MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN COURT OF APPEALS

FROM

FEBRUARY 19, 1971 to MARCH 26, 1971

HOWARD L. ELLIS
SUPREME COURT REPORTER

WILLIAM H. LEWIS
CHIEF DEPUTY COURT REPORTER
FOR THE
COURT OF APPEALS

VOLUME 31
FIRST EDITION

ROCHESTER, NEW YORK
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
1972

US/MI
SOP
MIC

Copyright 1971, by Richard H. Austin, Secretary of State for the State of Michigan, Official Advance Sheets, Vol. 31, Nos. 1 and 2
Copyright 1972, by Richard H. Austin, Secretary of State for the State of Michigan

COURT OF APPEALS

CHIEF JUDGE

	TERM EXPIRES
T. JOHN LESINSKI, DETROIT	Jan. 1, 1973

CHIEF JUDGE PRO TEM

JOHN W. FITZGERALD, GRAND LEDGE	Jan. 1, 1975

JUDGES

ROBERT B. BURNS, GRAND RAPIDS	Jan. 1, 1977
JOHN H. GILLIS, GROSSE POINTE	Jan. 1, 1977
DONALD E. HOLBROOK, CLARE	Jan. 1, 1973
LOUIS D. McGREGOR, FLINT	Jan. 1, 1977
TIMOTHY C. QUINN, EAST LANSING	Jan. 1, 1973
CHARLES L. LEVIN, DETROIT	Jan. 1, 1975
VINCENT J. BRENNAN, DETROIT	Jan. 1, 1975
S. JEROME BRONSON, FRANKLIN VILLAGE	Jan. 1, 1975
THOMAS M. BURNS, SAGINAW	Jan. 1, 1975
ROBERT J. DANHOF, EAST LANSING	Jan. 1, 1975

COMMISSIONERS:

JACK L. BORST, LANSING
JOSEPH D. REID, EAST LANSING
JOHN H. STENGER, LANSING
NORMAN OTTO STOCKMEYER, JR., EAST LANSING
JOHN E. TORMEY, EAST LANSING

CLERK: RONALD L. DZIERBICKI, LANSING
ASSISTANT CLERKS: JAMES O. DEVEREAUX, JR., EAST LANSING
DONALD UBELL, EAST LANSING

DEPUTY CLERKS:

FIRST DISTRICT: STEPHEN DALLOS, DETROIT
THIRD DISTRICT: GEORGE K. BECK, GRAND RAPIDS
ATTORNEY GENERAL: FRANK J. KELLEY, ALPENA
SOLICITOR GENERAL: ROBERT A. DERENGOSKI, EAST LANSING

12/5/74 C12

SUPREME COURT

CHIEF JUSTICE

	TERM EXPIRES
THOMAS M. KAVANAGH, CARSON CITY . .	Jan. 1, 1975

ASSOCIATE JUSTICES

EUGENE F. BLACK, PORT HURON	Jan. 1, 1973
PAUL L. ADAMS, LAINGSBURG	Jan. 1, 1973
THOMAS E. BRENNAN, EAST LANSING . . .	Jan. 1, 1975
THOMAS G. KAVANAGH, BIRMINGHAM . . .	Jan. 1, 1977
JOHN B. SWAINSON, MANCHESTER	Jan. 1, 1979
G. MENNEN WILLIAMS, GROSSE POINTE FARMS .	Jan. 1, 1979

SUPREME COURT COMMISSIONERS:
MARCEL S. GREENIA, EAST LANSING
JOSEPH W. PLANCK, LANSING
C. W. RUSKOWSKI, BLOOMFIELD HILLS

COURT ADMINISTRATOR: WILLIAM R. HART, LANSING
DEPUTY—CIRCUIT COURTS—AUSTIN J. DOYLE, EAST LANSING
DEPUTY—PROBATE COURTS—ROBERT L. DRAKE, EAST LANSING
DEPUTY—DISTRICT COURTS—HAROLD J. HARRIS, OKEMOS

CLERK: DONALD F. WINTERS, OKEMOS
CRIER: PHILIP A. SPRAGUE, LANSING

SUPREME COURT REPORTER: HOWARD L. ELLIS, LANSING

CIRCUIT JUDGES

	Term Expires
1. ROBERT W. McINTYRE, Reading	Jan. 1, 1973
2. CHESTER J. BYRNS, St. Joseph	Jan. 1, 1973
JULIAN E. HUGHES, St. Joseph	Jan. 1, 1975
KARL F. ZICK, Sodus	Jan. 1, 1975
3. VICTOR J. BAUM, Detroit	Jan. 1, 1975
EDWARD F. BELL, Detroit	Jan. 1, 1975
THEODORE R. BOHN, Detroit	Jan. 1, 1977
GEORGE E. BOWLES, Grosse Pointe Shores	Jan. 1, 1977
BENJAMIN D. BURDICK, Detroit	Jan. 1, 1973
JAMES N. CANHAM, Detroit	Jan. 1, 1975
HARRY J. DINGEMAN, Jr., Detroit	Jan. 1, 1973
CHARLES S. FARMER, Detroit	Jan. 1, 1973
NEAL E. FITZGERALD, Detroit	Jan. 1, 1975
THOMAS J. FOLEY, Detroit	Jan. 1, 1973
HORACE W. GILMORE, Detroit	Jan. 1, 1977
CHARLES KAUFMAN, Detroit	Jan. 1, 1975
NATHAN J. KAUFMAN, Detroit	Jan. 1, 1977
RICHARD M. MAHER, Detroit	Jan. 1, 1973
GEORGE T. MARTIN, Dearborn	Jan. 1, 1973
JAMES MONTANTE, Detroit	Jan. 1, 1975
BLAIR MOODY, Jr., Grosse Pointe Shores	Jan. 1, 1973
JOSEPH A. MOYNIHAN, Jr., Detroit	Jan. 1, 1977
JOHN D. O'HAIR, Detroit	Jan. 1, 1975
ROLAND L. OLZARK, Grosse Pointe	Jan. 1, 1973
EDWARD S. PIGGINS, Detroit	Jan. 1, 1975
JOSEPH G. RASHID, Detroit	Jan. 1, 1977
THOMAS D. ROUMELL, Dearborn Heights	Jan. 1, 1975
JAMES L. RYAN, Detroit	Jan. 1, 1973
MICHAEL L. STACEY, Detroit	Jan. 1, 1973
JOSEPH A. SULLIVAN, Grosse Pointe Park	Jan. 1, 1977
JOHN M. WISE, Detroit	Jan. 1, 1977
4. GORDON W. BRITTEN, Grass Lake	Jan. 1, 1977
JOHN C. DALTON, Brooklyn	Jan. 1, 1975
CHARLES J. FALAHEE, Michigan Center	Jan. 1, 1973
5. RICHARD E. ROBINSON, Eaton Rapids	Jan. 1, 1973
WILLARD L. MIKESELL, Charlotte	Jan. 1, 1977
6. CLARK J. ADAMS, Pontiac	Jan. 1, 1977
WILLIAM R. BEASLEY, Birmingham	Jan. 1, 1973
WILLIAM JOHN BEER, Berkley	Jan. 1, 1975
WILLIAM P. HAMPTON, Bloomfield Hills	Jan. 1, 1973
ARTHUR E. MOORE, Royal Oak	Jan. 1, 1977
FARRELL E. ROBERTS, Bloomfield Hills	Jan. 1, 1973
ROBERT L. TEMPLIN, Birmingham	Jan. 1, 1973

	JAMES S. THORBURN, Royal Oak	Jan. 1, 1977
	FREDERICK C. ZIEM, Pontiac	Jan. 1, 1975
7.	JOHN W. BAKER, Flint	Jan. 1, 1973
	PHILIP C. ELLIOTT, Flint	Jan. 1, 1975
	DONALD R. FREEMAN, Flint	Jan. 1, 1973
	ANTHONY J. MANSOUR, Flint	Jan. 1, 1977
	ELZA H. PAPP, Flint	Jan. 1, 1977
	THOMAS C. YEOTIS, Flint	Jan. 1, 1975
8.	LEO B. BEBEAU, Belding	Jan. 1, 1973
9.	DONALD T. ANDERSON, Kalamazoo	Jan. 1, 1977
	RAYMOND W. FOX, Kalamazoo	Jan. 1, 1973
	LUCIEN F. SWEET, Kalamazoo	Jan. 1, 1975
10.	HAZEN R. ARMSTRONG, Saginaw	Jan. 1, 1973
	FRED J. BORCHARD, Saginaw	Jan. 1, 1977
	EUGENE SNOW HUFF, Saginaw	Jan. 1, 1975
	JOSEPH R. McDONALD, Saginaw	Jan. 1, 1975
11.	WILLIAM F. HOOD, Manistique	Jan. 1, 1977
12.	STEPHEN D. CONDON, Hancock	Jan. 1, 1973
13.	CHARLES L. BROWN, Traverse City	Jan. 1, 1973
	JAMES M. FITZPATRICK, Traverse City	Jan. 1, 1975
14.	CHARLES A. LARNARD, Jr., Muskegon	Jan. 1, 1975
	JOHN H. PIERCEY, Muskegon Heights	Jan. 1, 1975
	JAMES F. SCHOENER, Muskegon	Jan. 1, 1973
15.	MARK S. ANDREWS, Coldwater	Jan. 1, 1973
16.	HOWARD R. CARROLL, Mount Clemens	Jan. 1, 1977
	WALTER P. CYNAR, Warren	Jan. 1, 1973
	GEORGE R. DENEWETH, Mount Clemens	Jan. 1, 1977
	EDWARD J. GALLAGHER, Warren	Jan. 1, 1977
	FRANK E. JEANNETTE, Mount Clemens	Jan. 1, 1973
	ALTON H. NOE, Mount Clemens	Jan. 1, 1975
	JAMES E. SPIER, Mount Clemens	Jan. 1, 1975[1]
	HUNTER D. STAIR, Mount Clemens	Jan. 1, 1973[2]
17.	GEORGE V. BOUCHER, Grand Rapids	Jan. 1, 1977
	STUART HOFFIUS, East Grand Rapids	Jan. 1, 1977
	JOHN T. LETTS, Grand Rapids	Jan. 1, 1973
	ROMAN J. SNOW, Grand Rapids	Jan. 1, 1973
	JOHN H. Vander WAL, East Grand Rapids	Jan. 1, 1975
18.	LEON R. DARDAS, Bay City	Jan. 1, 1975
	JOHN X. THEILER, Bay City	Jan. 1, 1973
19.	CHARLES A. WICKENS, Baldwin	Jan. 1, 1973
20.	WENDELL A. MILES, Holland	Jan. 1, 1973
	RAYMOND L. SMITH, Holland	Jan. 1, 1973
21.	ROBERT H. CAMPBELL, Clare	Jan. 1, 1973
22.	WILLIAM F. AGER, Jr., Ann Arbor	Jan. 1, 1977
	ROSS W. CAMPBELL, Ann Arbor	Jan. 1, 1975
	JOHN W. CONLIN, Ann Arbor	Jan. 1, 1973
23.	ALLAN C. MILLER, East Tawas	Jan. 1, 1973
24.	ARTHUR M. BACH, Bad Axe	Jan. 1, 1973
25.	BERNARD H. DAVIDSON, Negaunee	Jan. 1, 1973
26.	PHILIP J. GLENNIE, Alpena	Jan. 1, 1973
27.	HAROLD Van DOMELEN, Hart	Jan. 1, 1973
28.	WILLIAM R. PETERSON, Cadillac	Jan. 1, 1973
29.	LEO W. CORKIN, St. Johns	Jan. 1, 1973
30.	RAY C. HOTCHKISS, Lansing	Jan. 1, 1977

[1] Died February 27, 1971.
[2] From March 1, 1971.

	SAM STREET HUGHES, Lansing	Jan. 1, 1973
	DONALD L. REISIG, Lansing	Jan. 1, 1977
	MARVIN J. SALMON, Lansing	Jan. 1, 1975
	JACK W. WARREN, Lansing	Jan. 1, 1973
31.	STANLEY C. SCHLEE, Port Huron	Jan. 1, 1973
	HALFORD I. STREETER, Port Huron	Jan. 1, 1975
32.	DONALD L. MUNRO, Ontonagon	Jan. 1, 1973
33.	EDWARD H. FENLON, Petoskey	Jan. 1, 1973
34.	DENNIS J. O'KEEFE, Standish	Jan. 1, 1973
35.	MICHAEL CARLAND, Owosso	Jan. 1, 1973
36.	DAVID ANDERSON, Jr., Paw Paw	Jan. 1, 1973
37.	CREIGHTON R. COLEMAN, Battle Creek	Jan. 1, 1973
	RONALD M. RYAN, Battle Creek	Jan. 1, 1975
38.	JAMES J. KELLEY, Jr., Monroe	Jan. 1, 1973
	WILLIAM J. WEIPERT, Jr., Monroe	Jan. 1, 1975
39.	REX B. MARTIN, Adrian	Jan. 1, 1973
40.	NORMAN A. BAGULEY, Lapeer	Jan. 1, 1975
	JAMES P. CHURCHILL, Vassar	Jan. 1, 1973
41.	ERNEST W. BROWN, Iron Mountain	Jan. 1, 1973
42.	JAMES R. ROOD, Midland	Jan. 1, 1973
43.	JAMES E. HOFF, Dowagiac	Jan. 1, 1975
44.	PAUL R. MAHINSKE, Howell	Jan. 1, 1975
45.	ROBERT E. A. BOYLE, Sturgis	Jan. 1, 1977

Recorder's Court of Detroit

ROBERT J. COLOMBO.
GEORGE W. CROCKETT, Jr.
ELVIN L. DAVENPORT.
ROBERT E. DeMASCIO.
ROBERT L. EVANS.
GERALDINE BLEDSOE FORD.
JOSEPH A. GILLIS.
HENRY L. HEADING.
DONALD S. LEONARD.
JOSEPH E. MAHER.
SAMUEL H. OLSEN.
THOMAS L. POINDEXTER.
FRANK G. SCHEMANSKE.

Traffic and Ordinance Division

WILLIAM C. HAGUE.
JOHN R. KIRWAN.
ANDREW C. WOOD.

JUDICIAL CIRCUITS

County	Seat	Circuit
Alcona	Harrisville	23
Alger	Munising	11
Allegan	Allegan	20
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	34
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	28
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	13
Cheboygan	Cheboygan	33
Chippewa	Sault Ste. Marie	11
Clare	Harrison	21
Clinton	St. Johns	29
Crawford	Grayling	34
Delta	Escanaba	25
Dickinson	Iron Mountain	41
Eaton	Charlotte	5
Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	21
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	24
Ingham	Mason, Lansing	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	28
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	19
Lapeer	Lapeer	40
Leelanau	Leland	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	33
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	19
Mecosta	Big Rapids	27
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	19
Oscoda	Mio	23
Otsego	Gaylord	34
Ottawa	Grand Haven	20
Presque Isle	Rogers City	26
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
Tuscola	Caro	40
Van Buren	Paw Paw	36
Washtenaw	Ann Arbor	22
Wayne	Detroit	3
Wexford	Cadillac	28

JUDGES OF THE MICHIGAN COURT OF APPEALS

JANUARY, 1971



(Standing) S. JEROME BRONSON, ROBERT J. DANHOF, DONALD E. HOLBROOK, CHARLES L. LEVIN, VINCENT J. BRENNAN, THOMAS M. BURNS

(Seated) ROBERT B. BURNS, LOUIS D. MCGREGOR, JOHN W. FITZGERALD, T. JOHN LESINSKI, JOHN H. GILLIS, TIMOTHY C. QUINN
CHIEF JUDGE PRO TEM. CHIEF JUDGE

AMENDMENTS OF THE CONSTITUTION, STATUTES, AND COURT RULES PERTAINING TO THE COURT OF APPEALS since their publication in 1 Mich App xx–clx.

CONSTITUTION

ARTICLE 6

Removal of domicile of judge.

Sec. 20. Whenever a justice or judge removes his domicile beyond the limits of the territory from which he was elected or appointed, he shall have vacated his office.

Incumbent judges, affidavit of candidacy.

Sec. 22. Any judge of the court of appeals, circuit court or probate court may become a candidate in the primary election for the office of which he is the incumbent by filing an affidavit of candidacy in the form and manner prescribed by law.

Judicial vacancies, filling; appointee, term; successor; new offices.

Sec. 23. A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first gen-

eral election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law. The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

Incumbent judges, ballot designation.

Sec. 24. There shall be printed upon the ballot under the name of each incumbent justice or judge who is a candidate for nomination or election to the same office the designation of that office.

Judicial tenure commission; selection; terms; duties; power of supreme court.

Sec. 30. (1) A judicial tenure commission is established consisting of nine persons selected for three-year terms as follows: Four members shall be judges elected by the judges of the courts in which they serve; one shall be a court of appeals judge, one a circuit judge, one a probate judge and one a judge of a court of limited jurisdiction: Three shall be members of the state bar who shall be elected by the members of the state bar of whom one shall be a judge and two shall not be judges. Two shall be appointed by the governor; the members appointed by the governor shall not be judges, retired judges or members of the state bar. Terms shall be staggered as provided by rule of the supreme court. Vacancies shall be filled by the appointing power.

(2) On recommendation of the judicial tenure commission, the supreme court may censure, sus-

pend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings.

These amendments were approved by the people at a special election on August 6, 1968.

STATUTES

MICHIGAN ELECTION LAW

168.409b Court of appeals judge; nominating petitions, form, filing. [M.S.A. 6.1409(2)]

Sec. 409b. (1) To obtain the printing of the name of any qualified person other than an incumbent elected judge of the court of appeals as a candidate for nomination for the office of judge of the court of appeals upon the official nonpartisan primary ballots, there shall be filed with the secretary of state nominating petitions containing the signatures, addresses and dates of signing of a number of qualified and registered electors residing in the appellate court district, equal to not less than 1/2 of 1% nor more than 2% of the total number of votes cast in that appellate court district for secretary of state at the last preceding general November election in which a secretary of state was elected. Such nominating petitions shall be in the form provided in sections 544 and 544a of this act, excepting that it shall contain no reference to any political party. The secretary of state shall receive such nominating petitions up to 4 p.m., eastern standard time, on the seventh Tuesday preceding the primary.

Incumbent judge; affidavit of candidacy.

(2) Any incumbent judge of the court of appeals may become a candidate in the primary election for

the office of which he is the incumbent by filing with the secretary of state an affidavit of candidacy not less than 120 days prior to the date of the primary election. The affidavit of candidacy shall contain statements that the affiant is an incumbent judge of the court of appeals, that he is domiciled within the district, that he will not attain the age of 70 by the date of election and a declaration that he is a candidate for election to the office of judge of the court of appeals.

168.409*l* Court of appeals judge; vacancy, filling, election. [M.S.A. 6.1409(12)]

Sec. 409l. When a vacancy occurs in the office of judge of the court of appeals, the governor shall appoint a successor to fill the vacancy. The person appointed by the governor shall be considered an incumbent for purposes of this act and shall hold office until 12 noon of January 1 following the next general election at which a successor is elected and qualified. Candidates shall be nominated at the next fall primary held at least 70 days after such vacancy occurs, to fill the vacancy in the manner provided in this chapter for the nomination of candidates for judge of the court of appeals. The vacancy shall be filled at the general election next following the primary in the manner provided in this chapter for the election of judges of the court of appeals. The person elected shall hold such office for the remainder of the unexpired term.

Sections 409b, 409*l* as amended by 1970 PA 10.

REVISED JUDICATURE ACT OF 1961

600.301 Court of appeals; judges; court of record. [M.S.A. 27A.301]

Sec. 301. The court of appeals shall consist of 12 judges and is a court of record.

600.302 Court of appeals districts. [M.S.A. 27A-.302]

Sec. 302. For the election of judges, the state shall be divided into 3 judicial districts. Districts 1, 2 and 3 shall be entitled to elect 4 judges for their respective districts. The districts shall be initially constituted and numbered as follows:

District 1 shall consist of the county of Wayne.

District 2 shall consist of the counties of Huron, Tuscola, Sanilac, Genesee, Lapeer, St. Clair, Shiawassee, Livingston, Oakland, Macomb, Ingham, Jackson, Washtenaw, Hillsdale, Lenawee and Monroe.

District 3 shall consist of the counties of Berrien, Cass, St. Joseph, Branch, Calhoun, Kalamazoo, Van Buren, Allegan, Barry, Eaton, Ionia, Kent, Ottawa, Muskegon, Montcalm, Clinton, Gratiot, Saginaw, Bay, Midland, Isabella, Mecosta, Newaygo, Oceana, Mason, Lake Osceola, Clare, Gladwin, Arenac, Iosco, Ogemaw, Roscommon, Missaukee, Wexford, Manistee, Benzie, Grand Traverse, Leelanau, Kalkaska, Crawford, Oscoda, Alcona, Alpena, Montmorency, Otsego, Antrim, Emmet, Charlevoix, Cheboygan, Presque Isle, Mackinac, Chippewa, Luce, School-

craft, Alger, Delta, Menominee, Dickinson, Marquette, Iron, Baraga, Houghton, Keweenaw, Gogebic and Ontonagon.

Sections 301, 302 as amended by 1968 PA 127.

600.304 Court of appeals; judges; compensation. [M.S.A. 27A.304]

Sec. 304. (1) Each judge of the court of appeals shall receive an annual salary of $38,500.00.

(2) The judges shall be reimbursed for their actual and necessary expenses from the state treasury, upon the warrant of the state treasurer.

Section 304 as amended by 1970 PA 248.

600.306 Transfer of judges; divisions of court of appeals. [M.S.A. 27A.306]

Sec. 306. The supreme court may transfer judges from the circuit or superior courts to the court of appeals to act as temporary judges thereof. The transfer may be made to replace disabled or disqualified judges, or to enlarge the court of appeals temporarily to not more than 18 judges if the business of the court of appeals is deemed by the supreme court to warrant it. If the court of appeals sits in divisions, such temporary judges may be assigned to any such division. No more than 1 circuit judge shall be assigned to hear any case. Such temporary judge shall be disqualified from hearing, in the court of appeals, cases tried before him in the trial court.

Section 306 as amended by 1968 PA 127.

600.308 Court of appeals, jurisdiction. [M.S.A. 27A.308]

Sec. 308. The court of appeals has jurisdiction on appeals from:

(1) All final judgments from the circuit courts,

court of claims, and recorder's court, except judgments on ordinance violations in the traffic and ordinance division of recorder's court. Appeals from final judgments from all other courts and from convictions for ordinance violations in the traffic and ordinance division of recorder's court shall be taken to the circuit courts, upon which further review may be had only upon application for leave to appeal granted by the court of appeals.

(2) Such other judgments or interlocutory orders as the supreme court may by rule determine.

Section 308 as amended by 1968 PA 116.

600.310 Court of appeals; original jurisdiction; writs, directives and mandates. [M.S.A. 27A.310]

Sec. 310. The court of appeals has original jurisdiction to issue prerogative and remedial writs or orders as provided by rules of the supreme court, and has authority to issue any writs, directives and mandates that it judges necessary and expedient to effectuate its determination of cases brought before it.

Section 310 as amended by 1967 PA 65.

600.321 Fees; waiver; disposition. [M.S.A. 27A-.321]

Sec. 321. The following fees shall be paid to the clerk of the court of appeals, and may be taxed as costs where costs are allowed by order of the court:

(1) There shall be paid to the clerk the sum of $50.00 on appeal as of right and $50.00 on application for leave to appeal.

(2) Upon the entry of any motion upon the motion docket, there shall be paid to the clerk the sum of $20.00.

(3) The clerk shall be allowed the sum of 50 cents per page for certified copies of any entries or papers in any action or proceedings when required for any other purpose than one connected with the progress or disposition of such action or proceeding.

(4) The clerk shall charge the sum of 50 cents per page for all uncertified copies of opinions, excepting those sent to 1 counsel representing each party in the case, for which no charge shall be made.

(5) If a person is unable to pay the fees mentioned herein, he may by motion, accompanied by his affidavit stating facts showing such inability, ask the court to waive such fees and the court or a judge thereof may waive payment of such fees.

(6) Each month the clerk shall deposit with the state treasurer all fees collected, securing and filing a receipt therefor.

(7) Costs shall be awarded in the discretion of the court.

(8) Upon appeal to the court of appeals there shall be paid to the clerk of the trial court the sum of $10.00 as an appeal fee.

Section 321 as amended by 1970 PA 248.

600.4304 Habeas corpus; power to issue writ. [M.S.A. 27A.4304]

Sec. 4304. The writ of habeas corpus to inquire into the cause of detention, or an order to show cause why the writ should not issue, may be issued by the following:

(1) The supreme court, or a justice thereof.

(2) The court of appeals, or a judge thereof.

(3) The circuit courts, or a judge thereof.

(4) The municipal courts of record, including but not limited to the recorder's court of the city of Detroit, common pleas court, or a judge thereof.

600.4401 Mandamus; state officers. [M.S.A. 27A-.4401]

Sec. 4401. All actions for mandamus against state officers shall be commenced in the court of appeals or in the supreme court, as provided by rules by the supreme court.

Sections 4304, 4401 as amended by 1967 PA 65.

GENERAL COURT RULES 1963

Subrule 710.7 was amended February 13, 1969, effective immediately. New matter is indicated by italics. Deletions are not indicated.—REPORTER.

RULE 710. IN GENERAL.

.1–.6 (Unchanged)

.7 Procedure. Where Relief is Sought in the Court of Appeals.

(1) A complaint filed in the Court of Appeals is treated as a motion.

(2) The Court may order the complaint, writ, or order to show cause answered and heard either before it, a judge thereof, or before any circuit court.

(3) The Court may refer the issues or the taking of evidence to a circuit *judge*.

(4) Briefs may be filed as provided in subrule 806.3(5).

.8–.9 (Unchanged)

Chapter 80 of the General Court Rules of 1963 is here reprinted in its entirety. Dates of amendment are given in small type beneath the appropriate section. Changes are italicized.—REPORTER.

CHAPTER 80

APPEALS TO THE COURT OF APPEALS

RULE 800. ORGANIZATION AND OPERATION OF COURT OF APPEALS.

.1 Divisions. The Court of Appeals shall sit to

hear cases in Divisions consisting of three judges except as otherwise directed by the Supreme Court. The judges of each Division shall be rotated in such manner as to cause each judge to sit with each other judge with equal frequency consistent with the efficient administration of the business of the Court. At least three judges shall hear all cases unless otherwise directed by the Supreme Court.

.2 Assignment of Judges. Judges for each Division and the matters to be heard by them shall be assigned by the Chief Judge of the Court of Appeals on or before 15 days prior to the first day of each session. Motions, interlocutory matters, applications for leave to appeal, original proceedings, and any appeals or other matters before the Court may be assigned to Divisions of the Court or any panel of three judges.

.3 Assignment of Circuit Judges and Former Judges. The Supreme Court may assign circuit judges *or former judges* to the Court of Appeals to act as temporary judges thereof, provided that the judges of the Court of Appeals shall at no time exceed *18* in number, nor shall more than one circuit judge *or former judge* sit in any hearing.

Subrule 800.3 as amended May 27, 1971, effective immediately.

.4 Decisions by the Court. The decision of a majority of the judges of a Division or panel in attendance at the hearing shall constitute the decision of the Court. Decisions of the Court of Appeals are final except as reviewed by the Supreme Court on leave granted by the Supreme Court.

.5 Place of Hearing. The Divisions of the Court shall sit in Detroit, Lansing, Grand Rapids, and Marquette as designated from time to time by the Chief Judge of the Court of Appeals. Hearings of calendar cases shall be assigned for hearing in such

place as is nearest to the court or tribunal from which the appeal was taken or as stipulated by the parties, except as otherwise required for the efficient administration of the Court.

.6 *Sessions of the Court. There shall be 9 regular sessions of each Division of the Court each year. Each session shall commence on the first Tuesday after the first Monday during the months of October through June, except as otherwise required for the efficient administration of the Court. The sessions of each Division shall continue for such number of days as may be necessary to conclude the hearing of cases scheduled for argument. In addition to such regular sessions of the Court, the Chief Judge may order such special sessions as he deems necessary.*

Subrule 800.6 as amended December 7, 1966, effective March 1, 1967.

.7 Chief and Presiding Judge. There shall be a Chief Judge of the Court of Appeals who shall be selected from among them by the judges thereof every third year. The Chief Judge shall preside over any hearings in which he sits and perform such other functions as the Court of Appeals or the Supreme Court by rule or special order shall direct. There shall be a Presiding Judge for each session of a Division or panel who shall be designated by the Chief Judge of the Court of Appeals from among the members of the Division or panel. The Presiding Judge of each Division or panel shall preside at the hearings thereof and perform such other functions as the Court of Appeals or Supreme Court by rule or special order shall direct. *A Chief Judge pro tem shall be selected in like manner as the Chief Judge. The Chief Judge pro tem shall perform the functions of the Chief Judge when the*

latter is absent or unavailable to act and such other functions as the Chief Judge shall direct.

Subrule 800.7 as amended December 7, 1966, effective March 1, 1967.

.8 Judicial Conferences. At least once each year, and as often in addition thereto as the Supreme Court, the Court of Appeals or its Chief Judge shall deem necessary, at times and places determined by them, the judges of the Court of Appeals shall meet to consider the promulgation and amendment of rules of practice and procedure before that Court, the improvement of the administration of the law, including the operations of that Court and the transaction of any business which properly may come before it.

.9 Approval of Expenses. Expenses for operation of the Court of Appeals and expense accounts of the judges, including attendance at any judicial conferences, shall be subject to approval by the court administrator. The court administrator shall prepare budgets for the Court of Appeals which shall be adhered to except as otherwise directed by the Supreme Court.

.10 Court of Appeals Clerk. The clerk of the Court of Appeals shall be appointed by that Court, and he shall be subject to like requirements as provided in Rule 902. The clerk's office shall be located in Lansing and shall be operated under direction of the Court of Appeals. The clerk may appoint deputy clerks as necessary, with approval of the Court of Appeals.

.11 Filing with Clerk. All papers to be filed with the Court of Appeals or the clerk thereof shall be filed in the office of the clerk of the Court of Appeals in Lansing, *except that papers may be filed with a deputy clerk in the office of a Division with like effect as if filed at the clerk's office in Lansing.*

Papers filed with the deputy clerk and fees paid incident thereto shall be forwarded by him to the clerk's office in Lansing.

Subrule 800.11 as amended December 7, 1966, effective March 1, 1967.

.12 *Order by Majority Action. No motion shall be granted or order entered by the Court unless all required documents have been filed with the Court and requisite fees have been paid and only upon concurrence of a majority of the judges of the Division to which such motion has been assigned.*

Subrule 800.12 as amended December 7, 1966, effective March 1, 1967.

RULE 801. REVIEW OF CASES BY COURT OF APPEALS.

.1 Method of Review. In all cases in which review by the Supreme Court or by the Court of Appeals is authorized by law, review shall be had by appeal to the Court of Appeals, subject to further appeal to the Supreme Court as provided by these rules. This rule refers only to the Court and method of review and does not restrict, enlarge, or change the right or scope of review provided by law, except as explicitly set out in these rules.

.2 Concurrent Power of Review. Where any administrative action is subject to review concurrently by direct appeal to the Supreme Court or the Court of Appeals (or by any writ or remedy for which appeal is a substitute) and by suit, action, or proceedings authorized by law in the circuit court for the same or similar ultimate relief, the circuit court shall have the duty to proceed in any such suit, action or proceeding brought in said court as if the same were the sole method of review, unless otherwise ordered by the Court of Appeals or the Supreme Court.

.3 Statutory Jurisdiction of Court of Appeals. The Court of Appeals and each of its Divisions shall have authority to issue any writs, orders, directives and mandates that it judges necessary and expedient to effectuate its determination of cases brought before it. It shall have jurisdiction in all appeals from:

(1) All final judgments *from* the *circuit courts, court of claims and recorder's court, except judgments on ordinance violations in the traffic and ordinance division of recorder's court. Appeals from final judgments from all other courts and from conviction for ordinance violations in the traffic and ordinance division of recorder's court shall be taken to the circuit courts, upon which further review may be had only upon application for leave to appeal granted by the Court of Appeals.*

(2) Such other judgments or interlocutory orders as the Supreme Court may by rule determine.

Subrule 801.3 as amended February 13, 1969, effective immediately.

RULE 802. MANNER AND EFFECT OF TAKING APPEALS.

.1 Filing Claim of Appeal; Fees. Every appeal to the Court of Appeals shall be taken by filing a claim of appeal with the *Court of Appeals and paying the entry fee required by subrule 822.3(1). A docket number shall thereupon be assigned to such appeal by the clerk of the Court of Appeals.* See also subrule 803.5. The Court of Appeals shall thereupon have jurisdiction of the case. No such appeal shall be dismissed except on stipulation, on special motion and notice, or by the Court of Appeals on its own motion, subject, however, to the provisions of Rule 809.

Subrule 802.1 as amended December 7, 1966, effective March 1, 1967.

.2 Effect of Filing Claim of Appeal.

(1) Except as otherwise provided by statute or

rule, and until the record is filed in the Supreme Court or Court of Appeals, the trial court, tribunal, or officer has jurisdiction to grant further time to do, properly perform, or correct any act in connection with the appeal, omitted or insufficiently done, except to extend time for filing claim of appeal or paying the appeal fee, to dismiss the appeal, or to allow a delayed appeal.

(2) When an appeal is taken while property is being held for conservation or management under the order or judgment of the trial court, such court shall retain jurisdiction over such property pending appeal unless a stay of proceedings has been had pursuant to Rule 808, or except as the Supreme Court or Court of Appeals shall otherwise order.

(3) All orders of the trial court made prior to judgment, in relation to the custody, control and management of property, for temporary alimony, support or custody of minor children and expense in divorce suits, and preliminary injunctions, shall remain in effect and be enforceable in the trial court, pending appeal, except as otherwise may be ordered by the trial court, the Court of Appeals or the Supreme Court.

(4) The clerk of the trial court shall keep a separate book in which every appeal to the Court of Appeals shall be entered as soon as taken.

RULE 803. TIME FOR TAKING APPEAL.

.1 Appeal as of Right. Appeal to the Court of Appeals as of right in civil cases, shall be taken not later than 20 days after the entry of the judgment or order appealed from, or within 20 days after the entry of an order denying a motion for a new trial or rehearing, provided such motion is made and served (a) within 20 days after the entry of the

judgment or order appealed from, or (b) within such further time as may be allowed by the trial court during such 20-day period. In criminal proceedings, appeal as of right shall be taken not later than 60 days after the entry of the judgment or order appealed from or after the entry of an order appointing appellate counsel for an indigent defendant pursuant to subrule 785.4(1), or within 60 days after the entry of any order denying a motion for new trial, provided such motion is made and served (a) within 60 days after the entry of judgment or order appealed from, or (b) within such further time as may be allowed by the trial court during such 60-day period. The time herein provided is jurisdictional in appeals as of right.

.2 Appeal Upon Leave. An appeal upon leave shall be deemed to be taken by filing of claim of appeal and paying the *fees required by subrules 822.3(1) and 803.5* within 20 days after notice of entry of order allowing appeal has been mailed to counsel by the clerk of the Court of Appeals.

Subrule 803.2 as amended December 7, 1966, effective March 1, 1967.

.3 Delayed Appeal. After expiration of the period for timely appeal, the Court of Appeals may, in its discretion, grant leave to appeal from any order or judgment from which timely appeal would have been available either as of right or by leave, upon showing, supported by affidavit, that there is merit in the grounds for appeal and that the delay was not due to appellant's culpable negligence.

.4 Appeals from Administrative Bodies. The filing of a claim of appeal shall not be necessary in cases provided for in Rule 806.6, and such appeals shall be deemed taken upon allowance thereof.

.5 Service of Claim of Appeal; Fees. Immediately after a claim of appeal has been filed, a copy

thereof *shall be served on all other parties to the cause and a copy thereof shall be filed with the court, tribunal or officer whose action is to be reviewed. Simultaneously therewith a filing fee of $5 shall be paid to the court, tribunal or officer whose action is to be reviewed.*

Subrule 803.5 as amended December 7, 1966, effective March 1, 1967.

RULE 804. BONDS, FEES AND OTHER REQUIREMENTS ON APPEALS.

.1 Conditions Precedent.

(1) Within the time limited for taking an appeal, the appellant, in addition to filing claim of appeal and paying the *entry* fee, shall:

(a) File with the clerk of the trial court or tribunal, or with the judge or presiding officer thereof, if there be no clerk, any bond required by law as a condition of appeal.

(b) Make any delivery or deposit of money, property or documents and do any other act required by law.

(c) Serve copy of the claim of appeal (with statement that the required bond, naming the amount and sureties, has been filed, the *entry and appeal fees* paid and deposit made, if any, with the items thereof, and date of performance of these acts), upon all other nondefaulted parties to the cause or their attorneys of record in the court or tribunal from which appeal is taken, and upon any other person or officer entitled by rule or statute to notice of the appeal, and file proof of such service in *the Court of Appeals.*

(2) Such service may be made upon any party, attorney or officer in the manner provided for service of papers on attorneys, and if service cannot be so made, it shall be made within such time and in such manner as may be ordered by the court or tribunal

appealed from. If service is by mail, it shall be deemed sufficient in time if properly deposited in the mail within the prescribed period.

Subrule 804.1 as amended December 7, 1966, effective March 1, 1967.

.2 Failure to Comply; Motion to Dismiss. For failure to properly and timely perform any act required on appeal by any rule, the appeal may be dismissed on motion by the Court of Appeals, or further time granted on terms. No act on appeal shall be deemed insufficient unless motion to dismiss the appeal or to strike or correct the act be made within 15 days after service of notice of performance of such act. No performance of an act on appeal after the time provided shall be deemed valid unless further time therefor has been granted in advance by the trial court, tribunal, or officer; or by the Court of Appeals. No motion for further time shall be heard in the trial court or tribunal while a motion to dismiss is pending in the Court of Appeals.

RULE 805. FORM AND CONTENTS OF CLAIM OF APPEAL.

(1) The claim of appeal shall be entitled in the Court of Appeals and the cause, naming and designating the parties, in the same order as in the original proceedings, and adding to each the proper designation as appellant or appellee. It shall be in substantially the following form:

"..... (Plaintiff or defendant) claims an appeal from the ..... (judgment, order, et cetera) entered ..... (date) in ..... (naming the court or tribunal from which the appeal is taken) by ..... (naming the judge, officer, or board making the order)."

If the appeal is by leave of court granted, the claim of appeal should so state.

(2) It shall be dated and signed by the appellant or his attorney and the business address shall be plainly written under such signature.

(3) A copy of the judgment or order appealed from shall be attached to the claim of appeal.

Subrule 805(3) as added December 5, 1968, effective immediately.

RULE 806. APPEALS BY RIGHT AND BY LEAVE.

.1 Appeal as of Right. In all criminal and civil matters, an aggrieved party shall have a right to appeal from all final judgments *or final orders* from the circuit courts, *court of claims and recorder's court, except judgments on ordinance violations in the traffic and ordinance division of recorder's court. Appeals from final judgments from all other courts and from convictions for ordinance violations in the traffic and ordinance division of the recorder's court shall be taken to the circuit courts, upon which further review may be had only upon application for leave to appeal granted by the Court of Appeals.* Final judgments or interlocutory orders of courts which by law are appealable to the circuit court only upon leave or on appeal are to be tried de novo in the circuit court shall continue to be tried in the circuit court. See subrule 701.1. *Appeals from final or interlocutory judgments of the district court, common pleas court, or judgments in ordinance cases in the traffic and ordinance division of recorder's court shall be taken to the circuit court in which such court is located.* Appeals as of right shall be taken in accordance with and within the time prescribed by these rules.

Subrule 806.1 as amended February 13, 1969, effective immediately.

.2 Appeal by Leave. The Court of Appeals may grant leave to appeal from:

(1) Final or interlocutory judgments or orders of

administrative agencies or tribunals which by law are appealable to the Court of Appeals or the Supreme Court.

(2) Any judgment, order, act or failure to act by the circuit courts, court of claims, *and recorder's court, except on ordinance violations in the traffic and ordinance division of recorder's court,* which is not a final judgment appealable as of right.

(3) Orders in domestic relations cases for temporary alimony, payment of expenses, or support or custody of minors entered prior to final judgment shall be deemed interlocutory in nature and appealable only by leave.

(4) *Appeals from final judgments entered by the circuit court on appeals from any other courts or tribunals.*

(5) Such other matters as are provided by the rules of the Supreme Court or other laws.

In no event shall leave to appeal be granted later than 18 months from the entry of the order or judgment appealed from in any civil matter.

Subrule 806.2 as amended February 13, 1969, effective immediately.

.3 Procedure for Leave to Appeal. To obtain leave to appeal to the Court of Appeals, appellant shall within the time limited for taking an appeal as of right, except when delayed appeal is sought:

(1) Prepare an application for leave to appeal as follows:

(a) The application shall set forth the reasons and grounds for granting leave to appeal. The Court will pay particular attention to the following reasons and grounds:

(i) Where appeal as of right is not expressly allowed by statute or rule from a final judgment or order. The showing of any condition for appeal required by statute or rule and that the matter asserted

is either of major significance to the jurisprudence of the State or that the decision is clearly erroneous.

(ii) In all interlocutory matters. That the trial judge has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, or if it is shown by the appellant that the matter is either of major significance to the jurisprudence of the State or that the decision is clearly erroneous and appellant would suffer substantial harm by awaiting final judgment before taking appeal.

(b) The application shall have attached to it a proposed concise statement of the proceedings and facts as far as they are material. In all cases where error is alleged in the charge of the court, the whole of the charge shall be set up in the statement. It shall also contain the calendar entries to date, the date of entry and a copy of the judgment or order appealed from, and the opinion or findings of the court, if on file, or dictated to the court reporter.

(c) If defendant desires bail pending appeal in criminal cases, the application shall state the amount of bail set by the trial court pending application for leave to appeal, if any was set.

(2) Serve a copy of the application and proposed concise statement on all other parties whether joint or adverse, with notice of prompt settlement of the statement before the trial judge or any other judge having authority to perform necessary acts in the review process. See subrule 812.9.

The trial court may after a hearing, on a motion filed and served within 20 days from the entry of an order appealed from, extend the time for taking the above steps for a period not exceeding 30 days. The

Court of Appeals may grant further time on motion filed within such extended period.

(3) Objections to the concise statement shall be settled promptly by the judge, and, when satisfied, he shall certify that it fairly presents the questions for review.

(a) A transcript of the testimony shall not be required as a basis for the settlement. The judge settling such statement may correct it or add matters of record which he may deem necessary to present the issue properly. When a discretionary action of the court is to be reviewed, the judge may add to the statement his reasons for such action.

(b) In case either party objects to the statement by the judge, he may file in the Court of Appeals affidavits, copies of pleadings, exhibits or a transcript of the relevant testimony relating to the question for review and a copy thereof shall promptly be served on the other side.

(4) *Within 10 days* after the statement is settled and certified, appellant shall file 4 duplicate typewritten or printed copies of the application and certified statement along with 4 copies of documents filed by him pursuant to subsection (3)(b) hereof with the clerk of the Court of Appeals and notice it for hearing as a motion accompanied by 4 duplicate typewritten or printed copies of a brief in support thereof. At least 1 of such copies shall be signed as provided in Rule 114. The day of the hearing shall not be earlier than 20 days after the notice except by agreement of counsel or order of the Court of Appeals.

(5) With service of notice of hearing, appellant shall serve on all other parties a copy of the documents filed under subdivision (4) hereof and make proof of service thereof. Any party may file a brief in opposition to the application, *provided such brief*

is filed at least 5 days prior to the date the application is noticed for hearing. Four duplicate typewritten or printed copies of briefs and documents filed by appellee pursuant to subsection (3)(b) hereof shall be filed with the clerk of the Court of Appeals and a copy thereof shall be served on the opposite side.

(6) All briefs filed in support of, or in opposition to, applications for leave to appeal shall conform to the requirements of Rules 813 and 814.

Subrule 806.3 as amended December 7, 1966, effective March 1, 1967.

.4 Delayed Appeal.

(1) In cases where timely appeal requires leave, application for delayed appeal shall be made as above provided, and, in addition, shall affirmatively show, by affidavit of facts, that the delay was not due to appellant's culpable negligence. Any party may file affidavits in opposition thereto.

(2) Where timely appeal would have been of right, application for delayed appeal need not be accompanied by settled statement of facts but shall affirmatively show, by statement of facts and brief, that there is merit in the claim of appeal and, by affidavit of facts, that the delay was not due to appellant's culpable negligence. The application shall be noticed for hearing as a motion. Any other party may file opposing statement, brief and affidavits.

Briefs filed in support of, or in opposition to, applications for delayed appeal shall conform to the requirements of Rules 813 and 814.

Subrule 806.4 as amended December 7, 1966, effective March 1, 1967.

.5 Emergency Appeal. On showing of emergency, of appellant's due diligence, and of the character of injury to him through observance of the above practice on application for leave to appeal, applica-

tion may be made on ex parte statement of fact, showing of merit, and on proof of such notice to other parties as the circumstances permit, or excuse for lack of notice, an immediate consideration of the application may be prayed.

.6 Appeals from Administrative Bodies and Officers.

(1) To obtain leave to appeal to the Court of Appeals from an order, award, or action of any administrative board, officer, or tribunal, the appellant shall, except in cases of delayed appeal, within 20 days after the entry of the order, award, or action sought to be appealed, or within 30 days in appeals from workmen's compensation cases:

(a) File in the Court of Appeals 4 duplicate copies of an application for leave to appeal, setting out the reasons and grounds of appeal, accompanied by the original record certified as correct by the officer having custody *thereof,* with 4 duplicate copies of supporting brief; *provided, however, if appellant has ordered such certified record from the officer having custody thereof and it has not yet been delivered, such record shall be filed within 10 days after delivery thereof to appellant.*

(i) The certified record shall include all documents, files, pleadings, testimony, opinions of the board or officer, except such as may be summarized or omitted in whole or in part by stipulation of parties. Any testimony not then transcribed shall be filed as promptly thereafter as possible.

(ii) The certified record shall be separate from the application for leave to appeal and the original record shall be returned by the clerk to the board or department from which it originated after the final determination of such appeal, or denial of the application for leave to appeal.

(b) Notice the application for hearing as a motion in the Court of Appeals and serve copies of the application, record, and briefs, on all other parties or their counsel, at least 20 days before the date of hearing or such shorter period as shall be stipulated by counsel or as ordered by the Court of Appeals.

(2) In proper cases, subrules 806.4 and 806.5 shall be applicable under this subrule 806.6.

(3) Upon the determination of such application by the Court of Appeals, the clerk shall enter an order in accordance therewith and mail copies to counsel for the parties. If the application is denied, the Court may tax costs as on motion.

Subrule 806.6 as amended July 13, 1965, effective immediately, and December 7, 1966, effective March 1, 1967.

.7 Peremptory Order. Upon any application for leave to appeal, the Court on its own motion or by stipulation of the parties, may in lieu of leave to appeal enter a final decision or issue an appropriate peremptory order.

.8 Costs on Denial of Leave. If leave to appeal is denied, costs shall be taxed as on motion unless otherwise indicated by the Court.

Subrule 806.8 as added December 7, 1966, effective March 1, 1967.

RULE 807. CROSS APPEALS.

.1 Right to Cross Appeal. When an appeal is taken to the Court of Appeals and any other party in a civil action desires to appeal, he may take a cross appeal in the same manner and under the same rules and practice as in case of an original appeal, except that the 20 days' time for filing claim of cross appeal shall run from the date of the service upon him of the claim of appeal. If a transcript of testimony or a stenographer's certificate therefor has

been filed by the appellant, such transcript of testimony or stenographer's certificate shall not be required of the cross-appellant. In event of failure of the appellant to file the transcript of testimony or the stenographer's certificate therefor within the time provided by the rules, the cross-appellant shall thereafter have 20 days within which to procure and file such transcript of testimony or a stenographer's certificate therefor in accordance with subrule 812.3.

.2 On Grant of Leave to Appeal. Leave to appeal granted to appellant shall vest appellee, in civil cases, with the right to a cross appeal which may be taken by filing, within 20 days after service upon appellee of the appellant's claim of appeal, of a claim of cross appeal in the same manner as provided in the case of an original appeal. If during the time within which claim of cross appeal might have been filed, or after such claim of cross appeal has been filed, appellant shall abandon his appeal or the same shall be dismissed by the Court, appellee's cross appeal may nevertheless be prosecuted to a conclusion in accordance with the rules and practice of the Court regarding appeals, but the time within which to secure and file a stenographer's certificate and take subsequent steps shall run from date of order of dismissal of the appellant's appeal.

.3 Multiple Parties. Where there is more than 1 party plaintiff or defendant and any 1 party appeals upon leave granted, each of the other parties to the cause except the people in criminal proceedings, whether on the same or opposite side as the party first appealing, shall have the right by cross appeal to take an appeal as against all or any of the other parties to the cause as well as against the party first taking the appeal. If said cross appeal shall operate against any party not affected by the first appeal taken or against any party affected thereby in a

different manner than by the first appeal taken, such party so affected by said cross appeal shall have like time thereafter to take a further cross appeal as if the cross appeal so affecting such party had been the first appeal.

RULE 808. STAY OF PROCEEDINGS.

.1 Bond as Stay. No appeal to the Court of Appeals shall operate as a stay of execution unless and until there is filed a bond to the adverse party or to such other party or official as required by subrule 808.2, or as is expressly required by the statute authorizing the appeal, in the amount and with the sureties provided by law, conditioned:

(1) to prosecute the appeal to effect,

(2) to perform and satisfy the judgment or order of the Court of Appeals or the Supreme Court,

(3) to perform and satisfy the judgment or order appealed from in case the appeal should be dismissed or discontinued,

(4) in cases involving the possession of land or judgment for foreclosure of a mortgage or land contract, to pay the appellee the damages which may result from the stay of proceedings, and

(5) to do any other act which shall be expressly named, in the statute authorizing appeal, as a condition of the appeal bond.

.2 Bond if not Otherwise Prescribed.

(1) Unless otherwise prescribed by statute, the amount of the bond on appeal from *a trial court and bail for criminal cases appealed from a trial court* shall be fixed by the judge *of the trial court* and be in such amount so as to adequately protect the opposite party *in civil cases and to assure appearance of a defendant in criminal cases.*

(2) The Court of Appeals, or the judge of the *trial court,* may on special motion, order an addi-

tional or different bond and fix the penalty thereof, and approve the sureties thereto or the Court of Appeals may refer the matter to *the court from which the appeal is taken.*

Subrule 808.2 as amended December 7, 1966, effective March 1, 1967.

.3 Stay of Proceedings by Circuit Court; Bond.

(1) No stay of proceedings shall be ordered by any circuit court, except as otherwise provided in the rules, unless and until a bond shall be filed as follows:

(a) Where such order staying proceedings is applied for before taking an appeal, a stay bond to the appellee shall be filed and conditioned

(i) to perform and satisfy the judgment or order if the same is not set aside or reversed,

(ii) in case an appeal shall thereafter be taken from such judgment or order, to prosecute such appeal to effect and to perform and satisfy such judgment or order as may be rendered by the appellate court.

(b) Where such order staying proceedings is applied for after taking an appeal, a bond shall be filed conditioned as provided in subrule 808.1.

(2) When a stay bond is filed under subrule 808.3 (1)(a), having the substantial requirements of subrule 808.1, and an appeal has thereafter been taken, it shall operate to stay proceedings pending disposition of the appeal in all respects as though it had been filed under subrule 808.1.

(3) The order allowing any stay shall conform to any further condition expressly required by the statute authorizing review.

.4 Notice to Adverse Party; Filing.

(1) Notice of the time and place of making application for the approval of any stay bond or appeal

bond shall be given to the adverse party as in the case of a motion in every appeal to the Court of Appeals.

(2) The bond, if any be given, shall be filed in the office of the clerk of the court in which the judgment was rendered.

.5 Stay of Execution.

(1) If a bond is filed before execution issues, and notice thereof is given to the officer having authority to issue execution, such execution shall be stayed. If such bond is filed after the issuance but before the collection of an execution, and notice thereof is given to the officer holding the same, such execution shall be suspended.

(2) The Court of Appeals may stay or terminate stay of any order or judgment of an inferior court or tribunal on such terms as are deemed just.

(3) Where the amount of the judgment is in excess of $1,000 over the coverage of an insurance policy or surety obligation, then such policy or obligation shall not qualify to stay execution under MCLA § 500.3036. In such event, stay of execution pending appeal shall be achieved by complying with that statute and by filing a bond pursuant to this rule in an additional amount so as to adequately protect the opposite party.

Subrule 808.5(3) as added October 4, 1971, effective immediately.

.6 Stay for Special Motion. Whenever a stay of proceedings may be necessary in order to make a special motion in either the trial court or the Court of Appeals, the court or a judge thereof before whom the motion will be heard may grant an order for that purpose; and service of such order, with copies of the affidavits on which it is grounded and the notice of the motion, shall operate as a stay of proceedings until the order of the court is had in the

premises, unless the judge shall in the meantime supersede or set aside such order. But the proceedings shall not be stayed for a longer time than to enable the party to make his motion according to the practice of the court, and if made, until the decision of the court thereon.

.7 Leave to Appeal as Stay. The granting of leave to appeal from interlocutory as well as other orders and judgments shall not act as a stay of proceedings except as provided in this rule or except, in the case of interlocutory orders, as the Court granting the leave to appeal makes a different order for the protection of the parties.

Rule 809. Stipulations in Appeals.

The parties in any appeal to the Court of Appeals from any court, tribunal, or officer, may stipulate in writing regarding any matters relevant to the statement or other record constituting the basis for any application for leave to appeal, or regarding any matters relevant to any part of the record on appeal, if such stipulation is made a part of the record and transmitted to the clerk of the Court of Appeals. The parties to an appeal may file with the clerk of the Court of Appeals a stipulation agreeing to the dismissal of the appeal. Upon payment of his fees, the clerk shall enter an order dismissing the appeal; provided, however, that appeals in class actions shall not be dismissed without an order of the trial court or the Court of Appeals.

Rule 810. Review of Issues Tried Without a Jury.

(1) Upon appeal to the Court of Appeals from a judgment involving an issue tried without a jury, such judgment may be affirmed or reversed, the cause remanded with directions, or a new trial ordered.

(2) Appellant may assign as error that the finding on the issue tried without a jury is clearly erroneous.

RULE 811. RECORD ON APPEAL.

(1) Appeals to the Court of Appeals shall be heard on original papers, which papers shall constitute the record on appeal.

(2) In appeals to the Court of Appeals from any administrative board, officer or tribunal, the record on appeal shall consist of the same application and the same certified record, together with the stipulations, if any, attached thereto, which was prepared and filed with the clerk of the Court of Appeals when leave to appeal was asked.

RULE 812. FILING RECORD ON APPEAL.

.1 Transmission of Record. Within the time provided by subrule 812.3, the clerk of the court, tribunal, or officer whose action is to be reviewed, shall transmit to the clerk of the Court of Appeals all original papers in the file dealing with the action, suit, or proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file in the case. The clerk shall append his certificate identifying the papers with reasonable definiteness. Under all circumstances, the clerk shall transmit as part of the record, in addition to all of said original papers, the following:

(a) A list of docket entries in the case.

(b) All opinions and findings of the court.

(c) The order or judgment appealed from.

(d) The order allowing appeal, when leave to appeal is required.

(e) Claim of appeal.

.2 Filing Transcript and Other Documents.

(a) Before transmission of the record to the Court of Appeals, the appellant shall file with the clerk of the trial court *4 legible copies on numbered pages of* the full transcript of testimony and hearings had in the trial court, except that upon motion of appellant for good cause shown, with notice to opposing party, the trial court may order that some portion less than the full transcript may be transmitted. Such motion shall be filed within the time required for taking an appeal and if such motion is granted, appellee shall be free to file for transmission to the Court of Appeals any portions of the transcript omitted by appellant. The filing of such motion shall extend the time for filing of the stenographer's certificate provided for by subrule 812.3 until 5 days after the entry of the trial court's order thereon. The parties may at any time agree by stipulation that some portion less than the full transcript be transmitted, with like effect as the entry of an order by the trial court.

(b) Where there is no stenographic record of the proceedings in the trial court, a settled record shall be *filed* in lieu thereof as provided in Rule 705.

(c) Where facilities for the copying or reproduction of records are available to the county clerk or clerk of the court, tribunal or officer whose action is to be reviewed, such clerk, upon the written request of an attorney for appellant or appellee and upon deposit of the estimated cost or security therefor, shall procure for such attorney as promptly as may be and at the cost therefor to the clerk, the requested number of copies of documents, transcripts and exhibits on file.

(d) Transcripts and other documents which are part of the record on appeal shall be filed and attached in 1 or more volumes under a hard surfaced

or other suitable cover, showing title of the cause and preceded on the front page by an index showing the subject matter thereof with page references wherever feasible.

Subrule 812.2 as amended July 13, 1965, effective immediately; December 7, 1966, effective March 1, 1967; and December 5, 1968, effective immediately.

.3 Duties of Stenographer re Transcript.

(1) An appellant desiring to transmit a transcript of testimony as part of the record on appeal, shall, within the time for taking an appeal, unless extended as provided in subrule 812.2, file same with the clerk of the trial court, or produce and file in the trial court a certificate from the stenographer of the trial court stating that a transcript of the testimony and hearings has been ordered, that payment therefor has been made or secured, and that the same will be furnished as soon as possible by said stenographer. Such stenographer shall furnish and file such transcript in the office of the clerk of the trial court not later than 90 days after the furnishing of such certificate, except that the *Court of Appeals* may grant such stenographer an extension of time beyond said 90-day period upon such stenographer's petition to the court for cause shown, after notice to the parties. Additional copies of the transcript required by appellant may be ordered from the stenographer or copies may be made of the transcript furnished by the stenographer. Any stenographer failing in the proper performance of his duty to furnish such transcript shall be subject to plenary disciplinary action by the *courts,* including the power to punish for contempt of court. Upon filing of the transcript, the stenographer shall promptly give notice thereof to all parties of record, and the clerk of the Court of Appeals, and shall file in the cause an affidavit of the mailing of such notice.

(2) The record, including the documents required by subrules 812.1 and 812.2, shall be transmitted promptly, after notice to the clerk of the trial court by either party that the briefs of both parties have been filed in the Court of Appeals, or that the time for the filing of the brief of either appellant or appellee has expired without extension thereof, or at any time upon order of the Court of Appeals.

(3) Until transmitted to the Court of Appeals, counsel of record shall be permitted to withdraw any transcripts and exhibits on file in the cause, upon written receipt to the clerk thereof, signed by such counsel, which shall obligate counsel to make use thereof only for purposes of preparation of the briefs hereinafter provided for, and to promptly return the same to the clerk after such use or earlier, upon order of the court.

Subrule 812.3 as amended December 7, 1966, effective March 1, 1967.

.4 Exhibits. Within 20 days after filing of claim of appeal, attorneys for appellant or appellee having possession of any exhibits offered in evidence shall file them with the clerk for transmission to the Court of Appeals, as part of the record on appeal, unless by stipulation of counsel, or order of the trial court, it is provided that they shall not be transmitted, or that copies or summaries or excerpts shall be transmitted in lieu thereof, and provided further, that photostatic copies may be filed in lieu of originals of any exhibits, unless the trial court shall otherwise require. Upon final disposition of the case, such exhibits shall be returned to the persons who filed them.

.5 Record on Motion. If, prior to the time the complete record on appeal is transmitted to the Court of Appeals, a party desires to make in said court a motion for dismissal, or admission to bail, for a stay pending appeal, for additional or change

of security on the bond on appeal, or on the supersedeas bond, or for any intermediate order, the clerk of the trial court shall on request of any party transmit to the clerk of the Court of Appeals such of the original papers in the action or proceeding in the trial court as are needed for that purpose, which shall be returned to the clerk of the trial court after decision of the motion.

.6 Denial of New Trial as Error. When a motion for new trial or rehearing has been previously denied by the trial judge, the party appealing may claim error in such decision, and thereupon the decision shall be reviewed by the Court of Appeals.

.7 Excluded Evidence to be in Record. In civil actions, the substance or transcript of excluded evidence offered at the trial and proceedings had at the trial in relation thereto shall be transmitted as part of the record on appeal.

.8 Appeal from Decision on Motion for Judgment Notwithstanding Verdict. Upon appeal from a decision on a motion for judgment notwithstanding the verdict, the party who prevailed on that motion may, as appellee, assert any ground which would entitle him to a new trial in the event that the appellate court concludes that the trial court erred in granting or denying the motion for judgment notwithstanding the verdict. No cross appeal shall be required of appellee in order to assert such grounds.

.9 Acts by Other Judges.

(1) Whenever the judge who has heard a cause or proceeding shall die, resign or vacate office before the expiration of his term, or whenever such judge is unable to do any act necessary to be performed in connection with the appeal of a case by reason of sickness, absence from the State or any other cause whatever, within the time prescribed by statute or these rules, any other judge of the same court as

the judge who heard said cause or proceeding, and in case there should be no other judge of such court, or in case of his or their absence or disability from any cause, any other circuit judge may act to perform any of the acts necessary to be performed by the trial court in the review process.

(2) Whenever a case is tried by a judge transferred from some other circuit, the judicial acts necessary in the preparation of a record for appeal may be performed by a local judge of the same court by consent of counsel.

.10 Agreed Statement of Facts. The parties or their attorneys may agree upon a statement of facts without procuring the stenographer's minutes of the testimony taken at the trial, and the statement so signed by the parties or their attorneys shall be transmitted as the record of testimony in the case.

.11 Return of Record. After the appeal is determined by the Court of Appeals and the time for timely application for leave to appeal to the Supreme Court has expired without such application being filed, or after denial of such application, the Court of Appeals shall promptly return the original record to the clerk of the court from which it was received, together with a certified copy of the order or judgment entered. The clerk of the lower court shall promptly notify counsel of the receipt of such record.

RULE 813. APPELLANT'S BRIEF.

.1 *Table of Contents, Index of Authorities, and* Statement of Questions Involved. *In the forepart of the brief there shall be a table of contents listing the subject headings of the brief in the order of their presentation showing page numbers within the brief. The table of contents shall be followed by an index of authorities in alphabetical order including the*

year of publication or decision and showing page numbers of brief where cited. Following the index, appellant shall concisely and without repetition, under the heading "Statement of Questions Involved," state the questions involved in the appeal. Each question shall be numbered and set forth separately in the briefest terms, and whenever possible, each question must be followed immediately by a statement as to whether the lower court answered it "Yes" or "No" or qualified it or failed to answer it together with a statement that appellant contends that it should be answered "Yes" or "No" as the case may be. Ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved.

Subrule 813.1 as amended December 7, 1966, effective March 1, 1967.

.2 Statement of Facts.

(1) Following the statement of questions involved there shall be, under the heading "Statement of Facts," with specific page references to the record in support thereof, a clear and concise chronological statement in brief narrative form of the facts of the case, with dates of instruments or important events, including the nature of the action, the character of the pleadings and proceedings, the substance of the proof in sufficient detail to make it clearly intelligible, the rulings and orders of the court, the nature of the verdict and judgment, the substantial errors complained of, and any other matters necessary to an understanding of the nature of the controversy and of the questions involved on the appeal.

(2) The Court may consider such statement sufficient and accurate unless the opposite party points out in his brief wherein the statement is insufficient or inaccurate.

(3) The statement of facts shall be presented without argument or bias and in such manner as to fairly present the facts, both favorable and unfavorable, with appropriate indication of those facts which are undisputed and those which are in controversy.

.3 Argument. Following the statement of facts, the appellant shall, under the heading "Argument," set forth his argument with similar page references to the record to where the facts referred to may be found. The main points of the argument shall be set out in capital letters or bold face type.

.4 Relief. There shall be a concluding section, under the heading "Relief," specifying the order or judgment to which the appellant contends he is entitled.

.5 (*Deleted*).

Subrule 813.5 deleted December 7, 1966, effective March 1, 1967.

RULE 814. APPELLEE'S BRIEF.

.1 *Table of Contents, Index of Authorities and Statement* of Questions Involved. *Appellee's brief shall contain a table of contents and shall be indexed in like manner as appellant's brief. See subrule 813.1. Following the index,* appellee shall state in his brief, under the heading "Statement of Questions Involved" that he accepts the statement of the questions set forth in appellant's brief, or he shall make, under the heading "Counter-Statement of Questions Involved" such different statement of the questions involved as he believes to be necessary or advisable.

Subrule 814.1 as amended December 7, 1966, effective March 1, 1967.

.2 Counter-Statement of Facts. Under the heading "Statement of Facts," the appellee shall state that he accepts the statement of facts in the appellant's brief, or under the heading "Counter-State-

ment of Facts" he shall point out such inaccuracies as he believes to exist in the appellant's statement, with full references to the pages of the record in support thereof, but without repetition of matters in appellant's statement of facts.

.3 Argument. Under the heading "Argument" the appellee shall set forth his argument in the case, with similar page references to the record wherein the facts referred to may be found. The main points in the argument shall be set out in capital letters or bold face type.

.4 Relief. If there is a cross appeal, the appellee shall, under the heading "Relief," specify the order or judgment that he believes should be entered by the Court of Appeals.

.5 (*Deleted*).

Subrule 814.5 deleted December 7, 1966, effective March 1, 1967.

RULE 815. FILING AND SERVING BRIEFS AND RECORD.

.1 Appellant's Brief.

(1) Four duplicate typewritten or printed copies of appellant's brief shall be filed with the clerk of the Court of Appeals within 60 days after the filing of the claim of appeal, or 60 days after filing in court of the stenographer's transcript, whichever date shall be later. *A 30-day extension for filing of appellant's brief may be had upon written stipulation of the parties. A copy of such stipulation* shall promptly be filed with the clerk of the Court of Appeals and with the clerk of the trial court. Any extension of time for filing of appellant's brief for a longer period than *90 days* from the filing of the claim of appeal or the transcript, whichever date shall be later, shall be had only upon order of the Court of Appeals *upon motion for cause shown.*

(2) Within 20 days after the transcript is filed with the clerk of the trial court, a copy of the record

on appeal, including the transcript, shall be served on an attorney for each appellee and if there be more than one party appellee represented by separate counsel, appellant shall provide an additional copy to an attorney for each such appellee; *provided, however, that copies of documents in possession of appellee may be incorporated by reference, with designation of page numbers applicable thereto in the record as forwarded to the Court of Appeals.*

(3) Within the time for filing appellant's brief, 2 copies thereof shall be served upon an attorney for each appellee.

(4) Proof of service of record and briefs upon opposite parties shall be promptly filed with the clerk of the Court of Appeals and a copy thereof shall be filed with the clerk of the trial court.

(5) If the appellant fails to file and serve his brief or the transcript or record within the time herein required, the Court of Appeals may, on motion by the appellee, dismiss the cause and award costs to the appellee, or may grant further time for compliance, on terms.

Subrule 815.1 as amended December 7, 1966, effective March 1, 1967.

.2 Appellee's Brief.

(1) Within 40 days after service upon him of appellant's brief, appellee shall file with the clerk of the Court of Appeals 4 duplicate typewritten or printed copies of his brief. *A 30-day extension may be had upon written stipulation of the parties. A copy of such stipulation shall promptly be filed with the clerk of the Court of Appeals and with the clerk of the trial court.* Any extension of time for filing of appellee's brief for a longer period than *70 days* from the date of filing of appellant's brief shall be had only upon order of the Court of Appeals *upon motion for cause shown.*

(2) Within the time for filing appellee's brief, 2 copies thereof shall be served upon an attorney for each appellant or other party. Proof of such service shall be filed promptly with the clerk of the Court of Appeals and with the clerk of the trial court.

(3) In the case of default by either party in the timely service of briefs, the Court may make such order as may be deemed appropriate, including in the case of appellant's default, the dismissal of the appeal, or the affirmance of the judgment or order appealed from, and there shall be no right to oral argument by the defaulting party, except upon order of the Court of Appeals entered in advance of the day of argument at a time when both parties shall have adequate opportunity to appear for oral argument.

Subrule 815.2 as amended December 7, 1966, effective March 1, 1967.

.3 Earlier Filing and Serving. The time herein provided for filing and serving either appellant's or appellee's brief or the transcript of testimony or other documents may be shortened for cause shown upon order of the Court of Appeals, upon petition filed by either party with notice to the opposing party.

.4 Type of Print. All briefs, records, documents or copies thereof required to be filed in appeals to the Court of Appeals which may be typewritten or printed may also be prepared by xerographic or other forms of duplication which result in legible copy.

RULE 816. CALENDAR OF APPEALS AND HEARING OF ORIGINAL PROCEEDINGS.

.1 Notice for Hearing.

(1) After the record has been sent to the Court of Appeals by the clerk of the court or tribunal from

which the appeal is taken, either party may notice the cause for hearing. Such notice shall also state the place of hearing as provided in subrule 800.5, except that the place of hearing may be designated elsewhere upon motion to the Court by either party or upon the Court's own motion and in the latter event, written notice of such designation shall be given to all attorneys of record by the clerk of the Court of Appeals at least 5 days prior to the date of hearing. Said notice shall be filed with the clerk of the Court of Appeals and served on the other parties to the appeal at least 32 days before the first day of the session at which the argument is desired, and proof of service thereof shall be promptly filed. No such notice shall be given unless both parties have filed their briefs, except that appellant may give such notice upon the expiration of time for the filing of appellee's brief.

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

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

.2 Hearing of Appeals and Original Proceedings.

(1) Appeals. All cases brought up by claim of appeal and original proceedings ready for submission on the merits are termed calendar cases and to be heard at any session must be placed on the session calendar as provided in subrule 816.1. Appeals ordered to be heard by the Court as motions shall be noticed and heard as motions and placed on the motion calendar as provided in Rule 817. Except as otherwise provided, the rules applicable

to the filing of the record, documents, and briefs for appeals as of right shall apply to such appeals. Such appeals shall not be noticed for hearing on the merits until both parties have filed their briefs, except that appellant may give notice upon the expiration of the time for the filing of appellee's brief. After a case has been noticed for hearing, a copy of the briefs and record shall be distributed by the clerk to each of the judges participating in the hearing.

(2) Original Proceedings.

(a) Original proceedings required by law to be filed in the Supreme Court shall be filed in the Court of Appeals unless otherwise ordered by the Supreme Court. All pleadings in original proceedings in the Supreme Court or the Court of Appeals shall be filed with the clerk of the Court of Appeals unless otherwise ordered by the Supreme Court. Except as herein otherwise provided, the general rules of pleading shall apply thereto as near as practicable.

(b) In an original proceeding in the Court of Appeals for mandamus or superintending control, 4 copies of the complaint shall be filed with the clerk. Within such complaint, or by separate instrument, motion shall be made and noticed for hearing for entry of an order to show cause why the relief sought in the complaint shall not be granted. Four copies of brief in support thereof shall be filed and together with the complaint shall be served on defendant at least *20* days prior to the time set for hearing of such motion and proof of service thereof shall be filed at or before the date of hearing. Defendant shall file with the clerk 4 copies of answer to such complaint and brief in support thereof and shall serve same on plaintiff at least 5 days before the date of hearing of such motion and shall file proof of service thereof. *Any reply thereto shall be filed not later than the date of hearing.* Copies of

documents, record evidence or supporting affidavits may be attached as exhibits to any of the pleadings.

All briefs filed in support of, or in opposition to, such original complaint and motion shall conform to the requirements of Rules 813 and 814.

(c) Upon hearing of motion for entry of such order to show cause, the Court of Appeals may grant or deny the entry of such order. The denial of such order shall constitute a dismissal of the cause. The granting of an order to show cause shall entitle the parties to a hearing on the merits pursuant to procedures hereinafter described or such other procedure as the Court of Appeals by its order shall direct. Such order may provide for reference to a circuit court or a judge thereof for taking of proofs and report of factual findings where any material facts are in dispute. Within 20 days after the entry of such order, defendant may file an amended answer without leave of Court.

(d) After the entry of such order to show cause, or after filing a report of factual findings where such is required, the submission of the cause for decision shall be in accordance with the rules applicable to appeals as of right, including the filing of the record and documents and the filing and serving of briefs, and notice of hearing. The time requirements for filing of briefs shall commence from the date of the entry of the order to show cause, the filing of an amended answer, if any, or the filing of the report of factual findings, if any, whichever is later.

(e) In quo warranto proceedings in the Court of Appeals by persons other than the attorney general, the procedures shall conform to subdivisions (a), (b), (c), and (d) of this subrule, except as herein otherwise provided. Notice of all such proceedings shall be served upon the attorney general, in addition to the defendant, and the attorney general may

participate in the cause. The granting of the order to show cause shall constitute leave to file the action.

(f) In original proceedings for habeas corpus in the Court of Appeals, the proceedings shall conform as near as may be to subdivisions (a), (b), (c), and (d) of this subrule. Upon entry of an order granting habeas corpus, the defendant shall promptly file with the clerk all pertinent records but the body of prisoner need not be produced unless the order so provides.

(g) Notwithstanding any provisions of this subrule to the contrary, the time and manner for filing pleadings, records, briefs, taking of proofs, hearings, oral arguments, or taking any other steps in original proceedings in the Court of Appeals shall be under the control of the Court of Appeals upon orders entered in the cause. In all original proceedings in the Court of Appeals upon a showing of emergency, of due diligence, and of the character of injury through observance of the procedure set forth in this subrule, the parties may request ex parte interim relief, such limited notice, if any, as the circumstances permit, or such time limitations for answer, hearing, briefs, taking of proofs, or taking of any other steps as the situation warrants and the Court of Appeals may, in its discretion, issue the appropriate peremptory order.

Subrule 816.2 as amended December 7, 1966, effective March 1, 1967.

.3 Arrangement of Calendar. *Fifteen* days before the first day of session, cases will be placed on the session calendar before a designated division and the order in which they are to be heard will be arranged. Conformable with that arrangement, or rearrangement as provided in subrule 816.4, cases will be called and heard.

Subrule 816.3 as amended December 7, 1966, effective March 1, 1967.

.4 Continuances; Rearrangement of Calendar. *No changes may be made on the session calendar except by order of the Court on its own motion or in response to motions filed by counsel. No calendar case shall be withdrawn after being placed upon the call except upon a showing of extreme emergency.*

Subrule 816.4 as amended December 7, 1966, effective March 1, 1967.

.5 Vexatious Proceedings; Consequences.

(1) The Court may, upon its own motion, or the motion of any party, dismiss an appeal, assess punitive damages or take other disciplinary action where it has been determined that an appeal or any of the proceedings therein was vexatious by reason:

(a) That an appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or

(b) That any pleading, motion, argument, petition, brief, document, or record filed in the cause or any testimony presented in the cause was grossly lacking in the requirements of propriety or grossly disregarded the requirements of a fair presentation of the issues to the Court.

(2) Punitive damages as herein provided shall not exceed an amount equivalent to actual damages and expenses incurred by the opposing party, including reasonable attorney's fees, and an added amount not exceeding 10 per cent of any judgment for money damages awarded in the lower court or tribunal.

.6 Time Requirements In Contested Custody Cases. In appeals involving a contest as to custody of minor children, all steps on appeal required under the rules, including, without limitation, the time for filing claim of appeal, transcript, record and briefs

and noticing of hearing shall be reduced by 1/2 and no extensions of time shall be had except upon order of the Court of Appeals. Such cases shall have precedence over other civil cases in the hearing of cases on any session calendar. Notice that the case involves a contest as to the custody of minor children should be stated in the claim of appeal but this requirement is not jurisdictional.

Subrule 816.6 as added December 7, 1966, effective March 1, 1967.

RULE 817. MOTIONS IN THE COURT OF APPEALS.

.1 Form. In the Court of Appeals, all motions and affidavits and briefs in support thereof shall be typewritten or printed and 4 copies thereof shall be filed with the clerk. *Allegations of fact in motions shall be supported by affidavit.* All papers filed by either party shall contain proof of service of same on opposing counsel. Motions shall set out briefly but distinctly the grounds upon which they are founded and shall be signed by the attorney of the party in whose behalf they are filed. This rule shall not apply to appeals heard as motions, as to which see subrules 816.2 and 819.2(2).

Subrule 817.1 as amended December 7, 1966, effective March 1, 1967.

.2 Notice of Hearing. Notice of hearing of motions, together with a copy thereof and of the affidavits on which they are based, and briefs in support, shall be served on the opposite attorney at least *5* days before the time noticed for hearing of the same. For good cause shown the Court may consider a motion on shorter notice. Proof of service shall be filed prior to the hearing.

.3 Motion Calendar. The clerk of the Court of Appeals shall keep a motion calendar and shall enter the motions filed under this rule on said calendar in the order in which they are delivered to him.

.4 Motion Day. The motion day in the Court of Appeals shall be Tuesday of each week. No oral argument shall be had on motions, except upon order of the Court at a time and place designated therein.

.5 Motion to Dismiss or Affirm.

(1) In addition to any other relief available under the rules, appellee may file a printed or typewritten motion to dismiss or affirm accompanied by 4 copies of a brief in support thereof. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss.

(2) A motion to dismiss an appeal may be made by appellee on the ground that:

(a) the appeal is not within the jurisdiction of the Court of Appeals, or

(b) the appeal was not taken or pursued in conformity with the rules, or

(c) the question or questions sought to be reviewed were not timely or properly raised.

(3) A motion to affirm the order or judgment sought to be reviewed may be made by the appellee on the ground that it is manifest that the question or questions sought to be reviewed on which the decision of the cause or matter depends, are so unsubstantial as to need no argument or formal submission.

(4) The appellant shall have 20 days from the date of receipt of a motion to dismiss or affirm within which to file a brief opposing the motion.

(5) Upon the filing of appellant's brief or after expiration of the time for filing appellant's brief, whichever is earlier, the motion and briefs shall be submitted by the clerk for decision by the Court. If, at the time of such submission, the record on appeal has not yet been transmitted to the Court of Appeals from the court below, the appellee shall

cause such record to be transmitted to the clerk of the Court of Appeals, pursuant to subrule 812.5. After consideration of such motion, the Court will enter an appropriate order. If such order is one of denial of appellee's motion to dismiss or affirm, the case shall stand for submission as provided in Rule 816.

RULE 818. APPEALS IN WHICH NO PROGRESS HAS BEEN MADE.

.1 Designation. *Excluding only those periods of time wherein extensions of time or continuances have been granted by the Court of Appeals, all proceedings which have not been noticed for hearing on the merits within 6 months after the filing of the claim of appeal, of an order granting leave to appeal from decisions of an administrative board, officer or tribunal or of an order to show cause in original proceedings shall be designated as "Appeals in which no progress has been made."*

Subrule 818.1 as amended December 7, 1966, effective March 1, 1967; and December 5, 1968, effective immediately.

.2 Notice; Dismissal. In all appeals so designated, the clerk shall mail to each party, or his attorney, notice that unless cause is shown to the contrary the appeal will be dismissed and shall file due proof of such notice. Thereafter, the clerk shall place at the head of each session calendar all appeals in which notice of no progress has been mailed at least 20 days prior to the first day of that session. On the first day of each session, each appeal *or original proceeding* appearing on the calendar as an appeal in which no progress has been made shall be dismissed unless cause is shown to the contrary.

Subrule 818.2 as amended December 7, 1966, effective March 1, 1967.

Rule 819. Call and Argument of Cases in the Court of Appeals.

.1 Call; Notice of Argument; Continuances. The Court, on the first day of each session, after motions are disposed of, will commence calling the cases for argument in the order as they stand on the session calendar as rearranged, and proceed from day to day during the session in the same order. No oral argument of session calendar cases will be permitted, except on order of the Court, unless counsel shall advise the clerk, in writing of his desire to argue orally at least 21 days before the first day of the session and if neither party shall be entitled and ready to proceed in the argument the cause will be listed as submitted on briefs. No cause shall be withdrawn after being placed on the call except upon a showing of extreme emergency.

.2 Argument.

(1) In the argument of session calendar cases 2 counsel may be heard on *each* side. The time allowed for argument shall be 30 minutes on each side. Where but 1 side is represented, only 15 minutes on a side may be allowed. The time for argument may be extended by the Court upon application before argument begins upon motion made at least *20* days prior to commencement of the session, or by the Presiding Judge during the argument.

(2) No oral argument shall be had in appeals ordered heard as motions unless by special permission of the Court first obtained.

Subrule 819.2 as amended December 7, 1966, effective March 1, 1967.

.3 Submission on Briefs. Any cause may be submitted upon briefs by stipulation at any time.

.4 Application for Rehearing. No application for rehearing will be considered by the Court unless the

moving party, within 20 days from the filing of the opinion therein, causes any papers upon which it is based, together with his reasons for granting the same, to be typewritten or printed and 4 copies thereof to be filed with the clerk of the Court, and a copy thereof to be served upon the counsel for the opposite party. Proof of service thereof shall be filed with the clerk. *A motion fee shall be payable upon filing such application for rehearing. See subrule 822.3(2).* The party opposing may, within 10 days thereafter, file with the clerk 4 copies of his objections to the application, either printed or typewritten, as he may prefer; the Court will then examine the papers, and without further argument, unless specially ordered, will pass upon the application.

Subrule 819.4 as amended December 7, 1966, effective March 1, 1967.

.5 (*Deleted*).

Subrule 819.5 deleted December 7, 1966, effective March 1, 1967.

RULE 820. MISCELLANEOUS RELIEF OBTAINABLE IN COURT OF APPEALS.

.1 Relief Obtainable. The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on such terms as it deems just:

(1) Exercise any or all of the powers of amendment of the court or tribunal below;

(2) Allow substitution of parties by reason of marriage, death, bankruptcy, assignment, or any other cause, allow new parties to be added or parties to be dropped, or allow parties to be rearranged as appellants or appellees, on such reasonable notice as it may require;

(3) Permit the reasons or grounds of appeal to be amended or new grounds to be added;

(4) Permit the transcript or record to be amended by correcting errors or adding matters which should have been included;

(5) Continue the cause until such further evidence shall be taken and brought before it as the Court may deem necessary in order to do justice;

(6) Draw inferences of fact;

(7) Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, as the case may require;

(8) In the event that a judgment notwithstanding the verdict is set aside on appeal, the Court of Appeals may grant a new trial or such other relief as it deems just.

.2 Allowing Act After Expiration of Time. Where, under the practice relating to appeals or stay of proceedings, any nonjurisdictional act is required to be done within a designated time, the Court of Appeals may at any time, upon motion and due notice, permit it to be done after the expiration of such period upon a showing made to the Court of Appeals that there was good cause for such delay or that it was not due to the culpable negligence of the appellant. Application for such permission shall be heard only on the usual notice required for special motions, and notice thereof shall be accompanied with a copy of the application and the affidavits on which the same is based.

Rule 821. Decisions and Final Process from Court of Appeals.

.1 Decisions of the Court. Decisions of the Court of Appeals shall be in the form of written opinions signed by the judges and showing the writer thereof or memorandum decisions briefly stating the issues

before the Court and the decisions thereon. Copies of its written opinions and memorandum decisions shall be delivered to the Supreme Court reporter not later than when they are filed with the clerk of the Court of Appeals. The reporter shall cause said opinions and memorandum decisions to be printed in like manner as those of the Supreme Court, but in separate volumes containing the decisions of the Court of Appeals only, in a form and manner and under contract with a publisher to be approved by the Supreme Court. An order or judgment pursuant to such decision shall be entered by the clerk under the direction of the Court.

.2 Final Process. Final process to which any party may be entitled upon a decision, judgment, or order of the Court of Appeals shall be issued by the clerk not less than 20 nor more than 30 days from the time of the entry of such decision, judgment or order unless otherwise ordered by the Court or unless application for rehearing timely filed is pending.

RULE 822. TAXATION OF COSTS.

.1 Rule Applicable. Rule 526 applies generally to taxation of costs in the Court of Appeals.

.2 Expenses Taxable. *A prevailing party entitled to costs in the Court of Appeals may tax the reasonable expenses of (a) printing of briefs, or if briefs were typewritten, a charge of 75 cents per original page; (b) any stay bond; (c) the transcript and necessary copies thereof; (d) documents required for the record on appeal; (e) fees paid to the clerk of the Court of Appeals or of the trial court incident to the appeal; (f) taxable attorney fees allowed by statute in appeals to the Supreme*

Court; and (g) other expenses taxable under applicable court rules.

Subrule 822.2 as amended December 7, 1966, effective March 1, 1967.

.3 Fees Paid to the Clerk. The following fees shall be paid to the clerk of the Court of Appeals, and may be taxed as costs where costs are allowed by order of the Court:

(1) There shall be paid to the clerk the sum of $25 on appeal as of right; $15 on *the filing of an* application for leave to appeal *or an original proceeding;* and $10 *within 20 days of the mailing of an order granting an application for leave to appeal or a motion to show cause in an original proceeding.*

(2) Upon the entry of any motion upon the motion docket, there shall be paid to the clerk the sum of $5.

(3) The clerk shall be allowed the sum of 50 cents per page for certified copies of any entries or papers in any action or proceeding when required for any other purpose than one connected with the progress or disposition of such action or proceeding. Where copies are presented to the clerk for certification, the charge shall be $1 per document.

(4) The clerk shall charge the sum of 50 cents per page for all uncertified copies of opinions, *orders or documents* excepting *that 1 copy of all opinions and orders shall be* sent to 1 counsel representing each party in the case, for which no charge shall be made.

(5) If a person is unable to pay the fees mentioned herein, he may by motion, accompanied by his affidavit stating facts showing such inability, ask the Court to waive such fees and the Court or a judge thereof may waive payment of such fees.

Subrule 822.3 as amended December 7, 1966, effective March 1, 1967.

RULE 823. CHECKLIST OF STEPS ON APPEAL TO COURT OF APPEALS.

The appellate process for appeals to the Court of Appeals is governed by the rules in chapter 80. This rule is intended to serve as a checklist for the ordinary appeal to the Court of Appeals.

.1 Steps by Appellant in Appeals as of Right. Within the 20-day period (subrule 803.1) for taking appeals as of right, the following steps should be taken by appellant:

(1) File claim of appeal with the *Court of Appeals* (subrule 802.1; Rule 805).

(2) Pay to the clerk of *the Court of Appeals the $25 entry fee and he will assign a docket number to the case* (subrules 802.1 and 822.3[1]).

(3) File appeal bond, if any required by statute (subrule 804.1[1]).

(4) File stay of proceedings bond, if such is desired, and secure approval thereof by circuit judge (Rule 808).

(5) *Immediately after filing claim of appeal a copy thereof should be filed in the trial court (subrule 803.5).*

(6) *Simultaneously with filing of item (5), pay filing fee of $5 to the clerk of the trial court (subrule 803.5).*

(7) *Serve copy of claim of appeal on the other side together with notice setting forth the fact and date of the filing thereof and the bond, if any, and the payment of the appeal and entry fees (subrule 804.1[1][c]).*

(8) *File proof of service of item (7) in the Court of Appeals (subrule 804.1[1][c]).*

(9) *File stenographer's certificate as to ordering of transcript (subrule 812.3[1]).*

The following steps may be taken without limitation of the 20-day period:

(10) Within 20 days after filing claim of appeal, file exhibits in appellant's possession with clerk of trial court (subrule 812.4).

(11) File transcript of testimony with clerk of trial court. Stenographer has duty to file transcript with clerk of trial court and notify clerk of Court of Appeals and parties thereof within 90 days after furnishing of stenographer's certificate unless time is extended by *Court of Appeals* (subrules 812.2 and 813.2). Transcript must have hard surfaced covers and table of contents.

(12) Within 20 days after the transcript is filed in the trial court, serve a copy of the record on appeal, including the transcript, on each appellee and file proof of service thereof in the Court of Appeals and in the trial court *except that documents in possession of appellee may be incorporated by reference* (subrule 815.1).

(13) Within 60 days after transcript is filed, prepare and file in the Court of Appeals, 4 copies of a typewritten or printed brief. Serve 2 copies on attorney for each appellee and file proof of service in Court of Appeals and trial court (subrule 815.1).

(14) If unable to abide by 60-day period provided in item (13), extension may be had *for an additional 30 days* by stipulation or *by* motion in the Court of Appeals (subrule 815.1[1]).

(15) *After appellee has filed his brief or his time for filing has expired, notify clerk of the trial court to forward the record to the Court of Appeals (subrule 812.3[2]). Stipulate where possible to eliminate forwarding of interlocutory or other proceedings or documents not needed for decision of issues on appeal (subrule 812.2).*

(16) *After the record and briefs of both sides have been filed or the time has expired for filing of appellee's brief, notice the case for hearing in the Court of Appeals. Such notice must be given and filed and notice given to the opposite party at least 32 days prior to the first day of the session at which it is to be argued and after the original record has been filed in the Court of Appeals. Designate in the notice the place of hearing using Detroit, Grand Rapids, Lansing, or Marquette, whichever is closer to the court from which the appeal is taken unless otherwise stipulated. File in the Court of Appeals proof of service of such notice on the opposite side (subrule 816.1). To insure that the original record will be transmitted to the Court of Appeals in time for proper noticing, check with clerk of trial court in advance thereof.*

(17) *Notify clerk of Court of Appeals in writing at least 21 days before the first day of session that oral argument is requested, if such be the case. Serve copy thereof on appellee (subrule 819.1).*

Subrule 823.1 as amended December 7, 1966, effective March 1, 1967.

.2 Steps by Appellee in Appeals as of Right.

(1) Within 20 days after claim of appeal is filed, file exhibits in appellee's possession with clerk of trial court (subrule 812.4).

(2) Within 20 days after service of claim of appeal, take cross-appeal if desired (Rule 807).

(3) Within 40 days after appellant's brief is filed, prepare and file in Court of Appeals 4 copies of typewritten or printed brief. Serve 2 copies on attorneys for other parties and file proof of service thereof with clerk of Court of Appeals (subrule 815.3).

(4) If unable to abide by 40-day period in item (3), extension may be had *for an additional 30 days*

by stipulation or motion in the Court of Appeals (subrule 815.2).

(5) Notify clerk of Court of Appeals in writing at least 21 days before the first day of session that oral argument is requested, if such be the case. Serve copy thereof on appellee (subrule 819.1).

Subrule 823.2 as amended December 7, 1966, effective March 1, 1967.

.3 Steps by Appellant in Appeals by Leave. Except in delayed appeals, or where additional time is granted by the rules, steps *(1)–(3)* should be taken within the 20-day period for taking appeals *as of right and step (4) thereafter:*

(1) Prepare application for leave to appeal, setting forth reasons for appeal and attach proposed concise statement of material facts and copy of judgment or order appealed from, showing date of entry, and copy of lower court's opinion, if any. If from interlocutory order, attach certificate, if any, of trial judge (subrule 806.3). If motion to extend time for filing is filed within 20 days, trial court may grant up to 30 days in addition (subrule 806.3). If this period is insufficient, apply to Court of Appeals for further extension (subrules 806.3[2]; 820.2).

(2) Serve copy of application for leave to appeal on opposite side with a notice for settlement of concise statement before lower court (subrule 806.3[2]).

(3) Notice hearing in lower court on settlement of concise statement (subrule 806.3[2]).

(4) Procure certificate of trial court certifying concise statement. See subrule 806.3(3).

Within 10 days after item (4), the following steps should be *taken:*

(5) File 4 copies of application for leave to appeal and certified concise statement with Court of Appeals clerk together with 4 copies of brief in support thereof, 1 of which shall be signed as provided in

Rule 114, and notice it for hearing as a motion on a date which is at least 20 days after the date of notice (subrule 806.3[4]).

(6) Pay $15 entry fee to Court of Appeals clerk (Rule 822.3).

(7) Serve copy of documents in item (5) hereof on other parties and file proof of service thereof with clerk of Court of Appeals (subrules 806.3[4] and 806.3[5]).

(8) Upon granting of leave to appeal, pay $10 fee to clerk of Court of Appeals (subrule 822.3[1]). After leave to appeal is granted, the 20-day period for taking subsequent steps begins to run from the date of the order granting the appeal (subrule 803.2). Items (1) through *(9) of* subrule 823.1 must be *performed* during such 20-day period *except for item (2).* Steps *(10)* through *(17) of* subrule 823.1 must be *taken* thereafter (subrule 803.2).

Subrule 823.3 as amended December 7, 1966, effective March 1, 1967.

.4 Steps by Appellee in Appeals by Leave.

(1) Appear in trial court on settlement of concise statement or file consent thereto.

(2) Prior to hearing date on application for leave to appeal, file with clerk of Court of Appeals 4 copies of brief and affidavits in opposition (subrule 806.3 [5]).

(3) Serve copy of brief and affidavits on other parties and file proof of service with clerk of Court of Appeals (subrule 806.3[5]).

(4) If leave to appeal is granted, items (1) through (5) of steps for appellee in appeals as of right (subrule 823.2) become applicable.

TABLE OF CASES REPORTED

A

PAGE

Adair *v.* Phoenix Mutual Life Insurance Company 38
African Methodist Episcopal Church *v.* Shoulders 290
Allen, People *v.* 183
A.O.C. Corporation, Silver *v.* 147
Ashwell *v.* Ashwell 172

B

Baber, People *v.* 106
Ballard, People *v.* 31
Banner *v.* Travelers Insurance Company 608
Beets, People *v.* 378
Benincasa *v.* Mihailovich 473
Bennett *v.* Pitts 530
Bognar, People *v.* 110
Boone, People *v.* 193
Boykin, People *v.* 681
Brady *v.* Michigan Consolidated Gas Company 498
Braidwood *v.* Harmon 49
Brewer, People *v.* 177
Bryant, People *v.* 297
Burnside, People *v.* 59

C

Cadillac Sands Motel, Inc., Komraus Plumbing & Heating, Inc. *v.* 674

PAGE

California, State of, *v.* Larsen Transportation, Inc. 594
California, State of, *v.* Max Larsen, Inc. 594
Cartier *v.* Young 151
Castleton, Township of, Cotton *v.* 620
Chapman *v.* Chapman 576
Chapman *v.* Russell 586
City of Dearborn *v.* Dixie Cartage, Inc. 573
City of Dearborn, Schwall *v.* 169
City of Detroit, Frigid Food Products, Inc., *v.* 402
City of Detroit, Hooks *v.* 662
City of Detroit *v.* State of Michigan 563
City of Flint, White *v.* 509
City of Muskegon *v.* Irwin 263
City of Trenton, Mulias *v.* 535
Collins, People *v.* 197
Conlon *v.* Department of Treasury 180
Consumers Power Company *v.* Reich 138
Corbin, People *v.* 338
Corrections, Department of, Feazel *v.* 425
Cotton *v.* Township of Castleton 620
County of Macomb, Locke *v.* 22
Cuadra (de la), Sattiewhite *v.* 117

D

Dailey (R. E.) & Co. *v.* Department of State Highways 518
Dault *v.* Schulte 698
Dearborn, City of, *v.* Dixie Cartage, Inc. 573
Dearborn Municipal Court, Green *v.* 591
Dearborn (City of), Schwall *v.* 169
De Bruyn Brothers Realty Company *v.* Photo Lith Plate Service Corporation 487
de la Cuadra, Sattiewhite *v.* 117

Page

Department of Corrections, Feazel *v.* 425
Department of State Highways, R. E. Dailey & Co. *v.* 518
Department of Treasury, Conlon *v.* 180
Detroit, City of, Frigid Food Products, Inc., *v.* 402
Detroit, City of, Hooks *v.* 662
Detroit, City of, *v.* State of Michigan 563
Dixie Cartage, Inc., City of Dearborn *v.* 573
Doss, People *v.* 78
Downing, People *v.* 31
Dukes *v.* Glen of Michigan 500
DuPuie, People *v.* 14

F

Farness *v.* Farness 35
Feazel *v.* Department of Corrections 425
Flint, City of, White *v.* 509
Frank, People *v.* 378
Fredrickson *v.* Kool 62
Frigid Food Products, Inc., *v.* City of Detroit .. 402
Frimberger Company, Lemanski *v.* 285

G

Garcia, People *v.* 447
Gary Boat Club, Inc., *v.* Oselka 465
Getterson, People *v.* 124
Gill, People *v.* 395
Gillen *v.* Martini 685
Gilleylen, People *v.* 416
Gitre *v.* Kessler Products Co., Inc. 1
Glen of Michigan, Dukes *v.* 500
Globe Indemnity Company, Robinson's Home Outfitting Company *v.* 104
Goniwicha, People *v.* 175
Graves, People *v.* 635

PAGE

Green *v.* Dearborn Municipal Court 591
Grove *v.* Story Oldsmobile, Inc. 613

H

Hammond *v.* Weiss 717
Harmon, Braidwood *v.* 49
Harrington, People *v.* 136
Harris, People *v.* 100
Hatch, People *v.* 154
Hatfield *v.* Safeco Insurance Company 671
Hawkeye Security Insurance Company *v.* Shields 649
Hayward *v.* Postma 720
Head, People *v.* 491
Heard, People *v.* 439
Hearndon, People *v.* 113
Highway Commission (State) *v.* L & L Concession Company 222
Hooks *v.* City of Detroit 662
Huntley *v.* Motor Wheel Corporation 385

I

Iaconis, People *v.* 703
In re Spalter 458
Irwin, City of Muskegon *v.* 263
Isbey *v.* Isbey 185

J

Jackson, People *v.* 276
Jerome Building Company, Stoneleigh Homes, Inc., *v.* 542
Johnson, People *v.* 416
Jones (Richard), People *v.* 68
Jones (Willie J.), People *v.* 599

K

PAGE
Kennedy, People *v.* 538
Kessler Products Co., Inc., Gitre *v.* 1
Klein, Plumley *v.* 26
Knopek, People *v.* 129
Komraus Plumbing & Heating, Inc. *v.* Cadillac Sands Motel, Inc. 674
Kool, Fredrickson *v.* 62
Kuchulan, People *v.* 280
Kyes *v.* Pisco 72

L

Laine, People *v.* 271
Lake *v.* Travelers Insurance Company 688
Larsen Transportation, Inc., State of California *v.* 594
Ledbetter, People *v.* 160
Lemanski *v.* Frimberger Company 285
Lewis (J. C. Jr.), People *v.* 91
Lewis (Willie Lee), People *v.* 433
L & L Concession Company, State Highway Commission *v.* 222
Locke *v.* Macomb County 22
Love, People *v.* 85

M

Macomb County, Locke *v.* 22
Maddox, People *v.* 167
Maglaya, People *v.* 351
Marathon Pipe Line Company *v.* Nienhuis 407
Martin (George), People *v.* 624
Martin (John), People *v.* 283
Martini, Gillen *v.* 685
Mathews, Westgate *v.* 480
Max Larsen, Inc., State of California *v.* 594

PAGE

McFadden, People *v.* 512
McGath, People *v.* 351
Michigan Bell Telephone Company, Valentine *v.* 18
Michigan Consolidated Gas Company, Brady *v.* 498
Michigan Life Insurance Company, Smart *v.* 189
Michigan, State of, City of Detroit *v.* 563
Mihailovich, Benincasa *v.* 473
Milkovich, People *v.* 582
Miller, People *v.* 121
Miron, People *v.* 142
Morrin, People *v.* 301
Morton *v.* Wibright 8
Motor Wheel Corporation, Huntley *v.* 385
Mulias *v.* City of Trenton 535
Mulligan, People *v.* 274
Muskegon (City of) *v.* Irwin 263

N

Nelson *v.* Runnels 163
Nienhuis, Marathon Pipe Line Company *v.* ... 407

O

Osborn, People *v.* 156
Oselka, Gary Boat Club, Inc., *v.* 465

P

Paesani, People *v.* 145
Parker, People *v.* 133
Payne, People *v.* 14
Peck, People *v.* 667
People *v.* Allen 183
People *v.* Baber 106
People *v.* Ballard 31
People *v.* Beets 378
People *v.* Bognar 110

	Page
People *v.* Boone	193
People *v.* Boykin	681
People *v.* Brewer	177
People *v.* Bryant	297
People *v.* Burnside	59
People *v.* Collins	197
People *v.* Corbin	338
People *v.* Doss	78
People *v.* Downing	31
People *v.* DuPuie	14
People *v.* Frank	378
People *v.* Garcia	447
People *v.* Getterson	124
People *v.* Gill	395
People *v.* Gilleylen	416
People *v.* Goniwicha	175
People *v.* Graves	635
People *v.* Harrington	136
People *v.* Harris	100
People *v.* Hatch	154
People *v.* Head	491
People *v.* Heard	439
People *v.* Hearndon	113
People *v.* Iaconis	703
People *v.* Jackson	276
People *v.* Johnson	416
People *v.* Richard Jones	68
People *v.* Willie J. Jones	599
People *v.* Kennedy	538
People *v.* Knopek	129
People *v.* Kuchulan	280
People *v.* Laine	271
People *v.* Ledbetter	160
People *v.* J. C. Lewis, Jr.	91
People *v.* Willie Lee Lewis	433
People *v.* Love	85

PAGE
People *v.* Maddox 167
People *v.* Maglaya 351
People *v.* George Martin 624
People *v.* John Martin 283
People *v.* McFadden 512
People *v.* McGath 351
People *v.* Milkovich 582
People *v.* Miller 121
People *v.* Miron 142
People *v.* Morrin 301
People *v.* Mulligan 274
People *v.* Osborn 156
People *v.* Paesani 145
People *v.* Parker 133
People *v.* Payne 14
People *v.* Peck 667
People *v.* Peoples 278
People *v.* Potts 67
People *v.* Reynolds 110
People *v.* Rolston 200
People *v.* Sankey 76
People *v.* Sheehy 628
People *v.* Shuck 70
People *v.* Harry James Smith 366
People *v.* Larry Joseph Smith 191
People *v.* Stephen 604
People *v.* Stroble 94
People *v.* Tofil 342
People *v.* Trice 299
People *v.* Turner 44
People *v.* Vaughn 599
People *v.* Wasson 638
People *v.* Henry Watkins 599
People *v.* James Watkins 288
People *v.* Wenrich 644
People *v.* White 80

PAGE
People *v.* Williams 299
People *v.* Wynn 80
Peoples, People *v.* 278
Phoenix Mutual Life Insurance Company, Adair *v.* 38
Photo Lith Plate Service Corporation, De Bruyn Brothers Realty Company *v.* 487
Pisco, Kyes *v.* 72
Pitts, Bennett *v.* 530
Plumley *v.* Klein 26
Postma, Hayward *v.* 720
Potts, People *v.* 67

R

Raschke, Zaitzeff *v.* 87
R. E. Dailey & Co. *v.* Department of State Highways 518
Reich, Consumers Power Company *v.* 138
Reynolds, People *v.* 110
Robinson's Home Outfitting Company *v.* Globe Indemnity Company 104
Rolston, People *v.* 200
Rumph *v.* Wayne Community School District .. 555
Runnels, Nelson *v.* 163
Russell, Chapman *v.* 586

S

Safeco Insurance Company, Hatfield *v.* 671
Sankey, People *v.* 76
Sattiewhite *v.* de la Cuadra 117
Scarf, Troppi *v.* 240
Schulte, Dault *v.* 698
Schwall *v.* City of Dearborn 169
Sheehy, People *v.* 628

PAGE

Shields, Hawkeye Security Insurance Company *v.* ... 649
Shoulders, African Methodist Episcopal Church *v.* ... 290
Shuck, People *v.* ... 70
Silver *v.* A.O.C. Corporation ... 147
Smart *v.* Michigan Life Insurance Company ... 189
Smith (Harry James), People *v.* ... 366
Smith (Larry Joseph), People *v.* ... 191
Spalter, *In re* ... 458
State Highway Commission *v.* L & L Concession Company ... 222
State Highways, Department of, R. E. Dailey & Co. *v.* ... 518
State of California *v.* Larsen Transportation, Inc. ... 594
State of California *v.* Max Larsen, Inc. ... 594
State of Michigan, City of Detroit *v.* ... 563
Stephen, People *v.* ... 604
Stoneleigh Homes, Inc., *v.* Jerome Building Company ... 542
Story Oldsmobile, Inc., Grove *v.* ... 613
Stroble, People *v.* ... 94

T

Tofil, People *v.* ... 342
Township of Castleton, Cotton *v.* ... 620
Travelers Insurance Company, Banner *v.* ... 608
Travelers Insurance Company, Lake *v.* ... 688
Treasury (Department of), Conlon *v.* ... 180
Trenton, City of, Mulias *v.* ... 535
Trice, People *v.* ... 299
Troppi *v.* Scarf ... 240
Turner, People *v.* ... 44

V

PAGE
Valentine *v.* Michigan Bell Telephone Company 18
Vaughn, People *v.* 599

W

Wasson, People *v.* 638
Watkins (Henry), People *v.* 599
Watkins (James), People *v.* 288
Wayne Community School District, Rumph *v.* ..555
Weiss, Hammond *v.* 717
Wenrich, People *v.* 644
Westgate *v.* Mathews 480
White *v.* City of Flint 509
White, People *v.* 80
Whitmire, Wright *v.* 692
Wibright, Morton *v.* 8
Williams, People *v.* 299
Wright *v.* Whitmire 692
Wynn, People *v.* 80

Y

Young, Cartier *v.* 151

Z

Zaitzeff *v.* Raschke 87

GITRE *v.* KESSLER PRODUCTS CO., INC.

1. ACCORD AND SATISFACTION — REQUIREMENTS — CONSIDERATION — MEETING OF THE MINDS.

An accord and satisfaction, being a contract, must possess all the essential elements of a contract including consideration and a meeting of the minds.

2. ACCORD AND SATISFACTION—SALES—COMMISSIONS.

Plaintiff's depositing defendants' checks constituted an accord and satisfaction in regard to sales commissions due plaintiff as of the date of the checks where plaintiff had complained to the defendants that certain customers had been wrongfully classified as house accounts and the amounts on the checks and the accompanying invoices clearly showed that the commissions paid the plaintiff did not include the disputed commissions on the house accounts, but the depositing of the checks did not constitute an accord and satisfaction as to amounts which thereafter may have become due as damages for breach of contract.

3. CONTRACTS—BREACH—RELEASE.

Plaintiff's depositing checks from the defendants, even though working an accord and satisfaction as to disputed commissions due the plaintiff as of the date of the checks, did not cancel the defendants' debt for future commissions from the alleged breach of allegedly written and oral lifetime contracts providing for sales commissions where a release of the claim for the breaches of the contracts was not in the contemplation of the parties, as evidenced by the checks which were limited to the amount the defendants believed they owed the plaintiff as of the date of checks.

REFERENCES FOR POINTS IN HEADNOTES

[1] 1 Am Jur 2d, Accord and Satisfaction § 4.
[2, 3] 1 Am Jur 2d, Accord and Satisfaction § 19.

Appeal from Wayne, Harry J. Dingeman, Jr., J. Submitted Division 1 December 16, 1970, at Detroit. (Docket No. 9073.) Decided February 19, 1971. Leave to appeal granted August 31, 1971, 385 Mich 787.

Complaint by Jerry L. Gitre and Gitre Company, Inc., against Kessler Products Co., Inc., and The Dover Molded Products Company for breach of contract. Accelerated judgment for defendants. Plaintiffs appeal. Affirmed in part, reversed and remanded in part.

Jaffe, Snider, Raitt, Garratt & Heuer (by *Wallace H. Glendening*), for plaintiffs.

Long, Preston, Evans & Kinnaird, for defendants.

Before: V. J. BRENNAN, P. J., and J. H. GILLIS and JEANNETTE,* JJ.

V. J. BRENNAN, P. J. This appeal arises out of a civil action initiated by plaintiffs Jerry L. Gitre and Gitre Co., Inc., against Kessler Products Co., Inc., (hereinafter referred to as "Kessler") and The Dover Molded Products Co. (hereinafter referred to as "Dover"), for damages arising out of breach of contract. From a grant of defendants' motions for accelerated judgment, plaintiffs appeal.

In 1953, plaintiff Jerry Gitre entered into a manufacturer's agent agreement with Kessler which provided that he was to act as the company's sole agent in Michigan and part of Ohio for the sale of aluminum window and door products. Plaintiff was to receive a 5% commission and the agreement was cancellable by either party upon 30 days' notice to the other.

* Circuit judge, sitting on the Court of Appeals by assignment.

In 1960, Gitre Co., of which Jerry Gitre was president, entered into a similar agreement with Dover, an Ohio corporation with the same principals as Kessler. Plaintiff company was to be exclusive sale agent for Dover in Michigan and Lucas county, Ohio. Here, too, the contract was cancellable by either party on 30 days' notice.

Over the years the sale of Kessler's products in plaintiff's exclusive territory grew from nothing to approximately $500,000 annually in gross sales. Kessler regularly paid plaintiff commissions on each month's sales on the 15th day of the following month by transmitting checks with stubs identifying the preceding month and the total commissions payable. The checks were also accompanied by a commission statement showing sale invoice numbers and the gross sales price of products sold within plaintiff's exclusive territory.

Defendant Dover's sales also experienced an increase due to the plaintiff's efforts; the manner in which commissions were paid was similar to that employed by Kessler.

Problems began when, in 1967, Kessler reclassified as a "house account" one of Jerry Gitre's largest customers. Shortly thereafter, Kessler reclassified two other large accounts. The result was that Gitre lost all commissions on future sales to his three largest customers. According to plaintiff's complaint, this was done "without the consent, against the will, and over the objections of Gitre".

Then, on January 8, 1968, defendant Kessler sent plaintiff a letter stating that it elected to terminate and cancel the agency contract as of February 15, 1968. Similarly, defendant Dover informed plaintiff by letter dated February 1, 1968, that the contract between them would terminate on February 15, 1968. Pursuant to these letters, both defendants

sent checks to the plaintiffs for the balance of commissions due for the period of January 1 to February 15. The reverse side of Kessler's check bore the following legend:

"Endorsement and payment of the within check constitutes a full release by the payee of all claims for commission or otherwise against the drawer and its affiliates"

The back of Dover's check provided:

"Endorsement and payment of the within check constitutes a full release by the payees of the drawer of the within check, of all claims and demands for commissions or other compensation."

These checks were indorsed with the indorsement stamp of Gitre Co., Inc., and deposited in its account in the National Bank of Southfield. In plaintiffs' answer to defendants' motion to dismiss, we are told the cancellation of the contract by the Kesslers (the principals of Kessler and Dover) was done "despite plaintiffs' objections".

Thereafter, plaintiffs' attorneys formally demanded that Kessler retract its election to cancel the contract. The basis for the demand was that their written contract was subsequently modified both orally and by a course of dealing so that it was in effect a "lifetime" agreement. When defendants refused to proceed with the contract, plaintiff sued for breach thereof.

Both defendants filed motions for accelerated judgment pursuant to GCR 1963, 116.1(5), on the basis of release and accord and satisfaction. In a written opinion granting defendants' motions the court said that the checks were sufficient to discharge the obligations under MCLA § 566.1 (Stat

Ann 1970 Rev § 26.978[1]),[1] and that "in any event there also was a discharge of the obligations through an 'accord and satisfaction' ".

Defendants, relying on *People* v. *Louis J. Dettore Construction Company* (1969), 17 Mich App 101, claim that the deposit of the checks with their restrictive legends was sufficient to constitute an accord and satisfaction, since the amount owed to plaintiffs for commissions on the reclassification of certain customers as house accounts and for breach of contract, if any, was disputed. Plaintiffs, relying on *Durkin* v. *Everhot Heater Co.* (1934), 266 Mich 508, claim that no real dispute concerning money owed to them arose until after the checks were deposited and thus there was no consideration to support an accord and satisfaction. They further contend that the checks were so ambiguous that they were not sufficiently apprised of the conditions accompanying the tender.

An accord and satisfaction, being a contract, must possess all the essential elements of a contract, including consideration, *Puett* v. *Walker* (1952), 332 Mich 117, and a meeting of the minds, *Obremski* v. *Dworzanin* (1948), 322 Mich 285. The case relied on by defendants, *Dettore, supra,* is concerned mainly with the element of consideration. It held that where *part* of a debt is liquidated and *part* is unliquidated, the entire debt is held to be unliquidated and payment of only the liquidated part is sufficient consideration to discharge the whole debt.

---

[1] "Section 1. An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, That the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge."

On the other hand, the case relied upon by plaintiffs, *Durkin, supra,* p 513, deals with the requirement that there be a meeting of the minds:

"To work an accord and satisfaction the tender of payment as being *in full* should be made in unequivocal terms, so that the creditor in accepting the conditional payment will surely do so understandingly."

The fact question of whether or not a dispute existed at the time the checks were deposited is important because it is relevant both to the issue of consideration and to that of a meeting of the minds.

It is clear by virtue of the amounts on the checks and from the accompanying invoices that they represented commissions due on sales which did not include the house accounts; as to that debt the trial court was correct; there was an accord and satisfaction.

However, if plaintiffs' contentions are correct there arose another cause of action over and above the one for commissions due and owing up to February of 1968. This new cause would embrace damages arising *after* February 1968 for an alleged breach of written and oral contracts for future commissions.

We cannot accept defendants' contention that the accord and satisfaction of the past due debt for commissions would cancel a debt for the alleged breach. In the breach action there is a possibility, depending on plaintiffs' proofs, for a separate and distinct indebtedness to plaintiffs. It is clear that it was not within the contemplation of either party that the commission checks of February 1968 were in satisfaction of a possible breach indebtedness for future commissions.

Obviously, the defendants did not wish to bring about an unjust result by virtue of these writings. They undoubtedly intended nothing more than to pay plaintiffs' commissions they honestly believed they owed up to February 1968 as the amounts of $57.92 and $2,844.46 clearly indicate; and, therefore, we read this so-called release as *not* applying to an action for future commissions.

In other words, if there was in fact a valid oral lifetime contract and there was in fact a breach, the damages would be calculated from February 1968 to a future point in time depending on the measure used.

In order to determine this factual issue, the trial court would have to conduct a hearing on the merits; therefore, we affirm the trial court's decision as to any dispute over monies due and owing up to February 1968. However, we reverse and remand for the purpose of a trial on the merits to determine if there was a breach of an oral lifetime contract and, if so, what damages resulted therefrom.

Affirmed in part, reversed and remanded in part.

All concurred.

MORTON *v.* WIBRIGHT

1. NEGLIGENCE—VIOLATION OF STATUTE—NEGLIGENCE PER SE—PRIMA FACIE CASE.

   Violation of a statute is negligence *per se* and will support a *prima facie* case of negligence.

2. NEGLIGENCE—VIOLATION OF STATUTE—EFFECT—RECOVERY—PROXIMATE CAUSE.

   The violation of a statute alone will not support a recovery because the violation must also be the proximate cause of the injury complained of.

3. AUTOMOBILES—NEGLIGENCE—WRONG-LANE COLLISION—QUESTION OF FACT.

   The question of how a driver in a negligence case got on the wrong side of the road where he collided with another driver is a question of fact.

4. NEGLIGENCE—EVIDENCE—BURDEN OF PROOF—BURDEN OF PROCEEDING.

   The burden of proof in a negligence case never shifts and is always on the plaintiff; however the burden of proceeding with proofs can shift at different points during the trial as a result of various legal presumptions or *prima facie* proofs.

5. AUTOMOBILES—NEGLIGENCE—BURDEN OF PROCEEDING—IMPROPER LANE USAGE.

   Defendant driver had the burden of proceeding with proofs which would explain or excuse his crossing into plaintiff's decedent's lane of traffic, where the defendant's and the plaintiff's decedent's cars collided where there was uncontest-

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 5, 6] 38 Am Jur, Negligence §§ 158–170, 180.
[3] 38 Am Jur, Negligence § 344 *et seq.*
[4–6] 29 Am Jur 2d, Evidence §§ 123–131.
38 Am Jur, Negligence §§ 285–289.
[6] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 689, 690, 761.

able proof that plaintiff's decedent was free of any negligence, that defendant had violated the statute governing proper lanes of traffic, and that the violation caused the collision (MCLA § 257.634).

6. AUTOMOBILES—NEGLIGENCE—WRONG-LANE COLLISION—EVIDENCE—STATUTORY VIOLATION—BURDEN OF PROCEEDING.

Finding of fact that it was unknown whether defendant driver skidded into the plaintiff's lane of traffic, where he collided with plaintiff's car, because of a patch of ice, or a rut, or an icy hump on the road, or if the defendant was first negligent in his driving under the existing conditions, required reversal of judgment of no cause of action and remand for a new trial where there was uncontestable evidence that plaintiff was not guilty of any negligence, defendant did cross into plaintiff's lane of traffic, and the violation of the statute governing proper lanes of traffic was the cause of the collision, because the burden of producing proof to explain the violation of the statute was on the defendant (MCLA § 257.634).

Appeal from Lenawee, Rex B. Martin, J. Submitted Division 2 January 7, 1971, at Lansing. (Docket No. 9076.) Decided February 19, 1971.

Complaint by Morrie Morton, administrator of the estate of Harry F. Cook, deceased, against Vernon Wibright and Larry Wibright for automobile negligence. Judgment of no cause of action. Plaintiff appeals. Reversed and remanded.

James I. Moran, for plaintiff

Alexander M. DesChenes, Jr., for defendants.

Before: QUINN, P. J., and BRONSON and O'HARA,* JJ.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

O'HARA, J. This is an appeal of right from a judgment of no cause of action rendered by the trial judge sitting without a jury as trier of the facts in an automobile negligence case.

One relevant fact is undisputed. The collision occurred in the lane of traffic legally occupied by plaintiff's decedent. Defendant's car crossed the center line and the point of impact was in decedent's proper lane of travel.

We recite the attendant circumstances. Deerfield Highway, at the point of collision, is a two-lane blacktopped, undivided highway running generally east and west. The night of the collision was cold and windy with occasional snow falling. At the scene of the accident, the surface of the road was icy and slippery. As a result of the collision, Larry Wibright, the driver of defendant Vernon Wibright's car was injured and Harry F. Cook was killed instantly. Defendant Vernon asserts total amnesia as to the period immediately preceding and following the collision. There is no proof to the contrary. Hence, we have a highway collision as to which there was no eyewitness testimony.[1] Witnesses arriving at the scene very shortly after the collision fixed the point of impact in decedent's lane of travel.

Judge Martin favored this Court with an exhaustive review of the testimony. He made specific findings of fact and discussed in depth the legal issues. We express our appreciation.

In finality, the controlling issue may be stated as whether or not plaintiff sustained his burden of

[1] Plaintiff chose not to call defendant driver adversely. Defendants did not call him for direct examination. The claim of amnesia was asserted at the pre-trial conference, and this claim was included in the pre-trial summary.

proof that defendant's violation of the statute[2] providing that "upon roadways of sufficient width a vehicle shall be driven upon the right half of the roadway" (with certain exceptions not here relevant), was the proximate cause of decedent's death and consequential damage.

Violation of a statute is negligence *per se*. Proof of the violation makes out a *prima facie* case of negligence. *Warwick* v. *Blackney* (1935), 272 Mich 231. This proof alone does not support recovery since:

"the issue as to how the driver got on the wrong side of the road is factual and for the jury,[3] [and] the violation * * * must be the proximate cause of the injury." *Hackley Union National Bank & Trust Company* v. *Warren Radio Company*, 5 Mich App 64, 73.

It was on this issue of proximate causality that the trial judge based his no-cause judgment. We may not disturb it unless it is clearly erroneous or unless his arriving at it was attended by an error of law. *McDaniels* v. *Schroeder* (1968), 9 Mich App 444; *Hughson* v. *O'Reilly* (1967), 7 Mich App 324; *Leonard* v. *Hey* (1934), 269 Mich 491; *Rickels* v. *Isabella County Road Commission* (1965), 375 Mich 294.

We quote certain of the court's findings:

(1) "He [defendant driver] did not suddenly come on a patch of icy road."

(2) "The court is convinced the defendant crossed the center line and struck the plaintiff's [decedent's] car."

(3) "Plaintiff [decedent] is presumed to have been driving carefully and there is nothing to overcome that presumption."

---

[2] MCLA § 257.634 (Stat Ann 1970 Cum Supp § 9.2334).

[3] In this case, it was the trial judge.

After making these specific findings of fact, the trial judge then reviewed analytically many Michigan decisions relating to skidding and crossing the center line into the proscribed lane. At the termination of his analysis, the court said:

"The court is sure * * * attorneys reading this opinion wondered why it has taken the court so long to decide their 'simple' case and why all this dry old law has been cited. The research was done, and the delay caused, *by the court's inability to determine as a matter of fact what actually caused this accident.*" (Emphasis supplied.)

We believe in the underlined portion of the excerpt lies the error which impels us to reverse. We think the court earlier answered its own question when it found:

"The court is convinced the defendant crossed the center line and struck plaintiff's car."

Beyond purview of doubt, defendant's crossing the center line caused the collision of the two vehicles. The real question is: What caused defendant to cross the center line and, just as importantly, whose burden is it to prove that the admitted illegal act was excusable or unforeseeable, and thus not a proximate cause of plaintiff's decedent's death?

The settled controlling rule of law is difficult of articulation because of the ever recurrent confusion between the terms "burden of proof" and "burden of proceeding with proofs".

It is axiomatic, and our courts, both ours and the Supreme Court, cling tenaciously to the theorem that "the burden of proof [in a negligence case] never shifts." It is equally axiomatic that the "burden of proceeding with the proof" can.

The difference between the burden of ultimate persuasion and the burden of coming forward with

evidence is that the former never shifts and is always with the plaintiff. The latter may shift at different points during the trial as a result of various legal presumptions or *prima facie* proofs.

We hold here that when plaintiff incontestably established that defendant-driver violated the statute, and that the violation just as incontestably caused the collision, and where, as here, the plaintiff's decedent was incontestably free of any negligence, it became the burden of defendant to introduce that measure of exculpatory proof which would clearly explain or excuse his violation of the statute.

Having so held legally, we examine the trial court's findings to determine whether defendant met that burden. We quote:

"We don't know if the defendant skidded solely because of a patch of ice or a rut or an icy hump on the road *or if he was first of all negligent in* [*his*] *driving under the existing conditions.*" (Emphasis supplied.)

We hold as a matter of law this finding of fact, which we accept, is insufficient to meet defendant's burden of coming forward with and introducing sufficient exculpatory proof.

For the reasons hereinbefore detailed, we reverse for a new trial.

Plaintiff may tax costs.

All concurred.

PEOPLE *v.* DUPUIE
PEOPLE *v.* PAYNE

1. WITNESSES—CREDIBILITY—QUESTION OF FACT.
   The credibility of a witness's testimony, as long as it is admissible, even if it is unclear, contradictory, and uncertain, is for the jury to determine.

2. CRIMINAL LAW—IDENTIFICATION TESTIMONY—WEIGHT—MOTION TO STRIKE.
   Failing to strike a witness's identification testimony of the defendant was not error even though the witness testified that she had been shown photographs of the defendant but was unable to identify him, that she had seen the defendant's picture in the newspaper and on television, but still couldn't identify him, that she was unable to identify the defendant at a showup, but that she was later able to identify the defendant at a second showup and where the witness's testimony was unclear and contradictory, because the weight to be given identification testimony is for the trier of fact to decide.

Appeal from Recorder's Court of Detroit, Robert J. Colombo, J. Submitted Division 1 January 7, 1971, at Detroit. (Docket Nos. 9083 and 9220.) Decided February 19, 1971.

William DuPuie and James C. Payne were convicted of first-degree murder. Defendants appeal. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Witnesses § 862.
[2] 29 Am Jur 2d, Criminal Law §§ 371, 372.
Admissibility of evidence as to extrajudicial or pretrial identification of accused. 71 ALR2d 449.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Angelo A. Pentolino,* Assistant Prosecuting Attorney, for the people.

Charles Burke, for defendant DuPuie.

Oliver C. Nelson, for defendant Payne.

Before: R. B. BURNS, P. J., and J. H. GILLIS and DANHOF, JJ.

R. B. BURNS, P. J. Two armed men broke into an apartment occupied by Nathan and Dorothy Lefkowitz. They forced Mr. and Mrs. Lefkowitz into the bedroom where they taped them and compelled them to lie on the floor. The shorter of the intruders was wearing a Halloween-type mask while the other's face was clearly visible. The shorter one rifled through some bureau drawers, took an envelope containing approximately $1,000, and then fled the apartment with the other man.

At the time the two men broke in Mrs. Lefkowitz was talking on the telephone with the apartment manager. When the two broke in she uttered an exclamation and dropped the phone and the apartment manager became suspicious. The manager then called Carl Lindberg, a Michigan State Trooper living in the same apartment complex, and asked him to investigate. Lindberg arrived as the two men were fleeing the apartment and one of them shot and killed him.

Defendants were both charged with and convicted of the crime of first-degree murder.[1]

[1] MCLA § 750.316 (Stat Ann 1954 Rev § 28.548).

On the Tuesday following the crime, the police showed photographs to Mr. and Mrs. Lefkowitz for the purpose of identifying the two men. They were unable to identify them from the photographs. Subsequently, on Friday, the Detroit *News* published a copy of one of the pictures shown to them, along with a story stating that a warrant had been issued for defendant DuPuie. That evening a similar story and photograph appeared on television. Mrs. Lefkowitz testified at trial that while the pictures on television and in the newspapers were the same as the ones that were shown to her by the police, she was unable to identify DuPuie in any of them. The next morning the police conducted a showup at the station in the presence of counsel. Mrs. Lefkowitz was unable to identify defendant DuPuie at that time.

A second showup was conducted on October 13, 1970. It was at this showup that Payne was identified by both Mr. and Mrs. Lefkowitz. Counsel was also present at this showup.

At trial Mrs. Lefkowitz testified to all of the above events. Her testimony was unclear, contradictory, and rather uncertain. However, Mr. Lefkowitz had identified DuPuie at the first lineup and later in court. DuPuie's fingerprints were found on an envelope taken from the premises. Because Mrs. Lefkowitz's testimony was so uncertain, counsel moved to strike it from the record and to instruct the jury to disregard it. The motion was denied and counsel assigns this denial as error on appeal.

The jury, as the sole judge of credibility, was properly allowed to weigh Mrs. Lefkowitz's testimony as long as it was admissible. Counsel was present and the lineup was properly conducted.[2]

[2] *United States* v. *Wade* (1967), 388 US 218 (87 S Ct 1926, 18 L Ed 2d 1149); *Gilbert* v. *California* (1967), 388 US 263 (87 S Ct

The lineup procedure being unassailable, the next question becomes whether or not the identification at the lineup was based on the prior showing of the photographs and if so whether the prior showing of the photographs was, in the words of *Simmons* v. *United States* (1968), 390 US 377 (88 S Ct 967, 19 L Ed 2d 1247), "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification".

The identification at DuPuie's lineup was *not* based on the prior photographic identification. Even if it had been, there is no showing that the circumstances surrounding the photographic identification procedure was so "impermissibly suggestive" as to warrant its invalidation. In the circumstances of this case the weight to be given identification testimony, as the weight to be given other kinds of testimony, is for the jury. *People* v. *Lloyd* (1967), 5 Mich App 717; *People* v. *Camak* (1967), 5 Mich App 655. The question was properly one for the jury's consideration. Even if they decided not to consider Mrs. Lefkowitz's testimony, there was ample other evidence (especially the fingerprint evidence) to sustain this conviction.

Defendant Payne likewise assigns error in the judge's failure to grant his motion to strike Mrs. Lefkowitz's testimony. He, like DuPuie, was also identified by Mr. Lefkowitz, both at trial and at the lineup. Also, like DuPuie, there was other evidence to link him to the crime. He had borrowed a gun from one Albert Swift. The bullet taken from the deceased's body was, in the opinion of the people's ballistics expert, fired from Swift's gun. *People* v. *Lloyd* and *People* v. *Camak, supra,* state that the weight to be given identification testimony is for

1951, 18 L Ed 2d 1178); *Stovall* v. *Denno* (1967), 388 US 293 (87 S Ct 1967, 18 L Ed 2d 1199).

the jury. What was said in *People* v. *Hammond* (1913), 177 Mich 416, 418 is here applicable.

"We think there was enough to admit this testimony in the instant case, and the jury could give it such weight as they might think it was entitled to."

Sufficient proof is on record to sustain these convictions.

Affirmed.

All concurred.

VALENTINE *v.* MICHIGAN BELL TELEPHONE COMPANY

1. TELECOMMUNICATIONS — TELEPHONES — INADEQUATE SERVICE AND EQUIPMENT — JURISDICTION.
   Primary jurisdiction over issues of inadequate telephone service and inadequate telephone equipment lies with the Public Service Commission (MCLA §§ 484.103, 484.111).

2. PUBLIC SERVICE COMMISSION—JUDICIAL REVIEW—JURISDICTION.
   Judicial review of a final order of the Public Service Commission dealing with inadequate telephone service and equpiment is exclusively in the Ingham County Circuit Court (MCLA § 484-.114).

Appeal from Oakland, William John Beer, J. Submitted Division 2 January 7, 1971, at Detroit. (Docket No. 9113.) Decided February 19, 1971. Leave to appeal granted May 13, 1971, 384 Mich 841.

Complaint by Stephen K. Valentine and Frances M. Valentine against Michigan Bell Telephone Com-

---

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Telegraphs and Telephones §§ 36–38, 62, 63.

pany for damages for inadequate service and a court order requiring that defendant provide adequate service. Judgment for defendant. Plaintiffs appeal. Affirmed.

Stephen K. Valentine, for plaintiffs.

Mary M. Conrad and *Hartman, Beier, Howlett, McConnell & Googasian,* for defendant.

Before: QUINN, P. J., and BRONSON and O'HARA,* JJ.

QUINN, P. J. Plaintiffs' complaint and amended complaints filed in Oakland County Circuit Court sought money damages from defendant and a court order requiring defendant to provide adequate telephone service to plaintiffs. As finally amended, their complaint contained a count for breach of warranty, a count charging defendant with gross negligence, counts charging defendant with fraud and misrepresentation with respect to services and with respect to equipment, and a fifth count which combines charges of gross negligence, fraud, and misrepresentation. Regardless of the several theories pleaded, the basis for each was that defendant furnished plaintiffs with inadequate service and equipment. Defendant moved for accelerated judgment (GCR 1963, 116) on the basis that the court lacked jurisdiction because the doctrine of primary jurisdiction required that the regulatory body (MPSC) determine the issues raised in the first instance and because another action was pending between the same parties involving the same

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

claim, namely: a complaint before MPSC. In addition, defendant moved for summary judgment (GCR 1963, 117) for the reason that the complaint failed to state a claim upon which relief could be granted due to the limitation of liability provisions of defendant's tariff and the Michigan Administrative Code. The trial court determined that "neither the complaint nor any amendment thereto set forth a cause of action cognizable by this court" and dismissed the action without prejudice. Plaintiffs appeal contending that the MPSC has no authority to award them damages for losses already incurred and that it was error for the trial court to dismiss their action.

We have reviewed the many authorities cited by the parties in support of their positions and find that the only case factually applicable is *Grevers* v. *Michigan Bell Telephone Company* (1969), 18 Mich App 422. For that reason, we only discuss *Grevers.*

This Court recognized in *Grevers* that MPSC had primary jurisdiction over issues of inadequate service and equipment under the provisions of MCLA §§ 484.103 and 484.111 (Stat Ann 1970 Rev §§ 22.1443 and 22.1451). However, because MPSC could not award the relief sought by plaintiff, namely: damages for losses already incurred, the *Grevers* court stayed the trial court proceedings pending a determination by MPSC on remand to that body by the trial court.

We agree with *Grevers, supra,* that primary jurisdiction over issues of inadequate service and equipment lies with MPSC. We do not agree with the stay procedure adopted in *Grevers.* We note that the lack of jurisdiction of the Wayne Circuit Court was not raised in *Grevers,* hence, it cannot be said that we do not follow it.

The reason for disagreement is that MCLA § 484.114 (Stat Ann 1970 Rev § 22.1454) grants judicial review to plaintiffs if they are dissatisfied with the final order of MPSC. That review is exclusively in Ingham County Circuit Court, *City of Ludington* v. *Michigan Associated Telephone Company* (1952), 333 Mich 79, without a jury. (The review statute provides that review proceedings are in chancery.) There is no jurisdiction in Oakland County to litigate the issues of inadequate service and equipment. Since plaintiffs' right to damages is dependent on the resolution of unresolved issues not resolvable by Oakland County Circuit Court, the trial court was correct in his dismissal of plaintiffs' action.

This conclusion obviates discussion of the limitation of liability issue arising from the provisions of defendant's tariff and the Michigan Administrative Code.

Affirmed with costs to defendant.

All concurred.

LOCKE *v.* MACOMB COUNTY

1. MANDAMUS—REQUIREMENTS—CLEAR LEGAL DUTIES.
   Mandamus is appropriate only where duties are created by law and only where the duties to be enforced are clear.

2. SHERIFFS AND CONSTABLES—DEPUTY SHERIFF—REMOVAL—DISCRETION—CIVIL SERVICE SYSTEM—STATUTES.
   Statutory provision allowing a sheriff complete discretion in the removal of deputy sheriffs does not apply where a civil service commission for the sheriff's department has been adopted (MCLA §§ 51.70, 51.351 *et seq.*).

3. STATUTES—REPEAL BY IMPLICATION—REPUGNANCY.
   A later statute, as a general rule, will repeal an earlier one to the extent that the two are repugnant, even though repeal of a statute by implication is not favored.

4. OFFICERS—CIVIL SERVICE SYSTEM—PURPOSE.
   A civil service system exists to replace the complete discretion in the hiring and firing of county employees with an objective testing procedure aimed at hiring on the basis of objective qualifications and firing on the basis of cause.

5. SHERIFFS AND CONSTABLES—REMOVAL OF DEPUTY SHERIFF—CIVIL SERVICE PLAN—STATUTES.
   A sheriff may remove a deputy sheriff only for cause and only after the deputy sheriff receives a written statement of the charges within 90 days from the date of violation where a civil service plan for the sheriff's department has been adopted (MCLA § 51.362).

REFERENCES FOR POINTS IN HEADNOTES

[1] 52 Am Jur 2d, Mandamus §§ 40, 64, 72, 73, 80, 251.
[2, 7] 47 Am Jur, Sheriffs, Police, and Constables §§ 154, 155.
[2, 5, 8] 15 Am Jur 2d, Civil Service §§ 28, 33, 36, 38.
[3] 50 Am Jur, Statutes §§ 534–551, 556–558.
[4] 15 Am Jur 2d, Civil Service § 1.
[6] 52 Am Jur 2d, Mandamus § 251.

6. SHERIFFS AND CONSTABLES—REMOVAL OF DEPUTY SHERIFF—SHERIFF'S DUTIES—MANDAMUS.

Legal duties associated with the removal of deputy sheriffs apply to sheriffs only and the duties are enforceable by *mandamus* against sheriffs only.

7. SHERIFFS AND CONSTABLES—REMOVAL OF DEPUTY SHERIFFS—COUNTY'S AUTHORITY.

A county has no authority to appoint or remove deputy sheriffs.

Appeal from Macomb, Alton H. Noe, J. Submitted Division 2 December 16, 1970, at Lansing. (Docket No. 9219.) Decided February 19, 1971. Leave to appeal granted June 15, 1971, 385 Mich 755.

Complaint by James B. Locke against Macomb County and Lester A. Almstadt, Macomb County Sheriff, for a writ of mandamus ordering defendants to reinstate the plaintiff as a deputy sheriff. Writ denied. Plaintiff appeals. Reversed and remanded.

Hatchett, Brown, Waterman & Campbell, for plaintiff.

Alfred A. Blomberg, Civil Counsel, and *Ray W. McPeters,* Assistant Civil Counsel, for defendants.

Before: BRONSON, P. J., and R. B. BURNS and HOFF,* JJ.

R. B. BURNS, J. This is an appeal from the trial court's refusal to grant plaintiff's request for mandamus against Macomb County and its sheriff.

On September 11, 1968, plaintiff, a deputy sheriff in Macomb County, was removed from his job "pending the outcome of the charges" for which he was arrested on the same day. Acquitted of the criminal charges on February 19, 1969, the plaintiff

* Circuit judge, sitting on the Court of Appeals by assignment.

immediately requested reinstatement, but was refused. Denied review by the Macomb County Civil Service Commission,[1] the plaintiff next sought mandamus in the Circuit Court of Macomb County to require the sheriff to reinstate him. The trial judge denied the motion for mandamus and ruled that the appointment and removal of deputy sheriffs was entirely within the sheriff's discretion.

Mandamus is appropriate only where duties are created by law (*Kosiba* v. *Wayne County Board of Auditors* [1948], 320 Mich 322) and only where the duties to be enforced are clear. *Franchise Realty Corp.*, v. *Detroit* (1962), 368 Mich 276; *Kerrigan* v. *Saginaw Drain Comr.* (1968), 12 Mich App 127.

The trial court erred in holding that removal of deputy sheriffs by a sheriff is completely discretionary. Legal duties do exist and the duties are clear. MCLA § 51.70 (Stat Ann 1970 Cum Supp § 5.863), must be construed in light of the elected civil service system of Macomb County.

Although MCLA § 51.70, *supra,* gives the sheriff complete discretion when removing deputy sheriffs, this provision obviously does not apply when the majority of electors in a county election adopt the civil service provisions contained in MCLA § 51.351 *et seq.* (Stat Ann 1970 Cum Supp § 5.1191[101] *et seq.*).

The preamble reads:

"An act to establish and provide a board of civil service commissioners for sheriffs' departments * * *."

[1] The commission claimed lack of jurisdiction on the alternative grounds of (a) plaintiff's failure to answer the formal charge of September 11, 1968, within five days as required by MCLA § 51.362 (Stat Ann 1970 Cum Supp § 5.1191[112]), and (b) if the September 11, 1968 notice was not the reason for discharge then, no formal charge having been issued, the commission was precluded from review.

MCLA § 51.362 (Stat Ann 1970 Cum Supp § 5.1191[112]), states in part:

"No member of any department within the terms of this act shall be removed, discharged, reduced in rank or pay or suspended, or otherwise punished, except for cause, and in no event until he shall have been furnished with a written statement of the charges and the reasons for such actions."

The general rule as to statutory construction is that although the repeal of a statute by implication is not favored, a later act will repeal an earlier one to the extent that the two are repugnant. *Jackson* v. *Corrections Commission* (1946), 313 Mich 352.

The purpose of the civil service system is to replace the complete discretion in the hiring and firing of county employees with an objective testing procedure aimed at hiring on the basis of objective qualifications and firing on the basis of cause.[2]

The duties of the sheriff in removal of a deputy sheriff are clear and well defined. The appointing officer can remove only for cause and only after the deputy sheriff receives a written statement of the charges within 90 days from the date of violation. MCLA § 51.362 (Stat Ann 1970 Cum Supp § 5.1191 [112]). However, nowhere does one find statutory language existing in Michigan authorizing the county to appoint or remove deputy sheriffs. The duties associated with removal of deputy sheriffs apply to sheriffs only and they are enforceable by mandamus against sheriffs only.

Reversed and remanded for relief consistent with this opinion.

All concurred.

---

2 The expressed purpose of the act is "to provide a civil service system based upon examination * * * as to merit, efficiency and fitness for appointment" and "to regulate the transfer, reinstatement, suspension and discharge of said officers".

PLUMLEY *v.* KLEIN

1. NEGLIGENCE — WRONGFUL DEATH ACT — IMMUNITY — DECEASED'S PERSONAL IMMUNITY.

   Those injured by the death of a person who was killed by the wrongful act of a defendant are not barred from recovering from the defendant under the wrongful death act even though a purely personal immunity might have barred suit by the deceased.

2. NEGLIGENCE—INTRAFAMILY IMMUNITY.

   The basis of the doctrine of intrafamily immunity in negligence suits is the prevention of the likelihood of collusion and the causing of family discord; where those possibilities do not exist, the reasons for intrafamily immunity do not exist and the doctrine will not be applied.

3. NEGLIGENCE — WRONGFUL DEATH ACT — INTRAFAMILY — SUIT BY CHILD AGAINST PARENT.

   A father, administrator of the estate of his children, may sue the estate of his deceased wife under the wrongful death act for the deaths of his children in an automobile accident in which his wife, who was also the mother of the children, was driving and was killed, despite the doctrine of intrafamily immunity, because the reasons for the doctrine, the likelihood of collusion and the possibility of causing family discord no longer exist where the parties are dead.

Appeal from Van Buren, David Anderson, Jr., J. Submitted Division 3 November 13, 1970, at Grand Rapids. (Docket No. 9335.) Decided February 19,

---

REFERENCES FOR POINTS IN HEADNOTES

[1-3] 22 Am Jur 2d, Damages §§ 73–75, 79–81.

Relationship of parent and child between tortfeasor and person by whom or for whose benefit death action is brought as affecting right to maintain action under death statute. 119 ALR 1394.

1971. Leave to appeal granted July 19, 1971, 385 Mich 771.

Complaint by Howard Plumley against Alma Klein, administratrix of the estate of Claudia Ann Plumley, for damages for the wrongful deaths of Nita Plumley, Virginia Lee Plumley, Melissa Kay Plumley, and Howard Everett Plumley caused by an automobile accident. Summary judgment for defendant. Plaintiff appeals. Reversed.

Marcus, McCroskey, Libner, Reamon, Williams & Dilley (by *Robert J. Van Leuven*), for plaintiff.

Troff, Lilly, Piatt, File & Doyle (by *C. Reid Hudgins, III*), for defendant.

Before: T. M. BURNS, P. J., and R. B. BURNS and MUNRO,* JJ.

MUNRO, J. On May 22, 1969, plaintiff's deceased children, all under seven years of age, were killed in an automobile accident on Highway M-40 in Van Buren County, Michigan, involving a pickup truck in which they were passengers. The defendant estate's decedent was the mother of the children, wife of the plaintiff, and operator of the pickup truck which was owned by the plaintiff administrator personally. She was also killed in the accident. The other defendants were the owner and driver of the second truck involved in the collision. Plaintiff, as administrator of the estates of his deceased children, filed this wrongful death action against the defendant estate of Claudia Ann Plumley, deceased; David William Rumery, driver of the other vehicle, and Superior Market, owner of the other vehicle, alleg-

* Circuit judge, sitting on the Court of Appeals by assignment.

ing that his four children were injured and killed as a result of the negligence of both his deceased wife and defendant Rumery.

Defendant Alma Klein, as administratrix of the estate of Claudia Ann Plumley, deceased, filed a motion for accelerated or summary judgment asserting that her deceased was the wife of plaintiff administrator and the mother of the deceased children; Further, that by virtue of the relationship between plaintiff, the deceased children, and Claudia Ann Plumley being husband, parent, and child, the defendant was immune from suit.

The trial court granted defendant's motion for summary judgment and entered judgment against plaintiff as to defendant estate of Claudia Ann Plumley from which decision plaintiff takes this appeal.

The issue is: may a father, as administrator and sole beneficiary of the estates of his deceased children, maintain a wrongful death action against the estate of his deceased wife, the mother of the deceased children, arising out of a motor vehicle accident founded on ordinary negligence where both the children and the mother are deceased as a result of the accident?

The guest passenger act is not at issue here, because all of the deceased children were under seven years of age at the time of the accident and, therefore, did not have the capacity of exercising their choice in becoming guest passengers. *Burhans* v. *Witbeck* (1965), 375 Mich 253.

The issue whether the plaintiff may bring this action under the wrongful death statute (MCLA § 600.2922 [Stat Ann 1962 Rev §27A.2922]), even though the deceased could not have brought such an action, has been most recently ruled on by our

Supreme Court in *Mosier* v. *Carney* (1965), 376 Mich 532, where the Court, in effect, held that those injured by the death of a person who was killed by the wrongful act of a defendant are not barred from recovering from the defendant under the wrongful death act even though a purely personal immunity of the deceased might have barred suit by the deceased.

The doctrine of law applicable here relates to the intrafamily immunity which had in the past held parents to be immune from suits by their children for ordinary negligence and immune from suit as between husband and wife in the field of ordinary negligence. This principle as it affects parent and child was first determined in Michigan in the case of *Elias* v. *Collins* (1926), 237 Mich 175, and was subsequently, as to interspousal immunity, discussed by the Michigan Supreme Court in an exhaustive opinion rendered in the case of *Mosier* v. *Carney* (1965), 376 Mich 532. *Elias, supra,* was most recently referred to in the case of *Rodebaugh* v. *Grand T. W. R. Co.* (1966), 4 Mich App 559, where an automobile-train accident injured an unemancipated minor. In that case this Court held that the rule of intrafamily immunity must be retained for ordinary negligence but held that unemancipated minors may bring suit against their parents for personal injuries resulting from intentional acts, gross negligence, and wilful and wanton misconduct in activities which do not involve an exercise of parental care, discipline, and control. In the *Rodebaugh* case, however, neither the parent nor the child was killed as a result of the accident.

As was discussed at great length in *Mosier, supra,* some of the members of the Court felt that modification of the intrafamily immunity doctrine in the

tort field might better be left to the legislature. The fact is that a majority of the Court held that where the basis for the doctrine of intrafamily immunity has been destroyed, that is, the prevention of the likelihood of collusion and the causing of family discord, the reason for the continuation of such immunity no longer exists and the Court determined that where the reasons for the doctrine were nonexistent, the doctrine of interspousal immunity would not apply. In that case, as in the case here before the Court, the parties are deceased and it appears to this Court that the reasoning, logic, and exhaustive opinions of the Supreme Court in the *Mosier* case apply with equal force to a case concerned with a parent-child relationship under the circumstances here existing as to a case concerned with a husband-wife relationship.

This doctrine has most recently been interpreted in Michigan in the case of *Brinks* v. *Chesapeake & O. R. Co.* (WD Mich, 1969), 295 F Supp 1318, 1323. In that case the Federal District Court for the Western District of Michigan, interpreting Michigan law on the doctrine of intrafamily immunity, said:

"Viewing the trend, and applying the analogous reasoning of *Mosier, supra,* the latest Michigan case, this court deems it the law of Michigan that the doctrine of parental tort immunity as enunciated in *Elias* and modified by *Rodebaugh* does not apply in cases where both the parent and child are deceased as a result of the alleged tortious conduct".

It is this Court's decision that the quoted portions of *Brinks,* referring to *Mosier,* are applicable under the facts and circumstances here, because the reasons for the doctrine of intrafamily immunity have been terminated by death.

The decision of the trial court is reversed and this matter remanded for trial consistent with the pro-

visions of this decision. No costs, a question of general public importance, being involved.

All concurred.

PEOPLE *v.* DOWNING
PEOPLE *v.* BALLARD

CRIMINAL LAW—PRISON INMATES—UNTRIED CHARGES—180-DAY RULE—STATUTES—REQUIREMENT.

Statute mandating prosecution against a prison inmate be commenced within 180 days from a Department of Correction's request for final disposition does not require that the trial itself occur within the 180-day period; all that is required to comply with the statute is that there be a good faith initiation of the prosecution within 180 days and reasonable diligence thereafter in proceeding with the case.

Appeal from Recorder's Court of Detroit, Joseph A. Gillis, J. Submitted Division 1 January 13, 1971, at Detroit. (Docket Nos. 9399, 9404.) Decided February 19, 1971. Leave to appeal denied as to Downing October 19, 1971, 386 Mich 761.

Everett Lee Downing and John Ballard were convicted, on their pleas of guilty, of manslaughter. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,*

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law §§ 3, 249, 250, 254.

Chief, Appellate Department, and *Robert A. Reuther,* Assistant Prosecuting Attorney, for the people.

Charles Burke, for defendant Downing on appeal.

Gerald S. Surowiec, for defendant Ballard on appeal.

Before: V. J. BRENNAN, P. J., and FITZGERALD and LEVIN, JJ.

FITZGERALD, J. Everett Lee Downing and John Ballard, codefendants charged with first-degree murder[1], were both allowed during trial to enter pleas of guilty to manslaughter.[2] Defendants contend that their convictions are void because of noncompliance with the 180-day rule of MCLA § 780.131 (Stat Ann 1970 Cum Supp § 28.969[1]):

"Whenever the department of corrections shall receive notice that there is pending in this state any untried warrant, indictment, information or complaint setting forth against any inmate of a penal institution of this state a criminal offense for which a prison sentence might be imposed upon conviction, such inmate shall be brought to trial within 180 days after the department of corrections shall cause to be delivered to the prosecuting attorney of the county in which such warrant, indictment, information or complaint is pending written notice of the place of imprisonment of such inmate and a request for final disposition of such warrant, indictment, information or complaint."

Defendants say this necessitates reversal of their convictions pursuant to MCLA § 780.133 (Stat Ann 1970 Cum Supp § 28.969[3]), which provides:

---

1 MCLA § 750.316 (Stat Ann 1954 Rev § 28.548).
2 MCLA § 750.321 (Stat Ann 1954 Rev § 28.553).

"In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

Defendant Downing's period of incarceration during which an untried warrant was outstanding consisted of 395 days. Defendant Ballard's period of incarceration during which an untried warrant was outstanding consisted of 279 days.

In *People* v. *Farmer* (1969), 16 Mich App 148, 151, a claim was asserted under the 180-day rule and the Court of Appeals reversed the conviction, noting:

"In the present case 272 days had elapsed *without any action* having been taken. * * * The statutory procedures were not followed and no good cause was shown for such delay." (Emphasis supplied.)

In *People* v. *Parker* (1970), 21 Mich App 399, 404, this Court, reversing another conviction on the basis of the 180-day rule, said:

"In the instant case it is clear that the 180-day rule was not met. *No action whatsoever* was taken by the prosecutor following defendant's imprisonment on the second charge on March 31, 1967, until March 13, 1968. The prosecutor offers this Court no excuse for the delay of nearly a year." (Emphasis supplied.)

All that is required is that there be a good faith initiation of the prosecution within 180 days and reasonable diligence thereafter in proceeding with the case. *People* v. *Hendershot* (1959), 357 Mich 300; *People* v. *Loney* (1968), 12 Mich App 288. It

is not necessary that the trial itself occur within the 180 days. *People* v. *Williams* (1968), 9 Mich App 676.

Neither defendant here has shown bad-faith delay in the prosecution of the case, nor has either shown circumstances where no action whatsoever was taken within the 180-day period of limitations.

While delays of this magnitude are not viewed with approval and frequently result in justifiable criticism of our legal system, all delays are not flatly condemnable *per se*.. A plethora of motions to consolidate, to adjourn, to dismiss, and finally to declare a mistrial created the delays here complained of. The courts were as diligent as counsel for all parties permitted them to be and the process, while sluggish, was largely a procedural morass where, while time was passing slowly, process was gyrating wildly.

Defendants have not shown violations of the 180-day rule, nor in fact have they shown any prejudice to themselves resulting from whatever delays there were.

Convictions and judgments affirmed.

All concurred.

FARNESS *v.* FARNESS

1. DIVORCE—PROPERTY SETTLEMENT.

   No rigid rule for the division of property pursuant to a divorce judgment exists; however, a major consideration is the security of living for the wife.

2. DIVORCE—PROPETY SETTLEMENT—DISCRETION.

   Awarding the wife in a divorce action property being purchased by spouses on land contract before the divorce action, ordering the husband to complete the payments within two years, at which time title was to be conveyed to the wife, and awarding the husband the family home and property on which the home was located was not an abuse of discretion (MCLA § 552.23).

Appeal from Ingham, Donald L. Reisig, J. Submitted Division 2 January 6, 1971, at Lansing. (Docket No. 9446.) Decided February 19, 1971. Leave to appeal denied June 18, 1971, 385 Mich 757.

Complaint by Sherly Farness against Sanford Farness for divorce. Judgment for plaintiff. Defendant's motion for reconsideration of the property settlement made pursuant to the judgment of divorce denied. Defendant appeals. Affirmed.

William L. Mackay, for plaintiff.

H. Donald Bruce, for defendant.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 24 Am Jur 2d, Divorce and Separation § 925 *et seq.*

Before: QUINN, P. J., and BRONSON and O'HARA,* JJ.

BRONSON, J. In 1967, plaintiff, Sherly Farness, secured a divorce from her husband, defendant Sanford Farness. In 1969, defendant petitioned the lower court for reconsideration of the property settlement made pursuant to the judgment of divorce. The petition was denied. The court granted rehearing on the petition, heard defendant's motion, and again denied the requested relief. Defendant appeals as of right.

Defendant's sole contention on appeal questions the authority of the lower court to award plaintiff the parcel of real estate the parties were purchasing on land contract before the divorce. The terms of the property settlement awarded the parties' interest as vendees under the contract to the wife, and compelled defendant to pay the balance due on the contract within two years, at which time title was to be conveyed to the wife. Defendant was awarded the family home and the property on which it was located, subject to a lien securing his obligation on the land contract.

Defendant does not attack the property settlement as unjust or unreasonable; his argument is that the court's decree was unlawful. None of the cases cited by defendant supports his conclusion and the logic by which defendant argues his position defies restatement. It should suffice, for the purposes of this opinion, to note that MCLA § 552.23 (Stat Ann 1970 Cum Supp § 25.103) provides:

"Upon every divorce from the bond of matrimony [with exceptions not relevant here], if the estate and effects awarded to the wife shall be insufficient for

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

the suitable support and maintenance of herself [and children in her custody], *the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate real and personal, to be paid to her in gross or otherwise as it shall deem just and reasonable, having regard to the ability of the husband and the character and situation of the parties, and all the other circumstances of the case.*" (Emphasis supplied.)

There is no rigid rule of division of property pursuant to a divorce judgment; however, a major consideration is the security of living for the wife. *Brown* v. *Brown* (1941), 297 Mich 24; *Mayer* v. *Mayer* (1934), 266 Mich 241. It does not appear from the record that the trial court abused its discretion in fashioning the judgment. See *Stathas* v. *Stathas* (1965), 1 Mich App 510. We find no error.

Affirmed. Costs to plaintiff.

All concurred.

ADAIR *v.* PHOENIX MUTUAL LIFE INSURANCE COMPANY

1. INSURANCE—LIFE INSURANCE—DOUBLE INDEMNITY PROVISION—ACCIDENTAL DEATH—BURDEN OF PROOF.

   The burden of proving accidental death under a double indemnity provision of a life insurance policy is on the party claiming the benefits.

2. INSURANCE—LIFE INSURANCE—ACCIDENTAL DEATH—EVIDENCE.

   Conclusion that plaintiff's husband, the deceased insured, had died accidentally was supported by the record where evidence showed that plaintiff's husband was 40 years old, in good health, was cleaning the drainage system in his home at the time of his death, his wife found him with his head submerged in water to the waist, in a drainable stationary tub with some portion of his leg or legs extended and a bruise or abrasion on his head, but neither medical testimony nor factual testimony showed accidental death or that accidental death was the sole cause of death and the court reasoned in its opinion that it was inconceivable that the insured had a heart attack while standing on his feet or leaning against the tub, three feet from the ground, and then could have fallen into the water so as to be in the drainage tub up to his waist with his head down.

3. TRIAL—EVIDENCE—ADMISSIBILITY—TIMELINESS.

   Certified copy of deceased's death certificate, indicating that death was due to a heart attack, submitted to the deceased's insurer by his wife beneficiary as proof of death was not admissible at trial as an admission against the plaintiff's interest but admissible solely as proof of death where counsel argued the question, the court ruled that the certificate would be admitted only as proof of death, but stated that the pur-

---

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 44 Am Jur 2d, Insurance § 1965.

pose of admission might be broadened later in view of the proofs and applicable statutes, the exhibit was never reoffered, no further proof in relation to the death certificate was introduced, no reference to any statute was made, and the insurer did not argue the certificate's use as an admission against interest until closing argument.

Appeal from Oakland, Arthur E. Moore, J. Submitted Division 2 January 7, 1971, at Lansing. (Docket No. 9471.) Decided February 19, 1971.

