* v. *Lee*, 108.
2. Under written instrument executed by purchaser mortgaging automobile to secure payment of purchase price, and promising to pay any deficiency arising on foreclosure, purchaser is liable in action for balance due after automobile has been rendered practically worthless by collision, although there is no express promise to pay in said mortgage, and no note or other evidence of indebtedness is secured thereby. *Id.* 109.

CHATTEL MORTGAGES—Continued.

3. Where finance corporation, purchasing chattel mortgage on automobile, recorded it and assignment thereof, subsequent purchasers of automobile from mortgagor were chargeable with notice of said mortgage and took subject thereto, notwithstanding mortgagor, by mistake, was allowed to retain memorandum showing payment in full, given to him prior to execution of mortgage on understanding that he was to pay cash. *Saginaw Financing Corp.* v. *Detroit Lubricator Co.*, 441.

See JUDGMENT (5).

CIRCUIT COURT COMMISSIONERS.

General appearance by plaintiff in circuit court waived any irregularities in appeal by defendant from judgment rendered by circuit court commissioner. *Heath* v. *Gloster*, 291.

CIRCUIT JUDGE—See HABEAS CORPUS (1, 3, 5, 6).

CIRCULATION—See LIBEL AND SLANDER (2).

CITY COUNCIL—See MUNICIPAL CORPORATIONS (10).

CLAIM OF THIRD PARTY—See GARNISHMENT (2, 4).

CLAIMS—See EXECUTORS AND ADMINISTRATORS (7, 8).

CLEAR WEIGHT OF EVIDENCE—See TRIAL (1).

COERCION OF JURY—See CRIMINAL LAW (52).

COLLATERAL ATTACK—See JUSTICES OF PEACE (1); PROCESS.

COLLECTIBLE ACCOUNTS—See RECEIVERS (8).

COMMERCE.

Regulation of commerce between States having been committed to Congress, States are inhibited from levying direct burden on interstate commerce. *Watson-Higgins Milling Co.* v. *St. Paul Milling Co.*, 258.

COMMISSIONER—See MUNICIPAL CORPORATIONS (9).

COMMISSIONS—See BILLS AND NOTES (2); BROKERS (6–11).

COMMON COUNTS—See CONVERSION (5).

COMMON LAW—See CHATTEL MORTGAGES (1); CONVERSION (4); NEGLIGENCE (1); SEAMEN (1).

COMMON-LAW LIABILITY OF HUSBAND FOR WIFE'S FUNERAL EXPENSES—See HUSBAND AND WIFE (4).

COMMON-LAW TRUSTS—See CORPORATIONS (12); TRUSTS.

COMMUNICATION WITH JURY—See CRIMINAL LAW (18).

COMMUNITY OF WRONGDOING—See DEATH (7).

COMPENSABLE ACCIDENT—See MASTER AND SERVANT (20, 21).

COMPENSATION—See EMINENT DOMAIN (3); RECEIVERS (3, 4, 10).

COMPLAINT—See CRIMINAL LAW (47).

COMPLETING APPEAL—See APPEAL AND ERROR (15, 16, 21).

COMPROMISE AND SETTLEMENT—See CONTINUANCE (2); FRAUD (2).

CONCEALED FRAUD—See LIMITATION OF ACTIONS (2).

CONCLUSIONS—See EVIDENCE (4).

CONCURRENT WRONGDOERS—See DEATH (5).

CONDITIONAL SALES CONTRACT—See MOTOR VEHICLES (6–8).

CONDITIONS—See CONTINUANCE; ELECTRICITY (5); NEGLIGENCE (14).

CONDITION SUBSEQUENT—See RAILROADS (14, 15).

CONFLICT OF JUDICIAL DECREES—See PATENTS (2).

CONJECTURE—See APPEAL AND ERROR (24); DEATH (9); TRIAL (2).

CONSENT—See CORPORATIONS (6); INSURANCE (1); JUDGMENT (8); MOTOR VEHICLES (22); SCHOOLS AND SCHOOL DISTRICTS (10, 11).

CONSEQUENTIAL DAMAGES—See EMINENT DOMAIN (3, 4).

CONSIDERATION—See APPEAL AND ERROR (23); BILLS AND NOTES (1, 2); BROKERS (10); CANCELLATION OF INSTRUMENTS (1); EXECUTORS AND ADMINISTRATORS (6); MORTGAGES (3); PATENTS; PAYMENT (1); RAILROADS (19); VENDOR AND PURCHASER (2, 3, 7).

CONSTITUTIONAL LAW—See BENEFICIAL ASSOCIATIONS (4, 7); CORPORATIONS (11); CRIMINAL LAW (4, 17, 19, 20); HABEAS CORPUS (2); JURY (1).

CONSTRUCTION OF CONTRACT—See INDEMNITY (1).

CONSTRUCTION OF DECREE—See RECEIVERS (1).

CONSTRUCTION OF GRANT—See RAILROADS (12, 13).

CONSTRUCTION OF POLICY—See INSURANCE (5).

CONSTRUCTION OF STATUTE—See SCHOOLS AND SCHOOL DISTRICTS (15); STATUTES (1, 5).

CONSTRUCTIVE FRAUD—See LIMITATION OF ACTIONS (2); MUNICIPAL CORPORATIONS (2, 4).

CONSTRUCTIVE NOTICE—See CARRIERS (6); CHATTEL MORTGAGES (3).

CONSTRUCTIVE OCCUPANCY—See MORTGAGES (4).

CONTINUANCE.

1. Where plaintiff accepted continuance on condition that, if he failed to pay defendant's costs within 10 days, judgment of nonsuit would be entered, plaintiff thereby lost right to attack condition imposed as abuse of discretion. *Richardson* v. *Michigan Bell Telephone Co.*, 444.
2. Where cause had been at issue for a year and a half, and defendant's counsel was urging trial and plaintiff's was avoiding it, it was not abuse of discretion to require, as condition for granting continuance on plaintiff's motion, that, if he failed to pay defendant's costs within 10 days, judgment of nonsuit would be entered, especially where defendant had paid plaintiff, through his attorney, substantial sum in settlement of suit. *Id.*

See CRIMINAL LAW (22–25).

CONTINUING BUSINESS—See RECEIVERS (9).

CONTINUING DISABILITY—See MASTER AND SERVANT (9, 24).

CONTRACTS.

1. In suit for money decree for damages for breach of alleged promises by defendant's agents in connection with written contract which had been fully performed by both parties, decree dismissing bill on ground that plaintiffs had failed to make case is affirmed, on appeal. *Allgeyer* v. *Chicago & North Western Ry. Co.*, 20.
2. Where time of performance is so uncertain that it may or may not arrive in distant future, contract is void for uncertainty. *Schneider* v. *Levy*, 184.
3. Written contract may be varied by subsequent parol agreement unless forbidden by statute of frauds, although parties stipulate therein that it is not to be changed except in writing. *Reid* v. *Bradstreet Co.*, 283.
4. In action for money paid to defendant to buy stocks on margin for plaintiff, where defendant paid all of money to broker and evidence fails to show promise, express or implied, on part of defendant to pay, finding of court in favor of plaintiff is not sustained. *Karsten* v. *La Huis*, 524.

See APPEAL AND ERROR (1, 23); CANCELLATION OF INSTRUMENTS (3); CARRIERS (3); DISCOVERY; EQUITY (7); EVIDENCE (8); EXECUTORS AND ADMINISTRATORS (2, 4–6); INDEMNITY; INSURANCE (1, 8); JOINT ADVENTURES; LANDLORD AND TENANT (14); MASTER AND SERVANT (1, 2, 10); MECHANICS' LIENS; MORTGAGES (12); MUNICIPAL CORPORATIONS (14); PATENTS; PAYMENT (1); SALES (1, 3); SCHOOLS AND SCHOOL DISTRICTS (3–5); SPECIFIC PERFORMANCE (2, 3); VENDOR AND PURCHASER (2).

CONTRADICTORY STATEMENTS OF WITNESS—See CRIMINAL LAW (36).

CONTRIBUTORY NEGLIGENCE—See ELECTRICITY (5); MOTOR VEHICLES (1–5, 9–12, 14, 17–21, 26, 27); NEGLIGENCE (5); RAILROADS (23, 24).

CONTROL—See MASTER AND SERVANT (12).

CONVERSION.

1. Where defendant repudiated written agreement under which it purchased oil from plaintiff, and, after delivery to it, assumed that it belonged to another, and refused to pay for it, its action in selling it and converting it into money amounted to conversion. *Nelson & Witt* v. *Texas Co.*, 66.
2. Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. *Id.*
3. One whose personal property has been converted by another is entitled to recover market price at time of conversion. *Id.*
4. At common law one might waive tort and sue in assumpsit in case tort arose out of contract relations between parties, or tort consisted of conversion of plaintiff's property into money or money's worth. *Id.*
5. Where defendant converted plaintiff's oil into money, recovery therefor under the common counts, as for money had and received, was proper. *Id.*

See EVIDENCE (10); RECEIVERS (15).

CONVEYANCE IN FEE—See RAILROADS (11).

CORPORATIONS.

1. Claim of automobile buyer that he dealt with defendant personally, and that latter was not agent of corporation because it had failed to file its annual report and had thereby forfeited its charter, *held*, without merit. *Bergeron* v. *Belisle*, 225.
2. Law respecting forfeiture of charter through corporation's failure to file report and pay fees is not self-executing, but requires judicial proceeding to declare and enforce such forfeiture. *Id.* 226.
3. Objection that bill by purchaser to rescind purchase of corporate stock does not allege purchase from defendant—contract between the parties which might be rescinded—is without merit, where effect of mass of allegation is that purchase was from defendant, although there was no express allegation to that effect. *Thompson* v. *American State Bank*, 245.
4. Allegation in bill to rescind purchase of corporate stock that stock is "practically worthless" means actually, not theoretically, worthless. *Id.*
5. Return or offer to return corporate stock, which is alleged to be worthless, is not necessary prerequisite to maintaining suit to rescind its purchase on ground of fraud. *Id.* 246.

CORPORATIONS—Continued.

6. Foreign corporation is amenable to process to enforce personal liability, in absence of consent, only if it is doing business within State in such manner and to such extent as to warrant inference that it is present there, and even if it is doing business within State process will be valid only if served on some authorized agent. *Watson-Higgins Milling Co.* v. *St. Paul Milling Co.*, 258.

7. Whether foreign corporation is amenable to process depends on facts of each case; no general rule being applicable. *Id.*

8. Foreign corporation not admitted to do business in State, and maintaining no office, warehouse, or stock of goods therein, and selling flour either directly or through broker handling flour of other manufacturers, was not doing business within State in such manner as to warrant inference that it was present, and therefore it was not amenable to process served on broker. *Id.*

9. Receiver takes corporation's property subject to all prior liens. *Fildew* v. *Stockard*, 494.

10. If corporation is insolvent, it is receiver's duty to attack all liens that are fatally defective. *Id.*

11. "Powers or privileges of corporations not possessed by individuals or partnerships," within meaning of constitutional provision providing for corporations (article 12, § 2), are, in effect, franchises from State provided to be offered by general law and accepted by individuals organizing corporation by compliance therewith. *Michigan Trust Co.* v. *Herpolsheimer*, 589.

12. Where validity of lease was recognized by corporation succeeding to property and rights of common-law trust and also by lessor's personal representatives, lease was adopted by both parties, thus rendering it valid even if previously void by reason of failure of common-law trust to file annual reports as required by statute (2 Comp. Laws 1929, § 10138). *Id.*

See APPEARANCE; BROKERS (3, 5); EQUITY (7); MUNICIPAL CORPORATIONS (3); PLEADING (4); TRUSTS (2).

COSTS.

1. Costs are not awarded to appellee who failed to file brief, although judgment of court below is affirmed, on appeal. *Scarborough* v. *Detroit Operating Co.*, 173.

2. Where, after dismissal of defendant's appeal to circuit court from judgment rendered by circuit court commissioner, plaintiff confessed error and offered to reinstate appeal, which defendant refused, and appealed to Supreme Court, said appeal being vexatious, defendant is required to pay taxable costs and additional fee of $100. *Heath* v. *Gloster*, 291.

See CONTINUANCE.

COUNCILMEN—See MUNICIPAL CORPORATIONS (9).

COUNTIES—See MUNICIPAL CORPORATIONS (1–4); STATUTES (2, 4).

COUNTY CLERK—See STATUTES (4).

COUNTY TREASURER—See STATUTES (4).

COURSE OF EMPLOYMENT—See MASTER AND SERVANT (19).

COURT OF CONCILIATION—See CRIMINAL LAW (41).

COURT ORDER—See RECEIVERS (2).

COURT PROCEEDINGS—See LIBEL AND SLANDER (4).

COURT RULES—See APPEAL AND ERROR (14–17, 21, 25, 29, 31, 32); COURTS (3); EMINENT DOMAIN (10); EXECUTORS AND ADMINISTRATORS (11); RECEIVERS (13).

COURTS.

1. Where judge, led into error in improvidently appointing receiver, was informed of error by attorneys for interested parties, he had power to summarily revoke said appointment, notwithstanding objection to any action until attorneys had formally entered appearance and given notice of their purpose of appearing. *Brandimore* v. *Dickens*, 129.
2. Judge may on his own motion correct palpable wrong, and his hand is not stayed by invoked formality tending to prolong duration of wrong. *Id.*
3. Publication of notice by court that on and after certain date circuit court rule requiring demand for jury trial would be strictly enforced was reasonable method of correcting delinquency in its enforcement (former Circuit Court Rule No. 39). *Basmajian* v. *City of Detroit*, 539.
4. Circuit court is court of record, acting through judge or judges only in suits that are properly begun by filing of appropriate pleadings; court only acting judicially. *Goetz* v. *Black*, 565.
5. Judicial power is power of court to decide and pronounce its judgment and to carry it into effect between persons and parties who bring case before it for decision. *Id.*

See ATTORNEY AND CLIENT (1); RECEIVERS (11, 12).

COVENANT OF USE—See RAILROADS (18).

COVENANTS.

1. Under 3 Comp. Laws 1929, § 13281, no covenant may be implied in any conveyance of real estate except oil and gas leases. *Quinn* v. *Pere Marquette Ry. Co.*, 145.
2. Construction and operation of miniature golf course in residential district is violation of building restriction limiting use of lots in subdivision to residential purposes. *Bohm* v. *Rogoff*, 199.

See INJUNCTION (1).

COVERTURE—See HUSBAND AND WIFE (3).

CREDIBILITY OF RES GESTÆ WITNESSES—See CRIMINAL LAW (37, 38, 40).

CREDIT BUREAU—See LIBEL AND SLANDER (1, 2).

CREDITORS—See MORTGAGES (3).

CRIMINAL LAW.

1. Under 3 Comp. Laws 1929, § 17131, defendants in criminal cases, whether cognizable by justices of peace or otherwise, have right to waive jury trial. *People* v. *Martin*, 33.
2. Indictments returned by grand jury continuing to exercise its functions beyond term in which it was organized are not void, although they are in connection with matters not under consideration by it before term was concluded. *People* v. *Kaplan*, 36.
3. Where indictment returned by grand jury was sufficient, under 3 Comp. Laws 1929, §§ 17258, 17287, to charge perjury in connection with testimony given before it, there was no error in permitting amendment thereto by prosecutor specifically charging that alleged perjured testimony was false and material. *Id.* 37.
4. Indorsing name of defendant's former attorney on indictment and calling him to witness stand, placing defendant in position where he was compelled to invoke privilege, constituted reversible error. *Id.*
5. Charging defendant with perjury in testifying before grand jury that he did not know there was house of prostitution in certain city put in issue and necessitated proving existence of house of that character actually kept or operated as such. *Id.*
6. Keeping or operating house of prostitution should be established by proof of fact, and this cannot be accomplished by proof of reputation alone. *Id.*
7. Where, in prosecution for perjury, existence of house of prostitution in certain city was issue, instruction from which jury might infer that existence of house of that character might be established by reputation alone was error. *Id.*
8. In prosecution for perjury, introduction in evidence of statements written by witness for prosecution and found on his person nearly month before trial was reversible error, where jury were not instructed as to any particular application or limited use to be made of same. *Id.*
9. In prosecution for perjury, error in permitting introduction in evidence of statements written by witness for prosecution and found on his person nearly month before trial was not alleviated by fact that defendant's counsel had opportunity to cross-examine witness. *Id.*
10. Question of separate trials, where there is more than one defendant, rests in discretion of court (3 Comp. Laws 1929, § 17298). *People* v. *Mullane*, 54.

CRIMINAL LAW—Continued.

11. Where motion for separate trial was not supported by affidavit stating facts from which court might determine whether defenses relied on were inconsistent and joint trial might result in prejudice, its denial was not abuse of discretion. *Id.*

12. Omission of court to instruct jury to disregard statement of prosecuting attorney that defense attorney had asked question solely to prejudice witness in eyes of jury, *held,* not reversible error. *Id.*

13. Charge of court that *alibi* is easy to prove and very hard to disprove, *held,* not reversible error, in view of charge as whole relating to said subject. *Id.*

14. Where, in ruling against admission of statement of one defendant as not binding on others, prosecuting attorney said "The declaration of a co-conspirator, your honor," and court responded "That is true," incident *held,* not prejudicial to defendants; no objection having been taken thereto. *Id.*

15. Where rights of accused were fully protected and requests to charge, so far as applicable to facts, were covered in charge as given, there was no error in refusing said requests. *Id.* 55.

16. Right to new trial is conferred by statute and motion therefor is appeal to sound discretion of court (3 Comp. Laws 1929, § 17355). *Id.*

17. In criminal case, motion for new trial is based on claim that defendant has not had that fair and impartial trial guaranteed to him by Constitution, or that verdict is against great weight of evidence. *Id.*

18. Where evidence in criminal case strongly supports verdict, there was no abuse of discretion in denial of motion for new trial based on affidavits relating to alleged communications with jury during trial. *Id.*

19. In prosecution for negligent homicide, it was improper for prosecutor to ask if defendant was to be witness in his own behalf, nor was answer of defendant's counsel that defendant would be witness justification or excuse for prosecutor's comment on defendant's failure to testify (Const. art. 2, § 1; 3 Comp. Laws 1929, § 14218). *People* v. *Wessel,* 72.

20. In prosecution for negligent homicide, it was reversible error for prosecutor to state to jury that defendant hadn't denied that he was under the influence of liquor, and, on objection by defendant's counsel, to state that he was not commenting on fact that defendant did not take witness stand (Const. art. 2, § 16; 3 Comp. Laws 1929, § 14218). *Id.* 73.

21. Error of prosecutor in commenting, in his argument to jury, on defendant's failure to take stand in his own behalf, was not cured by court's instruction to jury to be careful to disregard said remark entirely. *Id.*

22. Continuance of criminal case is within sound discretion of trial court. *People* v. *Raider,* 131.

23. Party claiming abuse of discretion in denial of motion for continuance has burden of proving it. *Id.*

CRIMINAL LAW—Continued.

24. To warrant finding of abuse of discretion in denial of defendant's motion for continuance, prejudice to him must be apparent or proved to have been at least probable. *Id.*

25. Arrest of witnesses charged with perjury in trial of defendant's companion in crime, who was tried separately, and resulting publicity given thereto in newspapers, would not necessarily result in prejudice to defendant, and, in absence of showing that it came to attention of jurors, there was no abuse of discretion in denying defendant's motion for continuance until perjury cases were tried. *Id.*

26. It is duty of prosecutor, with certain exceptions, to indorse on information and call as witnesses all eyewitnesses to crime of violence who are available, except when they are numerous and those not called obviously would be merely cumulative. *Id.*

27. Where witnesses had testified under oath in trial of defendant's companion in crime that they witnessed crime, prosecutor would not be excused from calling them in defendant's trial on ground that prosecutor did not know that they were witnesses. *Id.*

28. Purposes of rule requiring prosecutor to indorse on information and call as witnesses all eyewitnesses to crime are to insure disclosure of whole of *res gestæ*, to protect accused against suppression of testimony favorable to him, and to give him benefit of cross-examination. *Id.* 132.