Complaint by Evelyn L. Adair against the Phoenix Mutual Life Insurance Company of Hartford, Connecticut, for proceeds under the double indemnity clause of a life insurance policy. Judgment for plaintiff. Defendant appeals. Affirmed.

Portnoy & Mossman (by *Bernard N. Portnoy*), for plaintiff.

Fischer, Sprague, Franklin & Ford (by *David G. Barnett*), for defendant.

Before: QUINN, P. J., and BRONSON and O'HARA,* JJ.

O'HARA, J. This is an appeal of right by defendant insurance company. The action was brought by plaintiff wife as beneficiary of an insurance policy on the life of her husband. The policy provided payment of $5,000, the face amount upon proper proof of death, and double that amount in case of proof of accidental death, as that term is defined and limited in the policy.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

The case was tried to the court without a jury. Judgment was for the plaintiff. A motion for a new trial was denied.

It has long been the settled law of this state that when a beneficiary brings an action on the double indemnity provision of a life insurance policy, the burden of proving accidental death rests with the claiming beneficiary. See *Merrett* v. *Masonic Mutual* (1894), 98 Mich 338, 340, and subsequent cases following this rule.

Such was plaintiff's burden here. We examine the record for evidentiary support of the verdict and judgment.

After the *pro forma* proofs of the existence of the policy, plaintiff adduced proofs, which were summarized by the trial judge. We quote:

"the decedent [was] * * * a man in good health, approximately forty years of age.

* * *

"[A]t the time in question, [he] took what has been referred to as a snake to the basement with the expressed object of cleaning the drainage system.

* * *

"[L]ater [his] wife went to the basement and there found him with his head submerged in water, with his body in water to the waist, [in what apparently was a drainable stationary tub] with some portion of his leg or legs extended, and with a bruise or an abrasion on his right forehead.

* * *

"[N]either by medical testimony nor by factual testimony has there been a definite proof of the cause of accidental death or proof that accidental death was the sole cause.

"[T]he party litigant did not produce either medical testimony available or autopsy evidence."

After setting forth this summary, the experienced and able trial judge found as follows:

"The court finds and it determines as a matter of necessary conclusion from the proven facts and reasonable inferences therefrom, that the respondent in this case [who] went to the basement, was a healthy individual, and something happened at that time which is best shown by all the surrounding circumstances, and I conclude in my judgment, and I will fully expose my thinking as follows. I conclude he was engaged in trying to clean his drainage system. I conclude he did have water in the basement sinks, and I conclude that his face being down in the water, and having a definite indication of a blow on his forehead, that an accident of some type did occur. It is hard for me to believe, and I reject the idea, therefore, that he could have a heart attack when he was standing on his feet or leaning against the tub, three feet from the ground, and then as [a] result of the heart attack, fall into the water so that he would be in the laundry tubs up to his waist with his head down.

"I conclude that he had an accident of some form which projected his head against a solid object and stunned him to some degree or created his death by the contact, but more likely of the two, stunned him while his body fell into the water, and death ensued from drowning.

"I conclude that plaintiff has sustained the burden of proof."

It would be impossible within the universally recognized limits of appellate review to disturb such detailed findings of fact based upon the testimony and evidence, and the well-reasoned conclusions from such findings by the court sitting as the trier of the facts, absent some clear error of law.

But, says appellant insurer, and with a capital "B", there was indeed a clear error of law, and this

is it: plaintiff wife, when she submitted to the insurer the proofs of death of the namer insured, included therewith a certified copy of her husband's death certificate.

This certified copy (apparently a photographic reproduction of some kind) was offered by defendant as its Exhibit "B". Then, a colloquy between the court and counsel took place. Plaintiff's counsel objected to its admission for any purpose other than as part of the proof of death, specifically objecting to it as proof of the validity of "what is stated therein". Defense counsel argued that it was a "competent document in and of itself" and that having been submitted to the insurer voluntarily, it thus became an admission against her interest. The court ruled:

"We will receive it for that purpose alone [proof of death] now, broaden it later in view of the statute and what your proofs show."

Thereafter the exhibit was never again re-offered, nor was any further proof in relation to it introduced. No reference to any statute appears subsequent to this point in the trial transcript. We read it line by line.

After the parties had both rested and during argument to the court, which is identical to argument before a jury, where one participates in trial as the trier of the fact, defense counsel on his final rebuttal argument urged:

"*Mr. Barnett* [*defendant's counsel*]: Now again on this record we have Exhibit B, which is the death certificate which says on its face, the death was due to a coronary. Not a word about drowning on Exhibit B.

"*Mr. Portnoy* [*plaintiff's counsel*]: I must object * * * [defense] counsel was reminded * * * *by the court that if he wished the document admitted*

*as a general exhibit * * * he could do so later in the evidence and that was never done.*" (Emphasis supplied.)

Defense counsel responded with vigor that it *was* offered as an admission against interest. The court interposed:

"*The Court:* Both documents [including the death certificate] by and of themselves, until the circumstances are proper for their admission, until those circumstances were shown, both documents would not be admissible at all. Counsel admitted them for * * * limited purposes.

"*Mr. Barnett* [*defense counsel*]: Well, as a matter of law on that, I believe the documents are admissible as admissions against interest.

"*The Court:* All I am saying is, it comes too late to urge them that way. They are in evidence for a limited purpose. *That is the record.*" (Emphasis added.)

We can naught but agree. It could hardly be contended that in the middle of argument to a jury any party could re-raise an issue as to limitations on admissibility of exhibits earlier ruled upon by the judge.

Appellant's second stated assignment of error, *viz.:* that the death certificate should have been admissible as an admission against interest as to the cause of death is simply not before us.[1] We cannot pass upon it on review.

---

[1] Lest it be thought that we have been procedurally overtechnical as opposed to being concerned with the merits of the question, it should be noted that in our close review of the trial transcript we examined the controversial exhibit with care. Speaking non-decisionally, we suggest that had it been admitted for all purposes, it would likely have had little effect on Judge Moore's findings and decision. In one place it indicates the cause of death was coronary related. In another place, calling for a designation of whether the death was accidental, the word "deferred" was handprinted in. Its evidentiary value, if any, would seem to have been minimal as to either party.

As previously noted, we hold the findings of fact and permissible inferences from facts of the trial judge sitting as the trier of the fact are supported by the record.

We find no reversible error. The order of the trial court denying the motion for a new trial is affirmed. Costs to the plaintiff.

All concurred.

PEOPLE *v.* TURNER

1. ROBBERY—ARMED ROBBERY—SPECIFIC INTENT—CHARGE TO JURY—CONNOTATION OF "ROB".

   Charging the jury that to find the defendant guilty of armed robbery they must find beyond a reasonable doubt that the defendant assaulted the complainant and, while armed with a knife, did rob, take, and steal from the complainant's presence $47 was not reversible error even though the specific intent necessary in a robbery armed was not detailed and defined, because as used in this instruction the word "rob" indicated a felonious and larcenous intent and no reasonable man could construe the word "rob" to mean a taking without felonious or larcenous intent (MCLA § 750.529).

2. CRIMINAL LAW—SPECIFIC INTENT—CRIMES—INTOXICATION—INSTRUCTIONS TO JURY.

   Failure to instruct the jury on the effect of intoxication on specific intent crimes in defendant's trial for armed robbery did not constitute error even though there was evidence that the defendant had been drinking alcoholic beverages for several hours before the robbery where neither the prosecution nor the defense requested an instruction, and the defense advised the

---

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 46 Am Jur, Robbery §§ 10–13, 58–60.

court they preferred no instruction on intoxication because the theory of the defense was that the robbery never took place and that the defendant was in possession of his faculties throughout the evening.

Appeal from Muskegon, Albert J. Engel, J. Submitted Division 3 November 10, 1970, at Grand Rapids. (Docket No. 9543.) Decided February 19, 1971.

Charles Turner, Jr., was convicted of armed robbery. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Paul M. Ladas,* Prosecuting Attorney, and *Michael J. Flynn,* Assistant Prosecuting Attorney, for the people.

Brian Mark Gray, for defendant on appeal.

Before: T. M. BURNS, P. J., and R. B. BURNS and MUNRO,* JJ.

MUNRO, J. The defendant appeals from his jury trial conviction of armed robbery. MCLA § 750.529 (Stat Ann § 28.797).

The facts here are that the complaining witness, John Brown, together with the defendant and others, spent considerable time in the drinking of alcoholic beverages at various bars during the late afternoon and evening of July 19, 1967. At the close of these drinking activities the complaining witness testified that defendant put a knife to his neck and demanded money. He further testified that he then turned over to defendant $47 in cash. The defendant admitted that he and others had

* Circuit judge, sitting on the Court of Appeals by assignment.

spent several hours consuming alcoholic beverages, but denied that the robbery ever took place or that he demanded any money from the complaining witness. Defendant's motion for a new trial was denied and on appeal defendant raises two issues both of which were raised in his motion for a new trial. Those issues are:

1. Did the trial court commit reversible error by failing to instruct the jury concerning the element of intent in armed robbery?
2. Did the trial court commit reversible error by failing to charge the jury on the issue of intoxication?

The instruction given by the trial court on armed robbery which the defendant contends was erroneous and necessitates reversal is as follows:

"If you find from the evidence and beyond a reasonable doubt that the defendant did at the time and place make an assault on John L. Brown, and did rob, take and steal from the presence of John L. Brown $47 in paper currency, said defendant then being armed with a knife, then it will be your duty to convict the defendant of the offense charged against him. If, on the other hand, the prosecution has failed to convince you from the evidence and beyond a reasonable doubt of the existence of each and every element of the offense charged, as I have given it to you, or if you have reasonable doubt as to whether the prosecution has established the existence of each and every element of the offense charged, then, and in either event, it will be your duty to acquit the defendant on the charge of armed robbery."

The record in this matter indicates that there were no objections by defendant's counsel at time of trial to the instruction as given nor was any specific request for an instruction including in detail

the question of intent requested by the defendant. Armed robbery is a specific intent crime, *People* v. *Kelley* (1970), 21 Mich App 612, and the problem here is in large measure covered by the provisions of GCR 1963, 516.2 as modified by GCR 1963, 529.1, and further dealt with by the legislature in MCLA § 769.26 (Stat Ann 1954 Rev § 28.1096). It appears evident from the court rules and the statutory enactment that where no instruction has been offered by the defendant and refused by the court and no objections to the instructions as given are made, although opportunity for such objection is offered, the appellate courts will not reverse unless refusal to take such action appears inconsistent with substantial justice.

There is no question but that it would be better practice to detail the intent necessary in a charge of robbery armed and it has been frequently held by this Court that a trial judge has a *sua sponte* duty to instruct if a subject is an essential ingredient of a charge. *People* v. *Price* (1970), 21 Mich App 694; *People* v. *Sherman* (1968), 14 Mich App 720. However, where, as in this instruction, the court charged the jury in terms of assaulting the complaining witness and then charged them with the necessity of finding that defendant did rob, take, and steal from the presence of the complaining witness, being armed with a knife, certainly the term "rob" in and of itself indicates felonious and larcenous intent. It is this Court's opinion that no reasonable man could construe the word "rob" to mean a taking without felonious or larcenous intent.

The trial court in this matter relied on the case of *People* v. *Cabassa* (1930), 249 Mich 543, for the proposition that where language defining an offense can be understood by a person of ordinary intelligence it is not necessary for the court to define or

explain it unless specifically requested to do so. This Court is cognizant of the decision in the case of *People* v. *MacPherson* (1949), 323 Mich 438, requiring the court to include all elements of the offense in its instruction whether requested or not. Based on the facts here presented this Court holds that the word rob in and of itself implies larcenous and felonious intent. The failure of the court to further define the intent is not inconsistent with substantial justice in this matter and the failure to do so did not affect the jury deliberation in arriving at a verdict of proof of guilt beyond a reasonable doubt so as to constitute reversible error.

As to the second issue here, an examination of the record indicates that the trial court proposed to counsel the giving of an instruction on intoxication and its effect on specific intent crimes. Neither the prosecution nor defense requested such an instruction and, in fact, advised the court they preferred that no instruction be given on intoxication. It appears to this Court, from an examination of the briefs, pleadings and testimony, that defendant's counsel, as a matter of trial strategy, preferred not to have an instruction on intoxication given to the jury because the position of the defense was actually that the robbery never took place and that the defendant was in possession of his faculties throughout the evening, although all parties had consumed a considerable amount of intoxicating beverages. Appellate courts do not reverse trial courts solely because the strategy of the defendants in presenting their case was not successful. *People* v. *Kaczor* (1968), 14 Mich App 724, and *People* v. *Tubbs* (1970), 22 Mich App 549.

GCR 1963, 516.2 controls the situation. Not only did defendant make no objection to the failure to instruct on intoxication but advised the court it pre-

ferred no such instruction. The instructions of the trial court, when reviewed as a whole, did not mislead the jury and were adequate and are not inconsistent with substantial justice. *People* v. *Fred W. Thomas* (1967), 7 Mich App 519; *People* v. *Jackson* (1970), 23 Mich App 553.

The decision of the trial court is affirmed.

All concurred.

BRAIDWOOD *v.* HARMON

1. GIFTS—INTER VIVOS GIFT—REQUIREMENTS.

A valid *inter vivos* gift requires (1) that the donor must possess the intent to pass gratuitously title to the donee, (2) that actual or constructive delivery be made, and (3) that the donee accept the gift.

2. GIFTS—INTER VIVOS GIFT—DONOR'S WILL—FAILURE TO MENTION GIFT—EVIDENTIARY VALUE.

The silence of the will of the alleged donor of *inter vivos* gifts concerning the promissory note and mortgage given as gifts is as consistent with the contention that a gift was made as with the contention that a gift was not made, because if a gift is complete, the property given ceases to be part of the donor's estate and thus there is no need for the donor to recite the gift in his will.

REFERENCES FOR POINTS IN HEADNOTES

[1] 38 Am Jur 2d, Gifts §§ 16–35.

[2] Satisfaction or ademption of general legacy by inter vivos gift, transfer, or payment to the legatee or another. 28 ALR2d 9.

[3] 38 Am Jur 2d, Gifts §§ 95, 107.

[4] 38 Am Jur 2d, Gifts § 28.

[5, 6] 58 Am Jur, Witnesses § 214 *et seq.*

[6] 38 Am Jur 2d, Gifts §§ 98–102.

[7] 30 Am Jur 2d, Evidence §§ 1080, 1081.

3. GIFTS—INTER VIVOS GIFT—PROMISSORY NOTE—MORTGAGE—DELIVERY—MANUAL DELIVERY—SUFFICIENCY.

A valid *inter vivos* gift of a promissory note securing a mortgage, and a mortgage, can be completed by manual delivery of the instrument without a written assignment or other written evidence of the making of the gift.

4. GIFTS—INTER VIVOS GIFT—PROMISSORY NOTE—LIFE INCOME RESERVED—VALIDITY.

A gift of a promissory note may be complete even though the donor has reserved for his lifetime the income from the donated property.

5. EVIDENCE—DEAD MAN'S STATUTE—ADMISSIBLE TESTIMONY—CORROBORATION.

Testimony by a party which is adverse to a person incapable of testifying is admissible even though the matter must have been equally within the knowledge of the party who seeks to testify and the person incapable of testifying where some material portion of the party's testimony is supported by some other material evidence tending to corroborate his claim; every portion of the survivor's testimony need not be corroborated, only a material portion of the testimony need be corroborated (MCLA § 600.2166).

6. EVIDENCE—DEAD MAN'S STATUTE—ADMISSIBLE TESTIMONY—CORROBORATED TESTIMONY.

Testimony of the plaintiff's concerning conversations with a deceased donor which showed that the donor had given them, as gifts, a promissory note and a mortgage on the plaintiffs' home was admissible where one of the plaintiff's relatives testified that the donor had said "when I die it is your home free and clear" and another of the plaintiff's relatives testified that the donor had told her that he had signed the home over to the plaintiffs at his death and the home would belong to the plaintiffs (MCLA § 600.2166).

7. EVIDENCE—TESTIMONY—CORROBORATION—CREDIBILITY OF CORROBORATING WITNESS

Testimony is corroborated without regard to whether the corroborating witness or the witness whose testimony has been corroborated is believed by the judge; corroboration does not mean corroborated by evidence which the trial judge believes.

Appeal from Oakland, Robert L. Templin, J. Submitted Division 1 November 13, 1970, at Detroit. (Docket No. 9703.) Decided February 19, 1971.

Complaint by Harold Braidwood and Wanda Braidwood, his wife, against Henry W. Harmon, administrator with will annexed of the estate of Clarence L. Pinel, and Beatrice Case, to cancel a promissory note secured by a mortgage and for an injunction against foreclosing the mortgage. Judgment for defendants. Plaintiffs appeal. Reversed and remanded.

John Morth and *Riseman, Lemke & Piotrowski* (by *Harry Riseman*) for plaintiffs.

David B. Lichtig, for defendants.

Before: V. J. BRENNAN, P. J., and LEVIN and PETERSON,* JJ.

LEVIN, J. Plaintiffs, Harold and Wanda Braidwood, executed a promissory note secured by a mortgage on their home in favor of Harold Braidwood's uncle, Clarence L. Pinel. After Pinel's death, the Braidwoods commenced this action claiming that Pinel had, during his lifetime, made a gift of the note and mortgage to them. They asked that the note and mortgage be cancelled and that Pinel's administrator be enjoined from foreclosing the mortgage.

After hearing the evidence offered by both parties, the judge, as trier of fact, found that the Braidwoods had failed to prove a gift *inter vivos* and entered an order dismissing their complaint.

* Circuit judge, sitting on the Court of Appeals by assignment.

Among the issues is whether the Braidwoods' claim may be proved orally. It is also necessary to consider the recently amended dead man's statute.

Pinel went to live in the home of his nephew, plaintiff Harold Braidwood, in 1955 or 1956. Shortly after his arrival Pinel paid off the mortgage on the Braidwood home. In return the Braidwoods executed and delivered to Pinel a note and mortgage dated January 7, 1956 for $8,800, payable $50 a month, including interest at 4% *per annum*.

James Braidwood, Harold's brother, testified that a short time after the note and mortgage were executed Pinel handed the instruments to Harold and said, "As long as I'm living I want you to pay me and when I die it is your home free and clear". A sister of Mrs. Braidwood testified that Pinel had told her and her husband, "that he had signed the home over to Mr. Braidwood at his death, the home would be his and everything that he owned". Photocopies of the note and mortgage were attached to the Braidwoods' complaint filed when this action was commenced, and the originals were offered in evidence by the Braidwoods.

The judge refused to allow Harold and Wanda Braidwood to testify concerning their conversations with Pinel on the ground that their testimony concerned a matter equally within the knowledge of the deceased and was, therefore, barred by the dead man's statute.[1]

Pinel remained in the Braidwood home for over two years. In 1958 he moved to Oregon and subsequently to California, where he died on September 29, 1965. Four weeks before his death he wrote the Braidwoods about an intended visit and said, "I want you to have the house where you live after I

[1] MCLA § 600.2166 (Stat Ann 1970 Cum Supp § 27A.2166).

am gone". The Braidwoods did not learn of Pinel's death until February 1966, when Pinel's sister, the residuary legatee under Pinel's will, wrote to demand that the Braidwoods make the mortgage payments to her. The Braidwoods then stopped payment on the checks issued after Pinel's death and made no further monthly payment.

In April 1969 the Braidwoods paid $500 to the Michigan attorney acting for Pinel's estate. This payment is relied on by the defendants as being incompatible with the Braidwoods' claim of ownership. The Braidwoods explained that the payment was made in response to the advice of their then attorney, who had told them that they had to refinance the mortgage. They said they made the payment on their own initiative in order to obtain time to arrange the required financing. After making the payment they engaged their present attorney and made no further payment. They commenced this action after the defendants had commenced foreclosure proceedings.

The defendants offered in evidence a letter dated November 10, 1959, written to Pinel by an Oregon attorney, with enclosures of a photocopy of a "mortgage" and of a "mortgage note", a property tax search certificate, a certification of insurance coverage and "your letter to Braidwood dated 9/17/59 with registry receipt". The Oregon attorney's letter stated that Pinel should "retain this information in your permanent file". The referenced documents were not further identified. No testimony was offered concerning the November 10, 1959 letter to Pinel or its subject matter.

The trial judge found:

"First of all, the court finds in this matter that what we are really dealing with is an interest in

land. The court is sympathetic with the plaintiffs, although the court doesn't feel they have really lost too much because at the time the new mortgage was granted to them by the deceased, Mr. Pinel, they did have rather low payments, $50 a month, with a four percent rate of interest.

"The court finds that there was talk by the deceased that he meant to give the home to the plaintiffs, but, while he might have said it was his desire for them to have the home free and clear upon his death, the court finds that this did not constitute an *inter vivos* gift. At the most, it constituted a desire to create a testamentary gift, a gift which was never consummated.

"The court is primarily impressed with the will of the decedent, Mr. Pinel, which is defendant's Exhibit B, written on the 10th day of October 1958, when the mortgage in question was executed in January 1956. In his will, Mr. Pinel in paragraph three, after giving a bequest of $500 to his niece, gives and bequeaths all the rest, residue and remainder of his property to his sister, Beatrice Case. There is just nothing there about a gift of the mortgagee's interest in this house to the plaintiffs.

"As a matter of law, the court cannot hold that the plaintiffs are entitled to anything at all. There might have been intentions, there might have been talk, but it has to be in writing and it was never in writing, testamentary or otherwise."

For reasons about to be stated, we have concluded that the judge erred (1) in excluding the testimony of Harold and Wanda Braidwood on the ground that it was barred by the dead man's statute, (2) when he ruled that, "what we are really dealing with is an interest in land" and that, "as a matter of law * * * it has to be in writing and it was never in writing, testamentary or otherwise", and (3) in counting as an adverse factor that the later-dated will makes no mention of the gift.

It is entirely true that the judge could have decided against the claims of the Braidwoods because he disbelieved the testimony of the Braidwood family members. The tendency of his findings would appear, however, to support the view that he credited at least some of their testimony. In any event, he did not place his decision on the ground that he did not believe them. We have no way of knowing whether he would have reached a different result had he thought it permissible to consider the testimony of Harold and Wanda Braidwood themselves or to find a completed gift even though the will did not mention the claimed gift and there was no writing evidencing the transfer of the note and mortgage to them. Accordingly, we must remand for a new trial at which the facts are appraised unrestricted by an erroneous view of the law.

The elements of a gift *inter vivos* have recently been restated by our Supreme Court:

"It may be stated generally that the three elements necessary to constitute a valid gift are these: (1) that the donor must possess the intent to pass gratuitously title to the donee; (2) that actual or constructive delivery be made; and (3) that the donee accept the gift." *Osius* v. *Dingell* (1965), 375 Mich 605, 611.

Pinel's will, dated October 10, 1958, bequeaths $500 to a niece and devises the rest, residue, and remainder of his estate to his sister. The will's silence concerning the note and mortgage is consistent with the contentions of both the plaintiffs and the defendants. Merely because the will makes no mention of the claimed gift does not tend to negate the claim that there was a completed gift. If a gift is complete the property given ceases to be part of

the donor's estate; there is no need to recite the gift in his will.[2]

For some purposes a mortgage is, indeed, regarded as an "interest in land".[3] But the rule in Michigan and many other jurisdictions is that a valid gift *inter vivos* of a note and mortgage can be completed by manual delivery of the instruments without a written assignment or other written evidence of the making of the gift.[4] It is also established that a gift of a promissory note may be complete even though the donor has reserved for his lifetime the income from the donated property:[5]

---

2 See *Lumberg* v. *Commonwealth Bank* (1940), 295 Mich 566, holding that a gift *causa mortis* of a cashier's check is not revoked by a subsequent will, silent as to the check, which bequeathed the entire estate to a person other than the donee.

3 See MCLA § 566.106 (Stat Ann 1970 Rev § 26.906); *Aetna Mortgage Company* v. *Dembs* (1968), 13 Mich App 686; contrast *Dougherty* v. *Randall* (1855), 3 Mich 581.

4 *Hoyt* v. *Gillen* (1914), 181 Mich 509, 512; *Cook* v. *Fraser* (1941), 298 Mich 374, 378; *Hagerman* v. *Wigent* (1896), 108 Mich 192; *Dougherty* v. *Randall, supra.* See, generally, 38 Am Jur 2d, Gifts, §§ 54, 55, pp 860–863, and *Bernkrant* v. *Fowler* (1961), 55 Cal 2d 588 (12 Cal Rptr 269, 360 P2d 906, 908), where the California Supreme Court observed that the general rule is that an "oral agreement providing for the discharge of an obligation to pay money secured by an interest in real property is not within the real property provision of the statute of frauds, on the ground that the termination of the security interest is merely incidental to and follows by operation of law from the discharge of the principal obligation."

In *Brooks* v. *Gillow* (1958), 352 Mich 189, the Michigan Supreme Court held that the statute of frauds (MCLA § 566.106 [Stat Ann 1970 Rev § 26.906]) requires that a transfer or assignment of a vendor's interest in a land contract be in writing. None of the Michigan cases above cited in this footnote were adverted to in the *Brooks* opinion; we do not think that we could properly conclude that *Brooks* overrules those cases *sub silentio.* As pointed out in *Dougherty* v. *Randall,* the interest of a mortgagee is an incident of the debt. The debt (evidenced by a note) is a chose in action and clearly can be transferred without a writing. The consideration which moved the *Brooks* Court, namely that the legal title is shown of record as belonging to the land contract vendor, is not necessarily controlling where the transfer of the security interest (the mortgagee's interest) follows as an incident to a transfer of the debt. *Brooks* is critically discussed in 5 Wayne L Rev 137, 144 (1958).

5 *Shepard* v. *Shepard* (1910), 164 Mich 183, 201; *Jackman* v. *Jackman* (1935), 271 Mich 585, 589; *Hagerman* v. *Wigent, supra,*

"nor is the gift defeated by the fact that the donor reserved to himself the use or income from the subject-matter of the gift." *Shepard* v. *Shepard* (1910), 164 Mich 183, 201.[6]

As we have already indicated, the judge also erred in excluding, as a matter of law, the testimony of Harold and Wanda Braidwood on the basis of the dead man's statute. In 1967 the dead man's statute was amended[7] to permit a party to testify as to a matter equally within the knowledge of a deceased person, "if some material portion of his testimony is supported by some other material evidence tending to corroborate his claim". The 1967 amendment was adopted on the recommendation of the Michigan Law Revision Commission. The Commission in its accompanying report stated:

"It is not intended that every portion of the survivor's testimony need be corroborated. Rather, if any material portion is corroborated either by testimony of other witnesses or by demonstrative evidence, then the testimony of the survivor should be

---

fn 4. See, generally, 38 Am Jur 2d, Gifts, § 26, pp 829, 830, fns 18 and 19 and accompanying text.

[6] In *Shepard* v. *Shepard*, *supra*, the subject matter of the gift was an unsecured promissory note. In *Jackman* v. *Jackman*, *supra*, it was a secured promissory note. In both cases the donor continued to receive and retain payments on the notes during his lifetime after the gift was alleged to have been made. Nevertheless, the trial judges' findings that a completed gift had been made were affirmed on appeal. It is true that in these cases the delivery of the donated property was established by a written assignment, while here the only evidence of delivery is the testimony of the alleged manual transfer of the note and mortgage and the fact that the Braidwoods had physical possession of the original signed copies of the note and mortgage. But, as previously stated, the rule in this State is that a chose in action may be transferred manually without a written assignment. See, generally, 38 Am Jur 2d, Gifts, § 55, pp 862, 863, and § 26, pp 829, 830, concerning *inter vivos* gifts of notes and the effect of a reservation for the life of the donor of the income from the donated property.

[7] See PA 1967, No 263, further amended by PA 1969, No 63 (MCLA § 600.2166 [Stat Ann 1970 Cum Supp § 27A.2166]).

admitted." Mich Law Rev Comm, First Annual Report, 1966, p 29.

The testimony of Harold's brother and of Wanda's sister corroborated the excluded testimony of Harold and Wanda.[8] The excluded testimony should have been received in evidence and considered by the judge in deciding the disputed issue of whether there was an *inter vivos* gift of the note and mortgage.

The judge may, of course, as trier of fact, disbelieve the testimony of Harold and Wanda and the members of their families, but he could not refuse to consider Harold's and Wanda's testimony because he does not believe the corroborating testimony. It would be contrary to the clear intendment of the 1967 legislation to permit a judge to exclude a party's testimony because he does not believe the proffered corrobative evidence. In ordinary every day usage, testimony is said to be "corroborated" without regard to whether the corroborating witness or the witness whose testimony has in that manner been substantiated is believed. The word "corroboration", as used in this statute, does not mean "corroborated by evidence which the trial judge believes".[9]

Upon remand, following the completion of the proofs at the new trial, the judge should clearly indicate in his findings of fact the bases of his decision and particularly his determinations concern-

[8] The letter written by Pinel to the Braidwoods a few weeks before his death might also be regarded as tending to corroborate their claim. *Cf. Sleboede* v. *Sleboede* (1969), 16 Mich App 202.

[9] See *People* v. *Fiore* (1962), 12 NY2d 183 (188 NE2d 130, 136), holding that the credibility of accomplice testimony is to be decided by the trier of fact. Similarly, see *People* v. *Riker* (1918), 202 Mich 377, 383; *Lassiter* v. *Seaboard Air Line R. Co.* (1916), 171 NC 283 (88 SE 335, 337). *State* v. *Peacock* (1925), 201 Iowa 462 (205 NW 738).

ing the credibility and quality of the evidence offered by the parties. To properly perform our reviewing function we need to know the path the trial judge takes through the conflicting evidence. *McClary* v. *Wagoner* (1969), 16 Mich App 326, 328.

Reversed and remanded for a new trial.

All concurred.

PEOPLE *v.* BURNSIDE

LARCENY—IN A BUILDING—EVIDENCE—SUFFICIENCY.

Evidence that the defendant, charged with larceny in a building, entered the complainant's building holding a shopping bag, inquired about purchasing a car, was asked to return at 5 p.m. when the car would be there, and then left, the complainant went into his office and noticed that a portable adding machine was missing, got into his car and began cruising the streets, found the defendant walking along the way, called the defendant over to the car, opened the shopping bag, and finding the adding machine in it, made a citizen's arrest, and took the defendant to the police station, where after being advised of his rights, the defendant admitted stealing the adding machine was sufficient to support a verdict of guilty.

Appeal from Recorder's Court of Detroit, Donald S. Leonard, J. Submitted Division 1 December 8, 1970, at Detroit. (Docket No. 9960.) Decided February 19, 1971.

REFERENCES FOR POINTS IN HEADNOTE

29 Am Jur 2d, Evidence § 597 *et seq.*
50 Am Jur 2d, Larceny § 151.

James A. Burnside was convicted of larceny in a building. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Thomas P. Smith,* Assistant Prosecuting Attorney, for the people.

Jack J. Kraizman, for defendant on appeal.

Before: LEVIN, P. J., and BRONSON and O'HARA,* JJ.

O'HARA, J. Defendant was charged with larceny in a building contrary to MCLA § 750.360 (Stat Ann 1954 Rev § 28.592). He was found guilty by the court sitting without a jury. He was sentenced to two and one-half to four years in prison. He appeals of right.

Defendant contends that the people have failed to prove him guilty beyond a reasonable doubt because the court should have believed him instead of the complainant and the officer (1) because no one saw him take the portable adding machine alleged to have been stolen out of the office and (2) because of his testimony that he purchased it.

Complainant testified that he was working on a car in his auto repair shop on Livernois Avenue in Detroit. He heard the door open and thereafter observed the defendant standing in the doorway holding a shopping bag. Defendant inquired about purchasing a used car which he had seen on the

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

premises. Complainant informed him that the car was being used, but to return at 5 p.m.

Complainant went back into his office where he found that a portable adding machine was missing. He then got into his car and after cruising around he found defendant at Elmhurst and Monica Streets. He asked the defendant to come to his car, opened the shopping bag, and found the missing adding machine in the bag. He placed defendant under a citizen's arrest and took him to the 10th Precinct. There defendant was booked for larceny in a building.

Complainant further testified that the machine was valued at $75 to $85.

A sergeant of the Detroit Police Department testified that he advised the defendant of his constitutional rights. Upon questioning the defendant admitted stealing the adding machine in order to sell it and obtain some narcotics.

Upon a review of the record it cannot be said that there was reversible error. There was testimony which, if believed by the trial judge, would support a verdict of guilty beyond a reasonable doubt.

No error occurred. The decision of the court below is accordingly affirmed.

Affirmed.

All concurred.

FREDRICKSON *v.* KOOL

1. APPEAL AND ERROR—SCOPE OF REVIEW—INFERENCES OF FACT.
An appellate court may draw inferences of fact from the trial court record (GCR 1963, 820.1[6]).

2. AUTOMOBILES—NEGLIGENCE—COMMON-LAW NEGLIGENCE.
Defendant was guilty of common-law negligence where the record showed that the defendant was driving while there was no visibility, was suddenly blown by a gust of wind and swirling snow, and collided with plaintiff in the plaintiff's lane of traffic because an inference can be drawn that the defendant could have prevented his car from going into plaintiff's lane of traffic.

3. AUTOMOBILES — NEGLIGENCE — NEGLIGENCE PER SE — STATUTES — PROPER DRIVING LANE.
Defendant in an automobile negligence case will be guilty of negligence *per se* if from the facts presented the statute dealing with proper driving lanes was necessarily violated in order for the accident to have occurred (MCLA § 257.642).

Appeal from Ottawa, Chester A. Ray, J. Submitted Division 3 December 10, 1970, at Grand Rapids. (Docket No. 5601.) Decided February 22, 1971. Leave to appeal denied July 9, 1971, 385 Mich 762.

REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur 2d, Appeal and Error § 2.
5 Am Jur 2d, Appeal and Error § 834.
[2] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 725, 732, 761.
Liability for motor vehicle accident where vision of driver is obscured by smoke, dust, atmospheric condition, or unclean windshield. 42 ALR2d 13.
[3] 8 Am Jur 2d, Automobiles and Highway Traffic § 761.
38 Am Jur, Negligence §§ 158–170, 180.

Complaint by Dorothy V. Fredrickson and Detroit Automobile Inter-Insurance Exchange against Louis and Thomas Kool for automobile negligence. Judgment for plaintiffs. Defendants appeal. Affirmed.

Mika, Meyers, Beckett & Jones, for plaintiffs.

White, Spaniola, Knudsen & Stariha, for defendants.

Before: FITZGERALD, P. J., and QUINN and MCINTYRE,* JJ.

PER CURIAM. This automobile negligence case was tried before the court without a jury. Plaintiff Dorothy Fredrickson was driving south in the west lane of highway M-40. Defendant Thomas Kool was driving north in the east lane, 150 to 200 feet behind a truck proceeding in the same direction. Snowing and blowing caused a swirling of the snow to the extent that at times vision was obscured. The cars collided in the lane properly assigned to Dorothy Fredrickson, and the plaintiffs alleged negligence on the part of defendant Thomas Kool and asked for recovery of damages for injuries and loss of the motor vehicle. The trial court found for the plaintiffs and the defendants appealed.

The sole question on appeal is whether the trial judge recited findings of fact in his opinion (GCR 1963, 517.1) sufficient to justify his conclusion that defendant Thomas Kool was negligent.

Defendants contend that the trial court failed to find any specific acts of negligence and that to conclude upon strict liability theory that defendant

* Circuit judge, sitting on the Court of Appeals by assignment.

Thomas Kool was negligent for being in the wrong lane through no fault of his own constituted reversible error.

The trial judge's findings and opinion delivered from the bench prior to taking testimony concerning damages are adequately illustrated in the following quotation from the opinion.

"Now, the circumstances immediately preceding this accident are these: suddenly there was no visibility, and I am going to accept Mr. Kool's version that he was from 150 to 200 feet behind this truck, which was a safe distance, but there was no visibility, and suddenly there was a gust of wind and that not only hit these vehicles, but carried with it a great deal of swirling snow, and it is conceivable to this court, in searching from where the * * * facts are, that this gust of wind was sufficiently great at this point, and well aware that the court is of the prairie nature of that terrain, might have been sufficiently great that compensation, coupled with lack of visibility was insufficient and the Chevrolet carried over into the other lane. This same gust of wind, if the theories are sound and if we believe from all the evidence, it is the Volkswagen, instead of going to the east side, would have been going to the west as it came out from behind the truck because it had 150 to 200 feet to do it and would have been blown west.

"So, when you drive in the opposite lane, whether you intended to or whether you didn't intend to, or whether you do it when you can't see, is negligence under the law of this State, when somebody else is in the opposite lane and lawfully has a right to be there.

"So, as a result, the court finds that Thomas Kool was guilty of negligence at the time and place in operating his motor vehicle and that Dorothy V. Fredrickson was free from any negligence that con-

tributed to the collision and that Thomas Kool's negligence was the proximate cause of it."

This Court may draw inferences of fact from the record (GCR 1963, 820.1[6]), and an inference immediately arises that defendant Thomas Kool, being blinded by snow, may have taken some action to prevent his vehicle from proceeding into the west lane of traffic, thus avoiding the collision. The excerpt from the opinion of the trial judge and this inference constitute a sufficient basis for the finding that defendant Thomas Kool, under the rules of common-law negligence, was indeed negligent.

Elsewhere in the record appears evidence that the debris from the collision was lying in the west lane of the highway assigned to Dorothy Fredrickson. There appears to be no serious dispute that at the time of the incident, defendant Thomas Kool was in the wrong lane of traffic. MCLA § 257.642 (Stat Ann 1968 Rev § 9.2342), states:

"Whenever any roadway has been divided into 2 or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

"(a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

From the facts presented, defendant Thomas Kool did violate the statute in order to have collided with the plaintiffs' vehicle and was also, therefore, guilty of negligence *per se*. *Holmes* v. *Merson* (1938), 285 Mich 136; *Birkhill* v. *Todd* (1969), 20 Mich App 356, 361; *Chambers* v. *St. John* (1969), 20 Mich App 533, 536; see *Krzeminski* v. *Chuslo* (1966), 4 Mich App

310, 314; *Buchanan* v. *Cockrill* (1970), 23 Mich App 405.

We conclude that a fair reading of the portion of the opinion of the court quoted above compels a ruling that the trial judge satisfied the requirements of GCR 1963, 517.1, and that his factual recitations justified a finding that the defendant was negligent both under the common-law definition and by reason of statutory violation.

Affirmed, costs to the plaintiffs.

PEOPLE *v.* POTTS

Appeal from Recorder's Court of Detroit, Gerald W. Groat, J. Submitted Division 1 January 11, 1971, at Detroit. (Docket No. 5919.) Decided February 22, 1971. Leave to appeal denied May 11, 1971, 384 Mich 839.

Glenn Robert Potts was convicted of rape. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Robert A. Reuther,* Assistant Prosecuting Attorney, for the people.

Robert E. McCall, for defendant on appeal.

Before: V. J. BRENNAN, P. J., and FITZGERALD and LEVIN, JJ.

PER CURIAM. Defendant was convicted on April 3, 1968, after trial by jury in Detroit Recorder's Court, on a charge of rape. MCLA § 750.520 (Stat Ann 1954 Rev § 28.788). On April 18, 1968, he was sentenced to a term of from 10 to 20 years imprisonment. On appeal he alleges error in the trial court's having permitted the examination of jurors on *voir dire* to proceed in his absence. In contradiction to defendant's allegation and affidavit in support thereof, the *voir dire* transcript indicates he was in fact present during these proceedings.

Affirmed.

PEOPLE *v.* JONES

CRIMINAL LAW—FILING OF TRANSCRIPT—APPEAL AND ERROR—MOOTNESS.

Defendant's claim on appeal for a reversal and new trial because of the failure of the court reporter timely to file a transcript of closing arguments in the defendant's trial was moot where the transcript had been subsequently filed and counsel for the defendant was afforded sufficient time to assert any error in closing arguments, but no claim of error was asserted.

Appeal from Recorder's Court of Detroit, Thomas L. Poindexter, J. Submitted Division 1 November 5, 1970, at Detroit. (Docket No. 6220.) Decided February 22, 1971. Leave to appeal denied June 3, 1971, 385 Mich 754.

Richard Jones was convicted of assault with intent to commit great bodily harm less than murder and carrying a dangerous weapon with unlawful intent. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Thomas R. Lewis,* Assistant Prosecuting Attorney, for the people.

Arthur J. Tarnow, State Appellate Defender, for defendant on appeal.

REFERENCE FOR POINTS IN HEADNOTE

5 Am Jur 2d, Appeal and Error §§ 404, 761.

Before: LESINSKI, C. J., and J. H. GILLIS and BEASLEY,* JJ.

PER CURIAM. Defendant was convicted by a jury of assault with intent to commit great bodily harm less than the crime of murder[1] and carrying a dangerous weapon with unlawful intent.[2]

Defendant claims he is entitled to reversal and a new trial for failure of the court reporter to file timely a transcript of closing arguments. This claim is moot for the reason that the transcript of closing arguments has been subsequently filed and counsel for defendant afforded sufficient time to assert any error in closing arguments. No claim of error in closing arguments has been asserted.

The second issue is whether the court erred in failing to instruct the jury on the included offense of simple assault.[3] No request was made for the instruction nor did defendant object to the instructions as given as required by GCR 1963, 516.2, and MCLA § 768.29 (Stat Ann 1954 Rev § 28.1052), in order to preserve this issue on appeal.

Affirmed.

---

* Circuit judge, sitting on the Court of Appeals by assignment.
1 MCLA § 750.83 (Stat Ann 1962 Rev § 28.278).
2 MCLA § 750.226 (Stat Ann 1962 Rev § 28.423).
3 MCLA § 750.81 (Stat Ann 1962 Rev § 28.276).

PEOPLE *v.* SHUCK

CRIMINAL LAW—INSTRUCTION TO JURY—"NOT GUILTY" VERDICT.

Trial court's instruction to the jury that they could not return a general verdict of "not guilty" and that a verdict of not guilty would not be accepted by the court in absence of an explanation of insanity was reversible error.

Appeal from Genesee, Donald R. Freeman, J. Submitted Division 2 December 15, 1970, at Lansing. (Docket No. 6253.) Decided February 22, 1971. Leave to appeal denied May 12, 1971, 384 Mich 840.

Johnnie Ray Shuck was convicted of statutory rape and kidnapping. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief Assistant Prosecuting Attorney, for the people.

William C. Shedd, for defendant on appeal.

Before: BRONSON, P. J., and R. B. BURNS and HOFF,* JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

REFERENCE FOR POINTS IN HEADNOTE

53 Am Jur, Trial §§ 661, 662.

PER CURIAM. Defendant was convicted by a jury in Genesee County Circuit Court for the crimes of statutory rape[1] and kidnapping.[2] The trial judge sentenced the defendant to life imprisonment on the rape conviction and 50 to 70 years imprisonment for the offense of kidnapping. This appeal is of right from the trial court's denial of defendant's motion for a new trial.

Defendant contends that the trial court committed reversible error by failing to instruct the jury that it could return a verdict of not guilty. The trial judge instructed the jury that, in addition to guilty of kidnapping, it could find the defendant either guilty of statutory rape, attempted rape, or guilty of indecent liberties. The trial judge then presented the following instruction to the jury:

"I should tell you that you cannot,—I emphasize—you cannot find the defendant not guilty on a general issue. However, you may, under the evidence, find him not guilty because of insanity, and in the event that you return such a verdict, you should specifically state to this court that you find him not guilty because of insanity.

"A verdict of not guilty cannot be accepted by this court in the absence of the explanation of insanity." (Emphasis added.)

The trial court's instruction, which precluded the jury from returning a general verdict of not guilty, constituted reversible error. *People* v. *Woody* (1968), 380 Mich 332; *Underwood* v. *People* (1875), 32 Mich 1; *People* v. *Deneweth* (1968), 14 Mich App 604; *People* v. *Thompson* (1971), 30 Mich App 142.

Reversed and remanded for a new trial.

---

[1] MCLA § 750.520 (Stat Ann 1954 Rev § 28.788).
[2] MCLA § 750.349 (Stat Ann 1954 Rev § 28.581).

KYES *v.* PISCO

LIMITATION OF ACTIONS—TOLLING—SERVICE OF PROCESS OFFICERS—CIRCUIT COURT COMMISSIONER'S CLERK.

A clerk of a circuit court commissioner, when acting as a process server for his own benefit and not in furtherance of his official duties, is not an "officer" within the meaning of the statute which provides that the period of limitations is tolled for not longer than 90 days when "the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an officer for immediate service" (MCLA § 600.5856 [3]).

Appeal from Wayne, Benjamin D. Burdick, J. Submitted Division 1 January 8, 1971, at Detroit. (Docket No. 6662.) Decided February 22, 1971. Decided on rehearing February 18, 1972. Leave to appeal applied for March 8, 1972.

Complaint by Alberta Marion Kyes against Virginia Pisco for automobile negligence. Accelerated judgment for defendant. Plaintiff appeals. Affirmed. Reversed on rehearing.

F. M. M. Hally, for plaintiff.

Rouse, Selby, Dickinson, Shaw & Pike (by *Millard Becker, Jr.*), for defendant.

Before: R. B. BURNS, P. J., and J. H. GILLIS and DANHOF, JJ.

REFERENCE FOR POINTS IN HEADNOTE

1 Am Jur 2d, Abuse of Process §§ 16, 18.

PER CURIAM. On December 20, 1967, plaintiff instituted suit against defendant for damages arising out of an automobile accident which occurred on December 24, 1964.[1] On or about December 22, 1967, a copy of the complaint was delivered to a clerk in the circuit court commissioner's office who, in addition to his official duties as clerk, also served complaints and summonses to supplement his income. The clerk, acting as process server for plaintiff's attorney, served the complaint on defendant on December 30, 1967. Defendant moved for, and was granted, an accelerated judgment inasmuch as the pertinent statute of limitations had run. GCR 1963, 116.1(5).

On appeal, plaintiff maintains that the statute of limitations had been tolled by delivery of the complaint into the hands of a clerk to a circuit court commissioner. MCLA § 600.5856 (Stat Ann 1962 Rev § 27A.5856), reads as follows:

"The statutes of limitations are tolled when

"(1) the complaint is filed and a copy of the summons and complaint are served on the defendant, or when

"(2) jurisdiction over the defendant is otherwise acquired, or when

"(3) the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an officer for immediate service, but in this case the statute shall not be tolled longer than 90 days thereafter."

The critical issue in this case can be framed thus: whether a clerk to a circuit court commissioner who acts as a process server on his own behalf and not

[1] As can be easily seen, suit was begun before the statute of limitations had run but service on defendant was not completed until after the expiration of the statute. MCLA § 600.5805 (Stat Ann 1962 Rev § 27A.5805).

in the furtherance of his official duties is an "officer" within the purview of the above-cited statute. Initially, it is necessary to point out that the instant case is not the situation as in *Buscaino* v. *Rhodes* (1969), 20 Mich App 329, where we held that the statute is not tolled by placing copies of the summons and complaint in the hands of the sheriff for service of process but with the request that service be delayed, since such service is not "immediate" within the meaning of the section.[2] Several other decisions are more germane to the discussion of the question before us. In *Coleman* v. *Bolton* (1970), 24 Mich App 547, we held that a police officer who acts as a private citizen and not as a public agent in serving process is not such an "officer" within § 5856 of the Revised Judicature Act. *Salmanovitz* v. *Dexter-Davison Markets, Inc.* (1969), 17 Mich App 390, is another decision holding to the same effect and one we find essentially identical to the controversy at bar. In that case, service of process by a bailiff for circuit court commissioners, acting as a private individual, was found not to stay the running of the statute of limitations. The Court noted, at 391, 392:

"Any service of process unconnected with the commissioner is beyond the bailiff's official statutory power. When he accepts papers to be served from another person or entity not connected with the commissioner, the bailiff acts as an ordinary citizen or layman. As such, he is able to serve process on his own, but he cannot be considered an *officer of the court for immediate service* which would toll the statute of limitations for 90 days under CLS 1961, § 600.5856 (Stat Ann 1962 Rev § 27A.5856[3])."

[2] For a *contra* holding, see *Hoseney* v. *Zantop* (1969), 17 Mich App 141.

While the clerk may well have been a person of suitable age and discretion to act as process server under GCR 1963, 103.1, he was not such an officer as to effect a tolling of the statute under RJA § 5856.

Affirmed. Costs to appellee.

All concurred.

MEMORANDUM OPINION (ON REHEARING). This cause is controlled by the recent Supreme Court decision in *Buscaino* v *Rhodes,* 385 Mich 474 (1971), decided after our opinion was issued.

We grant plaintiff-appellant's delayed motion for rehearing and the decision of the trial court is reversed. No costs.

PEOPLE *v.* SANKEY

Appeal from Wayne, Harry J. Dingeman, Jr., J. Submitted Division 1 May 6, 1970, at Detroit. (Docket No. 6982.) Decided February 22, 1971.

Sam Sankey, Jr., was convicted of felonious assault. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Robert A. Reuther,* Assistant Prosecuting Attorney, for the people.

Lawrence R. Greene, for defendant on appeal.

Before: V. J. BRENNAN, P. J., and MCGREGOR and AGER,* JJ.

PER CURIAM. Defendant was tried and convicted by the court, sitting without a jury, of felonious assault and was sentenced to a term of three to four years in prison. MCLA § 750.82 (Stat Ann 1962 Rev § 28.277). On appeal, defendant claims that his conviction was against the great weight of the evidence. An examination of the record on appeal discloses sufficient evidence, if believed by the trier of

* Circuit judge, sitting on the Court of Appeals by assignment.

the facts, to support the finding that defendant was guilty, beyond a reasonable doubt, of felonious assault. *People* v. *Petrosky* (1938), 286 Mich 397; *People* v. *Szymanski* (1948), 321 Mich 248; *People* v. *Hogan* (1967), 9 Mich App 78; *People* v. *Jeter* (1970), 21 Mich App 158.

Affirmed.

PEOPLE *v.* DOSS

Appeal from Recorder's Court of Detroit, Robert E. DeMascio, J. Submitted Division 1 January 12, 1971, at Lansing. (Docket No. 7058.) Decided February 22, 1971. Leave to appeal denied July 15, 1971, 385 Mich 768.

Marshall Doss was convicted of armed robbery. Defendant appeals. Motion to affirm granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Leonard Meyers,* Assistant Prosecuting Attorney, for the people.

Arthur J. Tarnow, State Appellate Defender, for defendant on appeal.

Before: QUINN, P. J., and MCGREGOR and BRONSON, JJ.

PER CURIAM. Defendant was convicted by a jury of armed robbery, contrary to MCLA § 750.529 (Stat Ann 1970 Cum Supp § 28.797). His appeal as of right from that conviction is met by a motion to affirm. GCR 1963, 817.5(3).

The single question on appeal is whether the evidence warranted a finding of guilt beyond a reasonable doubt. It is manifest that the question pre-

sented, on which decision of the cause depends, is so unsubstantial as to need no argument or formal submission. The record contains evidence to support the jury's finding of defendant's guilt beyond a reasonable doubt.

Motion to affirm is granted.

PEOPLE *v.* WHITE
PEOPLE *v.* WYNN

APPEAL AND ERROR—INSTRUCTIONS TO JURY—PRESERVING QUESTION —COURT RULE.

To preserve the error of the trial court's refusal to give a requested instruction a party (1) must request the instruction and (2) must object to the trial court's erroneous refusal to give the instruction before the jury retires (GCR 1963, 516.2).

Appeal from Recorder's Court of Detroit, Robert E. DeMascio, J. Submitted Division 1 November 6, 1970, at Detroit. (Docket Nos. 7192, 7570.) Decided February 22, 1971. Affirmed by Supreme Court as to Wynn, 386 Mich 627. Leave to appeal denied as to White March 17, 1972, 387 Mich —.

James O. White and Ronald Wynn were convicted of breaking and entering with intent to commit a felonious assault. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Robert A. Reuther,* Assistant Prosecuting Attorney, for the people.

Arthur J. Tarnow, State Appellate Defender, for defendant Wynn on appeal.

Gerald J. Klein, for defendant White on appeal.

REFERENCE FOR POINTS IN HEADNOTE

5 Am Jur 2d, Appeal and Error § 623.

Before: LESINSKI, C. J., and J. H. GILLIS and BEASLEY,* JJ.

PER CURIAM. Defendants James White and Ronald Wynn were convicted by a jury of breaking and entering with intent to commit a felonious assault.[1] MCLA § 750.110 (Stat Ann 1970 Cum Supp § 28.305). Defendants appeal as a matter of right. A third defendant, Kenneth Wynn, was tried below but is not in this appeal.

Defendant White contends that the testimony of the two key prosecution witnesses was so discredited that the trial court should have granted defendant's motion for a directed verdict. It is true that *People* v. *Lyons* (1883), 51 Mich 215, indicates that a jury may not rely on the testimony of a witness who is "completely impeached". But by no means can the credibility of the prosecution's witnesses be said to have been totally impeached. The inconsistencies in the testimony of the witnesses presented a matter of credibility for the jury to determine and to evaluate. *People* v. *Gray* (1970), 23 Mich App 139.

Defendant Ronald Wynn assigns as error the trial court's refusal to instruct the jury as to the lesser, included offenses of breaking and entering, entering a building without breaking with intent to commit a felony and entering without permission. MCLA § 750.111 (Stat Ann 1962 Rev § 28.306); MCLA § 750.115 (Stat Ann 1962 Rev § 28.310). Defendants produced evidence compatible with these lesser offenses. *People* v. *Simpson* (1966), 5 Mich App 479.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

1 Defendants were originally charged with armed robbery as well as breaking and entering, but the jury could reach no verdict upon this count and the robbery charge was dismissed.

The request for the charge as to the lesser offenses was made by defendant Kenneth Wynn's counsel but denial of the request is assigned as error by defendant Ronald Wynn. The latter's counsel made no request for the instruction. The trial court declined the requested instruction principally because the evidence indicated a forcible entry. After the trial judge instructed the jury, he gave defense counsel below an opportunity to object. No objection was made by any of the three attorneys for defendants at this time for failure to give instructions on the lesser offenses. GCR 1963, 516.2 requires that to preserve the error of the trial court's refusal to give a requested instruction, a party must request the instruction and object to the trial court's erroneous refusal before the jury retires.

In *Sarazin* v. *Johnson Creamery, Inc.* (1964), 372 Mich 358, plaintiffs requested an instruction which should have been granted. As in the instant case, the trial court permitted counsel to put his objections to the charge on the record and counsel did so as to other instructions but failed to interpose an objection as to the refusal of the trial court to give the requested instruction. It was held in that case that omission of an objection as to a requested charge waived whatever error existed.

In *Hill* v. *Harbor Steel & Supply Corporation* (1965), 374 Mich 194, 206, the following is found:

"Although plaintiffs requested that certain instructions be given, it does not appear of record that they objected to the instructions as given before the jury had retired to consider its verdict. Even at the time of this trial in April, 1962, counsel had before them the decisions in *Gilson* v. *Bronkhorst,* 353 Mich 148, and *Lober* v. *Sklar,* 357 Mich 166, both of which emphasized that the credence this Court gives to claims that instructions were reversib'

erroneous depends to a considerable extent upon counsel's diligence in seeking correction of the instructions while 'time yet remains to set things right in the jury room', *Gilson* at 160, note, *Lober* at 171, 172, even after the jury had retired but before announcement of its verdict. As to cases tried after January 1, 1963, GCR 1963, 516.2 controls and requires that counsel object to alleged instructional errors *before* the jury retires if he expects to rely upon such alleged errors upon appeal. See *Salvatore* v. *City of Harper Woods,* 372 Mich 14, and *Sarazin* v. *Johnson Creamery, Inc.,* 372 Mich 358. However, since in this case we are reversing on other grounds, we will consider some of the alleged instructional errors *despite counsel's failure to follow the preferred, and now required, practice."*[2] (Emphasis supplied.)

Similarly, the Court in *Hunt* v. *Deming* (1965), 375 Mich 581, prescribes the procedure for preserving instructional errors on appeal. It is noted at 584, 585 that:

"Counsel may submit requests for instructions to the trial judge at or before the close of evidence and the trial judge is required to inform counsel of his action upon their requests prior to their arguments to the jury. GCR 1963, 516.1. Thus, by submitting comprehensive written requests to charge, upon which the trial judge must rule before arguments are made to the jury, counsel should be in a position to know when the charge is given whether a proper instruction was omitted or an improper one given. At the conclusion of the charge, the trial judge should excuse the jury and *then* give counsel an opportunity to make on the record such objections to the charge as they may have. GCR 1963, 516.2. When counsel have completed their statements of objections, the jury should be recalled for further

[2] See fn 7 of the Court's opinion in *Hill.*

instruction when necessary and for direction by the trial judge to retire for deliberation upon its verdict. Only if such procedure is followed by court and counsel can the rights of all parties properly be protected and objections to erroneous jury instructions assuredly be saved for appellate review".

Affirmed.

PEOPLE *v.* LOVE

CRIMINAL LAW—APPEAL AND ERROR—SPEEDY TRIAL—DEMAND—PRESERVING QUESTION FOR REVIEW.

A criminal defendant who made no formal or informal demand for a speedier trial before the actual trial cannot complain on appeal about the delay.

Appeal from Recorder's Court of Detroit, Robert E. DeMascio, J. Submitted Division 1 December 8, 1970, at Detroit. (Docket No. 7211.) Decided February 22, 1971. Leave to appeal denied October 14, 1971. 386 Mich 756.

William J. Love was convicted of armed robbery. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Luvenia D. Dockett,* Assistant Prosecuting Attorney, for the people.

Burton L. Borden, for defendant on appeal.

Before: LESINSKI, C. J., and LEVIN and O'HARA,* JJ.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

REFERENCES FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law §§ 253, 254.

Waiver or loss of accused's right to speedy trial. 129 ALR 572, s. 57 ALR2d 302.

PER CURIAM. William J. Love appeals his conviction of robbery armed. MCLA § 750.529 (Stat Ann 1970 Cum Supp § 28.797). The only assignment of error argued in defendant's brief on appeal is the claim that he was denied a speedy trial.

Love was arrested on the day the crime was committed, February 20, 1968. Examination was waived on March 6, 1968, and the information was filed April 4, 1968. On August 1, 1968, he pled guilty to the offense of attempted robbery armed. His motion to set aside his guilty plea was granted on September 5, 1968, and the trial at which he was convicted commenced on February 10, 1969. The court file shows that the adjournments in the trial date were due to the illness and hospitalization of the attorney assigned by the court to represent the defendant.

No formal or informal demand for a speedier trial was made by Love before the actual trial. Absent proper demand, he may not, under a long line of decisions, be heard now to complain. *People* v. *Duncan* (1964), 373 Mich 650, 656; *People* v. *Miklovich* (1965), 375 Mich 536, 539; *People* v. *Frazier* (1969), 16 Mich App 38, 41; *People* v. *Owens* (1970), 27 Mich App 359.

The other contentions, none of which are argued, are clearly without merit.

Love was apprehended a short time after the robbery. The weapon and the loot were found on his person. He was identified by the victim and a number of witnesses. The evidence of his guilt is overwhelming. We are convinced that Love had a fair trial and was properly convicted.

Affirmed.

ZAITZEFF *v.* RASCHKE

1. EVIDENCE—DOG-BITE CASE—HARBORING A VICIOUS DOG—CONVICTION—ADMISSIBILITY—DISCRETION.

   Trial court's refusing to admit into evidence in a civil case based on the dog-bite statute the defendants' conviction in traffic court of harboring a vicious dog was not an abuse of discretion, because of the dissimilarities between civil and criminal proceedings, different issues, different evidential rules, and different degrees of proof (MCLA § 287.351).

2. TRIAL — REREADING TESTIMONY — COUNSEL'S ABSENCE — DISCRETION.

   Allowing a portion of testimony to be read to the jury in the jury room without counsel being present was not an abuse of discretion where counsel had already left the courtroom and prior to leaving had expressly waived the right to be present at the time of the verdict.

3. TRIAL—REREADING TESTIMONY—DISCRETION.

   Allowing a witness's testimony to be read to the jury is in the trial court's discretion.

4. TRIAL—REREADING TESTIMONY—COUNSEL'S PRESENCE—VOLUNTARY ABSENCE.

   Failure to notify the parties and their counsel that a witness's testimony will be read to the jury is not error if the parties and their counsel have voluntarily chosen to absent themselves from the courtroom.

REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur 2d, Evidence § 334.
30 Am Jur 2d, Evidence §§ 981, 985.
[2–4] 53 Am Jur, Trial §§ 936–940.
Right to have reporter's notes read to jury. 50 ALR2d 176.
[5] 53 Am Jur, Trial § 904.

5. TRIAL—COMMUNICATION WITH JURY—OPEN COURT.

It is not good practice to communicate with the jury other than in open court.

Appeal from Wayne, Charles Kaufman, J. Submitted Division 1 December 17, 1970, at Detroit. (Docket No. 7475.) Decided February 22, 1971. Leave to appeal granted June 3, 1971, 385 Mich 754.

Complaint by Mary and Peter Zaitzeff against Marion and Joseph W. Raschke for personal injuries. Verdict and judgment for defendants. Plaintiffs appeal. Affirmed.

Samuel W. Barr, for plaintiffs.

Lizza & Mulcahy, for defendants.

Before: V. J. BRENNAN, P. J., and J. H. GILLIS and JEANNETTE,* JJ.

PER CURIAM. Plaintiffs bring this appeal from a jury verdict for defendants in a suit based on the dog-bite statute, MCLA § 287.351 (Stat Ann 1967 Rev § 12.544). Alternatively, plaintiffs sought to impose common-law liability by establishing the dangerous nature of defendants' dog and defendants' knowledge of the dangerous nature. *Grummel* v. *Decker* (1940), 294 Mich 71.

Plaintiffs assign as error the trial court's refusal to admit into evidence the defendants' conviction in traffic court on a charge of harboring a vicious dog in violation of a Detroit city ordinance.[1] The conviction arose out of the same transaction in which Marion Raschke sustained her injuries. The purpose for which the evidence was sought to be ad-

* Circuit judge, sitting on the Court of Appeals by assignment.
1 No. 449–F.

mitted was to prove the substantive issues. The trial court said:

"[I] am not going to allow the record of conviction to be brought before the jury because I don't think it is really relevant to the issues."

In light of the dissimilarity between civil and criminal proceedings—different issues, different evidential rules, and different degrees of proof, *etc.*—we find no abuse of discretion in excluding this evidence. 29 Am Jur 2d, Evidence, § 334, p 382.

Plaintiffs also urge that the trial court erred by permitting the testimony of a witness to be read to the jury in the jury room rather than in open court. In this same regard it is complained that the reading took place in the absence of counsel.

After deliberations had begun, the judge, in response to an inquiry by the jury concerning certain testimony, accompanied the stenographer into the jury room where the latter read to the jury portions of his stenographic notes which had been requested. Neither counsel was present as they had already departed the courtroom. Prior to leaving they expressly waived their right to be present at the time of the verdict. We do not feel that these facts warrant a reversal.

It is within the discretion of the trial court to allow or not to allow a portion of a witness's testimony to be read to the jury. See *Klein* v. *Wagenheim* (1967), 379 Mich 558. While it is better to notify the parties and their respective counsel in such case so that they might be present, failure to do so is not error if they have voluntarily chosen to absent themselves from the courtroom. *Loose* v. *Township of Deerfield* (1915), 187 Mich 206. Finally, we recognize that it is not good practice to com-

municate with the jury other than in open court, *Wilson* v. *Hartley* (1961), 365 Mich 188, but under the circumstances here present we find that if error occurred, it was harmless. GCR 1963, 529.1.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

PEOPLE *v.* J. C. LEWIS, JR.

1. CRIMINAL LAW—PSYCHIATRIC EXAMINATION—COURT-ORDERED EXAMINATION—COURT'S AUTHORITY.

   Trial court has the inherent power to compel a criminal defendant who has raised an insanity defense to undergo a psychiatric examination.

2. CRIMINAL LAW—PSYCHIATRIC EXAMINATION—COURT-ORDERED EXAMINATION—RIGHT AGAINST SELF-INCRIMINATION—PURPOSE OF EXAMINATION.

   Compelling a criminal defendant to submit to a psychiatric examination does not *per se* violate the defendant's constitutional right against self-incrimination where the underlying purpose of the examination is to obtain data germane to the question of sanity and not to obtain facts relating to the defendant's participation in the crime charged (US Const. Am 5).

Appeal from Oakland, Frederick C. Ziem, J. Submitted Division 2 December 10, 1970, at Lansing. (Docket No. 7578.) Decided February 22, 1971. Affirmed by Supreme Court, 386 Mich 407.

J. C. Lewis, Jr., was convicted of rape and gross indecency. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas G. Plunkett,* Prosecuting Attorney, *Dennis Donohue,* Chief Appellate Counsel, and *Frank R. Knox,* Assistant Prosecuting Attorney, for the people.

Douglas Chartrand, for defendant on appeal.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law § 48.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition. 32 ALR2d 434.

Before: MCGREGOR, P. J., and T. M. BURNS and ANDREWS,* JJ.

PER CURIAM. After a non-jury trial, the defendant was convicted on charges of rape, MCLA § 750.520 (Stat Ann 1954 Rev § 28.788), and gross indecency, MCLA § 750.338(b) (Stat Ann 1954 Rev § 28.570[2]). The defendant raised insanity as a defense and the court ordered him to undergo a psychiatric examination. He now appeals, contending it was error to compel him to submit to the psychiatric examination and that the trial court did not use the proper test to determine his sanity.

Defendant raises two objections to the compulsory psychiatric examination. He contends that a circuit court lacks the power to order a psychiatric examination in the absence of a statute giving the court such authority; he also contends that a compulsory psychiatric examination violates his privilege against self-incrimination.

Both of these contentions are governed by *People* v. *Sammy Martin* (1970), 26 Mich App 467; see *People* v. *Early* (1970), 25 Mich App 363. In *Martin,* the Court held that a circuit court has the inherent power to compel a defendant who has raised an insanity defense to undergo a psychiatric examination. The Court held also that, where the underlying purpose of a psychiatric examination is to obtain data germane to the question of sanity and not to obtain facts relating to defendant's participation in the crime, defendant's Fifth Amendment rights are not violated, *per se.*

In determining that the defendant was sane, the trial court applied the test found in *People* v. *Durfee* (1886), 62 Mich 487. The defendant now contends

* Circuit judge, sitting on the Court of Appeals by assignment.

that the court should have used the test found in the Model Penal Code § 4.01, or one of the variants of that test. Furthermore, at no time prior to the verdict did defense counsel request that the test now urged be used. This issue is controlled by *People* v. *Wright* (1970), 25 Mich App 499; *People* v. *Markham* (1969), 19 Mich App 616; *People* v. *Morris* (1968), 10 Mich App 526. In those cases we held that the test found in *Durfee, supra,* is presently the law of this state.

Affirmed.

PEOPLE *v.* STROBLE

1. CRIMINAL LAW — CONFESSIONS — VOLUNTARINESS — HEARING ON VOLUNTARINESS.

   Determination that defendant's confession was voluntary was not error even though the defendant testified that he was not advised of his rights prior to his confession and that he never made a statement to the police, where the police detective, to whom the confession was made, testified that he gave defendant the required warnings of constitutional rights, because the issue before the trial court was one of credibility.

2. APPEAL AND ERROR—CLOSING ARGUMENTS—PRESERVING QUESTION.

   Failure to make timely objection to the content or form of closing arguments precludes raising the question on review.

3. CRIMINAL LAW—APPEAL AND ERROR—CLOSING ARGUMENT—PROSECUTOR'S REMARKS—PRESERVING QUESTIONS.

   Contention that the defendant was prejudiced by the prosecutor's remark on closing argument expressing his personal belief that the testimony of a police officer, to whom the defendant confessed, was true, was precluded from review where defendant neither objected to the form or content of the closing remarks nor requested an instruction concerning the prosecutor's remarks.

4. CRIMINAL LAW—INTERSTATE AGREEMENT ON DETAINERS—120-DAY RULE.

   Defendant was not entitled to a reversal of his conviction of first-degree murder under the Interstate Agreement on Detainers Act even though his trial commenced more than 120 days after his arrival in the state where the defendant, by his own act, delayed the commencement of trial beyond the 120-

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur 2d, Evidence §§ 582–590.
[2, 3] 5 Am Jur 2d, Appeal and Error §§ 624–627.
[4] 5 Am Jur 2d, Arrest §§ 66, 75.

day limit, by seeking *habeas corpus* in federal court and where the defendant had been returned to this state for both assault with intent to murder and first-degree murder and was tried and convicted of the assault charge prior to the passing of 120 days (MCLA § 780.601).

Appeal from Recorder's Court of Detroit, Walter P. Cynar, J. Submitted Division 1 November 5, 1970, at Detroit. (Docket No. 7709.) Decided February 23, 1971. Leave to appeal denied May 20, 1971, 384 Mich 842.

Bernard Stroble was convicted of first-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Angelo A. Pentolino,* Assistant Prosecuting Attorney, for the people.

Arthur J. Tarnow, State Appellate Defender, for defendant on appeal.

Before: LESINSKI, C. J., and J. H. GILLIS and BEASLEY,* JJ.

PER CURIAM. Found guilty of first-degree murder[1] by a jury, defendant appeals, seeking reversal of his conviction.

This case arises from the shooting and killing of James Raffoul, a jewelry store clerk, in Detroit on December 24, 1965, during the course of an armed robbery. During this hold-up the jewelry store owner, Joseph Cooper, was also shot and subsequently died some months later.

* Circuit judge, sitting on the Court of Appeals by assignment.
[1] MCLA § 750.316 (Stat Ann 1954 Rev § 28.548).

Defendant was apprehended in New York City in connection with an unrelated offense and confessed the Detroit murder of Raffoul to a New York police detective, who testified he had not previously heard of the Detroit crime to which the defendant confessed. On trial, defendant's confession was admitted in evidence, after a full *Walker* hearing[2] by the trial judge.

It should be noted that the jury verdict did not rest solely upon the confession since the jewelry store owner, also shot in the robbery, positively identified defendant as the killer at the preliminary examination. However, he died of his wounds before trial.

In the *Walker* hearing, defendant asserted that he knew about the *Miranda* case[3] and understood the *Miranda* warnings. Specifically, defendant testified that he knew he had a right to remain silent; the right to refuse to give a statement; that if he did talk to the police what he said could be used against him; that he had a right to have counsel; that if he could not afford counsel, counsel would be furnished him; and that he had a right to have counsel present during the questioning if he chose; and that he had a right to be represented by counsel at trial, arraignment, examination, "etc." (Quoted "etc." is defendant's word.) Defendant subsequently claimed that the police did not give him *Miranda* warnings and that he never gave a statement.

However, in view of the other testimony in this record, it is unnecessary to decide whether there is any legal reason requiring a *Miranda* warning where a defendant freely and voluntarily admits he knows all about his *Miranda* rights. The New York police

---

[2] *People* v. *Walker* (On Rehearing 1965), 374 Mich 331.

[3] *Miranda* v. *Arizona* (1966), 384 US 436 (86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974).

detective testified unconditionally that he gave the *Miranda* warnings to defendant. If that testimony is believed, and the record would indicate the trial judge apparently did believe this testimony, there was sufficient basis for the trial judge to admit the confessions after the *Walker* hearing. The issue in the *Walker* hearing was of credibility, and the record was ample to support the trial judge's finding.

Defendant further argues that he was unduly prejudiced by the assistant prosecutor stating in closing argument his personal belief that the New York detective had told the truth. An examination of the closing argument as a whole does not give any indication that the prosecutor intended to apply any special knowledge as to the credibility of the witness. More important, no objections were raised to these remarks at the time they were made, nor was there a request made for an instruction concerning the argument. Failure to make timely objection to the content or form of closing arguments precludes raising the question on review.

Lastly, defendant claims that under the Interstate Agreement on Detainers to which Michigan has become a party pursuant to statute (MCLA § 780.601 [Stat Ann 1969 Rev § 4.147(1)]), this conviction for this murder should be reversed and an order entered dismissing these proceedings with prejudice on the ground that he was not brought to trial within the time specified in the statute. The portion of the statute relied upon by defendant provides as follows:

"In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the

court having jurisdiction of the matter may grant any necessary or reasonable continuance."

The facts are that defendant was arrested in New York City in connection with a homicide that occurred there. He was tried, convicted of first-degree manslaughter under New York law, and sentenced to a 20- to 30-year term in prison. As indicated above, defendant confessed both of the Detroit jewelry store murders to the New York police. On June 27, 1968, defendant was brought to Detroit under the Interstate Agreement on Detainers in connection with both crimes. In the other case he was charged with assault with intent to murder (MCLA § 750.83 [Stat Ann 1962 Rev § 28.278]), which, for purposes of this opinion, will be designated the assault case. On June 28, 1968, he was arraigned on both the assault charge and the within murder charge. On the assault charge, preliminary examination was held on July 16, 1968. On the murder charge, preliminary examination commenced on July 16, 1968, and was continued on July 30, 1968. On August 15, 1968, a pretrial hearing was held in this murder case and October 23, 1968, was the date set for trial.

In the meantime, on September 13, 1968, defendant was notified that the assault charge was set for trial on October 1, 1968. On that date, namely 95 days after defendant was brought to Michigan, the assault trial commenced, and on October 8, 1968, defendant was convicted by jury verdict of assault with intent to murder.

The within murder case was set for trial on October 23, 1968, but on October 11, 1968, defendant applied to the Federal district court in Detroit for a writ of *habeas corpus* in connection with the within case. On the trial date, October 23, 1968, the *habeas*

corpus in the Federal court was still pending and unresolved.

We find that under the circumstances of this case, the pendency of the *habeas corpus* proceeding in the Federal court operated to stay application of the 120-day period provided in the Interstate Agreement on Detainers.

Eventually, on November 7, 1968, the Federal court dismissed the *habeas corpus* proceeding brought by defendant.

On December 16, 1968, defendant went to trial on this murder charge and on December 20, 1968, the jury rendered a verdict of guilty of first-degree murder against defendant.

The adjournment of trial from October 23, 1968 to December 16, 1968 was for good cause.

Under the circumstances of this case where defendant was in fact brought to trial within 120 days on one of the charges for which he was brought to Michigan, and where defendant by his own act delayed his trial to seek relief from this charge in the Federal court, this Court does not believe defendant is entitled to dismissal of this conviction under the 120-day limitation Interstate Agreement on Detainers.

Affirmed.

All concurred.

PEOPLE *v.* HARRIS

1. CRIMINAL LAW—WITNESSES—RES GESTAE WITNESSES—INDORSEMENT—TIMELY OBJECTION—NEW TRIAL.

   The failure of the prosecution to indorse the names of *res gestae* witnesses on an information cannot be raised for the first time on a motion for a new trial.

2. CRIMINAL LAW—TRIAL—PROSECUTOR'S REMARK—IMPROPER REMARKS—RESPONSIVE REMARKS.

   Improper remarks by prosecutor during a criminal trial do not constitute reversible error where made primarily in response to matters previously discussed by defense counsel.

3. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DISCRETION—APPEAL AND ERROR.

   The granting of a new trial on the ground of newly-discovered evidence is largely a matter of discretion for the trial court; appellate relief is granted if the trial judge abused his discretion.

4. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—ABUSE OF DISCRETION—STANDARD OF REVIEW.

   A reviewing court in order to find an abuse of discretion by a trial court in denying motion for a new trial on the ground of newly-discovered evidence must find that the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but the defiance of judgment, not the exercise of reason but rather of passion or bias.

REFERENCES FOR POINTS IN HEADNOTES

[1] 39 Am Jur, New Trial § 39.
[2] 39 Am Jur, New Trial § 486.
[3] 39 Am Jur, New Trial §§ 26–28, 157.
[4] 39 Am Jur, New Trial § 157.
[5] 39 Am Jur, New Trial § 169.
[6] 39 Am Jur, New Trial § 165.

5. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—WITNESS'S PERJURY.
A motion for a new trial on the ground of newly-discovered evidence will not be granted on testimony tending to show the perjury of a witness.

6. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DIFFERENT RESULT—TRIAL COURT'S EVALUATION.
The trial judge is in a better position than a reviewing court to determine whether newly-discovered evidence would tend to produce a probable different result on retrial.

Appeal from Muskegon, Albert J. Engel, J. Submitted Division 3 January 5, 1971, at Grand Rapids. (Docket No. 7886.) Decided February 23, 1971.

Rufus Harris was convicted of felonious assault. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Paul M. Ladas,* Prosecuting Attorney, for the people.

Halbower & Ruck, for defendant.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

PER CURIAM. Defendant's jury trial on a charge of felonious assault, MCLA § 750.82 (Stat Ann 1962 Rev § 28.277), resulted in his conviction of the offense charged. He was sentenced, his motions for new trial on the basis of prejudicial remarks to the jury by the prosecutor and newly-discovered evidence were denied, and he appeals. The appeal raises two issues: (1) should the trial court have granted defendant's motion for a new trial on the basis of prejudicial remarks to the jury by the prosecutor?; and (2) should the trial court have

granted defendant's motion for a new trial on the basis of newly-discovered evidence?

The failure of the prosecution to indorse names of *res gestae* witnesses on an information cannot be raised for the first time in a motion for a new trial. *People* v. *Prescott* (1934), 268 Mich 606; *People* v. *Dimitroff* (1948), 321 Mich 205; *People* v. *Amos* (1968), 10 Mich App 533.

Remarks by a prosecutor, even if improper, do not constitute reversible error where made primarily in response to matters previously discussed by defense counsel. *People* v. *George* (1965), 375 Mich 262; *People* v. *Thomas* (1969), 17 Mich App 740.

Grant of a motion for new trial on the basis of newly-discovered evidence is discretionary. *People* v. *Bauman* (1952), 332 Mich 198; *People* v. *Dailey* (1967), 6 Mich App 99; *People* v. *Keiswetter* (1967), 7 Mich App 334. Appellate relief from a denial of a motion for a new trial on basis of newly-discovered evidence is granted if it is demonstrated that the trial court abused its discretion in such denial. "Abuse" in such a case would be evidenced by a result that is palpably and grossly violative of fact and logic, such that it evidences "not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias". *People* v. *Wolschon* (1966), 2 Mich App 186, 188.

In this case the newly-discovered evidence was the confession of the defendant's brother to the crime for which the defendant was convicted and to his own perjury at the defendant's trial. The rule in Michigan is that a new trial on grounds of newly-discovered evidence will not be granted on testimony tending to show the perjury of a witness. *People* v. *Smallwood* (1943), 306 Mich 49; *People* v. *Andrews* (1960), 360 Mich 572; *People* v. *Dailey, supra; People* v. *Miniear* (1967), 8 Mich App 591.

The record shows that the trial judge did not violate the well-established standard of judicial discretion in denying defendant's motion for new trial based on newly-discovered evidence. The trial judge is in a better position to determine whether new evidence would tend to produce a probable different result on a retrial. *People* v. *Keiswetter, supra; People* v. *Bennett* (1966), 3 Mich App 326; *People* v. *Miniear, supra.* There is no showing that the claimed newly-discovered evidence would probably produce a different result on retrial.

Affirmed.

ROBINSON'S HOME OUTFITTING COMPANY *v.*
GLOBE INDEMNITY COMPANY

INSURANCE—FIRE INSURANCE—LIMITATION OF ACTION—"QUESTION OF LOSS".

Fire insurance policy's requirement that an action against the insurer must be commenced within 12 months after the inception of the loss means that the limitation period runs from the date on which the damage occurred, not from the date on which defendant denied liability.

Appeal from Ingham, Sam Street Hughes, J. Submitted Division 2 December 15, 1970, at Lansing. (Docket No. 7968.) Decided February 23, 1971.

Complaint by Robinson's Home Outfitting Company against Globe Indemnity Company and other insurance companies for breach of contracts. Defendants' motion for summary judgment denied. Defendants appeal. Reversed and remanded with instructions to grant defendants' motion.

Anderson, Carr & Street, for plaintiff.

Carl L. Reagh, for defendants.

Before: BRONSON, P. J., and R. B. BURNS and HOFF,* JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

REFERENCE FOR POINTS IN HEADNOTE

43 Am Jur 2d, Insurance § 1910.

PER CURIAM. The plaintiff's building and its contents were damaged on January 22, 1967. Defendant insurance companies denied liability under the policies on March 21, 1967. On March 1, 1968, the plaintiff instituted this action. The defendants moved for summary judgment under GCR 1963, 117.2(1), and the motion was denied. They now appeal on leave granted.

Defendants contend that the plaintiff has not stated a claim upon which relief can be granted because the suit was commenced more than 12 months after the inception of the loss. In accordance with MCLA §§ 500.2806, 500.2832 (Stat Ann 1957 Rev §§ 24.12806, 24.12832), the policies contained the following clause:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss."

This limitation period runs from the date on which the damage occurred, not from the date on which defendants denied liability. *Lentz* v. *Teutonia Fire Insurance Co.* (1893), 96 Mich 445; *Barry & Finan Lumber Co.* v. *Citizens' Insurance Co.* (1904), 136 Mich 42; *Dahrooge* v. *Rochester German Insurance Co.* (1913), 177 Mich 442. *Cf. Guastello* v. *Citizens Mutual Insurance Company* (1968), 11 Mich App 120.

The order of the trial court is reversed and the cause is remanded with instructions to grant the defendants' motion for summary judgment.

Costs to appellants.

PEOPLE *v.* BABER

1. CRIMINAL LAW — EVIDENCE — COLLECTING EVIDENCE — POLICE'S DUTY.

   The police and prosecution do not have the duty to exhaust all scientific means available in collecting evidence at the scene of a crime.

2. CRIMINAL LAW—DUE PROCESS—EVIDENCE—COLLECTING EVIDENCE —POLICE'S DUTY.

   Police failure to check footprints in the snow near the scene of a breaking and entering with which defendant was charged to determine whether they matched defendant's footprints, failure to test a gun found at the scene of the crime for fingerprints even though the weapon did not belong to the complainant, failure to check a broken window and screen through which the defendant allegedly escaped for fibers of clothing to be compared with the defendant's clothing, and failure to check the house broken into for fingerprints did not constitute a denial of due process.

Appeal from Saginaw, Eugene Snow Huff, J. Submitted Division 3 January 19, 1970, at Detroit. (Docket No. 8018.) Decided February 23, 1971.

Charles Baber, Jr., was convicted of breaking and entering with intent to commit a felony and larceny. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 16 Am Jur 2d, Constitutional Law § 542 *et seq.*
[2] 21 Am Jur 2d, Criminal Law § 226.
29 Am Jur 2d, Evidence §§ 367, 374, 375, 377, 770.
30 Am Jur 2d, Evidence § 1145.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *George Thick, II,* Prosecuting Attorney, and *Gust Triantafillou,* Assistant Prosecuting Attorney, for the people.

Henry L. Greenwood, for defendant on appeal.

Before: LESINSKI, C. J., and J. H. GILLIS and V. J. BRENNAN, JJ.

PER CURIAM. Defendant appeals from a jury conviction on a charge of breaking and entering with intent to commit a felony and larceny.[1] Plaintiff moves to affirm.

The evidence against defendant in this case was overwhelming. Police were summoned when neighbors observed two men acting suspiciously in front of the Moon residence in Saginaw, Michigan. The first officer to arrive at the scene of the crime observed two men coming out of the Moon residence. While leaving the house they saw the police and ran back into the residence. One of these men was identified by eyewitness evidence as being the defendant. After the men reentered the house the police heard the sound of breaking glass. They went to the rear of the house and found a window had been broken out. They followed one set of footprints in the fresh snow and apprehended the defendant approximately one block from the Moon residence. They searched the defendant and found on his person a screwdriver with the tip broken off. In a subsequent investigation the tip of the screwdriver was discovered lodged in the lock which had been broken to gain entry to the house. Further, the defendant had on his person at the time of his arrest

[1] MCLA § 750.110 (Stat Ann 1970 Cum Supp § 28.305).

a roll of Kennedy half-dollars which had been marked by the owner with his name, "Moon".

Defendant's only claim of error is that his conviction was invalid because the police did not exhaust all scientific means in collecting evidence at the scene of the crime. Defendant claims that failure to collect such evidence and submit it to the jury constituted denial of due process. Defendant alleges and plaintiff does not deny that the police did not check the footprints in the snow to determine whether they matched defendant's footprints; that the police did not test a gun found at the scene of the crime for fingerprints even though such weapon was not the property of the Moons; that the broken window and screen through which the defendant allegedly escaped were not checked for fibers to be compared with the clothing of the defendant; and that no fingerprints were taken in the house. Defendant claims only that such evidence *might have been* favorable to the defendant and that, therefore, due process required that such evidence be gathered and submitted to the jury.

Defendant cites a number of cases in which he attempts to support this position. A review of those cases, however, reveals that they are concerned with questions of suppression of such evidence by the prosecution or exclusion of the evidence at trial. They do not support defendant's claim that failure to collect such evidence at the scene of the crime denied him due process.

The Michigan Supreme Court in *People* v. *Allen* (1958), 351 Mich 535, held that it was not the duty of the police or the people to exhaust all scientific means available in collecting evidence at the scene of a crime.

It is obvious, therefore, that defendant was not denied due process because the police did not gather

all possible evidence at the scene of the crime by scientific means. It is further obvious, that even in the absence of such evidence, the evidence submitted to the jury was sufficient to justify a verdict of guilty by the jury.

Further, the issue was not raised before the trial court and should not be considered for the first time on appeal. *People* v. *White* (1970), 25 Mich App 176.

Motion to affirm is granted.

PEOPLE *v.* REYNOLDS
PEOPLE *v.* BOGNAR

1. LARCENY—UNOCCUPIED HOUSE—DWELLING HOUSE—BUILDINGS.

A house is a dwelling house within the larceny in a building statute where the house's primary function is a place for human habitation and its residential function is apparent to an otherwise uninformed observer; the building need not be occupied at the time of the larceny (MCLA § 750.360).

2. LARCENY—BUILDINGS—DWELLING HOUSE—LOSS OF STATUS.

A building may lose its status as a dwelling house for the purpose of the larceny in a building statute by non-occupancy or disrepair; the condition of disrepair must be such as would communicate to an observer an apparent intent of the owner to abandon the house's function as a place in which people live (MCLA § 750.360).

3. LARCENY — BUILDINGS — DWELLING HOUSE — EVIDENCE — QUESTION OF FACT.

Question of whether a building was a dwelling house within the larceny in a building statute was a question of fact where the building had been a dwelling house, but at the time of the larceny and for some time before the larceny had not been occupied, the items which the defendants took from the building were articles normally found in a dwelling house, the house was full of furniture and furnishings, and was habitable (MCLA § 750.360).

Appeal from Tuscola, James P. Churchill, J. Submitted Division 2 February 3, 1971, at Lansing.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 50 Am Jur 2d, Larceny § 49.
[3] 50 Am Jur 2d, Larceny §§ 170, 171.

(Docket Nos. 8167, 8168.) Decided February 23, 1971. Leave to appeal denied May 12, 1971, 384 Mich 840.

Ruth Reynolds and Annabelle Bognar were convicted of larceny in a building. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Leo E. Maki,* Prosecuting Attorney, for the people.

Allan C. Schmid, for defendants.

Before: QUINN, P. J., and MCGREGOR and O'HARA,* JJ.

PER CURIAM. Defendants' jury trial resulted in their conviction of larceny in a building, MCLA § 750.360 (Stat Ann 1954 Rev § 28.592). They were sentenced and they appeal.

Although defendants specify four issues on appeal, all issues can be resolved by our response to one question, namely: As a matter of law, is the building from which the property was taken outside the statute involved?

The statute specifies "dwelling house" as one of the buildings covered by the statute. Defendants contend that due to disuse, disrepair, and nonhabitation the building involved was not a dwelling house, and hence the offense of which defendants were convicted was not proved. The building had been a dwelling house, although at the time of the offense and for some time prior thereto, it was not occupied. However, the items taken from the building were

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

items normally found in a dwelling house; there was testimony that the building was full of furniture and furnishings and that the building was habitable.

The trial judge left for jury determination the question of whether the building was a dwelling house, instructing the jury:

"Now a dwelling house, for the purpose of this statute, is a building of such design and character, and condition that its primary function is a place for human habitation, and such residential function must be apparent to an otherwise uninformed observer. The building need not be presently occupied to be a dwelling house, and a building may lose its status as a dwelling house by reason of non-occupancy and disrepair. But the condition of this disrepair must be such as would communicate to an observer an apparent intent of the owner to abandon its function as a place in which people live.

"The undisclosed intention of the owner does not control. The building's actual and apparent residential capacity do control. This is an issue for the jury on the evidence in this case. Even if you do determine that the defendants, or one of them, committed larceny in this building, it will be your duty to return a verdict of not guilty, unless you also find beyond a reasonable doubt that the building qualifies as a dwelling house, as I defined these terms, and of course, the time in which it must have been a dwelling house would have been at the time of such larceny."

We affirm. On this record, the status of the building as a dwelling house was a jury question. The instruction on this question was proper, and there is evidence to support the jury finding that the building was a dwelling house.

Affirmed.

PEOPLE v. HEARNDON

1. CRIMINAL LAW—IDENTIFICATION PROCEDURE—IN-COURT IDENTIFICATION.

   Identification procedure in which the complainant was shown mug shots of of her assailant and made a preliminary identification of the defendant as her assailant and in which the complainant identified the defendant at a lineup was not so prejudicial as to taint the subsequent in-court identification even though the complainant was hesitant about the accuracy of her identification testimony at the preliminary examination where at the defendant's trial, complainant stated she was positive about the identification.

2. CRIMINAL LAW—EVIDENCE—WEIGHT OF EVIDENCE.

   Contentions of the defendant, convicted of rape, that the complainant, who identified the defendant, stated outside the courtroom that she wasn't sure who had raped her and that the complainant said that because she was sick of the "whole mess", if something wasn't done on that day she wouldn't come to court anymore, concern the weight of the evidence and can be raised only on a motion for a new trial.

Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted Division 1 December 16, 1970, at Detroit. (Docket No. 8208.) Decided February 23, 1971. Leave to appeal denied as moot July 19, 1971, 385 Mich 771.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 29 Am Jur 2d, Evidence §§ 367, 371, 372.

[1] Admissibility of evidence as to extrajudicial or pretrial identification of accused. 71 ALR2d 449.

[2] 30 Am Jur 2d, Evidence § 1143.
39 Am Jur, New Trial § 169.

Albert Hearndon was convicted of rape. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Leonard Meyers,* Assistant Prosecuting Attorney, for the people.

Eddie D. Smith, for defendant on appeal.

Before: V. J. BRENNAN, P. J., and J. H. GILLIS and JEANNETTE,* JJ.

PER CURIAM. Defendant was convicted by a jury of rape, MCLA § 750.520 (Stat Ann 1954 Rev § 28.788), and sentenced to 15 to 20 years in prison.

The complainant, Mrs. Annie Sanders, alleged that on September 20, 1967, between 7 and 7:30 a.m., she was awakened by a man in her bedroom who was choking her and threatening her to remain silent. She was forced to have sexual intercourse with her assailant. She called the police as soon as her assailant was gone and was taken to a hospital for examination.

On or about November 5, 1967, Officer Richard Waldis of the Detroit Police Department talked to complainant and showed her some mug shots at her home, whereupon she made a preliminary identification of her assailant. Thereafter, on November 14, 1967, a lineup was conducted at police headquarters, at which time complainant identified defendant as her assailant.

On appeal defendant contends that the identification process was so prejudicial as to taint the sub-

* Circuit judge, sitting on the Court of Appeals by assignment.

sequent in-court identification and that there was insufficient evidence to support a finding of guilt beyond a reasonable doubt.

At the preliminary examination complainant identified defendant but showed considerable hesitation about the accuracy of the identification. She was certain that defendant was the man she had identified from the police photographs but much less certain that he was the person who had raped her. At trial, when confronted with the testimony from the preliminary hearing, complainant stated that while she was uncertain at that time, she was now positive of her identification.

A review of the record discloses no identification procedures which taint the in-court identification. There is sufficient evidence, if believed by the jury, to justify a finding of guilt beyond a reasonable doubt. *People* v. *Fred W. Thomas* (1967), 7 Mich App 519; *People* v. *Weems* (1969), 19 Mich App 553.

In further support of his arguments concerning identification, defendant includes two affidavits detailing an alleged conversation between complainant and another woman in the corridor outside the courtroom. Both women had been victims of rapes and both agreed that they did not know who had raped them. Complainant further stated that she was sick of the whole mess and that if something wasn't done that day it would be the last time that she came to court.

These allegations made by defendant go to the question of the weight of the evidence. The issue is not properly preserved for review in this Court:

"An objection going to the *weight* of the evidence can be raised only by a motion for a new trial. On

appeal, we review a denial for abuse of discretion. Here, no motion for a new trial was filed. The trial judge's discretion was, therefore, not invoked." *People* v. *Paintman* (1970), 28 Mich App 590.

Affirmed.

SATTIEWHITE *v.* DE LA CUADRA

1. AUTOMOBILES — INTERSECTIONS — STATUTORY RIGHT-OF-WAY — STANDARD OF CARE.

   A driver having the statutory right-of-way at an intersection does not have an absolute right and both the favored driver on a through street and the inferior driver on the secondary street must exercise due care (MCLA § 257.649).

2. AUTOMOBILES — INTERSECTIONS — STATUTORY RIGHT-OF-WAY — DRIVER'S DUTY.

   A motorist who has the statutory right-of-way at an intersection has the duties of making proper observation of existing conditions and of taking precautionary action as a result of the observation (MCLA § 257.649).

3. AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—STATUTORY RIGHT-OF-WAY.

   Determination that the plaintiff in an automobile negligence case was contributorily negligent in not keeping a proper look-out was supported by the record where evidence showed that the defendant's car was visible in enough time for the plaintiff, the favored driver on the through street, to have avoided the accident, the plaintiff testified that he did not see the defendant's vehicle until just before the accident, and the defendant testified that she had entered the intersection where the collision occurred slowly and was half-way in the intersection at the time of impact.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 735, 736.
[3] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 355, 361.
Applicability of last clear chance doctrine to collisions between motor vehicles crossing at intersection. 20 ALR3d 124.

Appeal from Wayne, Neal Fitzgerald, J. Submitted Division 1 January 5, 1971, at Detroit. (Docket No. 8214.) Decided February 23, 1971.

Complaint by Lawrence and Myrtle Sattiewhite against Genoveva de la Cuadra for damages for personal injuries sustained in an automobile collision. The Secretary of State, as Director of the Motor Vehicle Accident Claims Fund, appeared for defendant. Judgment for defendant. Plaintiffs appeal. Affirmed.

Blum & Sternberg (by *Samuel A. Graber*), for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Joseph B. Bilitzke,* Assistant Attorney General, and *John F. Potvin,* Special Assistant Attorney General, for the Secretary of State.

Before: R. B. Burns, P. J., and J. H. Gillis and Danhof, JJ.

Per Curiam. Plaintiff, Lawrence Sattiewhite, was injured in an automobile accident at the intersection of East Grand Boulevard and Trombly in Detroit on October 3, 1967. Plaintiff, the favored driver, was driving his automobile north on East Grand Boulevard, a wide, heavily-traveled, through street. Defendant, heading east on Trombly, brought her automobile to a stop at the intersection in compliance with stop signs on Trombly. Believing that plaintiff's automobile was far enough away to permit her to cross the boulevard with safety, defendant entered the intersection; a collision occurred. At the point of impact, plaintiff

swerved unsuccessfully to avoid hitting defendant's automobile. On appeal, defendant concedes that she negligently operated her automobile at the time of the accident. However, the trial court sitting without a jury, felt that plaintiff had been contributorily negligent and thus rendered a judgment for defendant. From this decision, plaintiffs appeal.

Plaintiffs maintain on appeal that the trial court's findings of fact are not supported by the evidence. This Court does not, of course, set aside factual determinations by a lower court sitting as trier of fact unless they are clearly erroneous. GCR 1963, 517.1. After a thorough review of the record below, we are unable to hold that the trial court clearly erred in arriving at the facts of the case.[1]

Nor do we find that the trial court misapplied the law in rendering its decision. The statutory right-of-way[2] is not an absolute right and both the favored driver on the through street and the inferior driver on the secondary street must exercise due care. *Kerr* v. *Hayes* (1930), 250 Mich 19; *Block* v *Peterson* (1938), 284 Mich 88; *Koehler* v. *Thom* (1938), 285 Mich 593. To the privilege of the

---

[1] The trial court was of the opinion that plaintiff did not exercise due care in traveling up the boulevard inasmuch as plaintiff apparently did not keep a proper lookout ahead for dangerous conditions and, had plaintiff been duly observant, he could have avoided the accident. First of all, while plaintiff testified that, as best as he could recall, he had been watching for hazardous situations as he progressed along the street, he also testified that he did not see defendant's motor vehicle until an instant before the collision. Defendant gave testimony to the effect that she was halfway into the intersection when the automobiles collided and that she entered the intersection slowly. A police officer testified that the through street, the boulevard, was the wider of the two streets. Extensive use of a blackboard diagram to fix the positions of the automobiles also aided the trial court. From this evidence the trial court concluded that defendant's automobile was visible and, had plaintiff been duly observant, he could have seen defendant's automobile in time to have prevented the collision.

[2] MCLA § 257.649 (Stat Ann 1968 Rev § 9.2349).

statutory right-of-way accorded the favored driver, that operator has, additionally, duties of making proper observation of existing conditions and of taking precautionary action as a result. *Holley* v. *Farley* (1939), 289 Mich 676.[3] Where, as here, there is some question as to whether the favored driver failed to exercise due care by failing to notice defendant's automobile until the instant before the point of impact, this question of contributory negligence is one for the trier of fact. *Marrs* v. *Taylor* (1950), 327 Mich 674; *Campbell* v. *Osterland* (1938), 283 Mich 175; *Tucker* v. *Gillette* (1967), 6 Mich App 210.[4] The trial court sifted through the facts as presented to him and concluded that plaintiff's failure to observe defendant's car constituted contributory negligence which was a proximate cause of the accident. We are unable to find any of these factual resolutions to be clearly erroneous and think the trial court properly applied prevailing law.

Affirmed. Costs to defendant.

---

[3] *McGuire* v. *Rabaut* (1958), 354 Mich 230, cannot be said to be in derogation of this principle. While it is true that the favored driver need not have his car under such control as to be able to avoid an accident with a subordinate driver who darts out illegally into his path and that the negligence of the favored driver must be scrutinized in light of an impending danger which the favored driver's *continuing* observations should reveal to a reasonably prudent person, we cannot read *McGuire* to mean that the favored driver may proceed along a through street or trunkline highway, blithely ignoring potentially hazardous traffic conditions ahead.

[4] See also, *McKinney* v. *Yelavich* (1958), 352 Mich 687, 696.

PEOPLE *v.* MILLER

CRIMINAL LAW—MISTRIAL—PROSECUTOR'S REMARKS—CURATIVE INSTRUCTION TO JURY.

Refusal to declare a mistrial because the prosecutor, in his opening statement, mentioned that a gun was found in a parking lot, the scene of the robbery charged, 13 hours after the robbery in which defendant allegedly participated had occurred, was not error even though the gun was later held inadmissible where the court instructed the jury to disregard the remark and where the prosecutor at the time he made the remark had no reason to believe or to know that the gun would not be admissible.

Appeal from Genesee, Donald R. Freeman, J. Submitted Division 2 February 2, 1971, at Lansing. (Docket No. 8350.) Decided February 23, 1971.

Eddie Miller was convicted of armed robbery. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, and *Donald A. Kuebler,* Assistant Prosecuting Attorney, for the people.

James R. Buckley, for defendant on appeal.

REFERENCES FOR POINTS IN HEADNOTES

42 Am Jur, Prosecuting Attorneys § 20.
53 Am Jur, Trial § 996.

Before: QUINN, P. J., and MCGREGOR and O'HARA,* JJ.

PER CURIAM. Defendant was apprehended during a robbery. At his trial on a charge of robbery armed,[1] the prosecuting attorney, in his opening statement to the jury, stated, "That afternoon, about one o'clock in the afternoon, the manager of the Big-D Party Store found a gun out in his parking lot". (The robbery occurred in that parking lot about 13 hours earlier.) Defendant objected immediately, the jury was excused and defendant moved for a mistrial. After argument, not in the presence of the jury, the trial judge ruled that the gun was inadmissible, denied the motion for mistrial, and when the jury returned, they were instructed to disregard the statement of the prosecuting attorney. There was no further reference to this gun during the trial.

The jury found defendant guilty; he was sentenced; his motion for a new trial was denied; and he appeals. The only issue raised on appeal is that the above-quoted remark of the prosecuting attorney so prejudiced defendant's trial that he was denied a fair trial; hence, denial of the motions for mistrial and new trial was an abuse of discretion.

The record does not support defendant's position. The quoted statement is the only reference to this gun in the jury's presence. There is no indication that the prosecuting attorney knew, or had reason to believe, that the gun would not be admitted in evidence when the statement was made. The argument concerning its admissibility and the

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

[1] MCLA § 750.529 (Stat Ann 1970 Cum Supp § 28.797).

judge's ruling thereon were in the absence of the jury. The gun was never offered in evidence in the jury's presence. If there was error, which is doubtful (see *People* v. *Williams* [1968], 11 Mich App 62), it was cured by the instruction.

Affirmed.

PEOPLE *v.* GETTERSON

CRIMINAL LAW—DEFENSES—INSANITY—STANDARD OF INSANITY—APPEAL AND ERROR—COURT OF APPEALS—BINDING PRECEDENT.

The "right-wrong, irresistible impulse test" for criminal responsibility remains the law until the Michigan Supreme Court or the legislature changes it and, until the rule is so changed, the Court of Appeals is bound by established precedent to conform its holdings to the "right-wrong, irresistible impulse test".

Appeal from Berrien, Chester J. Byrns, J. Submitted Division 3 November 9, 1970, at Grand Rapids. (Docket No. 8462.) Decided February 23, 1971. Leave to appeal denied March 14, 1972, 387 Mich —.

Ralph Getterson was convicted of assault with intent to do great bodily harm less than murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Ronald J. Taylor,* Prosecuting Attorney, and *Hugh W. Black,* Assistant Prosecuting Attorney, for the people.

Keller & Keller (by *Harry J. Creager*), for defendant.

REFERENCES FOR POINTS IN HEADNOTES

21 Am Jur 2d, Criminal Law §§ 28, 36–39.

Irresistible impulse as excuse for crime. 70 ALR 663, s. 173 ALR 392.

Before: T. M. BURNS, P. J., and R. B. BURNS and MUNRO,* JJ.

PER CURIAM. Defendant was charged with two counts of assault with intent to murder, MCLA § 750.83 (Stat Ann 1962 Rev § 28.278). To both counts defendant pled not guilty by reason of insanity. He was convicted by a jury on two counts of the lesser included offense of assault with intent to do great bodily harm less than murder.[1]

Defendant requested that the trial court give the following instruction to the jury:

"* * * If you find the defendant, Ralph Getterson, was in fact suffering a mental disease and that the unlawful act of October 31, 1967, which is the subject of this prosecution, was the product of and was caused by such mental disease and abnormality, then you must find him not guilty by reason of insanity, even though you find that he may be able to distinguish between right and wrong or that he did not have an irresistible impulse to commit the act in question * * *"

The trial judge refused to give the requested instruction. Instead, he instructed the jury:

"The defendant in this case, ladies and gentlemen, has entered a plea of not guilty by reason of insanity, and evidence has been introduced in his behalf to show that at the time of the commission of the alleged offense, or in this case there were two offenses, one against Mr. Arndt and one against Mrs. Arndt, that he was laboring under such a defect of reason from a disease of the mind as not to have a sufficient mental capacity to know the nature and the quality of the act or acts committed, or that if he did actually know it, that is, the

* Circuit judge, sitting on the Court of Appeals by assignment.
[1] MCLA § 750.84 (Stat Ann 1962 Rev § 28.279).

nature and the quality of the acts committed, that he did not know that he was doing wrong, or, even if he did know he was doing wrong, that he did not have the power to resist doing the act or the acts.

* * *

"A man is sane and legally responsible for his acts when he possesses sufficient mental capacity to distinguish right from wrong, to understand the nature and the consequences of his acts, and has sufficient mental capacity and control to enable him to apply that knowledge to his own case or to a situation that is presented for [*sic*] [to] him.

"The law does not require that a person have a normal intelligence or sensibilities in order that he be deemed sane, or that he be educated to any particular degree, or that he act or otherwise conduct himself as do normal people. Acts committed in passion, jealousy, anger, excitement are not excused on a claim of insanity unless the person doing such act does not have the mental capacity to know that such acts are wrong. The test is, did such person have sufficient mental capacity to know and to distinguish between right and wrong or to control his acts at the time of the commission of the alleged offenses."

Defendant here contends that the current Michigan test of criminal responsibility, first expressed in *People* v. *Durfee* (1886), 62 Mich 487, and commonly known as the "right-wrong, irresistible impulse test", should be replaced with the test set forth in *Durham* v. *United States* (1954) 94 App DC 228, 241 (214 F2d 862, 874, 45 ALR2d 1430, 1445), which is:

"[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

The defendant does not here contend that the instruction given does not conform to the rule enun-

ciated in *Durfee,* but rather that the rule in *Durfee* should be replaced by the rule in *Durham.*[2]

This Court has recently refused to replace the *Durfee* test with the *Durham* rule.[3] Defendant refers us, however, to *People* v. *Krugman* (1966), 377 Mich 559, 562, where the Court stated:

"Had defendant properly requested a charge in accordance with the *Durham* rule, our task would have been somewhat different. Then we would have been obliged to decide whether this Court in the exercise of its common-law authority should adopt a new test for determining criminal responsibility or continue to adhere to the venerable, if not venerated, right-wrong test and the irresistible impulse test. See *People* v. *Durfee* (1886), 62 Mich 487. When, and if, such a choice is squarely presented to us, we shall have to review the desirability of changing the law in Michigan with regard to * * * the principle announced, and thence seemingly overlooked, in *People* v. *Garbutt* (1868), 17 Mich 9, 23: '[I]f it appeared from the evidence that defendant was afflicted with insanity, and such affliction was the efficient cause of the act, he ought to be acquitted by the jury.' "

This Court is aware, therefore, that the present rule of criminal responsibility in Michigan may be reviewed and changed by the Supreme Court. However, until that Court or the Legislature[4] changes

---

2 It is defendant's contention, relying on many psychiatric, psychological, and law review articles, that only the *Durham* rule recognizes the sophisticated level to which psychiatry has progressed since the *Durfee* rule was announced. See Glueck, *Law & Psychiatry,* (The Johns Hopkins Press, 1962); Cohen, Criminal Responsibility and the Knowledge of Right and Wrong, 14 U Miami L Rev 30 (1959).

3 *People* v. *Markham* (1969), 19 Mich App 616; *People* v. *Morris* (1968), 10 Mich App 526.

4 The Michigan Legislature presently has before it the Michigan Revised Criminal Code (Final Draft, September 1967). Section 705 of that code proposes the following test of criminal responsibility (p 72):

the existing rule, we are bound by established precedent to conform our holding to the long-standing rule set forth in *Durfee*.[5]

Affirmed.

"A person is not criminally responsible for his conduct if at the time he acts, as a result of mental disease or defect, he lacks capacity to conform his conduct to the requirements of law."

[5] *People* v. *Cole* (1967), 8 Mich App 250.

PEOPLE *v.* KNOPEK

1. CRIMINAL LAW—PLEA OF GUILTY—VOLUNTARINESS—ILLEGALLY-OBTAINED CONFESSION.

   A plea of guilty is voluntary if it is knowingly and understandingly made with benefit of counsel, irrespective of the existence of an illegally-obtained confession.

2. CRIMINAL LAW—PLEA OF GUILTY—VOLUNTARINESS.

   A plea of guilty was voluntarily made where the trial judge before accepting the plea explained the offense charged, examined the defendant as to the reasons for his plea, discussed possible alternative pleas, explained that a guilty plea constituted a waiver of certain rights, indicated potential consequences which could ensue from a guilty plea, and where the defendant had an adequate opportunity to consult with counsel prior to entering the plea.

3. CRIMINAL LAW—PLEA OF GUILTY—COERCED CONFESSION.

   A plea of guilty made, after proper examination by the trial judge, to circumvent the expense of trial and perhaps motivated by hopes of leniency will not entitle a defendant after conviction to a hearing on the question of whether a coerced confession led to the guilty plea if the defendant simply adduces evidence indicating that the confession was coerced and that it contributed to his guilty plea.

4. CRIMINAL LAW—PLEA OF GUILTY—OUT-OF-COURT CONFESSION—JUDGE'S DUTY.

   The trial judge has no duty before accepting a plea of guilty to inquire *sua sponte* whether the defendant has made an out-of-court confession.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law §§ 485–487.
[3] 21 Am Jur 2d, Criminal Law § 485.
[4, 5] 21 Am Jur 2d, Criminal Law § 495.

5. CRIMINAL LAW—PLEA OF GUILTY—APPEAL AND ERROR—STANDARD OF REVIEW.

Appellate courts reviewing guilty plea proceedings should address themselves to questions of substance, rather than form; the principal query should be whether there has been a miscarriage of justice.

Appeal from Lapeer, James P. Churchill, J. Submitted Division 2 January 7, 1971, at Lansing. (Docket No. 8573.) Decided February 23, 1971.

Ralph Robert Knopek was convicted, on his plea of guilty, of uttering and publishing a check with intention to defraud. Defendant's motion to withdraw his plea denied. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *John P. Spires,* Prosecuting Attorney, for the people.

Morrice & Lengemann, for defendant on appeal.

Before: QUINN, P. J., and BRONSON and O'HARA,* JJ.

PER CURIAM. Defendant entered a plea of guilty to a charge of uttering and publishing a check with intention to defraud and was convicted pursuant to MCLA § 750.249 (Stat Ann 1962 Rev § 28.446).

Subsequently, he filed a motion to withdraw his guilty plea on the ground that the plea was induced by a prior confession allegedly obtained by illegal means, and since the confession had been coerced, the plea was necessarily involuntary.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

In raising the question under scrutiny, defendant has failed to take cognizance of the recently emergent jurisprudence holding that a guilty plea is "voluntary" if it is "knowingly and understandingly made with the benefit of counsel, irrespective of the existence of the illegally obtained confession". *People* v. *Temple* (1970), 23 Mich App 651, 660. See, also, *McMann* v. *Richardson* (1970), 397 US 759 (90 S Ct 1441, 25 L Ed 2d 763).

Even a cursory examination of the record amply indicates the voluntariness of defendants' plea. The trial judge explained the offense charged, examined defendant as to the reasons for his plea, discussed possible alternative pleas, explained that a guilty plea constituted a waiver of certain rights, and indicated potential consequences which could ensue from a guilty plea; also, defendant had an adequate opportunity to consult with counsel prior to entering the plea. Furthermore, we note that neither defendant nor his attorney attempted to suppress the confession at trial.

Where a defendant, aided by counsel, nevertheless, decides to plead guilty to circumvent the expense of trial and perhaps also motivated by hopes of leniency, he, after conviction is not entitled to a hearing on the question of whether a coerced confession led to the guilty plea if he simply adduces evidence indicating that the confession was coerced and that it contributed to his guilty plea. *McMann, supra.*

Whether defendant's confession had been brought to the attention of the trial judge or whether the trial judge had read the preliminary examination does not appear of record but, in any event, no burden has devolved upon the trial judge to inquire *sua sponte* whether or not defendant had made an out-of-court confession. *People* v. *Medley* (1970),

27 Mich App 195; *People* v. *Kinsman* (1970), 21 Mich App 242; *People* v. *Lucy* (1970), 21 Mich App 252.

The public policy of our state, as expressed in statutory enactments and opinions of our Supreme Court, indicates that on review appellate courts should address themselves to questions of substance, rather than form, and that the principal query should be whether there has been a "miscarriage of justice". *People* v. *Dunn* (1968), 380 Mich 693, 701.

It would be exceedingly difficult in the instant case to discover any "miscarriage of justice".

There being no reversible error, the decision of the trial court in denying defendant's motion to withdraw his plea of guilty is affirmed.

Affirmed.

PEOPLE *v.* PARKER

CRIMINAL LAW—NARCOTICS—POSSESSION OF MARIJUANA—EVIDENCE—SUFFICIENCY.

Defendant's conviction of possession of marijuana was supported by sufficient evidence where a witness, defendant's girl friend, testified that she had smoked marijuana the day of defendant's arrest with the defendant, that later she had taken the remainder of the marijuana to make a sale, that she and the defendant were to split the profits from the sale, and that after the sale, which was to a police informer who had given her marked money, she returned to the defendant's motel room, and where, even though no marijuana was found in defendant's possession, the marked money was found in defendant's possession (MCLA § 355.153).

Appeal from Chippewa, William F. Hood, J. Submitted Division 3 October 15, 1970, at Marquette. (Docket No. 8721.) Decided February 23, 1971. Reversed by Supreme Court and remanded for new trial, 386 Mich 774.

Freddie Parker was convicted of possession of marijuana. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Farrell E. Elliott,* Prosecuting Attorney, for the people.

Veum & Veum, for defendant on appeal.

REFERENCES FOR POINTS IN HEADNOTE

25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 44–47.
30 Am Jur 2d, Evidence §§ 289–291, 1124 *et seq.*

Before: FITZGERALD, P. J., and MCGREGOR and O'HARA,* JJ.

PER CURIAM. Defendant was charged with possession of marijuana, contrary to MCLA § 335.153 (Stat Ann 1957 Rev § 18.1123), and found guilty in a jury trial. On appeal, defendant claims that there was not sufficient evidence to support the verdict beyond a reasonable doubt and that a jury instruction concerning possession was improper.

At trial, defendant's girl friend testified that the defendant had brought a quantity of marijuana to Sault Ste. Marie, Michigan, that she and the defendant had smoked marijuana together in his motel room on the day of the arrest, that defendant had supplied the marijuana, and that, later, she had taken the remainder in her car to make a sale. The girl also testified that the defendant and herself were to share the profits of the sale. The girl friend was the only witness to testify as to having seen defendant in possession of the marijuana.

On the day of the arrest, a sale had been set up by the police between the girl friend and a purchaser with marked money. Immediately after the sale, she went to the defendant's motel room, stayed a few moments, and was arrested when she left. The remaining marijuana was found in her car. No marijuana or traces thereof were found on the person of the defendant or in his room. The marked money, however, was found on his person. Defendant disclaimed all knowledge of the marijuana.

The jury obviously believed the girl friend's detailed version of the day's events, as opposed to the

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

defendant's rather weak explanations. The record shows sufficient evidence to support the verdict. *People* v. *Fred W. Thomas* (1967), 7 Mich App 519; *People* v. *Weems* (1969), 19 Mich App 553.

The instructions in this case, taken as a whole, are accurate. *People* v. *Jones* (1965), 1 Mich App 633; *People* v. *Thomas, supra.* Counsel did not object to the instruction and the record does not support his contention that he was denied an opportunity to do so outside the hearing of the jury. This objection was not preserved for appeal. GCR 1963, 516.2.

Affirmed.

PEOPLE *v.* HARRINGTON

Appeal from Charlevoix, Charles L. Brown, J. Submitted Division 3 November 13, 1970, at Grand Rapids. (Docket No. 8732.) Decided February 24, 1971. Leave to appeal denied July 14, 1971, 385 Mich 766.

Clarence Jerry Harrington was convicted, on his plea of guilty, of uttering and publishing a forged instrument. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Harvey C. Varnum,* Prosecuting Attorney, for the people.

Robert L. Hoffman, for defendant on appeal.

Before: T. M. BURNS, P. J., and R. B. BURNS and MUNRO,* JJ.

PER CURIAM. A warrant was issued charging defendant with uttering and publishing a forged instrument. MCLA § 750.249 (Stat Ann 1962 Rev § 28.446). Arraignment was had on the warrant and a preliminary examination was waived. After the arraignment defendant was bound over to circuit court and an information was filed. On the same date defendant was arraigned on the informa-

* Circuit judge, sitting on the Court of Appeals by assignment.

tion and pled guilty. He was sentenced to serve from 7 to 14 years in the state prison.

On appeal defendant contends that his guilty plea was not properly accepted.

A review of the record shows that the lower court complied with GCR 1963, 785.3 in accepting the defendant's guilty plea. In addition, in reviewing the acceptance of a guilty plea this Court is concerned with substance and not form. There does not appear to be any miscarriage of justice in the instant case that requires reversal of the lower court. *People* v. *Winegar* (1968), 380 Mich 719.

Affirmed.

CONSUMERS POWER COMPANY *v.* REICH

1. INJUNCTION—TANGENTIAL MATTERS—APPEAL AND ERROR.

Whether plaintiff's attorney made knowingly false statements in the proceedings to obtain a permanent injunction prohibiting defendant from cutting plaintiff power company's gas and power lines was only tangential to the question whether the injunction was properly issued and, even if the attorney did make false statements, it would not have constituted reversible error.

2. APPEAL AND ERROR—MATTERS INADEQUATELY PRESENTED.

An appellate court cannot effectively review matters inadequately presented and argued to it.

Appeal from Allegan, John H. Piercey, J. Submitted Division 3 February 2, 1971, at Grand Rapids. (Docket No. 8742.) Decided February 24, 1971.

Complaint by Consumers Power Company and William A. Holtgreive against Albert Reich for a temporary restraining order and for the issuance of a peace bond. Permanent injunction granted to plaintiffs. Defendant's motion for rehearing with counterclaim denied. Defendant appeals. Affirmed.

Albert Reich, *in propria persona.*

REFERENCES FOR POINTS IN HEADNOTES

[1] 42 Am Jur 2d, Injunctions §§ 352, 353.
[2] 5 Am Jur 2d, Appeal and Error § 684 *et seq.*

Before: FITZGERALD, P. J., and V. J. BRENNAN and T. M. BURNS, JJ.

PER CURIAM. Defendant is a consumer of electric power and a customer of plaintiff, Consumers Power Company. Plaintiff threatened to terminate defendant's electric service unless he paid an overdue bill. Defendant then threatened to cut plaintiff's power and gas lines which cross his property unless plaintiff paid him a sum of money which defendant claimed was the amount of damages inflicted on defendant's property by plaintiff's employees.

Plaintiff filed a complaint for a temporary restraining order to prevent defendant from carrying out his threats and for the issuance of a peace bond against defendant pursuant to MCLA § 772.1 *et seq.* (Stat Ann 1954 Rev § 28.1154 *et seq.*). Defendant appeared *in propria persona* to contest the issuance of a peace bond or restraining order against him. The hearing resulted in the issuance of a permanent injunction for a period of two years prohibiting defendant from carrying out his threats against plaintiff's property. Penalty for violation of the terms of the injunction was $5,000.

Defendant filed a motion for rehearing with counterclaim. Defendant's motion was denied and the permanent injunction was left in full force and effect. Defendant appeals from the decision of the circuit court denying his motion for rehearing with counterclaim and upholding the injunction. Defendant raises three issues on appeal: (1) improper notice of the proceedings which resulted in the issuance of a permanent injunction against him; (2) use of testimony by plaintiff's attorney known by him to be false; and (3) denial of defendant's rights to jury trial and counsel and imposition of excessive penalty.

Defendant is not an attorney and was not represented below or on appeal by an attorney. Unfortunately, much of defendant's brief is not relevant to the issues of this case. Defendant's issues will be dealt with here *seriatim*.

(1) Defendant was properly brought before a circuit judge on a warrant issued pursuant to MCLA § 772.3 (Stat Ann 1954 Rev § 28.1156). No notice other than the warrant was required. Defendant freely agreed to proceed with the determination of the matter before the court rather than wait for a hearing to be scheduled at a later time. Defendant knowingly and understandingly agreed to the issuance of an injunction in lieu of a peace bond.

(2) The record reveals no impropriety of plaintiff's attorney as defendant charges. In any event, the matter is tangential to the real issue of whether the injunction was properly issued and could not have constituted reversible error.

(3) Defendant, after first demanding a jury trial, freely and understandingly waived his right to jury trial. Defendant waived his right to counsel. Authority cited by defendant for the proposition that the penalty imposed was excessive consists of New York and Wisconsin statutes which clearly do not control.

Defendant presents no cases, authorities, or compelling reasons in support of his assignments of error. An appellate court cannot effectively review matters inadequately presented and argued to it. *People* v. *Raub* (1967), 9 Mich App 114; *Mitcham* v. *City of Detroit* (1959), 355 Mich 182.

The record reveals that defendant received a full and fair hearing on the action against him, not once, but twice. Each time the trial judge carefully explained the nature and implications of the proceed-

ings to the defendant and conducted them with patience for defendant's lack of understanding of the legal process.

Careful search of the records of this case reveal no reversible error.

No costs, appellees not having filed brief on appeal.

PEOPLE *v.* MIRON

1. JURY—VOIR DIRE—EN MASSE QUESTIONING—WAIVER.
   En masse questioning of prospective jurors on the *voir dire* was not error where the defendant waived an objection by expressing satisfaction with the jury.

2. CRIMINAL LAW—PROSECUTOR'S ARGUMENT—ASSERTIONS OF PERSONAL KNOWLEDGE.
   Assertions of personal knowledge by the prosecutor in his argument to the jury are clearly improper.

3. CRIMINAL LAW—PROSECUTOR'S ARGUMENT—IMPROPER ARGUMENT—APPEAL AND ERROR—PRESERVING QUESTION FOR REVIEW.
   Failure to object to prosecutor's improper jury argument precludes review of it in the absence of a showing of a manifest injustice.

Appeal from Wayne, Nathan J. Kaufman, J. Submitted Division 1 January 13, 1971, at Detroit. (Docket No. 8775.) Decided February 24, 1971.

Roger Lee Miron was convicted of armed robbery. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Patricia J. Boyle,* Assistant Prosecuting Attorney, for the people.

M. Glenn Grossman, for defendant on appeal.

REFERENCES FOR POINTS IN HEADNOTES

[1] 47 Am Jur 2d, Jury § 197.
[2] 53 Am Jur, Trial §§ 483, 486.
[3] 5 Am Jur 2d, Appeal and Error §§ 545, 624–627.

Before: V. J. BRENNAN, P. J., and FITZGERALD and LEVIN, JJ.

PER CURIAM. On May 9, 1968, the defendant was convicted by a jury of robbery armed contrary to MCLA § 750.529 (Stat Ann 1970 Cum Supp § 28-.797), and sentenced to serve 7–1/2 to 12 years in prison.

The first issue raised on appeal concerns the manner in which the court conducted the *voir dire*. Defendant complains that *en masse* questioning of prospective jurors was improper and that this error was aggravated when replacement jurors were questioned less fully than the original panel. Not only do these contentions lack substantive merit in light of this record, but they were waived by the defendant's express indication of satisfaction with the jury. *People* v. *Jenkins* (1970), 23 Mich App 39; *People* v. *Rose* (1934), 268 Mich 529.

Next defendant contends that the court erred in instructing the jury: 1. that they could not make written notes and 2. that they could not consider as evidence the robbery victim's refusal to sign the complaint. The record reveals that the defendant failed to make any objection to these instructions as required by GCR 1963, 516.2. Accordingly, in the absence of a showing of substantial injustice, it is our duty to affirm. *People* v. *Martin #1* (1970), 21 Mich App 207.

Finally, defendant contends that the prosecutor's argument to the jury was improper and constituted reversible error. We do not agree.

Among the things alleged to have been taken in the armed robbery were three 20-dollar bills, a diamond ring, and a black leather jacket. At the phone booth where the defendant was arrested, the police found $82, a diamond ring, and a black jacket. In

response to defense counsel's statement that since $82 was found on the defendant's person and only three 20-dollar bills were reported stolen, it was evidently not the same money, the prosecutor said, without objection:

"Now, he says there was $82 and change, I suppose, found on the defendant. *Among that $82 was three 20-dollar bills.* He might have an argument if on the defendant was only found $2 and change. There's no $60 in $2. But there's $60 in $82, certainly." (Emphasis supplied.)

In point of fact, while the complaining witness testified that three 20-dollar bills were taken there was no testimony on the record concerning the denominations of the bills in defendant's pocket, and the bills themselves, although offered, were not admitted into evidence.

Assertions of personal knowledge by the prosecutor are clearly improper. *People* v. *Kirby* (1966), 4 Mich App 201; *People* v. *Brocato* (1969), 17 Mich App 277; *Berger* v. *United States* (1935), 295 US 78 (55 S Ct 629, 79 L Ed 1314). However, failure to object to improper jury argument precludes review of it in the absence of a showing of a manifest injustice. *People* v. *Humphreys* (1970), 24 Mich App 411 (*leave to appeal denied* 383 Mich 824). In view of the overwhelming evidence against the defendant concerning his possession of goods alleged to have been stolen, we do not feel that the error committed here warrants reversal. See *People* v. *Wardell* (1970), 26 Mich App 69.

For the foregoing reasons, the defendant's conviction is affirmed.

Affirmed.

PEOPLE *v.* PAESANI

APPEAL AND ERROR—STANDARD OF REVIEW—CREDIBILITY OF WITNESS.

A reviewing court will not disturb a judgment based upon the fact determination of the credibility of witnesses and the weight to be accorded to reasonable inferences from such testimony.

Appeal from Recorder's Court of Detroit, Donald S. Leonard, J. Submitted Division 1 December 8, 1970, at Detroit. (Docket No. 8768.) Decided February 24, 1971. Leave to appeal denied June 29, 1971, 385 Mich 758.

Mario Paesani was convicted of larceny under $100. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Leonard Meyers,* Assistant Prosecuting Attorney, for the people.

Eddie D. Smith, for defendant.

Before: LEVIN, P. J., and BRONSON and O'HARA,* JJ.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

REFERENCE FOR POINTS IN HEADNOTE

5 Am Jur 2d, Appeal and Error § 820 *et seq.*

PER CURIAM. Defendant was arrested and charged with larceny, and convicted of the misdemeanor of larceny under $100[1] for taking six long-playing records. He has been sentenced to one year of probation and to pay damages of $200. He contends upon appeal that the evidence presented at trial was insufficient to support a finding of guilt beyond a reasonable doubt.

We find that the trial court record contains evidence to support the verdict. This Court will not disturb a judgment based upon the fact determination of the credibility of witnesses and the weight to be accorded to reasonable inferences from such elicited testimony. *People* v. *Geddes* (1942), 301 Mich 258; *People* v. *Ragan* (1969), 15 Mich App 551.

Conviction affirmed.

---

[1] MCLA § 750.356 (Stat Ann 1970 Cum Supp § 28.588).

SILVER *v.* A. O. C. CORPORATION

1. LICENSES — ELECTRICAL CONTRACTING — EXEMPTION — MINOR REPAIRS — VALUE FACTORS.

   Both materials and labor used to complete electrical repair work are to be included in determining whether the value of the work done was less than $50, and, thus whether the repairman was not required to have an electrical contractor license (MCLA § 338.881 *et seq.*).

2. CONTRACTS—VIOLATION OF STATUTE—EFFECT.

   One who enters into a contract to perform services or furnish materials in violation of a statute which is enacted to protect the public health, morals, and safety, and which contains a penal provision cannot maintain an action to recover on the contract.

3. CONTRACTS—VIOLATION OF STATUTE—LICENSES—ELECTRICAL CONTRACTING.

   A plaintiff was not allowed to maintain a suit to recover on a contract to perform services and furnish materials for an electrical wiring job where the plaintiff was not licensed under the electrical administration act and where his work exceeded $50 in value (MCLA § 338.881 *et seq.*).

Appeal from Wayne, James N. Canham, J. Submitted Division 1 January 6, 1971, at Detroit. (Docket No. 8785.) Decided February 24, 1971.

Complaint by Arthur Silver against A. O. C. Corporation for damages for breach of contract. Judgment for plaintiff. Defendant appeals. Reversed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 51 Am Jur 2d, Licenses and Permits § 42.
[2] 17 Am Jur 2d, Contracts § 216 *et seq.*
[3] 51 Am Jur 2d, Licenses and Permits §§ 63–67.

Citron, Citron & Weiss, for plaintiff.

Hirsch, Keene & Jacobs, for defendant.

Before: R. B. BURNS, P. J., and J. H. GILLIS and DANHOF, JJ.

PER CURIAM. This is an appeal by leave granted from a judgment of the Wayne County Circuit Court which affirmed a judgment for plaintiff entered in common pleas court in a contract action for materials and services rendered.

Plaintiff is a journeyman electrician. At no time pertinent to this action was he licensed as an electrical contractor under either the state electrical administrative act, MCLA § 338.881 *et seq.* (Stat Ann 1970 Cum Supp § 18.204[1] *et seq.*), or the equivalent Detroit ordinance. Defendant is an apartment management company.

In 1966 plaintiff was employed by defendant's predecessor to repair lights at a Second Boulevard apartment building in Detroit. At that time he met the caretaker, to whom he gave his card "just in case they had an emergency sometime and they couldn't get ahold of [the management company], they could call me direct".

In 1967 the caretaker's wife called plaintiff to repair a short circuit in the caretaker's apartment. After fixing the short circuit plaintiff was asked by the caretaker's wife to fix one or two hallway lights. Plaintiff discovered that the wires in the hallway fixtures were burned by oversized bulbs. He found that the same condition existed in all the lights in the building and undertook to replace and rewire all the defective wiring. The project was accomplished over a four-month period (July–October, 1967). Plaintiff spent 125 hours on the job and used $143

worth of his own materials. In October, 1967, he submitted a bill for $893 to the defendant. It was defendant's first notice that the work had been done.

Defendant refused payment and plaintiff sued. Judgment for plaintiff was given in Common Pleas Court on findings that the work performed amounted to minor repair work which was exempted from the licensing statute and that the caretaker's wife had actual or apparent authority to contract on behalf of defendant. The circuit court affirmed, finding the characterization of the job as minor repair work not error and the finding of proper agency not against the great weight of the evidence.

Defendant claims the trial courts erred in holding that plaintiff was exempt from the licensing statute because the work done was minor repair work.

The electrical administrative act was an act "to safeguard persons and property" and "to provide for licensing of electricians and electrical contractors and the inspection of electrical wiring". MCLA § 338.881 (Stat Ann 1970 Cum Supp § 18.204[1]). The act, in effect, is to insure that persons who do electrical work are duly licensed. Section 7 of the act provides that no person, firm, or corporation shall engage in a business of electrical contracting unless duly licensed as an electrical contractor. An exception to this section is minor repair work, Section 7(a), which is defined as "electrical wiring not in excess of a valuation of $50". Section 1(f).

There appears to be little doubt that what plaintiff was doing would be considered to be electrical contracting. Section 1(b) defines electrical contracting as "any person, firm or corporation engaged in the business of erecting, installing, altering, repairing, servicing or maintaining electrical wiring devices, appliances or equipment". One of defendant's witnesses, a senior assistant electrical engineer

and supervisor of the Detroit Electrical Inspection Bureau, testified that the type of work done "was required to have been contracted for by a licensed electrical contractor".

Thus, unless the work fell under the "minor repair work" exception it could only be done by a licensed electrical contractor, which plaintiff wasn't.

As stated earlier, "minor repair work" is that which in value is worth $50 or less. Included in this figure must be the material as well as labor necessary to complete the repair and restore the item to good working order. OAG, 1961–1962, No. 4075, p 465 (July 30, 1962).

It was stipulated below that the value of the work done was $893. Since this is well in excess of $50, this work would not come under the "minor repair work" exception to the licensing requirement.

Plaintiff was in violation of the licensing act when he did the work. Therefore, his action to recover on the contract should be barred from the courts. When one enters into a contract to perform services or furnish materials in violation of a statute which is enacted to protect the public health, morals, and safety, and which contains a penal provision, as this statute does, he cannot maintain an action to recover thereon. *Cashin* v. *Pliter* (1912), 168 Mich 386; *Turner* v. *Schmidt Brewing Co.* (1936), 278 Mich 464.

The judgment of the circuit court affirming the judgment of the Common Pleas Court is reversed and the cause is remanded to the circuit court for entry of a judgment in favor of defendant against the plaintiff in the amount of $1,026.45, the sum recovered by plaintiff through a writ of garnishment while the appeal was pending. Costs to appellant.

CARTIER *v.* YOUNG

INSURANCE—LIABILITY COVERAGE—REFERENCE TO INSURANCE—REVERSIBLE ERROR.

Permitting plaintiffs' counsel to question the defendant in an automobile negligence case concerning his liability insurance coverage is reversible error (MCLA § 500.3030).

Appeal from St. Clair, Halford I. Streeter, J. Submitted Division 2 February 2, 1971, at Lansing. (Docket No. 8832.) Decided February 24, 1971.

Complaint by Francis O. Cartier, for himself and as next friend of Michael Cartier, a minor, against Thomas G. Young and Genevieve E. Young to recover for personal injuries sustained in an automobile-motorcycle accident. Verdict and judgment for plaintiffs. Defendants appeal. Reversed and remanded for new trial.

McIntosh, Oppliger & Mugan, for plaintiffs.

Bush, Luce, Henderson & Black, for defendants.

Before: QUINN, P. J., and MCGREGOR and O'HARA,* JJ.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

REFERENCE FOR POINTS IN HEADNOTE

22 Am Jur 2d, Damages §§ 319, 320.

PER CURIAM. Defendants state the only issue raised on this appeal as follows: "Did the trial court error in allowing plaintiffs' counsel to question defendant Thomas G. Young concerning his liability insurance coverage?"

During the course of the trial there were several references to defendants' insurance before the questioning of Thomas G. Young by plaintiffs' counsel which brought on this appeal. Defendants' motions for mistrial were denied on the basis that the references were inadvertent. From the wording of the issue raised on appeal, we conclude that plaintiffs would not claim error on this ruling.

However, plaintiffs called Thomas G. Young for cross-examination on rebuttal and the following occurred:

"*Q.* Why did you waste your time talking to Kathy Golden, Barbara Higginbottom, Ray Swoffer, Kathy Kramer, Bob Welch, Phil Erickson, and Edward Smith?

"*A.* Because I have four children and I was being sued for $150,000.

"*Q.* And you have insurance to cover it, haven't you?

"*A.* No, I have not.

"*Q.* You don't have insurance?

"*Mr. Henderson:* Your Honor, I would like to renew my motion that has been made previously, if I could.

(*Reference is to prior motions for new trial*)

"*The Court:* Motion denied.

"*Q.* You don't have insurance to cover this lawsuit?

"*A.* I have a little.

"*Q.* How much?

"*Mr. Henderson* (*for defendant*): Your Honor, I wonder if we could have the jury excused for me to make a motion, please.

"*The Court:* No, we'll go ahead. You can make the motion afterwards.

"*Q.* How much?

"*A.* How much insurance do I have?

"*Q.* Yes. You are pleading poverty. You say you have a wife and four children.

"*A.* I have $25,000 insurance."

Thomas G. Young was not a witness to the accident and he rebutted nothing.

Subsequently, defendants were permitted to make their motion for mistrial and it was denied. In their motion for judgment notwithstanding the verdict or for new trial, defendants again asserted the error involved in this appeal. In denying this motion in a ruling from the bench, the trial judge stated, among other things:

"Regarding the insurance matter, which first came into the case upon a question about the defendant's attorney, by one of his own witnesses. Once the insurance is mentioned, it is in the case. I can see no harm in it, if it appeared in the case after that."

Even if we agreed with the trial court that in this day and age there is no harm done by references to insurance in a motor vehicle accident case, we would still be compelled to reverse. MCLA § 500.3030 (Stat Ann 1957 Rev § 24.13030); *Benmark* v. *Steffen* (1965), 374 Mich 155.

Reversed and remanded for new trial with costs to defendants.

PEOPLE *v.* HATCH

1. CRIMINAL LAW—VENUE—ELEMENT OF OFFENSE.
Venue is not an element of a crime.

2. CRIMINAL LAW—PLEA OF GUILTY—ESTABLISHING VENUE.
Failure to establish venue when accepting a plea of guilty is not error.

Appeal from Recorder's Court of Detroit, George W. Crockett, J. Submitted Division 1 January 12, 1971, at Detroit. (Docket No. 8897.) Decided February 24, 1971.

Edward Hatch was convicted, on his plea of guilty, of assault with intent to rob being armed. Defendant appeals. People's motion to affirm granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

John F. Gilhool, for defendant on appeal.

Before: LESINSKI, C. J., and V. J. BRENNAN and J. H. GILLIS, JJ.

REFERENCE FOR POINTS IN HEADNOTES
[1, 2] 21 Am Jur 2d, Criminal Law §§ 398, 399.

PER CURIAM. Defendant was convicted by his plea of guilty of assault with intent to rob being armed, contrary to MCLA § 750.89 (Stat Ann 1962 Rev § 28.284). He appealed as of right. The people have moved to affirm the conviction. GCR 1963, 817.5(3).

It is manifest that the questions presented, on which decision of the cause depends, are so unsubstantial as to require no argument or formal submission. The record shows that the trial court determined that defendant's plea of guilty was freely, voluntarily, and understandingly made. Although the trial court initially misstated the offense to which the prosecutor would accept a plea of guilty, the court subsequently made it clear that defendant was being given the opportunity to plead guilty to assault with intent to rob being armed, rather than the offense originally charged—armed robbery. The failure of the trial court to establish the venue of the crime was not error. Venue is not an element of a crime. *People* v. *Cronk* (1968), 15 Mich App 309. As we said in *People* v. *Hollingworth* (1970), 27 Mich App 417, 418:

"The information properly sets out the time and place of the crime for which defendant now stands convicted. Defendant does not dispute the accuracy of the information. He merely contends that his failure to recite these facts before the trial court during the time of the plea proceeding constitutes reversible error. This contention is fatuous".

Motion to affirm is granted.

PEOPLE *v.* OSBORN

CRIMINAL LAW—INDECENT LIBERTIES—ELEMENTS—ASSAULT.

The taking of indecent liberties necessarily constitutes an assault; an assault separate and apart from the taking of the indecent liberties need not be proved to sustain a conviction of taking indecent liberties with a child under 16 years old (MCLA § 750.336).

Appeal from Berrien, Karl F. Zick, J. Submitted Division 3 January 8, 1971, at Grand Rapids. (Docket No. 8906.) Decided February 24, 1971.

Oren Osborn was convicted of taking indecent liberties with a child under the age of 16. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Ronald J. Taylor,* Prosecuting Attorney, and *John A. Smietanka,* Assistant Prosecuting Attorney, for the people.

Hartwig, Crow & Jones, for defendant on appeal.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

PER CURIAM. This is an appeal as of right from a non-jury conviction on a charge of indecent liber-

---

REFERENCE FOR POINTS IN HEADNOTE

6 Am Jur 2d, Assault and Battery § 119.

ties with a child under the age of 16, MCLA § 750-.336 (Stat Ann 1954 Rev § 28.568.)

At the trial, the complaining witness, a girl of 14, testified that she and a girl friend were at defendant's house on June 17, 1969. She further testified that while they were at the house, defendant asked her and her girl friend to follow him into the bedroom. Complainant testified that after they were in the bedroom defendant told her to take her clothes off and lay on the bed. She then testified that after she had complied with the defendant's demand, the defendant took off his clothes and laid on top of her for about five minutes. He then gave the complainant and her companion a dollar and left. Complainant also testified that she was afraid of defendant.

On appeal, defendant contends that under the statute two things must be proven: first, that there was an assault on a child under the age of 16 years; and second, following the assault there must be a taking of indecent liberties with the child. The relevant statute provides, in part:

"Any person or persons over the age of 16 years, who shall assault a child under the age of 16 years, and shall take or attempt to take indecent and improper liberties with the person of such child, without committing or intending to commit the crime of rape or the crime of sodomy or gross indecency upon such child, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 10 years, or by fine of not more than $5,000."[1]

The issue to be decided by this court is, therefore, whether the crime of taking or attempting to take indecent liberties with a child under the age of 16,

[1] MCLA § 750.336 (Stat Ann 1954 Rev § 28.568).

as set forth by the above statute, requires an assault as an essential element.

In *People* v. *Carr* (1966), 2 Mich App 222, 228, this court stated:

"An assault or assault and battery is necessarily involved in the crime of taking indecent * * * liberties with a * * * child under 16 years. *People* v. *Sanford* (1907), 149 Mich 266; *People* v. *Dupree* (1913), 175 Mich 632; and *People* v. *Place* (1924), 226 Mich 212. By the same token, an assault is a necessary element in the crime of attempting to take indecent and improper liberties with a female child."

The first sentence in the above-quoted paragraph indicates, therefore, that if one takes indecent liberties with a minor, then one has necessarily committed an assault. However, the second sentence indicates that if one *attempts* to take indecent liberties with a child, an assault is an additional element of the offense.

We do not agree with the defendant that an assault separate and apart from the act itself must be proven. In *People* v. *Sanford* (1907), 149 Mich 266, which the court in *Carr, supra,* cited, the Supreme Court stated:

"An assault and battery is necessarily involved in the crime of taking indecent and improper liberties with a female child under the age of 14 years, as provided in 3 Comp Laws, § 11719."

The taking of indecent liberties necessarily constitutes an assault. The conduct described by the complainant in her testimony does constitute "taking indecent liberties"; we find no merit in defendant's contention that an essential element of the crime is absent.

Defendant also contends that because of the discrepancies of the testimony of the witnesses, the lower court abused its discretion in finding defendant guilty beyond a reasonable doubt.

Although there were discrepancies in the testimony, and these discrepancies were acknowledged by the trial court, the trial court ruled that guilt was established beyond a reasonable doubt. Because the trial court heard and saw the witnesses, it was in a better position than this court to judge their credibility and because it found evidence to establish guilt beyond a reasonable doubt and such finding is supported by the record, this Court will not reverse the verdict of the trial court. *People* v. *Szymanski* (1948), 321 Mich 248.

Affirmed.

PEOPLE *v.* LEDBETTER

CRIMINAL LAW—DEFENDANT'S COMPETENCY—PSYCHIATRIC EXAMINATION—COURT RULE—REVERSIBLE ERROR.

A criminal defendant who shows that he may be incompetent *shall* be committed by the court to a forensic center for psychiatric examination; a court's failure to comply with this rule results in reversible error (GCR 1963, 786).

Appeal from Kent, John H. Vander Wal, J. Submitted Division 3 February 2, 1971, at Grand Rapids. (Docket No. 8985.) Decided February 24, 1971.

James R. D. Ledbetter was convicted of larceny by conversion over $100. Defendant appeals. Reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James K. Miller,* Prosecuting Attorney, and *Donald A. Johnston, III,* Chief Appellate Attorney, for the people.

Robert E. Gersch, for defendant on appeal.

REFERENCES FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 62 *et seq.*

Judicial declaration of sanity, made after alleged offense but before acquittal on ground of insanity at time of offense, as affecting duty of court to commit defendant to asylum for insane. 88 ALR 1084.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition. 32 ALR2d 434.

Before: FITZGERALD, P. J., and V. J. BRENNAN and T. M. BURNS, JJ.

PER CURIAM. Defendant was charged with larceny[1] and larceny by conversion or embezzlement.[2]

On May 28, 1969, defendant reported for work at a filling station where he worked as an attendant on the late shift. Trial testimony indicates that he was given $80 in bills and coins as "starting money". Sometime after midnight on May 29, 1969, defendant left the station unoccupied and unsecured and rode into town with friends, Mr. Smith and Miss Gasco. He did not return to the station. Customers alerted the police concerning the "open station". The police locked the station doors. Shortly after 7 a.m., the station manager arrived and audited the station, read the pumps, counted the oil, and studied the shift report of the preceding attendant. He determined that $168.30 of the station's money was missing. Mr. Smith and Miss Gasco testified that defendant admitted stealing the station's money. Defendant's girl friend, when contacted by a police detective, turned in over $115. At the close of the people's proofs, the larceny charge was dismissed. Defendant was found guilty of larceny by conversion over $100 by the jury.

Twelve issues are presented for review alleging reversible prejudice and improper use of judicial discretion by the trial court.

On appeal, defendant asks the following question:

Did the trial judge commit reversible error when, in response to defendant's motion for psychiatric examination, he ordered a locally prominent psychiatrist to examine defendant and to submit a report stating whether a diagnostic commitment to the

[1] MCLA § 750.356 (Stat Ann 1970 Cum Supp § 28.588).
[2] MCLA § 750.362 (Stat Ann 1954 Rev § 28.594).

Department of Mental Health was required pursuant to MCLA § 767.27a (Stat Ann 1970 Cum Supp § 28.966[11]); and, when this report was filed and indicated that diagnostic commitment was not required, he ordered the trial to commence as scheduled?

The following quotation clearly states the rule and establishes the precedent which we follow:

"The court rule promulgated in 1969 (GCR 1963, 786) now dictates the proper method for determination of a defendant's competency to stand trial. There can be no argument as to retroactivity of a court rule and accordingly we hold that the actions of the trial court at the time of defendant's 1968 trial satisfied the statute. *The 1969 court rule now prescribes the approved method and must be followed when the question of defendant's competency to stand trial is* properly raised." (Emphasis supplied.) *People* v. *Kerridge* (1969), 20 Mich App 184, 191; *People* v. *Hartford* (1970), 25 Mich App 200, 202.

The alleged crime in the instant case and the criminal procedures related thereto all occurred after May 15, 1969, when GCR 1963, 786, became prospectively applicable. The motion for psychiatric examination was properly filed by written motion before trial. The strong rule enunciated in the *Kerridge* case and adopted by this Court in the *Hartford* decision declares that where there is a showing that defendant *may* be incompetent, the court *shall* commit him to a forensic center for psychiatric examination. Failure to comply by the trial court results in reversible error.

Reversal on this ground obviates further consideration and decision on defendant's 11 other allegations of error.

Reversed and remanded.

NELSON v. RUNNELS

1. PLEADING—LATE FILING—DISCRETION.
Trial court has, by court rule, discretion in accepting the late filing of pleadings and motions (GCR 1963, 108.7[2]).

2. MOTIONS—MOTION TO DISMISS—LATE FILING—DISCRETION.
Granting defendants' motion to dismiss which was not timely filed was not error where the plaintiffs had failed to timely file the proof of service and there was evidence that the parties' attorneys had agreed to extend the time for filing an answer (GCR 1963, 108.1, 108.2, 108.7[2]).

Appeal from Kent, Stuart Hoffius, J. Submitted Division 3 February 2, 1971, at Grand Rapids. (Docket No. 9178.) Decided February 24, 1971.

Complaint by Robert Nelson and Sandra Nelson against R. J. Runnels and Flora Runnels for personal injuries sustained in an automobile accident. Defendants moved to dismiss on the ground that the statute of limitations had run. Motion granted. Plaintiffs appeal. Affirmed.

Raidle & Smith, for plaintiffs.

Hillman, Baxter & Hammond (by *William M. Bremer*), for defendants.

REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur, Pleading § 320.
[2] 41 Am Jur, Pleading §§ 323, 333.

Before: FITZGERALD, P. J., and V. J. BRENNAN and T. M. BURNS, JJ.

PER CURIAM. The present appeal arose out of an automobile accident which took place on December 10, 1966, and involved the plaintiffs and defendants. Plaintiffs commenced action on December 5, 1969; however, service of process was not placed in the hands of the sheriff until December 17, 1969, and was served the next day. Proof of service was not filed until February 13, 1970. On December 24, 1969, defendants' attorney contacted plaintiffs' counsel in an effort to arrange an extension of time in which to file an answer. The request was granted and shortly thereafter plaintiffs' attorney sent a written confirmation indicating that any extension which defendants' counsel might deem necessary for filing his answer would be agreeable.

On February 9, 1970, defendants filed an answer which contained a general denial along with a motion to dismiss based upon the statute of limitations. Plaintiffs filed their answer and affidavit in opposition thereto, contending that the motion had not been timely filed in compliance with the provisions of GCR 1963, 108.1 and 108.2 which provides:

".1 * * *

"(1) A defendant shall serve and file his answer or take such other action permitted by law within 20 days after personal service of the summons and a copy of the complaint upon him in this state.

* * *

".2 Time for Filing Motions. A motion which raises a defense or an objection to a pleading shall be filed within the time for filing the responsive pleading."

In ruling upon defendants' motion, the trial court stated:

"The answer to the motion to dismiss raises court rule 108.1 and 108.2, which says that special motions must be filed within the 20 days after service of summons and complaint.

"I am of the opinion that the failure to file the summons is fatal here, that the statute of limitations had run and that takes precedence over the filing of this motion * * * this court feels compelled to grant a motion to dismiss for the fact that the statute of limitations had run."

Plaintiffs now appeal, contending that the trial court erred in granting defendants' motion to dismiss which was filed more than 25 days subsequent to the time set forth by court rule. Plaintiffs do not dispute the court's determination that the action is barred by the statute of limitations. Therefore, the issue on appeal concerns only the timeliness of defendants' motion for dismissal. Plaintiffs aver that GCR 1963, 108.1 and 108.2 are mandatory in application and failure to comply is fatal to the cause of action.

We are unable to accept plaintiffs' argument in view of GCR 1963, 108.7(2) which permits court discretion in accepting the late filing of pleadings and motions. In *Guastello* v. *Citizens Mutual Insurance Company* (1968), 11 Mich App 120, 137, this Court set forth its position on the above court rule by stating:

"We have carefully examined GCR 1963, 108.7(2), and conclude that its express grant of dispensing power was not intended to preclude altogether the exercise of such power in areas not expressly dealt within that rule. Rule 108.7(2), expressly authorizes a circuit judge to extend the time for filing any pleading or motion 'or the doing of any act' if the request is made *before* the expiration of the period originally prescribed. The rule also provides that

after such period the circuit judge may 'permit a party to *plead*' where the failure to do so was the result of excusable neglect. (Emphasis supplied.)"

The trial court held that failure to file the proof of service provided a reasonable basis for a late filing of defendants' motion to dismiss. Furthermore, there is evidence of the fact that the two attorneys had agreed to extend the time for filing of the answer. Hence, the answer, which conforms to GCR 1963, 116, was late, but nevertheless excusable.

Affirmed. Costs to appellees.

PEOPLE v. MADDOX

Appeal from Recorder's Court of Detroit, Joseph A. Gillis, J. Submitted Division 1 January 13, 1971, at Detroit. (Docket No. 9345.) Decided February 24, 1971.

Robert Edgar Maddox was convicted of armed robbery. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Angelo A. Pentolino,* Assistant Prosecuting Attorney, for the people.

Roberts, Wigle & Nahhat, for defendant on appeal.

Before: V. J. BRENNAN, P. J., and FITZGERALD and LEVIN, JJ.

PER CURIAM. The defendant was convicted by a jury of armed robbery. MCLA § 750.529 (Stat Ann 1954 Rev § 28.797).

His contention that the identification testimony was insufficient is without merit. At the trial a witness identified him as the holdup man, another witness placed him at the scene of the crime, and a third witness said he looked similar to the holdup man.

At the time of sentencing the defendant claimed that an alibi witness, who appeared in court at the time of the trial, was told to return home. The alibi witness was located and was questioned by the court about a month after the defendant was sentenced. The witness did not support the alibi.

The claim that the defendant's assigned counsel did not conscientiously prepare the case for trial is not supported by the record; the contentions regarding the adequacy of the assigned counsel's representation of the defendant which find support only in the affidavit attached to his appellate brief should have been raised by a motion for a new trial. Without the kind of record which could be made on such a motion, we have nothing before us to review.

Affirmed.

SCHWALL v. CITY OF DEARBORN

1. DISMISSAL AND NONSUIT—LACK OF PROGRESS—REINSTATEMENT.

   Reinstating a suit which had been dismissed for lack of progress was not improper where the dismissal order provided that it was without prejudice.

2. ADMINISTRATIVE LAW—MUNICIPAL CORPORATIONS—ADMINISTRATIVE REMEDY—EXISTENCE OF REMEDY.

   A party bringing an action against a city must have an administrative remedy open to him before he can be required to exhaust his administrative remedies.

3. ADMINISTRATIVE LAW—MUNICIPAL CORPORATIONS—ADMINISTRATIVE REMEDY—ADEQUATE REMEDY.

   Contention that a city employee, who damaged city property, was requested to pay for it, retired, and sued the city for the money paid should have refused to pay, been dismissed or suspended, and then appealed his dismissal was totally without merit, because such a course of action is not an adequate administrative remedy.

4. MUNICIPAL CORPORATIONS—DAMAGE TO CITY PROPERTY—PAYMENT FOR DAMAGE—DISCIPLINARY ACTION.

   A city cannot use a threat of disciplinary action to collect for damage to city property in the absence of authority conferred by statute or ordinance.

REFERENCES FOR POINTS IN HEADNOTES

[1] 24 Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 79–93.
[2] 1 Am Jur 2d, Administrative Law § 595 *et seq.*
[3] 1 Am Jur 2d, Administrative Law §§ 602–605.
[4] 15 Am Jur 2d, Civil Service § 36.

Appeal from Wayne, Cornelia G. Kennedy, J. Submitted Division 1 January 5, 1971, at Detroit. (Docket No. 9411.) Decided February 25, 1971.

Complaint by Charles F. Schwall, Jr., against the City of Dearborn for recovery of monies paid for damaging city property. Judgment for plaintiff. Defendant appeals. Affirmed.

James Thomson, for plaintiff.

Joseph J. Burtell, City Attorney, and *Carl P. Garlow,* Assistant City Attorney, for defendant.

Before: R. B. BURNS, P. J., and J. H. GILLIS and DANHOF, JJ.

PER CURIAM. The plaintiff brought suit against the City of Dearborn seeking to recover $1,094.77. He contends he was illegally coerced into paying the city this amount. The trial judge in a nonjury trial granted a judgment in this amount and we affirm.

The facts as found by the trial judge and supported by the records show that the plaintiff was employed by the city as a policeman. In 1962 he was in three accidents that caused damage to police cars. The chief of police spoke to the plaintiff about the accidents and as a result of this the plaintiff was led to believe that he would be suspended or dismissed unless he reimbursed the city for the damage. If the plaintiff were suspended or dismissed it was possible he would lose his pension rights. Acting under this duress, the plaintiff made payment and shortly thereafter retired. After retirement he commenced this action.

The city civil service regulations provided that an employee could be dismissed for negligently

damaging city property. However, there is no provision in the regulations or anywhere else authorizing the city to use this method to recover damages.

On appeal the city raises three issues. It contends that the suit was improperly reinstated after it had been dismissed, that the plaintiff failed to exhaust his administrative remedies, and that the plaintiff had voluntarily offered to pay the money.

The case had at one time been dismissed for lack of progress; however, the order provided that it was without prejudice. Thus, it was not error to reinstate the cause.

Before one can be required to exhaust his administrative remedies he must have an administrative remedy open to him. Under the city's argument the plaintiff would have been forced to refuse to pay and then appeal his dismissal or suspension. We do not regard this as an adequate remedy.

The trial court found that the plaintiff had paid the money because of a threatened dismissal or suspension. We are not able to say that this finding was clearly erroneous. GCR 1963, 517.1. In the absence of authority conferred by statute or ordinance we do not believe the city can use a threat of disciplinary action to collect for damage to city property. See *Gordon* v. *Village of Wayne* (1963), 370 Mich 329.

Affirmed. Costs to plaintiff.

ASHWELL *v.* ASHWELL

1. DIVORCE—ALIMONY—DISCRETION.

Granting defendant wife in a divorce $1,500 in lieu of permanent alimony was not error where the wife, who had been employed off and on throughout the 34-year marriage, was earning $90 a week and the husband was earning $210 a week, and the parties' property was modest.