29. Prosecutor acting in good faith and on reasonable grounds may be excused from indorsing on information and calling as witnesses those who from community of interest in crime or relationship to accused might be inclined to perjure themselves, if they deemed it necessary in his behalf, since it would be incongruous to require prosecutor to make such witnesses his own. *Id.*

30. Prosecutor may be excused from indorsing on information names of claimed eyewitnesses to crime against whom formal charges of perjury have been laid in connection therewith, when, in sound discretion of court, said charges have been laid in good faith and upon reasonable grounds, and accused nevertheless is protected against suppression of testimony by people and is not prejudiced in his fight of cross-examination or to fair trial. *Id.*

31. Where prosecutor did not support charges of perjury against claimed eyewitnesses of crime, by showing reasons therefor on oath, court would have been justified in requiring indorsement of their names on information or trial of perjury case before that of defendant, but, under circumstances, denying indorsement *held,* not abuse of discretion. *Id.*

32. Nothing in nature of testimony may be taken in absence of defendant. *Id.*

33. Denial of defendant's motion for new trial because of action of officer, in claimed absence of defendant, in pointing out to

CRIMINAL LAW—Continued.

jury, who viewed premises, certain scales referred to in testimony, *held*, not abuse of discretion, where testimony in regard to scales was not important factor in case but came only by way of impeachment of witness, it is apparent incident was not prejudicial to defendant, and his counsel was witness to incident and made no objection before verdict, evidently considering it not of sufficient importance to call to court's attention. *Id.*

34. It is duty of prosecutor to indorse on information names of all known *res gestæ* witnesses. *People* v. *Keywell*, 139.

35. New trial was properly denied on ground that name of witness should have been indorsed on information, where said witness had already testified in another trial involving same offense that he did not see it committed. *Id.*

36. Where, in prosecution for murder, witness who saw killing testified that defendant was not killer, and, when asked as to contrary statements, denied making them, trial court should have given instruction, requested at time of taking testimony, that contradictory statements, if any, would not constitute substantive evidence; but defendant was not harmed thereby at that time, because denial relegated prosecution to its proof in contradiction. *Id.*

37. Where witness who saw killing testified that defendant was not killer, prosecutor was properly allowed to question him as to contrary statements for purpose of affecting his credibility, since he was witness prosecutor was required to call. *Id.* 140.

38. Prosecution does not vouch for credibility of witness it is required to call. *Id.*

39. In prosecution for murder, where victim was killed because he tried to look into building where bootleggers had their plant, officer who afterward entered said building was properly allowed to describe what he saw there. *Id.*

40. In prosecution for murder, where *res gestæ* witness testified that he saw murderer fire shot, that it was not defendant, and that he had not told officer that he couldn't or wouldn't identify any of them, there was no error in permitting officer to testify that witness did not identify any one, and that he said he was afraid to identify anybody. *Id.*

41. In trial of person accused of felony, it is highly improper that case be tried in informal manner and that court resolve itself into one of conciliation, although in civil case, where parties consent, such procedure would be unobjectionable. *People* v. *Ward*, 170.

42. Irrespective of whether criminal case is tried with or without jury, accused is entitled to presumption of innocence until it is overcome by evidence that satisfies court beyond reasonable doubt of his guilt. *Id.*

43. Where, in prosecution for embezzlement tried without jury, trial court, by remarks, indicated that presumption of guilt in-

CRIMINAL LAW—Continued.

stead of presumption of innocence was being indulged, conviction is set aside as against great weight of evidence. *Id.* 171.

44. In prosecution for embezzlement, where defendant was charged solely with embezzlement of specific sum, representing one transaction, testimony tending to show that he misappropriated other sums relating to transactions of like character at about same time was properly admitted for its bearing on question of intent (3 Comp. Laws 1929, § 17320). *People* v. *Armstrong*, 191.

45. In criminal case, best practice for trial judge is to state in positive and unequivocal language that presumption of innocence in favor of accused prevails unless and until it is overcome by convincing evidence. *Id.*

46. In prosecution for embezzlement, charge of trial court as to presumption of innocence in favor of accused, *held*, sufficient to protect his rights, although more positive and unequivocal language might have been used. *Id.*

47. In prosecution for murder, objection that complaint, although made positively, was in fact made on information and belief, comes too late, where not raised until after examination had been had and returned and after jury had been sworn. *People* v. *Licavoli*, 229.

48. Where, on examination, there was evidence that victim had been shot and testimony of eyewitness that defendant did shooting, motion to quash information for murder, on ground that examination showed no probable cause for charging defendant with offense, was properly denied. *Id.*

49. In prosecution for murder, placing certain exhibits on table in courtroom after jury had been accepted, but before final acceptance, was not prejudicial, where they were later received in evidence without objection. *Id.*

50. Under 3 Comp. Laws 1929, § 17253, one aiding and abetting commission of crime is principal. *Id.*

51. Where prosecutor's opening statement, in prosecution for murder, was that defendant did shooting, his departure therefrom to urge conviction whether defendant did shooting or was accessory (there being evidence to sustain both theories) was not error, in absence of showing that defendant, who offered no evidence in his own behalf, was misled to his prejudice. *Id.* 230.

52. Where, in prosecution for murder, jury had been out for many hours, court's calling them into court, admonishing them relative to their duties, and directing them to continue their deliberations, *held*, not coercion. *Id.*

53. Error in refusing to require prosecution to elect between inconsistent counts cannot be said to be without prejudice because defendant was acquitted of first offense charged, where evidence admitted in support thereof was not admissible in support of second offense, of which he was convicted, and may have produced conviction. *People* v. *Lahey*, 250.

CRIMINAL LAW—Continued.

54. In prosecution for failure to stop after automobile accident involving injury or death to person (1 Comp. Laws 1929, § 4722), where there was positive and undisputed testimony that injured person screamed and called lustily, opinion evidence from medical witnesses that, because of broken leg, he could not make outcry, was properly excluded. *Id.*

55. In prosecution for robbery armed, testimony by officer making arrest that, when he brought defendant from his hiding place, someone in room said, referring to defendant as one of robbers, "That is one of them," was properly admitted as part of *res gestæ*, although it was hearsay, and person making remark was not identified. *People* v. *Todaro*, 427.

56. Statement made to arresting officer by unidentified person in presence of defendant "That is one of them," meaning that defendant was one of robbers engaged in hold-up, was properly admitted in evidence at his trial, where he made no denial at time it was made, since his acquiescence therein may be inferred therefrom. *Id.*

See HOMICIDE; INDICTMENT AND INFORMATION.

CROSS-EXAMINATION—See CRIMINAL LAW (9, 28, 30).

CROSSING—See RAILROADS (22–24).

CURING ERROR—See CRIMINAL LAW (21).

CUSTODY OF CHILDREN—See DIVORCE (4, 5).

DAMAGES.

Where, through delay in bringing case to trial, amount due with interest exceeded *ad damnum* clause of declaration, plaintiff is entitled to recover interest to date as matter of right, although amendment of said clause was properly denied because of said delay. *Thomson Spot Welder Co.* v. *Oldberg Manfg. Co.*, 447.

See APPEAL AND ERROR (25); CONVERSION (3); DEATH (10, 11); EMINENT DOMAIN (3, 4, 6–10); INDEMNITY (3); LANDLORD AND TENANT (11–13); LIBEL AND SLANDER (3); SALES (3); TRIAL (2).

DANGEROUS PLACE TO WORK—See MASTER AND SERVANT (26).

DEATH.

1. Whether cause of action arises under death act (3 Comp. Laws 1929, §§ 14061, 14062) rather than under survival act (section 14040), depends on whether active cause of death continued to operate directly upon injured person until life was extinct. *Micks* v. *Norton*, 308.

2. Whether death of child struck by automobile was instantaneous was properly submitted to jury, where witness who arrived before doctor testified that child was alive when she arrived, although doctor testified that child was dead when he arrived, and, in answer to hypothetical question, said death was instantaneous. *Id.*

DEATH—Continued.

3. In action for death, in order to recover, it is necessary for plaintiff to show that defendant's negligence was proximate cause of death. *Frye* v. *City of Detroit*, 466.
4. In action for death, where decedent was struck by automobile shortly before being struck by street car, it is necessary, in order to recover for negligence of motorman, that proof be submitted from which jury may draw reasonable inference that death would not have occurred but for negligence of motorman. *Id.*
5. Under circumstances, automobile driver and motorman were independent tortfeasors rather than joint tortfeasors, and their acts did not constitute them concurrent wrongdoers. *Id.*
6. Where one party is negligent, second party also guilty of intervening negligent act is not liable for death unless intervening act caused it. *Id.* 467.
7. Parties may not be held jointly liable where there is no community of wrongdoing. *Id.*
8. In action for death, it is duty of trial court to determine whether evidence presents question of fact for jury. *Id.*
9. Where plaintiff's decedent was struck by automobile, and shortly after was struck by street car, so that cause of death was matter of conjecture, owner of street car could not be held liable, and trial court properly directed verdict in its favor. *Id.*
10. In administrator's action under survival act for wrongful death of wife, testimony as to value of her services as housekeeper should not have been considered in assessing damages, since husband alone may recover therefor. *Collins* v. *Hull*, 507.
11. In action under survival act, judgment for $4,000 for death of married woman 60 years of age, was justified, where she lived for four days after accident, during which time she was conscious and suffered very great pain. *Id.*

See APPEAL AND ERROR (24); HUSBAND AND WIFE (6, 7); LANDLORD AND TENANT (4); MASTER AND SERVANT (5, 17, 21, 22); MOTOR VEHICLES (1, 3, 22, 28–30); SEAMEN (1, 3); STREET RAILWAYS; TRIAL (3); WILLS (1); WITNESSES.

DEATH ACT—See DEATH (1).

DEBASING FEE NOT FAVORED BY LAW—See RAILROADS (12).

DEBTOR AND CREDITOR—See CHATTEL MORTGAGES (1).

DECLARATION—See LANDLORD AND TENANT (15).

DECLARATION OF PURPOSE—See RAILROADS (13).

DEDICATION—See RAILROADS (2).

DEDUCTIONS—See EVIDENCE (3).

DEEDS.

1. As against innocent purchasers for value, grantors, who received in full agreed purchase price and are still claiming benefit of related contracts, are precluded from claiming that deeds executed by them are void because executed in blank. *Kurbel* v. *O'Hair*, 680.
2. Knowledge by one of grantees that deeds were executed in blank, while a circumstance which might well have challenged his attention to scope of authority of grantors' agent, who perpetrated fraud, yet, standing alone, under circumstances of case, did not necessarily foreclose possibility of grantees being innocent purchasers. *Id.*

See ALTERATION OF INSTRUMENTS; CANCELLATION OF INSTRUMENTS (4); ESTOPPEL (3); MORTGAGES (12, 16, 17); MUNICIPAL CORPORATIONS (5); VENDOR AND PURCHASER (8, 12).

DE FACTO GRAND JURY—See CRIMINAL LAW (2).

DEFAULT—See VENDOR AND PURCHASER (1).

DEFECTIVE LIENS—See CORPORATIONS (10).

DEFECTIVE RETURNS—See JUSTICES OF PEACE (2); MANDAMUS.

DEFECTS IN PLEADING—See APPEARANCE.

DEFENSES—See ASSIGNMENTS (1); JUDGMENT (7).

DEFICIENCY—See CHATTEL MORTGAGES (2).

DELAY—See DAMAGES; HABEAS CORPUS (4); MANDAMUS; SALES (3).

DELINQUENT TAX SALE—See TAXATION.

DELIVERY—See BILLS AND NOTES (5); BROKERS (1, 12, 14); CARRIERS (4, 5); CONVERSION (1); SALES (1); WILLS (2).

DEMAND—See RECEIVERS (15).

DEMAND FOR JURY—See COURTS (3); JURY (4, 5).

DEPENDENTS—See MASTER AND SERVANT (17, 22, 23).

DEPOSITIONS—See WITNESSES (1).

DEPOSITS IN COURT.

Where invalid husband and his brother, without wife's knowledge, withdrew money deposited in bank in joint names of husband and wife, brother, after husband's death, was properly required, at suit of wife, to pay money into court. *Ridgley* v. *Ridgley*, 359.

DEPOSIT WITH BID—See INTERPLEADER; MUNICIPAL CORPORATIONS (14).

DESCRIPTION—See BROKERS (8); TAXATION.

DETACHMENT—See BILLS AND NOTES (5).

DETERMINABLE FEE—See RAILROADS (7, 14).

DILIGENCE IN DISCOVERING FRAUD—See FRAUD (3).

DIRECT ATTACK—See PROCESS.

DIRECTED VERDICT—See APPEAL AND ERROR (5, 8, 24, 28); DEATH (9); LIBEL AND SLANDER (7); MALICIOUS PROSECUTION; MOTOR VEHICLES (2, 5, 12); SALES (2); THEATRES AND SHOWS.

DIRECTORS—See MUNICIPAL CORPORATIONS (3).

DISABILITY—See MASTER AND SERVANT (11).

DISCHARGE—See MORTGAGES (9, 11); SCHOOLS AND SCHOOL DISTRICTS (14).

DISCLOSURE—See GARNISHMENT (2, 5, 7).

DISCOUNT—See BILLS AND NOTES (5).

DISCOVERED NEGLIGENCE—See NEGLIGENCE (6).

DISCOVERY.

1. Order permitting discovery of defendant's books of account for purpose of preparing for trial will not be granted unless it is affirmatively shown and proven to satisfaction of court that the information sought cannot be obtained at trial of case by subpœna *duces tecum*, in absence of trust or *quasi*-trust relationship between parties, or where contract provides for inspection of books and records by adverse party. *Gemsa* v. *Dorner*, 195.
2. In action for amounts claimed to be due under contract engaging plaintiff to assist defendant in selling and licensing manufacturers the right to use certain patents, order for discovery in advance of trial was properly denied, in absence of showing that information sought could not be obtained at trial by subpœna *duces tecum*. *Id.*

DISCRETION OF COURT—See APPEAL AND ERROR (16); CRIMINAL LAW (10, 16, 22, 30); JURY (4).

DISCRIMINATION—See CARRIERS (2, 4).

DISHES—See LANDLORD AND TENANT (11).

DISMISSAL—See APPEAL AND ERROR (16, 19, 21); CANCELLATION OF INSTRUMENTS (2); DIVORCE (8, 9); EQUITY (4); JUSTICES OF PEACE (2); MANDAMUS.

DISQUALIFIED JURORS—See JURY (2).

DITCH—See INJUNCTION (2); WATERS AND WATERCOURSES.

DIVISION OF PROPERTY—See DIVORCE (5).

DIVORCE.

1. In wife's suit for divorce, decree awarding her half interest in two-family flat, valued at $4,000, is modified, on appeal, under circumstances of case, and she is awarded $500 as alimony in gross and in lieu of dower. *Young* v. *Young*, 223.
2. In awarding permanent alimony court should take into consideration past relations and conduct of both parties, health and age of each, whether either is responsible for support of others, amount and source of husband's property, their station in life and manner of living, and, especially in view of all the testimony in case, what sum will leave financial condition of wife during her life not inferior to what it would be if husband's conduct had been correct and marriage undissolved. *Rice* v. *Rice*, 287.
3. In granting divorce to wife for husband's misconduct, award of half interest in $10,000 equity in home incumbered for $10,000, and $25 a week for three years as permanent alimony, *held*, not just and reasonable, in view of fact that he is awarded business from which he derives yearly income of $10,000 to $12,000, and decree is modified to award her entire equity in home and $30 per week for five years. *Id.* 288.
4. Where record shows that wife is not proper person to have custody of children, divorce decree awarding their custody to her is reversed, on appeal, and custody awarded to husband. *Panasewich* v. *Panasewich*, 356.
5. Where divorce decree awarding custody of minor children to wife is reversed, on appeal, and custody awarded to husband, allowance to him, on division of their property which is in wife's name, is increased accordingly. *Id.*
6. Husband's petty gambling, which is not of recent origin and which does not seriously affect family's pecuniary resources, although it may be reprehensible, is not in and of itself cause for divorce. *Frielink* v. *Frielink*, 472.
7. It is not extreme cruelty for father to go fishing and take his 13-year old son along, even on Sundays and school days. *Id.*
8. Decree dismissing wife's suit for divorce on ground of extreme cruelty is affirmed, on appeal. *Id.*
9. Decree granting separate maintenance to wife, and dismissing husband's cross-bill for absolute divorce, *held*, sustained by record. *Yokubausky* v. *Yokubausky*, 604.

DOING BUSINESS WITHIN STATE—See CORPORATIONS (6, 8).

DONATION OF LAND—See RAILROADS (2, 3, 6).

DOWER—See DIVORCE (1).

"DUMMY" CORPORATION—See GARNISHMENT (4).

DURESS—See MORTGAGES (1).

EASEMENTS—See RAILROADS (6, 7, 9–11, 20).

ELECTION OF COUNTS—See CRIMINAL LAW (53); INDICTMENT AND INFORMATION.

ELECTRICITY.

1. In action by truck driver against power company for injuries received when his load was caught by electric wire stretched across highway, negligence of defendant in originally placing wires below statutory height should not have been submitted to jury, where there was no evidence from which said fact could be inferred (1 Comp. Laws 1929, § 4056). *Eaton* v. *Consumers Power Co.*, 549.
2. Power company would be guilty of actionable negligence if wire causing accident sagged below statutory height because of its carelessness in originally fastening it, or if its fastening became loose and could have been discovered by reasonable inspection in time to avert injury. *Id.*
3. As bearing on jury's right to infer that wire would not have sagged below statutory height except for defendant's negligence in fastening it and maintaining it by proper inspection, jury would have right to consider that evidence showed no other possible cause. *Id.*
4. Circumstances of instant case *held*, sufficient to raise presumption of negligence on part of defendant, and make *prima facie* case for plaintiff. *Id.* 550.
5. Truck driver injured by electric wire stretched across highway was not guilty of contributory negligence in failing to examine wire before passing under, since he had right to assume that defendant would properly erect its wires and maintain them in safe condition at statutory height (1 Comp. Laws 1929, § 4056). *Id.*
6. In said action, admission of testimony by plaintiff that wire replaced by defendant after accident was one foot lower than statutory height was error. *Id.*
7. Failure to erect electric wires stretched across highway at statutory height is negligence, but failure to maintain them at said height may or may not be negligence. *Id.*
8. If electric wires properly erected across highway by power company become lower than height required by statute, company is not negligent unless its acts caused them to become so, or unless it had actual knowledge of their condition or by proper and reasonable inspection could have discovered it in time to avert injury; company not being insurer under statute (1 Comp. Laws 1929, § 4056). *Id.*

EMBEZZLEMENT.

In prosecution for embezzlement, defendant's claim that evidence was insufficient to take to jury question of his guilt, *held*, without merit. *People* v. *Armstrong*, 191.

See CRIMINAL LAW (43, 44, 46).

EMERGENCY—See NEGLIGENCE (8).

EMINENT DOMAIN.

1. When land is taken by eminent domain it becomes absolutely the property of the State or other public authority that has condemned it, and former owner retains no such rights in it as to prevent it from being used for general public purposes. *In re State Highway Commissioner*, 165.

2. Where State condemned land in village for purpose of widening State highway, village has right to use it for public improvements and to adopt ordinances regulating traffic thereon and forbidding its use by curb gasoline stations; former owner losing all legal right to use it as private property. *Id.*

3. Where only part of parcel of land is taken in condemnation proceedings, award should compensate for actual portion taken plus cost of altering building and all consequential damages on account of alteration. *Id.*

4. Where land used as outer drive by gasoline station owner was taken by State by condemnation, necessitating removal back of oil station building, and award by commissioners was only slightly more than value of land taken, and apparently did not take into account cost of moving building and consequential damages, award is set aside and remanded for reassessment of damages. *Id.*

5. On certiorari to review award in condemnation proceedings, Supreme Court may consider only such errors as are specified in application for writ. *In re Dillman*, 654.

6. Where entire tract of land through which proposed right of way sought to be condemned would diagonally pass was owned by one person, there was no error in commissioners' treating it as one parcel, in awarding damages, although counsel for State had presented map showing it divided into parcels numbered separately. *Id.*

7. In condemnation proceedings, witnesses who testified to facts showing that they were familiar with value of land in vicinity, were properly allowed to testify as to value of land taken. *Id.*

8. That judgment of Supreme Court, if called upon to make awards for lands condemned, might differ from awards of commissioners, is no justification for setting aside said awards. *Id.*

9. Awards in condemnation proceedings, which are within range of evidence and which were confirmed by probate judge over objection that they were excessive, are conclusive, on review, in absence of claim of fraud or prejudice. *Id.*

10. On certiorari to review award in condemnation proceedings, Supreme Court would not be justified, under Michigan Court Rule No. 79, in vacating order of confirmation and remanding case to probate court with directions to permit additional evidence to be there taken and to permit review of court's action after such evidence shall have been submitted to it, on theory that it is permitting amendment of record under said rule. *Id.*

See RAILROADS (2, 5, 6).