2. DIVORCE—ALIMONY—RESERVING QUESTION OF ALIMONY—JUDGMENT MODIFIED.

Judgment of divorce awarding the wife $1,500 in lieu of permanent alimony remanded for modification of the judgment so as to reserve the question of alimony where the parties had been married for almost 34 years and the wife was 56 years old, because, although the award of $1,500 was not error, the possibility might arise in the future that the wife will need support from her husband (MCLA § 552.28).

Appeal from Wayne, John D. O'Hair, J. Submitted Division 1 January 13, 1971, at Detroit. (Docket No. 9463.) Decided February 25, 1971.

Complaint by Percy Ashwell against Inez Ashwell for divorce. Judgment for plaintiff. Defendant appeals. Affirmed except provision for alimony remanded to be modified.

Russell J. Comer, for plaintiff.

Kasko, Williams & Associates, P. C., for defendant.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 24 Am Jur 2d, Divorce and Separation §§ 614–616.

Before: V. J. BRENNAN, P. J., and FITZGERALD and LEVIN, JJ.

PER CURIAM. The defendant wife, Inez Ashwell, appeals from a judgment of divorce granted her husband, plaintiff Percy Ashwell. She contends that the evidence fails to establish a sufficient basis for granting an absolute divorce on the ground of extreme cruelty and that the trial judge erred in distributing the property of the parties and in granting her $1,500 in lieu of permanent alimony.

The evidence offered in behalf of the husband amply supports the judge's conclusion that the husband had established grounds for a divorce. The judge, who sat as trier of the fact and was the judge of the credibility of the witnesses, was at liberty to disbelieve the testimony of the defendant wife and the other testimony offered in her behalf. On our review of the record, we are satisfied that we would not be justified in concluding that the judge's findings of fact were clearly erroneous.

The property of the parties was modest and we find no error in the provisions of the judgment concerning the division of the property.

The parties were married July 22, 1936. The judgment of divorce was entered February 27, 1970, after almost 34 years of marriage. The wife was employed off and on throughout the marriage. She was 56 years of age at the time of the hearing and was earning $90 a week. The husband was 58 and was earning $210 a week.

While we are satisfied that the judge did not err in failing to award the wife alimony in excess of the $1,500 which he allowed, we think, having in mind the length of the marriage and the age of the wife, that provision should be made for the possibility that she will require support from her husband some

time during her life. It may become appropriate at some future time, having in mind the husband's then circumstances and the wife's, to require him to pay some periodic amount as alimony for her support. Accordingly, the case is remanded for entry of an order modifying the judgment of divorce so as to reserve the question of alimony (MCLA § 552.28 [Stat Ann 1957 Rev § 25.106]); otherwise the judgment is affirmed.

PEOPLE v. GONIWICHA

CRIMINAL LAW—PRE-SENTENCE REPORT—EXAMINATION BY DEFENDANT—DISCRETION.

Failure of defendant's counsel to have a copy of the pre-sentence report did not constitute error where counsel never requested to see the report because even if a request had been made, the granting of the request was within the sound discretion of the trial judge.

Appeal from Oakland, James S. Thorburn, J. Submitted Division 2 February 1, 1971, at Lansing. (Docket No. 9491.) Decided February 25, 1971.

Roger Ernest Goniwicha was convicted, on his plea of guilty, of attempted possession of narcotics. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas G. Plunkett,* Prosecuting Attorney, and *Frank R. Knox,* Assistant Prosecuting Attorney, for the people.

Gerald M. Lorence, for defendant.

Before: QUINN, P. J., and MCGREGOR and O'HARA,* JJ.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 303.

Per Curiam. Originally charged with possession of narcotics, MCLA § 335.153 (Stat Ann 1957 Rev § 18.1123), defendant, on February 6, 1971, pleaded guilty to an added count of attempted possession of narcotics, MCLA § 750.92 (Stat Ann 1962 Rev § 28-.287). He was sentenced and he appeals as of right.

Defendant contends it was error for his counsel not to have a copy of the presentence report. There is no indication in the record that a request was ever made by defense counsel to have or to see the presentence report. Additionally, if such a request had been made, the furnishing of the presentence report to defense counsel is a matter of judicial discretion. *People* v. *Malkowski* (1970), 25 Mich App 195.

The sentence imposed by the trial court was within statutory limits and there is no basis for defendant's present attack on that sentence. *People* v. *Girard* (1969), 18 Mich App 593. Defendant's present contention that he pleaded guilty under duress because he feared that his commitment under the Holmes Youthful Trainee Act[1] for a prior offense would prejudice his right to a fair trial is without merit.

Affirmed.

---

[1] MCLA § 762.11 *et seq.* (Stat Ann 1970 Cum Supp § 28.853[11] *et seq.*).

PEOPLE v. BREWER

1. CRIMINAL LAW—PLEA OF GUILTY—WAIVER OF RIGHTS—RIGHT AGAINST SELF-INCRIMINATION—COURT'S DUTY.

Failure to inform a defendant that he waives his right against self-incrimination by entering a plea of guilty is not reversible error because there is no requirement compeling the court to inform the defendant that he is waiving certain constitutional rights; the only requirement prescribed by statute, court rule, or case law is that the guilty plea be voluntarily and intelligently made.

2. CRIMINAL LAW—PLEA OF GUILTY—SUFFICIENT FACTS.

Sufficient facts were elicited from the guilty-pleading defendant to establish his commission of an attempted breaking and entering where defendant, while represented by counsel, admitted breaking into the building, denied his plea of guilty was coerced, asserted that his plea was voluntary, and was advised of the consequences of his plea.

Appeal from Oakland, Robert L. Templin, J. Submitted Division 1 January 8, 1971, at Detroit. (Docket No. 9517.) Decided February 25, 1971.

Paul David Brewer was convicted, on his plea of guilty, of attempted breaking and entering. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas G. Plunkett,*

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 359.
[2] 21 Am Jur 2d, Criminal Law §§ 484–496.

Prosecuting Attorney, and *Frank R. Knox,* Assistant Prosecuting Attorney, for the people.

John H. Waldeck, for defendant on appeal.

Before: R. B. BURNS, P. J., and J. H. GILLIS and DANHOF, JJ.

PER CURIAM. Defendant appeals from the trial court's acceptance of his guilty plea to attempted breaking and entering. MCLA § 750.92 (Stat Ann 1962 Rev § 28.287).

The defendant gives two reasons why his guilty plea was erroneously accepted. First, he alleges that the trial court failed to inform him that he was waiving his constitutional right against self-incrimination. Secondly, he contends that the court failed to elicit sufficient facts from him to establish that the specific criminal acts charged had been committed by the defendant.

Defendant's reasons are not meritorious. There is no requirement compelling the trial judge to inform defendant that he is waiving certain constitutional rights. *People* v. *Jaworski* (1970), 25 Mich App 540. Basically, the only requirement prescribed by statute (MCLA § 768.35 [Stat Ann 1954 Rev § 28.1058]), court rule (GCR 1963, 785.3), and by long-established case authority (*Kercheval* v. *United States* [1927], 274 US 220 [47 S Ct 582, 71 L Ed 1009]; *Chambers* v. *Florida* [1940], 309 US 227 [60 S Ct 472, 84 L Ed 716]) is that the guilty plea be voluntarily and intelligently made by the defendant. *Boykin* v. *Alabama* (1969), 395 US 238 (89 S Ct 1709, 23 L Ed 2d 274). See also *Brady* v. *United States* (1970), 397 US 742 (90 S Ct 1463, 25 L Ed 2d 747).

Upon examination of the record we discover the following. Defendant had benefit of competent counsel, admitted breaking into the building, denied that the plea was coerced in any way, was apprised of the consequences of his plea, and asserted that his plea was voluntarily made. The court did not err in accepting the unfettered choice of the defendant to plead guilty.

Affirmed.

CONLON *v.* DEPARTMENT OF TREASURY

1. PROPERTY—ROADWAY—VACATION—RIGHT TO INTERVENE.

   Property owners in the platted subdivision in which a roadway was being vacated had a right to object to the vacation and to intervene in the proceedings despite the fact that their property did not abut the road in question (MCLA § 560.226).

2. JUDGMENT—ORDERS—SETTING ASIDE—DISCRETION.

   A trial court has wide latitude to set aside its previous orders (GCR 1963, 528.3[6]).

Appeal from Livingston, Paul R. Mahinske, J. Submitted Division 2 February 1, 1971, at Lansing. (Docket No. 9547.) Decided February 25, 1971.

Complaint by W. Allen Conlon and other persons who own property abutting a roadway to vacate a portion of a plat. Consent judgment vacating a portion of the road entered. Motion to permit intervention filed by property owners whose property did not abut the portion of the road vacated. Motion granted. Intervenors' motion to set aside the consent judgment granted. Plaintiffs appeal. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 27 Am Jur 2d, Eminent Domain §§ 145, 149, 200, 241–245, 248, 328.

[2] 47 Am Jur 2d, Judgments §§ 783, 784.

E. Reed Fletcher, for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Patrick Kowaleski,* Assistant Attorney General, for the Department of Treasury.

Richard R. Robinson, for intervenors.

Before: QUINN, P. J., and MCGREGOR and O'HARA,* JJ.

PER CURIAM. The plaintiffs petitioned the circuit court on October 29, 1968, to enter an order vacating a small portion of Lakeside Drive in the "Kirk's Landing Long Lake" subdivision in Livingston County. The Attorney General, acting as counsel for the named defendant, filed a consent to the action. On January 28, 1969, the order was entered. Thereafter, on October 1, 1969, on the motion of the intervening petitioners, an order setting aside the original order was filed. This is an appeal by leave granted.

The intervenors are property owners in the platted subdivision, but their property does not abut the road portion in question. Such parties may have an interest in the proceedings and a right to object to the vacation of the roadway. *In re Petition of Carson* (1961), 362 Mich 409. Futhermore, the Subdivision Control Act of 1967, MCLA § 560.226 (Stat Ann 1970 Rev § 26.430[226]) provides that alteration of plats may be ordered by circuit courts after "hearing all interested parties". This Court, not being presented with the question, is not

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

ruling on whether roads never adopted by the county road commission are nonetheless county roads, by virtue of the old McNitt Act. CL 1948 § 247.1 *et seq.* (Stat Ann § 9.141 *et seq.*), since repealed. *In re Petition of Miller* (1969) 18 Mich App 480; *In re Petition of Wernicke* (1959), 331 Mich 91.

The circuit court did not commit reversible error in setting aside the original order on a showing by intervenors of their interest and objection. Wide latitude is granted to a trial court to set aside its previous order, by GCR 1963, 528.3(6).

Affirmed. No costs.

PEOPLE v. ALLEN

CRIMINAL LAW—PLEA OF GUILTY—ELEMENTS OF OFFENSE—DEFENDANT'S TESTIMONY.

Acceptance of a proper plea of guilty does not require that the defendant establish each element of the offense charged by his testimony.

Appeal from Wayne, Harry J. Dingeman, Jr., J. Submitted Division 1 January 5, 1971, at Detroit. (Docket No. 9562.) Decided February 25, 1971.

Ronald P. Allen was convicted, on his plea of guilty, of second-degree murder. Defendant appeals. Motion to affirm granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

Gerald Curtis, for defendant on appeal.

Before: FITZGERALD, P. J., and J. H. GILLIS and V. J. BRENNAN, JJ.

PER CURIAM. Defendant pleaded guilty to the offense of murder in the second degree, contrary to

---

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law §§ 484–496.

MCLA § 750.317 (Stat Ann 1954 Rev § 28.549), and was sentenced to a 20 to 40 year prison term. His appeal as of right from that conviction and sentence is met by a motion to affirm. GCR 1963, 817.5(3).

Defendant argues on appeal that the court should not have accepted his guilty plea because he did not admit in his own words the existence of all of the elements of the crime. It is manifest that the questions sought to be reviewed, on which decision of the cause depends, is so unsubstantial as to need no argument or formal submission. A proper plea of guilty does not require that defendant establish each and every element of the offense by his testimony. *People* v. *Reid* (1970), 27 Mich App 415; *People* v. *Donald T. Moore* (1970), 21 Mich App 150; *People* v. *Bartlett* (1969), 17 Mich App 205. A review of the record in this case establishes that there was a substantial factual basis for defendant's plea.

Motion to affirm is granted.

ISBEY *v.* ISBEY

1. CONTINUANCE—DISCRETION.
   Granting a continuance lies within the discretion of the court.

2. CONTINUANCE—DISCRETION.
   Denying a continuance to the defendant who sought a continuance because he was allegedly ill was not an abuse of discretion where the defendant's own medical expert testified that the defendant had uremic poisoning, was wearing a catheter, but that he had observed that the defendant had no symtoms which would prevent the defendant's appearance in court (GCR 1963, 503).

3. DISCOVERY—DEFAULT JUDGMENT—FAILURE TO APPEAR.
   Entry of a default judgment against the defendant in a divorce action for his failure to present himself to be deposed and to produce certain documents and records relating to the parties' marital assets was not error where the court complied with all the court rules in entering the default and took testimony to support the divorce and to establish the nature and extent of the marital assets (GCR 1963, 313.2[2][c]).

Appeal from Wayne, Thomas J. Foley, J. Submitted Division 1 January 14, 1971, at Detroit. (Docket No. 9566.) Decided February 25, 1971. Leave to appeal denied June 29, 1971, 385 Mich 758.

Complaint by Jean Robertson Isbey against Frank N. Isbey for divorce. Default judgment for plaintiff. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 17 Am Jur 2d, Continuance §§ 3, 4.
[3] 24 Am Jur 2d, Divorce and Separation §§ 425, 426.

Buesser, Buesser, Snyder & Blank, for plaintiff.

Edward W. Gleeson (*Meyer D. Stein,* of counsel), for defendant.

Before: V. J. BRENNAN, P. J., and FITZGERALD and LEVIN, JJ.

PER CURIAM. This appeal arises out of a suit for divorce filed by the plaintiff, Jean Isbey, in which she sought to terminate her marriage of 45 years with the defendant. Following an extensive pretrial concerned chiefly with the marital assets, the case was set for trial on October 20, 1969. The defendant, Frank N. Isbey, was not present in court. His attorneys asked for a continuance, because defendant allegedly was ill and unable to attend. In support of this motion, defendant's attorneys called Dr. William R. Flora, a urologist, who testified that Mr. Isbey was ill with uremic poisoning, that he was wearing a catheter, and that he had observed no symptoms which indicated that the defendant would not be able to appear in court. The trial judge denied defendant's motion for a continuance.

Then, it appearing that the defendant had failed to present himself to be deposed and had failed to comply with an order to produce certain documents and records relating to the marital assets, the court made a ruling that defendant was in default under GCR 1963, 313.2(2)(c) in that he had wilfully disobeyed the court's discovery orders. Thereafter, testimony was taken to support the divorce and also to establish the nature and extent of the marital assets, but since defendant was already in default, the court permitted his attorneys to put in proofs only on the issue of the marital property. When both sides had finished presenting written and testi-

monial evidence on the value of various properties, the court awarded approximately $360,000 worth of assets and $500 per month permanent alimony to the plaintiff, and approximately $550,000 worth of assets to the defendant.

For the purposes of this appeal we will treat defendant's numerous assignments of error under three main headings: (1) the refusal of the trial court to grant a continuance; (2) entry of the default judgment for failure to comply with discovery orders; and (3) the propriety of the distribution of the marital property and of the alimony award.

The grant or denial of a continuance under GCR 1963, 503 rests within the sound discretion of the trial court. *McKay* v. *Black* (1967), 5 Mich App 711; *Baker* v. *Wetherald* (1939), 291 Mich 646. As the testimony of defendant's own expert witness did not support his allegation that he was unable to attend, it is impossible for us to find that the trial judge abused his discretion in denying the continuance.

Defendant's second allegation of error is that the entry of a default against him under GCR 1963, 313.2(2)(c) was improper because of numerous procedural defects and because it deprived defendant of property without due process of law. A review of the record indicates that the trial judge complied with all applicable court rules in entering the default; he was completely within his powers in dealing with the situation as he did. *Washburn* v. *Lake Diane, Inc.*, (1969), 17 Mich App 704. Nor are we persuaded that the trial court was in error when it found that defendant's conduct amounted to a "refusal" to obey the court's discovery orders.[1]

[1] See *Societe Internationale Pour Participations Industrielles* v. *Rodgers* (1958), 357 US 197 (78 S Ct 1087, 2 L Ed 2d 1255), for

Finally, defendant complains that the court abused its discretion in the division of the marital property. Although our review is *de novo,* we give special weight to the trial judge's findings. *Guenin* v. *Guenin* (1970), 28 Mich App 449; *Westgate* v. *Westgate* (1939), 291 Mich 18. We feel that the award made in this case gives due consideration to the standards set forth in *Johnson* v. *Johnson* (1956), 346 Mich 418, and we are unconvinced that we would have had to reach a different result had we occupied the position of the trial court. *Paul* v. *Paul* (1960), 362 Mich 43; *Ross* v. *Ross* (1970), 24 Mich App 19.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

---

a discussion of Federal Rule 37 from which GCR 1963, 313 is derived.

SMART *v.* MICHIGAN LIFE INSURANCE COMPANY

Appeal from Oakland, Arthur E. Moore, J. Submitted Division 2 January 8, 1971, at Lansing. (Docket No. 9625.) Decided February 25, 1971.

Complaint by Loretta Smart and Reba Smart against Michigan Life Insurance Company for accidental death benefits due under a contract of insurance. Verdict and judgment for plaintiffs. Defendant appeals. Affirmed.

Weinstein & Weinstein, for plaintiffs.

Condit, Denison, Devine, Porter & Bartush (by *Charles J. Porter*), for defendant.

Before: QUINN, P. J., and BRONSON and O'HARA,* JJ.

PER CURIAM. Plaintiffs' action below was for the recovery of accidental death benefits allegedly due plaintiffs as a result of the insured's death on November 8, 1967. A jury verdict was returned against the defendant in the sum of $5,000. Defendant appeals as of right from the denial of its motion for a new trial.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

The sole issue on appeal relates to the trial court's instructional definition of the word "accident". A review of the trial court's instructions reveals that the instructional definition of "accident" was in accordance with the terms of the insurance policy and consistent with the accepted definition set forth in *Guerdon Industries, Inc.*, v. *Fidelity & Casualty Company of New York* (1963), 371 Mich 12, 18, 19. See *Brant* v. *Citizens Mutual Automobile Insurance Company* (1966), 4 Mich App 596.

Judgment affirmed.

PEOPLE v. LARRY SMITH

Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted Division 1 January 14, 1971, at Detroit. (Docket No. 9635.) Decided February 25, 1971.

Larry Joseph Smith was convicted of armed robbery. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Leonard Meyers,* Assistant Prosecuting Attorney, for the people.

Carl Ziemba, for defendant on appeal.

Before: V. J. BRENNAN, P. J., and FITZGERALD and LEVIN, JJ.

PER CURIAM. Defendant Larry Joseph Smith was arrested and charged with the robbery of a Detroit area drug store which occurred in May of 1969. He was subsequently tried by a jury and on February 27, 1970, was convicted of robbery armed, a violation of MCLA § 750.529 (Stat Ann 1970 Cum Supp § 28.797).

Testimony elicited during the trial disclosed that late in the afternoon of May 13, 1969, two men, one of whom was brandishing a gun, entered the Park-

way Drug Store at 22443 Plymouth Road in Detroit and announced a holdup. After compelling a clerk to fill a paper bag with money, the men also directed the pharmacist to place certain narcotics in the same bag. The customers present were ordered to remain still and to place their hands against the counter. The pair then fled.

Two issues are raised on this appeal, both of which concern the trial court's instructions to the jury. Defendant's first assignment of error is that the trial court erred in failing to include defendant's theory of the case in the instructions to the jury. Defendant's contention was that the identification of defendant by four eyewitnesses was contradictory and unreliable. The record reveals that defendant did not request such a charge during the course of the trial nor did he object to the instructions given. Therefore, he is now precluded from raising the issue for the first time on appeal. GCR 1963, 516.2; *People* v. *Wright* (1970), 23 Mich App 330; *People* v. *Schram* (1970), 23 Mich App 91; *People* v. *Floyd* (1968), 15 Mich App 284; *People* v. *Ivy* (1968), 11 Mich App 427.

Defendant also contends that the court erred in overemphasizing the charge of robbery armed in relation to the lesser included offenses. The trial court gave a complete instruction on the elements of armed robbery. The jury was also instructed on the four lesser included offenses of assault with intent to rob being armed; larceny from the person; attempted robbery armed; and assault and battery. We find no error which would result in a clear injustice, and since no objection was raised at trial, this Court will not review the matter for the first time on appeal. *People* v. *Ivy, supra; People* v. *Schram, supra.*

Affirmed.

PEOPLE *v.* BOONE

CRIMINAL LAW—NARCOTICS—SALE OF MARIJUANA—AGENT.

A person "sells" marijuana within the meaning of the narcotics act whether he acts as a principal, proprietor, agent, servant, or employee in the transaction (MCLA § 335.51).

Appeal from Kent, John T. Letts, J. Submitted Division 3 January 26, 1971, at Lansing. (Docket No. 9651.) Decided February 25, 1971.

Robert Lord Boone was convicted of the unlicensed sale of marijuana. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James K. Miller,* Prosecuting Attorney, and *Donald A. Johnston, III,* Chief Appellate Attorney, for the people.

Theodore Earl Dunn, for defendant on appeal.

Before: QUINN, P. J., and MCGREGOR and BRONSON, JJ.

PER CURIAM. Defendant was convicted by a jury of sale of narcotics, MCLA § 335.152 (Stat Ann 1957

REFERENCE FOR POINTS IN HEADNOTE

25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 35–39.

Rev § 18.1122). He appeals and the people move to affirm.

The critical facts surrounding the offense are that one James Johnson entered into a discussion with one William Gaunt of the Muskegon Police Department whereby Johnson offered to attempt to make a buy of marijuana in Grand Rapids. An agreement was reached that Johnson would make the buy with furnished funds and be reimbursed for out-of-pocket expenses.

Johnson and one Lewis Thomas proceeded to Grand Rapids where they planned to make a buy from a man named Saunders. Unable to locate Saunders, they met a man in a bar who offered to get some marijuana. At trial that man was identified as the defendant.

Johnson, Thomas, and the defendant left the bar and proceeded to a house where defendant, after going inside, informed Johnson that he could get a "bag" but would need $15 to pay for it. Johnson gave defendant the money and he went back into the house returning shortly. After they left the area, the defendant gave Johnson a tinfoil envelope which tests later revealed contained marijuana. Johnson testified that he then gave defendant $3 for his troubles.

Of the issues raised by defendant on appeal, only one merits attention. The defendant argues that the trial judge erred in refusing to give the following requested instruction:

"Before you can find the defendant guilty of sale of narcotics, you must find beyond a reasonable doubt that he sold narcotics to someone. If you find that he was merely a conduit, or agent, or errand boy of James Johnson, the police informant, then you must find him not guilty. The term agency in its broadest sense, includes every relation in which

one person acts for or represents another by the latter's authority."

Defendant's contention is not persuasive. The definitions section of the Michigan narcotics act, MCLA § 335.51 (Stat Ann 1957 Rev § 18.1071), defines a "sale" as follows:

" 'Sale' includes barter, exchange, or gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, *agent,* servant, or employee." (Emphasis supplied.)

It is evident that in the transaction set out in the above facts whether or not defendant was an "agent" is not a defense under the definition of "sale" as supplied by the Michigan legislature.

While this point has not been heretofore raised in Michigan, we note that in Illinois, where the statutory definition of a "sale" is similar, a defendant acting as an "agent" is held to fall under the sales statute. The Illinois Supreme Court has commented:

"It is true that there is no direct testimony that Aldridge ever owned or had possession of the heroin, or that he acted as principal in the transaction. Also, the record shows that at the time of his arrest Aldridge had not received any of the money which had been paid for the drug. However, the scope of the offense here involved is not restricted by the principles of law that relate to normal sales. Section 2-11 of the Uniform Narcotic Drug Act defines 'sale' to include 'barter, exchange, or gift, or offer therefor, and each such transaction made by any person whether as principal, proprietor, broker, agent, servant or employee.' (Ill Rev Stat 1957, Chap 38, par 192.28-2.11.) Under the broad reach of this definition it is not necessary to trace title to the drug with technical nicety in order to establish an unlawful sale. Nor does one who is proved

to have participated in some capacity forbidden by the statute escape guilt because the proof does not fix with certainty the particular capacity in which he acted. Proof that a person participated in a transaction as principal, agent, servant, or employee is sufficient." *People* v. *Aldridge* (1960), 19 Ill 2d 176, 179 (166 NE2d 563, 565).

"We interpret the meaning of the word 'sale', as defined by the act, to be much broader in scope than that usually given to it in other branches of the law. Admittedly, the defendant took the role of at least an agent, and the act specifically declares an agent in a narcotics transaction to be a seller. We are of the opinion that the definition shows a legislative intent that the act of a person whether as agent, either for the seller or the purchaser, or as a go-between, in such a transaction constitutes a sale. Since the agency was admitted and proved, the conviction under counts for dispensing and selling was established beyond a reasonable doubt." *People* v. *Shannon* (1959), 15 Ill 2d 494, 496, 497 (155 NE 2d 578, 580.)

While noting that decisions in other jurisdictions may be interpreted to hold otherwise (*Commonwealth* v. *Harvard* [1969], 356 Mass 452 [253 NE 2d 346]; *People* v. *Branch* [1961], 13 App Div 2d 714 [213 NYS2d 535]; *United States* v. *Sawyer* [CA3, 1954], 210 F2d 169), we feel that the Illinois decisions are more in line with what we think is a clear legislative intent in including the term "agent" within the definition of a "sale". The trial judge did not err in refusing the requested instruction.

Motion to affirm is granted.

PEOPLE *v.* COLLINS

CRIMINAL LAW—BAIL—CAPIAS—IMPROPER CONFINEMENT.

Failure of jail record to reflect a docket entry showing the removal of a *capias* previously issued for defendant's failure to appear at the trial of a charge unrelated to the one being appealed, which resulted in the defendant's continued incarceration until the time of trial on the charge now on appeal, did not result in a miscarriage of justice where defendant was represented by counsel throughout the entire trial court proceeding and the record reveals that defendant was credited with all time served in jail prior to the imposition of sentence and that not even after the *capias* had been removed did defendant seek his release on bond.

Appeal from Recorder's Court of Detroit, Daniel VanAntwerp, J. Submitted Division 1 January 12, 1971, at Grand Rapids. (Docket No. 9683.) Decided February 25, 1971.

Harold S. Collins was convicted of entering without breaking. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Luvenia D. Dockett,* Assistant Prosecuting Attorney, for the people.

REFERENCE FOR POINTS IN HEADNOTE

8 Am Jur 2d, Bail and Recognizance § 5.

George G. Matish (*Dorean M. Koenig,* of counsel), for defendant on appeal.

Before: R. B. BURNS, P. J., and FITZGERALD and HOLBROOK, JJ.

PER CURIAM. On September 15, 1969, defendant was arraigned on a charge of breaking and entering a business place contrary to MCLA 1970 Cum Supp § 750.110 (Stat Ann 1970 Cum Supp § 28.305). At that time he was incarcerated in the Wayne County Jail in lieu of a $2,000 bond. Trial counsel was appointed to assist the defendant and on September 22, 1969, preliminary examination was waived and bond was reduced to $1,000 and two sureties. After approximately one month's incarceration the defendant, through his counsel, filed a motion for reduction of bond, October 28, 1969. The motion was denied and on that same day a *capias* was issued against the defendant by a different judge for his failure to appear at trial on another charge.

Defendant and his codefendant were tried by a jury and found guilty of the lesser included offense of entering without breaking, contrary to MCLA § 750.111 (Stat Ann 1970 Cum Supp § 28.306). On March 24, 1970, the defendant was sentenced to a term of four to five years imprisonment. Claim of appeal has been filed on behalf of the defendant, where it is requested that this Court set aside the conviction and discharge the defendant on the grounds that he was illegally detained in the Wayne County Jail on another charge. The people have filed a motion to affirm the conviction and sentence.

After defendant had been incarcerated in the Wayne County Jail for a period of approximately

six weeks, unable to post bond in the amount of $1,000 and two sureties, a *capias* was issued for his failure to appear for trial upon another unrelated charge. The *capias* was removed on December 9, 1969. However, the jail record failed to reflect this docket entry showing the removal of the *capias.*

Defendant contends that due to the failure of the jail record to reflect the docket entry showing the removal of the previously issued *capias,* the defendant remained incarcerated in the Wayne County Jail up until the time he was tried on the breaking and entering charge. For this reason it is contended that the present conviction should be set aside and the defendant discharged. The only issue on appeal which may be relevant to this conviction is that the failure of the defendant to obtain his release prior to the commencement of trial deprived him of the opportunity to work effectively to defend himself.

It should be noted that throughout the entire trial court proceeding, the defendant was represented by counsel. The trial court record does not suggest, nor does the defendant contend that he attempted to seek his release on bond after the *capias* had been removed December 9, 1969. The trial court record does reveal that the defendant was credited with all time served in the Wayne County Jail prior to the imposition of sentence.

We have examined the trial court record which fails to reveal a miscarriage of justice.

The motion to affirm is granted.

PEOPLE *v.* ROLSTON

OPINION OF THE COURT

1. KIDNAPPING—PRELIMINARY EXAMINATION—PROBABLE CAUSE.

   Probable cause existed at the preliminary examination to believe that a kidnapping had been committed and that the defendant had committed the crime where the evidence showed that the defendant, along with another man, handed the victim, a barmaid, a note, she and the defendant's companion went into an unoccupied room in which the victim's employer kept a large sum of money, the defendant joined them outside the bar when signalled to do so by his companion, the barmaid was not seen alive after departing from the bar, she left behind an untended bar and personal belongings, and several hundreds of dollars of her employer's money was missing.

2. CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—COMMENT ON PRIVILEGE.

   The constitutional privilege against self-incrimination protects a defendant from the introduction of evidence at his trial that he remained silent or claimed his Fifth Amendment privilege in the face of an accusation made after he was taken into custody (US Const, Am 5).

3. CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—COMMENT ON EXERCISE—SCOPE OF RIGHT—DEFENDANT TESTIFYING.

   The constitutional privilege against self-incrimination protects a defendant, whether he testifies at trial or not, from the introduction of evidence at his trial that he remained silent

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 443, 444, 447, 449, 450.
[2] 21 Am Jur 2d, Criminal Law §§ 356, 366.
[3, 4] 21 Am Jur 2d, Criminal Law § 358.
[5] 21 Am Jur 2d, Criminal Law §§ 349–354, 360.
[6, 7] 21 Am Jur 2d, Criminal Law §§ 358, 367.
[8] 21 Am Jur 2d, Criminal Law §§ 357–359, 362, 367.
[9] 21 Am Jur 2d, Criminal Law §§ 159–167.

or claimed his Fifth Amendment privilege in the face of an accusation made after he was taken into custody, because it is intolerable that one constitutional right should have to be surrendered in order to assert another constitutional right (US Const, Am 5).

4. CONSTITUTIONAL LAW — DEFENDANT TESTIFYING — PRIVILEGE AGAINST SELF-INCRIMINATION — CROSS-EXAMINATION — SCOPE OF CROSS-EXAMINATION.

A defendant who chooses to testify at his trial subjects himself to cross-examination on what he says, on both inculpatory and exculpatory matters; however, it is not legally relevant that on an earlier occasion he chose to exercise his right against self-incrimination and remain silent (US Const, Am 5).

5. CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—SEVERABILITY.

The right to remain silent is severable, and, therefore, may be exercised on one occasion and waived on another (US Const, Am 5).

6. CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—STATEMENT BEFORE TRIAL—ADMISSIBILITY.

The prosecutor may introduce a statement made by the defendant before the defendant's trial at a time when the defendant chose not to exercise his constitutional right to remain silent, because such a procedure does not penalize the exercise of the constitutional choice to speak or remain silent.

7. CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—EXERCISE BEFORE TRIAL—EVIDENCE OF EXERCISE—ADMISSIBILITY.

Prosecutor's introducing into evidence and reading to the jury a transcript of the defendant's statement to the police in which the defendant exercised his constitutional right against self-incrimination by refusing to answer numerous questions was reversible error, even though the defendant took the stand at trial, because such a procedure chills the exercise of both the pretrial and the trial choices of whether to remain silent.

DISSENT BY GILLIS, J.

8. CRIMINAL LAW — PRIVILEGE AGAINST SELF-INCRIMINATION — DEFENDANT TESTIFYING — WAIVER — SILENCE BEFORE TRIAL.

A criminal defendant who voluntarily takes the stand waives his right against self-incrimination and may be questioned as to

all other relevant facts, including his silence on prior occasions, because to hold otherwise would allow a defendant to fabricate his testimony without fear of impeachment and because the defendant's silence before trial may go to his credibility.

9. CRIMINAL LAW—APPEAL AND ERROR—STANDARD OF REVIEW.
A criminal conviction should be reversed only where it fairly appears that the defendant's rights have been prejudiced.

Appeal from Wayne, John M. Wise, J. Submitted Division 1 February 3, 1970, at Detroit. (Docket No. 5317.) Decided February 26, 1971. Leave to appeal denied June 30, 1971, 385 Mich 760.

Robert Rolston was convicted of kidnapping. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Thomas P. Smith,* Assistant Prosecuting Attorney, for the people.

M. Glenn Grossman, for defendant on appeal.

Before: LEVIN, P. J., and J. H. GILLIS and BRONSON, JJ.

LEVIN, P. J. The defendant, Robert Rolston, and Larry Markham were convicted of kidnapping by a jury.[1] Markham's conviction was affirmed by our Court upon a separate appeal.[2] This is Rolston's appeal; he raises a number of issues, but our disposition makes it unnecessary for us to consider all of them.

---

[1] MCLA § 750.349 (Stat Ann 1954 Rev § 28.581).
[2] See *People* v. *Markham* (1969), 19 Mich App 616, leave to appeal denied (1970), 383 Mich 804.

I.

He contends, firstly, that the evidence presented at his preliminary examination was insufficient to support a finding of probable cause and that he should not have been bound over for trial.[3]

The people's evidence showed that the victim, Mrs. Kathleen Riddell, a trusted and responsible employee of Delaney's Great Lakes Bar, suddenly left her place of work without a word of warning to her employer or anyone else shortly after an exchange of communications with Markham and Rolston, who had earlier entered the bar.

Shortly after taking a seat at the bar, Rolston handed Mrs. Riddell a note. She thereafter accompanied Markham into an unoccupied room near where her employer kept a large sum of money; Markham emerged from the room and signalled Rolston to join him outside—Rolston did so. Mrs. Riddell was not seen alive after her departure from the bar. She left behind an untended bar and her personal belongings. Several hundred dollars of her employer's money was missing.

From these facts the magistrate could justifiably infer that it was more probable than not that her departure from the bar was involuntary, that she was forcibly removed, and he could properly conclude that there was probable cause to believe that the crime of kidnapping had been committed.[4]

---

[3] The defendant's attorney preserved this point for appeal by resisting the people's motion to bind the defendant over following the examination and by moving to quash the information before trial.

The rule in Michigan is that if the people fail to establish probable cause at the preliminary examination the defendant's conviction must be overturned even though additional evidence sufficient to support the magistrate's decision is subsequently developed at the trial. See *People* v. *Kennedy* (1968), 9 Mich App 346.

[4] See *People* v. *Spann* (1966), 3 Mich App 444, 455; *People* v. *Dellabonda* (1933), 265 Mich 486, 490; *People* v. *Karcher* (1948), 322 Mich 158, 163.

II.

Rolston next contends, and we think with merit, that his Fifth Amendment right not to be compelled to incriminate himself was violated when the people were permitted to prove that he chose to exercise that right when the police attempted to question him.

Rolston surrendered to a lawyer on February 7, 1967, who, before turning him over to the police, took a stenographic statement from him. On the following day, February 8, when Rolston was in custody, the police sought to obtain a statement, but he declined to answer any questions, standing on his Fifth Amendment privilege.

Subsequently Rolston's lawyer gave the prosecutor a copy of the statement he had obtained from Rolston on February 7. At the trial the people introduced that statement into evidence. The people were then permitted to prove, over objection, by reading a transcript of the February 8 questioning, that Rolston had exercised his constitutional right to remain silent when the police questioned him; this was error.

It was the people, not defense counsel, who introduced Rolston's February 7 statement into evidence. There is nothing in the February 8 transcript at all inconsistent with the February 7 statement;[5] on February 8 Rolston, except for preliminary questions, refused to answer all questions.

Rolston's exercise of his constitutional privilege was stressed by reading several pages of the February 8 transcript which showed that he had repetitiously answered, "I don't care to answer that" or

[5] *Cf. People* v. *John Willie Williams* (1970), 26 Mich App 218, 226, fn 10, where we said that the rule which prevents questioning a defendant on his exercise of his Fifth Amendment right to remain silent does not preclude questioning him regarding a prior inconsistent statement.

words to that effect, in response to questions like: Do you know Larry Markham? Did you see Larry Markham on the night of January 23? Was Rolston at the Great Lakes Bar that evening? Does Rolston own an automobile? Where had he been since January 23? Did he desire to make a statement regarding the charged offense of kidnapping? Did he know a bar maid who was employed at the Great Lakes Bar? The apparent and only purpose of reading the transcript was to incriminate Rolston by showing that he had refused to answer those pertinent questions.

The constitutional privilege against self-incrimination "protects an accused person from introduction at trial of evidence that he remained silent or claimed that privilege in the face of an accusation made after he was taken into custody". *People* v. *Fry* (1969), 17 Mich App 229, 233.[6] While there is authority in other jurisdictions that this rule does not apply when the defendant takes the stand and subjects himself to cross-examination, and there are statements in opinions of our Court to the same effect,[7] our Court has consistently held (*People* v.

[6] That the rule prohibiting comment on an accused's previous silence or exercise of his Fifth Amendment privilege also applies to pre-custody confrontations and accusations, see *People* v. *Bigge* (1939), 288 Mich 417, 420.

[7] See *People* v. *Russell* (1970), 27 Mich App 654.

In *Russell*, the fact that the defendant had stood on his constitutional privilege was shown during his cross-examination, not, as here, before the defendant took the stand. Rolston did not testify until after the people brought out, during their case in chief, that he had exercised his constitutional privilege.

Also, in contrast with *Russell*, Rolston made no statement before the trial inconsistent with either his trial testimony or his declination to answer questions on February 8; the February 8 transcript does not contradict the February 7 statement introduced by the people.

Further, since Rolston's at-trial defense of coercion was consistent with his February 7 statement, his failure to answer questions on February 8 was not even of probative value.

The statement from *People* v. *Graham* (1971), 29 Mich App 528, quoted in Judge J. H. GILLIS' opinion was one of three alternative grounds of decision; one of the other two being that the defendant

Hicks [1970], 22 Mich App 446; *People* v. *Seales* [1969], 16 Mich App 572; *People* v. *John Willie Williams* [1970], 26 Mich App 218, 230) that the rule of constitutional law which protects an accused person who does not take the stand against proof that he exercised his Fifth Amendment right in the face of accusation protects as well a defendant who exercises his separate constitutional right[8] to take the stand and testify in his own behalf. Relevant in this connection is the principle that it is "intolerable that one constitutional right should have to be surrendered in order to assert another".[9]

An accused person who chooses to take the stand does, indeed, subject himself to cross-examination; what he says as a witness, inculpatory and exculpatory, must be carefully scrutinized—he is no longer

---

himself opened the door to the testimony when he stated on direct examination that he attempted on several occasions to tell the officers his account of how the incident took place and that no one would listen to him, and the remaining reason being that, even if the defendant's constitutional rights had been violated, the error was harmless beyond a reasonable doubt.

In *People* v. *Shugar* (1970), 29 Mich App 139, also cited in Judge J. H. GILLIS' opinion, the fact that the defendant had remained silent at the police station was brought out on direct examination of the defendant by his own attorney. In *Shugar* we said (p 145):

"In the case at bar, in contrast with *Seales*, defendant made no objection to the questions at the time they were asked by the prosecution. Moreover, before the now objected to questions were asked, the defendant's lawyer brought out on direct examination of the defendant that he had exercised his constitutional right to remain silent based upon the advice of counsel. Having explained this to the jury himself, he cannot properly say that the additional questioning by the people prejudiced him."

[8] *Cf. In re Oliver* (1948), 333 US 257, 273 (68 S Ct 499, 507, 92 L Ed 682, 694); *MacKenna* v. *Ellis* (CA5, 1960), 280 F2d 592, 595, *cert den* 368 US 877 (82 S Ct 121, 7 L Ed 2d 78); *Ferguson* v. *Georgia* (1961), 365 US 570 (81 S Ct 756, 5 L Ed 2d 783).

[9] *Simmons* v. *United States* (1968), 390 US 377, 394 (88 S Ct 967, 976; 19 L Ed 2d 1247, 1259). Other cases holding unconstitutional rules that needlessly penalize assertion of constitutional rights include *United States* v. *Jackson* (1968), 390 US 570, 583 (88 S Ct 1209, 20 L Ed 2d 138); *Groshart* v. *United States* (CA9, 1968), 392 F2d 172, 180; *People* v. *Luna* (1967), 37 Ill 2d 299, 308 (226 NE2d 586, 590); *Griffin* v. *California* (1965), 380 US 609, 614 (85 S Ct 1229, 14 L Ed 2d 106).

silent. But it is impertinent, not legally relevant, that on an earlier occasion he made a different choice, that he *then* chose to remain silent.

The right to remain silent is severable, that is, it may be exercised on one occasion and waived on another, or *vice versa, viz.:* the refusal of an accused person to answer questions before trial does not preclude him from taking the stand at the time of trial; on the other hand, even if he makes a statement before the trial he may decline to testify at his trial.[10]

True, if the accused makes a statement before the trial (*e.g.,* Rolston's February 7 statement later turned over to the police), it may be shown in evidence at trial without regard to whether he testifies.[11] This subjects the accused to possible adverse conclusion by the trier of fact based on what the accused said when he did *not* assert the privilege to remain silent; that does not penalize free assertion of this constitutional privilege. It would, however, penalize assertion of this privilege to permit the people to challenge those accused persons who take the stand for asserting it.

It unnecessarily and, therefore, impermissibly chills exercise of both the pretrial and the trial choice of whether to speak or to remain silent and the trial choice of whether to testify, to allow the people to challenge an accused person who testifies in his own behalf by showing—here, even before he took the stand—that before trial (*i.e.,* at a different time and place) he exercised his severable right to remain silent.[12]

---

[10] See *People* v. *James* (1971), 29 Mich App 522.

[11] See *People* v. *James, supra,* where we held that the transcript of a defendant's testimony at his preliminary examination was admissible at his trial even though he did not testify at his trial.

[12] The people have not claimed that the error is harmless. The record is voluminous; accordingly, we have not attempted to evaluate

III.

Rolston raises another issue, one that may arise again upon the retrial. While we now advert to it, we do not think the record is adequate to permit definitive consideration.

Before and after his preliminary examination on February 16, 1967, Rolston shared a cell with one Daniel Brome. Brome testified at the trial that Rolston told him before February 16 that Larry Markham forced him at gunpoint to participate in the kidnapping of Mrs. Riddell; this was entirely consistent with Rolston's trial testimony—indeed his defense was that his participation was coerced.

When Brome attempted to testify concerning certain confidences which Rolston shared with him after February 16, Rolston's attorney objected. He claimed that on February 16 Brome became an agent for the police and that his task was to obtain inculpatory information from Rolston. In this connection it is relevant that Rolston was represented

---

the harmlessness of the error without the benefit of briefs of counsel directed to that issue.

We observe, however, that Rolston's presence during the commission of the crime of kidnapping Mrs. Riddell was admitted by him, as were the essential facts and circumstances of that offense. Rolston's defense was that his participation was coerced by Markham. Whether his defense would succeed turned largely on the jury's appraisal of Rolston's credibility. It would be difficult to say, in a case where the critical issue is credibility, that we are convinced that innuendo of the kind injected by the prosecutor through the reading of the February 8 transcript was harmless beyond a reasonable doubt. See *Harrington* v. *California* (1969), 395 US 250 (89 S Ct 1726, 23 L Ed 2d 284).

If such error is harmless in a case where there is no significant evidence on the critical issue in the case other than the testimony of the defendant and another interested witness (Markham), then the error would, as a matter of law, become harmless "beyond a reasonable doubt" in almost every case; it would be tantamount to saying that the error is never reversible error. The rule of law that the jury, not the appellate or trial court, is the judge of the credibility of the witnesses cuts both ways; we become thirteenth jurors for this purpose only when a motion for a new trial has been filed. See *Dyer* v. *MacDougall* (CA2, 1952), 201 F2d 265, 271, 272 (Frank, J., concurring).

by an attorney throughout the period when he was incarcerated with Brome.

Brome reported to the police on February 16, the day of Rolston's preliminary examination, that Rolston was talking. The record is unclear whether Brome expected or was offered or received any consideration from the people for reporting post-February 16 conversations. At the trial he denied he was motivated by a hope that he would be dealt with more leniently, but in response to questions as to whether it was not a fact that he was hopeful that if he cooperated the police would make a "deal" or give him a "break", he responded that one of the detectives may have said that and, also, that another officer said he "would see what he could do". The charges against Brome were dismissed before Rolston's trial.

Although the people contended at the trial that Brome should be allowed to testify concerning the post-February 16 conversations, the assistant prosecuting attorney eventually announced that he would not, in view of Rolston's lawyer's objections, question Brome further regarding those conversations. Evidence of the conversations was, nevertheless, introduced in response to questions put by Markham's counsel. Parenthetically, while Markham's and Rolston's defenses were inconsistent, no motion for a separate trial was made in Rolston's behalf.

In *Massiah* v. *United States* (1964), 377 US 201 (84 S Ct 1199, 12 L Ed 2d 246), the United States Supreme Court ruled that it was an infringement upon a defendant's Sixth Amendment right to the assistance of counsel to use against him at his trial (p 206) "evidence of his own incriminating words, which Federal agents had deliberately elicited from him [through a codefendant who had been wired for

sound] after he had been indicted and in the absence of his counsel".

Clearly the *Massiah* rule does not protect an accused person from betrayal of information confided before the police become aware of the confidant's willingness to become an informer.[13] It is also clear, however, that, if information is imparted after charges have been lodged against an accused person and he is represented by counsel, its use would not necessarily be justified merely because the information was knowingly confided by the accused to another person, not merely overheard by means of a microphone secretly installed by the police.

In *United States, ex rel. Milani,* v. *Pate* (CA 7, 1970), 425 F2d 6, it was determined that the informer's testimony related only to conversations that took place before he agreed with the police to report further conversations; decision on the question with which we are concerned was, therefore, unnecessary.[14] Nevertheless, the majority of the Seventh Circuit panel declared that admissibility of this variety of informer testimony turns on whether the police encouraged the informer to continue to insinuate himself into the confidence of the accused person or whether they were passive beneficiaries of a totally uninspired effort of the informer. One judge, concurring separately, indicated that he would hold that once the police learn that an accused person represented by counsel is confiding in an informer and they make it possible for the accused to continue so to share his confidences, the informer should be deemed to be the agent of the police even though he is not actively encouraged.

---

[13] *Stowers* v. *United States* (CA 9, 1965), 351 F2d 301; *People* v. *Milani* (1968), 39 Ill 2d 22 (233 NE2d 398).

[14] The Seventh Circuit Court rejected Milani's petition for a writ of habeas corpus. See fn 13 for citation to the earlier opinion of the Illinois Supreme Court affirming Milani's conviction.

In other cases it has been held that the *Massiah* rule applies even when the post-indictment statements obtained by the government agent were not "deliberately elicited by interrogation or induced by misapprehension engendered by trickery or deception".[15]

The issue is one on which we are in doubt. The record in this case is far from clear as to the character of the conversations on February 16 between Brome and the police and the other surrounding circumstances. We think it would be better to defer consideration of the question until it is determined more precisely how passive or encouraging the police were when Brome made it known to them that Rolston was talking.[16]

Reversed and remanded for a new trial.

---

[15] See *Hancock* v. *White* (CA 1, 1967), 378 F2d 479, 482; *People* v. *Milani, supra,* pp 401, 402.

In *Beatty* v. *United States* (1967), 389 US 45 (88 S Ct 234, 19 L Ed 2d 48), the United States Supreme Court reversed *Beatty* v. *United States* (CA 5, 1967), 377 F2d 181. The Fifth Circuit had attempted to distinguish *Massiah* on the ground that the defendant Beatty had sought the interview with the informer while Massiah had been induced to talk by the informer; the Fifth Circuit had declared that the *Massiah* (p 189) "rule only applies to those statements induced or deliberately elicited by officers or their agents from the accused after his indictment while he is without assistance of counsel." The Supreme Court reversed *per curiam* and without opinion citing *Massiah*. We also note that the fact that the informer in *Beatty* went to work for the police before indictment and was allowed to relate pre-indictment conversations was not treated as a relevant factor in determining the admissibility of his post-indictment conversations.

[16] See *Stowers* v. *United States, supra,* where the United States Court of Appeals for the Ninth Circuit refused to infer that Federal officers moved a cellmate to act in their behalf from evidence showing that the cellmate was interviewed by Federal officers on the day before his conversation with the defendant Stowers and was released on bail on the second day after the questioned conversation.

In *Stowers,* as here, the informer and the accused person were cellmates; in *Milani* they were fellow inmates, but the intimacy of sharing a cell was lacking. There was no finding in *Stowers* that the cellmate had agreed with the police to report further conversations with Stowers; in this case, in contrast, the evidence is clear that Brome did agree to report further conversations with Rolston.

BRONSON, J., concurred.

J. H. GILLIS, J. (*dissenting*). Once again Judge LEVIN and I are on opposite ends of the judicial spectrum. Broadly stated, the question presented in Part II of this case is the same as that which divided us in *People* v. *Russell* (1970), 27 Mich App 654.

Although Judge LEVIN purports to distinguish *Russell* in footnote 7 of his opinion, I find the suggested distinctions of no decisional significance. With all deference, I must dissent.

In *Russell,* we held that where a defendant voluntarily takes the witness stand, he waives his right against self-incrimination and may thereafter be questioned as to all other relevant facts, including his silence on a prior occasion. We reasoned that to hold otherwise would allow a defendant to fabricate his testimony on the stand without fear of impeachment under cross-examination. That a defendant remained silent on an earlier occasion, where such silence undermines the credibility of defendant's testimony at trial, is both relevant and legally admissible. See *People* v. *Russell, supra,* p 662; *accord, People* v. *McCrea* (1942), 303 Mich 213; *People* v. *Graham* (1971), 29 Mich App 528.

In the present case, defendant voluntarily took the stand on his own behalf and related the same exculpatory story which had been given to the police by his lawyer on February 24. The February 8 transcript was offered to show that on an earlier occasion, one closer to the time of defendant's arrest, Rolston, although given the opportunity to do so in the presence of his counsel, had nothing to say. The situation is thus comparable to that presented in *People* v. *Graham, supra,* where a unanimous panel of this Court held (p 538):

"The people, after the defendant had rested, called the detective who had talked with the defendant less than six hours after his arrest and gave him an opportunity to tell his story and at that time he told the officer that he had nothing to say. The defendant by placing himself on the witness stand voluntarily placed in issue his credibility. The rebuttal testimony rebutted his claim that he had tried to tell his claimed, true account of the incident but was not permitted to do so. * * * Following the last ruling by our Michigan Supreme Court as set forth in the *McCrea* case, *supra,* we must rule until otherwise mandated that the rebuttal testimony was admissible."

The result in the present case should be the same. And this is true notwithstanding the fact that the February 8 transcript was read into the record as part of the people's case.[1]

More fundamentally, there is an additional reason why I regard admission of the February 8 transcript as not requiring reversal of defendant Rolston's conviction.

It has always seemed to me to be the law—constitutional or otherwise—that we should reverse a criminal conviction only where it fairly appears that defendant's rights have been prejudiced. In short, I am prepared to reverse but only when satisfied that defendant did not receive a fair trial. The words of Mr. Justice Cardozo, recently reiterated in *Dutton* v. *Evans* (1970), 400 US 74, 89, 90 (91 S Ct 210, 220, 27 L Ed 2d 213, 227), are appropriate in the present context:

[1] The February 8 transcript was read at trial after the people had introduced into evidence Rolston's exculpatory statement given to the police on February 24. There was no objection from the defense to a reading of the exculpatory statement. The trial court was of the view that fair play to both sides then required giving the people a chance to show that, on an earlier occasion, defendant remained silent although the natural inclination would have been to relate the same exculpatory story. I share the trial court's view.

" 'There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.' "

The majority reverse defendant Rolston's conviction on the theory that reference to his refusal to answer questions on February 8 impermissibly suggested to the jury that defendant was guilty of the crime charged. In *People* v. *John Willie Williams* (1970), 26 Mich App 218, 229, the Court, *per* Judge LEVIN, quoting *People* v. *Hicks* (1970), 22 Mich App 446, 452, stated the rationale for reversal as follows:

" 'Juries composed of ordinary laymen not trained in the law tend to associate the exercise of the Fifth Amendment privilege with guilt rather than possible innocence and exposure to ambiguous compromising situations.' "

The Court continued (*Williams,* p 230):

"The tacit admission argument is a legally impermissible argument. It is just as impermissible to argue to the jury that it may infer guilt from silence as it would be to argue that it may infer guilt from a failure to take the stand.

* * *

"Howsoever the impermissible innuendo is injected it penalizes the defendant for exercising his constitutional right to remain silent and, therefore, chills exercise of that right."

In this case I find nothing in the record warranting any suggestion that the jury was asked to draw an inference of guilt from defendant Rolston's refusal to answer questions on February 8. In my

view, the possibility of the jury drawing the "impermissible innuendo" was gossamer at best. But for the one permissible reading of the February 8 transcript (reproduced in full in Appendix A), defendant's silence was never mentioned again, either in cross-examination of the defendant by the people or in the people's closing argument. When read as a whole, the transcript expressly indicates that defendant Rolston was silent on the 8th on account of the advice of counsel, not because of any innuendo of guilt. Under these circumstances, a panel of this Court, including my Brother LEVIN, has held that there is no violation of defendant's right to remain silent. See *People* v. *Shugar* (1970), 29 Mich App 139. Again, the result in the instant case should be the same.

Finally, we should not so lightly disregard the trial judge's immediate charge to the jury informing it of defendant's right to remain silent. See Appendix A. Apparently defendant's counsel, who had requested the charge, was satisfied. No motion for a mistrial was ever filed.

As to other issues raised by defendant on appeal, I am of the opinion that they are likewise without merit. This includes the question discussed, but left unanswered, in Part III of the majority opinion.

The trial judge specifically found that Brome was not acting as an agent for the police, that he neither expected, nor was he offered any consideration for reporting post-February 16 conversations. I do not believe, as do the majority, that the record is unclear on this point. Moreover, the trial court's conclusion is supported by record testimony and not clearly erroneous.

I would affirm defendant's conviction.

APPENDIX A

During the colloquy between the trial court and counsel on the question of the admissibility of the February 8 transcript, the trial judge made these comments:

"*The Court:* Let the record indicate that the witness, Inspector Schattler, was about to testify relative to a statement allegedly given to Assistant Prosecutor Mowatt. I may say that this statement is only as to the defendant Rolston. Counsel for defendant Rolston, Mr. Otis, is objecting thereto and asked for a conference with the court at the bench before we adjourned to chambers. This objection is that the statement is not admissible. Also, that he had not received notice of such a statement. The record will show that the statement of defendant Rolston has already been introduced, which was taken by Mr. Otis and presented to the prosecutor's office.

"I agree with you, Mr. Otis, that he has a right not to make a statement and he is informed of that at the time. However, in this particular instance, but had he not made a statement at all, I'll tell you right now, I would not have allowed this type of procedure; but in view of the fact that the defendant has made a statement subsequent to this date, a self-serving statement—even counsel for the defendant indicated it was self-serving—but in view of the fact that he did make a statement in his counsel's office, which was presented to the police department and the prosecuting attorney's office, I'm going to allow the statement that he made if his constitutional rights were protected.

* * *

"*Mr. Otis:* I'm going to ask the court to instruct the jury that Mr. Rolston was under no obligation whatsoever to make a statement.

* * *

"*The Court* (*interposing*): Let me point something out. Your strategy in this cause has been evidence of the defendant and with this you're going to show how your fine client cooperated with the police, gave them a statement that he's an innocent lad.

* * *

"*The Court:* I'm going to allow it in, but I'll instruct the jury he had the right to remain silent."

Thereafter, Inspector Schattler resumed the stand and testified as follows:

"*By Mr. Eggleton* [*assistant prosecutor*]:

"*Q.* Mr. Schattler, at the time that Mr. Rolston [*sic*] was brought before the prosecuting attorney, Mr. John A. Mowatt, was he advised of his constitutional rights?

"*A.* Yes, sir, he was. His attorney was present.

"*Mr. Otis:* That would go to conclusion. If there's a statement, may the statement be read.

"*The Court:* Counsel's position is well taken.

"*Mr. Eggleton:* Thank you, your Honor.

"*Q.* Would you read that portion of that statement regarding the constitutional rights, sir?

"*A.* Should I read it?

"*Q.* Begin reading it and I'll tell you when to stop.

"*A.* 'Statement of Robert Lee Rolston, in the presence of Sheldon Otis, attorney, taken in the office of the prosecuting attorney for the County of Wayne, out-county branch at Westland, Michigan, on Wednesday, February 8, 1967, at about 2:40 p.m., by Mr. John A. Mowatt, assistant prosecuting attorney, in the presence of Inspector Raymond Schattler and Detective Gene Barnes, River Rouge Police Department, Elizabeth J. Ponczek, criminal testimony stenographer.

"'*By Mr. Mowatt:*

"'*Q.* And your full name, Mr. Rolston?

"'*A.* Robert Lee Rolston.

"'*Q*. Is that R-o-l-s-t-o-n? And your age?

"'*A*. 30.

"'*Q*. And your address?

"'*A*. Box 117, Versailles, Indiana.

"'*Q*. My name is John Mowatt. I am one of the assistant prosecuting attorneys of Wayne County. I want to talk to you regarding your conduct and behavior on the evening of January 23 of this year. Do you understand, Mr. Rolston, anything you tell us this afternoon can be used against you on a trial?

"'*A*. Yes, sir.

"'*Q*. You understand that. And your attorney, Mr. Sheldon Otis, is with you?

"'*A*. Yes, sir.

"'*Q*. And you understand, Mr. Rolston, that you don't have to make any answers to my questions until you have consulted with your attorney?

"'*A*. Yes.

"'*Q*. You understand that?

"'*A*. Yes.

"'*Q*. And you also understand that if you are unable to afford an attorney, the County of Wayne will supply you with one?

"'*A*. Yes.

"'*Q*. And has anyone promised you anything to make this statement? I mean to make a statement, to answer my questions?

"'*A*. No.

"'*Q*. Has anyone threatened you in any way to make this statement?

"'*A*. No.

"'*Q*. Do you know a Larry Markham?'

"*Mr. Eggleton:* Thank you, stop right there. I submit this adequately covers the area of advice concerning the constitutional rights of the defendant.

"*Mr. Otis:* I'll object to the speech by the prosecutor, your Honor, and ask that this statement be finished.

"*The Court:* Do you wish to proceed with this statement?

"*A.* Yes.

"*Mr. Eggleton:* Continue on.

"*A.* The last question was:

"'*Q.* Do you know a Larry Markham?

"'*Sheldon Otis* (*interjecting*): Mr. Mowatt, I think I should interject at this point. I advised Mr. Rolston not to make any statement concerning anything other than to give you information concerning his name and address, *et cetera,* and I would appreciate if you would respect that instruction. I have also asked the River Rouge Police, as well as the FBI agents who have participated in this, not to question, interrogate, interview or in any way investigate the person of Mr. Rolston without my presence and so far they have all cooperated in respecting that wish, and I would appreciate the same from the Wayne County prosecutor's office.

"'*Q.* Well, you do not desire Mr. Rolston to answer any of my questions, except what he has already answered, is that it?

"'*Sheldon Otis:* That is correct, unless if you choose to ask questions and we would see whether on individual questions I would advise him to answer, that's up to you.

"'*Q.* (*to Robert Lee Rolston*): Do you know a Larry Markham?

"'*Sheldon Otis:* (No response.)

"'*A.* (*by Robert Lee Rolston*): (No response.)

"'*Q.* You don't want—

"'*Sheldon Otis* (*interrupting*): Let me put it this way. If I, if I advise Mr. Rolston, I will do so orally, and my silence means that he does not choose to answer any questions.

"'*Q.* (*to Robert Lee Rolston*): Do you know a Larry Markham?

"'*A.* (*by Robert Lee Rolston*): (No response.)

"'*Sheldon Otis:* (No response.)

"'*A.* (*by Robert Lee Rolston*): I don't care to answer that.

"'*Q.* Did you see a Larry Markham on that particular night, January 23?

"'*A.* I don't care to answer that.

"'*Q.* Were you at the bar, Great Lakes Bar in River Rouge that evening?

"'*A.* I don't care to answer that.

"'*Q.* Do you own an automobile?

"'*A.* Can't answer that.

"'*Q.* You do not want to answer my questions, is that right? Where have you been since January 23 of this year?

"'*A.* I can't answer that.

"'*Q.* You understand that you are being charged with the crime of kidnapping?

"'*A.* Yes.

"'*Q.* You want to make any statement regarding that particular charge?

"'*Q.* Did you know a barmaid who was employed at the Great Lakes Bar?

"'*A.* I can't answer that.

"'(*Stenographer to Robert Lee Rolston:* "I can't" or "I don't care to answer that?")

"'*A.* I ain't, no.

"'*Q.* Were you employed for—

"'*A.* (*interrupting*): Can't answer that.

"'*Mr. Mowatt:* Might as well—okay.'

"That's it. That's the end of the statement.

"*Mr. Eggleton:* Thank you. Now, it's your testimony this statement was taken two weeks before the other statement was brought in by Mr. Otis. Is that correct?

"*A.* Yes, sir, that's correct.

"*Q.* Now, sir, as to the additional clothing taken from Mr. Markham, did you bring those officers in today?

"*A.* Yes, sir, I have them here.

"*Q.* Thank you, sir, you may cross-examine.

"*Mr. Otis:* Your Honor, before proceeding with any questions, I would ask the court to appropriate instructions concerning this matter at this time.

"*The Court:* Ladies and gentlemen of the jury, under the United States Constitution, anyone who is in custody charged with an offense or investigation of an offense, has the constitutional right to remain silent and it's not to be used in any manner whatsoever. So, if a person remains silent and doesn't wish to answer any questions, they have the constitutional right to take that position, and I am instructing you regarding this at this time because of the statement that was just made into the record.

"*Mr. Otis:* Thank you, your Honor."

STATE HIGHWAY COMMISSION *v.* L & L CONCESSION COMPANY

1. EMINENT DOMAIN—PROPERTY VALUE—BASIS—EFFECT OF CONDEMNATION.

   The value of an interest in property is determined without regard to any enhancement or reduction of the value attributable to condemnation or the threat of condemnation.

2. PROPERTY—LEASEHOLDS.

   A leasehold and rights derived from a leasehold constitute "property"; just compensation must be made or secured for a taking of such property.

3. EMINENT DOMAIN—GOING-CONCERN VALUE—COMPENSATION.

   Compensation is not ordinarily allowed for the goodwill or going-concern value of a business operated on real estate which is being condemned.

4. EMINENT DOMAIN—BUSINESS'S VALUE—COMPENSATION.

   Recovery is awarded for the value of a business destroyed by condemnation.

5. EMINENT DOMAIN—GOING-CONCERN VALUE—COMPENSATION.

   The intangible character of a business's going-concern value does not preclude compensation for its taking.

REFERENCES FOR POINTS IN HEADNOTES

[1] 27 Am Jur 2d, Eminent Domain § 266 *et seq.*
[2, 7, 8, 15] 27 Am Jur 2d, Eminent Domain §§ 352–355.
[3, 5–8, 10, 11, 15] 27 Am Jur 2d, Eminent Domain §§ 287, 353.
[4, 9–11] 26 Am Jur 2d, Eminent Domain § 160.
27 Am Jur 2d, Eminent Domain §§ 285–287.
[7, 8, 12, 15] Elements and measure of lessee's compensation for taking or damaging leasehold in eminent domain. 3 ALR2d 286.
[12, 13] 27 Am Jur 2d, Eminent Domain §§ 247, 466.
[14] 27 Am Jur 2d, Eminent Domain §§ 408, 409, 471.

6. EMINENT DOMAIN—DAMAGES—GOING-CONCERN VALUE.

An owner or lessee may recover going-concern value where the condemned property cannot realistically be valued apart from the business there conducted or, as it is sometimes said, the business for which the property is best "adapted."

7. EMINENT DOMAIN—LEASEHOLDS—GOING-CONCERN VALUE—COMPENSATION.

Value of goodwill or loss of going-concern should not be awarded as separate damages in a condemnation case where the value of the leasehold taken already reflects the value of the business operated on leasehold, because such an award would be redundant.

8. EMINENT DOMAIN—LEASEHOLDS—GOING-CONCERN VALUE—COMPENSATION.

Going-concern value must be awarded to a lessee in a condemnation case where the valuations of the estates of the lessor and of the lessee in the land condemned do not reflect the going-concern value of the lessee's business.

9. EMINENT DOMAIN—BUSINESS'S VALUE—LOSS OF LOCATION—COMPENSATION.

The loss of a particular business location, caused by condemnation, may destroy business altogether, for want of access to any other suitable location; "just compensation" requires that whatever injury has been suffered be compensated.

10. EMINENT DOMAIN—DAMAGES—GOING-CONCERN VALUE—LOSS OF BUSINESS.

A lessee may recover for the loss of going-concern value caused by condemnation if he can establish that business conducted on the leased premises cannot be transferred to another location.

11. EMINENT DOMAIN—DAMAGES—GOING-CONCERN VALUE—LOSS OF BUSINESS.

Lessee, a concession operator, was entitled to compensation for the going-concern value of its business operated at lessor's racetrack, which was condemned, where the value of the concession was related to the patronage of the racetrack and flowed from the lessee's locational advantage and monopoly position, not conventional customer goodwill resulting from cultivation of customers by the lessee, if the lessee can prove on remand that business it conducted at the racetrack could not be transferred to another location.

12. EMINENT DOMAIN—LEASEHOLDS—VALUATION—UNITARY VALUATION—DIVISION OF AWARD.

Commissioners in a condemnation case may not separately appraise a lessor's and a lessee's interests, but must make a unitary appraisal of the value of the property as a whole; it is the duty of the courts to divide the award between the claimants.

13. EMINENT DOMAIN—LEASEHOLDS—DIVISION OF AWARD.

An award in an eminent domain case should not be divided between the lessor and the lessee of the condemned land where the award does not include any amount attributable to the lessee's interest because the Highway Commission successfully and erroneously blocked the lessee's attempt to introduce evidence concerning the lessee's interest.

14. EMINENT DOMAIN—INSTRUCTIONS TO COMMISSIONERS—APPEAL AND ERROR.

Lessee's failure to object to the instructions given to the commissioners in an eminent domain case did not constitute a waiver of its right to object to the court's refusal to entertain its proofs where the court had already ruled that the lessee would not be allowed to present its case.

15. EMINENT DOMAIN — LEASEHOLDS — LESSEE'S INTEREST — GOING-CONCERN VALUE.

Judgment on an award in a condemnation case is affirmed as to the lessor of the condemned land and remanded as to the lessee of the condemned land where the trial court had excluded evidence concerning the value of the lessee's interest in the land.

Appeal from Kent, John H. Vander Wal, J. Submitted Division 3 March 4, 1970, at Grand Rapids. (Docket No. 6799.) Decided February 26, 1971.

Condemnation proceedings by the State Highway Commission against Ora, Inc., and L & L Concession Company, lessee of defendant Ora. Condemnation award to Ora, Inc. L & L Concession Company appeals. Affirmed as to Ora, Inc.; remanded with instructions as to L & L Concession Company.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Louis J. Caruso* and *Stanley D. Steinborn,* Assistants Attorneys General, and *Roger D. Anderson,* Special Assistant Attorney General, for plaintiff.

Warner, Norcross & Judd (by *Harold S. Sawyer*), for defendant Ora, Inc.

Shapero, Shapero & Cohn (by *Walter Shapero*), for defendant L & L Concession Company.

Before: R. B. BURNS, P. J., and FITZGERALD and LEVIN, JJ.

LEVIN, J. The State Highway Commission commenced an action to condemn 22 acres of a parcel of land.[1] The condemned land had been improved with a half-mile automobile racing track and grandstands, known as the Grand Rapids Speedrome. Ora, Inc. owned the property. L & L Concession Company had acquired the lessee's interest in a food and souvenir concession lease made by Ora as lessor. The lease gave L & L the exclusive right to sell food and souvenirs in the grandstand until January 1, 1976.

At the hearing before the commissioners the judge refused to allow L & L to prove the existence and value of the lease and L & L made an offer of proof.[2]

---

[1] These proceedings were initiated by the Michigan State Highway Commission pursuant to MCLA § 213.171, *et seq.* (Stat Ann 1958 Rev § 8.171, *et seq.*)

[2] L & L's offer of proof covered the lease, the physical location and layout of the concession area, a description of the equipment used in operating the concession, the food and merchandise sold, the hours per day and the number of days per week and weeks per year the concession had been operated, the labor employed, the amount spent by L & L for equipment, repairs, maintenance and improvements, gross concession receipts, rentals paid to Ora, operating profits and other financial information, information concerning concession

The judge declared that the lease was, by its terms, to be operative only as long as Ora was conducting races, that Ora had ceased to operate the track and, therefore, L & L's interest was valueless.[3]

The commissioners made an award of $168,950, and a judgment on the award for that amount was entered in favor of Ora. L & L appealed. Our Court granted a stay of proceedings pending the appeal.

Paragraph 7 of the lease provided:

"Second party [L & L] shall conduct the concession business at the leased premises only at such times as races are being conducted at the racetrack premises. Second party, at its option, may operate the concession at such times as other public events are being conducted at the race track premises."

Ora ceased to operate the track in July, 1966, several months before the taking in September, 1966. But the decision to close the track appears to have been attributable to the impending condemnation.[4] It is an established rule of condemnation law

operations at "similar operations of L & L and others", the history of the operation, the "special adaptability of concession to the business being conducted, and probability of continuance and expectancy of renewal of lease", the "destruction of business and lack of access to substitute", the "valuation of concession lease agreements like the one in question and practices in the trade", the valuation of such lease agreements generally and description of concession business generally, the fair market value based on profitability, and the reasonable rental value of comparable leases.

L & L also offered to prove that the fair market value for cash of the lease in question as well as similar leases is a multiple (approximately 3) of a percentage (approprixmately 25%) of the annual gross receipts of the concession; and that, in this case, the value by this method is approximately $26,000.

[3] The state agreed to pay L & L's moving costs and no issue is presented concerning that element of damage.

[4] There was testimony that representatives of the highway commission had indicated from time to time beginning in 1965 that the property would be taken on various dates in 1966. An Ora representative testified that racing events must be programmed in advance and that it was losing drivers because it had become known that it would not be operating the track in 1967. The uncertainty as to

that the value of an interest in property is to be determined without regard to any enhancement or reduction of the value attributable to condemnation or the threat of condemnation.[5]

Viewing the matter, as we must, as if on the date of taking there had been no threat of condemnation, there is no record evidence which would support a finding that the lease was valueless because, for reasons not attributable to the threatened condemnation, the racetrack would not be operated at any time during the remaining nine years of the term of L & L's lease.

Paragraph 7 of the lease was not a condemnation clause, it did not confer on Ora the right to cancel L & L's lease in the event of condemnation or for any other reason. The lease rental was a percentage of L & L receipts. Paragraph 7 addresses itself to the question of the extent of L & L's duty to operate the concession. Such clauses are common in percentage leases.[6] Without such a clause, it might be contended that L & L was obligated to operate the concession at times other than when races were being held at the track.

The agreement of the parties, as expressed in paragraph 7, was that L & L would be obligated to operate the concession only during such times as

---

the date of the taking and the attendant difficulties in retaining drivers appear to have been responsible for the decision to close in July 1966.

[5] See, generally, 27 Am Jur 2d, Eminent Domain, §§ 282, 283, but see, also, § 436.

See *United States* v. *Virginia Electric & Power Company* (1961), 365 US 624, 635, 636 (81 S Ct 784, 5 L Ed 2d 838); *McGovern* v. *City of New York* (1913), 229 US 363 (33 S Ct 876, 57 L Ed 1228); *In re Urban Renewal, Elmwood Park Project* (1965), 376 Mich 311; *Matina Holding Corporation* v. *State* (1969), 31 App Div 2d 1004 (299 NYS2d 95, 96). This rule has been codified in § 29 of the new highway condemnation act, MCLA § 213.389 (Stat Ann 1970 Cum Supp § 8.261[29]).

[6] See Note: The Lessee's Obligation Under a Percentage Lease, 60 NW L Rev 677 (1956).

races were being held and that it might operate the concession at other public events at its option.

L & L does not contend that Ora was under a duty to operate the racetrack and thereby enable L & L to profit from the operation of its food and souvenir concession; accordingly, there is no need to consider whether such a covenant might properly be implied.[7] Even if Ora was not under an obligation to operate, nonoperation of the track would not terminate L & L's concession which, by its terms, continued until a date nine years after the taking.

The possibility that for economic or other reasons the racetrack might not be operated during some portion of the nine-year period must, indeed, be considered in evaluating L & L's concession. That contingency does not render it impossible to determine the value of the concession with reasonable certainty.[8]

It is a "settled rule in Michigan that a leasehold, and rights derived from a leasehold, constitute

---

[7] L & L's failure to make that contention should not preclude it from doing so, if it becomes pertinent, on remand. Although we abhor piecemeal appeals, we cannot expect counsel to argue complex issues not essential to our disposition merely because they may become relevant on remand or because the unargued issue provides an alternative ground in support of the appeal.

[8] Even a tenant at will or a tenant who holds his tenancy subject to a right of termination held by the lessor has an estate in land and is entitled to be compensated for the value of that interest in the event of condemnation. The uncertainty as to the length of the tenancy affects the value of the leasehold, it does not operate as a condemnation clause to deprive the tenant of any compensation at all. *In re Widening of Gratiot Avenue* (1940), 294 Mich 569, 574; 4 Nichols, Eminent Domain, § 12.42(3), p 320.

Cf. State Highway Commissioner v. *Eilender* (1961), 362 Mich 697, 700, holding that where rezoning is "a reasonable possibility [citation omitted] this possibility should be assigned a monetary value in fixing the value of the property as of the time of the taking." See, generally, *Allison* v. *Chandler* (1863), 11 Mich 542, 554; *Purcell* v. *Keegan* (1960), 359 Mich 571, 576.

'property', for the taking of which just compensation must be made or secured."[9]

Ordinarily no compensation is allowed for the goodwill or going-concern value of a business operated on the real estate being condemned.[10] This view has been strongly criticized by commentators who argue that "the owner has no assurance after the taking that he can again combine [at a new location] all the factors of production into his previously efficient and profitable operation."[11] However, since the state but rarely intends to operate the

---

[9] *Lookholder* v. *State Highway Commissioner* (1958), 354 Mich 28, 35–37.

It is unimportant whether L & L's interest is deemed a lease or a license (see *United States* v. *Smoot Sand and Gravel Corporation* [CA 4, 1957], 248 F2d 822; see, generally, 5 Restatement, Property, §§ 565, 566; 26 Am Jur 2d, Eminent Domain, § 177, pp 854, 855, 866; *State Highway Commissioner* v. *Fegin* [1966], 2 Mich App 698, 701); it is transferable property and, as such, the state may not take it without paying for it.

[10] See *In re Edward J. Jeffries Homes Housing Project* (1943), 306 Mich 638, 651, where the Court said: "The loss of good will is not an element of compensation where the business is not taken for use as a going concern. * * * A good plumber should be able to continue his business in almost any location and do as well as he formerly did." Similarly, see *In re Slum Clearance* (1952), 332 Mich 485, 496, 497.

[11] Aloi and Goldberg, A Re-Examination of Value, Good Will and Business Losses in Eminent Domain, 53 Cornell L Rev 604, 636; see, also, pp 615, 618, 619, 625 (1968); Spies and McCord, Recovery of Consequential Damages in Eminent Domain, 48 Va L Rev 437, 452–454 (1962); Slavitt, Inequities and Injustices of Condemnation Acquisitions, 40 Conn B J 11, 14 (1966); Slavitt, More Inequities and Injustices of Condemnation Acquisitions, 43 Conn B J 89, 96–103 (1969); McCormick, The Measure of Compensation in Eminent Domain, 17 Minn L Rev 461, 482 (1933); Phay, the Eminent Domain Procedure of North Carolina: The Need for Legislative Action, 45 NC L Rev 587, 626 (1967); Searles and Raphael, Current Trends in the Law of Condemnation, 27 Fordham L Rev 529, 553 (1958–1959); Comment, Consequential Damages and "Just Compensation" in Federal Condemnations, 18 U of Chicago L Rev 349 (1950–1951); Comment, Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses, 67 Yale L J 61, 96 (1957). See, also, Sax, Takings and the Police Power, 74 Yale L J 36, 63 (1964); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv L Rev 1165 (1967); Note, An Act to Provide Compensation for Loss of Goodwill Resulting from Eminent Domain Proceedings, 2 Harv L Legis 445 (1966).

business, the courts have been unwilling to award compensation unless the destruction of the business was a necessary consequence of the condemnation.

Where the condemnee's business has been destroyed, recovery of the value of the business has been awarded. In *Jackson* v. *United States* (Ct Cl, 1952), 103 F Supp 1019, 1020, the government redefined certain restricted military proving ground areas to include fishing grounds where a commercial fisherman had been licensed by the State of Maryland to operate All other locations had been appropriated by other fishermen and, therefore, the fisherman could not secure a license to fish elsewhere. In requiring the government to compensate the fisherman for the loss of his livelihood, the court declared that he "had a sort of property right in his fishing ground, and that the Government took that property from him". Similarly, see *United States* v. *Smoot Sand and Gravel Corporation* (CA 4, 1957), 248 F2d 822, 828, holding that whether the rights granted by a state statute to a riparian landowner in sand and gravel under tidal waters "is called a revocable though unrevoked 'license', or a 'profit a prendre' is immaterial. The label does not matter; the substance cannot be taken away by the United States even for a public use without the owner being made whole."

In *State, ex rel. Mattson,* v. *Saugen* (1969), 283 Minn 402 (169 NW2d 37), the Supreme Court of Minnesota held that the owner of a liquor license was entitled to recover for the destruction, as a result of condemnation proceedings, of the going-concern value of his business where he had proven that he was unable to transfer the license to a new location and there was no evidence that he could not continue to operate the business successfully at the premises being condemned.

In a carefully reasoned opinion, the Minnesota Court declared that the "intangible character of going-concern value does not preclude compensation for its taking." The Court relied in part on *Kimball Laundry Company* v. *United States* (1949), 338 US 1, 5, 13, 14 (69 S Ct 1434, 93 L Ed 1765, 7 ALR2d 1280). In *Kimball,* the Federal government, during a war, had temporarily taken a laundry because it needed the facility to launder military uniforms. The temporary take-over destroyed the goodwill and going-concern value (route lists) of the business. Although the government had no need for the route lists, they had a "transferable value" and the government, therefore, was required to compensate the owner for the destruction of the going-concern value of his business: "this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use."

In so holding, the *Kimball* Court referred to public utility condemnation cases, where the condemning authority has been required to pay for going-concern value, and observed:

"The rationale of the public-utility cases, as opposed to those in which circumstances have brought about a diminution of going-concern value although the owner remained free to transfer it, must therefore be that an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable 'taking' of property. (See *United States* v. *General Motors Corp.* [1945], 323 US 373, 378 [65 S Ct 358, 89 L Ed 311, 318, 156 ALR 390]; *cf. United States* v. *Causby* [1946], 328 US 256, [66 S Ct 1062, 90 L Ed 1206]). If such a deprivation has occurred, the going-concern value of the business is at the government's disposal whether or not it

chooses to avail itself of it. Since what the owner had has transferable value, the situation is apt for the oft-quoted remark of Mr. Justice Holmes, 'the question is what has the owner lost, not what has the taker gained. *Boston Chamber of Commerce* v. *City of Boston* [1910], 217 US 189, 195 (30 S Ct 459, 54 L Ed 725, 727)."

In a large number of cases owners and lessees have recovered going-concern value where the condemned property could not be realistically valued apart from the business there conducted, or, as it is sometimes said, the business for which the property is best "adapted".[12]

In this case L & L claims that it can prove both that its concession at the Speedrome had a transferable value and that the business it there conducted could not be transferred to another location.

The going-concern value of L & L's business is not related to customers L & L cultivated but to the

---

[12] *In re Grand Haven Highway* (1959), 357 Mich 20, 27; *In re Widening of Michigan Avenue* (1937), 280 Mich 539, 550, 551; *St. Agnes Cemetery* v. *State* (1957), 3 NY2d 37 (163 NYS2d 655); *City of St. Louis* v. *Union Quarry & Construction Company* (Mo, 1965), 394 SW2d 300, 306; *Phillips Petroleum Company* v. *City of Omaha* (1960), 171 Neb 457, 477 (106 NW2d 727, 739); *Todd* v. *United States* (Ct Cl, 1961), 292 F2d 841; *United States* v. *Eden Memorial Park Association* (CA 9, 1965), 350 F2d 933, 935; *State Highway Commissioner* v. *Hessell* (1967), 5 Mich App 559, 564; *State Highway Commissioner* v. *Hahn* (1968), 380 Mich 115, 117; *State Highway Commissioner* v. *Green* (1967), 5 Mich App 583, 586, 589; *State Highway Commissioner* v. *Miller* (1967), 5 Mich App 591, 595, 596.

Although it is sometimes said that the sum of the parts cannot be greater than the whole, that mathematical concept cannot supersede the constitutional requirements of "just compensation". Thus, if a landlord has a favorable lease this is to be reflected in arriving at the fair market value of his property, although there may be a tendency to avoid the resulting problems by capitalizing the rent payable under the lease as if it were the current rental value. The excess of the actual rent over the current rental value is a separate segment of value to be capitalized and paid for above and beyond a fair market value based on the capitalization of current rental value. See Polasky, The Condemnation of Leasehold Interests, 48 Va L Rev 477, 490 (1962); 1 Orgel on Valuation Under Eminent Domain (2d ed), § 123.

patronage of the racetrack; the concession gives L & L a monopoly on food and souvenir sales at the Speedrome. The value of the concession flows from locational advantage and L & L's monopoly position at that location, not conventional customer goodwill.[13] The value flows from an "adaptation" of the grandstand to a use for which it is suited. Viewed from that perspective, allowing compensation for the value of the concession is consistent with the case law which recognizes that in valuing real estate for condemnation purposes it is proper to include value attributable to a use for which the real estate is adapted.

The efforts to limit *Kimball* to temporary takings elides the central meaning of that case.[14] The Federal government was not required to pay for the route lists because the plant was only temporarily taken or because they represented customer goodwill but because their value was destroyed by the taking. The circumstance which caused the destruction of the value of the route lists was the temporariness of the taking which precluded construction and outfitting of a replacement plant. L & L claims that, given the opportunity to prove its case, it can provide comparable assurances that the value for which it seeks compensation has been destroyed, not saved to its advantage elsewhere.

In the case of *In re Park Site on Private Claim 16, City of Detroit* (1929), 247 Mich 1, 4, the city had

---

[13] It would be an oversimplification to say that L & L did not enjoy the benefits of customer goodwill because it exploited its locational advantage and the goodwill built by the operators of the racetrack. To the extent that L & L's locational advantage and monopoly position gave it an opportunity to exploit that goodwill, it may have enjoyed and appropriated an aspect of that goodwill.

[14] See *State, ex rel Mattson,* v. *Saugen* (1969), 283 Minn 402 (169 NW2d 37), fn 13; Comment, Consequential Damages and "Just Compensation" in Federal Condemnations, 18 U of Chicago L Rev 349, 353, 354 (1950–1951).

condemned the land and building operated by the Belle Isle Coliseum Company. The property was operated by the coliseum company under a lease from a private property owner. The unexpired term of the lease was 24 years. The question presented was whether the coliseum company was entitled to recover damages for business losses in addition to the $280,000 which the property owner (lessor) and the coliseum company (lessee) had before the trial agreed was "the value of the leasehold interest of the Belle Isle Coliseum Company". In holding that prospective profits could not be recovered, the Supreme Court ruled (p 3) that "all of the damages recoverable in this case are included in the value of the leasehold interest for which the lessee has received payment". The Court observed:

"In estimating the value, it is proper to consider the location of the premises, their special adaptability to the business there being conducted, the length of time it has been established, its earnings and profits, the unexpired term of the lease, and every other fact that may affect its value. All of these matters go to *enhance the value of the lease.* They are not substantive elements of damages in condemnation proceedings.

"In the instant case, the lessee stipulated that the value of its leasehold interest was $280,000. The profits of the business, now the subject of this suit, are included in the stipulated value of the leasehold, for which it has received payment from the lessor." (Emphasis supplied.)

Thus, in many cases, as in the case of the *Belle Isle Coliseum,* where the value of the leasehold as an estate in land and the value of the business there conducted cannot readily be separated, the valuation ascribed to the leasehold may reflect the value of the business there operated. In such a case it is

entirely sound to refuse to award as a separate element of damages anything for loss of going-concern value or goodwill; to do so would be redundant.[15] But where the valuations of the estates of the lessor and of the lessee in land do not reflect the going-concern value of the lessee's business there operated, then, as in *State, ex rel. Mattson,* v. *Saugen, supra,* and the other cases cited, the going-concern value can, without making the total damages awarded redundant, and, if full compensation is to be paid, must be determined and awarded to a businessman whose business has been destroyed by the taking.

"Nothing can be fairly termed just compensation which does not put the party injured in as good a condition as he would have been if the injury had not occurred."[16]

The principle here applicable was recognized in an early Michigan case, *Grand Rapids & I. R. Co.* v. *Weiden* (1888), 70 Mich 390, 395, where our Supreme Court declared:

"Both of the appellants were using their property in lucrative business, in which the locality and its

---

[15] See, also, *Mitchell* v. *United States* (1925), 267 US 341, 345 (45 S Ct 293, 69 L Ed 644), where there was no finding that the government took the business, and where the Court concluded, therefore, that any destruction of the business would have been an unintended incident of the taking. The Court observed that the special adaptability of the land for use in a particular business is an element to be considered in determining just compensation and that "doubtless such special value of the plaintiff's land was duly considered."

[16] *In re Widening of Bagley Avenue* (1929), 248 Mich 1, 5. Quoted approvingly in *In re Grand Haven Highway* (1959), 357 Mich 20, 28. Similarly, see *State Highway Commissioner* v. *Eilender* (1961), 362 Mich 697, 699.

Const 1963, art 10, § 2 provides:

"Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

surroundings had some bearing on its value. Apart from the money value of the property itself, they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. *There may be cases when the loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it. Whatever damage is suffered, must be compensated.* Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possessions by making up to them the whole of their losses." (Emphasis supplied.)[17]

In its offer of proof, L & L offered to prove both "destruction of business and lack of access to substitute". It will, of course, be for the trier of fact to determine on remand whether the business conducted by L & L at the Grand Rapids Speedrome was transferable to another location, that is to say, the extent to which, if at all, the business was destroyed by the condemnation of the Speedrome.

It is clear on this record that nothing was included in the computation of the $168,950 award made to Ora in respect to the going-concern value of L & L's concession business. The appraisers used the three

[17] In later cases the Court has said that damages may not be recovered, on the authority of *Weiden*, for "loss of profits" due to interruption of business and that in the case of "interruption of business" the recovery will be limited to the amount of the "expenses" attributable to the interruption. *In re Grand Haven Highway* (1959), 357 Mich 20, 31. Such statements cannot properly be read as precluding recovery of damages in the kind of case alluded to in the *Weiden* opinion, where the "loss of a particular location may *destroy business altogether*, for want of access to any other that is suitable for it." (Emphasis supplied.)

L & L is not asking that it be compensated for loss of profits but for the value of the concession; no doubt evidence of the price for which the concession could have been sold will be the best evidence of that value.

traditional approaches in establishing their appraisals: comparable sales,[18] replacement cost,[19] and capitalization of economic rent.

In establishing an economic rent for the Grand Rapids Speedrome for the purpose of arriving at their appraisals of its value, Ora's and the state's appraisers treated the rent paid by L & L to Ora as the economic rent of the space rented to L & L. It is, of course, true that Ora might itself have operated the concession instead of leasing it to an independent operator, such as L & L. And, without regard to whether it had done so, the appraisers might, in capitalizing income, have capitalized the income deprived or that might be derived from the operation of the concession as well as the racetrack. But they did not, they capitalized only the rent paid by L & L which did not reflect the going-concern value of the concession business.

This brings us to the rule of *State Highway Commissioner* v. *Woodman* (1962), 366 Mich 385, 392, 393, where the Court held that under the relevant statute[20] the commissioners may not separately appraise the lessor's and lessee's interests but, rather, must make a unitary appraisal of the value of the property as a whole, and that it is for the court to divide the award among the several claimants.

On the authority of *Woodman*, the highway commission contends that, in the event we decide that

[18] While comparable sales of other racetracks were considered by the appraiser, there is nothing in the record that would justify a conclusion that those sales figures reflected the going-concern value of concessions operated at those tracks. Moreover, the appraisers testified that they gave little weight to comparable sales because each track is unique in construction and location.

[19] L & L's concession grants it the right to conduct its business in a space 12 feet by 80 feet, situated underneath the grandstand "together with such additional space situated at said racetrack premises as may be mutually agreed upon by the parties." Manifestly the value of the physical space occupied by L & L was nominal. See fn 21.

[20] MCLA § 213.189 (Stat Ann 1958 Rev § 8.190).

L & L is entitled to be compensated, the $168,950 award should be apportioned between Ora and L & L. Ora responds, we think correctly, that this does not make sense because the $168,950 award does not include any amount attributable to L & L's interest.[21]

The State Highway Commission, having succeeded in excluding any evidence concerning the value of L & L's concession, should not be heard to argue that the award made by the commissioners includes some amount in respect to the going-concern value.

The appraisal of the separate interests of Ora and L & L could, and, perhaps, should have been made at the same time and a lump sum awarded to be apportioned between them by the court. However, even though the state is willing to relitigate the entire case, it would be an undue burden on Ora to require it to relitigate the value of its interest in order to preserve a procedural point under the circumstance that the value ascribed to Ora's interest does not reflect any amount attributable to the going-concern value for which L & L seeks compensation. The product of many days of trial is not to be lightly disturbed.[22]

---

[21] The lease rental was 25% of the food and souvenir receipts plus 1¢ per package on cigarettes and nothing on cigars. If L & L had a favorable lease—if the percentage rental it was obligated to pay was less than the current rental value of the concession—then part of the amount awarded Ora based on a capitalization of current rental value would be apportionable to L & L. See *Pierson* v. *H. E. Leonard Furniture Co.* (1934), 268 Mich 507; see, also, *In re Widening of Michigan Avenue, supra,* fn 12; 4 Nichols, Eminent Domain, § 12.42(3), p 314 *et seq.* But the amount capitalized was the rent actually paid by L & L.

L & L does not claim that the rent it paid Ora was less than it would have to pay elsewhere, but rather, although the lease had a transferable value, that the business it was conducting on Ora's premises under the lease could not be transferred to another location and, thus, was destroyed by the condemnation.

[22] *Western Michigan University Board of Trustees* v. *Slavin* (1968), 381 Mich 23, 26.

Our disposition of this case makes it unnecessary to consider whether the alleged failure of the state to make an offer to L & L deprived the court of jurisdiction to decide the controversy.[23]

There is no merit in the highway commission's contention that L & L waived its right to object to the refusal of the court to entertain its proofs because it did not object to the instructions given to the commissioners. When the case was submitted to the commissioners and the court instructed them in that regard, the court had already ruled that L & L would not be allowed to prove its case. It would have been entirely superfluous for L & L to object to the instructions after the court had refused to allow it to present any proofs.

The judgment on the award is affirmed as to Ora, Inc., and the cause is remanded for further proceedings to determine the amount of compensation payable by the State Highway Commission to L & L Concession Company. Costs to L & L Concession Company.

All concurred.

---

[23] *In re Petition of Rogers* (1928), 243 Mich 517, 521, 522; *State Highway Commissioner* v. *Newstead* (1953), 337 Mich 233, 243, 244; *Lookholder* v. *State Highway Commissioner, supra,* fn 9, p 37. But see *State Highway Commissioner* v. *Ottawa Circuit Judge* (1954), 339 Mich 390, 396.

TROPPI *v.* SCARF

1. NEGLIGENCE—PHARMACISTS—STANDARD OF CARE—LIABILITY.

   A pharmacist is held to a very high standard of care in filling prescriptions; a pharmacist is liable for the harm resulting to a purchaser when he negligently supplies a drug other than the one requested.

2. NEGLIGENCE—PREGNANCY—BIRTH CONTROL PILLS—COMPENSABLE LOSS.

   Plaintiffs' complaint for damages as a result of plaintiff wife's becoming pregnant caused by defendant pharmacist's incorrectly filling an order for birth control pills stated a claim on which relief could be granted because pregnancy, for purposes of determining the correctness of a summary judgment, was a foreseeable consequence of the defendant's negligence, and money expended on medical care, loss of wages during pregnancy, and pain and suffering, as that in childbirth, are compensable injuries.

3. NEGLIGENCE—DAMAGES—EXTENT OF LIABILITY.

   The general rule of damages in an action for tort is that the wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether foreseeable by him or not, provided they are the legal and natural consequences of the defendant's wrongful act and, according to common experience, might reasonably have been anticipated.

REFERENCES FOR POINTS IN HEADNOTES

[1, 6] 25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 54–57, 60, 61. Liability of druggist for injury in consequence of mistake. 44 ALR 1482.

[1] 28 Am Jur, Negligence §§ 29–42.

[2, 4] 12 Am Jur 2d, Birth Control §§ 2–5.

[2, 4, 5, 8–16] Tort liability for wrongfully causing one to be born. 22 ALR3d 1441.

[3] 38 Am Jur, Negligence §§ 104–108.

[5] 12 Am Jur 2d, Birth Control §§ 4–6.

[7–16] 52 Am Jur 2d, Torts §§ 10–17.

4. HEALTH—CONTRACEPTIVES—POLICY.

Trial court's statement that to allow damages for the birth of a child following a pharmacist's negligence in filling a prescription for birth-control pills is in contravention of public policy does not express the manifest will of the people where the legislature has recently enacted two separate statutes designed to foster the use of contraceptives and where hundreds of thousands of persons use contraceptives daily, thus expressing the sense of the community.

5. CONSTITUTIONAL LAW—CONTRACEPTIVES—NEGLIGENCE ACTION—BARRING SUITS.

The State, not being able to infringe upon the rights of a husband and wife to use contraceptives to limit the size of their family, may not negate these rights by completely denying access to the courts to sue for a pharmacist's negligence in filling an order for birth control pills.

6. NEGLIGENCE—PHARMACISTS—PUBLIC POLICY.

Public policy favors a tort scheme which encourages pharmacists to exercise great care in filling prescriptions.

7. NEGLIGENCE—DAMAGES—BENEFITS RULE.

The value of a benefit conferred upon a plaintiff or his property by a tortfeasor is considered, where equitable, in mitigation of damages where the tortious conduct confers both a harm and a special benefit to the same interest harmed.

8. NEGLIGENCE—UNPLANNED CHILD—DAMAGES—BENEFITS RULE.

The benefits of an unplanned child may be weighed against all the elements of claimed damage resulting from the unplanned child, which include the anxiety, incapacity, and pain and suffering inextricably related to child bearing.

9. NEGLIGENCE—UNWANTED CHILD—DAMAGES—BENEFITS RULE.

The benefits rule, allowing a special benefit conferred on the plaintiff by the tortfeasor's conduct that produced the harm complained of to be considered in reducing damages, does not preclude as a matter of law recovery for damages for the birth of an unwanted child; the services and companionship of an unwanted child do not always have a dollar value equivalent or greater than the economic costs of the child's support, and the restrictions and pain and suffering caused by pregnancy and the obligation to rear the child.

10. NEGLIGENCE — UNWANTED CHILD — DAMAGES — BENEFITS — QUESTION OF FACT.

The benefits conferred on the parents of an unwanted or unplanned child is a question for the trier of fact; factors to be considered include family size, family income, and age of the parents.

11. NEGLIGENCE—UNWANTED CHILD—DAMAGES—MITIGATION—ADOPTION—REASONABLENESS.

Parents who seek to recover damages for the birth of an unwanted child are not under a duty to mitigate damages by placing the child for adoption, because the doctrine which requires a plaintiff to take measures to minimize the financial consequences of a defendant's negligence requires only that reasonable measures be taken.

12. NEGLIGENCE — REASONABLENESS — STANDARDS — PLAINTIFF'S CONDUCT.

The standard used to judge the reasonableness of the acts of a plaintiff after an injury has occurred is less stringent than the standard used to judge the tortious conduct itself.

13. NEGLIGENCE — UNWANTED CHILD — DAMAGES — MITIGATION — CHILD'S BEST INTERESTS.

The best interests of the child must be considered in determining the reasonableness of actions of the parents plaintiffs in a suit for damages for the birth of an unwanted child, in mitigating damages; the law recognizes the desirability of a child being reared by his natural parents.

14. PARENT AND CHILD—MOTHER'S RIGHTS—UNWANTED CHILD.

A child will not be taken from his mother without her consent, without regard to whether the child was conceived or born in wedlock, unless the child is neglected or the mother is unfit; a mother's right to keep her child is not dependent on whether she desired the conception of the child.

15. NEGLIGENCE—UNWANTED CHILD—DAMAGES—MITIGATION—ABORTION—ADOPTION.

A tortfeasor whose negligence results in the conception and birth of an unwanted child has no right to insist upon the mother's aborting or placing the child for adoption in order to mitigate damages, because the tortfeasor takes the injured party as he finds her and cannot complain that the damages he will be assessed are greater than those which would have been determined if the plaintiff were willing to abort or place the child for adoption.

16. DAMAGES — MITIGATION — UNWANTED CHILD — ABORTION — ADOPTION.

A plaintiff, wed or unwed, suing for damages resulting from the birth of an unwanted child caused by the tortfeasor's failure to properly fill an order for birth control pills does not, as a matter of law, have to abort or place the child for adoption in order to have reasonably mitigated damages; the plaintiff parents are entitled to have the jury instructed that they may not, in computing damages, take into consideration the fact that the plaintiffs might have aborted the child or placed the child for adoption.

Appeal from Wayne, Joseph G. Rashid, J. Submitted Division 1 February 5, 1970, at Detroit. (Docket No. 6992.) Decided February 26, 1971. Leave to appeal denied June 3, 1971, 385 Mich 753.

Complaint by John E. Troppi and Dorothy M. Troppi, his wife, against Frank H. Scarf, doing business as Scarf's Drug Store, for damages for negligently supplying a prescription drug. Summary judgment for defendant. Plaintiff appeals. Reversed and remanded for trial.

Temple & Cutler, for plaintiffs.

Sullivan, Sullivan, Ranger & Ward, for defendant.

Before: LEVIN, P. J., and J. H. GILLIS and BRONSON, JJ.

LEVIN, P. J. In this case we consider the civil liability of a pharmacist who negligently supplied the wrong drug to a married woman who had ordered an oral contraceptive and, as a consequence, became pregnant and delivered a normal, healthy child.

I.

A summary judgment was entered dismissing the complaint of the plaintiffs, John and Dorothy Trop-

pi, on the ground that it does not state a claim upon which relief can be granted. In our appraisal of the correctness of the trial judge's ruling we accept as true plaintiffs' factual allegations.

In August 1964, plaintiffs were the parents of seven children, ranging in age from 6 to sixteen years of age. John Troppi was 43 years old, his wife 37.

While pregnant with an eighth child, Mrs. Troppi suffered a miscarriage. She and her husband consulted with their physician and decided to limit the size of their family. The physician prescribed an oral contraceptive, Norinyl, as the most desirable means of insuring that Mrs. Troppi would bear no more children. He telephoned the prescription to defendant, Frank H. Scarf, a licensed pharmacist. Instead of filling the prescription, Scarf negligently supplied Mrs. Troppi with a drug called Nardil, a mild tranquilizer.

Believing that the pills she had purchased were contraceptives, Mrs. Troppi took them on a daily basis. In December, 1964, Mrs. Troppi became pregnant. She delivered a well-born son on August 12, 1965.

Plaintiffs' complaint alleges four separate items of damage: (1) Mrs. Troppi's lost wages; (2) medical and hospital expenses; (3) the pain and anxiety of pregnancy and childbirth; and (4) the economic costs of rearing the eighth child.

In dismissing the complaint the judge declared that whatever damage plaintiffs suffered was more than offset by the benefit to them of having a healthy child.

II.

Contraception, conjugal relations, and childbirth are highly charged subjects. It is all the more

important, then, to emphasize that resolution of the case before us requires no intrusion into the domain of moral philosophy. At issue here is simply the extent to which defendant is civilly liable for the consequences of his negligence. In reversing and remanding for trial, we go no further than to apply settled common-law principles.

We begin by noting that the fundamental conditions of tort liability are present here. The defendant's conduct constituted a clear breach of duty. A pharmacist is held to a very high standard of care in filling prescriptions. When he negligently supplies a drug other than the drug requested, he is liable for resulting harm to the purchaser.

As early as 1882, the Michigan Supreme Court recognized that a pharmacist's negligence in providing the wrong drug is actionable. In *Brown* v. *Marshall* (1882), 47 Mich 576, 583, plaintiff requested Epsom salts from her druggist, who instead sold her zinc sulphate. Plaintiff suffered severe burns. The Court declared:

"The case, it must be conceded, is one in which a very high degree of care may justly be required. People trust not merely their health but their lives to the knowledge, care and prudence of druggists, and in many cases a slight want of care is liable to prove fatal to some one. It is therefore proper and reasonable that the care required shall be proportioned to the danger involved."

We assume, for the purpose of appraising the correctness of the ruling dismissing the complaint, that the defendant's negligence was a cause in fact of Mrs. Troppi's pregnancy.[1] The possibility that

[1] We note that this is not a product liability case. It is not claimed that Mrs. Troppi's pregnancy was attributable to the use of defective birth control pills or that she was misled by a misrepresentation concerning the effectiveness of birth control pills as a means of con-

she might become pregnant was certainly a foreseeable consequence of the defendant's failure to fill a prescription for birth control pills; we, therefore, could not say that it was not a proximate cause of the birth of the child.[2]

Setting aside, for the moment, the subleties of the damage question, it is at least clear that the plaintiffs have expended significant sums of money as a direct and proximate result of the defendant's negligence. The medical and hospital expenses of Mrs. Troppi's confinement and her loss of wages arose from the defendant's failure to fill the prescription properly. Pain and suffering, like that accompanying childbirth, have long been recognized as compensable injuries.

This review of the elements of tort liability points up the extraordinary nature of the trial court's holding that the plaintiffs were entitled to no recovery as a matter of law. We have here a negligent, wrongful act by the defendant, which act directly and proximately caused injury to the plaintiffs.

What we must decide is whether there is justification here for a departure from generally applicable, well-established principles of law:

"The general rule of damages in an action of tort is that the wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether they could or could not have been foreseen by him, provided the particular damages in respect to which he proceeds are the legal and natural consequences of the wrongful act imputed to the defendant, and

---

traception. In a product liability case the causation issue is likely to be hotly contested and the proofs complex.

[2] On the relationship between "case in fact" and "proximate cause", see Prosser, Torts (3d ed), § 41, p 240; 2 Harper and James, Torts, § 20.4, p 1132. As to foreseeable consequences, see Prosser, Torts (3d ed), § 50, p 288; 2 Harper and James, Torts, § 20.5, p 1134.

are such as, according to common experience and the usual course of events, might reasonably have been anticipated. Remote, contingent, or speculative damages will not be considered in conformity to the general rule above laid down." *Van Keulen & Winchester Lumber Co.* v. *Manistee & N. R. Co.* (1923), 222 Mich 682, 687.[3]

III.

The trial judge based his decision upon what he perceived to be the law "announced by a majority of the courts in this country". But, as yet, no appellate court has passed upon the liability of a pharmacist for negligently dispensing oral contraceptives. Several cases have, indeed, dealt with the liability of physicians for failure to exercise due care in the therapeutic or elective sterilization of patients. Because the elements of damage in these cases correspond to some of the damages prayed for here, the decisions deserve scrutiny.

In *Christensen* v. *Thornby* (1934), 192 Minn 123 (255 NW 620, 93 ALR 570), a physician had warned that the plaintiff's wife might not survive the birth of another child. Plaintiff consented to a sterilization operation which the defendant surgeon performed. Although the surgeon represented that the operation was successful, the plaintiff's wife subsequently became pregnant and delivered a healthy child. The plaintiff sued for the medical expenses and his anxiety occasioned by fears for his wife's health.

The Minnesota Supreme Court affirmed an order of the trial court sustaining defendant's demurrer upon two grounds. The first was that since the plaintiff had sued for deceit, not negligence, proof

[3] Similarly, see *Sutter* v. *Biggs* (1966), 377 Mich 80, 86.

of fraudulent intent was required. Second, the plaintiff had suffered no damage (p 126):

"The purpose of the operation was to save the wife from the hazards to her life which were incident to childbirth. It was not the alleged purpose to save the expense incident to pregnancy and delivery. The wife has survived. Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child."

That case is, of course, distinguishable from the one before us. The plaintiff husband in *Christensen* made no claim that the child itself or the economic consequences of its birth were unwanted. The operation was directed at the threat to his wife's health. Since her health remained unimpaired, no damage was suffered. That the husband could not have foreseen that his wife would emerge unscathed and his anxiety was therefore quite justified was a factor the court did not discuss.

In *Shaheen* v. *Knight* (Pa, 1957), 11 D & C2d 41, 45, 46, a Pennsylvania *nisi prius* court ruled that a physician who violated his promise to perform an effective, elective sterilization operation was not liable for the consequences of his breach of contract. Plaintiff, the father of four children, wanted no more. As a result of an ineffective sterilization, plaintiff was able to impregnate his wife, who delivered a healthy baby. After finding defendant in breach of contract, the court said:

"Defendant argues, however, and pleads, that plaintiff has suffered no damage. We agree with defendant. The only damages asked are the expenses of rearing and educating the unwanted child. We are of the opinion that to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people.

"Many consider the sole purpose of marriage a union for having children. * * *

"To allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which plaintiff Shaheen will have in the rearing and educating of this, [plaintiff's] fifth child. Many people would be willing to support this child were they given the right of custody and adoption, but according to plaintiff's statement, plaintiff does not want such. He wants to have the child and wants the doctor to support it. In our opinion to allow damages would be against public policy."

Underlying the *Shaheen* opinion are two principal ideas. The first is that the birth of a healthy child confers such an undoubted benefit upon the plaintiff as to outweigh, as a matter of law, the expenses of delivering and rearing the child. The second is that if the child is really unwanted, plaintiff has a duty to place him for adoption, in effect to mitigate damages. We defer for the moment our evaluation of these concepts, while noting their relevance to the issues at hand.

Different questions were presented to the New Jersey Supreme Court in *Gleitman* v. *Cosgrove* (1967), 49 NJ 22, 29 (227 A2d 689, 693, 22 ALR3d 1411). Mrs. Gleitman contracted rubella (German measles) during her pregnancy and subsequently gave birth to a deformed child. The infant and his parents sued the defendant physician for malpractice, alleging that he had negligently failed to warn Mrs. Gleitman of the likelihood that her child would be born defective. As a result of his negligence, Mrs. Gleitman did not seek a therapeutic abortion.

The majority of the court assumed that Mrs. Gleitman could have obtained a lawful abortion, but

nonetheless affirmed the decision of the trial court dismissing the complaint as to all three plaintiffs.

The majority distinguished between the rights of the infant plaintiff and those of his parents. As to the infant, the court held in essence that it could not countenance an action for "wrongful life".

A more difficult question was presented by the parents' claim for compensatory damages. The court disposed of this claim in extraordinary fashion. Of principal relevance to the case before us is the holding that compensatory damages were too uncertain to be awarded:

"In order to determine their compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries."

Three of the seven justices were of the view that money damages were ascertainable with reasonable precision and would have allowed the parents' claim to be presented to the trier of fact.

In *Milde* v. *Leigh* (1947), 75 ND 418 (28 NW2d 530, 173 ALR 738), the defendant negligently performed a therapeutic sterilization operation upon the plaintiff's wife and she subsequently delivered a healthy child. The appeal was taken by the defendant from an order of the trial court rejecting his defense of the statute of limitations. In affirming this order, the North Dakota Supreme Court declared that the plaintiff could recover for loss of his wife's services, society, and companionship during her pregnancy, as well as for medical expenses occasioned by her confinement.

A comprehensive review of the cases dealing with negligent sterilization was conducted by a Califor-

nia intermediate appellate court in *Custodio* v. *Bauer* (1967), 251 Cal App 2d 303, 325 (59 Cal Rptr 463, 476, 477, 27 ALR3d 884). Plaintiffs, husband and wife, had eight children. The defendant physician recommended that Mrs. Custodio be sterilized, citing her large family and uncertain health. After the operation, she became pregnant and delivered a healthy baby. The plaintiffs sued for medical expenses, Mrs. Custodio's physical damage, her pain and suffering, and the cost of supporting the child until he reached maturity. The trial court dismissed the suit before trial.

Expressly rejecting *Christensen* v. *Thornby, supra,* and *Shaheen* v. *Knight, supra,* the California appeals court reversed, noting "some trend of change in social ethics with respect to the family establishment" and declared:

"It is clear that if successful on the issue of liability, [plaintiffs] have established a right to more than nominal damages."

How the excess over nominal damages was to be determined was not specified, beyond this suggestion:

"Where the mother survives without casualty there is still some loss. She must spread her society, comfort, care, protection and support over a larger group. If this change in the family status can be measured economically it should be as compensable as the former losses." (*Custodio, supra,* 323, 324.)

Additional decisions recognizing that there is a cause of action for negligent sterilization are *Jackson* v. *Anderson* (Fla App, 1970), 230 So 2d 503; *Bishop* v. *Byrne* (SD W Va, 1967), 265 F Supp 460;

cf. Doerr v. *Villate* (1966), 74 Ill App 2d 332, 334, 335 (220 NE2d 767, 768).[4]

IV.

Our review has been conducted to determine whether the defendant in this case should be exempted from the consequences of his negligence. We conclude that there is no valid reason why the trier of fact should not be free to assess damages as it would in any other negligence case.

Public Policy. The trial court found that "to allow damages such as claimed here would be in contravention of public policy". A judicial declaration of pre-emptive public policy should express the manifest will of the people. Not only does contraception not violate the public policy of the State of Michigan, the legislature has recently enacted two separate statutes designed to foster the use of contraceptives. Family planning services may be supplied to medically indigent women by the State, upon request; the availability of such services is to be made known to prospective recipients of public

[4] *Cf. Ball* v. *Mudge* (1964), 64 Wash 2d 247, 250 (391 P2d 201, 204). A physician had performed a vasectomy upon the plaintiff. This operation had been prompted by fears for the health of Mrs. Ball if she became pregnant again, as well as by a desire on the part of Mr. and Mrs. Ball to avoid the expense of rearing a fourth child. Despite the vasectomy, Mrs. Ball again became pregnant and delivered a healthy baby. The plaintiffs appealed a *jury verdict* in favor of the physician and argued that they should have been granted a directed verdict on the issue of negligence. This was rejected on the ground that subsequent fertility is not conclusive proof that a vasectomy was negligently performed. As to damages, the Court observed:

"As reasonable persons, the *jury* may well have concluded that appellants suffered no damage in the birth of a normal, healthy child, whom they dearly love, would not consider placing for adoption, and 'would not sell for $50,000,' and that the cost incidental to such birth was far outweighed by the blessing of a cherished child, albeit an unwanted child at the time of conception and birth." (Emphasis supplied.)

The Washington Supreme Court expressly avoided the defendant's contention that the trial court should not have permitted the case to go to the jury.

health services.[5] Another statute goes a step further; it provides that the Department of Social Welfare may

"make available upon request of recipients of public assistance advice and treatment in family planning by referral upon request of the recipient to a licensed medical doctor * * * . Necessary drugs and recognized medical appliances for use in family planning may also be made available through licensed pharmacists upon prescription." MCLA § 400.14b (Stat Ann 1968 Rev § 16.414[2]).

Where the State's advocacy of family planning is so vigorous as to include payments for contraceptives as part of the welfare program, public policy cannot be said to disfavor contraception. The notion that public policy may favor contraception for the poor, yet disapprove of it for the more affluent, is unworthy of serious discussion.

Contraceptives are used to prevent the birth of healthy children. To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.

Contraception has been held to be within a constitutionally protected "zone of privacy" that surrounds the marital relationship.[6] The State may not infringe upon the rights of husband and wife to use contraceptives to limit the size of their family. Since the State may not infringe upon this right, it

[5] MCLA § 325.7a (Stat Ann 1969 Rev § 14.7[1]).

[6] *Griswold* v. *Connecticut* (1965), 381 US 479, 485 (85 S Ct 1678, 14 L Ed 2d 510). See *Brodie*, Marital Procreation, 49 Or L Rev 245 (1970).

may not constitutionally denigrate the right by completely denying protection provided as a matter of course to like rights.[7]

In theory at least, the imposition of civil liability encourages potential tortfeasors to exercise more care in the performance of their duties, and, hence, to avoid liability-producing negligent acts.[8] Applying this theory to the case before us, public policy favors a tort scheme which encourages pharmacists to exercise great care in filling prescriptions. To absolve defendant of all liability here would be to remove one deterrent against the negligent dispensing of drugs. Given the great numbers of women who currently use oral contraceptives, such absolution cannot be defended on public policy grounds.

Overriding Benefit. It is arguable that the birth of a healthy child confers so substantial a benefit as to outweigh the expenses of his birth and support. In the great majority of cases, this is no doubt true, else, presumably, people would not choose to multiply so freely. But can we say, as a matter of law, that a healthy child always confers such an overriding benefit?

The so-called "benefit rule" is pertinent. The Restatement declares:

"Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable." Restatement, Torts, § 920, p 616.

---

[7] Compare 1 Antieau, Modern Constitutional Law, § 7:13, p 542; § 8:10, p 574.

[8] Prosser, Torts (3d ed), § 4, p 23; 2 Harper and James, Torts, § 11.5, p 742.

Thus, if the defendant's tortious conduct conferred a benefit to the same interest which was harmed by his conduct, the dollar value of the benefit is to be subtracted from the dollar value of the injury in arriving at the amount of damages properly awardable.[9]

Since pregnancy and its attendant anxiety, incapacity, pain, and suffering are inextricably related to child bearing, we do not think it would be sound to attempt to separate those segments of damage from the economic costs of an unplanned child in applying the "same interest" rule. Accordingly, the benefits of the unplanned child may be weighed against all the elements of claimed damage.

The trial court evidently believed, as did the court in *Shaheen* v. *Knight, supra,* that application of the benefits rule prevents any recovery for the expenses of rearing an unwanted child. This is unsound. Such a rule would be equivalent to declaring that in every case, as a matter of law, the services and companionship of a child have a dollar equivalent greater than the economic costs of his support, to say nothing of the inhibitions, the restrictions, and the pain and suffering caused by pregnancy and the obligation to rear the child.

There is a growing recognition that the financial "services" which parents can expect from their offspring are largely illusory. As to companionship, cases decided when "loss of companionship" was a compensable item of damage for the wrongful death of a child reveal no tendency on the part of juries to value companionship so highly as to outweigh expenses in every foreseeable case.

Our discussion should not be construed as an expression of doubt as to the efficacy of the benefits

[9] *Burtraw* v. *Clark* (1894), 103 Mich 383; 22 Am Jur 2d, Damages, § 204, p 283; McCormick, Damages, § 40, p 146.

rule in cases like the one before us. On the contrary, we believe that rule to be essential to the rational disposition of this case and the others that are sure to follow. The benefits rule allows flexibility in the case-by-case adjudication of the enormously varied claims which the widespread use of oral contraceptives portends.

What must be appreciated is the diversity of purposes and circumstances of the women who use oral contraceptives. Unmarried women who seek the pleasures of sexual intercourse without the perils of unwed motherhood, married women who wish to delay slightly the start of a family in order to retain the career flexibility which many young couples treasure, married women for whom the birth of another child would pose a threat to their own health or the financial security of their families, all are likely users of oral contraceptives. Yet it is clear that in each case the consequences arising from negligent interference with their use will vary widely. A rational legal system must award damages that correspond with these differing injuries. The benefits rule will serve to accomplish this objective.

Consider, for example, the case of the unwed college student who becomes pregnant due to a pharmacist's failure to fill properly her prescription for oral contraceptives. Is it not likely that she has suffered far greater damage than the young newlywed who, although her pregnancy arose from the same sort of negligence, had planned the use of contraceptives only temporarily, say, while she and her husband took an extended honeymoon trip? Without the benefits rule, both plaintiffs would be entitled to recover substantially the same damages.

Application of the benefits rule permits a trier of fact to find that the birth of a child has materially

benefitted the newly wed couple, notwithstanding the inconvenience of an interrupted honeymoon, and to reduce the net damage award accordingly. Presumably a trier of fact would find that the "family interests" of the unmarried coed has been enhanced very little.

The essential point, of course, is that the trier must have the power to evaluate the benefit according to all the circumstances of the case presented. Family size, family income, age of the parents, and marital status are some, but not all, the factors which the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents. That the benefits so conferred and calculated will vary widely from case to case is inevitable.

Mitigating Damages. It has been suggested that parents who seek to recover for the birth of an unwanted child are under a duty to mitigate damages by placing the child for adoption. If the child is "unwanted", why should they object to placing him for adoption, thereby reducing the financial burden on defendant for his maintenance?

However, to impose such a duty upon the injured plaintiff is to ignore the very real difference which our law recognizes between the avoidance of conception and the disposition of the human organism after conception. This most obvious distinction is illustrated by the constitutional protection afforded the right to use contraceptives, while abortion is still a felony in most jurisdictions. At the moment of conception, an entirely different set of legal obligations is imposed upon the parents. A living child almost universally gives rise to emotional and spiritual bonds which few parents can bring themselves to break.

Once a child is born he obviously should be treated with love regardless of whether he was wanted when he was conceived. Many, perhaps most, persons living today are conceptional accidents in the sense that their parents did not desire that a child result from the particular intercourse in which the person was conceived. Nevertheless, when the child is born, most parents accept him with love. That the plaintiffs accepted their eighth child does not change the fact that the birth of another child, seven years younger than the youngest of their previously born children, unbalanced their life style and was not desired by them.

The doctrine which requires a plaintiff to take measures to minimize the financial consequences of a defendant's negligence requires only that reasonable measures be taken.[10]

"If the effort, risk, sacrifice, or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages." McCormick, Damages, § 35, p 133.

It should be noted that the standards by which reasonable conduct is determined are less stringent when used to evaluate the subsequent acts of the injured party than when used to evaluate the tortious act itself.[11]

---

[10] "Where one person has committed a tort * * * against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages." McCormick, Damages, § 33, p 127; *Talley* v. *Courter* (1892), 93 Mich 473; *Smith* v. *Jones* (1969), 382 Mich 176, 186.

[11] Courts have been reluctant, for example, to require that plaintiffs submit to surgical procedures that are more than routine. Where ethical or religious scruples prevent a plaintiff from submitting to relatively minor surgery, the trier of fact may consider these scruples as part of the circumstances which bear upon the reasonableness of

In determining reasonableness, the best interests of the child must be considered. The law has long recognized the desirability of permitting a child to be reared by his natural parents.[12] The plaintiffs may have believed that the hazards of adoption would damage the child.

A child will not be taken from his mother without her consent, without regard to whether the child was conceived or born in wedlock, unless the child is neglected or the mother is unfit. The mother's right to keep the child is not dependent on whether she desired the conception of the child.

As a matter of personal conscience and choice parents may wish to keep an unwanted child. Indeed, parents have been known to keep children that many think should be institutionalized, *e.g.*, mentally retarded children, not because of any anticipated joy or happiness that the child will bring to them but out of a sense of obligation. So, too, the parents of an unplanned, healthy child may feel, and properly so, that whether they wanted the child or not is beside the point once the child is born and that they have an obligation to rear the child as best they can rather than subject him to rearing by unknown persons.

Further, even though the parents may not want to rear the child they may conclude that the psychological impact on them of rejecting the child and placing him for adoption, never seeing him again, would be such that, making the best of a bad situation, it is better to rear the child than to place him for adoption.

---

his conduct. McCormick, Damages, § 36, p 136; 22 Am Jur 2d, Damages, § 39, p 63. *Cf. Romankewiz* v. *Black* (1969), 16 Mich App 119.

[12] *In re Ernst* (1964), 373 Mich 337, 362–371; *In re Mathers* (1963), 371 Mich 516, 534; *Herbstman* v. *Shiftan* (1961), 363 Mich 64, 67; *In re Mark T.* (1967), 8 Mich App 122.

Many women confronted with an unwanted pregnancy will abort the fetus, legally or illegally. Some will bear the child and place him for adoption. Many will bear the child, keep and rear him. The defendant does not have the right to insist that the victim of his negligence have the emotional and mental makeup of a woman who is willing to abort or place a child for adoption. If the negligence of a tortfeasor results in conception of a child by a woman whose emotional and mental makeup is inconsistent with aborting or placing the child for adoption, then, under the principle that the tortfeasor takes the injured party as he finds him, the tortfeasor cannot complain that the damages that will be assessed against him are greater than those that would be determined if he had negligently caused the conception of a child by a woman who was willing to abort or place the child for adoption.

While the reasonableness of a plaintiff's efforts to mitigate is ordinarily to be decided by the trier of fact, we are persuaded to rule, as a matter of law, that no mother, wed or unwed, can reasonably be required to abort (even if legal) or place her child for adoption.[13] The plaintiffs are entitled to have the jurors instructed that if they find that negligence of the defendant was a cause in fact of the plaintiffs' injury, they may not, in computing the amount, if any, of the plaintiffs' damages, take into consideration the fact that the plaintiffs might have aborted the child or placed the child for adoption.

Uncertainty of Damages. Of the four items of damage claimed by plaintiffs, each is capable of reasonable ascertainment. The medical and hospi-

[13] In saying this we recognize that there is much discussion today about compulsory family planning. We do not mean to be understood as addressing ourselves to the constitutionality of such legislation if enacted.

tal expenses and Mrs. Troppi's lost wages may be computed with some exactitude. Plaintiffs' claimed pain and anxiety, if not capable of precise determination, is a component of damage which triers of fact traditionally have been entrusted to ascertain. As to the costs of rearing the child until his majority, this is a computation which is routinely performed in countless cases.

It should be clear that ascertainment of *gross* damages is a routine task. Whatever uncertainty attends the final award arises from application of the benefits rule, which requires that the trier of fact compute the dollar value of the companionship and services of an unwanted child. Placing a dollar value on these segments may well be more difficult than assessing damages for, say, Mrs. Troppi's lost wages. But difficulty in determining the amount to be subtracted from the gross damages does not justify throwing up our hands and denying recovery altogether.

Michigan law is clear that there need only be a basis for reasonable ascertainment of the amount of the damages. Where the fact of liability is proven, difficulty in determining damages will not bar recovery. As the Michigan Supreme Court noted in *Allison* v. *Chandler* (1863), 11 Mich 542, 554.

"The law does not require impossibilities; and can not, therefore, require a higher degree of certainty than the nature of the case admits."

More recently, the Court said in *Purcell* v. *Keegan* (1960), 359 Mich 571, 576:

"But where injury to some degree is found, we do not preclude recovery for lack of precise proof. We do the best we can with what we have. We do not, 'in the assessment of damages, require a mathematical precision in situations of injury where,

from the very nature of the circumstances, precision is unattainable.' Particularly is this true where it is defendant's own act or neglect that has caused the imprecision."

Moreover, the Michigan Supreme Court has repeatedly recognized that the dollar value of a child's services and companionship is not too uncertain to be left to the judgment of the trier of fact. Beginning in 1960, with *Wycko* v. *Gnodtke* (1960), 361 Mich 331, recovery for the wrongful death of a child was measured by considering, among other elements of damage, the value of his services and companionship. Although there was spirited dissent as to the statutory basis of this rule, subsequent cases reflected no feeling on the part of the Court that these damages were too uncertain to be entrusted to determination by the trier of fact.[14] The recent disavowel of *Wycko* in *Breckon* v. *Franklin Fuel Company* (1970), 383 Mich 251, involved a question of statutory interpretation, and not the specificity of the measure of damages.

The assessment of damages in this is properly within the competence of the trier of fact. The element of uncertainty in the net recovery does not render the damages unduly speculative.

Reversed and remanded for trial.

BRONSON, J., concurred.

J. H. GILLIS, J., concurred in result.

---

[14] See *Routsaw* v. *McClain* (1961), 365 Mich 167, 171; *Godwin* v. *Ace Iron & Metal Company* (1965), 376 Mich 360, 368, 369; *Wolverine Upholstery Company* v. *Ammerman* (1965), 1 Mich App 235, 244, 245; *Howard* v. *City of Melvindale* (1970), 27 Mich App 227.

CITY OF MUSKEGON *v.* IRWIN

1. EMINENT DOMAIN—NECESSITY.

   The question of necessity in an eminent domain case is more than *pro forma;* the single declaration of necessity by the condemning authority does establish necessity.

2. EMINENT DOMAIN — EVIDENCE — RULES OF EVIDENCE — ENFORCEMENT.

   Strict rules as to the admissibility of testimony are not and should not be enforced in condemnation cases.

3. EMINENT DOMAIN—PROPERTY OWNER'S RIGHTS—POLICY.

   A party whose land is being taken by eminent domain is entitled to the utmost protection of the courts since the exercise of the power of eminent domain is a drastic one.

4. EMINENT DOMAIN—FRAUD—EVIDENCE—LIMITING EVIDENCE.

   Refusing to allow the landowners in an eminent domain case to introduce evidence of events which occurred after the date on which the city commission had authorized condemnation of their land for urban renewal was not reversible error where the landowners were attempting to prove that the commission had abused its discretion or committed fraud and where even if the excluded evidence had been admitted the landowners did not have enough evidence to establish their contention.

REFERENCES FOR POINTS IN HEADNOTES

[1, 5] 26 Am Jur 2d, Eminent Domain §§ 111–117.
27 Am Jur 2d, Eminent Domain § 404.
[2] 27 Am Jur 2d, Eminent Domain § 423.
[3] 26 Am Jur 2d, Eminent Domain § 173.
27 Am Jur 2d, Eminent Domain §§ 247, 248, 405.
[4] 27 Am Jur 2d, Eminent Domain § 419 *et seq.*
[6] 27 Am Jur 2d, Eminent Domain §§ 419, 505.

5. EMINENT DOMAIN—NECESSITY—EVIDENCE—ADMISSIBILITY—POLICY.

Trial courts should liberally allow property owners in cases in which their land is being condemned for an urban renewal project to present evidence relevant to the issue of necessity in determining fraud or abuse of discretion up to the time the condemnation is authorized; however, in order to prevent jeopardizing the success of urban renewal projects, the evidence should be restricted so as to exclude negotiations with developers and others who insist on secrecy until contracts have been completed.

6. EMINENT DOMAIN—FRAUD—BURDEN OF PROOF.

Property owners in an urban renewal condemnation case have, by statute, the burden of proving fraud or abuse of discretion on the part of the condemning authority.

Appeal from Muskegon, Albert J. Engel, John J. Piercey, and Charles A. Larnard, Jr., JJ. Submitted Division 3 November 13, 1970, at Grand Rapids. (Docket Nos. 9190–9199.) Decided February 26, 1971. Leave to appeal denied July 14, 1971, 385 Mich 766.

Petition by the City of Muskegon against Alex W. Irwin, Nellie M. Irwin, Charles Pevic, Bernice M. Pevic, Margaret L. McMahon, Harvey H. Kroeze, Sophie Kroeze, George S. Danigelis, Christine Dault, and Aphrodite Drelles for condemnation of land. Judgment for plaintiff. Defendants appeal. Affirmed.

O'Toole & Johnson (by *James J. Kobza*), for plaintiff.

Warner, Norcross & Judd (by *John H. Logie*), for defendants.

Before: T. M. BURNS, P. J., and R. B. BURNS and MUNRO,* JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

MUNRO, J. After several years of study and planning the City Commission of the City of Muskegon, pursuant to the provisions of PA 1945, No 344, as amended (MCLA § 125.71 *et seq.* [Stat Ann 1969 Rev § 5.3501 *et seq.*]), adopted an urban renewal plan designating an urban renewal area, the ordinance being passed on October 8, 1968. On September 23, 1969, the city commission declared defendants' land was necessary to implement the urban renewal plan and authorized condemnation which was commenced December 15, 1969. Defendants are ten of the parties whose lands were to be condemned under the resolution of the city commission passed on September 23, 1969; defendants filed a timely motion requesting a review of the necessity of the proposed taking in accordance with the provisions of PA 1966, No 295, MCLA § 213.368 (Stat Ann 1958 Rev § 8.261[8]). By stipulation of the parties the ten cases were consolidated for trial before an *en banc* panel of three Muskegon County Circuit judges. A three-day trial was held, commencing February 10, 1970, and the trial court held there was no showing of fraud or abuse of discretion by the city and defendants' motion for review of the necessity of the taking was dismissed.

Defendants appeal from the denial of such motion and on appeal raise two issues. The first of those issues is:

Did the adoption by the city commission of its ordinance designated "Urban Renewal Plan" on October 8, 1968, fix the date for determination of necessity limiting proofs as to fraud or abuse of discretion to that date?

During the trial the court held, "the decision to be reviewed was reached on October 8, 1968, and

the question is whether or not, on or before that date, the city was guilty of fraud or abuse of discretion in reaching it". Based on this holding the trial court, over defendants' objection, limited the testimony and proofs to events leading up to and including that date and excluded testimony of subsequent events except where such might have a bearing on the credibility of the witness or for impeachment purposes. The defendants contend that they should be allowed to introduce proofs indicating fraud or abuse of discretion up to and including the date that the plaintiff city commission passed the resolution authorizing condemnation, to wit: September 23, 1969.

The question here involves the interpretation of two of the provisions in PA 1966, No 295, as amended by PA 1967, No 206. MCLA § 213.366 (Stat Ann 1958 Rev § 8.261[6]) provides in part:

"When the petitioner is unable to agree with any person interested in any private property for the purchase thereof, the petitioner, after making a good faith written offer to purchase the property, may file a petition for acquisition of the property or property rights, in the circuit court for the county in which the property is located."

MCLA § 213.368 (Stat Ann 1958 Rev § 8.261[8]) provides in part:

"Within 10 days after the notice required by Section 6 has been given, a person claiming fraud or abuse of discretion, or both, in the necessity of the taking of all or any part of the property for the purposes stated in the petition, and having a justiciable interest in the proporty involved, may file a motion in the same court and cause, asking that such necessity be reviewed."

This statute expresses the Legislature's intent as to when a person claiming fraud or abuse of dis-

cretion, or both, may challenge the necessity of taking.

There is no contention by the defendants that any of the provisions of the Blighted Area Rehabilitation Act, MCLA § 125.71 *et seq.* (Stat Ann 1969 Rev § 5.3501 *et seq.*), were not complied with and this Court, therefore, assumes that all of the provisions of that act have been complied with by the city commission.

The question of necessity under the provisions of this statute and other statutes granting municipalities the powers of eminent domain is more than just a *pro forma* determination by the municipality and has been so designated by the Supreme Court in *Western Michigan University Board of Trustees* v. *Slavin* (1968), 381 Mich 23, 26, where the Court held:

"that under the sweeping provisions of the statute which accords to 'any public corporation or state agency' the power of eminent domain the question of necessity is and should be much more than *pro forma.* The simple declaration of necessity by the empowered agency does not establish that necessity.

"It remains established law under the Constitution of 1963 as it did under its predecessor Constitution of 1908:

" 'The words "necessity for using such property" in our Constitution does not mean an indefinite, remote, or speculative future necessity, but means a necessity now existing or to exist in the near future' ",

citing *Grand Rapids Board of Education* v. *Baczewski* (1954), 340 Mich 265, 269.

In determining whether the city commission was guilty of fraud or abuse of discretion or both in

deciding that a slum or blighted area exists and the necessity for its elimination, it seems to this Court that the trial court's ruling that the proofs should be limited to the information presented to the commission and acts of the city commission relating to those proofs is, under the circumstances here presented, a proper restriction on proofs. This is not to say that the admission of proofs relating to acts or failures to act subsequent to the date of determination of necessity would be reversible since it is a well-recognized legal principle in condemnation or eminent domain cases that strict rules as to the admissibility of testimony are not and should not be strictly enforced. *City of Detroit* v. *Fidelity Realty Co.* (1921), 213 Mich 448, 454. The party whose property is being taken by eminent domain is entitled to the utmost protection of the courts since the exercise of such power is drastic and should be construed in favor of the displaced landholder. *State Board of Education* v. *von Zellen* (1965), 1 Mich App 147; *In re Petition of Rogers* (1928), 243 Mich 517.

At the close of proofs in this matter the defendants, on the record, made an offer of proof with regard to the several matters which the trial court had excluded as relating to matters subsequent to the October 8, 1968, date. Our review of the record, including the defendants' offer of proof as to post-October 8, 1968, evidence, fails to indicate sufficient proof that fraud or abuse of discretion, or both, were practiced by the city commission in this matter. Errors in judgment and administrative errors do not ordinarily constitute fraud or abuse of discretion justifying a reversal and this Court rules that had the items included in defendants' offer of proof been admitted, the decision of the trial court would still be justified.

While it may have been better practice to permit defendants to offer proofs in certain areas up to the time of the city commission's action authorizing condemnation (September 23, 1969) it does not, in the opinion of this Court, constitute reversible error for the trial court to have so restricted proofs in this matter.

We believe that trial courts should in the future liberally allow the property owner to present such evidence as is relevant to the issue of necessity in determining fraud or abuse of discretion up to the time condemnation is authorized, restricting such evidence, however, to prevent jeopardizing the success of such urban renewal projects in revealing negotiations with developers and others who insist on secrecy until contracts have been completed. Each person's property rights, though entitled to the law's protection, is necessarily subject to the public's paramount needs, provided the property owner is adequately compensated for such property.

We, therefore, hold that the court's ruling restricting proofs to the date of the adoption of the urban renewal plan was not reversible error in this matter.

The second question to be determined on defendants' appeal is:

Was the evidence presented at the hearing of this cause in the circuit court of Muskegon county sufficient to show fraud or abuse of discretion, or both, in determining the necessity of taking of defendants' properties for the purposes stated in the petition?

The defendants contend that the proofs in this matter show that the city commission, through its agents and employees, in adoption of the urban renewal plan, misrepresented the costs to the city

and the monies to be received from the Federal government in the program, that changes in the plan have been effected, and that defendants were misled by agents of the city as to their rights in this matter.

Under our law the burden of proving fraud or abuse of discretion in the matter here before the Court is by the Legislature placed on the property owner.

This matter was tried before three Muskegon County circuit judges sitting *en banc* who heard the evidence and observed the witnesses. Based on the proofs submitted, the trial court's findings of fact and conclusions of law being supported by the evidence, this Court will not reverse unless the record fails to justify such findings and the same are clearly erroneous, or to prevent a miscarriage of justice. GCR 1963, 517.1; *King* v. *Partridge* (1968), 9 Mich App 540, 544. We do not so find.

Defendants have also alleged a violation of their right to due process of law. It appears to this Court that the city commission followed the provisions of MCLA § 125.71 *et seq.* (Stat Ann 1969 Rev § 5.3501 *et seq.*) which defendants had not contested at the trial of this matter and that, in addition, the defendants were given a three-day hearing in the Circuit Court of Muskegon County before a panel of three circuit judges. It is this Court's judgment that defendants have not only been accorded their right to due process of law but have been given adequate opportunity to demonstrate fraud or the abuse of discretion both before the city commission and before the three-member panel of circuit judges.

Affirmed. No costs, a question of general public concern being here involved.

All concurred.

PEOPLE v. LAINE

1. CRIMINAL LAW—ACCESSORY—EVIDENCE—PRINCIPAL'S GUILT.
The conviction of the principal is no longer necessary to sustain an accessory's conviction; however, the guilt of the principal must still be shown.

2. APPEAL AND ERROR—INSTRUCTIONS TO JURY—PARTIES' CONTENTIONS.
Error cannot be predicated upon the trial judge's restatement in the instructions to the jury of the parties' contentions.

3. ROBBERY—ACCESSORY—EVIDENCE—SUFFICIENCY.
Evidence that the robbery charged was committed, that defendant's codefendants committed the robbery, and that the defendant participated in the robbery charged by providing transportation for the codefendants to and from the scene of the crime was sufficient to establish defendant's guilt.

Appeal from Berrien, Julian E. Hughes, J. Submitted Division 3 February 4, 1971, at Grand Rapids. (Docket No. 9693.) Decided February 26, 1971. Leave to appeal denied June 3, 1971, 385 Mich 752.

Norman Laine was convicted of unarmed robbery. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Ronald J. Taylor,*

REFERENCES FOR POINTS IN HEADNOTES
[1] 21 Am Jur 2d, Criminal Law §§ 127, 128.
[2] 53 Am Jur, Trial §§ 646–648.
[3] 21 Am Jur 2d, Criminal Law §§ 115, 118, 124–130.

Prosecuting Attorney, and *John A. Smietanka,* Assistant Prosecuting Attorney, for the people.

Charles J. La Sata, for defendant on appeal.

Before: FITZGERALD, P. J., and V. J. BRENNAN and T. M. BURNS, JJ.

PER CURIAM. Defendant Norman Laine, charged with unarmed robbery,[1] was convicted upon a jury verdict and sentenced to 7 to 15 years in prison. Taking an appeal as of right, defendant raises three issues.

First, defendant contends it was error[2] for the trial judge to instruct the jury that they must find beyond a reasonable doubt that the crime was committed, that it was committed by the codefendants, and that defendant Norman Laine either aided, assisted, procured, or counseled the codefendants in its commission. It is true, by virtue of MCLA § 767.39 (Stat Ann 1954 Rev § 28.979), that the distinction between principal and accessory has been removed. However, though *conviction* of the principal is no longer necessary to charge the accessory, the *guilt* of the principal must still be shown. See, *People* v. *Tunnacliff* (1965), 375 Mich 298, 301; *People* v. *DeBolt* (1934), 269 Mich 39; *People* v. *Hoaglin* (1933), 262 Mich 162; *People* v. *Owen* (1927), 241 Mich 111.

Defendant's second complaint about the instructions is wholly without merit. There can be no error in the trial judge's restating the contentions of the parties.

---

1 MCLA § 750.530 (Stat Ann 1954 Rev § 28.798).

2 No objection was voiced regarding the jury instructions, thus this issue is evaluated by the manifest injustice standard.

Second, defendant asserts insufficiency of the evidence. Though the evidence was partly circumstantial, it is clear from the record that the evidence established defendant's guilt. The evidence shows that the robbery was committed, that co-defendants Brown and Small committed it, and that defendant participated therein at least to the extent of providing transportation to and from the scene of the crime.

Third, defendant asserts a denial of fair trial and due process based on his first two assertions of error. The first two claims of error fail, therefore, this issue must fail.

Defendant has shown no error. Conviction affirmed.

PEOPLE *v.* MULLIGAN

1. CRIMINAL LAW—PLEA OF GUILTY—TRUTHFULNESS.

Accepting defendant's plea of guilty of felonious assault was not error even though the defendant's recitation indicated that the stabbing in question was accidental, where the defendant later indicated his willingness to tell the truth and the court then continued the examination and determined the defendant's guilt.

2. CRIMINAL LAW—PLEA OF GUILTY—INTOXICATION.

Plea of guilty was properly accepted where the record reveals defendant's ability to recall the details of the crime, the court elicited a detailed version of the acts regarding the crime, and defendant's claim of intoxication was not substantiated by the record.

Appeal from Monroe, James J. Kelley, Jr., J. Submitted Division 2 February 3, 1971, at Lansing. (Docket No. 9721.) Decided February 26, 1971.

Richard William Mulligan was convicted, on his plea of guilty, of felonious assault. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James J. Rostash,* Prosecuting Attorney, and *John J. Sullivan,* Chief Assistant Prosecuting Attorney, for the people.

Patricia Costello, for defendant on appeal.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law §§ 484–496.

Before: QUINN, P. J., and MCGREGOR and O'HARA,* JJ.

PER CURIAM. Defendant appeals from his conviction upon a plea of guilty to the charge of assault with a deadly weapon, MCLA § 750.82 (Stat Ann 1962 Rev § 28.277). He was originally charged with assault with intent to commit murder, MCLA § 750.83 (Stat Ann 1962 Rev § 28.278), after he allegedly stabbed a woman in a laundromat. On appeal, he claims that the trial court erred in accepting his guilty plea when the examination revealed serious doubts as to the truthfulness of his plea. *People* v. *Stewart* (1968), 10 Mich App 553. We note, however, that the trial judge did refuse to accept defendant's plea when his factual recitation indicated the stabbing was accidental. It was only after the defendant stated that he had been lying and was then willing to tell the truth that the trial court continued. The court then conducted a lengthy explanation of the elements of felonious assault and carefully ascertained the defendant's guilt before finally accepting the plea.

Defendant's contention that the court should not have accepted the plea because of his intoxication is in no way substantiated by the record. The record reveals that the defendant was able to recall the events and the trial court elicited a detailed version of the defendant's acts regarding the crime. *People* v. *Duncan* (1969), 17 Mich App 710.

The trial court is affirmed.

---

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

PEOPLE *v.* JACKSON

1. APPEAL AND ERROR—NEW TRIAL—MOTION FOR NEW TRIAL—PRESERVING QUESTION.

   Court of Appeals will not consider whether to grant a motion for a new trial on the ground of newly-discovered evidence even though the statutory period to move for a new trial as a matter of right has passed where no application for leave to move for a new trial had been made in the trial court (MCLA §§ 770.1, 770.2).

2. MOTIONS—MOTION FOR NEW TRIAL—STATUTES—TIME LIMIT.

   Statute limiting the time in which a motion for a new trial may be made as a matter of right is not jurisdictional (MCLA § 770.2).

Appeal from Recorder's Court of Detroit, Henry Heading, J. Submitted Division 1 January 12, 1971, at Detroit. (Docket No. 9726.) Decided February 26, 1971.

Albert Jackson was convicted of armed robbery. Defendant appeals. Motion to affirm granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Patricia J. Boyle,* Assistant Prosecuting Attorney, for the people.

Charles T. Burke, for defendant on appeal.

REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur 2d, Appeal and Error § 499.
[2] 39 Am Jur, New Trial § 12.

Before: LESINSKI, C. J., and V. J. BRENNAN and J. H. GILLIS, JJ.

PER CURIAM. Defendant was tried by jury on the charge of robbery armed and found guilty on February 10, 1970. On March 3, 1970, he was sentenced to a term of 5 to 20 years imprisonment by Judge Henry Heading of the Recorder's Court. By order dated May 26, 1970, Judge Heading granted defendant's timely motion for the appointment of appellate counsel. Counsel filed a claim of appeal within 60 days thereafter.

The only issue advanced in support of this appeal is whether this Court should grant the appellant a new trial on the basis of an affidavit submitted here which presumably qualifies as newly-discovered evidence. The people have filed a motion to affirm the conviction and sentence.

The defendant contends that he was precluded from filing a motion for new trial in the lower court because of the requirement contained in MCLA § 770.2 (Stat Ann 1954 Rev § 28.1099), "motions for new trials shall be made within 30 days after verdict". Therefore, it is argued, this Court must consider the motion on appeal.

Although the time allowing motions for new trial as a matter of right has expired, the statute which sets out the time period is not jurisdictional. The defendant is not precluded from filing an application for leave to move for a new trial pursuant to MCLA § 770.1 (Stat Ann 1954 Rev § 28.1098). This Court has previously stated that it will not substitute its judgment for that of the trial court. Since the issue has not been raised in the lower court it is not properly before us now. See *People* v. *Thomas* (1968), 10 Mich App 693. The motion to affirm is granted.

PEOPLE *v.* PEOPLES

CRIMINAL LAW—PLEA OF GUILTY—FACTUAL BASIS.

Defendant's plea of guilty was properly accepted by the court where the record contains a substantial factual basis for the plea, even disregarding the court's questioning the defendant as to the facts of the crime and his participation in it, the transcript of the preliminary examination alone contains a substantial factual basis for the plea, and the transcript adequately demonstrates the voluntariness of defendant's plea.

Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted Division 1 January 19, 1971, at Grand Rapids. (Docket No. 9728.) Decided February 26, 1971.

Willie L. Peoples was convicted, on his plea of guilty, of gross indecency. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

David M. Hartsook, for defendant on appeal.

Before: R. B. BURNS, P. J., and FITZGERALD and HOLBROOK, JJ.

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law §§ 484–496.

PER CURIAM. At the conclusion of the preliminary examination the defendant was bound over on a two-count information charging kidnapping (MCLA § 750.349 [Stat Ann 1954 Rev § 28.581]) and assault with intent to commit gross indecency (MCLA § 750.85 [Stat Ann 1962 Rev § 28.280]). On March 4, 1970 the defendant tendered a plea of guilty to the added charge of gross indecency. MCLA § 750.338(b) (Stat Ann 1954 Rev § 28.570[2]). The plea was accepted by the trial judge. Defendant was sentenced to a term of four to five years imprisonment. Throughout the trial court proceeding the defendant was represented by counsel.

Defendant filed a timely claim of appeal grounded on the contention that the trial court erred in failing to ascertain the voluntariness of the plea. The people have filed a motion to affirm the conviction and sentence of the trial court.

Contrary to the contention of the defendant, the record contains a substantial factual basis for the plea. Even ignoring the trial court's direct questioning of the defendant as to the facts of the crime and his participation in it, the preliminary examination transcript satisfies this requirement. *People* v. *Bartlett* (1969), 17 Mich App 205. The transcript adequately demonstrates that the defendant tendered a voluntary plea to the crime charged. The motion to affirm the conviction and sentence of the trial court is granted.

PEOPLE *v.* KUCHULAN

1. CRIMINAL LAW—PLEA OF GUILTY—FACTUAL BASIS—COURT'S EXAMINATION—TRUTHFULNESS.

   Trial judge's failure to examine a guilty-pleading defendant at the plea-taking proceeding regarding the defendant's participation in the crime charged is not necessarily fatal to defendant's plea of guilty; the trial judge is required only to reasonably ascertain the truth of the guilty plea before accepting it.

2. CRIMINAL LAW—PLEA OF GUILTY—TRUTHFULNESS—FACTUAL BASIS.

   The truth of a plea of guilty is ascertained when the record discloses a substantial factual basis for it.

3. CRIMINAL LAW—PLEA OF GUILTY—FACTUAL BASIS.

   A substantial factual basis for defendant's plea of guilty existed even though the defendant was not questioned at the plea-taking proceeding regarding his participation in the crime where the preliminary examination transcript furnishes a substantial basis and where the defendant entered his plea during the second day of trial and just after a codefendant was questioned regarding his participation in the offense.

Appeal from Wayne, Richard M. Maher, J. Submitted Division 1 January 12, 1971, at Lansing. (Docket No. 9762.) Decided February 26, 1971. Leave to appeal denied October 20, 1971, 386 Mich 762.

John Kuchulan was convicted, on his plea of guilty, of aiding and abetting in the placing of an injurious substance with intent to destroy the prop-

---

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 21 Am Jur 2d, Criminal Law §§ 484–496.

erty of another. Defendant appeals. People's motion to affirm granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

Charles E. Raymond, for defendant on appeal.

Before: QUINN, P. J., and MCGREGOR and BRONSON, JJ.

PER CURIAM. Defendant was convicted, by his plea of guilty, of aiding and abetting in the placing of an injurious substance with intent to destroy the property of another, contrary to MCLA § 750.208 (Stat Ann 1962 Rev § 28.405). On appeal, the people move to affirm. GCR 1963, 817.5(3).

The only issue raised on appeal is whether defendant's plea of guilty was properly accepted where the trial judge did not examine him to establish the crime and his participation therein. It is manifest that the question presented, on which decision of the cause depends, is so unsubstantial as to need no argument or formal submission.

The failure of the trial judge to examine defendant with reference to the crime and his participation therein is not necessarily fatal to the conviction. *People* v. *Seifert* (1969), 17 Mich App 187, *People* v. *Donald T. Moore* (1970), 21 Mich App 150. Before accepting a guilty plea, the trial court is required to arrive at a reasonable ascertainment of the truth of the plea. *People* v. *Bartlett* (1969), 17 Mich App 205. The truth of a plea is ascertained when there appears from the record a substantial

factual basis for it. In the present case, the transcript of the preliminary examination furnishes a substantial factual basis for the plea. In addition, defendant's plea was entered during the second day of trial and just shortly after a codefendant was questioned as to his participation in the offense. The record in this case contains a substantial factual basis for the plea and the trial judge did not err by not examining defendant as to the crime and his participation therein.

Motion to affirm is granted.

PEOPLE *v.* JOHN MARTIN

1. CRIMINAL LAW—PLEA OF GUILTY—COURT'S DUTY—DEFENSE OF INSANITY.

   The trial court has no duty to explain *sua sponte* to a defendant who pleads guilty the defense of insanity.

2. CRIMINAL LAW—DEFENSES—INSANITY—PLEA OF GUILTY.

   The rights of defendant, who pled guilty, were fully protected with regard to a possible defense of insanity where the court, pursuant to statute, ordered a psychiatric evaluation (MCLA § 767.27a).

Appeal from Recorder's Court of Detroit, Donald S. Leonard, J. Submitted Division 1 January 12, 1971, at Detroit. (Docket No. 9838.) Decided February 26, 1971. Leave to appeal denied August 3, 1971, 385 Mich 773.

John I. Martin was convicted, on his plea of guilty, of murder in the second degree. Defendant appeals. People's motion to affirm granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

Thomas A. Maher, for defendant on appeal.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law §§ 45, 46, 484–496.

Before: R. B. BURNS, P. J., and FITZGERALD and HOLBROOK, JJ.

PER CURIAM. Defendant was charged with murder in the first degree, contrary to MCLA § 750.316 (Stat Ann 1954 Rev § 28.548), on January 23, 1969. With the assistance of trial counsel he tendered a plea of guilty to the lesser offense of murder in the second degree on May 11, 1970. MCLA § 750.317 (Stat Ann 1954 Rev § 28.549). The plea was accepted and on May 25, 1970, he was sentenced to life imprisonment.

Defendant's claim of appeal presents a single question for appellate review. It is his contention that the plea was not understandingly made since the trial court failed to inform the defendant of the prosecution's burden of proof as to the defendant's sanity, if the presumption of sanity were overcome. The people have filed a motion to affirm the conviction and sentence on the ground that the question presented for review is so unsubstantial as to warrant no argument or formal submission.

This Court has not discovered, nor has the appellant advanced any authority which would impose upon the trial court a duty to *sua sponte* explain to the defendant the defense of insanity. The rights of the defendant with regard to a possible defense of insanity were fully protected when the lower court signed an order for commitment for psychiatric evaluation dated October 10, 1969, pursuant to MCLA § 767.27a (Stat Ann 1970 Cum Supp § 28-.966[11]). The report failed to support a possible defense of insanity at the conclusion of the examination.

The motion to affirm is granted.

LEMANSKI *v.* FRIMBERGER COMPANY

WORKMEN'S COMPENSATION—APPEAL AND ERROR—FINDINGS OF FACT —SCOPE OF REVIEW.

The findings of fact of the Workmen's Compensation Appeal Board are binding on appeal where there is evidence in the record to support them.

Appeal from the Workmen's Compensation Appeal Board. Submitted Division 3 February 3, 1971, at Lansing. (Docket No. 9844.) Decided February 26, 1971.

Robert W. Lemanski presented his claim for workmen's compensation against the Frimberger Company and the United States Fidelity and Guaranty Company. Award to plaintiff. Defendants appeal. Affirmed.

Cicinelli, Mossner, Majoros, Harrigan & Alexander, for plaintiff.

Smith & Brooker (by *A. T. Lippert*), for defendants.

Before: QUINN, P. J., and MCGREGOR and O'HARA,* JJ.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

REFERENCE FOR POINTS IN HEADNOTE

58 Am Jur, Workmen's Compensation § 530.

PER CURIAM. Plaintiff, a journeyman sheet metal worker and a resident of Saginaw, was severely injured in an automobile collision on his way to a job site in Mount Pleasant. He was permanently and totally disabled due to paralysis of two limbs and brain damage. Under his employment contract, plaintiff had been paid for travel to and from the job site, 60 miles from Saginaw, at a rate of ten cents per mile.

The workmen's compensation hearing referee found that plaintiff had suffered a compensable injury during the course of his employment; defendants appealed and the appeal board affirmed stating:

"Defendants' position is that this is merely a going to and from work situation and therefore excluded from coverage. This board does not agree. The payment of mileage pursuant to agreement is obviously intended to cover a special situation entailing more than a mere trip between home and shop and is a recognition that this employment has placed demands outside the ordinary on plaintiff in order to fulfill the requirements of his job for defendant, that highway travel is a necessary and routine part of the work assigned."

The questions raised by defendants on appeal are:

"Was the plaintiff in the course of his employment at the time he received a personal injury?

"Did the plaintiff receive a personal injury arising out of his employment?"

These questions do not properly state the factors which control our decision. Proximate causality is a question for the fact finder, *Scroggins* v. *Corning Glass Company* (1969), 382 Mich 628. Fact findings by the Workmen's Compensation Appeal Board,

supported by proof, are binding on this Court, *Johnson* v. *Vibradamp Corporation* (1968), 381 Mich 388. There is proof in this record supporting the appeal board's finding that plaintiff's injuries arose out of and in the course of his employment.

Affirmed with costs to plaintiff.

PEOPLE *v.* WATKINS

Appeal from Recorder's Court of Detroit, Vincent J. Brennan, J. Submitted Division 1 January 8, 1971, at Detroit. (Docket No. 9867.) Decided February 26, 1971.

James Watkins was convicted, on his plea of guilty, of murder in the second degree. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

M. Arthur Arduin and *Kenneth A. Webb,* for defendant on appeal.

Before: R. B. BURNS, P. J., and J. H. GILLIS and DANHOF, JJ.

PER CURIAM. The defendant pled guilty to a charge of second-degree murder. MCLA § 750.317 (Stat Ann 1954 Rev § 28.549). He now appeals contending that the trial court did not inform him of the nature of the crime and that the record does not show that he had the intent to kill.

The record shows that the trial court explained the nature of the offense and that the defendant admitted that he intended to kill his victim. Therefore, a detailed discussion of the issues raised is unnecessary.

Affirmed.

AFRICAN METHODIST EPISCOPAL CHURCH *v.* SHOULDERS

JUDGMENT—SUMMARY JUDGMENT—ISSUE OF FACT.

The court in deciding whether the case before it is appropriate for summary judgment must be strictly sure that it is not required to pass summarily upon any genuinely disputed issue of fact (GCR 1963, 117).

Appeal from St. Clair, Halford I. Streeter, J. Submitted Division 2 December 9, 1970, at Lansing. (Docket No. 9976.) Decided February 26, 1971.

Complaint by the African Methodist Episcopal Church, St. Paul African Methodist Episcopal Church of Port Huron, Michigan, Fred Porter, Wennie Kennedy, Reverend Mr. Joseph L. Roberts and Reverend Mr. Delano Bowman against Earl Shoulders, Eleger Harvey, James Stanley, James Johnson, John Doe, and Mary Roe for an injunction preventing defendants from obstructing access to church buildings and preventing religious worship, and for an accounting. Summary judgment for plaintiffs. Defendants appeal. Remanded for trial.

Bush, Luce, Henderson & Black (by *S. Keith Bankson* and *Herbert Dudley,* of counsel), for plaintiffs.

Touma, Watson & Andresen, for defendants.

REFERENCE FOR POINTS IN HEADNOTE

41 Am Jur, Pleading §§ 340–343.

Before: MCGREGOR, P. J., and T. M. BURNS and ANDREWS,* JJ.

PER CURIAM. This case arises out of a dispute among members and officers of St. Paul African Methodist Episcopal Church of Port Huron. Defendants appeal the summary judgment granted on plaintiffs' motion. (The judgment is shown in the appendix *infra.*)

On April 16, 1970, plaintiffs filed a complaint alleging, *inter alia,* that the church was an unincorporated association (a copy of the articles of association was attached to the complaint), that the local AME church was a local affiliate of the national AME church, and that the defendants physically prevented plaintiffs' access to the church building. Plaintiffs prayed for an injunction preventing defendants from obstructing access to church buildings and preventing religious worship, and for an accounting.

Defendants' motion for accelerated judgment of no cause of action under GCR 1963, 116, based on a lack of jurisdiction over the subject matter, was not noticed for hearing nor decided. Plaintiffs' motion for a preliminary injunction was granted.

Following a pretrial conference the trial judge filed a "statement of case" reciting:

"This is a case in which the plaintiffs allege that a dissident group, possibly a majority of the congregation, wish to use the St. Paul African Methodist Episcopal Church of Port Huron, Michigan, for other than African Methodist Episcopal Church uses as set forth in the discipline, laws and usages of the parent church and the historical doctrines of the local church. In addition to the basic injunction,

* Circuit judge, sitting on the Court of Appeals by assignment.

plaintiffs are requesting an accounting of the funds of the church.

"Defendants contend they have a substantial majority, if not all, of the congregation, and that the African Methodist Episcopal National and State Church has rules, doctrines, and Discipline for governing a local church, and in violating those rules and by their conduct have raised a serious question as to whether they are abiding by the rules of the African Methodist Episcopal Church, and defendants contend, that in order to practice their religion as they understand it, they can no longer affiliate with the African Methodist Episcopal Church, and that the practices conducted in the past by the American Methodist Episcopal Bishop and his other officers have violated the doctrines and principles of the African Methodist Episcopal Church."

The case was set for trial on July 16, 1970 when the trial court, without taking testimony, granted plaintiffs' motion for "judgment on the pleadings"[1] and ordered, *inter alia,* that defendants be permanently restrained from obstructing the use of church property and from interfering with church activities and church members. In addition, defendants were ordered to make an accounting of assets belonging to the church.

The question before this Court is whether defendants stated a valid defense to the claims asserted against them. Paragraphs 10 and 11 of the complaint allege that the defendants physically obstructed church members from entering the church building and from conducting religious services therein, that the defendants intend to deny church officers entrance to the church buildings, and that

[1] 1 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 357:

"The new rule 117 continues the existing practice and expands summary judgment to include functions formerly performed by * * * (2) a motion for judgment on the pleadings."

defendants "have seized all of the finances" of the church. The answer denied these allegations as follows:

"The defendants deny any illegal purpose or plan and have not prevented anyone from attending the church services that have been held every Sunday in the church buildings; and

"The defendants deny that they initially refused or denied the minister or the representative and presiding bishop from entering the premises and the pulpit but admit that they have denied the recent appointee of the bishop from conducting services at the church. The defendants further deny that they have been improperly using the church facilities."

In addition, the defendants raised numerous affirmative defenses, alleging their grievances against the plaintiffs. 1 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 359, states:

" * * * in deciding whether the case is appropriate for summary judgment, the court must be strictly sure that it is not required to pass summarily upon any genuinely disputed issue of fact. In this sense, the rule is strictly construed." See *Podvin* v. *St. Joseph Hospital* (1963), 369 Mich 65 and *Durant* v. *Stahlin* (1965), 375 Mich 628.

We conclude that the defendants stated a valid defense and they were entitled to be heard.

Remand for trial.

APPENDIX

INJUNCTIVE JUDGMENT

At a session of said court, continued and held at the County-City Building, in the circuit court-room, in the City of Port Huron, County of St. Clair, State of Michigan, this 22nd day of July, 1970.

Present: Hon. Halford I. Streeter
Circuit Judge

The complaint and answer having been filed in the above matter; and

Following two hearings of record on different motions filed by each party; and

The court having examined the allegations contained in paragraphs eight, nine, and ten of the complaint and the admissions thereof contained in paragraphs eight, nine, and ten of the defendants' answer; and

A hearing having been held for the purpose of determining the nature of the judgment to be entered pursuant to the court's examination as set forth in the immediately preceding paragraph;

Wherefore, it is hereby ordered that the above defendants be and are permanently restrained from:

(A) Locking the doors and/or preventing the church from being used at all times for religious purposes by the authorized personnel and members of the St. Paul African Methodist Episcopal Church of Port Huron, Michigan.

(B) Preventing, obstructing, molesting, and/or interfering with the minister of the St. Paul African Methodist Episcopal Church assigned by the bishop from entering and leaving the church building.

(C) Preventing the minister assigned by the bishop from entering the pulpit and conducting religious services and/or carrying out any of the regular and customary duties of a minister assigned to the church.

(D) Preventing or obstructing members of the St. Paul African Methodist Episcopal Church of Port Huron, Michigan, from entering or leaving church buildings for purposes of worship, religious services, or any of the activities related thereto.

(E) Bringing in ministers of other faiths or denominations to usurp the pulpit of the St. Paul African Methodist Episcopal Church.

(F) Squandering, secreting, or disposing of church funds or diverting same from their normal, regular, and historical use.

(G) Conveying away, encumbering, mortgaging, or disposing of in any manner the real estate belonging to St. Paul African Methodist Episcopal Church.

(H) Removing, altering, obliterating or distorting, changing or interfering in any manner with the sign bearing the name of the St. Paul African Methodist Episcopal Church of Port Huron, Michigan.

(I) Interfering with, molesting, threatening, or preventing members or friends from approaching, entering, or attending services at the St. Paul African Methodist Episcopal Church of Port Huron, Michigan.

It is further ordered and adjudged that on or before October 22, 1970, said defendants make a complete accounting to plaintiffs through their respective attorneys concerning all assets owned by the African Methodist Episcopal Church or owned by any other person or organization involved in this controversy. Defendants are ordered to make said

accounting and to turn over to the plaintiffs, through their respective attorneys, all assets involved in said accounting. This portion of this judgment includes but is not limited to the building fund, the Senior Choir Fund, the Sunday School Fund, the General Treasury, the Senior Missionary Society Fund, the Scholarship Fund, the Aries Choir Fund, the Junior Usher Board Fund, and the Stewardess Fund. On or before October 22, 1970, the defendants are ordered to turn over to the plaintiffs any keys to any church property, any rents received from any church property, and any other thing involved in this controversy which, in view of the court's determination in favor of the plaintiffs, should become controlled by the plaintiffs.

It is further ordered and adjudged that between the date hereof and October 22, 1970, the defendants shall have the right to use the church building to conduct worship services under their auspices in accordance with the schedule heretofore established by the court in connection with the entry of preliminary injunction. The times allocated to the defendants are from 8 a.m. to 10 a.m., and from 1 p.m. to 3 p.m., on Sundays. It is the intent of this paragraph of the judgment to give the defendants three months in which to continue worshiping as a group during which time they will have opportunity to seek other permanent arrangements for a place of worship. It is hereby ordered that from and after October 22, 1970, said defendants shall have no right to use said church building in any manner whatsoever except under the express and specific consent and permission of the African Methodist Episcopal Church authorities as established in the Discipline.

PEOPLE v. BRYANT

CRIMINAL LAW—PLEA OF GUILTY—TRUTHFULNESS.

Plea of guilty was properly accepted even though the defendant was at first reluctant to implicate himself in the crime to which he pled guilty where the trial court recessed so that the defendant could consult with his counsel and when the proceedings resumed, the defendant admitted sufficient facts to substantiate the truthfulness of his plea.

Appeal from Recorder's Court of Detroit, Samuel H. Olsen, J. Submitted Division 1 December 29, 1970, at Lansing. (Docket No. 10023.) Decided February 26, 1971.

Gerald Bryant was convicted, on his plea of guilty, of unarmed robbery. Defendant appeals. People's motion to affirm granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

George A. Schudlich and *Edward P. Echlin,* for defendant on appeal.

Before: DANHOF, P. J., and MCGREGOR and QUINN, JJ.

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law §§ 484–496.

PER CURIAM. Defendant appeals from his conviction upon a plea of guilty to the offense of robbery unarmed. MCLA § 750.530 (Stat Ann 1954 Rev § 28.798). He now contends that the trial court erred in accepting his plea when his responses were qualified and equivocal. *People* v. *Richard E. Johnson* (1967), 8 Mich App 204. The people have submitted a motion to affirm his conviction.

We discern from the plea transcript, as did the trial court personally, that defendant was extremely reluctant to implicate himself in the crime to which he tendered a plea of guilty. The court consequently recessed the proceedings so defendant could consult with his attorney. Upon resumption of the proceedings, defendant admitted sufficient facts to substantiate the truth of his plea. With this procedure we cannot take issue.

Motion to affirm is granted.

PEOPLE *v.* TRICE
PEOPLE *v.* WILLIAMS

CRIMINAL LAW—PLEA OF GUILTY—JOINT INTERROGATION—COURT RULE.

Interrogating three codefendants jointly during the taking of their pleas of guilty was not error where the transcript of the interrogation shows that the trial judge obtained a separate, distinct, and clear response from each of the defendants as to each question which he put to them collectively and that he separately and clearly established as to each defendant that defendant's participation in the commission of the offense (GCR 1963, 785.3[2]).

Appeal from Recorder's Court of Detroit, Robert J. Colombo, J. Submitted Division 1 December 29, 1970, at Detroit. (Docket Nos. 10430, 10431.) Decided February 26, 1971.

William Trice and Rufus Williams were convited, on their pleas of guilty, of second-degree murder. Defendants appeal. People's motions to affirm granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 496.

William H. Ferguson (*Edward P. Echlin,* of counsel), for defendant William Trice on appeal.

George W. Schudlich (*Edward P. Echlin,* of counsel), for defendant Rufus Williams on appeal.

Before: FITZGERALD, P. J., and LEVIN and V. J. BRENNAN, JJ.

PER CURIAM. Defendants appeal from their convictions upon pleas of guilty to the offense of murder in the second degree. MCLA § 750.317 (Stat Ann 1954 Rev § 28.549).

Together with a third man, they were originally charged with first-degree murder arising out of the killing of a grocer during the course of a robbery. The three defendants, each represented by his own counsel, entered pleas of guilty in a single proceeding. Defendants Trice and Williams now claim that the trial court erred under GCR 1963, 785.3(2), in jointly interrogating the three codefendants upon their pleas. The people have submitted motions to affirm.

The transcript of the interrogation shows that the judge obtained a separate, distinct, and clear response from each of the defendants as to each question which he put to them collectively and that he separately and clearly established as to each defendant his participation in the commission of the offense.

It is manifest that the question presented is so unsubstantial as to need no argument or formal submission. *People* v. *Douglas* (1966), 4 Mich App 208; *People* v. *Tolliver* (1969), 15 Mich App 500.

Motions to affirm are granted.

PEOPLE v. MORRIN

1. HOMICIDE—FIRST-DEGREE MURDER—ELEMENTS OF OFFENSE.

   First-degree murder requires proof of malice aforethought and wilfulness, premeditation, and deliberation (MCLA 1971 Cum Supp § 750.316).

2. HOMICIDE—FIRST-DEGREE MURDER—SECOND-DEGREE MURDER—NEW TRIAL.

   New trial need not be ordered for a defendant convicted of first-degree murder even though the evidence presented did not warrant a reasonable inference that the defendant killed his victim with deliberation and premeditation where the jury's verdict, read in light of the charge, constituted an express finding that the homicide was intentional and not committed under circumstances of mitigation nor justifiable or excusable; judgment was remanded for entry of a conviction of second-degree murder.

REFERENCES FOR POINTS IN HEADNOTES

[1] 40 Am Jur 2d, Homicide §§ 44–52.
[2, 12, 13, 16–21, 28] 40 Am Jur 2d, Homicide § 558.
[3] 40 Am Jur 2d, Homicide § 1.
[4–6] 40 Am Jur 2d, Homicide §§ 1, 110.
[7, 10, 15] 40 Am Jur 2d, Homicide §§ 41–53.
[8] 40 Am Jur 2d, Homicide §§ 45, 50, 51.
[9] 40 Am Jur 2d, Homicide §§ 50, 51.
[11] 40 Am Jur 2d, Homicide § 255.
[14, 16–21] 40 Am Jur 2d, Homicide § 50.
Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR 656.
Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.
[22] 40 Am Jur 2d, Homicide § 536.
[23] 40 Am Jur 2d, Homicide §§ 463, 464.
[24] 53 Am Jur, Trial §§ 936–940.
[25, 26] 40 Am Jur 2d, Homicide §§ 416–420.
Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.
[27] 40 Am Jur 2d, Homicide §§ 298–309.

3. HOMICIDE—TYPES OF HOMICIDE.
   Homicide, the killing of one human being by another, may be either innocent or criminal.

4. HOMICIDE—INNOCENT HOMICIDE.
   A homicide is innocent if it is justifiable or excusable.

5. HOMICIDE—JUSTIFIABLE HOMICIDE.
   A homicide is "justifiable" if it is authorized, as in the case of self-defense, or if it is commanded by law, as in the execution of a death sentence.

6. HOMICIDE—EXCUSABLE HOMICIDE.
   A homicide is "excusable" if the death is the result of an accident and the actor was not criminally negligent.

7. HOMICIDE—MURDER—ELEMENTS.
   A person who kills another is guilty of the crime of murder if the homicide is criminal, neither justifiable nor excusable, and if it is committed with malice aforethought.

8. HOMICIDE—MALICE AFORETHOUGHT—DEFINITION.
   Malice aforethought is the intention to kill, actual or implied, under circumstances which do not constitute excuse or justification or mitigate the degree of the killing to manslaughter.

9. HOMICIDE—INTENT TO KILL—IMPLIED INTENT.
   The intent to kill may be implied by law where the actor actually intends to inflict great bodily harm or the natural tendency of his behavior is to cause death or great bodily harm.

10. HOMICIDE—MURDER—ILL WILL.
    A killing may be murder even though the actor harbored no hatred or ill will against the victim and even though he acted on the spur of the moment.

11. HOMICIDE—MURDER—MALICE AFORETHOUGHT—INFERENCE PERMISSIBLE—PRESUMPTION OF INNOCENCE.
    Malice aforethought is a permissible inference, not a presumption arising from the fact of a homicide; the presumption of innocence applies to the element of malice.

12. HOMICIDE—FIRST-DEGREE MURDER—MALICE AFORETHOUGHT—INSTRUCTIONS TO JURY.
    Courts in order to clarify the confusion surrounding the meaning of "malice aforethought" might well instruct a jury in a murder case that it can convict the defendant of murder

only when it is convinced beyond a reasonable doubt that the defendant (1) actually or impliedly intended to kill and (2) circumstances constituting excuse, justification, or mitigation do not exist.

13. HOMICIDE—FIRST-DEGREE MURDER—ELEMENTS.

First-degree murder is a statutory offense which consists of the common-law offense of murder, a homicide committed with malice aforethought, and of a murder by poison, lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or in the perpetration or attempt to perpetrate certain crimes enumerated by statute (MCLA § 750-.316).

14. HOMICIDE—MURDER—MALICE AFORETHOUGHT—PREMEDITATION.

"Malice aforethought" is not synonymous in law with "premeditation."

15. HOMICIDE—MURDER—DEGREES OF MURDER—POLICY.

The division of murder into degrees was prompted by a feeling that not all murders reflected the same quantum of culpability.

16. HOMICIDE—FIRST-DEGREE MURDER—PREMEDITATION AND DELIBERATION.

Premeditation and deliberation are all that distinguish first-degree from second-degree murder; in order to preserve the distinction between the degrees of murder, premeditation and deliberation must be given independent meaning in a prosecution for first-degree murder.

17. HOMICIDE—FIRST-DEGREE MURDER—PREMEDITATION AND DELIBERATION—DEFINITIONS.

Premeditation is to think about beforehand; deliberation is to measure and to evaluate the major facets of a choice or problem.

18. HOMICIDE—FIRST-DEGREE MURDER—PREMEDITATION AND DELIBERATION—THOUGHT PROCESS—REFLECTION.

Premeditation and deliberation characterize a thought process undisturbed by hot blood; some orderly reflection is required for premeditation and deliberation and, while the time period is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a second look.

19. HOMICIDE—FIRST-DEGREE MURDER—PREMEDITATION AND DELIBERATION—EVIDENCE—INFERENCES.

Premeditation and deliberation may be established by inferences from all the facts of the case.

20. HOMICIDE—FIRST-DEGREE MURDER—PREMEDITATION AND DELIBERATION—EVIDENCE.

Insufficient evidence existed to warrant an inference that the defendant killed his victim, a hitchhiker, with premeditation and deliberation where there was no prior relationship between the parties tending to show motive; the murder weapon, tongs used by the defendant in his trade and usually carried with him, was not acquired or positioned in preparation for homicide; no evidence existed to support an inference that the defendant transported the victim to the secluded place where the murder occurred for an illicit or criminal purpose; the defendant's actions before the killing, giving the victim a ride and following the victim's road directions, and the circumstances of the killing itself, a struggle in which the victim was killed, were as consistent with the absence as with the presence of premeditation and deliberation; the defendant's distraught and hysterical condition after the killing, while perhaps showing consciousness of guilt, was neither coherent nor organized enough to suggest a place in an organized scheme; and where there was a bizarre rectal wound on the victim which, especially assuming the truth of the prosecution's case that the wound was inflicted after the victim was dead, was inconsistent with rational, deliberative processes.

21. HOMICIDE—FIRST-DEGREE MURDER—PREMEDITATION AND DELIBERATION—EVIDENCE—DEADLY WEAPON—INFERENCES.

The use of a deadly weapon in a killing may give rise to a presumption or, at least, permit an inference of premeditation where there are other circumstances showing motive or plan which would make reasonable the inference that the use of the weapon was not a spur-of-the-moment decision, but rather that it was acquired or positioned with the thought beforehand of using it to kill the victim.

22. HOMICIDE—MURDER—CROSS-EXAMINATION.

Prosecutor's asking the defendant, charged with murder, whether he told his sister that he had rammed tongs into the deceased's rectum after the victim was already dead was proper cross-examination where, although not testifying to the matter on direct examination, the defendant's sister did testify to it at preliminary examination.

23. CRIMINAL LAW—TRIAL—PROSECUTOR'S ARGUMENT—IMPROPER ARGUMENT—APPEAL AND ERROR.

Prosecutor's overzealous emphasis to the jury concerning a rectal wound on the victim of a murder was disapproved by the Court of Appeals; however, since no objection or motion for a corrective instruction or a mistrial was made, the error was not preserved for review.

24. TRIAL—REREADING OF TESTIMONY—DISCRETION.

The reading to jury or the granting of permission for the jury's reading of testimonial excerpts is in the trial court's discretion; the trial court's decision is reversible only if there was an abuse of discretion.

25. HOMICIDE—MURDER—EVIDENCE—PHOTOGRAPHS—ADMISSIBILITY.

Photographs of a homicide victim are admissible at trial if they accurately depict what they represent and are helpful in illuminating a material issue.

26. HOMICIDE—MURDER—EVIDENCE—PHOTOGRAPHS—ADMISSIBILITY.

Admitting a photograph of the victim of the murder with which the defendant was charged was not an abuse of discretion even though the photograph was taken at the morgue rather than at the scene of the crime where the photograph was an accurate picture of the body, the moving of the body did not affect the accuracy of the photograph, and the photograph was intended to show the body, not the scene of the crime.

27. WITNESSES—CHARACTER WITNESS—BASIS.

Testimony of a character witness must be based on what the witness has heard others in the party's business or residential community say about the party whose character is in issue.

28. HOMICIDE—FIRST-DEGREE MURDER—SECOND-DEGREE MURDER—REMANDING FOR ENTRY OF JUDGMENT.

An appellate court can remand a first-degree murder conviction to the trial court for the entry of a judgment of second-degree murder where the defendant was convicted on evidence sufficient only to prove the less aggravated crime.

Appeal from Monroe, James J. Kelley, Jr., J. Submitted Division 2 June 10, 1969, at Detroit. (Docket No. 4757.) Decided March 16, 1971. Leave to appeal denied August 3, 1971, 385 Mich 775.

Leslie Taylor Morrin was convicted of first-degree murder. Defendant appeals. Remanded for

entry of judgment of conviction of second-degree murder and resentencing.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas J. Rostash,* Prosecuting Attorney and *E. J. McCormick, Jr.,* Assistant Prosecuting Attorney, for the people.

Daniel L. Sullivan, for defendant on appeal.

Before: FITZGERALD, P. J., and LEVIN and T. M. BURNS, JJ.

LEVIN, J. Leslie Taylor Morrin was convicted of first-degree murder[1] by a jury in Monroe County Circuit Court. At the trial he testified that he killed the victim in self-defense. His evidence, coupled with the jury's unquestioned right to reject the claim of self-defense, provided sufficient evidence to sustain a verdict finding that he committed the crime of second-degree murder by killing another human being with malice aforethought.[2]

The statutory offense of which Morrin was convicted was, however, first-degree, not second-degree, murder. Although evidence that a homicide was committed with malice aforethought will support a conviction of second-degree murder, to convict an accused person of first-degree murder the people must additionally prove that the murder was committed with willfulness, deliberation, and premeditation. We hold that the evidence presented in this case is not sufficient to support a reasonable inference that Morrin killed his victim with the requisite deliberation and premeditation.

---

[1] MCLA § 750.316 (Stat Ann 1954 Rev § 28.548); see text accompanying fn 29 for a quotation of this statutory provision.

[2] "All other kinds of murder shall be murder of the second degree." MCLA § 750.317 (Stat Ann 1954 Rev § 28.549).

There is, however, no need to order a new trial. The jury's verdict, read in the light of the judge's charge, constituted an express finding that the homicide was intentional and neither justifiable nor excusable nor committed under circumstances of mitigation, and hence that it was committed with malice aforethought. Since a conviction of second-degree murder is proper upon such a finding, we remand for entry of a judgment convicting Morrin of second-degree murder. Upon conviction of first-degree murder a life sentence is mandatory. A defendant convicted of second-degree murder may, but need not, be sentenced to a life term. Morrin shall, therefore, be resentenced.

I.

Morrin killed William Abell, a 53-year-old unmarried male. Abell died from some combination of eight blows to the head inflicted by Morrin with a large pair of tongs.

There were no witnesses to the killing or the events that preceded it. Morrin's testimony is the only affirmative evidence concerning the circumstances of the killing.

Morrin was 37 years old at the time of the killing. He was a millwright by trade. On March 27, 1967, at approximately 8:30 a.m., he completed 17 hours of work in Oregon, Ohio. He testified that after eating breakfast he went to a union hall in nearby Toledo, Ohio, to talk to the union's business agent. Finding that the agent was not there, he stopped at a nearby bar, where he periodically phoned the union hall to see if the business agent had returned. Morrin drank seven or eight glasses of beer before 1 p.m., when he learned the agent was gone for the day.

While sitting in the bar, Morrin was approached by Abell, a complete stranger. Abell asked for a ride to Erie, Michigan, which was near Morrin's home in Monroe, Michigan. After Morrin learned that the business agent was unavailable, he and Abell left together.

When they reached Erie, Abell asked to be taken to a specific location. Morrin agreed, and proceeded at Abell's direction to traverse a number of quite remote, unpaved roads. Ultimately the car became mired in a mudhole. Abell alighted to push while Morrin attempted to extricate the vehicle by rocking the wheels. Their joint efforts succeeded, and the car was freed, whereupon Abell re-entered the car.

At this point, Morrin testified, Abell pulled out a knife. Grabbing Morrin by the hair, he held the knife to his throat. Morrin offered to let Abell have all the money in his possession. Abell said that Morrin would first have to commit an oral sexual act upon him.

With Abell still holding the knife at Morrin's throat, they slid out of the car, whereupon Morrin was forced to assume a kneeling position, facing Abell. Abell directed Morrin to remove his (Abell's) trousers, but when Morrin did not move Abell partially removed them himself. Abell then commanded Morrin to commit the sexual act. When Morrin still did not move, Abell grasped him by the back of the head to pull him forward.

Morrin testified that he then struck Abell in the testicles. Rising to his feet, Morrin started to flee before he saw Abell advancing on him with the knife. Morrin then grabbed a large pair of tongs from the back seat of the car. (The tongs apparently were one of the tools of his trade and he customarily took them on trips to and from work.)

A struggle then ensued and the two men exchanged blows. Finally, as Morrin swung the tongs, they entered Abell's rectum. Abell fell forward slightly and Morrin struck him several more times with the tongs. When Abell fell to the ground, Morrin seized Abell's knife and threw it away. (The knife was not found.)[3] Morrin then ran to his car and drove away. He drove straight home, stopping once at a gasoline station. He told the attendant that he had been in a scuffle.

Upon reaching home, he was in a distraught and hysterical state. His wife called his sister who immediately came over. Morrin said that he had hurt someone, perhaps killed him. He was crying and somewhat incoherent. He kept repeating the words, "if he hadn't disgusted me so". He took his sister out to the car to convince her that he was telling the truth. His sister washed the blood off the car and also washed the tongs which were in the back seat.

Morrin and his sister drove back to the place of the fight to see whether Abell was alive. The sister drove. It took them some time to find the exact place. Morrin alone got out of the car and found that Abell was, indeed, dead. They then returned home. It was agreed that they would do nothing immediately but would take some action the next morning.

The sister then returned to her home and phoned an attorney who then phoned the police. The police picked up the sister who took them to Abell's body. Morrin said that the next morning, without having

[3] The record does not indicate that the scene was searched except for a search made shortly after Abell's body was discovered and before Morrin was taken into custody. A police officer testified that the police did not look for a knife when they made the search and, if there had been a knife, because of the terrain, the likelihood or probability is that it would have escaped detection.

heard from his sister, he decided to turn himself in. He met the police on the way to his sister's home.

This was substantially the evidence upon which the case went to the jury. The prosecution introduced numerous photographs of the deceased taken at the scene. Morrin produced two character witnesses. Throughout the trial, the prosecutor repeatedly emphasized the bizarre rectal wound suffered by Abell; he claimed that the wound was inflicted after Abell was already dead.

The jury was instructed on the elements of first-degree murder, second-degree murder, and manslaughter, as well as self-defense.

II.

Homicide, the killing of one human being by another, may be innocent or criminal. There are two categories of innocent homicide; they are called justifiable homicide and excusable homicide. Homicide is "justifiable" if it is authorized (*e.g.*, self-defense) or commanded (*e.g.*, execution of a death sentence) by law. Homicide is "excusable" if the death is the result of an accident and the actor was not criminally negligent.[4]

A person who kills another is guilty of the crime of murder if the homicide is committed with malice aforethought.[5] Malice aforethought is the intention to kill, actual or implied,[6] under circumstances which do not constitute excuse or justification or mitigate

[4] Perkins on Criminal Law (2d ed), p 33. As to criminal negligence, see 1 Wharton's Criminal Law and Procedure, §§ 290, 291, pp 609–614; Perkins on Criminal Law (2d ed), p 71 *et seq.*; Moreland, Law of Homicide, p 99 *et seq.*; Clark and Marshall Crimes (6th ed), § 10.12, pp 634–637.

[5] Perkins on Criminal Law (2d ed), p 34; 1 Wharton's Criminal Law and Procedure, § 242, pp 522–527; Clark and Marshall, Crimes (6th ed), § 10.04, pp 561–566; Moreland, Law of Homicide, p 16.

[6] *People* v. *Potter* (1858), 5 Mich 1, 6; 1 Wharton's Criminal Law and Procedure, § 242, and authorities cited in fn 5.

the degree of the offense to manslaughter.[7] The intent to kill may be implied where the actor actually intends to inflict great bodily harm or the natural tendency of his behavior is to cause death or great bodily harm.[8] (The common-law felony-murder rule is an example of implied intent or implied malice aforethought.)[9]

Thus, as "malice aforethought" is now defined, a killing may be murder even though the actor harbored no hatred or ill will against the victim[10] and

---

[7] In general, mitigating circumstances are the commission of the killing in a sudden heat of passion caused by adequate legal provocation. 1 Wharton's Criminal Law and Procedure, § 274, p 580 *et seq.;* Perkins on Criminal Law (2d ed), p 54. Wharton and Perkins say that even where such mitigating circumstances are not present the crime may be manslaughter, not murder, when the actor kills in self-defense but was not entitled to do so under the circumstances, either because he was not free from fault or his belief that he was in danger was not justified. 1 Wharton's Criminal Law and Procedure, § 274, p 583; Perkins on Criminal Law (2d ed), p 70.

[8] Clark and Marshall, Crimes (6th ed), § 10.04; Perkins on Criminal Law (2d ed), p 36; 1 Wharton's Criminal Law and Procedure, § 242, pp 524–526. See, generally, Holmes, The Common Law, pp 51–63, and Moreland, Law of Homicide, pp 13–16 for the evolvement of the concept of implied intent.

[9] Perkins on Criminal Law (2d ed), p 37; Moreland, Law of Homicide, pp 14, 42; Clark and Marshall, Crimes (6th ed), § 10.07. In Michigan certain felony murders are by statute murder of the first degree. MCLA § 750.316 (Stat Ann 1954 Rev § 28.548).

[10] See Perkins on Criminal Law (2d ed), pp 34, 35; authorities cited in fn 8; and, as an example, *People* v. *Roberts* (1920), 211 Mich 187, a mercy killing.

" 'Malice aforethought' means an intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but 'malice aforethought' does not necessarily imply any ill will, spite or hatred towards the individual killed." 1 Devitt & Blackmar, Federal Jury Practice and Instructions (2d ed), § 43.05, p 538.

Cf. Bonkowski v. *Arlan's Department Store* (1970), 383 Mich 90, 99, a civil case, where a majority of the Court declared: "Malice, in its common acceptation, means ill will towards some person. In its legal sense, it applies to a wrongful act committed intentionally against that person, without legal justification or excuse."

"While actual hatred or enmity may be present, malice is not limited in its meaning to hatred, ill will, or malevolence. Moreover, malice aforethought may exist although there is no particular enmity or ill will toward the victim." 1 Wharton's Criminal Law and Procedure, § 242, p 524.

even though he "acted on the spur of the moment".[11] Whatever may be the philological origin of the words "malice aforethought", today "each word has a different significance in legal usage than in ordinary conversation".[12]

The nature of malice aforethought is the source of much of the confusion that attends the law of homicide.[13] The cause of this confusion has been the

---

To call the distinguishing factor "malice" is to confuse the reader and listener who naturally is looking for a state of mind although the state of mind of the actor is not necessarily important. Of course, one who actually intends to kill generally is malicious in the sense in which that term is used by most persons; but not if the killing is justifiable or excusable. A person who engages in behavior the natural tendency of which is to cause death or great bodily harm does not necessarily act in a state of mind which all or even most speakers of English would describe as malicious.

[11] *Nye* v. *People* (1876), 35 Mich 16, 19; *State* v. *Heidelberg* (1907), 120 La 300, 306 (45 So 256, 258).

"The fact that malice aforethought means merely that malice must exist at the same time as the act, in effect makes 'aforethought' meaningless surplusage." 1 Wharton's Criminal Law and Procedure, § 243, p 527; Perkins on Criminal Law (2d ed), p 35; Moreland, Law of Homicide, p 70.

"There is much learning and some subtlety in the older books upon the question whether a sudden homicide could be properly classed as murder, because that requires malice aforethought. The courts decided that the real test of malice in such cases was to be found in the presence or absence of adequate cause or provocation to account for the violence, and that an unprovoked homicide, however suddenly conceived, might be malicious." *Nye* v. *People, supra,* p 19.

Perkins says:

"Malice aforethought" probably once meant premeditation:

"Thus Lambard, writing in 1581 uses 'malice aforethought' in the sense of real and substantial premeditation although he does not require direct and positive evidence thereof." Perkins on Criminal Law (2d ed), p 53; Moreland also reports that Coke, writing in the middle of the 17th century, declared that a killing upon a sudden occasion (a chance medley) was without malice aforethought and was manslaughter, not murder. Moreland, Law of Homicide, p 64.

[12] Perkins on Criminal Law (2d ed), p 34; authorities cited in fns 10 and 11. Similarly, see 1 Wharton's Criminal Law and Procedure, § 242, p 523.

"Malice, in the definition of murder, has not the same meaning as in common speech." Holmes, The Common Law, p 53.

"In this case it is rather the popular than the legal sense of the word that has changed." 2 Pollock & Maitland, History of English Law (2d ed), p 469.

[13] Moreland, Law of Homicide, p 205; Perkins on Criminal Law (2d ed), p 46.

evolution of malice aforethought from an independently significant element of murder to a "term of art"[14] whose significance is largely historical and procedural.

The precise roots of malice aforethought are uncertain.[15] Common-law courts spoke of "malice prepense" as early as the 13th century.[16] The requirement that malice aforethought be established in all murder prosecutions represented the common law's recognition that a rational legal system will punish certain homicides (for example, those that are intentional) while excusing others (accidental homicides, for example).

From the beginning malice aforethought was defined principally in functional terms. We know

---

"Precision in the use of legal language is essential, particularly in the law of homicide. In a murder trial the use of a word or turn of a phrase may mark the difference between whether the accused leaves the courtroom free—or sentenced to death.

"Yet the phrase 'malice aforethought,' used in defining murder, peers at us like a demon through the dust of more than 400 years of history, lying in wait to clutter statutes and confuse juries. In examining the historical background of the phrase, one probes the roots of a term which, though withering on the vine, lives on to strangle the penal codes of the several States." Purver, The Language of Murder, 14 UCLA L Rev 1306 (1967).

[14] *Austin* v. *United States* (1967), 127 App DC 180, 184 (382 F2d 129, 133).

[15] See, for example, the "hypothesis" advanced in Kaye, The Early History of Murder and Manslaughter, 83 L Q Rev (Part I) 365, (Part II) 569 (1967); Moreland, Law of Homicide, p 9 *et seq.*; Plucknett, A Concise History of the Common Law (5th ed), pp 444–446; Kenny's Outlines of Criminal Law (19th ed), pp 147–155; Russell on Crime (12th ed), pp 465–477; Great Britain Royal Commission on Capital Punishment, Report 1949–1953, appendix 7, p 381 *et seq.*; ch 2, p 25 *et seq.*

The word "murder" is of more ancient origin. It meant a secret killing in early English law. After the Norman Conquest, William the Conqueror found it necessary to impose a heavy fine called the "murdrum" upon any hundred where a man was found slain; the sole defense was Englishry, *i.e.*, that the man slain was an Anglo-Saxon, not a Norman. Moreland, Law of Homicide, p 9; Milson, Historical Foundation of the Common Law, p 370.

[16] See Kaye, The Early History of Murder and Manslaughter, *supra*, Part II, p 569; 2 Pollock & Maitland, History of English Law (2d ed), p 469; Perkins, A Re-Examination of Malice Aforethought, 43 Yale L J 537, 544 (1934).

what it did; it both distinguished criminal from innocent homicide and murder from manslaughter. Yet what it was, the precise state of mind which it described, eluded symmetrical definition.[17]

The common-law courts were faced with a difficult problem: malice aforethought was a requisite ele-

---

[17] Malice, observed Oliver Wendell Holmes, Jr., "is an averment of a conclusion of law which is permitted to abridge the facts (positive and negative) on which it is founded." Holmes, The Common Law, p 63.

Manslaughter (voluntary) has been defined as an intentional killing without malice, and murder as an intentional killing with malice. It is frequently said, perhaps in an effort to state the law of homicide in a nutshell, that the factor that distinguishes murder from manslaughter is the presence or absence of malice aforethought. Clark and Marshall, Crimes (6th ed), § 10.05, p 567; 1 Wharton's Criminal Law and Procedure, § 242, pp 522, 523; § 271, p 574; Perkins on Criminal Law (2d ed), p 51. But that is circular and misleading; murder and manslaughter are more accurately defined affirmatively than negatively.

Malice aforethought means intent to kill not under circumstances of excuse, justification or mitigation. Since excuse and justification are defenses to both murder and manslaughter, the principal factor that distinguishes murder from voluntary manslaughter is the presence or absence of circumstances of mitigation. But a killing is not necessarily murder even though it is neither justifiable, excusable nor committed under circumstances of mitigation.

It is murder only if there is intent to kill, actual or implied. Where there is no actual intent to kill, intent to kill will be implied only in certain circumstances, *e.g.*, where the actor actually intends to inflict great bodily harm or the natural tendency of his behavior is to cause death or great bodily harm, where, as Perkins would put it (see fn 28), the actor has a "man-endangering state of mind."

But, even where there is actual intent to kill and circumstances of mitigation are not present, malice aforethought is not present if the actor acted justifiably, *e.g.*, self-defense.

Thus, an intentional killing may or may not be "malicious" (it may be excused or justified or the offense reduced because of mitigating circumstances); an unintentional killing may or may not be "malicious" (intent to kill may be implied, but not necessarily, and even if intent is implied the killing may be excused, justified or the offense reduced to manslaughter by reason of mitigating circumstances); and the absence of mitigating circumstances does not necessarily make the offense murder (there must be actual or implied intent to kill).

Yet the common law sums up all these mottled, contradictory concepts in one term, "malice aforethought," a construct so complex that it is meaningless except to those initiated in the mystique of the law of homicide. See Moreland, Law of Homicide, pp 205, 206; Purver, The Language of Murder, 14 UCLA L Rev 1306, 1308 (1967).

ment of murder, but one so elusive that in many cases it resisted direct proof. Their solution was to create a presumption of malice. As early as the 16th century proof that the accused person killed the victim gave rise to a "presumption" that the act was done with malice aforethought. Once it was established that the accused killed the victim, the burden was upon the accused to prove circumstances of justification, excuse, or mitigation.[18]

This rule, firmly rooted in English law, has taken hold in a great many American jurisdictions,[19] including Michigan:

"if the act of killing was proved, the presumption of law is that it was done with malice aforethought.

---

18 See Moreland, Law of Homicide, pp 20–23.

19 Perkins says:

"It would be an unreasonable burden upon the prosecution to require it in every murder case to prove not only the killing of the deceased by the defendant, but also the nonexistence of every conceivable set of circumstances which might be sufficient to constitute either innocent homicide or guilt of manslaughter only. Thus the state is not required to prove (in addition to the killing of the deceased by the defendant) that the defendant was not so insane as to be wanting in criminal capacity, or that the killing was not by accident, or that it did not result from the privileged use of deadly force, or that it did not result from the sudden heat of passion engendered by adequate provocation or other matters of this kind. To require such proof would constitute an absurd waste of time. This difficulty is avoided by a rule of law in the form of a presumption. * * * Every homicide is presumed to have been committed with malice aforethought 'unless the evidence which proves the killing itself shows it to have been without malice.'

"Since this is a presumption in the true sense it merely places upon the defendant the burden of going forward with the evidence. It is rebuttable and may be overcome by evidence which throws a different light upon the situation or indicates exculpating or mitigating circumstances. If no such evidence is offered a conviction of murder is proper because of the 'presumed malice'." Perkins on Criminal Law (2d ed), pp 49–51.

See cases cited at 2 Wharton on Homicide, § 187, pp 188–193; similarly, see 1 Wharton's Criminal Evidence, § 132, pp 246–252. New Jersey is perhaps a representative jurisdiction:

"Our cases have long adhered to the view that proof of a killing raises a presumption of malice, and that it is incumbent upon the defendant to adduce facts of justification, excuse or mitigation unless they arise out of the evidence produced against him." *State* v. *Williams* (1959), 29 NJ 27, 43 (148 A2d 22, 31).

* * * The burden of disproving malice is in all cases of murder cast upon the prisoner."[20] *People* v. *Potter* (1858), 5 Mich 1, 9.

The merits of the rule are that it relieves the prosecution from the necessity of proving the nonexistence of circumstances of excuse, justification, and mitigation—frequently an impossible burden—and instead allocates the burden of proving such circumstances to the defendant, who, arguably, has greater ability to do so than the prosecution.

"Ordinarily the government must prove beyond a reasonable doubt each element of the offense charged. But where the pertinent information is much more readily available to the defendant than to the government, the burden may be shifted to him, provided this can be done 'without subjecting the accused to hardship or oppression'. *Morrison* v. *California* (1934), 291 US 82, 87–89 (54 S Ct 281, 284; 78 L Ed 664). This proviso is required to safeguard the presumption of innocence." *Communist Party of United States* v. *United States* (1963), 118 App DC 61 (331 F2d 807, 814).

There is also, however, a grave drawback to this presumptive device. This defect arises in connection with jury instructions. To instruct a jury that malice is presumed from the fact of killing is to invite confusion concerning the ultimate burden of proof in the trial. The prosecution must always prove the defendant guilty beyond a reasonable doubt; a rule of law that shifts the burden of proof with respect to "malice" tends to cloud the dimensions of the prosecution's ultimate burden.

---

[20] Unless, added the court, "the case made by the prosecution shows it to be absent," in which event, of course, the people have failed to prove the allegation of the information. Accord: see authorities discussed in fn 19.

It was this danger which led the House of Lords in 1935 to repudiate instructions that charged jurors that they are to presume malice from the mere fact of killing.[21] Speaking of the presumption of innocence as a "golden thread" running through the common law,[22] the Court rejected a formulation that required the jurors to find a defendant guilty unless he discharged his burden of rebutting the presumption of malice.

The Court did not rule that malice must be proved by evidence independent of the killing itself. The fact of homicide still *permits* the jury to find malice aforethought. But it in no sense *compels* such a finding, even absent any evidence of excuse, justification or mitigation on the part of the defendant.

---

21 *Woolmington* v. *The Director of Public Prosecutions,* [1935] AC 462, 472. The judge in that case charged:

"All homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse or justification. 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him: for the law will presume the fact to have been found in malice until the contrary appeareth.' That has been the law of this country for all time since we had law."

Moreland says the rule has been repudiated in some American jurisdictions. Moreland, Law of Homicide, p 24. See, also, Criminal Law—The Abolition of the Presumption of Malice and Second Degree Murder, 34 Temple L Q 336 (1961), discussing *Commonwealth, ex rel. Johnson,* v. *Myers* (1961), 402 Pa 451 (167 A2d 295). But see *Commonwealth* v. *Jordan* (1962), 407 Pa 575 (181 A2d 310); *Commonwealth* v. *Kaminsky* (1969), 434 Pa 38 (252 A2d 695).

22 See *In re Winship* (1970), 397 US 358, 363 (90 S Ct 1068, 1072; 25 L Ed 2d 368, 375), where the United States Supreme Court declared:

"The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law'. *Coffin* v. *United States* (1895), 156 US 432, 453 (15 S Ct 394, 39 L Ed 481)."

See, also, *Sinclair* v. *United States* (1929), 279 US 263, 296, 297 (49 S Ct 268, 73 L Ed 692); *Deutch* v. *United States* (1961), 367 US 456, 471 (81 S Ct 1587, 6 L Ed 2d 963); *Stack* v. *Boyle* (1951), 342 US 1, 4 (72 S Ct 1, 96 L Ed 3, 6).

"All that is meant is that if it is proved that the conscious act of the prisoner killed a man and nothing else appears in the case, there is evidence upon which the jury may, not must, find him guilty of murder." *Woolmington* v. *The Director of Public Prosecutions,* [1935] AC 462, 480.[23]

The Michigan Supreme Court recognized at an early date the importance of categorizing malice aforethought as a permissible inference rather than a presumption. In *Maher* v. *People* (1862), 10 Mich 212, 217, 218, the Court said:

"To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense or aforethought. This malice is just as essential an ingredient of the offense as the act which causes the death; without the concurrence of both, the crime can not exist; and, as every man is presumed innocent of the offense with which he is charged till he is proved to be guilty, this presumption must apply equally to both ingredients of the offense—to the malice as well as to the killing. Hence, though the principle seems to have been sometimes overlooked, the burden of proof, as to each, rests equally upon the prosecution, though the one may admit and require more direct proof than the other; malice, in most cases, not being susceptible of direct proof, but to be established by inferences more or less strong, to be drawn from the facts and circumstances connected with the killing, and which indicate the disposition or state of mind with which it was done. It is for the court to define the legal import of the term, malice aforethought, or, in other words, that state or disposition of mind which constitutes it; but the question whether it existed or not, *in the particular instance,* would, upon principle, seem to be as clearly a question of fact for the jury, as any other fact

[23] See Moreland, Law of Homicide, p 22.

in the cause, and that they must give such weight to the various facts and circumstances accompanying the act, or in any way bearing upon the question, as in their judgment, they deserve: and that the court have no right to withdraw the question from the jury by assuming to draw the proper inferences from the whole, or any part of, the facts proved, as presumption of law. If courts could do this, juries might be required to find the fact of malice where they were satisfied from the whole evidence it did not exist." (Emphasis by the Court.)

This firm admonition that the presumption of innocence applies to the element of malice as well as to the other elements of the offense and that malice aforethought is a permissible inference—not a mandatory presumption—arising from the fact of homicide is invaluable as an obstacle to one species of confusion in jury instructions.

There is, however, really no need to attempt to educate jurors about malice aforethought, a term which means one thing to laymen and something altogether different in the law. There is no need to tell a jury why the court thinks there is sufficient evidence to convict. From the fact that the judge is charging the jury rather than directing a verdict, it is apparent that the court is satisfied that there is sufficient evidence to justify reasonable men in finding the defendant guilty beyond a reasonable doubt.

"The arcane jargon of the law should not be recited *in vacuo* but, rather, the law pertinent to the case should be related in a meaningful manner to the evidentiary facts of the case." *Hill* v. *Harbor Steel & Supply Corporation* (1965), 374 Mich 194, 208.

Consider that the term "malice aforethought" is supposed to signify both what murder is: the pres-

ence of an essential element of the offense (intent to kill, actual or implied), and what it isn't: the absence of certain defenses (excuse and justification)—but not other defenses[24]—and, as well, the absence of circumstances which would mitigate the seriousness of the offense reducing it to manslaughter. Add that the term "malice aforethought" does not mean malice as used in ordinary speech,[25] and forethought is not required, and it becomes clear that it is well-nigh impossible to communicate to jurors in the arcane jargon of malice aforethought the mental state required. No doubt many jurors are confused, and many, in error but understandably, make up their own working definition out of their own appreciation of what malice aforethought "must" mean.

"The retention of 'malice' in the law of murder is a constant source of trouble and confusion. The word has long been a highly technical 'word of art' practically never used in its natural meaning and so ambiguous and indefinite that lawyers and judges themselves find difficulty in treading the mazes of its various meanings. It is no wonder that the average juryman is completely lost when he at-

[24] Coercion, mistake, insanity, among others, are possible defenses, but they would not necessarily negative malice aforethought taken to mean intent to kill, actual or implied, neither excused nor justified.

[25] Since "malice," as that word is used in ordinary speech, is not an issue, it is misleading to continue to speak to juries of ill will, corruption or malignancy of heart and depravity of the soul. It is, of course, arguable that where the issue is first-degree or second-degree murder, a court might describe one who premeditates and deliberates and decides to kill as being corrupt, malignant or depraved. But the issue is whether the actor deliberated or premeditated, not whether he was corrupt, malignant or depraved. Similarly, those words can be used to distinguish the "non-malignant" conduct of a person who accidentally kills his victim or who acted in self-defense or under circumstances of mitigation; however, again, the true issue would not be whether the actor was corrupt, malignant or depraved but whether he was justified in acting as he did in self-defense or whether it was an accident or there were circumstances of mitigation.

tempts, under the instructions ordinarily given, to make the distinction between malice in its ordinary sense and malice in law. Furthermore, there is no practical reason for the longer retention of the term. The various situations which constitute murder can be better enumerated in the statute in plain and unambiguous language and the present uncertainty removed." Moreland, Law of Homicide, pp 205, 206.[26]

The new penal codes,[27] in defining the crime of murder, eliminate the word "malice." Although Michigan has not remolded its penal code along these lines, a restatement of the common law need not wait upon legislative action. Murder is a common-law crime: "Neither murder nor manslaughter is defined by our statutes, and the definition of murder remains the same as at common law". 3 Gillespie, Michigan Criminal Law and Practice, § 1637, p 1969. If the language of the common law is mis-

[26] See Purver, The Language of Murder, 14 UCLA 1306, 1308.

[27] See New York Revised Penal Code, § 125.25 (murder is intentional killing or, under circumstances evincing a depraved indifference to human life, actor recklessly engages in conduct which creates great risk of death and causes death); Illinois Criminal Code, T. 38, § 9–1 (1961) (murder is killing with intent to kill or do great bodily harm, or where actor knows that such acts will cause death or he knows such acts create a strong probability of death or great bodily harm). Similarly, see Study Draft of a New Federal Criminal Code, § 1601 (1970) (murder is a killing intentionally or knowingly committed or death caused under circumstances manifesting extreme indifference to human life); Model Penal Code, § 210.2 (1962) (murder is a criminal homicide committed purposely or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life); proposed Michigan Revised Criminal Code, §§ 2005, 2006 (1967).

It will be observed that the simplification in language has wrought no fundamental change in the elements of the crime of murder: matters of defense and mitigation are sometimes dealt with in other provisions.

The new formulations are also designed to meet other objections which have been advanced to the common law and Pennsylvania statutory grading definitions. See American Law Institute, Model Penal Code, Tentative Draft 9, § 201.2, p 28; Wechsler and Michael, A Rationale of the Law of Homicide, 37 Colum L Rev (Part I) 701, (Part II) 1261 (1937).

leading it should be clarified. It is the duty of the common-law courts to speak clearly in language that jurors can understand, not to persist in the lazy repetition of words which have lost all capacity to convey relevant thoughts and which are frequently misleading.

The problem of formulating suitable instructions on malice aforethought does not lend itself to ready solution.[28] Although the formulation of jury instructions is outside the scope of this opinion, defendants charged with murder will either deny that they killed the victim or direct their defense toward the proof of facts inconsistent with malice aforethought, claiming either that they did not intend to kill or, even if it is found that they did, that the homicide was justified, excusable, or committed under circumstances of mitigation.

In *People* v. *Dunn* (1925), 233 Mich 185, 197, the Supreme Court of Michigan observed:

"In practical application legal refinements of definition over which those learned in the law often differ are of scant aid to a jury.

" 'If the jurors are told what constitutes legal justification or excuse, and what circumstances will

---

[28] Perkins suggests a change in phraseology:

"Since murder cannot be adequately defined in terms of an intent to kill, without resort to the ancient fiction whereby such an intent was 'implied' in certain cases in which it did not exist in fact, some other phrase must be used. And since malice aforethought is neither a self-explanatory phrase, as used in the law, nor one which designates any single and invariable frame of mind, it is probably wise to employ a phrase to which a meaning may be assigned quite arbitrarily. The phrase 'man-endangering-state-of-mind' is suggested for this purpose with the assumption that it be arbitrarily understood to include every attitude of mind which includes (1) an intent to kill, or (2) an intent to inflict great bodily injury, or (3) an intent to do an act in wanton and wilful disregard of an unreasonable human risk (*i.e.*, the wilful doing of a wanton act under such circumstances that there is obviously a plain and strong likelihood that death or great bodily injury may result), or (4) an intent to perpetrate a dangerous felony." Perkins on Criminal Law (2d ed), p 46.

reduce the killing to manslaughter, they have all the law they need to determine whether the particular homicide is murder or not, without the mention of the word malice.' 13 RCL p 773."

Courts might well emphasize that juries can convict of murder only when they are convinced beyond a reasonable doubt that (1) the defendant intended (actually or impliedly) to kill and (2) circumstances of justification, excuse or mitigation do *not* exist. A judge could, for example, charge that the defendant is guilty of the crime of murder if the jurors find, beyond a reasonable doubt, that he killed the victim and that he actually intended to kill the victim or (where relevant), although he did not actually intend to kill, he actually intended to inflict great bodily harm or engaged in behavior the natural tendency of which is to cause death or great bodily harm, unless (where relevant) the jurors have a reasonable doubt whether (i) circumstances of mitigation are present, in which event the offense is reduced from murder to manslaughter, or (ii) the killing was accidental, or (iii) the defendant justifiably acted in self-defense.

We have addressed ourselves to this perplexing question in order to make clear the nature of the presumption of malice aforethought, to caution against misdirection of jurors regarding the "presumption", and to show why in the instant case there was adequate evidence to sustain a conviction of common-law, *i.e.*, second-degree, murder. The fact that Morrin killed his victim was not in dispute. From this fact, the jury was permitted to infer that the killing was committed with malice aforethought. Morrin's testimony concerning self-defense sought to nourish a reasonable doubt in the minds of the jurors as to the existence of this inferential fact. The jury, nevertheless, chose to draw the requisite

inference and exercised its prerogative to disbelieve Morrin's exculpatory testimony.

III.

First-degree murder is a statutory offense. It is the common-law offense of murder (homicide committed with "malice aforethought") with an added element:

"All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life." MCLA § 750.316 (Stat Ann 1954 Rev § 28.548).

We turn to the question of whether the people proved that the murder of William Abell was committed with deliberation and premeditation. The connotative similarities between the words "aforethought" and "premeditation" have confused many courts;[29] malice aforethought and premeditation are

[29] See Wechsler and Michael, A Rationale of the Law of Homicide, (Part I), 37 Colum L Rev 701, 707–709 (1937); Perkins on Criminal Law (2d ed), p 92.

It is easy to make an error in terminology even when the writer has no misunderstanding of the law. Such was probably the case in *People* v. *Lane* (1942), 304 Mich 29, 31, where the Court said that the "defendant was charged with murder of the first degree, involving the element of malice aforethought." It is true that any murder involves malice aforethought, but first-degree murder requires proof of deliberation and premeditation as well as malice aforethought. In *Nye* v. *People*, fn 11, *supra*, p 18, the Court said that "malice aforethought did not mean deliberate and calculating malice, but only malice existing at any time before the act so as to be its moving cause or concomitant" and that the statutory grading of murder into murder of the first degree and of the second degree did not change the "common-law qualities" of murder and "the division is chiefly between cases where the malice aforethought is deliberate and where it is not."

not, in legal terminology, synonymous.[30] Malice aforethought is a term of art firmly rooted in the common law.[31] Premeditation and deliberation are legislative offspring and are to be construed in the light of the statutory scheme.

At common law all murders were punishable by death. The severity of this rule led Pennsylvania to enact, in 1794, the first statute dividing murder into degrees.[32] The Pennsylvania statute defined first-degree murder as a killing committed willfully and with premeditation and deliberation and classified "all other kinds of murder" as second-degree murder. Only first-degree murder was punishable by death.

Michigan adopted the Pennsylvania statute verbatim by 1838.[33] At one time all but ten states had similar statutes.[34]

As noted above, the division of murder into degrees was prompted by a feeling that not all murders reflected the same quantum of culpability on the part of the wrongdoer. Conviction of first-degree murder carries an automatic sentence of life imprisonment without possibility of parole, while second-degree murder is punishable by imprisonment for life or for any terms of years and the offender is parolable.

Decisions of the Michigan Supreme Court have, from the beginning, acknowledged that first-degree

[30] See *Ornelas* v. *United States* (CA9, 1956), 236 F2d 392; *Beardslee* v. *United States* (CA8, 1967), 387 F2d 280, 291.

[31] See fns 15 and 16.

[32] See Keedy, History of the Pennsylvania Statute Creating Degrees of Murder, 97 Pa L Rev 759 (1949); Perkins on Criminal Law (2d ed), p 88.

[33] RS 1838, part 4, T 1, ch 3, p 621; Rev Stat 1846, ch 153, § 1, p 658, now MCLA § 750.316 (Stat Ann 1954 Rev § 28.548). The Pennsylvania origin of our statute is acknowledged and discussed in *People* v. *Potter*, fn 6, *supra*, p 6.

[34] See 1 Wharton's Criminal Law and Procedure, § 263, p 558. Modern statutes eliminate the grading of murder but preserve the distinction between murder and manslaughter; see fn 27.

murder is a "more atrocious" crime than its second-degree counterpart.[35] In 1876, the Michigan Supreme Court observed:

"It was rightly considered that what is done against life deliberately indicates a much more depraved character and purpose than what is done hastily or without contrivance." *Nye* v. *People* (1876), 35 Mich 16, 19.

The clarity of the policy underlying the statutory division of murder into degrees contrasts sharply with the lack of precise standards for determining what constitutes premeditation and deliberation sufficient to establish first-degree murder. Since premeditation and deliberation are all that distinguish first-degree from second-degree murder, imprecise definition of these elements tends to erode the distinction between the two offenses.

A number of jurisdictions have all but obliterated this distinction by observing the rule that premeditation and deliberation need precede the homicidal act only momentarily.[36] (This is probably the result of the mistaken assumption that malice *aforethought* means with "premeditation" and the unthinking adoption of the cases which long before the statutory grading of murder into two degrees had held that premeditation was not required to establish malice aforethought.)[37] The rule prevalent in those jurisdictions grants the jury an unstructured discretion to find premeditation and deliberation in any murder case.

Michigan adheres to a more meaningful standard.[38] *Nye* v. *People, supra,* struck down a jury

---

[35] *People* v. *Potter,* fn 6, *supra,* p 7.

[36] *Hammil* v. *People* (1961), 145 Colo 577 (361 P2d 117); *Caldwell* v. *State* (1919), 203 Ala 412 (84 So 272); *Jackson* v. *State* (1918), 133 Ark 321 (202 SW 683).

[37] See authorities cited in fn 11.

[38] It should be emphasized that a number of jurisdictions, in ad-

instruction that a willful, deliberate design to take life "might be formed an instant before the act". The Court ruled that "it is a perversion of terms to apply the term deliberate to any act which is done on a sudden impulse". In *Nye* the homicide occurred in a sudden affray; the Supreme Court held that there was no testimony whatever upon which a verdict of murder in the first degree could properly have been rendered.

Aside from the language of *Nye*, the Michigan cases do not attempt to define premeditation and deliberation with any specificity. Lack of suitable definitions, however, has not prevented the Michigan Supreme Court from insisting upon strict observance of the premeditation-deliberation requirement. The Court has repeatedly reversed first-degree murder convictions in which the evidence did not support an inference of premeditation and deliberation.[39]

---

dition to Michigan, reject the notion that premeditation and deliberation and the killing may occur instantaneously. See *Austin* v. *United States*, fn 14, *supra; People* v. *Anderson* (1968), 70 Cal 2d 15 (73 Cal Rptr 550, 447 P2d 942); *State* v. *Esherick* (1969), 19 Ohio App 2d 40 (249 NE2d 78).

[39] *People v. Potter, supra,* fn 6; *Nye* v. *People,* fn 11, *supra; People* v. *Gordon* (1894), 100 Mich 518. And see fn 49 for cases where the Court reversed manslaughter and second-degree murder convictions where there was insufficient evidence to warrant submission of the first-degree murder issue to the jury.

The statement in *Potter* (p 9) that, "Malice aforethought is either express or implied, and there can be no case of murder in the first-degree [except felony murder] when there does not exist *express* malice; while, in case of murder in the second degree, the malice is generally, if not universally, *implied*" [emphasis by the Court], has been the source of some confusion. All the Court said was that in cases of first-degree murder there is generally actual intent to kill (express malice) while in second-degree murder frequently there is no actual intent to kill and, therefore, generally, if not universally, the intent to kill is implied. This cannot properly be read as meaning that proof of actual intent to kill (express malice) suffices to support a conviction of first-degree murder; the Court elsewhere recognized that the deliberation and premeditation elements (p 8) "must be affirmatively shown, and cannot be established by those ordinary legal inferences which were sufficient at the common law to establish the general crime, but at which the statute, by dividing the crime into degrees,

The real focus of first-degree murder jurisprudence in Michigan has been on the kind of evidence which permits an inference of premeditation and deliberation. To some extent this approach has minimized the need for functional definitions of premeditation and deliberation. Since the distinguishing elements of first-degree murder ultimately resolve themselves into questions of fact, minimum standards of proof, if reasonably related to the circumstances which must be proved, will serve to preserve the distinction between first-degree and second-degree murder.

Our concern with maintaining the distinction between degrees of murder reflects a growing insistence by many courts that first-degree and second-degree murder be clearly differentiated.[40] Such differentiation furthers the statutory objectives, of course. Yet it serves a more fundamental purpose by insuring that murder prosecutions do not violate fundamental due process.

First-degree and second-degree murder are separate offenses, carrying vastly different penalties, distinguished only by the requirement that a homicide punishable as first-degree murder be committed with premeditation and deliberation. If premeditation and deliberation are ill-defined, the jury is

especially aimed." The Court's ruling reversing the conviction of first-degree murder because of the failure of the trial court to charge that the people must prove (p 3) "such facts in addition to the act of killing as made the killing murder of the first degree" emphasizes that the Court required proof of more than malice aforethought, even if it was express in the sense of being actual intent to kill.

[40] *Austin* v. *United States*, fn 14, *supra; People* v. *Anderson*, fn 38, *supra; State* v. *Esherick*, fn 38, *supra; Herhal* v. *State* (Del, 1968), 243 A2d 703; *People* v. *Hopper* (1956), 145 Cal App 2d 180 (302 P2d 94); *People* v. *Goedecke* (1967), 65 Cal 2d 850 (56 Cal Rptr 625, 423 P2d 777); *People* v. *Hillman* (1956), 140 Cal App 2d 902 (295 P2d 939); *State* v. *Cosby* (1955), 100 Ohio App 459 (137 NE2d 282); *People* v. *Price* (CA3, 1950), 181 F2d 394; *Driggers* v. *State* (Fla, 1964), 164 So 2d 200; *Simmons* v. *State* (1957), 227 Ark 1109 (305 SW2d 119).

left with no objective standards upon which to base its verdict. Convictions of the two offenses will be distributed not on the basis of ascertainable criteria, but entirely as products of the subjective, wholly individualistic determinations of different juries.

The United States Supreme Court has frequently ruled that juries cannot be permitted to determine criminal liability without a reasonably ascertainable standard of guilt.[41] Absent such standards, the jury has the sort of naked and arbitrary power[42] which is inconsistent with due process.

Accordingly, it underscores the difference between the statutory degrees of murder to emphasize that premeditation and deliberation must be given independent meaning in a prosecution for first-degree murder. The ordinary meaning of the terms will suffice. To premeditate is to think about beforehand;[43] to deliberate is to measure and evaluate the major facets of a choice or problem.[44] As a number of courts have pointed out, premeditation and deliberation characterize a thought process un-

---

[41] See, for example, *Herndon* v. *Lowry* (1937), 301 US 242, 263, 264 (57 S Ct 732, 81 L Ed 1066) (a jury cannot be "licensed" to "create its own standard in each case"; a "reasonably ascertainable standard of guilt" should be prescribed in the statute); *Giaccio* v. *Pennsylvania* (1966), 382 US 399, 402, 403 (86 S Ct 518, 15 L Ed 2d 447) ("a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each pertinent case").

[42] *Yick Wo* v. *Hopkins* (1886), 118 US 356 (6 S Ct 1064, 30 L Ed 220). *Cf. Thompson* v. *City of Louisville* (1960), 362 US 199 (80 S Ct 624, 4 L Ed 2d 654); *Johnson* v. *Florida* (1968), 391 US 596 (88 S Ct 1713, 20 L Ed 2d 838), holding that a conviction without evidence of an essential ingredient of the crime is a denial of due process.

[43] *State* v. *Faust* (1961), 254 NC 101, 106 (118 SE2d 769, 772).

[44] *Simmerman* v. *State* (1883), 14 Neb 568 (17 NW 115); *People* v. *Richards* (1905), 1 Cal App 566 (82 P 691); *People* v. *Thomas* (1945), 25 Cal 2d 880, 898 (156 P2d 7, 17).

disturbed by hot blood.[45] While the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a "second look".[46]

This interpretation of premeditation and deliberation in no way departs from existing Michigan law. Time and again the Michigan Supreme Court

---

[45] *Austin* v. *United States,* fn 14, *supra; People* v. *Anderson,* fn 38, *supra; State* v. *Brown* (1958), 249 NC 271 (106 SE2d 232); *State* v. *Mitchell* (Mo, 1966), (408 SW2d 39).

[46] *Austin* v. *United States,* fn 14, *supra,* p 135; *People* v. *Guadagnino* (1922), 233 NY 344 (135 NE 594); *State* v. *Clayton* (1912), 83 NJ 673 (85 A 173); *State* v. *Faust,* fn 43, *supra.*

Perkins sums up:

"An additional requirement of this particular clause [willful, deliberate and premeditated] is that this intent be formed by a mind free from undue excitement. 'Deliberation means that the act is done in a cool state of blood.'

" * * * 'Premeditation means "thought of beforehand" for some length of time, however short.' * * * The notion that a fully-formed intent is always deliberate and premeditated, no matter how short the time between the first thought of the matter and the execution of the plan, is preposterous. * * *

"The sound interpretation of such a statute is that a killing is deliberate and premeditated if, and only if, it results from real and substantial reflection. It is not sufficient that the idea be fully formed and acted upon; it must be pondered over and weighed in the mind. The intent to kill must be turned over in the mind and given a 'second thought'. It is true the law does not attempt to set a period of time for this requirement in terms of hours, or minutes or even seconds; but premeditation takes 'some appreciable time'. * * *

"[T]here are three basic requirements for murder in the first degree, in addition to the requirement that the homicide must be murder within the rules of the common law. The first of these is that the homicide be intentional; the second is that the intent to kill must be formed by a mind that is cool rather than one that is unreasonably inflamed or excited; and the third is that the thought of taking the victim's life must have been reflected upon for some appreciable length of time *before* it was carried into effect, although not necessarily *after* the fatal decision was made. Needless to add, deliberation, premeditation and malice may all be inferred from sufficiently probative facts and circumstances." Perkins on Criminal Law (2d ed), pp 91–93. (Emphasis by author.)

The opinions of the United States Court of Appeals for the District of Columbia in *Austin* v. *United States,* fn 14, *supra,* and of the Supreme Court of California in *People* v. *Anderson,* fn 39, *supra,* are particularly instructive.

has reversed convictions where the evidence of premeditation and deliberation was insufficient to warrant submission of a charge of first-degree murder to the jury. In each case, the homicide occurred during an affray whose nature would not permit cool and orderly reflection.[47]

To decide whether Morrin's conviction may stand in the case before us, we must determine if the prosecution met its burden of proving premeditation and deliberation. Since these are subjective factors, usually incapable of direct proof, they may be established by inference from all the facts of the case.[48] The question is whether the evidence introduced at the trial fairly supports an inference of premeditation and deliberation.

There is abundant case law on the kinds of evidence from which premeditation and deliberation may be inferred.[49] Having examined the law we conclude that here there was insufficient evidence to support the requisite inference. Here there was no prior relationship between the parties that would tend to show a motive.[50] The murder weapon was not acquired or positioned in preparation for homi-

---

[47] *People* v. *Potter,* fn 6, *supra* (sudden altercation between two men who had been drinking together); *Nye* v. *People,* fn 11, *supra* (homicide occurred during a sudden affray); *People* v. *Gordon* (1894), 100 Mich 518 (father accidentally killed his own child while attempting to shoot a third party); *People* v. *Marshall* (1962), 366 Mich 498 (prostitute killed an attacker who assaulted her without warning); *People* v. *Hansen* (1962), 368 Mich 344, 352 (man shot an intruder whom he thought was menacing his family; "He did not have time to stop and think calmly as to the proper course to follow").

[48] *People* v. *Wolf* (1893), 95 Mich 625.

[49] *People* v. *Wolf,* fn 48, *supra; People* v. *Vinunzo* (1920), 212 Mich 472; *People* v. *Bauman* (1952), 332 Mich 198; *People* v. *Collins* (1921), 216 Mich 541; *People* v. *Milhem* (1957), 350 Mich 497. See, also, *People* v. *Anderson,* fn 38, *supra,* and *Austin* v. *United States,* fn 14, *supra,* for comprehensive analyses of the types of evidence which will support inferences of premeditation and deliberation.

[50] Thus distinguishing this case from *People* v. *Wolf,* fn 48, *supra; People* v. *Jackzo* (1919), 206 Mich 183; *People* v. *Dunn* (1925), 233 Mich 185.

cide.[51] There is nothing in the record which would support an inference that Morrin transported Abell to the secluded location for an illicit or criminal purpose. The circumstances of the killing itself and the events preceding it were equivocal, as consistent with the absence as with the presence of premeditation and deliberation.[52] Morrin's conduct subsequent to the assault, while it perhaps reflected consciousness of guilt, was neither coherent nor organized enough to suggest it occupied a place in a scheme or plan deliberated and premeditated upon before the homicide.[53]

Morrin's exculpatory testimony, although disbelieved by the jury, was not substantive evidence of facts inconsistent with his account.[54]

---

[51] Thus distinguishing this case from *People* v. *Bauman*, fn 49, *supra; People* v. *Younger* (1968), 380 Mich 678; *People* v. *Holmes* (1896), 111 Mich 364; and *People* v. *Milhem*, fn 49, *supra*. In each case defendant's orderly positioning of a deadly weapon supported a finding of deliberation.

[52] Circumstantial evidence which is as consistent with the innocence as with the guilt of an accused person does not support a conviction. *People* v. *Spann* (1966), 3 Mich App 444, 454.

[53] Flight proves only consciousness of guilt, not premeditation and deliberation. *State* v. *Foster* (1902), 130 NC 666 (41 SE 284); *Austin* v. *United States*, fn 14, *supra*, p 140. *Cf. People* v. *Anderson*, fn 38, *supra; People* v. *Cismadija* (1911), 167 Mich 210, 215.

[54] "The mere disbelief of a witness' testimony cannot serve to fill an evidentiary gap in the case; it will not justify a conclusion that the opposite of the witness' testimony is true in the absence of any independent evidence affirmatively supporting that conclusion." *People* v. *Matthews* (1969), 17 Mich App 48, 53, 54, fn 5, citing *Nishikawa* v. *Dulles* (1958), 356 US 129, 137 (78 S Ct 612, 2 L Ed 2d 659, 665); *Moore* v. *Chesapeake & O. R. Co.* (1951), 340 US 573, 576 (71 S Ct 428, 95 L Ed 547).

A hasty reading of *People* v. *Wolf*, fn 49, *supra*, and *People* v. *Vinunzo*, fn 51, *supra*, might suggest that the improbability of a defendant's description of the homicide, or alibi, is substantive evidence of premeditation and deliberation. In fact, however, these cases merely declare that the improbability of the defendant's story might impair his credibility thus casting greater weight on the prosecution's affirmative evidence of premeditation and deliberation.

In *Wolf* there was evidence that the defendant killed the victim to steal his money. In *Vinunzo* the record shows that the jury could have properly concluded from the defendant's testimony that he did not ordinarily carry a gun and, from the testimony of other witnesses, that he had a gun in his hand when the victim was killed.

The bizarre rectal wound, which the prosecution contended had great evidentiary weight, likewise permits no inference of premeditation or deliberation before the homicide,[55] particularly if, as the prosecution argued, that injury was inflicted after Abell was already dead. The infliction of a brutal or revolting wound is hardly consistent with, let alone evidence of, rational deliberative processes.[56]

There is language in some early cases which suggests that a killing with a deadly weapon gives rise to a presumption—or at least permits an inference—that the homicide was premeditated.[57] In each of these cases, however, there was ample additional evidence of premeditation.

Where the use of a deadly weapon has been held to evidence premeditation there were other circumstances showing motive or plan which would make reasonable the inference that the use of the deadly weapon was not a spur-of-the-moment decision, but rather that it was acquired or positioned with the thought beforehand of using it to kill the victim.[58] In the Michigan case of *Nye* v. *People, supra,* where

---

[55] "It is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation." *People* v. *Anderson,* fn 38, *supra,* p 24.

"The violence and multiple wounds, while more than ample to show an intent to kill, cannot standing alone, support an inference of a calmly calculated plan to kill requisite for premeditation and deliberation." *Austin* v. *United States,* fn 14, *supra,* p 139.

Similarly, see *People* v. *Goedecke,* fn 40, *supra.*

[56] *People* v. *Anderson,* fn 38, *supra; Austin* v. *United States,* fn 14, *supra.*

[57] *People* v. *Potter,* fn 6, *supra; People* v. *Wolf,* fn 49, *supra; People* v. *Jackzo,* fn 50, *supra; People* v. *Statkiewicz* (1929), 247 Mich 260.

[58] *People* v. *Wolf,* fn 49, *supra; People* v. *Jackzo,* fn 50, *supra; People* v. *Statkiewicz,* fn 57, *supra; People* v. *Holmes* (1896), 111 Mich 364; *People* v. *Case* (1967), 7 Mich App 217, 226, all involve factors other than the mere fact of killing. In other words, these cases reflect the uncontroversial view that a killing with a deadly weapon may permit an inference of premeditation and deliberation if other attendant circumstances (motive, lying in wait, plan) also support the inferenee as well. In *People* v. *Vinunzo,* fn 49, *supra,* the Court said that a correct summary of the law is as follows:

the homicide occurred in a sudden affray and the defendant killed the victim with a knife "which he had in his pocket and which was apparently one calculated to be used as a weapon", the absence of any testimony whatsoever to show that the killing was not a sudden impulse prompted the Court to rule that there was insufficient evidence to support a verdict of first-degree murder.

Here there is no evidence that Morrin murdered William Abell with premeditation and deliberation. There is no evidence showing that Morrin acquired or positioned the tongs—an apparently impromptu weapon—with the thought beforehand to kill Abell or that he acted after a deliberate thought process. The record, and the reasonable inferences that might be drawn from it, fail to disclose any factual basis for finding premeditation and deliberation. The issue of first-degree murder should not have been submitted to the jury.

IV.

Morrin raises several other exceptions to the trial proceedings.

First, he contends that the prosecuting attorney should not have asked him on cross-examination whether he had told his sister that he had rammed

---

"The use of a lethal weapon is not in itself sufficient evidence to warrant a verdict of murder in the first degree but in addition to this there must be evidence in the case, as to circumstances surrounding the killing or the manner in which the weapon is used, from which a logical inference may be drawn that there was willfulness, deliberation and premeditation."

The statements in *People* v. *Potter*, fn 6, *supra*, as to the means of proving "the intent" are dictum; the issue in that case was whether there was instructional error, not whether there was sufficient evidence to show deliberation and premeditation. It is well established that the use of a lethal weapon will support an inference of actual intent to kill and, hence (to use the term used by the *Potter* Court), of "express malice". *Wellar* v. *People* (1874), 30 Mich 16; *People* v. *Collins* (1911), 166 Mich 4; Moreland, Law of Homicide, p 24.

the tongs into Abell's rectum after he was already dead. (Morrin denied making the alleged statement.) He argues that since his sister did not so testify when she was examined that the prosecutor was seeking to place before the jury false innuendo. Although his sister did not testify at the trial that Morrin made such a statement, she did so testify at the preliminary examination. The question was, therefore, proper cross-examination, not impermissible innuendo.

Morrin also claims that the prosecutor misrepresented the content of certain testimony during his closing argument. Misrepresentation did take place, and we disapprove of the prosecutor's overzealous efforts to emphasize the rectal wound. No objection or motion for a corrective instruction or mistrial was made by defense counsel, however, and therefore the issue is not preserved for review.[59]

Morrin further claims that the trial judge erred when he permitted the jurors to read a portion of the transcript after they had been deliberating for seven hours. The permission was granted following a request by the jurors to see testimony of Dr. Valdez, who performed the autopsy, concerning the rectal wound. All relevant testimony of Dr. Valdez was read. The applicable rule is that "to read or permit to be read testimonial excerpts is an exercise of judicial discretion. It is reviewable * * * and reversible only if there was an abuse of discretion".[60] We find no abuse here.

Morrin also objects to the admission into evidence of a photograph depicting Abell's wounds. He contends it was inadmissible because the body had

---

[59] *Koepel* v. *St. Joseph's Hospital* (1968), 381 Mich 440; *People* v. *Hider* (1968), 12 Mich App 526.

[60] *People* v. *Walker* (1963), 371 Mich 599, 610; *Rumptz* v. *Leahey* (1970), 26 Mich App 438, 443.

been removed to the morgue before the picture was taken. The general rule is that photographs of the victim may be introduced into evidence if they accurately depict what they represent and are helpful in throwing light on a material issue.[61] The movement of the body did not in this case diminish the accuracy or materiality of the photograph which displayed only a portion of the body, not the place where the picture was taken. The photograph, though not pleasant, was not gruesome.

Finally, Morrin objects to a ruling that one of his character witnesses was not qualified to testify concerning Morrin's reputation in the community. The testimony of a character witness must be based upon what he has heard other people in the defendant's residential or business community say about the defendant's reputation.[62] The record discloses that the witness had no basis for his testimony concerning Morrin's reputation. The ruling does not require reversal.

V.

Having determined that the trial judge erred only by submitting the issue of first-degree murder to the jury, we turn to the disposition of this case. The jury's verdict was an unequivocal assertion of its finding that Morrin did in fact murder William Abell. Its mistaken belief that the record permitted an inference of premeditation and deliberation does not detract from the fact that there was credible evidence to support a finding of second-degree murder.

In other first-degree murder cases, where juries have returned guilty verdicts upon evidence suf-

---

[61] *People* v. *Becker* (1942), 300 Mich 562; *People* v. *Freeman* (1965), 1 Mich App 63; *People* v. *Jenkins* (1968), 10 Mich App 257.

[62] *People* v. *Schultz* (1946), 316 Mich 106; *People* v. *Kronk* (1950), 326 Mich 744.

ficient only to prove the less aggravated second-degree crime, appellate courts have remanded for the entry of judgments of conviction of the lesser offense.[63] This is, of course, permissible *only* where the accused person is convicted of the charged offense and it is, therefore, apparent that the verdict is not the product of compromise.[64]

We remand this cause to the trial court for entry of a judgment convicting Morrin of second-degree murder, and for resentencing on that conviction.

All concurred.

---

[63] See *Austin* v. *United States,* fn 14, *supra; People* v. *Anderson,* fn 38, *supra; State* v. *Braley* (1960), 224 Or 1 (355 P2d 467); *Forsha* v. *State* (1946), 183 Tenn 604 (194 SW2d 463); *State* v. *Porello* (1941), 138 Ohio St 239 (34 NE2d 198); *State* v. *Cosby,* fn 40, *supra; State* v. *Jackson* (1936), 198 Minn 111 (268 NW 924). Similarly, see *People* v. *Lee* (1968), 14 Mich App 328. *Cf. People* v. *Monaco* (1964), 14 NY2d 43 (248 NYS2d 41).

[64] Where the defendant is convicted of a lesser offense, the possibility of compromise cannot be excluded. *Cf. People* v. *Marshall,* fn 47, *supra,* and *People* v. *Hansen,* fn 47, *supra,* where the issue of first-degree murder was submitted to the jury upon insufficient evidence, although the convictions were of lesser offenses and where the Supreme Court, therefore, reversed and remanded for new trials.

In *Nye* v. *People,* fn 11, *supra,* where a new trial was ordered in a case where the defendant was convicted of first-degree murder on insufficient evidence of premeditation and deliberation, there was other error in addition to the insufficiency in the evidence; similarly, *Herhal* v. *State,* fn 40, *supra.*

PEOPLE *v.* CORBIN

1. HOMICIDE—NEGLIGENT HOMICIDE—EVIDENCE—IMMODERATE SPEED —INTERFERING TACTICS ADMISSIBILITY.

   The general rule that, in a negligent homicide case, evidence of immoderate speed at points remote from the scene of the accident is incompetent to establish immoderate speed at the accident scene itself will not be applied where eyewitness testimony at the scene of the accident was prevented by the defendant's flight and by interfering tactics of the defendant (MCLA § 750.324).

2. HOMICIDE—NEGLIGENT HOMICIDE—EVIDENCE—IMMODERATE SPEED.

   Question of fact was created whether the defendant in a negligent homicide prosecution was driving at an immoderate speed at the time his car went off the road, killing an occupant of the car, even though there was no evidence of immoderate speed at the scene of the accident where the defendant's own statement of facts showed that the defendant was observed by a deputy sheriff to be carelessly driving, was ordered to pull over to the curb, but the defendant ran through a stop sign, went over a lawn, and entered a state trunkline, the defendant was pursued by the deputy sheriff, who was travelling at over 70 mph, the patrol car had to slow down because of dust from the defendant's car, and defendant's car was forced off a road three and one-half miles from where the deputy had lost sight of the car (MCLA § 750.324).

Appeal from Lapeer, James P. Churchill, J. Submitted Division 2 February 4, 1971, at Lansing. (Docket No. 5306.) Decided March 22, 1971.

Danny Lee Corbin was convicted of negligent homicide. Defendant appeals. Affirmed.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 7 Am Jur 2d, Automobiles and Highway Traffic §§ 337–339.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *John P. Spires,* Prosecuting Attorney, for the people.

Richard J. Bahls, for defendant on appeal.

Before: QUINN, P. J., and MCGREGOR and O'HARA,* JJ.

O'HARA, J. This is an appeal of right from a jury verdict of guilty upon the charge of negligent homicide. (MCLA § 750.324 [Stat Ann 1970 Cum Supp § 28.556].).

Appellant states his grounds for appeal as follows:

"Was there any competent evidence that the defendant committed any wrongful act at the time and place where the deceased received his fatal injuries?"

Defendant claims the trial judge's denial of his motion to dismiss at the conclusion of the state's case was an error of law, because in effect it erroneously amounts to an affirmative answer to the stated question.

Perforce, we examine the evidence adduced by the people in support of the charge. We will accept the defendant's version of what the trial testimony disclosed, as contained in his statement of facts.

Defendant was identified as the owner of a 1966 bluish-green Mustang automobile. Sometime on the morning of the fatal accident, he picked up his friend, the deceased. Defendant's version recites

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

that he and the passenger "drove about the Village of Almont for a good share of the day." We quote further from defendant's statement of facts:

"Defendant's driving was observed by Deputy Sheriff * * * Leonard to be very careless * * * he undertook to intercept defendant."

Unsuccessful at first, the deputy finally found defendant's car stopped in the center of an intersection of two streets in the village. He got out of the patrol car, approached defendant's vehicle, identified the defendant as the driver, and saw the passenger later identified as the deceased. He ordered the defendant to pull over to the curb "but instead the defendant squealed his tires, accelerated his car * * * straight through a stop sign * * * went over a lawn * * * and turned north on (state trunkline) M-53". The deputy and a citizen radio expert on temporary duty with the sheriff's department undertook pursuit. The patrol car attained a speed in excess of 70 miles per hour but was forced to slow down by reason of a cloud of dust generated by the defendant's car. The dust was kicked up when defendant left M-53 and continued on a graveled road. At this point, the deputy lost sight of the car and never saw it again until he came upon it 3–1/2 miles further on. It was in a field 95 feet off the highway. Tire tracks led to it out in a field past an uprooted stump.

On this testimony, in addition to other evidentiary matter we have not included, but which was indeed not exculpatory, defendant claims no jury question was created because the immoderate speed (70 mph) was last observed by the pursuing officer 3–1/2 miles back from the fatality.

Despite prior holdings[1] that evidence of immoderate speed at points remote from the scene of the accident is incompetent to establish immoderate speed at the accident scene itself, we decline to extend these holdings to situations where, as in the case at bar, eyewitness testimony at the scene was prevented by the defendant's flight, and the interfering incidents thereof.

The jury would have been hard put to infer from the physical facts at the scene that defendant had reduced his speed to a reasonable rate from that at which the pursuing officer could not catch him 3-1/2 miles back.

We have reviewed the trial court's ruling on admission of the evidence and his charge as to the extent to which it could be considered as bearing upon the ultimate issue of culpable negligence. Nowhere did the able trial judge ever suggest a negligence *per se* conclusion from testimony as to speed where the officer lost sight of the defendant's car.

We have reviewed the record and conclude that the question of whether the defendant was driving at an immoderate rate of speed under the existing conditions was one of fact and properly for the jury.

Affirmed.

All concurred.

---

[1] *People* v. *Barnes* (1914), 182 Mich 179; *People* v. *Campbell* (1927), 237 Mich 424.

PEOPLE *v.* TOFIL

1. CRIMINAL LAW—APPEAL AND ERROR—ASSIGNMENTS OF ERROR—IN PROPRIA PERSONA APPEALS.

   A defendant's appearing *in propria persona* on appeal does not relieve the prosecutor of the onus of meeting the defendant's allegations of error since the arguments of defendants who act in their own behalf are considered with the same circumspection as arguments advanced by counsel who represent defendants on appeal; a prosecutor has a duty to meet and to counter arguments advanced by appellants.

2. CRIMINAL LAW—DEFENDANT TESTIFYING—IMPEACHMENT—PRIOR INCONSISTENT STATEMENT.

   A testifying defendant may be impeached by a prior inconsistent statement to police officers where he voluntarily made the statement after he had been advised of his constitutional rights.

3. CRIMINAL LAW—EVIDENCE—EXTRAJUDICIAL STATEMENT—ADMISSIBILITY—DELAY IN ARRAIGNMENT.

   A statement by the defendant was not inadmissible on the ground that the defendant was detained for arraignment, thus allegedly rendering the statement involuntary, where the statement, that the defendant had not been at the scene of the crime with which he was charged, was made during the morning following

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 310.

[2–4] 30 Am Jur 2d, Evidence § 1082.

May a witness who testifies to facts be impeached by showing of prior inconsistent expressions of opinion by him. 158 ALR 820.

[3] 29 Am Jur 2d, Evidence §§ 537, 547.
30 Am Jur 2d, Evidence §§ 600–614.

[4] 29 Am Jur 2d, Evidence §§ 599, 610–615, 623.
30 Am Jur 2d, Evidence §§ 1132, 1133.

[5] 29 Am Jur 2d, Evidence § 425.

[6, 7] 21 Am Jur 2d, Criminal Law §§ 356, 361, 368.

the defendant's arrest, the defendant was advised of his constitutional rights before questioning, the statement was made during questioning concerning the defendant's family history, and because the statement was not a confession or inculpatory, but was a self-serving statement.

4. CRIMINAL LAW—EVIDENCE—DEFENDANT'S STATEMENT—NOTICE TO USE—IMPEACHMENT.

Prosecutor was not precluded from using the defendant's statement, made after the defendant's arrest that he had not been at the scene of the crime with which he was charged, even though the prosecutor filed notice that the defendant's confessions or admissions would not be introduced because the defendant's statement was neither a confession nor an admission and where the prosecutor did not introduce the statement as part of the prosecution's case in chief, but used it only to impeach the defendant's credibility.

5. SEARCHES AND SEIZURES—AUTOMOBILES—PROBABLE CAUSE.

Probable cause existed to search the defendant's automobile without a warrant where a police officer testified that he had received a radio report regarding an armed robbery and shooting, that the report named the defendant and gave a description of the automobile used in the robbery, including the car's license number, that the officer, having known the defendant for approximately 15 years, after seeing the defendant on the street, arrested the defendant, that the defendant surrendered his keys upon request, and that the officer, intending to confiscate the vehicle, got into it, looked under the front seat, and found a gun holster.

6. CRIMINAL LAW—IDENTIFICATION LINEUP—UNDULY SUGGESTIVE.

An identification lineup is not held in an unduly suggestive manner merely because every member of the lineup does not resemble the accused.

7. CRIMINAL LAW—IN-COURT IDENTIFICATION—IDENTIFICATION LINEUP—INDEPENDENT SOURCE.

In-court identification of the defendant as the man who fled from the scene of an armed robbery was not tainted by an alleged illegal lineup confrontation where an attorney was present at the identification lineup and the identifying witness had no difficulty in selecting the defendant at the lineup or at the defendant's trial as the man he observed on the night of the robbery, because, even assuming the existence of ir-

regularities at the lineup, an independent source of identification existed.

Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted Division 1 February 10, 1971, at Detroit. (Docket No. 7089.) Decided March 22, 1971. Leave to appeal denied June 18, 1971, 385 Mich 758.

Edward Tofil, Jr., was convicted of armed robbery. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Thomas P. Smith,* Assistant Prosecuting Attorney, for the people.

Edward Tofil, Jr., *in propria persona.*

Before: DANHOF, P. J., and HOLBROOK and BRONSON, JJ.

BRONSON, J. Defendant, Edward Tofil, Jr., and a codefendant were charged with the crime of armed robbery contrary to MCLA § 750.529 (Stat Ann 1970 Cum Supp § 28.797). Trial was commenced on October 8, 1968, and concluded on November 8, 1968. Both defendants were found guilty by a jury, and defendant Tofil was subsequently sentenced to 10 to 30 years in prison.

On August 24, 1970, following the withdrawal of two court-appointed attorneys, the trial court granted defendant's request to appeal to this Court *in propria persona.* Defendant's brief is replete with misleading statements. It lists ten issues on appeal. The prosecutor in his brief elects not to discuss some of defendant's assignments of error and

summarily dismisses others. That defendant appears *in propria persona* on appeal does not relieve the prosecutor of the onus of meeting such allegations of error, since this Court considers the arguments of defendants who act in their own behalf with the same circumspection as arguments advanced by counsel who represent defendants on appeal. It is the duty of the prosecutor to meet and to counter the arguments advanced by appellants.

Although defendant has enumerated ten assignments of error, we have consolidated defendant's meritorious issues into three allegations of error.

The first issue on appeal relates to the impeachment of the defendant through a prior inconsistent statement. At trial, defendant took the stand and during cross-examination testified as follows:

"*Q.* (*By Mr. McConnell, continuing*): Before I let, let me ask you this, sir. You state that you did know, no question about it now, you did go down to the Lucky Bar this night in question?

"*A.* Yes, sir, I did.

"*Q.* Did you ever make a statement different than that?

"*Mr. Kurz:* Object to that, your Honor, there has been, this has been gone into previously, Judge."

Following defense counsel's objection, the trial judge, outside the presence of the jury, held a *Walker*[1]-type hearing. The purpose of the hearing was to determine whether a statement allegedly made by defendant to the police officer following defendant's arrest, and to the effect that defendant had *not* been to the Lucky Bar, had been voluntarily made. After the hearing was held, the trial judge ruled that defendant's statement had been voluntarily made and that defendant had been advised of

[1] *People* v. *Walker* (On Rehearing, 1965), 374 Mich 331.

his constitutional rights.[2] The trial judge thus permitted the police officer to testify for the purpose of impeaching the defendant's in-court testimony.

Defendant argues that since he was held for 35 hours before arraignment, any statement made would be involuntary and thus inadmissible at trial. Defendant cites *People* v. *Hamilton* (1960), 359 Mich 410, in support of his position.

More recently, in *People* v. *Farmer* (1968), 380 Mich 198, 205, the Court stated the following with respect to confessions made during periods of police detention:

"It is maintained that the detention of defendant for three days—72 hours—from the morning of January 11, 1958, to the morning of January 14, 1958, before arraignment was such a lengthy detention as to render the confession involuntary. While this Court has repeatedly condemned the practice of undue detention, the test as to whether such a detention renders a confession involuntary is not the reasonableness of the length of time a person is detained but whether the detention has been used to coerce a confession."

The record in the instant case discloses that defendant was arrested at approximately 12:30 a.m. on September 9. The alleged statement was made by defendant to a police officer, who was questioning defendant regarding his family history, at approximately 8:30 a.m. on September 9. The questioning officer testified that he gave defendant the *Miranda* warnings prior to questioning him. Furthermore,

[2] Although we do not pass on the issue, we note that under the recent Supreme Court decision in *Harris* v. *New York* (1971), 401 US 222 (91 S Ct 643, 28 L Ed 2d 1), the defendant's statement may be admissible to impeach the defendant's in-court testimony even if defendant had not been advised of his constitutional rights as required by *Miranda* v. *Arizona* (1966), 384 US 436 (86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974).

the defendant's response to the effect that he had not been present at the Lucky Bar was not a confession nor was it inculpatory; rather, it was a self-serving statement. With the exception of defendant's allegations, we find nothing in the record to indicate that defendant's detention was used to coerce a statement from him. See *People* v. *Farmer, supra; People* v. *Matthews* (1970), 22 Mich App 619; *People* v. *Ball* (1968), 15 Mich App 5.

The defendant also challenges the right of the people to use defendant's alleged statement because the prosecutor had filed a notice that no confession or admission would be used at the trial of defendant. The court rule, GCR 1963, 785.5, which required the prosecutor to give defendant written notice of any confessions or admissions which were obtained by the police and which the prosecutor intended to use in evidence in the prosecution of defendant was repealed on June 8, 1967. See 379 Mich xxx, xxxi. However, it was apparently the practice of the prosecutor to continue furnishing such notice. The prosecutor filed a notice stating that no confessions or admissions would be used. Thus, defendant raises the question of fair play in regard to the prosecutor's use of defendant's statement at trial.

Assuming, but not deciding, that the prosecutor is bound by his written notice, we find no error in the instant case. First, the statement by defendant was *not* a confession or admission. The statement constituted a flat denial of complicity in the crime which occurred at the Lucky Bar. Second, the prosecutor did not introduce the statement as part of his case in chief. Rather, it was not until the defendant took the stand and testified that he had been to the Lucky Bar that the prosecutor brought forth the defendant's prior inconsistent statement. The purpose of admitting the prior inconsistent

statement was to impeach the defendant's testimony. We find no error in the trial court's ruling.

Defendant's second allegation of error relates to the search of defendant's automobile which produced a holster, subsequently introduced into evidence at trial. Defendant claims that the search was illegal and that the trial court erred by allowing the holster to be introduced into evidence at trial. The defendant properly preserved this issue on appeal by making a motion to suppress prior to trial and by timely objection at trial.

The arresting officer, who had known defendant for approximately 15 years, testified that he had received a radio report regarding an armed robbery and shooting at the Lucky Bar. The report named defendant and gave a description of the vehicle, including the license number. The defendant was arrested while walking on the sidewalk, near the corner of Goodson and Joseph Campau in Detroit. The officer testified to the following occurrences which happened after defendant was arrested:

"*Q*. All right. What did you then do, place him under arrest?

"*A*. Placed Mr. Tofil under arrest. We proceeded to look down Goodson Street to see if we seen his vehicle which was parked on Goodson approximately two, three cars off Joseph Campau.

"*Q*. This Oldsmobile with the license number that you had received?

"*A*. Yes, sir.

"*Q*. What did you do then?

"*A*. We asked Mr. Tofil if he had any keys. We were going to proceed to take Mr. Tofil into the station and drive the car into the station which was wanted also. So, we proceeded to search the car until we found a holster—

* * *

"*Q.* (*By Mr. McConnell, continuing*): All right. Is it then your testimony that, did you ask him for the keys to his car?

"*A.* Yes, sir, if he had the car was locked—

"*Q.* Did he give you the keys?

"*A.* Yes, sir, he did.

"*Q.* Let me ask you this, you knew at that time that this car had been at least was, there was a radio run, it had been the subject or had been suspected of being used in a holdup?

"*A.* Yes, sir.

"*Q.* And was it your intention to confiscate that car at that time?

"*A.* Yes, sir.

"*Q.* Take it into your possession?

"*A.* Yes, sir.

"*Q.* And you had the keys to the car, you got into the car?

"*A.* Yes, sir.

"*Q.* And you, what did you do?

"*A.* Proceeded to look around the car under the seats.

"*Q.* What did you find?

"*A.* A holster, sir.

"*Q.* Where did you find the holster?

"*A.* Under the front seat on the left hand side, which would be the driver's right, around the hump of the car.

"*Q.* You called it the hump, that is going in the middle of the car?

"*A.* Yes, sir."

The above facts were sufficient to establish probable cause to search the defendant's automobile. *Chambers* v. *Maroney* (1970), 399 US 42 (90 S Ct 1975, 26 L Ed 2d 419); *People* v. *Danny Williams* (1970), 383 Mich 549.

Defendant's final allegation of error relates to the identification showup. Defendant claims the showup was he ld in an unduly suggestive manner.

There is no requirement that every member of a showup resemble the accused. *People* v. *Taylor* (1970), 24 Mich App 321; *People* v. *Ayers* (1970), 28 Mich App 615. Defense counsel did not file a motion to suppress, nor was an objection made to the in-court identification of defendant. See *People* v. *Childers* (1969) 20 Mich App 639; *People* v. *Matthews* (1970), 22 Mich App 619.

The record discloses that an attorney was present at the lineup. The record further reveals that the identifying witness had observed the defendant fleeing from the location of the crime. The witness had no problem selecting defendant at the showup held in the police station subsequent to defendant's arrest. The witness identified the defendant at trial as the man he observed the night of the crime. Thus, even assuming that defendant did not waive possible constitutional attacks by failing to timely object, the testimony on the record before us is sufficient to support a finding of an independent source of identification which would eliminate any prejudice which might have resulted from any claimed irregularities in the showup procedures. See *People* v. *Ayers, supra.*

Judgment affirmed.

All concurred.

PEOPLE *v.* McGATH
PEOPLE *v.* MAGLAYA

1. CRIMINAL LAW—DISCOVERY—PSYCHIATRIC RECORDS.

   Refusing access to psychiatric records in the Recorder's Court Psychiatric Clinic about the mental condition of the prosecution's key witness and refusing to allow the defendants to examine the reports was not error where the existence of the records was disclosed, and the records and the doctors who had examined the witness were subject to subpoena and could have been reached by the defense.

2. CRIMINAL LAW—SENTENCING—DELAY—STANDING.

   A criminal defendant has no standing to assert that delays in the sentencing of the key witness against him violated the defendant's own rights.

3. CRIMINAL LAW—WITNESSES—CREDIBILITY—PROMISE OF LENIENCY—QUESTION OF FACT.

   The question whether the prosecution's key witness was telling the truth even though the sentencing of the witness had been repeatedly delayed until after he testified against the defendant, thereby giving rise to the possibility that leniency had been promised him, was a question for the jury to decide.

4. CRIMINAL LAW—INSTRUCTIONS TO JURY—LIMITING INSTRUCTIONS—REQUEST.

   Failure to give *sua sponte* a limiting instruction to the jury concerning the prosecution's key witness's testimony that he

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 23 Am Jur 2d, Depositions and Discovery § 322.
[2] 21 Am Jur 2d, Criminal Law §§ 526, 555–557.
[3, 13] 4 Am Jur, Witnesses § 860 *et seq.*
[4] 53 Am Jur, Trial § 646.
[5] 29 Am Jur 2d, Evidence §§ 1082, 1083, 1087, 1124.
[6–9] 21 Am Jur 2d, Criminal Law § 315.
[10, 11] 21 Am Jur 2d, Criminal Law §§ 310, 311.
Right of defendant in criminal case to conduct defense in person or to participate with counsel. 77 ALR2d 1233.
[12] 21 Am Jur 2d, Criminal Law §§ 533, 572.

had accomplices in other robberies in which he participated, leaving open the possibility that the jury might infer that the witness was referring to the defendants was not error where no limiting instruction was requested.

5. EVIDENCE—PRIOR INCONSISTENT STATEMENT—WARNING OF RIGHTS.

Allowing the prosecutor to ask the defendant, during cross-examination, if the defendant had ever given a different alibi to police, was not error on the ground that the prosecution had not established that the defendant had been advised of his constitutional rights where no previous statement was given or introduced into evidence.

6. CRIMINAL LAW—INEFFECTIVE COUNSEL.

Defendant was not denied effective counsel even though defense counsel failed to object to a police officer's testimony that the officer found a gun in defendant's photography studio at the time of the defendant's arrest where defense counsel requested an instruction to the jury regarding the gun and the trial judge told the jury to disregard testimony concerning the gun.

7. CRIMINAL LAW—INEFFECTIVE COUNSEL—STANDARD.

A criminal defendant's conviction will not be reversed on the ground of ineffectiveness of counsel unless the lawyer's mistake is so serious that it may have been decisive in bringing about defendant's conviction.

8. CRIMINAL LAW — INEFFECTIVE COUNSEL — TIME TO PREPARE — CALLING WITNESSES.

Defendant was not denied effective counsel on the ground that counsel was not given adequate time to prepare his defense, particularly time to interview alibi witnesses even though defense counsel failed to call the six alibi witnesses that he said he would call during *voir dire* where three alibi witnesses were called, counsel announced that two of the uncalled witnesses would not be called because their testimony would be cumulative, the court indicated its willingness to allow defense counsel time to prepare his case, and defense counsel at no time expressed dissatisfaction with the time allowed.

9. CRIMINAL LAW—INEFFECTIVE COUNSEL—CALLING WITNESSES.

Defense counsel's failure to call some alibi witnesses that the defendant thought should have been called does not amount to a denial of effective counsel; the decision to call witnesses to testify is a matter of trial strategy best left to counsel's discretion.

10. CRIMINAL LAW—RIGHT OF SELF-REPRESENTATION.
A defendant has the right to represent himself in court; however the trial court does not commit reversible error in permitting assigned counsel to continue to represent the defendant where the defendant does not assert his right to defend himself and where it cannot be inferred from the record that the defendant wants to represent himself.

11. CRIMINAL LAW—RIGHT OF SELF-REPRESENTATION.
Defendant was not denied the right to conduct his own defense where his only expression of dissatisfaction with his lawyer occurred before trial, after consulting with his court-appointed attorney who continued to represent the defendant without objection, and the defendant desired not to represent himself but to have another attorney represent him.

12. CRIMINAL LAW—SENTENCING—DISCRETION—APPEAL AND ERROR.
Imposition of sentences is within the trial court's discretion; sentences which are within the statutory maximum will not be reviewed on appeal.

13. WITNESSES—CREDIBILITY—QUESTION OF FACT.
Inconsistencies between a prosecution's witness's preliminary examination testimony and trial testimony, adjournment of the witness's sentencing, and the witness's mental condition were factors to be considered by the trier of fact in deciding whether to believe the witness's testimony.

Appeal from Recorder's Court of Detroit, Robert E. DeMascio, J. Submitted Division 1 December 10, 1970, at Detroit. (Docket No. 7109.) Decided March 22, 1971. Leave to appeal denied August 31, 1971, 385 Mich 785.

Ross McGath and Vincent Maglaya were convicted of armed robbery. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Patricia J. Boyle,* Assistant Prosecuting Attorney, for the people.

Arthur J. Tarnow, State Appellate Defender, for defendants on appeal.

Before: DANHOF, P. J., and HOLBROOK and VANDER WAL,* JJ.

VANDER WAL, J. On May 23, 1966, the manager of a Kroger Market located at 5931 Michigan Avenue, Detroit, was robbed at gunpoint of approximately $1500.

On September 2, 1966, Patrick Logan turned himself into the police, confessed commission of this and other crimes, and named as his accomplices defendant Maglaya and defendant McGath.

As a result, defendant Maglaya and defendant McGath were charged with the robbery of May 23, 1966.

Defendant Maglaya and Reece Hayes were charged with another armed robbery dated April 1, 1966, and were found guilty.

Prior to examination on December 6, 1966, a proceeding was held before the Honorable Daniel J. Van Antwerp, the purpose of which was to determine whether a preliminary examination would be held.[1]

It is clear that the proceedings dealt with both cases since all three defendants were brought in at the request of counsel.

Both cases are mentioned and all defendants claimed that they had a right to waive examination.

The people claimed that an examination was necessary to preserve Patrick Logan's testimony, because threats had been made against his life.

A preliminary examination was held in both cases on December 16, 1966. Maglaya was represented in both cases by retained counsel.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

1 Although the transcript is styled *People* v. *McGath* and *Maglaya*, it is numbered A-133317, the Hayes-Maglaya file number.

The defendants raise eight issues on this appeal for our review and decision, and we will treat each one of them separately.

I. A. Whether the court erred in withholding from the defense information which it had ordered its own psychiatric clinic to prepare, which information was highly relevant to the credibility of the key prosecution witness and would have been admissible at trial?

Defendants allege that reversible error was committed by the trial court in refusing access to the psychiatric file on Patrick Logan which was on file in the Recorder's Court Psychiatric Clinic and that they were thereby denied a fair opportunity to properly attack the credibility of the witness Logan through enlightened cross-examination.

A motion was made by the defense for the appointment of a sanity commission to examine Logan. The officer in charge stated that defendant had been examined by the Recorder's Court Psychiatric Clinic in connection with the charge on which he was waiting sentence.

Judge Van Antwerp, before the examination was held in the lower court, denied the motion, and also denied defendants' motion to examine the psychiatric clinic's file on Logan, on the ground that the records were confidential.

Thereafter, as noted above, examinations were held and McGath and Maglaya were bound over on the instant charge of robbery armed (133307) and Hayes and Maglaya were bound over on robbery armed in case number 133317. 17 Mich App 379.

During the trial of Hayes and Maglaya which was concluded on May 12, 1967, several months before the beginning of the trial of the instant case, the attorney for both of the defendants in that case moved

to prevent Logan from taking the stand, on the basis of his prior commitment to Ionia.

The attorney stated that Logan had been referred to the psychiatric clinic "as a matter precedent to sentence." The record of the trial (133317) is replete with facts going to the question of competency and credibility, including the 1966 examination by the Recorder's Court Psychiatric Clinic. Moreover, counsel had reviewed that file during the course of the instant trial.

Finally Logan himself testified that he had had homicidal compulsions, used drugs, had been despondent and depressed, and had attempted suicide six years ago; and that he had been committed to the Ionia State Hospital as a "manic depressive", and that he had been restored to competency.

Thus, the fact that Logan had mental problems and had been examined by the Clinic was known to Maglaya's counsel as early as December 6, 1966. The people did in fact disclose the existence of the recorder's court files. Thus, *Giles* v. *Maryland* (1966), 386 US 66 (87 S Ct 793, 17 L Ed 2d 737), *Powell* v. *Wiman* (CA 5, 1961), 293 F2d 605, and the other authority cited in support of appellants' claim is not in point, since there was not in the instant case a withholding or suppression. The defense knew about these reports but didn't subpoena the doctors for the purpose of offering the reports in evidence in this case. The reports and the witnesses were subject to subpoena and so there is no basis for a claim that the people suppressed such evidence, it not being in the people's exclusive possession and it being reachable by the defendants.

I. B. Whether the circumstances surrounding prosecution's treatment of witness Patrick Logan with

respect to the delay in sentencing on the prior charge were so revolting as to show such bias as demands reversal?

Defendants' claim that repeated adjournments of Patrick Logan's sentencing in case No. A131848 shows such *prima facie* bias as to require the reversal of their convictions, particularly in light of the fact that without the testimony of Patrick Logan a serious question of the sufficiency of the evidence would be raised.

Without furnishing a legal basis for their contention, appellants assert that the repeated adjournments of witness Logan's sentence and his subsequent sentence to five years probation, invalidates the conviction herein because there was an "implied promise" to Logan of leniency in his sentence.

Factually, the record establishes that the sentence in Logan's case was adjourned by the trial court pending completion of trial in cases 133317 and 133307. Thereafter, case no 133307 was adjourned four times, and case no 133317 was adjourned three times. Eleven months elapsed from the time of Logan's plea, November 17, 1966, to the time of the instant trial.

Appellants have no standing to assert that a delay in Logan's sentence violated their rights, *People* v. *Goeppner* (1969), 20 Mich App 425.

Secondly, Logan testified at the trial that he had not been promised anything in exchange for his testimony. Appellants claim that there was an implied promise of leniency is, in reality, their statement of disbelief of Logan, an issue which has been resolved by the jury's verdict.

The fundamental inquiry is whether Logan's testimony was true. The jury had before it the fact of previous adjournments, knew that Logan had been

released on personal bond, and chose to believe his testimony. We find the assignment claim of error in this regard is without merit.

II. Whether the trial court erred in failing to instruct the jury *sua sponte* that evidence of other robberies committed by the witness Logan and accomplices was to be considered for a limited purpose?

The following colloquy occurred during the examination of witness Logan:

"*Q*. Now you testified that you had participated in other holdups prior to this one in May?
"*A*. Yes, sir, I had.
"*Q*. Over how long a period of time?
"*A*. About a period of a year's time.
"*Q*. And during this period, how many holdups did you participate in?
"*A*. About nine or ten.
"*Q*. Did you do them alone?
"*A*. No, sir I did not.
"*Q*. Did you have accomplices?
"*A*. I did.
"*Q*. In everyone of the holdups?
"*A*. Everyone of the holdups, yes, sir.
"*Q*. Did you make plans in the participation of these holdups?
"*A*. Yes, sir.
"*Q*. With these accomplices?
"*A*. Yes.
"*Q*. Were cars used in these holdups?
"*A*. On every occasion.
"*Q*. Did you meet these accomplices at various times and go to these places?
"*A*. We did".

Appellants claim that because Logan testified as to accomplices in other robberies the jury may have reasonably thought the witness was referring to the

defendants. They contend that the obvious purpose of the prosecutor's eliciting this testimony from Logan was to implicate them as accomplices in the prior robberies.

A limiting instruction would have been proper, and appellants insist that one should have been made. There was no request for such instruction made on the part of the defendants and that is fatal to their claim.

Where evidence is admissible under the statute the applicable rule in regard to instruction is that of *People v. Anderson* (1968), 13 Mich App 427, 250.

"In the absence of a request or proper objection, the trial court was not required to give the limiting instruction now sought."

In the instant case, defendants did not make a proper objection to the introduction of the testimony nor did they request a limiting instruction. Thus, the trial court was not obligated to give the limiting instruction, *People* v. *Stevens* (1970), 25 Mich App 181.

In addition we are of the opinion that appellants have shown, in this claim of error, a very weak link between the testimony elicited and themselves. The witness was testifying as to his prior conduct and the fact that he had accomplices in these other robberies and so the link between the defendants and the offensive testimony proceeds upon speculation as no specific reference was made to defendants in respect to the prior robberies of Mr. Logan.

Defendants speculate regarding the effect this testimony had on the jury. The prejudice, if any, does not have the proportions of manifest injustice, and there being no objection raised at trial, the issue is foreclosed from review. See *People* v. *Anderson, supra.*

III. Whether reversible error resulted from the prosecutor's eliciting testimony that a gun similar to that used in the robbery was found when Maglaya's photography studio was searched?

On cross-examination of the officer who arrested defendant Maglaya on November 22, 1966, defense counsel asked if a search of the premises had been conducted when Maglaya was arrested. On re-direct the prosecutor asked whether any weapons had been found. The witness indicated that a gun had been found.

Defendants attempt to show bad faith on the part of the prosecutor, indicating that the gun was referred to by the same prosecuting attorney in Detroit Recorder's Court case No. A133317 (*People* v. *Maglaya*). It should be noted that this Court, reviewing the conviction in that case, examined a similar argument. The Court said, in *People* v. *Maglaya* (1969), 17 Mich App 379, 381:

"The gun referred to was similar to the gun used in the robbery. Thus the officer's testimony was not tantamount to reversible prejudice. Moreover, the court's instruction was curative and not compounding as to any prejudice occasioned by the testimony."

The record shows that the trial court struck the testimony relating to the gun and carefully explained to the jury its reasons for striking. In addition, curative instructions were given at appellants' request. No prejudice remains of which complaint may be made.

IV. Whether the prosecuting attorney caused prejudicial error by implying during cross-examination of McGath and his alibi witnesses that McGath had made a prior statement inconsistent with the alibi defense asserted at trial?

Appellant McGath claims to have denied a fair trial because of questioning by the prosecutor on cross-examination which implied the existence of a prior statement in which he told police he was in Pennsylvania.

In the first place no objection was made to the question and thus the matter has not been properly preserved for appellate review. See *People* v. *Jordan* (1967), 7 Mich App 28.

The question was whether the defendant had ever given a different alibi to the police. McGath's contention that reference to his prior statement constitutes error because the People did not establish that *Miranda* warnings[2] were given is without validity because in the instant case no statement was given or used. Thus, there is no factual foundation for a claim of a *Miranda* violation.

V. Whether defendants were denied effective assistance of counsel as shown by counsels' failure to object or move for mistrial upon the introduction of evidence.

When the testimony was elicited that upon the search of defendants-appellants' business premises a .25 caliber gun was found, the attorneys for both defendants did not object.

On direct examination, Officer John J. Yakush testified that he arrested defendant Maglaya. On cross-examination by Mr. Ferguson, Officer Yakush testified that he searched the photography studio where the arrest was made. On re-direct, the prosecutor brought out testimony that a revolver was found on the premises. No objection was made to such testimony at that time, though Maglaya's coun-

[2] *Miranda* v. *Arizona* (1966), 384 US 436 (86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974).

sel requested an instruction regarding the gun found.

The error not having rendered the trial manifestly unfair, and whatever possibility of prejudice having been cured by the court's express statement to the jury that they were to disregard testimony regarding the gun found in the photography studio, it does not appear that their attorneys denied them effective assistance of counsel.

Defendant McGath asserts ineffectiveness of his appointed counsel, Mr. Hubbell, on the ground that he failed to object to the prosecutor's inferences that McGath had made a prior statement to the police inconsistent with the testimony at trial. This Court said in *People* v. *Degraffenreid* (1969), 19 Mich App 702, 717:

"[Such relief will not be granted unless it appears that:] the lawyer's mistake is of such serious proportion that it may have been decisive, where but for the lawyer's mistake the defendant might not have been convicted."

VI. Whether Maglaya was denied effective assistance of counsel because of inadequate opportunity for preparation of trial counsel?

Maglaya asserts denial of effective counsel in that defendant himself indicated unreadiness to proceed claiming his appointed attorney, William H. Ferguson, was not fully informed of the case. Mr. Ferguson indicated he was acquainted with the case and that he was aware of the alibi, but had not yet interviewed the alibi witnesses.

The trial court determined that because of an intervening three-day weekend, defense counsel would have sufficient opportunity to complete his preparation. The court also indicated its willing-

ness to allow the defense additional time as the case went along.

Though defendant Maglaya asserts error in being deprived of additional time for the preparation of his defense, he shows no instance where his attorney indicated dissatisfaction with the time allowed.

The only prejudice alleged is that defense counsel had indicated during his *voir dire* examination of the jury that he would call six alibi witnesses on behalf of Maglaya when in fact only three were called.

The record doesn't bear out defendant's contention on this issue because it clearly shows that Maglaya's attorney indicated on the record that he did not intend to call two of the remaining alibi witnesses because their testimony would be cumulative.

In *People* v. *Crosby* (1969), 19 Mich App 135, where defendant claimed that counsel's failure to call a third alleged alibi witness constituted reversible error, the court stated at 142:

"The matter of calling witnesses * * * is considered to be trial strategy which is best left to trial counsel.

* * *

"Failure to call a witness or witnesses, does not, in and of itself, constitute incompetency."

The record fails to show that trial counsel for Maglaya lacked time to prepare, or if he did lack time, such lack denied Maglaya adequate representation.

VII. Whether the trial court committed reversible error in refusing to allow Maglaya to discharge his attorney.

Defendant Maglaya contends that because a defendant has the right to represent himself the trial court committed reversible error in not honoring a

request to discharge appointed counsel. He quotes *People* v. *Cooley* (1968), 11 Mich App 602, for the proposition that failure to act on a defendant's request to discharge his appointed counsel is unconstitutional and thus reversible error.

However, where the defendant does not assert the right and it is not inferrable from the record that defendant desires self-representation, the trial court does not err in permitting assigned counsel to continue to represent the defendant.

Thus, in *People* v. *Fred Smith* (1970), 22 Mich App 22, where defendant indicated on the day of trial, prior to jury selection, that he was dissatisfied with assigned counsel and the case was adjourned for the day to permit consultation between the defendant and counsel, no objection being thereafter made to continuation with counsel, the court concluded that error was not committed since the "defendant did not unequivocally request that he be permitted to conduct his own defense".

In the instant case defendant likewise expressed dissatisfaction with counsel before trial, opportunity for consultation was given and counsel thereafter continued to represent defendant without objection. Moreover, defendant stated during the colloquy between court, counsel, and defendant, "I only want somebody who has had ample opportunity to investigate the case".

Thus defendant indicated that his desire was not to represent himself, but was in fact the desire to have another attorney. See, *United States* v. *Denno* (CA2, 1965), 348 F2d 12, 15, *cert den,* 384 US 1007 (86 S Ct 1950, 16 L ed 2d 1020); *People* v. *Henley* (1969), 382 Mich 143, 148. We find no error on this issue.

VIII. Whether reversible error resides in the disparity between appellants' sentences and that of defendant Logan?

Maglaya received a sentence of 25 to 40 years and McGath received a sentence of 17 to 30 years, whereas defendant Logan received five years probation following his guilty plea.

It is well established that the imposition of sentences is entirely within the trial court's discretion and sentences imposed which are within the statutory maximum will not be reviewed on appeal. *People* v. *Henderson* (1968), 10 Mich App 333; *People* v. *Walker* (1968), 15 Mich App 25.

Here the statutory maximum is "life or for any term of years" (MCLA § 750.529 [Stat Ann 1954 Rev § 28.797]). Thus, as both Maglaya's and McGath's sentences are for less than life imprisonment, neither may be heard to complain of the other's sentence or that of witness Logan.

In conclusion, appellants contend that Logan's testimony was "so patently unreliable" that the conviction cannot stand. They cite inconsistencies between the witness's preliminary examination testimony and his trial testimony; adjournment of Logan's sentence on another charge; and the witness's mental condition as the factual ground for the allegation that the verdict was not supported by sufficient evidence.

All of these matters were brought out in the evidence and brought to the attention of the jury and it became a question of whether the jury believed Logan or the alibi witnesses. The jury's verdict decided this issue, and the reviewing court will not disturb the jury's conclusion.

After a careful review of all the evidence produced at the trial, we conclude that there was sufficient

evidence submitted to justify the verdict of guilty of armed robbery beyond a reasonable doubt.

Affirmed.

All concurred.

PEOPLE *v.* HARRY JAMES SMITH

OPINION OF THE COURT

1. CRIMINAL LAW—PROSECUTOR'S AUTHORITY—CHANGING STATUTE.

   A prosecutor has no authority to stipulate away the provisions of a duly enacted statute; a prosecution has no authority to delete or unilaterally change any part of a duly enacted statute.

2. CRIMINAL LAW—NARCOTICS—MARIJUANA—PROSECUTOR'S AUTHORITY—CHANGING STATUTE.

   Statute that defines marijuana as a narcotic cannot be changed by prosecutor's stipulations in open court that marijuana was not properly classified as a narcotic drug in the medical sense of the word (MCLA § 335.151).

3. SEARCHES AND SEIZURES—PRIVATE GUARDS—STANDARD OF CARE—ADMISSIBILITY.

   Marijuana seized from the defendant by a private guard, not acting under the authority of any police agency, is admissible into evidence whether the guard's actions were reasonable or unreasonable, because a private guard is a private individual and the standard of care placed on police officers regarding searches and seizures does not apply to private guards (US Const, Am 4).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 42 Am Jur, Prosecuting Attorneys §§ 9–18.

[3–5] 47 Am Jur, Searches and Seizures §§ 52–73.

Admissibility, in criminal case, of evidence obtained by search by private individual. 36 ALR3d 553.

DISSENT BY MCGREGOR P. J.

4. SEARCHES AND SEIZURES—PRIVATE GUARD—METHOD OF SEIZURE—REASONABLENESS—MARIJUANA.

Marijuana seized by a private guard acting under no police agency was inadmissible in defendant's trial where the guard lunged at the defendant who was attempting to enter a roller skating rink, hit the defendant with several judo chops, forcibly twisted the defendant's arm behind the defendant's back, and knocked a packet containing the marijuana from the defendant's pocket, because the method of seizure, although by a private individual, offends a sense of justice.

5. EVIDENCE—METHODS OF SEIZURE—ADMISSIBILITY.

Evidence seized by methods which offend a sense of justice ought not to be admissible in state trials.

Appeal from Oakland, William John Beer, J. Submitted Division 2 April 7, 1970, at Lansing. (Docket No. 7217.) Decided March 22, 1971.

Harry James Smith was charged with possessing or having under his control a narcotic drug. Defendant's motion to suppress the evidence and quash the information granted. The people appeal. Reversed and remanded for trial.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas G. Plunkett,* Prosecuting Attorney, *Dennis Donohue,* Chief Appellate Counsel, and *Bruce T. Leitman,* Special Assistant Prosecuting Attorney, for the people.

Before: MCGREGOR, P. J., and DANHOF and LARNARD,* JJ.

DANHOF, J. On August 13, 1967, the defendant was charged with possessing or having under his control a narcotic drug, to wit, *Cannabis Sativa*

* Circuit judge, sitting on the Court of Appeals by assignment.

(marijuana) and not having a license therefor, contrary to MCLA § 335.153 (Stat Ann 1957 Rev § 18.1123).

On September 26, 1967, a preliminary examination was held and the defendant was bound over to circuit court for trial. On November 24, 1967, the defendant moved to suppress the evidence and quash the information. The motion was argued on March 11, 1968, and on March 13, 1968, the circuit judge denied the defendant's motion. Subsequently, on April 16, 1968, the defendant renewed his motion and the motion was granted on May 15, 1968, for reasons which will be discussed subsequently.

The facts disclosed at the preliminary examination show that at approximately 9:30 p.m. on the night of August 13, 1967, the defendant approached the Rolladium Drome skating rink in Pontiac, Michigan. He purchased a ticket and attempted to enter the skating rink. Over the entrance doors of the skating rink is a large sign which states that in order to enter the skating rink all persons must be searched. The sign is in large letters and has been posted for a long time. The skating rink employed a private guard, one Alvin Leon Gunn. Mr. Gunn was employed as a Sergeant by Young's Private Patrol and had been employed at the skating rink for some period of time. As the defendant approached Mr. Gunn at the doors of the skating rink Mr. Gunn told the defendant that the general procedures at the Rolladium Drome skating rink were that each person was searched as he entered. Mr. Gunn inquired of the defendant if this was his first time at the skating rink and the defendant answered no. Mr. Gunn advised the defendant that the search was voluntary, but that if he wished to enter the skating rink he would have to be searched. Mr. Gunn informed the defendant that he was going to search

him if the defendant decided to enter the skating rink. The defendant replied that he would not let Mr. Gunn search him. Thereafter the facts become less clear, but it appears the defendant took one step backwards and Mr. Gunn two steps backwards at which point the defendant placed his hands in his pockets whereupon Mr. Gunn "judo chopped" him and pushed him out into the lobby. The defendant still had his hand in his pocket. Mr. Gunn then took the defendant's hand and forced it behind him. At that time some aluminum foil dropped from the defendant's hand. The defendant was then handcuffed by Mr. Gunn at which time he picked up the aluminum foil.

Subsequently, the Waterford Township Police Department was called and when the police arrived the aluminum foil package was turned over by Mr. Gunn to a police officer. Mr. Gunn then finished searching the defendant in the presence of the two officers and discovered a pack of cigarette papers. These too were turned over to the Waterford Township Police Department. Mr. Gunn testified that the reason he "judo chopped" the defendant was that the defendant could have had a razor blade concealed in his hand, and that he was apprehensive of the defendant. Mr. Gunn testified that his work at the skating rink was of a private nature, that he was a private policeman licensed in the state of Michigan, and that he had a Detroit license to be a private patrol watchman under a Detroit ordinance.

It was stipulated by the prosecutor and defense counsel that the contents of the aluminum foil package were marijuana.

There is no evidence on the record to show that Mr. Gunn was working in conjunction with, or was in any way assisting or acting under the authority of the Waterford Township Police Department.

The defendant moved to suppress the evidence alleging that it had been obtained by an illegal search and seizure and moved to quash the indictment. At the hearing on this motion on March 11, 1968, the people made a three-fold argument:

(1) The motion should be denied because the search was not in fact unreasonable.

(2) That assuming *arguendo* that the search was unreasonable, the illegal search and seizure would not bar the marijuana from evidence since Mr. Gunn was not a police officer, nor was he working as the agent of the police, and, therefore, his conduct was not proscribed by either the Fourth Amendment of the United States Constitution or Const 1963, art 1, § 11.

(3) That assuming *arguendo* that the search and seizure were unreasonable, the Michigan constitutional proviso (Const 1963, art 1, § 11) allowed the introduction of the marijuana because it was a narcotic drug.

The circuit judge did not consider the first two theories advanced by the people, but denied the motion and held that the evidence was a narcotic drug and therefore was admissible under Const 1963, art 1, § 11.

On April 16, 1968, the defendant renewed the motions to suppress and quash and at that time the prosecutor stipulated in open court that marijuana was not properly classified as a narcotic drug in the *medical sense of the word.* The circuit judge then held that if it was agreed that marijuana was not properly classified as a medical narcotic the constitutional proviso contained in Const 1963, art 1, § 11 did not apply, and the motions to suppress and quash were granted and an order to that effect was entered on May 15, 1968. In the order the trial judge stated the following:

"This matter was heard on the record in open court. It appeared that the court previously denied a motion to suppress evidence and quash the information because of article 1, § 11 of the Michigan Constitution which reads as follows:

" 'The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.'

"This court would have granted the earlier motion except for the provisions of the Michigan Constitution aforesaid and because in particular the court believed a narcotic drug was involved.

"Upon this subsequent argument and there being a stipulation on the record that marihuana medically is not a narcotic drug, the court therefore concludes the aforesaid constitutional provision is not applicable.

"The details of the arrest, search, and circumstances of obtaining the evidence are a matter of record at the preliminary examination and was noted in the pleadings.

"Now, therefore, this court concluding and by an absence within the constitutional sense of a narcotic drug and otherwise this court being prevailed upon that the matter of search, arrest, and circumstances of obtaining the evidence of the respondent was illegal; the motion to suppress evidence and quash the information hereby is granted."

The people filed an application for leave to appeal which was granted.

It is evident from reading the order entered by the circuit judge, although there is no opinion with the order, that the circuit judge had to make three decisions. First that marijuana was not a narcotic drug under Const 1963, art 1, § 11, and second that the search was unreasonable, and third, even though the search was conducted by a private person it was subject to the protection of the Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11, and hence the evidence was to be excluded.

We determine that the action of the trial court was erroneous and we order the matter remanded for trial.

At the outset we note that part of the problem which has arisen is due to the fact that the prosecutor took it upon himself to stipulate that marijuana was not a narcotic drug in the medical sense of the word. We are not here concerned with a medical fact, but rather, an enactment of the Legislature. Laudable as it may be to raise this particular point we know of no authority which allows a prosecutor to endeavor to stipulate away the provisions of a duly-enacted statute. Such conduct on behalf of the prosecutor amounts to prosecutorial legislation, and while the prosecutor may have discretion as to whether or not to authorize a warrant we doubt that he has the power to alter a statute. Nor, on the basis of public policy, should he have authority to delete or unilaterally change any part of a duly-enacted statute. MCLA § 335.151 (Stat Ann 1970 Cum Supp § 18.1121), states:

"Section 1. The following words and phrases, as used in this act, shall have the following meanings, unless the context otherwise requires:

* * *

"(2) 'Narcotics' includes the following:

* * *

"(f) All parts of the plant Cannabis Sativa. The term 'Cannabis' as used in this act shall include all parts of the plant Cannabis Sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of such plant, and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from seeds of such plant, other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks, except the resin extracted therefrom, fibre, oil, or cake, or the sterilized seed of such plant which is incapable of germination. This definition is to include marihuana and all allied plants of the cannabis family which are habit forming."

MCLA § 335.153 (Stat Ann 1957 Rev § 18.1123), provides for the criminal offense for which the defendant is charged. Sections 335.153 and 335.151, *supra,* are all parts of PA 1952, No 266, and hence we hold that the Legislature validly enacted the statute pursuant to the police power of the state designed to protect the public health, safety, and welfare. *People* v. *Sinclair* (1971), 30 Mich App 473.

Const 1963, art 1, § 11, will no longer allow the marijuana to be introduced into evidence. See *People* v. *Andrews* (1970), 21 Mich App 731; *People* v. *Pennington* (1970), 383 Mich 611.

However, other grounds exist which require the reversal of the trial judge's decision. As previously stated, Mr. Gunn was a private guard, not a police officer, nor was he acting under any authority of any police agency. He was, therefore, a private individual. Thus, the evidence obtained is admissible into evidence whether his actions were reasonable or

unreasonable. In *Burdeau* v. *McDowell* (1921), 256 US 465, 475 (41 S Ct 574, 576; 65 L Ed 1048, 1051), the United States Supreme Court said:

"The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

"In the present case the record clearly shows that no official of the Federal government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the Federal government. We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned."

This position has been reaffirmed in *Berger* v. *New York* (1967), 388 US 41, 53 (87 S Ct 1873, 1880; 18 L Ed 2d 1040, 1049), wherein Justice Clark speaking for the majority stated:

"It is now well settled that 'the Fourth Amendment's right of privacy has been declared enforce-

able against the states through the Due Process Clause of the Fourteenth' Amendment. *Mapp* v. *Ohio* (1961), 367 US 643, 655 (81 S Ct 1684, 1691; 6 L Ed 2d 1081, 1090; 84 ALR2d 933, 942). 'The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.' *Wolf* v. *Colorado* (1949), 388 US 25, 27 (69 S Ct 1359, 1361; 93 L Ed 1782, 1785). And its 'fundamental protections * * * are guaranteed * * * against invasion by the states.' *Stanford* v. *Texas* (1965), 379 US 476, 481 (85 S Ct 506, 509; 13 L Ed 2d 431, 434). This right has most recently received enunciation in *Camara* v. *Municipal Court* (1967), 387 US 523, 528 (87 S Ct 1727, 1730; 18 L Ed 2d 930, 935). *'The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'"* (Emphasis added.)

We concur in the reasoning of the United States Supreme Court and see no reason for going beyond it. To hold a private individual to the same standard of conduct as that required of a police officer who acts with, for, and on behalf of the authority of the state, would create a chaotic situation. We recognize that Mr. Gunn was a private policeman but unless, and until, the Legislature or the Supreme Court of the State of Michigan or the Supreme Court of the United States places upon private policemen the same standard of care as is placed on police officers they are acting in an individual and private capacity. Subsequently, neither the Fourth Amendment of the United States Constitution nor Const 1963, art 1, § 11 prohibits the introduction into evidence of the seized marijuana.

The order of the circuit court suppressing the evidence and quashing the information is reversed

and the case remanded for further proceedings consistent with this opinion.

LARNARD, J., concurred.

McGREGOR, P. J. (*dissenting*). This writer cannot tolerate nor give his tacit approval to the guard's conduct in this case by allowing the marijuana seized into evidence. If it were assumed at its inception that the guard's actions were justified, in lunging at the defendant, administering several judo chops, forcibly twisting defendant's arm in back of him, and further wrestling the packet from his hand, the seizure was in no way related in scope to any circumstances which may have justified the initial interference.

On the basis of the record presented, the guard's actions were utterly lacking in foundation and constituted an egregious intrusion upon defendant's person. Evidence seized by methods which offend "a sense of justice" ought not be admissible in state trials. See *Rochin* v. *California* (1952), 342 US 165, 173 (72 S Ct 205, 210; 96 L Ed 183, 190; 25 ALR2d 1396, 1403), referring to *Brown* v. *Mississippi* (1936) 297 US 278 (56 S Ct 461, 80 L Ed 682).

As Justices Holmes and Brandeis aptly stated in their dissent in *Burdeau* v. *McDowell* (1921), 256 US 465, 477 (41 S Ct 574, 576, 577; 65 L Ed 1048, 1051):

"Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

Alternatively, I would remand this matter to the lower court for further findings and a determination as to whether the peace officers were responsible

for the seizure of the marijuana. The record is unclear in several respects. It does not properly demonstrate why the officers were called to the scene nor does it properly relate the sequences of events following the seizure of the packet by the guard, *e.g.*, whether the guard knew the substance of the packet and related its contents to the peace officers when they arrived or whether the peace officers actually opened the packet and learned of its contents. Possibly if the latter were the situation, the responsibility for the search and seizure may have been that of the peace officers.

PEOPLE *v.* FRANK
PEOPLE *v.* BEETS

1. CRIMINAL LAW—DEFENDANT TESTIFYING—PREVIOUS ARRESTS—IMPEACHMENT.

Allowing the prosecutor to question the defendant about a breaking and entering arrest for which there had been no conviction in an attempt to impeach the defendant's credibility was not reversible error where the case was tried before the decision holding that questioning about a felony arrest that did not result in conviction was error.

2. CRIMINAL LAW—DEFENDANT TESTIFYING—PREVIOUS ARRESTS—CUMULATIVE EVIDENCE.

Allowing the prosecutor to impeach the defendant's credibility by asking the defendant about a breaking and entering arrest which did not result in conviction was not reversible error where the defendant was properly questioned about two breaking and entering convictions, because the improper evidence was merely cumulative.

3. RAPE—EVIDENCE—PHOTOGRAPHS—ADMISSIBILITY.

Admitting photographs of a rape victim detailing her physical condition after being beaten and raped was not an abuse of discretion even though a witness had already testified to the victim's condition where the photographs clarified the testimony of the witness, tended to show the force and violence in the two crimes charged, rape and aggravated assault, and

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Witnesses § 754.
Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution. 20 ALR2d 1421.
[3] 29 Am Jur 2d, Evidence §§ 785–787.
[4] Effect of voluntary statements damaging to accused, not proper subject of testimony, uttered by testifying police or peace officer. 8 ALR2d 1013.
[5] 58 Am Jur, Witnesses §§ 792, 793, 803.

the complainant's condition was not the product of an intervening medical examination.

4. CRIMINAL LAW—OTHER CRIMES—DEFENDANT'S ERROR.
Police officer's stating that he knew that there was a statutory rape warrant for defendant's arrest when asked by defense counsel if he knew that there was a "financial responsibility" warrant for defendant's arrest did not constitute reversible error where the prosecutor never brought up the issue of outstanding warrants, never pursued the issue, and did not emphasize it in closing remarks.

5. CRIMINAL LAW — WITNESSES — IMPEACHMENT — METHODS — TESTIMONY OF INVESTIGATOR — PRIOR INCONSISTENT STATEMENT.
Refusing to allow an investigator for defense counsel to testify that two witnesses, who at trial said that the defendant had been with them the night before the crime charged was committed, had told him that the defendant had been in a bar with them on the night the offense occurred was proper where the trial judge said that he would allow defense counsel to impeach the witnesses directly by prior inconsistent statements.

Appeal from Wayne, Edward S. Piggins, J. Submitted Division 1 November 10, 1970, at Detroit. (Docket Nos. 7237, 7398.) Decided March 22, 1971. Leave to appeal denied, 385 Mich 756, 386 Mich 755.

Rudy Frank and Douglas Beets were convicted of rape, breaking and entering, and aggravated assault. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Luvenia D. Dockett,* Assistant Prosecuting Attorney, for the people.

Rudy Frank, *in propria persona.*

Arthur J. Tarnow, State Appellate Defender, for defendant Beets.

Before: McGregor, P. J., and Holbrook and O'Hara,* JJ.

McGregor, P. J. Defendants were charged and convicted of rape, MCLA § 750.520 (Stat Ann 1954 Rev § 28.788), breaking and entering, MCLA § 750-.110 (Stat Ann 1965 Cum Supp § 28.305), and aggravated assault, CL 1948, § 750.81a (Stat Ann 1962 Rev § 28.276[1]), and from these convictions they appeal.

On the evening of January 26, or the early morning of January 27, 1968, the victim, a 16-year-old girl, was babysitting in a neighbor's home. She testified that the defendants broke the chain lock on the front door of the home, rushed in, knocked her unconscious, and subsequently raped her.

This opinion will first discuss those issues applicable to both defendants and then treat those issues which apply to the defendants individually.

Defendants alleged that the acts and comments of the trial court were so devoid of impartiality that defendants were prejudiced and were denied a fair trial. CL 1948, § 768.29 (Stat Ann 1954 Rev § 28-.1052), provides, in part:

"It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

While this statute gives the judge discretion in controlling court proceedings, it does not authorize the usurpation of the attorney's role nor the blatant

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

exhibition of partiality. The defendants' primary contention stems from the examination by the trial judge of the defendants' alibi witness, Arthur Chambers. We have studied the record pertaining to this questioning and do not find that it was such as to prejudice the defendants' case. Furthermore, the other alleged error concerning the judge's impartiality is without merit. If any error was committed, it was harmless.

Defendant Beets contends that the prosecution committed reversible error by attempting to impeach his credibility by the use of testimony concerning a breaking and entering felony for which there had been an arrest but no conviction, inasmuch as the charge was *nolle prossed.* Defendant contends that, since the *nolle prosequi* was not a conviction, the cross-examination was improper, pursuant to the holding in *People* v. *Brocato* (1969), 17 Mich App 277.

The language and holding in *Brocato, supra,* indicates that it was error to allow the prosecutor to question the defendant concerning a felony arrest, for which there had been no subsequent conviction, but *People* v. *Ruppuhn* (1970), 25 Mich App 62, has held that *Brocato* has only prospective application and, therefore, would not be applicable here since this trial was completed in 1968.

Furthermore, in the present case, defendant had been questioned about two prior convictions before the question arose regarding the *nolle prosequi,* and the previous offenses were also breaking and entering. We find that the jury was not given any different picture due to the discussion of this third offense. The challenged evidence was merely cumulative and its improper admission was not reversible error.

Defendant Beets claims that the admission of the photographs of the victim, showing her physical condition after being beaten and raped, was error. His contention is that, since a witness had already testified as to the girl's condition, the photographs were of limited probative value. It is his contention that the introduction of the photos was intended to inflame the jury and was, therefore, highly prejudicial. Although he acknowledged the lack of a timely objection to the introduction of such photos, the defendant argues in the alternative that he should receive a new trial, because of the trial counsel's mistake. *People* v. *DeGraffenreid* (1969), 19 Mich App 702. This Court, in *People* v. *Turner* (1969), 17 Mich App 123, a murder case, held that the admission of photographs was discretionary, but found that the trial court there had abused its discretion. The pictures in that case were the product of an intervening medical examination and the Court indicated that the photographs taken at such examination must be scrutinized more carefully than those taken by the police at the scene of the crime.

We find the present case more like *People* v. *Eddington* (1970), 23 Mich App 210, 227. In that case, a first-degree murder case, the prosecution introduced into evidence five colored photographs of the victims. The pictures detailed the conditions of the victims' bodies as the police found them. The scenes depicted were helpful in illuminating a material issue—the malice with which the crimes were committed. Furthermore, the Court noted that the photographs were not the product of an intervening medical examiner, as in *People* v. *Turner, supra.* The Court found that the judge, in admitting the photographs, did not abuse his discretion under the facts and circumstances presented.

In the present case, the photos were taken following the beating and no autopsy was involved. The photos helped to clarify the testimony of a witness and tended to show the force and violence involved in these crimes—aggravated assault and rape. The judge did not abuse his discretion.

During the trial, the prosecution introduced evidence that defendant Frank attempted to avoid arrest for the present charges since the police unsuccessfully sought to locate him for a month. (Defendant Frank voluntarily surrendered to the police on March 4, 1968.) In attempting to justify defendant's apparent flight from the police, the defense counsel asked a police officer if he was aware of an outstanding warrant on financial responsibility[1] against the defendant. In response, the officer indicated he was not, but that he did know of a warrant for statutory rape. Defendant Frank contends that this statement was prejudicial because of its necessary implications, and cites *People* v. *Brocato, supra,* for the proposition that care must be taken in examining witnesses when the offense charged is highly inflammatory. Although no trial objection was made, he asserts that an objection would have been meaningless and that it would have further alerted the jury to the issue.

In the instant case, the prosecution never brought up the issue of the outstanding warrant, never pursued the issue, and did not emphasize it in the closing remarks. It was defense counsel who had control of this witness and should have had the unrespon-

[1] This Court is unable to decipher from the record exactly what defense counsel meant by this term, except that it related to some aspect of the financial responsibility act of the Michigan Vehicle Code, MCLA § 257.1 *et seq.* (Stat Ann 1968 § 9.1801 *et seq.*). The theory apparently was that while defendant admittedly knew that he was being sought by the police, the reason he was wanted did not involve any serious degree of moral turpitude.

sive remark stricken. No reversible error was committed here.

Defense counsel called two alibi witnesses to establish that defendant Frank was at a bar on the date in question and at the time when he was reported to have committed the crime against the complainant. The two witnesses in question were the bartender and the owner of the bar, who testified that defendant Frank was in the bar on the night previous to the alleged offense. Inasmuch as the testimony of the witnesses was not beneficial to defendant, an effort was made to call one Frank Reeves, an investigator for defense counsel's office, so that he could testify that these witnesses had previously told him that this defendant was in the bar on the evening of the 26th and the morning hours of the 27th of January, 1968. Although the trial judge offered to allow the defense counsel to examine the bartender and the owner regarding any prior inconsistent statements, he refused to allow their direct impeachment by this investigator. Under Michigan law, this ruling was correct. *Higdon* v. *Kelley* (1954), 339 Mich 209, 216–219; see *People* v. *Lee* (1943), 307 Mich 743; 5 Callaghan's Michigan Pleading & Practice (2d ed), § 37.217, p 574.

The trial court is affirmed.

All concurred.

HUNTLEY *v.* MOTOR WHEEL CORPORATION

1. NEGLIGENCE—INSTRUCTIONS TO JURY.

   Contention that trial court erred in refusing to instruct the jury that the defendant's duty of due care to third parties regarding such an inherently dangerous instrumentality as high-voltage electricity could not be delegated away is without merit where the court did, in fact, instruct that if the defendant had any duty it could not be delegated.

2. NEGLIGENCE—DUTY—LANDLORD AND TENANT.

   Instruction to jury that defendant landlord was liable for an injury caused by a defect in the electrical system of its building only if it retained control over the electrical system, or had actual knowledge of defects in it, given as part of the law applicable to the landlord-tenant relationship, was proper.

3. TRIAL—INSTRUCTIONS TO JURY.

   The test of instructions to the jury is: Did the instructions as given adequately inform the jury on the applicable law reflecting and reflected by the various evidentiary claims in the particular case?, when they are objected to as being so lengthy, conflicting, ambiguous, and erroneous as to be unmeaningful and incomprehensible.

4. NEGLIGENCE—INHERENTLY DANGEROUS ACTIVITY—VICARIOUS LIABILITY.

   The inherently dangerous activity doctrine is closely akin to strict liability and an employer's duty to provide against

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 38 Am Jur, Negligence § 369.
53 Am Jur, Trial § 527.
[2] 49 Am Jur 2d, Landlord and Tenant § 880.
[3] 53 Am Jur, Trial § 539 *et seq.*
[4, 5] 41 Am Jur 2d, Independent Contractors § 37 *et seq.*
[6] 26 Am Jur 2d, Electricity, Gas, and Steam §§ 39, 53.

negligence as may be commensurate with the obvious dangers involved only arises where the employer is doing, or is causing to be done, work necessarily involving danger to others unless great care is used.

5. NEGLIGENCE—INHERENTLY DANGEROUS ACTIVITY—VICARIOUS LIABILITY.

An employer is vicariously liable for an independent contractor's negligence under the inherently dangerous activity doctrine, without proof of culpable negligence on the employer's part, only when the work itself is of such a nature that it would inevitably and unavoidably result in danger to others unless great care was used to prevent injury.

6. NEGLIGENCE—INHERENTLY DANGEROUS ACTIVITY—VICARIOUS LIABILITY.

Defendant was not vicariously liable, without proof of culpable negligence on its part, for plaintiff's injury, which was not inevitable from plaintiff's work as an electrician employee of an independent contractor where plaintiff was in fact injured by an instrumentality incidental to work being performed by the independent contractor for defendant.

Appeal from Ingham, Donald L. Reisig, J. Submitted Division 2 June 4, 1970, at Lansing. (Docket No. 7347.) Decided March 22, 1971. Leave to appeal denied March 17, 1972, 387 Mich —.

Complaint by Glen Huntley and Dorothy Huntley against Motor Wheel Corporation for negligence. Verdict and judgment of no cause of action. Plaintiffs appeal. Affirmed.

Parks, Church & Wyble (by *Richard Robinson*) for plaintiffs in the initial brief on appeal.

Wilfred A. Dupuis, supplemental brief on appeal for plaintiffs.

Domke, Marcoux, Allen & Beaman (by *William J. Marcoux*) for defendant.

Before: LESINSKI, C. J., and QUINN and ROOD,* JJ.

ROOD, J. This appeal, alleging improper jury instructions, arises out of an industrial accident which occurred on April 17, 1964. Plaintiff was severely burned when an electrical switch he was operating exploded at the Centrifugal Fusing Company in Lansing, Michigan, where he was employed as a plant electrician. The plant building and some of the electrical equipment was owned by the defendant and had been leased to Campbell, Wyant and Cannon Foundry Company by a lease agreement dated October 10, 1936. Campbell, Wyant and Cannon sublet the premises to Centrifugal Fusing Company by an agreement and lease dated July 31, 1937. The term of this lease was extended to December 31, 1966, by an agreement dated September 18, 1953. The lease agreement provided that Campbell, Wyant and Cannon was to keep the premises in good repair during the term of the lease.

The defendant had a manufacturing agreement with Campbell, Wyant and Cannon dated October 10, 1936, which provided that the defendant would purchase all of the brake drums produced at the plant and would pay all costs of production, including power. Campbell, Wyant and Cannon operated the plant through Centrifugal Fusing Company, a wholly-owned subsidiary. In 1957 Campbell, Wyant and Cannon sold all of its assets, including its interest in the Lansing plant, to Textron, Inc. At the time of the accident (April 17, 1964) Centrifugal Fusing Company was a division of Campbell, Wyant and Cannon which, in turn, was a division of Textron, Inc.

* Circuit judge, sitting on the Court of Appeals by assignment.

The operating equipment in the plant, including the No. 5 turntable, No. 5 induction heater, and the switch above B furnace, was owned by Campbell, Wyant and Cannon. The equipment in the power house, including the switch that exploded, was owned by the defendant. This switch was installed in 1952 or 1953. Centrifugal Fusing Company maintained and repaired all of the equipment in the plant, including the electrical switches, as provided for in the lease agreement. The electrical work was done by Centrifugal Fusing Company's plant electricians; however, they occasionally called in outside electrical contractors. All of the employees in the plant, including the plaintiff, were hired and trained by Campbell, Wyant and Cannon or Centrifugal Fusing Company. On the day of the accident the No. 5 induction heater malfunctioned, the result being that the electricity failed to turn off automatically. This situation was not unusual in that it had happened on many occasions before. The malfunction was made known to the plaintiff and he responded. The testimony is conflicting as to whether or not the plaintiff went into the power house to turn off the electricity so that he could work on the induction heater and switch or whether he had previously worked on the heater and switch and was going back into the power house to turn the electricity back on. It seems clear from the testimony that the plaintiff used the isolating switch, which was referred to as an oil-fused cut-out switch, rather than the switch over B Furnace, and that when he operated it, it exploded, causing him to be sprayed with hot oil and seriously burned.

The plaintiff began working for Centrifugal Fusing Company in the year 1953 as a laborer and bid in the job of electrician approximately one and one-half years before the accident. Plaintiff was trained

by the chief electrician of Centrifugal Fusing Company and had been shown how to do the work. The testimony is conflicting as to whether or not the plaintiff had been instructed fully as to the procedure to be followed when the induction heater malfunctioned.

The plaintiffs charged the defendant with negligence and gross negligence in failing to provide and install proper switches, failing to inspect and repair the machinery and switches, failing to install proper warning signs, failing to maintain men in its employ with sufficient education and knowledge to install, maintain, and operate the equipment, and in failing to maintain safety standards. The defendant denied that it was guilty of any negligence or gross negligence or that it had failed to perform any duties that it may have owed to the plaintiffs. The defendant raised the affirmative defense of contributory negligence.

The jury found no negligence, either gross or ordinary, on the part of the defendant.

The plaintiffs (appellants) raise three questions in their initial brief and two additional questions in their supplemental brief.

The first question raised by plaintiffs is that the court, after instructing the jury that high-voltage electricity is inherently dangerous, erred in refusing to instruct the jury that the defendant's duty of due care as to third parties regarding such a dangerous instrumentality could not be delegated away.

Plaintiff's requested instruction number 6 is as follows:

"I further charge you if you find the defendant Motor Wheel Corporation attempted to delegate to Centrifugal Fusing Company or Campbell, Wyant

and Cannon or anyone else the care and maintenance of the high voltage electricity which caused the harm, this does not, in any manner, excuse the defendant Motor Wheel Corporation from liability, if, in fact, you find there was negligence in the care and maintenance of the high voltage electricity and that said negligence in the care and maintenance of the high voltage electricity was the proximate cause of the injury to Mr. Huntley."

The lower court did instruct as follows in connection with the first claimed error as set forth by the plaintiff:

"In determining whether or not the defendant had a duty to the plaintiff to use reasonable care to prevent injury, and whether or not defendant breached that duty, you may consider the fact that high voltage electricity is inherently dangerous and thus the law imposes the duty upon the person transmitting high voltage electricity that degree of care and prudence which reasonable men would use under all the facts and circumstances. The degree of care which will satisfy this requirement will vary with the danger or with the extent of possible injury which might be incurred under all of the circumstances."

* * *

"However, if you find that Motor Wheel Corporation had a duty toward Mr. Huntley, and attempted to delegate that duty to Centrifugal Fusing Company, Campbell, Wyant and Cannon, Textron, or to anyone else, this does not in any way relieve the defendant of negligence *if you find that the defendant breached that duty,* and that the negligence was a proximate cause of Mr. Huntley's injuries, and except as I otherwise instruct you, Mr. Huntley was in turn free of any negligence which proximately contributed to his injuries." (Emphasis supplied.)

It is apparent from the foregoing that the lower court did, in fact, instruct the jury that the duty of

the defendant, if any existed in connection with the handling of high voltage electricity and its inherently dangerous characteristics, could not be delegated to Centrifugal Fusing Company, Campbell, Wyant and Cannon, Textron, or to anyone else.

The second contention of the plaintiffs is that the lower court instructed the jury on the incidents of the landlord-tenant relationship but did not instruct that the landlord would be unable to delegate duties when the activity carried on by the lessee was "inherently dangerous".

Plaintiffs cite no authority for their contention that the doctrine of nondelegable duties applies to a landlord-tenant relationship and this court has found no such authority. No claim is made that the law applicable to the landlord-tenant relationship was erroneous as given by the court. The only contention is that regardless of the fact that the jury may have found such relationship to exist as a matter of fact, nevertheless, the lower court should have instructed that defendant could not delegate its responsibility because of the "inherently dangerous activity" rule.

We find no error in the lower court's instructions in relation to the law applicable to landlord and tenant.

The third contention of plaintiffs is that the lower court erred in instructing that defendant was liable only if it retained control over the electrical system, or had actual knowledge of defects therein. The instructions given were proper since they were given as part of the law applicable to the landlord-tenant relationship, in case the jury should determine that such a status existed as a matter of fact.

Plaintiff, in his supplemental brief, raises the contention that the instructions of the lower court were so lengthy, conflicting, ambiguous, and erroneous

as to be unmeaningful and incomprehensible to the jury. We have examined the instructions carefully and we cannot say that the instructions taken as a whole were erroneous on these grounds. In the case of *Huffman* v. *First Baptist Church of Flushing* (1959), 355 Mich 437, 446, the Supreme Court said:

"It follows that the job of an appellate court in appraising jury instructions (usually given by the busy trial judge immediately following the tug and heat of the trial) is not to determine whether we would select his instructions as models of literary excellence and pearls of legal wisdom were we editing a form book on the subject; rather our role is mercifully more limited and our test less severe, namely: Did the instructions as given adequately inform the jury on the applicable law reflecting and reflected by the various evidentiary claims in the particular case? In other words, in the idiom of the day, we simply ask ourselves: Were the instructions understandable and did they give both sides a 'fair shake'? We must not also demand the subtle reasoning of a Socrates or the gem-like prose of a Walter Pater. Few jury verdicts anywhere would stand if that were the criterion."

Plaintiffs have argued throughout their brief, not only in connection with their first assignment of error, but also in connection with the other two, that the lower court erred in refusing to instruct the jury on the law applicable to the vicarious liability of the defendant. Plaintiffs contend that in addition to the question raised regarding high voltage electricity and its inherently dangerous characteristics, defendant should be held on the theory that the oil cut-out switch which was a part of the equipment inside the plant and which was leased to plaintiff's employer was in fact an inherently dangerous instrumentality. In support of this proposition plain-

tiff has cited the case of *Vannoy* v. *City of Warren* (1968), 15 Mich App 158. On pages 163, 164, the Court says:

"In Michigan the inherently or intrinsically dangerous activity doctrine is founded upon a theory which is closely akin to, but not exactly the same as,[5] strict liability. The principle is applied 'where a duty is imposed upon the employer in doing work necessarily involving danger to others, unless great care is used, to make such provision against negligence as may be commensurate with the obvious danger. It is this duty which cannot be delegated to another so as to avoid liability for its neglect.' *Inglis* v. *Millersburg Driving Association* (1912), 169 Mich 311, 321, 322. The doctrine imposes a nondelegable duty upon the party desiring the dangerous undertaking. See 23 ALR 1024."

---

[5] Absolute liability is not imposed by the doctrine. 23 ALR 1094.

The principle of vicarious liability was also set fourth in the case of *Mulcahy* v. *Argo Steel Construction Company* (1966), 4 Mich App 116. On page 127, the court says:

"Under this theory, commonly referred to as the 'inherently dangerous activity' theory, the general contractor or employer is held liable not for his own culpable negligence, but for the negligence of the independant contractor engaged in an activity of such a character that it necessarily subjects third persons to unusual danger. Thus, the general contractor is made vicariously liable for the negligent acts of the independent contractor. See Prosser on Torts (3d ed), § 70."

Under the evidence in this case we must hold that the lower court was not in error in refusing to instruct on a theory of vicarious liability. As pointed out in *Vannoy* v. *City of Warren,* the inherently or

intrinsically dangerous activity doctrine is closely akin to strict liability. The duty to make such provision against negligence as may be commensurate with the obvious dangers involved only arises where the employer is doing, or is causing to be done, "work necessarily involving danger to others unless great care is used." In order to apply this doctrine it must appear that the work itself was of such a nature that it would inevitably and unavoidably result in danger to others unless great care was used to prevent injury. The facts of this case are such that it cannot be said that plaintiff's injury was inevitable and that, therefore, the defendant should be held vicariously without proof of culpable negligence on its part. It would appear that the plaintiff was in fact injured by an instrumentality incidental to the work being performed by the independent contractor.

The judgment of the lower court is affirmed with costs to the defendant.

All concurred.

PEOPLE v. GILL

1. ARREST—PROBABLE CAUSE.

Probable cause existed to arrest the defendant for murder where a fingerprint on the victim's shoe matched a print taken of a "Joseph Gill" a year before the murder; the defendant was named Joseph Gill; the defendant had been a boyfriend of the victim; and the victim had told a girlfriend on the night of the murder that she was meeting a person named "Joe" that night.