ENTRY—See LANDLORD AND TENANT (7, 9).

EQUIPMENT—See LANDLORD AND TENANT (11, 13).

EQUITY.

1. Bondholder who intervened in suit to foreclose mechanic's lien on apartment house, incident to which receiver was appointed, has no legal or equitable grounds on which to base objection to action of circuit court in discharging receiver, where intervener's bonds have been called in for cancellation by trustee under bond issue, on payment of stipulated price, as provided for therein. *Pittelkow Heating & Engineering Co.* v. *Detroit Estates Corp.*, 116.
2. Bondholder intervening in suit claiming to be acting not only on his own behalf but on behalf of other undisclosed bondholders is treated as acting on his own behalf only. *Id.*
3. Bondholders who did not enter appearance in suit and whose identity is undisclosed may not be granted relief, where no relief was granted to another bondholder appearing in his own behalf and claiming to also appear for them. *Id.*
4. Where plaintiff was not entitled to any equitable relief prayed for, and only relief possible under general prayer of bill is damages, which are recoverable, if at all, in action at law, and plaintiff declined offer to transfer cause to law side of court, bill was properly dismissed. *Hall* v. *Detroit Estates Corp.*, 121; *Skelcey* v. *Detroit Estates Corp.*, 125.
5. Court of equity will not construe or enforce restriction on use of real estate to work injustice. *Quinn* v. *Pere Marquette Ry. Co.*, 145.
6. On motion to dismiss, material allegations of bill are taken as true. *Thompson* v. *American State Bank*, 245.
7. Motion to amend bill seeking rescission, on ground of fraud, of contract for sale of plaintiff's corporate stock, was properly denied, where amendment sought to bring into case entirely new issue, involving accounting on behalf of plaintiff and others who were stockholders of corporation eight years previously. *Backus* v. *Kirsch*, 368, 371.
8. Court of equity has jurisdiction in cases of fraud where property interests are involved, and where, on rescission, it is sought to impress lien against *res* in question on account of said fraud. *Holbrook* v. *Blick*, 396.

See BENEFICIAL ASSOCIATIONS (8); BROKERS (11); CANCELLATION OF INSTRUMENTS (2–4); CONTRACTS (1); INTERPLEADER; LIMITATION OF ACTIONS; MORTGAGES (5); RAILROADS (17); SPECIFIC PERFORMANCE (1, 2); VENDOR AND PURCHASER (6, 10–12).

ERRORS AGAINST NONAPPEALING PARTY NOT CONSIDERED—See APPEAL AND ERROR (3).

ESTATES BY ENTIRETIES—See HUSBAND AND WIFE (6).

ESTOPPEL.

1. Waiver is intentional relinquishment of known right. *Weller* v. *Manufacturer's Life Ins. Co.*, 532.
2. Although title to real estate may not be created by estoppel, party may estop himself, after arrangements have been fully executed, from asserting that title he by his own acts has created or aided in creating is not true title. *Spitzley* v. *Holmes*, 559.
3. Where owners gave deed and took back fictitious land contract, so that, when contract was discounted, they obtained more than could have been had through second mortgage, they are estopped from claiming that land contract constitutes second mortgage tainted with usury. *Id.*
4. One may not take inconsistent positions in trial of case. *Billingsley* v. *Gulick*, 606.
5. Where admission is made in first trial, admitting party, on second trial, is estopped from taking position inconsistent therewith. *Id.*

See ASSIGNMENTS (2); ATTACHMENT (1); CONTINUANCE (1); DEEDS (1); FRAUDS, STATUTE OF (2, 4); GARNISHMENT (4); INSURANCE (11); MUNICIPAL CORPORATIONS (11); RECEIVERS (5); VENDOR AND PURCHASER (4); WITNESSES (2).

EVICTION BY COURT DECISION—See JUDGMENT (7); PATENTS (1).

EVIDENCE.

1. Failure to produce evidence within party's control raises presumption that, if produced, it would operate against him; every intendment being in favor of opposite party. *In re Petition of Upjohn*, 181.
2. Opinion evidence from medical witnesses that injured boy, having broken leg, could not make outcry, has no tendency to make issue as against positive and undisputed testimony of number of witnesses that he did scream and call lustily. *People* v. *Lahey*, 250.
3. Where court or jury can make their own deductions, they should not be made by witness. *Zuidema* v. *Bekkering*, 327.
4. In action for damages caused by automobile collision at intersection, it was not reversible error to permit defendant to testify, in answer to question by his counsel, that there was nothing he could do to avert accident, where he had already testified to facts on which his conclusion was based. *Id.*
5. Although receipt in full of account does not establish agreement on part of creditor to accept as absolute payment at his own risk note of third person for debt, parol evidence is admissible to show that note was accepted in absolute payment. *Smith* v. *Baubie*, 335.
6. That insured had intoxicating liquor in house in which he was living at time of trial would have no probative force in establishing that he had liquor in insured building at time it

EVIDENCE—Continued.

was burned, about two months previously. *Evenson* v. *State Mutual Rodded Fire Ins. Co. of Michigan*, 372.

7. Since admission in open court is binding on party making it, and court may act on it without other proof relating thereto, such admission is equally binding and may be acted on when made in pleadings which rules require to be filed. *Detroit Trust Co.* v. *Smith*, 376.

8. Statements of foster mother that she intended to leave part of her property to plaintiff was properly held to be merely expressions of intention and not to evidence making of contract to that effect. *Sieg* v. *Sendelbach*, 456.

9. That defendant had knowledge, on April 12th, that water heater was not paid for, would not raise presumption that he knew, on May 20th, that it was not paid for, especially in view of plaintiff's express representation, on latter date, that property in which heater was installed was free from all liens and incumbrances. *Maxson* v. *Kohler*, 520.

10. In customer's action against broker's receivers for conversion of shares of stock, broker's securities ledger and subsequent audit of broker's affairs by receivers were not admissible in evidence; being self-serving as to defendants and not binding on plaintiff. *Hobart* v. *Vanden Bosch*, 687.

See APPEAL AND ERROR (8, 17, 18, 22–24, 26, 28, 33, 34); ATTACHMENT (3); BANKS AND BANKING (3); BILLS AND NOTES (6); CONTRACTS (4); CRIMINAL LAW (3, 6, 8, 9, 17, 18, 28, 30, 32, 33, 36, 39, 40, 42–45, 48, 49, 51, 53–56); DEATH (4, 8–10); DIVORCE (2); ELECTRICITY (1, 3, 6); EMBEZZLEMENT; EMINENT DOMAIN (7, 9, 10); EXECUTORS AND ADMINISTRATORS (3, 5, 7); FRAUD (1); HOMICIDE; INDEMNITY (3); INDICTMENT AND INFORMATION (1); JUDGMENT (2, 8); MALICIOUS PROSECUTION; MASTER AND SERVANT (6, 8, 10, 11, 25); MOTOR VEHICLES (2, 3, 14, 18, 22); MUNICIPAL CORPORATIONS (5); NEGLIGENCE (12); NEW TRIAL; PARTNERSHIP (2); RAILROADS (24); RECEIVERS (7); SALES (2, 3); SCHOOLS AND SCHOOL DISTRICTS (2); SPECIFIC PERFORMANCE (3); STREET RAILWAYS; THEATRES AND SHOWS; TRIAL; WATERS AND WATERCOURSES; WILLS (2); WITNESSES.

EXAMINATION OF JURORS BY JUDGE—See JURY (3).

EXCESSIVE SPEED—See MOTOR VEHICLES (25–27).

EXCESSIVE VERDICT—See APPEAL AND ERROR (10, 11); EMINENT DOMAIN (8, 9); LIBEL AND SLANDER (3); TRIAL (1).

EXCHANGE FOR STOCK IN MERGED CORPORATION—See BROKERS (3).

EXECUTION IN BLANK—See DEEDS.

EXECUTORS AND ADMINISTRATORS.

1. Presumption that, because of relation of parties, services rendered to deceased by plaintiff were gratuitous, may be rebutted by facts and circumstances attending performance of services. *In re Weber's Estate*, 61.
2. Extent and character of services and circumstances under which they were rendered are important in determining whether services were gratuitous. *Id.*
3. That parties were not members of same household weakens presumption that, because of relation of parties, services rendered were gratuitous, and gives support to other evidence tending to overcome presumption. *Id.*
4. Where services rendered to incompetent person by plaintiff were at instance or order of attending physician, were extraordinary and arduous, and were rendered in plaintiff's own home to one able to pay, plaintiff is entitled to recover therefor, as for necessaries furnished on promise implied by law, although furnished to one who stood in *loco parentis* to her. *Id.*
5. In claim against estate of deceased wife, based on her oral contract to pay plaintiffs, as attorneys, 40 per cent. of any saving effected in reduction of Federal taxes claimed by the government, one-half of which was payable by her and the other one-half by her deceased husband's estate, of which she was sole beneficiary, evidence *held*, sufficient to establish said contract. *Torbert* v. *Smith's Estate*, 93.
6. Under such circumstances, wife could bind herself to pay the whole charge for such services, there was ample consideration, and claim is allowed in full amount against her estate. *Id.*
7. Order of allowance or judgment on claim against executors in foreign State is no evidence of debt against ancillary administrator in this State. *Green* v. *Martin's Estate*, 529.
8. Burden is on judgment creditor to prove balance due it on judgment against estate, and administrator should not have attempted to do so. *In re Parkinson's Estate*, 638.
9. Probate court properly disallowed $1,250 item in administrator's account for attorney's fees in suit to have certain property decreed to belong to estate, on proof as appears in record. *Id.*
10. Item allowed in circuit court to administrator for extraordinary services is set aside, on appeal; amount to be determined at hearing to be hereafter had. *Id.*
11. There was no intention, on adoption of new rules providing for appeal from probate court (Michigan Court Rule No. 55 *et seq.*), to provide that hearing in such case should be other than *de novo*. *Id.*

See HUSBAND AND WIFE (5); LANDLORD AND TENANT (5).

EXHIBITS—See CRIMINAL LAW (49).

EXPRESS PROMISE—See CONTRACTS (4).

EXPRESS TRUSTS—See TRUSTS (1).

EXTENSION OF TIME—See VENDOR AND PURCHASER (2, 3).

EXTINGUISHED MORTGAGE—See MORTGAGES (17).

EXTRAORDINARY SERVICES—See EXECUTORS AND ADMINISTRATORS (10).

EXTREME CRUELTY—See DIVORCE (7, 8).

EYES—See MASTER AND SERVANT (9).

EYEWITNESSES—See CRIMINAL LAW (26, 28, 30, 31, 36, 37); MOTOR VEHICLES (3).

FAILURE TO EXECUTE LEASE—See LANDLORD AND TENANT (10).

FAILURE TO LOOK AGAIN AFTER STOPPING—See MOTOR VEHICLES (20, 21).

FAIR REPORTS—See LIBEL AND SLANDER (4, 5, 9).

FALLING OVERBOARD—See SEAMEN (3).

FALSE PRETENSES—See MALICIOUS PROSECUTION.

FALSE STATEMENTS—See LIBEL AND SLANDER (2).

FEDERAL CIRCUIT COURTS OF APPEALS—See PATENTS (2).

FEDERAL EMPLOYERS' LIABILITY ACT—See MASTER AND SERVANT (25); TRIAL (1).

FEDERAL MERCHANT MARINE ACT—See SEAMEN (1, 3).

FEE ABSOLUTE—See RAILROADS (7, 11).

FEES—See CORPORATIONS (2).

FIDUCIARY RELATIONS—See MUNICIPAL CORPORATIONS (1, 3).

FINAL ACCOUNT—See RECEIVERS (2, 3, 7, 8).

FINDING OF COURT—See APPEAL AND ERROR (22); CONTRACTS (4); INSURANCE (10); MASTER AND SERVANT (10, 25); PARTNERSHIP (2); PRINCIPAL AND AGENT; STREET RAILWAYS; WATERS AND WATERCOURSES.

FINDING OF DEPARTMENT—See MASTER AND SERVANT (6, 11).

FINDINGS OF FACT—See APPEAL AND ERROR (2, 26, 29).

FINDINGS OF LAW—See APPEAL AND ERROR (2).

FINGERS—See THEATRES AND SHOWS.

FIRE INSURANCE—See APPEAL AND ERROR (26); INSURANCE (5, 8); VENDOR AND PURCHASER (5, 6, 8).

FIRES.

City ordinance against fires, including bonfires, under police power, has reference to acts with possible effects reaching beyond limits of situs of fire, but has no application to persons who interfere with fire or intrude or enter premises as licensees. *Peck* v. *Adomaitis*, 207.

See NEGLIGENCE (1, 3).

FIRST CLASS SCHOOL DISTRICTS—See SCHOOLS AND SCHOOL DISTRICTS (12).

FIRST DEGREE MURDER—See HOMICIDE (2).

FISHING—See DIVORCE (7).

FLAGMEN—See RAILROADS (23, 24).

FLOUR—See CORPORATIONS (8).

FOG—See MOTOR VEHICLES (13, 15).

FORECLOSURE—See CHATTEL MORTGAGES (2); MORTGAGES (1, 2, 4–10).

FOREIGN CORPORATIONS—See CORPORATIONS (6–8).

FORFEITURE—See CORPORATIONS (1, 2); INSURANCE (6, 7); VENDOR AND PURCHASER (1, 4).

FOSTER MOTHER—See EVIDENCE (8); SPECIFIC PERFORMANCE (3).

FRACTIONAL SCHOOL DISTRICTS—See SCHOOLS AND SCHOOL DISTRICTS (6–9).

FRACTURED SKULL—See MASTER AND SERVANT (19).

FRANCHISE—See TRUSTS (2).

FRATERNAL ASSOCIATIONS—See BENEFICIAL ASSOCIATIONS.

FRAUD.

1. Nonperformance of promise is neither fraud nor evidence of fraud. *Leib* v. *Bostwick*, 277.
2. Where plaintiffs, on discovering that they had been defrauded in purchasing one-half of vendee's interest in land contract, promptly notified defendants, brief delay caused by plaintiffs' attempts at settlement, which in no way injured defendants, did not amount to waiver of right to rescind, in absence of acts on plaintiffs' part indicating intent to waive. *Holbrook* v. *Blick*, 396.
3. Defrauded party is not obligated to party who defrauds him to exercise diligence in discovering fraud. *Hathaway* v. *Hudson*, 694.

See ATTACHMENT (2, 3); BANKS AND BANKING (1); BILLS AND NOTES (1, 6); CANCELLATION OF INSTRUMENTS (4); CORPORATIONS (5); DEEDS (2); EMINENT DOMAIN (9); EQUITY (7, 8); LIMITATION OF ACTIONS; MORTGAGES (1); MUNICIPAL CORPORATIONS (3); SPECIFIC PERFORMANCE (1); VENDOR AND PURCHASER (7, 9–12).

FRAUDS, STATUTE OF.

1. Oral modification of 10-year lease, by allowing lessees to occupy more space than lease calls for, thus releasing lessor from necessity of making expensive alterations in premises, is not void under statute of frauds (3 Comp. Laws 1929, § 13411), but is valid as oral lease from year to year. *Zannis* v. *Freud Hotel Co.*, 578.
2. Lessees accepting benefits of oral modification of 10-year lease are estopped from claiming modification was void under statute of frauds (3 Comp. Laws 1929, § 13411). *Id.*
3. Oral modification of 10-year lease comes within statute of frauds (3 Comp. Laws 1929, § 13411). *Id.*
4. While agreement required by statute of frauds to be in writing may not be substantially altered by verbal agreement, parties may not accept benefits from such alteration and then claim that transaction is void. *Id.*

See BROKERS (8–10); CONTRACTS (3); ESTOPPEL (2).

FRAUDULENT CREDIT ON CONTRACT—See VENDOR AND PURCHASER (7).

FUNERAL EXPENSES—See HUSBAND AND WIFE (4, 5).

FURNACE—See PAYMENT (3).

FURTHER COMPENSATION—See MASTER AND SERVANT (11, 24).

GAMBLING—See DIVORCE (6).

GARNISHMENT.

1. Certificates of stock in corporation in hands of third party are subject to garnishment. *Industrial Co.* v. *Winter*, 474.
2. Disclosure by garnishee defendant that fund in his hands is claimed by third party does not in and of itself defeat jurisdiction. *Id.*
3. Where affidavit for writ of garnishment alleges that principal defendant is nonresident, it is permissible to file summons the day it issues (3 Comp. Laws 1929, § 14885). *Id.*
4. Corporation which was created by principal defendant in order to color his personal transactions with corporate protection is estopped from claiming, in garnishment proceedings, that stock transferred to it by him and pledged as collateral to his personal loan belongs to it. *Id.* 475.
5. Where garnishee defendant, by disclosure, denies facts contained in affidavit for writ, statutory issue must be framed for trial of question of garnishee's liability. *Hoffman* v. *Professional Underwriters*, 622.
6. Garnishment procedure is not modified by statute in relation to summary judgments (3 Comp. Laws 1929, §§ 14867, 14868). *Id.*
7. Where garnishee defendant, by disclosure, denied liability, plaintiff's motion for summary judgment was properly denied. *Id.*

See APPEARANCE; INSURANCE (3).

GASOLINE STATIONS—See EMINENT DOMAIN (2, 4).

GENERAL APPEARANCE—See APPEARANCE; ATTACHMENT (1); CIRCUIT COURT COMMISSIONERS.

GENERAL LEGISLATION—See STATUTES (2, 3).

GIFTS—See CANCELLATION OF INSTRUMENTS (1); MORTGAGES (3).

GOLF CLUB—See BILLS AND NOTES (4, 5).

GOLF COURSE—See INJUNCTION (1).

GOOD-FAITH PURCHASERS—See CANCELLATION OF INSTRUMENTS (4); DEEDS.

GOVERNMENTAL AGENCY—See SCHOOLS AND SCHOOL DISTRICTS (12).

GRACE PERIOD—See INSURANCE (8, 10, 12).

GRAND JURY—See CRIMINAL LAW (2, 3, 5).

GRANT TO RAILROAD—See RAILROADS (3, 8, 10–16, 18, 19).

GRATUITOUS SERVICES—See EXECUTORS AND ADMINISTRATORS (1–3).

GRAVEL TRUCKS—See MOTOR VEHICLES (13–15).

GREAT WEIGHT OF EVIDENCE—See CRIMINAL LAW (17, 43); HOMICIDE; NEW TRIAL.

GROSS NEGLIGENCE—See MOTOR VEHICLES (23, 29); NEGLIGENCE (6).

GUEST PASSENGER—See MOTOR VEHICLES (23, 28–30).

"GUEST" STATUTE—See MOTOR VEHICLES (23); NEGLIGENCE (6, 7).

GYMNASIUM EQUIPMENT—See MASTER AND SERVANT (12, 13, 17).

HABEAS CORPUS.

1. It is necessary to file petition for writ of *habeas corpus*, and thus have suit properly begun, as condition precedent to any further proceedings in or on account of suit, such as action to recover statutory penalty for wrongful refusal of writ (3 Comp. Laws 1929, §§ 15208, 15216). *Goetz* v. *Black*, 564.
2. The right to writ of *habeas corpus* is fundamental to personal liberty (Const., art. 2, § 11). *Id.*
3. While judge may, of his own volition, issue writ of *habeas corpus* without petition, nevertheless when petition is filed it must be in proper legal form (3 Comp. Laws 1929, §§ 15210, 15215). *Id.*
4. Writ of *habeas corpus* proceeding is suit, and only method of bringing such suit is by filing petition for *habeas corpus* with court without any substantial delay after its grant or refusal, and unless petitioner properly begins suit he abandons proceeding. *Id.*

HABEAS CORPUS—Continued.

5. If circuit judge arbitrarily refused to examine petition for writ of *habeas corpus,* he is not subject to statutory penalty (3 Comp. Laws 1929, § 15216), unless it appears by record made at time of "suit" that the very paper submitted to him in form and substance commanded issuance of writ (3 Comp. Laws 1929, § 13941). *Id.* 565.
6. Petitioner for writ of *habeas corpus* who neglected or refused to file petition, on refusal of circuit judge to issue writ, abandoned proceedings, no "suit" was ever begun, and therefore he may not maintain action against judge for statutory penalty (3 Comp. Laws 1929, § 15216). *Id.*

HARMLESS ERROR—See APPEAL AND ERROR (10).

HEARING—See EXECUTORS AND ADMINISTRATORS (11); MASTER AND SERVANT (7, 8); MUNICIPAL CORPORATIONS (8); RECEIVERS (2); SCHOOLS AND SCHOOL DISTRICTS (14).

HEARSAY—See CRIMINAL LAW (8, 47, 55, 56).

HIDDEN DANGER—See MASTER AND SERVANT (26); SEAMEN (3).

HIGHWAYS AND STREETS—See APPEAL AND ERROR (31); EMINENT DOMAIN (2); MOTOR VEHICLES (4, 9–13, 15, 18–21, 23, 24, 27); MUNICIPAL CORPORATIONS (5, 11–13).

HIT AND RUN DRIVER—See CRIMINAL LAW (54); INDICTMENT AND INFORMATION (2).

HOLDER IN DUE COURSE—See BILLS AND NOTES (3).

HOLDING ONESELF OUT AS PARTNER—See PARTNERSHIP (2).

HOLDING OVER—See LANDLORD AND TENANT (1, 4).

HOMICIDE.

1. In prosecution for murder, verdict of guilty, which was well within evidence, cannot be said to be contrary to great weight thereof, although testimony was contradictory. *People* v. *Keywell,* 139.
2. In prosecution for murder, verdict of guilty in first degree *held,* not against great weight of evidence, although testimony was sharply conflicting. *People* v. *Licavoli,* 230.

See CRIMINAL LAW (36, 37, 39, 40, 47–49, 51, 52).

HORSE-DRAWN VEHICLES—See MOTOR VEHICLES (10).

HOUSE OF PROSTITUTION—See CRIMINAL LAW (5–7).

HUMANITARIAN DOCTRINE—See NEGLIGENCE (6).

HUSBAND AND WIFE.

1. Married woman may give valid and binding mortgage on her individual property to secure payment of her husband's debt. *Peoples Wayne Co. Bank* v. *Wesolowska,* 45.

HUSBAND AND WIFE—Continued.

2. Validity of mortgage given by wife on her individual property to secure payment of her husband's debt was not impaired by fact that mortgagee knew purpose for which it was given. *Id.*
3. Whether mortgage executed by wife on her individual property was given for her personal debt or that of her husband she cannot escape liability on ground of coverture. *Id.*
4. Under common law, husband was liable for his wife's necessaries, including expenses of her funeral and burial, over which he had sole control. *Moran* v. *Le Blanc's Estate,* 189.
5. Where wife's will, duly probated, directs that her funeral expenses be paid in full, her estate is liable therefor, regardless of whether her husband would otherwise be liable. *Id.*
6. Lease of land owned by husband and wife by entireties, signed by husband alone, is valid during his lifetime, but it terminates at his death. *Marks* v. *Corliss' Estate,* 460.
7. Husband is entitled to wife's services as housekeeper, and therefore he alone may recover for loss thereof through wrongful killing of wife. *Collins* v. *Hull,* 507.

See DEATH (10); DEPOSITS IN COURT; LANDLORD AND TENANT (4); MORTGAGES (1); NEGLIGENCE (5).

HYPOTHETICAL QUESTION—See DEATH (2).

ILLINOIS BLUE SKY LAW—See LICENSES (2).

IMPAIRMENT OF CONTRACTS—See INSURANCE (2).

IMPEACHMENT—See CRIMINAL LAW (33).

IMPLIED COVENANTS—See COVENANTS (1).

IMPLIED PROMISES—See CONTRACTS (4); EXECUTORS AND ADMINISTRATORS (4).

IMPROPER ARGUMENT—See APPEAL AND ERROR (4, 9–11); CRIMINAL LAW (19–21); TRIAL (1).

IMPUTABLE NEGLIGENCE—See NEGLIGENCE (5, 9).

INCOMPATIBLE PROVISIONS—See STATUTES (8).

INCOMPETENT PERSONS—See EXECUTORS AND ADMINISTRATORS (4).

INCONSISTENT FINDINGS OF LAW—See APPEAL AND ERROR (2).

INCONSISTENT POSITIONS—See ESTOPPEL (4, 5).

INCONSISTENT STATUTES—See STATUTES (3).

INDEMNITY.

1. Agreement to sustain one from loss in business means net loss, if any, that remains after deducting those items that may properly be deemed profits from those of expenses, etc., that may be properly classified as losses. *Richards* v. *F. C. Matthews & Co.*, 159.
2. In action on oral contract to sustain plaintiff from loss in business, burden of proof to establish loss is on him. *Id.* 160.
3. Where, in action on oral contract to sustain plaintiff from loss in business, there was verdict for plaintiff although testimony showed that no loss was sustained, judgment *non obstante veredicto* was properly entered for defendant. *Id.*

See INSURANCE (3).

INDEPENDENT CONTRACTOR—See MASTER AND SERVANT (12, 13, 15, 16).

INDEPENDENT TORTFEASORS—See DEATH (5).

INDICTMENT AND INFORMATION.

1. Where information contains two or more counts charging distinct crimes which were committed by same acts, at same time, and same evidence must be relied on for conviction under either count, no election may be required. *People* v. *Lahey*, 250.
2. Where information in one count charged negligent homicide (3 Comp. Laws 1929, § 16743), and in another failure to stop after automobile accident involving injury or death to person (1 Comp. Laws 1929, § 4722), it was error to refuse to require prosecution to elect between said counts, since it is apparent that said offenses do not grow out of same facts. *Id.*

See CRIMINAL LAW (2–4, 26–31, 34, 35).

INDORSEMENT BY PARTNER—See PARTNERSHIP (1).

INEQUITABLE ASSESSMENTS—See MUNICIPAL CORPORATIONS (13).

INFANTS—See LICENSES (1); MASTER AND SERVANT (23); MOTOR VEHICLES (17, 18); NEGLIGENCE (1–3); STREET RAILWAYS.

INFERENCES—See DEATH (4); ELECTRICITY (1, 3); MOTOR VEHICLES (3).

INFORMAL TRIAL—See CRIMINAL LAW (41).

INJUNCTION.

1. In suit to enjoin construction and operation of miniature golf course in violation of building restrictions, statement in defendant's brief, on appeal, that course has been abandoned does not prevent decree prohibiting such use. *Bohm* v. *Rogoff*, 199.

INJUNCTION—Continued.

2. Where small, unmeandered lake is wholly within plaintiffs' land, they are entitled to enjoin defendants from going upon it through unnavigable artificial drainage ditch connecting lake with pond on defendants' land. *Bushman* v. *Estleman*, 243.

See APPEAL AND ERROR (31, 32); MUNICIPAL CORPORATIONS (4, 8, 13); RAILROADS (17, 21); WATERS AND WATERCOURSES.

INJURY TO FEELINGS—See LIBEL AND SLANDER (3).

INSANE PERSONS—See EXECUTORS AND ADMINISTRATORS (4).

INSOLVENCY—See BROKERS (15); CORPORATIONS (10); RECEIVERS (14, 15).

INSPECTION—See DISCOVERY (1); ELECTRICITY (2, 3, 8).

INSTRUCTIONS—See APPEAL AND ERROR (12, 13); CRIMINAL LAW (7, 8, 12, 13, 15, 21, 36, 45, 46); LIBEL AND SLANDER (9).

INSURANCE.

1. Generally, policyholder in mutual insurance company is bound by subsequent changes or amendments of by-laws where he has consented thereto, such as where he has agreed expressly in contract to be so bound. *Partridge* v. *Michigan Mutual Windstorm Ins. Co.*, 76.

2. Policyholders in mutual insurance company who did not expressly agree to be bound by amendments of by-laws subsequently adopted are not bound thereby, notwithstanding charter gives board of directors power to amend by-laws, and insured agreed to be governed in all cases by charter and by-laws. *Id.*

3. Where automobile insurance policy provided that insurer would pay insured any loss covered by policy within 90 days from time amount of loss was determined, and it unsuccessfully defended negligence action against insured, it is liable as garnishee defendant on said undischarged judgment; its claim that insured has sustained no loss because he has not paid judgment being without merit (following *Kipkey* v. *Casualty Ass'n of America*, 255 Mich. 408). *Rogers* v. *Youngs*, 213.

4. Award of arbitrators denying liability of insurer for loss of building was properly set aside, where it is apparent that their decision was based on mistake of law. *Evenson* v. *State Mutual Rodded Fire Ins. Co. of Michigan*, 372.

5. If there be language in fire insurance policy calling for construction, it should be construed in favor of insured. *School Dist. No. 7, Keeler Twp.*, v. *Farmers Mutual Fire Ins. Co. of Dowagiac*, 515.

6. If mutual fire insurance policy contains no provision for forfeiture for insured's failure to pay assessments, failure to pay same on day named therein will not constitute forfeiture of policy. *Id.*

INSURANCE—Continued.

7. Clause in mutual fire insurance policy stating that assessment shall be paid within stipulated time or policy will be forfeited is valid, and operates of itself to work forfeiture, where there is no provision for suspension, and assessment is not so paid. *Id.*

8. 3 Comp. Laws 1929, § 12604, limiting time for carrying suspended members by mutual fire insurance companies, does not change contract of insurance, provide period of grace, or prolong insurer's liability beyond period provided in contract, but its purpose is to correct abuse of carrying suspended members indefinitely. *Id.*

9. Where life insurance policy dated August 23d provided that premium was due and payable on delivery of policy, and thereafter on each succeeding 23d day of August until premiums were paid in full, delay in delivery of policy did not have effect of postponing due date of subsequent annual premiums. *Weller* v. *Manufacturer's Life Ins. Co.*, 532.

10. In action on life insurance policy, finding of trial court that insurer accepted unconditionally payment of premium after expiration of grace period, *held*, sustained by record, notwithstanding insurer later mailed blank application for reinstatement. *Id.*

11. Waiver by acceptance of premium after due date is not based on contract, but on theory that insurer is estopped to insist on conditions of contract inconsistent with unconditional acceptance of premium. *Id.*

12. By unconditionally accepting premium after expiration of grace period, insurer waived conditions of policy requiring reinstatement and showing of insurability, although at time it had no knowledge of insured's illness. *Id.*

See APPEAL AND ERROR (10, 26, 27); EVIDENCE (6); MASTER AND SERVANT (3–5); MOTOR VEHICLES (16); VENDOR AND PURCHASER (4–6, 8).

INTENT—See ALTERATION OF INSTRUMENTS; CRIMINAL LAW (44); EVIDENCE (8); EXECUTORS AND ADMINISTRATORS (11); FRAUD (2); MORTGAGES (13–17); MOTOR VEHICLES (16); RAILROADS (4); SCHOOLS AND SCHOOL DISTRICTS (15); STATUTES (1); VENDOR AND PURCHASER (7); WILLS.

INTEREST IN LAND—See JOINT ADVENTURES.

INTEREST RECOVERABLE—See DAMAGES.

INTERPLEADER.

Where bidder on sewer contract, interpleaded with city holding certified check deposited with bid, prayed for cancellation of its bid, which it claimed was too low because of mistake, and city did not challenge jurisdiction of court to pass on said matter, court had jurisdiction to decree return of proceeds of said check to bidder. *Union & People's National Bank* v. *Anderson-Campbell Co.*, 674.

INTERPRETATION OF STATUTE—See STATUTES (1).

INTERSECTING HIGHWAYS—See EVIDENCE (4); MOTOR VEHICLES (11, 12, 19–21); NEGLIGENCE (4).

INTERSTATE COMMERCE—See CARRIERS; COMMERCE; CORPORATIONS (8).

INTERVENERS—See EQUITY (1, 2); RECEIVERS (5).

INTERVENING ACT—See DEATH (4, 6).

INTOXICATING LIQUORS—See CRIMINAL LAW (20); EVIDENCE (6).

IRREGULARITIES IN APPEAL—See CIRCUIT COURT COMMISSIONERS.

ISSUES—See APPEAL AND ERROR (27); ATTACHMENT (2); CRIMINAL LAW (5).

JOINT ADVENTURES.

Contract whereby plaintiffs purchased one-half of vendee's interest in contract on apartment house did not constitute partnership, but at most transaction was joint venture. *Holbrook* v. *Blick*, 396.

JOINT DEPOSITS—See DEPOSITS IN COURT.

JOINT LIABILITY—See DEATH (7).

JOINT OBLIGATION—See PAYMENT.

JUDGE OF PROBATE—See STATUTES (4).

JUDGES—See EVIDENCE (3).

JUDGMENT.

1. Where allegations in defendant's affidavit of merits do not constitute sufficient defense, summary judgment should be entered for plaintiffs. *Schneider* v. *Levy*, 184.
2. Where, in suit to set aside judgment in justice's court for want of jurisdiction of person, testimony that officer served process on wrong person was convincing and not disputed, judgment was properly set aside. *Reves* v. *Hillmer*, 240.
3. Doctrine of *res judicata* does not apply to decision which was not rendered on merits of questions involved. *Leib* v. *Bostwick*, 277.
4. Motion by trustee for summary judgment for costs in proceeding involving trustee's compensation, which is payable out of trust estate on order of probate court, was properly denied; summary judgments statute being inapplicable. *In re Stott's Estate*, 281.
5. Decision of Supreme Court that title of receiver to goods sold to it was good as against unrecorded chattel mortgage necessarily presupposed valid receivership, and therefore is conclusive of question of jurisdiction of court to appoint receiver. *Grand Rapids Electrotype Co.* v. *Powers-Tyson Corp.*, 311.

JUDGMENT—Continued.

6. Court may enter judgment on pleadings where they disclose unconditional admission of liability for amount for which judgment is entered. *Detroit Trust Co.* v. *Smith*, 377.

7. In action for royalties accruing subsequent to former decision of Supreme Court holding defendant liable for royalties due at that time under contract for use of patented machines, plaintiff's claim that former judgment is *res judicata* of all defenses is not tenable as to defendant's claim that by subsequent judgment of United States Supreme Court holding said patent invalid it has been evicted from its contract, since said issue was not involved in former decision. *Thomson Spot Welder Co.* v. *Oldberg Manfg. Co.*, 447.

8. Where, in suit for accounting between partners, decree was entered by consent of counsel and parties in open court, it is immaterial that it may not have had full evidentiary support, and therefore bill to set it aside was properly dismissed. *Fortunato* v. *Di Flippo*, 545.

See APPEAL AND ERROR (1, 2, 22, 23, 29); ATTACHMENT (2); CONTINUANCE; EXECUTORS AND ADMINISTRATORS (7, 8); INJUNCTION (1); INSURANCE (3); JUSTICES OF PEACE (1); MORTGAGES (2); TRIAL (1).

JUDGMENT NON OBSTANTE VEREDICTO—See INDEMNITY (3); TRIAL (2).

JUDICIAL POWER DEFINED—See COURTS (5).

JUDICIAL PROCEEDING—See LIBEL AND SLANDER (8).

JURISDICTION—See APPEAL AND ERROR (14, 15, 19–21); BASTARDY (3); EQUITY (8); GARNISHMENT (2); INTERPLEADER; JUDGMENT (2, 5); JUSTICES OF PEACE (1); MUNICIPAL CORPORATIONS (7); PROCESS; RECEIVERS (5).

JURY.

1. Persons accused of crime have right to trial by impartial jury (Const. art. 2, § 19) and to exercise challenges, either for cause or peremptory, at any time before jury is sworn. *People* v. *Mullane*, 54.

2. Where, after jury had been finally accepted, court excused two jurors for disqualification and called two who were qualified, accused, who had right to inquire of them as to their qualification, was not deprived of any right although his peremptory challenges were exhausted. *Id.*

3. Trial judge properly undertook examination of jurors on *voir dire*. *People* v. *Lahey*, 250.

4. Permitting jury trial, although no demand therefor had been made, as required by former Circuit Court Rule No. 39, was within discretion of court. *Basmajian* v. *City of Detroit*, 539.

5. Refusal of jury trial because no demand therefor had been made as required by former Circuit Court Rule No. 39, *held*, not abuse of discretion, under circumstances. *Id.*

See CRIMINAL LAW (12, 18); EVIDENCE (3).

JURY TRIAL—See BASTARDY (4); COURTS (3); CRIMINAL LAW (1); JURY (1, 4, 5).

JUSTICE—See PLEADING (3).

JUSTICE'S COURT—See JUDGMENT (2).

JUSTICES OF PEACE.

1. Where proceedings before justice of peace and his docket entries show that he acquired jurisdiction of subject-matter and of person of defendant, judgment entered may not be collaterally attacked. *Detroit Automobile Inter-Insurance Exchange* v. *George,* 380.
2. Where, on appeal from justice's court, justice failed to return any pleadings, as required by 3 Comp. Laws 1929, § 16233, and, although appellant knew of said omission, he failed to procure amended return under sections 16236, 16237, there was no abuse of discretion in refusing permission to file pleadings four days before case was to be heard, and dismissing appeal. *Benson* v. *Wayne Circuit Judge,* 436.

See CRIMINAL LAW (1); MANDAMUS.

LACHES—See FRAUD (2); LIMITATION OF ACTIONS (1).

LAND CONTRACTS—See DEEDS (1); ESTOPPEL (3); FRAUD (2); MORTGAGES (4, 11); VENDOR AND PURCHASER (1–9).

LANDLORD AND TENANT.

1. Where one has lease for years with annual rent reserved, and holds over after expiration of term with acquiescence of landlord, tenancy is from year to year on conditions of lease, although rent is payable in monthly instalments; but where rent reserved is monthly, holding over is from month to month unless lease otherwise provides. *Marks* v. *Corliss' Estate,* 460.
2. Where lease terminates by substitution of landlord not bound by lease, tenant continues in possession by sufferance. *Id.*
3. Unless parties make different agreement, payment and acceptance of rent does no more than change tenancy by sufferance to one at will or from month to month, and if rent is payable monthly it may be terminated on month's notice (3 Comp. Laws 1929, § 13492). *Id.*
4. Where lease of land owned by entireties was terminated by death of husband because signed by him alone, and no agreement between wife and tenant was made, latter's tenancy was from month to month, and was subject to termination by month's notice (3 Comp. Laws 1929, § 13492). *Id.*
5. Where tenancy was terminated by notice, claim against tenant's estate for rent for period subsequent to time termination became effective was properly disallowed. *Id.*
6. Agreement for lease to be executed later is no demise, and does not create relation of lessor and lessee. *Blair* v. *Lux,* 463.
7. Where plaintiffs as prospective lessees entered into agreement with defendant for lease to be executed later, plaintiff's entry

LANDLORD AND TENANT—Continued.

for purpose of moving small building did not convert agreement for lease into tenancy, but said act was in nature of license. *Id.*

8. Mere agreement for lease does not create tenancy, or give to party with whom it is made right to possession. *Id.*

9. Where owner failed to execute lease for three-year term to plaintiffs as he agreed to do, no tenancy for any term was created, although plaintiffs, in anticipation of lease, entered premises and removed small building. *Id.* 464.

10. Money paid on agreement for execution of lease is recoverable in action at law, where owner failed to execute it. *Id.*

11. Lessees, in action for damages for breach of lease, are not entitled to recover for equipment consisting of dishes, glassware, etc., which was removable and remained their property. *Zannis* v. *Freud Hotel Co.*, 579.

12. In order for tenant to recover for cost of repairs and alterations, there must be distinct agreement on part of landlord to pay for them. *Id.*

13. Lessees are not entitled to recover on *quantum meruit* for cost of equipment, repairs, and alterations, where lessor did not breach lease, although lease provided that lessor would pay therefor if it terminated lease. *Id.*

14. Option in lease of extending same for additional term by giving written notice was continuing offer, which, by acceptance, became valid and binding contract. *Michigan Trust Co.* v. *Herpolsheimer*, 589.

15. Lessor's allegation in declaration in former action for rent that it had permitted cancellation of lease as of certain date, and had leased to another, constituted surrender of lease by operation of law. *Michigan Lafayette Building Co.* v. *Continental Bank*, 619.