2. CRIMINAL LAW—FINGERPRINTING—PERMISSIBILITY—VALID ARREST.

Fingerprinting an accused is permissible where there has been a valid arrest and the police conduct does not shock the conscience of the courts (US Const, Am 4).

3. CRIMINAL LAW—FINGERPRINTS—VALID ARREST.

Refusing to suppress fingerprints of the defendant, taken after valid arrest on probable cause, consisting of the facts that a fingerprint on the murder victim's shoe matched the fingerprint on an old arrest card of "Joseph Gill" and that the defendant was named "Joseph Gill" was proper even though the defendant had once before been unlawfully arrested on the same murder charge and illegally fingerprinted.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Arrest §§ 44–48.

[2, 3] 21 Am Jur 2d, Criminal Law § 369.
29 Am Jur 2d, Evidence §§ 374, 770.
Fingerprints, palm prints, or bare footprints as evidence. 28 ALR2d 1115.

[4] 40 Am Jur 2d, Homicide §§ 416–419.
Admissibility of photograph of corpse in prosecution for homicide or civil action causing death. 159 ALR 1413, s. 73 ALR2d 769.

[5] 40 Am Jur 2d, Homicide §§ 337, 536.
53 Am Jur, Trial § 970 *et seq.*

[6] 40 Am Jur 2d, Homicide §§ 460, 463.

4. HOMICIDE — FIRST-DEGREE MURDER — EVIDENCE — PHOTOGRAPHS — ADMISSIBILITY.

Admitting into defendant's trial for first-degree murder color slides showing the murder victim's battered body was not an abuse of discretion, because the slides were relevant in showing premeditation and malice aforethought.

5. CRIMINAL LAW—MISTRIAL—IMPROPER QUESTIONING.

Denying a motion for a mistrial, based on the prosecution's asking the person who fingerprinted the defendant, charged with murder, whether the witness had made any comment to the defendant about the rough area on one of the defendant's fingers was not an abuse of discretion where the trial court ruled the question improper, the defense withdrew its objection to the question, and a curative instruction to the jury was given.

6. HOMICIDE — MURDER — PROSECUTOR'S REMARKS — PERMISSIBLE ARGUMENT — INFERENCES.

Prosecutor's reference to the "bloody fingerprint" of the defendant, charged with murder, was a permissible argument where there was testimony that the defendant's fingerprint was in a "red substance" and that the murder victim had been severely beaten, because the conclusion that the "red substance" was "blood" was a reasonable inference.

Appeal from Genesee, Stewart A. Newblatt, J. Submitted Division 2 March 2, 1971, at Lansing. (Docket No. 7419.) Decided March 22, 1971.

Joseph Gill was convicted of first-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief Assistant Prosecuting Attorney, for the people.

Jerome F. O'Rourke (*James Bearinger*, of counsel), for defendant on appeal.

Before: R. B. BURNS, P. J., and J. H. GILLIS and T. M. BURNS, JJ.

R. B. BURNS, P. J. The facts leading to defendant's first-degree murder[1] conviction are relatively uncomplicated and, with few exceptions, undisputed.

On the morning of August 24, 1967, the half-nude body of a 17-year-old girl was found in a creek lying face down in four to six inches of water. She had been severely beaten about the face and head and apparently dragged by her feet, on her back, from some bushes in a nearby park to the creek where she was drowned. Her right shoe was found along the path where she had been dragged. A fingerprint, found in a "reddish substance" on the shoe, was later matched to the defendant's left index fingerprint. On August 28, 1967, the defendant was interrogated, arrested, and fingerprinted in connection with the brutal slaying. On the same day, without being arraigned, defendant was released from custody. On October 11, 1967, defendant was re-arrested and fingerprinted a second time after the crime lab determined that his first print matched the one found on the victim's shoe.

Prior to trial the court granted defendant's motion to suppress the fingerprints taken on August 28, 1967, on the ground that the police did not have probable cause to arrest defendant at that time.[2] The fingerprints taken after the October 1967 arrest were also suppressed by the trial court. Justifica-

[1] MCLA § 750.316 (Stat Ann 1954 Rev § 28.548).

[2] In its opinion the trial court notes that the totality of information possessed by the arresting officer prior to the arrest was that defendant had dated the deceased and had shown deception on some polygraph tests. The fingerprints were suppressed according to the well-entrenched policy of disallowing the state to benefit from "products" of their illegal conduct. *Davis* v. *Mississippi* (1969), 394 US 721 (89 S Ct 1394, 22 L Ed 2d 676). Fingerprints obtained as the result of an illegal arrest have been held to be such a product. *Davis* v. *Mississippi, supra.*

tion for suppression of the October 1967 prints was based on the judicial policy of excluding all evidence obtained as a result of illegal police conduct. *Silverthorne Lumber Co.*, v. *United States* (1920), 251 US 385 (40 S Ct 182, 64 L Ed 319, 24 ALR 1426).[3] Since the second arrest was founded upon matching of the illegally-obtained first print, the second arrest prints were determined to be "fruits of the poisonous tree."[4] After suppressing both sets of prints the trial court, pursuant to a motion by defense, dismissed the first-degree murder charge.

The prosecution obtained a 1966 set of fingerprints on a "Joseph Gill" who had been arrested for a 1966 felony. After matching the print taken pursuant to the arrest of Joseph Gill in 1966 to the print on the victim's shoe, the police again arrested defendant and fingerprinted him once on October 14, 1968, and again on October 23, 1968. These 1968 prints presented the primary link between defendant and the slaying of the young girl.

In his first assigned error defendant points to the trial court's refusal to grant his motion to suppress the 1968 prints. Defendant's argument that the 1968 prints were products of an illegal arrest is not persuasive. Arrests based on "probable cause" are within constitutional guidelines.[5] The arrest warrant in question was based upon the following set of facts:

The fingerprint detected on the dead girl's shoe matched a 1966 print associated with a 1966 arrest of one "Joseph Gill"; the defendant had been one of the victim's boyfriends; and the victim had told

[3] See, also, *Wong Sun* v. *United States* (1963), 371 US 471 (83 S Ct 407, 9 L Ed 2d 441).

[4] *Id.*

[5] US Const, Am 4; Const 1963, art 1, § 11.

her girlfriend the night of the murder that she was meeting a person named "Joe" that night.[6]

Certainly this information would cause a prudent and cautious man to believe defendant committed the murder.[7] Since the arrest was constitutionally permissible the subsequent fingerprinting was valid.[8] Indeed the fingerprinting was necessary in order to show conclusively that the "Joseph Gill" of the 1966 arrest card was the defendant. Given a valid arrest and providing the police conduct does not "shock the conscience" of the court, it is entirely proper to fingerprint the accused. *United States* v. *Krapf* (CA3, 1961), 285 F2d 647; *Bynum* v. *United States* (1960), 107 App DC 109 (274 F2d 767). See, also, *Smith* v. *United States* (1963), 117 App DC 1 (324 F2d 879).

Knowledge of the 1966 arrest card was not the product of illegal police conduct. Suppressing the 1968 prints would not vindicate defendant's Fourth Amendment rights; such action would only defeat the avowed purpose of the exclusionary rules, *i.e.*, to force the state to seek legitimate evidence before infringing upon the freedom of the citizens it serves.[9]

Defendant's argument that his fingerprints were taken "despite objection" is not supported by the record. Furthermore any fingerprints taken subsequent to a valid arrest, providing the process does not shock the court's conscience, does not violate

---

[6] The defendant's name is Joseph Gill.

[7] This belief constitutes "probable cause" within the meaning of the Fourth Amendment. *Carroll* v. *United States* (1925), 267 US 132 (45 S Ct 280, 69 L Ed 543, 39 ALR 790); *Brinegar* v. *United States* (1949), 338 US 160 (69 S Ct 1302, 93 L Ed 1879); *McCray* v. *Illinois* (1967), 386 US 300 (87 S Ct 1056, 18 L Ed 2d 62).

[8] *Smith* v. *United States* (1963), 117 App DC 1 (324 F2d 879); *Bynum* v. *United States* (1960), 107 App DC 109 (274 F2d 767).

[9] It might also be noted that no "causal chain" between the primary illegality and the fingerprinting evidence has been shown by defendant. See *People* v. *Tucker* (1969), 19 Mich App 320, 329.

Fourth Amendment protections. *Cf. Schmerber* v. *California* (1966), 384 US 757 (86 S Ct 1826, 16 L Ed 2d 908). See, also, *Smith* v. *United States, supra.*

Defendant's argument that he was unconstitutionally deprived of counsel during fingerprinting is made for the first time on appeal. Finding no evidence of manifest injustice we refuse to hear questions not raised in the trial court.[10] *People* v. *Camak* (1967), 5 Mich App 655; *People* v. *Teal* (1969), 20 Mich App 176.

Defendant next contends that the admission and projection of two large color slides of the victim's battered body at trial level was reversible error. Both slides showed parts of the victim's battered body as it laid in the morgue. The admission of the slides into evidence was within the sound discretion of the trial court. *People* v. *Rogers* (1968), 14 Mich 207; *People* v. *Gregory* (1969), 21 Mich App 76; *People* v. *Hoffman* (1970), 24 Mich App 244. This Court cannot find any clear abuse of discretion in allowing the slides into evidence. We cannot say that their possible prejudicial effect clearly outweighed their probative value. See *People* v. *Turner* (1969), 17 Mich App 123, 130. The slides were relevant to show premeditation and malice aforethought; these elements of first-degree murder must be proven by the prosecutor beyond a reasonable doubt. See *People* v. *Surles* (1970), 29 Mich App 132.

In his next assignment of error defendant argues that the trial court should have granted his motion for a mistrial based on the unfavorable position he

[10] Defendant's claim, irrespective of the procedural defect, has dubious merit. *Gilbert* v. *California* (1967), 388 US 263 (87 S Ct 1951, 18 L Ed 2d 1178); *Pearson* v. *United States* (CA5, 1968), 389 F2d 684.

was placed in before the jury in having to object to a question by the prosecution. The question involved in this issue was asked of a witness who fingerprinted the defendant on October 14, 1968. The question and answer were:

"*Q.* Did you make any comment to him about the rough area on the left index finger?

"*A.* No, sir. I did not."

Pursuant to defense counsel's objection the court ruled the question improper and objectionable. The trial court did not abuse its discretion in denying the motion for a mistrial.[11] Not only did defense counsel withdraw his objection to the question but his request for a curative instruction was granted at the conclusion of the proofs.[12]

Next the defendant argues that the prosecutor's reference in closing argument to the "bloody fingerprint of Joseph Gill" should have been stricken and the jury instructed to disregard it because there was no direct evidence that the defendant's finger was bloody. Since there was previous testimony that the fingerprint was in a "red substance" and that the victim was severely beaten, the conclusion that the "red substance" was "blood" was a reasonable inference which the prosecutor was entitled to argue. *People* v. *Morlock* (1925), 233 Mich 284; *People* v. *Badge* (1968), 15 Mich App 29; *People* v. *Russell* (1970), 27 Mich App 654.

---

[11] A mistrial should be granted only where the error is so grievous that the prejudicial effect can be removed in no other way. See *People* v. *Watson* (1943), 307 Mich 596; *People* v. *Hayton* (1970), 28 Mich App 673.

[12] "I instruct you, that it is a lawyer's duty to object when he feels that improper testimony is being offered or an improper procedure is being implied, and it is the duty of the court to rule under such circumstances. *You are not to consider either counsel's objections as evidence or inferences of guilt or innocence of the defendant Joseph Gill.*" (Emphasis supplied.)

The defendant argues that even if none of the foregoing issues constitutes reversible error that taken with alleged errors of lesser significance the defendant was denied due process of law and a fair trial. After review of the record we are satisfied that defendant received a fair trial. The trial judge was not in error in denying a mistrial and we are convinced that the verdict was a just one.

Affirmed.

All concurred.

FRIGID FOOD PRODUCTS, INC., *v.*
CITY OF DETROIT

1. APPEAL AND ERROR—CONSTITUTIONAL LAW—STATUTES.
   The constitutionality of a statute will not be considered for the first time on appeal, especially where the issue was not raised in the pleadings and was specifically withdrawn at the pre-trial conference.

2. TAXATION—STATUTES—EXEMPTIONS—CONSTRUCTION.
   Statutes exempting persons or property from taxation are to be strictly construed.

3. TAXATION—PERSONAL PROPERTY TAX—EXEMPTION—PUBLIC WAREHOUSE—"AFFILIATE".
   Two companies were "affiliated" within the meaning of the statute providing that a warehouse operated, leased, or owned by an affiliate of the warehouseman is not a public warehouse for purposes of entitling the affiliate to an exemption from personal property taxes on goods in a public warehouse where

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 574.
[2] 51 Am Jur, Taxation § 524.
[3] 51 Am Jur, Taxation §§ 529, 539.

with the exception of one person, the stockholders, board of directors, and officers of the taxed corporation and the warehouse company were the same (MCLA § 211.9).

Appeal from Wayne, Edward S. Piggins, J. Submitted Division 1 October 15, 1970, at Detroit. (Docket Nos. 7837 and 7838.) Decided March 22, 1971.

Complaint by Frigid Food Products, Inc. against the City of Detroit and the County of Wayne for refund of property taxes paid. Judgment for defendants. Plaintiff appeals. Affirmed.

Barris, Sott, Denn & Driker (by *David L. Denn* and *James A. Simpson*), for plaintiff.

William L. Cahalan, Prosecuting Attorney, *Aloysius J. Suchy,* Assistant Prosecuting Attorney, and *William F. Koney,* Assistant Prosecuting Attorney, for defendant County of Wayne.

Michael M. Glusac, Corporation Counsel, and *Julius C. Pliskow* and *Lawrence W. Morgan,* Assistants Corporation Counsel, for defendant City of Detroit.

Before: J. H. GILLIS, P. J., and DANHOF and MAHINSKE,* JJ.

MAHINSKE, J. Plaintiff Frigid Food Products was, for the purposes of 1965 Wayne County and City of Detroit personal property taxes, the owner of certain personal property. The original $110,590 tax assessment of that property was sought to be increased by the Board of Assessors of the City of

* Circuit judge, sitting on the Court of Appeals by assignment.

Detroit upon petition filed with the State Tax Commission. Over the duly-filed protest of plaintiff, the commission granted the request of that petition and increased the assessed valuation to $235,960, including $128,380 of farm products in storage in the General Cold Storage Warehouse. Thereafter, the County of Wayne submitted a supplementary tax bill to plaintiff in the amount of $1,052.17 and the City of Detroit similarly submitted a supplementary tax bill in the amount of $5,327.52. Both amounts were paid to the appropriate treasurers, under protest, on February 18, 1966.

The order of the State Tax Commission increasing the assessment was based upon their conclusion that plaintiff's farm products stored in General's warehouse were not entitled to the exemption from personal property taxation contained in MCLA § 211.9 (Stat Ann 1970 Cum Supp § 7.9), based upon a finding that plaintiff and General were "affiliated" corporations within the meaning of that statute which provides in part:

"No portion of a public warehouse, dock or port facility leased to a tenant or no portion of any premises owned or leased or operated by a consignor or consignee or any affiliate or subsidiary of such consignor or consignee shall be deemed to be a public warehouse, dock or port facility."

Plaintiff challenged the assessment in Wayne County Circuit Court. At the pre-trial conference plaintiff included challenges to the constitutionality of the statute as being too vague and failing to set forth intelligible standards for defining the term "affiliate". Defendants objected to the inclusion of the constitutional issues and plaintiff subsequently withdrew the objection. The issue before the circuit court was whether General Cold Storage Warehouse was an affiliate of Frigid Food Products so as

to exclude plaintiff from the personal property tax exemption.

The trial court found that Frigid and General were affiliated and that the assessment was proper. This decision was based upon a determination that "affiliated" means "connected" and that plaintiff did not establish its right to an exemption by a preponderance of the evidence.

Plaintiff attempts to raise the constitutional issue again on appeal. This Court will not entertain a question which was not raised in the pleadings, was specifically withdrawn by plaintiff at the pretrial conference, and where it is apparent on the record that plaintiff not only could but did decide to proceed without reference to the principles of constitutional law. *Mitchell* v. *Grewal* (1953), 338 Mich 81, 87; *Ridenour* v. *County of Bay* (1962), 366 Mich 225, 243; *Azzaro* v. *Stupar* (1969), 17 Mich App 170, 172.

Divested, by its own actions, of constitutional questions, the appellant's case before this Court is based upon affirmance or reversal of the trial court's holding that appellant's connection with General Cold Storage Warehouse comes within the definition or application of "affiliate" as used in the exemption clause of the act under review here.

The facts of economic life with regard to Frigid Food Products (appellant) and General Cold Storage Warehouse are as follows:

Frigid Food Products	*General Cold Storage*
Officers	
Joseph Roth, President	Irwin Roth, President
Philip Wechsler, V.P.	Philip Wechsler, V.P.
Herbert Sott, V.P.	
Irwin Roth, Sec. Treas.	Joseph Roth, Sec. Treas.

Board of Directors

William Roth, Chairman	Joseph Roth, Chairman
Joseph Roth	Philip Wechsler
Irwin Roth	Irwin Roth
Herbert Sott	

Stockholders

Joseph Roth	Joseph Roth
Irwin Roth	Irwin Roth
Anna Roth	
William Roth	
Lillian Roth Greenstone	
doing business as LRG Co.	

(William and Anna Roth are the parents of Irwin, Joseph & Lillian)

Only in the case of the Board of Directors of General Cold Storage (*re:* Philip Wechsler) is there a lack of complete duplication of the parties on the opposite side of the above ledger. A mere fleeting glance at such ledger would ring bells of affiliation in the mind of even a trainee tax collector, much less the hawk-eyed tax agents of appellees.

The trial court below held there was a showing of some evidence of affiliation or relationship between Frigid and General and, therefore, the exemption was not available to Frigid. We agree.

Statutes and provisions exempting persons or property from taxation are strictly construed, *McConnell* v. *Township of Lake* (1916), 191 Mich 544; *Remus* v. *City of Grand Rapids* (1936), 274 Mich 577. To construe the exemption provision of the statute under examination to not include the fact situation now before this Court would be to hold "affiliate" a meaningless word. Such is the argument, in law, of appellant here. With such argument we cannot and do not agree.

This Court finds in *these* cases of *Frigid Food Products* v. *City of Detroit* and *Frigid Food Products* v. *County of Wayne* that there was a definite affiliation between plaintiff and General Cold Storage as that term is generally understood in its common usage. MCLA § 8.3 (Stat Ann 1969 Rev § 2.212).

Affirmed. No costs, a public question being involved.

All concurred.

MARATHON PIPE LINE COMPANY *v.* NIENHUIS

1. TRESPASS — EASEMENT — UNDERGROUND PIPELINE — CONTRACTOR'S LIABILITY.

   A contractor who in performing work for a landowner breaks an underground pipeline crossing the land by right of an easement is guilty of trespass.

2. INDEMNITY—CONTRACTOR'S RIGHT—UNINTENTIONAL TRESPASSER.

   A contractor who in performing work for a landowner unintentionally becomes a trespasser by breaking an underground pipeline of which he knew nothing may call upon the landowner for indemnification.

Appeal from Ottawa, Raymond L. Smith, J. Submitted Division 3 November 10, 1970, at Grand Rapids. (Docket No. 8015.) Decided March 22, 1971. Leave to appeal denied May 20, 1971, 384 Mich 843.

REFERENCES FOR POINTS IN HEADNOTES

[1] 52 Am Jur, Trespass §§ 9–14.
[2] 52 Am Jur, Trespass § 34.

Complaint by Marathon Pipe Line Company against Elmer and Henrietta Nienhuis and Boeve Construction Company to recover damages for a pipeline rupture caused by negligence and trespass. Holland American Legion Memorial Park intervened as a party plaintiff against Marathon Pipe Line Company, Elmer and Henrietta Nienhuis, and Boeve Construction Company to recover for damages to land. Judgment for intervening plaintiff against Marathon Pipe Line Company. Judgment for plaintiff Marathon against defendants Nienhuis and Boeve Construction Company. Defendants appeal. Affirmed.

Lokker, Boter, Dalman & Murphy and *Joseph F. Diver,* for plaintiff.

John B. Nahan, for defendants Nienhuis.

Scholten & Fant (by *R. Neal Stanton*), for defendant Boeve Construction Company.

Before: T. M. BURNS, P. J., and R. B. BURNS and MUNRO,* JJ.

T. M. BURNS, P. J. Defendants Nienhuis own property subject to an easement which is now owned by plaintiff Marathon Pipe Line Co. The easement created the right to construct, maintain, operate, and protect a pipeline for the transportation of oil, gas, and the products thereof, over and through the Nienhuis land.

On December 28, 1964, Boeve Construction Company, also a defendant below, in the process of excavating a portion of the Nienhuis land, struck and ruptured the pipeline which had been constructed

* Circuit judge, sitting on the Court of Appeals by assignment.

pursuant to the easement. As a result of the rupture, a quantity of oil leaked out of the pipeline and onto the Nienhuis land as well as onto a neighboring golf course owned by the Holland American Legion, an intervening plaintiff.[1]

By reason of the puncture and the ensuing leak, plaintiff made repairs to the pipeline and also performed certain work in removing the oil and cleaning up the lands of both the Nienhuises and the American Legion.

Plaintiff then brought suit, claiming both negligence and trespass, to recover damages sustained in making the necessary repairs to the pipeline, for the work performed in cleaning up the oil from the land onto which it had flowed, and for the value of the crude oil which leaked from the pipeline and had been lost. The trial court found the defendant construction company guilty of trespass, and the defendants Nienhuis guilty of negligence and trespass and entered a judgment in plaintiff's favor for $11,043.62 with interest and costs. The trial court also enjoined any further excavations on the Nienhuis land without prior notification being given to plaintiff. The trial court further held that defendant Boeve Construction Company was entitled to indemnification from defendants Nienhuis for any sums collected from them on the judgment. Both defendants Nienhuis and Boeve Construction Company appeal.

Defendants first contend that the trial court did not have a basis in fact upon which to determine that defendants were guilty of negligence and trespass.

Some time prior to the actions which gave rise to the present controversy, plaintiff placed five num-

[1] A judgment was recovered by the American Legion against Marathon Pipe Line Co., but that judgment has not been appealed.

bered posts across the Nienhuis land. At the trial Mr. Nienhuis testified that an employee of plaintiff, a Mr. Thompson, told him that the pipeline lay in a straight line between the posts. Therefore, contend defendants, since it was found by the trial court that the excavation which resulted in the rupture took place some distance from the line running between the nearest two posts, the defendants are excused from any claims of negligence or trespass.

Thompson, as a witness for the plaintiff, denied ever having told Nienhuis that the pipeline lay in a straight line between the numbered posts. Thompson also testified that Mr. Nienhuis told him that any excavation would be done on the north side of an east-west fence which divides the Nienhuis property. Thompson further testified that while he was on the Nienhuis property at a time when some prior excavation was being performed, Nienhuis told him that there would be no further excavations on the property.

Another employee of plaintiff, Mr. Doles, testified that when he discussed with Mr. Nienhuis about some excavations that Nienhuis was planning, Nienhuis informed him that he was only going to excavate on the north side of an east-west fence which divides the Nienhuis property. The pipeline is on the south side of the east-west fence, and, therefore the excavation which resulted in the rupture was also on the south side of the fence. Nienhuis denied that he ever told Thompson or Doles that he did not intend to do any excavating south of the east-west fence.

Thompson went on to testify that when he saw Nienhuis on the Nienhuis farm on September 17, 1964, he told Nienhuis that any time there was any digging or excavating on the farm that Nienhuis should get in touch with the plaintiff who would then

send a man out to spot the pipeline and mark its location and depth. Thompson also stated that he told Nienhuis the same thing on November 3, 1964. Nienhuis testified that he did not recall Thompson making any such statements.

Nienhuis testified that he repeatedly informed the plaintiff that he intended to excavate a 50-foot wide channel adjoining his west boundary line. However, it is undisputed that the above area is nowhere near the pipeline.

Based upon the above conflicting testimony the trial judge in his opinion stated:

"It is the claim of defendant Nienhuis that he was justified in digging in the area of the rupture because Thompson had told him where the pipe lay. The court does not agree. The court has gone over the transcribed testimony of Doles, Thompson, and Nienhuis twice in an effort to determine the facts. The court believes plaintiff indicated a concern over the pipeline and a readiness to cooperate with Nienhuis to protect it, that plaintiff wanted notice of any activity that might endanger the line, that when plaintiff had such notice it always acted promptly, and that Nienhuis had indicated there would be no activity south of the E-W fence line that would endanger the line. There is nothing in the record to indicate that plaintiff had any knowledge of the method that Nienhuis planned in excavating his pond or that if it did know that the borrow was to be recast that this operation included excavating. Consequently plaintiff was deprived of the opportunity to protect its pipeline.

"There is nothing in the record to indicate that the location of the two stakes in question was misleading. These stakes were about 1150 feet apart. There was no evidence that property owners, by custom or experience, had any right to infer that the line ran in a direct line between the stakes.

"The court is of the opinion that the rupture of the pipeline was both a trespass and a negligent act for which plaintiff is entitled to compensation."

The question for this Court to decide, therefore, is whether the trial court was justified in making the above findings of fact.

GCR 1963, 517.1, provides:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. It will be sufficient if the court makes brief, definite, and pertinent findings and conclusions upon the contested matters without over elaboration of detail or particularization of facts. * * * Requests for findings are not necessary for purposes of review. No exception need be taken to any finding or decision. Findings of fact shall not be set aside unless clearly erroneous. * * * [R]egard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses who appeared before it." [As amended February 13, 1969, effective immediately.]

Based upon the testimony set forth in this opinion, as well as our review of the entire record we certainly cannot say that the trial court's findings are clearly erroneous. We also note that many decisions of this Court which state that we will not reverse the findings of the trial court sitting without a jury unless it is clear that the evidence preponderates in the opposite direction.[2] We, therefore, find no merit in defendants' contention that the trial court's findings of fact are clearly opposed to the evidence.

Defendants Nienhuis do not contend that the trial judge erroneously applied the law to the findings of

[2] *Weeks* v. *Conservation Department* (1968), 9 Mich App 429; *Jinkner* v. *Town & Country Lanes, Inc.* (1968), 10 Mich App 596.

fact recited in his opinion. They simply contend that the trial court could not have found for the plaintiff if the trial judge had believed that plaintiff's employees had informed Mr. Nienhuis that the pipeline ran directly between the numbered markers which would either result in a finding that no negligent act or trespass occurred or that plaintiff was estopped from asserting any negligence or trespass on defendant's part. Defendants Nienhuis, at p 29 of their brief, state:

"It is submitted that although the landowner has the duty to refrain from interfering with the pipeline company's easement, so has the pipeline company the duty, *if it marks its line, to mark its pipeline correctly.* On that principle, our case stands or falls." (Emphasis supplied by the defendants.)

Since we have already decided that we are not going to disturb the trial court's findings of fact on this cause, the trial court must be affirmed as to the defendants Nienhuis.

Defendant Boeve Construction Company contends that it was guilty of neither negligence nor trespass. We note here that the trial court did not find this defendant guilty of negligence[3] so we will discuss only the court's finding that defendant had committed a trespass.

The Michigan Supreme Court has found a contractor guilty of trespass under a similar fact situation: In *Edison Illuminating Co.* v. *Misch* (1918), 200 Mich 114, a heating company laid underground cables and pipes in a public alley. A contractor, who was excavating for an abutting land owner, excavated in such a manner that a cave-in occurred

[3] The trial court, in its opinion, stated:

"Defendants Boeve, although acting under the direction of defendants Nienhuis, are guilty of trespass in rupturing the plaintiff's pipeline."

which resulted in injury to the cables and pipes. In finding the contractor guilty of trespass, the Supreme Court stated (pp 122, 123):

"We are clearly of the opinion that the defendant had no right to interfere with any structures rightfully in the alley. That the mains and conduits in question had been lawfully and properly placed in the alley by authority of the city is, we think, too clear for controversy. The defendant made excavation into the alley at his peril. If he did not have from the surrounding objects and monuments sufficient to put him upon notice of the presence of the mains and conduits in the alley, there was at least sufficient evidence to warrant the submission of the question to the jury, which was done by the trial court. The plaintiff and its assignor were, by their mains and conduits, rightfully first in the alley, and their rights were entitled to protection by defendant in such occupancy. *New York Steam Co.* v. *Foundation Co.* [1909], 195 NY 43 (21 LRA NS 470)."

We therefore hold that the trial court was correct in finding the defendant construction company liable.[4]

The defendant Boeve Construction Company also, in the alternative, requested this Court to affirm that part of the trial court's judgment which allows the company indemnification from the defendants Nienhuis. Although this issue is not disputed by the Nienhuises, we will discuss the applicable law which is set forth in 52 Am Jur, Trespass, § 34, p 864, where it is stated:

---

[4] We would also note that defendant construction company cited no authority in its brief to support the proposition that it had not committed a trespass. Nor did defendant attempt to distinguish any factual differences which might exist between the cases cited by the plaintiff and the case at bar. It is not the function of this Court to supply all of the research once an issue has been raised. Therefore, although our finding of a trespass is supported by our review of the record, we do not find it necessary to deal with this question in detail.

"In accord with the general principles of contribution, as between master and servant, if the servant has caused an injury for which the master is compelled to respond in damages in an action of trespass, but as to which no wrong is attributable to the master except from the relation of master and servant, the master may call upon the servant for indemnity. On the other hand, if the master directs the servant to perform an act which the servant has reason to believe is legal but in the performance of which he unintentionally becomes a wrongdoer, he may call upon the master for indemnity."

Since the construction company was acting under the direction of Mr. Nienhuis and since they did unintentionally become a wrongdoer, they are entitled to indemnification from the Nienhuises.

Affirmed.

All concurred.

PEOPLE *v.* GILLEYLEN

PEOPLE *v.* JOHNSON

1. CRIMINAL LAW—CITIZEN'S COMPLAINT—POLICEMAN'S DUTY.

A policeman has a duty to investigate citizen's complaint.

2. CRIMINAL LAW—ARREST—PROBABLE CAUSE.

The police had probable cause to arrest the defendant where the police were lawfully present to make a routine inquiry based on a citizen's complaint and heard, as they approached a car, something hit the ground and discovered a gun on the ground near the car.

3. SEARCHES AND SEIZURES—WAIVER OF WARRANT.

A person may waive the issuance of a search warrant and by consent permit the search of his premises.

4. SEARCHES AND SEIZURES—CONSENT—WAIVER—EVIDENCE—WEIGHT.

Ruling that the defendant had consented to a search of his automobile will not be reversed on appeal even though the ruling was based on a state constitutional proviso since declared unconstitutional where the testimony at the hearing on the motion to suppress showed that the defendant voluntarily handed his trunk keys to the officer after the officer's request to look into the trunk and the search was reasonable.

REFERENCES FOR POINTS IN HEADNOTES

[1] 47 Am Jur, Sheriffs, Police, and Constables § 35.
[2] 5 Am Jur 2d, Arrest §§ 44–49.
[3, 4] 47 Am Jur, Searches and Seizures §§ 18, 52, 71.
[5] 56 Am Jur, Weapons and Firearms §§ 9–15.
[6] 58 Am Jur, Witnesses § 754.
Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution. 20 ALR2d 1421.
[7] 17 Am Jur 2d, Continuance §§ 29, 32.
[8, 9] 41 Am Jur 2d, Indictments and Informations §§ 56, 60.
[10, 11] 5 Am Jur 2d, Arrest §§ 13, 116, 117.

5. CRIMINAL LAW—CARRYING A CONCEALED WEAPON—EXCEPTION—BURDEN OF PROOF.

The burden of establishing any exception, excuse, proviso, or exemption to a charge of carrying a concealed weapon is upon the defendant; the prosecution need not prove that a defendant did not have a license to carry the weapon in another state.

6. CRIMINAL LAW — DEFENDANT TESTIFYING — PERMISSIBILITY — PREVIOUS ARRESTS — EFFECT.

The rule that the prosecution may not question a criminal defendant about previous arrests which did not result in convictions does not apply to trials commenced before May 5, 1969.

7. CRIMINAL LAW—CONTINUANCE—UNREASONABLE DELAY.

Refusal to grant a continuance to allow the defense to assemble its alibi witnesses who had gone out-of-state was not an abuse of discretion where the record indicates that the defense had adequate time to prepare its case and where granting the continuance would have unreasonably delayed the trial.

8. WITNESSES—RES GESTAE WITNESSES—INDORSEMENT—PURPOSE.

The indorsement of *res gestae* witnesses is required to allow time for defense counsel to prepare for trial; any claim of error in the indorsement must be measured by the extent to which trial preparation was impaired.

9. WITNESSES—RES GESTAE WITNESSES—INDORSEMENT ON INFORMATION—PREJUDICE.

The prosecution's failure to indorse on the original information the name of the complainant who was a *res gestae* witness did not cause reversible error where that name was indorsed some time after the original filing, where the defense was aware of the identity of the witness, where a continuance was waived, where the defense waived calling the witness, and where no showing of prejudice was made.

10. CRIMINAL LAW—ARREST—COMPLAINT—KNOWLEDGE OF AFFIANT—VALIDITY.

A complaint which on its face purports to be made upon the knowledge of the affiant confers jurisdiction upon the court to issue the warrant for the arrest of the defendant and the defendant cannot later assert that the affiant lacked knowledge because an illegal arrest cannot render later proceedings invalid.

11. ARREST—VALIDITY—COMPLAINT.

An arrest, illegal or without warrant, followed by a complaint and warrant on which the defendant is held for trial, cannot be attacked at trial.

Appeal from Kent, Stuart Hoffius, J. Submitted Division 3 March 3, 1971, at Grand Rapids. (Docket Nos. 8048, 8049.) Decided March 22, 1971. Leave to appeal denied July 15, 1971, 385 Mich 768.

Aaron Gilleylen and Robert Edward Johnson were convicted of carrying concealed weapons and armed robbery. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James K. Miller,* Prosecuting Attorney, and *Donald A. Johnston, III,* Chief Appellate Attorney, for the people.

Gordon A. Doherty, for defendant on appeal.

Before: FITZGERALD, P. J., and HOLBROOK and BRONSON, JJ.

FITZGERALD, P. J. Defendants, in separate jury trials, were convicted of the crimes of carrying concealed weapons without a license[1] and robbery armed.[2] Sentences of 2 to 5 years and 10 to 20 years were imposed. Defendants appeal both convictions.

On November 8, 1968, Roosevelt Saffore, a resident of the City of Grand Rapids, called the police to report two men who were sitting in a vehicle bearing Ohio license plates and acting in a suspicious manner. Two police officers were dispatched to investigate. After stopping their police car, they approached the vehicle on foot to make routine

[1] MCLA § 750.227 (Stat Ann 1962 Rev § 28.424).
[2] MCLA § 750.529 (Stat Ann 1954 Rev § 28.797).

inquiries. The officers testified they heard the door on the passenger side of the automobile open and close and heard something hit the ground with a dull thud. With the aid of a flashlight, one of the officers discovered a .38 caliber revolver on the grass between gutter and sidewalk within a foot or so of the passenger door. The gun was loaded, dry, and rust-free.

Defendants Gilleylen and Johnson were ordered out of the car and Gilleylen was arrested for carrying a concealed weapon. With the alleged permission of Johnson, the officers then searched the interior of the automobile.

Upon request, defendant Johnson handed the trunk key to one of the officers. A loaded sawed-off 16-gauge shotgun was found in the vehicle trunk. Defendant Johnson was then arrested for carrying a concealed weapon in an automobile. A timely motion was made to suppress the introduction of the shotgun and ammunition which had been taken from the vehicle as exhibits. Defendants were subsequently found guilty of the crime with which they were charged.

The second offense and trial stems from an armed robbery on October 10, 1968, when four men entered the Fairview Pharmacy in Walker, Michigan. Defendants, while in custody on the concealed weapons charge, were placed in a series of jail line-ups and identified as participants by the Fairview Pharmacy robbery witnesses. Following identification, the defendants were charged with armed robbery and the subsequent jury trial resulted in conviction.

On appeal, defendants question the sufficiency of the evidence to convict and allege several procedural and trial errors.

Case No. 8048

Defendants contend that the officers, on the basis of the complaint, lacked probable cause to arrest.

The officers were lawfully present to make a routine inquiry based upon a citizen's complaint. It is a policeman's job and duty to investigate such matters. The officers had no reason to arrest anyone on the basis of the complaint alone. The arrest was based upon facts and circumstances obvious and discernable to the officers' senses of hearing and sight. The facts available to the officers at the moment of the arrest of defendant Gilleylen would warrant the belief that an offense had been committed. *Beck* v. *Ohio* (1964), 379 US 89 (85 S Ct 223, 13 L Ed 2d 142); *People* v. *Sansoni* (1968), 10 Mich App 558; *People* v. *Wolfe* (1967), 5 Mich App 543. The arrest was a result of practical considerations of everyday life on which reasonable and prudent men, not legal technicians would act. *Brinegar* v. *United States* (1949), 338 US 160 (69 S Ct 1302, 93 L Ed 1879); *People* v. *Harper* (1962), 365 Mich 494; *People* v. *Alexander* (1970), 26 Mich App 321.

Looking at the facts available to the policeman in this case, the officer had reasonable cause to believe that there was a concealed weapon violation and probable cause to make the arrest.

Defendant's motion to suppress the shotgun and ammunition found in the vehicle trunk on the ground of unlawful search and seizure was denied.

There was sufficient and probable cause to arrest defendant Gilleylen. The arrest was lawful. The officers, therefore, had the right and duty to search the interior of the automobile incident to this arrest. *People* v. *Harris* (1942), 300 Mich 463, 465. *People* v. *Ritholz* (1960), 359 Mich 539, 551; *People* v. *Otis Dumas* (1970), 25 Mich App 535, 538.

At the hearing on the motion to suppress, testimony indicates that defendant Johnson voluntarily produced his trunk key from his pocket and handed it to the officer following the officer's request to look into the trunk. One may waive the issuance of a search warrant and by consent permit the search of his premises. *People* v. *Cope* (1969), 18 Mich App 14.

The trial court's finding that Johnson had consented to the search and voluntarily without police duress or coercion handed the trunk key to the officer, is not, on the record, clearly erroneous. GCR 1963, 517.1; *People* v. *Castelli* (1967), 7 Mich App 1, 4.

Although one of the reasons the trial judge admitted the seized evidence was on a false impression of prevailing law (Const 1963, art I, § 11) instead of the rule in *Mapp* v. *Ohio* (1961), 367 US 643 (81 S Ct 1684, 6 L Ed 2d 1081), no reversal or remand is necessary because in this case the arrests were lawful and the search of the trunk was both with consent and reasonable.

Defendants claim that the prosecutor must prove that the defendants did not have a license to carry a concealed weapon in some other state. There is no such requirement. The burden of establishing any exception, excuse, proviso, or exemption contained in any such act is upon the defendant. MCLA § 776.20 (Stat Ann 1970 Cum Supp § 28.1274[1]); *People* v. *Jiminez* (1970), 27 Mich App 633.

Defendant Gilleylen claims the court erred in permitting the prosecutor to question him concerning a previous arrest which did not result in a conviction.

This trial was commenced on March 10, 1969. At this time, established procedural guidelines allowed such cross-examination. *People* v. *Hoffman* (1965), 1 Mich App 557; *People* v. *Foley* (1941), 299 Mich

358. *People* v. *Brocato* (1969), 17 Mich App 277, held that no reference could be made to arrests not resulting in convictions. But *Brocato* was decided on May 5, 1969.

In *People* v. *Ruppuhn* (1970), 25 Mich App 62, this Court held:

"*Hoffman* was the law before *Brocato* and was relied on by the trial court. *Brocato* affects trial procedure and will apply only to those trials which commenced after the date of this Court's decision in the case."

No objection was made to this question and answer. The defendant further explained that he had not been convicted of the crime for which he had been arrested. Taking into consideration the entire record, we determine that there has been no miscarriage of justice. MCLA § 769.26 (Stat Ann 1954 Rev § 28.1096).

Roosevelt Saffore, the original complainant, was not indorsed on the original information. Defendant contends because of this there was interference with his right to a fair trial.

The record discloses that this witness was indorsed on the information some time after the original filing. The purpose of *res gestae* indorsement is to allow time to prepare for trial. *People* v. *Lee* (1943), 307 Mich 743. Any claim of error must be measured by the extent to which this right is impaired. *People* v. *Rowls* (1970), 28 Mich App 190.

Defendant was cognizant of Roosevelt Saffore's identity, but made no motion to require indorsement or trial production of this alleged *res gestae* witness, *People* v. *Rasmus* (1967), 8 Mich App 239; *People* v. *Bowen* (1968), 13 Mich App 178; or for a

continuance, and on the record waived the calling and eliciting of testimony from this witness.

Defendants have made no showing that they were in any way hindered in preparing their defense. Their right to a fair trial was adequately protected.

The complaint was signed by a city police officer instead of complaining witness Saffore. Defendants challenge the jurisdiction of the court.

"A complaint which, upon its face purports to be made upon the knowledge of the affiant, is a sufficient compliance with the statute, and it is incompetent for a defendant, upon arraignment, to impeach the complaint by showing a lack of knowledge by the complaining witness. * * * Jurisdiction having attached for the issuance of the warrant, it could not be later impeached." *People* v. *Mosley* (1953), 338 Mich 559, 564; *People* v. *Campbell* (1971), 30 Mich App 43.

Arrest, illegal or without warrant, followed by a complaint and warrant on which defendant is held for trial, cannot be considered at the trial. *People* v. *Nawrocki* (1967), 6 Mich App 46, 53, 54. *People* v. *Drummonds* (1971), 30 Mich App 275. The trial court had jurisdiction over the case even though the complaint was based upon the knowledge and belief of the police officer.

A witness, after defendants' arrest, looked into the police cruiser and identified Gilleylen as having been in his drug store earlier. Defendants' claim that this identification show-up without the presence of an attorney was contrary to *United States* v. *Wade* (1967), 388 US 218 (87 S Ct 1926, 18 L Ed 2d 1149). This question has not been preserved for review because there was no objection to the in-court identifications. *People* v. *Childers* (1969), 20 Mich App 639; *People* v. *Matthews*

(1970), 22 Mich App 619, 632; *People* v. *McLaughlin* (1970), 25 Mich App 211.

Case No. 8049

Defendants contend that forcing them to participate in a line-up in connection with the Fairview Pharmacy armed robbery while in jail for the concealed weapons charge and without the aid of counsel was a violation of their constitutional rights.

There is no law or decision which says that a man, free or incarcerated, has a constitutional right not to be observed and possibly identified as the perpetrator of a crime even though no formal charges have been made. *People* v. *Hall* (1970), 24 Mich App 509, 514, 515.

Defendants did not object to the in-court identification of them by the Fairview Pharmacy robbery witnesses. *Childers, Matthews,* and *McLaughlin* cited and discussed in the previous issue obviates further discussion.

Defendants claim a violation of prosecutorial duty for failing to establish during direct examination that the fingerprints from the robbery cash box were not proved to be those of the defendants. This fact was brought out through defense counsel's cross-examination of the investigating officer. It was, therefore, before the jury for purposes of weight and credibility. No obvious reversible prejudice is developed on such a record.

The record indicates that defendants had ample time to prepare their alibi defense. With one exception, defendants' alibi witnesses had returned to Ohio. Defendants' requested continuance to recall these out-of-state witnesses would have resulted in an unreasonable delay of the trial. We find no

abuse of discretion and do not reverse. *People* v. *Ciatti* (1969), 17 Mich App 4; *People* v. *Rastall* (1969), 20 Mich App 264.

Reviewing the totality of circumstances leading to conviction, we do not find the court's refusal to delay the trial resulted in injustice.

Finally, defendants were identified as being participants in the Fairview Pharmacy hold-up by witnesses. We find there was sufficient evidence, if believed by the jury, to justify a finding of guilt beyond a reasonable doubt. *People* v. *Weems* (1969), 19 Mich App 553, 557; *People* v. *Graham* (1971), 30 Mich App 298.

Both convictions are affirmed.

All concurred.

FEAZEL *v.* DEPARTMENT OF CORRECTIONS

1. PARDON AND PAROLE—PAROLE VIOLATION HEARING—30-DAY RULE—RETURN TO PENAL INSTITUTION—STATUTES.

   A parolee is deemed returned to a state penal institution for the purpose of the 30-day rule governing parole violation hearings when the parole violation warrant is issued, the parolee arrested, and the parolee incarcerated under the parole violation warrant in any penal institution, whether local, county, or state (MCLA § 791.240a).

2. PARDON AND PAROLE—PAROLE VIOLATION HEARING—30-DAY RULE—PAROLE VIOLATION WARRANT.

   A parole violation hearing must be held within 30 days of the parolee's arrest and incarceration under a parole violation war-

---

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 39 Am Jur, Pardon, Reprieve and Amnesty §§ 79, 95.

rant; a parolee's arrest, if the arrest was not under a parole violation warrant, does not begin the running of the 30-day period (MCLA § 791.240a).

3. PARDON AND PAROLE—PAROLE VIOLATION HEARING—PROCEDURE—RIGHT TO PRODUCE EVIDENCE.

A parolee accused of a parole violation has the right to a hearing at which he may produce witnesses and proofs and meet the witnesses who are produced against him, because a hearing which does not allow the parolee these rights is not a hearing at all (MCLA § 791.240a).

Original action for mandamus in the Court of Appeals. Submitted Division 2 October 7, 1970, at Lansing. (Docket No. 8062.) Decided March 22, 1971.

Complaint by Ronald Feazel against the Department of Corrections for a writ of mandamus to compel defendant to hold a formal parole violation hearing. Writ granted.

Ronald Feazel, *in propria persona.*

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for defendant.

Before: LEVIN, P. J., and T. M. BURNS and J. E. HUGHES,* JJ.

T. M. BURNS, J. Plaintiff, an inmate at Marquette Prison, seeks a writ of mandamus requiring the Department of Corrections to hold a formal parole violation hearing.

On December 6, 1968, plaintiff was paroled from prison where he was serving a sentence for the

* Circuit judge, sitting on the Court of Appeals by assignment.

felony of escape. On February 7, 1969, a complaint was filed against the plaintiff charging him with possession of an uncased shotgun in an automobile. He was arrested on February 11, 1969, and taken to the Macomb County Jail.

On March 6, 1969, a parole violation warrant was issued and plaintiff was returned to prison on March 17, 1969. On March 20, 1969, plaintiff was informed of the parole violation charges against him and was also informed of his right to a hearing before two members of the Parole Board within 30 days. He was also informed of his right to have counsel present at the hearing at his own expense. Plaintiff requested a hearing and it was set for March 31, 1969. Plaintiff's attorney then advised the Parole Board that the date for the hearing was inconvenient and the date was changed for him to April 14, 1969.

On the date set for the hearing, plaintiff was brought before two members of the Parole Board. His attorney had withdrawn from the case and plaintiff, not being able to afford another attorney, appeared by himself. After this meeting, the Parole Board revoked the plaintiff's parole.

Plaintiff then filed a complaint in this Court for an order to show cause and a writ of mandamus requiring the Department of Corrections to hold a formal parole violation hearing. On January 22, 1970, this Court ordered the Department of Corrections to show cause why plaintiff should not be granted the writ of mandamus.

Plaintiff first contends that the Parole Board was denied jurisdiction to conduct a parole violation hearing because more than 30 days had elapsed from the date of his arrest to the date of the hearing. The applicable statute provides in part:

"Within 30 days after a paroled prisoner has been returned to a state penal institution under accusation of a violation of his parole * * * he shall be entitled to a hearing on such charges."[1]

Since the 30-day period does not begin to run until the paroled prisoner has been "returned to a state penal institution", the question presented to this Court is when was the plaintiff returned to a state penal institution for purposes of the statute.

Since it is not uncommon for state prisoners to be temporarily housed in local or county jails, the plaintiff should be deemed to have been "returned to a state penal institution" upon issuance of the parole violation warrant and arrest. The prisoner should not have to wait until he is actually returned to a state prison. When a paroled prisoner is incarcerated in any penal institution under the paroled violation warrant, the 30-day period should begin to run.

It is plaintiff's position, however, that the 30-day period should begin to run from the date of his arrest regardless of when the parole violation warrant is issued. We do not agree. Plaintiff was arrested and charged with possession of an uncased shotgun. Plaintiff does not question the legality of his confinement on the charge. Therefore, since he was not incarcerated "under accusation of a violation of his parole" until the Department of Corrections had considered whether to recommend revocation of parole and the parole violation warrant had been issued, plaintiff was not "returned to a state penal institution" until March 6, 1969. Therefore, since the hearing was originally scheduled for March 31, 1969, and the one adjournment was at the request of the plaintiff, the 30-day requirement

[1] MCLA § 791.240a (Stat Ann 1970 Cum Supp § 28.2310[1]).

of MCLA § 791.240a (Stat Ann 1970 Cum Supp § 28.2310[1]) was met. Therefore, since plaintiff does not contend that the 25-day period between the date of his arrest and the issuance of the parole violation warrant was undue or unreasonable, we find plaintiff's first contention to be without merit.

Plaintiff next contends that he was not given a "hearing" within the meaning of MCLA § 791.240a (Stat Ann 1970 Cum Supp § 28.2310[1]), which provides:

"Within 30 days after a paroled prisoner has been returned to a state penal institution under accusation of a violation of his parole, other than the conviction for a felony or misdemeanor punishable by imprisonment in any jail, a state or federal prison under the laws of this state, the United States or any other state or territory of the United States, he shall be entitled to a hearing on such charges before 2 members of the parole board. Hearings shall be conducted in accordance with rules and regulations adopted by the director, and the accused prisoner shall be given an opportunity to appear personally or with counsel and answer to the charges placed against him."

The brief record of the proceeding which was held before two members of the Parole Board reads as follows:

"*Mr. McConnell:* You are Ronald Feazel, No. 110–445?

"*A.* Yes.

"*Mr. McConnell:* You are before us today as a parole violator. Did you incur any convictions while on parole?

"*A.* No sir.

"*Mr. McConnell:* All right, do you have plans for counsel?

"*A.* No sir, I couldn't afford it.

"*Mr. McConnell:* You will be heard today by the board then?

"*A.* Yes sir.

"*Mr. McConnell:* All right, I will read the charges and I would like you to answer to them.

"1. Rule 5, in that you had under your control a deadly weapon a 20-gauge shotgun without permission, when you were ticketed by the Shelby Police. Did you have a gun?

"*A.* Yes I had a reasonable facsimile thereof.

"2. Violated Rule 7, special condition No. 5, failed to conduct yourself so as not to be a hazard to yourself. You threatened another person.

"*A.* No sir, I did not.

"3. Special condition No. 1, cashed a check at a market.

"*A.* True."[2]

Plaintiff was not given the opportunity to present witnesses or introduce proofs at the proceeding before the Parole Board. The plaintiff, therefore, contends that he has not been afforded a hearing within the meaning of the statute.

The present statute replaces MCLA § 791.240 (Stat Ann 1954 Rev § 28.2310), which provided for a "fair and impartial hearing" at which the prisoner:

"shall be allowed to be heard by counsel of his own choice, at his own expense, and may defend himself, and he *shall have the right to produce witnesses and proofs in his favor and to meet the*

---

[2] What else occurred at the proceeding beyond what has been set forth above has not been made to appear by affidavit or otherwise. We have only been advised by the Attorney General's brief that "unfortunately the full hearing was not recorded".

Defendant contends that the testimony of the plaintiff constitutes an admission of the parole violations. However in light of the meager record, we are not convinced that plaintiff admitted anything, especially in light of the fact that plaintiff contends that he had been fixing the shotgun and that it was completely inoperable.

witnesses who are produced against him." (Emphasis supplied.)

It is the Attorney General's position that the deletion of the provisions for the production of witnesses and proofs by the defendant from the present statute reveals a clear legislative intent to limit the rights of paroled prisoners. In support of his position the Attorney General cites *Lane* v. *Parole Board* (1970), 383 Mich 50, as standing for the proposition that under the present statute a parolee accused of a parole violation is no longer entitled to introduce any evidence at the hearing. However, the question before the Court in *Lane* was whether the period of parole could be extended without giving the paroled prisoner the benefit of a hearing. The Court decided that it could and did not, therefore, reach the question of what constitutes a hearing.

The present statute does not spell out the right of the parolee to produce witnesses and proofs, but it does provide for a hearing. It is the opinion of this Court that a hearing necessarily comprehends the right of the accused to produce witnesses and proofs and to meet the witnesses who are produced against him. We are of the opinion that any proceeding which does not provide for the production of witnesses and the introduction of evidence would not be a hearing at all.

The Court would also point out that on May 28, 1970, the Department of Corrections, Parole Board, filed with the Secretary of State rules and regulations concerning paroles, pardons, reprieves, and commutations of sentences.[3] Of these, Rule 32(4) provides:

"Except as otherwise provided in these rules, Act No 306 of the Public Acts of 1969, being sec-

[3] Administrative Code: 1970 AACS, R 791.301–R 791.351.

tions 24.201 to 24.313 of the Compiled Laws of 1948, will apply to the hearing."[4]

Chapter 4 of Act No 306 sets forth the procedures to be used in contested cases. Section 72(3) of chapter 4 provides:

"The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact."

Although we are of the opinion that the plaintiff was denied a "hearing" within the meaning of MCLA § 791.240a, we are also of the opinion that just because this particular parolee was accused of a parole violation between the time MCLA § 791.240 was repealed and the present regulations governing the hearing were adopted, he should not be denied the opportunity to introduce proofs and present witnesses.

The case is, therefore, reversed and remanded to the Parole Board for a new hearing in compliance with the new procedures adopted by the Department of Corrections.

---

[4] *Id.*, R 791.332.

PEOPLE *v.* WILLIE LEE LEWIS

1. CRIMINAL LAW—EFFECTIVE COUNSEL—CONSTITUTIONAL ISSUES—TIMELY MOTIONS.

   Defendant's contention that his trial counsel was ineffective because counsel failed to timely raise a viable search and seizure issue was without merit where, by trial counsel's own explanation, the events which would have indicated a substantial search and seizure problem had not been related to him until after a timely motion could have been made.

2. CRIMINAL LAW—WARNING OF RIGHTS CASES—APPEAL AND ERROR—MANIFEST INJUSTICE.

   Admission into defendant's trial, held before a United States Supreme Court's decision that an accused must be warned of his constitutional rights when taken into custody, of defendant's statements did not constitute a manifest injustice where the statements were exculpatory, the statements were corroborated by the defendant's own testimony at trial, and where no objection was raised in the trial court to the admission of the statements.

3. CRIMINAL LAW—EVIDENCE—ORDER OF PROOF—CORPUS DELICTI—DEFENDANT'S GUILT—CIRCUMSTANTIAL EVIDENCE.

   Introducing a defendant's statements into evidence before introducing proof of the *corpus delicti* is not necessarily error in a case based on circumstantial evidence because the proof

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 315.
[2] 53 Am Jur, Trial § 135.
21 Am Jur 2d, Criminal Law §§ 313, 314, 316, 317.
29 Am Jur 2d, Evidence §§ 611–614.
[3] 53 Am Jur, Trial §§ 128, 131.
[4] 39 Am Jur, New Trial § 159.
[5] 39 Am Jur, New Trial § 54.
53 Am Jur, Trial §§ 463, 480.
[6] 44 Am Jur, Rape §§ 66, 74, 101, 102.

of the *corpus delicti* and of the defendant's guilt may be so interwoven as to dictate a chronological presentation for the jury's understanding.

4. CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Refusal to grant a new trial on the basis of newly-discovered evidence, an affidavit from a fellow inmate of the defendant stating that the testimony of one of the witnesses was a fabrication, was not an abuse of discretion where the sworn statement contained an admission that the defendant was well aware of the affiant's information before trial.

5. CRIMINAL LAW—PROSECUTOR'S COMMENT—RES GESTAE WITNESS—UNAVAILABLE WITNESS.

Prosecution's reference during defendant's trial to a *res gestae* witness who was unavailable at the trial was improper, but not prejudicial, where the record shows that any prejudicial effect was abrogated by testimony establishing that both the defendant and the missing witness had denied being with each other the night of the crime charged.

6. RAPE — EVIDENCE — ADMISSIBILITY — OCCURRENCE OF CRIME — PROBATIVE VALUE.

Scientific evidence pointing strongly to the complainant's being raped but which was less convincing in implicating the defendant, accused of the rape, was admissible because it shed some light on the material issues of the case.

Appeal from Ingham, Louis E. Coash, J. Submitted Division 2 December 14, 1970, at Lansing. (Docket No. 8094.) Decided March 22, 1971.

Willie Lee Lewis was convicted of first-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Raymond L. Scodeller,* Prosecuting Attorney, and *James R. Ramsey,* Assistant Prosecuting Attorney, for the people.

W. Charles Kingsley, for defendant on appeal.

Before: BRONSON, P. J., and R. B. BURNS and HOFF,* JJ.

R. B. BURNS, J. On November 8, 1962, the defendant was convicted of first-degree murder. MCLA § 750.316 (Stat Ann 1954 Rev § 28.548). The evidence leading to defendant's arrest and conviction was partly fortuitous and partly a result of diligent police work. Approximately two weeks after the rape and murder of Mrs. Lucy Norris the defendant was picked up on a charge of breaking and entering. Subsequent police investigations into that charge linked defendant with the Norris murder. Items seized from defendant's dwelling were scientifically connected to the Norris murder and eventually played a role in the defendant's conviction.

Defendant now appeals, claiming seven errors. Prefatory remarks in defendant's brief on appeal suggest defendant's deprivation of effective counsel at trial level. The most serious allegation raised against trial counsel was that he had failed to timely raise a viable search and seizure issue. Defendant cannot expect counsel to fabricate events in order to stress an issue. *People* v. *Crawford* (1969), 16 Mich App 92. By trial counsel's own explanation it was made clear that events which would indicate a substantial search and seizure problem had not been related to him until after a timely motion could have been made. Reviewing the entire record we cannot say trial counsel's representation "was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation." *Williams* v. *Beto* (CA5, 1965), 354 F2d 698, 704. Followed in *People* v. *Degraffenreid* (1969), 19 Mich App 702, 710.

* Circuit judge, sitting on the Court of Appeals by assignment.

In defendant's first formal claim of error he asserts infringement of his constitutional right against self-incrimination. Since this case is pre-*Miranda*[1] no question of constitutional warnings arises. The question of whether defendant's statements were voluntary in the traditional sense[2] was never ruled upon at trial level. Defendant never objected to introduction of these statements and raises this error for the first time on appeal.

In the absence of manifest injustice this Court must conclude that "either there was no issue of involuntariness or that such issue was waived as a matter of trial strategy". *People* v. *Farmer* (1968), 380 Mich 198, 204. This Court, after carefully reviewing the trial records, finds no manifest injustice. The statements in question were not only exculpatory[3] but were corroborated by the defendant's own testimony during trial. Defendant's argument that the statements were introduced before proof of the *corpus delicti* and that this constituted error is also raised for the first time on appeal. In a case such as this, based on circumstantial evidence, proof of the *corpus delicti* and defendant's guilt may be so interwoven as to dictate a chronological presentation for the understanding of the jury. *People* v. *Hawksley* (1890), 82 Mich 71.

Defendant next claims that his premises were searched and certain items seized in violation of his constitutional right against unreasonable searches

---

[1] *Miranda* v. *Arizona* (1966), 384 US 436 (86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974). The *Miranda* rules do not apply retroactively. *Johnson* v. *New Jersey* (1966), 384 US 719 (86 S Ct 1772, 16 L Ed 2d 882); *People* v. *Fordyce* (1966), 378 Mich 208.

[2] The pre-*Miranda* law on voluntariness may be found in *Clewis* v. *Texas* (1967), 386 US 707 (87 S Ct 1338, 18 L Ed 2d 423).

[3] We realize that the privilege against self-incrimination does not depend on whether or not statements are exculpatory (*People* v. *Besonen* [1966], 4 Mich App 131) but we think it bears on the question of voluntariness.

and seizures.[4] A search of defendant's premises occurred on two different occasions. Only the second search is relevant to defendant's issue since the items introduced into trial by the prosecution were products of the second search. The search was without a warrant but the police contend they obtained defendant's consent. The trial court judge ruled against defendant on the basis that his motion to suppress was not timely. Reviewing the trial court record we find that the motion was untimely. Yet, regardless of defendant's tardiness the trial judge conducted a hearing on the legality of the search and seizure. At the hearing defendant's testimony denying consent for the first search indicates that he may have given consent to the second search. This testimony does not, of course, measure up to "unequivocal and specific" proof of consent as required by *People* v. *Kaigler* (1962), 368 Mich 281, 294. But this factor combined with the testimony of two police officers to the effect that defendant's unequivocal and full consent was obtained convinces this Court that defendant's constitutional right was not violated.

Defendant next claims a right to a new trial based on newly-discovered evidence. Mr. Warren, a fellow inmate of defendant at Jackson Prison before trial, issued a sworn statement alleging that the trial testimony of one Mr. Fisk was a complete fabrication. However, this sworn statement also admits that defendant was well aware of Warren's information prior to trial. This information cannot be classified as newly discovered. See *People* v. *McAllister* (1969), 16 Mich App 217. The trial court's refusal to grant a new trial on this basis was not an abuse of discretion. *People* v. *Thomas* (1969), 17 Mich App 740.

[4] US Const, Am 4.

A Louis Carter was indorsed on the information as a *res gestae* witness. Aware that Carter was unavailable as a witness, the prosecution still referred to him several times during trial. Defendant claims this was prejudicial. Upon review of the trial record it is clear that any prejudicial effect was abrogated by testimony establishing that both defendant and Carter denied being with each other the night of the crime. Although improper, the prosecutor's remarks were rendered harmless and resulted in no prejudice to the accused. See *People* v. *Hider* (1968), 12 Mich App 526.

Defendant's fifth claim of error concerns the sufficiency of certain scientific evidence linking the defendant to the crime. Much of the scientific evidence was used to establish the commission of rape upon the victim.[5] A necessary and vital element of the scientific evidence pointed strongly to the occurrence of rape but was less convincing in implicating the defendant. The scientific evidence along with other circumstantial evidence shed some light upon material issues of the case and was, therefore, probative. It is for the jury to determine the weight of such evidence. *People* v. *Rogers* (1968), 14 Mich App 207.

Defendant's next claim of error concerns his counsel's failure to assert a motion to sequester witnesses at trial level pursuant to MCLA § 600-.1420 (Stat Ann 1962 Rev § 27A.1420). We conclude the lack of a motion did not result in such prejudice that if the motion had been made and granted the jury would have reached a different conclusion.

Defendant lastly claims error when the prosecution was permitted to cross-examine defendant re-

[5] In this case proof of rape was a necessary element for conviction of first-degree murder. See MCLA § 750.316 (Stat Ann 1954 Rev § 28.548) for the felony murder rule.

garding details of a 1955 robbery conviction. The court sustained defense counsel's objections at that time. This Court cannot agree with defendant's assertion that prejudicial error resulted. The matter presented before the jury at that time was not so prejudicial that the jury was improperly influenced. *People* v. *Morehouse* (1950), 328 Mich 689.

Affirmed.

All concurred.

PEOPLE *v.* HEARD

1. JURY—JURY QUESTIONNAIRES—AVAILABILITY—JURY COMMISSION OFFICE.

   Former practice of the Detroit Recorder's Court of keeping jury questionnaires in the jury commission office rather than in the courtroom during *voir dire* did not prejudice the defendant where the questionnaires were available to defendant's counsel before *voir dire* and where the trial court gave defendant's counsel adequate time during the *voir dire* to inspect the questionnaires (GCR 1963, 510.3[2]).

2. JURY—QUESTIONING WITNESS—DISCRETION.

   Allowing the jury to submit written questions to be asked of a witness has often been disapproved of and has usually been held to be within the discretion of the trial court.

REFERENCES FOR POINTS IN HEADNOTES

[1] 47 Am Jur 2d, Jury §§ 195, 196, 202, 211.
[2] 53 Am Jur, Trial § 852.
[3, 4] 53 Am Jur, Trial §§ 36, 904.
[5] 21 Am Jur 2d, Criminal Law §§ 368, 369.
29 Am Jur 2d, Evidence § 375.
40 Am Jur 2d, Homicide § 288.
[6, 7] 53 Am Jur, Trial § 684 *et seq.*

3. JURY—JUDGES—COMMUNICATION WITH JURY.

Trial judge's communicating with the jury after the jury had retired to consider its verdict and without the presence of the parties or their counsel is error.

4. JURY—JUDGE'S COMMUNICATION WITH JURY—ENTERING JURY ROOM.

Defendant's contention that the trial judge's taking exhibits into the jury room after the jury had retired to consider their verdict and without the parties or their counsel being present constituted a manifest injustice because the judge may have said something prejudicial to the jury *held,* without merit, where the defendant's counsel was aware of what had happened and did not raise an objection in the trial court and even though the judge's action was improper the record reveals no prejudice by the brief delivery of the exhibits to the jury.

5. EVIDENCE—FINGERPRINT CARDS—ADMISSIBILITY.

Admitting two fingerprint cards into evidence in defendant's trial for murder, even though the defendant did not take the stand, was not reversible error on the ground that the cards showed defendant's past police record where all information on the cards had been masked out except the defendant's signature and the words "prisoner's signature" and at no time was any comment made about the defendant's police record.

6. CRIMINAL LAW—PRESUMPTION OF INNOCENCE—INSTRUCTIONS TO JURY.

Failure to give an instruction to the jury on the presumption of innocence is not necessarily reversible error.

7. CRIMINAL LAW—PRESUMPTION OF INNOCENCE—INSTRUCTIONS TO JURY.

Failure to instruct the jury that the presumption of innocence "goes into the jury room" with them was not error where the trial court instructed that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt.

Appeal from Recorder's Court of Detroit, Joseph A. Gillis, J. Submitted Division 1 January 11, 1971, at Detroit. (Docket No. 8120.) Decided March 22, 1971. Leave to appeal granted August 31, 1971, 385 Mich 787.

Robert Heard, Jr., was convicted of first-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Angelo A. Pentolino,* Assistant Prosecuting Attorney, for the people.

Charles Burke, for defendant on appeal.

Before: V. J. BRENNAN, P. J., and FITZGERALD and LEVIN, JJ.

FITZGERALD, J. Defendant was convicted of first-degree murder[1] and on appeal contends that his trial was only a notch better than the *Dreyfus* trial. Virtually nothing transpired which is not claimed to be error and the brief on appeal yields 15 issues (two of which are identical) and argues an estimated 11.

On oral argument (by counsel other than the trial counsel and preparer of the brief), an attempt was made to reduce the matters to specificity. While many issues still remain somewhat arcane, we proceed to explore and resolve the most nearly meritorious.

The defendant first contends that under GCR 1963, 510.3(2), jury questionnaires must be kept in the courtroom during *voir dire.* It appears that in recorder's court at the time of the trial, the questionnaires were kept in the jury commission office. Counsel contends that he has no way of knowing in advance from which group the jury will be selected.

[1] MCLA § 750.316 (Stat Ann 1954 Rev § 28.548).

Therefore, if he goes to the jury commission office before *voir dire,* he will have to check many more questionnaires than he would if they were kept in the courtroom.

Other than the court rule, counsel cites no authority. The rule provides:

"The attorneys shall be given a reasonable time to examine the questionnaires before being called upon to challenge for cause."

While it might be better practice or more convenient to have the questionnaires in the courtroom, counsel did have access to them. They were available in the jury commission office before *voir dire* began. Also, the trial court gave counsel time to go to the jury commission office during *voir dire.* Presently, the questionnaires are kept in the building, considerably more accessible. The process at time of trial did not deprive the defendant of a reasonable opportunity to examine the questionnaires during the *voir dire* and, while perhaps cumbersome, resulted in no prejudice.

The defendant further contends that it was error for the trial court to rule that the jury could not question the witness. In his opening statement, counsel for the defendant told the jury that they could submit written questions. The prosecution objected and the trial court ruled that the jury could not submit questions. The following colloquy took place:

"*Mr. Pillon* [*for defendant*]: The judge sits here as a referee and passes upon points of law, he makes sure we stay within our bounds, and he determines the issues, questions of law. But who decides the question of fact? You do. You decide if this occurred, what day it occurred, who did it,

and everything else; because you decide questions of fact. Since that is so, let me say this to you: We lawyers get busy in a trial lots of times. We don't try to deliberately avoid anything when we have witnesses on the stand. We want you to hear all of it. But sometimes in trial of a case the prosecution or defense forgets to ask a witness something or overlooks something.

"Now, you are the trier of the facts; if there's some question that is disturbing you about some witness, and you would like to ask that witness a question, raise your hand—just raise your hand, and we will have you write it out on a piece of paper. If the judge thinks it's a proper question, we will ask the question of the witness; because you are the trier of the facts, and you have the right to do that, as the judge when he's the trier of the facts.

"Mr. Lacey [*assistant prosecutor*]: I object, your Honor; this is argument. It hasn't been a proper opening statement. Now Mr. Pillon is attempting to control the exercise of this courtroom in a manner which I have never seen.

"The Court: I was going to ask Mr. Pillon his authority on that. I've never heard of that before.

"Mr. Lacey: I've never heard of that.

"Mr. Pillon: There's an English case on that.

"The Court: How old is it?

"Mr. Pillon: I don't know.

"The Court: Give me the citation. There's no case in the American jurisprudence to allow a juror to ask questions. I don't want a statement like that from any attorney.

"Mr. Pillon: I will put it right now on the record. I can see you and I are having a disagreement. When you are the trier of the fact, you ask questions of the witnesses. The jury has the same—

"The Court: This is a new theory of law in America.

"*Mr. Pillon:* I've done it before in Recorder's Court.

"*The Court:* Do you know any case anywhere in the United States—in the 50 states—or Federal jurisdiction that permits this?

"*Mr. Pillon:* I will try and bring you back a citation after the lunch hour."

There does not appear to be any Michigan authority on this question nor did the English case materialize after lunch. When the question has arisen, the practice has often been disapproved of and it is usually held to be within the discretion of the trial court. See Anno, 159 ALR 374.

The defendant also argues that it was error for the trial court to take the exhibits into the jury room. After ruling that the exhibits could go into the jury room, the trial court personally delivered them to the jury. Counsel for the defendant was aware of this:

(Proceedings held outside the presence and hearing of the jury.)

"*The Court:* Let the record reflect that all exhibits, with the exception of People's Exhibit No. 3, the wallet, and People's Exhibit No. 5, the Polish News, have been given to the jury, including Defense Exhibits A through D.

"*Mr. Pillon:* Let the record further show that the jury did not request these exhibits, that the judge decided to give these exhibits to the jury and took them into the jury room himself and tendered them to the jury.

"I think that is an improper procedure; I think that jurors have to ask for them."

Counsel now contends that the judge may have said something to the jury that was prejudicial. Since he was aware of what happened, he should have explored this question in the trial court. It

was, indeed, improper for the court in the absence of the parties and their counsel to communicate with the jury after it had retired to consider its verdict, but the record reveals no manifest injustice by the brief delivery of the exhibits to the jury.

The defendant contends that fingerprint cards that were introduced into evidence tended to show that he had a police record. Since he did not take the stand, he argues that he was prejudiced by the introduction of these cards. On both of these cards, all information was masked out except the words "prisoner's signature" and the signature. The first of these cards had been made in 1966; however, there was no testimony regarding the date it was taken. The officer who took these prints could not positively identify the defendant as the man whose prints were taken and the defendant opposed their admission because of this.

After this, the people produced the man who had taken the defendant's prints on January 14, 1969, and he positively identified the defendant. Both sets of prints were then compared to prints found at the scene of the crime. At no time was any comment made about the defendant's record and no reversible error occurred.

The defendant further submits that it was error to refuse to instruct the jury that the presumption of innocence "goes into the jury room" with them.

In considering the defendant's contention, it should first be pointed out that failure to give an instruction on the presumption of innocence has been held to be not necessarily reversible error. *People* v. *Graney* (1892), 91 Mich 646; *People* v. *Smith* (1892), 92 Mich 10; *People* v. *Ostrander* (1896), 110 Mich 60; *People* v. *Williams* (1919), 208 Mich 586. In *People* v. *Parsons* (1895), 105 Mich 177, 186, 187, the Court stated:

"The reason why the jury must solve all reasonable doubts in favor of the accused is that the presumption of innocence is with respondent. The burden is upon the people to overcome that presumption of innocence by proof that will convince the jury, beyond all reasonable doubt, of respondent's guilt. The case should not be reversed simply because the court has failed to give the reason why such burden is imposed upon the people. Where neither instruction has been given, it would be error; but where the jury have been instructed that they must be satisfied, beyond all reasonable doubt, that the respondent has committed the offense charged, it cannot be said that the respondent has been prejudiced by an omission to charge that the respondent is presumed to be innocent, especially where the court has already stated, in the presence of the jury, that in a criminal prosecution nothing can be presumed against the respondent."

The trial court instructed, *inter alia,* as follows:

"The defendant in this case is presumed to be innocent of the charge brought against him here; and that presumption of innocence abides with him throughout the entire trial of the case until he is proven beyond a reasonable doubt by the testimony given to be guilty of the charge brought against him."

It can only be concluded that a refusal to instruct specifically that the presumption of innocence "goes into the jury room" is not error. The instructions as a whole gave defendant all the presumptions and proper safeguards that the law requires.

Other issues raised have been considered and do not merit discussion, being either abandoned or incapable of unravelling.

As stated in *Mitcham* v. *City of Detroit* (1959), 355 Mich 182, 203:

"It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."

The record has been thoroughly examined and closely scrutinized. No reversible error is apparent, real or imagined.

Affirmed.

All concurred.

PEOPLE *v.* GARCIA

1. CRIMINAL LAW—PROSECUTOR'S REMARKS—DEFENDANT'S GUILT—PROSECUTOR'S BELIEF—EVIDENTIARY BASIS.

   A prosecutor cannot tell a jury that he believes that the defendant is guilty; however, the prosecutor can argue that from the testimony that the defendant is guilty and can state whether the evidence convinces him and should convince the jury of the defendant's guilt.

2. CRIMINAL LAW—PROSECUTOR'S REMARKS—DEFENDANT'S GUILT—PROSECUTOR'S BELIEF—EVIDENTIARY BASIS.

   Prosecutor's remark during closing argument that the defendant was guilty did not constitute prejudicial error on the ground that the remark showed the prosecutor's own belief where the

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial §§ 485, 486.
[3] 53 Am Jur, Trial § 495 *et seq.*
[4] 46 Am Jur, Riots and Unlawful Assembly §§ 8, 16.
21 Am Jur 2d, Criminal Law §§ 442, 443, 450.
[5] 46 Am Jur, Riots and Unlawful Assembly § 16.
[6] 46 Am Jur, Riots and Unlawful Assembly §§ 8, 12.

prosecutor also stated that he was not asking the jury to find the defendant guilty on no evidence and that there was ample evidence to find the defendant guilty.

3. CRIMINAL LAW—PROSECUTOR'S REMARKS—INFLAMMATORY ARGUMENT.

Prosecutor's remark, on closing argument, implying that unless the citizenry kept people like the defendant, charged with rioting, off the streets riots would occur again in their community was overzealous but not so inflammatory as to deprive the defendant of a fair trial.

4. RIOT—UNLAWFUL ASSEMBLY—PRELIMINARY EXAMINATION—PROBABLE CAUSE.

Binding over of the defendant on charges of rioting and unlawful assembly was proper where the facts derived at preliminary examination showed that there was a group of about 40 persons who were yelling and shouting and hurling stones at a police car, that the group divided into two smaller groups, and that a police officer identified the defendant as being both part of the larger group and one of the smaller groups even though it was not established that the defendant was hurling stones, because the larger group's action constituted a crime and defendant's presence in the group constituted probable cause to believe he committed the crime and because the defendant's failure to leave the group after the violence began would indicate that the defendant shared the group's purpose.

5. EVIDENCE—HEARSAY—RIOT—UNLAWFUL ASSEMBLY.

Admitting the testimony of a police officer into defendant's trial for riot and unlawful assembly that the officer had received a radio communication that a group was breaking windows and that the officers should go to the scene of the disturbance was not error where the testimony concerning the radio communication was limited to show that a communication had been made and that as a result of the broadcast, the officers went to the scene and where the testimony was not admitted or offered to show the truth of the matter asserted in the communication (MCLA § 752.541, 752.543).

6. RIOT—"PUBLIC ALARM"—STATUTES.

"Public terror or alarm", as the phrase is used in the statute defining the crime of "riot", would be caused any time a segment of the public is put in fear of injury to either their persons or property (MCLA § 752.541).

Appeal from Kalamazoo, Lucien F. Sweet, J. Submitted Division 3 November 9, 1970, at Grand Rapids. (Docket No. 8138.) Decided March 22, 1971.

Jaime Garcia was convicted of riot and unlawful assembly. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Donald A. Burge,* Prosecuting Attorney, and *Stewart D. Fenner, Jr.,* Assistant Prosecuting Attorney, for the people.

Quinn E. Benson, for defendant on appeal.

Before: T. M. BURNS, P. J., and R. B. BURNS and MUNRO,* JJ.

T. M. BURNS, P. J. On July 30, 1968, Jaime Garcia was arrested in the City of Kalamazoo on the charges of riot and unlawful assembly in violation of MCLA 1971 Cum Supp § 752.541 (Stat Ann 1971 Cum Supp § 28.790[1]) and MCLA 1971 Cum Supp § 752.543 (Stat Ann 1971 Cum Supp § 28.790[3]). Following a preliminary examination and arraignment, defendant was found guilty on both counts and was sentenced to serve 2–1/2 to 10 years on each count with the sentences to run concurrently. Defendant raises five issues on appeal.

1. *Were the remarks of the prosecuting attorney in closing arguments so highly prejudicial that they affected the result of the trial and caused a miscarriage of justice?*

In his closing arguments the prosecutor made the following remarks:

* Circuit judge, sitting on the Court of Appeals by assignment.

"I have taken too much time. I am going to close. I only want to urge upon you, ladies and gentlemen, Kalamazoo is your community. This type of conduct went on all last summer. It is probably going to go on this summer, too. The police are out there doing their job. They did their job that night as best they could. He is arrested; many others are arrested. I can assure you they will also come to trial.

"This is not the type of conduct that makes for a good community. Not at all. It is going to go on this summer again unless we can get these people off the streets, the people causing the problems. Here is one right here. Here is your chance as a citizen to do something about this problem in Kalamazoo. It is right here as you sit in these chairs. When you go upstairs to deliberate, you can do something right here. You can bring back a verdict of guilty on both counts as to this man, because he is guilty. There is plenty of evidence for you to find him guilty. I urge upon you to do your duty as a citizen. Consider the testimony and in the name of the People of the State of Michigan, I ask you to return a verdict of guilty on both counts. Thank you."

Defendant contends that the closing remarks by the prosecutor were prejudicial because they appealed to the fears and apprehensions of the jury and because the prosecutor stated a belief that the defendant was guilty.

In 2 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 621, at page 801 it is stated:

"It is not proper for the prosecuting attorney to tell the jury that he believes the defendant guilty. However, it is not error for the prosecutor to argue from the testimony that the defendant is guilty, and to state whether the evidence convinces him and should convince the jury of such guilt."

Upon examination of the prosecutor's closing remarks as a whole, it appears that the remark concerning defendant's guilt was based upon the evidence. In the prosecutor's rebuttal argument he stated:

"I am not asking you to find this man guilty on no evidence. I would say there is ample evidence to find this man guilty on both counts. If he is innocent, and you find that, I won't grumble. I will abide by it, but I say there is evidence for you to find him guilty."

We therefore hold that the prosecutor's remarks about defendant's guilt were based upon the evidence and were not prejudicial.[1]

Defendant also contends, however, that the prosecutor's remarks appealed to the fears of the jurors because of the riots which had occurred in several cities around the country, including Kalamazoo. However, the prosecutor made no mention of any particular occurrence. He did state that this type of conduct would "go on this summer unless we can get these people off the streets." These comments, although not in the best of taste, were not the type of inflammatory statement which would warrant a reversal. In *People* v. *Peck* (1907), 147 Mich 84, 95, it was stated:

"We are not disposed to reverse convictions in criminal cases because of the impassioned arguments of the prosecuting officers, unless we can clearly see that such arguments were unwarranted

[1] Although defendant did not object to the remarks of the prosecutor, we have held that an objection is required only when an instruction by the trial court would correct the prejudice. Since it would be difficult to cure prejudice of this type by an instruction, we examined the issue to determine whether in fact defendant was prejudiced, despite the fact that no objection was raised at trial. See *People* v. *David Smith* (1969), 16 Mich App 198.

by the evidence and probably contributed to the result."

The prosecutor's remarks here, although overzealous, were not so prejudicial that they deprived the defendant of a fair trial.

2. *Was the examining magistrate in error in denying defendant's motion to dismiss the charges at the conclusion of the preliminary examination and binding the defendant over to stand trial?*[2]

In the first count of the information defendant was charged with having violated MCLA 1971 Cum Supp § 752.541 (Stat Ann 1971 Cum Supp § 28.790[1]), which provides:

"It is unlawful and constitutes the crime of riot for 5 or more persons, acting in concert, to wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm."

In the second count of the information defendant was charged with violation of MCLA 1971 Cum Supp § 752.543 (Stat Ann 1971 Cum Supp § 28.790[3]), which provides:

"It is unlawful and constitutes an unlawful assembly for a person to assemble or act in concert with 4 or more persons for the purpose of engaging in conduct constituting the crime of riot, or to be present at an assembly that either has or develops such a purpose and to remain thereat with intent to advance such purpose."

At a preliminary examination, two questions must be answered in the affirmative before a de-

[2] Defendant also moved to quash the information. The trial court's denial of this motion is also claimed as error by the defendant. Since the motion to quash presents the same question as the motion to dismiss at the preliminary hearing, both issues will be discussed together.

fendant can be bound over for trial: (1) has the crime with which the defendant has been charged been committed and (2) is there probable cause to believe that the defendant committed that crime?[3] Therefore, in the case at bar, the questions before the examining magistrate were whether the crimes of riot and unlawful assembly had been committed and whether there was probable cause to believe that defendant committed those crimes.

The relevant facts derived from the testimony at the preliminary examination are these: a Kalamazoo police officer testified that he was watching a group of about 40 people walking in the street in a northerly direction at the intersection of Rose and Bush Streets in the City of Kalamazoo. The officer then testified that the group turned onto Bush Street and again proceeded walking in the street. The officer then stated that he drove around the corner, stopped his car, got out, and turned on four floodlights, one on each corner of the car. The officer stated that the group was yelling and shouting; that stones were hurled at the car; that the group then divided into two smaller groups; and that he saw defendant in the large group and also in one of the smaller groups.

Defendant contends that even though the people may have established that the crimes in question were committed, they failed to establish probable cause that the defendant committed the crimes. It is defendant's position that because defendant was not seen hurling rocks, but was only seen as a member of the groups that defendant's participation in the action of the group was not established.

The statute defining the crime of unlawful assembly requires no action such as the hurling of rocks.

[3] *People* v. *Asta* (1953), 337 Mich 590; *People* v. *Jackson* (1967), 8 Mich App 643.

It only requires the defendant to be in an assembly of four or more persons "for the purpose of engaging in conduct constituting the crime of riot, or to be present at an assembly that either has or develops such a purpose and to remain thereat with intent to advance such purpose". The defendant was seen both in the large group and one of the smaller groups after the rocks had been hurled. Therefore, since the larger group's action constituted a crime under the definition of the statute, defendant's presence there constitutes probable cause that he had committed the crime. Since he did not leave the group after the violent conduct began, it would be reasonable to presume that he shared in that group's purpose. Of course his intent might have been totally alien to the actions of the group as a whole, but that is a question to be decided at trial, not at the preliminary examination where the concern is only with whether the crime has been committed and whether there is probable cause to believe that defendant committed the crime. We, therefore, hold that the decision of the examining magistrate was correct.

3. *Did the trial court commit reversible error by allowing Officer Sparrow to testify as to the content of certain police radio communications received by him?*

The objected-to testimony of Officer Sparrow is as follows:

"*Q.* Approximately 11:15 did you receive some radio communication?

"*A.* Yes, sir.

"*Q.* What was that communication?

"*Mr. Benson:* Your Honor, I think that Officer Sparrow can testify as to what he did. I don't

think the radio communication is relevant in this case.

"*Mr. Mitzel* (*assistant prosecutor*): I am only trying to show why this officer reacted the way he did or why he went. I am not trying to determine the proof of any radio communication.

"*The Court:* You may take it for that purpose.

"*Mr. Mitzel:* What was the radio communication?

"*The Witness:* I was dispatched to Number 4 Fire Station on Rose Street. A call came that a group of subjects were breaking windows and for us to proceed to the scene."

Defendant now contends that Officer Sparrow's testimony is hearsay even though the testimony was objected to as irrelevant and not as hearsay. However, even had defendant properly objected to the testimony on the grounds that it violated the hearsay rule, we would have to rule that the trial court was correct in accepting the testimony. Officer Sparrow's statement concerning the radio communications was offered to show only that the statement was made, and that as a result of the statement, the officers reacted and went to the scene. The statement was not offered as evidence to prove that defendant broke any windows at the fire station. Therefore, since the statement was not offered to show the truth of the matters asserted therein, it cannot be hearsay.[4] We, therefore, hold that the trial court was correct in admitting the testimony for the purpose of showing why the officers went to the scene.

4. *Whether sections 1 and 3 of PA 1968, No 302 (MCLA §§ 752.541, 752.543 [Stat Ann 1971 Cum Supp §§ 28.790(1), 28.790(3)]) are in violation of the United States Constitution or the Michigan Constitution?*

[4] McCormick, Evidence § 225, p 460.

Defendant contends that the two sections of Act 302 are unconstitutional because they are so vague the average citizen of average intelligence cannot tell what he may or may not do thereunder. MCLA 1971 Cum Supp § 752.541 (Stat Ann 1971 Cum Supp § 28.790[1]), provides:

"It is unlawful and constitutes the crime of riot for 5 or more persons, acting in concert, to wrongfully engaged in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm."

The above section defines the crime of "riot". It specifically states that a riot is five or more people, acting in concert, wrongfully engaging in violent conduct and who, thereby, intentionally or recklessly create a serious risk of causing public terror or alarm. Although defendant attacks almost every phrase in the statute, including what the statute means by the phrase "5 or more persons", this Court is of the opinion that only the phrase "causing public terror or alarm" can be subject to any misinterpretation.

"Public terror or alarm" would be caused any time a segment of the public is put in fear of injury either to their persons or their property. The phrase is sufficiently clear that men of average intelligence would not have to guess as to its meaning nor differ as to its application. We hold that Section 1 gives adequate guidance as to what constitutes the crime of "riot".

MCLA 1971 Cum Supp § 752.543 (Stat Ann 1971 Cum Supp § 28.790[3]), provides:

"It is unlawful and constitutes an unlawful assembly for a person to assemble or act in concert with 4 or more persons for the purpose of engaging in conduct constituting the crime of riot, or to be

present at an assembly that either has or develops such a purpose and to remain thereat with intent to advance such purpose."

The language of the statute defining what constitutes an unlawful assembly is abundantly clear. Since we have already upheld the statute defining the crime of "riot", we must also uphold this statute, since in this Court's opinion the word "riot" is the only term contained in the statute which can be said to be confusing. The statute clearly and concisely sets forth the conduct which constitutes the crime of "unlawful assembly" and does not, therefore, violate due process. The statute is not void for vagueness and uncertainty.

5. *Whether the verdict was against the great weight of the evidence?*[5]

This Court will not disturb a verdict unless the evidence fails to support the findings of fact. Our review of the record, especially the testimony of the police officers whose testimony at trial was substantially the same as their testimony at the preliminary examination, as set forth in issue 2, leads us to the conclusion there is ample evidence, if believed by the jury, to support a verdict of guilty beyond a reasonable doubt.

Affirmed.

All concurred.

---

[5] Defendant here reiterates an incorrect standard of proof. The correct standard is whether there was sufficient evidence to convict beyond a reasonable doubt. *People* v. *Washington* (1966), 4 Mich App 453; *People* v. *Williams* (1962), 368 Mich 494.

In re SPALTER

1. GRAND JURY—WITNESSES—IMMUNITY—SCOPE OF IMMUNITY.
   The immunity granted a grand jury witness pursuant to statute is coextensive with a defendant's Fifth Amendment privilege; the immunity granted is absolute (MCLA 1971 Cum Supp § 767.19b).

2. GRAND JURY — WITNESS — IMMUNITY — ORDER OF IMMUNITY — VALIDITY.
   The order granting a grand jury witness immunity is valid when it is signed by the presiding judge even though the grand jury was summoned by the circuit bench *en banc* where the presiding judge signed the order summoning the grand jury (MCLA § 767.19a).

3. CONTEMPT—CONTEMPT OF COURT—GRAND JURY.
   Court was not required to order the defendant to answer questions posed by the grand jury before it found the defendant guilty of contempt of court where the petition for the order to show cause was for contempt for refusal to answer questions before the grand jury after being granted immunity (MCLA 1971 Cum Supp § 767.19c).

4. COURTS—ORDERS—OPINIONS—EFFECT.
   A court speaks by its orders, not its opinion.

5. GRAND JURY—CONTEMPT—MULTIPLE CONTEMPTS.
   Each appearance by a witness before a grand jury is a separate event creating the possibility of separate contempts.

REFERENCES FOR POINTS IN HEADNOTES

[1] 38 Am Jur 2d, Grand Jury § 38.
[1, 2] Privilege against self-incrimination as to testimony before grand jury. 38 ALR2d 225.
[2] 38 Am Jur 2d, Grand Jury §§ 38, 39.
58 Am Jur, Witnesses §§ 36 *et seq.*, 93.
[3] 17 Am Jur 2d, Contempt §§ 6, 30, 32.
[4] 20 Am Jur 2d, Courts § 70.
[5] 17 Am Jur 2d, Contempt §§ 13, 14.

Appeal from Wayne, Nathan J. Kaufman, J. Submitted Division 1 February 8, 1971, at Detroit. (Docket Nos. 10082, 10129.) Decided March 22, 1971. Leave to appeal denied April 8, 1971. 384 Mich 823.

Louis Spalter was convicted of two counts of contempt for refusal to answer questions before a Wayne County Grand Jury after having been granted immunity. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Patricia J. Boyle,* Assistant Prosecuting Attorney, for the people.

Kent B. Willis, for defendant.

Before: QUINN, P. J., and DANHOF and O'HARA,* JJ.

QUINN, P. J. These appeals are from two orders, dated August 17, 1970, and August 21, 1970, adjudging defendant in contempt of court and sentencing him for such contempt.

Defendant was subpoenaed to appear July 23, 1970, before a citizens' grand jury duly convened by order of the Wayne County Circuit Court. He did appear pursuant to the subpoena and he was sworn as a witness. He refused to answer one of three questions on the ground that the answer might tend to incriminate him.

July 23, 1970, the prosecuting attorney filed an application and petition for an order granting

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

defendant immunity. The same day the presiding judge of the Wayne County Circuit Court signed an order which provided that:

"Louis Spalter shall appear and testify before the grand jury as to those matters set forth in the aforesaid application and petition of the prosecuting attorney, and he shall thereafter be held immune from any criminal prosecution growing out of the events about which he testifies before the grand jury, as provided in CL 1948, § 767.19b, as amended by act No 9, PA 1970."

A true copy of the order, application, and petition were served on defendant July 23, 1970. The petition specified the matters concerning which the prosecuting attorney proposed to interrogate defendant.

July 23, 1970, defendant returned before the grand jury and refused to answer 17 questions on the ground that the answers might tend to incriminate him. Defendant was served with another subpoena requiring his appearance before the grand jury August 10, 1970.

July 31, 1970, an order granting leave to disclose testimony of defendant before the grand jury pertinent to the petition for order to show cause to be instituted by the prosecuting attorney was signed and filed. August 3, 1970, defendant filed a motion to suppress the subpoena which required his appearance before the grand jury August 10, 1970. This motion was heard August 7 and August 10, 1970, and on the latter date, the motion was denied and defendant was ordered to appear before the grand jury forthwith.[1]

[1] Apparently defendant agreed on August 7, 1970, to appear before the grand jury forthwith in the event his motion to suppress the subpoena was denied.

August 10, 1970, defendant again appeared before the grand jury and refused to answer 207 questions on the ground that the answers might tend to incriminate him. Most of these questions related to the matters specified in the prosecuting attorney's petition in support of the application for grant of immunity as areas of inquiry to be addressed to defendant.

August 10, 1970, the prosecuting attorney filed a petition for an order to show cause why defendant should not be found in contempt as provided in MCLA 1971 Cum Supp § 767.19c, as added by PA 1970, No 9 (Stat Ann 1971 Cum Supp § 28.959[2]), for his failure to answer 224 questions before the grand jury, the specific questions were attached to the petition. The affidavit of the prosecuting attorney in verification of this petition was dated August 7, 1970, three days before defendant refused to answer 207 of the 224 questions. The order to show cause issued and on August 10, 1970, defendant was served with copies of the order and the petition.

Defendant failed to appear August 14, 1970, as required by the foregoing order, but he did appear August 7, 1970, after the trial judge had issued a body attachment for him. At the hearing August 17, 1970, defendant questioned the validity of the hearing because the jurat on the petition predated the alleged refusal of defendant to answer 207 questions on August 10, 1970. After much wrangling, the trial judge restricted the show cause hearing to the 17 questions asked and not answered July 23, 1970. Defendant then conceded that these questions were asked, that he had been granted immunity, and that he still refused to answer. He argued that his refusal to answer was based on his

doubt as to the validity and extent of the grant of immunity.

At the conclusion of the August 17, 1970 hearing, defendant was found in contempt for his refusal to answer questions before the grand jury after being served with a valid order granting immunity. He was sentenced to serve six months in the Detroit House of Correction or until the expiration of the grand jury or until he purged himself. He was granted bail pending appeal.

August 17, 1970, the prosecuting attorney filed a petition for order to show cause why defendant should not be found in contempt pursuant to MCLA 1971 Cum Supp § 769.19c, added by PA 1970, No 9, which petition was sworn to after all 224 questions were asked of and not answered by defendant. The order to show cause issued and the hearing pursuant to it was held August 21, 1970. Defendant stipulated that the 207 questions were asked of him and that he refused to answer them on the basis of the Fifth Amendment in spite of the order of immunity. Defendant was again found in contempt and he was given the same punishment he was given August 17, 1970.

CL 1948, § 767.19b, added by PA 1970, No 9 (Stat Ann 1971 Cum Supp § 28.959[b]) referred to in the order granting immunity reads in pertinent part:

"The order granting immunity shall extend to all related questions which may thereafter be put to the witness and he shall not be prosecuted for any offense which is discovered as a result of any answers to a question put to him irrespective of the degree of knowledge provided to the questioning authority. No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him."

This statutory provision is broader than the statutory provision involved in *In re Colacasides* (1967), 379 Mich 69,[2] because it specifically covers "any offense which is discovered as a result of any answers" as well as "any offense concerning which such answers may have tended to incriminate". Here, as in *Colacasides,* the immunity order explicitly says that the immunity grant is in accordance with the statute. The statute gives immunity coextensive with the defendant's Fifth Amendment privilege, *Colacasides, supra.*

Defendant's argument to the contrary is untenable. By taking the single phrase "he shall not be prosecuted for any offense which is discovered as a result of any answers to a question", defendant argues that the statutory immunity is not absolute, as it must be. We cannot ignore the statutory language, "no person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him", as does defendant. When the total statutory language is considered, the immunity granted is absolute.

The remaining issues raised are noted and disposed of as follows:

1. The order granting immunity is invalid because it is based on a false petition. The alleged falsity is based on the fact that the petition alleged that defendant "refused to answer questions on the grounds that the answers might incriminate him", when in fact, one question was involved. We decline to dignify the argument by further comment.

2. The order granting immunity is invalid because it is signed by the presiding judge and the Wayne bench *en banc* ordered the summoning of the grand jury. The statute requires the judge who

[2] MCLA § 767.6 (Stat Ann 1954 Rev § 28.946).

summoned the jury to sign the order of immunity. MCLA 1971 Cum Supp § 767.19a (Stat Ann 1971 Cum Supp § 28.959[1]). The presiding judge signed the order summoning the jury.

3. Alleging that the contempt charged was contempt of court and not contempt of the grand jury, defendant asserts he was never ordered to answer by the court, hence no contempt. The petition for order to show cause was for contempt under the provisions of MCLA 1971 Cum Supp § 767.19c, added by PA 1970, No 9, and the contempt found was under this statute. No order or direction was required.

4. Defendant asserts he requested and was denied an explanation of his proposed immunity as limited by the matters before the grand jury, hence, he was denied due process. The record does not support this assertion. Defendant asserted that he was entitled to know the "scope of the questions". (Transcript August 21, 1970, page 25). The area of proposed questions was specified in the petition for order granting immunity, a copy of which was served on defendant.

5. By quoting comments of the trial judge out of context, defendant argues improper standards were imposed in determining guilt. A court speaks by its orders, not its opinions. *Boyle* v. *Berg* (1928), 242 Mich 225. The order here involved found defendant in contempt, "for his refusal to answer questions before the Wayne county citizens' grand jury after being served with a valid order granting him immunity".

6. Defendant claims he was inveigled into the jurisdiction and that service of the subpoena was therefore invalid. The record discloses that defendant was on probation to Recorder's Court. As

a condition precedent to obtaining permission of that court to live outside the state, he agreed to return whenever requested. He was requested and he did return.

7. On a "splitting of cause of action" theory, defendant argues that two contempt proceedings for identical events are improper, hence the second order of contempt is a nullity. Each appearance by a witness before a grand jury is a separate event creating the possibility of separate contempts. Additionally, the sentences on both orders run concurrently and no prejudice is shown.

Affirmed. Defendant's bond is cancelled and he is ordered to commence serving his sentence forthwith.

All concurred.

GARY BOAT CLUB, INC. *v.* OSELKA

1. CONTRACTS—CONSTRUCTION—INTENT—ATTENDANT FACTS.
Due regard must be given to the intentions of the parties to a contract as indicated by their language and the attendant facts and circumstances when construing the provisions of the contract, and such intent, when ascertained, must prevail over the literal meaning of the expressions used in the agreement.

REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 17 Am Jur 2d, Contracts §§ 244, 246, 253.
[2] 5 Am Jur 2d, Appeal and Error §§ 839–842.
[3] 53 Am Jur, Trial §§ 1122, 1123.
[5] 17 Am Jur 2d, Contracts §§ 244–253, 272.
[6] 55 Am Jur, Vendor and Purchaser § 28 *et seq.*
17 Am Jur 2d, Contracts §§ 60, 61, 320–323.

2. TRIAL—NONJURY TRIAL—FINDINGS OF FACT—APPEAL AND ERROR.
A party, on appeal from the decision of a nonjury trial, must show that the trial court clearly erred in making its factual findings (GCR 1963, 517.1).

3. TRIAL—NONJURY TRIAL—COURT'S FUNCTION.
A trial judge in a nonjury action evaluates the testimony of each witness, draws permissible inferences, and decides the issues in the light of controlling principles.

4. CONTRACTS—AMBIGUOUS CONTRACT—COURT'S DUTY—INTENT.
A court must determine the true intent of the parties to a contract by construction of the instrument where ambiguity exists.

5. CONTRACTS—CONSTRUCTION—INTENT—DETERMINATION.
Determining the true intent of contracting parties demands that the trial court consider the language employed, the subject matter, and the surrounding circumstances under which the parties entered into the agreement; the court should effectuate the intent of the parties when the agreement was consummated.

6. CONTRACTS—AMBIGUOUS CONTRACT—OPTIONS.
Determination that an ambiguous contract provision giving the plaintiff the right, after 5 years, to buy the defendants' real estate unless the land was needed for the development of a harbor by the government or for the construction by the defendants of a new navigation channel meant that the option was not exercisable if the land was needed for a government harbor and if for only that reason the defendants had to build a new navigation channel where, during the five-year period in which the option was not exercisable, the defendants had never applied for any of the necessary permits to construct a channel or for a permit to construct a retaining wall, necessary to prevent the flooding of any excavation, and a hole dug in the disputed land was completely flooded for several years.

Appeal from Berrien, Karl F. Zick, J. Submitted Division 3 January 5, 1971, at Grand Rapids. (Docket No. 8173.) Decided March 23, 1971. Leave to appeal denied July 19, 1971, 385 Mich 770.

Complaint by Gary Boat Club, Inc., against Paul F. and Elsie K. Oselka for specific performance of

a contract. Defendants counterclaim. Judgment for plaintiff. Defendants appeal. Affirmed.

Killian, Spelman, Taglia, Meek, Lagoni & Burdick, for plaintiff.

Riley & Roumell (by *Michael H. Feiler*), for defendants.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

MCGREGOR, J. Defendants appeal as of right from a judgment of the circuit court decreeing conveyance of a parcel of land to the plaintiff upon payment to defendants of $44,830. Plaintiff instituted this action, seeking specific performance of the contract of purchase, which it alleged required the conveyance sought. The defendants filed a counterclaim. Both agree that the written agreement (contract) is ambiguous, at least, part of it. Much of the testimony and evidence was conflicting. The trial court found actual ambiguity in the contract, principally in part of paragraph 9 of the agreement.

Defendants are the owners of the Snug Harbor Marina, situated on land across from a peninsula of land bordered on the west by Lake Michigan and on the east by the channel (the channel opens into the Galien River about 200 feet from Lake Michigan), upchannel from the mouth of the Galien River; in addition, they owned the peninsula. Access to Lake Michigan by boats moored in the channel is through the mouth of the Galien River. Since 1954, defendants have annually dredged the mouth to preserve this access to their marina, although other boat owners used the dredged area.

In 1960, the plaintiff boat club was searching for a new location and approached the defendants in its effort to obtain a location for its club on the peninsula. After a series of meetings, the contract here in dispute was executed.

The peninsula was divided into three land parcels: B, the first parcel adjoining the mainland; A, the next contiguous parcel; and C, the tip of the peninsula. Parcel A, with 400 frontage feet on Lake Michigan, was immediately conveyed to plaintiff in return for $40,000. Parcel B was subsequently conveyed to plaintiff in return for $100 per frontage foot, pursuant to the contract. The remaining Parcel C is the subject of this suit. The status of the parcel is governed by paragraph 9 of the contract:

"The Oselkas further grant to the club and its successors, the option, for a period of ten (10) years from the date of this agreement, to purchase the following described real estate, or such part thereof as may remain at the time of the exercise of said option between the Parcel A real estate and the nearest bank of any new navigation channel or harbor which may have been constructed through or along said real estate, for a purchase price of One Hundred ($100.00) Dollars per front foot plus the actual cost to Oselkas of any buildings, landscaping or other improvements hereafter made thereon, to wit: [therein follows the legal description of Parcel C].

"It is understood that the Oselkas contemplate that part of said Parcel C real estate may be needed for the development of a harbor by governmental agencies or for the construction by Oselkas of a new navigation channel leading to Lake Michigan; and, for said purpose, it is agreed that the option herein granted shall not be exercised until either the land required for the aforesaid developments

shall have been determined to the satisfaction of Oselkas or until the expiration of five (5) years from the date of this agreement, whichever event first occurs, and that said option shall be capable of being exercised at any time thereafter and until the the expiration of the said ten (10) year option period."

It was defendants' contention that paragraph 9 permitted them to preclude plaintiff's exercise of an option to purchase Parcel C by making a determination within five years that they personally would build a navigation channel across Parcel C. At the time the disputed contract was written, no constructional work had yet been begun by the Army Corps of Engineers (apparently the government agency referred to in the disputed contract) on the contemplated project. Defendants, however, did not want to continue forever to provide the outlet for the other competing marinas on the channel. They claim that they intended to reserve to themselves the right to determine to construct a private navigation channel across Parcel C within five years after the execution of the contract of purchase, if the Federal project still had not been begun. The conflicting evidence was properly considered by the trial court, in finding that defendants' notice was given in bad faith.

The trial court found:

"(c) Mr. Oselka, himself, admitted that he never, at any time applied for a permit from the Federal, state, city or village government to construct a channel, although he knew that such a permit was necessary. He further testified that he knew that a retaining wall on the Lake Michigan side of his excavation would be necessary to prevent Lake Michigan from overflowing and filling in his excavation; that a permit for this retaining wall would

be necessary and that he never applied for a permit for such retaining wall. Lake Michigan was in fact allowed to flow completely over and fill the hole dug in Parcel C, between 1965 and 1968."

In construing the provisions of a contract due regard must be given to the intentions of the parties as indicated by their language and the attendant facts and circumstances, and such intent, when ascertained, must prevail over the literal meaning of the expressions used in the agreement. *Stark* v. *Budwarker, Inc.* (1970), 25 Mich App 305.

An additional issue at trial was to what amount, if any, defendants were entitled as "the actual cost to Oselkas of any buildings, landscaping or other improvements hereafter made thereon" if the defendants were required to convey. Defendants claimed as improvements the construction of seawalls, boat wells, a gas dock, and walkways. Plaintiff claimed these amounts should be offset by waste committed by defendants, and also claimed that these items of construction were not, in most instances, improvements but were maintenance and repairs for the benefit of the defendants.

The trial judge found for the plaintiff, and disallowed defendants' claims except for a part thereof, finding waste to have been committed by the defendants. The trial court further ordered specific performance by the defendants upon payment by the plaintiff of $40,330 for 403.30 feet of frontage, plus damage adjustments and improvements of $4,500, for a total of $44,830, with taxable costs to plaintiff.

The principal issues before this Court appear to be: (1) whether the trial court clearly erred in interpreting an admittedly ambiguous contract in the manner in which it did, and (2) whether the trial court clearly erred in excluding as costs of improve-

ments those repairs, maintenance, and improvements built on the property. There were other issues raised which are not pertinent to this decision.

This was a nonjury trial, and the defendants, on appeal, must show that the trial court clearly erred in making its factual findings. GCR 1963, 517.1; *Insurance Company of North America* v. *Iroff* (1967), 9 Mich App 151. A trial court, as the trier of facts, when sitting without a jury, evaluates the testimony of each witness, draws permissible inferences therefrom, and decides the issues in the light of controlling principles. *Texaco, Inc.,* v. *Lumsden* (1970), 23 Mich App 30. Plaintiff bears the burden of establishing its interpretation of the contract by a clear preponderance of the evidence; there must be a glaring error by the trial court on a finding of fact to afford occasion for reversal by this Court. *Barnes* v. *Beck* (1957), 348 Mich 286. Plaintiff, as draftor of the agreement, had an initial burden of overcoming the presumption that an ambiguous contract term is to be strictly construed against the preparer of the contract. *Keller* v. *Paulos Land Company* (1968), 381 Mich 355, 362.

The critical factor in the trial court's findings is the ambiguity of the contract as set out, *supra.* The original states that part of Parcel C "may be needed for the development of a harbor by governmental agencies or for the construction by [the defendants] Oselkas of a new navigation channel leading to Lake Michigan". The trial court reconstructed this to read that Parcel C "may be needed for the development of a harbor by governmental agencies and that it may for that reason be necessary for the Oselkas to construct a new navigational channel leading to Lake Michigan".

"We are well aware of the settled rules of law, so well established that citation of authority therefor

is unnecessary, that it is not the province of the court by construction or by the addition of words or punctuation to remake the contract of the parties or to find a meaning not intended. Where ambiguity exists, however, it is the duty of the court to determine, if possible, the true intent of the parties by construction of the instrument." *Fox* v. *Detroit Trust Company* (1938), 285 Mich 669, 677.

In determining this "true intent" the trial court should consider the language employed, the subject matter, and the surrounding circumstances under which the parties entered into the agreement; it should effectuate the intent of the parties when the agreement was consummated. *Kellogg* v. *Kellogg Toasted Corn Flake Co.* (1920), 212 Mich 95; *Montgomery* v. *Central National Bank & Trust Co. of Battle Creek* (1934), 267 Mich 142.

In the instant case, the trial court found:

"The court specifically finds that at no time between the execution of the agreement of the parties and the expiration of five (5) years was there any reasonable cause on the part of Oselkas or the Boat Club to apprehend the necessity of a channel through Parcel C in connection with the development of a harbor by governmental agencies."

The trial court's finding that defendants' option to build a navigational channel only if the Federal government also built a harbor can be supported from the evidence.

Defendants contend that the trial court, after mandating sale of the parcel, erred in disallowing their claims for alleged improvements pursuant to the contract. Defendants claimed that the seawalls, docks, and the boat wells constitute such compensable improvements. It was plaintiff's contention that all or much of the defendants' alleged improvements merely constituted maintenance or ordinary

repairs, or was for defendants' current use, and that further defendants had committed waste on the property.

The evidence was conflicting regarding the improvements, and the findings of fact made by the trial court were sufficient to indicate a factual basis for its ultimate conclusion. *Lacey* v. *City of Warren* (1967), 7 Mich App 105.

This Court has analyzed the defendants' claim of error concerning the deposition, and finds no reversible error therein.

Affirmed. Costs to plaintiff.

All concurred.

BENINCASA *v.* MIHAILOVICH

1. VENDOR AND PURCHASER—LAND CONTRACT—ACCELERATION CLAUSE —VALIDITY.

   An acceleration clause in a land contract, although clearly valid, is harsh and in the nature of a forfeiture or penalty; an appellate court will refuse to infer that an acceleration clause exists if the contract between the parties does not provide it.

2. VENDOR AND PURCHASER—LAND CONTRACT—ACCELERATION CLAUSE —INTENT.

   Plaintiff vendors did not have a right to accelerate the balance on a land contract on the vendee's transfer of a liquor license even though the transfer was in violation of an agreement between the parties where the land contract for the sale of a motel and a security agreement covering furniture in the

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 55 Am Jur, Vendor and Purchaser §§ 340, 453.
[3] 55 Am Jur, Vendor and Purchaser §§ 644, 663.
[4] 42 Am Jur 2d, Injunctions §§ 78, 79.

motel sold were designed to protect the vendors in case of a default in the land contract, not a transfer of the liquor license.

3. VENDOR AND PURCHASER—LAND CONTRACT—LIQUOR LICENSE—SALE OF LICENSE—DEFAULT.

Plaintiff vendors on a land contract were not entitled to have a liquor license retransferred to them where vendee had conveyed the liquor license to a third party in violation of a separate agreement with the vendors, the agreement covering the liquor license did not require the vendee to retransfer the license unless there had been a default on the land contract, and the land contract had not been breached.

4. VENDOR AND PURCHASER—INJUNCTION—LIQUOR LICENSES—TRANSFER OF LICENSE.

An injunction prohibiting further transfer of a liquor license was a proper and adequate remedy even though the vendee, on land contract, of a motel had transferred the liquor license used in conjunction with the motel in violation of an agreement, separate from the land contract, not to transfer the liquor license as long as the vendors had an interest in the land contract where the third party who acquired the license also purchased the vendee's interest in the motel and had agreed not to transfer the liquor license from the motel and where land contract vendors' primary concern was that the removal of the liquor license from the motel would diminish their security by decreasing the motel's trade.

Appeal from Muskegon, John H. Piercey, J. Submitted Division 3 February 2, 1971, at Grand Rapids. (Docket No. 8175.) Decided March 23, 1971.

Complaint by William and E. Kathleen Benincasa against Risto Mihailovich, Volney Swift, the Liquor Control Commission, and James A. Smalley for foreclosure of a land contract and reassignment of a liquor license. Summary judgment for defendants and injunction prohibiting further transfers of the liquor license. Plaintiffs appeal. Affirmed.

Stiles & Fowler, for plaintiffs.

Poppen, Street, Sorensen & Engle, for defendants.

Before: FITZGERALD, P. J., and V. J. BRENNAN and T. M. BURNS, JJ.

V. J. BRENNAN, J. This appeal arises out of a suit to foreclose a land contract. From a judgment in favor of the defendant vendee, the plaintiffs appeal.

The plaintiffs, William and Kathleen Benincasa, were the owners of improved land in Laketon Township on which was situated a motel and a combination bar and restaurant. In 1964, plaintiffs leased the bar and restaurant to William J. Perry and George C. Ollier. The lease gave the plaintiffs a right of first refusal to purchase the goodwill of the business and the class C liquor license. On February 14, 1966, plaintiffs entered into a land contract with defendant Mihailovich for the sale of the motel. On the same day, the parties entered into two other agreements. First, Mihailovich executed a document entitled "Security Agreement", which created a security interest in the furniture, equipment, and fixtures contained in the motel in favor of the plaintiffs. It provided that a default under the land contract was a default under the security agreement. This was intended as additional security for the land contract. Second, the plaintiffs executed a document entitled "Assignment", in which they assigned their interest in the lease and their right of first refusal to defendant. As part of that same agreement, defendant Mihailovich covenanted as follows:

"In the event Risto Mihailovich acquires the class 'C' liquor license aforementioned and, during the existence of the land contract between the said Ris-

to Mihailovich and William J. Benincasa and E. Kathleen Benincasa, the said Risto Mihailovich should default on his obligations to the said Benincasas, then, and in that event, the Benincasas shall be entitled to purchase from the said Risto Mihailovich all of his right, title and interest in and to said liquor license for a sum identical to that expended by the said Risto Mihailovich in the purchase of said license, unless said Risto Mihailovich shall cure said default in accordance with the terms of said land contract.

"It is further agreed that so long as William J. Benincasa and E. Kathleen Benincasa have any interest in the Tally-Ho Motel, under the terms of said land contract, Risto Mihailovich agrees that he will not voluntarily dispose of said liquor license."

The intent here also was to give the sellers additional security for the debt owing on the land contract.

Thereafter, Mihailovich did in fact acquire the liquor license, but in December of 1967, he sold his interest in the bar and restaurant and the liquor license to one Volney Swift. The purchase agreement provided:

"The purchaser [Swift] agrees that he will not attempt to transfer the liquor licenses now in the name of the seller [Mihailovich] from the premises during the original term of such lease or any option term thereof."

On March 7, 1968, the plaintiffs instituted the present suit to foreclose the land contract and to force Volney Swift to reassign the liquor license to the plaintiffs. Plaintiffs filed a motion for summary judgment praying for acceleration of the balance due on the land contract as provided therein. Defendants likewise filed a motion for summary judgment. The trial court, having decided that

there were no disputed issues of fact, granted the defendants' motion for summary judgment. As requested by the plaintiffs, however, the court enjoined Swift and Mihailovich from petitioning the Liquor Control Commission to make any further transfers of the license until the plaintiffs are paid or unless they consent thereto. The court stated in its opinion that the vendee had not defaulted in any payments and that the injunction would sufficiently protect the security of the vendors.

Since it is undisputed that the defendant Mihailovich has breached his promise to refrain from disposing of the liquor license, we must determine whether the plaintiffs were entitled to declare a default and accelerate the balance due under the land contract.

Looking to the terms of various agreements which comprised the transaction in question, we are unable to find a provision in any of them which states that breach of the above-quoted covenant in the *assignment agreement* is a default under the *land contract.* The acceleration clause in the land contract applies only if "the buyer shall fail to perform any of the covenants or conditions *contained in this contract*". (Emphasis supplied.) It is clear that such clause is expressly limited to breach of the covenants contained on the face of the land contract itself. Furthermore, the relevant portion of the assignment agreement does not provide for acceleration. It merely recites that the buyer will not dispose of the license but does not specify what consequences will flow if he does do so. Thus, the parties have made no express provision for acceleration in the case of the defendants' breach of the covenant against transfer of the liquor license.

While acceleration clauses in land contracts are clearly valid, *Brody* v. *Crozier* (1928), 242 Mich 660, they have been variously described as "harsh,"[1] and "in the nature of a forfeiture or penalty".[2] In view of the severity of this remedy, we refuse to imply that it exists if the contract between the parties does not provide for it. In an analogous situation where the plaintiffs claimed the right to declare a forfeiture for breach of a covenant, the Court in *Hull* v. *Hostettler* (1923), 224 Mich 365, 369, said:

"But the Lambergs claim that they have a right to declare a forfeiture of the contract because of the breach of this covenant. If it could be said that for this reason they might have such a right, in any case, they have none in this, because the contract does not give it to them. It declares some causes of forfeiture, but does not include a violation of the non-assignability clause. None can be implied. In view of these facts, if the vendors have any remedy because of the assignment, it is an action for damages for breach of the covenant."

This reasoning is equally applicable to the case at bar.

Finally, we are reluctant to imply an extension of the strict terms of the acceleration clause for yet another reason. When the different agreements entered into by the parties in February, 1967, are viewed as a whole, it is manifest that the emphasis was on the plaintiffs' remedies in case of a default in the obligation of the land contract. It is for this reason that the "Security Agreement" provided:

"Default in payment and performance of any of the obligations of the debtor, contained in said land contract, is a default under this agreement."

---

[1] *Young* v. *Zavitz* (1961), 365 Mich 354.
[2] *Wilcox* v. *Allen* (1877), 36 Mich 160.

Significantly, at no time did the parties agree that the converse was also true, *i.e.*, a breach of some obligation under one of the personal property security agreements, which provided merely additional security for the same debt, would be a default under the land contract. We must therefore conclude that the parties did not contemplate the result now urged by the plaintiffs.

Since we hold that the plaintiffs had no right to accelerate the balance due for breach of the covenant not to transfer the license, the lower court was correct in denying their motion for summary judgment.

The only remaining question, whether the lower court should have ordered Volney Swift to reconvey the license to plaintiffs, is easily answered. That the assignment does not require the defendant to sell the license to the plaintiffs unless there has been a default *under the land contract* is evident from the language in the assignment to the effect that the default must be cured "in accordance with the terms of said land contract". The covenant not to transfer the license was not part of the land contract and breach thereof is not a default. Plaintiffs are not entitled to have the license transferred to them.

From their brief it is clear that the plaintiffs' main concern is that the liquor license stay on the premises. They argue that the bar is necessary to draw trade for the motel and that without it the motel would suffer a great financial setback. This setback, in turn, would diminish the value of the plaintiffs' security. We agree with the trial court that under the circumstances of this case the injunction against further transfer of the liquor license from the premises is all the security to which the plaintiffs are entitled.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

All concurred.

WESTGATE *v.* MATHEWS

PROPERTY—TITLE—COLOR OF TITLE—ACTUAL POSSESSION.

Actual possession of some portion of disputed land is necessary to establish ownership of the disputed land under the doctrine of possession under color of title; title to land cannot be gained simply because it was erroneously included in a claimant's deed.

Appeal from Newaygo, Harold Van Domelen, J. Submitted Division 3 November 9, 1970, at Grand Rapids. (Docket No. 8210.) Decided March 23, 1971.

Complaint by Russell E. Westgate against Erwin M. and Hazel L. Mathews to quiet title. Judgment for defendants. Plaintiff appeals. Affirmed.

Bergstrom, Slykhouse & Shaw (by *Robert G. Quinn*), for plaintiff.

Paul L. Greer and *Theodore A. Caris,* for defendants.

REFERENCE FOR POINTS IN HEADNOTE

42 Am Jur, Property §§ 36, 42, 43.

Before: T. M. BURNS, P. J., and R. B. BURNS and MUNRO,* JJ.

T. M. BURNS, P. J. This cause arises out of a dispute over the ownership of a parcel of land some 54.2 feet wide north and south and 198 feet wide east and west. (The disputed area is bordered by line C—C[1] on the north and D—D[1] on the south on the attached diagram.) From a judgment of no cause entered September 17, 1969, by the court sitting without a jury, plaintiff appeals.

In 1936, Elmore Westgate, plaintiff's father and predecessor in title, purchased a piece of land 12 rods square from a Mr. and Mrs. Schmidt. This piece of land would be bounded by the lines A—A[1] on the north and C—C[1] on the south on the attached diagram. On December 9, 1938, Elmore Westgate sold this piece of property to his son, the present plaintiff. However, the description contained in the deed included the disputed land to which Elmore Westgate never had title.

On November 3, 1952, Forrest and Mary Waldo purchased a large parcel of land from Mrs. Schmidt, her husband then being deceased. The deed gave title to land surrounding plaintiff's land, and excepted only that portion (bounded by A—A[1] and C—C[1] on the diagram) which the Schmidts had deeded to plaintiff's father. The conveyance to the Waldos thus included the disputed property bounded by C—C[1] and D—D[1] on the diagram.

On June 24, 1967, the Waldos sold a parcel of land which included the disputed area to the defendants. In the fall of 1967, defendants started construction of a laundromat, part of which was on the disputed parcel. Plaintiff, upon learning of the use defendants were intending for the land

* Circuit judge, sitting on the Court of Appeals by assignment.

which he thought to be his, brought this action to quiet title.

Plaintiff alleges title based upon three theories of the law: (1) adverse possession; (2) possession under color of title; and (3) acquiescence in the boundary line by the adjoining property owners for more than 15 years.

1. *Whether plaintiff's acts of ownership over the disputed parcel were of such a character as to meet the requirements necessary to gain title by adverse possession.*

The land to which plaintiff actually has title and is in actual possession of has been used by him and his tenants as a gasoline station since 1958. At the trial plaintiff attempted to show that the disputed land had been used to store junk cars; the taxes had been paid upon the parcel by plaintiff since 1938; and the land was surveyed and stakes set at various times since 1938 evidencing the boundaries to be as plaintiff contends.

Defendants asserted that the land is low and swampy and at times was filled with water and that the junk cars were never stored on the disputed parcel. Based upon all of the conflicting testimony the trial court arrived at the following decision:

"The plaintiff has failed to prove by a preponderance of the evidence that he or his predecessor in title have for any 15-year period had possession of this disputed area in a continuous, visible, notorious manner as to the record title holder. The evidence is devoid of any proof of occupation of any part of the disputed area by plaintiff except for part of an old truck or car extending over the line for a period shorter than 15 years."

The transcript of the trial reveals a great conflict in the testimony. However, the trial court, upon

hearing the testimony and weighing the credibility of the witnesses, found that the plaintiff had not made a visible and hostile use of the disputed land. This Court in *Rose* v. *Fuller* (1970), 21 Mich App 172, held that findings of fact shall not be set aside unless clearly erroneous.[1] The Court went on to state that the findings of fact shall not be disturbed unless, upon a review of the entire record, the reviewing court would have reached a different result.[2] The Supreme Court in *Martin* v. *Arndt* (1959), 356 Mich 128, held that great weight is given to findings of fact, particularly when there is a conflict in the testimony.

Based upon the above authority and our review of the record, which reveals ample evidence to support the trial court's findings, we affirm the trial court's determination that plaintiff had not gained title to the disputed land by adverse possession.

2. *Whether plaintiff gained title to the disputed land by possession under color of title to the land through his 1938 deed.*

Plaintiff argues that since he was in actual possession of the parcel which had been rightfully deeded to him by his father, he was also in constructive possession of the whole parcel deeded to him. Plaintiff contends, therefore, that since he has been in constructive possession of the disputed parcel since 1938, the date of the deed, that he has gained title to the land.

However, plaintiff must be in actual possession of some portion of the disputed land before good title may be gained in this manner. In *Turner* v. *Stephenson* (1888), 72 Mich 409, a similar fact situation was presented to the Supreme Court. In

[1] See GCR 1963, 517.1.
[2] *Rose* v. *Fuller, supra,* p 177.

holding that the claimant could not acquire title without being in actual possession of the disputed land the Court stated:

"We cannot see how a man, by simply occupying his own land, the title to which is not disputed, can acquire title to another's land, simply because the deed to the land he occupies covers adjoining land, which he neither owns nor occupies. If so, then the mere recording of a deed would amount constructively to actual possession. The plaintiff in this case, or any other person, is not bound to suppose that a man occupying adjoining land to his own is thereby claiming title to or possession of his premises."[3]

Since we have already found that the trial court was correct in its determination that plaintiff was not in actual possession of the disputed land, we must affirm the trial court's holding that plaintiff could not gain title to the parcel simply because it was erroneously included in his deed.

3. *Whether plaintiff acquired title to the disputed parcel by reason of acquiescence in the boundary line by the adjoining property owners for more than 15 years.*

The trial court found that there was no controversy or dispute over the boundary line between the plaintiff and any of the adjoining owners. While there was testimony which might tend to raise the inference that the prior property owners had acquiesced in the boundary, the finding of the trial court was not against the preponderance of the evidence. There was sufficient evidence to find that the defendants' predecessors in title did not know exactly where the boundary line was, and

[3] *Turner* v. *Stephenson, supra,* p 411.

because the parcel was unused and unusable, did not bother to find out where the boundary ran.

The fact that both of defendants' immediate predecessors in title gave deeds which included the disputed parcel seems to repudiate the inference that they had acquiesced to the line south of the disputed area. There was no really persuasive evidence that any boundary other than that described in the original deed to plaintiff's father was contemplated or agreed to by defendants' predecessors in title.

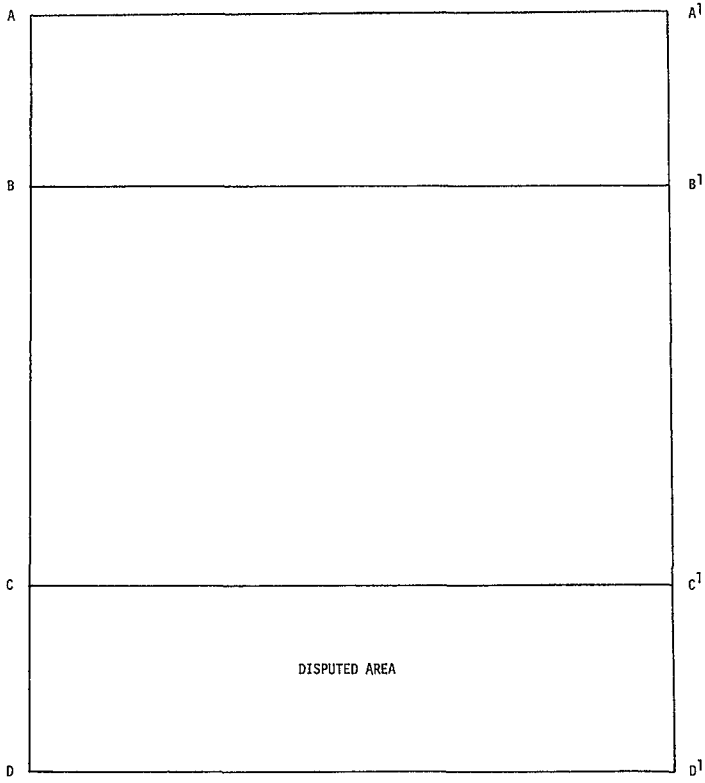
The trial court's finding that there was no acquiescence to a boundary other than that described in defendant's deed has support in the evidence and will not be set aside.[4]

Affirmed.

All concurred.

---

[4] See *Rose* v. *Fuller, supra.*


A
A1
B
B1
C
C1
DISPUTED AREA
D
D1

DE BRUYN BROTHERS REALTY COMPANY *v.*
PHOTO LITH PLATE SERVICE CORPORATION

1. LANDLORD AND TENANT — CONSTRUCTIVE EVICTION — ADEQUATE HEAT — RODENT INFESTATION.

   Landlord's failure to provide adequate heat and to control rodent infestation was sufficient to deprive the tenant of the beneficial use and enjoyment of the leased premises and constituted a constructive eviction.

2. LANDLORD AND TENANT—CONSTRUCTIVE EVICTION—WAIVER—PAYMENT OF RENT—RELIANCE.

   Tenant's paying the rent for two months after it had vacated the leased premises did not waive its defense of constructive eviction where the rent was paid because of reliance on the landlord's promises to correct the conditions constituting the constructive eviction.

3. LANDLORD AND TENANT—CONSTRUCTIVE EVICTION—SUB-LEASING VALUE—PARKING SPACES.

   Landlord's failing to provide tenant parking spaces, as agreed to by the parties, and storing articles in the leased premises after the defendant tenant had vacated the premises, on the grounds of lack of heat and rodent infestation, constituted a constructive eviction, because any value to the tenant in subletting the premises was destroyed by the landlord's actions.

Appeal from Kent, John T. Letts, J. Submitted Division 3 January 6, 1971, at Grand Rapids. (Docket No. 8262.) Decided March 23, 1971.

REFERENCES FOR POINTS IN HEADNOTES

[1] 49 Am Jur 2d, Landlord and Tenant §§ 301, 310.
[2] 49 Am Jur 2d, Landlord and Tenant §§ 303, 310.
[3] 49 Am Jur 2d, Landlord and Tenant § 301.

Complaint by De Bruyn Brothers Realty Company against Photo Lith Plate Service Corporation for rent on a lease. Judgment for defendant. Plaintiff appeals. Affirmed.

Wheeler, Upham, Bryant & Uhl (by *Edwin F. Uhl* and *Geoffrey L. Gillis*), for plaintiff.

Warner, Norcross & Judd (by *William K. Holmes*), for defendant.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

T. M. BURNS, J. In January 1961, plaintiff as lessor and defendant as lessee entered into a lease for certain premises in the City of Grand Rapids. The lease provided for a monthly rent of $165 and covered the period of January 1, 1961 to January 1, 1966.

In May 1964, defendant vacated the premises. Defendant paid the rent for June and July of 1964, but then made no further rent payments during the remaining 17 months of the lease.

Plaintiff then brought an action for rent. Defendant raised the affirmative defense of constructive eviction and also cited plaintiff's failure to mitigate damages. The trial court found that defendant had been constructively evicted and that the lease was terminated when defendant vacated the premises. Plaintiff appeals by right.

Defendant based his defense of constructive eviction upon the failure of the plaintiff to provide adequate heating and also plaintiff's failure to control rodent infestation of the leased premises. Defendant also claimed that plaintiff's actions after defendant had vacated the premises, *i.e.*, failing to

provide parking spaces as agreed and allowing clutter to accumulate on the premises, prevented defendant from subleasing the premises.

The trial court, sitting without a jury, found all of defendant's allegations to be true. Our review of the record reveals ample evidence to support the trial court's findings of fact and we will not, therefore, set them aside since they are not clearly erroneous.[1] The only question for this Court to decide then is whether the existence of the above facts would result in a constructive eviction.

In *Pridgeon* v. *The Excelsior Boat Club* (1887), 66 Mich 326, 327, 328, the Court stated:

"A party should be held evicted when the act of the landlord is of such a character as to deprive the tenant, or has the effect of depriving him, of the beneficial use and enjoyment of the whole or any part of the demised property, to the extent he is thus deprived."

The failure by the landlord to provide adequate heat was sufficient ground to justify defendant in vacating the premises. Lack of heat would certainly deprive the tenant of the beneficial use and enjoyment of the premises and, therefore, under *Pridgeon,* defendant should be held to have been evicted. We, therefore, hold that defendant was constructively evicted from the premises due to lack of heat and rodent infestation and was under no further duty to pay rent once the premises had been vacated.

Plaintiff contends, however, that even if defendant was constructively evicted from the premises, the defense of constructive eviction was waived because defendant continued to pay rent for two months after it had vacated. We disagree. De-

[1] GCR 1963, 517.1.

fendant had, on many occasions, requested that the heating problems be corrected. Plaintiff had promised to cure this problem and also to eliminate the rodents. Plaintiff did neither of these.

Defendant cannot be said to have waived the defense of constructive eviction by paying rent upon the reliance that the landlord would correct the conditions complained of.

In any event, plaintiff's actions subsequent to the time defendant moved out, *i.e.,* failing to provide parking spaces and storing articles in the demised premises, destroyed any value the premises may have had to the defendant as far as subletting is concerned. These actions then also deprived defendant of the beneficial use of the premises and could amount to a second constructive eviction. Even if we were to hold that the first constructive eviction was waived as a defense by the defendant, the second eviction by the plaintiff is sufficient to uphold the trial court's decision.

Affirmed.

All concurred.

PEOPLE v. HEAD

1. CRIMINAL LAW—PLEA OF GUILTY—VOLUNTARINESS—FACTS OF OFFENSE.

A trial judge before accepting a plea of guilty must ascertain from the defendant that the plea is freely, understandingly, and voluntarily made; but the trial judge is not required to obtain from the defendant the facts of the offense (GCR 1963, 785.3[2]; MCLA § 768.35).

2. CRIMINAL LAW—PLEA OF GUILTY—FACTS OF OFFENSE—ESTABLISHING OFFENSE.

A plea of guilty establishes the crime charged and the guilty-pleading defendant's participation in the crime (GCR 1963, 785.3[2]).

Appeal from Wayne, Thomas J. Foley, J. Submitted Division 1 January 5, 1971, at Detroit. (Docket No. 8308.) Decided March 23, 1971.

Glenn Marvin Head was convicted, on his plea of guilty, of driving under the influence of intoxicating liquor, third offense. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

Richard B. Whitney, for defendant on appeal.

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 485, 486.
[2] 21 Am Jur 2d, Criminal Law § 495.

Before: R. B. BURNS, P. J., and J. H. GILLIS and DANHOF, JJ.

DANHOF, J. Once more this Court encounters an appeal taken as a matter of right from a plea of guilty. Examination of the record discloses, more clearly than usual, that the defendant is not appealing his plea but appealing the sentence. This is evident from the petition which the defendant filed in the trial court asking for the appointment of appellate counsel and which states:

"and he (defendant) petitions said court to appoint an attorney and to furnish such attorney with such portions of the transcript as he requires to prepare post conviction motions and/or to perfect an appeal. *For sentence reduction*" (Emphasis added.)

It is interesting that the underlined portion was added to the printed form, obviously in the defendant's own hand, and exhibits his real reason for filing an appeal in this case.

The facts in the case are relatively simple. Defendant was arrested upon a warrant issued by the Municipal Judge of the City of Lincoln Park on March 6, 1969. The warrant charged the defendant with driving under the influence of intoxicating liquor, third offense, in violation of MCLA § 257.625 (Stat Ann 1968 Rev § 9.2325). The defendant waived preliminary examination and was bound over to Circuit Court for Wayne County. On May 8, 1969, defendant's retained counsel filed an appearance, and on the same date defendant appeared for arraignment before the Honorable Joseph A. Sullivan. Defendant stood mute and a plea of not guilty was entered by the court. On June 2, 1969,

a waiver of jury trial was executed and filed by the defendant. On the same day defendant, accompanied by his retained counsel, entered a plea of guilty to the information as filed. Thus, this is not a case of plea bargaining.

At the arraignment held before the Honorable Thomas J. Foley, Circuit Judge of the Third Judicial Circuit, defendant's retained counsel made the following statement: "Your Honor, I have discussed the charge with my client, and gone over the facts, and we are prepared to plead guilty to the charge". As stated before this is a relatively simple charge, not complicated or difficult to understand. The information states:

"that Glenn Marvin Head late of the City of Lincoln Park in said county, heretofore, to wit, on the 28 day of February A.D. 1969 at the said City of Lincoln Park in said County, Wayne did then and there drive a motor vehicle, to wit: a Pontiac convertible, 1969 Michigan License Number EX 4613; upon and along Fort Street, in the said City of Lincoln Park, County of Wayne and State of Michigan, while he, the said Glenn Marvin Head was then and there under the influence of intoxicating liquor; he, the said Glenn Marvin Head, having been heretofore, to wit, on the 30th day of March A.D. 1964, and on the 11th day of March, A.D. 1965, convicted in the Justice Court of the Township of Taylor (March 30, 1964) and convicted in the Municipal Court of the City of Lincoln Park (March 11, 1965); of the offense of operating a motor vehicle while under the influence of intoxicating liquor, and the offense hereinbefore set forth constitutes a third or subsequent offense; and the said Glenn Marvin Head is so herein charged as a third or subsequent offender;"

At the arraignment the trial judge stated:

"Your counsel states you wish to offer a plea of guilty to the third offense drunk motor law, violation of the drunk motor law. Is that correct?

"The Defendant: Yes, sir.

"The Court: Are you aware that a third offense carries a penalty up to four years in prison, and/or a fine of $2,000? Are you aware of that?

"The Defendant: Yes, sir.

"The Court: You know that you could proceed and have a trial by jury, or waive the trial by jury and be tried by the court without a jury, and that this is up to you to decide? You understand that?

"The Defendant: Yes, sir.

"The Court: You understand that the court at this time has no idea what it will do with this case as far as a penalty is concerned because I haven't got a pre-sentencing report yet; I won't make up my mind until such time as I get that report? You understand that?

"The Defendant: Yes.

"The Court: Has anybody offered you any leniency or offered you any inducement to bring about this plea?

"The Defendant: No."

The court then advised the defendant that his previous driver's license had been suspended and that a plea in the instant case would bring about a revocation. The trial court then made the following statement:

"Knowing these things as I have explained them to you, do you still desire to plead guilty to the third offense violation of drunk motor law?

"The Defendant: Yes."

The trial judge sentenced the defendant to a term in the State Prison of Southern Michigan.

From that sentence defendant appeals. He alleges that the court failed to make sufficient inquiry as to the voluntariness of the plea and failed to in-

quire as to the nature of the defendant's acts so as to ascertain the truth of the plea.

A review of the record indicates that there is no question as to the voluntariness of the plea, and further that the question of voluntariness not having been raised before the trial court is not properly before this Court. *People* v. *Taylor* (1970), 383 Mich 338.

The defendant asserts, however, that the record is devoid of any factual basis of the plea and cites to us the requirements of GCR 1963, 785.3(2), and *People* v. *Perine* (1967), 7 Mich App 292. In *People* v. *Perine, supra,* p 294, this Court stated the question to be:

"Did the trial judge commit error in failing to obtain from the defendant what acts in fact he had committed so as to constitute the crime to which he was entering a plea of guilty?"

The Court went on to point out (p 294):

"The record before us contains no examination of the accused by the trial judge with respect to the facts of the crime and defendant's participation in it.

"This noncompliance with GCR 1963, 785.3(2), is fatal to the validity of the plea. Whether a defendant is represented by counsel or not such examination is required. *People* v. *Barrows* (1959), 358 Mich 267."

It appears to us that much of the confusion concerning the requirements imposed on the trial court during arraignment arises from the opinion in *People* v. *Barrows* (1959), 358 Mich 267. A reading of that opinion and from the portions of the record cited therein discloses that the defendant, Barrows, never in fact himself pled guilty. Rather, the plea of guilty was made by his attorney. The only state-

ment the respondent made was in response to a question from the court, "How old are you young man?" The respondent answered, "nineteen".

This writer has looked in vain for a requirement under GCR 1963, 785.3(2), in its predecessor, Court Rule No 35A (1945), or the statute, MCLA § 768.35 (Stat Ann 1954 Rev § 28.1058), which requires the trial judge to obtain from the defendant the facts of the offense. Nor, upon close scrutiny do we find such a requirement in *People* v. *Barrows, supra.* In *Barrows,* Justice EDWARDS states (p 272):

"The direct questioning of a defendant by the trial judge on plea of guilty is required by the rule for the purpose of establishing the crime and the participation therein of the person pleading guilty. This is a precaution against involuntary or induced false pleas of guilty, and against subsequent false claims of innocence.

"In the present situation there are facts which establish an obvious inducement for the plea. In addition, the defendant was young and this was his first experience with criminal court. He protested his innocence at every point when given an opportunity to do so. He protests innocence of the crime at this time."

Careful study of *Barrows, supra,* indicates that what is needed is an examination by the trial judge of the defendant in which the defendant himself and not through his attorney pleads guilty. The trial court must ascertain from the defendant that the plea is freely, understandingly, and voluntarily made. When this has been done and the plea accepted, then the purpose of the rule has been complied with, and it is the plea of guilty that establishes the crime charged and the participation of the defendant therein.

In the instant case the trial judge ascertained that the defendant knew and understood the charge and that he made a free and understanding and voluntary plea of guilty upon the advice and in the presence of his retained counsel. There is in this case no protestation of innocence, either at the trial level or at the appellate level, and it is clear that the defendant is not protesting his innocence, but rather, is objecting to the sentence which he received from the trial court.

Thus, upon the record presented to us, we are convinced that this defendant did freely, understandingly, and voluntarily plead guilty to the offense for which he was charged.

Affirmed.

All concurred.

BRADY *v.* MICHIGAN CONSOLIDATED GAS COMPANY

NEGLIGENCE—NONJURY TRIAL—APPEAL AND ERROR.

Finding that the plaintiff, injured when the ground she was walking on collapsed, failed to prove that her injuries were caused by the defendant's digging a hole, failing to restore the ground, and failing to make the area safe for use was clearly mistaken and mandated reversal and a new trial where there was testimony that the defendant had been digging in the area of the accident for about a week several weeks before the accident, the plaintiff's witnesses were uncertain whether the digging occurred at the place where the plaintiff was injured or at a short distance away, and where the trial judge's finding was based on the conclusion that the plaintiff had failed to prove that the defendant had dug at the precise spot where the accident occurred; however, because the defendant presented only proofs on damages, the cause was remanded for a new trial.

Appeal from Wayne, George T. Martin, J. Submitted Division 1 November 12, 1970, at Detroit. (Docket No. 8331.) Decided March 23, 1971. Leave to appeal denied May 20, 1971, 384 Mich 842.

Complaint by Joanne Brady against the Michigan Consolidated Gas Company for damages for personal injury. Judgment of no cause of action for

---

REFERENCES FOR POINTS IN HEADNOTES

5 Am Jur 2d, Appeal and Error § 839 *et seq.*
39 Am Jur 2d, Highways, Streets, and Bridges §§ 364, 482, 496.
38 Am Jur, Negligence § 130.
53 Am Jur, Trial § 1148.
Liability of landowner for injury to or death of child caused by cave-in or landslide. 28 ALR2d 195.

defendant. Plaintiff appeals. Reversed and remanded.

John Cozart, Jr., for plaintiff.

Dyer, Meek, Ruegsegger & Bullard (by *Richard J. McClear*), for defendant.

Before: V. J. BRENNAN, P. J., and LEVIN and PETERSON,* JJ.

LEVIN, J. Plaintiff, Joanne Brady, stepped out of an automobile onto ground which appeared to her to be solid, but was, in fact, faulty. She sank into a hole up to her chest.

There was testimony that the defendant gas company had been digging in the area for about a week several weeks before the accident, but the witnesses were uncertain whether the digging occurred at the place where the plaintiff suffered her injuries or at a short distance, less than 50 feet, from it. The trial judge, who sat without a jury, found that the plaintiff did not preponderate, not because he disbelieved the testimony of the plaintiff's witnesses, but because he concluded that the plaintiff had failed to prove that the defendant had dug at the precise spot where the accident happened.

We are left with the definite and firm conviction that the judge made a mistake in finding that the plaintiff failed to prove that her injuries were caused by the negligence of the defendant in digging and not restoring the ground and in failing to make the area again reasonably safe for use.[1]

---

* Circuit judge, sitting on the Court of Appeals by assignment.

[1] GCR 1963, 517.1; 2 Honigman and Hawkins, Michigan Court Rules Annotated (2d ed), pp 596, 597, authors' comments.

We observed in *Humphrey* v. *Swan* (1968), 14 Mich App 683, 686:

In the light of the entire record we do not wish to preclude the defendant, who offered no proofs on liability, only on damages, from controverting plaintiff's claim, and, accordingly, we do not confine the inquiry on remand to the amount of plaintiff's damages.

Reversed and remanded for a new trial. Costs to abide the event.

All concurred.

"Appellate courts traditionally exercise a broader review of judges' decisions than of jury verdicts.

"'A jury's verdict-view of facts is entitled to an even higher degree of appellate respect than is a judge's verdict-view of the same facts, learned though the judge may be in law. For reasons known well to students of American history, a finding of fact by "the twelvers" is more apt to be sound than that of one man.' *Schneider* v. *Pomerville* (1957), 348 Mich 49, 54."

DUKES *v.* GLEN OF MICHIGAN

1. NEGLIGENCE—ORDINANCES—BUILDING CODE—CHANGE OF BUILDING'S USE.

   A building code ordinance providing that a change of use of a building will bring the building under the provisions of the ordinance was proper evidence to be considered by a jury in determining the storeowner's negligence in not complying with the ordinance where the second story of the building was changed from a storage area to a display room open to the public even though the changes consisted only of painting and did not entail structural changes.

REFERENCES FOR POINTS IN HEADNOTES

[1] 38 Am Jur, Negligence §§ 14, 168, 180, 192.

[2–4] 38 Am Jur, Negligence §§ 98, 100, 131–136, 199, 366.

Liability of proprietor of store, office, or similar business premises for injury from fall due to defect in stairway. 64 ALR2d 398.

2. NEGLIGENCE—INVITEES—EVIDENCE—HANDRAILS.

The absence of handrails on a stairway is competent evidence, without the consideration of the applicability of any ordinance, to be considered by the jury in determining whether a defendant had provided reasonably safe premises for its business invitees.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EXPOSURE TO HARM—EXERCISE OF RIGHT.

A plaintiff is not guilty of contributory negligence in exposing himself to a risk of bodily harm where the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless the plaintiff exposes himself to the risk, unless the plaintiff acted unreasonably.

4. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BUSINESS INVITEES—EXPOSURE TO HARM—EXERCISE OF RIGHT.

Contributory negligence of a plaintiff, a customer, in using a stairway without handrails to leave from a second-story salesroom open to the public was a question of fact even if the plaintiff knew the stairway did not have handrails where stairway was the only means to enter and exit the second floor.

Appeal from Manistee, Charles A. Wickens, J. Submitted Division 3 October 7, 1970, at Grand Rapids. (Docket No. 8359.) Decided March 23, 1971.

Complaint by Etta Dukes against Glen of Michigan for personal injuries received from a fall down defendant's stairway. Summary judgment for defendant. Plaintiff appeals. Reversed and remanded for a trial on the merits.

Donald G. Jennings, for plaintiff.

Korn & Burns, for defendant.

Before: HOLBROOK, P. J., and R. B. BURNS and J. J. KELLEY, JR.,* JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

HOLBROOK, P. J. Plaintiff appeals from a summary judgment entered against her on October 27, 1969, upon motion filed by defendant pursuant to GCR 1963, 117.2(1).

Defendant, which manufactures and sells women's wear, has its principal office and plant in Manistee, Michigan.

The building was purchased in 1960 and the first floor was used by defendant as a factory outlet.

In 1962, the City of Manistee adopted an ordinance incorporating the Uniform Building Code of the International Conference of Building Officials. Section 1 of the ordinance in question provides in part:

"That a certain document, three (3) copies of which are on file in the office of the City Clerk of the City of Manistee; being marked and designated as 'Uniform Building Code, 1961 Edition, Published in the year 1961, by International Conference of Building Officials,' be and the same is hereby adopted as the building code of the City of Manistee, for regulating the erection, construction, enlargement, alteration, repair, moving, removal, demolition, conversion, occupancy, equipment, use, height, area, and maintenance of all buildings and/or structures in the City of Manistee * * * ."

The building code provides in part the following:

"Sec. 102. The purpose of this code is to provide minimum standards to safeguard life or limb, health, property, and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and structures within the city and certain equipment specifically regulated herein."

"Sec. 103. The provisions of this code shall apply to the construction, alteration, moving, demoli-

tion, repair and *use* of any building or structure within the city * * * .

"Additions, alterations, repairs, and *changes of use* or occupancy in all buildings and structures shall comply with the provisions for new buildings and structures except as otherwise provided * * * ." (Emphasis supplied.)

Among the building code provisions is the following:

"Sec. 3305(g). Stairways shall have hand rails on each side, and every stairway more than eighty-eight inches (88″) in width shall have intermediate hand rails dividing the stairway into portions not more than sixty-six inches (66″) in width.

"Hand rails shall be placed not less than thirty inches (30″) nor more than thirty-four inches (34″) above the nosing of treads, and ends of hand rails shall be returned to the wall."

In July of 1967, the defendant opened the second floor of the building to the public for use as a display area, thereby converting the same from its former use as a storage area with access only to defendant's employees.

While work, consisting of painting and installing treads, was done on the sole stairway to the second floor, no structural changes were made.

On April 16, 1968, plaintiff, then 71 years of age, was shopping for the first time on the second floor of defendant's building. While returning from the second floor by means of the stairway serving as the only means of ascent and descent to and from the second floor, as apparently evidenced by a sign or signs posted directing customers to the stairway, plaintiff stumbled and fell the entire length of the stairway, which contained some 20 steps, to the bottom of the stairs, thereby sustaining severe personal

injury. It is undisputed that, at the time of the accident in question, there were no handrails installed on the stairway.

Plaintiff's complaint averred in part as follows:

"The sole proximate cause of the plaintiff's accident and injury was the negligence of the defendant in the operation of it's store which negligence consisted, among other things, of the following:

"(a) Failure to maintain the premises in a condition reasonably safe for customers.

"(b) Failure to have handrails on the stairway as required by the building code of the City of Manistee for commercial buildings such as this.

"(c) Failure to provide proper treads on the stairway to prevent slipping and falling such as this.

"(d) Failure to adequately attach the rubber mats or treads which were on the stairway so that this mat or tread would not slip or come loose causing a customer, such as the plaintiff, to fall.

"(e) Failure to provide handrailings on the stairway, even if not required by the City of Manistee, as these railings would be required in the exercise of reasonable prudence and due care.

"(f) Failure to warn customers of the hazardous condition of the stairway though such condition was known to the defendant."

Defendant in its answer, denied the above allegations of negligence and, additionally, as an affirmative defense, pleaded contributory negligence on the part of plaintiff, in failing to exercise due care in descending the stairway in question, as the proximate cause of her injuries.

The trial court, in its opinion granting defendant's motion for summary judgment, stated in part:

"Plaintiff Etta Dukes sues Glen of Michigan claiming that they were negligent in the operation of their store premises on April 16, 1968, when she

fell coming down the stairs in their Glen of Michigan store in Manistee, Michigan. Her claimed negligence is because of their failure to provide a handrail on the wall of the stairwell where she fell.

"The deposition of the plaintiff was taken and her deposition discloses that she went up the stairs on the 16th of April, 1968, and while going up the stairs she observed nothing wrong with the stairs, nor did she see any dangerous conditions then existing. Her testimony further states that as she came down the stairs she saw nothing wrong with the stairs but she caught her heel on something, probably a stair tread, and fell. Her deposition discloses that she does not know what she caught her heel on, nor what made her fall, that she does not know what caused her to trip and she cannot disclose any defect in the stairway that caused her to trip and stumble. Therefore, the conclusion is inescapable that she fell for reasons other than the negligence of the defendant in the operation of his premises, because she cannot show any defect in the premises.

"Admittedly, after the plaintiff started to fall, she grabbed for a handrail on the side of the stairwell. *There is some question * * * whether or not there was a duty to provide a handrail* in light of the date of the construction of the building and the ordinances of the city, *etc.* The question then becomes whether or not one who trips and starts to fall, through no negligence of the owner of the premises, can recover from the owner of the premises because of his failure to provide a handrail which might lessen his injuries as a result of his fall. This question the court must decide viewing the facts most favorable to the plaintiff. It is the contention of the plaintiff that a handrail is required by City Ordinance of 1962 (Uniform Building Code, § 3305, labelled "Stairs"). This section of the building code does not require a handrail on the defendant's premises. The premises predate the ordinance and were in their existing condition when the

ordinance went into effect. They were subsequently altered merely by redecorating and the ordinance provides that subsequent alterations of a premises will bring the ordinance into play, providing the value of the alterations exceeds a certain amount. The redecorating done by the defendants does not bring that provision on the alterations into play in this case, and the ordinance need not be complied with when merely redecorating.

"In light of the foregoing, the court must conclude that due to the fact that the plaintiff, Mrs. Dukes, cannot show any defect in the premises which caused her original stumble and starting to fall, the court must conclude that the original stumble resulted from her own negligence.

* * *

"The failure to have a handrail, on the part of the store owner, is only an intervening cause, and does not relieve Mrs. Dukes from her responsibility of setting the original cause in motion, and the failure to have a handrail does not become a superceding cause to relieve Mrs. Dukes of her original negligence in tripping and starting her fall." (Emphasis supplied.)

Plaintiff contends that the trial court erred in granting summary judgment; that the Manistee Building Code required defendant to install handrails on the stairway on its premises; and that even if the code is inapplicable to defendant's building, evidence of failure to provide a handrail may be introduced to show that defendant did not provide reasonably safe premises for its customers.

The trial court, basing its decision upon the provision of the ordinance governing alteration and repair of premises, ruled that the ordinance and building code made a part thereof were inapplicable on the ground that the sum expended by defendant for alterations and repairs subsequent to enactment

of the ordinance did not exceed the amount required by the code to bring the ordinance into effect. However, the building code ordinance, having been adopted some five years before defendant's opening of the second floor of its building to the general public as a display area for its merchandise, is applicable to the instant case on the basis that defendant's *change of use* of the premises invoked the relevant provisions of the ordinance. The provisions are designed, as set forth therein, to establish minimum standards relative to buildings and structures within the city to "safeguard life or limb, health, property, and public welfare". We rule that the building code ordinance in question is, under the facts of this case, proper evidence to be considered by a jury in determining the question of negligence. As was recently stated by this Court in the analogous case of *Mills* v. *A. B. Dick Company* (1970), 26 Mich App 164, 168:

"The violation of an ordinance is * * * evidence of negligence. Railings are required for the protection of persons who accidentally lose their balance, including those who lose their balance through no fault of the landowner. The jury should have been permitted to determine whether defendants were negligent in failing to have conformed to the standard of care required by the ordinance."

We further rule that, aside from the building code ordinance, the absence of handrails is competent evidence to be considered by the jury in determining if defendant had provided reasonably safe premises for its business invitees. In *Mills, supra,* p 168, it was stated:

"Moreover, apart from the ordinance, we think the Mills were entitled to have their case submitted to the jury under an instruction that if it finds the

installation of a handrail * * * was necessary to make the premises reasonably safe for use by one, who, like Sidney Mills, was invited to come on the premises, on that ground as well it could find that the failure to have provided this safeguard was negligence."

See, generally, 64 ALR2d 398–468; *Davis* v. *Buss Machine Works* (1913), 175 Mich 61.

As to defendant's claims that plaintiff was guilty of contributory negligence, we reiterate what we stated in *Pollack* v. *Oak Office Building* (1967), 7 Mich App 173, 186:

"The applicable rule as to danger encountered in the exercise of a right or privilege is found in 2 Restatement Torts, 2d, § 473, p 523: 'If the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he exposes himself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence in so doing unless he acts unreasonably.' "

The jury could properly find that plaintiff did not act unreasonably in using the staircase even though she may have known that it did not have a handrail.

Reversed and remanded for a trial on the merits. Costs to plaintiff.

All concurred.

WHITE *v.* CITY OF FLINT

APPEAL AND ERROR—MOOTNESS—LABOR RELATIONS—RESOLVED CONTROVERSY.

Employer hospital's appeal from an order dismissing the action of plaintiff union and its members for an injunction restraining the employer from unfair labor practices in enforcing uniform-wearing requirements for x-ray technicians, where the order to dismiss was made on the plaintiffs' motion after the injunction had been granted them, was dismissed as moot where the uniform-wearing dispute had been resolved at the bargaining table after the defendants had perfected their appeal.

Appeal from Genesee, Anthony J. Mansour, J. Submitted Division 2 February 1, 1971, at Lansing. (Docket Nos. 8388, 9286 and 9287.) Decided March 23, 1971.

Complaint by Robert B. White and Council 29, American Federation of State, County, and Municipal Employees against the City of Flint, the Board of Hospital Managers, and Milton Sacks, Director of Hurley Hospital, for a permanent injunction to restrain defendants from enforcing a work-dress rule and disciplining its violators until the issue was resolved by the Employment Relations Commission. Injunction issued. Defendants appeal. Plaintiffs' motion to dismiss the pending action granted. De-

---

REFERENCE FOR POINTS IN HEADNOTE

5 Am Jur 2d, Appeal and Error §§ 761–763, 765, 913, 961.

fendant appeals the dismissal. Appeal dismissed as moot.