See APPEAL AND ERROR (33); CORPORATIONS (12); FRAUDS, STATUTE OF (1–3); HUSBAND AND WIFE (6); PARTNERSHIP (3); RECEIVERS (9–10).

LAST CLEAR CHANCE DOCTRINE—See NEGLIGENCE (6).

LATENT EQUITIES—See ASSIGNMENTS (3).

LAUNDRY—See MASTER AND SERVANT (2).

LAWFULLY ASSEMBLED—See BENEFICIAL ASSOCIATIONS (3, 5, 7).

LEASE—See HUSBAND AND WIFE (6); LANDLORD AND TENANT; MUNICIPAL CORPORATIONS (2–4); RAILROADS (7); SPECIFIC PERFORMANCE (1).

LEFT TURN—See MOTOR VEHICLES (25, 27).

LEG INJURY—See CRIMINAL LAW (54).

LIABILITY FOR FREIGHT—See CARRIERS (3–7).

LIABILITY OF MORTGAGOR—See CHATTEL MORTGAGES (2).

LIBEL AND SLANDER.

1. If privilege relation exists between merchants credit bureau and its subscribers, it may not be extended to outsiders. *Hanschke* v. *Merchants Credit Bureau,* 272.
2. False statement in effect proclaiming plaintiff to be criminal, published by merchants credit bureau in bulletin voluntarily circulated among its members and furnished gratuitously to others, was not privileged. *Id.*
3. Verdict of $3,500 for injury to plaintiff's feelings in falsely charging him, in publication given wide circulation in community where he lived and worked, with attempting to commit crime, *held,* not excessive. *Id.* 273.
4. Faithful and fair report of proceedings in courts of justice are privileged, even though reputations of individuals suffer from publication, and publishers are neither civilly nor criminally liable for their publication. *Sherwood* v. *Evening News Assn.,* 318.
5. Fair and impartial reports of judicial, executive, legislative, or other public official proceedings are qualifiedly privileged. *Id.*
6. If alleged libelous article is qualifiedly privileged, it is incumbent upon plaintiff to allege and prove express or actual malice in order to recover. *Id.*
7. If article is qualifiedly privileged, and record rebuts idea of malice, there is no case for jury. *Id.*
8. Publication of libelous article charging plaintiff with commission of crime, based on alleged conversation with officers, is not report of judicial investigation, and therefore is not privileged. *Id.*
9. In action against newspaper publisher for libel, instruction that, if defendant fairly and without malice reported and published information given to it or its reporters by sheriff or his deputies, articles so published are qualifiedly privileged, and defendant would not be liable, *held,* more favorable than defendant was entitled to. *Id.*

See APPEAL AND ERROR (11).

LIBERTY—See HABEAS CORPUS (2).

LICENSES.

1. Boy who with other children was in habit of using path across private lot had no legal right thereon, and at most was licensee. *Peck* v. *Adomaitis,* 207.
2. Where subscriber to stock of Illinois corporation was interested in its organization and agreed to subscribe for stock when it was organized, his subscription is not in violation of Illinois blue sky law (Cahill Rev. Stat. Illinois, chap. 32, ¶ 258, subd. [2]; Smith-Hurd Rev. Stat. Illinois, chap. 121½, § 100[2]). *Wilder National Tavern System* v. *Jillson,* 479.

See FIRES; LANDLORD AND TENANT (7); NEGLIGENCE (2, 3); PATENTS; RAILROADS (7).

LIENS—See BROKERS (14); CHATTEL MORTGAGES (1); CORPORATIONS (9, 10); EQUITY (8); EVIDENCE (9); MORTGAGES (9, 10).

LIFE INSURANCE—See INSURANCE (9, 10, 12).

LIMITATION OF ACTIONS.

1. Vendees' right to equitable relief by way of rescission for misrepresentation by vendors' agent of location of boundary line is not barred by statute of limitations, where vendees acted promptly after discovering mistake or fraud. *Hathaway* v. *Hudson*, 694.
2. If defrauded party's remedy is essentially equitable one, it is immaterial whether it is based on active or constructive fraud, in regard to applicability of statute (3 Comp. Laws 1929, § 13983) authorizing suit within two years after discovery of concealed fraud. *Id.*

See FRAUD (3).

LIMITATIONS OF TENURE—See RAILROADS (6, 13).

LISTING AGREEMENT—See BROKERS (8, 9).

LOCAL IMPROVEMENTS—See APPEAL AND ERROR (31); MUNICIPAL CORPORATIONS (8).

LOCO PARENTIS—See EXECUTORS AND ADMINISTRATORS (4).

LOOSE GRAVEL—See MOTOR VEHICLES (24).

LOSS—See INDEMNITY; INSURANCE (3).

LOSS OF PROFITS—See RECEIVERS (9).

MACHINERY—See PRINCIPAL AND AGENT; SALES (3).

MAINTENANCE—See ELECTRICITY (7).

MAJORITY ACTION—See BENEFICIAL ASSOCIATIONS (7).

MALICE—See LIBEL AND SLANDER (6, 7, 9).

MALICIOUS PROSECUTION.

In action for damages for malicious prosecution, based on plaintiff's arrest on charge of false pretenses, defense of advice of counsel, *held*, made out as matter of law, under evidence. *Maxson* v. *Kohler*, 521.

MANDAMUS.

Mandamus will not issue to compel circuit court to set aside order dismissing appeal from justice's court because of justice's defective return, where petition for mandamus was not filed until eight months after appeal had been dismissed, and hearing thereon was not brought on until two years after order to show cause was issued. *Benson* v. *Wayne Circuit Judge*, 436.

MANDATORY ACTS—See APPEAL AND ERROR (15).

MAPS—See EMINENT DOMAIN (6); TRIAL (4).

MARGINAL TRANSACTIONS—See BILLS AND NOTES (1); CONTRACTS (4).

MARKET PRICE—See CONVERSION (3).

MARRIED WOMAN—See HUSBAND AND WIFE (1).

MASTER AND SERVANT.

1. Workmen's compensation act, to be applicable to given case, requires relation of employer and employee under contract of hire. *Blust* v. *Sisters of Mercy*, 1.
2. A novitiate in the Sisters of Mercy, a Roman Catholic charitable organization, who had devoted her life to charitable purposes without hope of pecuniary reward, is not an employee of the order within the meaning of the workmen's compensation act, and therefore is not entitled to compensation for injuries received while working in the order's laundry; there being no contract of hire. *Id.*
3. Provision of workmen's compensation act (2 Comp. Laws 1929, § 8460) that insurance company carrying risk for employer must file notice of termination or cancellation with department of labor and industry at least ten days before taking effect is not applicable where employer actually changes carrier of risk, so notifies department, and new carrier files its certificate of coverage. *Zakrzewski* v. *American Box Board Co.*, 26.
4. Authority of insurance company to carry risk for employer is determined by commisssioner of insurance. *Id.*
5. Where employer canceled its insurance policy, so notified department, and procured new policy with another company, which filed certificate of coverage with department 11 days before effective date, it is liable for accidental death occurring after effective date, although former insurer did not file notice of cancellation until after accident occurred, since, under circumstances, filing of said notice is not required. *Id.*
6. Finding of department of labor and industry on disputed question as to whether disability for which original award of compensation was made still continues is conclusive, where sustained by evidence. *Raykov* v. *Crittall Casement Window Co.*, 28.
7. Question as to compliance with department's Rule No. 20, raised at hearing before deputy, but not raised at hearing before department on appeal, is not considered by Supreme Court. *Id.* 29.
8. Denial of employer's motion for permission to introduce additional testimony at hearing on appeal before department was not abuse of discretion, where hearing before deputy was adjourned for 15 days, giving ample time in which to take other testimony before award was made. *King* v. *Stephens-Adamson Manfg. Co.*, 30.
9. Where employer's physician treating employee's injured eye testified that he would not recommend employee's resuming work until growth on eye had been removed, order of depart-

MASTER AND SERVANT—Continued.

ment continuing compensation, but suggesting that employee should submit to such treatment as employer offered to relieve said disability, is affirmed, on appeal. *Id.*

10. Finding of court below that written contract of employment was changed by subsequent parol agreement, *held,* sustained by preponderance of evidence. *Reid* v. *Bradstreet Co.,* 282.

11. Where injured employee's proofs showed renewed disability after discontinuance of compensation, but proof as to time of commencement of disability was vague and uncertain, department of labor and industry was at liberty to find that compensation should be allowed from date of filing petition, although employee claimed that it began one year and five months prior thereto, and gave uncorroborated testimony in support thereof. *Louwaert* v. *D. Graff & Sons,* 387.

12. That contractor installing apparatus in school gymnasium was directed by employee of school board where certain equipment should be placed was not exercising control over him so as to establish relation of master and servant, but was rather in nature of aid in performance of his work. *Slessor* v. *Board of Education of Kalamazoo,* 389.

13. Where dealer not under workmen's compensation act sold gymnasium equipment to school board and engaged employer operating under said act to install it, said employer, who was not subject to control of either school board or dealer, was not employee, but independent contractor. *Id.*

14. Employees and not employers have benefit of workmen's compensation act. *Id.*

15. Power to control one engaged to do work, and not actual control, is test whether he is employee or independent contractor. *Id.*

16. Injured independent contractor does not come within provisions of workmen's compensation act. *Id.*

17. Employer operating under workmen's compensation act, who was accidentally killed while working with his men installing equipment in school gymnasium, was not within provisions of said act, although dealer contracting with him to install same was not under act, and, therefore, his dependents are not entitled to compensation from school board. *Id.*

18. Assault by one employee on another for personal reasons, not growing out of relation as fellow employees or out of acts in performance of their work, may not be held to arise out of employment. *Schultz* v. *Chevrolet Motor Co.,* 393.

19. Where plaintiff and fellow employee were engaged in unloading "pedal bundles" from truck, when latter, angry because he was hit by bundle tossed by plaintiff, struck him over head with stake, fracturing his skull, injuries resulting from assault arose out of and in course of employment within meaning of workmen's compensation act. *Id.*

20. Generally, accidents to employee while going to or from his work and not in immediate vicinity thereof do not arise out

MASTER AND SERVANT—Continued.

of or in course of his employment, unless some service was being rendered to employer at time of accident. *Spero* v. *Heagany & Draper Co.*, 403.

21. Where automobile salesman was permitted to keep car he was selling at his home until sold, and was overcome by monoxide gas when he went to get car ready to show to prospective customer in morning, resulting in his death, said accident arose out of and in course of his employment. *Id.*

22. Compensation allowed to dependents of deceased employee was properly based on amount reported by employer to be his weekly wage, in absence of any evidence inconsistent therewith. *Id.*

23. Award of compensation to widow and minor daughter of deceased employee, "share and share alike," was proper, although daughter was not made party plaintiff (2 Comp. Laws 1929, § 8421). *Id.* 404.

24. Where agreement by employer to pay injured employee compensation during total disability was approved by department of labor and industry, and settlement receipt was filed but not approved by department, petition for further compensation growing out of same accident, not being proper remedy, should have been denied. *Groleau* v. *Ford Motor Co.*, 408.

25. In action under Federal employers' liability act for personal injuries alleged to have been caused by defendant's negligence, judgment for defendant, on court's finding that it was not guilty of negligence, *held*, supported by preponderance of evidence. *Budzen* v. *Michigan Central R. Co.*, 454.

26. Where inexperienced servant is put to dangerous work, or is sent into dangerous place to work outside scope of his employment, it is master's duty to warn, instruct, and inform servant as to all dangers incident to said work which are not discoverable from ordinary observation by inexperienced person who would have no reason to anticipate danger. *Lewis* v. *Phelps* 647.

See SEAMEN; TRIAL (1).

MATERIAL ALTERATION—See ALTERATION OF INSTRUMENTS; BILLS AND NOTES (5).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —See WITNESSES.

MAYOR—See MUNICIPAL CORPORATIONS (9).

MEASURE OF DAMAGES—See CONVERSION (3); GARNISHMENT (11).

MECHANICS' LIENS.

1. Contract with contractor and separate contract with owner may not be tacked together so as to extend statutory time for filing mechanic's lien for labor and material furnished (3 Comp. Laws 1929, § 13105). *R. C. Mahon Co.* v. *Ford Motor Co.*, 255.

MECHANICS' LIENS—Continued.

2. In suit to enforce mechanic's lien, plaintiffs have burden of proof to establish compliance with statutory requirements, and where burden was not sustained, suit was properly dismissed. *Id.*

See EQUITY (1).

MEETINGS—See BENEFICIAL ASSOCIATIONS (3–7); SCHOOLS AND SCHOOL DISTRICTS (1–3).

MEMBERS OF CREDIT BUREAU—See LIBEL AND SLANDER (1, 2).

MEMBERS OF SAME HOUSEHOLD—See EXECUTORS AND ADMINISTRATORS (3).

MEMORANDUM ON NOTE—See BILLS AND NOTES (4).

MERCHANTS CREDIT BUREAU—See LIBEL AND SLANDER (1, 2).

MERGER—See BROKERS (3, 5); MORTGAGES (13–16).

MINIATURE GOLF COURSE—See COVENANTS (2); INJUNCTION (1).

MISNOMER—See APPEARANCE; PLEADING (2).

MISTAKE—See BILLS AND NOTES (6); CARRIERS (5, 7); CHATTEL MORTGAGES (3); INSURANCE (4); INTERPLEADER; LIMITATION OF ACTIONS (1); MUNICIPAL CORPORATIONS (14); VENDOR AND PURCHASER (12).

MONEY DAMAGES—See CONTRACTS (1).

MONOXIDE POISONING—See MASTER AND SERVANT (21).

MORTGAGE BONDS—See CANCELLATION OF INSTRUMENTS (2, 3); EQUITY (1–3).

MORTGAGES.

1. In suit to foreclose mortgage given by married woman, her claim that note and mortgage were obtained from her by fraud, misrepresentation, duress, and undue influence, *held*, without merit. *Peoples Wayne Co. Bank* v. *Wesolowska*, 45.
2. Mortgagee is entitled to pay defaulted taxes and have amount thereof included in decree on foreclosure, although mortgage does not so provide. *Id.* 46.
3. Although mortgage on land was executed to secure payment of note which was gift, it is valid, since mortgage may be made by way of gift when rights of creditors are not thereby interfered with. *Goethe* v. *Gmelin*, 112.
4. Where parts of mortgaged premises were subsequently sold on land contracts, sale on foreclosure should have been in separate parcels as required by 3 Comp. Laws 1929, § 14431, instead of collectively, since purchasers under land contracts had at least constructive occupancy of their respective parcels and their rights should have been recognized. *Northwestern Loan & Discount Corp.* v. *Scully*, 202.

MORTGAGES—Continued.

5. Where mortgage foreclosure by advertisement was void for failure to sell in parcels as required by 3 Comp. Laws 1929, § 14431, and no redemption was had, permission to foreclose in equity is granted on condition that sale be for amount not less than that bid at former sale. *Id.*

6. It is not necessary that amount requisite to redeem from foreclosure sale be paid to register of deeds, as provided in 3 Comp. Laws 1929, § 14433, but redemption may be had by mortgagor or any person claiming under him by paying to purchaser at foreclosure sale amount of bid, interest, and costs (section 14435). *Dryden State Bank* v. *Fisher,* 314.

7. Where purchaser of fee took assignment of mortgage from second mortgagee after latter had purchased at foreclosure sale but before expiration of redemption period, paying therefor amount covenanted to be due, transaction amounted to redemption from mortgage sale, so that thereafter neither second mortgagee nor any one else claiming under him could assert any title to mortgaged property. *Id.*

8. Foreclosure of mortgage extinguishes it. *Mortgage & Contract Co.* v. *First Mortgage Bond Co.,* 451.

9. Where mortgagee in second mortgage paid taxes, and, on foreclosure by advertisement, bid in property, from which no redemption was had, discharge of said mortgage discharged lien for taxes, so that it could not be revived and become lien superior to first mortgage. *Id.*

10. Where purchase price bid on foreclosure of second mortgage by mortgagee was applied to full payment of taxes, effect was same, in respect to mortgagee's lien for taxes, as though stranger had bought property on foreclosure, and taxes had been paid mortgagee out of purchase money. *Id.*

11. In suit for accounting and discharge of mortgage on ground that mortgagee had accepted land contract and agreed to give credit therefor on mortgage, decree dismissing bill, *held,* justified by record. *Shimp* v. *Sturgis National Bank,* 481.

12. When deed given as security for indebtedness is accompanied by contract to repurchase, transaction is regarded as mortgage. *Spitzley* v. *Holmes,* 559.

13. Generally, when holder of real estate mortgage becomes owner of fee, former estate is merged in latter, unless it is to interest of mortgagee to keep mortgage alive and it is his intention to do so. *First National Bank of Utica* v. *Ramm,* 573.

14. In determining whether there is merger of estates when holder of mortgage becomes owner of fee, intention of mortgagee is controlling. *Id.*

15. When it is to interest of mortgagee, who has become owner of fee, to keep mortgage alive, his intention to do so will be presumed unless his intention to merge is expressed. *Id.*

16. Where holder of mortgage, on accepting quitclaim deed, clearly expressed intention of extinguishing mortgage, merger

MORTGAGES—Continued.

of estates was effected, and no secret intention to keep mortgage alive may be presumed. *Id.* 574.

17. Where mortgage is once extinguished by holder's expressed intention on acceptance of quitclaim deed from grantee assuming mortgage, it may not be revived subsequently against mortgagor. *Id.*

See ALTERATION OF INSTRUMENTS; CANCELLATION OF INSTRUMENTS (1); ESTOPPEL (3); HUSBAND AND WIFE (1–3).

MOTION TO DISMISS—See BANKS AND BANKING (2); CORPORATIONS (3); EQUITY (6).

MOTION TO QUASH—See CRIMINAL LAW (48).

MOTION TO STRIKE—See TRIAL (4).

MOTOR VEHICLES.

1. Where, in action for death of plaintiff's decedent resulting from collision with automobile, question of decedent's contributory negligence was brought into case, burden of establishing his freedom from contributory negligence was on plaintiff. *Pomeroy* v. *Dykema,* 100.

2. Where plaintiff failed to offer any testimony that her decedent was free from contributory negligence, although that question was in case, judgment for defendant was properly directed. *Id.*

3. Where there was testimony of eyewitnesses as to facts and circumstances immediately surrounding accident causing death of plaintiff's decedent, from which reasonable inferences may be drawn as to whether he was exercising reasonable care, presumption that he was not guilty of contributory negligence vanishes, although no one saw the impact. *Id.*

4. Pedestrian about to cross street from west side is bound to be mindful that lawful course of south-bound vehicles is on westerly side. *Id.* 101.

5. Pedestrian who walked into side of automobile and was killed as automobile was proceeding south on right-hand side of street after coming around truck parked on west side, was guilty of negligence which caused or at least contributed to accident, justifying directed verdict in favor of driver. *Id.*

6. Purchaser having exclusive use of automobile under conditional sales contract is "owner," within meaning of 1 Comp. Laws 1929, § 4658, requiring seller to transfer to purchaser certificate of title, although purchaser agreed to keep car in seller's garage. *Scarborough* v. *Detroit Operating Co.,* 173.

7. Conditional contract for sale of automobile, giving to purchaser exclusive use thereof, is void under 1 Comp. Laws 1929, § 4658, where seller neglected to transfer certificate of title to purchaser. *Id.*

8. Where contract for sale of automobile is void, and seller has repossessed car, purchaser is entitled to recover payments made thereon. *Id.*

MOTOR VEHICLES—Continued.

9. Person crossing highway has right to assume that, when he has reached side of highway where he has right to be, automobile driver using highway will observe traffic laws and keep on his side of highway. *Salz* v. *Waldecker*, 219.

10. Whether driver of horse and buggy who, when 17 feet from crossing, looked and saw defendant's automobile approaching 60 rods away, was guilty of contributory negligence in crossing without again looking until he reached middle of road was question for jury, especially where he had reached other side and was where he had right to be when struck by defendant's car. *Id.*

11. Automobile driver approaching intersection with green light in his favor is not guilty of contributory negligence as matter of law in proceeding to cross without looking to see whether truck driver approaching from right on intersecting street is going to obey law by stopping before red light and waiting until it changed, since he had right to assume that truck driver would obey law. *Travis* v. *Eisenlord*, 264.

12. Automobile driver who, when 60 feet from intersection, saw defendant approaching from right 160 feet away at speed of 50 or 60 miles an hour, was guilty of contributory negligence as matter of law in proceeding to cross without again looking to right. *Boerema* v. *Cook*, 266.