Charles A. Forrest, Jr., for plaintiffs.

Dykema, Wheat, Spencer, Goodnow & Trigg (by *Paul H. Townsend, Jr.,* and *Ronald J. Santo*), for the Board of Hospital Managers and Milton Sacks.

Robert E. Weiss, City Attorney, for the City of Flint.

Before: QUINN, P. J., and MCGREGOR and O'HARA,* JJ.

O'HARA, J. This is a labor controversy between plaintiff and his collective bargaining representative on the one hand, and the City of Flint and the Board of Managers of its municipal hospital on the other.

Actually there is nothing before us which is now justiciable. We are asked, however, to express ourselves on the subject of the exclusivity of remedy for alleged unfair labor practices by the Michigan Employment Relations Commission, as opposed to the injunctive power of a court of equity.

This is a sensitive area in labor relations law. We think it would be imprudent to write decisionally in this case with its somewhat unsettled record and its admixture of substantive and procedural questions. We have included an extensive note[1] in

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

[1] Shortly after plaintiff union was duly certified as the bargaining representative for defendant hospital's X-ray employees, and while contract negotiations were underway but incomplete, the employer hospital decided to enforce rigidly a pre-existent but hitherto loosely

order that the trial bench and the concerned members of the bar may understand our reasons for disposing of the case on the basis of mootness.

The appeal is dismissed as moot. No costs.

All concurred.

---

enforced uniform wearing requirement on the part of the X-ray personnel.

The union filed a complaint with the Mediation Board asserting the enforcement was an unfair labor practice and in violation of the Public Employee Representation Act (PERA). The commission set a hearing on the charge for October 27, 1969. It was filed September 19 of that year. Before the hearing was held, and after filing the complaint, the *plaintiffs* instituted an original action in the circuit court seeking injunctive relief, which they characterize as a prayer to "maintain the *status quo*". The trial judge issued an injunction restraining the defendants from "disciplining" plaintiffs pending a hearing by the Labor Mediation Board.

Meanwhile, back at the bargaining table, the issue seemed to have been resolved.

However, defendant-appellants had already perfected their appeal to this court from the issuance of the injunction on the ground that the circuit court lacked jurisdiction of the subject matter. The circuit judge, after the appeal had been perfected, *on plaintiff's motion,* dismissed the pending action as moot. Defendants promptly appealed that order on the ground that the circuit court had lost the jurisdiction it never had in the first place.

Appellants' brief states "the commission conducted a hearing and held that the hospital's enforcement of the rule * * * constituted an unfair labor practice, namely a refusal to bargain in good faith". Upon our request, the board furnished us with a copy of an order in letter form advising "all parties that the withdrawal request (by plaintiffs) * * * was approved and * * * the case closed". The board further advised us that "the other complaint" must have been dismissed by oral order. The record, at best, is somewhat equivocal.

It should be apparent to the trial bench and all counsel in this specialized practice that this Court, on such a record, is not disposed to open this litigious container of *vermis annelides.*

We commend the parties for the excellence of their briefs.

PEOPLE *v.* McFADDEN

1. ARREST—TRAFFIC VIOLATIONS—VALID DRIVER'S LICENSE.

   A police officer may arrest a person who is operating a motor vehicle and who does not have in his immediate possession a valid operator's license even though the officer is aware of the person's identity and that he is a resident of the neighborhood; the decision whether to release the traffic violator from custody with written instructions to appear in court or to retain custody pending examination is in the discretion of the police (MCLA § 257.727).

2. ARREST — TRAFFIC VIOLATIONS — SEARCHES AND SEIZURES — WEAPONS.

   A police officer can make a reasonable search of a person who has been arrested for a traffic violation for weapons which might be used in resisting arrest or effecting escape.

3. SEARCHES AND SEIZURES—PLAIN VIEW.

   Objects falling in the plain view of a police officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence.

4. CONSTITUTIONAL LAW—RIGHT TO BEAR ARMS.

   The right to bear arms is subject to the reasonable exercise of the police power.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Arrest §§ 40, 43.
7 Am Jur 2d, Automobiles and Highway Traffic §§ 98, 126.
Validity and construction of statute making it a criminal offense for the operator of a motor vehicle not to carry or display his operator's license of the vehicle registration certificate. 6 ALR 3d 506.

[2, 3] 47 Am Jur, Searches and Seizures §§ 18, 19.
Lawfulness of search of motor vehicle following arrest for traffic violation. 10 ALR3d 314.

[4] 56 Am Jur, Weapons and Firearms § 5.

[5] 21 Am Jur 2d, Criminal Law § 303.

5. CRIMINAL LAW—PRESENTENCE REPORT—EXAMINATION—DISCRETION.

The trial judge has no duty to allow either party an opportunity to examine a presentence report on the defendant; review of the presentence report rests in the sound discretion of the trial court.

Appeal from Genesee, Donald R. Freeman, J. Submitted Division 2 February 2, 1971, at Lansing. (Docket No. 8390.) Decided March 23, 1971. Leave to appeal denied July 19, 1971, 385 Mich 771.

Roscoe McFadden was convicted of carrying a concealed weapon and possession of narcotics. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief Assistant Prosecuting Attorney, for the people.

William A. Shaheen, Jr., for defendant on appeal.

Before: QUINN, P. J., and MCGREGOR and O'HARA,* JJ.

O'HARA, J. From his conviction by a jury of carrying a concealed weapon, MCLA § 750.227 (Stat Ann 1962 Rev § 28.424), and possession of drugs, MCLA § 335.153 (Stat Ann 1957 Rev § 18.1123), defendant appeals of right.

Defendant's troubles began acorn size when he was stopped by the police for operating an automobile without headlights. Thereafter they grew to the proportions of a mighty oak. When he was unable to produce a driver's license, he was placed

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

under arrest. Pursuant to the "normal procedure" employed by Flint's police officers, defendant's person was searched for weapons. The search disclosed a revolver which the police seized. As the officers escorted defendant to the police cruiser, preparatory to taking him to the station, they observed defendant drop a small white envelope. A subsequent analysis disclosed that the envelope contained cocaine and amphetamines.

Defendant may believe, with some justification, that the police received a "windfall" at his expense. Mayhaps this is true. Such, however, is a sometime peril of carrying an illegal weapon and proscribed narcotics.

An initial allegation by defendant is that the revolver and drugs were products of an illegal search and seizure and, therefore, inadmissible in evidence.

By statutory authority, police officers may arrest one who does not have in his immediate possession a valid operator's license. MCLA § 257.727 (Stat Ann 1968 Rev § 9.2427). Even though the officers may have been aware of defendant's identity and that he was a resident of the neighborhood, whether they released him from custody with written instructions to appear in court, or whether they retained custody pending examination before a magistrate, rested in the officers' discretion. MCLA § 257.727, *supra.*

Having once decided to arrest the defendant, the officers were justified in making a reasonable search, without a warrant, for any concealed weapon which might have been used in resisting arrest or in seeking to escape. *Chimel* v. *California* (1969), 395 US 752 (89 S Ct 2034, 23 L Ed 2d 685); *Preston* v. *United States* (1964), 376 US 364 (84 S Ct 881, 11 L Ed 2d 777); *People* v. *McDonald* (1968), 13 Mich

App 226; *People* v. *Panknin* (1966), 4 Mich App 19; *People* v. *Gonzales* (1959), 356 Mich 247. To preclude officers from exercising care for their own safety is to invite recurrence of tragedies which have all too frequently attended arrests for minor traffic violations.

In the case at bar the arrest was a legitimate exercise of authority vested in the officers to take into custody one operating a vehicle without a license. Nowhere is there any serious indication that the arrest was a "pretext" whereby a random search for evidence could be carried out. See *Gonzales, supra.*

The retrieved narcotics also were properly admitted by the court. "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris* v. *United States* (1968), 390 US 234, 236 (88 S Ct 992, 19 L Ed 2d 1067). Also, see *People* v. *Beauregard* (1970), 21 Mich App 224.

Defendant also contends that the statute governing the licensing of concealed weapons is void for vagueness and, therefore, that his conviction pursuant to the statute is fatally defective.

The applicable statute empowers a local board to issue licenses with the following guide lines:

"No such license to carry a pistol concealed on the person or to carry a pistol, whether concealed or otherwise, in any vehicle operated or occupied by the person applying for such license, shall be granted to any person except he be 21 years of age or over, a citizen of the United States, and has resided in this state 6 months or over, and in no event shall such license be issued unless the application for the same is first approved in writing by the township supervisor, when said applicant resides in

that part of the county not included within an incorporated city or village, or by the commissioner or chief of police or marshal when the applicant resides in an incorporated city or village having an organized department of police, and unless it appears that the applicant has good reason to fear injury to his person or property, or has other proper reasons, and that he is a suitable person to be so licensed, and in no event to a person who has been convicted of a felony or confined therefor in this state or elsewhere during the 8 year period immediately preceding the date of such application or has been adjudged insane unless he has been restored to sanity and so declared by court order." MCLA § 28.426 (Stat Ann 1971 Cum Supp § 28.93).

Because of the State's legitimate interest in limiting access to weapons peculiarly suited for criminal purposes, the right to bear arms, like all other rights, is subject to the reasonable exercise of the police power. *People* v. *Brown* (1931), 253 Mich 537. Also, see *United States* v. *Miller* (1939), 307 US 174 (59 S Ct 816, 83 L Ed 1206), which approvingly cites *Brown, supra.*

Pursuant to constitutional requirements, the statute enumerates explicit criteria to guide the concealed weapon licensing board in processing applications. Thus, any suggestion that absence of standards creates a potential for arbitrary action lacks merit.

As a third assignment of error, defendant contends that the trial court permitted rebuttal argument beyond matters raised in defense counsel's closing argument. GCR 1963, 507.6. We find this allegation to be without merit. An examination of the record discloses that the prosecutor's argument did not exceed permissible limits. Even if such violation did occur, defendant has failed to demonstrate any miscarriage of justice sufficient to neces-

sitate a reversal of the judgment of conviction. *People* v. *Winegar* (1968), 380 Mich 719.

The claimed error, if any, must be viewed as harmless. GCR 1963, 529.1.

Lastly, a denial of due process is alleged to arise from failure of the trial judge to allow defendant or his counsel to review the presentence report. On previous occasions we have held that a trial judge has no duty to allow either party an opportunity to examine the presentence report. *People* v. *Malkowski* (1970), 25 Mich App 195; *People* v. *Charles Williams* (1969), 19 Mich App 544; *People* v. *Beard* (1969), 17 Mich App 409. Review of these reports rests within the sound discretion of the trial court. In the instant case the defendant has failed to demonstrate an abuse of discretion.

Affirmed.

All concurred.

R. E. DAILEY & CO. *v.*
DEPARTMENT OF STATE HIGHWAYS

1. CONTRACTS—MEETING OF MINDS—WRITTEN INSTRUMENTS—TRUE INTENT.

   A writing is not a contract when it fails to express that on which the minds of the parties met; a mistake of expression occurs where the parties are of the same mind regarding the terms of the agreement but the writing intended to embrace those terms does not express their true meaning.

2. CONTRACTS — PARTIES' INTENT — WRITTEN INSTRUMENT — TRUE INTENT.

   Awarding plaintiff contractor damages for extra work done on welding a bridge, necessitated by the defendant's request that the welding method conform to the American Welding Society's specifications was proper even though the written contract between the parties provided that the society's specifications would be followed where the parties admitted that, at the time of contracting, they intended the general industry practice at that time to be followed, the industry practice was followed by the plaintiff with the defendant's approval, the society's specifications were changed while the work was being performed, and the new specifications were not the same as the trade custom at the time of contracting, because the contract requirement that the welding conform to the society's specifications did not express the intent of the parties and, thus, did not constitute their real contract.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 17 Am Jur 2d, Contracts § 18 *et seq.*
[3] 45 Am Jur, Reformation of Instruments §§ 55, 56.
[4] 17 Am Jur 2d, Contracts § 282.
28 Am Jur 2d, Estoppel and Waiver §§ 35, 76.
Construction contractor's liability to contractee for defects or insufficiency of work attributable to the latter's plans and specifications. 6 ALR3d 1394.
[5–7] 41 Am Jur, Pleading §§ 335–343.

3. REFORMATION OF INSTRUMENTS—PARTIES' INTENT—TRUE INTENT —UNREQUESTED REFORMATION.

A written instrument may be reformed by a court to comply with the parties' intention even though neither party requested reformation; a judgment may confer only the final legal remedy, the preliminary equitable relief of reformation having been assumed as a prerequisite to the judgment.

4. CONTRACTS — CONSTRUCTION ESTIMATES — RELIANCE — JUSTIFIED RELIANCE.

Reliance by plaintiff contractor on defendant builder's estimate of the amount of concrete necessary was justified even though the defendant's offer stated that its estimates were not guaranteed where the plaintiff had only a short time to prepare its bid and where there were several omissions and errors in the estimate the defendant prepared.

5. JUDGMENT—SUMMARY JUDGMENT—DISPUTED FACTS—CONTRACTS —BRIDGES.

Summary judgment was improperly granted to the plaintiff contractor where there was a factual dispute whether the damages to a newly-constructed bridge was caused by a heavy rainfall relieving the contractor of the duty to repair the bridge at its own expense, or by defective workmanship, imposing a duty on the contractor to repair the bridge.

6. JUDGMENT—SUMMARY JUDGMENT—DISPUTED FACTS—CONTRACTS.

Summary judgment was improperly granted to plaintiff contractor for payment of railroad-crossing flagging protections costs where the contract limited defendant's costs unless the costs were caused by building operations during an approved extension of time or by conditions beyond the contractor's control and where the defendant admitted contractual liability for some, but not all, of the costs.

7. JUDGMENT—SUMMARY JUDGMENT—DISPUTED FACTS.

Summary judgment was improperly granted where there were questions of facts whether the refusal of defendant's engineers to work for plaintiff contractor more than an eight-hour day constituted a strike within the meaning of the parties' contract and whether the engineers' refusal caused a delay entitling plaintiff contractor to additional compensation.

Appeal from the Court of Claims, William John Beer, J. Submitted Division 2 January 6, 1971, at

Lansing. (Docket No. 8406.) Decided March 23, 1971. Leave to appeal denied June 18, 1971, 385 Mich 757.

Complaint by R. E. Dailey & Co. against the State Highway Department for breach of contract and for extra work. Summary judgment for plaintiff. Defendant appeals. Affirmed in part; reversed and remanded in part.

Clark, Klein, Winter, Parsons & Prewitt (by *Laurence M. Scoville, Jr.*, and *Robert G. Buydens*), for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Louis J. Caruso, James D. Mueller, Karl S. Vasiloff,* and *Thomas J. Giachino,* Assistants Attorney General, for defendant.

Before: QUINN, P. J., and BRONSON and O'HARA,* JJ.

BRONSON, J. Plaintiff and defendant entered into a contract for the purpose of constructing a high-rise bridge, approximately three miles in length, over the Rouge River in Wayne County.

During the construction period certain disputes arose between the parties relating to the methods of attaching and suspending forms in which to pour and hold the concrete while it hardened (Count I); liability for a 2,169.3 cubic yard overrun in concrete (Count II); liability for the replacement of a damaged portion of the bridge (Count III); liability for the payment of sums required by the contract for

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

the protection of railroad operations and crossings (Count IV); and liability for damages caused by delay resulting from an alleged "strike" of certain of defendant's employees (Count V).

Plaintiff filed a complaint containing the above counts with the Court of Claims. Following receipt of defendant's answer, plaintiff moved for a summary judgment, alleging that no genuine issue of material fact existed and that plaintiff was entitled to prevail on each count as a matter of law. Defendant filed written objections to plaintiff's motion on the grounds that while no material issue of fact existed as to Counts I and II, defendant, not plaintiff, was entitled to prevail as a matter of law on Counts I and II. Defendant further contended that genuine issues of fact existed as to Counts III, IV, and V. The Court of Claims granted plaintiff's motion for summary judgment on all five counts. The amount of the judgment for plaintiff totaled over $581,000. Defendant's motion to set aside the summary judgment and order a new trial was denied. Defendant appeals as of right.

Count I of the plaintiff's complaint alleged that plaintiff was entitled to $411,033 in additional compensation because plaintiff was required to perform "extra work" which was not included in the parties' contract. Defendant does not question the monetary value placed on the work performed by plaintiff. Rather, it is defendant's contention that the work was required by the contract and thus did not constitute "extra work" which would entitle the plaintiff to extra compensation. Both plaintiff and defendant agreed no material dispute of fact exists with respect to the issue presented under Count I of plaintiff's complaint.

The issue of extra compensation arose with respect to the method to be employed in building

and suspending forms which hold the poured concrete while it hardens. The written document executed between the parties incorporated by reference the Michigan State Highway Department Standard Specifications (MSHD Specs). The MSHD Specs, in its section regarding electric arc welding, incorporated by reference the American Welding Society Specifications (AWS Specs) of 1963. Herein lies the problem.

It is admitted that at the time the written document was executed on May 19, 1965, it was the custom in the bridge construction industry in Michigan to attach the support form to the bridge by means of a certain welding process. It is further admitted that both parties, at the time the contract was executed, intended that existing custom be followed with respect to the welding process. The plaintiff submitted its bid and entered into the contract with the defendant intending that the general industry practice be followed with respect to welding procedures. The defendant, until March 1966, treated the welding process performed by plaintiff as being in compliance with the parties' contract. The defendant was aware that the practice of the industry was being followed, observed the welding, raised no objections to it, and considered the welding to be satisfactory and acceptable. However, apparently unknown to either party, the AWS Specs, which had been incorporated into the parties' written document, had been changed to require a new and different process of attaching the forms.

In March 1966, defendant was informed by the Federal government that the welding was not being performed in accordance with the AWS Specs. The defendant then informed plaintiff that the previously accepted method of welding the forms to the

permanent structural steel of the bridge had to be changed and that the welding would have to be performed in accordance with the AWS Specs. The new method, which admittedly was not within the intent of either the plaintiff or defendant at the time the parties executed the written document, required plaintiff to perform extra work. Plaintiff performed the work and promptly filed notice of its claim, alleging that defendant was liable for the work in the amount of $411,033. Plaintiff's claim in Count I did not request damages for rewelding, but merely for the extra work and expense required by the changed welding procedure.

Defendant, in the action below, did not challenge the value amount placed on plaintiff's services, nor did defendant contend that any factual controversy existed with respect to Count I. Rather, defendant contended that it, rather than plaintiff, should have been granted a summary judgment because the work performed by plaintiff had been required by the written document. That is, the work performed by plaintiff in welding the forms in accordance with the AWS Specs did not constitute extra work, but rather constituted work required by the express terms of the parties' written contract, which incorporated by reference the AWS Specs.

These uncontroverted facts present a situation in which the parties intended to enter into a contract for the construction of a bridge, but in which the written instrument, in part, varied from the intent of the parties. The variance was material and related to the welding procedure to be followed. As such, that portion of the written instrument requiring welding in accordance with the AWS Specs did not constitute the real contract of the parties because it did not express that on which the minds of the parties had met:

"A writing is not a contract when it fails to express that on which the minds of the parties met, and courts freely exercise the power to correct mistakes when the proof leaves no doubt that the real contract was something else. A mistake of expression occurs where the parties are of the same mind regarding the terms of the agreement, but the writing intended to embrace those terms does not express their true meaning. * * *" 17 CJS, Contracts, § 142, p 888.

Since the written document did not express the intention of the parties with respect to the welding procedure, and since both parties intended that the welding procedure would be done in accordance with the custom then used in the trade, the trial court could legally reform the instrument to comply with the parties' intent. The mere fact that neither party sought to have the written instrument reformed does not bar this remedy:

"* * * [I]n jurisdictions in which the distinctions between law and equity are abolished, or in which both forms of relief are administered by the same court, in an action at law upon an instrument *the court may in a proper case construe the contract as it was intended by the parties,* or supply matters omitted either by mutual mistake or fraud, *and render a proper judgment on the basis thereof, just as if there had been first a reformation of the contract. The judgment may confer only the final legal remedy, the preliminary equitable relief being assumed as a prerequisite, but not in terms awarded.* * * *" 45 Am Jur, Reformation of Instruments, § 11, pp 589, 590. (Emphasis added.)

The welding procedure used by the plaintiff until March 1966, was the same as that customarily used in the trade and the same as that intended by the parties when they entered into the contract. The

defendant approved this welding procedure until defendant was informed by the Federal government that welding had to be performed in accordance with the AWS Specs. Thus, the action of plaintiff in changing the welding procedure, upon defendant's request, to conform to the AWS Specs constituted a modification of the parties' original contract. Under the circumstances, plaintiff could reasonably expect to be compensated for the extra work necessitated by the modification. Since defendant does not contest the value placed upon the expenses incurred by the plaintiff in satisfying the AWS Specs, the trial judge properly granted plaintiff a summary judgment for the extra work in the amount of $411,033.

The second issue on appeal relates to Count II of plaintiff's complaint. The trial court granted plaintiff a summary judgment in the amount of $127,337-.91 for concrete overruns poured on the bridge superstructures. The superstructure is the concrete deck designed for vehicular travel built between supporting steel girders. Defendant again, in its answer to plaintiff's motion for summary judgment, admits that no genuine issue of fact exists, but contends that it, rather than plaintiff, is entitled to summary judgment as a matter of law.

It is defendant's contention that under the contract payment could be made only for the amount of concrete estimated, and not the amount of concrete poured. The uncontroverted facts establish that plaintiff, in preparing its bid, relied upon defendant's construction plan in which defendant's engineer estimated in the "plan quantity" that 35,712 cubic yards of concrete would be required to construct the superstructure. Plaintiff's bid included this estimate of 35,712 cubic yards and set a value amount of $58.70 per cubic yard of concrete. The

amount of concrete actually poured by plaintiff exceeded the estimate by 2,169.3 cubic yards.

It is not disputed that the defendant computed the amount of concrete that would be needed for the bridge, approved the manner in which the forms to hold the concrete were made, approved the forms which were used, directed changes to be made in the forms, determined the location of and directed the placing of the forms, determined the height or elevation of the forms, directed the time and manner of the pouring of the concrete, inspected the concrete, and controlled and directed the amount of concrete used. Despite these strict controls, it is conceded that the quantity of concrete required by the defendant and actually poured by the plaintiff exceeded the estimate by 2,169.3 cubic yards.

Defendant contends that because of the following language in the MSHD Specs, it is not liable for 2,169.3 cubic yards of concrete which were poured in excess of the estimated 35,712 cubic yards:

"Interpretation of estimates. The engineer's estimate of quantities as shown in the proposal shall be used for the comparison of bids upon which the award of the contract will be made. These quantities are not guaranteed, and the furnishing of this information creates no liability on the part of the state."

In our opinion, the record amply supports the trial court's disposition of this issue:

"1. Although section 1.02.02 of the defendant's standard specifications was an attempted disclaimer of liability for the furnishing of estimated plan quantities, it was ineffective because of the short time plaintiff was allowed to prepare its bid and because of the errors and omissions in the defendant's estimate. Accordingly, plaintiff's reliance on defendant's estimate was justified and defendant is

liable to plaintiff for all concrete furnished in excess of defendant's estimated plan quantity. *Hersey Gravel Co.* v. *State Highway Department* (1943), 305 Mich 333; *W. H. Knapp Co.* v. *State Highway Department* (1945), 311 Mich 186."

With respect to payment for concrete, the contract provided:

"Concrete bridge construction will be paid for at the *contract unit price per cubic yard* for the grade of concrete specified." (Emphasis added.)

Since the unit price for concrete is $58.70 per cubic yard and since it is admitted that plaintiff poured 2,169.3 cubic yards in addition to the "plan quantity" as determined by defendant, the trial court properly granted the plaintiff a summary judgment in the amount of $127,337.91.

Under Count III of plaintiff's complaint, it was alleged that defendant required plaintiff to replace a portion of the bridge because it was damaged. The contract provided:

"Until the final acceptance of the work by the engineer, as evidenced in writing, the contractor shall have the charge and care thereof and shall take every precaution against injury or damage to any part thereof by the action of the elements or from any other cause, whether arising from the execution or from the nonexecution of the work. The contractor shall rebuild, repair, restore, and make good all injuries or damages to any portion of the work occasioned by any of the above causes before final acceptance and shall bear the expense thereof, except damage to the work due to unforeseeable causes beyond the control of and without fault or negligence of the contractor, including but not restricted to acts of God, or of the public enemy, acts of the government, slides found by the engineer to have been unavoidable and ordinary wear and tear

on any section of the road opened to traffic by order of the engineer."

Defendant contended that the damage to the bridge was caused by defective workmanship, while plaintiff contended that the damage was caused by a heavy rainfall and that it was not required by the contract to replace it. Although the facts were disputed by both parties, the trial court granted the plaintiff a summary judgment in the sum of $17,849-.02.

Summary judgment may not be granted where a genuine issue of material fact exists. In considering a motion for summary judgment every well pleaded allegation of the opposing party is assumed to be true. *Bielski* v. *Wolverine Insurance Company* (1967), 379 Mich 280; *Beardsley* v. *R. J. Manning Company* (1966), 2 Mich App 172. In the instant case, defendant alleged that the span of bridge in question did not meet the required specifications. Since a material issue of fact was presented, the trial court improperly granted the plaintiff a summary judgment as to this count. GCR 1963, 117.3.

Plaintiff, in Count IV of its complaint, sought reimbursement from the defendant for $19,724.11, which plaintiff claimed to have paid for flagging protection at various railroad crossings during the construction of the bridge. The contract provided that all protection costs up to a specified amount were to be borne by defendant and that extra costs were to be paid by plaintiff "unless it is established that such excess costs are caused by operations of the contractor during an approved extension of time or by conditions beyond his control."

The record discloses that the plaintiff was inadvertently billed by the railroads for flagging protection costs and that plaintiff mistakenly paid the railroads the sum of $19,724.11. Defendant admits

some liability under the contract for the flagging costs, but contends that a fact question exists as to the actual amount the contract obligates the defendant to pay. The trial court held no factual hearing to determine how much of the money which plaintiff mistakenly paid to the railroads was in fact owed by the defendant under the terms of the contract. A fact question was presented as to the amount of excess costs which were "caused by operations of the contractor during an approved extension of time or by conditions beyond his control". Since a fact question existed, the trial court erred in granting plaintiff a summary judgment on this count. GCR 1963, 117.3; *Beardsley* v. *R. J. Manning Company, supra.*

Finally, defendant contends that the trial court erred by granting plaintiff a summary judgment in the amount of $5,498 for damages caused by delay from an alleged "strike" of defendant's employees. Plaintiff contends that a delay which resulted in additional expenses was caused by the refusal of defendant's engineers to work more than eight hours a day. It is plaintiff's contention that this refusal constituted a "strike" within the meaning of the contract and that plaintiff is entitled to extra compensation for damages caused by the delay. Defendant denies these allegations in its answer.

We hold that a fact question was presented as to whether the refusal of defendant's engineers to work more than eight hours per day constituted a "strike", and if so, whether this refusal caused a delay for which the plaintiff is entitled to additional compensation. The trial court erred by granting the plaintiff a summary judgment under Count V.

To summarize, based upon the pleadings, depositions, admissions, and documentary evidence pre-

sented, the trial court properly granted plaintiff's motion for a summary judgment as to Counts I and II. Counts III, IV, and V presented factual questions, and as such the trial court erred by granting plaintiff a summary judgment on these counts. No costs, neither party having prevailed in full.

All concurred.

BENNETT *v.* PITTS

1. AUTOMOBILES — "UNINSURED MOTOR VEHICLE" — DEFINITION — USUAL DEFINITION.

   An "uninsured motor vehicle" is generally one with respect to which *neither the owner* nor the *operator* carried bodily injury liability insurance.

2. STATUTES—CONSTRUCTION—TERMS—GENERAL MEANING—LEGISLATIVE DEFINITION.

   The generally understood meaning of a term at the time that term is used by the legislature is usually relevant in an attempt to interpret the legislative meaning; however, it is within the competence of the legislature to provide a legislative definition varying generally understood meaning and controlling over all other definitions.

3. STATUTES — CONSTRUCTION — TERMS — LEGISLATIVE DEFINITION —EFFECT.

   The definition of a term provided in a statute is binding when a court is interpreting the term's use in that statute and the court cannot look elsewhere for the term's meaning.

REFERENCES FOR POINTS IN HEADNOTES

[1] 7 Am Jur 2d, Automobile Insurance § 136.
[2, 3] 50 Am Jur, Statutes §§ 261–265.
[4] 7 Am Jur 2d, Automobile Insurance §§ 98, 99.

4. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—"INSURED MOTOR VEHICLE"—INSURED DRIVER.

An automobile is an "insured motor vehicle" within the motor vehicle accident claims act even though the owner of the automobile does not have insurance where the driver of the automobile has insurance covering him, by a "while driving another car" provision, while driving the automobile in question; a defect in the driver's insurance which might be applicable to a claimant other than the one present is not relevant so long as the driver's policy is "in force" against the present claimant (MCLA § 257.1102(d)).

Appeal from Wayne, Charles S. Farmer, J. Submitted Division 1 December 8, 1970, at Detroit. (Docket No. 8444.) Decided March 23, 1971.

Complaint by Kenneth J. Bennett against Tony Pitts and Edward Galloway for personal injuries received in an automobile accident. Default judgment against defendant Galloway and order issued requiring the Motor Vehicle Accident Claims Fund to pay any damages assessed against defendant Galloway. Motion by the Fund to modify the order so as to relieve the Fund from liability. Motion granted. Plaintiff appeals. Affirmed.

Liss & Newman, for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Joseph B. Bilitzke,* Assistant Attorney General, and *Glenn M. Taub,* Special Assistant Attorney General, for defendant Galloway.

Before: LEVIN, P. J., and BRONSON and O'HARA,* JJ.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

O'HARA, J. This is an appeal upon leave granted. The order appealed from is not only interlocutory in nature, it is anticipatory in that it holds that any judgment "which might eventually be rendered against defendant, Edward Galloway, would be the personal responsibility of Edward Galloway *and not that of the Michigan Motor Vehicle Accident Claims Fund*".[1] (Emphasis supplied.)

This holding upon the part of the trial judge was premised upon certain admitted facts.

First, defendant Galloway, who owned the claimed offending vehicle, was not covered by a policy of liability insurance issued to him as owner. He had in the absence thereof, in order to be able to purchase license plates, paid the requisite $35 uninsured motorist fee.

Second, defendant Pitts was covered by a policy of liability insurance which covered *him* when driving vehicles other than the one specified in a policy of insurance issued to his wife. For our purpose no policy defense is raised, and we thus conclude necessarily that in the event of a judgment against Pitts and Galloway jointly, this so-called "drive other car" coverage will, for decisional purposes, be in full force and effect.

Thus, we are reduced to the single, narrow, specific question of whether under these facts (there being only *one* claimed offending vehicle) the fact that Pitts was protected by a policy of liability insurance while driving *that* car, the Michigan Motor Vehicle Accident Claims Fund is liable for payment

[1] The net effect of Judge Farmer's orders was almost the same as a declaratory judgment. We note this so that in the event of further review of our decision the record before the Supreme Court will indicate that we were aware of the possible procedural infirmity. We chose not to address ourselves to that issue because the question raised and briefed on the merits is of major significance to the jurisprudence. Our acceptance of it on leave granted does not indicate our approval of the procedural method employed to present it.

of damages in any amount which might be awarded to plaintiff. Stated in the simplest possible terms, the question is: Did Galloway's otherwise uninsured vehicle become an "insured vehicle" under the wording of the applicable statute?

The question is one of first impression. We hold that it did. We further hold that for this reason under the foregoing stated facts, the fund can in no wise be liable for any damages awarded plaintiff.

The statute, MCLA § 257.1102(d) (Stat Ann 1968 Rev § 9.2802[d]), contains the definition of an "uninsured motor vehicle".

" 'Uninsured motor vehicle' means a motor vehicle as to which there is not in force a liability policy meeting the requirements of the motor vehicle responsibility law of this state * * * and which is not owned by a holder of self-insurance under the law."

The legal texts dealing with this question point out that "ordinarily" or "generally" an uninsured motor vehicle is one with respect to which *neither the owner* nor the *operator* carried bodily injury liability insurance. See Annotation: *Rights and Liabilities Under "Uninsured Motorists" Coverage,* 1961, 79 ALR2d 1252; 7 Blashfield, Automobile Law and Practice (3d ed), § 274.10, p 74. While the generally understood meaning of a term at the time that term is used by the legislature is relevant in an attempt to interpret the legislative meaning it is, of course, within the competence of the legislature to provide a legislative definition varying generally understood meaning and controlling over all other definitions. *Erlandson* v. *Genesee County Employees' Retirement Commission* (1953), 337 Mich 195. Where the statute expressly provides the defi-

nition of terms used therein, such definitions are binding and the court cannot look elsewhere for their meaning. *W. S. Butterfield Theatres, Inc.*, v. *Department of Revenue* (1958), 353 Mich 345; *Woods* v. *Progressive Mutual Insurance Company* (1968), 15 Mich App 335.

Here the legislature has given us an express definition of "uninsured motor vehicle" which we quoted above. In light of this specific legislative definition, we see no reason for any other judicially formulated.

The fund is subject to claims only when there is no liability insurance policy in force *with respect to that vehicle.*[2] Pitts's insurance policy was in force "with respect to that vehicle". *Ergo,* it was not uninsured. *Ergo,* the fund cannot be liable.

In so holding, we do not ignore plaintiff's argument that the statute requires that the policy of liability insurance in force with respect to the involved vehicle meet all the requirements set forth in the financial responsibility act. MCLA § 257.501 *et seq.* (Stat Ann 1968 Rev § 9.2201 *et seq.*).

Whatever merit there may be in this contention, the policy provisions which affect the potential liability of Pitts's insurer to the plaintiff in this case are not inconsistent with the requirements of the financial responsibility act. Whether, under plaintiff's theory, there are defects in the coverage which might be available to another claimant, in other circumstances, does not alter the fact that the policy issued to Pitts is "in force" for the purpose of any legally cognizable interest which this plaintiff may possess in this case. Hence the issue is not decisionally relevant and we do not decide it.

---

[2] The self-insurer proviso is not involved.

For the reasons herein set forth, the order of the trial judge is affirmed. No costs, a public question.

All concurred.

MULIAS *v.* CITY OF TRENTON

1. ZONING—TRAILER PARKS—PUBLIC HEALTH, WELFARE, MORALITY.

   A writ of mandamus compelling defendant city to issue building permits for a trailer park was supported by the record where the plaintiffs' application complied with state law and the city's zoning ordinance and the refusal to issue the permits seems to have been based on the small amount of revenues to the city that the trailer park would produce, the desirability of an industrial corridor in the area, and the belief that the furnishing of school facilities to the trailer park might be difficult, because these reasons do not show the substantial relationship to the public welfare, health, safety, or morals necessary to invoke the police power.

2. CONSTITUTIONAL LAW—CONSTITUTIONAL ISSUES—COURTS' DECISIONS—POLICY—JUDICIAL POLICY.

   Judicial policy favors decisions on grounds other than constitutional grounds.

Appeal from Wayne, Charles S. Farmer, J. Submitted Division 1 February 2, 1971, at Detroit. Decided March 23, 1971. Leave to appeal denied May 25, 1971, 384 Mich 843.

Complaint by Sadie Mulias and Stanley Ellias against the City of Trenton for mandamus compelling the issuance of building permits for a trailer

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Zoning § 63.

[2] 16 Am Jur 2d, Constitutional Law § 531 *et seq.*

park. Writ granted. Defendant appeals. Affirmed.

Dale D. Libby, for plaintiffs.

Raubolt, MacDonald & Smiertka and *Ian MacDonald,* City Attorney, for defendant.

Before: LESINSKI, C. J., and R. B. BURNS and LEVIN, JJ.

R. B. BURNS, J. This appeal is taken from the trial court's entry of a writ of mandamus against defendants compelling them to issue building permits to the plaintiffs. The permits would enable plaintiffs to begin construction of a trailer park on their property. By resolution the Trenton City Council denied plaintiffs' request for the permits.

The land in question measures approximately 1,260 feet in length by 80 to 400 feet in depth. The property is bounded on the east by a 4-lane highway, on the west by railroad tracks with a Chrysler engineering plant abutting, on the north by a combined business and residential area, and on the south by scattered businesses.

The Trenton zoning ordinance, § 1708(1) reads:

"Subsection 1. *Trailer Courts:* Trailer courts shall only be permitted in the following districts and under the conditions herein indicated, and subject further to the approval of the Council.

"(a) Within 'M–1' Districts wherein the trailer court area is not isolated or surrounded on more than three abutting sides by industry.

"(b) Along the 'M–1' District edge, and within the 'M–1' District, wherein such District abuts a Multiple-Family District. Said Trailer area must then provide a twenty (20) foot greenbelt between

abutting 'R' District and the 'M–1' District in which trailer court is located, and must further provide for a twenty (20) foot greenbelt between itself and the abutting industry."

The plaintiffs' land is within a district zoned M–1 and they submitted a plan to the city council complying with the requirements of section 1708(1) of the zoning ordinance and the state law governing trailer parks. MCLA § 125.1001 *et seq.* (Stat Ann 1961 Rev § 5.278[31] *et seq.*).

Although the city council denied the permits by resolution the trial judge placed great emphasis on the contents of a letter from the planning commission to the mayor and city council. While the commission did not make any recommendations, the letter stated:

"* * * a mobile home site would violate the concept of sound and proper planning for the area.

"Predicated on the following reasons:

"1. Revenue returns to the city would be less for this type of development than for any other.

"2. Good planning for this area would be for an industrial corridor concept—which presently exists.

"3. Since this parcel is generally isolated from other residential developments by existing and planned industrial area, the servicing of the trailer coach units with school facilities may prove difficult."

The trial judge found:

"There is not sufficient or competent evidence to show that there is a real or substantial relationship to the general welfare, public safety, morals, or health, and to the proposed use of the land to constitute a reasonable and legitimate exercise of the police power of the City of Trenton."

In zoning cases great weight is given to the findings of fact made by the trial judge. *Biske* v. *City of Troy* (1969), 381 Mich 611.

The trial judge's decision that the action of the city council was arbitrary and unreasonable was based on his findings that the council's reasons for denying the permits were not supported by the facts. A review of the record supports the trial judge's findings.

Although the plaintiffs challenged the constitutionality of § 1708(1) of the zoning ordinance in their pleadings, the trial judge did not rule on its constitutionality. In view of the policy favoring decisions on grounds other than constitutional grounds, the trial judge was correct in not ruling on the constitutionality of the ordinance.

Affirmed. Costs to appellees.

All concurred.

PEOPLE *v.* KENNEDY

1. EVIDENCE—HANDWRITING—IN-COURT EXEMPLARS.
   A witness may not be compelled to make handwriting samples in court for comparison purposes; however, where the witness consents to make in-court samples and there is no objection by opposing counsel, the samples may be used.

2. CRIMINAL LAW—EVIDENCE—HANDWRITING—IN-COURT EXEMPLARS —PROSECUTION'S OBJECTION—DISCRETION.
   Allowing a defendant to make handwriting samples in court for comparison purpose where the prosecution objects to the defendant's request is in the trial judge's discretion, because

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 21 Am Jur 2d, Criminal Law § 362.
29 Am Jur 2d, Evidence §§ 806–815.

the evidential value of in-court exemplars is questionable in that they are self-serving and would present an opportunity for fabrication.

3. CRIMINAL LAW—EVIDENCE—HANDWRITING—IN-COURT EXEMPLARS —PROSECUTOR'S OBJECTION—DISCRETION.

Refusing to allow a defendant, charged with uttering and publishing, to make an in-court exemplar of his handwriting or of anything that a handwriting expert, present in court, might require to make a proper comparison between the defendant's handwriting and the forged indorsement was not an abuse of discretion where the prosecutor objected to the in-court exemplars being made, the court had appointed a handwriting expert for the defendant, and the expert had testified that he could not form an opinion concerning the identity of the person who indorsed the check due to the paucity of letters in both the indorsement and the handwriting exemplars provided him.

Appeal from Recorder's Court of Detroit, Geraldine Bledsoe Ford, J. Submitted Division 1 March 2, 1971, at Detroit. (Docket No. 8550.) Decided March 23, 1971.

Thomas R. Kennedy was convicted of uttering and publishing. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Thomas P. Smith,* Assistant Prosecuting Attorney, for the people.

Burton L. Borden, for defendant on appeal.

Before: V. J. BRENNAN, P. J., and QUINN and O'HARA,* JJ.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

V. J. BRENNAN, P. J. Defendant was convicted in a nonjury trial of uttering and publishing contrary to MCLA § 750.249 (Stat Ann 1962 Rev § 28.446) and was sentenced to serve 5 to 14 years in prison.

At the trial, it was defendant's position that he was never inside the bar of the complaining witness and that he never forged the name of "Robert T. Lee" on the back of a stolen check to induce the complaining witness to cash it. Since defendant was an indigent, the court, at his request, appointed a handwriting expert to testify on his behalf. Defense counsel submitted a number of samples to the expert witness, James Hurt, dating back to 1961. Mr. Hurt testified that he could not form an opinion concerning the identity of the person who indorsed the check in question due to the paucity of letters in both the check and the handwriting exemplars. At that point defendant volunteered to write anything the expert might require in order to make a proper comparison. The prosecutor objected to the offer, and the court sustained the objection.

On appeal defendant's sole assignment of error is that the court erred in sustaining the prosecutor's objection to the defendant's offer to submit handwriting samples written in court. We do not agree.

The issue before us is one of first impression in this jurisdiction. It has long been the law in Michigan that a witness may not be compelled to make handwriting samples in court for comparison purposes. *First National Bank of Houghton* v. *Peter Robert* (1879), 41 Mich 709. Where, however, the witness consents to make exemplars and there is no objection by opposing counsel, it is clear that the in-court samples may be used. *People* v. *Sturman* (1920), 209 Mich 284. The problem at hand is whether it is an abuse of discretion to

refuse to allow the making of in-court samples where the defendant consents thereto but the prosecutor objects.

It appears that a majority of courts that have passed upon this issue favor exclusion. See 7 Wigmore on Evidence, § 2018(1), pp 227, 228; *People* v. *Rosenbaum* (1921), 299 Ill 93 (132 NE 433); *People* v. *Sauer* (1958), 163 Cal App 2d 740 (329 P2d 962); *Hickory* v. *United States* (1894), 151 US 303 (14 S Ct 334, 38 L Ed 170). The rationale given is that such writings would be in the nature of a self-serving act and would present a unique opportunity for fabrication. We are inclined to agree that there is a high degree of unreliability inherent in allowing a witness to prepare writing samples in court to show that his handwriting does or does not match that on another instrument which has already been inspected by him. Under these circumstances it was not an abuse of discretion to refuse the defendant's offer to prepare writing samples during the trial. This is not to say that the in-court preparation of exemplars can never be allowed, rather we hold that the evidential value of this procedure is such that, upon objection, the court has discretion not to permit it.

Affirmed.

All concurred.

STONELEIGH HOMES, INC., *v.*
JEROME BUILDING COMPANY

1. CORPORATIONS—DEFAULTING CORPORATION—ANNUAL REPORT—CONTRACTS—ENFORCEMENT.

   A corporation which does not file its annual report or pay its annual privilege fee, as required by statute, is precluded from enforcing any contract made by it while in default (MCLA § 450.87).

2. CORPORATIONS — DEFAULTING CORPORATION — QUANTUM MERUIT — RIGHT TO RECOVER.

   A corporation which did not file its annual report, as required by statute, but later filed its annual report can recover on a quantum meruit basis for services rendered and materials furnished to a defendant during the time when it was not in default (MCLA § 450.87).

Appeal from Calhoun, Ronald M. Ryan, J. Submitted Division 3 October 6, 1970, at Grand Rapids. (Docket No. 8572.) Decided March 23, 1971. Leave to appeal denied June 3, 1971, 385 Mich 753.

Complaint by Stoneleigh Homes, Inc., against Jerome Building Company for damages for breach of contract. Accelerated judgment for defendant. Amended complaint for breach of contract and for the value of labor and materials furnished. Accelerated judgment for defendant. Plaintiff appeals. Reversed and remanded.

John M. Jereck, for plaintiff.

Allen, Worth, Hatch & Calderone, for defendant.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 18 Am Jur 2d, Corporations § 176.

Before: HOLBROOK, P. J., and R. B. BURNS and J. J. KELLEY, JR.,* JJ.

HOLBROOK, P. J. This is an appeal by plaintiff Stoneleigh Homes, Inc., of Battle Creek, Michigan, from grant of motions for accelerated judgment in favor of defendant, Jerome Building Company, of Southfield, Michigan.

Plaintiff brought suit on February 7, 1968, in Calhoun County Circuit Court for breach of contract by defendant arising out of an agreement between the parties dated July 20, 1967, pursuant to which plaintiff, as subcontractor, was to furnish labor, material, equipment, and tools for the undertaking of foundation, masonry, and concrete flat work on and around a building to be constructed by defendant in Battle Creek, Michigan. *In addition* to the original agreement, four *addenda* thereto were executed by the parties, the last of which was dated September 25, 1967.

Plaintiff alleged in its pleadings that it was not allowed to complete its work and plaintiff further alleged, and defendant denied, that, at the time of its dismissal, plaintiff was performing its work in accordance with the agreement and *addenda* thereto. Defendant, in its amended answer filed April 10, 1968, raised as an affirmative defense the following:

"The contract between plaintiff and defendant described in plaintiff's complaint was entered into on July 20, 1967. Plaintiff's annual report to the Michigan Department of Treasury for the year 1967 required by *Section 450.82 of Michigan Compiled Laws of 1948 (MSA 21.82)* and due not later than May 15, 1967, was not filed until August 16, 1967, on which date the filing fee and annual privi-

* Circuit judge, sitting on the Court of Appeals by assignment.

lege fee required by law were also submitted to said department. By virtue of its failure to timely file its 1967 annual report and the provisions of *Section 450.87 of Michigan Compiled Laws of 1948 (MSA 21.87)* relating thereto, plaintiff's corporate powers were suspended at the time said contract was entered into between plaintiff and defendant and plaintiff is barred from maintaining this action upon such contract."

In answer to defendant's requests for admissions, plaintiff admitted that it did not file its 1967 annual corporate report nor pay its privilege fee until August 16, 1967.

On September 23, 1968, defendant filed a motion for accelerated judgment for the reason that plaintiff's annual report was not timely filed nor its privilege fee timely paid and that, therefore, the contract in question, dated July 20, 1967, was entered into while plaintiff was in default and while its corporate powers were suspended. MCLA § 450.87 (Stat Ann 1963 Rev § 21.87). The trial court granted defendant's motion for accelerated judgment by a finding entered and filed January 21, 1969, subject to plaintiff's right to file an amended complaint within 20 days from date of judgment for recovery of damages for work and labor performed, setting up defendant's liability to pay such damages, or any waiver or estoppel which would allow recovery against defendant. An order to that effect was entered and filed January 27, 1969.

On February 12, 1969, plaintiff filed an amended complaint alleging in count I thereof in part as follows:

"* * * plaintiff and defendant entered into a series of supplemental agreements, two of which are also dated July 20, 1967, one having no date thereon, and the fourth being dated September 25,

1967, copies of which are attached to plaintiff's original complaint, marked Exhibits 'B', 'C', 'D', and 'E', respectively, and made a part hereof by reference.

"(5) That said last agreement (Exhibit 'E') was entered into on the 25th day of September, 1967; that plaintiff had both filed its annual report and paid its annual privilege fee on August 16, 1967.

"(6) That said Exhibit 'E' provides as follows: 'It is mutually agreed and affirmed that Stoneleigh Homes has agreed that the original agreement with Jerome Building Co. included all fill sand necessary to bring the interior and exterior grades up to the height required for the installation of the concrete flat work, and further in order to resolve this question and the question of monies that are due for additional depth of footings, pads, *etc.*, the Jerome Bldg. Co. agrees to pay Stoneleigh Homes an additional $500 over and above the present contract price, and Jerome Bldg. further agrees that they will advance a sum sufficient to cover the cost of the sand after same has been put in place. The cost of the sand is to be charged against the original contract amount.'

"(7) That said Exhibit 'E' therefore is a ratification and affirmance of the original contract and other supplemental agreements (Exhibits 'A' through 'D'); that therefore the original contract is in existence either by virtue of Exhibit 'E' or by waiver resulting from the execution of Exhibit 'E'."

Plaintiff further alleged, in count I, that, inasmuch as defendant had made payments to plaintiff pursuant to the contract on or about September 19, 20, and 27, 1967, after plaintiff had filed its annual report and paid its privilege fee on August 16, 1967, and had made payments to suppliers and materialmen on behalf of plaintiff, thereby causing plaintiff to rely on the contract and continue to provide labor and materials in accordance therewith, there

was a waiver of the affirmative defense or a ratification of the contract between the parties and that defendant had waived its right to object to plaintiff's complaint for recovery of services rendered and lost profits. In count II of its amended complaint plaintiff alleged in part as follows:

"(2) That plaintiff was engaged by defendant to furnish certain labor and materials on defendant's behalf in the construction of a United States Post Office building in the City of Battle Creek, Michigan.

"(3) That plaintiff, as a result of defendant's request, did provide considerable labor and materials on behalf of said defendant in said construction; that said labor and materials were substantially in accordance with acceptable workmanship and quality.

"(4) That at the time of furnishing said labor and materials said plaintiff expected to receive compensation for the same, and further, said plaintiff believes that defendant expected to pay plaintiff for said labor and materials.

"(5) That while defendant has paid for a portion of the labor and materials furnished by your plaintiff, there still remains a balance due to your plaintiff, the reasonable value thereof being approximately $20,000.

"(6) That defendant has refused, failed, and neglected to pay your plaintiff the said balance due; that if defendant is not ordered to pay said balance, defendant will become unjustly enriched in said amount."

Thereafter, on March 7, 1969, the trial court, considering plaintiff's amended complaint, reaffirmed its grant of accelerated judgment for defendant, while recognizing that it had not yet denied plaintiff recovery, for the value of labor and material furnished, on a quasi-contract theory.

Defendant, on June 4, 1969, again moved for accelerated judgment on plaintiff's amended complaint, again alleging that plaintiff was precluded from maintaining its action by virtue of its delayed filing of its annual report and payment of the required privilege fee, as required by MCLA 1967 Cum Supp § 450.82 (Stat Ann 1967 Cum Supp § 21.82). On November 12, 1969, the trial court again entered its finding granting defendant's motion for accelerated judgment against both counts of plaintiff's amended complaint.

The issues which are dispositive of this appeal are considered in order:

1. *Is a corporation entitled to judicial enforcement of a contract which it made while in default for failure to file its annual report and pay its annual privilege fee required by § 87 of the Michigan general corporation act, MCLA § 450.87 (Stat Ann 1963 Rev § 21.87)?*

Defendant, in its motions for accelerated judgment, relied upon § 87 of the general corporation act, MCLA § 450.87 (Stat Ann 1963 Rev § 21.87), which provides in part:

"(1) If any corporation neglects or refuses to make and file the reports and/or pay any fees required by this act[1] within the time herein specified, and shall continue in default for 10 days thereafter, unless the secretary of state shall for good cause shown extend the time for the filing of such report or the payment of such fee, as the case may be, as provided in section 91 of this act, and (2) if such corporation shall continue in default for 10 days

[1] MCLA 1967 Cum Supp § 450.82 (Stat Ann 1967 Cum Supp § 21.82), provides in part:

"A report accompanied by a filing fee of $2.00 and the amount of the annual privilege fee as provided by law shall be filed with the department of treasury by all profit corporations, * * *. The report shall be filed in duplicate on or before May 15 each year."

after the expiration of such extension, its corporate powers shall be suspended thereafter, until it shall file such report, and it shall not maintain any action or suit in any court of this state upon any contract entered into during the time of such default."

Plaintiff contends that the foregoing statute is intended to prohibit a defaulting corporation from maintaining an action based on contract only so long as the corporation remains in default, inasmuch as the statute provides specifically that corporate powers are to be suspended only "until it shall file such report"; that to permit enforcement by the opposite party of a contract entered during the period of default, as provided in the statute, is inconsistent with an interpretation of the statute which would hold the contract void and never enforceable by the defaulting party; that an interpretation of the statute providing for the forfeiture of contract rights by the defaulting corporation in addition to the payment by it of the other fines and penalties provided by the Michigan General Corporation Act[2] would place a hardship upon the corporation not intended by the enactment in question; and that PA 1933 (Ex Sess), No 11, "An act to provide the terms and conditions upon which the suspension of corporate powers may be waived and said corporations be authorized to do business",[3]

---

[2] PA 1931, No 327, MCLA § 450.1 *et seq.* (Stat Ann 1963 Rev § 21.1 *et seq.*), especially MCLA § 450.87 (Stat Ann 1963 Rev § 21.87); MCLA § 450.88 (Stat Ann 1963 Rev § 21.88); and MCLA § 450.91 (Stat Ann 1963 Rev § 21.91).

[3] Section 1 of the act provides:

"All profit corporations *whose powers are now suspended* under the provisions of section eighty-seven of act number three hundred twenty-seven of the public acts of nineteen hundred thirty-one, as amended, may, upon the filing of such delinquent report and/or the payment of one-fourth of such privilege fee in default, but without penalties, *within two months of the effective date of this act*, secure from the secretary of state, an extension of time within which to pay the remainder of such fee: *Provided, however*, That such extension of time shall in no case exceed one year." (Emphasis supplied.)

when read in conjunction with MCLA § 450.87 (Stat Ann 1963 Rev § 21.87), render the contract in question valid and enforceable.

Defendant claims that the provisions of PA 1933 (Ex Sess), No 11, by their express terms, were applicable only to those corporations in default prior to December 26, 1933, the effective date of the act, and which were able to cure such default prior to February 26, 1934. We agree with defendant's contentions as to the inapplicability of PA 1933 (Ex Sess), No 11, to this case.

In *Irvine & Meier* v. *Wienner* (1920), 212 Mich 199, the facts of which are analogous to those in the case under consideration, the Court, in considering § 87 of the general corporation act, stated in part as follows (pp 200, 202):

"The case then which is presented for our consideration is this: Plaintiff was in default for failure to file its 1915 report, when the contract was made on October 14, 1916, but was not in default when the bill was filed to enforce the lien on September 25, 1917. Under these facts was the chancellor right in holding that no relief could be granted the plaintiff?

"1. A solution of the question calls for a construction of the following provision:

" 'If any corporation neglect or refuse to make and file the reports required by this section within the time herein specified, and shall continue in default for ten days thereafter, its corporate powers shall be suspended thereafter, until it shall file such report, and it shall not maintain an action in any court of this state upon any contract entered into during the time of such default.' * * *

"Plaintiff argues that it was not the purpose of the legislature to make such contracts void, but merely to suspend the right of enforcement during the period of default. This view is a plausible one,

but we are not persuaded that the language will permit of that construction. There are several reasons which incline us to the view that the inhibition against enforcement was intended to be perpetual. Some of them are:

"a. The language of the statute taken in its common and ordinary meaning would preclude any recovery thereon.

"b. Because this view is consistent with the first penalty imposed. If plaintiff's power to contract was suspended it is not clear how it could, during the period of suspension, make a contract which would ever have any validity.

"c. It is obvious that the prepositional phrase 'during the time of such default' modifies either the verb 'maintain' or the verb 'entered into'. If it modifies 'maintain' it is clear that the inhibition against enforcement continued only during default, but if it modifies 'entered into' it is equally clear that the inhibition is perpetual. Under the rule that modifying clauses should be placed as near as consistent to the words which they modify, we must conclude that it was intended the phrase should modify the words 'entered into'.

"d. Two penalties are imposed in this section for the failure of a corporation to file its annual report, namely: A suspension of corporate powers and a denial of the right to enforce its contracts. The first named penalty is to continue until the report is filed. If the legislature had intended that the inhibition against enforcement of contracts should be only temporary, may we not assume that it would have added a limitation as it did to the former penalty, by repeating the words 'until it shall file such report', or other words of similar import?

"e. A glance at the former legislation on this subject discloses that the legislation has been steadily, for several years, growing more drastic. The obvious reason for this was to compel prompt filing of annual reports. With the legislature in this

frame of mind when this legislation was passed, it is hardly conceivable that it intended only a temporary suspension of the right to enforce contracts, as that would be but mild punishment for its default. Under this view a corporation could continue to be lax with reference to its annual report, and in the event it desired to sue upon its contract it could then file its report and its atonement would be complete.

"Our conclusion is that the chancellor was right in holding that the contract had no validity and, therefore, no relief could be granted."

In the case of *Adams* v. *E. M. Burke Homes, Inc.* (1968), 14 Mich App 578, 591, it is stated that a contract entered into in circumstances such as those existing in the present case is so far invalid that it may not be affirmatively relied upon by the delinquent corporation.

Upon the basis of the foregoing authority we hold that the trial court was correct in ruling that plaintiff was barred, pursuant to § 87 of the general corporation act, from enforcement of the contract in question.

2. *Where § 87 of the general corporation act, MCLA § 450.87 (Stat Ann 1963 Rev § 21.87), prohibits a plaintiff corporation from maintaining "any action or suit in any court of this state upon any contract entered into during the time of such default", is plaintiff entitled to recover on the theory of quantum meruit for labor and material furnished defendant after the disability of the plaintiff has been removed by a proper filing of the report and payment of the fees?*

Plaintiff claims it is, in any event, entitled to recover for the value of services, materials, and labor performed, after August 16, 1967, when it was not in default on the theory of quantum meruit, as set forth in count II of its amended complaint. We

further determine that § 87 of the general corporation act does not prohibit the recovery on a *quantum meruit* basis by a corporation for the value of its services and materials furnished during a period of time when it is in good standing.

The defendant claims the case of *Lake States Engineering Corporation* v. *Lawrence Seaway Corporation* (1969), 15 Mich App 637, is applicable to the facts herein when considered in conjunction with MCLA § 600.2021 (Stat Ann 1962 Rev § 27A.2021).[4] We disagree because the particular section of the act dealing with foreign corporations provides a permanent bar to the maintenance of actions founded upon forbidden acts, and is distinguishable from § 87 of the general corporation act which suspends the corporation's powers necessarily including its power to enter into contracts only so long as the corporation is in default.

In the case of *Industrial Coordinators, Inc.,* v. *Artco, Inc.* (1962), 366 Mich 313, 317, it is stated in part as follows:

"The powers of a corporation are many—the power to sue and to be sued; the power to deed real estate; the power to carry on a business, et cetera. Furthermore, corporate activity consists of a flow of many acts, some beginning, some ending, and some in process at a given instant. A corporation hires, fires, manufactures, trades, sells, and engages in corporate activities until such time as the suspension is invoked. In this connection, *Turner* v. *Western Hydro-Electric Co.* [1927], 241 Mich 6, is of interest for holding that the failure to pay fees

[4] "When, by the laws of this state, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law, and such act was done by a foreign corporation, *the foreign corporation shall not maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act.*" (Emphasis supplied.)

does not cancel the charter even though the statute under consideration in that case declared the charter to be absolutely 'void.' The Court said that such a provision is not self-executing and that a judicial inquiry would be required in order to forfeit the corporate charter.

* * *

"The suspension here intended is to deny to the corporation the benefit of the use of its powers until the default is cured. So, a corporation cannot carry on a suit while it is in default if the defense is raised (*Meldman Cartage Co.* v. *Fruehauf Trailer Co.* [1935], 271 Mich 304), but once the default has been corrected, there is no bar to the action. *Eagle Oil Corp.* v. *Cohasset Oil Corp.* [1933], 263 Mich 371." (Emphasis supplied.)

While, as defendant asserts, § 87 of the general corporation act does not retroactively validate contracts made unenforceable during the period of default, we hold that, on the other hand, giving the statute a liberal construction to which it is entitled,[5] that it should not be construed so as to prevent plaintiff herein from recovering on a quantum meruit basis for services rendered and materials furnished to defendant at a time when plaintiff was not in default. *Industrial Coordinators, Inc.*, v. *Artco, Inc., supra.*

The trial judge had difficulty with the problem presented in this case as is evidenced in what he said in his last ruling granting accelerated judgment:

"While it has appeared to this court that a party furnishing valuable materials and labor to another after the annual report was filed and fees paid, should in justice and equity recover the value of such goods and services on a quasi-contract theory,

[5] *L. J. Barry Coal Co.* v. *Houghten* (1937), 282 Mich 547.

no decisions in this state have been found to support such an action. There are cases in which relief has been denied, but the quasi-contract theory was not put squarely before the court. In *Detroit United Fruit Auction Co.*, v. *Kroger Grocery and Baking Co.* [1924], 227 Mich 412, plaintiff was denied recovery where 330 boxes of grapefruit were sold and delivered during the default period. Might the decision have been different if the delivery took place after the reports were filed and fees paid?

* * *

"In the absence of cases in point and because the legislature has imposed a strong prohibition against maintaining any action on a contract made while a corporation is in default, this court is constrained to hold that plaintiff corporation may not recover any money on a restitutional theory on an implied contract when it is forbidden to recover on the express contract."

There is no question in this case but that plaintiff corporation had the power to carry on all of its business after qualifying by filing its annual report and fees on August 16, 1967. The cases of *Vanderhoef* v. *Parker Brothers Company, Limited* (1934), 267 Mich 672, and *Orcutt* v. *White* (1922), 220 Mich 590, are applicable to this case as to the period of time when the plaintiff was in good standing and able to transact its business. *Industrial Coordinators, Inc.*, v. *Artco, Inc., supra.*

This Court recognizes the desire of the trial court to come to the same conclusion that we have in this case. We, therefore, reverse and remand for further proceedings consistent with this opinion including the amendment of pleadings if desired or needed. Costs to plaintiff.

All concurred.

RUMPH *v.* WAYNE COMMUNITY SCHOOL DISTRICT

1. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—TENURE TEACHERS—LOSS OF TENURE—NOTICE—PURPOSE.

   Statute providing that a teacher who discontinues his services, without either mutual consent or notice 60 days before the school year, forfeits his rights to continuing tenure was designed to prevent teachers from departing a school district immediately before school begins, and, thus, leaving the school district without sufficient teachers or time to replace the leaving teachers (MCLA § 38.111).

2. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—TENURE TEACHERS—LOSS OF TENURE RIGHTS—NOTICE.

   A teacher's rights under continuing tenure are lost only if the teacher resigns without giving notice 60 days before the school year (MCLA §§ 38.102, 38.111).

3. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—TENURE TEACHER—DISMISSAL—SUMMARY DISMISSAL—TENURE ACT—PURPOSE.

   School boards are not allowed to summarily dismiss tenure teachers even if the Tenure Commission later finds that the teacher had discontinued his service, because the legislative intent in the teachers' tenure act would be violated because the burden would be on the tenure teacher to persuade the Tenure Commission that he should not have been dismissed (MCLA §§ 38.101, 38.102, 38.111).

4. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—TENURE TEACHERS—DISMISSAL—PROCEDURE—STATUTES.

   Discharge of a tenure teacher can be accomplished only by strict compliance with the procedural safeguards of the tenure act (MCLA §§ 38.101, 38.102).

REFERENCES FOR POINTS IN HEADNOTES

[1–5] 47 Am Jur, Schools §§ 134, 138–140.

[5] What amounts to waiver of status or rights under teachers' tenure statute. 145 ALR 1078.

5. Schools and School Districts—Teachers—Tenure Teachers—Dismissal—Procedure—Statutes.

Failure to comply with all of the procedural requirements of the teachers' tenure act when dismissing a teacher who allegedly discontinued his services by failing to file required interim reports while on sabbatical leave rendered the dismissal procedurally defective; the dismissed tenure teacher did not by his omissions forfeit his rights under continuing tenure (MCLA §§ 38.102, 38.111).

Appeal from Wayne, Richard M. Maher, J. Submitted Division 1 February 10, 1971, at Detroit. (Docket No. 8590.) Decided March 24, 1971. Leave to appeal denied August 4, 1971, 385 Mich 775.

Plaintiff Matthew Rumph was dismissed as a teacher by the Board of Education of the Wayne Community School District. Plaintiff appealed to the State Tenure Commission. Appeal dismissed. Plaintiff appealed to circuit court. Dismissal affirmed. Plaintiff appeals. Reversed.

Craig, Fieger & Golden, for plaintiff.

Tinkham, Snyder, MacDonald & Wilder, for defendant.

Before: Danhof, P. J., and Holbrook and Bronson, JJ.

Bronson, J. The plaintiff, Matthew Rumph, had been a teacher in the defendant school district for approximately nine years prior to the instant controversy. It is unquestioned that plaintiff's professional services had been satisfactory during this period. In the spring of 1965, plaintiff, a tenure teacher, applied for a sabbatical leave from the school district. Plaintiff's formal application for a sabbatical leave provided:

"State Purpose of Sabbatical Leave. My prime purpose of seeking a sabbatical leave at this time is to do research work in Europe (some in the states). Along with research, I plan on doing extensive travel and possibly participating in seminar and course work at a foreign university. This is for the purpose of getting a PhD in Comparative Education.

"Give Program of Work or Study * * * Outline of Proposed Project. For the first half of the school year I plan on doing comparative research of the various types of schools (Folk Skoles and Hoch Skoles), in countries such as Holland, Germany, Switzerland, Italy, and France. Time permitting, I shall attempt to cover some of the other surrounding countries. For the second semester I shall take seminar work at the University of Leiden or the University of Munich.

* * *

"Give Plan for Reporting to the Superintendent in Accordance With Requirements. I shall be compiling research information which I plan on submitting to Phi Delta Kappa for publication. At the conclusion of each segment of my research on specific countries, I shall make a report of my findings and conclusions, and forward such to Dr. Hinchey."

The plaintiff's request for a sabbatical leave was granted by the defendant for the school year commencing in September 1965 and ending in June 1966. Plaintiff was to receive one-half of his teaching salary during this period. Plaintiff's leave was granted subject to the defendant's sabbatical leave rules and regulations, which provided, in pertinent part:

"During said sabbatical leave, the teacher shall be considered to be in the employ of the said board, shall have a contract,

* * *

"The employee shall immediately request approval from the superintendent for substantial changes in the planned program of the leave as outlined in the approved application.

* * *

"An interim report shall be filed at the mid-point of the period for which leave is taken. This report shall contain sufficient information to enable the superintendent to determine that the leave is being utilized in the approved manner.

"A final report shall be filed with the superintendent in accordance with the provisions as stated in a following section."

Plaintiff failed to file the required interim report, which was due in January 1966. Defendant's representative sent plaintiff two letters requesting the report, but defendant's requests went unanswered. Accordingly, the defendant suspended plaintiff's salary on March 8, 1966. Plaintiff returned to the United States in July 1966 and arranged a meeting with the school administrators on July 26, 1966. At this meeting, the plaintiff was informed that a contract for 1966–1967 would not be issued to him until his legal status was determined, and on August 8, 1966, the attorney for defendant wrote the plaintiff a letter informing him that a contract would not be issued for the coming year.

The reason for defendant's decision not to offer the plaintiff a contract, as expressed in the letter from defendant's attorney, was defendant's belief that plaintiff had breached the sabbatical leave agreement. The defendant also demanded that plaintiff reimburse the defendant for the salary plaintiff received for part of the sabbatical year.

Plaintiff, upon learning of defendant's intention not to offer him a contract for the 1966–1967 school year, requested a hearing before the board of edu-

cation for the defendant school district. The school board held a hearing and upheld the refusal to extend a contract to the plaintiff. The plaintiff then requested a hearing before the State Tenure Commission which, after a hearing, dismissed plaintiff's appeal. Plaintiff appealed this dismissal to the Wayne County Circuit Court, which affirmed the dismissal of the appeal by the State Tenure Commission.

The only issue raised on appeal which merits discussion may be stated as follows:

Whether plaintiff's employment was terminated in accordance with the teachers' tenure act?

The discharge of a tenure teacher is governed by Article IV of the teachers' tenure act, MCLA § 38-.101 *et seq.* (Stat Ann 1968 Rev § 15.2001 *et seq.*). The statute provides, in part:

"Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and *only after such charges, notice, hearing, and determination thereof, as are hereinafter provided.*"[1] (Emphasis added.)

The act then provides:

"All charges against a teacher shall be made in writing, signed by the person making the same, and filed with the secretary, clerk or other designated officer of the controlling board: Provided, That charges concerning the character of professional services shall be filed at least 60 days before the close of the school year. The controlling board, if it decides to proceed upon such charges, shall furnish the teacher with a written statement of the charges, and shall, at the option of the teacher, provide for a hearing to take place not less than

[1] MCLA § 38.101 (Stat Ann 1968 Rev § 15.2001).

30 nor more than 45 days after the filing of such charges."[2]

Defendant admits that, although a hearing was held, other procedural requirements under Article IV were not followed. Nevertheless, it is defendant's position that the plaintiff, because he breached the sabbatical leave agreement, is no longer entitled to the protection of Article IV of the teachers' tenure act.

Defendant relies on MCLA § 38.111 (Stat Ann 1968 Rev § 15.2011) to support its position:

"No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least 60 days before September first of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act."

The defendant contended, and the Tenure Commission held, that plaintiff's breach of the sabbatical leave agreement, in effect, constituted a discontinuance of his services without the consent of the controlling board. Such action, according to defendant and the Tenure Commission, constituted a forfeiture of tenure rights, and, thus, the procedural requirements under Article IV need not be complied with.

The circuit court upheld the decision of the Tenure Commission by holding as follows:

"In substance, this court finds that the appellant did discontinue his services with the controlling board, which was not by mutual consent and as a result, he totally forfeited his rights as a tenure

[2] MCLA § 38.102 (Stat Ann 1968 Rev § 15.2002).

teacher. Having lost his tenure rights, he had no right to a hearing under Article IV. He in effect, through his own actions, also lost his rights to an appeal. It is noted that Article V provides the sole exception by which a tenure teacher may lose his tenure rights without the necessity of a formal board hearing."

We cannot accept this interpretation of MCLA § 38.111 (Stat Ann 1968 Rev § 15.2011). Under Article V, the above-cited statute provides that a teacher who discontinues his services, without either mutual consent or a notice to the board 60 days before the school year, "shall forfeit his rights to *continuing tenure* previously acquired under this act". This section of the tenure act is clearly designed to prevent teachers from departing a school district immediately before school commences and thus leaving the school board without a sufficient number of teachers, or time to replace them. In addition, the penalty for a teacher's discontinuance in a manner inconsistent with the act is the loss of "*rights to continuing tenure* previously acquired under this act". Under the tenure act, rights to continuing tenure include, *but are not limited to, the procedural safeguards set forth in Article IV.*[3]

The interpretation given to Article V by the Tenure Commission and the circuit court is, in our opinion, inconsistent with the legislative intent.

[3] In addition to the procedural requirements of the act, a teacher who has acquired continuing tenure is provided with the following statutory rights: cannot be discharged or demoted except for "reasonable and just cause", MCLA § 38.101 (Stat Ann 1968 Rev § 15.2001); may transfer districts without being subjected to the two-year probationary status under Article II, MCLA § 38.92 (Stat Ann 1968 Rev § 15.1992); given priority when vacancy arises if employment terminated because of necessary reduction in personnel in the school district, MCLA § 38.105 (Stat Ann 1968 Rev § 15.2005). These statutory rights are not provided to those teachers who have not acquired "continuing tenure under the act". See *Munro* v. *Elk Rapids Schools* (1970), 383 Mich 661; MCLA § 38.84 (Stat Ann 1968 Rev § 15.1984).

The rights that are lost under Article V are all those rights acquired by a teacher under continuing tenure, and those rights are lost only if the teacher resigns without giving the required 60-day notice to the school board.

To affirm the decision of the circuit court could mean that school boards could avoid the procedural requirements of Article IV merely by finding that the teacher had improperly discontinued services under MCLA § 38.111 (Stat Ann 1968 Rev § 15-.2011). Such a result would certainly discourage a tenure teacher from taking a sabbatical leave, because the possibility would exist that such a determination would be made without the teacher being provided with the procedural protection of Article IV.

Furthermore, we find it to be contrary to the legislative intent, as expressed in the tenure act, to permit school boards to summarily dismiss tenure teachers and then have the Tenure Commission, after the fact, find that the teacher had discontinued his services. Such a procedural approach places the burden upon the tenure teacher to persuade the commission that he should not have been dismissed, rather than the present statutory approach which places the burden upon those making charges against the tenure teacher.

Discharge of a tenure teacher can be accomplished only by strict compliance with the procedural safeguards provided under Article IV of the tenure act. See *Wilson* v. *Flint Board of Education* (1960), 361 Mich 691; *Karabetsos* v. *School District of City of East Detroit* (1969), 17 Mich App 10; *Wright* v. *Port Huron School District* (1968), 13 Mich App 1. We hold that dismissal of plaintiff was procedurally defective because the defendant failed to comply with MCLA § 38.102 (Stat Ann

1968 Rev § 15.2002). The decision of the circuit court holding that plaintiff had forfeited his rights under Article IV of the tenure act is reversed.

All concurred.

CITY OF DETROIT *v.* STATE OF MICHIGAN

1. TAXATION—STATE'S LIABILITY—PROPERTY TAX—SOVEREIGN IMMUNITY.

   All public property belonging to the state is exempt from taxation on the basis of sovereign immunity unless the one asserting nonexemption can point to some legislation in support of its position (MCLA § 211.7).

2. TAXATION—STATE'S LIABILITY—INTEREST.

   The state is not liable for interest on taxes except where, expressly or by reasonable construction of a contract or statute, it has placed itself in a position of liability.

3. TAXATION—STATE'S LIABILITY—PROPERTY TAX—BASE TAX.

   The state is required by statute to pay the base tax on property which it acquires after tax date whether before or after levy date (MCLA § 211.40).

4. TAXATION — STATE'S LIABILITY — PROPERTY TAX — INTEREST — PENALTIES — LEVY DATE.

   The state is required by statute to pay not only base taxes on property which it acquires but also interest and penalties if the base taxes are paid late, regardless whether the interest and penalties accrued before or after the levy date, because the state assumes the status of the former owner as of tax day for all taxing purposes (MCLA § 211.40).

REFERENCE FOR POINTS IN HEADNOTES

[1–7] 51 Am Jur, Taxation § 557 *et seq.*

5. TAXATION—PROPERTY TAX—"TAXABLE STATUS"—DEFINITION.
Statutory phrase that the taxable status of persons and of real and personal property shall be determined as of each December 31, the tax day, means the status of persons in relation to a particular piece of property (MCLA § 211.2).

6. TAXATION—PROPERTY TAX—"PUBLIC AGENCY"—DEFINITION.
The term "public agency" as used in the statute governing the proration of taxes on property acquired by purchase or condemnation is broader than "governmental agency" and includes quasi-public corporations (MCLA § 211.2).

7. TAXATION—PUBLIC AGENCY'S LIABILITY—PROPERTY TAX—INTEREST—PENALTIES.
"General property taxes" as used in the statute governing property taxes payable by public agencies includes penalties and interest; therefore, the statutory liability of a public agency for all general property taxes levied on or after the date title passes to it, means taxes, penalties, and interest (MCLA § 211.2).

Appeal from Court of Claims, William John Beer, J. Submitted Division 2 at Lansing, October 7, 1970. (Docket No. 8665.) Decided March 24, 1971. Leave to appeal denied June 18, 1971, 385 Mich 757.

Complaint by City of Detroit and its City Treasurer, against the State of Michigan, the State Treasurer, and the Department of State Highways for delinquent real property taxes and interest. Judgment for plaintiffs. Defendants appeal. Affirmed.

Michael M. Glusac, Corporation Counsel, and *Robert Reese, Julius C. Pliskow,* and *Arthur Yim,* Assistants Corporation Counsel, for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Louis J. Caruso* and *Karl S. Vasiloff,* Assistants Attorney General, for defendants.

Before: LEVIN, P. J., and T. M. BURNS and J. E. HUGHES,* JJ.

J. E. HUGHES, J. The facts are stipulated as follows:

"1. Certain parcels of real property in the City of Detroit were acquired by the Department of State Highways between the tax date, December 31, 1966, and levy date, July 15, 1967, said parcels being acquired either by condemnation or purchase.

"2. On tax date, December 31, 1966, said parcels were privately owned and subject to taxation for 1967.

"3. The Department of State Highways acquired title to said parcels subject to 1967 real property taxes.

"4. The Charter (Title VI, Chapter 4) of Detroit provides that said real property taxes became due at the office of the City Treasurer on July 15, 1967, and that one half of such taxes may be paid on or before August 15 and the second half on or before January 15, 1968, or if same were paid in full, then on or before August 31, 1967.

"5. The Charter of Detroit further provides for imposition of interest at the rate of one half (1/2) of one percent per month for such taxes which have not been timely paid.

"6. The Department of State Highways did offer to pay the base amounts of the taxes, without interest, on the parcels involved herein in March and April of 1968; that the respective checks were returned by the City of Detroit Treasurer to the Department of State Highways.

"7. Liability is admitted by defendants only for the base amounts of taxes on the respective parcels of real property involved herein."

---

* Circuit judge, sitting on the Court of Appeals by assignment.

Judgment in favor of plaintiffs in the amount of $15,332.31 (delinquent taxes plus interest) was signed by the Honorable William J. Beer, Oakland County Circuit Judge sitting in the Court of Claims.

The sole issue to be answered is: When the state acquires land by either purchase or condemnation for public purposes between tax date (December 31) and levy date (July 15) and the payment of the taxes is late, is the state liable for interest as well as for the taxes?

For the purpose of this opinion, at least, we see no need to make a distinction between the terms "penalties" and "interest". Exempted from taxation is "all public property belonging to the state of Michigan * * * ". MCLA § 211.7 (Stat Ann 1960 Rev § 7.7). *People, ex rel. Auditor General,* v. *Ingalls* (1927), 238 Mich 423, on the basis of sovereign immunity, holds this to be the law of the state "unless the one asserting it [non-exemption] can point to some legislation in support of it". There appears to be no Michigan authority on this question; however, it is certainly the general rule, also based on sovereign immunity, that a state is not liable for interest "except where, expressly or by reasonable construction of a contract or statute, it has placed itself in a position of liability". 24 ALR2d 928, 974, § 16. We accept this to be the law in Michigan.

The Attorney General concedes that our statutes have for some time contained clear authorization requiring the payment by the state of the base tax on property acquired by the state after tax date whether before or after levy date. This was accepted to be the law when the Attorney General

issued an opinion on October 23, 1961,[1] which contained the following language:

"No statutory provision exists which grants the Michigan State Highway Department an exemption from the payment of interest and penalties upon delinquent taxes and special assessments."

The state concedes that this opinion is good law today, admitting that base taxes are due in either case but claiming that this opinion of 1961, so far as liability for penalties and interest is concerned, applies only to the situation where the state acquires property after levy date. This authority for so limiting the 1961 opinion is an Attorney General's opinion issued November 27, 1967,[2] which says that that is what the 1961 opinion held. The 1967 opinion holds that under circumstances that exist in the instant case—acquisition between tax date and levy date—no interest or penalties can be charged the state for the late payment of the levied taxes. The City of Detroit claims that the property concerned in the 1961 opinion was acquired between tax date and levy date as in the case before us. Be that as it may, we do not deem the important aspect of the 1961 opinion to be when the land was acquired by the state, but rather the reason behind the opinion, that is, from where the authorization requiring the state to so pay came. The state concedes that this authority is found in MCLA § 211.40 (Stat Ann 1960 Rev § 7.81), the relevant portion of which then and now reads as follows:

"Sec. 40. Notwithstanding any provisions in the charter of any city or village to the contrary, all taxes shall become a debt due to the township, city,

[1] Letter opinion to John C. Mackie, State Highway Commissioner, October 23, 1961.

[2] OAG, 1967–1968, No 4615, p 154 (November 27, 1967).

village and county from the owner or person otherwise to be assessed on the tax day provided for in sections 2 and 13 of this act, and the amounts assessed on any interest in real property shall, on the first day of December, for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, become a lien upon such real property, and the lien for such amounts, and for all interest and charges thereon, shall continue until payment thereof."

At the time, MCLA § 211.2 (Stat Ann 1960 Rev § 7.2) [§ 2 of the General Property Tax Act] consisted of only two paragraphs the first of which is not material and the second of which in 1961 read:

"The taxable status of persons and real property after January 1, 1958, should be determined as of December 31, 1958, and each December 31 thereafter, which shall be deemed the tax day, any provisions in the charter of any city or village to the contrary notwithstanding. No assessing officer shall be restricted to any particular period in the preparation of the assessment roll but may survey, examine or review properties at any time prior to or after said tax day."

Outside of the removal of certain surplus language and the addition of "personal property", this paragraph reads the same and has exactly the same meaning now as it had then.

Under this statutory setting, the state concedes clear authority not only requiring it to pay the base taxes when property is acquired between tax day and levy day, but also for the payment of interest and penalties if the base taxes are paid late. The interest and penalties that the state concedes it must pay are not only those which accrued prior to acquisition but all that accrue thereafter until the taxes are paid. The state concedes that this author-

ity is still found in § 40 without reference to either paragraph 3 (added in 1966) or paragraph 4 (added in 1968) of § 2. We think this to be most significant as the 1967 opinion seems to completely ignore § 40 and deals with the problem as simply an interpretation of § 2 alone, apparently looking on paragraph 3 of the section as the basis of authority obligating the state to pay the base tax. This paragraph reads as follows:

"Notwithstanding any provision to the contrary in any law, when real property is acquired for public purposes by purchase or condemnation, all general property taxes, but not penalties, levied during the 12 months immediately preceding, but not including, the day title passes to the public agency shall be prorated in accordance with this paragraph (or section). The sellor [sic] or condemnee is responsible for the portion of taxes from the levy date or dates to, but not including, the day title passes and the public agency is responsible for the remainder of such taxes. If the date that title will pass cannot be ascertained definitely and an agreement in advance to prorate taxes is desirable, an estimated date for the passage of title may be agreed to. In the absence of such agreement, the public agency shall compute the proration of taxes as of the date title passes. The question of proration of such taxes shall not be considered in any condemnation proceeding. As used in this paragraph (section) 'levy date' means the day on which taxes become due and payable. In addition to the portion of taxes for which the public agency is responsible under the provisions of this paragraph (section), the public agency is also responsible for all general property taxes levied on or after the date title passes and before the property is removed from the tax rolls."[3]

[3] This act was amended in 1968, but the amendment is not here material.

The Attorney General then seems to try to lift himself by his own bootstraps by saying that when the legislature amended § 2 in 1968 by making certain minor modifications in language in paragraphs 2 and 3 and adding paragraph 4, the legislature adopted the Attorney General's 1967 interpretation of this section.

In any case, thereby arises the apparent difference between the approach of the two Attorney General's opinions. The 1961 opinion says that the obligation to pay base taxes arises out of § 40 and, there being no statutory limitation elsewhere, the state owes interest and penalties when the taxes are paid late. The 1967 opinion, apparently assuming the basic authority to be in paragraph 3 (added in 1966), merely interprets this section and arrives at the conclusion that the state has an obligation to pay base taxes only.

The Attorney General argues that this is not the case at all, but rather that under § 40, the state assumes the status of the property owner and must, therefore, pay the base tax; however, penalties and interest arise out of the lien that attaches on levy date and so property acquired before levy date requires the state to pay only base taxes as it assumes only the "personal debt" of the prior owner. But when property is acquired after levy day, the taxes plus interest and penalties (accrued and owing) because the lien having attached, are now "debts of the land itself" which must be assumed.

We fail to find this fine distinction in § 40. If, as § 40 and § 2 existed prior to 1966, the statutes clearly required the state to pay base taxes because it assumed the status of the former owner as of tax day, it would appear equally clear that it assumed that status for all taxing purposes and we believe that is exactly what the 1961 opinion rightly

held. Paragraph 2 of § 2, which has remained virtually unchanged since 1961, states that "The taxable status of persons and real and personal property shall be determined as of each December 31, which shall be deemed the tax day * * * ." It would appear to us that the legislature meant the status of persons in relation to a particular piece of property, which property then became so impressed. Any other interpretation of this language would create uncertainty, if not chaos, particularly when the possible variations that may arise under MCLA § 211.7 (Stat Ann 1960 Rev § 7.7) are considered.

Further, we believe that paragraphs 3 and 4 of § 2 are concerned with the respective rights between the seller or condemnee and the "public agency" or buyers as to how tax responsibility should be prorated between them, and in no way modify or change the obligation arising under § 40. We believe the term "public agency" to have been used advisedly by the legislature as a broader term than "state" or even "governmental agency" in that quasi-public corporations, such as railroads, power companies, etc., have authority to acquire land by purchase or condemnation for public use. The narrow interpretation that the state apparently seeks would result in there now being a statutory formula for the proration of taxes when land is acquired for public use by the state (and likewise a plan to deal with the private real estate transaction), but none when land is acquired by condemnation by a quasi-public corporation. We do not believe that the legislature intended this result.

Nevertheless, assuming that we are wrong in our analysis to this point, we still cannot reach the same conclusion as the Attorney General in his interpretation of § 2 alone. We believe that as used in

this section, the term "general property taxes" is the broad term which includes penalties and interest. Therefore, when the legislature said that the public agency is responsible for "all general property taxes levied on or after the date title passes," it meant taxes, penalties, and interest; in this connection we note that it was thought necessary to limit the term "general property taxes" when earlier used in the section by qualifying it to read "general property taxes, *but not penalties*" (emphasis supplied) to make it clear that the state was not to be responsible for costs (interest and penalties), created by the laxity of the former owner in paying his taxes, in prorating tax responsibility as between the two parties to the transaction.

In sustaining the award of the Court of Claims, we offer, in paraphrased form, the same advice to the State Highway Commission that was given to them in 1961 by the then Attorney General, Paul L. Adams: "The problem may be easily avoided by timely payment of taxes."

Affirmed.

All concurred.

CITY OF DEARBORN *v.* DIXIE CARTAGE, INC.

AUTOMOBILES — TRUCKS — WEIGHT ORDINANCES — PENALTIES — STATUTES — UNIFORMITY PROVISION.

Dismissal of complaints and warrants against defendant lessee of a truck for violating weight ordinances was improper even though the defendant lessee was originally charged with the driver of the truck and the penalty provision of the ordinance as to drivers was invalid under the applicable state statute's uniformity provision where the penalty provision as to lessees in the ordinance was the same as in the applicable state statute (MCLA § 257.724).

Appeal from Wayne, Horace W. Gilmore, J. Submitted Division 1 March 2, 1971, at Detroit. (Docket No. 8671.) Decided March 24, 1971.

Dixie Cartage, Inc., was convicted of two violations of a City of Dearborn ordinance restricting the weight of vehicles on city streets. Defendant appealed to the Wayne County Circuit Court. Motion to dismiss complaints and warrants granted. The City of Dearborn appeals. Reversed and remanded for trial.

Joseph J. Burtell, City Attorney, and *Carl P. Garlow,* Assistant City Attorney, for the City of Dearborn.

Edward Sanders, for defendant.

REFERENCE FOR POINTS IN HEADNOTE

7 Am Jur 2d, Automobiles and Highway Traffic § 160.

Before: V. J. BRENNAN, P. J., and QUINN and O'HARA,* JJ.

PER CURIAM. Although this appeal was consolidated for argument and decision with *Green v. Dearborn Municipal Court* (1971), 31 Mich App 591, on the basis that such appeals presented identical questions, our analysis establishes that this is not the fact. Hence, we write separate decisions in each case.

At its inception, June 1968 and April 1969, in Dearborn municipal court, this appeal involved three charges of overweight violations of the municipal ordinance. One charge involved the owner of the vehicle, the lessee thereof (Dixie Cartage, Inc.), and the driver. The other two charges involved the lessee and the drivers. The charges against the owner and the drivers were dismissed by the municipal court. Dixie Cartage, Inc., was found guilty on each charge and was fined according to the graduated scale specified in the ordinance, which scale was the same as that specified in MCLA 1971 Cum Supp § 257.724 (Stat Ann 1971 Cum Supp § 9.2424).

Defendant appealed all three convictions to circuit court. Before trial, defendant moved to quash the complaints and warrants on the basis that the penalty provision of the ordinance with respect to drivers exceeded the penalty provision of the statute with respect to drivers and that the ordinance was invalid under the uniformity provision of the statute, MCLA § 257.605 (Stat Ann 1968 Rev § 9.2305). The trial judge granted the motions to dismiss on this basis and this appeal followed.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

On the record before the trial court, no driver was involved. The only defendant was the lessee, Dixie Cartage, Inc. With respect to this defendant, the ordinance provisions and the statutory provisions were identical. This being true, we do not reach the other issues raised on appeal, but they are before us in *Green* v. *Dearborn Municipal Court, supra.*

Reversed and remanded for trial but without costs.

CHAPMAN *v.* CHAPMAN

1. TRUSTS—CONSTRUCTIVE TRUST—RIGHTFULLY-ACQUIRED PROPERTY—UNCONSCIONABLE—WITHHELD PROPERTY.

   Constructive trust relief may be appropriate in a case in which there is family relationship, trust, and confidence even though the property in question was not wrongfully acquired where the property is unconscionably withheld.

2. TRUSTS—CONSTRUCTIVE TRUST—FAMILY RELATIONSHIP.

   Imposition of a constructive trust on the proceeds from land sales by the defendants, the plaintiff's brother and sister-in-law, was sustained where four witnesses testified at trial that the agreement between the parties by which the plaintiff, in financial difficulty, conveyed the property, later sold, to the defendant was to vest only legal title in the defendants while plaintiffs retained the beneficial interest.

3. TRUSTS—CONSTRUCTIVE TRUST—GROUNDS.

   A constructive trust can be based upon a breach of fiduciary or confidential relationship, misrepresentation, concealment, mistake, undue influence, duress, or fraud.

4. TRUSTS—CONSTRUCTIVE TRUSTS—"UNCLEAN HANDS".

   An action to establish a constructive trust on the proceeds of the sale of property, conveyed by the defendant to the plaintiffs, the defendant's brother and sister-in-law, did not entail an "unclean hands" issue where even though the defendant was $250,000 in debt at the time of the transfer, there was no evidence that plaintiff did not have sufficient other property to meet the claims of his creditors had all his outstanding debts been reduced to judgment and where the defendant brother's business, selling automobile parts manufactured by his plaintiff brother,

---

REFERENCE FOR POINTS IN HEADNOTE

[1–4] 54 Am Jur, Trusts § 245 *et seq.*

was totally dependent on his brother's rehabilitation, because the transfers were a sound businesslike way to rehabilitate the plaintiff.

Appeal from Oakland, James S. Thorburn, J. Submitted Division 2 December 10, 1970, at Lansing. (Docket No. 8759.) Decided March 24, 1971.

Complaint by William C. Chapman and Rosalee Chapman against George Chapman and Jean Jolly Chapman to recover proceeds from sale of lands less any disbursements defendants had made for instalments, taxes, and insurance. Judgment imposing a constructive trust on defendants. Defendant Jean Jolly Chapman appeals. Affirmed.

Fulkerson, Moffett & Fulkerson, for plaintiffs.

Louisell & Barris, for defendant Jean Jolly Chapman.

Before: MCGREGOR, P. J., and T. M. BURNS and ANDREWS,* JJ.

T. M. BURNS, J. Defendant appeals from a judgment against her and her former husband jointly and severally, imposing a constructive trust on the proceeds from property sold by defendant and her former husband.

William C. Chapman is an inventor and in 1961 and 1962 was engaged in manufacturing certain parts used in the production of automobiles. William's brother, George Chapman, was engaged in the business of selling these parts to automobile manufacturers. Each brother was, therefore, de-

* Circuit judge, sitting on the Court of Appeals by assignment.

pendent upon the other for his own business success or failure.

In 1963, William C. Chapman suffered business reverses to the extent that he was unable to meet installments due on two parcels of land which he held jointly with his wife. To avoid foreclosure on the land contracts to which the parcels were subject, William and his wife, Rosalee, entered into an agreement with George and his wife, Jean, whereby the latter would pay installments, taxes, and insurance on the two properties known as the Rickett Road Property and the Pontiac Trail Property. In order to secure George and Jean for the money they were to advance, William and Rosalee quitclaimed the two properties to them. It was plaintiffs' contention below that defendants agreed to reconvey the property when plaintiffs' financial situation improved.

Defendants, however, sold the two properties for a total of $96,000. Plaintiffs, who had not consented to the sale of either parcel, then brought this action to recover the proceeds from the sales less any disbursements defendants had made for installments, taxes, and insurance.

The trial court concluded that plaintiffs were entitled to $20,200 of the $96,000 proceeds; the trial court's holding is based upon the theory of constructive trust. Jean Jolly Chapman appeals from the judgment of the trial court.

Defendant first contends that the relief of constructive trust is inappropriate because defendants did not wrongfully acquire the property from plaintiffs.

In *Kent* v. *Klein* (1958), 352 Mich 652, the Court was presented with elements similar to the instant case: family relationship, trust and confidence.

The Court found constructive trust relief appropriate (p 657):

"[I]t is not necessary that property be wrongfully acquired. It is enough that it be unconscionably withheld. * * *

"It is enough, to compel the surrender, that one feed and grow fat on that which in good conscience belongs to another, that he enjoy a windfall resulting in his unjust enrichment, that he reap a profit in a situation where honor itself furnishes rich reward, where profit, the mainspring of the market place, is both foreign and inimical to the trust imposed."

In order for the trial court to have imposed a constructive trust on the proceeds from the two sales, plaintiffs must have established at the trial that the agreement between the parties was to vest only legal title in defendants while plaintiffs retained the beneficial interest. The trial court, in finding this to be the case, arrived at its determination upon the testimony of the four witnesses.

Although this is a chancery case and reviewed *de novo,* this Court will not reverse the findings of the trial court unless convinced that it would have reached a different conclusion had it occupied the position of the trial court. It is apparent from our review of the record that the trial court's findings were based upon the testimony of the trial witnesses which the trial judge chose to believe. This Court recognizes the superior position of the trial judge to test the credibility of the witnesses. We will not, therefore, reverse the trial court's findings in this case.

Defendant also maintains that since plaintiffs failed to demonstrate any fraud on defendant's part, the remedy of constructive trust is incorrect. However, fraud is not the only action predicating

the imposition of a constructive trust. Other actions which would warrant a constructive trust remedy are misrepresentation, concealment, mistake, undue influence, duress, and breach of fiduciary or confidential relations. The trial court's remedy based upon the confidence and trust between the parties was, therefore, correct.

Defendant next contends that the trial court erred in impressing a constructive trust because plaintiffs allegedly have "unclean hands". It is defendant's position that despite defendant's failure to raise the issue below, the court should have applied the doctrine on its own motion:

"The unconscionable character of a transaction between the parties need not be pleaded or set up as a defense. Whenever it is disclosed the court will of its own motion apply the maxim."[1]

However, no such action on the part of the trial court was required in this case. William Chapman did testify that he was some $250,000 in debt at the time of the transfers, but there is no indication that plaintiffs were not possessed of sufficient other property to meet the claims of their creditors had all of their outstanding debts been reduced to judgments. In fact, William Chapman contended throughout the trial that the reason for the transfers was to prevent foreclosure on the properties. The transfers, therefore, gave added protection to the creditors whose loans were secured by the two parcels. We also would note that since George Chapman's success in his business was completely dependent upon the existence of his brother's manufacturing business, it was to his benefit to rehabilitate William in any way possible. It appears to this Court that the transfers in question represent nothing

[1] 30 CJS, Equity, § 97, pp 1031, 1032.

more than a sound businesslike procedure for rehabilitating William Chapman, upon whose financial success both brothers depend. We find no error in the trial court's failure to invoke the maxim of clean hands to prevent the imposition of a constructive trust.

Defendant finally contends that the trial court failed to make findings of fact pursuant to GCR 1963, 517.1, in regard to the amount of the judgment which the trial court determined to be $20,200.

In his opinion, the trial judge indicated that he had considered: (1) that George Chapman was credited with monies expended on William Chapman's behalf; (2) that William Chapman should pay rent for the period he occupied the property; (3) that no interest should be allowed; and (4) that he had weighed all claims and counterclaims. GCR 1963, 517.1 expressly states that findings should be made "without over elaboration of detail or particularization of facts". Defendant makes no showing, nor can this Court say from our review of the voluminous record, that the court's finding is clearly erroneous.

Affirmed.

All concurred.

PEOPLE *v.* MILKOVICH

1. JURY—VOIR DIRE—VENIREMEN'S PREJUDICES—REQUESTED QUESTIONS.

   A defendant, charged with driving with a revoked license, was effectively precluded from eliciting the veniremen's possible prejudices in favor of police testimony where the court, instead of asking the question requested by defense counsel, whether they would give more weight to a police officer's testimony simply because he was a police officer, instructed the veniremen that they were not to give a policeman's testimony greater weight than a civilian's and then asked the veniremen if they were going to obey his instruction, because jurors who might have been wrestling with their consciences, had the question been properly asked, were not likely to admit noncompliance with the strong judicial mandate.

2. JURY—VOIR DIRE—EXAMINATION—PARTIES' RIGHTS.

   Trial courts have wide latitude concerning the scope of juror examination and need not ask the exact question posed by a party; however parties are entitled to reveal substantial prejudices which veniremen may possess and to develop a rational basis for the exclusion of prospective jurors.

3. CRIMINAL LAW—PROSECUTOR'S OBJECTIONABLE QUESTIONS—DISPLAYING INADMISSIBLE EVIDENCE.

   Prosecutor's holding up a four-page proposed exhibit and then eliciting testimony from a police officer that the exhibit was the driving record of the defendant, charged with a traffic offense, even though the jury was instructed to disregard it, constituted reversible error and deprived the defendant of a

---

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 47 Am Jur 2d, Jury §§ 195, 196, 198, 200–202, 212.

[3] 53 Am Jur, Trial § 98.

Prejudicial effect of prosecuting attorney's misconduct in physically exhibiting to jury objects or items not introduced as evidence. 46 ALR2d 1423.

fair trial, because the evidence was clearly inadmissible and because the damage had already been done to the defendant's cause in the minds of the jury.

Appeal from Recorder's Court of Detroit, Traffic and Ordinance Division, Andrew C. Wood, J. Submitted Division 1 February 2, 1971, at Detroit. (Docket No. 8804.) Decided March 24, 1971.

John Milkovich, Jr., was convicted of driving a motor vehicle while his license was revoked. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Thomas P. Smith,* Assistant Prosecuting Attorney, for the people.

Gage, Burgess & Knox (*Jane Burgess,* of counsel), for defendant.

Before: LESINSKI, C. J. and R. B. BURNS and LEVIN, JJ.

R. B. BURNS, J. The defendant was found guilty by a jury of driving while his operator's license was revoked.[1] He raises two questions on appeal.

I.

Was it error for the court to refuse to ask a question pertaining to the state of mind of the veniremen during *voir dire* examination, when specifically requested to do so by defense counsel?

[1] MCLA 1971 Cum Supp § 257.904 (Stat Ann 1968 Rev § 9.2604).

The court asked whether any additional questions (to the veniremen) were desired, and defense counsel made the following request:

"Ask the jurors whether or not they would give greater weight to the testimony of an officer simply because he is an officer."

Instead of submitting the request in the form of a *question* to the veniremen, the trial judge *instructed* the veniremen that they were not to give more weight to the testimony of a police officer merely because he was a police officer.

Defense counsel, in an attempt to ascertain the thoughts of the individual veniremen on the subject, again urged the court to ask the proposed question. The court then stated to the veniremen:

"After I explained it to you I take it you are not to give greater weight to the testimony of an officer simply because they are officers than you would a civilian. Everybody understands that, I take it. You all will follow the law as given to you by the court and you can consider that a *preliminary instruction* so everybody is willing to follow that. If anybody isn't, why say so right now."

The judge first *informed* the veniremen that they could not weight a policeman's testimony over that of a non-policeman's testimony, and then *asked* if anyone was going to ignore his demand. Veniremen who might have been wrestling with their consciences, had the question been properly asked, were not likely to admit noncompliance with the strong judicial mandate.

Defense counsel was effectively precluded from eliciting possible prejudices in favor of police testimony, and such testimony was instrumental in the defendant's conviction.[2]

[2] The "police" officers were two officers of the Public Service Com-

While a trial judge has wide latitude concerning the scope of juror examination and need not ask the exact question posed by a party,[3] parties are entitled to reveal substantial prejudices which veniremen may possess[4] and have the right to develop a rational basis for the exclusion of prospective jurors.[5]

The manner in which the trial judge phrased defense counsel's question encroached upon these rights and entitles defendant to a new trial.

Since this case is to be retried, we deem it important to discuss the defendant's second issue.

II.

Was it error for the court to deny defendant's motion for mistrial following the prosecutor's mention of defendant's four-page driving record?

While questioning a Michigan public service officer the prosecutor held up a four-page proposed exhibit and then elicited testimony from the officer indicating that the exhibit was defendant's driving record. Although the court instructed the jury to disregard the testimony, by "that time * * * the damage had already been done to defendant's cause in the minds of the jurors". *People* v. *Greenway* (1962), 365 Mich 547, 550.

Counsel should not make statements in the presence of the jury in relation to facts which are incompetent to be proved.[6]

---

mission whose principal duties were to enforce the vehicle code. The most incriminating evidence came from their testimony.

[3] GCR 1963, 511.3; *People* v. *Cole* (1967), 8 Mich App 250; *Kuisel* v. *Farrar* (1967), 6 Mich App 560.

[4] *Monaghan* v. *Agricultural Fire Ins. Co.* (1884), 53 Mich 238; *Towl* v. *Bradley* (1896), 108 Mich 409.

[5] *People* v. *Cole* (1967), 8 Mich App 250; see also *Fedorinchik* v. *Stewart* (1939), 289 Mich 436.

[6] "Evidence that tends to show that the accused person has committed other acts or crimes or has a disposition toward conduct sim-

This Court continues to have appeals where prosecutors have deliberately attempted to introduce inadmissible evidence and asked objectionable questions for the calculated purpose of prejudicing the defendant's right to a fair trial. The practice must stop.

The trial court erred in not granting defendant's motion for a mistrial.

Reversed and remanded for a new trial.

All concurred.

---

ilar to the offense charged is ordinarily inadmissible to prove the commission of the charged offense." *People* v. *Matthews* (1969), 17 Mich App 48, 51, 52; 1 Gillespie, Mich Criminal Law & Procedure (2d ed), § 446, p 549; 1 Wharton's Criminal Evidence (12th ed), § 232, pp 492–498. This rule applies with equal force to proof of former traffic offenses. 15 Blashfield Automobile Law and Practice (3d ed), § 491.9, pp 473–475.

CHAPMAN *v.* RUSSELL

JUDGMENT—ENFORCEMENT OF JUDGMENT—SUMMARY JUDGMENT.

Summary judgment for plaintiffs was properly denied in their actions to enforce a Federal judgment against the personal assets of an alleged partner, defendant, of the person against whom they had obtained their judgment where the judgment was based on a Federal securities law violation, there was no evidence that the partnership was formed to sell the securities with which the Federal judgment dealt, where the receiver of the alleged partnership, not the partnership, was joined as a party, and where the defendant was never served in the Federal case.

REFERENCE FOR POINTS IN HEADNOTE

41 Am Jur, Pleading §§ 340–343.

Appeal from Gratiot, Leo W. Corkin, J. Submitted Division 3 November 10, 1970, at Grand Rapids. (Docket No. 8812.) Decided March 24, 1971.

Complaint by Bernard A. Chapman, Anna Chapman, Joseph C. Kalman, Thomas L. Lowery, Jr., Dale H. Burgess, Leonard G. Burgess, Johanna Adamson, and Ralph Isbrandt against Stewart H. Russell to enforce a judgment against the separate assets of defendant as a partner in Ohio East Producers. Plaintiffs' motion for summary judgment denied. Plaintiffs appeal by leave granted. Affirmed.

Heritier, Abbott & Nicholson, for plaintiffs.

Fortino, Plaxton & Moskal, for defendant.

Before: T. M. BURNS, P. J., and R. B. BURNS and MUNRO,* JJ.

MUNRO, J. Plaintiffs appeal from the trial court's denial of their motion for summary judgment.

On April 17, 1968, the United States District Court for Eastern Michigan entered a judgment on behalf of plaintiffs against Ben Gittleman personally and doing business as Ohio East Producers. An appeal was taken from the judgment to the United States Court of Appeals for the Sixth Circuit.

During the pendency of the appeal, Stewart H. Russell filed a petition for dissolution of a partnership with Ben Gittleman, doing business as Ohio East Producers, in Common Pleas Court for Wash-

* Circuit judge, sitting on the Court of Appeals by assignment.

ington County, Ohio. Upon learning that Ohio East Producers was, in fact, a partnership rather than a sole proprietorship, plaintiffs filed a motion with the United States Court of Appeals for the Sixth Circuit to substitute James Dunn, the receiver for Ohio East Producers appointed by the Washington County Court, as a party defendant appellant to the Federal litigation as the legal successor to Ben Gittleman, doing business as Ohio East Producers. The motion was granted by the court on or about August 7, 1968. On July 9, 1969, the United States Court of Appeals affirmed the judgment of the district court and that judgment has become final.

On March 26, 1969, plaintiffs filed the present action against Stewart H. Russell, defendant, in the Circuit Court for the County of Gratiot to enforce the Federal district court judgment against the separate assets of defendant as partner in Ohio East Producers. Defendant, in his answer, denied that he was a partner.

Plaintiffs then filed a motion for summary judgment in accordance with GCR 1963, 117. Defendant filed no response to plaintiffs' motion; but when a hearing was held on the motion, the circuit judge denied the motion. This Court then granted plaintiffs leave to appeal the trial court's order.

The grounds stated in plaintiffs' motion were in accordance with GCR 1963, 117.2(3) which provides:

"The motion for summary judgment shall state that the moving party is entitled to judgment in his favor because of any one of the following grounds:

* * *

"(3) That except as to the amount of damages there is no genuine issue as to any material fact, and the moving party is, therefore, entitled to judgment as a matter of law."

Plaintiffs contend that the affidavits with which they supported their motion conclusively establish that defendant is a partner in Ohio East Producers with Ben Gittleman and that defendant is personally liable on the judgment obtained against that partnership.

We disagree. Included in the affidavits supporting plaintiffs' motion was a certified copy of defendant's petition for dissolution of the partnership. Plaintiffs contend that the petition, along with a deposition in which defendant admitted being a partner with Ben Gittleman in Ohio East Producers, establish that defendant was a general partner in the firm called Ohio East Producers.

Although defendant, in his brief, raises doubt whether defendant actually was a partner in the company, even were we to assume that plaintiffs' affidavits establish the existence of a partnership and the defendant's role as a partner, plaintiffs' motion would still have to fail. GCR 1963, 117.3 provides in part:

"Judgment shall be rendered forthwith if the pleadings show that any party is entitled to a judgment as a matter of law or if the affidavits or other proof show that there is no genuine issue of fact."

It is the opinion of this court that there are many issues of fact which would preclude the summary judgment. First, the judgment sued upon was based upon a violation of the Securities Act of 1933. Nowhere do plaintiffs contend that the partnership was formed for the purpose of selling said securities. Without a factual determination of this issue it would be impossible for this Court or any court to determine whether the defendant can be held personally liable for the actions of Ben Gittleman as his partner in violating the Securities Act of 1933.

There is also some question whether jurisdiction was ever obtained over the partnership. The judgment in the United States District Court was against "Ben Gittleman, individually and/or d/b/a [doing business as] Ohio East Producers, and Lois Gittleman". Then, when plaintiffs found out that Ohio East Producers was a partnership, they joined not the partnership itself but only the receiver appointed by the Ohio court. Defendant himself was never served with process in the district court case.

There may be some theory upon which plaintiffs may establish jurisdiction over defendant so they may enforce their judgment against the separate assets of defendant. However, their pleadings and affidavits fall far short of proving every material fact. Therefore, since there are still issues of fact and law to be decided, the motion for summary judgment was properly denied.

Although we have assumed for purposes of this appeal that defendant was a partner with Ben Gittleman in a company called Ohio East Producers, this was only to facilitate the writing of this opinion. The issue whether defendant was a partner in the company is still unresolved.

Affirmed.

All concurred.

GREEN v. DEARBORN MUNICIPAL COURT

1. AUTOMOBILES—ORDINANCES—PENALTIES—MOTOR VEHICLE CODE—UNIFORMITY PROVISION.

   The motor vehicle code prohibits local units of government from enacting or enforcing a penalty provision that is in conflict with the state statute.

2. CRIMINAL LAW—DRUNK DRIVING—ORDINANCES—PENALTIES—MOTOR VEHICLE CODE—UNIFORMITY PROVISION.

   A city's traffic ordinance providing for a fine of $500 upon conviction of drunk driving was invalid and unenforceable to the extent it conflicted with the state statute providing for a maximum fine of $100, because the state statute requires statewide uniformity; however, the city ordinance was valid and enforceable to the extent that the penalty was within the limits of the state statute (MCLA §§ 257.605, 257.625[b]).

3. CONSTITUTIONAL LAW—ORDINANCES—AUTOMOBILES—PENALTIES—MOTOR VEHICLE CODE—UNIFORMITY PROVISION.

   Penalty provision in a municipal traffic ordinance that exceeds the maximum penalty permitted by the motor vehicle code does not render the entire ordinance unconstitutional (MCLA § 257.605).

4. AUTOMOBILES—MOTOR VEHICLE CODE—UNIFORMITY PROVISION.

   The uniformity provision of the motor vehicle code is a limitation, not a prohibition, upon the authority of local units of government to control their highways and streets (Const 1963, art 7, § 29; MCLA § 257.605).

REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 4] 7 Am Jur 2d, Automobiles § 15.
[2] 7 Am Jur 2d, Automobiles § 253.

Appeal from Wayne, Neal Fitzgerald, J. Submitted Division 1 March 2, 1971, at Detroit. (Docket No. 8865.) Decided March 24, 1971.

Complaint by Robert D. Green against the Dearborn Municipal Court for superintending control. Writ granted. Defendant appeals. Reversed and remanded with directions.

John T. McWilliams, for plaintiff.

Joseph J. Burtell, City Attorney, and *Gerald J. Connolly* and *Carl P. Garlow,* Assistant City Attorneys, for defendant.

Before: V. J. BRENNAN, P. J., and QUINN and O'HARA,* JJ.

QUINN, J. Defendant appeals from the judgment of the circuit court which held chapter 6.1(c) of the official traffic code of Dearborn invalid, unreasonable, and unconstitutional because it conflicts with MCLA § 257.625(b) (Stat Ann 1968 Rev § 9.2325-[2]), and dismissed the prosecution of plaintiff under that ordinance.

Under the ordinance, plaintiff was charged with operating a motor vehicle while under the influence of intoxicants. His motion to dismiss because the maximum fine under the ordinance exceeded the maximum fine under the statute was denied and trial was set.

Prior to trial, plaintiff filed his complaint for superintending control in the circuit court. The trial court found that the maximum fine under the ordinance was $500 which conflicted with the maximum

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

fine of $100 under the statute and on the basis of the uniformity provision of the state motor vehicle code, MCLA § 257.605 (Stat Ann 1968 Rev § 9.2305), he held the ordinance unconstitutional and entered the judgment appealed from.

The uniformity provision reads:

"The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any ordinance, rule or regulation in conflict with the provisions of this chapter."

We agree with the trial court that this statute prohibits Dearborn from enacting or enforcing a penalty provision in an ordinance that is in conflict with the state statute. We do not agree that enactment of such a penalty provision makes the entire ordinance unconstitutional.

Const 1963, art 7, § 29, reserves to local units of government the reasonable control of their highways and streets. The statute quoted above recognizes this reservation by the fact of requiring statewide uniformity. If the sole authority to control highways and streets was vested in the state, the uniformity provision would be superfluous. It is a limitation on the authority of local units of government to control their highways and streets, not a prohibition against the exercise of that control.

To the extent that the penalty provision of chapter 6.1(c) of the official traffic code of Dearborn exceeds MCLA § 257.625(b), *supra,* the penalty provision is invalid and unenforceable. Within the penalty limits of MCLA § 257.625(b), the Dearborn traffic code is valid and enforceable.

Reversed and remanded with direction to the circuit court to remand the action to Dearborn Munici-

pal Court for trial. Those provisions of the circuit court judgment not specifically referred to in this opinion are affirmed. No costs are allowed in view of the public question.

All concurred.

STATE OF CALIFORNIA *v.* MAX LARSEN, INC.

STATE OF CALIFORNIA *v.* LARSEN TRANSPORTATION, INC.

1. PLEADING—AMENDMENT—DISCRETION.

Refusing to allow defendants to amend their pleadings in action to enforce an out-of-state judgment was not an abuse of discretion where the defendants sought to file, on the day of trial, a supplemental answer stating that the complaint in the original action failed to state a cause of action, because the defendants did not give the court any reason for the delay in filing such an elementary defense and because no reason exists to compel the plaintiff to meet an entirely new defense on the day of trial (GCR 1963, 118).

2. JUDGMENTS—FOREIGN JUDGMENT—VALIDITY—BURDEN OF PROOF.

A party seeking to enforce an out-of-state judgment has the burden of proving that the judgment was rendered; the opposing party then has the burden of proving that the judgment was void for lack of jurisdiction.

3. EVIDENCE—FOREIGN JUDGMENT—SEAL—INTEGRATED DOCUMENT—STATUTES.

Admitting a copy of a California judgment was proper even though the judgment itself was not sealed where the judgment papers consisted of three numbered pages, the first two

---

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 41 Am Jur Pleading §§ 288–315.
Uniform Enforcement of Foreign Judgments Act. 72 ALR2d 1255.
[2] 46 Am Jur 2d, Judgments §§ 905, 906.
[3] 30 Am Jur 2d, Evidence §§ 988–990.

pages consisted of attestations by the clerk of the court and certifications by the trial judge, and one of the attestation pages had a seal annexed to it, because the three pages were integrated to the extent they became one single document and a seal on any of the three pages would comply with statutory requirements (MCLA § 600.2103).

Appeal from Branch, Mark S. Andrews, J. Submitted Division 3 November 10, 1970, at Grand Rapids. (Docket Nos. 8918 and 8919.) Decided March 24, 1971.

Complaint by the State of California against Max Larsen, Inc., to enforce a judgment entered by a California court for payment of sales and use taxes. Judgment for plaintiff. Defendant appeals. Complaint by the State of California against Larsen Transportation, Inc., to enforce a judgment entered by a California court for payment of sales and use taxes. Judgment for plaintiff. Defendant appeals. Appeals consolidated. Both judgments affirmed.

Robert L. Redmond, for plaintiff.

Warner, Norcross & Judd (by *William K. Holmes*), for defendants.

Before: T. M. BURNS, P. J., and R. B. BURNS and MUNRO,* JJ.

T. M. BURNS, P. J. Plaintiff, the State of California, sued defendant corporations separately in California for payment of that state's sales and use taxes. Process in each of the California suits was served on defendants in Michigan. Defendants did not appear in either suit and the California court entered default judgments. Thereafter, plaintiff

* Circuit judge, sitting on the Court of Appeals by assignment.

brought suit in Michigan to enforce the California judgments and the trial court found in plaintiff's favor in each case. Defendants appeal both judgments, the appeals having been consolidated since the same questions are presented in both cases.

Defendants first contend that the trial court erred in refusing defendants' motion to amend their answers at the time of trial. GCR 1963, 118 provides:

"A party may amend his pleading once as a matter of course at any time before or within 15 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, he may amend it at any time before or within 15 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires."

The supplemental answer with which defendants sought to amend their pleading stated that the complaint in the California suit failed to state a cause of action. Defendants did not give the trial court, nor do they give this Court, any reason for the delay in filing such an elementary defense. Absent some reason for failure to file such an answer, we see no reason for compelling plaintiff to meet an entirely new defense on the day of trial. The trial court did not abuse the discretion conferred upon it by the court rule by refusing to allow the defendants to amend their answer.

Defendants also contend that the trial court erred by failing to find that the California court did not have jurisdiction over the parties, and, therefore, the judgments are void and not entitled to full faith and credit.[1]

[1] US Const, art 4, § 1.

At the close of plaintiff's proofs, the defendants moved for directed verdicts on the ground that jurisdiction of the California court over defendants had not been proven. The court denied defendants' motions. The defendants offered no evidence and the trial court entered judgment against Max Larsen, Inc., in the amount of $2,901.32 plus interest and costs and against Larsen Transportation, Inc., in the amount of $1,007.36 plus interest and costs.

It is defendants' position that by asserting the defense of lack of jurisdiction in their answer, the burden of establishing jurisdiction was upon the plaintiff, a burden the plaintiff failed to carry. However, plaintiff has no such burden. The burden upon plaintiff is to prove that the judgment has been rendered in the California court. It is then the burden of the defendant to prove that the judgment of that court is void for want of jurisdiction. In *Henry* v. *Henry* (1960), 362 Mich 85, 102, the Supreme Court stated:

"We have no doubt, as appellant's counsel contend, that in attacking a presumptively valid decree of divorce issued by a sister state, the full faith and credit clause (US Const, Art 4, § 1) and ample case precedent (*citations omitted*) demand that the attacking party bear the burden of proof that no domicile was established."

Therefore, all plaintiff is required to establish is that the California court rendered the judgments in question. Then, since the judgments are presumed valid,[2] it would be incumbent upon the defendants to successfully attack the jurisdiction of the court in which the judgments were taken. Absent defendants' successful attack upon jurisdiction, the courts

[2] *United States* v. *French* (1934), 9 F Supp 30; *Detroit Trust Co.* v. *Union Guardian Trust Co.* (1933), 65 F2d 73; *Northrup* v. *Jay* (1933), 262 Mich 463; 31A CJS, Evidence, § 145, p 310.

in this state are bound by the United States Constitution to give the judgments full faith and credit.

Plaintiff, in the action below, in an attempt to establish that the judgments sued upon were actually rendered by the California court, entered into evidence copies of the judgments. Defendants contend that these copies should not have been admitted because they did not conform to the requirements set forth in MCLA § 600.2103 (Stat Ann 1962 Rev § 27A.2103), which provides:

"The records and judicial proceedings of any court in the several states and territories of the United States * * * shall be admitted in evidence in the courts of this state upon being authenticated by the attestation of the clerk of such court with the seal of the court annexed, or of the officer in whose custody such records are legally kept with the seal of his office annexed."

Each of plaintiff's exhibits 7 and 8 consisted of three numbered pages. The first two pages consisted of attestations by the clerk of the court and certifications by the trial judge. On the third page appeared the judgments. The attestations on page one had a seal annexed to them, but no seal appeared on either judgment. Defendants contend, therefore, that the requirements of the above statute have not been met because the seal must be annexed to the judgment itself.

We disagree. It is obvious from an examination of the exhibits that the three pages are integrated to the extent that they become one single document. A seal on any of the three pages would be consistent with the requirements of the statute. We, therefore, hold that the copies of the judgments were properly admitted by the trial court.

Since the existence of the judgments was established by the admittance of the copies thereof into

evidence and since defendants then offered no proofs whatever to establish that the judgments were void for want of jurisdiction, we find that the trial court was correct in holding that the judgments sued upon are entitled to full faith and credit.

Affirmed.

All concurred.

PEOPLE *v.* VAUGHN
PEOPLE *v.* JONES
PEOPLE *v.* WATKINS

1. INDICTMENT AND INFORMATION—RES GESTAE WITNESSES—LATE INDORSEMENT—DISCRETION.

   The trial court has very wide discretion in deciding whether to allow the people to make late indorsements of *res gestae* witnesses; the trial court's discretion is even wider where the identity of the witnesses is known to both the defendant and the people, because no surprise can be shown.

2. INDICTMENT AND INFORMATION — RES GESTAE WITNESSES — INDORSEMENT — UNINDORSED WITNESSES.

   Denying defendants' motion for a mistrial made on the ground that the prosecutor had not indorsed the names of all known *res gestae* witnesses, was not an abuse of discretion where the names of the witnesses were known to the defendants as early as the preliminary examination.

3. INDICTMENT AND INFORMATION — RES GESTAE WITNESSES — INDORSEMENT — LATE INDORSEMENT.

   Denying defendants' motion for a mistrial, made on the ground that the prosecutor indorsed the names of additional *res gestae*

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 41 Am Jur 2d, Indictments and Informations §§ 55, 56.
[4] 21 Am Jur 2d, Criminal Law §§ 222, 309–317.
[5] 21 Am Jur 2d, Criminal Law §§ 136, 137.

witnesses at trial was not an abuse of discretion where the defendants were allowed time to confer with the witnesses before the witnesses testified and where the names of the witnesses were known by the defendants as early as the preliminary examination.

4. CRIMINAL LAW — ADEQUATE COUNSEL — PREPARATION — CONFERENCES.

The number of hours an attorney spent conferring with his client defendant and other witnesses is not in itself sufficient to raise the issue of the inadequacy of counsel.

5. CRIMINAL LAW—DEFENSES—ALIBI—NOTICE.

Denying defendant's motion to admit alibi testimony was proper even though the trial court indicated in its opinion that the motion came too late as a matter of law where the motion to admit was made after the swearing of the jury and prior to the taking of proofs, defense counsel was present at preliminary examination where the matter of alibi could have been discussed, and defense counsel stated that the theory of alibi was discussed several times during counsel's representation of the defendant, but that the defense of alibi was not decided upon until the day of trial (MCLA § 768.20).

Appeal from Genesee Ollie B. Bivins, Jr., J. Submitted Division 2 March 2, 1971, at Grand Rapids. (Docket Nos. 8938, 8975, and 9047.) Decided March 24, 1971.

Tommy Vaughn, Willie Judge Jones, and Henry Watkins were convicted of armed robbery. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief Assistant Prosecuting Attorney, for the people.

W. Schuyler Seymour, Jr., for defendant Vaughn on appeal.

Jeffrey A. Chimovitz, for defendant Jones on appeal.

John T. Connolly, for defendant Watkins on appeal.

Before: FITZGERALD, P. J., and HOLBROOK and BRONSON, JJ.

HOLBROOK, J. The basic facts concerning this criminal action are as follows:

At approximately 6:45 a.m. on August 3, 1969, a group of people were congregated at a house at 617 East Baker Street, Flint, Michigan. At that time, three men entered the dwelling together and mingled with the persons already there, some of whom were shooting dice and some of whom were drinking. Some 45 minutes later, the trio went into action. One pointed a shotgun, previously concealed, at the group, another stood by and a third wandered among the victims, picking or emptying their pockets. The shotgun wielder, in fact, told the wanderer, "That isn't the way to do it. You're in the line of fire." The three, after taking over $410, fled from the house. The police were immediately called by the victims and a complaint was subsequently filed with the Flint police department by Roy Beauregarde, the owner of the house. Defendants Willie Judge Jones, Henry Watkins, and Tommy Vaughn were arrested in the next few weeks. All were convicted by a jury of the crime of armed robbery, MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28-.797), and sentenced to various terms in prison.

Among those present at the house that morning were four witnesses who were not indorsed on the information, although they were known by nicknames to both the prosecutor and defendants as

early as the preliminary examination. At trial all defendants moved for a mistrial on the basis of the people's failure to indorse the witnesses and their motion was denied. The people then moved to indorse these witnesses; that motion, opposed by defendants, was granted and the additional witnesses were indorsed, subpoenaed, and produced. Before it came time for these witnesses to testify, defendants were allowed a brief period with which to confer with the witnesses regarding their testimony. Surprisingly enough, the testimony of the two witnesses who were actually called was favorable to defendants. All defendants claim reversible error on this issue.

MCLA § 767.40 (Stat Ann 1971 Cum Supp § 28-.980), requires that the prosecutor prior to trial indorse on the information the names of all witnesses known to him at that time who form part of the *res gestae*. It further provides that, "[n]ames of additional witnesses may be indorsed before or during the trial by leave of the court and upon such conditions as the court shall determine".

Pursuant to the above statute, the court has very wide discretion in this matter of late indorsement and such discretion will not be upset unless abuse is clearly shown. This discretion should be and is even wider where the identity of the witness is known to the defendants as well as the prosecutor, and, therefore, no surprise can be shown. *People* v. *Rasmus* (1967), 8 Mich App 239. The law concerning late indorsement has frequently been before this Court, and we have consistently followed the familiar rule stated in *People v. McCrea* (1942), 303 Mich 213, and *People* v. *Davis* (1955), 343 Mich 348, reaffirming that the ultimate question for a reviewing court is whether the trial court abused its discretion and that the burden ordinarily rests on the

party asserting the abuse. Defendants fall far short of sustaining that burden.

The next contention by defendant Vaughn is that his representation by counsel was insufficient. He claims that even though the preliminary examination was rather lengthy and the trial lasted 19 hours with all defense counsel vigorously protecting the rights of all the defendants, his counsel was inadequate under the rule of *People* v. *Higginbotham* (1970), 21 Mich App 489. His claim has even less merit than that of Higginbotham whose claim in this regard was there denied. He claims that inadequate time was spent in preparation of the case as shown by counsel's petition for fees, appended to this defendant's brief. Defendant's attorney was present and represented him throughout all of the proceedings commencing with the preliminary examination. A review of the transcript of the preliminary examination reveals that the defendant was properly represented there. A further review of the record of the trial shows likewise that the defendant was adequately represented. The number of hours alone representing the conferences with the defendant and other witnesses is not sufficient to raise the issue of inadequate representation by counsel. *United States* v. *Brierley* (ED Pa, 1968), 286 F Supp 773. Under the record before us, it can nowise be said that defendant's representation by counsel was so lacking in competence as to require reversal. *People* v. *Hill* (1970), 21 Mich App 178, 180; *People* v. *Davison* (1968), 12 Mich App 429.

After swearing of the jury and just prior to the taking of proofs defendant Jones moved to admit alibi testimony even though he had not given the notice required by MCLA § 768.20 (Stat Ann 1954 Rev § 28.1043). He claimed the court abused its

discretion in denying this motion because the court indicated that *as a matter of law* the motion came too late. This language was unfortunate, at most, and the record shows that the court was correct in denying this motion because the trial judge also indicated on the record that defense counsel was also counsel at the preliminary examination where the matter of alibi could have been discussed. Further, defendant's attorney stated that the question of alibi was discussed several times throughout the period of his representing defendant and prior to trial (as were other theories of defense) but was not decided on until the morning of the actual trial.

Affirmed.

All concurred.

PEOPLE *v.* STEPHEN

1. CRIMINAL LAW—LESSER INCLUDED OFFENSES—INSTRUCTIONS TO JURY.

   Failure to instruct on the lesser included offenses was not error where there was no evidence to support a lesser included offense, there was no request for an instruction, and where the defense was alibi.

2. CRIMINAL LAW—WITNESSES—RES GESTAE WITNESS—PRODUCTION OF WITNESS—DUE DILIGENCE.

   The prosecution's due diligence in attempting to locate an indorsed *res gestae* witness, who was not produced at trial, need not be submitted to the jury.

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial §§ 286, 796–802.
[2] 53 Am Jur, Trial §§ 588, 695–698.
[3] 41 Am Jur 2d, Indictments and Informations §§ 56, 60.

3. CRIMINAL LAW—WITNESSES—NOTICE OF ALIBI—NONINDORSEMENT OF WITNESS.

Precluding a defense witness who is not indorsed on the defendant's notice of alibi from testifying is not error (MCLA § 768.20).

Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted Division 1 March 3, 1971, at Detroit. (Docket No. 8957.) Decided March 24, 1971. Leave to appeal denied May 25, 1971, 384 Mich 843.

David C. Stephen was convicted of first-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Angelo A. Pentolino,* Assistant Prosecuting Attorney, for the people.

Sol Plafkin, for defendant on appeal.

Before: V. J. BRENNAN, P. J., and QUINN and O'HARA,* JJ.

QUINN, J. December 18, 1969, a jury found defendant guilty of murder in the first degree, MCLA § 750.316 (Stat Ann 1954 Rev § 28.548). The victim was killed during an armed robbery. Defendant was sentenced; he did not move for new trial, and he appeals.

Defendant raises 14 issues on appeal. We note these issues and dispose of them as follows:

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

1. Defendant's claim that he was denied a fair trial because of alleged systematic exclusion of blacks and others from jury service is in effect a challenge to the array. It is raised for the first time on appeal. This is too late, *People* v. *McCrea* (1942), 303 Mich 213, 278.

2. The record does not support a finding that defendant's trial counsel was ineffective to the extent that defendant was denied a fair trial or was denied his constitutional right to counsel. See *People* v. *Degraffenreid* (1969), 19 Mich App 702.

3. Defendant made five objections during the prosecuting attorney's closing argument all of which were sustained by the trial court. If further error occurred during that argument, it was not saved for review because of lack of objection. *People* v. *Panknin* (1966), 4 Mich App 19.

4. It was not error for the trial judge not to instruct on lesser included offenses absent request therefor. *People* v. *Clouse* (1969), 18 Mich App 582. There was no evidence to support a lesser included offense. *People* v. *Sweet* (1970), 25 Mich App 95. Additionally, the defense was alibi. See *People* v. *Camak* (1967), 5 Mich App 655, 663.

5. It was not error to deny defendant's post conviction motion for psychiatric examination. *People* v. *Russell* (1970), 27 Mich App 654.

6. The record supports the finding of the trial court that the people exercised due diligence in their attempt to locate an indorsed *res gestae* witness and the non-production of this witness was not error.

7. This due diligence need not be submitted to the jury. *People* v. *Kern* (1967), 6 Mich App 406.

8. Witnesses Barbara Beck and Albert White were not *res gestae* witnesses and there was no error in failing to require their indorsement as

such; nor was it error for the prosecuting attorney not to call them as witnesses.

9. The instruction relative to witness Beck was necessary because of defendant's reference to her in closing argument.

10. At trial, defendant made no claim of unfair lineup procedure. The issue of the people's failure to produce as a witness defendant's lineup counsel is not before us. *People* v. *Rowls* (1970), 28 Mich App 190.

11. It was not error to preclude a defense witness, not indorsed on the notice of alibi, from testifying. MCLA § 768.20 (Stat Ann 1954 Rev § 28.1043); *People* v. *George Johnson* (1966), 5 Mich App 257.

12. The instruction on alibi, read in its entirety, was correct and it was not objected to at trial. No error is presented. GCR 1963, 516.2.

13. There is ample evidence in the record, if believed by the jury, to support a finding of guilt beyond a reasonable doubt.

14. Finally, defendant asks, "Does the failure of trial counsel to object to the violation of basic constitutional guarantees preclude the defendant from raising those issues on appeal where the denial would lead to a 'miscarriage of justice'?"

Defendant's negative answer to this question is based on two false premises. The record does not support his claims of "unfair trial" and "miscarriage of justice".

Affirmed.

All concurred.

BANNER *v.* TRAVELERS INS. CO.

OPINION OF THE COURT

1. WORKMEN'S COMPENSATION—THIRD-PARTY TORTFEASOR—RIGHT TO SUE.

   The Workmen's Compensation Act allows an employee to sue third parties whose acts of negligence cause injury (MCLA § 418.827[1]).

2. WORKMEN'S COMPENSATION—COMPENSATION—INSURANCE CARRIER—LIABILITY—"THIRD-PARTY" TORTFEASOR.

   A workmen's compensation insurance carrier is a third party, not an employer for purposes of the statute allowing an injured employee to sue a third party whose negligence has caused the employee's injuries; a workmen's compensation insurance carrier is not immune from common-law tort liability for its own acts of negligence which cause injury to an employee (MCLA § 418.827[1]).

3. WORKMEN'S COMPENSATION—COMPENSATION—INSURANCE CARRIER—"THIRD-PARTY" TORTFEASOR—LIABILITY—NEGLIGENCE.

   Workmen's compensation insurance carrier whose allegedly negligent performance of its safety inspection and service contract with the plaintiff's employer was claimed to have been the proximate cause of the plaintiff employee's injury was a third-party tortfeasor under the Workmen's Compensation Act, and, therefore, liable for its own acts of negligence (MCLA § 418.827[1]).

CONCURRENCE BY O'HARA, J.

4. WORKMEN'S COMPENSATION—COMPENSATION—INSURANCE CARRIER—LIABILITY—PRIMARY LIABILITY.

   Liability of a workmen's compensation insurance carrier is primary, not that of an indemnitor or a guarantor; an insurance

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation §§ 60, 264.
[2–5] 58 Am Jur, Workmen's Compensation §§ 42, 555 *et seq.*

carrier, as evidenced by the facts that it is a named party defendant and that it is required to respond directly when compensation benefits are awarded, is indistinguishable, in law and fact, from the employer.

5. WORKMEN'S COMPENSATION—COMPENSATION—INSURANCE CARRIER —"THIRD-PARTY" TORTFEASOR—LIABILITY.

Judicial construction that a workmen's compensation insurance carrier is a "third party" subject to suit for its own negligence causing injuries to its insured's employees, although illogical, the insurance carrier's liability is primary and, as shown, by the fact that the judicial construction would mean that a self-insured employer would be liable in fact on the ground that the employer is also the insurance carrier, is nevertheless the settled law of this state.

Appeal from Wayne, Thomas Roumell, J. Submitted Division 1 December 7, 1970, at Detroit. Decided March 24, 1971. Leave to appeal denied June 30, 1971, 385 Mich 760.

Complaint by Michael Banner by Ralph Banner, his next friend, against The Travelers Insurance Co. for negligent performance of contract with plaintiff's employer. Summary judgment for defendant. Plaintiff appeals. Reversed and remanded with instructions.

Plunkett, Cooney, Rutt & Peacock (by *Boleslaus I. Stanczyk* and *Joel S. Morse*) for plaintiffs.

Vandeveer, Doelle, Garzia, Tonkin & Kerr (by *Buell Doelle*) and *Travis, Warren, Nayer & Burgoyne* (by *Harry M. Nayer*), for defendant.

Before: LESINSKI, C. J., and LEVIN and O'HARA,* JJ.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

LESINSKI, C. J. Plaintiff Michael Banner brought this action against his employer's workmen's compensation insurance carrier, defendant Travelers Insurance Company, alleging that negligence during the performance of a contract with the employer to provide safety inspections and safety engineering services was the proximate cause of his injury. Defendant moved for and was granted summary judgment on the ground that the suit was barred by the Workmen's Compensation Act[1] and that this Court's prior interpretation of that act in *Ray* v. *Transamerica Insurance Company* (1968), 10 Mich App 55, was incorrect. Plaintiff appeals as of right.

The Workmen's Compensation Act allows an employee to sue third parties whose acts of negligence cause injury. MCLA § 418.827(1) (Stat Ann 1971 Cum Supp § 17.237[827][1]), provides:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person *other than* a natural person in the same employ or *the employer* to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his dependents or personal representative may also proceed to enforce the liability of the *third party* for damages in accordance with the provisions of this section." (Emphasis supplied.)

In *Ray, supra,* this Court construed the above-quoted language[2] to mean that the insurance carrier was a "third party", rather than an "employer", and

---

1 MCLA § 418.101 *et seq.* (Stat Ann 1971 Cum Supp § 17.237[101] *et seq.*).

2 At the time *Ray* v. *Transamerica Insurance Company* (1968), 10 Mich App 55, was decided, MCLA § 413.15 (Stat Ann 1960 Rev § 17.189), embodied the present provision.

not immune from common-law tort liability for its own acts of negligence.

After a review of divergent authority from other jurisdictions,[3] we conclude that resolution of the issue depends upon the interpretation given various state compensation schemes, and not upon principles of constitutional law.[4]

We conclude that the decision in *Ray, supra,* was a correct interpretation of legislative intent. It was error to grant defendant's motion for summary judgment.

Reversed and remanded for action not inconsistent with this opinion. Costs to plaintiff.

LEVIN, J., concurred.

O'HARA, J. *(concurring).* I regard it my duty, as well as the duty of the trial bench, to follow the settled law of this state.

Ray v. *Transamerica Insurance Company* (1968), 10 Mich App 55, is settled law. No panel of this Court has held to the contrary. The Supreme Court has not spoken on the issue.

I am not persuaded that a constitutional question is presented as urged by appellee insurer. Hence, I do not address myself to that issue.

I do record my own judicial disagreement with *Ray.*

The liability of the insurance carrier under the Michigan Workmen's Compensation Act is primary.

---

[3] *Fabricius* v. *Montgomery Elevator Co.* (1963), 254 Iowa 1319 (121 NW2d 361); *Mager* v. *United Hospitals of Newark* (1965), 88 NJ Super 421 (212 A2d 664), *affirmed* (1966), 46 NJ 398 (217 A2d 325); *Kerner* v. *Employers Mutual Liability Insurance Company* (1967), 35 Wis 2d 391 (151 NW2d 72); *Flood* v. *Merchants Mutual Insurance Company* (1963), 230 Md 373 (187 A2d 320).

[4] Defendant asserted below that the decision in *Ray,* fn 2, *supra,* unconstitutionally impaired existing insurance contracts. We find no merit in this contention. See *Ruth* v. *Bituminous Casualty Corporation* (CA6, 1970), 427 F2d 290.

It is not the liability of an indemnitor nor guarantor. It is a named party defendant in claims brought by employees under the act, as distinguished from the claims asserted against defendants in other negligence actions where the insurer *cannot* be named. The insurer is required to respond directly when benefits are awarded under the act. Within the terms of the concerned statute the employer and the insurer are indistinguishable in law and in fact.

The act permits an employer to be a self-insurer. It can hardly be seriously contended that if the employer in the case at bar were a self-insurer, the separate cause of action here asserted could be maintained against the employer because it negligently inspected its own premises or equipment. How then does the existence of insurance coverage create one?

Be all this as it may, *Ray* is the law of this state. I am constrained to add that if it so flagrantly offended against the legislative intent as judicially construed, the legislature has had the opportunity to express a contrary intent by amendment. It has not done so, and *Ray* remains the settled law. The failure of the trial judge to apply it was clearly and reversibly erroneous.

I concur with the Chief Judge.

GROVE *v.* STORY OLDSMOBILE, INC.

1. PLEADING—AMENDMENT—DENIAL.
   Denial of a leave to amend the pleading necessitates a finding by the trial court that justice would not be served by permitting the proposed amendment.

2. PLEADING—AMENDMENT—POLICY.
   The privilege to amend the pleadings should be liberally granted.

3. PLEADING—AMENDMENT—FACTORS—SURPRISE—DISADVANTAGE.
   The trial court in its determination whether to grant leave to amend the pleading must consider (1) surprise and (2) disadvantage to the adverse party.

4. PLEADING—AMENDMENT—SURPRISE—DISADVANTAGE.
   Granting plaintiffs, driver and guest passenger, leave to amend their complaint to state that the back of the driver's bucket seat came loose rather than, as stated in the original complaint, that the whole seat came loose was not an abuse of discretion even though the motion to amend was made only 12 days before trial where a deposition had been taken at which the driver stated that only the back of the seat had come loose, and the defendant was represented at the taking of the deposition, because the defendant, being aware of the facts in the amendment, was neither surprised nor disadvantaged.

5. CONTINUANCE—DISCRETION—APPEAL AND ERROR.
   Granting or denying a motion for a continuance is discretionary and will not be reversed on appeal absent a showing of abuse of discretion.

REFERENCES FOR POINTS IN HEADNOTES

[1–4] 41 Am Jur, Pleading § 291 *et seq.*
[5, 6] 17 Am Jur 2d, Continuance §§ 3, 4.
[7] 58 Am Jur, Witnesses §§ 562, 563.
[8] 22 Am Jur 2d, Damages §§ 347, 366.

6. CONTINUANCE—DISCRETION.

Denying defendant's motion for a continuance was not an abuse of discretion where the trial court, in its ruling, stated that it was willing to grant a continuance if the defendant showed what would be accomplished by a delay and defendant made no attempt to show the extra time could be advantageously used.

7. TRIAL—REDIRECT EXAMINATION—UNFAVORABLE INFERENCES.

A party, on redirect examination may attempt to mitigate an unfavorable inference arising from cross-examination.

8. DAMAGES—EXCESSIVE AWARD—STIPULATION—REMITTITUR.

Defendant cannot complain about the excessiveness of an award where the plaintiff offered to stipulate to a remittitur which would have reduced the amount of the recovery to precisely the amount defendant contends is proper but the defendant chose not to accept the stipulation.

Appeal from Ingham, Donald L. Reisig, J. Submitted Division 2 December 9, 1970, at Lansing. (Docket No. 8977.) Decided March 24, 1971.

Complaint by Charlotte Bugbee, for herself and as next friend of Valere Lynn Tanzola Grove, a minor, against Story Oldsmobile, Inc., for personal injuries resulting from a breach of warranty. Judgment for plaintiffs. Defendant appeals. Affirmed.

Harold W. Glassen and *Hudson E. Deming,* for plaintiffs.

Carl L. Reagh, for defendant.

Before: MCGREGOR, P. J., and T. M. BURNS and ANDREWS,* JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

T. M. BURNS, J. Defendant appeals a jury verdict awarding plaintiff Charlotte Bugbee $5,000 and plaintiff Valere Lynn Tanzola Grove $80,000.

Plaintiff Grove filed suit on March 17, 1966, alleging defendant's breach of warranty as the proximate cause of extensive injuries she received as a guest passenger in an automobile involved in a collision March 21, 1965. She originally claimed the accident was caused when the driver's seat, a so-called bucket seat, came loose from the floorboards of the automobile causing the seat to slide all of the way to the back seat. The complaint alleged that the front seat then turned over on its back causing the driver to lose contact with the wheel and the car to go completely out of control.

Defendant raises five issues on appeal: (1) Whether the trial court erred in permitting plaintiffs to amend their complaint to allege a different defect proximately causing the injuries complained of, when the request to amend was made only 12 days before trial? (2) Whether the trial court erred in denying defendant's request for a continuance when plaintiffs amended their complaint only 12 days before trial? (3) Whether the trial court erred in the scope of examination permitted plaintiffs on redirect questioning of their expert medical witness? (4) Whether the trial court erred in instructing the jury on plaintiffs' burden of proof? (5) Whether the verdict of the jury is excessive?

1. *Whether the trial court erred in permitting plaintiffs to amend their complaint to allege a different defect proximately causing the injuries complained of, when the request was made only 12 days before trial.*

Plaintiffs amended their complaint both in 1967 and 1968. At a conference on October 3, 1969, which

defendant styles a second pretrial conference and the trial judge a resumption of the original pretrial conference, plaintiffs again sought to amend their complaint. After a hearing on October 9, 1969, plaintiffs were permitted to amend the complaint to allege the accident was caused "when the back of the driver's seat, a so-called bucket seat came loose on the left-hand side causing the driver to partially lose contact with the steering wheel and to lose control of the car". The plaintiffs were thus permitted to change their complaint to allege that it was the back of the driver's seat which came loose rather than alleging, as they had in the original complaint, that the whole seat came loose from the floorboard.

The trial judge, in permitting plaintiffs to amend, stated:

"[B]ased upon the representations that this is not the first time that this matter, the subject matter of the amendment, has been brought to anyone's attention, that there was testimony at a deposition with reference to the character of the alleged defect, I find that though the amendment is late or the motion to amend is late and I don't like late amendments, I find no surprise here and no compelling reason to deny the amendment."

The deposition which the judge referred to is one taken of the driver of the car, the testimony revealing that it was the back of the seat rather than the seat as a whole which came loose.

Defendant was represented at the deposition and it is, therefore, clear that defendant was well aware of the factual basis of the claim well before the time that the motion to amend was granted. GCR 1963, 118.1, permits amendment by leave of the court at any time and explicitly provides that leave should be granted when justice requires. Denial of leave

necessitates a finding by the trial court that justice would not be served by permitting the proposed amendment,[1] and the Supreme Court has repeatedly stressed the liberality with which the privilege to amend should be granted.[2]

Two important factors to be weighed by the trial court in its determination are: (1) surprise and (2) disadvantage to the adverse party.[3] Since defendant was well aware of the facts which gave rise to the cause of action, defendant can neither claim surprise nor disadvantage, especially since it still had 12 days to prepare a defense. The determination by the trial court in granting the motion was an exercise of its discretion and will not be reversed absent a showing of abuse.[4] Defendant has failed to demonstrate any compelling reason why the amendment should not have been permitted. We, therefore, find that the trial court's determination was not an abuse of its discretion and must be upheld.

2. *Whether the trial court erred in denying defendant's request for a continuance when plaintiffs amended their complaint only 12 days before trial.*

Having failed in its opposition to plaintiffs' amendment, defendant then sought a continuance. Twelve days remained before trial, and defendant contended that this period was insufficient to prepare a defense to the altered basis for negligence. The trial court denied defendant's motion:

"I think at this time, until there is some ascertainment by the court of some representation to the court as to how a reasonable continuance would assist Mr. Reagh, I would have to reserve judgment

---

1 *Burg* v. *B & B Enterprises, Inc.* (1966), 2 Mich App 496.
2 *LaBar* v. *Cooper* (1965), 376 Mich 401, 409.
3 *Jackson Bank & Trust Co.* v. *Blair* (1952), 333 Mich 399, 404.
4 *Rosenbrock* v. *School District No. 3, Fractional* (1955), 344 Mich 335, 339.

on the motion, or even deny the motion until it was renewed. I would want to know what could be done during a reasonable period of adjournment."

The decision of the trial court on a motion for a continuance is also discretionary and will not be reversed on appeal absent a showing of abuse of that discretion.[5] The trial court, in its ruling, made clear to defendant that it was willing to continue the case upon a showing by defendant of what could be accomplished by such a delay. Defendant made no attempt to show how the extra time could be advantageously used. Defendant cannot, therefore, now complain that it was prejudiced. The trial court's ruling was very fair and certainly not an abuse of discretion and must, therefore, be upheld.

3. *Whether the trial court erred in the scope of examination permitted plaintiffs on redirect questioning of their expert medical witness.*

Defendant alleges that the trial court erred in permitting plaintiffs to "cross-examine" their own medical witness on redirect examination.

As an initial matter, defendant has failed in its brief to do any more than point out what it considers to be error on the part of the trial court. Defendant leads us to no authority to support its proposition. Defendant may not leave it to this court to "search for authority" to sustain or reject its position.[6]

We will only say then that our review of the entire testimony of the witness reveals that plaintiffs' counsel was only attempting to mitigate an unfavorable inference arising from cross-examination. This, of course, is permissible.[7] We find no

[5] *McKay* v. *Black* (1967), 5 Mich App 711, 714.
[6] *Mitcham* v. *City of Detroit* (1959), 355 Mich 182, 203; *People* v. *Rogers* (1968), 10 Mich App 380, 381.
[7] *Rogers* v. *Fowler* (1908), 151 Mich 485.

attempt on plaintiffs' part to cross-examine or impeach their own witness. The examination was, therefore, proper.

4. *Whether the trial court erred in instructing the jury on plaintiffs' burden of proof.*

Defendant complains that the trial court did not adequately charge the jury on the applicable burden of proof, but again defendant has failed to provide this court with any authority to support its position.[8]

Plaintiffs point out, however, that defendant did not object to the instructions in question. Having failed to object, defendant has not properly preserved the question for review. GCR 1963, 516.2.[9]

5. *Whether the verdict of the jury is excessive.*

Charlotte Bugbee's award was $5,000; her actual damages totaled $2,354.89. Defendant contends that counsel for both parties stipulated to the latter figure as the amount of damages, and, therefore, the verdict must be excessive. Without deciding whether defendant's contention is correct (defendant again cites no authority), we are informed that Charlotte Bugbee offered to stipulate to a remittitur and continues to make this offer, but defendant has not chosen to accept it. Having had the opportunity to reduce the amount of the recovery to precisely the amount it now contends is proper, we see no reason for defendant to now complain about the excessiveness of the award.

Defendant next contends that because the jury doubled the amount of Charlotte Bugbee's award, that they must also have doubled the amount to which Valere Grove is entitled. Defendant's conten-

[8] See *Mitcham* v. *City of Detroit, supra,* and *People* v. *Rogers, supra.*

[9] See *O'Donnell* v. *H. J. Van Hollenbeck Leasing, Inc.* (1968), 12 Mich App 536.

tion is based upon the fact that the jury must have acted in sympathy toward plaintiff Grove.

However, the trial court instructed the jury on two occasions that it must not be influenced by sympathy or prejudice. This Court will not interfere with a jury verdict unless we find that it "shocks the conscience", or has been secured by improper means, prejudice, or sympathy.[10]

Since the trial court properly instructed the jury not to be influenced by sympathy or prejudice, we find nothing to support defendant's contention. Our review of the evidence reveals that the verdict was well within the range of the testimony. Defendant has in no way documented its contention that the verdict is excessive. There is no basis which would justify interference with the determination of the jury.

Affirmed.

All concurred.

---

[10] *McKay* v. *Hargis* (1958), 351 Mich 409; *Morgan* v. *Engles* (1968), 13 Mich App 656.

COTTON *v.* TOWNSHIP OF CASTLETON

1. HIGHWAYS—ROADWAY BY USER—REQUIREMENTS—STATUTES.

A roadway by user is established where the public has used the roadway and the appropriate governmental unit has exercised control over the road (MCLA § 221.20).

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 39 Am Jur 2d, Highways, Streets and Bridges §§ 25–31, 52, 53.

2. HIGHWAYS—ROADWAY BY USER—CONTROL—REPAIRS.

Repair work on a road 50 years before suit was filed did not constitute acts of dominion necessary for giving the governing authority ownership by right of user.

Appeal from Barry, Richard Robinson, J. Submitted Division 3 February 3, 1971, at Grand Rapids. (Docket No. 9033.) Decided March 24, 1971.

Complaint by Elgin A. and Vida L. Cotton and Edward R. and Dorothy Stalbaum against the Township of Castleton and the Barry County Road Commission for a declaration of the rights of the parties to a strip of land used as a roadway. Judgment for defendants. Plaintiffs appeal. Reversed.

Cortright & Boddy, for plaintiffs.

Siegel & Hudson, for defendants.

Before: FITZGERALD, P. J., and V. J. BRENNAN and T. M. BURNS, JJ.

T. M. BURNS, J. Plaintiffs appeal from an adverse judgment, entered January 30, 1970, declaring the rights of the respective parties to a strip of land 290 feet long. The strip of land was held to be a county road.

The strip of land in question is an extension of Cogswell Road in Barry County, the strip leading directly to the north shore of Thornapple Lake. No formal grant of the strip of land nor dedication for public highway purposes was ever made. There is no dispute over Cogswell Road except as to the final 290 feet ending at Thornapple Lake.

Cogswell Road does appear on a Barry County map, published in 1940, as a north-south road lead-

ing directly to the north shore of Thornapple Lake. However, testimony at the trial revealed that although some work had been done on the road at the township's direction sometime prior to 1936, neither the township nor the county had performed any maintenance on the strip of land for at least 50 years.

Since there was no formal dedication or grant of the strip of land to the public use, defendants' claim that the land constitutes a public road is based upon establishment of the roadway by user. The legislative standard for a roadway by user is found in MCLA § 221.20 (Stat Ann 1958 Rev § 9.21):

"All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for ten years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be four rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be two rods in width on each side of such lines."

Michigan case law has established the requirement that, not only must the public use the roadway, the appropriate governmental unit must also exercise control over the road:

" 'To constitute a highway by user, there must be a defined line, and it must be used and worked upon by the public authorities, and traveled over and used by the public, for 10 consecutive years, without

interruption, and the possession thereof by the public must be open, notorious, and exclusive.' *Alton* v. *Meeuwenberg* (syllabus) [1896], 108 Mich 629."[1]

In the instant case, the lower court found specifically that the strip of land had been used by the public for approximately 70 years, until 1963, when plaintiffs blocked it off and this dispute began. However, the only maintenance work carried out by the public authorities occurred 50 or more years previously:

"Between 50 and 70 years ago, the Township did maintenance work on a roadway in this area." (Trial court's opinion, page 2.)

Under the McNitt Act,[2] the county obtained jurisdiction over all township roads by April 7, 1936. However, there was no evidence that the county ever attempted to maintain the road until 1962 or 1963. Therefore, for over 25 years, the county while having jurisdiction over all township roads in Barry County, never attempted to take any action regarding the strip of land in question. It is our opinion that the total lack of acts of dominion by any public authority precludes the claim that the strip of land is a public roadway. The requirements of the statute setting the standard for establishing a roadway by user, as set forth in *Missaukee Lakes Land Company* v. *Missaukee County Road Commission* (1952), 333 Mich 372, are clear. There must be both public use and some acts of dominion by the public authority to establish a roadway by user. The few instances of repair by the township some 50 years before the instant dis-

---

[1] *Bain* v. *Fry* (1958), 352 Mich 299, 305.

[2] CL 1948, §§ 247.1–247.13 (Stat Ann 1958 Rev §§ 9.141–9.153). The statute was repealed by PA 1951, No 51, § 21. See now MCLA § 247.651 *et seq.* (Stat Ann 1958 Rev § 9.1097 *et seq.*).

pute arose are not sufficient acts of dominion to satisfy the statute as it has been interpreted by the Michigan Supreme Court.

Reversed, costs to plaintiffs.

All concurred.

PEOPLE *v.* GEORGE MARTIN

1. SEARCHES AND SEIZURES—MOTION TO SUPPRESS—TIMELINESS.

   The illegality of the seizure of evidence must be made before trial in a motion to suppress where the defendant knows of the facts constituting the illegal seizure; the illegality of a search and seizure may not even be raised for the first time at trial.

2. SEARCHES AND SEIZURES—MOTION TO SUPPRESS—TIMELINESS—WAIVER OF ILLEGALITY.

   Illegality of search and seizure was waived where the defendant, who was clearly aware of all the facts surrounding his arrest and the questioned search and seizures, did not move to suppress the seized evidence before trial.

3. CRIMINAL LAW—WITNESSES—IDENTIFICATION TESTIMONY—CREDIBILITY—QUESTION OF FACT.

   Resolution of conflicting testimony of witnesses regarding the identification of the defendant as the man who committed the crime charged is a question of fact; the trier of fact is the sole judge of the credibility of witnesses in a criminal case.

4. CRIMINAL LAW—NEW TRIAL—EVIDENCE.

   New trial was properly denied a defendant convicted of armed robbery where the record contained ample evidence to establish all the elements of the offense charged and sufficient testimony identifying the defendant as a participant in the crime charged.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial § 134.
[3] 29 Am Jur 2d, Evidence §§ 371–373.
[4] 39 Am Jur, New Trial § 139.

Appeal from Saginaw, Fred J. Borchard, J. Submitted Division 3 February 2, 1971, at Grand Rapids. (Docket No. 9056.) Decided March 24, 1971. Leave to appeal denied August 18, 1971, 385 Mich 782.

George C. Martin was convicted of armed robbery. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *George E. Thick, II,* Prosecuting Attorney, and *Duane T. van Benschoten,* Assistant Prosecuting Attorney, for the people.

Heilman, Purcell, Tunison & Cline (by *Miles J. Purcell*), for defendant on appeal.

Before: FITZGERALD, P. J., and V. J. BRENNAN and T. M. BURNS, JJ.

FITZGERALD, P. J. Defendant's jury trial resulted in his conviction of armed robbery[1] and his sentence of from 20 to 30 years in the State Prison for Southern Michigan. Defendant's delayed motion for new trial was denied and he appeals. Two issues are raised on appeal: (1) illegal search of the car in which defendant was riding when arrested and illegal seizure of items in the car; (2) denial of defendant's delayed motion for new trial on grounds of conflicting testimony of witnesses who identified defendant.