13. Automobile driver, with knowledge that narrow gravel road on which he was driving in fog was being used by gravel trucks, had duty to be watchful, to drive slowly, and to keep his car under constant control. *Hollingshead* v. *Gunderman*, 299.

14. In action by automobile driver for injuries received in collision with truck, negligence of truck driver and contributory negligence of plaintiff, *held*, questions for jury, under evidence. *Id.*

15. Defendant's claim that plaintiff was negligent because he was driving in fog on narrow road in one of the ruts used by gravel trucks, *held*, without merit, where he was on right-hand side of road. *Id.*

16. In action based on automobile collision, reference to insurance is improper, and, where intentional, amounts to reversible error. *Id.*

17. Child five years and eleven months old, struck by automobile, is incapable of being guilty of contributory negligence. *Micks* v. *Norton*, 308.

18. Question of negligence of driver of automobile striking child on street in business district was properly submitted to jury, under evidence (1 Comp. Laws 1929, § 4693). *Id.*

19. Where automobile driver, with knowledge of car approaching on intersecting road, drove on in front of it, resulting in collision, he was guilty of contributory negligence. *Zuidema* v. *Bekkering*, 327.

MOTOR VEHICLES—Continued.

20. Automobile driver who stopped and looked down intersecting road to left and saw car approaching, and then drove on across intersection without again looking to left, resulting in collision, was guilty of contributory negligence. *Id.*

21. Automobile driver who failed to see car approaching on intersecting highway when there was nothing to prevent his seeing it, and drove across, resulting in collision, is guilty of contributory negligence, although he stopped and looked, since he must be held to have seen what he should have seen. *Id.* 328.

22. In action for death of plaintiff's decedent due to collision with defendant's automobile, there was no error in submitting to jury question of whether car was being driven with defendant's consent, either express or implied, under circumstances. *Barnum* v. *Berk,* 363.

23. Automobile driver who drove across through highway without obeying "stop" sign, resulting in collision and injury to guest passenger in his car, while guilty of ordinary negligence, was not guilty of gross negligence within meaning of "guest" statute (1 Comp. Laws 1929, § 4648), and therefore is not liable for said injuries. *Oxenger* v. *Ward,* 499.

24. Automobile driver who drove at rate of 40 to 45 miles per hour over rough road cut up with ruts, with loose gravel in middle, resulting in car's swerving and striking car going in opposite direction, was properly found guilty of negligence. *Collins* v. *Hull,* 507.

25. Automobile driver making left turn is not bound to anticipate that approaching automobile is exceeding lawful speed limit (1 Comp. Laws 1929, § 4697). *Bernstein* v. *Brody,* 512.

26. That plaintiff's automobile was exceeding speed limit at time of collision will not bar recovery for damages unless speed has causal relation to accident. *Id.*

27. Passenger in automobile injured in collision at street intersection is precluded from recovering damages therefor, where collision would not have occurred had automobile not been exceeding lawful speed limit, although driver of car with which it collided was also guilty of negligence in making left turn in front of it. *Id.*

28. In action for death of guest passenger in defendant's automobile, where death was caused by collision with rear end of trailer which defendant failed to see, rate of speed at which he was driving is not important, in absence of showing that it had causal relation to accident. *Van Blaircum* v. *Campbell,* 527.

29. If driving at speed of 45 miles an hour at night when collision occurred resulting in death of guest passenger is negligence, it is not gross negligence, nor is it wilfulness or wantonness (1 Comp. Laws 1929, § 4648). *Id.*

30. Failure of automobile driver to see trailer in front of him, which was proximate cause of collision resulting in death of

MOTOR VEHICLES—Continued.

guest passenger, is at most ordinary negligence, for which driver is not liable under guest passenger act (1 Comp. Laws 1929, § 4648). *Id.*

See APPEAL AND ERROR (10); CHATTEL MORTGAGES (2, 3); CORPORATIONS (1); DEATH (2, 4, 5, 9); NEGLIGENCE (4, 5, 7, 9); SALES (2); SCHOOLS AND SCHOOL DISTRICTS (1–5); THEATRES AND SHOWS; TRIAL (3).

MUNICIPAL CORPORATIONS.

1. Board of supervisors of Kent county has fiduciary relationship to entire county and not to city of Grand Rapids alone, notwithstanding approximately 80 per cent. of taxable property of county lies in city. *Myers* v. *Post*, 156.
2. Board of supervisors of Kent county, in refusing to renew lease of property owned by it in city of Grand Rapids to responsible person at $3,000 per year and leasing it to city for $501 per year, was guilty of constructive fraud on rights of taxpayers of county, even if there was no wilful dishonesty. *Id.*
3. Where all city members of board of supervisors voted to lease to city property owned by county at about one-sixth of its rental value, and all members of board from townships voted against it, action of city members in so voting is analogous to that of directors of corporation who vote for their personal interest rather than that of corporation. *Id.*
4. Board of supervisors was properly restrained, at suit of taxpayers, from leasing property to city for about one-sixth of its rental value, where it is apparent that city was being favored at expense of county, and said action amounted to constructive fraud on taxpayers of county. *Id.*
5. In proceedings under 3 Comp. Laws 1929, § 13198 *et seq.*, to vacate portion of plat in township, objectors, who claim rights in driveways sought to be closed, may claim no rights under deeds running to others who are not objecting. *In re Petition of Upjohn*, 181.
6. Petition to vacate portion of plat in township was properly granted, where proceedings were regular and in conformity with 3 Comp. Laws 1929, § 13198 *et seq.*, and objectors thereto failed to show any reasonable objection. *Id.*
7. Municipal corporation may not maintain action to recover taxes and special assessments levied against real estate; there being no statutory authority, court is without jurisdiction in such case (1 Comp. Laws 1929, §§ 3431, 3438). *Schaefer* v. *Woodmere Cemetery Assn.*, 332.
8. Where property owner was given no notice or opportunity to be heard on question of necessity of local improvement, as required by city ordinance, collection of tax therefor was properly enjoined. *Rood* v. *City of Detroit*, 547.
9. Provisions of city charter fixing salaries of commissioners or councilmen and mayor have force of law. *Saginaw City Council* v. *Saginaw Board of Estimates*, 624.

MUNICIPAL CORPORATIONS—Continued.

10. Under charter of city of Saginaw board of estimates has power to reduce items in estimates of council for salaries of officers and employees employed by council or city departments, notwithstanding provision in charter that said salaries are to be fixed or determined by city council. *Id.*

11. Where assessments for expense of street improvement were not levied in accordance with provisions of city charter or in proportion to benefits received, property owners are not estopped from contesting said assessments by the fact that they petitioned for said improvement. *I. H. Gingrich & Sons* v. *City of Grand Rapids*, 661.

12. It is not present use of property which determines benefit it receives from street improvement, but rather its available uses. *Id.* 662.

13. Collection of tax for expense of street improvement was properly enjoined, where assessments therefor were not levied in accordance with provisions of city charter, were lacking in uniformity and equality, and were far removed from plan of levy according to benefits. *Id.*

14. Bidder on sewer contract, who notified city before acceptance that its bid was too low because of mistake, is entitled to recover deposit accompanying bid after refusing to enter into contract, where bidder's good faith and fact that mistake was made is not questioned. *Union & People's National Bank* v. *Anderson-Campbell Co.*, 674.

See APPEAL AND ERROR (31); EMINENT DOMAIN (2); INTERPLEADER; NUISANCE; SCHOOLS AND SCHOOL DISTRICTS (13); STATUTES (6, 8).

MURDER—See HOMICIDE.

MUTUAL INSURANCE COMPANIES—See APPEAL AND ERROR (26); INSURANCE (1, 2, 6–8).

NAKED ORAL PROMISE—See VENDOR AND PURCHASER (2).

NATURE OF TENANCY—See LANDLORD AND TENANT (1).

NAVIGABLE WATERS—See INJUNCTION (2); WATERS AND WATERCOURSES.

NECESSARIES—See EXECUTORS AND ADMINISTRATORS (4); HUSBAND AND WIFE (4).

NECESSITY—See MUNICIPAL CORPORATIONS (8).

NEGLIGENCE.

1. Leaving bonfire unattended on one's private premises at place where children are wont to go is not in violation of any duty imposed by common law or statute. *Peck* v. *Adomaitis*, 208.

2. Owner of private property is under no obligation to trespassers or licensees to keep premises safe for use of children as playground. *Id.*

NEGLIGENCE—Continued.

3. Owner of private lot who started bonfire thereon and left it unattended is not liable for injuries caused by said fire to boy 3 years and 9 months of age, who was mere licensee thereon, although owner knew that children were in habit of crossing said lot. *Id.*

4. Where drivers of automobiles in collision at intersection were both guilty of negligence in failing to look and see each other until it was too late to avoid accident, doctrine of subsequent negligence is not applicable. *Boerema* v. *Cook*, 267.

5. Contributory negligence of husband driving automobile is imputable to wife who was injured in collision while riding with him. *Zuidema* v. *Bekkering*, 327.

6. Term "gross negligence," as used in "guest" statute (1 Comp. Laws 1929, § 4648), is not limited to subsequent negligence, discovered negligence or peril, humanitarian doctrine, last clear chance doctrine, etc., but it means such degree of recklessness as approaches wanton and wilful misconduct. *Oxenger* v. *Ward*, 499.

7. Purpose of "guest" statute is to absolve owner or driver of motor vehicle from liability for negligence unless he is guilty of wanton and wilful misconduct. *Id.*

8. One placed in emergency through no fault of his own is not bound to exercise same degree of care as if emergency did not exist. *Collins* v. *Hull*, 507.

9. Negligence of automobile driver is imputable to passenger in his car. *Bernstein* v. *Brody*, 512.

10. Rule of *res ipsa loquitur* is not recognized in this State. *Eaton* v. *Consumers Power Co.*, 549.

11. Want of care may be presumed from established facts and circumstances. *Id.*

12. Evidence of facts or circumstances sufficient to raise presumption that accident would not have happened save for want of care on part of defendant makes *prima facie* case for plaintiff. *Id.*

13. Where thing happens which would not ordinarily have occurred if due care had been used, fact of such happening raises presumption of negligence in someone. *Id.*

14. Question of negligence must be determined from conditions at time of accident. *Id.* 550.

See APPEAL AND ERROR (24); DEATH (3, 4, 6); ELECTRICITY (1–4, 7, 8); FIRES; LICENSES (1); MASTER AND SERVANT (25, 26); MOTOR VEHICLES (1, 9, 10, 13–15, 18, 23–25, 27, 29, 30); RAILROADS (22); SEAMEN (1); STREET RAILWAYS; THEATRES AND SHOWS.

NEGLIGENT HOMICIDE—See CRIMINAL LAW (19, 20); INDICTMENT AND INFORMATION (2).

NEGOTIABLE INSTRUMENTS—See BILLS AND NOTES (3, 4).

NET LOSS—See INDEMNITY (1).

NEW ISSUE—See EQUITY (7).

NEWSPAPERS—See CRIMINAL LAW (25); LIBEL AND SLANDER (4, 8, 9).

NEW TRIAL.

Motion for new trial, on ground that verdict for defendant was against great weight of evidence, *held*, properly denied. *Barnum* v. *Berk*, 364.

See APPEAL AND ERROR (4); CRIMINAL LAW (16–18, 33, 35); TRIAL (1, 2).

NONAPPEALING PARTY—See APPEAL AND ERROR (3).

NONPERFORMANCE OF PROMISE—See FRAUD (1).

NONRESIDENTS—See GARNISHMENT (3).

"NO RECOURSE" PROVISION—See CARRIERS (5).

NOTE GIVEN BY JOINT DEBTOR—See PAYMENT.

NOTICE—See APPEAL AND ERROR (14–19, 21, 26, 27, 29); ASSIGNMENTS (3); BROKERS (3); CANCELLATION OF INSTRUMENTS (4); CARRIERS (6); CHATTEL MORTGAGES (3); COURTS (1, 3); DEEDS (2); ELECTRICITY (8); EVIDENCE (9); FRAUD (2); HUSBAND AND WIFE (2); INSURANCE (12); LANDLORD AND TENANT (3–5, 14); MASTER AND SERVANT (3, 5); MUNICIPAL CORPORATIONS (8); PATENTS (3); RECEIVERS (13).

NUISANCE.

Bonfire on one's own premises is not nuisance *per se*, even if it is in violation of city ordinance. *Peck* v. *Adomaitis*, 207.

NURSERY BUSINESS—See APPEAL AND ERROR (31, 32).

OBJECTIONS—See APPEAL AND ERROR (34).

OFFER TO PERFORM—See VENDOR AND PURCHASER (10–12).

OFFICERS—See BENEFICIAL ASSOCIATIONS (1–4, 6–8).

OFFICERS' CONVERSATION—See LIBEL AND SLANDER (8).

OIL—See CONVERSION (1, 5); SALES (1).

OIL AND GAS—See COVENANTS (1); RAILROADS (16, 17, 20, 21).

OPENING STATEMENT—See CRIMINAL LAW (51).

OPINION EVIDENCE—See CRIMINAL LAW (54); EVIDENCE (2).

OPTIONS—See LANDLORD AND TENANT (14); VENDOR AND PURCHASER (1).

ORAL AUTHORIZATION TO SIGN FOR OWNER—See BROKERS (9).

ORAL CONTRACTS—See EXECUTORS AND ADMINISTRATORS (5); FRAUDS, STATUTE OF (4); INDEMNITY (2, 3).

ORAL CONTRACT TO CONVEY LAND—See EVIDENCE (8); SPECIFIC PERFORMANCE (2, 3).

ORAL MODIFICATION OF LEASE—See FRAUDS, STATUTE OF (1–3); PARTNERSHIP (3).

ORAL PROMISE TO EXTEND TIME OF PAYMENT—See VENDOR AND PURCHASER (3).

ORDERS—See RECEIVERS (12, 13).

ORDINANCES—See EMINENT DOMAIN (2); FIRES; MUNICIPAL CORPORATIONS (8); NUISANCE.

OTHER SIMILAR ACTS—See CRIMINAL LAW (44).

OUTLAWED COLLECTIBLE ACCOUNTS—See RECEIVERS (8).

OWNER—See MOTOR VEHICLES (6).

PAIN AND SUFFERING—See DEATH (11).

PAROL AGREEMENTS—See CONTRACTS (3); MASTER AND SERVANT (10).

PAROL EVIDENCE—See EVIDENCE (5).

PARTIES—See EQUITY (1–3); MASTER AND SERVANT (23); PLEADING (2); VENDOR AND PURCHASER (9).

PARTNERSHIP.

1. Partnership, by receiving proceeds of note indorsed before delivery in name of partnership by one partner, ratified said indorsement, and therefore both partners are liable in action on note regardless of whether partner had authority to indorse firm name. *Leesburg State Bank* v. *Pinner*, 261.
2. In action against defendant on theory that he was partner in concern purchasing goods from plaintiff on credit, finding of trial court that defendant was not partner in fact, and that he had not held himself out to be partner, *held*, justified by evidence. *E. H. Pudrith Co.* v. *White*, 491.
3. Partner active in business was acting within scope of his duties in agreeing to modification of lease whereby partnership secured considerably more space than called for in the lease without payment of additional rent, and lessor was released from making expensive alterations (2 Comp. Laws 1929, § 9846). *Zannis* v. *Freud Hotel Co.*, 578.

See JOINT ADVENTURES.

PASSENGERS—See MOTOR VEHICLES (23, 27–30); NEGLIGENCE (9).

PASSING TITLE—See SALES (1).

PATENTS.

1. When licensee is actually evicted from his contract use of patent by decision of court of its invalidity, contract falls as to liability for further royalties, through failure of consideration. *Thomson Spot Welder Co.* v. *Oldberg Manfg. Co.*, 447.
2. Where one United States circuit court of appeals held patent valid, and another circuit court of appeals held it invalid, hazard of use without license remained until final decision of conflict by United States Supreme Court, and therefore there was continuing consideration for contract licensing its use until said final decision determining its invalidity. *Id.*
3. Where contract licensing use of patented machines provided for termination by notice, discontinuance of use, and agreement not to use them thereafter without further license, plea in former case that contract was void as without consideration did not have effect of notice of termination. *Id.*

See DISCOVERY (2); JUDGMENT (7).

PAYMENT.

1. In action against joint defendants on written contract, where obligation to pay full consideration was joint, contract controls, and claim that note given by one joint debtor, which has not been paid was personal obligation and accepted by plaintiffs as payment, is without merit. *Feldpausch* v. *Hendershot*, 204.
2. In absence of express agreement to contrary by creditor, acceptance of note of one or more joint obligors bound for a pre-existing debt is not payment thereof, and does not release other joint obligors who did not sign note. *Id.*
3. Where defendants jointly agreed to convey certain pieces of property to plaintiffs with right to rents after certain date, and to install furnace in one of said properties, defendants are jointly liable for rents collected on said property by one defendant after said date, who gave his note therefor but failed to pay it, and also for price of furnace which defendants installed but which plaintiffs had to pay for in order to retain it. *Id.*

See BROKERS (1); CARRIERS (3–7); EVIDENCE (5); INSURANCE (9–12); MORTGAGES (10); RECEIVERS (2); SALES (1); VENDOR AND PURCHASER (1–3).

PEDESTRIAN—See MOTOR VEHICLES (4, 5); RAILROADS (24).

PENALTIES—See STATUTES (5).

PEREMPTORY CHALLENGES—See JURY (1, 2).

PERFECTED APPEAL—See APPEAL AND ERROR (14, 19, 21).

PERFORMANCE—See CONTRACTS (2); VENDOR AND PURCHASER (3).

PERJURY—See CRIMINAL LAW (3, 5, 7–9, 25, 29–31).

PERMANENT ALIMONY—See DIVORCE (2, 3).

PERMISSIVE STATUTE—See RAILROADS (22).

PERSONAL INTEREST OF CORPORATE DIRECTORS—See MUNICIPAL CORPORATIONS (3).

PETITION—See HABEAS CORPUS (1, 3–6); MASTER AND SERVANT (24); MUNICIPAL CORPORATIONS (6).

PETTY GAMBLING—See DIVORCE (6).

PHYSICIANS AND SURGEONS—See MASTER AND SERVANT (9).

PLANKING—See RAILROADS (22).

PLATS—See MUNICIPAL CORPORATIONS (5, 6).

PLEADING.

1. Purpose of rule relating to pleading is to eliminate all immaterial matters and frame issues either of fact or law to be tried by court or jury. *Detroit Trust Co.* v. *Smith*, 376.
2. While due diligence is required in pleadings of plaintiff in description of parties, yet, where no one has been misled in any manner by misnomer, amendment should be permitted (3 Comp. Laws 1929, § 14144). *Fildew* v. *Stockard*, 494.
3. Under statute of amendments (3 Comp. Laws 1929, § 14144), court has power to amend any process, pleading, or proceeding in action or proceeding, either in form or substance, for furtherance of justice and may disregard any error or defect therein which does not affect substantial rights of parties. *Id.*
4. Court properly permitted amendment of pleadings erroneously describing defendant corporation as Michigan corporation, where no one had been misled by error (3 Comp. Laws 1929, § 14144). *Id.*

See APPEARANCE; ATTACHMENT (1); COURTS (4); EQUITY (7); EVIDENCE (7); HABEAS CORPUS (1, 3–6); JUDGMENT (6); JUSTICES OF PEACE (2); LANDLORD AND TENANT (15).

PLEDGES—See BROKERS (1–3, 13).

POSSESSION—See BENEFICIAL ASSOCIATIONS (1); LANDLORD AND TENANT (2, 8); MOTOR VEHICLES (6–8); RECEIVERS (15).

POSSIBILITY OF REVERTER NOT ASSIGNABLE BEFORE BREACH—See RAILROADS (15).

POSTDATED CHECK—See APPEAL AND ERROR (23).

POWERS—See CORPORATIONS (11); SCHOOLS AND SCHOOL DISTRICTS (12, 13).

PRE-EXISTING DEBT—See PAYMENT (2).

PREFERENCES—See SCHOOLS AND SCHOOL DISTRICTS (14, 15).

PREJUDICE—See CRIMINAL LAW (24, 25, 49, 51); EMINENT DOMAIN (9); TRIAL (1).