Defendant knew of the facts constituting the alleged illegal search and seizure before trial, but no motion to suppress evidence was made before trial. Defendant did not object at trial to the introduction of evidence which he now claims was obtained

[1] MCLA § 750.529 (Stat Ann 1954 Rev § 28.797).

through illegal search and seizure. In Michigan, the rule is that the illegality of the seizure of evidence, where the facts constituting such illegality are known before trial, must first be raised by a motion to suppress in advance of trial. Defendant may not even raise the issue at trial for the first time. *People* v. *Bass* (1926), 235 Mich 588; *People* v. *Heibel* (1943), 305 Mich 710; *People* v. *Ferguson* (1965), 376 Mich 90; *People* v. *Wilson* (1967), 8 Mich App 651; *People* v. *Childers* (1969), 20 Mich App 639; *People* v. *Kennedy* (1970), 22 Mich App 524; *People* v. *Willie Williams #1* (1970), 23 Mich App 129.

Where a defendant has knowledge of facts constituting an illegal search and seizure before trial, he has the responsibility of communicating those facts to his attorney, who then has the responsibility of moving to suppress in advance of trial. *People* v. *Ferguson, supra; People* v. *Wilson, supra.* In this case, the defendant was clearly aware of all the facts surrounding his arrest and the search and seizure of the evidence now complained of. Since no motion to suppress was made prior to trial, the issue of illegal search and seizure was waived. *People* v. *Williams, supra.*

Although there was some conflict among the witnesses as to the identification of the defendant, there was positive identification by a number of witnesses that defendant was the man who carried the shotgun during the holdup. Defendant made no objection at trial to the conflict among the witnesses as to his identification.

This issue is one of the credibility of the witnesses. Resolution of conflicting testimony of witnesses with respect to identification of the defendant is for the jury. *People* v. *De Smyther* (1970), 23 Mich App 48. A defendant in a criminal

case who fails to raise objections to improper admission of identification testimony at trial may not raise them for the first time on appeal, and the Court of Appeals will not consider them except to avoid clear injustice. *People* v. *Schram* (1970), 23 Mich App 91. The jury is the sole judge of the credibility of the witnesses in a criminal case. *People* v. *Gray* (1970), 23 Mich App 139. In this case, the record contains ample evidence to establish all the elements of the offense and there was sufficient identification testimony to support the jury's finding that the defendant was the man carrying the shotgun. In such a case a motion for a new trial is properly denied. *People* v. *Paugh* (1949), 324 Mich 108.

The test in a criminal case is not whether there was some irregularity but whether or not the defendant had a fair trial. *People* v. *Mosley* (1953), 338 Mich 559. The record in this case does not disclose any miscarriage of justice.

Affirmed.

All concurred.

PEOPLE *v.* SHEEHY

1. RAPE—EVIDENCE—RES GESTAE—GROSS INDECENCY.

   An act of gross indecency committed immediately prior to a rape is a part of the *res gestae* of the crime of rape, because the testimony concerning the gross indecency serves to characterize and illustrate the act which constituted the crime of rape and because the gross indecency was proximate in time to the rape.

2. EVIDENCE—ADMISSIBILITY—RELEVANCY—DETERMINATION.

   Evidence may be excluded if it will not shed light upon any matter contested; the determination of relevancy is one for the trial court and will not ordinarily be revised on appeal.

3. EVIDENCE—ADMISSIBILITY—RELEVANCY—DISCRETION.

   Excluding defendant's evidence concerning another criminal case in the area, which the defendant contended he was discussing with the prosecutor in a bar on the night the crime with which the defendant was charged was committed, was not an abuse of discretion even though the defendant contended that the evidence would lend credence to his story, where the defendant could have called the bartender, another patron or the proprietor himself to confirm the story and where the other crime had received much publicity, and thus, the defendant's knowledge of the case would not have established that he learned about the case from the prosecutor.

4. CRIMINAL LAW—PROSECUTOR'S REMARKS—SENTENCING—COURT'S RESPONSIBILITY.

   Prosecutor's remark to the jury in closing argument that the judge, not the jury, would decide the sentence did not prejudice defendant's right to a fair trial.

REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur 2d, Evidence §§ 718, 721, 732, 736.
[2, 3] 29 Am Jur 2d, Evidence §§ 249, 251–257, 267.
[4, 5] 53 Am Jur, Trial §§ 453–504.

5. CRIMINAL LAW—PROSECUTOR'S REMARKS—DEFENDANT'S GUILT—PROSECUTOR'S BELIEF.

A request by the prosecutor for a verdict of guilty at the conclusion of the people's argument to the jury does not constitute a statement as to what the prosecutor personally believes about the guilt or innocence of the defendant.

Appeal from Crawford, Robert H. Campbell, J. Submitted Division 3 January 8, 1971, at Grand Rapids. (Docket No. 9065.) Decided March 25, 1971. Leave to appeal denied May 26, 1971, 384 Mich 844.

Mark Francis Sheehy was convicted of rape. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Bruce B. Benson,* Prosecuting Attorney, for the people.

James N. McNally, for defendant on appeal.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

T. M. BURNS, J. On February 5, 1970, defendant was convicted by a jury of the crime of rape.[1] He was sentenced on February 18, 1970, to a term of from three to ten years in the state prison. Defendant appeals as of right.

Defendant first contends that the trial court should not have permitted the victim to testify that just prior to committing the rape charged, her assailant committed gross indeceny, *i.e.* penetration *per os,* a criminal act in itself under MCLA § 750-.338b (Stat Ann 1954 Rev § 28.570[2]). The trial

[1] MCLA § 750.520 (Stat Ann 1954 Rev § 28.788).

court ruled that the evidence was admissible as part of the *res gestae.*

In *People* v. *Savage* (1923), 225 Mich 84, 86, the Supreme Court stated:

"It is elementary that the acts, conduct and demeanor of a person charged with crime at the time of, or shortly before or after the offense is claimed to have been committed, may be shown as a part of the *res gestae.* Proof of such acts is not rendered inadmissible by the fact that they may tend to show the commission of another crime."

However, to be admitted as part of the *res gestae,* the facts to be proven must not only be proximate in time to the principal fact, they must also illustrate and characterize the principal fact:

" 'No inflexible rule has ever been and probably never can be adopted as to what is a part of the *res gestae.* It must be determined largely in each case by the peculiar facts and circumstances incident thereto; but it may be stated as a fixed rule that, included in the *res gestae* are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect.' *Chicago & Erie Ry. Co.* v. *Cummings* (1899), 24 Ind App 192, 209 (53 NE 1026, 1031)."[2]

In view of these decisions, the trial court was correct in concluding that an act of gross indecency, committed immediately prior to the forced act of sexual intercourse, was a part of the *res gestae* of the crime of rape. The gross indecency was proximate in time and the testimony concerning it served to illustrate and characterize the act which consti-

[2] *People* v. *Kayne* (1934), 268 Mich 186, 192.

tuted the crime of rape. The testimony was, therefore, properly admitted.

Defendant next contends that the trial court erred in precluding his counsel from introducing evidence in regard to an unrelated rape case. At the trial, defendant testified that at the time the crime was supposed to have been committed, he was in a hotel having a conversation with Mr. Benson, the prosecutor who was trying the case for the people. When on cross-examination, Mr. Benson asked defendant what had been discussed during their alleged conversation, the defendant gave the following response:

"You said you had another rough case coming up where an elderly man was accused of raping his niece, and I asked you who that was, if you could tell me and you said yes, it was a Mr. Owens."

Defense counsel then requested that he be given an opportunity to introduce further evidence about the Owens case to establish that there was, in fact, such a case. The purpose of establishing the existence of the other rape case was to lend credence to defendant's story that he was actually talking to the prosecutor at the time the crime was being committed. The trial court held, however, that any additional evidence on the Owens case would be immaterial and collateral.

Since the conversation took place in a hotel bar, it is difficult to understand why defense counsel did not call the bartender, another patron, or the prosecutor himself to confirm the defendant's story. The facts of the Owens case received much publicity in the community and proof of the existence of the case could hardly establish that defendant gained knowledge of it by talking with Mr. Benson on the night in question.

Evidence may be excluded if it will not shed light upon any matter contested; the determination of relevancy is one for the trial court and will not ordinarily be revised on appeal.[3] Defendant has failed to show that the exclusion of the proposed evidence would have affected the jury's determination of his guilt, that the evidence itself bore on the main issue at trial, or that the evidence was in any way competent, material, and relevant to the trial. The trial court did not abuse its discretion by excluding the evidence defense counsel proposed to introduce.

Defendant next argues that certain remarks made by the prosecutor during closing argument prejudiced defendant's right to a fair trial. Defendant takes exception to two passages of the prosecutor's closing argument to the jury:

"*Mr. Benson:* I want to bring to your attention the fact that the question of a sentence in this case is not for your deliberation, but merely for the judge to decide * * * .

* * *

"Finally, once again, ladies and gentlemen, I respectfully request, as Prosecuting Attorney for Crawford County, that you ladies and gentlemen find the defendant guilty of the charge of rape."

This court fails to see how either of the above two remarks prejudiced defendant's right to a fair trial. The first remark informs the jury that their responsibility ends with a finding of guilt, and that it is then the responsibility of the court to punish. The prosecutor did not mention what defendant's possible punishment would be if he was found guilty by

[3] *Detroit Iron & Steel Co.* v. *Detroit Gray Iron Foundry Co.* (1927), 240 Mich 677, 680.

the jury. We find no reversible error in these remarks by the prosecutor.[4]

The prosecutor's second remark, requesting a verdict of guilty, is objected to on the ground that it, in effect, expressed the prosecutor's personal opinion of defendant's guilt.[5] However, it is the opinion of this Court that a request for a verdict of guilty at the conclusion of the prosecutor's argument to the jury does not constitute a statement as to what the prosecutor personally believes about the guilt or innocence of the defendant. We hold, therefore, that the remarks of the prosecutor were not prejudicial and the trial court did not err in overruling defendant's objection to them.[6]

Defendant finally questions the sufficiency of the evidence upon which the conviction is based. At the trial the complainant testified that defendant arrived at her cabin around 9:50 p.m., on the night in question; that after conversing several minutes, he put his arm around her throat, pulled her down onto the floor, and choked her; that he beat her head against the kitchen sink; that after an extensive struggle he took off her clothes; and that after first inserting his organ into her mouth, he finally completed the vaginal penetration of the act of intercourse.

A friend of the complainant corroborated her identification of the defendant by testifying that he

---

[4] *People* v. *Singer* (1913), 174 Mich 361.

[5] In *People* v. *Slater* (1970), 21 Mich App 561, this Court held that error is committed when the prosecutor states what he personally believes about the defendant's guilt. However, even when the prosecutor does express such an opinion, it does not constitute error if the prosecutor relates his opinion to the evidence. *People* v. *McElheny* (1922), 221 Mich 50; and *Slater, supra.*

[6] The prosecutor is free in final argument to relate the facts to his theory of the case and to say that certain evidence leads him to believe the defendant is guilty. *People* v. *Humphreys* (1970), 24 Mich App 411. It would follow, therefore, that after reviewing all of the evidence, the prosecutor may also request the jury to return a verdict of guilty.

saw defendant at the complainant's cabin when he stopped there at 10:30 p.m., and again at 11:45 p.m. The last time he testified that he not only saw the defendant at the cabin but that he had talked with him concerning why the complainant was crying, to which defendant replied to the effect that they had had an argument. He also testified that he saw a black 1958 or 1959 Ford at her cabin on both visits. Defendant, on cross-examination, admitted owning such a vehicle.

The physician who examined the complainant soon after the alleged rape testified to finding numerous superficial abrasions on the complainant's body. He also testified that in his opinion the complainant had been involved in sexual intercourse immediately prior to the examination. A laboratory examination confirmed the presence of spermatazoa in a specimen taken from the complainant's vagina. Photographs taken of the complainant the day after the alleged offense occurred confirmed the existence of facial bruises and abrasions.

The transcript does contain evidence which contradicts the testimony of the complainant and her friend which tends to establish that defendant was at her cabin and perpetrated the offense in question. This conflict, however, precisely framed a question of fact for the jury.[7] Moreover, this Court does not constitute a reviewing jury and will not hear cases anew.[8] We find, therefore, that the prosecution presented sufficient evidence, if believed by the jury, to find the defendant guilty beyond a reasonable doubt of the crime with which he was charged.

Affirmed.

All concurred.

---

[7] *People* v. *Jamroz* (1969), 19 Mich App 644.

[8] *People* v. *Bratton* (1969), 20 Mich App 523, 525.

PEOPLE v. GRAVES

1. CRIMINAL LAW—PROSECUTING ATTORNEY—OFFICERS.
A prosecuting attorney is the chief law enforcement officer of his county.

2. CRIMINAL LAW—PROSECUTOR'S DISCRETION.
A prosecuting attorney has a right to exercise discretion in determining under which applicable statute a prosecution will be instituted.

Appeal from Recorder's Court of Detroit, Joseph A. Gillis, J. Submitted Division 1 February 9, 1971, at Detroit. (Docket No. 9072.) Decided March 25, 1971.

William Graves, Jr., was convicted of larceny in a building. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Thomas R. Lewis,* Assistant Prosecuting Attorney, for the people.

Markus S. Simon, for defendant on appeal.

Before: DANHOF, P. J., and HOLBROOK and BRONSON, JJ.

REFERENCE FOR POINTS IN HEADNOTES
[1, 2] 42 Am Jur, Prosecuting Attorney §§ 9–18.

BRONSON, J. Defendant was convicted by a jury for the crime of larceny in a building contrary to MCLA § 750.360 (Stat Ann 1954 Rev § 28.592). The trial judge sentenced the defendant to serve a term of two and one-half to four years in prison. Defendant appeals as of right.

Evidence adduced at trial established that defendant unlawfully took six ladies' sweaters valued at $10 each from a department store in Detroit.

Defendant contends that since the value of the goods stolen was less than $100, he should have been charged with the offense of simple larceny under MCLA § 750.356 (Stat Ann 1970 Cum Supp § 28.588), which is a misdemeanor. Defendant argues that the prosecutor's decision to charge him for a felony under MCLA § 750.360 (Stat Ann 1954 Rev § 28.592), rather than a misdemeanor under MCLA § 750.356 (Stat Ann 1970 Cum Supp § 28-.588), violated constitutionally-protected rights.

The premise upon which defendant's argument proceeds is that the two statutes proscribing essentially similar activity are vague and indefinite because they fail to provide sufficient distinguishing guidelines. Further, defendant contends that because the delineation is not clear, the two statutes unlawfully delegate judicial and legislative authority to the prosecutor.

Defendant's arguments are without merit. The prosecuting attorney is the chief law enforcement officer of his county. The ultimate police power reposes in the hands of this civilian law enforcement officer who was elected by the people. It is axiomatic that the prosecutor has a right to exercise discretion in determining under which applicable statute a prosecution will be instituted. *People* v. *Lombardo* (1942), 301 Mich 451; *People* v. *Thrine* (1922), 218 Mich 687; *People* v. *Ryan* (1968), 11

Mich App 559; *People* v. *Eineder* (1969), 16 Mich App 270.

The facts of the instant case disclose that the acts of the defendant constituted criminal activity in violation of both of the statutes under consideration. The legislative mandate under MCLA § 750-.360 (Stat Ann 1954 Rev § 28.592) is unequivocal in its pronouncement that when a larceny is committed in the areas enumerated, the actor has committed a felony without reference to the value of the goods stolen.

The distinction between simple larceny, MCLA § 750.356 (Stat Ann 1970 Cum Supp § 28.588), and larceny in a building, MCLA § 750.360 (Stat Ann 1954 Rev § 28.592), is clear on the face of the statutes. The additional aggravation of stealing from a public building is deemed more severe by the legislature.

Since the statutory crimes are distinct, and since the facts encompassed the crime charged, the prosecutor did not abuse his discretion in proceeding under MCLA § 750.360 (Stat Ann 1954 Rev § 28.592).

Defendant's remaining issue on appeal relates to the trial court's instruction to the jury. A review of the record reveals that the instruction apprised the jury of the applicable law in a clear and concise manner. *People* v. *Weems* (1969), 19 Mich App 553.

Judgment affirmed.

All concurred.

PEOPLE *v.* WASSON

1. SEARCHES AND SEIZURES—EVIDENCE—POSSESSION BY THIRD PARTY —EXPOSURE TO PUBLIC SCRUTINY.

   An unreasonable search and seizure claim will not be heard where a defendant has turned over potential evidence to a third party, thus exposing it to public scrutiny.

2. SEARCHES AND SEIZURES—EVIDENCE—POSSESSION BY THIRD PARTY —EXPOSURE TO PUBLIC SCRUTINY.

   A defendant could not complain of an illegal seizure of a stolen motorcycle where he had placed the motorcycle in the hands of a repairman, thus exposing it to the full view of all who entered the repair shop.

3. SEARCHES AND SEIZURES—EVIDENCE—OBJECTION—TIMELINESS.

   Failure to object in the trial court to admission of evidence obtained in a search and seizure precludes raising of that issue on appeal unless manifest injustice has occurred.

4. CRIMINAL LAW—WARNING OF RIGHTS—ACCUSATORY STAGE.

   The specificity of a police investigation, *i.e.*, whether the investigation has focused on one suspect and has become accusatory rather than investigatory, determines whether a suspect must be warned of his constitutional rights.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 29 Am Jur 2d, Evidence § 425.
[3] 29 Am Jur 2d, Evidence §§ 412, 418, 425.
[4–6] 21 Am Jur 2d, Criminal Law §§ 313, 317, 357, 367, 449.
Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation. 10 ALR3d 1054.
What constitutes "Custodial Interrogation" within rule of *Miranda* v. *Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.
[7, 8] 29 Am Jur 2d, Evidence §§ 320, 321, 327, 333.
[9] 47 Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 4, 8.

5. CRIMINAL LAW—WARNING OF RIGHTS—INVESTIGATORY STAGE.

Police did not have to advise the defendant of his constitutional rights where the defendant voluntarily complied with a request to come to the police station for questioning and after questioning he was not placed in protective custody but was permitted to leave.

6. CRIMINAL LAW—WARNING OF RIGHTS—POLICE QUESTIONING—INVESTIGATORY STAGE.

A person does not have to be advised of his constitutional rights before a police interview is held if the purpose of police interview is investigatory rather than accusatory and if, in submitting to the interview, the suspect was not substantially deprived of his freedom of action in any way.

7. CRIMINAL LAW—DEFENDANT TESTIFYING—PRIOR ARRESTS—IMPEACHMENT.

A defendant testifying at his own trial may not be asked if he has been previously arrested or charged with a crime where the arrest or charge did not result in his conviction and where the only purpose of such questions is to impeach the defendant's credibility.

8. CRIMINAL LAW—DEFENDANT TESTIFYING—PRIOR ARRESTS—IMPEACHMENT.

Permitting prosecution to cross-examine defendant, charged with receiving stolen property, regarding his prior arrests which did not result in convictions constituted prejudicial error where the only purpose was to impeach defendant's credibility and where the defendant's credibility, whether he knew that the motorcycle which he had placed in the hands of a repairman had been stolen, was a most important issue.

9. CRIMINAL LAW—EVIDENCE—JUVENILE RECORDS—ADMISSIBILITY.

Records of juvenile arrests or juvenile court convictions may not be introduced against a defendant in adult criminal proceedings (MCLA § 712A.23).

Appeal from Wayne, Edward S. Piggins, J. Submitted Division 1 January 7, 1971, at Detroit. (Docket No. 9132.) Decided March 25, 1971.

Michael Wasson was convicted of receiving stolen property. Defendant appeals. Reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Leonard Meyers,* Assistant Prosecuting Attorney, for the people.

D. Michael Kratchman, for defendant on appeal.

Before: R. B. BURNS, P. J., and J. H. GILLIS and DANHOF, JJ.

J. H. GILLIS, J. Defendant was convicted in a jury trial of receiving stolen property, MCLA § 750-.535 (Stat Ann 1971 Cum Supp § 28.803). This appeal as of right raises three issues.

Defendant was the alleged owner of a motorcycle which was suspected of having been stolen. Police tests revealed that the serial number on the vehicle was altered. The complainant in this case, the true owner of the motorcycle in question, reported seeing his missing motorcycle in a repair shop in Southgate, Michigan. He based his identification on several distinctive marks which were the result of his workmanship on the vehicle. This discovery was reported to the police, who in turn seized the vehicle from the repair shop. Defendant argues that the trial court erred in receiving evidence regarding the altered description of the serial number and alleges that this evidence is the product of an illegal search and seizure.

The evidence in question was not in the possession of the defendant, but rather in possession of a repairman at the time it was seized by police. The United States Court of Appeals for the Sixth Circuit recently reviewed a similar factual situation in which evidence was in the possession of a dry cleaners at the time it was seized without a warrant.

That Court held that when potential evidence is turned over by a defendant to a third party, thus exposing it to public scrutiny, no claim of unreasonable search and seizure will be heard. That Court concluded:

"Here appellant delivered the suit to the cleaners open to public view. He knew that the suit could be handled and examined by many persons in the course of the cleaning process, but he in no way tried to conceal the suit or anything contained thereon, nor did he try to restrict the number of persons who handled it. We are therefore unable to find any significant invasion of anything which appellant sought to 'preserve as private'". *Clarke* v. *Neil* (CA 6, 1970), 427 F2d 1322, 1325.

In the case now before us, the defendant placed the motorcycle in the hands of the repairman, in full view of all who entered the shop. Furthermore, at trial, no objection was made to the admission of the evidence obtained in the search and seizure now in question. Barring the occurrence of manifest injustice, this Court has consistently held that issues not properly preserved below cannot now be raised for the first time. *People* v. *Omell* (1968), 15 Mich App 154; *People* v. *Bradley* (1966), 4 Mich App 660; *People* v. *Willis* (1965), 1 Mich App 428. Alleged violation of the search and seizure guaranty is without merit in this instance.

Secondly, defendant alleges that the trial court erred in allowing into evidence a statement made by him before he was advised of his constitutional rights. The statement in question was made by the defendant to a detective when defendant was called into the police station.

The basic issue thus is whether at the time the statement was made the investigation had become accusatory. If the investigation had reached

that stage, the defendant was entitled to be advised of his constitutional rights. *Escobedo* v. *Illinois* (1964), 378 US 478 (84 S Ct 1758, 12 L Ed 2d 977); *Miranda* v. *Arizona* (1966), 384 US 436 (86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974). The deciding factor, in each case, is determined by examining the specificity of the investigation, *i.e.,* whether the investigation has focused on one suspect.

In the case at bar, defendant was requested to come to the police station for questioning. He voluntarily complied with that request. At the conclusion of the interview he was not placed in protective custody, but rather was freely permitted to leave the police station. Courts have consistently held that where the purpose of such interviews is investigatory rather than accusatory, the questioning authorities need not first give the *Miranda* warnings. *United States* v. *Hall* (CA 2, 1965), 348 F2d 837; *Gaudio* v. *State* (1967), 1 Md App 455 (230 A2d 700); *State* v. *Barnes* (1969), 54 NJ 1 (252 A2d 398); *State* v. *Evans* (1965), 241 Or 567 (407 P2d 621); *People* v. *Wright* (1969), 273 Cal App 2d 325 (78 Cal Rptr 75); *People* v. *Robinson* (1970), 22 Mich App 124. In submitting to the interview, defendant was not substantially deprived of his freedom of action in any way. Anno: 31 ALR3d 565.

Thirdly, defendant alleges that the trial court erred in permitting the prosecution to cross-examine him regarding prior arrests which did not result in convictions. The defendant cites to us authority with which we are very familiar:

"We now hold that a defendant testifying at his own trial may not be asked if he has been arrested or charged with crime, where the arrest or charge has not resulted in a conviction and where the only purpose of the questions is to impeach the defend-

ant's credibility as a witness. Where credibility is the only issue, the probative value of arrests and charges, unsubstantiated by a conviction, is slight at best. When weighed against the great danger that the jury despite careful instructions, might misapply such evidence, the scales of justice tip in favor of exclusions." (Citations omitted.) *People* v. *Brocato* (1969), 17 Mich App 277, 302, 303.

We agree with defendant's conclusions that the defendant's credibility was a most important issue in the trial below, "as the question of his knowledge of whether the motorcycle was stolen was the chief issue". Therefore, we find that it was prejudicial to the defendant to attack his credibility by the improper references to previous arrests. *United States* v. *Beno* (CA 2, 1963), 324 F2d 582; *People* v. *Brocato, supra; People* v. *Eddington* (1970), 23 Mich App 210. Further, the prosecution may not introduce either juvenile arrests or juvenile court convictions against the defendant in adult criminal proceedings. MCLA § 712A.23 (Stat Ann 1962 Rev § 27.3178[598.23]); *People* v. *Smallwood* (1943), 306 Mich 49; *People* v. *Warren* (1970), 23 Mich App 20; 1 Underhill's Criminal Evidence (5th ed, 1956) § 244, p 607, note 17a.

The prejudicial error committed below requires reversal.

Reversed and remanded for new trial.

All concurred.

PEOPLE *v.* WENRICH

1. ARREST—WITHOUT WARRANT—REASONABLE BELIEF.

A police officer may arrest a person when he has reasonable belief that a felony has been committed and reasonable cause to believe that the person arrested has committed it; when the constitutional validity of an arrest is challenged, the court must determine whether the facts available to the officers at the time of the arrest would warrant a man of reasonable caution in the belief that an offense had been committed (MCLA § 764.15).

2. SEARCHES AND SEIZURES—WITHOUT WARRANT—PROBABLE CAUSE.

Seizure of marijuana was proper as incident to a lawful arrest where the police (1) had information that there would be drug traffic at a house on the evening in question, (2) placed the house under surveillance and observed furtive conduct by the defendant while near the house, (3) observed the defendant converse with the occupants of another car who were later reported to be narcotics suppliers, and (4) the driver of the vehicle in which defendant was riding was arrested for possession of a concealed weapon.

3. CRIMINAL LAW—POLICE INFORMER—DISCLOSURE.

The name of a police informer may be withheld in order to protect the informer and insure his continued cooperation where the informer is not also a material witness on the issue of defendant's guilt.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 5 Am Jur 2d, Arrest §§ 22–51.
Lawfulness of nonconsensual search and seizure without warrant prior to arrest. 89 ALR2d 715.
[3] 29 Am Jur 2d, Evidence § 409.
Accused's right to, and prosecution's privilege against, disclosure of identity of informer. 76 ALR2d 262.
[4] 29 Am Jur 2d, Evidence § 290.

4. EVIDENCE—IDENTITY—CHAIN OF POSSESSION.

The people proved that the marijuana introduced at trial was the same marijuana seized from the defendant where they showed an unbroken chain of possession which accounted for the whereabouts of the narcotic from the time of seizure to the time of trial.

Appeal from Wayne, George E. Bowles, J. Submitted Division 1 March 4, 1971, at Detroit. (Docket No. 9148.) Decided March 25, 1971.

Michael Henry Wenrich was convicted of possession of marijuana. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Thomas R. Lewis,* Assistant Prosecuting Attorney, for the people.

Thomas J. Wing, for defendant on appeal.

Before: V. J. BRENNAN, P. J., and QUINN and O'HARA,* JJ.

V. J. BRENNAN, P. J. Defendant was convicted by the court sitting without a jury of unlawful possession[1] of marijuana and sentenced to serve three and one-half to ten years in prison.

On the evening of December 3, 1968, officers Prokes and Whitty of the Livonia Police Department were cruising in their patrol car when they received a radio message to call the police station. Over the telephone, Sgt. Griese related that a narcotics raid had occurred earlier that night at a

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

[1] MCLA § 335.153 (Stat Ann 1971 Cum Supp § 18.1123).

dwelling on Joy Road and that one of the persons arrested informed them that "the big boys" would be coming back to the house later on with 70 bricks of marijuana.

On the basis of this information the officers proceeded to stake out the house on Joy Road. Shortly thereafter, a Javelin sportscar with three occupants pulled up in front of the house. The defendant, a frontseat passenger, got out of the car and walked up to the house. As defendant was walking around the house, the Javelin pulled into the driveway whereupon a red Cadillac turned off of Joy Road and pulled up next to it. A conversation took place between the persons in these cars in which defendant participated. Then, all left.

Through their binoculars the officers observed that the Javelin's rear license plate light was out. Since they had been instructed to pull over cars coming to the house if at all possible in order to get the names of the occupants, they stopped the Javelin for the traffic offense. As the police motioned the car to pull over, they observed the driver bend over, apparently attempting to put something under the seat. Both officers approached the car, but Officer Prokes heard a broadcast over the police radio and went back to listen. Meanwhile Officer Whitty asked the driver to step out of the car. Under the driver's seat Officer Whitty discovered a loaded pistol. At that point Officer Prokes heard over the radio that a red Cadillac was allegedly one of the cars carrying marijuana and that the subjects could be armed. Officer Prokes returned to the Javelin and ordered the defendant and the rear-seat passenger out of the car. Officer Whitty asked defendant if he had a weapon too; the defendant said he did not. Officer Prokes said: "Do you mind if I look?" Defendant replied: "No". Officer Whitty

patted the defendant down. The officer then pulled out a total of five plastic bags of marijuana from two pockets of the defendant's trench coat. Defendant was then given his *Miranda* warnings[2] and taken to the station.

Defendant made a timely motion to suppress the evidence and a hearing was held thereon. The court denied the motion and found defendant guilty as charged.

The crucial assignment of error on this appeal is whether the court ought to have excluded the marijuana as the fruits of an illegal search and seizure.

The people contend, and we agree, that the evidence was properly seized as incident to a lawful arrest.

A police officer in Michigan may arrest a person when he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it. MCLA § 764.15 (Stat Ann 1954 Rev § 28.874). When the constitutional validity of an arrest is challenged, the court must determine whether the facts available to the officers at the moment of the arrest would warrant a man of reasonable caution in believing that an offense had been committed. *Beck* v. *Ohio* (1964), 379 US 89 (85 S Ct 223, 13 L Ed 2d 142). This determination is of prime importance since the validity of a warrantless search and seizure incident to an arrest stands or falls with the validity of the arrest. *People* v. *Wolfe* (1967), 5 Mich App 543.

In the case at bar, we believe that the following facts, known to the officers at the time of defendant's arrest, support a finding of probable cause: (1) information from an informer that there would be further drug traffic at the house that same night; (2)

[2] *Miranda* v. *Arizona* (1966), 384 US 436 (86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974).—REPORTER.

defendant's furtive action at the house; (3) defendant's conversation with the occupants of the red Cadillac who were reported over the police radio as suppliers of narcotics; (4) the arrest of the driver of the car in which defendant was riding for possession of a concealed weapon. A lawful search of an automobile based upon probable cause is not rendered illegal by an attending arrest for a traffic violation. *People* v. *Zeigler* (1960), 358 Mich 355.

Having found that probable cause for arrest existed, the officers were privileged to search the arrestee's person and seize any evidence to prevent its concealment or destruction. *Chimel* v. *California* (1969), 395 US 752 (89 S Ct 2034, 23 L Ed 2d 685); *People* v. *Nelson* (1970), 29 Mich App 251.

Defendant also contends that the prosecution was required to disclose the identity of its informant in order to afford an opportunity to test his reliability. Suffice it to say that the practice of withholding the name of an informer in order to protect him and to insure his continued cooperation in the future is completely proper where, as here, the informant is not also a material witness on the issue of guilt. *United States* v. *Acosta* (CA5, 1969), 411 F2d 627; *Scher* v. *United States* (1938), 305 US 251 (59 S Ct 174, 83 L Ed 151).

Defendant's final contention, that the people failed to prove that the marijuana produced at trial was the same as that taken from the defendant, is without merit. The prosecution proved an unbroken chain of possession which accounted for the whereabouts of the marijuana from the time it was seized until trial. This was all that was necessary. See generally 21 ALR2d 1216.

Affirmed.

All concurred.

HAWKEYE SECURITY INSURANCE COMPANY
v.
SHIELDS

1. INSURANCE—HOMEOWNER'S POLICY—BODILY INJURY—INTENTIONALLY-CAUSED INJURY.

Clause in homeowner's insurance policy excluding insurer from liability for bodily injury caused intentionally by or at the insured's direction did not apply where the insured, a high school student, was in a street fight with a student from another high school, the student from the other school was struck by a classmate of the insured in the testicles, necessitating the removal of one testicle, the stipulated facts show that the insured did not strike the injured party in the groin area and that the insured did not direct his classmate to kick the injured party in the groin area.

2. INSURANCE—CRIMINAL ACTS OF INSURED—PUBLIC POLICY.

Public policy prohibits a person from collecting additional insurance benefits for his accidental death where the insured puts the accidental acts leading to his death in motion by a criminal act fraught with danger to his life by violent means.

3. INSURANCE—INTENTIONALLY-CAUSED INJURY—THIRD PARTY'S ACT —IMPUTED INTENT.

Third person's intent to injure another when he kicked the injured person in the groin was not to be imputed to the insured, also engaged in the street fight with the injured party, where the stipulated fact stated that the insured did not do the kicking that caused the injury or direct it to be done.

REFERENCES FOR POINTS IN HEADNOTES

[1–5] 44 Am Jur 2d, Insurance §§ 1411–1413, 1430, 1445 *et seq.*
Liability insurance: Specific exclusion of liability for injury intentionally caused by insured. 2 ALR3d 1238.

4. INSURANCE—BODILY INJURY—INTENTIONALLY-CAUSED INJURY—INTENTIONAL ACT.

A distinction exists between an intentional act and an intentionally-caused injury when determining the applicability of an insurance policy clause excluding coverage for bodily injury intentionally caused.

5. INSURANCE—BODILY INJURY—INTENTIONALLY-CAUSED INJURY—THIRD PARTY'S ACT.

Insurer was liable under homeowner's policy obligating it to pay all sums which the insured became legally obligated to pay except bodily injury "caused intentionally by or at the direction of the insured", a high school student, where the insured was in a street fight, a student from another high school was injured in the testicles when kicked by a classmate of the insured, the insured did not do the kicking that caused the injury complained of and did not direct his classmate to kick the injured person, because the insurance policy concerns intentionally-caused injuries, not intentional acts.

Appeal from Kalamazoo, Wade Van Valkenburg, J. Submitted Division 3 October 9, 1970, at Grand Rapids. (Docket No. 9166.) Decided March 25, 1971.

Complaint for declaratory judgment by Hawkeye Security Insurance Company against Mary Jo Shields, Michael Shields, and William E. Burrell, himself and as next friend of James R. Burrell, to determine the plaintiff's obligation under an insurance policy to defend its insureds, Mary Jo and Michael Shields. Judgment for defendants. Plaintiff appeals. Affirmed.

Phelps, Linsey, Strain & Worsfold (by *Dale M. Strain*), for plaintiff.

Huff, Deming & Hughey (by *Quinn E. Benson*), for defendants Shields.

Troff, Lilly, Piatt, File & Doyle (by *Roger File*), for defendants Burrell.

Before: HOLBROOK, P. J., and R. B. BURNS and J. J. KELLEY, JR.,* JJ.

HOLBROOK, P. J. This action for declaratory judgment was filed by plaintiff, Hawkeye Security Insurance, against its insureds, Mary Jo Shields and Michael Shields; and against William E. Burrell, individually and as next friend of James R. Burrell, a minor, plaintiff in a damage action against Michael Shields and others.

The case was submitted to the trial court upon a stipulation of agreed facts and briefs on the law. The determination of this matter on appeal requires a careful consideration of the facts and, therefore, it is deemed proper to repeat the stipulated facts:

"On or about January 15, 1966, Wayne Marks, Burley Kiracofe, and Michael Shields were in a vehicle operated by Wayne Marks which was proceeding from a Hackett High School basketball game to Schwartz's Drive-in which is located on Westnedge Avenue. That the vehicle was proceeding in an easterly direction on Kilgore Road.

"The three boys were students at Portage High School and Hacket High School had won the basketball game. The boys were upset over the loss of said game.

"As the vehicle was proceeding down said Kilgore Road, it came abreast of three other boys who were walking on the northerly side of said road. They were students at Hackett High School, and apparently an exchange of words took place at which point someone in the vehicle yelled 'stop', and the vehicle was brought to a stop. That Wayne Marks, Burley Kiracofe, and Michael Shields got out of said car and either walked or ran across said Kilgore Road towards the boys on the opposite shoulder at which

* Circuit judge, sitting on the Court of Appeals by assignment.

time one of the three boys on the north shoulder ran, leaving two boys present, one of said boys being James R. Burrell. That it was the apparent intent and desire of the three boys who had left the automobile to in fact stir up trouble and to get in a fight with the Burrell boy and his companions.

"During the course of the confrontation, Michael Shields did strike James R. Burrell in the shoulder and/or chest area; however, he did not kick or strike James R. Burrell in the region of the testicles. The three boys who had previously been in the car were the aggressors in the action, and they continued the assault until they were interrupted by a priest or some other person who came on the scene. When all three boys left the motor vehicle to confront James R. Burrell and his companions, it was their intent to get into a fight and they either intended or must be assumed to have intended that physical pain and/or injuries would be inflicted upon James R. Burrell and his companions. It is further agreed that neither James R. Burrell nor any of his companions were the aggressors and there is no claim of self-defense as regards Michael Shields for the purpose of this litigation.

"It is further agreed that for the purpose of this litigation, that during the course of the confrontation, Wayne Marks kicked James R. Burrell in the testicle, and that although Wayne Marks denies that he intentionally kicked him in that area, he thereafter stated, 'I got him good—right in the balls', and for the purpose of this litigation, it is admitted that it is Wayne Marks who actually inflicted the injury to the testicle.

"It is further agreed that Michael Shields did not direct Mr. Wayne Marks to kick James R. Burrell in the testicle or groin area, and did not actually see the contact causing the injury. As a result of the injury to the testicle, James R. Burrell required medical treatment for his injuries which included

the removal of one testicle which was irreparably damaged by the kick.

"All three boys, *i.e.,* Wayne Marks, Michael Shields, and Burley Kiracofe pleaded guilty to a charge of assault and battery arising out of the attack.

"Subsequent to the above, all of the above-named parties were joined in an eight-count complaint, a copy of which is on file.

"The Hawkeye Security Insurance Company which had issued a homeowner's insurance policy now denies coverage and/or liability for the liability of Mary Jo Shields and Michael Shields claiming that clause (c) of its special exclusions excludes liability for the injury to the testicle under the following language of the special exclusions:

" '(c) Under coverage E and F *to bodily injury or property damage caused intentionally by or at the direction of the insured.*'

"The defendants Burrell and Shields both take the position that the exclusion does not apply because the injury to the testicle was not intentionally inflicted by or at the direction of Michael Shields and as to Mary Jo Shields, that the exclusion is not applicable as to the vicarious liability of a parent created by statute." (Emphasis supplied.)

The trial court determined that the insureds (Shields) were covered by plaintiff's insurance policy as to the incident here involved. Plaintiff has taken this appeal by leave granted.

The homeowner's policy issued by plaintiff to Mary Jo Shields provided coverage in part as follows:

"1. Coverage E—Personal Liability:
(a) Liability: To pay on behalf of the insured *all sums* which the insured shall *become legally obligated to pay as damages because of bodily injury* or property damage, * * * .
* * *

"5. Supplementary Definitions:
(a) *'bodily injury'* means bodily injury, sickness or disease, including death resulting therefrom, sustained by any person; * * *." (Emphasis supplied.)

Plaintiff claims that the trial court committed error by improperly interpreting the exclusionary clause in the policy which is stated as follows:

"(c) under Coverages E and F, *to bodily injury* or property damage *caused intentionally by or at the direction of the insured;* * * *." (Emphasis supplied.)

It is universal law that the language inserted in an insurance policy by an insurance company is binding upon the insurer, and if ambiguous it must be construed strictly against the insurance company and in favor of the insured. *Hilburn* v. *Citizens' Mutual Automobile Insurance Company* (1954), 339 Mich 494; *Farm Bureau Insurance Company of Michigan* v. *Pedlow* (1966), 3 Mich App 478; *Michigan Mutual Liability Company* v. *Karsten* (1968), 13 Mich App 46; *Squires* v. *Hayes* (1968), 13 Mich App 449.

It is stated in the stipulated facts that it was Wayne Marks who kicked James R. Burrell in the groin which "caused" the "injury" to the testicle for which James Burrell seeks damages. It is also stated:

"It is further agreed that Michael Shields *did not direct* Mr. Wayne Marks to kick James R. Burrell in the testicle or groin area, and did not actually see the contact causing the injury." (Emphasis supplied.)

Upon the stipulated facts agreeing that *Mr. Shields* did not "cause" or inflict the "injury" or direct Mr. Marks to kick Mr. Burrell in the groin

which "caused" the "injury" for which Mr. Burrell seeks damages we must conclude that the exclusionary clause (the only exception to the coverage contained in paragraph E of the policy), does not relieve plaintiff of liability under the homeowner's policy of insurance issued to Mary Jo Shields. Because this may appear a too simple determination of the issue raised on this appeal taking into consideration the thorough briefs filed by the plaintiff with numerous cases cited and because there is no precedent directly in point controlling this case in our jurisdiction we discuss plaintiff's claims and some of the cases it asserts as being applicable.

Plaintiff asserts that it would be against the public policy of this state to insure against criminal acts committed by the insured and that this rule is applicable to the instant case, and cites several cases in support of its position which we deal with in order.

(1) *Acme Finance Company* v. *National Life Company* (1948), 118 Colo 445 (195 P2d 728), was an action by a criminal to recover for his wrecked automobile under the collision clause of an automobile insurance policy. The plaintiff had just committed a bank robbery and a murder and the auto was being pursued at the time by the police. The Court said, "If Calentino could recover on this policy under the facts hereinbefore recited gangsters can insure the cars used by them in bank robberies and murders and collect in full when they are wrecked by pursuing officers. All such contracts are universally held unenforceable as against public policy." This case is analogous to a man insuring his building against fire damage, and then burning it down to collect the insurance. This case is not applicable to the instant case.

(2) *Rousseau* v. *Metropolitan Life Insurance Company* (1937), 299 Mass 91 (11 NE2d 921), was a case where the policy holder of two life insurance policies attempted to collect additional death benefits providing for such payments when death results "solely through external, violent, and accidental means". Plaintiff was one of three that stole an automobile after an evening of drinking together. The police tried unsuccessfully to stop them and then pursued them until the car left the road because of its high speed and plaintiff was killed. The Court ruled that it would be against public policy to pay the additional payments where death resulted from a felonious stealing of an automobile and while the crime was still being committed. This is similar to the case set forth in (1) above. It would be against public policy for a person to insure himself for added benefits if his death was caused by accidental means, and then to put those accidental acts in motion by a criminal act fraught with danger to his life by violent means. The type of policy and the facts are just not analogous to the instant case and it is pointed out that the payment for the death was not contested.

(3) *DeMello* v. *John Hancock Mutual Life Insurance Company* (1932), 281 Mass 190 (183 NE 255), was a matter where plaintiff was a fisherman and at the time of death a member of a crew on a boat which was smuggling liquor in violation of Federal law. The Coast Guard, in stopping the boat, fired machine gun shots at the hull of the boat to disable it and cause it "to be hauled to". The death of the insured was caused by these shots fired at the boat. Plaintiff sought payment of added benefits for accidental death under a policy of life insurance. The Court denied recovery saying that death occurred while the insured engaged in the criminal act of

smuggling liquor contrary to Federal law and it would be against public policy to permit recovery for accidental death caused by the insured in the commission of a crime. This case is smiliar to case (2) above and the death benefits were not contested. It is not applicable to this case involving a homeowner's policy with specific liability and subject only to the exclusions therein contained.

We have no quarrel with the rules of law followed in the three cases reviewed above as applied to the facts and insurance policies therein present. However, plaintiff has failed to cite any case in our jurisdiction or elsewhere that would extend the public policy of our state so as to prevent the insured in the instant case from invoking the plain terms of the homeowner's insurance policy issued by plaintiff to Mary Jo Shields. In the absence of such precedent we decline to so extend the public policy of our state.

Plaintiff further asserts that the insured's son, defendant Mr. Shields, an admitted party to the assault, may be legally liable for all injuries sustained by the injured Mr. Burrell under the theory of law that in a concert of action case the acts of one are the acts of all[1] and, therefore, in this case the acts of Mr. Marks are imputed to Mr. Shields.[2] Because of this imputation by law which requires defendant Shields to answer for the acts of Marks, plaintiff would have us impute to Shields the intent to injure accompanying the act of Mr. Marks in kicking Mr. Burrell in the groin, when it is agreed that Shields did not do the act that caused the injury or direct it to be done.

---

[1] *King v. Herfurth* (1943), 306 Mich 444; *Fisher* v. *Rumler* (1927), 239 Mich 224.

[2] 6 CJS, Assault and Battery, § 27, pp 830–832.

Plaintiff cites several cases which we consider:

(1) *Wendell* v. *Union Mutual Fire Insurance Company* (1963), 123 Vt 294 (187 A2d 331), a case which held, "on the record before us it appears that the judgment rendered against the plaintiff in this action was founded upon an intentional act, an assault and battery. The policy issued by the defendant *did not cover* the plaintiff against the recovery of a judgment of this nature rendered against him". (Emphasis supplied.) The case is authority only for the ruling that under the policy terms it did not cover "any intentional act", and that an assault and battery was an intentional act. It is not authority for the claim of plaintiff as to imputation.

(2) *MacDonald* v. *United Pacific Insurance Company* (1957), 210 Or 395 (311 P2d 425), ruled that "[t]he policy clearly excludes from its coverage 'injury * * * caused intentionally by * * * the insured' ". This is not applicable in the instant case because it is agreed that Shields did not intentionally cause the injury to Burrell and it was not done at his direction.

(3) *Pendergraft* v. *Commercial Standard Fire & Marine Co.* (CA 10, 1965), 342 F2d 427, is a case with a similar homeowner's policy of insurance. The insured came up from behind Pendergraft, spun him around, and struck him on the cheek just below the eye, which knocked Pendergraft down into the street, causing him to fall upon the pavement striking the back of his head with sufficient force to fracture his skull and render him unconscious. The exclusionary clause provided that liability would not extend " * * * to bodily injury or property damage caused intentionally by or at the direction of the insured". The *injury* was one *intentionally caused by the insured* and, therefore, was clearly

within the terms of the exclusionary clause, and the Court so ruled.

(4) *Heider* v. *Commercial Insurance Company* (1968), 248 Or 564 (436 P2d 268), dealt with liability on a comprehensive liability policy. Heider's employee had assaulted one Gowin and a judgment had been obtained against Heider as employer. The case is not applicable because it involved vicarious liability. The question was not whether or not the injury caused by the employee was "intentionally caused by or at the direction of the insured" but whether or not it was "accidental" within the meaning of the policy's exclusionary clause.

These cases do not support the claim of plaintiff as to imputing to Mr. Shields the *intentional causing of the injury* to Mr. Burrell by Mr. Marks. We, likewise, decline to adopt plaintiff's theory of law in this case.

We now consider the cases of *Putman* v. *Zeluff* (1964), 372 Mich 553, and *Morrill* v. *Gallagher* (1963), 370 Mich 578. The original action in *Putman, supra,* was against Zeluff for killing a hunting dog, and this case resulted in judgment for Putman. The case the Court was concerned with was a garnishment proceeding against Farm Bureau Mutual Insurance Company. The Court stated the question presented as follows:

" * * * under the foregoing facts, was the company's liability avoided by reason of the exclusion of damage or destruction to property caused intentionally by the insured, *i.e.,* Roger—to whom coverage extended."

The Court had no trouble in limiting the exclusionary clause to apply to only those injuries which were actually intentionally caused by the insured. They

noted that Roger intended to fire the weapon and that he intended to stop the onrush of the animal by shooting in its direction. It remained, however, a question of fact as to whether or not Roger *intended* to destroy the dog. The trier of facts found that he did not intend to destroy the dog but intended only to protect himself and to wound the onrushing animal. Therefore, the insurance company was liable in damages for the destruction of the animal and judgment against the garnishee defendant was affirmed.

In *Morrill, supra,* a case relied on in *Putman,* the Court also had no trouble in separating intent to cause injury from the act. The defendant in *Morrill* had thrown a "cherry bomb" into the area where plaintiff was working. Defendant intended only to scare him, but the explosion caused plaintiff serious impairment of his hearing and a nervous disorder. The Court, in holding the insurance company liable, stated at 370 Mich 588:

"Some emphasis is placed on exclusion (c) on the ground that in the instant case the firecracker was thrown intentionally. Unquestionably such was the case, but it will be noted that under the language of the excluding clause the *injury* must be caused 'intentionally'. There is nothing in this case to justify a conclusion that either Gallagher or Canfield *intended to cause any physical harm to plaintiff*. The language of the policy is binding on appellant, and if ambiguous it must be construed against appellant's claims in the instant controversy. It may not be interpreted as barring liability under the policy." (Emphasis supplied.)

The trial judge, in his opinion, relied on the Illinois case of *Smith* v. *Moran* (1965), 61 Ill App 2d 157 (209 NE2d 18). The court, in referring to that case, stated in its opinion as follows:

"Here a waitress was hit by a bullet which was not intended for her but for another person who was working in the same establishment. The court follows through on a well-reasoned opinion to the effect that the culprit in this case had no intention of injuring the plaintiff and therefore it was a result which was not expected. The court held that this was an unintentional result of an intended act and therefore the insurance company was liable under the homeowner's policy. Perhaps it should also be noted that the wording is almost identical with the one under consideration. The rule is summarized in the headnote [209 NE2d 18] and reads as follows:

" 'Injury caused to shooting victim who was hit by bullet when insured was shooting at victim's fellow employee was not "intentionally caused" by insured within the homeowner's policy excluding from coverage injury caused intentionally by or at direction of insured, but the injury was unintentional result of an intended act.' "

The key distinction here is that between intentional *acts* and intentional *injuries*. The appellant in *Smith, supra,* overlooked this distinction and directed the Court's attention to cases holding that the exclusionary clause would apply in such a case. The court, however, noted that the exclusionary clause in those cases cited stated that the insurance company would not be liable for damages caused by intentional *acts* of the insured. The case before the *Smith* Court, and the one before this Court relates to injuries caused intentionally by or at the direction of the insured. Also see, *Connecticut Indemnity Company* v. *Nestor* (1966), 4 Mich App 578.

There is indeed a distinction between an intentional act and an intentionally-caused injury. We agree with the trial judge in his determination that

the *injury* to James Burrell was not *caused* intentionally by Michael Shields, or at his direction.

Affirmed. Costs to defendants.

All concurred.

HOOKS *v.* CITY OF DETROIT

1. NEGLIGENCE—MUNICIPAL CORPORATION—ABANDONED POLICE STATION—SUMMARY JUDGMENT.

   A complaint alleging that the minor plaintiff who, while sitting on the sidewalk with his feet hanging over an air vent well, six feet long, four feet wide, and six feet deep, guarded by a rail and adjacent to an abandoned police station, was struck by a passer-by causing him to fall into the vent created several questions of fact and granting summary judgment for defendant was error (MCLA § 691.1401 *et seq.*).

2. MUNICIPAL CORPORATIONS — NEGLIGENCE — PUBLIC STREETS — "TRAVELER" — QUESTION OF FACT.

   Whether a boy playing on the street and sidewalk is a "traveler" within the statute imposing liability on cities for injuries caused by negligent maintenance of public streets is a question of fact (MCLA § 691.1401 *et seq.*).

3. NEGLIGENCE—NUISANCE—NUISANCE IN FACT—ABANDONED BUILDING—AIR VENT—QUESTION OF FACT.

   Whether a light and air vent six feet long, four feet wide, and six feet deep, guarded by a railing along the perimeter, adjacent to an abandoned police station constituted a nuisance in fact is a question of fact (MCLA § 691.1401 *et seq.*).

REFERENCES FOR POINTS IN HEADNOTES

[1] 39 Am Jur 2d, Highways, Streets, and Bridges §§ 340, 342, 347, 348, 371, 374.
40 Am Jur 2d, Highways, Streets, and Bridges § 585.
[2] 39 Am Jur 2d, Highways, Streets, and Bridges § 348.
[3, 4] 39 Am Jur 2d, Highways, Streets, and Bridges §§ 285, 404.
[5] 39 Am Jur 2d, Highways, Streets, and Bridges §§ 374, 375.

4. NEGLIGENCE—ATTRACTIVE NUISANCE—ABANDONED POLICE STATION.
Whether the defendant city knew or should have known that the area around an abandoned police station was an attractive nuisance likely to draw neighborhood children is a question of fact (MCLA § 691.1401 *et seq.*).

5. NEGLIGENCE — MUNICIPAL CORPORATIONS — PUBLIC STREETS — ABANDONED POLICE STATION — PROXIMATE CAUSE.
Whether defendant city's allowing an abandoned police station with a light and air vent, six feet long, four feet wide, and six feet deep, guarded by a railing, to exist was the proximate cause of the injuries the minor plaintiff sustained when knocked into the vent by a passer-by is a question of fact; the fact that a force other than the city's inaction brought about the harm does not relieve the city from liability as a matter of law.

Appeal from Wayne, Charles Kaufman, J. Submitted Division 1 February 4, 1971, at Detroit. (Docket No. 9172.) Decided March 25, 1971.

Complaint by Frank Hooks and by A. Donald Kadushin, as next friend of Harold B. Hooks, against the City of Detroit for negligence. Summary judgment for defendant. Plaintiffs appeal. Reversed and remanded.

Rothe, Marston, Mazey, Sachs, O'Connell, Nunn & Freid, P. C., for plaintiffs.

Michael M. Glusac, Corporation Counsel, and *Alfred Sawaya* and *David S. DeWitt,* Assistants Corporation Counsel, for defendant.

Before: BRONSON, P. J., and R. B. BURNS and LEVIN, JJ.

BRONSON, P. J. Plaintiffs, Harold Hooks, an eight-year-old boy, by his next friend, Donald Kadushin, and Frank Hooks, father of the minor

plaintiff, brought this suit to recover damages for injuries sustained by the boy when he fell into a basement light and air vent of an abandoned police station. At the close of plaintiffs' opening statement to the jury, defendant, City of Detroit, moved for dismissal, and a judgment of no cause of action was entered. Plaintiffs appeal as of right.

The record shows that the trial court dismissed plaintiffs' compaint for failure to state a cause of action upon which relief could be granted. It is clear that what was intended was a summary judgment. GCR 1963, 117.2(1). The determinative issue on appeal is whether defendant was entitled to the judgment as a matter of law even if the facts alleged by plaintiffs are true. See *Durant* v. *Stahlin* (1965), 375 Mich 628.

Plaintiffs' complaint alleged that the presence of a light and air vent six feet long, four feet wide, and six feet deep, guarded by a railing along the perimeter, adjacent to an abandoned building, constituted a nuisance, an attractive nuisance to children, and a violation of the city's statutory duty to maintain safe streets and sidewalks.

Plaintiffs' opening statement alleged that plaintiff Harold Hooks was playing on the sidewalk in the area of the police station. While plaintiff was sitting on the sidewalk with his feet dangling over the edge of the vent well, another boy, pushing a grocery cart, struck him in the back, causing him to fall into the vent.

The statute drawn into question is MCLA § 242.1 (Stat Ann 1958 Rev § 9.591), which provides:[1]

"Any person or persons sustaining bodily injury upon any of the public highways or streets in this

[1] The statute cited was in effect at the time of the injury, but has since been repealed. Similar provisions are now included in MCLA § 691.1401 *et seq.* (Stat Ann 1969 Rev § 3.996[101] *et seq.*).

state, by reason of neglect to keep such public highways or streets, and all bridges, sidewalks, crosswalks and culverts on the same in reasonable repair, and in condition reasonably safe and fit for travel by the * * * city or corporation whose corporate authority extends over such public highway, street, bridge, sidewalk, crosswalk or culvert, and whose duty it is to keep the same in reasonable repair, such * * * city or corporation shall be liable to and shall pay to the person or persons so injured or disabled, and to any person suffering damages by reason of such injury, just damages, to be recovered in an action of trespass on the case before any court of competent jurisdiction."

It is clear from a reading of the statute that the city's liability is predicated on either a finding of fact that the sidewalk was not in reasonable repair or not in a condition reasonably safe and fit for travel. See *Carver* v. *Detroit & Saline Plank Road Co.* (1886), 61 Mich 584; *Sebert* v. *City of Alpena* (1889), 78 Mich 165; *Bravo* v. *Chernick* (1970), 28 Mich App 210. Such a determination was for the jury.

The question of whether a boy playing on the street and sidewalk is a "traveler" and within the ambit of the statute is a question of fact. *Beaudin* v. *Bay City* (1904), 136 Mich 333; *Elbert* v. *City of Saginaw* (1961), 363 Mich 463. It was for the jury to decide whether the light and air vent constituted a nuisance in fact, *Bluemer* v. *Saginaw Central Oil & Gas Service, Inc.* (1959), 356 Mich 399; *Brown* v. *Nichols* (1953), 337 Mich 684, and whether the city knew or should have known that the area was an attractive nuisance likely to draw neighborhood children. *Lyshak* v. *City of Detroit* (1958), 351 Mich 230; *Jaworski* v. *Detroit Edison Co.* (1920), 210 Mich 317. The issue of whether the alleged dangerous condition was the proximate cause of the

injuries is the subject of jury determination, and the fact that another force may have brought about the harm would not, as a matter of law, relieve defendant of liability. *Raatikka* v. *Olin Mathieson Chemical Corporation* (1967), 8 Mich App 638.

The issues of fact, if resolved in plaintiffs' favor, could support a judgment against defendant. While the evidence may not establish defendant's liability for the complained of injuries, it was error to grant defendant's motion before plaintiffs had an opportunity to prove their case.

Reversed and remanded. Costs to plaintiffs.

All concurred.

PEOPLE *v.* PECK

1. SEARCHES AND SEIZURES — AUTOMOBILES — TRAFFIC VIOLATION — PROBABLE CAUSE.

   Search of an automobile and seizure of a brown substance suspected to be marijuana was unreasonable where police officers stopped a vehicle for speeding, the police noted that the passengers were moving around in the vehicle and appeared to be putting something in the glove compartment console, the driver, after alighting from the vehicle, produced a valid driver's license and one of the passengers produced the vehicle registration, one of the police officers entered the vehicle and sat in the driver's seat, one of the passengers opened the console for the officer's inspection, the officer found a plastic bag containing a brown substance which he was told was incense and which neither he nor his fellow officer could identify, the officer found two more plastic bags containing the brown substance in a partially open suitcase in the back seat and then arrested the occupants of the car.

2. CRIMINAL LAW — AUTOMOBILES — OCCUPANTS' MOVEMENT — PROBABLE CAUSE.

   Movement of the occupants of an automobile may be some evidence of wrongdoing but does not necessarily point to the commission of a felony.

3. SEARCHES AND SEIZURES—EXPLANATORY SEARCHES.

   General or exploratory searches are not permitted; a searcher must have in mind some reasonably specific thing he is looking for and reasonable grounds to believe it is in the place being searched.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 4, 5] 47 Am Jur, Searches and Seizures §§ 18, 19.
[3] 47 Am Jur, Searches and Seizures § 21 *et seq.*

4. SEARCHES AND SEIZURES — AUTOMOBILES — TRAFFIC VIOLATION — GENERAL SEARCH.

Police do not have the right to make a general search of an automobile incident to an arrest for a traffic offense, because there are no fruits of a traffic offense to be found in the console or back seat of an automobile.

5. SEARCHES AND SEIZURES—AUTOMOBILE—TRAFFIC VIOLATION.

Entering or searching an automobile incident to an arrest for a minor traffic violation absent a reasonable belief that a felony had been or is being committed is unconstitutional.

Appeal from Berrien, Karl F. Zick, J. Submitted Division 3 March 3, 1971, at Grand Rapids. (Docket No. 9177.) Decided March 25, 1971.

Thomas O. Peck was charged with unlawful possession of marijuana. Defendant's motion to suppress the evidence denied. Defendant appeals by leave granted. Motion to suppress granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Ronald J. Taylor,* Prosecuting Attorney, and *John A. Smietanka,* Assistant Prosecuting Attorney, for the people.

Craig, Fieger & Golden, for defendant.

Before: FITZGERALD, P. J., and HOLBROOK and BRONSON, JJ.

HOLBROOK, J. The defendant, Thomas Peck, was charged with unlawful possession of a narcotic drug (marijuana). MCLA § 335.153 (Stat Ann 1957 Rev § 18.1123).

On February 13, 1969, defendant was driving a motor vehicle owned by a Mrs. Litwin, whose son, Robert, was a rear seat passenger. State police stopped the vehicle for excessive speed.

One of the troopers testified that as they pulled behind the car to stop it, the subjects were moving around and appeared to be putting something into the between-seat console or glove compartment.

Upon request, defendant produced his operator's license and then walked to the parked patrol car. Officer Beck entered the vehicle and occupied the vacated driver's seat. Robert Litwin was requested to produce the vehicle registration and proof of ownership. This was satisfactorily established. Trooper Beck then asked, "What were you putting in the console when we stopped you?" Litwin answered, "Nothing", and opened the console. Officer Beck then reached into the console and took out a clear plastic bag containing a brown substance which he was told was incense. He and his fellow officer looked at it and both said they had not seen anything like it before.

The officer then observed a second plastic bag containing the brown substance in defendant's partly-open suitcase in the back of the car. Another brown paper bag containing the substance was found in the suitcase. Officer Beck then believed that the substance was marijuana and defendant Peck and the other occupants were arrested and charged with illegal possession.

Defendant filed a timely motion to suppress the claimed marijuana as illegally seized, contending that the seizure was in violation of his constitutional rights against unreasonable search and seizure. Leave has been granted to review the trial court's denial of defendant's motion.

The issue on appeal is whether the evidence seized by the officer after a search of the automobile operated by the defendant and stopped for speeding was the result of a lawful search.

Shuffling in an automobile may be some evidence of conscious wrongdoing, but it does not necessarily point to the commission of a felony. When the Litwin vehicle was stopped for speeding, the officers had no foreknowledge or grounds for reasonable belief that a felony had been or was being committed because they did not know and could not have known that the automobile contained marijuana.

The searcher must have in mind some reasonably specific thing he is looking for and reasonable grounds to believe it is in the place being searched. General exploratory searches are not permitted. *Carroll* v. *United States* (1925), 267 US 132 (45 S Ct 280, 69 L Ed 543); *United States* v. *Tate* (D Del, 1962), 209 F Supp 762, 765. There is no showing in the instant case that the officers had any reason to believe that there was contraband in the automobile.

Police do not have the right to make a general search of an automobile as an incident to an arrest for a traffic offense. There are no fruits of a traffic offense to be found in the console or on the back seat of an automobile. *People* v. *Gonzales* (1959), 356 Mich 247; *People* v. *Marshall* (1970), 25 Mich App 376, 380.

Officer Beck had no right to enter the automobile or to search the automobile. To do so, according to applicable case precedent and decision, constituted a clear violation of defendant's constitutional right to be free from unreasonable searches and seizures. *People* v. *Gonzales, supra; People* v. *Marshall, supra.*

The evidence in this case was illegally obtained and is, therefore, inadmissible. Defendant's motion to suppress is hereby granted.

Reversed and remanded.

All concurred.

HATFIELD *v.* SAFECO INSURANCE COMPANY

1. ARBITRATION AND AWARD—JUDICIAL REVIEW.

A court, in reviewing an arbitration award, may not substitute its own judgment for that of the arbitrator's.

2. ARBITRATION AND AWARD—VACATION OF AWARD—INADEQUATE AWARD.

Vacation of arbitration award because the trial court believed it inadequate was error where the record did not show any defect in the arbitration proceedings (GCR 1963, 769.9[1][c]).

Appeal from Oakland, William John Beer, J. Submitted Division 1 March 10, 1971, at Detroit. (Docket No. 9246.) Decided March 25, 1971.

Complaint by W. F. Hatfield and Katheryn Hatfield against Safeco Insurance Company to recover on an insurance policy. Plaintiffs' motion to vacate arbitration award granted. Defendant appeals. Reversed and remanded.

Hatfield, Raguso & Peterson (by *Thomas Raguso*), for plaintiffs.

Lizza & Mulcahy (by *John B. Lizza*), for defendant.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Arbitration and Award §§ 159–161.
[2] 5 Am Jur 2d, Arbitration and Award §§ 167–189.

Before: DANHOF, P. J., and MCGREGOR and LEVIN, JJ.

DANHOF, J. Defendant is appealing an order setting aside an arbitration award. The defendant is an insurance carrier and the plaintiffs are the insured. The plaintiffs were injured by an uninsured motorist and sought to recover from the defendant. A dispute arose over the amount of the defendant's liability and the plaintiffs requested arbitration in conformity with the arbitration clause in the contract of insurance. The arbitrator made an award in the amount of $875 and the plaintiffs sought to have the order set aside. The trial court held that the arbitrator had exceeded his powers and set the award aside under GCR 1963, 769-.9(1)(c). The parties appear to be in agreement that the court rule is controlling.

A hearing was held by the judge on the plaintiffs' motion and testimony was taken regarding the plaintiffs' medical expenses and loss of income. After hearing the testimony the trial judge indicated that he believed that the arbitrator's award was inadequate. All of the testimony was directed to the adequacy of the award.

The trial court based its decision on its finding that the arbitrator had not awarded adequate compensation for lost income.

In reviewing an arbitration award a court may not substitute its own judgment for that of the arbitrator's. In *The Port H. & N. R. Co.* v. *Callanan* (1887), 61 Mich 22, 26, Justice CAMPBELL said:

"There is power in a court of equity to relieve against awards in some cases where there has been fraud and misconduct in the arbitrators, or they

have acted under manifest mistake, and perhaps in some defined and undefined cases. But it is evident that there are great objections to any general interference by courts with awards. They are made by a tribunal of the parties' own selection, who are, usually at least, expected to act on their own view of law and testimony more freely and less technically than courts and regular juries. They are also generally expected to frame their decisions on broad views of justice, which may sometimes deviate from the strict rules of law. It is not expected that after resorting to such private tribunals either party may repudiate their action and fall back on the courts. And equity, on whatever pretext it may intervene in such cases, does so upon the reason that the tribunal has not really acted within the lines of the duty laid upon it, and has not in fact carried out the agreement under which it has obtained authority to proceed."

In *Phelps* v. *Wayne Circuit Judge* (1898), 117 Mich 35, 36, the Court said:

"The vacation of the award involved an examination into the testimony upon which the arbitrators based it. Courts do not possess this power, under the statute. *Chicago,* * * * *R. Co.* v. *Hughes* [1873], 28 Mich 186. The circuit judge was in error in holding that it was in his power to vacate the award if, in his opinion, the ends of justice required it. The award is conclusive, and the court can only refuse to enter judgment confirming it for one of the reasons specified in the statute. Neither of these reasons existed. The circuit judge, and not the arbitrators, exceeded his powers. He should have confirmed the award."

In this case the court simply held a hearing on the merits and arrived at its own conclusions. The record before us does not show any defect in the

arbitration proceedings, and therefore, the order of the circuit court must be reversed.

Reversed and remanded, costs to the defendant.

All concurred.

KOMRAUS PLUMBING & HEATING, INC.

v.

CADILLAC SANDS MOTEL, INC.

1. PLEADING—FRAUD—FORMAL DEFECTS.

   The affirmative defense of fraud must be set forth separately and labeled in the pleadings along with sufficient facts to apprise the adverse party of the nature of the defense; however, the pleader's failure to set forth the defense separately and to label it as such was not fatal where the pleadings sufficiently describe the alleged fraud in the disputed transaction (GCR 1963, 111.7).

2. PRINCIPAL AND AGENT—IMPLIED AGENCY.

   An agency relationship need not be express, but may be implied from the circumstances.

3. PRINCIPAL AND AGENT—IMPLIED AGENCY.

   Plaintiff's requesting the impleaded third-party defendant to procure the defendant's acceptance of an offer and the impleaded defendant's carrying out the assignment was sufficient to create an agency relationship.

4. CONTRACTS—EVIDENCE—FRAUD—PAROL EVIDENCE RULE.

   The parol evidence rule does not bar evidence of fraud, lack of acceptance, or any defense which, if proven, would vitiate

---

REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur, Pleading § 159.
[2, 3] 3 Am Jur 2d, Agency § 18.
[4] 30 Am Jur 2d, Evidence §§ 1033, 1034.
[5, 6] 17 Am Jur 2d, Contracts § 151.

the contract, because such evidence does not vary or contradict the written contract, but seeks to demonstrate that the writing never became a contract.

5. CONTRACTS—FRAUD—VOIDABLE CONTRACT.

A voidable contract existed between a motel builder and a subcontractor where the contractor, acting as an agent for the subcontractor, submitted a contract offer for plumbing to the builder from the subcontractor, the contract offer had been signed by the contractor without the subcontractor's consent and the contractor told the builder that it had signed the offer only to secure a performance bond and that no contractual relations would exist between the builder and the subcontractor because a contract induced by fraud is voidable by the party defrauded.

6. CONTRACTS—FRAUD—EFFECT—VOIDABLE CONTRACT.

A contract induced by fraud is voidable by the party defrauded even if the fraud succeeds because of a party's negligence.

Appeal from Wexford, William R. Peterson, J. Submitted Division 3 February 3, 1971, at Grand Rapids. (Docket No. 9297.) Decided March 25, 1971. Leave to appeal granted May 25, 1971, 384 Mich 843.

Complaint by Komraus Plumbing & Heating, Inc., against Cadillac Sands Motel, Inc., for damages for breach of contract. Third-party complaint by Cadillac Sands Motel against Ken-Bar Construction Co., Inc., for damages. Judgment for Komraus Plumbing & Heating, Inc., against Cadillac Sands Motel, Inc., and for Cadillac Sands Motel, Inc., against Ken-Bar Construction Co. Cadillac Sands Motel appeals the judgment rendered against it in favor of Komraus Plumbing & Heating, Inc. Reversed.

Herrinton, Herrinton & Hughes, for plaintiff.

Butzel, Levin, Winston & Quint, for defendant Cadillac Sands Motel, Inc.

Before: FITZGERALD, P. J., and V. J. BRENNAN and T. M. BURNS, JJ.

V. J. BRENNAN, J. This appeal arises out of a suit to recover damages for breach of contract. From a judgment in favor of the plaintiff, Komraus Plumbing and Heating, Inc., defendant appeals.

In 1968, the defendant, Cadillac Sands Motel, Inc., decided to expand its facilities by constructing an addition to its motel. In furtherance of this resolve, the Sands engaged the third-party defendant, Ken-Bar Construction, to oversee the work. An employee of Ken-Bar, Howard Reynolds, suggested to plaintiff that his plumbing and heating company submit a bid on the plumbing work. Having been advised by its attorney to contract with the Sands directly rather than with Ken-Bar whose financial condition was questionable, plaintiff executed a written offer expressly directed to Vernon Vincent, the president of the Sands. Plaintiff gave this written offer to Ken-Bar and requested that it be presented to Mr. Vincent for his signature. For some unexplained reason, the president of Ken-Bar, Harold Brickner, signed the offer on behalf of his company in the space designated "accepted" before submitting it to Mr. Vincent.

At first Mr. Vincent refused to sign the contract, as he didn't want to enter into contractual relations with any of the subcontractors. Mr. Brickner then told Mr. Vincent that his signature was needed only so that defendant could obtain a performance bond and that it would not amount to a contract between the Sands and Komraus. Vincent then agreed to sign the offer, since the Small Business Administration loan, by which the addition to the motel was to be financed, was dependent upon all work being bonded. The trial court found as a fact that Brick-

ner made this false representation without plaintiff's knowledge or consent and that Vincent relied thereon in signing the offer. The document was then returned to Komraus with no mention of what had occurred.

Shortly thereafter a dispute arose concerning when the plaintiff was to begin work. Since it was felt that plaintiff had not commenced work on time, a different plumbing contractor was hired. Plaintiff then sued to recover lost profits of $10,000 on a theory of anticipatory repudiation. The defendant claimed that it was the plaintiff who committed the first breach, and that in any event, no contract existed due to the misrepresentation made to Mr. Vincent. Ken-Bar was impleaded as a third-party defendant.

The trial court rendered a judgment in favor of Komraus against the Sands and a judgment in favor of the Sands against the third-party defendant, Ken-Bar, both judgments being in the amount of $7,747.80. In a written opinion, the court found that the defendant, the Sands, never intended to be bound, its signature being induced by Ken-Bar's false representation, but that the parol evidence rule prohibited Vincent from denying that he intended to bind the Sands.

On appeal, defendant contends that the court erred in allowing recovery on the contract, since the contract was induced by fraud and, therefore, voidable. We agree.

Before discussing the issue of fraud, we must first dispose of plaintiff's arguments that the defendant is not entitled to raise this issue at the present time.

Preliminarily, plaintiff contends that fraud was never raised at the trial and may not now be raised for the first time. It is true that as an affirmative defense fraud must be set forth separately along

with sufficient facts to apprise the adverse party of the nature of the defense. GCR 1963, 111.7. Although the defendant committed a technical violation of Rule 111.7 by not setting forth its affirmative defense separately and labelling it as such, we do not feel that this merely formal defect is fatal in view of the fact that the pleadings sufficiently described the alleged fraud in the transaction. See 1 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 199.

Next, plaintiff contends that there is no evidence that Ken-Bar acted as the plaintiff's agent. In *Saums* v. *Parfet* (1935), 270 Mich 165, 172, the Court quoted with approval the description of an agent as set forth in 1 Mechem on Agency (2d ed), p 21:

" 'The characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractural obligations between his principal and third persons. To the proper performance of his functions, therefore, it is absolutely essential that there shall be third persons in contemplation between whom and the principal legal obligations are to be thus created, modified or otherwise affected by the acts of the agent.' "

An agency relationship need not be express, but may be implied from the circumstances. *Shinabarger* v. *Phillips* (1963), 370 Mich 135. When plaintiff requested Ken-Bar to procure Vincent's acceptance of the offer and Ken-Bar proceeded to carry out this mission, all the elements necessary to create an agency relationship existed, and the court could have so found.

We come now to a discussion of the issue of fraud. The problem in the court below was the

erroneous belief by the trial judge that parol evidence could not be introduced to vary or contradict the written contract. It has long been recognized that the parol evidence rule does not bar evidence of fraud, lack of acceptance, or any other defense which, if proven, would vitiate the contract. *Rood* v. *Midwest Matrix Mart, Inc.* (1957), 350 Mich 559; *Tuuk* v. *Andersen* (1969), 21 Mich App 1; *Jackson National Life Insurance Company* v. *Bakaian* (1969), 16 Mich App 26. The rationale is that such evidence does not vary or contradict the written contract; rather, it seeks to demonstrate that the writing never became a contract. The lower court was in error in discarding as irrelevant the testimony concerning the misrepresentations made to Vincent.

When Ken-Bar misrepresented to Vincent the purpose of the latter's signature, it was acting as plaintiff's agent and did so in his behalf even though the plaintiff was unaware of the wrongful conduct. See *Upell* v. *Bergman* (1929), 246 Mich 82. If this be true, we must view this transaction as if it occurred between plaintiff and defendant directly. When thus viewed, it becomes clear that a voidable contract was formed.

It is axiomatic that a contract induced by fraud is voidable by the party defrauded. *Rood* v. *Midwest Matrix Mart, Inc., supra.* This holds trus even if the fraud succeeds due to a party's negligence.[1] See *Rood, supra.* In the case at bar, the testimony indicates and the court found that Vincent's signature was induced by a material misrepresentation as to an existing fact. In *Schupp* v. *Davey Tree Expert Co.* (1926), 235 Mich 268, the Court, facing a similar situation said:

---

[1] *Contra,* see 2 Restatement Contracts, § 475, p 905.

"In case of fraud in procuring a signature to a writing, courts of equity and law have concurrent jurisdiction in many instances. In case of fraud in procuring a signature to a writing, defense against liability may be made at law or the power of the court of equity to cancel the writing may be invoked. *Austin* v. *Ash* [1935], 232 Mich 251.

"We have given due consideration to the business experience and supposed acumen of plaintiff and his confessed simplicity in sending out the paper over his signature to accomplish a purpose directly opposed to its terms, but feel that his guilelessness on this occasion should not cause us to overlook the guile employed by defendant's representative. The fraud worked because plaintiff was careless, but this did not render it any less a fraud."

We, therefore, hold that no binding contract was ever consummated between plaintiff and defendant.

For the foregoing reason the judgments of the lower court in favor of the plaintiff and the defendant are reversed.

Reversed.

All concurred.

PEOPLE *v.* BOYKIN

1. ARREST—UNLAWFUL ARREST—RIGHT TO RESIST.

   An arrest must be unlawful in fact before the right to resist arises.

2. ARREST—RIGHT TO ARREST—MISDEMEANORS—TRAFFIC OFFENSES.

   Police officers had the right to arrest the defendant for speeding and for failure to produce his driver's license upon their request, because both of these offenses were misdemeanors committed in the officers' presence (MCLA § 257.901).

3. ARREST — APPRISEMENT OF ARREST — ASSAULT AND BATTERY — RESISTING ARREST.

   Failure of police officers to inform the defendant, tried for assaulting the officers, that he was under arrest was not significant even though the defendant contended he was resisting an unlawful arrest where the trial court found that defendant began to resist the officers before they had a reasonable opportunity to inform him of his arrest (MCLA § 764.19).

4. CRIMINAL LAW—MISDEMEANORS—RES GESTAE WITNESS—INDORSEMENT ON COMPLAINT.

   Contention that the statute requiring indorsement of *res gestae* witnesses on all informations would also require indorsement of witnesses on a complaint in misdemeanor cases where no information is filed was not determined where the defendants failed to show that permitting an unindorsed *res gestae* witness, the arresting officer, to testify in defendants' misdemeanor trial over their objection prejudiced their rights in any significant way (MCLA § 767.40; GCR 1963, 529.1).

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 5 Am Jur 2d, Arrest §§ 112, 113.
[2] 5 Am Jur 2d, Arrest §§ 26, 30.
[4] 5 Am Jur 2d, Appeal and Error §§ 780, 797.

Appeal from Recorder's Court of Detroit, George E. Wickland, J. Submitted Division 1 March 2, 1971, at Detroit. (Docket No. 9319.) Decided March 25, 1971.

Alvin Boykin and Calvin Boykin were convicted of assault and battery. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Patricia J. Boyle,* Assistant Prosecuting Attorney, for the people.

Plunkett, Cooney, Rutt & Peacock (by *Joel S. Morse*), for defendants.

Before: V. J. BRENNAN, P. J., and QUINN and O'HARA,* JJ.

V. J. BRENNAN, P. J. The defendants were convicted in a nonjury trial of the offense of assault and battery. MCLA § 750.81 (Stat Ann 1962 Rev § 28.276). Calvin Boykin was fined $25 and his brother, Alvin, was fined $15.

On March 2, 1970, the complainant, Officer Alex Davis, and his partner, Officer Fred Bedient, observed Calvin Boykin proceeding in his automoble at an excessive rate of speed. They followed him until he finally pulled up in front of his home at 11399 Dalrymple and got out of the car.

The events giving rise to the present prosecution were testified to by Officer Davis as follows. He and his partner got out of their scout car and told

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

the defendant to "halt". Defendant continued walking. As the officers drew closer, they asked to see his driver's license. The defendant began to swear at them, ignoring several more requests to see his driver's license. The officers then attempted to arrest him, but he retaliated by initiating an affray in which he assaulted both arresting officers. Meanwhile, Alvin Boykin emerged from the house and attempted to come to his brother's aid by joining in the affray. Alvin struck Officer Davis with his fist and wrestled with Officer Bedient. The latter officer managed to get free long enough to radio for help. Reinforcements arrived shortly thereafter, and the defendants were arrested.

On appeal defendants allege three assignments of error, none of which requires reversal.

The Boykins' first assignment of error is that in making his findings of fact the trial judge totally ignored the testimony of a defense witness, Elizabeth Thompson, whom they claim is a disinterested witness. Mrs. Thompson, defendants' neighbor, testified that the police officers initiated the struggle by throwing Calvin to the ground and that Calvin was merely defending himself.

The standard by which findings of fact made by a judge sitting without a jury in a criminal case are reviewed is the "clearly erroneous" standard set forth in GCR 1963, 517.1, which provides in part:

"Findings of fact shall not be set aside unless clearly erroneous. In the application of this principle regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses who appeared before it."

After a careful review of the contradictory testimony in this case, we cannot say that the lower court

was clearly in error. *People* v. *Hawk* (1970), 22 Mich App 337.

Next, defendants urge that, as a matter of law, they were entitled to resist the unlawful arrest.[1]

Before the extent of one's right to resist an unlawful arrest can be considered, it must first be determined that the arrest was in fact unlawful. In the instant case the court found that the defendant Calvin Boykin was speeding[2] and that he failed to produce his driver's license upon request of a police officer.[3] Both of the above offenses constitute misdemeanors under MCLA § 257.901 (Stat Ann 1971 Cum Supp § 9.2601). It is thus clear that the officers had the right to arrest Calvin Boykin, as he had committed misdemeanors in their presence. MCLA § 764.15 (Stat Ann 1954 Rev § 28.874). Nor is it significant that the officers had not informed Calvin Boykin that he was under arrest, since it is implicit in the trial court's findings that the defendant began to resist the officers before they had a reasonable opportunity to do so. MCLA § 764.19 (Stat Ann 1954 Rev § 28.878).

Finally, defendants contend that it was reversible error to allow an unindorsed *res gestae* witness, Officer Fred Bedient, to testify over their objection. It is claimed that MCLA § 767.40 (Stat Ann 1971 Cum Supp § 28.980), which requires indorsement of witnesses on *"all informations,"* would require indorsement of witnesses on the *complaint* in the case of misdemeanors where no information is filed. We need not, however, determine the effect of MCLA § 767.40 in misdemeanor prosecutions, since the defendants have failed to demonstrate that the action

---

1 See 23 Mich L Rev 62 (1923); 5 Am Jur 2d, Arrest, § 94, p 778.
2 See MCLA § 257.627 *et seq.* (Stat Ann 1968 Rev § 9.2327 *et seq.*)
3 MCLA § 257.311 (Stat Ann 1968 Rev § 9.2011).

of the trial court prejudiced their rights in any significant way. If error occurred, it was harmless. GCR 1963, 529.1.

Affirmed.

All concurred.

GILLEN v. MARTINI

1. NEGLIGENCE—INVITEES—DUTY.

A landowner is not an insurer of his invitee's safety; however, the landowner is under an affirmative duty to exercise due care to make the premises reasonably safe for the invitee's use.

2. NEGLIGENCE—INVITEES—ICE AND SNOW—LIABILITY.

A landowner is not liable to his invitees for injuries caused by the landowner's failure to remove natural accumulations of ice and snow from a normal, outdoor, unobstructed sidewalk.

Appeal from Ingham, Donald L. Reisig, J. Submitted Division 2 March 4, 1971, at Lansing. (Docket No. 9320.) Decided March 25, 1971.

Complaint by Arlene Gillen against James C. Martini and Ann M. Martini for negligence. Judgment for plaintiff. Defendants appeal. Reversed.

Glassen, Parr, Rhead & McLean, for plaintiff.

Burwell & Shrank (by *Eric C. Humpsch*), for defendants.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 38 Am Jur, Negligence §§ 96–103.

Before: R. B. BURNS, P. J., and J. H. GILLIS and T. M. BURNS, JJ.

J. H. GILLIS, J. This is a slip and fall case. Plaintiff, Arlene Gillen, brought this action claiming that defendants, James and Ann Martini, were negligent in failing to remove a natural accumulation of ice and snow from the private walkway to their home, and that such negligence was a proximate cause of plaintiff's fall and ensuing injuries. At the nonjury trial, defendants cross-examined plaintiff's witnesses, but offered no proofs and rested their case on a motion for directed verdict. They appeal as of right from the judgment entered for plaintiff.

Plaintiff is an antique dealer. She went to defendants' home to purchase antiques in response to an advertisement in the local Lansing newspaper. A recent storm had left a three-inch accumulation of snow and ice in the general area and defendants' sidewalk and private walkway were not cleared. Plaintiff testified that she was proceeding slowly on the walkway because she knew it was slippery, when she fell and fractured her arm.

Plaintiff's status as a business invitee is not questioned, and there is ample evidence in the record to sustain the trial court's finding on this issue. See 2 Restatement of Torts 2d, § 332, comment e, p 179; 2 Harper & James, Law of Torts, § 27.12, p 1481. Defendants do not dispute the well-settled rule that while a landowner is not an insurer of the invitee's safety, he is under an affirmative duty to exercise due care to make the premises reasonably safe for the invitee's use. *Shorkey* v. *Great Atlantic & Pacific Tea Co.* (1932), 259 Mich 450, 452; *Ruemenapp* v. *National Food Stores, Inc.* (1970), 25 Mich App 291, 294; *Mills* v. *A. B. Dick Company* (1970), 26 Mich App 164, 167. Rather, defendants' argument

is that the general duty owed invitees does not include removal of natural accumulations of ice and snow.

In this regard, we note that an abutting property owner may not be held liable to pedestrians for injuries sustained by falling on sidewalks made hazardous by natural accumulations of ice and snow, and statutes and ordinances which impose a duty upon landowners to clean sidewalks create no private liability. *Taylor* v. *Lake Shore & M. S. R. Co.* (1881), 45 Mich 74; *Grooms* v. *Union Guardian Trust Co.* (1944), 309 Mich 437; *Levendoski* v. *Geisenhaver* (1965), 375 Mich 225. Cases which alter the rule of non-liability to pedestrians do so when artificial conditions cause aggravation of natural hazards. *Betts* v. *Carpenter* (1927), 239 Mich 260; *Weider* v. *Goldsmith* (1958), 353 Mich 339.

Once the status of invitee is established, plaintiffs have been able to establish the liability of the landowner where the injuries are sustained either in the vestibule of a building, *Keech* v. *Clements* (1942), 303 Mich 69, or on a sloping terrazzo walkway leading from the store to a public sidewalk, *DeSmit* v. *J. C. Penney Company* (1963), 369 Mich 527. However, we have found no Michigan case in which a landowner has been held liable for failure to clear a natural accumulation of ice and snow from a normal, outdoor, and unobstructed sidewalk. The record in this case clearly shows that the dangerous condition, if it existed, was caused solely by natural accumulations of ice and snow.

In *Perl* v. *Cohodas, Peterson, Paoli, Nast Co.* (1940), 295 Mich 325, 334, 335, the Court observed that:

"Most of the cases involving ice and snow concern actions against municipalities for such accumulations on sidewalks. However, *the standard of*

duty of the municipality to those who use its streets and sidewalks is the same as that of the owner or occupier of premises to an invitee.

"In such cases the criterion is whether the danger was caused by natural or unnatural and artificial conditions." (Emphasis supplied.)

In *Mayo* v. *Village of Baraga* (1913), 178 Mich 171, it was held that municipalities are not liable for failure to protect pedestrians from danger caused by the natural accumulation of ice and snow upon sidewalks. Applying that rule to the instant case, we find defendants' assignment of error well taken.

Reversed. Costs to appellants.

All concurred.

LAKE *v.* THE TRAVELERS INSURANCE COMPANY

1. INSURANCE—TERMS OF CONTRACT—CONSTRUCTION.

The words used in an insurance contract must be given their plain and ordinary meaning, each word must be given effect as far as practicable, and ambiguous phrases are to be resolved in favor of the insured if reasonably susceptible of such construction.

2. INSURANCE—"BASIC ANNUAL SALARY OR WAGE"—CONSTRUCTION.

The phrase "basic annual salary or wage" in a group life insurance contract does not include overtime pay.

REFERENCES FOR POINTS IN HEADNOTES

[1] 43 Am Jur 2d, Insurance §§ 257, 259, 271.
[2] 43 Am Jur 2d, Insurance § 257 *et seq.*

Appeal from Wayne, Theodore R. Bohn, J. Submitted Division 1 January 7, 1971, at Detroit. (Docket No. 9351.) Decided March 25, 1971. Reversed by Supreme Court, 385 Mich 761.

Complaint by Alice Lake against The Travelers Insurance Company for benefits under a life insurance policy. Summary judgment for plaintiff. Defendant appeals. Reversed and remanded for entry of judgment for defendant.

Glotta & Adelman, for plaintiff.

Dickinson, Wright, McKean & Cudlip (by *Allen M. Bornheimer* and *Charles F. Clippert*), for defendant.

Before: R. B. BURNS, P. J., and J. H. GILLIS and DANHOF, JJ.

R. B. BURNS, P. J. Defendant insurance company appeals from a summary judgment[1] granted plaintiff at trial level.

The issue on appeal concerns the construction of a phrase contained in the group life insurance policy issued by the defendant to plaintiff's husband's employer. The policy contained a provision limiting the total proceeds due upon the employee's death to $4,000 where that employee's "basic annual salary or wage" was less than $10,000. Defendant argues that plaintiff's husband's "basic annual salary or wage" was less than $10,000, which would entitle plaintiff, as beneficiary, to only $4,000. Plaintiff contends that her husband's "basic annual salary or wage" exceeded $10,000 which, according to the terms of the insurance policy, would entitle the beneficiary to receive $10,000.

[1] GCR 1963, 117.2.

In computing the husband's "basic annual salary" defendant excluded three items that plaintiff included in her computation, *i.e.,* overtime pay, vacation pay, and Christmas bonus.[2]

The final decision revolves around the reasonable interpretation of the phrase "basic annual salary or wage". More specifically, does "basic annual salary or wage" include or exclude such items as overtime pay, vacation pay, and monetary bonuses?

In construing this insurance contract phrase we must give the words their plain and ordinary meaning,[3] give effect to every word as far as practicable,[4] and construe the phrase in favor of the insured if the phrase is ambiguous and reasonably susceptible to such "construction".[5] These basic rules of construction are widely accepted.[6] After an exhaustive analysis of the trial court's opinion, this Court is convinced that the trial judge was in error. The trial judge avoided defining the word "basic" and almost all of his cited authorities dealt with the definitions of "wage", "average annual wage", "monthly salary", or "annual salary". The trial court failed to give the word *basic,* as that word appears in the term *"basic* annual salary or wage", its plain and ordinary meaning. This violates the principle stated in *Mondou* v. *Lincoln Mutual Casualty Co.* (1938), 283 Mich 353, 358, 359:

"A contract will be construed so as to give effect to every word or phrase as far as practicable."

---

[2] Adding overtime pay of $4,121.14, vacation pay of $224, and the Christmas bonus of $664, with his regular hourly wage of $5,686 would exceed $10,000.

[3] *Bowman* v. *Preferred Risk Mutual Insurance Company* (1957), 348 Mich 531; *Squires* v. *Hayes* (1968), 13 Mich App 449.

[4] *Mondou* v. *Lincoln Mutual Casualty Co.* (1938), 283 Mich 353.

[5] *Leski* v. *State Farm Mutual Automobile Insurance Company* (1962), 367 Mich 560; *Michigan Mutual Liability Company* v. *Ferguson* (1968), 15 Mich App 298.

[6] See 13 Appleman, Insurance Law and Practice, §§ 7383–7385, pp 11–29.

The trial court's interpretation of the phrase "basic annual salary or wage" is contrary to the plain and ordinary meaning of the phrase. To interpret as defendant suggests would strain the meaning of the phrase and would in effect be rewriting the contract. This result is impermissible in Michigan[7] as well as elsewhere.[8] In our view the phrase "basic annual salary or wage" excludes overtime pay and is supported by textual definitions as well as common sense.[9]

Reversed and remanded for entry of judgment in accordance with this opinion. Costs to defendant.

All concurred.

---

[7] *Edgar's Warehouse, Inc.*, v. *United States Fidelity & Guaranty Company* (1965), 375 Mich 598; *Huron Bowl, Inc.*, v. *Security Insurance Company of New Haven* (1968), 14 Mich App 62.

[8] See 13 Appleman, Insurance Law and Practice, § 7383, pp 10, 11.

[9] 5 Words and Phrases, p 292, defines "basic salary" as salary "* * * without taking into consideration any extra compensation to which he might be entitled for extra work". The term "basic wage" or "basic salary" is defined in Webster's Third New International Dictionary (Unabridged ed, 1961) as: "2. A rate of pay for a standard work period exclusive of such additional payments as bonuses and overtime." Courts in Michigan have frequently looked to dictionary meanings when construing insurance policies. See, *e.g.*, *Huron Bowl, Inc.*, v. *Security Insurance Company of New Haven* (1968), 14 Mich App 62.

WRIGHT *v.* WHITMIRE

1. EVIDENCE — DEPOSITIONS — DEPOSITION ADMISSIONS — MULTIPLE DEFENDANTS—ADMISSIBILITY.

   Allowing the deposition admissions of defendant's codefendant to be read into evidence in an automobile negligence case was harmless error where both the defendant and the codefendant testified fully at trial regarding the matters contained in the deposition and where their testimony constituted substantive evidence as to how the plaintiff was injured and who, if anyone, was responsible for the injury.

2. TRIAL—INSTRUCTIONS TO JURY—REQUESTED INSTRUCTION.

   Requested instructions to the jury need not be given where the court has correctly instructed on the subject covered by the requested instructions.

3. AUTOMOBILES—NEGLIGENCE—EVIDENCE.

   Evidence that defendant driver in an automobile negligence case was speeding, that he saw the plaintiff standing in the center of the road when he was ten car lengths away, that he never varied his speed or course, that there were no cars either between the plaintiff and the defendant or to the defendant's right, that plaintiff was caught between and hit by another car, coming from the opposite direction, driven by a codefendant, and by the defendant's car, and that the plaintiff did not move at all while standing in the highway was sufficient to support a jury verdict that the defendant was guilty of negligence.

Appeal from Wayne, George T. Martin, J. Submitted Division 1 February 9, 1971, at Detroit. (Docket No. 9358.) Decided March 25, 1971.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 803.
[2] 53 Am Jur, Trial §§ 527, 528.
[3] 8 Am Jur 2d, Automobiles and Highway Traffic § 1002.

Complaint by Marguriet Moore Wright against Edward W. Whitmire, Toni Kay Osborne Bufe, and Frank Osborne for damages for injuries in an automobile-pedestrian accident. Judgment for plaintiff. Defendant Whitmire appeals. Affirmed.

Richard G. Eubank, for plaintiff.

Rouse, Selby, Dickinson, Shaw & Pike (by *Forrest G. Shaw*), for defendant Whitmire.

Before: DANHOF, P. J., and HOLBROOK and BRONSON, JJ.

HOLBROOK, J. This is an appeal by Edward W. Whitmire which arises out of a negligence action for personal injuries sustained by the plaintiff as a result of being struck by one or both of the defendants' vehicles. After a jury trial, a verdict of $50,000 against both defendants was returned and judgment was entered thereon.

The accident occurred in front of the Burroughs plant on Plymouth Road, east of Haggerty in Wayne County at about 7 a.m. on November 15, 1963. Plymouth Road was a four-lane paved highway running east and west with a double yellow line down the center. It was testified that the speed limit was between 35 and 45 miles per hour. It was dark, the weather was clear and the pavement dry. The traffic was light. Defendant Whitmire was traveling east on Plymouth Road, and defendants Osborne were traveling west. There was testimony that defendant Whitmire was speeding, probably going 60 miles per hour. He admitted that this was probably an accurate estimate and admitted to at least 40 to 50 miles per hour. To the west of the accident scene on Plymouth Road there is a hill, and Whitmire

came up on the hill to a point where he was able to and did see the plaintiff at the time he was about ten carlengths away. When he first saw the plaintiff, she was standing right on the center yellow line. She was standing, body erect, not moving and waiting to cross. She may have turned her head.

Whitmire was traveling in the lane closest to the center line. He never varied his course or speed. There was no car between Whitmire and the plaintiff and no car to Whitmire's right. The only other car in the vicinity was defendants' Osborne car approaching from the opposite direction and in the lane closest to the center line. When the Osborne car was five carlengths away from the plaintiff, Whitmire was ten carlengths away. Toni Kay Osborne Bufe knew that Whitmire was going to hit the plaintiff. The plaintiff was caught right in between the two cars and she testified that she could feel suction. Whitmire stated that he felt her hit against the side of his car and that there was a swishing or sucking sound from the wind between the two cars. Mrs. Osborne Bufe heard the bump and knew that there was no question that plaintiff had been hit.

There is some testimony that the speed limit was 40 or 45 miles per hour. Whitmire did claim that he was only two carlengths away when he came over the hill and saw plaintiff for the first time. Whitmire at one point said that the plaintiff was north of the center line and that he saw that she was standing on the opposite side of the yellow line from him. Mrs. Osborne Bufe said at one point that plaintiff was on the south side of the yellow line so that she was standing on the opposite side of the yellow line from her. Both defendants agree that plaintiff never moved. Whitmire thought there was a car to the right of the Osborne car.

Aside from these rather minor points, the testimony is undisputed.

The plaintiff testified that traffic was clear for one-half mile in each direction when she started to cross Plymouth Road. Apparently defendants' vehicles were not in sight. What interfered with her crossing is unknown, and she does not remember being struck. Plaintiff stated that she remembers nothing but saying, "Oh my God", until the following Thursday. Plaintiff suffered from retrograde amnesia. The one undisputed fact agreed to by both defendants is that the plaintiff stood stock-still in the center of the highway from the time each defendant saw her until each defendant's left-front fender passed her.

Defendant Whitmire raises four issues on appeal.

I

Was it error to permit excerpts from codefendant Osborne Bufe's deposition to be read to the jury by her counsel over defendant Whitmire's objection that they were hearsay and self-serving?

The objected-to testimony is as follows:

"*Mr. Eggenberger:* From the bottom of page 36: —this is a question by myself:

"'*Question:* Toni, I have just a few questions that I want to ask you. What did you do, if anything, right after you first saw this woman standing south, in the center lane?

"'*Answer:* When my headlights shined on her I began cutting into the very right lane, the outside lane.

"'*Question:* Did you get completely into that lane, Toni, by the time this other car struck her?

"'*Answer:* I don't recall whether I was completely in it or going into the lane.

"'*Question:* Can you estimate for me about how far—how much of your car was into the right-hand lane by the time you either glanced or heard this impact?

"'*Answer:* I am sure half of it was in this lane.

"'*Question:* Did you then just continue in that lane after the accident and pulled off on the shoulder?

"'*Answer:* Then I pulled off, yes.'"

The use of a deposition at trial is governed by the provisions of GCR 1963, 302.4(1), (2), (3), and (4). Plaintiff's counsel initiated the reading of codefendant Osborne Bufe's deposition, and, being an adverse party, the procedure was proper. Defendant Whitmire's counsel then read additional portions of the deposition. At this point, codefendant Osborne Bufe's attorney then read the objected-to portions. The same procedure was followed as to the deposition of defendant Whitmire. After plaintiff's counsel and codefendants' counsel had introduced portions of the deposition, Whitmire's attorney read other parts of the deposition. This procedure, provided the evidence is admissible, is permissible under GCR 1963, 302.4(4) which reads as follows:

"If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

In any event, Mrs. Osborne Bufe was a witness at trial and testified to the very same facts as those introduced from her deposition to which defendant Whitmire objects.

Whether the whole of the deposition of a witness was or was not received in evidence becomes unimportant where it appears that the witness testified

on the trial to the facts covered thereby. *People* v. *Smith* (1895), 106 Mich 431.

The admissions of defendant Osborne Bufe in a deposition were not admissible as against Whitmire,[1] and defendant Whitmire's admissions in his deposition were not admissible as against Osborne Bufe. However, in the instant case, both defendants were witnesses at the trial. They testified fully as to the matters contained in their depositions and such testimony constituted substantive evidence as to how the accident happened and who, if anyone, was responsible and liable for it.

Under these circumstances we rule that any error committed concerning this issue was harmless. *People* v. *Hallaway* (1970), 25 Mich App 604. *People* v. *Wardell* (1970), 26 Mich App 69.

II

Defendant asserts that the trial court erred in refusing to give defendant's first requested jury instruction.

This instruction dealt with the duties of a pedestrian in crossing the highway and the law of contributory negligence. We have reviewed the instructions given by the court and find that the instruction desired was properly given in the words of the trial judge. The correct instruction having been given, it is not error to refuse to give a requested instruction on the same subject. *Shirley* v. *The Drackett Products Company* (1970), 26 Mich App 644.

III

Defendant asserts that the trial court committed error by not directing a verdict in his favor at the close of the proofs.

---

[1] *Ghezzi* v. *Holly* (1970), 22 Mich App 157, 168.

A review of the testimony clearly indicates that there were issues of fact to be determined by the jury, and for the court to have given a directed verdict in favor of defendant at the close of the proofs would have been highly improper. *Genesee Merchants Bank & Trust Company* v. *National Auto Leasing Corporation* (1970), 24 Mich App 462; *Shirley* v. *Drackett Products Company, supra.*

IV

Defendant contends that the verdict of the jury was against the great weight of the evidence.

A review of the record reveals that there was ample evidence submitted to justify the verdict of the jury in favor of plaintiff and against defendant, both as to liability and as to damages.

Affirmed. Costs to plaintiff.

All concurred.

DAULT *v.* SCHULTE

1. CONTRACTS—ABANDONMENT—INTENTION.
   The abandonment of a contract is a matter of intention; it need not be expressed, but may be inferred from the conduct of the parties and the attendant circumstances.

2. CONTRACTS—ABANDONMENT—INCONSISTENT ACTS—ACQUIESCENCE.
   A contract will be treated as abandoned where one party acquiesces in the other party's acts which are inconsistent with the contract.

REFERENCE FOR POINTS IN HEADNOTES

[1–6] 17 Am Jur 2d, Contracts § 484.

3. CONTRACTS—ABANDONMENT—INCONSISTENT ACTS—ACQUIESCENCE.

Acquiescence by plaintiff-contractor in defendant's change of contract plans which were inconsistent with their written contract constituted abandonment of the contract.

4. CONTRACTS—ABANDONMENT—BURDEN OF PROOF.

The burden of proving abandonment or modification of a written agreement rests upon the party asserting abandonment.

5. CONTRACTS — ABANDONMENT — EVIDENCE — CONTRACT CHANGES — COSTS OF CHANGES.

Evidence of contract changes and their costs is, as a general rule, by necessity admissible to show modification or abandonment of the contract, because the party asserting modification or abandonment must be permitted to introduce evidence to substantiate his position.

6. CONTRACTS—ABANDONMENT—EVIDENCE—TIME AND LABOR COSTS.

Time and labor costs incurred by plaintiff contractor after he had acquiesced in, and had carried out, defendant's changes in their written contract were properly admitted to show modification or abandonment of the contract.

Appeal from Presque Isle, Philip J. Glennie, J. Submitted Division 3 March 3, 1971, at Grand Rapids. (Docket No. 9391.) Decided March 25, 1971.

Complaint by Harold Dault against Anastasia Schulte for labor and materials furnished. Counterclaim by defendant. Judgment for plaintiff. Defendant appeals. Affirmed.

Jason, Wenzel & Kowalski (by *Douglas K. Wenzel*), for plaintiff.

Charles C. Menefee, for defendant.

Before: FITZGERALD, P. J., and HOLBROOK and BRONSON, JJ.

HOLBROOK, J. This is an appeal as of right from a judgment, entered after a nonjury trial, for the plaintiff in the amount of $3,123.95 for labor and materials.

In January 1968, plaintiff, a self-employed builder, entered into an oral agreement to construct a tavern for the defendant. Work commenced on the tavern that same month and defendant advanced plaintiff $500 at that time. On February 2, 1968, the parties entered into a written agreement for the construction of the bar for the price of $38,564.24.[1] During the period from February 8, 1968 through June 28, 1968, defendant paid plaintiff some $43,000, substantially more than the total amount stated in the contract. These sums were paid because of oral changes made in the contract by the parties.

---

[1] "DATE 2-2 1968

* * *

"It has been agreed that I, Harold Dault, build said bar for Mrs. Anthony Schulte at the price of $38,564.24.

"With the understanding that a third be paid when the building is started and half when the building is half done and the bal. when the building is completed.

"There is one exception that the wash tanks, stoles, chairs and tables and utensils be bought and paid for by Mrs. Schultes son Tony.

"Signed Harold Dault
"Signed Mrs. A. Schulte

"Furnace	$ 2,400.00
"Well (estimate)	500.00
"Septic Tank	600.00
"Cooler installed	3,000.00
"Fill	3,365.00
"Sub Floor	1,837.63
"Block, Mortar & Sand	2,191.20 1,331.24
"Roof & Interior	5,614.17
"Finish Floors	1,250.00
"Dance Floor	300.00
"Labor	11,000.00
"Windows & Doors	600.00
"Bar	800.00
"Basement Floor & Toilets	1,200.00
"Plumbing & Wiring & Lights	2,575.00
	38,564.24"

Plaintiff's records indicate that his costs during this period of time were $48,394.08. In July 1968, defendant refused to pay plaintiff any sums in addition to the $43,000 and plaintiff then refused to proceed. Defendant paid other parties to complete the work.

Plaintiff sued defendant to recover $5,394.08 ($48,394.08 minus $43,000). Defendant counterclaimed for $6,546 for damages sustained in completion costs. The trial judge found that the parties had, due to various changes in the contract, in effect abandoned that contract and that plaintiff was entitled to the claimed $5,394.08, less $2,270.13 that defendant was allowed on her counterclaim, or $3,123.95.

In the instant case, the following items were established as being in addition to the contract: variations in mode and amount of payment, the addition of the basement banquet room, the basement ceilings, the basement fireplace, and the finishing of the basement and the power line.

It is stated in 17 Am Jur 2d, Contracts, § 484, pp 954, 955:

"The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted. An abandonment of a contract need not be express but may be inferred from the conduct of the parties and the attendant circumstances. A contract will be treated as abandoned when acts of one party, inconsistent with the existence of the contract, are acquiesced in by the other party.

"Abandonment of a contract is a mixed question of law and fact; what constitutes an abandonment is a matter of law, and whether there has been an abandonment is a question of fact."

Here there were a number of "acts of one party, inconsistent with the existence of the contract", that were "acquiesced in by the other party". There was testimony in the record to the effect that the defendant visited the job site nearly every working day. Further, that the defendant proceeded to change the plans as contained in the contract from time to time in accordance with her desires. This constituted evidence of acts which were inconsistent with the contract. The plaintiff acquiesced and proceeded in accordance with the directions given him by the defendant.

Defendant claims that the finding of the lower court that the contract had been abandoned was in error and that certain evidence as to plaintiff's time and labor costs were erroneously admitted.

Plaintiff contends that when a contract is claimed to have been abandoned or deviated from, evidence is properly admitted for purposes of explanation.

In the instant case, the plaintiff below was trying to prove abandonment or modification of the written agreement. The party claiming such a change has the burden of proving it. *Bishop Electric, Inc.*, v. *Simpson* (1967), 7 Mich App 391. Generally, evidence of changes in the contract, and their costs, is by necessity admissible to show the modification or abandonment of the contract. See *Minkus* v. *Sarge* (1957), 348 Mich 415. Indeed, when the burden is put on the party to introduce evidence to show a change in the contract, he must be permitted to introduce evidence to substantiate his position. It thus appears that the lower court was correct in admitting the contested evidence.

After a careful review of the record, we are satisfied that there was competent evidence to support the factual finding of the trial court that there had been an abandonment of the contract. *H. O. Brack-*

ney & Son v. *Ryniewicz* (1956), 346 Mich 404. We are further persuaded that the contested evidence concerning the changes in the contract which resulted in the determination that the contract had been abandoned and the cost to the plaintiff of building the bar were properly admitted. *Minkus* v. *Sarge, supra.* There is no showing that the lower court ruling was clearly erroneous so as to require our reversal. GCR 1963, 517.1.

Affirmed. Costs to plaintiff.

All concurred.

PEOPLE *v.* IACONIS

1. ARREST—DELAYED ARREST—DUE PROCESS—PREJUDICE.

A delay in obtaining an arrest warrant is not sufficient evidence of prejudice to raise the issue of denial of due process under the state and Federal constitutions, since it is not the delay itself, but the evidence of prejudice resulting from the delay, that violates the due process guarantee.

2. ARREST—DELAYED ARREST—DUE PROCESS.

A 165-day delay in obtaining an arrest warrant against defendant for illegal sale and possession of marijuana did not deny the defendant due process where the defendant was out-of-state for all but two weeks of that period, where the police wanted to keep the identity of the informer in defendant's case secret until they completed their investigation in other marijuana cases in which the informer was also participating, and where, even though the defendant claimed that the delay caused his alibi witnesses to be unable to testify with certainty to the defendant's presence at their home when the crime was com-

---

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 5 Am Jur 2d, Arrest §§ 2, 7, 11.

mitted, the defendant did not raise the defense of alibi at two earlier times when his trial was set or at the preliminary examination but waited until a year after his arrest.

CONCURRENCE BY DANHOF, J.

3. ARREST—DELAYED ARREST—DUE PROCESS.
A delay in an arrest is not a violation of due process.

Appeal from Recorder's Court of Detroit, Joseph A. Gillis, J. Submitted Division 1 February 2, 1971, at Detroit. (Docket No. 9398.) Decided March 26, 1971.

Samuel Iaconis was charged with unlicensed sale and illegal possession of marijuana. Information quashed. The people appeal. Reversed and remanded with instructions.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, *Robert A. Reuther,* Assistant Prosecuting Attorney, for the people.

Ivan E. Barris, for defendant.

Before: DANHOF, P. J., and HOLBROOK and BRONSON, JJ.

HOLBROOK, J. The people appeal by leave of this Court the February 26, 1970 order of the trial court which was affirmed on rehearing March 4, 1970, granting defendant's motion to quash the information which charged him in two counts with unlicensed sale and unlawful possession of marijuana contrary to MCLA § 335.152 (Stat Ann 1957 Rev § 18.1122), and MCLA § 335.153 (Stat Ann 1957 Rev § 18.1123).

Because a knowledge of the proceedings and facts is essential to a proper decision in this case, we quote verbatim the concise statement of the proceedings and facts as certified by the trial judge concerning the application of the people for leave to appeal as follows:

"The plaintiff in this case claims by the testimony of Frank Mothersbaugh, a Livonia Police Officer, that the defendant, Samuel Iaconis, made an illegal sale or dispensed and possessed marijuana on November 8, 1967, contrary to § 335.152 and § 335.153 CL 1948, as amended by PA 1952 No 266.

"Testimony taken at the preliminary examination on March 5, 1969, and evidentiary hearing on March 23, 1970, was as follows:

"Frank Mothersbaugh came in contact with Samuel Iaconis in 1966, when Mothersbaugh was working on the police detail at the Detroit Race Course. He was pointed out by another officer.

"Mothersbaugh received information from an informer that Iaconis would sell him a quantity of marijuana at a certain location which he later learned was in the City of Detroit.

"Mothersbaugh saw pictures of Iaconis. On November 8, 1967, he went to the Brunch's Restaurant. He saw Iaconis in the restaurant and recognized him. He said nothing to Iaconis.

"A few minutes later, Iaconis left the building and Mothersbaugh left. He followed and accompanied Iaconis to Iaconis' automobile. The automobile was parked on the front lot, located on the south side of the restaurant.

"Iaconis unlocked the passenger's side of the vehicle. Mothersbaugh entered as Iaconis walked around the driver's side and entered the vehicle.

"Iaconis said, 'Frank?' Mothersbaugh said, 'Yes. Are you Sam?' Iaconis said 'Yes, here you are.' At this point, Iaconis reached into a trash container

located in the center of the vehicle in the front seat portion and removed a brown paper bag and handed it to Mothersbaugh. Mothersbaugh opened the bag and observed three smaller white paper bags. He observed one of these bags contained a plant material that appeared to be marijuana.

"Iaconis was given $50 by Mothersbaugh. Fifty dollars was the prior agreed price.

"There were four to six other police officers present at the scene in the area of the restaurant. They had visual observation of the restaurant and the automobile but not the transaction itself.

"Mothersbaugh left the parking lot in another vehicle. This was five minutes from when he entered the restaurant.

"A Detective Asiala of the Michigan State Police followed right behind Mothersbaugh. The two officers met between the scene and at the state police post.

"Mothersbaugh turned the brown bag over to Asiala at one of these times. Mothersbaugh could not remember at which time.

"It took Mothersbaugh ten minutes to get to the state police post. He spent ten minutes at the post and returned to his Livonia office 15 minutes later. At this time, Mothersbaugh recorded the events.

"He testified that he had no independent recollection of the particular facts of the transaction. He had a general recollection. He testified from his notes as to details. He did not remember or recollect the color of Iaconis' car. He could not recollect or recall any psychedelic design on the defendant's car nor did he recall or recollect a stuffed animal in the back seat of the defendant's car. He knew that the defendant had a Florida license plate on the car but did not get or recall the numbers.

"Mothersbaugh had no independent knowledge of whether an electronic device was used.

"At the examination, Mothersbaugh stated (March 5, 1969) that 100 people made attempts or sold him narcotics within the past year.

"A warrant was requested by the Michigan State Police and recommended by the prosecutor of Wayne County on April 22, 1968 for sale, dispensing, and possession and control of marijuana on April 22, 1968.

"The Honorable James R. McCann, Municipal Judge for the City of Livonia, signed the warrant on the same date.

"Testimony taken at the aforesaid evidentiary hearing and examination indicated the following as to why the request was not made to the prosecutor before April 22, 1968:

"The delay between the date of the alleged purchase and the last of February was due to the fact that the informer used in this case was also used in three other cases connected with this informer.

"The warrant was not requested in that period because the Livonia Police Department did not want to divulge the informer's identity as there was a continuous investigation on the other cases.

"The request on the three other cases was made in the last of February by the Livonia Police Department. Legal proceedings were instituted in these cases and convictions were obtained.

"From March until the date of Iaconis' warrant, the warrant was not requested due to the fact that the defendant was in Florida at no specific location. No extradiction proceedings were instituted.

"Mothersbaugh obtained this information a week after the sale took place.

"On or about April 22, 1968, Mothersbaugh received information that the defendant was back in Michigan from Florida and the warrant was requested.

"Mothersbaugh and the state police then made an attempt to locate the defendant at his residence on Kendall in Dearborn. He was not found.

"Three or four days later, Mothersbaugh and other state police officers arrested Iaconis at the Hazel Park Race Track on April 29, 1968.

"The Wayne County Justice Court file for the Municipal Court for the City of Livonia, No 5756, and the Wayne County Circuit Court file No 47099 shows the following:

"That after the Honorable James R. McCann issued a warrant charging the defendant with sale and possession and control of marijuana on November 8, 1967, on April 22, 1968, Iaconis was arraigned on April 29, 1968 and entered a plea of not guilty.

"Examination was set for May 7, 1968. The defendant's attorney requested an adjournment and waived the ten day rule. Examination was set for May 28, 1968.

"On May 28, 1968, the examination was adjourned until July 16, 1968 at the request of the defendant.

"The examination was then adjourned until August 20, 1968. The examination was held and the defendant was bound over for trial on the charges contained in the complaint and warrant.

"On September 4, 1968, the return on examination was sent to the Circuit Court for Wayne County.

"Defendant, on April 30, 1968, filed a motion for the reduction of the defendant's bond which motion was granted before the Honorable Joseph A. Sullivan, Wayne County Circuit Court Judge.

"An information was filed by the people on September 13, 1968, charging the defendant with sale or dispensing, possessing and controlling marijuana.

"Arraignment and pre-trial was set for September 25, 1968. Notice was sent to the defendant and his attorney. The notice addressed to the defendant was returned stating that there was no such address as 7755 Kendall, Detroit, Michigan.

"On September 26, 1968, the Honorable Joseph A. Sullivan canceled bond and issued a *capias*.

"These orders were set aside on October 3, 1968 and arraignment was set for October 9, 1968.

"On October 9, 1968, the defendant was arraigned and pre-trial was held before the Honorable George E. Bowles, a judge of the Wayne County Circuit Court. The defendant pleaded not guilty.

"The cause was assigned for trial on November 7, 1968, before the Honorable Victor J. Baum, a judge of the Circuit Court for Wayne County. The cause was adjourned until January 3, 1969. Defense counsel had another cause in progress. The people's chemist was not available.

"The cause was then assigned for trial on January 6, 1969 before the Honorable Cornelia G. Kennedy, a judge of the Circuit Court for the County of Wayne. No notice of alibi was filed.

"By written order dated January 7, 1969, the court determined that the offense was committed in the City of Detroit and not in the City of Dearborn. The court ordered the case dismissed because it was without jurisdiction to conduct a trial.

"A warrant was issued by the Honorable Frank G. Schemanske, a judge of the Recorder's Court for the City of Detroit on January 6, 1969 for sale or dispensing and possession of marijuana by Iaconis on November 8, 1967. § 335.152 and § 335.153, CL 1948 Act 66 PA 1952.

"On February 5, 1969, the defendant was arraigned on the warrant before the Honorable Samuel H. Olsen, a judge of the Recorder's Court. Examination was set for February 10, 1969.

"On February 10, 1969, the Honorable Samuel H. Olsen adjourned the examination until February 24, 1969. The defendant was to retain new counsel.

"On February 24, 1969, the Honorable William J. Sutherland, Municipal Judge assigned to the Recorder's Court, adjourned the examination until March 5, 1969. The defendant appeared without counsel and indicated his desire to retain his own counsel.

"On March 5, 1969, an examination was held before the Honorable Robert E. DeMascio, a judge of the Recorder's Court of the City of Detroit. The defendant was bound over for trial on the charges contained in the complaint and warrant.

"An information was filed by the people charging that the defendant sold or dispensed and possessed marijuana. The defendant was arraigned upon the information on March 17, 1969 before the Honorable Elvin L. Davenport, a judge of the Recorder's Court for the City of Detroit. Defendant stood mute and a plea of not guilty was entered.

"On April 28, 1969, a notice of alibi was filed by the defendant that on November 8, 1967, the defendant was not in Detroit but in Clarksbury, West Virginia at his grandmother's home at 614 Buckingham. The defendant alleged that Teresa Romano, 614 Buckingham, Clarksbury, West Virginia, and Barbara Ann Beto, 216 Waldeck Street, Clarksbury, West Virginia, among others, would be called as witnesses.

"The cause was then set for trial on November 17, 1969. No court being open, the matter was adjourned until March 12, 1970.

"On January 26, 1970, the defendant filed a motion to quash the information with a notice of hearing on February 2, 1970.

"He alleged by way of notarized affidavits of Barbara Beto and Teresa Romano in Harrison County, West Virginia, that: 'Affiant further says that Sam Iaconis, of 7755 Kendall Street, Dearborn, Michigan, came to her home in the City of Clarksbury, West Virginia, some time during the first two weeks of November, 1967.' He alleged that two of his witnesses were unable with any degree of certainty to place the date that the defendant was in Clarksbury, West Virginia. That the people, by their unexplainable delay, have deprived the defendant due process under *People* v. *Hernandez* (1968), 15 Mich App 141.

"The motion was adjourned until February 13, 1970 and then until February 20, 1970.

"On February 26, 1970, the court quashed the information by written order, deciding that 'considering the totality of the circumstances involved in the instant case, the court finds that there was an unreasonable delay between the date of the alleged offense and the issuance of the warrant.'

"On March 5, 1970, the people filed a motion for a rehearing on order quashing the information and for an evidentiary hearing on the reasonableness of the delay.

"The people alleged that *People* v. *Hernandez, supra,* was contrary to *People* v. *Noble* (1969), 18 Mich App 300, and the statute of limitations § 767-.24 CL 1948, and they wanted to present evidence directly related to the issue, and that the defendant was not denied due process.

"The motion was noticed for hearing on March 16, 1970 and adjourned until March 23, 1970 at the request of both parties.

"On March 23, 1970, the court granted a rehearing and took evidence. Wayne County Justice Court file No 5756 of the Municipal Court of Livonia, and Wayne County Circuit Court file No 47099 were admitted in evidence as to transactions of the cause prior to the cause being instituted in Recorder's Court.

"Frank Mothersbaugh was also called as a witness by the people. The court, by written order dated March 24, 1970, affirmed its order of February 26, 1970.

"It is from the motion to quash the information which plaintiff seeks leave to appeal."

Plaintiff raises two issues which will be stated and dealt with in order.

I

Whether a 165-day delay between the date of the alleged offense and the date of the warrant denied defendant the due process guaranteed him by the Michigan and Federal Constitutions, where MCLA § 767.24 (Stat Ann 1954 Rev § 28.964) provides that the people may institute an indictment within 6 years of the alleged offense?

Defendant cites the cases of *People* v. *Hernandez* (1968), 15 Mich App 141, and *Ross* v. *United States* (1965), 121 App DC 233 (349 F2d 210) to support his position that the delay denied defendant the due process guaranteed him by the Michigan and Federal Constitutions. The mere fact that the people delayed for 165 days after the offense before obtaining a warrant is insufficient evidence of prejudice to raise the issue of due process being denied the defendant under the Michigan and Federal Constitutions. We stated in *Hernandez, supra,* p 146:

"It is this evidence[1] of *prejudice* that results in the violation of due process which the court refers to in *Ross* v. *United States* (1965), 121 App DC 233 (349 F2d 210), *not the delay itself,* which is the guideline."

II

Did the defendant make out a meritorious showing of some prejudice, and, if so, did the people present and show clear and convincing proof to the trier of fact: (1) that the delay was explainable, (2) it was not deliberate, and (3) no undue prejudice attached to the defendant under *People* v. *Hernandez, supra,* pp 146, 147?

It is true that there were many delays in these proceedings, some caused by the people and some

[1] Other material facts stated in the opinion.

by the defendant. What we are concerned with here in the first instance is: Did the first delay of 165 days from the date of the offense to the date of defendant's arrest prejudice the defendant in his defense of the case? The people desired to delay the request of the warrant until the end of February or the first part of March 1968 because the informer used in this case was also used in three other cases and the police did not want to divulge the informer's identity as there was a continuing investigation on these cases. This procedure is justified under the decision in *Wilson* v. *United States* (CA 9, 1969), 409 F2d 184. It is stated on p 186 of the opinion:

"Under the *Ross* rule the reasonableness of the police conduct in the particular case is to be weighed against the possible prejudice to the defendant. 121 App DC 235, 236 (349 F2d 212, 213). Here, appellant's arrest was postponed because at the time of the sale to Abbey, Abbey and Bishop were working on other narcotics cases. An earlier arrest would have revealed their identities and made them useless in the other cases. * * * It thus appears that the delay of appellant's arrest was for a valid, reasonable police purpose."

The same circumstances are present in the instant case. Other facts are also important. Defendant left the State of Michigan within one week of the date of the offense for the State of Florida. He returned in April 1968 about a week before he was located and arrested. During the time that he was out of the state, the statute of limitations was tolled.[2] Defendant cannot complain now for the delay of 165 days when he spent all of that period lacking about two weeks outside of the state. Further, defendant's trial on the charges in the

[2] MCLA § 767.24 (Stat Ann 1954 Rev § 28.964).

Circuit Court for Wayne County was set on two different occasions. At both of these times as well as at the preliminary examination, defendant was represented by counsel. No notice of alibi was filed on behalf of the defendant in the Circuit Court. For the first time on April 28, 1969, a notice of alibi was filed by defendant in the Recorder's Court for the City of Detroit asserting that he was, at the time of the offense in Clarksbury, West Virginia. On January 26, 1970, defendant filed a motion to quash the information and attached two affidavits, those of Barbara Beto and Teresa Romano, both dated December 18, 1969, stating that defendant visited at their homes sometime in the first two weeks in November 1967. The defendant then asserted that the delay of the people in proceeding with the complaint, warrant, and arrest of the defendant was prejudicial to him. He based this claim upon the assertion that the two witnesses could not, at that date, ascertain with certainty the exact time or times that he was at their homes. There is no showing by defendant that he attempted to ascertain his whereabouts on the date of the offense from these witnesses prior to December 1969. The witnesses' inability to specify the date of defendant's presence in Clarksbury, West Virginia, is attributable as much to infirmity of the alibi as to the delay. Even if their inability is attributable to delay alone, no showing is made that the offending delay was the five and one-half month delay before arrest, rather than the year's delay caused by court proceedings. The latter delay is incident to court proceedings and affects the people's case as much as defendant's. The fact that the court delay was compounded by a year's proceeding wasted in a court without jurisdiction, benefits defendant nothing. Defendant had, at all times, the knowledge of the

facts and the legal counsel to discover and remedy the jurisdictional defect. His failure to do so could have been strategic. It appears that the defense of alibi was an afterthought, for no such claim was made in the circuit court action in Wayne County. The affidavits of the two witnesses are consistent with the facts that he was present in Michigan on the date and at the scene of the offense as testified to by at least two witnesses. The people state that there were at least two to four other witnesses who were present and available to give testimony that they observed the defendant at the scene of the offense. The chances of misidentifying the defendant were extremely remote. *Wilson* v. *United States, supra,* p 187.

We rule that the defendant failed to show that some prejudice resulted to him from the delay between the date of the offense to the date of arrest.

Arguendo, assuming that it could be said that some prejudice was shown by defendant, we come to the determination that (1) the delay was satisfactorily explained by the requirements of effective law enforcement, (2) that it was not deliberately planned, *i.e.,* the needs under requirement number (1) having extended to the latter part of February 1968 and the defendant being out of the state until about a week before he was arrested and (3) that no undue prejudice attached to the defendant under *People* v. *Hernandez, supra.*

We said in *Hernandez,* p 146:

"The facts in each case are to be fully considered and the balancing of interests must be weighed to determine whether there is a denial of due process. To do this in this case, we must consider the character and credibility of the witness, Alma Silva; the indication of a 'deal' between that witness and the prosecution; the lack of corroborating material evi-

dence; the incapabilities inherent in defendant's character; the indignity and unnecessary severity of the manner in which defendant was arrested; the alleged fact that there was marked money used which was not recovered and the delay of 42 days before arrest of the defendant, an uneducated illiterate man."

In the instant case, defendant was known by the police officer, whereas in *Hernandez,* there was the bare testimony of one witness of highly questionable credibility. In *Hernandez,* there was no corroborating witness. Here there are four and possibly six corroborating witnesses. In this case there is no evidence of a deal between the prosecution and any party in the litigation. Unlike *Hernandez,* there are no incapabilities inherent in defendant's character; no claim has been made that the defendant is uneducated or illiterate. Also, defendant did not allege that he suffered any unnecessary severity in the manner of his arrest. Further, Hernandez was available all during the time of the delay whereas in the instant case defendant was not available, being out of the state for all but two weeks of the delay period. Applying *Hernandez, supra,* we rule that the people have shown by clear and convincing proof that (1) the delay was explainable, (2) it was not deliberate, and (3) no undue prejudice attached to the defendant.

The order of the trial court quashing the information is hereby set aside, and the case is remanded for further proceedings not inconsistent with this opinion.

BRONSON, J., concurred.

DANHOF, J., *(concurring).* I concur with the result reached by the majority, but because their opin-

ion perpetuates what I consider to be the erroneous philosophy expressed in *People* v. *Hernandez* (1968), 15 Mich App 141, I cannot subscribe to the same. See *People* v. *Noble* (1969), 18 Mich App 300, fn 1, p 302:

"The Court is aware of *People* v. *Hernandez* (1968), 15 Mich App 141, which by a decision of two to one considers a delay in arrest a violation of due process. This panel does not agree with the holding of that case and will not follow it until the ruling of that case is determined controlling in similar cases by the Michigan Supreme Court."

The order of the trial judge quashing the information and discharging the defendant is reversed; the information reinstated and the defendant remanded to the trial court for trial.

HAMMOND *v.* WEISS

JUDGMENT—ACCELERATED JUDGMENT—GROUNDS—SPECULATIVE DAMAGES.

An accelerated judgment cannot be granted on the ground that damages cannot be determined with accuracy because that is not a ground for accelerated judgment (GCR 1963, 116.1).

Appeal from Genesee, John W. Baker, J. Submitted Division 2 February 2, 1971, at Lansing. (Docket No. 9416.) Decided March 26, 1971.

REFERENCE FOR POINTS IN HEADNOTE

46 Am Jur 2d, Judgments § 1098 *et seq.*

Complaint by Melzor Hammond against Arthur Weiss and John D. Damm for malpractice. Accelerated judgment for defendants. Plaintiff appeals. Reversed.

Charfoos & Charfoos, for plaintiff.

Walker, Troester & Picard, for defendant Weiss.

Winegarden & Crawford, for defendant Damm.

Before: QUINN, P. J., and McGREGOR and O'HARA,* JJ.

O'HARA, J. This appeal, taken of right, presents a limited legal issue.[1] The question is whether the trial judge properly granted a motion for accelerated judgment in a suit against defendant attorneys for alleged legal malpractice. The grounds for granting accelerated judgment are:

"(1) the court lacks jurisdiction of the person or property,

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

[1] This litigation had a somewhat erratic course in the court below. The complaint charged defendant attorneys with breach of contract and malpractice in failing to initiate and prosecute a cause of action against a doctor for negligently treating plaintiff in this case during his minority (age 8). The claim was asserted at that time against the treating doctor, the hospital, and several medical technicians. A compromise settlement was offered and accepted by the minor's guardian and approved by formal order of the probate court entered after a hearing at which extensive testimony was taken. The theory in reasserting the claim, despite the approved settlement, seems to have been that a fraud was perpetrated on the court to which in some manner the defendant doctor was a party. When the defendant attorneys did not institute the action, plaintiff's present counsel did. Thereafter, the action was dismissed on motion of this plaintiff (now having attained majority). We were unable to determine what relevance all this had to the only question before us, whether the complaint in this case was subject to dismissal on any one of the grounds specified in the rule.

"(2) the court lacks jurisdiction of the subject matter,

"(3) the party asserting the claim lacks legal capacity to sue,

"(4) another action is pending between the same parties involving the same claim,

"(5) the claim is barred because of release, payment, prior judgment, statute of limitations, statute of frauds, infancy, or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." (GCR 1963, 116.1)

The trial judge granted judgment on the following grounds:

"The basic reason for this opinion (*sic* "order") is that damages, if any, in this action cannot be determined with accuracy at this time."

The grounds relied upon will not support the order. The asserted grounds might have supported the grant of a motion to continue the case, but not for accelerated judgment.

The order of the trial court is vacated. Plaintiff may tax costs.

All concurred.

HAYWARD *v.* POSTMA

1. SALES—SECURED TRANSACTIONS—RISK OF LOSS—PARTIES' AGREEMENT—INSURANCE.

   Security agreement clause declaring that the buyer must at all times keep the goods fully insured is not equivalent to a contrary agreement of the parties within the Uniform Commercial Code provision relating to time when risk of loss passes from seller to buyer (MCLA § 440.2509[4]).

2. SALES—RISK OF LOSS—STATUTES—POLICY.

   Uniform Commercial Code provision that the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant and if otherwise, the risk passes to the buyer on tender of delivery covers the common situation where parties have not agreed on who shall bear the risk of loss; the theory of the provision is that a merchant who is to make physical delivery at his own place continues to control the goods and can be expected to insure his interest in them, while the buyer, having no control of the goods, is extremely unlikely to carry insurance on goods not yet in his possession (MCLA § 440.2509[3]).

3. SALES—SECURED TRANSACTIONS—RISK OF LOSS—INSURANCE.

   Security agreement language that the buyer agrees to keep the goods insured at all times does not sufficiently apprise the buyer that he bears the risk of loss on goods for which he has contracted but has not yet received.

4. SALES—RISK OF LOSS—SHIFTING RISK—BUYER'S RISK.

   A seller who wants to shift the risk of loss to the buyer before the buyer receives the goods must make his intent very clear to the buyer, because shifting the risk of loss to the buyer in such a situation is very unusual.

REFERENCE FOR POINTS IN HEADNOTES

[1–5] 46 Am Jur, Sales §§ 279, 280.

5. SALES—SECURED TRANSACTIONS—RISK OF LOSS—PARTIES' AGREEMENT—INSURANCE.

Fine print in a security agreement that the buyer must at all times keep the goods fully insured does not shift the statutorily-imposed risk of loss, since "at all times" commonly means "at all times after one gets possession."

Appeal from Kent, Stuart Hoffius, J. Submitted Division 3 February 4, 1971, at Grand Rapids. (Docket No. 9418.) Decided March 26, 1971. Leave to appeal denied May 25, 1971, 384 Mich 843.

Complaint by Donald Hayward against Herbert F. Postma to determine risk of loss under sales contract. Judgment for plaintiff. Defendant appeals. Affirmed.

Warner, Norcross & Judd (by *J. M. Neath, Jr.*, and *Edward Malinzak*), for plaintiff.

Mohney, Norris, Goodrich, Titta & Carpenter (by *Reginald L. Norris*), for defendant.

Before: FITZGERALD, P. J., and V. J. BRENNAN and T. M. BURNS, JJ.

V. J. BRENNAN, J. From a judgment in favor of the plaintiff buyer in an action to determine risk of loss under a sales contract, defendant appeals.

On February 7, 1967, the plaintiff agreed to purchase a 30-foot Revel Craft Playmate Yacht for $10,000. The total purchase price included a number of options which the dealer was to install after he received the boat from the manufacturer. The parties agreed that defendant would deliver the boat to a slip on Lake Macatawa in or about April, 1967.

On March 1, 1967, shortly after the boat arrived at the dealer's showroom, plaintiff executed a secur-

ity agreement in favor of the defendant seller along with a promissory note in the amount of $13,095.60. The note was subsequently assigned to Michigan National Bank. Clauses 7 and 8 of the security agreement provided:

"(7) Buyer will at all times keep the goods in first class order and repair, excepting any loss, damage or destruction which is fully covered by proceeds of insurance;

"(8) Buyer will at all times keep the goods fully insured against loss, damage, theft and other risks, in such amounts and companies and under such policies * * * satisfactory to the secured party, which policies shall specifically provide that loss thereunder shall be payable to the secured party as its interest may appear * * * ."

In April of 1967, prior to delivery of the boat, a fire on defendant's premises destroyed part of his inventory of boats including the Revel Craft Playmate. Neither party had obtained insurance although both the seller and the buyer had an insurable interest[1] in the boat. Plaintiff requested the defendant to pay off the promissory note or reimburse him for payments made, and when he refused, the plaintiff started suit in Kent County Circuit Court. The lower court held that the seller bore the risk of loss and entered judgment for plaintiff.

There is little dispute as to the facts of this case; the entire controversy centers around a single provision of the Uniform Commercial Code. Under the code,[2] risk of loss is no longer determined by which party has title to the goods at the time of the loss. It is determined, instead, by rules in the code cover-

1 See MCLA § 440.2501 (Stat Ann 1964 Rev § 19.2501).

2 MCLA § 440.1101 *et seq.* (Stat Ann 1964 Rev § 19.1101 *et seq.*). Hereinafter the provisions of the Code will be referred to by section number only.

ing specific fact situations independent of title. The question of risk of loss in the absence of breach of the sale contract is covered in § 2509 which provides in subsection (3):

" * * * risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery."

But for the next subsection of the code, the solution to this case would be clear, since it is undisputed that the seller was a merchant[3] and that the buyer had not received the goods.

The code further provides at § 2509(4) that:

"The provisions of this section are subject to contrary agreement of the parties and to the provisions of this article on sale on approval (section 2327) and on effect of breach on risk of loss (section 2510)."

It is the seller's claim that clause 8, *supra,* in the security agreement declaring that the buyer must "at all times keep the goods fully insured" is equivalent to a contrary agreement of the parties. We do not agree.

The general approach of Article 2 of the code is that freedom of contract prevails; the greater part of it is concerned with detailing what happens where the contract is silent on a particular point. Such is the purpose of § 2509(3). This provision was meant to cover the common situation where parties have not agreed on who shall bear the risk of loss. In deciding that the seller should bear the risk of loss while the goods are still in his hands, the drafters give the following explanation in Code Comment No 3:

[3] See § 2104.

"The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is *extremely unlikely* that he will carry insurance on goods not yet in his possession." (Emphasis supplied.)

The code drafters correctly observed that it would be highly unusual for the average consumer to carry insurance on an item of personal property weeks or even months before it is delivered to him. The question in our case, then, is whether boilerplate language in a security agreement to the effect that the buyer agrees to keep the goods insured at all times is sufficient to apprise the buyer that he bears the risk of loss on goods he has contracted for, but has not yet received. We think not.

On the contrary, we feel that a contract which shifts the risk of loss to the buyer before he receives the goods is so unusual that a seller who wants to achieve this result must make his intent very clear to the buyer. Fine print in a security agreement concerning insurance does not achieve this result. Clause 8 is entirely vague when it states that insurance is to be carried "at all times". Common experience would dictate that the words "at all times" mean "at all times after one gets possession". This interpretation of the clause is borne out if we consider the language immediately preceding it:

"(7) Buyer will at all times keep the goods in first class order and repair, excepting any loss, damage or destruction which is fully covered by proceeds of insurance;"

Clause 7, including its mention of insurance which is later expanded upon in clause 8, apparently as-

sumes that the buyer (debtor) is in possession of the collateral. One cannot keep in repair what he does not have. Finally, risk of loss is nowhere mentioned in clause 8, and under the circumstances it cannot readily be inferred. We, therefore, hold that the parties to this contract had not agreed that the buyer would bear the risk of loss prior to his receipt of the goods and that the seller bears the loss under § 2509(3).

To hold otherwise would be to set a trap for the unwary. This is especially evident in the present case where the trial court found as a fact that the only reason for entering into the security agreement was to allow the *seller* to discount the paper to a bank and use the proceeds to pay the manufacturer for the boat and thus avoid financing ("floor planning") the purchase from the manufacturer. The idea that clause 8 of the security agreement was equivalent to an "agreement contrary" under § 2509 (4) was clearly an afterthought.

We do not mean to say that parties may not validly agree on who bears the risk of loss; rather, we hold that if they intend to shift that burden to the buyer before his receipt of the goods, they must do so in clear and unequivocal language.

For the foregoing reasons, the judgment of the lower court is affirmed.

Affirmed.

All concurred.

INDEX-DIGEST

ABANDONED BUILDING—See
NEGLIGENCE (18–20)

ABANDONMENT OF CONTRACT—See
CONTRACTS (14–19)

ABORTION—See
DAMAGES (9, 10)

ABSENCE OF COUNSEL—See
TRIAL (1, 3)

ACCELERATED JUDGMENT—See
JUDGMENT (8)

ACCELERATION CLAUSE—See
VENDOR AND PURCHASER (1, 2)

ACCESSORIES—See
CRIMINAL LAW (40)
ROBBERY (2)

ACCIDENT—See
HOMICIDE (6)

ACCIDENTAL DEATH—See
INSURANCE (1, 2, 6)

ACCIDENT CLAIMS ACT—See
AUTOMOBILES (9)

ACCORD AND SATISFACTION

1. An accord and satisfaction, being a contract, must possess all the essential elements of a contract including consideration and a meeting of the minds. *Gitre* v. *Kessler Products Co.*, 1.
2. Plaintiff's depositing defendants' checks constituted an accord and satisfaction in regard to sales commissions due plaintiff as of the date of the checks where plaintiff had complained to the defendants that certain customers had been wrongfully classified as house accounts and the amounts on the checks and the accompanying invoices clearly showed that the

ACCORD AND SATISFACTION—Continued

commissions paid the plaintiff did not include the disputed commissions on the house accounts, but the depositing of the checks did not constitute an accord and satisfaction as to amounts which thereafter may have become due as damages for breach of contract. *Gitre* v. *Kessler Products Co.*, 1.

See
CONTRACTS (1)

ACCUSATORY STAGE—See
CRIMINAL LAW (109)

ACQUIESCENCE—See
CONTRACTS (15, 16)

ADMINISTRATIVE LAW

1. A party bringing an action against a city must have an administrative remedy open to him before he can be required to exhaust his administrative remedies. *Schwall* v. *City of Dearborn*, 169.

2. Contention that a city employee, who damaged city property, was requested to pay for it, retired, and sued the city for the money paid should have refused to pay, been dismissed or suspended, and then appealed his dismissal was totally without merit, because such a course of action is not an adequate administrative remedy. *Schwall* v. *City of Dearborn*, 169.

ADMISSIBILITY—See
CONSTITUTIONAL LAW (5, 6)
CRIMINAL LAW (54, 114)
EMINENT DOMAIN (19)
EVIDENCE (1–3, 5, 7–9, 12, 13, 15)
HOMICIDE (23–25, 27)
RAPE (1, 2)
SEARCHES AND SEIZURES (2, 3)

ADMISSIONS—See
EVIDENCE (1, 15)

ADOPTION—See
DAMAGES (6, 9, 10)

ADVERSE POSSESSION

1. Actual possession of some portion of disputed land is necessary to establish ownership of the disputed land under the doctrine of possession under color of title; title to land cannot be gained simply because it was erroneously included in a claimant's deed. *Westgate* v. *Mathews*, 480.

AFFIDAVITS—See
ARREST (2)

"AFFILIATE"—See
TAXATION (2)

AFFIRMATIVE DEFENSES—See
PLEADING (7)

AGENCY—See
PRINCIPAL AND AGENT (1, 2)

AGREEMENT OF PARTIES—See
SALES (1, 5)

AIR VENT—See
NEGLIGENCE (18)

ALIBI—See
CRIMINAL LAW (64, 99, 102)

ALIMONY—See
DIVORCE (3, 4)

AMBIGUOUS CONTRACT—See
CONTRACTS (5, 7)

AMENDMENT—See
PLEADING (2–6)

ANNUAL REPORT—See
CORPORATIONS (1, 2)

ANSWER—See
PLEADING (2)

APPEAL AND ERROR

1. An appellate court may draw inferences of fact from the trial court record (GCR 1963, 820.1[6]). *Fredrickson* v. *Kool*, 62.
2. To preserve the error of the trial court's refusal to give a requested instruction a party (1) must request the instruction and (2) must object to the trial court's erroneous refusal to give the instruction before the jury retires (GCR 1963, 516.2). *People* v. *White*, 80.
3. Failure to make timely objection to the content or form of closing arguments precludes raising the question on review. *People* v. *Stroble*, 94.
4. An appellate court cannot effectively review matters inadequately presented and argued to it. *Consumers Power Company* v. *Reich*, 138.
5. A reviewing court will not disturb a judgment based upon the fact determination of the credibility of witnesses and the weight to be accorded to reasonable inferences from their testimony. *People* v. *Paesani*, 145.
6. Error cannot be predicated upon the trial judge's restatement in the instructions to the jury of the parties' contentions. *People* v. *Laine*, 271.

APPEAL AND ERROR—Continued

7. Court of Appeals will not consider whether to grant a motion for a new trial on the ground of newly-discovered evidence even though the statutory period to move for a new trial as a matter of right has passed where no application for leave to move for a new trial had been made in the trial court (MCLA §§ 770.1, 770.2). *People* v. *Jackson*, 276.

8. An appellate court can remand a first-degree murder conviction to the trial court for the entry of a judgment of second-degree murder where the defendant was convicted on evidence sufficient only to prove the less aggravated crime. *People* v. *Morrin*, 305.

9. The constitutionality of a statute will not be considered for the first time on appeal, especially where the issue was not raised in the pleadings and was specifically withdrawn at the pre-trial conference. *Frigid Food* v. *City of Detroit*, 402.

10. A party, on appeal from the decision of a nonjury trial, must show that the trial court clearly erred in making its factual findings (GCR 1963, 517.1). *Gary Boat Club, Inc.* v. *Oselka*, 466.

11. Employer hospital's appeal from an order dismissing the action of plaintiff union and its members for an injunction restraining the employer from unfair labor practices in enforcing uniform-wearing requirements for x-ray technicians, where the order to dismiss was made on the plaintiff's motion after the injunction had been granted them, was dismissed as moot where the uniform-wearing dispute had been resolved at the bargaining table after the defendants had perfected their appeal. *White* v. *City of Flint*, 509.

See

CONTINUANCE (3)
CRIMINAL LAW (4, 6, 10, 14, 17, 19, 39, 51, 52, 68, 84)
EMINENT DOMAIN (13)
INJUNCTION (1)
NEGLIGENCE (12)
NEW TRIAL (1, 2)
PUBLIC SERVICE COMMISSION (1)
WORKMEN'S COMPENSATION (1)

ARBITRATION AND AWARD

1. A court, in reviewing an arbitration award, may not substitute its own judgment for that of the arbitrator's. *Hatfield* v. *Safeco Ins. Co.*, 671.

2. Vacation of arbitration award because the trial court believed it inadequate was error where the record did not show any defect in the arbitration proceedings (GCR 1963, 769.9[1][c]). *Hatfield* v. *Safeco Ins. Co.*, 671.

ARGUMENT OF COUNSEL—See

APPEAL AND ERROR (3)
CRIMINAL LAW (10, 26, 27, 51, 90–92, 105, 106)
HOMICIDE (28)

ARMED ROBBERY—See
ROBBERY (1)

ARREST

1. Probable cause existed to arrest the defendant for murder where a fingerprint on the victim's shoe matched a print taken of a "Joseph Gill" a year before the murder; the defendant was named Joseph Gill; the defendant had been a boyfriend of the victim; and the victim had told a girlfriend on the night of the murder that she was meeting a person named "Joe" that night. *People* v. *Gill,* 395.
2. A complaint which on its face purports to be made upon the knowledge of the affiant confers jurisdiction upon the court to issue the warrant for the arrest of the defendant and the defendant cannot later assert that the affiant lacked knowledge because an illegal arrest cannot render later proceedings invalid. *People* v. *Gilleylen,* 417.
3. An arrest, illegal or without warrant, followed by a complaint and warrant on which the defendant is held for trial, cannot be attacked at trial. *People* v. *Gilleylen,* 418.
4. A police officer may arrest a person who is operating a motor vehicle and who does not have in his immediate possession a valid operator's license even though the officer is aware of the person's identity and that he is a resident of the neighborhood; the decision whether to release the traffic violator from custody with written instructions to appear in court or to retain custody pending examination is in the discretion of the police. *People* v. *McFadden,* 512.
5. A police officer can make a reasonable search of a person who has been arrested for a traffic violation for weapons which might be used in resisting arrest or effecting escape. *People* v. *McFadden,* 512.
6. A police officer may arrest a person when he has reasonable belief that a felony has been committed and reasonable cause to believe that the person arrested has committed it; when the constitutional validity of an arrest is challenged, the court must determine whether the facts available to the officers at the time of the arrest would warrant a man of reasonable caution in the belief that an offense had been committed (MCLA § 764.15). *People* v. *Wenrich,* 644.
7. An arrest must be unlawful in fact before the right to resist arises. *People* v. *Boykin,* 681.
8. Police officers had the right to arrest the defendant for speeding and for failure to produce his driver's license upon their request, because both of these offenses were misdemeanors committed in the officers' presence (MCLA § 257.901). *People* v. *Boykin,* 681.
9. Failure of police officers to inform the defendant, tried for assaulting the officers, that he was under arrest was not significant even though the defendant contended he was resisting an unlawful arrest where the trial court found that defendant began to resist the officers before they had a reasonable opportunity to inform him of his arrest (MCLA § 764.19). *People* v. *Boykin,* 681.

ARREST—Continued

10. A delay in obtaining an arrest warrant is not sufficient evidence of prejudice to raise the issue of denial of due process under the state and Federal constitutions, since it is not the delay itself, but the evidence of prejudice resulting from the delay, that violates the due process guarantee. *People* v. *Iaconis,* 703.
11. A 165-day delay in obtaining an arrest warrant against defendant for illegal sale and possession of marijuana did not deny the defendant due process where the defendant was out-of-state for all but two weeks of that period, where the police wanted to keep the identity of the informer in defendant's case secret until they completed their investigation in other marijuana cases in which the informer was also participating, and where, even though the defendant claimed that the delay caused his alibi witnesses to be unable to testify with certainty to the defendant's presence at their home when the crime was committed, the defendant did not raise the defense of alibi at two earlier times when his trial was set or at the preliminary examination but waited until a year after his arrest. *People* v. *Iaconis,* 703.
12. *A delay in an arrest is not a violation of due process. People* v. *Iaconis,* 704.

See
CRIMINAL LAW (75, 76, 79)
PARDON AND PAROLE (2)
SEARCHES AND SEIZURES (12)

ASSAULT—See
CRIMINAL LAW (30)

ASSAULT AND BATTERY—See
ARREST (9)

ASSIGNMENTS OF ERROR—See
CRIMINAL LAW (52)

ASSISTANCE OF COUNSEL—See
CRIMINAL LAW (62–67, 83, 98)

ATTRACTIVE NUISANCE—See
NEGLIGENCE (19)

AUTOMOBILES

1. The question of how a driver in a negligence case got on the wrong side of the road where he collided with another driver is a question of fact. *Morton* v. *Wibright,* 8.
2. Defendant driver had the burden of proceeding with proofs which would explain or excuse his crossing into plaintiff's decedent's lane of traffic, where the defendant's and the plaintiff's decedent's cars collided where there was uncontestable proof that plaintiff's decedent was free of any negligence, that defendant had violated the statute governing proper lanes of traffic, and that the violation caused the collision (MCLA § 257.634). *Morton* v. *Wibright,* 8.

AUTOMOBILES—Continued

3. Finding of fact that it was unknown whether defendant driver skidded into the plaintiff's lane of traffic, where he collided with plaintiff's car, because of a patch of ice, or a rut, or an icy hump on the road, or if the defendant was first negligent in his driving under the existing conditions, required reversal of a judgment of no cause of action and remand for a new trial where there was uncontestable evidence that plaintiff was not guilty of any negligence, defendant did cross into plaintiff's lane of traffic, and the violation of the statute governing proper lanes of traffic was the cause of the collision, because the burden of producing proof to explain the violation of the statute was on the defendant (MCLA § 257.634). *Morton* v. *Wibright*, 9.
4. Defendant was guilty of common-law negligence where the record showed that the defendant was driving while there was no visibility, was suddenly blown by a gust of wind and swirling snow, and collided with plaintiff in the plaintiff's lane of traffic, because an inference can be drawn that the defendant could have prevented his car from going into plaintiff's lane of traffic. *Fredrickson* v. *Kool*, 62.
5. Defendant in an automobile negligence case will be guilty of negligence *per se* if from the facts presented the statute dealing with proper driving lanes was necessarily violated in order for the accident to have occurred (MCLA § 257.642). *Fredrickson* v. *Kool*, 62.
6. A driver having the statutory right-of-way at an intersection does not have an absolute right and both the favored driver on a through street and the inferior driver on the secondary street must exercise due care (MCLA § 257.649). *Sattiewhite* v. *de la Cuadra*, 117.
7. A motorist who has the statutory right-of-way at an intersection has the duties of making proper observation of existing conditions and of taking precautionary action as a result of the observation (MCLA § 257.649). *Sattiewhite* v. *de la Cuadra*, 117.
8. Determination that the plaintiff in an automobile negligence case was contributorily negligent in not keeping a proper look-out was supported by the record where evidence showed that the defendant's car was visible in enough time for the plaintiff, the favored driver on the through street, to have avoided the accident, the plaintiff testified that he did not see the defendant's vehicle until just before the accident, and the defendant testified that she had entered the intersection where the collision occurred slowly and was half-way in the intersection at the time of impact. *Sattiewhite* v. *de la Cuadra*, 117.
8. An "uninsured motor vehicle" is generally one with respect to which *neither the owner* nor the *operator* carried bodily injury liability insurance. *Bennett* v. *Pitts*, 530.
9. An automobile is an "insured motor vehicle" within the motor vehicle accident claims act even though the owner of the automobile does not have insurance where the driver of the auto-

AUTOMOBILES—Continued

mobile has insurance covering him, by a "while driving another car" provision, while driving the automobile in question; a defect in the driver's insurance which might be applicable to a claimant other than the one present is not relevant so long as the driver's policy is "in force" against the present claimant (MCLA § 257.1102(d). *Bennett* v. *Pitts*, 531.

10. Dismissal of complaints and warrants against defendant lessee of a truck for violating weight ordinances was improper even though the defendant lessee was originally charged with the driver of the truck and the penalty provision of the ordinance as to drivers was invalid under the applicable state statute's uniformity provision where the penalty provision as to lessees in the ordinance was the same as in the applicable state statute (MCLA § 257.724). *City of Dearborn* v. *Dixie Cartage, Inc.*, 573.

11. The motor vehicle code prohibits local units of government from enacting or enforcing a penalty provision that is in conflict with the state statute. *Green* v. *Dearborn Municipal Court*, 591.

12. A city's traffic ordinance providing for a fine of $500 upon conviction of drunk driving was invalid and unenforceable to the extent it conflicted with the state statute providing for a maximum fine of $100, because the state statute requires statewide uniformity; however, the city ordinance was valid and enforceable to the extent that the penalty was within the limits of the state statute (MCLA §§ 257.605, 257.625[b]). *Green* v. *Dearborn Municipal Court*, 591.

13. The uniformity provision of the motor vehicle code is a limitation, not a prohibition, upon the authority of local units of government to control their highways and streets (Const 1963, art 7, § 29; MCLA § 257.605). *Green* v. *Dearborn Municipal Court*, 591.

14. Evidence that defendant driver in an automobile negligence case was speeding, that he saw the plaintiff standing in the center of the road when he was ten car-lengths away, that he never varied his speed or course, that there were no cars either between the plaintiff and the defendant or to the defendant's right, that plaintiff was caught between and hit by another car, coming from the opposite direction, driven by a codefendant, and by the defendant's car, and that the plaintiff did not move at all while standing in the highway was sufficient to support a jury verdict that the defendant was guilty of negligence. *Wright* v. *Whitmire*, 692.