PRELIMINARY NOTICE—See APPEAL AND ERROR (17, 18).

PRESCRIPTION—See RAILROADS (2).

PRESUMPTIONS—See CRIMINAL LAW (42, 43, 45, 46); ELECTRICITY (4); EVIDENCE (1, 9); EXECUTORS AND ADMINISTRATORS (1, 3); MORTGAGES (15, 16); MOTOR VEHICLES (3); NEGLIGENCE (11–13); STATUTES (7).

PRIMA FACIE CASE—See ELECTRICITY (4); NEGLIGENCE (12).

PRIMARY SCHOOL DISTRICTS—See SCHOOLS AND SCHOOL DISTRICTS (6–9).

PRINCIPAL—See CRIMINAL LAW (50, 51).

PRINCIPAL AND AGENT.

In action for breach of contract to purchase special machines to be constructed for defendant, finding of trial court that company making contract for said machines was acting as agent for plaintiff, and that defendant is bound thereby, *held*, justified by record. *Hoefer Manfg. Co.* v. *Ford Motor Co.*, 643.

See CARRIERS (7); CONTRACTS (1); CORPORATIONS (1, 6); DEATH (2); LIMITATION OF ACTIONS (1); SPECIFIC PERFORMANCE (1); VENDOR AND PURCHASER (10–12).

PRIVATE LAKE—See INJUNCTION (2); WATERS AND WATERCOURSES.

PRIVATE RIGHTS—See EMINENT DOMAIN (1, 2).

PRIVILEGE—See CORPORATIONS (11); CRIMINAL LAW (4, 19–21); LIBEL AND SLANDER (1, 2, 4–9).

PRIVITY OF CONTRACT—See CORPORATIONS (3).

PROBABLE CAUSE—See CRIMINAL LAW (48).

PROBATE COURT—See EMINENT DOMAIN (9, 10); EXECUTORS AND ADMINISTRATORS (9, 11); JUDGMENT (4).

PROBATIVE VALUE—See EVIDENCE (6).

PROCESS.

In suit to set aside judgment in justice's court for want of jurisdiction of person, officer's return of service may be attacked; said attack being direct and not collateral. *Reves* v. *Hillmer*, 239.

See APPEARANCE; CORPORATIONS (6–8); GARNISHMENT (3); JUDGMENT (2); PLEADING (3).

PRODUCTION OF BOOKS OF ACCOUNT—See DISCOVERY.

PROPERTY DONATED FOR SPECIAL PURPOSE—See RAILROADS (3).

PROSECUTING ATTORNEY—See STATUTES (4).

PROTECTED CROSSING—See RAILROADS (23, 24).

PROXIMATE CAUSE—See APPEAL AND ERROR (24); DEATH (3, 4, 6, 9); MOTOR VEHICLES (26, 28, 30).

PUBLICATION—See LIBEL AND SLANDER (3, 4).

PUBLIC EMPLOYMENT—See SCHOOLS AND SCHOOL DISTRICTS (14, 15).

PUBLICITY—See CRIMINAL LAW (25).

PURPOSE OF PLEADING—See PLEADING (1).

QUALIFIED PRIVILEGE—See LIBEL AND SLANDER (5–7, 9).

QUANTUM MERUIT—See BROKERS (10); LANDLORD AND TENANT (13).

QUASI-CORPORATIONS—See SCHOOLS AND SCHOOL DISTRICTS (13).

QUASI-CRIMINAL CASES—See BASTARDY (3).

QUESTION FOR JURY—See APPEAL AND ERROR (27); BANKS AND BANKING (3); DEATH (2, 8); ELECTRICITY (1); EMBEZZLEMENT; LIBEL AND SLANDER (7); MOTOR VEHICLES (10, 14, 18, 22); RAILROADS (24).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (6, 22); CERTIORARI (2); EMINENT DOMAIN (5); MASTER AND SERVANT (7).

QUITCLAIM DEED—See MORTGAGES (16, 17).

RAILROADS.

1. Michigan statutes do not single out railroad rights of way for special treatment in regard to conveyance and use, but they provide a uniform rule for acquisition of lands and other property "for the construction, maintenance and accommodation of its railroads," bridges, buildings, etc. (2 Comp. Laws 1929, § 11121 *et seq.*). *Quinn* v. *Pere Marquette Ry. Co.*, 143.
2. Title may be acquired to lands by railroad companies by voluntary grant, purchase, condemnation (2 Comp. Laws 1929, § 11121 *et seq.*), or prescription, but not by dedication. *Id.*
3. Where property is taken by railroad company through voluntary grant and donation, it "shall be held and used for the purpose of such grant only" (2 Comp. Laws 1929, § 11121), and, upon abandonment of the road, title to property so donated is restored to donor or his representatives or assigns. *Id.*

RAILROADS—Continued.

4. Failure of statute to attach to lands purchased by railroad company conditions of tenancy, use, and reverter provided for donated property is persuasive of intention of legislature that they are not to be applied to limit title so taken. *Id.*
5. On condemnation of land by railroad company, owner "shall be divested and barred of all right, estate, and interest in such real estate, franchise, or other property until such right or title shall be again legally vested in such owner" (2 Comp. Laws 1929, § 11135). *Id.*
6. Michigan statutes furnish no ground for holding, by analogy to condemnation, donation, or otherwise, that a title taken by railroad company by purchase is merely an easement or that it is subject to limitations of tenure not expressed in deed. *Id.*
7. Railroad company may acquire in strip of land for right of way, as well as in other real estate, title in fee absolute, determinable fee, easement, lease, or license, as may another corporation or individual. *Id.* 144.
8. Where property is taken by railroad company by purchase, character of estate is determined by terms of grant, as in other cases. *Id.*
9. "Right of way" has two meanings in railroad parlance: strip of land upon which track is laid, and legal right to use such strip; and in latter sense it may mean easement, but character of title taken to strip depends upon language of conveyance. *Id.*
10. Where grant to railroad company is not of land, but is merely of use or of right of way, or, in some cases, of the land specifically for right of way, easement only is conveyed. *Id.*
11. Where land itself is conveyed, although for railroad purposes only, without specific designation of right of way, conveyance is in fee and not of easement. *Id.*
12. Debasing of fee in grant to railroad company is not favored by law, but provisions tending thereto are to be construed against grantor. *Id.*
13. Where there is no reverter clause in grant of land to railroad company, statement of use is merely declaration of purpose of conveyance, without effect to limit grant. *Id.*
14. Where grant to railroad company contains reverter clause, title is determinable fee upon condition subsequent. *Id.*
15. If grant to railroad company created fee upon condition subsequent, purchaser of grantor's rights before breach could not enforce reverter, because possibility of reverter may not be assigned before breach of condition. *Id.* 145.
16. Where grant of land to railroad company was for railroad purposes only, but deed contained no reservation to grantors, grantee took title to gas and oil in place. *Id.*
17. Court of equity will not intervene, at instance of adjoining landowner, to prevent drilling of oil well by railroad company

RAILROADS—Continued.

on its right of way, where it does not appear that mere operation of drilling will injure plaintiff's land; but equitable procedure would be to accord to both parties free and equal chance to develop their own lands. *Id.*

18. Grant of land to railroad company "to be used for railroad purposes only" is not covenant of use. *Id.*

19. Where land was granted to railroad company to be used for railroad purposes only, and principal consideration was benefit to adjoining land through construction and operation of railroad, so long as railroad continues in operation, purpose of grant is subserved and consideration fully paid. *Id.*

20. Railroad company taking merely easement in land may not drill for gas and oil, but where it takes title in fee by deed without conditions it may drill for gas and oil. *Id.*

21. If drilling for gas and oil on its right of way by railroad company is *ultra vires* under 2 Comp. Laws 1929, § 11135, State may by proper proceeding compel it to return to its proper sphere, but private person who has no restrictive estate or interest in land owned by it may not question its use in any manner which would be lawful if owned by individual. *Id.* 146.

22. Railroad company is not guilty of negligence as matter of law, under 2 Comp. Laws 1929, § 11121, in not planking in V-shaped space in crosswalk near where rails of side track and main track are merged; statute being permissive merely. *Arons* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 241.

23. Rule that one about to cross railroad track must take all reasonable precaution and be assured that it is safe to cross, and that failure to do so is contributory negligence as matter of law, precluding recovery, is applicable to so-called open crossings, but not to those protected by flagmen, since some reliance may be placed on protection afforded at crossing. *Motyka* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 417.

24. Whether pedestrians killed at protected railroad crossing were guilty of contributory negligence was question for jury, where evidence shows that, when they approached crossing, flagman was in view and train was passing, but, when they attempted to cross, after train had passed, flagman had disappeared, and they were struck by locomotive backing down on them, which they could have seen had they taken precaution to look. *Id.*

See TRIAL (1).

RATES—See CARRIERS (1, 2, 6).

RATIFICATION—See PARTNERSHIP (1).

REASONABLE TIME—See SCHOOLS AND SCHOOL DISTRICTS (10).

REASONABLY SAFE PLACE TO WORK—See SEAMEN (2).

REBUTTAL—See EXECUTORS AND ADMINISTRATORS (1).

RECEIPT—See EVIDENCE (5).

RECEIVERS.

1. "Surplus" decreed by court to be paid to trustee by receiver of hotel property is construed to mean surplus left in his hands after payment of administrative expenses. *Lalley* v. *Tuller Hotel Co.*, 105.
2. Order of court for payment of appraisers' and attorneys' fees, made after hearing and before payment, is complete protection to receiver, and amounts so paid were properly allowed in receiver's final account. *Id.*
3. Receiver's compensation was proper subject for attack on hearing on allowance of his final account. *Id.*
4. Where receiver introduced proof as to value of his services, and there was no proof that amount charged by him was unreasonable, its allowance is not disturbed, on appeal. *Id.*
5. Recognition of receivership and effort to obtain benefits thereunder by intervener estops it from attacking validity of receivership and jurisdiction of court to appoint receiver. *Grand Rapids Electrotype Co.* v. *Powers-Tyson Corp.*, 311.
6. Receiver's claim for solicitors' fees for services rendered before receiver's appointment is disallowed; receiver having no authority to employ counsel previous to appointment. *Id.* 312.
7. On allowance of receiver's final account, he has burden of accounting for his acts and for property which came into his hands, and he may not hide behind lack of testimony which it is his duty to produce. *Locke* v. *Ætna Casualty & Surety Co.*, 438.
8. On allowance of receiver's final account, collectible accounts which he allowed to outlaw without attempting to collect them are proper charges against him. *Id.*
9. Where receiver had been ordered by court to continue business, but instead of doing so he sublet premises at profit, which practice was later discontinued because of his alleged failure to pay rent, loss of profits from subletting was not properly chargeable to him, as he had no authority for subletting. *Id.*
10. Allowance of compensation to receiver for services should have stopped at time liability for profits on subletting stopped, where he performed no other service. *Id.*
11. Receiver may not be sued without leave of court appointing him. *In re Guaranty Indemnity Co.*, 671.
12. Receiver, being but "an arm of the court" in performance of his duties, need not be consulted by court in making of orders which to it seem just and proper. *Id.*
13. Order permitting receivers to be sued was not void because granted without notice of motion for hearing thereon having been given to them or their attorneys; Michigan Court Rule No. 10 not being applicable to such order. *Id.* 672.

RECEIVERS—Continued.

14. Receiver acquires no better title to property found in insolvent's hands than insolvent had when receiver was appointed. *Hobart* v. *Vanden Bosch*, 686.

15. In customer's action against broker's receivers for conversion of shares of stock, defendants' claim that retention of possession was lawful because it was incident to audit of insolvent broker's affairs is without merit, where, at time of trial, 17 months had passed since demand for delivery was made, and they were still claiming lawful possession. *Id.* 687.

See APPEAL AND ERROR (6); ATTORNEY AND CLIENT (2); CORPORATIONS (9, 10); COURTS (1); EQUITY (1); EVIDENCE (10); JUDGMENT (5).

RECEIVER'S TITLE NO BETTER THAN INSOLVENT'S—See RECEIVERS (14).

RECITAL IN DEED—See ALTERATION OF INSTRUMENTS.

RECORD—See APPEAL AND ERROR (4, 5, 18, 30); DIVORCE (9); EXECUTORS AND ADMINISTRATORS (9); HABEAS CORPUS (5); MORTGAGES (11); PRINCIPAL AND AGENT.

RECORDING—See CHATTEL MORTGAGES (3).

RECOVERY OF MONEY PAID—See LANDLORD AND TENANT (10).

REDEMPTION—See MORTGAGES (5-7).

REGISTER OF DEEDS—See MORTGAGES (6).

REGULATION—See COMMERCE.

REINSTATEMENT—See COSTS (2); INSURANCE (10, 12).

REINSTATEMENT OF NOTE—See BILLS AND NOTES (6).

REINSURANCE—See MASTER AND SERVANT (5).

REJECTION OF STOCK—See BROKERS (1, 3).

RELATION BETWEEN BROKER AND CUSTOMER—See BROKERS (13).

RELATION OF PARTIES—See CHATTEL MORTGAGES (1).

RELEASE—See CARRIERS (5); FRAUDS, STATUTE OF (1); PARTNERSHIP (3); PAYMENT (2).

RELIEF—See CANCELLATION OF INSTRUMENTS (3); EQUITY (3).

REMAND FOR JUDGMENT—See APPEAL AND ERROR (1).

REMARKS OF COURT—See APPEAL AND ERROR (13); CRIMINAL LAW (14).

REMARKS OF PROSECUTOR—See CRIMINAL LAW (12, 14).

REMEDY—See LANDLORDS AND TENANT (10).

REMITTITUR—See APPEAL AND ERROR (11).

REMOTENESS OF CONSENT—See SCHOOLS AND SCHOOL DISTRICTS (11).

REMOVABLE PROPERTY—See LANDLORD AND TENANT (11).

RENEWAL NOTE—See BILLS AND NOTES (6).

RENTS—See PAYMENT (3).

REPAIRS—See LANDLORD AND TENANT (12, 13).

REPEAL—See SCHOOLS AND SCHOOL DISTRICTS (7–9); STATUTES (3, 4, 6–8).

REPORT—See CORPORATIONS (1, 2).

REPUTATION—See CRIMINAL LAW (6, 7); LIBEL AND SLANDER (4).

REQUESTS TO CHARGE—See APPEAL AND ERROR (12); CRIMINAL LAW (15, 36).

RESALE—See MORTGAGES (5).

RESCISSION—See BANKS AND BANKING (1, 2); CORPORATIONS (3–5); EQUITY (7, 8); FRAUD (2); LIMITATION OF ACTIONS (1); VENDOR AND PURCHASER (9, 10, 12).

RESERVATION IN DEED—See RAILROADS (16).

RES GESTÆ—See CRIMINAL LAW (28, 34, 40, 55).

RES IPSA LOQUITUR—See NEGLIGENCE (10).

RES JUDICATA—See ATTACHMENT (2); JUDGMENT (3, 5, 7).

RESTRICTIONS—See EQUITY (5).

RETURN TO BROKER FOR TRANSFER—See BROKERS (12).

REVERTER—See RAILROADS (4, 13–15).

REVIVING MORTGAGE—See MORTGAGES (17).

RIGHT OF CLIENT TO PARTICULAR SHARES—See BROKERS (4).

RIGHT OF VENDEE TO INSURANCE MONEY TO REPLACE BUILDINGS—See VENDOR AND PURCHASER (5).

RIGHT OF WAY—See RAILROADS (1, 9–11, 17).

RIGHT SIDE OF ROAD—See MOTOR VEHICLES (9, 10).

RIGHTS OF CREDITORS—See BANKS AND BANKING (1); MORTGAGES (3).

RIGHT TO RECOVER PAYMENTS—See MOTOR VEHICLES (8).

RIGHT TO RENTS—See PAYMENT (3).

RIGHT TO WAIVE JURY TRIAL—See BASTARDY (4); CRIMINAL LAW (1).

ROBBERY—See CRIMINAL LAW (55).

ROYALTIES—See JUDGMENT (7); PATENTS (1, 2).

RULES OF DEPARTMENT OF LABOR AND INDUSTRY—See MASTER AND SERVANT (7).

SAGGING WIRES—See ELECTRICITY (8).

SAGINAW CHARTER—See MUNICIPAL CORPORATIONS (10).

SALARIES—See MUNICIPAL CORPORATIONS (9, 10).

SALE IN PARCELS—See MORTGAGES (4, 5).

SALE OF STOCK—See LICENSES (2).

SALES.

1. Under written agreement that defendant oil company would buy oil from plaintiff, that another oil company unable to fulfill its contract with defendant would deliver the oil free and receive credit for it as furnished on its contract, that defendant was to make payment to plaintiff through designated bank, and that plaintiff was to retain title to oil until delivery to defendant, company delivering oil to defendant never had title thereto. *Nelson & Witt* v. *Texas Co.*, 65.
2. In buyer's action for trade-in value of his old automobile on defendant's failure to deliver new car, plaintiff's testimony *held*, to establish that he dealt with corporation and not defendant personally, and that verdict should have been directed in defendant's favor. *Bergeron* v. *Belisle*, 225.
3. In action for breach of contract to purchase special machines to be constructed for defendant, latter's claim that cancellation was justified by plaintiff's delay, and that there was no sufficient proof of damages, *held*, without merit. *Hoefer Manfg. Co.* v. *Ford Motor Co.*, 643.

See BROKERS (12); CONVERSION (1); PRINCIPAL AND AGENT.

SAVING QUESTION FOR REVIEW—See APPEAL AND ERROR (34).

SCALES—See CRIMINAL LAW (33).

SCHOOL CODE—See SCHOOLS AND SCHOOL DISTRICTS (1, 2, 8–10, 12).

SCHOOLS AND SCHOOL DISTRICTS.

1. Under 2 Comp. Laws 1929, § 7104, authority of school board to purchase bus for transportation of pupils must be traced to grant thereof by school electors at valid special or annual meeting. *Leslie* v. *School District No. 1, Mason Twp.*, 22.

SCHOOLS AND SCHOOL DISTRICTS—Continued.

2. Action taken by electors at special meeting of school district authorizing school board to purchase school bus (2 Comp. Laws 1929, § 7104) is *held*, ineffective, in absence of evidence of compliance with statute in calling said special meeting (2 Comp. Laws 1929, §§ 7362, 7363). *Id.*
3. Where electors at annual school district meeting voted that it be left to school board to purchase bus to transport pupils, power was granted to board to determine need and make purchase. *Id.*
4. Where power was given to school board to determine need for bus to transport pupils, giving order for bus by majority of board determined need. *Id.*
5. That there was no money on hand to pay for school bus did not render contract for its purchase by school board void, where board could vote tax for such purpose. *Id.* 23.
6. Fractional primary school district created by special act of legislature (Act No. 283, Local Acts 1901) as an entity could be altered or destroyed only by legislature itself, or by some agent exercising properly delegated powers for that purpose. *Munn* v. *Lentz*, 233.
7. Township board, having power under general school law to alter boundaries of primary school districts (Act No. 31, Pub. Acts 1909), is nevertheless without power to change boundaries or destroy entity of fractional primary school district created by special act of legislature (Act No. 283, Local Acts 1901) which stands unrepealed. *Id.*
8. Act No. 283, Local Acts 1901, creating fractional primary school district, was not repealed by school code (Act No. 319, Pub. Acts 1927); not having been included in repealing section (chapter 37, § 1). *Id.*
9. It is beyond power of electors of township acting pursuant to Act No. 319, Pub. Acts 1927, to destroy legal identity of fractional primary school district created by special act of legislature, which stands unrepealed, by voting to organize township into single school district. *Id.*
10. Consent of electors of graded school district, necessary to its being included in township school district (Act No. 319, Pub. Acts 1927, pt. 1, chap. 4, § 2), should be given within reasonable time. *Id.*
11. Consent of electors of graded school district necessary to its being included in township school district, which was given two years before vote was taken on organizing township school district, was too remote. *Id.* 234.
12. While school district of first class is body corporate, it is to be regarded as agency of State government with limited powers exclusively restricted to purposes of education (2 Comp. Laws 1929, §§ 7266–7329). *Board of Education of City of Detroit*, v. *Campbell*, 350.

SCHOOLS AND SCHOOL DISTRICTS—Continued.