See

CONSTITUTIONAL LAW (10)
EVIDENCE (15)
INSURANCE (4)
SEARCHES AND SEIZURES (1, 13, 14, 16, 17)

BAIL—See

CRIMINAL LAW (37)

BASE TAX—See
TAXATION (5, 6)

"BASIC ANNUAL SALARY OR WAGE"—See
INSURANCE (11)

BELIEF—See
CRIMINAL LAW (90, 91)

BIRTH-CONTROL PILLS—See
CONSTITUTIONAL LAW (7)
DAMAGES (10)
DRUGGISTS (2)
HEALTH (1)

BODILY INJURY—See
INSURANCE (5, 8, 9)

BREACH OF CONTRACT—See
CONTRACTS (1)

BRIDGES—See
JUDGMENT (3)

BUILDING CODE—See
NEGLIGENCE (13)

BUILDINGS—See
LARCENY (2-4)

BURDEN OF PROCEEDING—See
AUTOMOBILES (2, 3)
NEGLIGENCE (3)

BURDEN OF PROOF—See
CONTRACTS (17)
CRIMINAL LAW (80)
EMINENT DOMAIN (20)
INSURANCE (1)
JUDGMENTS (7)
NEGLIGENCE (3)

BUSINESS INVITEES—See
NEGLIGENCE (16)

BUYER'S RISK—See
SALES (4)

CALLING WITNESSES—See
CRIMINAL LAW (64, 65)

CAPIAS—See
CRIMINAL LAW (37)

CARRYING A CONCEALED WEAPON—See
CRIMINAL LAW (80)

CASE LAW—See
CRIMINAL LAW (19)

CHAIN OF POSSESSION—See
EVIDENCE (14)

CHANGE OF USE—See
NEGLIGENCE (13)

CHANGES—See
CONTRACTS (18)

CHARACTER WITNESS—See
WITNESSES (2)

CHILDREN—See
DAMAGES (3–6, 8, 9)
PARENT AND CHILD (1)

CIRCUIT COURT COMMISSIONER'S CLERK—See
LIMITATION OF ACTIONS (1)

CIRCUMSTANTIAL EVIDENCE—See
CRIMINAL LAW (85)

CITIZEN'S COMPLAINT—See
CRIMINAL LAW (78, 79)

CITY PROPERTY—See
MUNICIPAL CORPORATIONS (1)

CIVIL SERVICE—See
OFFICERS (1)
SHERIFFS AND CONSTABLES (1, 2)

CLEAR LEGAL DUTY—See
MANDAMUS (1)

CLOSING ARGUMENT—See
APPEAL AND ERROR (3)
CRIMINAL LAW (10)

CODEFENDANTS—See
CRIMINAL LAW (50)

COLLECTING EVIDENCE—See
CRIMINAL LAW (14, 15)

COLOR OF TITLE—See
ADVERSE POSSESSION (1)

COMMENT ON SILENCE—See
CONSTITUTIONAL LAW (1, 2)

COMMISSIONS—See
ACCORD AND SATISFACTION (2)

COMMON-LAW NEGLIGENCE—See
AUTOMOBILES (4)

COMMUNICATION WITH JURY—See
JURY (4, 5)
TRIAL (4)

COMPENSATION—See
EMINENT DOMAIN (2–4, 6–8)

COMPETENCY—See
CRIMINAL LAW (31)

COMPLAINT—See
ARREST (2)
CRIMINAL LAW (116)

CONDEMNATION—See
EMINENT DOMAIN (1, 2, 4–20)
PROPERTY (1)

CONFESSIONS—See
CRIMINAL LAW (9, 20, 22, 23)

CONNOTATION OF "ROB"—See
ROBBERY (1)

CONSENT—See
SEARCHES AND SEIZURES (5)

CONSIDERATION—See
ACCORD AND SATISFACTION (1)

CONSTITUTIONAL ISSUES—See
CRIMINAL LAW (83)

CONSTITUTIONAL LAW

1. The constitutional privilege against self-incrimination protects a defendant from the introduction of evidence at his trial that he remained silent or claimed his Fifth Amendment privilege in the face of an accusation made after he was taken into custody (US Const, Am 5). *People* v. *Rolston*, 200.
2. The constitutional privilege against self-incrimination protects a defendant, whether he testifies at trial or not, from the introduction of evidence at his trial that he remained silent or claimed his Fifth Amendment privilege in the face of an accusation made after he was taken into custody, because it is intolerable that one constitutional right should have to be surrendered in order to assert another constitutional right (US Const, Am 5). *People* v. *Rolston*, 200.
3. A defendant who chooses to testify at his trial subjects himself to cross-examination on what he says, on both inculpatory and exculpatory matters; however, it is not legally relevant that on an earlier occasion he chose to exercise his right against self-incrimination and remain silent (US Const, Am 5). *People* v. *Rolston*, 201.

CONSTITUTIONAL LAW—Continued

4. The right to remain silent is severable, and, therefore, may be exercised on one occasion and waived on another (US Const, Am 5). *People* v. *Rolston*, 201.

5. The prosecutor may introduce a statement made by the defendant before the defendant's trial at a time when the defendant chose not to exercise his constitutional right to remain silent, because such a procedure does not penalize the exercise of the constitutional choice to speak or remain silent. *People* v. *Rolston*, 201.

6. Prosecutor's introducing into evidence and reading to the jury a transcript of the defendant's statement to the police in which the defendant exercised his constitutional right against self-incrimination by refusing to answer numerous questions was reversible error, even though the defendant took the stand at trial, because such a procedure chills the exercise of both the pretrial and the trial choices of whether to remain silent. *People* v. *Rolston*, 201.

7. The State, not being able to infringe upon the rights of a husband and wife to use contraceptives to limit the size of their family, may not negate these rights by completely denying access to the courts to sue for a pharmacist's negligence in filling an order for birth control pills. *Troppi* v. *Scarf*, 241.

8. The right to bear arms is subject to the reasonable exercise of the police power. *People* v. *McFadden*, 512.

9. Judicial policy favors decisions on grounds other than constitutional grounds. *Mulias* v. *City of Trenton*, 535.

10. Penalty provision in a municipal traffic ordinance that exceeds the maximum penalty permitted by the motor vehicle code does not render the entire ordinance unconstitutional (MCLA § 257.605). *Green* v. *Dearborn Municipal Court*, 591.

See
APPEAL AND ERROR (9)
CRIMINAL LAW (8)

CONSTRUCTION OF CONTRACTS—See
CONTRACTS (4–7)
INSURANCE (10, 11)
SALES (5)
VENDOR AND PURCHASER (2)

CONSTRUCTION OF STATUTES—See
RIOT (2)
STATUTES (1–3)
TAXATION (1)

CONSTRUCTIVE EVICTION—See
LANDLORD AND TENANT (1, 2, 3)

CONSTRUCTIVE TRUST—See
TRUSTS (1, 2, 3, 4)

CONTEMPT

1. Court was not required to order the defendant to answer questions posed by the grand jury before it found the defendant guilty of contempt of court where the petition for the order to show cause was for contempt for refusal to answer questions before the grand jury after being granted immunity (MCLA 1971 Cum Supp § 767.19c). *In re Spalter*, 458.

See
GRAND JURY (3)

CONTENTIONS OF PARTIES—See
APPEAL AND ERROR (6)

CONTINUANCE

1. Granting a continuance lies within the discretion of the court. *Isbey* v. *Isbey*, 185.
2. Denying a continuance to the defendant who sought a continuance because he was allegedly ill was not an abuse of discretion where the defendant's own medical expert testified that the defendant had uremic poisoning, was wearing a catheter, but that he had observed that the defendant had no symptoms which would prevent the defendant's appearance in court (GCR 1963, 503). *Isbey* v. *Isbey*, 185.
3. Granting or denying a motion for a continuance is discretionary and will not be reversed on appeal absent a showing of abuse of discretion. *Grove* v. *Story Oldsmobile, Inc.*, 613.
4. Denying defendant's motion for a continuance was not an abuse of discretion where the trial court, in its ruling, stated that it was willing to grant a continuance if the defendant showed what would be accomplished by a delay and defendant made no attempt to show the extra time could be advantageously used. *Grove* v. *Story Oldsmobile, Inc.*, 614.

See
CRIMINAL LAW (82)

CONTRACEPTIVES—See
CONSTITUTIONAL LAW (7)
HEALTH (1)

CONTRACTORS—See
CONTRACTS (3)
LICENSES (1)

CONTRACTS

1. Plaintiff's depositing checks from the defendants, even though working an accord and satisfaction as to disputed commissions due the plaintiff as of the date of the checks, did not cancel the defendants' debt for future commissions from the alleged breach of allegedly written and oral lifetime contracts providing for sales commissions where a release of the claim for the breaches of the contracts was not in the contemplation of the parties, as evidenced by the checks which were limited to the amount the defendants believed they owed the plaintiff as of the date of checks. *Gitre* v. *Kessler Products Co.*, 1.

CONTRACTS—Continued

2. One who enters into a contract to perform services or furnish materials in violation of a statute which is enacted to protect the public health, morals, and safety, and which contains a penal provision cannot maintain an action to recover on the contract. *Silver* v. *A. O. C. Corporation*, 147.
3. A plaintiff was not allowed to maintain a suit to recover on a contract to perform services and furnish materials for an electrical wiring job where the plaintiff was not licensed under the electrical administration act and where his work exceeded $50 in value (MCLA § 338.881 *et seq.*). *Silver* v. *A. O. C. Corporation*, 147.
4. Due regard must be given to the intentions of the parties to a contract as indicated by their language and the attendant facts and circumstances when construing the provisions of the contract, and such intent, when ascertained, must prevail over the literal meaning of the expressions used in the agreement. *Gary Boat Club, Inc.* v. *Oselka*, 465.
5. A court must determine the true intent of the parties to a contract by construction of the instrument where ambiguity exists. *Gary Boat Club, Inc.* v. *Oselka*, 466.
6. Determining the true intent of contracting parties demands that the trial court consider the language employed, the subject matter, and the surrounding circumstances under which the parties entered into the agreement; the court should effectuate the intent of the parties when the agreement was consummated. *Gary Boat Club, Inc.* v. *Oselka*, 466.
7. Determination that an ambiguous contract provision giving the plaintiff the right, after 5 years, to buy the defendants' real estate unless the land was needed for the development of a harbor by the government or for the construction by the defendants of a new navigation channel meant that the option was not exercisable if the land was needed for a government harbor and if for only that reason the defendants had to build a new navigation channel where, during the five-year period in which the option was not exercisable, the defendants had never applied for any of the necessary permits to construct a channel or for a permit to construct a retaining wall, necessary to prevent the flooding of any excavation, and a hole dug in the disputed land was completely flooded for several years. *Gary Boat Club, Inc.* v. *Oselka*, 466.
8. A writing is not a contract when it fails to express that on which the minds of the parties met; a mistake of expression occurs where the parties are of the same mind regarding the terms of the agreement but the writing intended to embrace those terms does not express their true meaning. *R. E. Dailey & Co.* v. *Highway Dept.*, 518.
9. Awarding plaintiff contractor damages for extra work done on welding a bridge, necessitated by the defendant's request that the welding method conform to the American Welding Society's specifications was proper even though the written contract between the parties provided that the society's specifications would be followed where the parties admitted that,

CONTRACTS—Continued

at the time of contracting, they intended the general industry practice at that time to be followed, the industry practice was followed by the plaintiff with the defendant's approval, the society's specifications were changed while the work was being performed, and the new specifications were not the same as the trade custom at the time of contracting, because the contract requirement that the welding conform to the society's specifications did not express the intent of the parties and, thus, did not constitute their real contract. *R. E. Dailey & Co.* v. *Highway Dept.*, 518.

10. Reliance by plaintiff contractor on defendant builder's estimate of the amount of concrete necessary was justified even though the defendant's offer stated that its estimates were not guaranteed where the plaintiff had only a short time to prepare its bid and where there were several omissions and errors in the estimate the defendant prepared. *R. E. Dailey & Co.* v. *Highway Dept.*, 519.

11. The parol evidence rule does not bar evidence of fraud, lack of acceptance, or any defense which, if proven, would vitiate the contract, because such evidence does not vary or contradict the written contract, but seeks to demonstrate that the writing never became a contract. *Komraus Plumbing* v. *Cadillac Sands*, 674.

12. A voidable contract existed between a motel builder and a subcontractor where the contractor, acting as an agent for the subcontractor, submitted a contract offer for plumbing to the builder from the subcontractor, the contract offer had been signed by the contractor without the subcontractor's consent and the contractor told the builder that it had signed the offer only to secure a performance bond and that no contractual relations would exist between the builder and the subcontractor, because a contract induced by fraud is voidable by the party defrauded. *Komraus Plumbing* v. *Cadillac Sands*, 675.

13. A contract induced by fraud is voidable by the party defrauded even if the fraud succeeds because of a party's negligence. *Komraus Plumbing* v. *Cadillac Sands*, 675.

14. The abandonment of a contract is a matter of intention; it need not be expressed, but may be inferred from the conduct of the parties and the attendant circumstances. *Dault* v. *Schulte*, 698.

15. A contract will be treated as abandoned where one party acquiesces in the other party's acts which are inconsistent with the contract. *Dault* v. *Schulte*, 698.

16. Acquiescence by plaintiff-contractor in defendant's change of contract plans which were inconsistent with their written contract constituted abandonment of the contract. *Dault* v. *Schulte*, 699.

17. The burden of proving abandonment or modification of a written agreement rests upon the party asserting abandonment. *Dault* v. *Schulte*, 699.

CONTRACTS—Continued

18. Evidence of contract changes and their costs is, as a general rule, by necessity admissible to show modification or abandonment of the contract, because the party asserting modification or abandonment must be permitted to introduce evidence to substantiate his position. *Dault* v. *Schulte,* 699.
19. Time and labor costs incurred by plaintiff contractor after he had acquiesced in, and had carried out, defendant's changes in their written contract were properly admitted to show modification or abandonment of the contract. *Dault* v. *Schulte,* 699.

See
ACCORD AND SATISFACTION (1, 2)
CORPORATIONS (1, 2)
INSURANCE (10, 11)
JUDGMENT (3–5)
REFORMATION OF INSTRUMENTS (1)

CONTRIBUTORY NEGLIGENCE—See
AUTOMOBILES (8)
NEGLIGENCE (15, 16)

CONVEYANCE IN TRUST—See
TRUSTS (2, 4)

CONVICTION—See
EVIDENCE (5)

CORPORATIONS

1. A corporation which does not file its annual report or pay its annual privilege fee, as required by statute, is precluded from enforcing any contract made by it while in default (MCLA § 450.87). *Stoneleigh Homes* v. *Jerome Bldg. Co.,* 542.
2. A corporation which did not file its annual report, as required by statute, but later filed its annual report can recover on a quantum meruit basis for services rendered and materials furnished to a defendant during the time when it was not in default (MCLA § 450.87). *Stoneleigh Homes* v. *Jerome Bldg. Co.,* 542.

See
EVIDENCE (2–4)
TAXATION (2)

CORPUS DELICTI—See
CRIMINAL LAW (85)

CORROBORATION—See
EVIDENCE (2–4)

COSTS OF CHANGES—See
CONTRACTS (18)

COUNSEL—See
CRIMINAL LAW (62–67, 83, 98)

COUNTIES—See
SHERIFFS AND CONSTABLES (4)

COURT RULES—See
APPEAL AND ERROR (2)
CRIMINAL LAW (31, 50)

COURTS
1. A court speaks by its orders, not its opinion. *In re Spalter*, 458.

See
CRIMINAL LAW (7)

CREDIBILITY—See
APPEAL AND ERROR (5)
CRIMINAL LAW (60, 103)
EVIDENCE (4)
WITNESSES (1, 3)

CRIMINAL ACTS OF INSURED—See
INSURANCE (6)

CRIMINAL LAW
1. Failing to strike a witness's identification testimony of the defendant was not error even though the witness testified that she had been shown photographs of the defendant but was unable to identify him, that she had seen the defendant's picture in the newspaper and on television, but still couldn't identify him, that she was unable to identify the defendant at a showup, but that she was later able to identify the defendant at a second showup and where the witness's testimony was unclear and contradictory, because the weight to be given identification testimony is for the trier of fact to decide. *People* v. *DuPuie*, 14.
2. Statute mandating prosecution against a prison inmate be commenced within 180 days from a Department of Correction's request for final disposition does not require that the trial itself occur within the 180-day period; all that is required to comply with the statute is that there be a good faith initiation of the prosecution within 180 days and reasonable diligence thereafter in proceeding with the case. *People* v. *Downing*, 31.
3. Failure to instruct the jury on the effect of intoxication on specific intent crimes in defendant's trial for armed robbery did not constitute error even though there was evidence that the defendant had been drinking alcoholic beverages for several hours before the robbery where neither the prosecution nor the defense requested an instruction, and the defense advised the court they preferred no instruction on intoxication because the theory of the defense was that the robbery never took place and that the defendant was in possession of his faculties throughout the evening. *People* v. *Turner*, 44.
4. Defendant's claim on appeal for a reversal and new trial because of the failure of the court reporter timely to file a

CRIMINAL LAW—Continued

transcript of closing arguments in the defendant's trial was moot where the transcript had been subsequently filed and counsel for the defendant was afforded sufficient time to assert any error in closing arguments, but no claim of error was asserted. *People* v. *Jones*, 68.

5. Trial court's instruction to the jury that they could not return a general verdict of "not guilty" and that a verdict of not guilty would not be accepted by the court in absence of an explanation of insanity was reversible error. *People* v. *Shuck*, 70.

6. A criminal defendant who made no formal or informal demand for a speedier trial before the actual trial cannot complain on appeal about the delay. *People* v. *Love*, 85.

7. Trial court has the inherent power to compel a criminal defendant who has raised an insanity defense to undergo a psychiatric examination. *People* v. *J. C. Lewis, Jr.*, 91.

8. Compelling a criminal defendant to submit to a psychiatric examination does not *per se* violate the defendant's constitutional right against self-incrimination where the underlying purpose of the examination is to obtain data germane to the question of sanity and not to obtain facts relating to the defendant's participation in the crime charged (US Const, Am 5). *People* v. *J. C. Lewis, Jr.*, 91.

9. Determination that defendant's confession was voluntary was not error even though the defendant testified that he was not advised of his rights prior to his confession and that he never made a statement to the police, where the police detective, to whom the confession was made, testified that he gave defendant the required warnings of constitutional rights, because the issue before the trial court was one of credibility. *People* v. *Stroble*, 94.

10. Contention that the defendant was prejudiced by the prosecutor's remark on closing argument expressing his personal belief that the testimony of a police officer, to whom the defendant confessed, was true, was precluded from review where defendant neither objected to the form or content of the closing remarks nor requested an instruction concerning the prosecutor's remarks. *People* v. *Stroble*, 94.

11. Defendant was not entitled to a reversal of his conviction of first-degree murder under the Interstate Agreement on Detainers Act even though his trial commenced more than 120 days after his arrival in the state where the defendant, by his own act, delayed the commencement of trial beyond the 120-day limit, by seeking *habeas corpus* in federal court and where the defendant had been returned to this state for both assault with intent to murder and first-degree murder and was tried and convicted of the assault charge prior to the passing of 120 days (MCLA § 780.601). *People* v. *Stroble*, 94.

12. The failure of the prosecution to indorse the names of *res gestae* witnesses on an information cannot be raised for the first time on a motion for a new trial. *People* v. *Harris*, 100.

CRIMINAL LAW—Continued

13. Improper remarks by prosecutor during a criminal trial do not constitute reversible error where made primarily in response to matters previously discussed by defense counsel. *People* v. *Harris*, 100.

14. The police and prosecution do not have the duty to exhaust all scientific means available in collecting evidence at the scene of a crime. *People* v. *Baber*, 106.

15. Police failure to check footprints in the snow near the scene of a breaking and entering with which defendant was charged to determine whether they matched defendant's footprints, failure to test a gun found at the scene of the crime for fingerprints even though the weapon did not belong to the complainant, failure to check a broken window and screen through which the defendant allegedly escaped for fibers of clothing to be compared with the defendant's clothing, and failure to check the house broken into for fingerprints did not constitute a denial of due process. *People* v. *Baber*, 106.

16. Identification procedure in which the complainant was shown mug shots of her assailant and made a preliminary identification of the defendant as her assailant and in which the complainant identified the defendant at a lineup was not so prejudicial as to taint the subsequent in-court identification even though the complainant was hesitant about the accuracy of her identification testimony at the preliminary examination where at the defendant's trial, complainant stated she was positive about the identification. *People* v. *Hearndon*, 113.

17. Contentions of the defendant, convicted of rape, that the complainant, who identified the defendant, stated outside the court room that she wasn't sure who had raped her and that the complainant said that because she was sick of the "whole mess", if something wasn't done on that day she wouldn't come to court anymore, concern the weight of the evidence and can be raised only on a motion for a new trial. *People* v. *Hearndon*, 113.

18. Refusal to declare a mistrial because the prosecutor, in his opening statement, mentioned that a gun was found in a parking lot, the scene of the robbery charged, 13 hours after the robbery in which defendant allegedly participated had occurred, was not error even though the gun was later held held inadmissible where the court instructed the jury to disregard the remark and where the prosecutor at the time he made the remark had no reason to believe or to know that the gun would not be admissible. *People* v. *Miller*, 121.

19. The "right-wrong, irresistible impulse test" for criminal responsibility remains the law until the Michigan Supreme Court or the Legislature changes it and, until the rule is so changed, the Court of Appeals is bound by established precedent to conform its holdings to the "right-wrong, irresistible impulse test". *People* v. *Getterson*, 124.

20. A plea of guilty is voluntary if it is knowingly and understandingly made with benefit of counsel, irrespective of the existence of an illegally-obtained confession. *People* v. *Knopek*, 129.

CRIMINAL LAW—Continued

21. A plea of guilty was voluntarily made where the trial judge before accepting the plea explained the offense charged, examined the defendant as to the reasons for his plea, discussed possible alternative pleas, explained that a guilty plea constituted a waiver of certain rights, indicated potential consequences which could ensue from a guilty plea, and where the defendant had an adequate opportunity to consult with counsel prior to entering the plea. *People* v. *Knopek*, 129.

22. A plea of guilty made, after proper examination by the trial judge, to circumvent the expense of trial and perhaps motivated by hopes of leniency will not entitle a defendant after conviction to a hearing on the question of whether a coerced confession led to the guilty plea if the defendant simply adduces evidence indicating that the confession was coerced and that it contributed to his guilty plea. *People* v. *Knopek*, 129.

23. The trial judge has no duty before accepting a plea of guilty to inquire *sua sponte* whether the defendant has made an out-of-court confession. *People* v. *Knopek*, 129.

24. Appellate courts reviewing guilty plea proceedings should address themselves to questions of substance, rather than form; the principal query should be whether there has been a miscarriage of justice. *People* v. *Knopek*, 130.

25. Defendant's conviction of possession of marijuana was supported by sufficient evidence where a witness, defendant's girl friend, testified that she had smoked marijuana the day of defendant's arrest with the defendant, that later she had taken the remainder of the marijuana to make a sale, that she and the defendant were to split the profits from the sale, and that after the sale, which was to a police informer who had given her marked money, she returned to the defendant's motel room, and where, even though no marijuana was found in defendant's possession, the marked money was found in defendant's possession (MCLA § 355.153). *People* v. *Parker*, 133.

26. Assertions of personal knowledge by the prosecutor in his argument to the jury are clearly improper. *People* v. *Miron*, 142.

27. Failure to object to prosecutor's improper jury argument precludes review of it in the absence of a showing of a manifest injustice. *People* v. *Miron*, 142.

28. Venue is not an element of a crime. *People v. Hatch*, 154.

29. Failure to establish venue when accepting a plea of guilty is not error. *People* v. *Hatch*, 154.

30. The taking of indecent liberties necessarily constitutes an assault; an assault separate and apart from the taking of the indecent liberties need not be proved to sustain a conviction of taking indecent liberties with a child under 16 years old (MCLA § 750.336). *People* v. *Osborn*, 156.

31. A criminal defendant who shows that he may be incompetent *shall* be committed by the court to a forensic center for psychiatric examination; a court's failure to comply with this rule results in reversible error (GCR 1963, 786). *People* v. *Ledbetter*, 160.

CRIMINAL LAW—Continued

32. Failure of defendant's counsel to have a copy of the presentence report did not constitute error where counsel never requested to see the report because even if a request had been made, the granting of the request was within the sound discretion of the trial judge. *People* v. *Goniwicha*, 175.

33. Failure to inform a defendant that he waives his right against self-incrimination by entering a plea of guilty is not reversible error because there is no requirement compelling the court to inform the defendant that he is waiving certain constitutional rights; the only requirement prescribed by statute, court rule, or case law is that the guilty plea be voluntarily and intelligently made. *People* v. *Brewer*, 177.

34. Sufficient facts were elicited from the guilty-pleading defendant to establish his commission of an attempted breaking and entering where defendant, while represented by counsel, admitted breaking into the building, denied his plea of guilty was coerced, asserted that his plea was voluntary, and was advised of the consequences of his plea. *People* v. *Brewer*, 177.

35. Acceptance of a proper plea of guilty does not require that the defendant establish each element of the offense charged by his testimony. *People* v. *Allen*, 183.

36. A person "sells" marijuana within the meaning of the narcotics act whether he acts as a principal, proprietor, agent, servant, or employee in the transaction (MCLA § 335.51). *People* v. *Boone*, 193.

37. Failure of jail record to reflect a docket entry showing the removal of a *capias* previously issued for defendant's failure to appear at the trial of a charge unrelated to the one being appealed, which resulted in the defendant's continued incarceration until the time of trial on the charge now on appeal, did not result in a miscarriage of justice where defendant was represented by counsel throughout the entire trial court proceeding and the record reveals that defendant was credited with all time served in jail prior to the imposition of sentence and that not even after the *capias* had been removed did defendant seek his release on bond. *People* v. *Collins*, 197.

38. A criminal defendant who voluntarily takes the stand waives his right against self-incrimination and may be questioned as to all other relevant facts, including his silence on prior occasions, because to hold otherwise would allow a defendant to fabricate his testimony without fear of impeachment and because the defendant's silence before trial may go to his credibility. People v. *Rolston*, 201.

39. A criminal conviction should be reversed only where it fairly appears that the defendant's rights have been prejudiced. People v. *Rolston*, 202.

40. The conviction of the principal is no longer necessary to sustain an accessory's conviction; however, the guilt of the principal must still be shown. *People* v. *Laine*, 271.

41. Accepting defendant's plea of guilty of felonious assault was not error even though the defendant's recitation indicated that

CRIMINAL LAW—Continued

the stabbing in question was accidental, where the defendant later indicated his willingness to tell the truth and the court then continued the examination and determined the defendant's guilt. *People* v. *Mulligan*, 274.

42. Plea of guilty was properly accepted where the record reveals defendant's ability to recall the details of the crime, the court elicited a detailed version of the acts regarding the crime, and defendant's claim of intoxication was not substantiated by the record. *People* v. *Mulligan*, 274.

43. Defendant's plea of guilty was properly accepted by the court where the record contains a substantial factual basis for the plea, even disregarding the court's questioning the defendant as to the facts of the crime and his participation in it, the transcript of the preliminary examination alone contains a substantial factual basis for the plea, and the transcript adequately demonstrates the voluntariness of defendant's plea. *People* v. *Peoples*, 278.

44. Trial judge's failure to examine a guilty-pleading defendant at the plea-taking proceeding regarding the defendant's participation in the crime charged is not necessarily fatal to defendant's plea of guilty; the trial judge is required only to reasonably ascertain the truth of the guilty plea before accepting it. *People* v. *Kuchulan*, 280.

45. The truth of a plea of guilty is ascertained when the record discloses a substantial factual basis for it. *People* v. *Kuchulan*, 280.

46. A substantial factual basis for defendant's plea of guilty existed even though the defendant was not questioned at the plea-taking proceeding regarding his participation in the crime where the preliminary examination transcript furnishes a substantial basis and where the defendant entered his plea during the second day of trial and just after a codefendant was questioned regarding his participation in the offense. *People* v. *Kuchulan*, 280.

47. The trial court has no duty to explain *sua sponte* to a defendant who pleads guilty the defense of insanity. *People* v. *John Martin*, 283.

48. The rights of a defendant, who pled guilty, were fully protected with regard to a possible defense of insanity where the court, pursuant to statute, ordered a psychiatric evaluation (MCLA § 767.27a). *People* v. *John Martin*, 283.

49. Plea of guilty was properly accepted even though the defendant was at first reluctant to implicate himself in the crime of which he pled guilty where the trial court recessed so that the defendant could consult with counsel and when the proceedings resumed, the defendant admitted sufficient facts to substantiate the truthfulness of his plea. *People* v. *Bryant*, 297.

50. Interrogating three codefendants jointly during the taking of their pleas of guilty was not error where the transcript of the interrogation shows that the trial judge obtained a separate,

CRIMINAL LAW—Continued

distinct, and clear response from each of the defendants as to each question which he put to them collectively and that he separately and clearly established as to each defendant that defendant's participation in the commission of the offense (GCR 1963, 785.3[2]). *People* v. *Trice,* 299.

51. Prosecutor's overzealous emphasis to the jury concerning a rectal wound on the victim of a murder was disapproved by the Court of Appeals; however, since no objection or motion for a corrective instruction or a mistrial was made, the error was not preserved for review. *People* v. *Morrin,* 305.

52. A defendant's appearing *in propria persona* on appeal does not relieve the prosecutor of the onus of meeting the defendant's allegations of error since the arguments of defendants who act in their own behalf are considered with the same circumspection as arguments advanced by counsel who represent defendants on appeal; a prosecutor has a duty to meet and to counter arguments advanced by appellants. *People* v. *Tofil,* 342.

53. A testifying defendant may be impeached by a prior inconsistent statement to police officers where he voluntarily made the statement after he had been advised of his constitutional rights. *People* v. *Tofil,* 342.

54. A statement by the defendant was not inadmissible on the ground that the defendant was detained for arraignment, thus allegedly rendering the statement involuntary, where the statement, that the defendant had not been at the scene of the crime with which he was charged, was made during the morning following the defendant's arrest, the defendant was advised of his constitutional rights before questioning, the statement was made during questioning concerning the defendant's family history, and because the statement was not a confession or inculpatory, but was a self-serving statement. *People* v. *Tofil,* 342.

55. Prosecutor was not precluded from using the defendant's statement, made after the defendant's arrest that he had not been at the scene of the crime with which he was charged, even though the prosecutor filed notice that the defendant's confessions or admissions would not be introduced because the defendant's statement was neither a confession nor an admission and where the prosecutor did not introduce the statement as part of the prosecution's case in chief, but used it only to impeach the defendant's credibility. *People* v. *Tofil,* 343.

56. An identification lineup is not held in an unduly suggestive manner merely because every member of the lineup does not resemble the accused. *People* v. *Tofil,* 343.

57. In-court identification of the defendant as the man who fled from the scene of an armed robbery was not tainted by an alleged illegal lineup confrontation where an attorney was present at the identification lineup and the identifying witness had no difficulty in selecting the defendant at the lineup or at the defendant's trial as the man he observed on the night

CRIMINAL LAW—Continued

of the robbery, because, even assuming the existence of irregularities at the lineup, an independent source of identification existed. *People* v. *Tofil*, 343.

58. Refusing access to psychiatric records in the Recorder's Court Psychiatric Clinic about the mental condition of the prosecution's key witness and refusing to allow the defendants to examine the reports was not error where the existence of the records was disclosed, and the records and the doctors who had examined the witness were subject to subpoena and could have been reached by the defense. *People* v. *McGath*, 351.

59. A criminal defendant has no standing to assert that delays in the sentencing of the key witness against him violated the defendant's own rights. *People* v. *McGath*, 351.

60. The question whether the prosecution's key witness was telling the truth even though the sentencing of the witness had been repeatedly delayed until after he testified against the defendant, thereby giving rise to the possibility that leniency had been promised him, was a question for the jury to decide. *People* v. *McGath*, 351.

61. Failure to give *sua sponte* a limiting instruction to the jury concerning the prosecution's key witness's testimony that he had accomplices in other robberies in which he participated, leaving open the possibilty that the jury might infer that the witness was referring to the defendants was not error where no limiting instruction was requested. *People* v. *McGath*, 351.

62. Defendant was not denied effective counsel even though defense counsel failed to object to a police officer's testimony that the officer found a gun in defendant's photography studio at the time of the defendant's arrest where defense counsel requested an instruction to the jury regarding the gun and the trial judge told the jury to disregard testimony concerning the gun. *People* v. *McGath*, 352.

63. A criminal defendant's conviction will not be reversed on the ground of ineffectiveness of counsel unless the lawyer's mistake is so serious that it may have been decisive in bringing about defendant's conviction. *People* v. *McGath*, 352.

64. Defendant was not denied effective counsel on the ground that counsel was not given adequate time to prepare his defense, particularly time to interview alibi witnesses even though defense counsel failed to call the six alibi witnesses that he said he would call during *voir dire* where three alibi witnesses were called, counsel announced that two of the uncalled witnesses would not be called because their testimony would be cumulative, the court indicated its willingness to allow defense counsel time to prepare his case, and defense counsel at no time expressed dissatisfaction with the time allowed. *People* v. *McGath*, 352.

65. Defense counsel's failure to call some alibi witnesses that the defendant thought should have been called does not amount to a denial of effective counsel; the decision to call witnesses to testify is a matter of trial strategy best left to counsel's discretion. *People* v. *McGath*, 352.

CRIMINAL LAW—Continued

66. A defendant has the right to represent himself in court; however the trial court does not commit reversible error in permitting assigned counsel to continue to represent the defendant where the defendant does not assert his right to defend himself and where it cannot be inferred from the record that the defendant wants to represent himself. *People* v. *McGath*, 353.

67. Defendant was not denied the right to conduct his own defense where his only expression of dissatisfaction with his lawyer occurred before trial, after consulting with his court-appointed attorney who continued to represent the defendant without objection, and the defendant desired not to represent himself but to have another attorney represent him. *People* v. *McGath*, 353.

68. Imposition of sentences is within the trial court's discretion; sentences which are within the statutory maximum will not be reviewed on appeal. *People* v. *McGath*, 353.

69. A prosecutor has no authority to stipulate away the provisions of a duly enacted statute; a prosecution has no authority to delete or unilaterally change any part of a duly-enacted statute. *People* v. *Harry James Smith*, 366.

70. Statute that defines marijuana as a narcotic cannot be changed by prosecutor's stipulations in open court that marijuana was not properly classified as a narcotic drug in the medical sense of the word (MCLA § 335.151). *People* v. *Harry James Smith*, 366.

71. Allowing the prosecutor to question the defendant about a breaking and entering arrest for which there had been no conviction in an attempt to impeach the defendant's credibility was not reversible error where the case was tried before the decision holding that questioning about a felony arrest that did not result in conviction was error. *People* v. *Frank*, 378.

72. Allowing the prosecutor to impeach the defendant's credibility by asking the defendant about a breaking and entering arrest which did not result in conviction was not reversible error where the defendant was properly questioned about two breaking and entering convictions, because the improper evidence was merely cumulative. *People* v. *Frank*, 378.

73. Police officer's stating that he knew that there was a statutory rape warrant for defendant's arrest when asked by defense counsel if he knew that there was a "financial responsibility" warrant for defendant's arrest did not constitute reversible error where the prosecutor never brought up the issue of outstanding warrants, never pursued the issue, and did not emphasize it in closing remarks. *People* v. *Frank*, 379.

74. Refusing to allow an investigator for defense counsel to testify that two witnesses, who at trial said that the defendant had been with them the night before the crime charged was committed, had told him that the defendant had been in a bar with them on the night the offense occurred was proper where the trial judge said that he would allow defense counsel

CRIMINAL LAW—Continued

to impeach the witnesses directly by prior inconsistent statement. *People* v. *Frank*, 379.

75. Fingerprinting an accused is permissible where there has been a valid arrest and the police conduct does not shock the conscience of the courts (US Const, Am 4). *People* v. *Gill*, 395.

76. Refusing to suppress fingerprints of the defendant, taken after a valid arrest on probable cause, consisting of the facts that a fingerprint on the murder victim's shoe matched the fingerprint on an old arrest card of "Joseph Gill" and that the defendant was named "Joseph Gill" was proper even though the defendant had once before been unlawfully arrested on the same murder charge and illegally fingerprinted. *People* v. *Gill*, 395.

77. Denying a motion for a mistrial, based on the prosecution's asking the person who fingerprinted the defendant, charged with murder, whether the witness had made any comment to the defendant about the rough area on one of the defendant's fingers was not an abuse of discretion where the trial court ruled the question improper, the defense withdrew its objection to the question, and a curative instruction to the jury was given. *People* v. *Gill*, 396.

78. A policeman has a duty to investigate citizen's complaint. *People* v. *Gilleylen*, 416.

79. The police had probable cause to arrest the defendant where the police were lawfully present to make a routine inquiry based on a citizen's complaint and heard, as they approached a car, something hit the ground and discovered a gun on the ground near the car. *People* v. *Gilleylen*, 416.

80. The burden of establishing any exception, excuse, proviso, or exemption to a charge of carrying a concealed weapon is upon the defendant; the prosecution need not prove that a defendant did not have a license to carry the weapon in another state. *People* v. *Gilleylen*, 417.

81. The rule that the prosecution may not question a criminal defendant about previous arrests which did not result in convictions does not apply to trials commenced before May 5, 1969. *People* v. *Gilleylen*, 417.

82. Refusal to grant a continuance to allow the defense to assemble its alibi witnesses who had gone out-of-state was not an abuse of discretion where the record indicates that the defense had adequate time to prepare its case and where granting the continuance would have unreasonably delayed the trial. *People* v. *Gilleylen*, 417.

83. Defendant's contention that his trial counsel was ineffective because counsel failed to timely raise a viable search and seizure issue was without merit where, by trial counsel's own explanation, the events which would have indicated a substantial search and seizure problem had not been related to him until after a timely motion could have been made. *People* v. *Willie Lee Lewis*, 433.

CRIMINAL LAW—Continued

84. Admission into defendant's trial, held before a United States Supreme Court's decision that an accused must be warned of his constitutional rights when taken into custody, of defendant's statements did not constitute a manifest injustice where the statements were exculpatory, the statements were corroborated by the defendant's own testimony at trial, and where no objection was raised in the trial court to the admission of the statements. *People* v. *Willie Lee Lewis,* 433.

85. Introducing a defendant's statements into evidence before introducing proof of the *corpus delicti* is not necessarily error in a case based on circumstantial evidence because the proof of the *corpus delicti* and of the defendant's guilt may be so interwoven as to dictate a chronological presentation for the jury's understanding. *People* v. *Willie Lee Lewis,* 433.

86. Refusal to grant a new trial on the basis of newly-discovered evidence, an affidavit from a fellow inmate of the defendant stating that the testimony of one of the witnesses was a fabrication, was not an abuse of discretion where the sworn statement contained an admission that the defendant was well aware of the affiant's information before trial. *People* v. *Willie Lee Lewis,* 434.

87. Prosecution's reference during defendant's trial to a *res gestae* witness who was unavailable at the trial was improper, but not prejudicial, where the record shows that any prejudicial effect was abrogated by testimony establishing that both the defendant and the missing witness had denied being with each other the night of the crime charged. *People* v. *Willie Lee Lewis,* 434.

88. Failure to give an instruction to the jury on the presumption of innocence is not necessarily reversible error. *People* v. *Heard,* 440.

89. Failure to instruct the jury that the presumption of innocence "goes into the jury room" with them was not error where the trial court instructed that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. *People* v. *Heard,* 440.

90. A prosecutor cannot tell a jury that he believes that the defendant is guilty; however, the prosecutor can argue that from the testimony that the defendant is guilty and can state whether the evidence convinces him and should convince the jury of the defendant's guilt. *People* v. *Garcia,* 447.

91. Prosecutor's remark during closing argument that the defendant was guilty did not constitute prejudicial error on the ground that the remark showed the prosecutor's own belief where the prosecutor also stated that he was not asking the jury to find the defendant guilty on no evidence and that there was ample evidence to find the defendant guilty. *People* v. *Garcia,* 447.

92. Prosecutor's remark, on closing argument, implying that unless the citizenry kept people like the defendant, charged with rioting, off the streets riots would occur again in their com-

CRIMINAL LAW—Continued

munity was overzealous but not so inflammatory as to deprive the defendant of a fair trial. *People* v. *Garcia,* 448.

93. A trial judge before accepting a plea of guilty must ascertain from the defendant that the plea is freely, understandingly, and voluntarily made; but the trial judge is not required to obtain from the defendant the facts of the offense (GCR 1963. 785.3[2]; MCLA § 768.35). *People* v. *Head,* 491.

94. A plea of guilty establishes the crime charged and the guilty-pleading defendant's participation in the crime (GCR 1963, 785.3[2]). *People* v. *Head,* 491.

95. The trial judge has no duty to allow either party an opportunity to examine a presentence report on the defendant; review of the presentence report rests in the sound discretion of the trial court. *People* v. *McFadden,* 513.

96. Allowing a defendant to make handwriting samples in court for comparison purpose where the prosecution objects to the defendant's request is in the trial judge's discretion, because the evidential value of in-court exemplars is questionable in that they are self-serving and would present an opportunity for fabrication. *People* v. *Kennedy,* 538.

97. Prosecutor's holding up a four-page proposed exhibit and then eliciting testimony from a police officer that the exhibit was the driving record of the defendant, charged with a traffic offense, even though the jury was instructed to disregard it, constituted reversible error and deprived the defendant of a fair trial, because the evidence was clearly inadmissible and because the damage had already been done to the defendant's cause in the minds of the jury. *People* v. *Milkovich,* 582.

98. The number of hours an attorney spent conferring with his client defendant and other witnesses is not in itself sufficient to raise the issue of the inadequacy of counsel. *People* v. *Vaughn,* 600.

99. Denying defendant's motion to admit alibi testimony was proper even though the trial court indicated in its opinion that the motion came too late as a matter of law where the motion to admit was made after the swearing of the jury and prior to the taking of proofs, defense counsel was present at preliminary examination where the matter of alibi could have been discussed, and defense counsel stated that the theory of alibi was discussed several times during counsel's representation of the defendant, but that the defense of alibi was not decided upon until the day of trial (MCLA § 768.20). *People* v. *Vaughn,* 600.

100. Failure to instruct on the lesser included offenses was not error where there was no evidence to support a lesser included offense, there was no request for an instruction, and where the defense was alibi. *People* v. *Stephen,* 604.

101. The prosecution's due diligence in attempting to locate an indorsed *res gestae* witness, who was not produced at trial, need not be submitted to the jury. *People* v. *Stephen,* 604.

CRIMINAL LAW—Continued

102. Precluding a defense witness who is not indorsed on the defendant's notice of alibi from testifying is not error (MCLA § 768.20). *People* v. *Stephen,* 605.

103. Resolution of conflicting testimony of witnesses regarding the identification of the defendant as the man who committed the crime charged is a question of fact; the trier of fact is the sole judge of the credibility of witnesses in a criminal case. *People* v. *George Martin,* 624.

104. New trial was properly denied a defendant convicted of armed robbery where the record contained ample evidence to establish all the elements of the offense charged and sufficient testimony identifying the defendant as a participant in the crime charged. *People* v. *George Martin,* 624.

105. Prosecutor's remark to the jury in closing argument that the judge, not the jury, would decide the sentence did not prejudice defendant's right to a fair trial. *People* v. *Sheehy,* 628.

106. A request by the prosecutor for a verdict of guilty at the conclusion of the people's argument to the jury does not constitute a statement as to what the prosecutor personally believes about the guilt or innocence of the defendant. *People* v. *Sheehy,* 629.

107. A prosecuting attorney is the chief law enforcement officer of his county. *People* v. *Graves,* 635.

108. A prosecuting attorney has a right to exercise discretion in determining under which applicable statute a prosecution will be instituted. *People* v. *Graves,* 635.

109. The specificity of a police investigation, *i.e.,* whether the investigation has focused on one suspect and has become accusatory rather than investigatory, determines whether a suspect must be warned of his constitutional rights. *People* v. *Wasson,* 638.

110. Police did not have to advise the defendant of his constitutional rights where the defendant voluntarily complied with a request to come to the police station for questioning and after questioning he was not placed in protective custody but was permitted to leave. *People* v. *Wasson,* 639.

111. A person does not have to be advised of his constitutional rights before a police interview is held if the purpose of police interview is investigatory rather than accusatory and if, in submitting to the interview, the suspect was not substantially deprived of his freedom of action in any way. *People* v. *Wasson,* 639.

112. A defendant testifying at his own trial may not be asked if he has been previously arrested or charged with a crime where the arrest or charge did not result in his conviction and where the only purpose of such question is to impeach the defendant's credibility. *People* v. *Wasson,* 639.

113. Permitting prosecution to cross-examine defendant, charged with receiving stolen property, regarding his prior arrests which did not result in convictions constituted prejudicial error where

CRIMINAL LAW—Continued

the only purpose was to impeach defendant's credibility and where the defendant's credibility, whether he knew that the motorcycle which he had placed in the hands of a repairman had been stolen, was a most important issue. *People* v. *Wasson*, 639.

114. Records of juvenile arrests or juvenile court convictions may not be introduced against a defendant in adult criminal proceedings (MCLA § 712A.23). *People* v. *Wasson*, 639.

115. The name of a police informer may be withheld in order to protect the informer and insure his continued cooperation where the informer is not also a material witness on the issue of defendant's guilt. *People* v. *Wenrich*, 644.

116. Contention that the statute requiring indorsement of *res gestae* witnesses on all informations would also require indorsement of witnesses on a complaint in misdemeanor cases where no information is filed was not determined where the defendants failed to show that permitting an unindorsed *res gestae* witness, the arresting officer, to testify in defendants' misdemeanor trial over their objection prejudiced their rights in any significant way (MCLA § 767.40; GCR 1963, 529.1). *People* v. *Boykin*, 681.

See
ARREST (2)
AUTOMOBILES (12)
FORGERY (1)
LARCENY (1)
PARDON AND PAROLE (1)
RAPE (1)
RIOT (2)

CROSS-EXAMINATION—See
CONSTITUTIONAL LAW (3)
EVIDENCE (6)
HOMICIDE (22)
WITNESSES (4)

CUMULATIVE EVIDENCE—See
CRIMINAL LAW (72)

CURATIVE INSTRUCTION—See
CRIMINAL LAW (77)

DAMAGES

1. The general rule of damages in an action for tort is that the wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether foreseeable by him or not, provided they are the legal and natural consequences of the defendant's wrongful act and, according to common experience, might reasonably have been anticipated. *Troppi* v. *Scarf*, 240.

2. The value of a benefit conferred upon a plaintiff or his property by a tortfeasor is considered, where equitable, in mitigation of damages where the tortious conduct confers both a

DAMAGES—Continued

harm and a special benefit to the same interest harmed. *Troppi* v. *Scarf*, 241.

3. The benefits of an unplanned child may be weighed against all the elements of claimed damage resulting from the unplanned child, which include the anxiety, incapacity, and pain and suffering inextricably related to childbearing. *Troppi* v. *Scarf*, 241.

4. The benefits rule, allowing a special benefit conferred on the plaintiff by the tortfeasor's conduct that produced the harm complained of to be considered in reducing damages, does not preclude as a matter of law recovery for damages for the birth of an unwanted child; the services and companionship of an unwanted child do not always have a dollar value equivalent or greater than the economic costs of the child's support, and the restrictions and pain and suffering caused by pregnancy and the obligation to rear the child. *Troppi* v. *Scarf*, 241.

5. The benefits conferred on the parents of an unwanted or unplanned child is a question for the trier of fact; factors to be considered include family size, family income, and age of the parents. *Troppi* v. *Scarf*, 242.

6. Parents who seek to recover damages for the birth of an unwanted child are not under a duty to mitigate damages by placing the child for adoption, because the doctrine which requires a plaintiff to take measures to minimize the financial consequences of a defendant's negligence requires only that reasonable measures be taken. *Troppi* v. *Scarf*, 242.

7. The standard used to judge the reasonableness of the acts of a plaintiff after an injury has occurred is less stringent than the standard used to judge the tortious conduct itself. *Troppi* v. *Scarf*, 242.

8. The best interests of the child must be considered in determining the reasonableness of actions of the parents plaintiffs in a suit for damages for the birth of an unwanted child, in mitigating damages; the law recognizes the desirability of a child being reared by his natural parents. *Troppi* v. *Scarf*, 242.

9. A tortfeasor whose negligence results in a conception and birth of an unwanted child has no right to insist upon the mother's aborting or placing the child for adoption in order to mitigate damages, because the tortfeasor takes the injured party as he finds her and cannot complain that the damages he will be assessed are greater than those which would have been determined if the plaintiff were willing to abort or place the child for adoption. *Troppi* v. *Scarf*, 242.

10. A plaintiff, wed or unwed, suing for damages resulting from the birth of an unwanted child caused by the tortfeasor's failure to properly fill an order for birth control pills does not, as a matter of law, have to abort or place the child for adoption in order to have reasonably mitigated damages; the plaintiff parents are entitled to have the jury instructed that they may

DAMAGES—Continued

not, in computing damages, take into consideration the fact that the plaintiffs might have aborted the child or placed the child for adoption. *Troppi* v. *Scarf*, 243.

11. Defendant cannot complain about the exessiveness of an award where the plaintiff offered to stipulate to a remittitur which would have reduced the amount of the recovery to precisely the amount defendant contends is proper but the defendant chose not to accept the stipulation. *Grove* v. *Story Oldsmobile, Inc.*, 614.

See
EMINENT DOMAIN (1–12, 14)
PROPERTY (1)

DANGEROUS ACTIVITY—See
NEGLIGENCE (9, 10, 11)

DEADLY WEAPON—See
HOMICIDE (21)

DEAD MAN STATUTE—See
EVIDENCE (2, 3)

DEATH CERTIFICATE—See
EVIDENCE (1)

DECLARATION OF NECESSITY—See
EMINENT DOMAIN (15)

DEEDS—See
TRUSTS (2)

DEFAULT—See
VENDOR AND PURCHASER (3)

DEFAULTING CORPORATION—See
CORPORATIONS (1, 2)

DEFAULT JUDGMENT—See
DISCOVERY (1)

DEFENDANT TESTIFYING—See
CONSTITUTIONAL LAW (2, 3)
CRIMINAL LAW (38, 53, 55, 71, 72, 81, 112, 113)
EVIDENCE (6)
HOMICIDE (22)

DEFENSES—See
CONTRACTS (11)
CRIMINAL LAW (3, 7, 8, 19, 42, 47, 48, 99, 102)
JUDGMENTS (7)
PLEADING (2, 7)

DEFINITION—See
AUTOMOBILES (8)
HOMICIDE (8, 17)
INSURANCE (11)
STATUTES (2, 3)
TAXATION (7–9)

DEGREES OF MURDER—See
HOMICIDE (15)

DELAY—See
CRIMINAL LAW (11)

DELAYED ARREST—See
ARREST (10, 11, 12)

DELAY IN ARRAIGNMENT—See
CRIMINAL LAW (54)

DELIBERATION—See
Homicide (13, 16–21)

DELIVERY—See
GIFTS (3)

DEMAND—See
CRIMINAL LAW (6)

DEPOSITIONS—See
EVIDENCE (15)

DEPUTY SHERIFF—See
SHERIFFS AND CONSTABLES (1)

DIFFERENT RESULT—See
NEW TRIAL (4)

DISADVANTAGE—See
PLEADING (5, 6)

DISCIPLINARY ACTION—See
MUNICIPAL CORPORATIONS (1)

DISCOVERY
1. Entry of a default judgment against the defendant in a divorce action for his failure to present himself to be deposed and to produce certain documents and records relating to the parties' marital assets was not error where the court complied with all the court rules in entering the default and took testimony to support the divorce and to establish the nature and extent of the marital assets (GCR 1963, 313.2[2][c]). *Isbey* v. *Isbey*, 185.

See
CRIMINAL LAW (58)

DISCRETION—See
CONTINUANCE (1–4)
CRIMINAL LAW (32, 68, 82, 95, 96, 108)
DISMISSAL AND NONSUIT (1)
DIVORCE (2, 3)
EVIDENCE (5, 13)
FORGERY (1)
INDICTMENT AND INFORMATION (3, 5)
JUDGMENT (1)
JURY (3)
MOTIONS (1)
NEW TRIAL (1, 2)
PLEADING (1–6)
SHERIFFS AND CONSTABLES (1)
TRIAL (1, 2, 5)

DISMISSAL AND NONSUIT

1. Reinstating a suit which had been dismissed for lack of progress was not improper where the dismissal order provided that it was without prejudice. *Schwall* v. *City of Dearborn*, 169.

See
MOTIONS (1)

DISMISSAL OF TEACHERS—See
SCHOOLS AND SCHOOL DISTRICTS (3, 4, 5)

DISPLAYING INADMISSIBLE EVIDENCE—See
CRIMINAL LAW (97)

DISPUTED FACTS—See
JUDGMENT (3, 4, 5)

DIVISION OF AWARD—See
EMINENT DOMAIN (11, 12)

DIVORCE

1. No rigid rule for the division of property pursuant to a divorce judgment exists; however, a major consideration is the security of living for the wife. *Farness* v. *Farness*, 35.
2. Awarding the wife in a divorce action property being purchased by spouses on land contract before the divorce action, ordering the husband to complete the payments within two years, at which time title was to be conveyed to the wife, and awarding the husband the family home and property on which the home was located was not an abuse of discretion (MCLA § 552.23). *Farness* v. *Farness*, 35.
3. Granting defendant wife in a divorce $1,500 in lieu of permanent alimony was not error where the wife, who had been employed off and on throughout the 34-year marriage, was earning $90 a week and the husband was earning $210 a week, and the parties' property was modest. *Ashwell* v. *Ashwell*, 172.

DIVORCE—Continued

4. Judgment of divorce awarding the wife $1,500 in lieu of permanent alimony remanded for modification of the judgment so as to reserve the question of alimony where the parties had been married for almost 34 years and the wife was 56 years old, because, although the award of $1,500 was not error, the possibility might arise in the future that the wife will need support from her husband (MCLA § 552.28). *Ashwell* v. *Ashwell*, 172.

DOG-BITE CASE—See
EVIDENCE (5)

DOMINION—See
HIGHWAYS (3)

DOUBLE INDEMNITY—See
INSURANCE (1)

DRIVER'S LICENSE—See
ARREST (4)

DRUGGISTS

1. A pharmacist is held to a very high standard of care in filling prescriptions; a pharmacist is liable for the harm resulting to a purchaser when he negligently supplies a drug other than the one requested. *Troppi* v. *Scarf*, 240.
2. Plaintiffs' complaint for damages as a result of plaintiff wife's becoming pregnant caused by defendant pharmacist's incorrectly filling an order for birth-control pills stated a claim on which relief could be granted because pregnancy, for purposes of determining the correctness of a summary judgment, was a foreseeable consequence of the defendant's negligence, and money expended on medical care, loss of wages during pregnancy, and pain and suffering, as that in childbirth, are compensable injuries. *Troppi* v. *Scarf*, 240.
3. Public policy favors a tort scheme which encourages pharmacists to exercise great care in filling prescriptions. *Troppi* v. *Scarf*, 241.

See
CONSTITUTIONAL LAW (7)
DAMAGES (10)

DRUNK DRIVING—See
AUTOMOBILES (12)

DUE DILIGENCE—See
CRIMINAL LAW (101)

DUE PROCESS—See
ARREST (10, 11, 12)
CRIMINAL LAW (15)
EMINENT DOMAIN (17)

DWELLING HOUSE—See
LARCENY (2–4)

EASEMENTS—See
INDEMNITY (1)
TRESPASS (1)

EFFECTIVE COUNSEL—See
CRIMINAL LAW (83, 98)

ELECTRICAL CONTRACTING—See
CONTRACTS (3)
LICENSES (1)

ELECTRICITY—See
NEGLIGENCE (8)

ELEMENTS OF CRIME—See
CRIMINAL LAW (28, 30, 35)
HOMICIDE (1, 7, 11, 13, 16)

EMINENT DOMAIN

1. The value of an interest in property is determined without regard to any enhancement or reduction of the value attributable to condemnation or the threat of condemnation. *Highway Comm.* v. *L & L Concession Co.*, 222.
2. Compensation is not ordinarily allowed for the good will or going-concern value of a business operated on real estate which is being condemned. *Highway Comm.* v. *L & L Concession Co.*, 222.
3. Recovery is awarded for the value of a business destroyed by condemnation. *Highway Comm.* v. *L & L Concession Co.*, 222.
4. The intangible character of a business's going-concern value does not preclude compensation for its taking. *Highway Comm.* v. *L & L Concession Co.*, 222.
5. An owner or lessee may recover going-concern value where the condemned property cannot realistically be valued apart from the business there conducted or, as it is sometimes said, the business for which the property is best 'adapted.' *Highway Comm.* v. *L & L Concession Co.*, 223.
6. Value of good will or loss of going-concern should not be awarded as separate damages in a condemnation case where the value of the leasehold taken already reflects the value of the business operated on leasehold, because such an award would be redundant. *Highway Comm. v. L & L Concession Co.*, 223.
7. Going-concern value must be awarded to a lessee in a condemnation case where the valuations of the estates of the lessor and of the lessee in the land condemned do not reflect the going-concern value of the lessee's business. *Highway Comm.* v. *L & L Concession Co.*, 223.
8. The loss of a particular business location, caused by condemnation, may destroy business altogether, for want of access to

EMINENT DOMAIN—Continued

any other suitable location; "just compensation" requires that whatever injury has been suffered be compensated. *Highway Comm.* v. *L & L Concession Co.*, 223.

9. A lessee may recover for the loss of going-concern value caused by condemnation if he can establish that business conducted on the leased premises cannot be transferred to another location. *Highway Comm.* v. *L & L Concession Co.*, 223.

10. Lessee, a concession operator, was entitled to compensation for the going-concern value of its business operated at lessor's racetrack, which was condemned, where the value of the concession was related to the patronage of the race track and flowed from the lessee's locational advantage and monopoly position, not conventional customer goodwill resulting from cultivation of customers by the lessee, if the lessee can prove on remand that business it conducted at the race track could not be transferred to another location. *Highway Comm.* v. *L & L Concession Co.*, 223.

11. Commissioners in a condemnation case may not separately appraise a lessor's and a lessee's interests, but must make a unitary appraisal of the value of the property as a whole; it is the duty of the courts to divide the award between the claimants. *Highway Comm.* v. *L & L Concession Co.*, 224.

12. An award in an eminent domain case should not be divided between the lessor and the lessee of the condemned land where the award does not include any amount attributable to the lessee's interest because the Highway Commission successfully and erroneously blocked the lessee's attempt to introduce evidence concerning the lessee's interest. *Highway Comm.* v. *L & L Concession Co.*, 224.

13. Lessee's failure to object to the instructions given to the commissioners in an eminent domain case did not constitute a waiver of its right to object to the court's refusal to entertain its proofs where the court had already ruled that the lessee would not be allowed to present its case. *Highway Comm.* v. *L & L Concession Co.*, 224.

14. Judgment on an award in a condemnation case is affirmed as to the lessor of the condemned land and remanded as to the lessee of the condemned land where the trial court had excluded evidence concerning the value of the lessee's interest in the land. *Highway Comm.* v. *L & L Concession Co.*, 224.

15. The question of necessity in an eminent domain case is more than *pro forma;* the single declaration of necessity by the condemning authority does establish necessity. *City of Muskegon* v. *Irwin*, 263.

16. Strict rules as to the admissibility of testimony are not and should not be enforced in condemnation cases. *City of Muskegon* v. *Irwin*, 263.

17. A party whose land is being taken by eminent domain is entitled to the utmost protection of the courts since the exercise of the power of eminent domain is a drastic one. *City of Muskegon* v. *Irwin*, 263.

EMINENT DOMAIN—Continued

18. Refusing to allow the landowners in an eminent domain case to introduce evidence of events which occurred after the date on which the city commission had authorized condemnation of their land for urban renewal was not reversible error where the landowners were attempting to prove that the commission had abused its discretion or committed fraud and where even if the excluded evidence had been admitted the landowners did not have enough evidence to establish their contention. *City of Muskegon* v. *Irwin*, 263.

19. Trial courts should liberally allow property owners in cases in which their land is being condemned for an urban renewal project to present evidence relevant to the issue of necessity in determining fraud or abuse of discretion up to the time the condemnation is authorized; however, in order to prevent jeopardizing the success of urban renewal projects, the evidence should be restricted so as to exclude negotiations with developers and others who insist on secrecy until contracts have been completed. *City of Muskegon* v. *Irwin*, 264.

20. Property owners in an urban renewal condemnation case have, by statute, the burden of proving fraud or abuse of discretion on the part of the condemning authority. *City of Muskegon* v. *Irwin*, 264.

See
PROPERTY (1)

ENFORCEMENT OF JUDGMENT—See
JUDGMENT (6)

ENTERING JURY ROOM—See
JURY (5)

ENTRY OF JUDGMENT—See
APPEAL AND ERROR (8)

EQUITY—See
TRUSTS (1, 2, 3, 4)

ESTIMATES—See
CONTRACTS (10)

EVICTION—See
LANDLORD AND TENANT (1, 2, 3)

EVIDENCE

1. Certified copy of deceased's death certificate, indicating that death was due to a heart attack, submitted to the deceased's insurer by his wife beneficiary as proof of death was not admissible at trial as an admission against the plaintiff's interest but admissible solely as proof of death where counsel argued the question, the court ruled that the certificate would be admitted only as proof of death, but stated that the purpose of admission might be broadened later in view of the proofs and applicable statutes, the exhibit was never reoffered, no

EVIDENCE—Continued

further proof in relation to the death certificate was introduced, no reference to any statute was made, and the insurer did not argue the certificate's use as an admission against interest until closing argument. *Adair* v. *Phoenix Mutual L. I. Co.*, 38.

2. Testimony by a party which is adverse to a person incapable of testifying is admissible even though the matter must have been equally within the knowledge of the party who seeks to testify and the person incapable of testifying where some material portion of the party's testimony is supported by some other material evidence tending to corroborate his claim; every portion of the survivor's testimony need not be corroborated, only a material portion of the testimony need be corroborated (MCLA § 600.2166). *Braidwood* v. *Harmon*, 50.
3. Testimony of the plaintiffs concerning conversations with a deceased donor which showed that the donor had given them, as gifts, a promissory note and a mortgage on the plaintiffs' home was admissible where one of the plaintiff's relatives testified that the donor had said "when I die it is your home free and clear" and another of the plaintiff's relatives testified that the donor had told her that he had signed the home over to the plaintiffs at his death and the home would belong to the plaintiffs (MCLA § 600.2166). *Braidwood* v. *Harmon*, 50.
4. Testimony is corroborated without regard to whether the corroborating witness or the witness whose testimony has been corroborated is believed by the judge; corroboration does not mean corroborated by evidence which the trial judge believes. *Braidwood* v. *Harmon*, 50.
5. Trial court's refusing to admit into evidence in a civil case based on the dog-bite statute the defendants' conviction in traffic court of harboring a vicious dog was not an abuse of discretion, because of the dissimilarities between civil and criminal proceedings, different issues, different evidential rules, and different degrees of proof (MCLA § 287.351). *Zaitzeff* v. *Raschke*, 87.
6. Allowing the prosecutor to ask the defendant, during cross-examination, if the defendant had ever given a different alibi to police, was not error on the ground that the prosecution had not established that the defendant had been advised of his constitutional rights where no previous statement was given or introduced into evidence. *People* v. *McGath*, 352.
7. *Evidence seized by methods which offend a sense of justice ought not to be admissible in state trials. People* v. *Harry James Smith*, 367.
8. Admitting two fingerprint cards into evidence in defendant's trial for murder, even though the defendant did not take the stand, was not reversible error on the ground that the cards showed defendant's past police record where all information on the cards had been masked out except the defendant's signature and the words "prisoner's signature" and at no time was any comment made about the defendant's police record. *People* v. *Heard*, 440.

EVIDENCE—Continued

9. Admitting the testimony of a police officer into defendant's trial for riot and unlawful assembly that the officer had received a radio communication that a group was breaking windows and that the officers should go to the scene of the disturbance was not error where the testimony concerning the radio communication was limited to show that a communication had been made and that as a result of the broadcast, the officers went to the scene and where the testimony was not admitted or offered to show the truth of the matter asserted in the communication (MCLA §§ 752.541, 752.543). *People* v. *Garcia*, 448.

10. A witness may not be compelled to make handwriting samples in court for comparison purposes; however, where the witness consents to make in-court samples and there is no objection by opposing counsel, the samples may be used. *People* v. *Kennedy*, 538.

11. Admitting a copy of a California judgment was proper even though the judgment itself was not sealed where the judgment papers consisted of three numbered pages, the first two pages consisted of attestations by the clerk of the court and certifications by the trial judge, and one of the attestations pages had a seal annexed to it, because the three pages were integrated to the extent they became one single document and a seal on any of the three pages would comply with statutory requirements (MCLA § 600.2103). *California* v. *Max Larsen, Inc.*, 594.

12. Evidence may be excluded if it will not shed light upon any matter contested; the determination of relevancy is one for the trial court and will not ordinarily be revised on appeal. *People* v. *Sheehy*, 628.

13. Excluding defendant's evidence concerning another criminal case in the area, which the defendant contended he was discussing with the prosecutor in a bar on the night the crime with which the defendant was charged was committed, was not an abuse of discretion even though the defendant contended that the evidence would lend credence to his story, where the defendant could have called the bartender, another patron or the proprietor himself to confirm the story and where the other crime had received much publicity, and thus, the defendant's knowledge of the case would not have established that he learned about the case from the prosecutor. *People* v. *Sheehy*, 628.

14. The people proved that the marijuana introduced at trial was the same marijuana seized from the defendant where they showed an unbroken chain of possession which accounted for the whereabouts of the narcotic from the time of seizure to the time of trial. *People* v. *Wenrich*, 645.

15. Allowing the deposition admissions of defendant's codefendant to be read into evidence in an automobile negligence case was harmless error where both the defendant and the codefendant testified fully at trial regarding the matters contained in the deposition and where their testimony constituted substantive

EVIDENCE—Continued

evidence as to how the plaintiff was injured and who, if anyone, was responsible for the injury. *Wright* v. *Whitmire*, 692.

See
ARREST (1)
AUTOMOBILES (3, 14)
CONSTITUTIONAL LAW (1, 5, 6)
CONTRACTS (11, 18, 19)
CRIMINAL LAW (14–17, 25, 40, 54, 55, 73, 85, 96, 104, 114, 115)
EMINENT DOMAIN (16, 18, 19)
FORGERY (1)
HOMICIDE (17–21, 23–27)
INSURANCE (2)
LARCENY (1, 4)
NEGLIGENCE (3, 12–14)
RAPE (1–3)
RIOT (1)
ROBBERY (2)
SEARCHES AND SEIZURES (2, 3, 5, 7–13)
WITNESSES (4)

EXAMINATION BY COURT—See
CRIMINAL LAW (50)

EXAMINATION OF REPORT—See
CRIMINAL LAW (32)

EXCEPTIONS—See
CRIMINAL LAW (80)

EXCESSIVE AWARD—See
DAMAGES (11)

EXCUSABLE HOMICIDE—See
HOMICIDE (4, 6)

EXEMPLARS—See
CRIMINAL LAW (96)
EVIDENCE (10)
FORGERY (1)

EXEMPTIONS—See
TAXATION (1–3)

EXHAUSTION OF REMEDIES—See
ADMINISTRATIVE LAW (1, 2)

EXPLORATORY SEARCHES—See
SEARCHES AND SEIZURES (15)

FACTUAL BASIS OF PLEA—See
CRIMINAL LAW (43–46)

FAILURE TO APPEAR—See
DISCOVERY (1)

FAMILY RELATIONSHIP—See
TRUSTS (1, 2)

FELONY-MURDER—See
HOMICIDE (13)

FILING—See
MOTIONS (1)
PLEADING (1)

FILING OF TRANSCRIPT—See
CRIMINAL LAW (4)

FINDINGS OF FACT—See
APPEAL AND ERROR (10)
NEGLIGENCE (12)
WORKMEN'S COMPENSATION (1)

FINGERPRINTS—See
CRIMINAL LAW (75, 76)
EVIDENCE (8)

FIRE INSURANCE—See
INSURANCE (3)

FIRST-DEGREE MURDER—See
APPEAL AND ERROR (8)
HOMICIDE (1, 2, 12–21, 27)

FOREIGN JUDGMENT—See
EVIDENCE (11)
JUDGMENTS (7)
PLEADING (2)

FORESEEABILITY—See
DRUGGISTS (2)

FORGERY

1. Refusing to allow a defendant, charged with uttering and publishing, to make an in-court exemplar of his handwriting or of anything that a handwriting expert, present in court, might require to make a proper comparison between the defendant's handwriting and the forged indorsement was not an abuse of discretion where the prosecutor objected to the in-court exemplars being made, the court had appointed a handwriting expert for the defendant, and the expert had testified that he could not form an opinion concerning the identity of the person who indorsed the check due to the paucity of letters in both the indorsement and the handwriting exemplars provided him. *People* v. *Kennedy*, 539.

FORMAL DEFECTS—See
PLEADING (7)

FRAUD—See
CONTRACTS (11, 12, 13)
EMINENT DOMAIN (18, 20)
PLEADING (7)

GENERAL MEANING—See
STATUTES (2)

"GENERAL PROPERTY TAX"—See
TAXATION (9)

GIFTS
1. A valid *inter vivos* gift requires (1) that the donor must possess the intent to pass gratuitously title to the donee, (2) that actual or constructive delivery be made, and (3) that the donee accept the gift. *Braidwood* v. *Harmon*, 49.
2. The silence of the will of the alleged donor of *inter vivos* gifts concerning the promissory note and mortgage given as gifts is as consistent with the contention that a gift was made as with the contention that a gift was not made, because if a gift is complete, the property given ceases to be part of the donor's estate and thus there is no need for the donor to recite the gift in his will. *Braidwood* v. *Harmon*, 49.
3. A valid *inter vivos* gift of a promissory note securing a mortgage, and a mortgage, can be completed by manual delivery of the instrument without a written assignment or other written evidence of the making of the gift. *Braidwood* v. *Harmon*, 50.
4. A gift of a promissory note may be complete even though the donor has reserved for his lifetime the income from the donated property. *Braidwood* v. *Harmon*, 50.

GOING-CONCERN VALUE—See
EMINENT DOMAIN (2, 4–10, 14)

GOODWILL—See
EMINENT DOMAIN (2, 6)

GRAND JURY
1. The immunity granted a grand jury witness pursuant to statute is co-extensive with a defendant's Fifth Amendment privilege; the immunity granted is absolute (MCLA 1971 Cum Supp § 767.19b). *In re Spalter*, 458.
2. The order granting a grand jury witness immunity is valid when it is signed by the presiding judge even though the grand jury was summoned by the circuit bench *en banc* where the presiding judge signed the order summoning the grand jury (MCLA § 767.19a). *In re Spalter*, 458.
3. Each appearance by a witness before a grand jury is a separate event creating the possibility of separate contempts. *In re Spalter*, 458.

See
CONTEMPT (1)

GROSS INDECENCY—See
RAPE (3)

GUILT—See
CRIMINAL LAW (90, 91, 106)

HANDRAILS—See
NEGLIGENCE (14, 16)

HANDWRITING—See
CRIMINAL LAW (96)
EVIDENCE (10)
FORGERY (1)

HARBORING A VICIOUS DOG—See
EVIDENCE (5)

HEALTH
1. Trial court's statement that to allow damages for the birth of a child following a pharmacist's negligence in filling a prescription for birth-control pills is in contravention of public policy does not express the manifest will of the people where the legislature has recently enacted two separate statutes designed to foster the use of contraceptives and where hundreds of thousands of persons use contraceptives daily, thus expressing the sense of the community. *Troppi* v. *Scarf*, 241.

HEARSAY—See
EVIDENCE (9)

HEAT—See
LANDLORD AND TENANT (1)

HIGHWAYS
1. Property owners in the platted subdivision in which a roadway was being vacated had a right to object to the vacation and to intervene in the proceedings despite the fact that their property did not abut the road in question (MCLA § 560.226). *Conlon* v. *Department of Treasury*, 180.
2. A roadway by user is established where the public has used the roadway and the appropriate governmental unit has exercised control over the road (MCLA § 221.20). *Cotton* v. *Township of Castleton*, 620.
3. Repair work on a road 50 years before suit was filed did not constitute acts of dominion necessary for giving the governing authority ownership by right of user. *Cotton* v. *Township of Castleton*, 621.

HOMEOWNER'S POLICY—See
INSURANCE (5)

HOME RULE—See
AUTOMOBILES (11–13)
CONSTITUTIONAL LAW (10)

HOMICIDE

1. First-degree murder requires proof of malice aforethought and wilfulness, premeditation, and deliberation (MCLA 1971 Cum Supp § 750.316). *People* v. *Morrin,* 301.
2. New trial need not be ordered for a defendant convicted of first-degree murder even though the evidence presented did not warrant a reasonable inference that the defendant killed his victim with deliberation and premeditation where the jury's verdict, read in light of the charge, constituted an express finding that the homicide was intentional and not committed under circumstances of mitigation nor justifiable or excusable; judgment was remanded for entry of a conviction of second-degree murder. *People* v. *Morrin,* 301.
3. Homicide, the killing of one human being by another, may be either innocent or criminal. *People* v. *Morrin,* 302.
4. A homicide is innocent if it is justifiable or excusable. *People* v. *Morrin,* 302.
5. A homicide is "justifiable" if it is authorized, as in the case of self-defense, or if it is commanded by law, as in the execution of a death sentence. *People* v. *Morrin,* 302.
6. A homicide is "excusable" if the death is the result of an accident and the actor was not criminally negligent. *People* v. *Morrin,* 302.
7. A person who kills another is guilty of the crime of murder if the homicide is criminal, neither justifiable nor excusable, and if it is committed with malice aforethought. *People* v. *Morrin,* 302.
8. Malice aforethought is the intention to kill, actual or implied, under circumstances which do not constitute excuse or justification or mitigate the degree of the killing to manslaughter. *People* v. *Morrin,* 302.
9. The intent to kill may be implied by law where the actor actually intends to inflict great bodily harm or the natural tendency of his behavior is to cause death or great bodily harm. *People* v. *Morrin,* 302.
10. A killing may be murder even though the actor harbored no hatred or ill will against the victim and even though he acted on the spur of the moment. *People* v. *Morrin,* 302.
11. Malice aforethought is a permissible inference, not a presumption arising from the fact of a homicide; the presumption of innocence applies to the element of malice. *People* v. *Morrin,* 302.
12. Courts in order to clarify the confusion surrounding the meaning of "malice aforethought" might well instruct a jury in a murder case that it can convict the defendant of murder only when it is convinced beyond a reasonable doubt that the defendant (1) actually or impliedly intended to kill and (2) circumstances constituting excuse, justification, or mitigation do not exist. *People* v. *Morrin,* 302.
13. First-degree murder is a statutory offense which consists of the common-law offense of murder, a homicide committed with malice aforethought, and of a murder by poison, lying in wait,

HOMICIDE—Continued

or by any other kind of wilful, deliberate, and premeditated killing, or in the perpetration or attempt to perpetrate certain crimes enumerated by statute (MCLA § 750.316). *People* v. *Morrin*, 303.

14. "Malice aforethought" is not synonomous in law with "premeditation". *People* v. *Morrin*, 303.

15. The division of murder into degrees was prompted by a feeling that not all murders reflected the same quantum of culpability. *People* v. *Morrin*, 303.

16. Premeditation and deliberation are all that distinguish first-degree from second-degree murder; in order to preserve the distinction between the degrees of murder, premeditation and deliberation must be given independent meaning in a prosecution for first-degree murder. *People* v. *Morrin*, 303.

17. Premeditation is to think about beforehand; deliberation is to measure and to evaluate the major facets of a choice or problem. *People* v. *Morrin*, 303.

18. Premeditation and deliberation characterize a thought process undisturbed by hot blood; some orderly reflection is required for premeditation and deliberation and, while the time period is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a second look. *People* v. *Morrin*, 303.

19. Premeditation and deliberation may be established by inferences from all the facts of the case. *People* v. *Morrin*, 304.

20. Insufficient evidence existed to warrant an inference that the defendant killed his victim, a hitchhiker, with premeditation and deliberation where there was no prior relationship between the parties tending to show motive; the murder weapon, tongs used by the defendant in his trade and usually carried with him, was not acquired or positioned in preparation for homicide; no evidence existed to support an inference that the defendant transported the victim to the secluded place where the murder occurred for an illicit or criminal purpose; the defendant's actions before the killing, giving the victim a ride and following the victim's road directions, and the circumstances of the killing itself, a struggle in which the victim was killed, were as consistent with the absence as with the presence of premeditation and deliberation; the defendant's distraught and hysterical condition after the killing, while perhaps showing consciousness of guilt, was neither coherent nor organized enough to suggest a place in an organized scheme; and where there was a bizarre rectal wound on the victim which, especially assuming the truth of the prosecution's case that the wound was inflicted after the victim was dead, was inconsistent with rational, deliberative processes. *People* v. *Morrin*, 304.

21. The use of a deadly weapon in a killing may give rise to a presumption or, at least, permit an inference of premeditation where there are other circumstances showing motive or plan

HOMICIDE—Continued

which would make reasonable the inference that the use of the weapon was not a spur-of-the-moment decision, but rather that it was acquired or positioned with the thought beforehand of using it to kill the victim. *People* v. *Morrin,* 304.

22. Prosecutor's asking the defendant, charged with murder, whether he told his sister that he had rammed tongs into the deceased's rectum after the victim was already dead was proper cross-examination where, although not testifying to the matter on direct examination, the defendant's sister did testify to it at preliminary examination. *People* v. *Morrin,* 304.

23. Photographs of a homicide victim are admissible at trial if they accurately depict what they represent and are helpful in illuminating a material issue. *People* v. *Morrin,* 305.

24. Admitting a photograph of the victim of the murder with which the defendant was charged was not an abuse of discretion even though the photograph was taken at the morgue rather than at the scene of the crime where the photograph was an accurate picture of the body, the moving of the body did not affect the accuracy of the photograph, and the photograph was intended to show the body, not the scene of the crime. *People* v. *Morrin,* 305.

25. The general rule that, in a negligent homicide case, evidence of immoderate speed at points remote from the scene of the accident is incompetent to establish immoderate speed at the accident scene itself will not be applied where eyewitness testimony at the scene of the accident was prevented by the defendant's flight and by interfering tactics of the defendant (MCLA § 750.324). *People* v. *Corbin,* 338.

26. Question of fact was created whether the defendant in a negligent homicide prosecution was driving at an immoderate speed at the time his car went off the road, killing an occupant of the car, even though there was no evidence of immoderate speed at the scene of the accident where the defendant's own statement of facts showed that the defendant was observed by a deputy sheriff to be carelessly driving, was ordered to pull over to the curb, but the defendant ran through a stop sign, went over a lawn, and entered a state trunkline, the defendant was pursued by the deputy sheriff, who was travelling at over 70 mph, the patrol car had to slow down because of dust from the defendant's car, and defendant's car was forced off a road three and one-half miles from where the deputy had lost sight of the car (MCLA § 750.324). *People* v. *Corbin,* 338.

27. Admitting into defendant's trial for first-degree murder color slides showing the murder victim's battered body was not an abuse of discretion, because the slides were relevant in showing premeditation and malice aforethought. *People* v. *Gill,* 396.

28. Prosecutor's reference to the "bloody fingerprint" of the defendant, charged with murder, was a permissible argument where there was testimony that the defendant's fingerprint was in a "red substance" and that the murder victim had been

HOMICIDE—Continued

severely beaten, because the conclusion that the "red substance" was "blood" was a reasonable inference. *People* v. *Gill*, 396.

See
APPEAL AND ERROR (8)
ARREST (1)

ICE—See
NEGLIGENCE (22)

IDENTIFICATION—See
CRIMINAL LAW (1, 15, 16, 56, 57, 103)

IDENTITY—See
EVIDENCE (14)

ILLEGAL ARREST—See
ARREST (3)

ILL WILL—See
HOMICIDE (10)

IMMODERATE SPEED—See
HOMICIDE (25, 26)

IMMUNITY—See
CONTEMPT (1)
GRAND JURY (1, 2)
NEGLIGENCE (4–6)

IMPEACHMENT—See
CRIMINAL LAW (53, 55, 71, 72, 74, 112, 113)

IMPLIED AGENCY—See
PRINCIPAL AND AGENT (1, 2)

IMPLIED INTENT—See
HOMICIDE (9)

IMPROPER ARGUMENT—See
CRIMINAL LAW (27, 51)

IMPROPER QUESTIONING—See
CRIMINAL LAW (77)

IMPUTED INTENT—See
INSURANCE (7)

IN A BUILDING—See
LARCENY (1)

INADEQUATE AWARD—See
ARBITRATION AND AWARD (2)

INADEQUATE SERVICE AND EQUIPMENT—See
TELECOMMUNICATIONS (1)

INCIDENT TO ARREST—See
SEARCHES AND SEIZURES (12)

INCLUDED OFFENSES—See
CRIMINAL LAW (100)

INCONSISTENT ACTS—See
CONTRACTS (15, 16)

IN-COURT EXEMPLARS—See
CRIMINAL LAW (96)
EVIDENCE (10)
FORGERY (1)

IN-COURT IDENTIFICATION—See
CRIMINAL LAW (57)

INDECENT LIBERTIES—See
CRIMINAL LAW (30)

INDEMNITY
1. A contractor who in performing work for a landowner unintentionally becomes a trespasser by breaking an underground pipeline of which he knew nothing may call upon the landowner for indemnification. *Marathon Pipe Line Co.* v. *Nienhuis,* 407.

INDEPENDENT IDENTIFICATION—See
CRIMINAL LAW (16)

INDEPENDENT SOURCE—See
CRIMINAL LAW (57)

INDICTMENT AND INFORMATION
1. The indorsement of *res gestae* witnesses is required to allow time for defense counsel to prepare for trial; any claim of error in the indorsement must be measured by the extent to which trial preparation was impaired. *People* v. *Gilleylen,* 417.
2. The prosecution's failure to indorse on the original information the name of the complainant who was a *res gestae* witness did not cause reversible error where that name was indorsed some time after the original filing, where the defense was aware of the identity of the witness, where a continuance was waived, where the defense waived calling the witness, and where no showing of prejudice was made. *People* v. *Gilleylen,* 417.
3. The trial court has very wide discretion in deciding whether to allow the people to make late indorsements of *res gestae* witnesses; the trial court's discretion is even wider where the identity of the witnesses is known to both the defendant and the people, because no surprise can be shown. *People* v. *Vaughn,* 599.

INDICTMENT AND INFORMATION—Continued

4. Denying defendants' motion for a mistrial made on the ground that the prosecutor had not indorsed the names of all known *res gestae* witnesses, was not an abuse of discretion where the names of the witnesses were known to the defendants as early as the preliminary examination. *People* v. *Vaughn*, 599.
5. Denying defendants' motion for a mistrial, made on the ground that the prosecutor indorsed the names of additional *res gestae* witnesses at trial was not an abuse of discretion where the defendants were allowed time to confer with the witnesses before the witnesses testified and where the names of the witnesses were known by the defendants as early as the preliminary examination. *People* v. *Vaughn*, 599.

INDORSEMENT—See
CRIMINAL LAW (102)
INDICTMENT AND INFORMATION (1–5)

INDORSEMENT OF WITNESSES—See
CRIMINAL LAW (12, 116)

INFERENCES—See
APPEAL AND ERROR (1)
AUTOMOBILES (4)
GIFTS (2)
HOMICIDE (11, 19–21, 28)

INFLAMMATORY ARGUMENT—See
CRIMINAL LAW (93)

INFORMERS—See
CRIMINAL LAW (115)

INHERENTLY DANGEROUS ACTIVITY—See
NEGLIGENCE (9, 10, 11)

INHERENT POWER—See
CRIMINAL LAW (7)

INJUNCTION

1. Whether plaintiff's attorney made knowingly false statements in the proceedings to obtain a permanent injunction prohibiting defendant from cutting plaintiff power company's gas and power lines was only tangential to the question whether the injunction was properly issued and, even if the attorney did make false statements, it would not have constituted reversible error. *Consumers Power Company* v. *Reich*, 138.

INJUNCTION—See
VENDOR AND PURCHASER (4)

INNOCENCE—See
CRIMINAL LAW (88, 89)

INNOCENT HOMICIDE—See
HOMICIDE (4)

IN PROPRIA PERSONA—See
CRIMINAL LAW (52)

INSANITY—See
CRIMINAL LAW (5, 7, 8, 19, 31, 47, 48)

INSTRUCTIONS TO COMMISSIONERS—See
EMINENT DOMAIN (13)

INSTRUCTIONS TO JURY—See
APPEAL AND ERROR (2, 6)
CRIMINAL LAW (3, 5, 18, 61, 77, 88, 89, 100)
HOMICIDE (12)
NEGLIGENCE (7)
ROBBERY (1)
TRIAL (6, 7)

INSURANCE

1. The burden of proving accidental death under a double indemnity provision of a life insurance policy is on the party claiming the benefits. *Adair* v. *Phoenix Mutual L. I. Co.*, 38.
2. Conclusion that plaintiff's husband, the deceased insured, had died accidentally was supported by the record where evidence showed that plaintiff's husband was 40 years old, in good health, was cleaning the drainage system in his home at the time of his death, his wife found him with his head submerged in water to the waist, in a drainable stationary tub with some portion of his leg or legs extended and a bruise or abrasion on his head, but neither medical testimony nor factual testimony showed accidental death or that accidental death was the sole cause of death and the court reasoned in its opinion that it was inconceivable that the insured had a heart attack while standing on his feet or leaning against the tub, three feet from the ground, and then could have fallen into the water so as to be in the drainage tub up to his waist with his head down. *Adair* v. *Phoenix Mutual L. I. Co.*, 38.
3. Fire insurance policy's requirement that an action against the insurer must be commenced within 12 months after the inception of the loss means that the limitation period runs from the date on which the damage occurred, not from the date on which defendant denied liability. *Robinson's Home Outfitting* v. *Globe*, 104.
4. Permitting plaintiffs' counsel to question the defendant in an automobile negligence case concerning his liability insurance coverage was reversible error (MCLA § 500.3030). *Cartier* v. *Young*, 151.
5. Clause in homeowner's insurance policy excluding insurer from liability for bodily injury caused intentionally by or at the insured's direction did not apply where the insured, a high

INSURANCE—Continued

school student, was in a street fight with a student from another high school, the student from the other school was struck by a classmate of the insured in the testicles, necessitating the removal of one testicle, the stipulated facts show that the insured did not strike the injured party in the groin area and that the insured did not direct his classmate to kick the injured party in the groin area. *Hawkeye Security Ins. Co.* v. *Shields*, 649.

6. Public policy prohibits a person from collecting additional insurance benefits for his accidental death where the insured puts the accidental acts leading to his death in motion by a criminal act fraught with danger to his life by violent means. *Hawkeye Security Ins. Co.* v. *Shields*, 649.

7. Third person's intent to injure another when he kicked the injured person in the groin was not to be imputed to the insured, also engaged in the street fight with the injured party, where the stipulated facts stated that the insured did not do the kicking that caused the injury or direct it to be done. *Hawkeye Security Ins. Co.* v. *Shields*, 649.

8. A distinction exists between an intentional act and an intentionally-caused injury when determining the applicability of an insurance policy clause excluding coverage for bodily injury intentionally caused. *Hawkeye Security Ins. Co.* v. *Shields*, 650.

9. Insurer was liable under homeowner's policy obligating it to pay all sums which the insured became legally obligated to pay except bodily injury "caused intentionally by or at the direction of the insured", a high school student, where the insured was in a street fight, a student from another high school was injured in the testicles when kicked by a classmate of the insured, the insured did not do the kicking that caused the injury complained of and did not direct his classmate to kick the injured person, because the insurance policy concerns intentionally-caused injuries, not intentional acts. *Hawkeye Security Ins. Co.* v. *Shields*, 650.

10. The words used in an insurance contract must be given their plain and ordinary meaning, each word must be given effect as far as practicable, and ambiguous phrases are to be resolved in favor of the insured if reasonably susceptible of such construction. *Lake* v. *Travelers Ins. Co.*, 688.

11. The phrase "basic annual salary or wage" in a group life insurance contract does not include overtime pay. *Lake* v. *Travelers Ins. Co.*, 688.

See

SALES (1, 2, 3, 5)

INSURANCE CARRIER—See

WORKMEN'S COMPENSATION (3, 4, 5, 6)

INSURED DRIVER—See

AUTOMOBILES (9)

"INSURED MOTOR VEHICLE"—See
AUTOMOBILES (9)

INTEGRATED DOCUMENT—See
EVIDENCE (11)

INTENT—See
CONTRACTS (4–6, 8, 9)
CRIMINAL LAW (3)
HOMICIDE (12)
REFORMATION OF INSTRUMENTS (1)
ROBBERY (1)
VENDOR AND PURCHASER (2)

INTENTION—See
CONTRACTS (14)

INTENTIONAL ACT—See
INSURANCE (8)

INTENTIONALLY-CAUSED INJURY—See
INSURANCE (5, 7, 8, 9)

INTENT TO KILL—See
HOMICIDE (9)

INTEREST—See
TAXATION (4, 6, 9)

INTERSECTIONS—See
AUTOMOBILES (6–8)

INTERSTATE AGREEMENT ON DETAINERS—See
CRIMINAL LAW (11)

INTERVENING ACT—See
NEGLIGENCE (20)

INTER VIVOS GIFT—See
GIFTS (1–4)

INTOXICATION—See
CRIMINAL LAW (3, 42)

INTRA-FAMILY IMMUNITY—See
NEGLIGENCE (5, 6)

INVESTIGATION—See
CRIMINAL LAW (14, 15)

INVESTIGATORY STAGE—See
CRIMINAL LAW (110, 111)

INVITEES—See
NEGLIGENCE (14, 16, 21, 22)

ISSUE OF FACT—See
JUDGMENT (2–6)
NEGLIGENCE (17–20)

JUDGMENT

1. A trial court has wide latitude to set aside its previous orders (GCR 1963, 528.3[6]). *Conlon* v. *Department of Treasury*, 180.

2. The court in deciding whether the case before it is appropriate for summary judgment must be strictly sure that it is not required to pass summarily upon any genuinely disputed issue of fact (GCR 1963, 117). *African ME Church* v. *Shoulders*, 290.

3. Summary judgment was improperly granted to the plaintiff contractor where there was a factual dispute whether the damages to a newly-constructed bridge was caused by a heavy rainfall relieving the contractor of the duty to repair the bridge at its own expense, or by defective workmanship, imposing a duty on the contractor to repair the bridge. *R. E. Dailey & Co.* v. *Highway Dept.*, 519.

4. Summary judgment was improperly granted to plaintiff contractor for payment of railroad-crossing flagging protections costs where the contract limited defendant's costs unless the costs were caused by building operations during an approved extension of time or by conditions beyond the contractor's control and where the defendant admitted contractual liability for some, but not all, of the costs. *R. E. Dailey & Co.* v. *Highway Dept.*, 519.

5. Summary judgment was improperly granted where there were questions of facts whether the refusal of defendant's engineers to work for plaintiff contractor more than an eight-hour day constituted a strike within the meaning of the parties' contract and whether the engineers' refusal caused a delay entitling plaintiff contractor to additional compensation. *R. E. Dailey & Co.* v. *Highway Dept.*, 519.

6. Summary judgment for plaintiffs was properly denied in their actions to enforce a Federal judgment against the personal assets of an alleged partner, defendant, of the person against whom they had obtained their judgment where the judgment was based on a Federal securities law violation, there was no evidence that the partnership was formed to sell the securities with which the Federal judgment dealt, where the receiver of the alleged partnership, not the partnership, was joined as a party, and where the defendant was never served in the Federal case. *Chapman* v. *Russell*, 586.

7. A party seeking to enforce an out-of-state judgment has the burden of proving that the judgment was rendered; the opposing party then has the burden of proving that the judgment was void for lack of jurisdiction. *California* v. *Max Larsen, Inc.*, 594.

8. An accelerated judgment cannot be granted on the ground that damages cannot be determined with accuracy because that

JUDGMENT—Continued

is not a ground for accelerated judgment (GCR 1963, 116.1). *Hammond* v. *Weiss*, 717.

See
EVIDENCE (11)

JUDICIAL POLICY—See
CONSTITUTIONAL LAW (9)

JUDICIAL REVIEW—See
ARBITRATION AND AWARD (1)

JURISDICTION—See
JUDGMENTS (7)
PUBLIC SERVICE COMMISSION (1)
TELECOMMUNICATIONS (1)

JURY

1. *En masse* questioning of prospective jurors on the *voir dire* was not error where the defendant waived an objection by expressing satisfaction with the jury. *People* v. *Miron*, 142.
2. Former practice of the Detroit Recorder's Court of keeping jury questionnaires in the jury commission office rather than in the courtroom during *voir dire* did not prejudice the defendant where the questionnaires were available to defendant's counsel before *voir dire* and where the trial court gave defendant's counsel adequate time during the *voir dire* to inspect the questionnaires (GCR 1963, 510.3[2]). *People* v. *Heard*, 439.
3. Allowing the jury to submit written questions to be asked of a witness has often been disapproved of and has usually been held to be within the discretion of the trial court. *People* v. *Heard*, 439.
4. Trial judge's communicating with the jury after the jury had retired to consider its verdict and without the presence of the parties or their counsel is error. *People* v. *Heard*, 440.
5. Defendant's contention that the trial judge's taking exhibits into the jury room after the jury had retired to consider their verdict and without the parties or their counsel being present constituted a manifest injustice because the judge may have said something prejudicial to the jury *held*, without merit, where the defendant's counsel was aware of what had happened and did not raise an objection in the trial court and even though the judge's action was improper the record reveals no prejudice by the brief delivery of the exhibits to the jury. *People* v. *Heard*, 440.
6. A defendant, charged with driving with a revoked license, was effectively precluded from eliciting the veniremen's possible prejudices in favor of police testimony where the court, instead of asking the question requested by defense counsel, whether they would give more weight to a police officer's testimony simply because he was a police officer, instructed the veniremen that they were not to give a policeman's testimony greater weight than a civilian's and then asked the veniremen if they

JURY—Continued

were going to obey his instruction, because jurors might have been wrestling with their consciences, had the question been properly asked, were not likely to admit noncompliance with the strong judicial mandate. *People* v. *Milkovich*, 582.

7. Trial courts have wide latitude concerning the scope of juror examination and need not ask the exact question posed by a party; however parties are entitled to reveal substantial prejudices which veniremen may possess and to develop a rational basis for the exclusion of prospective jurors. *People* v. *Milkovich*, 582.

See
TRIAL (1–4)

JUSTIFIABLE HOMICIDE—See
HOMICIDE (4, 5)

JUSTIFIED RELIANCE—See
CONTRACTS (10)

JUVENILE RECORDS—See
CRIMINAL LAW (114)

KIDNAPPING

1. Probable cause existed at the preliminary examination to believe that a kidnapping had been committed and that the defendant had committed the crime where the evidence showed that the defendant, along with another man, handed the victim, a barmaid, a note, she and the defendant's companion went into an unoccupied room in which the victim's employer kept a large sum of money, the defendant joined them outside the bar when signalled to do so by his companion, the barmaid was not seen alive after departing from the bar, she left behind an untended bar and personal belongings, and several hundreds of dollars of her employer's money was missing. *People* v. *Rolston*, 200.

KNOWLEDGE OF AFFIANT—See
ARREST (2)

LABOR RELATIONS—See
APPEAL AND ERROR (11)

LACK OF PROGRESS—See
DISMISSAL AND NONSUIT (1)

LAND CONTRACT—See
VENDOR AND PURCHASER (1, 2, 3)

LANDLORD AND TENANT

1. Landlord's failure to provide adequate heat and to control rodent infestation was sufficient to deprive the tenant of the beneficial use and enjoyment of the leased premises and constituted a constructive eviction. *De Bruyn Bros.* v. *Photo Lith Corp.*, 487.

LANDLORD AND TENANT—Continued

2. Tenant's paying the rent for two months after it had vacated the leased premises did not waive its defense of constructive eviction where the rent was paid because of reliance on the landlord's promises to correct the conditions constituting the constructive eviction. *De Bruyn Bros.* v. *Photo Lith Corp.*, 487.
3. Landlord's failing to provide its tenant parking spaces, as agreed to by the parties, and storing articles in the leased premises after the defendant tenant had vacated the premises on the grounds of lack of heat and rodent infestation, constituted a constructive eviction, because any value to the tenant in subletting the premises was destroyed by the landlord's actions. *De Bruyn Bros.* v. *Photo Lith Corp.*, 487.

See
NEGLIGENCE (8)

LANDOWNERS—See
NEGLIGENCE (21, 22)

LARCENY

1. Evidence that the defendant, charged with larceny in a building, entered the complainant's building holding a shopping bag, inquired about purchasing a car, was asked to return at 5 p.m. when the car would be there, and then left, the complainant went into his office and noticed that a portable adding machine was missing, got into his car and began cruising the streets, found the defendant walking along the way, called the defendant over to the car, opened the shopping bag, and finding the adding machine in it, made a citizen's arrest, and took the defendant to the police station, where after being advised of his rights, the defendant admitted stealing the adding machine was sufficient to support a guilty verdict. *People* v. *Burnside*, 59.
2. A house is a dwelling house within the larceny in a building statute where the house's primary function is a place for human habitation and its residential function is apparent to an otherwise uninformed observer; the building need not be occupied at the time of the larceny (MCLA § 750.360). *People* v. *Reynolds*, 110.
3. A building may lose its status as a dwelling house for the purpose of the larceny in a building statute by non-occupancy or disrepair; the condition of disrepair must be such as would communicate to an observer an apparent intent of the owner to abandon the house's function as a place in which people live (MCLA § 750.360). *People* v. *Reynolds*, 110.
4. Question of whether a building was a dwelling house within the larceny in a building statute was a question of fact where the building had been a dwelling house, but at the time of the larceny and for some time before the larceny had not been occupied, the items which the defendants took from the building were articles normally found in a dwelling house, the house was full of furniture and furnishings, and was habitable (MCLA § 750.360). *People* v. *Reynolds*, 110.

LATE FILING—See
MOTIONS (1)
PLEADING (1)

LEASEHOLDS—See
EMINENT DOMAIN (6, 7, 11, 12, 14)
PROPERTY (1)

LEGISLATIVE DEFINITION—See
STATUTES (2, 3)

LESSER INCLUDED OFFENSES—See
CRIMINAL LAW (100)

LEVY DATE—See
TAXATION (6)

LIABILITY—See
DRUGGISTS (1)

LIABILITY COVERAGE—See
INSURANCE (4)

LICENSES

1. Both materials and labor used to complete electrical repair work are to be included in determining whether the value of the work done was less than $50, and, thus whether the repairman was not required to have an electrical contractor license (MCLA § 338.881 *et seq.*). *Silver* v. *A. O. C. Corporation,* 147.

See
ARREST (4)
CONTRACTS (2, 3)
CRIMINAL LAW (80)

LIFE INCOME RESERVED—See
GIFTS (4)

LIFE INSURANCE—See
INSURANCE (1, 2)

LIMITATION OF ACTIONS

1. A clerk of a circuit court commissioner, when acting as a process server for his own benefit and not in furtherance of his official duties, is not an "officer" within the meaning of the statute which provides that the period of limitations is tolled for not longer than 90 days when "the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an officer for immediate service" (MCLA § 600.5856[3]). *Kyes* v. *Pisco,* 72.

See
INSURANCE (3)

LIMITING EVIDENCE—See
EMINENT DOMAIN (18)

LIMITING INSTRUCTIONS—See
CRIMINAL LAW (61)

LINEUP—See
CRIMINAL LAW (56, 57)

LIQUOR LICENSE—See
VENDOR AND PURCHASER (3, 4)

LOSS OF LOCATION—See
EMINENT DOMAIN (8–10)

LOSS OF TENURE—See
SCHOOLS AND SCHOOL DISTRICTS (1, 2)

MAINTENANCE—See
MUNICIPAL CORPORATIONS (2)

MALICE—See
HOMICIDE (1, 2, 7–14, 27)

MANDAMUS
1. Mandamus is appropriate only where duties are created by law and only where the duties to be enforced are clear. *Locke* v. *Macomb County*, 22.

See
SHERIFFS AND CONSTABLES (3)

MANDAMUS—See
ZONING (1)

MANIFEST INJUSTICE—See
CRIMINAL LAW (84)

MANUAL DELIVERY—See
GIFTS (3)

MARIJUANA—See
ARREST (11)
CRIMINAL LAW (25, 36, 70)
EVIDENCE (14)
SEARCHES AND SEIZURES (3, 13)

MATTERS INADEQUATELY PRESENTED—See
APPEAL AND ERROR (4)

MEASURE OF DAMAGES—See
EMINENT DOMAIN (1–7, 11)
PROPERTY (1)

MEETING OF THE MINDS—See
ACCORD AND SATISFACTION (1)
CONTRACTS (8)

METHOD OF SEIZURE—See
EVIDENCE (7)
SEARCHES AND SEIZURES (3)

MINOR REPAIRS—See
LICENSES (1)

MIRANDA WARNING—See
CRIMINAL LAW (109, 110, 111)

MISDEMEANORS—See
ARREST (8)
CRIMINAL LAW (116)

MISTAKE—See
CONTRACTS (8)

MISTRIAL—See
CRIMINAL LAW (18, 77)

MITIGATION—See
DAMAGES (2, 3, 6-10)

MODIFICATION OF CONTRACT—See
CONTRACTS (18, 19)

MODIFICATION OF JUDGMENT—See
DIVORCE (4)

MOOT QUESTION—See
APPEAL AND ERROR (11)
CRIMINAL LAW (4)

MORTGAGE—See
GIFTS (3)

MOTHER'S RIGHTS—See
PARENT AND CHILD (1)

MOTIONS

1. Granting defendants' motion to dismiss which was not timely filed was not error where the plaintiffs had failed to timely file the proof of service and there was evidence that the parties' attorneys had agreed to extend the time for filing an answer (GCR 1963, 108.1, 108.2, 108.7[2]). *Nelson* v. *Runnels*, 163.
2. Statute limiting the time in which a motion for a new trial may be made as a matter of right is not jurisdictional (MCLA § 770.2). *People* v. *Jackson*, 276.

See
APPEAL AND ERROR (7)
JUDGMENT (2)

MOTION TO DISMISS—See
MOTIONS (1)

MOTION TO SUPPRESS—See
SEARCHES AND SEIZURES (7, 8)

MOTOR VEHICLE CODE—See
AUTOMOBILES (11–13)
CONSTITUTIONAL LAW (10)

MOVEMENT—See
SEARCHES AND SEIZURES (14)

MULTIPLE DEFENDANTS—See
EVIDENCE (15)

MUNICIPAL CORPORATIONS
1. A city cannot use a threat of disciplinary action to collect for damage to city property in the absence of authority conferred by statute or ordinance. *Schwall* v. *City of Dearborn*, 169.
2. Whether a boy playing on the street and sidewalk is a "traveler" within the statute imposing liability on cities for injuries caused by negligent maintenance of public streets is a question of fact (MCLA § 691.1401 *et seq.*). *Hooks* v. *City of Detroit*, 662.

See
ADMINISTRATIVE LAW (1, 2)
EMINENT DOMAIN (18–20)
NEGLIGENCE (17, 19, 20)

MURDER—See
APPEAL AND ERROR (8)
ARREST (1)
HOMICIDE (7, 10–24, 27, 28)

NARCOTICS—See
CRIMINAL LAW (25, 36, 70)
EVIDENCE (14)
SEARCHES AND SEIZURES (13)

NECESSITY OF TAKING—See
EMINENT DOMAIN (15, 19)

NEGLIGENCE
1. Violation of a statute is negligence *per se* and will support a *prima facie* case of negligence. *Morton* v. *Wibright*, 8.
2. The violation of a statute alone will not support a recovery because the violation must also be the proximate cause of the injury complained of. *Morton* v. *Wibright*, 8.
3. The burden of proof in a negligence case never shifts and is always on the plaintiff; however the burden of proceeding with proofs can shift at different points during the trial as a result of various legal presumptions or *prima facie* proofs. *Morton* v. *Wibright*, 8.
4. Those injured by the death of a person who was killed by the wrongful act of a defendant are not barred from recovering from the defendant under the wrongful death act even

NEGLIGENCE—Continued

though a purely personal immunity might have barred suit by the deceased. *Plumley* v. *Klein*, 26.

5. The basis of the doctrine of intrafamily immunity in negligence suits is the prevention of the likelihood of collusion and the causing of family discord; where those possibilities do not exist, the reasons for intrafamily immunity do not exist and the doctrine will not be applied. *Plumley* v. *Klein*, 26.

6. A father, administrator of the estate of his children, may sue the estate of his deceased wife under the wrongful death act for the deaths of his children in an automobile accident in which his wife, who was also the mother of the children, was driving and was killed, despite the doctrine of intrafamily immunity, because the reasons for the doctrine, the likelihood of collusion and the possibility of causing family discord, no longer exist where the parties are dead. *Plumley* v. *Klein*, 26.

7. Contention that trial court erred in refusing to instruct the jury that the defendant's duty of due care to third parties regarding such an inherently dangerous instrumentality as high-voltage electricity could not be delegated away is without merit where the court did, in fact, instruct that if the defendant had any duty it could not be delegated. *Huntley* v. *Motor Wheel Corporation*, 385.

8. Instruction to jury that defendant landlord was liable for an injury caused by a defect in the electrical system of its building only if it retained control over the electrical system, or had actual knowledge of defects in it, given as part of the law applicable to the landlord-tenant relationship, was proper. *Huntley* v. *Motor Wheel Corporation*, 385.

9. The inherently dangerous activity doctrine is closely akin to strict liability and an employer's duty to provide against negligence as may be commensurate with the obvious dangers involved only arises where the employer is doing, or is causing to be done, work necessarily involving danger to others unless great care is used. *Huntley* v. *Motor Wheel Corporation*, 385.

10. An employer is vicariously liable for an independent contractor's negligence under the inherently dangerous activity doctrine, without proof of culpable negligence on the employer's part, only when the work itself is of such a nature that it would inevitably and unavoidably result in danger to others unless great care was used to prevent injury. *Huntley* v. *Motor Wheel Corporation*, 386.

11. Defendant was not vicariously liable, without proof of culpable negligence on its part, for plaintiff's injury, which was not inevitable from plaintiff's work as an electrician employee of an independent contractor where plaintiff was in fact injured by an instrumentality incidental to work being performed by the independent contractor for defendant. *Huntley* v. *Motor Wheel Corporation*, 386.

12. Finding that the plaintiff, injured when the ground she was walking on collapsed, failed to prove that her injuries were caused by the defendant's digging a hole, failing to restore the ground, and failing to make the area safe for use was

clearly mistaken and mandated reversal and a new trial where there was testimony that the defendant had been digging in the area of the accident for about a week several weeks before the accident, the plaintiff's witnesses were uncertain whether the digging occurred at the place where the plaintiff was injured or at a short distance away, and where the trial judge's finding was based on the conclusion that the plaintiff had failed to prove that the defendant had dug at the precise spot where the accident occurred; however, because the defendant presented only proofs on damages, the cause was remanded for a new trial. *Brady* v. *Michigan Consolidated Gas Co.*, 498.

13. A building code ordinance providing that a change of use of a building will bring the building under the provisions of the ordinance was proper evidence to be considered by a jury in determining the storeowner's negligence in not complying with the ordinance where the second story of the building was changed from a storage area to a display room open to the public even though the changes consisted only of painting and did not entail structural changes. *Dukes* v. *Glen of Michigan*, 500.
14. The absence of handrails on a stairway is competent evidence, without the consideration of the applicability of any ordinance, to be considered by the jury in determining whether a defendant had provided reasonably safe premises for its business invitees. *Dukes* v. *Glen of Michigan*, 501.
15. A plaintiff is not guilty of contributory negligence in exposing himself to a risk of bodily harm where the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless the plaintiff exposes himself to the risk, unless the plaintiff acted unreasonably. *Dukes* v. *Glen of Michigan*, 501.
16. Contributory negligence of a plaintiff, a customer, in using a stairway without handrails to leave from a second-story salesroom open to the public was a question of fact even if the plaintiff knew the stairway did not have handrails where stairway was the only means to enter and exit the second floor. *Dukes* v. *Glen of Michigan*, 501.
17. A complaint alleging that the minor plaintiff who, while sitting on the sidewalk with his feet hanging over an air vent well, six feet long, four feet wide, and six feet deep, guarded by a rail and adjacent to an abandoned police station, was struck by a passer-by causing him to fall into the vent created several questions of fact and granting summary judgment for defendant was error (MCLA § 691.1401 *et seq.*). *Hooks* v. *City of Detroit*, 662.
18. Whether a light and air vent six feet long, four feet wide, and six feet deep, guarded by a railing along the perimeter, adjacent to an abandoned police station constituted a nuisance in fact is a question of fact (MCLA § 691.1401 *et seq.*). *Hooks* v. *City of Detroit*, 662.
19. Whether the defendant city knew or should have known that the area around an abandoned police station was an attractive

NEGLIGENCE—Continued

nuisance likely to draw neighborhood children is a question of fact (MCLA § 691.1401 *et seq.*). *Hooks* v. *City of Detroit*, 663.

20. Whether defendant city's allowing an abandoned police station with a light and air vent, six feet long, four feet wide, and six feet deep, guarded by a railing, to exist was the proximate cause of the injuries the minor plaintiff sustained when knocked into the vent by a passer-by is a question of fact; the fact that a force other than the city's inaction brought about the harm does not relieve the city from liability as a matter of law. *Hooks* v. *City of Detroit*, 663.

21. A landowner is not an insurer of his invitee's safety; however, the landowner is under an affirmative duty to exercise due care to make the premises reasonably safe for the invitee's use. *Gillen* v. *Martini*, 685.

22. A landowner is not liable to his invitees for injuries caused by the landowner's failure to remove natural accummulations of ice and snow from a normal, outdoor, unobstructed sidewalk. *Gillen* v. *Martini*, 685.

See
AUTOMOBILES (1–8, 14)
CONSTITUTIONAL LAW (7)
DAMAGES (1–10)
DRUGGISTS (1–3)
EVIDENCE (15)
INSURANCE (4)
MUNICIPAL CORPORATIONS (2)
WORKMEN'S COMPENSATION (1–4, 6)

NEGLIGENT HOMICIDE—See
HOMICIDE (25, 26)

NEWLY-DISCOVERED EVIDENCE—See
CRIMINAL LAW (86)
NEW TRIAL (1–4)

NEW TRIAL

1. The granting of a new trial on the ground of newly-discovered evidence is largely a matter of discretion for the trial court; appellate relief is granted if the trial judge abused his discretion. *People* v. *Harris*, 100.

2. A reviewing court in order to find an abuse of discretion by a trial court in denying motion for a new trial on the ground of newly-discovered evidence must find that the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but the defiance of judgment, not the exercise of reason but rather of passion or bias. *People* v. *Harris*, 100.

3. A motion for a new trial on the ground of newly-discovered evidence will not be granted on testimony tending to show the perjury of a witness. *People* v. *Harris*, 101.

NEW TRIAL—Continued

4. The trial judge is in a better position than a reviewing court to determine whether newly-discovered evidence would tend to produce a probable different result on retrial. *People* v. *Harris,* 101.

See
APPEAL AND ERROR (7)
CRIMINAL LAW (86, 104)
HOMICIDE (2)
MOTIONS (2)

NONEXEMPTION—See
TAXATION (3)

NONJURY TRIAL—See
APPEAL AND ERROR (10)
NEGLIGENCE (12)
TRIAL (7)

NO PROGRESS—See
DISMISSAL AND NONSUIT (1)

"NOT GUILTY" VERDICT—See
CRIMINAL LAW (5)

NOTICE—See
CRIMINAL LAW (55)
SCHOOLS AND SCHOOL DISTRICTS (1, 2)

NOTICE OF ALIBI—See
CRIMINAL LAW (99, 102)

NUISANCE—See
NEGLIGENCE (18)

OCCURRENCE OF CRIME—See
RAPE (2)

OFFICERS

1. A civil service system exists to replace the complete discretion in the hiring and firing of county employees with an objective testing procedure aimed at hiring on the basis of objective qualifications and firing on the basis of cause. *Locke* v. *Macomb County,* 22.

See
CRIMINAL LAW (107)
LIMITATION OF ACTIONS (1)

OPERATOR'S LICENSE—See
ARREST (4)

OPINIONS—See
COURTS (1)

OPTION—See
CONTRACTS (7)

ORAL TRUSTS—See
TRUSTS (2, 4)

ORDER OF IMMUNITY—See
GRAND JURY (2)

ORDER OF PROOF—See
CRIMINAL LAW (85)

ORDERS—See
COURTS (1)

ORDINANCES—See
AUTOMOBILES (10–12)
CONSTITUTIONAL LAW (10)
NEGLIGENCE (13)

OTHER CRIMES—See
CRIMINAL LAW (73)
RAPE (3)

PARDON AND PAROLE

1. A parolee is deemed returned to a state penal institution for the purpose of the 30-day rule governing parole violation hearings when the parole violation warrant is issued, the parolee arrested, and the parolee incarcerated under the parole violation warrant in any penal institution, whether local, county, or state (MCLA § 791.240a). *Feazel* v. *Department of Corrections*, 425.
2. A parole violation hearing must be held within 30 days of the parolee's arrest and incarceration under a parole violation warrant; a parolee's arrest, if the arrest was not under a parole violation warrant, does not begin the running of the 30-day period (MCLA § 791.240a). *Feazel* v. *Department of Corrections*, 425.
3. A parolee accused of a parolee violation has the right to a hearing at which he may produce witnesses and proofs and meet the witnesses who are produced against him, because a hearing which does not allow the parolee these rights is not a hearing at all (MCLA § 791.240a). *Feazel* v. *Department of Corrections*, 426.

PARENT AND CHILD

1. A child will not be taken from his mother without her consent, without regard to whether the child was conceived or born in wedlock, unless the child is neglected or the mother is unfit; a mother's right to keep her child is not dependent on whether she desired the conception of the child. *Troppi* v. *Scarf*, 242.

See
DAMAGES (3–6, 8, 9)

PAROL EVIDENCE—See
CONTRACTS (11)

PAROLE VIOLATION HEARING—See
PARDON AND PAROLE (1, 2, 3)

PARTIES—See
WORKMEN'S COMPENSATION (3, 4, 5, 6)

PAYMENT FOR DAMAGE—See
MUNICIPAL CORPORATIONS (1)

PAYMENT OF RENT—See
LANDLORD AND TENANT (2)

PENALTIES—See
AUTOMOBILES (10–12)
CONSTITUTIONAL LAW (10)
TAXATION (6, 9)

PERJURY—See
NEW TRIAL (3)

PER SE NEGLIGENCE—See
AUTOMOBILES (5)
NEGLIGENCE (1)

PERSONAL IMMUNITY—See
NEGLIGENCE (4)

PERSONAL KNOWLEDGE—See
CRIMINAL LAW (26)

PERSONAL PROPERTY—See
TAXATION (2)

PHARMACISTS—See
CONSTITUTIONAL LAW (7)
DRUGGISTS (1–3)

PHOTOGRAPHS—See
HOMICIDE (23, 24, 27)
RAPE (1)

PLAIN VIEW—See
SEARCHES AND SEIZURES (6)

PLEADING

1. Trial court has, by court rule, discretion in accepting the late filing of pleadings and motions (GCR 1963, 108.7[2]). *Nelson* v. *Runnels*, 163.
2. Refusing to allow defendants to amend their pleadings in action to enforce an out-of-state judgment was not an abuse of discretion where the defendants sought to file, on the day of trial, a supplemental answer stating that the complaint in

PLEADING—Continued

the original action failed to state a cause of action, because the defendants did not give the court any reason for the delay in filing such an elementary defense and because no reason exists to compel the plaintiff to meet an entirely new defense on the day of trial (GCR 1963, 118). *California* v. *Max Larsen, Inc.*, 594.

3. Denial of a leave to amend the pleading necessitates a finding by the trial court that justice would not be served by permitting the proposed amendment. *Grove* v. *Story Oldsmobile, Inc.*, 613.
4. The privilege to amend the pleadings should be liberally granted. *Grove* v. *Story Oldsmobile, Inc.*, 613.
5. The trial court in its determination whether to grant leave to amend the pleading must consider (1) surprise and (2) disadvantage to the adverse party. *Grove* v. *Story Oldsmobile, Inc.*, 613.
6. Granting plaintiffs, driver and guest passenger, leave to amend their complaint to state that the back of the driver's bucket seat came loose rather than, as stated in the original complaint, that the whole seat came loose was not an abuse of discretion even though the motion to amend was made only 12 days before trial where a deposition had been taken at which the driver stated that only the back of the seat had come loose, and the defendant was represented at the taking of the deposition, because the defendant, being aware of the facts in the amendment, was neither surprised nor disadvantaged. *Grove* v. *Story Oldsmobile, Inc.*, 613.
7. The affirmative defense of fraud must be set forth separately and labeled in the pleadings along with sufficient facts to apprise the adverse party of the nature of the defense; however, the pleader's failure to set forth the defense separately and to label it as such was not fatal where the pleadings sufficiently describe the alleged fraud in the disputed transaction (GCR 1963, 111.7). *Komraus Plumbing* v. *Cadillac Sands*, 674.

PLEADING—See
NEGLIGENCE (17)

PLEA OF GUILTY—See
CRIMINAL LAW (20–24, 29, 33–35, 41–50, 93, 94)

POLICE INFORMER—See
CRIMINAL LAW (115)

POLICEMAN'S DUTY—See
CRIMINAL LAW (78)

POLICE OFFICERS—See
ARREST (8)

POLICE POWER—See
CONSTITUTIONAL LAW (8)
ZONING (1)

POLICE QUESTIONING—See
CRIMINAL LAW (111)

POLICY—See
SALES (2)

POSSESSION—See
ADVERSE POSSESSION (1)

POSSESSION BY THIRD PARTY—See
SEARCHES AND SEIZURES (9, 10)

POSSESSION OF MARIJUANA—See
CRIMINAL LAW (25)

POTENTIAL EVIDENCE—See
SEARCHES AND SEIZURES (9)

PRECEDENT—See
CRIMINAL LAW (19)

PREGNANCY—See
DRUGGISTS (2)

PREJUDICE—See
ARREST (10, 11)
INDICTMENT AND INFORMATION (2)
JURY (6)

PRELIMINARY EXAMINATION—See
KIDNAPPING (1)
RIOT (1)

PREMEDITATION—See
HOMICIDE (1, 2, 13, 14, 16–21, 27)

PRESCRIPTIONS—See
DRUGGISTS (1, 2)
HIGHWAYS (2, 3)

PRE-SENTENCE REPORT—See
CRIMINAL LAW (32, 95)

PRESERVING QUESTION—See
APPEAL AND ERROR (2, 3, 7)
CRIMINAL LAW (6, 10, 12, 27)
SEARCHES AND SEIZURES (11)

PRESUMPTIONS—See
CRIMINAL LAW (88, 89)
HOMICIDE (11)

PRIMA FACIE CASE—See
NEGLIGENCE (1)

PRIMARY LIABILITY—See
WORKMEN'S COMPENSATION (5)

PRINCIPAL AND AGENT
1. An agency relationship need not be express, but may be implied from the circumstances. *Komraus Plumbing* v. *Cadillac Sands*, 674.
2. Plaintiff's requesting the impleaded third-party defendant to procure the defendant's acceptance of an offer and the impleaded defendant's carrying out the assignment was sufficient to create an agency relationship. *Komraus Plumbing* v. *Cadillac Sands*, 674.

PRINCIPALS—See
CRIMINAL LAW (40)

PRIOR ARRESTS—See
CRIMINAL LAW (71, 72, 81, 112, 113)

PRIOR INCONSISTENT STATEMENT—See
CRIMINAL LAW (53, 74)
EVIDENCE (6)

PRISON INMATES—See
CRIMINAL LAW (2)

PRIVATE GUARDS—See
SEARCHES AND SEIZURES (2, 3)

PRIVILEGE AGAINST SELF-INCRIMINATION—See
CONSTITUTIONAL LAW (1–6)
CRIMINAL LAW (8, 33, 38)

PROBABLE CAUSE—See
ARREST (1, 6)
CRIMINAL LAW (79)
KIDNAPPING (1)
RIOT (1)
SEARCHES AND SEIZURES (1, 12–15, 17)

PROBATIVE VALUE—See
RAPE (2)

PROCEDURE—See
PARDON AND PAROLE (3)
SCHOOLS AND SCHOOL DISTRICTS (4, 5)

PRODUCTION OF WITNESSES—See
CRIMINAL LAW (101)

PROMISE OF LENIENCY—See
CRIMINAL LAW (60)

PROMISSORY NOTE—See
GIFTS (3, 4)

PROPERTY

1. A leasehold and rights derived from a leasehold constitute "property"; just compensation must be made or secured for a taking of such property. *Highway Comm.* v. *L & L Concession Co.*, 222.

See
HIGHWAYS (1)

PROPERTY SETTLEMENT—See
DIVORCE (1, 2)

PROPERTY TAX—See
TAXATION (3, 5, 6, 7, 8, 9)

PROPERTY VALUE—See
EMINENT DOMAIN (1)

PROSECUTORS—See
CRIMINAL LAW (97, 107, 108)

PROSECUTOR'S AUTHORITY—See
CRIMINAL LAW (69, 70)

PROSECUTOR'S REMARKS—See
CRIMINAL LAW (10, 13, 18, 26, 27, 51, 87, 90–92, 105, 106)
HOMICIDE (28)

PROXIMATE CAUSE—See
DAMAGES (1)
NEGLIGENCE (2, 20)

PSYCHIATRIC EXAMINATION—See
CRIMINAL LAW (7, 8, 31, 48, 58)

"PUBLIC AGENCY"—See
TAXATION (8, 9)

"PUBLIC ALARM"—See
RIOT (2)

PUBLIC HEALTH, WELFARE, MORALITY—See
ZONING (1)

PUBLIC POLICY—See
DRUGGISTS (3)
HEALTH (1)
INSURANCE (6)

PUBLIC RECORDS—See
EVIDENCE (1)

PUBLIC SERVICE COMMISSION

1. Judicial review of a final order of the Public Service Commission dealing with inadequate telephone service and equip-

PUBLIC SERVICE COMMISSION—Continued

ment is exclusively in the Ingham County Circuit Court (MCLA § 484.114). *Valentine* v. *Michigan Bell Tel.*, 18.

See
TELECOMMUNICATIONS (1)

PUBLIC STREETS—See
MUNICIPAL CORPORATIONS (2)
NEGLIGENCE (20)

PUBLIC WAREHOUSE—See
TAXATION (2)

QUANTUM MERUIT—See
CORPORATIONS (2)

QUASI-PUBLIC CORPORATION—See
TAXATION (8)

QUESTIONING BY JURY—See
JURY (3)

QUESTIONNAIRES—See
JURY (2)

QUESTION OF FACT—See
AUTOMOBILES (1)
CRIMINAL LAW (60, 103)
DAMAGES (5)
LARCENY (4)
MUNICIPAL CORPORATIONS (2)
NEGLIGENCE (18, 20)
WITNESSES (1, 3)

RAPE

1. Admitting photographs of a rape victim detailing her physical condition after being beaten and raped was not an abuse of discretion even though a witness had already testified to the victim's condition where the photographs clarified the testimony of the witness, tended to show the force and violence in the two crimes charged, rape and aggravated assault, and the complainant's condition was not the product of an intervening medical examination. *People* v. *Frank*, 378.
2. Scientific evidence pointing strongly to the complainant's being raped but which was less convincing in implicating the defendant, accused of the rape, was admissible because it shed some light on the material issues of the case. *People* v. *Willie Lee Lewis*, 434.
3. An act of gross indecency committed immediately prior to a rape is a part of the *res gestae* of the crime of rape, because the testimony concerning the gross indecency serves to characterize and illustrate the act which constituted the crime of rape and because the gross indecency was proximate in time to the rape. *People* v. *Sheehy*, 628.

READING TO JURY—See
TRIAL (1, 3, 5)

REAL PROPERTY—See
ADVERSE POSSESSION (1)

REASONABLE BELIEF—See
ARREST (6)

REASONABLENESS—See
DAMAGES (7)
SEARCHES AND SEIZURES (3)

RECORD ON APPEAL—See
APPEAL AND ERROR (1)
CRIMINAL LAW (4)

RECORDS—See
CRIMINAL LAW (58)

REDIRECT EXAMINATION—See
WITNESSES (4)

REFERENCE TO INSURANCE—See
INSURANCE (4)

REFLECTION—See
HOMICIDE (18)

REFORMATION OF INSTRUMENTS
1. A written instrument may be reformed by a court to comply with the parties' intention even though neither party requested reformation; a judgment may confer only the final legal remedy, the preliminary equitable relief of reformation having been assumed as a prerequisite to the judgment. *R. E. Dailey & Co.* v. *Highway Dept.*, 519.

REHABILITATION—See
WITNESSES (4)

REINSTATEMENT OF ACTION—See
DISMISSAL AND NONSUIT (1)

RELEASE—See
CONTRACTS (1)

RELEVANCE—See
EVIDENCE (12, 13)
INJUNCTION (1)

RELIANCE—See
CONTRACTS (10)

REMITTITUR—See
DAMAGES (11)

REMOVAL OF DEPUTY—See
SHERIFFS AND CONSTABLES (1–4)

REPAIRS—See
HIGHWAYS (3)
LICENSES (1)

REPEAL BY IMPLICATION—See
STATUTES (1)

REPUTATION—See
WITNESSES (2)

REQUEST TO CHARGE—See
CRIMINAL LAW (61)
TRIAL (7)

RESERVING QUESTION OF ALIMONY—See
DIVORCE (4)

RES GESTAE—See
RAPE (3)

RES GESTAE WITNESSES—See
CRIMINAL LAW (12, 87, 101, 116)
INDICTMENT AND INFORMATION (1–5)

RESISTING ARREST—See
ARREST (7, 9)

RETURN TO PENAL INSTITUTION—See
PARDON AND PAROLE (1)

RIGHT OF SELF-REPRESENTATION—See
CRIMINAL LAW (66, 67)

RIGHT-OF-WAY—See
AUTOMOBILES (6–8)

RIGHT TO BEAR ARMS—See
CONSTITUTIONAL LAW (8)

RIGHT TO COUNSEL—See
CRIMINAL LAW (62–66)

RIGHT TO PRODUCE EVIDENCE—See
PARDON AND PAROLE (3)

RIGHT TO SILENCE—See
CONSTITUTIONAL LAW (1–6)
CRIMINAL LAW (38)

RIOT

1. Binding over of the defendant on charges of rioting and unlawful assembly was proper where the facts derived at preliminary examination showed that there was a group of about

RIOT—Continued

40 persons who were yelling and shouting and hurling stones at a police car, that the group divided into two smaller groups, and that a police officer identified the defendant as being both part of the larger group and one of the smaller groups even though it was not established that the defendant was hurling stones, because the larger group's action constituted a crime and defendant's presence in the group constituted probable cause to believe he committed the crime and because the defendant's failure to leave the group after the violence began would indicate that the defendant shared the group's purpose. *People* v. *Garcia,* 448.

2. "Public terror or alarm", as the phrase is used in the statute defining the crime of "riot", would be caused any time a segment of the public is put in fear of injury to either their persons or property (MCLA § 752.541). *People* v. *Garcia,* 448.

See
EVIDENCE (9)

RISK OF LOSS—See
SALES (1, 2, 3, 4, 5)

ROADWAY—See
HIGHWAYS (1)

ROADWAY BY USER—See
HIGHWAYS (2, 3)

ROBBERY

1. Charging the jury that to find the defendant guilty of armed robbery they must find beyond a reasonable doubt that the defendant assaulted the complainant and, while armed with a knife, did rob, take, and steal from the complainant's presence $47 was not reversible error even though the specific intent necessary in a robbery armed was not detailed and defined, because as used in this instruction the word "rob" indicated a felonious and larcenous intent and no reasonable man could construe the word "rob" to mean a taking without felonious or larcenous intent (MCLA § 750.529). *People* v. *Turner,* 44.
2. Evidence that the robbery charged was committed, that defendant's codefendants committed the robbery, and that the defendant participated in the robbery charged by providing transportation for the codefendants to and from the scene of the crime was sufficient to establish defendant's guilt. *People* v. *Laine,* 271.

RODENT INFESTATION—See
LANDLORD AND TENANT (1)

RULES OF EVIDENCE—See
EMINENT DOMAIN (16)

SAFE PREMISES—See
NEGLIGENCE (14–16, 21, 22)

SALARY—See
INSURANCE (11)

SALE OF MARIJUANA—See
CRIMINAL LAW (36)

SALES

1. Security agreement clause declaring that the buyer must at all times keep the goods fully insured is not equivalent to a contrary agreement of the parties within the Uniform Commercial Code provision relating to time when risk of loss passes from seller to buyer (MCLA § 440.2509[4]). *Hayward* v. *Postma*, 720.
2. Uniform Commercial Code provision that the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant and if otherwise, the risk passes to the buyer on tender of delivery covers the common situation where parties have not agreed on who shall bear the risk of loss; the theory of the provision is that a merchant who is to make physical delivery at his own place continues to control the goods and can be expected to insure his interest in them, while the buyer, having no control of the goods, is extremely unlikely to carry insurance on goods not yet in his possession (MCLA § 440.2509[3]). *Hayward* v. *Postma*, 720.
3. Security agreement language that the buyer agrees to keep the goods insured at all times does not sufficiently apprise the buyer that he bears the risk of loss on goods for which he has contracted but has not yet received. *Hayward* v. *Postma*, 720.
4. A seller who wants to shift the risk of loss to the buyer before the buyer receives the goods must make his intent very clear to the buyer, because shifting the risk of loss to the buyer in such a situation is very unusual. *Hayward* v. *Postma*, 720.
5. Fine print in a security agreement that the buyer must at all times keep the goods fully insured does not shift the statutorily-imposed risk of loss, since "at all times" commonly means "at all times after one gets possession." *Hayward* v. *Postma*, 721.

See
ACCORD AND SATISFACTION (2)

SANITY—See
CRIMINAL LAW (31)

SCHOOLS AND SCHOOL DISTRICTS

1. Statute providing that a teacher who discontinues his services, without either mutual consent or notice 60 days before the school year, forfeits his rights to continuing tenure was designed to prevent teachers from departing a school district immediately before school begins, and, thus, leaving the school district without sufficient teachers or time to replace the leaving teachers (MCLA § 38.111). *Rumph* v. *Wayne School District*, 555.

SCHOOLS AND SCHOOL DISTRICTS—Continued

2. A teacher's rights under continuing tenure are lost only if the teacher resigns without giving notice 60 days before the school year (MCLA §§ 38.102, 38.111). *Rumph* v. *Wayne School District*, 555.
3. School boards are not allowed to summarily dismiss tenure teachers even if the Tenure Commission later finds that the teacher had discontinued his service, because the legislative intent in the teachers' tenure act would be violated because the burden would be on the tenure teacher to persuade the Tenure Commission that he should not have been dismissed (MCLA §§ 38.101, 38.102, 38.111). *Rumph* v. *Wayne School District*, 555.
4. Discharge of a tenure teacher can be accomplished only by strict compliance with the procedural safeguards of the tenure act (MCLA §§ 38.101, 38.102). *Rumph* v. *Wayne School District*, 555.
5. Failure to comply with all of the procedural requirements of the teachers' tenure act when dismissing a teacher who allegedly discontinued his services by failing to file required interim reports while on sabbatical leave rendered the dismissal procedurally defective; the dismissed tenure teacher did not by his omissions forfeit his rights under continuing tenure (MCLA §§ 38.102, 38.111). *Rumph* v. *Wayne School District*, 556.

SCOPE OF IMMUNITY—See
GRAND JURY (1)

SEAL—See
EVIDENCE (11)

SEARCHES AND SEIZURES

1. Probable cause existed to search the defendant's automobile without a warrant where a police officer testified that he had received a radio report regarding an armed robbery and shooting, that the report named the defendant and gave a description of the automobile used in the robbery, including the car's license number, that the officer, having known the defendant for approximately 15 years, after seeing the defendant on the street, arrested the defendant, that the defendant surrendered his keys upon request, and that the officer, intending to confiscate the vehicle, got into it, looked under the front seat, and found a gun holster. *People* v. *Tofil*, 343.
2. Marijuana seized from the defendant by a private guard, not acting under the authority of any police agency, is admissible into evidence whether the guard's actions were reasonable or unreasonable, because a private guard is a private individual and the standard of care placed on police officers regarding searches and seizures does not apply to private guards (US Const, Am 4). *People* v. *Harry James Smith*, 366.
3. *Marijuana seized by a private guard acting under no police agency was inadmissible in defendant's trial where the guard*

SEARCHES AND SEIZURES—Continued

lunged at the defendant who was attempting to enter a roller skating rink, hit the defendant with several judo chops, forcibly twisted the defendant's arm behind the defendant's back, and knocked a packet containing the marijuana from the defendant's pocket, because the method of seizure, although by a private individual, offends a sense of justice. People v. *Harry James Smith*, 367.

4. A person may waive the issuance of a search warrant and by consent permit the search of his premises. *People* v. *Gilleylen*, 416.

5. Ruling that the defendant had consented to a search of his automobile will not be reversed on appeal even though the ruling was based on a state constitutional proviso since declared unconstitutional where the testimony at the hearing on the motion to suppress showed that the defendant voluntarily handed his trunk keys to the officer after the officer's request to look into the trunk and the search was reasonable. *People* v. *Gilleylen*, 416.

6. Objects falling in the plain view of a police officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence. *People* v. *McFadden*, 512.

7. The illegality of the seizure of evidence must be made before trial in a motion to suppress where the defendant knows of the facts constituting the illegal seizure; the illegality of a search and seizure may not even be raised for the first time at trial. *People* v. *George Martin*, 624.

8. Illegality of search and seizure was waived where the defendant, who was clearly aware of all the facts surrounding his arrest and the questioned search and seizures, did not move to suppress the seized evidence before trial. *People* v. *George Martin*, 624.

9. An unreasonable search and seizure claim will not be heard where a defendant has turned over potential evidence to a third party, thus exposing it to public scrutiny. *People* v. *Wasson*, 638.

10. A defendant could not complain of an illegal seizure of a stolen motorcycle where he had placed the motorcycle in the hands of a repairman, thus exposing it to the full view of all who entered the repair shop. *People* v. *Wasson*, 638.

11. Failure to object in the trial court to admission of evidence obtained in a search and seizure precludes raising of that issue on appeal unless manifest injustice has occurred. *People* v. *Wasson*, 638.

12. Seizure of marijuana was proper as incident to a lawful arrest where the police (1) had information that there would be drug traffic at a house on the evening in question, (2) placed the house under surveillance and observed furtive conduct by the defendant while near the house, (3) observed the defendant converse with the occupants of another car who were later reported to be narcotics suppliers, and (4) the driver of the

SEARCHES AND SEIZURES—Continued

vehicle in which defendant was riding was arrested for possession of a concealed weapon. *People* v. *Wenrich*, 644.

13. Search of an automobile and seizure of a brown substance suspected to be marijuana was unreasonable where police officers stopped a vehicle for speeding, the police noted that the passengers were moving around in the vehicle and appeared to be putting something in the glove compartment console, the driver, after alighting from the vehicle, produced a valid driver's license and one of the passengers produced the vehicle registration, one of the police officers entered the vehicle and sat in the driver's seat, one of the passengers opened the console for the officer's inspection, the officer found a plastic bag containing a brown substance which he was told was incense and which neither he nor his fellow officer could identify, the officer found two more plastic bags containing the brown substance in a partially open suitcase in the back seat and then arrested the occupants of the car. *People* v. *Peck*, 667.
14. Movement of the occupants of an automobile may be some evidence of wrongdoing but does not necessarily point to the commission of a felony. *People* v. *Peck*, 667.
15. General or exploratory searches are not permitted; a searcher must have in mind some reasonably specific thing he is looking for and reasonable grounds to believe it is in the place being searched. *People* v. *Peck*, 667.
16. Police do not have the right to make a general search of an automobile incident to an arrest for a traffic offense, because there are no fruits of a traffic offense to be found in the console or back seat of an automobile. *People* v. *Peck*, 668.
17. Entering or searching an automobile incident to an arrest for a minor traffic violation absent a reasonable belief that a felony had been or is being committed is unconstitutional. *People* v. *Peck*, 668.

See
ARREST (5)
EVIDENCE (7)

SECOND-DEGREE MURDER—See
APPEAL AND ERROR (8)
HOMICIDE (2, 14, 15)

SECURED TRANSACTIONS—See
SALES (1, 3, 5)

SECURITY—See
VENDOR AND PURCHASER (4)

SELF-DEFENSE—See
HOMICIDE (5)

SELF-INCRIMINATION—See
CONSTITUTIONAL LAW (1–6)
CRIMINAL LAW (8, 33, 38)

SENTENCES—See
CRIMINAL LAW (68)

SENTENCING—See
CRIMINAL LAW (59, 95, 105)

SERVICE OF PROCESS—See
LIMITATION OF ACTIONS (1)

SETTING ASIDE JUDGMENT—See
JUDGMENT (1)

SEVERABILITY—See
CONSTITUTIONAL LAW (4)

SHERIFFS AND CONSTABLES

1. Statutory provision allowing a sheriff complete discretion in the removal of deputy sheriffs does not apply where a civil service commission for the sheriff's department has been adopted (MCLA §§ 51.70, 51.351 *et seq.*). *Locke* v. *Macomb County*, 22.
2. A sheriff may remove a deputy sheriff only for cause and only after the deputy sheriff receives a written statement of the charges within 90 days from the date of violation where a civil service plan for the sheriff's department has been adopted (MCLA § 51.362). *Locke* v. *Macomb County*, 22.
3. Legal duties associated with the removal of deputy sheriffs apply to sheriffs only and the duties are enforceable by *mandamus* against sheriffs only. *Locke* v. *Macomb County*, 23.
4. A county has no authority to appoint or remove deputy sheriffs. *Locke* v. *Macomb County*, 23.

SIDEWALKS—See
NEGLIGENCE (22)

SILENCE—See
CRIMINAL LAW (38)
GIFTS (2)

SNOW—See
NEGLIGENCE (22)

SOVEREIGN IMMUNITY—See
TAXATION (3)

SPECIFIC INTENT—See
CRIMINAL LAW (3)
ROBBERY (1)

SPECULATIVE DAMAGES—See
JUDGMENT (8)

SPEEDY TRIAL—See
CRIMINAL LAW (6)

STAIRWAYS—See
NEGLIGENCE (14, 16)

STANDARD OF CARE—See
AUTOMOBILES (6, 7)
DRUGGISTS (1)

STANDARD OF INSANITY—See
CRIMINAL LAW (19)

STANDING—See
HIGHWAYS (1)

STATEMENTS—See
CONSTITUTIONAL LAW (5)
CRIMINAL LAW (54, 55)

STATUTES

1. A later statute, as a general rule, will repeal an earlier one to the extent that the two are repugnant, even though repeal of a statute by implication is not favored. *Locke* v. *Macomb County*, 22.
2. The generally understood meaning of a term at the time that term is used by the legislature is usually relevant in an attempt to interpret the legislative meaning; however, it is within the competence of the legislature to provide a legislative definition varying generally understood meaning and controlling over all other definitions. *Bennett* v. *Pitts*, 530.
3. The definition of a term provided in a statute is binding when a court is interpreting the term's use in that statute and the court cannot look elsewhere for the term's meaning. *Bennett* v. *Pitts*, 530.

See
APPEAL AND ERROR (9)
AUTOMOBILES (5, 10)
CRIMINAL LAW (2, 69, 70)
EVIDENCE (11)
HIGHWAYS (2)
INSURANCE (4)
LIMITATION OF ACTIONS (1)
MOTIONS (2)
MUNICIPAL CORPORATIONS (2)
PARDON AND PAROLE (1)
RIOT (2)
SALES (2)
SCHOOLS AND SCHOOL DISTRICTS (4, 5)
SHERIFFS AND CONSTABLES (1, 2)
TAXATION (1)

STIPULATIONS—See
CRIMINAL LAW (69, 70)

STRATEGY—See
CRIMINAL LAW (65)

STREETS—See
MUNICIPAL CORPORATIONS (2)

SUFFICIENCY—See
LARCENY (1)

SUFFICIENCY OF DELIVERY—See
GIFTS (3)

SUFFICIENCY OF EVIDENCE—See
CRIMINAL LAW (25)
HOMICIDE (20)
ROBBERY (2)

SUIT AGAINST PARENT—See
NEGLIGENCE (6)

SUMMARY DISMISSAL—See
SCHOOLS AND SCHOOL DISTRICTS (3)

SUMMARY JUDGMENT—See
JUDGMENT (2–6)

SUPPRESSION OF EVIDENCE—See
SEARCHES AND SEIZURES (7, 8)

SURPRISE—See
PLEADING (5, 6)

"TAXABLE STATUS"—See
TAXATION (7)

TAXATION

1. Statutes exempting persons or property from taxation are to be strictly construed. *Frigid Food* v. *City of Detroit,* 402.
2. Two companies were "affiliated" within the meaning of the statute providing that a warehouse operated, leased, or owned by an affiliate of the warehouseman is not a public warehouse for purposes of entitling the affiliate to an exemption from personal property taxes on goods in a public warehouse where with the exception of one person, the stockholders, board of directors, and officers of the taxed corporation and the warehouse company were the same (MCLA § 211.9). *Frigid Food* v. *City of Detroit,* 402.
3. All public property belonging to the state is exempt from taxation on the basis of sovereign immunity unless the one asserting nonexemption can point to some legislation in support of its position (MCLA § 211.7). *Detroit* v. *State,* 563.
4. The state is not liable for interest on taxes except where, expressly or by reasonable construction of a contract or statute, it has placed itself in a position of liability. *Detroit* v. *State,* 563.
5. The state is required by statute to pay the base tax on property which it acquires after tax date whether before or after levy date (MCLA § 211.40). *Detroit* v. *State,* 563.

TAXATION—Continued

6. The state is required by statute to pay not only base taxes on property which it acquires but also interest and penalties if the base taxes are paid late, regardless whether the interest and penalties accrued before or after the levy date, because the state assumes the status of the former owner as of tax day for all taxing purposes (MCLA § 211.40). *Detroit* v. *State,* 563.
7. Statutory phrase that the taxable status of persons and of real and personal property shall be determined as of each December 31, the tax day, means the status of persons in relation to a particular piece of property (MCLA § 211.2). *Detroit* v. *State,* 564.
8. The term "public agency" as used in the statute governing the proration of taxes on property acquired by purchase or condemnation is broader than "governmental agency" and includes quasi-public corporation (MCLA § 211.2). *Detroit* v. *State,* 564.
9. "General property taxes" as used in the statute governing property taxes payable by public agencies includes penalties and interest; therefore, the statutory liability of a public agency for all general property taxes levied on or after the date title passes to it, means taxes, penalties, and interest (MCLA § 211.2). *Detroit* v. *State,* 564.

TEACHERS—See
SCHOOLS AND SCHOOL DISTRICTS (1, 2, 3, 4, 5).

TELECOMMUNICATIONS
1. Primary jurisdiction over issues of inadequate telephone service and inadequate telephone equipment lies with the Public Service Commission (MCLA §§ 484.103, 484.111). *Valentine* v. *Michigan Bell Tel.,* 18.

TELEPHONES—See
TELECOMMUNICATIONS (1)

TENURE TEACHERS—See
SCHOOLS AND SCHOOL DISTRICTS (1, 2, 3, 4, 5)

TESTIMONY—See
CRIMINAL LAW (1)
EVIDENCE (2–4)

THIRD-PARTY TORTFEASOR—See
WORKMEN'S COMPENSATION (2, 3, 4, 6)

THOUGHT PROCESS—See
HOMICIDE (18)

TIME—See
INSURANCE (3)

TIME AND LABOR COSTS—See
CONTRACTS (19)

TIME LIMIT—See
MOTIONS (2)

TIMELINESS—See
EVIDENCE (1)

TIME TO PREPARE—See
CRIMINAL LAW (64)

TITLE—See
ADVERSE POSSESSION (1)

TOLLING—See
LIMITATION OF ACTIONS (1)

TORTS—See
NEGLIGENCE (4, 5)

TRAFFIC OFFENSES—See
ARREST (8)

TRAFFIC ORDINANCES—See
AUTOMOBILES (10)

TRAFFIC VIOLATIONS—See
ARREST (4, 5)
SEARCHES AND SEIZURES (13, 16, 17)

TRAILER PARKS—See
ZONING (1)

TRANSCRIPT—See
CRIMINAL LAW (4)

TRANSFER OF LICENSE—See
VENDOR AND PURCHASER (3, 4)

"TRAVELER"—See
MUNICIPAL CORPORATIONS (2)

TRESPASS

1. A contractor who in performing work for a landowner breaks an underground pipeline crossing the land by right of an easement is guilty of trespass. *Marathon Pipe Line Co.* v. *Nienhuis*, 407.

See
INDEMNITY (1)

TRIAL

1. Allowing a portion of testimony to be read to the jury in the jury room without counsel being present was not an abuse of discretion where counsel had already left the courtroom and prior to leaving had expressly waived the right to be present at the time of the verdict. *Zaitzeff* v. *Raschke*, 87.

TRIAL—Continued

2. Allowing a witness's testimony to be read to the jury is in the trial court's discretion. *Zaitzeff* v. *Raschke*, 87.
3. Failure to notify the parties and their counsel that a witness's testimony will be read to the jury is not error if the parties and their counsel have voluntarily chosen to absent themselves from the courtroom. *Zaitzeff* v. *Raschke*, 87.
4. It is not good practice to communicate with the jury other than in open court. *Zaitzeff* v. *Raschke*, 88.
5. The reading to jury or the granting of permission for the jury's reading of testimonial excerpts is in the trial court's discretion; the trial court's decision is reversible only if there was an abuse of discretion. *People* v. *Morrin*, 305.
6. The test of instructions to the jury is: Did the instructions as given adequately inform the jury on the applicable law reflecting and reflected by the various evidentiary claims in the particular case?, when they are objected to as being so lengthy, conflicting, ambiguous, and erroneous as to be unmeaningful and incomprehensible. *Huntley* v. *Motor Wheel Corporation*, 385.
7. A trial judge in a nonjury action evaluates the testimony of each witness, draws permissible inferences, and decides the issues in the light of controlling principles. *Gary Boat Club, Inc.* v. *Oselka*, 466.
8. Requested instructions to the jury need not be given where the court has correctly instructed on the subject covered by the requested instructions. *Wright* v. *Whitmire*, 692.

See
CRIMINAL LAW (13, 51)

TRUCKS—See
AUTOMOBILES (10)

TRUSTS

1. Constructive trust relief may be appropriate in a case in which there is family relationship, trust, and confidence even though the property in question was not wrongfully acquired where the property is unconscionably withheld. *Chapman* v. *Chapman*, 576.
2. Imposition of a constructive trust on the proceeds from land sales by the defendants, the plaintiff's brother and sister-in-law, was sustained where four witnesses testified at trial that the agreement between the parties by which the plaintiff, in financial difficulty, conveyed the property, later sold, to the defendant was to vest only legal title in the defendants while plaintiffs retained the beneficial interest. *Chapman* v. *Chapman*, 576.
3. A constructive trust can be based upon a breach of fiduciary or confidential relationship, misrepresentation, concealment, mistake, undue influence, duress, or fraud. *Chapman* v. *Chapman*, 576.
4. An action to establish a constructive trust on the proceeds of the sale of property, conveyed by the defendant to the plaintiffs,

TRUSTS—Continued

the defendant's brother and sister-in-law, did not entail an "unclean hands" issue where even though the defendant was $250,000 in debt at the time of the transfer, there was no evidence that plaintiff did not have sufficient other property to meet the claims of his creditors had all his outstanding debts been reduced to judgment and where the defendant brother's business, selling automobile parts manufactured by his plaintiff brother, was totally dependent on his brother's rehabilitation, because the transfers were a sound businesslike way to rehabilitate the plaintiff. *Chapman* v. *Chapman*, 576.

TRUTH OF PLEA—See
CRIMINAL LAW (34, 35, 41, 44, 45, 49, 50, 93, 49)

UNAVAILABLE WITNESS—See
CRIMINAL LAW (87)

"UNCLEAN HANDS"—See
TRUSTS (4)

UNDERGROUND PIPELINE—See
INDEMNITY (1)
TRESPASS (1)

UNFAVORABLE INFERENCES—See
WITNESSES (4)

UNIFORM COMMERCIAL CODE—See
SALES (1, 2, 3, 4, 5)

UNIFORMITY PROVISION—See
AUTOMOBILES (10–13)
CONSTITUTIONAL LAW (10)

UNINDORSED WITNESSES—See
INDICTMENT AND INFORMATION (4)

"UNINSURED MOTOR VEHICLE"—See
AUTOMOBILES (8, 9)

UNITARY VALUATION—See
EMINENT DOMAIN (11)

UNLAWFUL ARREST—See
ARREST (7)

UNLAWFUL ASSEMBLY—See
EVIDENCE (9)
RIOT (1)

UNOCCUPIED HOUSE—See
LARCENY (2)

UNPLANNED CHILD—See
DAMAGES (3–6, 8–10)
PARENT AND CHILD (1)

UNREASONABLE DELAY—See
CRIMINAL LAW (82)

UNREASONABLE SEARCH—See
SEARCHES AND SEIZURES (13, 15, 16, 17)

UNTRIED CHARGES—See
CRIMINAL LAW (2)

URBAN RENEWAL—See
EMINENT DOMAIN (18–20)

USER—See
HIGHWAYS (2, 3)

USUAL DEFINITION—See
AUTOMOBILES (8)

UTTERING AND PUBLISHING—See
FORGERY (1)

VACATION OF AWARD—See
ARBITRATION AND AWARD (2)

VACATION OF ROAD—See
HIGHWAYS (1)

VENDOR AND PURCHASER

1. An acceleration clause in a land contract, although clearly valid, is harsh and in the nature of a forfeiture or penalty; an appellate court will refuse to infer that an acceleration clause exists if the contract between the parties does not provide it. *Benincasa* v. *Mihailovich*, 473.
2. Plaintiff vendors did not have a right to accelerate the balance on a land contract on the vendee's transfer of a liquor license even though the transfer was in violation of an agreement between the parties where the land contract for the sale of a motel and a security agreement covering furniture in the motel sold were designed to protect the vendors in case of a default in the land contract, not a transfer of the liquor license. *Benincasa* v. *Mihailovich*, 473.
3. Plaintiff vendors on a land contract were not entitled to have a liquor license retransferred to them where vendee had conveyed the liquor license to a third party in violation of a separate agreement with the vendors, the agreement covering the liquor license did not require the vendee to retransfer the license unless there had been a default on the land contract, and the land contract had not been breached. *Benincasa* v. *Mihailovich*, 474.
4. An injunction prohibiting further transfer of a liquor license was a proper and adequate remedy even though the vendee, on

VENDOR AND PURCHASER—Continued

land contract, of a motel had transferred the liquor license used in conjunction with the motel in violation of an agreement, separate from the land contract, not to transfer the liquor license as long as the vendors had an interest in the land contract where the third party who acquired the license also purchased the vendee's interest in the motel and had agreed not to transfer the liquor license from the motel and where land contract vendors' primary concern was that the removal of the liquor license from the motel would diminish their security by decreasing the motel's trade. *Benincasa* v. *Mihailovich*, 474.

VENIREMEN—See
JURY (6, 7)

VENUE—See
CRIMINAL LAW (28, 29)

VERDICTS—See
CRIMINAL LAW (5)

VICARIOUS LIABILITY—See
NEGLIGENCE (9, 10, 11)

VIOLATION OF STATUTE—See
AUTOMOBILES (3)
CONTRACTS (2, 3)
NEGLIGENCE (1, 2)

VOIDABLE CONTRACT—See
CONTRACTS (12, 13)

VOIR DIRE—See
JURY (1, 2, 6, 7)

VOLUNTARINESS—See
CRIMINAL LAW (9)

VOLUNTARINESS OF PLEA—See
CRIMINAL LAW (20, 21, 93)

VOLUNTARY ABSENCE—See
TRIAL (3)

WAGE—See
INSURANCE (11)

WAIVER—See
CRIMINAL LAW (33, 38)
JURY (1)
LANDLORD AND TENANT (2)
SEARCHES AND SEIZURES (4, 5, 8)

WAREHOUSE—See
TAXATION (2)

WARNING OF RIGHTS—See
CRIMINAL LAW (9, 84, 109–111)
EVIDENCE (6)

WARRANT—See
ARREST (2, 3)
PARDON AND PAROLE (2)
SEARCHES AND SEIZURES (4)

WEAPONS—See
ARREST (5)
CRIMINAL LAW (80)

WEIGHT—See
CRIMINAL LAW (1)

WEIGHT OF EVIDENCE—See
CRIMINAL LAW (17)
SEARCHES AND SEIZURES (5)

WEIGHT ORDINANCES—See
AUTOMOBILES (10)

"WHILE DRIVING ANOTHER CAR"—See
AUTOMOBILES (9)

WILLS—See
GIFTS (2)

WITHOUT WARRANT—See
ARREST (3, 6)
SEARCHES AND SEIZURES (1, 4, 5, 12)

WITNESSES

1. The credibility of a witness's testimony, as long as it is admissible, even if it is unclear, contradictory, and uncertain, is for the jury to determine. *People* v. *DuPuie,* 14.
2. Testimony of a character witness must be based on what the witness has heard others in the party's business or residential community say about the party whose character is in issue. *People* v. *Morrin,* 305.
3. Inconsistencies between a prosecution's witness's preliminary examination testimony and trial testimony, adjournment of the witness's sentencing, and the witness's mental condition were factors to be considered by the trier of fact in deciding whether to believe the witness's testimony. *People* v. *McGath,* 353.
4. A party, on redirect examination, may attempt to mitigate an unfavorable inference arising from cross-examination. *Grove* v. *Story Oldsmobile, Inc.,* 614.

WITNESSES—Continued

See

APPEAL AND ERROR (5)
CRIMINAL LAW (12, 16, 59, 60, 71–74, 101–103, 112, 113)
EVIDENCE (4, 6)
GRAND JURY (1, 2)
HOMICIDE (13, 22)
INDICTMENT AND INFORMATION (1–5)

WORDS AND PHRASES—See

AUTOMOBILES (8)
HOMICIDE (8, 17)
INSURANCE (11)
STATUTES (2, 3)
TAXATION (7–9)

WORKMEN'S COMPENSATION

1. The findings of fact of the Workmen's Compensation Appeal Board are binding on appeal where there is evidence in the record to support them. *Lemanski* v. *Frimberger Company*, 285.
2. The Workmen's Compensation Act allows an employee to sue third parties whose acts of negligence cause injury (MCLA § 418.827[1]). *Banner* v. *Travelers Ins. Co.*, 608.
3. A workmen's compensation insurance carrier is a third party, not an employer for purposes of the statute allowing an injured employee to sue a third party whose negligence has caused the employee's injuries; a workmen's compensation insurance carrier is not immune from common-law tort liability for its own acts of negligence which cause injury to an employee (MCLA § 418.827[1]). *Banner* v. *Travelers Ins. Co.*, 608.
4. Workmen's compensation insurance carrier whose allegedly negligent performance of its safety inspection and service contract with the plaintiff's employer was claimed to have been the proximate cause of the plaintiff employee's injury was a third-party tortfeasor under the Workmen's Compensation Act, and, therefore, liable for its own acts of negligence (MCLA § 418.827[1]). *Banner* v. *Travelers Ins. Co.*, 608.
5. *Liability of a workmen's compensation insurance carrier is primary, not that of an indemnitor or a guarantor; an insurance carrier, as evidenced by the facts that it is a named party defendant and that it is required to respond directly when compensation benefits are awarded, is indistinguishable, in law and fact, from the employer.* *Banner* v. *Travelers Ins. Co.*, 608.
6. *Judicial construction that a workmen's compensation insurance carrier is a "third party" subject to suit for its own negligence causing injuries to its insured's employees, although illogical, the insurance carrier's liability is primary and, as shown, by the fact that the judicial construction would mean that a self-insured employer would be liable in fact on the ground that the employer is also the insurance carrier, is nevertheless the settled law of this state.* *Banner* v. *Travelers Ins. Co.*, 609.

WRITTEN INSTRUMENTS—See
CONTRACTS (8, 9)
REFORMATION OF INSTRUMENTS (1)

WRONGFUL DEATH—See
NEGLIGENCE (4, 6)

WRONG-LANE COLLISION—See
AUTOMOBILES (1–3, 5)

ZONING

1. A writ of mandamus compelling defendant city to issue building permits for a trailer park was supported by the record where the plaintiffs' application complied with state law and the city's zoning ordinance and the refusal to issue the permits seems to have been based on the small amount of revenues to the city that the trailer park would produce, the desirability of an industrial corridor in the area, and the belief that the furnishing of school facilities to the trailer park might be difficult, because these reasons do not show the substantial relationship to the public welfare, health, safety, or morals necessary to invoke the police power. *Mulias* v. *City of Trenton*, 535.

120-DAY RULE—See
CRIMINAL LAW (11)

180-DAY RULE—See
CRIMINAL LAW (2)