13. School districts, although invested with certain corporate characteristics, are not municipalities nor public corporations in full sense, but, because of their restricted powers, are distinguished and recognized as *quasi* corporations. *Id.*

14. Statute preferring honorably discharged soldiers for public employments, and prohibiting their discharge without hearing, is not applicable to school districts; they not being among political subdivisions enumerated in act (1 Comp. Laws 1929, §§ 900, 901, as amended by Acts Nos. 66, 67, Pub. Acts 1931). *Id.*

15. Where legislature repeatedly amending statute preferring honorably discharged soldiers for public employments omitted employees of school districts from its provisions, it must be assumed that said omission was intentional (1 Comp. Laws 1929, §§ 900, 901, as amended by Acts Nos. 66, 67, Pub. Acts 1931). *Id.*

See MASTER AND SERVANT (12, 13, 17).

SCOPE OF DUTIES—See PARTNERSHIP (3).

SEAMEN.

1. In order to recover damages under Federal merchant marine act (46 USCA, § 688) for employee's death, it must appear that death resulted, in whole or in part, from negligence of employer, and negligence must be determined in accordance with common-law rules applicable thereto. *Lewis* v. *Phelps,* 646.

2. It was duty of employer's agent, instructing yacht engineer to put catboat in commission, to see that he had reasonably safe place in which to perform that service. *Id.* 647.

3. Failure of employer's agent to warn yacht engineer, instructed to put catboat in commission, against danger of falling overboard while performing that service did not render master liable under Federal merchant marine act (46 USCA, § 688) for employee's death by drowning when he fell overboard; employee not being so inexperienced that it was master's duty to warn him of danger of falling overboard, which was as apparent to employee as to employer. *Id.*

SECOND TRIAL—See ESTOPPEL (5); WITNESSES (2).

SECURITY—See BILLS AND NOTES (3); BROKERS (2, 3).

SELF-SERVING EVIDENCE—See EVIDENCE (10).

SEPARATE MAINTENANCE—See DIVORCE (9).

SEPARATE TRIAL—See CRIMINAL LAW (10, 11).

SERVICES—See EXECUTORS AND ADMINISTRATORS (1–4); RECEIVERS (10).

SETTLEMENT RECEIPT—See MASTER AND SERVANT (24).

SEWER CONTRACTS—See MUNICIPAL CORPORATIONS (14).

SIGNAL LIGHT—See MOTOR VEHICLES (11).

SISTERS OF MERCY—See MASTER AND SERVANT (2).

SOLDIERS—See SCHOOLS AND SCHOOL DISTRICTS (14, 15).

SPECIAL ACT—See SCHOOLS AND SCHOOL DISTRICTS (6–9).

SPECIAL ASSESSMENTS—See MUNICIPAL CORPORATIONS (7, 11, 13).

SPECIAL LEAVE—See APPEAL AND ERROR (14–16).

SPECIAL MEETING—See SCHOOLS AND SCHOOL DISTRICTS (1, 2).

SPECIAL QUESTIONS—See BASTARDY (2).

SPECIFIC PERFORMANCE.

1. Specific performance of agreement to lease, induced by misrepresentations of plaintiff's agent, was properly denied. *Lamhoff* v. *Daniel*, 333.
2. In suit for specific performance of alleged oral contract to convey land, burden of proof is on plaintiff, and must be such as satisfies mind and conscience of court that the contract was made as claimed. *Sieg* v. *Sendelbach*, 456.
3. In suit for specific performance of alleged oral contract by foster mother to convey to plaintiff one-half of home property, evidence, *held*, insufficient to establish said contract. *Id.*

SPEED—See MOTOR VEHICLES (12, 24–29).

STATEMENTS MADE IN PRESENCE OF ACCUSED—See CRIMINAL LAW (55, 56).

STATUTE OF FRAUDS—See CONTRACTS (3); FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

1. In interpreting and construing statutes, primary rule is to ascertain and give effect to intention of legislature. *Attorney General, ex rel. Whitcomb*, v. *Law*, 13.
2. Provisions of Revised Statutes 1846, tit. 3, chaps. 12–15, inclusive, relating to general subject of resignations, vacancies, and removals of State and county officers, are part of general plan of legislation, and, so far as embodied in later compilations of statutes, provisions applying to separate county offices are also general rather than special legislative enactments. *Id.*

STATUTES—Continued.

3. Act No. 199, Pub. Acts 1923 (1 Comp. Laws 1929, § 3369), relating to filling vacancies in appointive and elective public offices, is general act supplanting earlier general acts covering same subject-matter. *Id.*
4. Act No. 199, Pub. Acts 1923 (1 Comp. Laws 1929, § 3369), providing that vacancy in office of county treasurer shall be filled by judge of probate, county clerk, and prosecuting attorney, being later general enactment, by necessary implication repeals inconsistent provision of earlier general enactment (1 Comp. Laws 1929, § 1264), that vacancy in said office shall be filled by board of supervisors. *Id.*
5. Statute awarding penalty is to be strictly construed, and before recovery may be had, case must be brought clearly within its terms. *Goetz* v. *Black*, 565.
6. Repeals of statute or charter provision by implication are not favored. *Saginaw City Council* v. *Saginaw Board of Estimates*, 624.
7. Where no repealing words are inserted in act or amendment, strong presumption arises that no repeal was intended. *Id.*
8. Only when two acts or charter provisions are so incompatible that they cannot stand together does later provision repeal former. *Id.*

See APPEAL AND ERROR (29); BANKS AND BANKING (1, 2); BASTARDY (4); BILLS AND NOTES (3); BROKERS (9, 10); CORPORATIONS (2, 12); COVENANTS (1); CRIMINAL LAW (1, 3, 10, 16, 19, 20, 44, 50, 54); DEATH (1); ELECTRICITY (1, 5, 8); GARNISHMENT (3, 6); HABEAS CORPUS (1, 3, 5, 6); INDICTMENT AND INFORMATION (2); INSURANCE (8); JUSTICES OF PEACE (2); LANDLORD AND TENANT (3, 4); LIMITATION OF ACTIONS (2); MASTER AND SERVANT (1–3, 13, 14, 16, 17, 19, 23, 25); MECHANICS' LIENS; MORTGAGES (4–6); MOTOR VEHICLES (6, 7, 18, 23, 25, 29, 30); MUNICIPAL CORPORATIONS (5–7); NEGLIGENCE (1); PARTNERSHIP (3); PLEADING (2–4); RAILROADS (1–6, 21, 22); SCHOOLS AND SCHOOL DISTRICTS (1, 2, 6–10, 12, 14, 15); TAXATION; TRUSTS (3); WITNESSES.

STATUTORY HEIGHT—See ELECTRICITY (1–3, 5–8).

STATUTORY PENALTY—See HABEAS CORPUS (1, 5, 6); STATUTES (5).

STIPULATED DAMAGES—See VENDOR AND PURCHASER (1).

STIPULATIONS—See APPEAL AND ERROR (20).

STOCK CERTIFICATES—See BROKERS (1–5, 12, 14, 15); CORPORATIONS (3–5); EVIDENCE (10); GARNISHMENT (1, 4); RECEIVERS (15).

STOP SIGN—See MOTOR VEHICLES (23).

STREET CAR—See DEATH (4, 5, 9).

STREET IMPROVEMENTS—See MUNICIPAL CORPORATIONS (11–13).

STREET RAILWAYS.

In action for death of four-year old child run over by street car, finding of trial court that there was no actionable negligence on part of defendant, *held*, justified, under evidence. *Basmajian* v. *City of Detroit*, 539.

SUBPŒNA DUCES TECUM—See DISCOVERY.

SUBSCRIPTION OF PROMOTER—See LICENSES (2).

SUBSEQUENT NEGLIGENCE—See NEGLIGENCE (4, 6).

SUBSEQUENT PAROL AGREEMENT—See CONTRACTS (3); MASTER AND SERVANT (10).

SUBSTITUTION OF LANDLORD—See LANDLORD AND TENANT (2, 4).

"SUIT"—See HABEAS CORPUS (1, 4–6).

SUMMARY JUDGMENT—See GARNISHMENT (6, 7); JUDGMENT (1, 4).

SUPERVISORS, BOARD OF—See MUNICIPAL CORPORATIONS (1–4); STATUTES (4).

SUPPRESSION OF EVIDENCE—See CRIMINAL LAW (28, 30).

SURPLUS—See RECEIVERS (1).

SURRENDER BY OPERATION OF LAW—See LANDLORD AND TENANT (15).

SURVIVAL ACT—See DEATH (1, 10, 11).

SUSPENDED MEMBERS—See INSURANCE (7, 8).

SWITCH LAMP—See TRIAL (1).

TACKING SEPARATE CONTRACTS—See MECHANICS' LIENS (1).

TAXATION.

Where for 60 years in assessing certain lots included in recorded plat they were described as being in certain subdivision, description in assessment which omitted name of said subdivision was insufficient, rendering void tax proceedings and sale for delinquent taxes (1 Comp. Laws 1929, § 3413). *Walsh* v. *Porter*, 177.

See MUNICIPAL CORPORATIONS (7, 8); SCHOOLS AND SCHOOL DISTRICTS (5).

TAXES—See EXECUTORS AND ADMINISTRATORS (5); MORTGAGES (2, 9).

TEMPORARY OFFICERS—See BENEFICIAL ASSOCIATIONS (4, 6).

TENANCY AT WILL—See LANDLORD AND TENANT (3).

TENANCY BY SUFFERANCE—See LANDLORD AND TENANT (2, 3).

TENANCY FROM YEAR TO YEAR—See FRAUDS, STATUTE OF (1).

TENDER—See BROKERS (5, 14, 15); CORPORATIONS (5).

TERMINATION OF TENANCY—See LANDLORD AND TENANT (2–5).

TERMS OF GRANT—See RAILROADS (8, 9).

THEATRES AND SHOWS.

In action against theatre company for negligence of its employee in closing automobile door on plaintiff's fingers, resulting in serious injury, evidence *held*, to justify directed verdict in favor of defendant. *McIntyre* v. *Kunsky Theatres Corp.*, 634.

THROUGH HIGHWAY—See MOTOR VEHICLES (23).

TIME FOR FILING—See MECHANICS' LIENS (1).

TIME OF FILING OBJECTIONS TO FINDINGS—See APPEAL AND ERROR (29).

TIME OF PAYMENT OF PREMIUM—See INSURANCE (9).

TITLE—See BROKERS (14); CANCELLATION OF INSTRUMENTS (1); ESTOPPEL (2); RAILROADS (2–9, 11, 14, 16, 20); SALES (1).

TOWNSHIP BOARDS—See SCHOOLS AND SCHOOL DISTRICTS (7).

TOWNSHIP SCHOOL DISTRICT—See SCHOOLS AND SCHOOL DISTRICTS (9–11).

TRAILER—See MOTOR VEHICLES (28, 30).

TRANSCRIPT—See APPEAL AND ERROR (17).

TRANSFER OF PRESENT INTEREST—See WILLS.

TRANSFER OF TITLE—See MOTOR VEHICLES (6, 7).

TRANSFER TO OTHER SIDE OF COURT—See EQUITY (4).

TRANSPORTATION OF PUPILS—See SCHOOLS AND SCHOOL DISTRICTS (1, 3, 4).

TRESPASSERS—See FIRES; NEGLIGENCE (2); WATERS AND WATERCOURSES.

TRIAL.

1. In action under Federal employers' liability act against railroad company by employee for injuries received in fall from switch lamp, where plaintiff's counsel was guilty of improper argument in appealing to passion and prejudice of jurors,

TRIAL—Continued.

which was probably reflected in verdict, which was not only excessive but against clear weight of evidence, judgment is reversed. *Miechikoski* v. *Chicago & North Western Ry. Co.*, 85.

2. On disputed question of fact, where there is sufficient evidence to justify jury's verdict for plaintiff, trial court should not set verdict aside; but where testimony is so incomplete, uncertain, and indefinite that jury's verdict can only be result of conjecture, trial court should enter judgment *non obstante veredicto* for defendant. *Richards* v. *F. C. Matthews & Co.*, 160.
3. In action for death of plaintiff's decedent, resulting from automobile collision, it was not reversible error to strike unresponsive answer of witness that person at scene of accident said she told driver of defendant's car "not to turn" in front of plaintiff's car, where it did not appear at that time that said person was occupant of defendant's car, although it was shown later. *Barnum* v. *Berk*, 363.
4. Failure of court to pass on motion to strike out, "because of its inaccuracies," map showing distances at scene of accident involved, was not error, where counsel also said that he had no objection to its remaining as merely crude illustration of situation. *Id.*

See APPEAL AND ERROR (10, 22, 25); BASTARDY (2, 4); CRIMINAL LAW (7, 10–18, 36, 41–43, 45, 46, 52); ESTOPPEL (4, 5); GARNISHMENT (5); LIBEL AND SLANDER (9); PLEADING (1); WITNESSES (2).

TRUSTS.

1. Express trusts, recognized at common law, were expressly recognized and saved from abolition by Revised Statutes of 1846 (chapter 63). *Michigan Trust Co.* v. *Herpolsheimer*, 589.
2. Common-law trust is not corporation, having no franchise, but is based on voluntary action of individuals. *Id.*
3. Common-law trust is recognized by statutes as voluntary association which may sue and be sued. *Id.*

See CORPORATIONS (12); DISCOVERY (1); JUDGMENT (4).

ULTRA VIRES—See RAILROADS (21).

UNCERTAINTY—See CONTRACTS (2); VENDOR AND PURCHASER (3).

UNCONDITIONAL ACCEPTANCE OF PREMIUM—See INSURANCE (10–12).

UNDISCLOSED PARTIES—See EQUITY (2, 3).

UNDUE INFLUENCE—See MORTGAGES (1).

UNLAWFUL ASSEMBLY—See BENEFICIAL ASSOCIATIONS (6).

UNLAWFUL POSSESSION—See RECEIVERS (15).

UNPAID JUDGMENT—See INSURANCE (3).

UNRECORDED CHATTEL MORTGAGE—See JUDGMENT (5).

UNRESPONSIVE ANSWER—See TRIAL (3).

USE OF LAND—See RAILROADS (1, 13).

USURY—See ESTOPPEL (3).

VACANCY IN COUNTY OFFICE—See STATUTES (2–4).

VACATING PORTION OF PLAT—See MUNICIPAL CORPORATIONS (5, 6).

VENDOR AND PURCHASER.

1. Where there was absolute promise to make payments on part of vendees, vendors could insist on payments due thereunder, although they had option, in event of vendees' default, to declare contract ended and retain moneys paid thereon as stipulated damages. *Schneider* v. *Levy,* 184.
2. Mere naked promise of vendor to extend time of payment due under land contract, resting in parol and without any consideration, is invalid. *Id.*
3. Oral agreement to extend time of payment due under land contract until land was platted and sufficient lots sold to make such payment is void for uncertainty, even if consideration therefor may be inferred. *Id.*
4. Vendors, who had declared forfeiture of land contract, are not entitled to enforce same, where they accepted insurance money paid into court, which was applied on contract. *Shaw* v. *Cramton,* 293.
5. Vendee is not entitled to have insurance money applied to replace buildings destroyed by fire, in absence of stipulation in contract to that effect. *Id.*
6. Where contract provided that fire insurance money, in case of loss, should be payable to vendors as their interest might appear, decree applying insurance money in reduction of purchase price was equitable, since both parties were thereby benefited. *Id.*
7. Where vendors in land contract represented entire consideration to be about $120,000, when in fact it was only about $82,000, and gave vendee credit for about $44,500, when in fact he had paid only about $6,000, making it possible for vendee to perpetrate fraud on plaintiffs, vendors are liable for consequences thereof, although they had no wrongful intent. *Holbrook* v. *Blick,* 396.
8. Where fire insurance policy, taken out by assignees of vendees in pursuance of provision therefor in contract, provided that in case of loss payment should be made to vendor and vendees

VENDOR AND PURCHASER—Continued.

as their respective interests should appear, decree directing payment of amount due on contract, on vendor's furnishing proper deed and abstract, and balance to be paid to assignees, was correct. *Bennett* v. *Johnson*, 557.

9. In action by vendee's assignee against vendee and vendor to rescind land contract on ground of fraud, plaintiff is not entitled to relief against vendor, who was guilty of no fraud, misrepresentation, or deceit, and with whom plaintiff did not deal. *Hubar* v. *Hartman Finance Corp.*, 602.

10. Vendee's offer to do equity is condition of their right to equitable relief by way of rescission for misrepresentation by vendors' agent of location of boundary line. *Hathaway* v. *Hudson*, 694.

11. Vendors' good-faith offer to convey necessary strip of land to make good their agent's misrepresentation as to location of boundary line was not necessarily nullified by fact that they were not, at that time, actually possessed of legal ability to do so. *Id.*

12. Where vendors' agent misrepresented location of boundary line, and mistake was not discovered for over seven years, court should have given them opportunity to make good their offer to secure necessary strip of land and tender deed thereof before granting rescission to vendees. *Id.*

See ESTOPPEL (3); MORTGAGES (4, 12).

VERDICT—See APPEAL AND ERROR (9, 10, 35); CRIMINAL LAW (17, 18).

VETERANS—See SCHOOLS AND SCHOOL DISTRICTS (14, 15).

VEXATIOUS APPEAL—See COSTS (2).

VIEW OF PREMISES—See CRIMINAL LAW (33).

VOID SALE—See MOTOR VEHICLES (7, 8).

VOLUNTARY ASSOCIATIONS—See TRUSTS (2, 3).

WAIVER—See APPEARANCE; BASTARDY (4); CIRCUIT COURT COMMISSIONERS; CONVERSION (4); CRIMINAL LAW (1); ESTOPPEL (1); FRAUD (2); INSURANCE (11, 12); VENDOR AND PURCHASER (4); WITNESSES (2).

WANTONNESS—See MOTOR VEHICLES (29); NEGLIGENCE (6, 7).

WARNING SERVANT—See MASTER AND SERVANT (26); SEAMEN (3).

WATER HEATER—See EVIDENCE (9).

WATERS AND WATERCOURSES.

In suit to enjoin trespass on plaintiffs' private lake, finding of trial court that artificial drainage ditch through which defendants passed in order to reach said lake is not navigable in fact, *held*, supported by testimony. *Bushman* v. *Estleman*, 243.

See INJUNCTION (2).

WIFE'S FUNERAL EXPENSES—See HUSBAND AND WIFE (4, 5).

WIFE'S SEPARATE PROPERTY—See HUSBAND AND WIFE (1–3).

WIFE'S SERVICES AS HOUSEKEEPER—See DEATH (10); HUSBAND AND WIFE (7).

WILFUL MISCONDUCT—See MOTOR VEHICLES (29); NEGLIGENCE (6, 7).

WILLS.

1. Whether instrument is bill of sale or will depends on whether it intended to transfer present interest in property or to pass interest only on death of maker, and intention, if expressed on face of instrument in plain and unmistakable language, must govern. *In re Lloyd's Estate,* 305.
2. Where there was no ambiguity in language used in instrument in form of bill of sale, which purported to convey present interest in personal property, extrinsic evidence was not admissible to show that it was intended as will because it failed as bill of sale through nondelivery of property conveyed. *Id.*

See HUSBAND AND WIFE (5).

WIRES ACROSS HIGHWAY—See ELECTRICITY (1–3, 5–8).

WITNESSES.

1. In action against bank, use of deposition of plaintiff, taken after suit was commenced and used after her death, rendered competent testimony of defendant's assistant cashier (3 Comp. Laws 1929, § 14219). *Barnes* v. *First National Bank of St. Ignace,* 600.
2. Plaintiff, by failing to object to competency of defendants to testify as to matters equally within knowledge of deceased (3 Comp. Laws 1929, § 14219) and electing to cross-examine them on first trial in relation thereto, waived her right to object to their testimony on subsequent trial. *Billingsley* v. *Gulick,* 606.

See CRIMINAL LAW (4, 8, 9, 12, 25–31, 33–40, 48, 54); EMINENT DOMAIN (7); EVIDENCE (2, 3).

WORDS AND PHRASES—See CONVERSION (2); CORPORATIONS (4); MOTOR VEHICLES (6); RAILROADS (9); RECEIVERS (1).

WORKMEN'S COMPENSATION ACT—See MASTER AND SERVANT (1–3, 5, 6, 8, 9, 11–24).

WRITTEN CONTRACT—See CONTRACTS (3); MASTER AND SERVANT (10).

YACHT ENGINEER—See SEAMEN (2, 3).